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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BOEING COMPANY,

Respondent,

v.

PATRICIA DOSS,

Respondent,

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The Boeing Company (Boeing), as a self-insured employer, is responsible for paying the costs of Patricia Doss' post-pension treatment because this treatment is necessitated by a condition proximately caused by her chemical exposure at Boeing. Boeing should not be allowed to evade this responsibility by having the Department of Labor and Industries (Department) pay such costs out of the second injury fund because the second injury fund is a trust fund that is neither intended for nor funded to cover such costs. The second injury fund relieves a self-insured employer from paying the full amount of a permanently totally disabled employee's pension reserve. RCW 51.16.120(1) does not address and, thus, second injury fund relief does not cover, medical costs. As such, the second injury fund cannot be used to pay the costs of Doss' post-pension medical treatment because such costs are not an allowable charge under RCW 51.44.040(1). This Court should reverse the superior court's determination and order Boeing to pay the costs of Doss' medical treatment.

II. ARGUMENT

The central issue before the Court is the scope of relief provided to a self-insured employer, Boeing, when a worker, Doss, is permanently totally disabled as the result of the combined effects of a previous

disability and chemical exposure sustained while employed by a self-insured employer. Boeing argues it should be relieved of all costs of Doss' workers' compensation claim, except an amount equivalent to the partial permanent disability attributable to her industrial injury, pursuant to RCW 51.16.120(1). Br. of Resp't at 7. This is incorrect. The legislature did not intend for the second injury fund to relieve a self-insured employer from paying for all costs of a workers' compensation claim — it simply relieves the self-insured employer from having to pay the full amount of the employee's post-injury pension. Additionally, requiring Boeing to pay for Doss' medical treatment does not result in a "double assessment" and such a requirement is fair because Boeing chose to bear such costs when it opted to self-insure. Finally, charging the costs of Doss' treatment to the second injury fund violates the trust nature of the fund because such charges are not authorized under RCW 51.44.040.

A. Boeing Remains Responsible For Doss' Treatment Costs Because Medical Treatment Is Not A Disability Benefit Included In A Pension Reserve

Boeing chose to self-insure its workers' compensation claims and, thus, is responsible for paying for the medical treatment Doss needs for her asthmatic condition proximately caused by chemical exposure at Boeing. Boeing's responsibility for paying such costs remains, even though it was granted relief from paying the entire amount of Doss'

disability benefits under RCW 51.16.120(1). Boeing argues it should not be responsible for any costs that are not "only" or "solely" the result of Doss' chemical exposure. Br. of Resp't at 9-10. This misconstrues a self-insured employer's responsibility. An employer takes a worker "as he is, with all his preexisting frailties and bodily infirmities." *Wendt v. Dep't of Labor & Indus.*, 18 Wn. App. 674, 682-83, 571 P.2d 229 (1977). Thus, a worker is entitled to proper and necessary treatment if an industrial injury is a proximate cause of the condition requiring treatment.) 6A *Washington Pattern Jury Instructions: Civil* 155.06 (6th ed. 2012) (WPI); *Wendt*, 18 Wn. App. at 684; *see Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 116-17, 206 P.3d 657 (2009). The industrial injury need not be the sole or even the primary cause for the need for such treatment. WPI 155.06 ("The law does not require that the industrial injury be the sole proximate cause of such condition.").

Furthermore, contrary to Boeing's suggestions, the Department is not asking this Court to make Boeing responsible for a lifetime of medical treatment for conditions unrelated to Doss' chemical exposure at Boeing. Br. of Resp't at 18. Authorized post-pension medical treatment is limited to conditions proximately caused by an injury or occupational disease. RCW 51.36.010(4). Doss' exposure at Boeing permanently aggravated her preexisting asthma condition and, thus, her need for continuing

medical treatment is causally related to her employment at Boeing. Board Record at 67, ¶ 4. Boeing was responsible for the full costs of treating Doss' asthma before she was determined to be permanently totally disabled, even though her exposure at Boeing was not the sole cause of her condition or need for treatment. RCW 51.16.120(1) does not alter this responsibility as it addresses accident costs and does not modify Boeing's requirement to pay for medical treatment.

The dispute in this case centers on whether the terms "only" and "solely" in RCW 51.16.120(1) are limited to the amount Boeing must pay into Doss' pension reserve or whether they apply to all costs, as Boeing contends. Br. of Resp't at 9-10. The terms "only" and "solely" must be read within the context of the sentence containing these terms. The statute states, "a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from the further injury[.]" RCW 51.16.120(1). Boeing argues this "plain language states that the Employer pays only for the 'accident costs' that resulted solely from the last injury, nothing more and nothing less." Br. of Resp't at 9. Boeing also argues "the 'only' costs the self-insured employer 'shall pay' after second injury fund relief has been granted are those costs arising 'solely' from the industrial injury . . . ." Br. of Resp't at 10. However, Boeing misreads the statute and omits words from the statute.

RCW 51.16.120(1) does not say the only costs an employer shall pay are costs arising solely from the industrial injury. Boeing's reading omits a key phrase in the statute. The statute provides, "a self-insured employer *shall pay directly into the reserve fund* only the accident cost which would have resulted solely from the further injury[.]" RCW 51.16.120(1) (emphasis added). Boeing has impermissibly deleted the "shall pay directly into the reserve fund" from its reading of the statue. *See State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (words cannot be deleted from a statute). With the inclusion of this phrase, it is apparent the legislature was specifying a self-insured employer's obligations for funding an employee's pension reserve. The statute does not purport to address non-pension reserve obligations and it is silent with respect to other costs, like medical treatment. Thus, it is necessary to turn to other statutes to determine how these other costs are assessed, as argued in the Department's opening brief. Br. of Appellant at 7-12.

The Department's position is consistent with the plain language of RCW 51.16.120(1) which, by its terms, is limited to pension reserve costs. RCW 51.16.120(1) specifically discusses only what funds must be paid *into the pension reserve*. The accident cost paid by the self-insured employer is paid into the "reserve fund", meaning the pension reserve fund. RCW 51.16.120(1). Of the payments due to the pension reserve,

only the accident costs that would have resulted solely from the second injury are paid by the self-insured employer. The remainder of "the total cost of the pension reserve fund" is charged to the second injury fund. RCW 51.16.120(1). As noted by the Supreme Court, the fund "partially relieve[s] an employer's costs *related to an injured worker's pension.*" *Crown, Cork & Seal v. Smith*, 171 Wn.2d 866, 872, 259 P.3d 151 (2011) (emphasis added).

RCW 51.16.120(1) applies only to "accident costs." Boeing admits that "'accident costs' do not include the cost of the Claimant's ongoing treatment." Br. of Resp't at 9. Thus, RCW 51.16.120(1) does not address other costs, such as medical treatment payable outside the pension reserve. As explained in the Department's opening brief, medical costs are not part of a pension reserve. Br. of Appellant at 13-15, 18. Medical costs are separate and distinct from accident costs, such as permanent total disability benefits. Br. of Appellant at 10-11. Therefore, RCW 51.16.120(1) does not relieve Boeing from its responsibility to pay medical costs because the statute does not even address those costs.

This interpretation is consistent with Department rules.[1] The second injury fund "is used to relieve employers' *costs related to pensions*

[1] It is also consistent with decisions of the Board of Industrial Insurance Appeals, a state agency with expertise in interpreting the Industrial Insurance Act, Title 51 RCW. *See* Br. of Appellant at 24-26. Substantial weight is given "to an agency's

that result from the combined effects of the industrial injury and another prior injury, preferred worker claims, and job modifications." WAC 296-15-225(1) (emphasis added). The second injury fund is not intended to relieve a self-insured employer from its responsibility to provide its employees with necessary medical treatment. The plain language of RCW 51.16.120(1) clearly limits second injury fund relief to accident costs.

B. Post-Pension Medical Costs Are Not Calculated Into A Self-Insured Employer's Proportional Use Of The Second Injury Fund

Requiring Boeing to pay Doss' post-pension medical costs does not result in "a double assessment" or a "windfall" for the Department. *See* Br. of Resp't at 11. As explained in the Department's opening brief, the second injury fund has two revenue sources: one from self-insured employers and one from state insured employers. Br. of Appellant at 21-23. Self-insured employers pay a specific second injury fund assessment. The amount of this assessment is governed by statute and is calculated to be proportional to the "expenditures made by the second injury fund for claims of the self-insurer[.]" RCW 51.44.040(3)(a)(ii). "[E]xpenditures

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interpretation of a statute within its expertise, and an agency's interpretation of rules that the agency promulgated." *Dep't of Revenue v. Nord Nw. Corp.*, 164 Wn. App. 215, 223, 264 P.3d 259 (2011). Deference is not given to superior courts' legal conclusions. *Id.* Thus, this Court should defer to the Board of Industrial Insurance Appeals' decisions and the Department's interpretations, regardless of subsequent superior courts' treatment of such decisions.

made by the second injury fund" do not include medical treatment costs. RCW 51.44.040(3)(b).

Contrary to Boeing's assertions, post-pension medical costs are not included in calculating a self-insured employer's proportional use of the second injury fund, which is used to calculate the second injury fund assessment.[2] In support of its argument, Boeing points to a Department rule governing what information a self-insured employer must provide to the Department. Br. of Resp't at 12-13 (quoting WAC 296-15-221). This rule merely states a self-insured employer must report the amount of money paid for medical bills to the Department for the purpose of determining various assessments. WAC 296-15-221(4). It does not specify how second injury fund assessments are calculated.

Second injury fund assessments are not calculated in accordance with WAC 296-15-221(4) as Boeing alleges. Consequently, if the Court allows Boeing to avoid paying for Doss' post-pension medical treatment, it will come at the expense of state fund employers, as argued in the Department's opening brief. Br. of Appellant at 21-23. As the second injury fund cannot be used to pay post-pension medical costs, such costs

[2] However, the total costs paid by a self-insured employer are considered in relation to costs paid by all self-insured employers in determining a self-insured employer's experience factor, which is a factor in the second injury fund assessment formula. *See* WAC 296-15-225(3).

must either be charged to the self-insured employer or, in the case of a state fund employer, to the medical aid fund.

C. It Is Rational To Treat Self-Insured Employers Differently Than State Fund Employers

Boeing claims it should not be directly responsible for Doss' medical costs because, if it were a state fund employer, it would be "unaffected by post pension treatment costs." Br. of Resp't at 15. As a preliminary matter, contrary to Boeing's claims, a state fund employer is ultimately affected by payments of post-pension medical costs out of the medical aid fund because a state fund employer's premiums are not calculated solely based on its experience rating, contrary to Boeing's assertion. Br. of Resp't at 15.

Unlike self-insured employers, state fund employers do not directly pay for the costs of their employees' workers' compensation claims. Instead, state fund employers pay workers' compensation premiums to the Department and the Department pays state fund employees' workers' compensation benefits. The amount of premiums paid by the employer may be more or less than the actual costs of its claims. Premiums are calculated by a formula that includes a base rate for a particular type of employment, referred to as a risk classification, and a specific employer's experience rating. WAC 296-17-31010 (factors

involved in determining premiums), -31011(1) (base rate calculations), -31024 (calculation of premiums), -850 through -870 (rules governing calculations of experience ratings), -895 (listing current base rates). Payments from the medical aid fund would be factored into the base rate for a risk classification, even if not included in an individual employer's experience rating, as the Department is required to maintain actuarial solvency of this fund. *See* RCW 51.16.035(1)(a). Thus, it is not correct, as Boeing asserts, that state fund employers are not ultimately responsible for the costs of post-pension treatment.

Additionally, Boeing's argument that it is unfair for it to be treated differently than a state fund employer should be disregarded. Br. of Resp't at 14-16. Self-insured employers should be treated differently than state fund employers because they have chosen to be treated differently by more directly bearing the risk of their employees' workers' compensation claims. Paying one's own costs rather than premiums for insurance that spreads costs across various employers is the very essence of being self-insured.

Furthermore, treating self-insured employers differently than state fund employers is constitutional. In *Chicago Bridge & Iron Co. v. Department of Labor & Industries*, 46 Wn. App. 252, 256, 731 P.2d 1 (1986), a self-insured employer argued it was denied equal protection of

the laws because it was not treated the same as state fund employers for the purpose of applying second injury fund relief. The court rejected this argument, noting there was a rational basis for treating self-insured employers differently than state fund employers because the employers chose to become self-insured and, thus, responsible for the costs of their employees' injuries. *Chicago Bridge & Iron Co.*, 46 Wn.2d at 257. Boeing's argument that it is unfair to treat it differently than a state fund employer should be rejected because it chose to be treated differently by opting to self-insure.

D. The Second Injury Fund Can Be Used Only To Pay For Those Costs Identified In RCW 51.44.040

Finally, Boeing's assertion that the Department believes the second injury fund can only be used for pension payments misconstrues the Department's position. Br. of Resp't at 19-20. As set forth in detail in the Department's opening brief, it is the Department's position that the second injury fund is a trust fund that can only be used to pay charges identified by the legislature in RCW 51.44.040. Br. of Appellant at 16-21. Because post-pension medical costs are not one of the charges listed in RCW 51.44.040, they cannot be charged to the second injury fund.

III. CONCLUSION

For the aforementioned reasons, the Department respectfully requests this Court reverse the superior court's determination and order Boeing to pay the costs of Doss' post-pension medical treatment.

RESPECTFULLY SUBMITTED this 14th day of May, 2013.

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