

No. 69759-5-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant,

v.

THE BOEING COMPANY,
and
PATRICIA DOSS,

Respondents.

BRIEF OF RESPONDENT, THE BOEING COMPANY

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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A. INTRODUCTION

This case involves the question of whether the Department of Labor and Industries' Second Injury Fund can be used to provide coverage for an injured worker's post-pension medical treatment. When a claimant has been declared totally and permanently disabled, the Director of the Department of Labor and Industries, in his or her sole discretion, can authorize continued medical treatment, when such treatment is necessary to protect the worker's life. RCW 51.36.010. Here, neither party disputes the Claimant's entitlement to post-pension medical treatment. BR 67.¹ Instead, the dispute in this case concerns whether the cost of the Claimant's treatment should be paid out of the Second Injury Fund, as the Superior Court correctly found, as opposed to by the Self Insured Employer.

The Second Injury Fund is a fund established to encourage Employers to hire previously injured workers or workers with disabling conditions by defraying the costs that resulted, or continue to result, from that previous injury/condition against the fund. When a worker has a previous disability and suffers a further disability which, based on the combined effects, renders that worker totally and permanently disabled, *the employer of injury is responsible only for those accident costs which*

¹ The Certified Appeals Board Record is herein cited as "BR." The Clerk's Papers are cited as "CP." The Department's Brief of Appellant is cited as "AB."

would have resulted had there been no preexisting disability. RCW 51.16.120.

The difference between the amount charged to the employer and the total cost of the claimant's disability is charged to the Second Injury Fund. *Id.* As a result, employers are encouraged to hire previously disabled workers because the employer will only be responsible for those costs actually caused by the injury suffered while working for that employer. Here, there is no dispute that the Claimant is totally and permanently disabled as a result of her pre-existing disabling conditions and her occupational exposure, and that the employer is entitled to Second Injury Fund Relief. BR 67. The only issue in this appeal is whether the Second Injury Fund should be used to cover the post-pension medical treatment awarded to the Claimant for a condition that was not caused solely by her industrially related condition.

B. COUNTERSTATEMENT OF THE CASE

The underlying facts of this case are not in dispute. On March 10, 2000, the Claimant filed an application for benefits. BR 66. The medical evidence established that, prior to March 10, 2000, the Claimant suffered from asthma, was being treated for asthma, and had permanent work restrictions because of her asthma. As of August 1996, the Claimant was required to wear a dust mask while working due to her asthma. As of May

1998, the Claimant was permanently restricted from prolonged walking due to difficulty breathing with such activity related to her asthma. The Claimant's work exposures permanently aggravated her pre-existing symptomatic asthma and, as a result, the Claimant requires ongoing medical treatment. BR at 66-67.

The Department determined that, as of May 14, 2008, the Claimant was totally permanently disabled as a result of the combined effects of both her industrial exposure and preexisting conditions. BR at 73, 83. The Department subsequently awarded the Employer Second Injury Fund relief. BR at 77. The Employer was ordered to pay \$22,237.07 with the balance of the Claimant's benefits to "be charged against the Second Injury account." *Id.*

Although it had given the Employer Second Injury Fund relief based in part on the Claimant's preexisting and disabling asthma, the Department, at its sole discretion, ordered ongoing medical treatment for the Claimant's asthma. BR at 74. The Claimant's ongoing treatment is necessitated *only in part* by her exposure while working for the Employer. BR at 67. On July 27, 2010, the Department, by letter, directed the Employer to bear the *entire* cost of the Claimant's ongoing asthma treatment. BR at 89. The Employer filed a timely appeal of the

Department's letter to the Board of Industrial Insurance Appeals. BR at 98.

The sole issue presented to the Board was whether the Employer was required to pay for the Claimant's lifetime of post-pension asthma treatment. BR at 67. An Industrial Appeals Judge issued a Proposed Decision and Order affirming the Department's letter. BR at 23-28. The Employer filed a petition for review to the Board, which was granted. BR at 7-18. The Board issued its own Decision and Order, which also affirmed the Department's letter. BR at 1-6. The Employer filed a timely appeal of the Board's Decision and Order to the Superior Court. CP at 1-10.

The Superior Court reversed the Decision and Order of the Board. CP at 57-61. The Superior Court found that the Claimant's "post pension treatment benefits are properly payable from the Second Injury Fund, and are not the responsibility of" the Employer. CP at 60. The Department filed a timely Appeal to this Court. CP at 62- 67.

C. COUNTERSTATEMENT OF THE ISSUES

1. Did the Superior Court correctly decide that the Board erred in finding that the Employer is responsible for the Claimant's ongoing medical treatment after the Department has awarded the Employer Second Injury Fund relief?"

2. Did the Superior Court correctly rely on the Superior Court's prior decision in *Dep't of Labor & Indus. v. Boudon*, No. 00-2-05612-5KNT, as persuasive, but not binding, authority?

D. SCOPE AND STANDARD OF REVIEW

Because this case is being litigated based upon stipulated facts, there are no factual issues before this Court for review. As a result, this Court is presented with only questions of law. *Tunstall v. Bergeson*, 141 Wn.2d 201, 209-201, 5 P.3d 691 (2000). Where the sole issue on appeal is a question of law, this Court reviews the determinations of the Superior Court *de novo*. *Christensen v. Ellsworth*, 162 Wn. 2d 35, 370, 173 P.3d 228 (2007).

In addition, Courts review the Board and Department's interpretation of statutes or regulations *de novo*. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). Though Courts do "give substantial weight to the agency's interpretation of statutes and regulations within its area of expertise," *id.*, they must also "ensure that the agency applies and interprets its regulations consistently with the enabling statute." *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004) *aff'd on other grounds sub nom. Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 135 P.3d 913 (2006) (citing *Ortega v. Employment Sec. Dep't*, 90 Wn.

App. 617, 622, 953 P.2d 827 (1998)); *see also*, *Federated Am. Ins. v. Marquardt*, 108 Wn.2d 651, 655, 741 P.2d 18 (1987) (regulation must be consistent with the statute being implemented).

Additionally, Courts review agency interpretations under an error of law standard, which allows a Court to substitute its own interpretation of the statute or regulation for the agency's interpretation. *St. Francis Extended Health Care v. Dep't of Soc. & Health Serv.*, 115 Wn.2d 690, 695, 801 P.2d 212 (1990). Finally, "court[s] do[] not exercise deference to an agency's interpretation of a statute if the statute is not ambiguous[.]" *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 522, 852 P.2d 288 (1993) (citing *Municipality of Metro Seattle v. Dep't of Labor & Indus.*, 88 Wn.2d 925, 929, 568 P.2d 775 (1977)).

E. ARGUMENT

1. WHEN SECOND INJURY FUND RELIEF IS AWARDED IN A CLAIM, THE EMPLOYER IS RESPONSIBLE ONLY FOR THE PORTION OF THE CLAIMANT'S CONDITION RESULTING SOLELY FROM THE INDUSTRIAL INJURY OR OCCUPATIONAL DISEASE.

Under the facts present here, the Department's position that the Employer is solely responsible for the costs of the Claimant's ongoing treatment, *see, generally*, AB, is, simply, incorrect. When Second Injury Fund relief has been granted, self-insured Employers are not responsible for the costs of Claimants' ongoing medical care. Both the language of

the Second Injury Fund statute and the Department's own self-promulgated regulations show that Employers, when Second Injury Fund relief has been granted, are only responsible for the accident costs that resulted *solely* from the Claimants' industrial injury or disease.

- a. The plain language of RCW 51.16.120 mandates that the a self insured employer pay only the permanent partial disability resulting solely from the industrial injury/occupational disease; any ongoing post-pension treatment is to be paid from the Second Injury Fund.*

Though the Department spends considerable time in its Brief of Appellant discussing the statutory and administrative restrictions on its own ability to pay for the Claimant's ongoing medical care, AB at 9-10, 16-21, it conspicuously fails to provide any substantial support in favor of its proffered disposition in this appeal – the Employer bearing the *entire* burden of the Claimant's ongoing and unending medical treatment. This is because the plain language of the statute governing Employers' responsibilities when Second Injury Fund relief has been granted expressly exempts the Employer from bearing that burden.

RCW 51.16.120 governs the question before this Court and states, in relevant part, that

[w]henver a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by

this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of an employer insured with the state fund at the time of the further injury or disease shall be charged and a self-insured employer *shall pay directly into the reserve fund only the accident cost which would have resulted solely from the further injury or disease*, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts.

RCW 51.16.120(1) (emphasis added).

Industrial insurance claims are governed by explicit statutory directives and not by the common law. *Rector v. Dep't of Labor & Indus.*, 61 Wn. App. 385, 810 P.2d 1363 (1991); *Petersen v. Dep't of Labor & Indus.*, 40 Wn.2d 635, 245 P.2d 1161 (1952). Whether a self-insured Employer is statutorily required to pay for ongoing post-pension treatment, ordered at the Director's discretion, is determined by the clear and unambiguous language of the statute. It is a fundamental principle of statutory construction that Courts do not construe unambiguous statutes. *Vita Foods, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978) (citing *Pope & Talbot, Inc. v. Dep't of Revenue*, 90 Wn.2d 191, 194, 580 P.2d 262 (1978); *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 494 P.2d 216 (1972)).

As a result, this Court need look no further than the language of the Second Injury Fund statute, RCW 51.16.120(1). The statute states that, in

Second Injury Fund cases, the individual self-insured employer “shall pay... *only the accident cost which would have resulted solely from said further injury or disease*, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts.” RCW 51.16.120(1) (emphasis added). The statute is remarkably clear as to an Employer’s responsibility when Second Injury Fund relief is granted. Its plain language states that the Employer pays only for the “accident costs” that resulted solely from the last injury, nothing more and nothing less. As the Department itself notes, *see* AB at 18, “accident costs” do not include the cost of the Claimant’s ongoing treatment.

Even if this Court finds some ambiguity in RCW 51.16.120(1), numerous rules of statutory construction support the Employer’s construction of the statute. This Court’s primary duty in interpreting statutes is to give effect to the Legislature’s intent. *Sacred Heart v. Dep’t of Revenue*, 88 Wn. App. 632, 946 P.2d 409 (1997). In determining legislative intent, a court construes statutory language in the context of the statute as a whole. *Id.* The words used in a statute are given their usual and ordinary meaning when they are not otherwise defined by the statute. *Id.* A statute is construed to avoid strained, unlikely, or unrealistic

consequences. *Id.* A statute is not ambiguous unless it is susceptible of more than one reasonable interpretation. *Id.*

In addition, the specific inclusion of one item in a category excludes implication of other items of the same category. *State v. Greco*, 57 Wn. App. 196, 787 P.2d 940 (1990); *State v. Sommerville*, 111 Wn.2d 524, 760 P.2d 932 (1988). Moreover, a specific provision overrides a conflicting general provision. *Wilson Sporting Goods v. Pedersen*, 76 Wn. App. 300, 886 P.2d 203 (1994); *Hama Hama v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 536 P.2d 157 (1975).

By stating that 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, the Legislature, in RCW 51.16.120, explicitly *excluded* payments by the Employer for anything else. This specific statutory provision takes precedence over the more general provisions the Department cites that purport to require the Employer to cover the Claimant’s ongoing treatment costs. AB at 12 (citing RCW 51.08.173; RCW 51.14.020(1); RCW 51.44.070(1); Wash. Admin. Code 296-15-330(1)). Instead, the Employer’s obligation under the plain language of RCW 51.16.120 is limited to paying *only* for benefits caused *solely* by the industrial injury or occupational disease. In this case, the cost of any ongoing treatment and medical monitoring required for the

Claimant's pre-existing asthma should not be born solely by the Employer because the need for treatment did not arise "solely" from the industrial injury, but resulted from both the Claimant's pre-existing asthma and her industrial aggravation. BR 67; see, also, AB at 14 ("The need for [the Claimant's] treatment is caused, *in part*, by the exposure she sustained while employed by Boeing." (emphasis added)). Instead of imposing the costs of treatment on the Employer, this Court should follow the unmistakable language of RCW 51.16.120 which, as a unanimous Washington State Supreme Court recently found, "provides that the employer pays only the accident cost attributable to the latter industrial injury; the second injury fund covers the remainder." *Crown, Cork & Seal v. Smith*, 171 Wn. 2d 866, 873, 259 P.3d 151 (2011).

b. Forcing the Employer to bear the burden of providing for the Claimant's ongoing medical coverage would constitute a double assessment of the Employer and a windfall for the Department, as such costs are already included in Employer's Second Injury Fund assessments under Wash. Admin. Code 296-15-221.

In addition to the plain language of RCW 51.16.120(1), the Employer should not be required to bear the costs of the Claimant's ongoing medical treatment because requiring it to do so "would give an unjustified windfall to the State, at the expense of" the self-insured Employer. *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 425, 869

P.2d 14 (1994). The Second Injury Fund is a separate fund consisting of payments made by employers. RCW 51.44.040. The statute provides for “a fund to be known and designated as the ‘second injury fund’, which shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120 and 51.32.250.” RCW 51.44.040(1). The Employer pays assessments to the Second Injury Fund “in the proportion that the payments made from the fund on account of claims made against self-insurers bears to the total sum of payments from the fund.” RCW 51.44.040(3)(a)(i).

An Employer’s assessments to the Second Injury Fund are based on its total claims costs, not just those costs related to wage replacement benefits (time loss) or permanent partial disability awards. The Department’s own regulation, Wash. Admin. Code 296-15-221, provides that

[e]ach self insurer must submit:

(a) Complete and accurate quarterly reports summarizing worker hours and claim costs paid the previous quarter. Self-insured employers must use a form substantially similar to the preprinted Quarterly Report for Self-Insured Business, L&I form F207-006-000, form sent by the department. *This report is the basis for determining the administrative, second injury fund, supplemental pension, asbestosis and insolvency trust assessments.* Payment is due by the date specified on the preprinted report from the department.

(ii) *Claim costs include, but are not limited to:*

(A) Time loss compensation. Include the amount of time loss the worker would have been entitled to if kept on full salary.

(B) Permanent partial disability (PPD) awards.

(C) *Medical bills.*

(D) *Prescriptions.*

(E) *Medical appliances.*

(F) Independent medical examinations and/or consultations.

(G) Loss of earning power.

(H) *Travel expenses for treatment or rehabilitation.*

(I) Vocational rehabilitation expenses.

(J) Penalties paid to injured workers.

(K) Interest on board orders.

Wash. Admin. Code 296-15-221(4) (emphasis added). As a result, despite the Department's assertions to the contrary, AB at 21-23, the Employer's assessments for the Second Injury Fund are based, in part, on medical treatment costs.

Inclusion of treatment costs as part of the Legislature's mandate that *total claims costs* be considered for Second Injury Fund assessments on self-insured Employers shows that the Legislature contemplated that

post-pension treatment costs would be allowed to be paid out of the Second Injury Fund, after Second Injury Fund relief has been granted. To require the Employer to pay post-pension treatment costs after Second Injury Fund relief is granted would constitute a double assessment on the Employer and a windfall to the Department. *See Flanigan*, 123 Wn.2d 418 (double recoveries should be avoided). Indeed, it would allow the Department to fund the Second Injury Fund with assessments related to treatment costs, but foist those costs upon self-insured Employers when the Department, at its sole discretion, decides that they need to be paid. Such an inequitable interpretation of RCW 51.16.120(1) should not be adopted by this Court.

c. The Department does not charge a State Fund Employer's account for post pension treatment when a State Fund Employer is granted second injury fund relief thereby treating Self-Insured Employers and State Fund Employers differently.

As the Department has previously noted, when post-Second Injury Fund treatment costs are ordered in a State Fund case, the cost of that treatment is “spread to all state fund employers and employees” and paid out of their general fund. CP at 45. Typically, a State Fund Employer’s account is charged for actual and anticipated costs in allowed claims, including for pensions. The costs charged to the State Fund Employer’s account are then used to adjust their experience rating thereby resulting in

rate increases to the State Fund Employer. However, in those instances where a State Fund Employer's injured worker becomes totally disabled based on the combined effects of a pre-existing disabling condition and the industrially related condition, the State Fund Employer (just like a Self Insured Employer) is entitled to have the pension paid from the Second Injury Fund and not charged to their account or ultimately have it effect their experience rating.

As noted above, the Department admits that when post pension treatment is ordered in a second injury State Fund claim, the State Fund Employer's account *is not charged*. CP at 45. In fact, for State Fund Employers, their experience rating, and therefore the amount ultimately paid by the State Fund Employer as a result of its claim costs, are unaffected by post pension treatment costs. CP at 42. The Department's position in Self Insured cases is exactly the opposite of its position in State Fund cases. In essence, the Department argues Self-Insured Employers are and should be treated differently than State Fund Employers when it comes to post pension treatment having a direct financial impact.

More importantly, by stating post pension treatment costs should not be charged directly to a State Fund Employer, the Department is admitting no Employer is responsible for paying post pension treatment costs in second injury cases. In State Fund claims the cost of post pension

treatment is spread to all employers and employees. CP at 45. That in fact is the intent of the Second Injury Fund. That the Department may not have been properly assessing premiums for the Second Injury Fund to all Employers, both State Fund and Self Insured's, and charging these costs in State Fund claims to the general fund is no justification for their position in Self Insured claims. Self Insured Employers should be treated the same and equally as State Fund Employers. Surely such an inequitable result as advocated by the Department could not have been the intent of the Legislature and should not be the result reached by this Court.

2. ALLOWING THE CLAIMANT'S ONGOING MEDICAL TREATMENT TO BE PAID BY THE SECOND INJURY FUND EFFECTUATES THE LEGISLATURE'S INTENT IN CREATING AND MAINTAINING THE FUND.

As noted above, in its Brief, the Department devotes considerable time to an examination of the statutory and regulatory hurdles that it feels restrict it from providing coverage for the Claimant's ongoing treatment costs. AB at 9-10, 16-21. Though the Employer disagrees with the Department's position that it is barred from utilizing the Second Injury Fund to provide medical care to the Claimant, assuming, *arguendo*, that the Department's analysis of its statutory restrictions is correct, and neither the Employer nor the Department is required to provide the Claimant with ongoing medical coverage, there is a conflict within the

statutes governing the Second Injury Fund. In construing conflicting statutory language, “the primary objective of the court is to ascertain and carry out the intent and purpose of the legislature in creating it.” *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002). Indeed, even if this Court finds that the statute does not contain conflicting language, this Court should still seek to interpret the statutes governing the Second Injury Fund in a manner that would best effectuate the Legislature’s intent. *Sacred Heart*, 88 Wn. App. 632.

The Washington State Supreme Court addressed the purpose of the Second Injury Fund in *Jussila v. Dep’t of Labor & Indus.*, 59 Wn.2d 772, 370 P.2d 582 (1962). There, the Court stated that

[t]he Second-injury Fund is a special fund set up within the administrative framework of the workmen's compensation system to encourage the hiring of previously handicapped workmen by providing that the second employer will not, in the event such a workman suffers a subsequent injury on the job, be liable for a greater disability than actually results from the second accident.

“The usual provision makes the employer ultimately liable only for the amount of disability attributable to the particular injury occurring in his employment, while the fund pays the difference between that amount and *the total amount to which the employee is entitled for the combined effects of his prior and present injury.*” 2 Larson, Workmen's Compensation Law § 59.31. *See, also*, Fabing and Barrow’s “Encouragement of Employment of the Handicapped,” 8 *Vanderbilt L.Rev.* 575 (1955).

It is apparent that any rule which makes it easier for an employer to obtain reimbursement from the fund will tend to support the basic purpose of the fund. Conversely, if recovery from the fund is too difficult, an employer may find it easier and less costly simply to refuse to hire previously disabled persons.

Jussila, 59 Wn.2d at 778-779 (emphasis added).

Indeed, the Court has recently found that

[t]he second injury fund serves several underlying purposes. First, the fund encourages employers to hire and retain previously disabled workers, providing that the employer hiring the disabled worker will not be liable for a greater disability than what actually results from a later accident. Second, by recognizing that an employer is only required to bear the costs associated with the industrial injuries sustained by its employees, the fund encourages workplace safety and prevents placing unfair financial burdens on employers. *Jussila*, 59 Wash.2d at 778-79.

Crown, Cork & Seal, 171 Wash. 2d at 873.

The result urged by the Department here would be in direct contravention of the Legislature's purpose in creating the Second Injury fund. A decision by this Court that would require self-insured Employers to provide lifetime coverage for the entire cost of medical treatment for conditions either unrelated to or not caused solely by the injury for which they were responsible "makes it [harder] for an employer to obtain reimbursement from the fund" and will likely result in Employers "find[ing] it easier and less costly simply to refuse to hire previously disabled persons," especially those whose pre-employment disabilities

require ongoing care. *Jussila*, 59 Wn.2d at 779. In addition, a ruling in favor of the Department would discourage “employers [from] hir[ing] and retain[ing] previously disabled workers” as it would undercut the Second Injury Fund’s guarantee that “the employer hiring the disabled worker will not be liable for a greater disability than what actually results from a later accident.” *Crown, Cork & Seal*, 171 Wash. 2d at 873. Instead, it would “place[an] unfair financial burdens on employers.” *Id.* As a result of that “unfair financial burden[.]” Employers will be more likely to choose not to hire previously injured workers. *Id.* Such a result cannot have been the intent of the Legislature and should not be the result reached by this Court.

a. *In order to facilitate the Legislature’s intent, the Second Injury Fund is currently used to fund things other than pension payments.*

Indeed, despite the Department’s protestations regarding their supposed inability to utilize the Second Injury Fund to pay for anything other than pension payments, AB at 16-21, the Fund is currently used to pay for other programs that help encourage the hiring or continued employment of disabled and impaired workers. In order to facilitate this purpose, when a “Preferred Worker” sustains a new on-the-job injury, the cost of the associated workers’ compensation benefits are paid from the Second Injury Fund. BR 67. In addition, in order to assist employers in meeting the costs of job modifications and to encourage employers to

modify jobs in order to accommodate retaining or hiring workers with disabilities resulting from work-related injuries, the supervisor has discretion to pay job modification costs, up to five thousand dollars, out of the Second Injury Fund. BR 68. Though the Claimant here is not entitled to job modification costs or “Preferred Worker” status, the Legislature’s inclusion of these programs shows that the Second Injury Fund was not established solely for paying pension payments, but was intended to help defray the cost of benefits that encourage Employers to hire and retain previously disabled Employees. *Rothschild Int’l Stevedoring Co. v. Dep’t of Labor & Indus.*, 3 Wn. App. 967, 478 P.2d 759 (1970). Because the Second Injury Fund’s payment of post-Second Injury Fund relief medical expenses, like the payment of job modification costs and use of the “Preferred Worker” program, effectuates the goals of the Legislature such payments should be allowed by this Court.

3. THE DECISIONS OF THE BOARD OF INDUSTRIAL INSURANCE APPEALS CITED BY THE DEPARTMENT ARE NOT ENTITLED TO JUDICIAL DEFERENCE.

In support of its position that the Employer should bear the burden of the Claimant’s ongoing medical costs, and in the face of the statutory and regulatory language and the Legislature’s intent in creating the Second Injury Fund, the Department chiefly offers the Board of Industrial Insurance Appeals’ decision in *In re: Crella Boudon*, BIIA Dec., 98 17459

& 99 22359 (2000). There, the Board found, in contravention of the statute, that self-insured Employers, and not the Second Injury Fund, were required to provide for Claimants' post-Second Injury Fund relief medical care. *Id.* The Department argues that *Boudon*, and the Board's subsequent decisions applying *Boudon*, are "entitled to great deference." AB at 23-25 (quoting *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)). However, before this Court, "[d]ecisions of the Board of Industrial Insurance Appeals are not precedential." *Romo v. Dep't of Labor & Indus.*, 92 Wn.App. 348, 356, 962 P.2d 844 (1998) (citing *Walmer v. Dep't of Labor & Indus.*, 78 Wn.App. 162, 167, 896 P.2d 95, review denied, 128 Wn.2d 1003, 907 P.2d 297 (1995)). Indeed, rather than simply deferring to the Board, as the Department suggests, this Court is required to conduct its own *de novo* review of the relevant statutes and regulations. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d at 295. As the above shows, such a review reveals that the Board's decisions in *Boudon* and its progeny do not comport with the law and are, therefore, not entitled to deference. *St. Francis Extended Health Care v. Dep't of Soc. & Health Serv.*, 115 Wn.2d at 695.

The Department, in an attempt to prop up the Board's erroneous decision in *Boudon*, notes that it has "consistently adhered to" its position. AB at 24. The Department notes that the Board has done so in the face of

a judicial reversal of its decision in *Boudon* on appellate review by the Superior Court. *Id.* Instead of accepting the judicial branch's construction of who should bear the costs of Claimants' post-Second Injury Fund relief medical care or, in the alternative, seeking review by the Court of Appeals, until this case, the Board and the Department have continued to apply the Board's decision in *Boudon*. The Department contends that the Board's repeated reaffirmation of its position should provide the Board's decisions, applying its overturned decision in *Boudon*, with additional judicial deference. AB at 25 (citing, *In re: Pamela Campbell-Fox*, Dckt. No. 04 10890 (Jan. 17, 2006); *In re: Janet Tull*, Dckt. No. 04 10717 (Jan. 18, 2006); *In re: Theron Larrabee*, Dckt. No. 05 10559 (June 26, 2006)). However, what the Department fails to note is that, as consistent as the Board has been in applying its decision in *Boudon*, the Superior Court has been just as consistent in reversing the Board on appeal. *E.g., compare In re: Pamela Campbell-Fox with Healthtrust, Inc. v. Pamela A. Campbell-Fox*, No. 06-00251-5 and *In re: Janet Tull, with Prosser Memorial Hospital v. Janet E. Tull*, No. 06-00351-6.

That the Board, presented with consistent and repeated reversal of its construction on appeal, continues to apply that construction does not entitle it to additional judicial deference. If anything, the Board's consistent application of a rule of law that, by its own analysis is not even

“the law of t[he] particular case” that it continues to cite to, AB at 25 (citing *In re: Pamela Campbell-Fox*), belies a disrespect of the decisions of the Superior Court and the “ ‘ “ ‘province and duty of the judicial department to say what the law is.’ ” ’ ” *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 496, 585 P.2d 71 (1978) (alteration in original) (quoting *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163 (1976) (quoting *United States v. Nixon*, 418 U.S. 683, 703, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803))))). As a result, this Court should decline to provide *Boudon* and its progeny with judicial deference.

4. THE SUPERIOR COURT DID NOT COMMIT REVERSIBLE ERROR WHEN IT CONSIDERED, AS PERSUASIVE AUTHORITY, *DEP'T OF LABOR & INDUS. V. BOUDON* NO. 00-2-05612-5KNT.

Finally, the Department asserts that the Superior Court committed reversible error relying solely on a previous King County Superior Court decision in *Dep't. of Labor & Indus. v. Boudon*. As noted above, this decision was crucial in showing that the Board erroneously relied upon its own *reversed* decision in finding against the Employer in this case. At the Superior Court, as it does here, the Employer argued that the Court, as a result of the Court's reversal of the Board's decision in *Boudon*, stripped or, at the very least, severely restricted, the Board's decision's precedential value. CP at 21-23. The Department believes that because

the Superior Court agreed with the Employer's position, and cited the decision in *Dep't. of Labor & Indus. v. Boudon* as "precedent" in finding for the Employer, CP at 60, it committed reversible error. AB at 25-26. The Department argues this is the case because *stare decisis* is inapplicable to trial court conclusions of law. AB at 26 (citing *In re Estate of Jones*, 170 Wn.App. 594, 605, 287 P.3d 610 (2012)). However, the Department's position is incorrect for three reasons. First, as is stated in the Superior Court's Judgment, CP at 60, and quoted in the Department's brief, AB at 25, the Superior Court relied only "in part" on *Dep't. of Labor & Indus. v. Boudon* in reaching its Judgment. Second, an analysis of the Superior Court's Judgment shows that the Court did not merely apply *stare decisis* in this case. The Superior Court made numerous detailed Findings of Fact and six case-specific Conclusions of Law in support of its Judgment. CP at 57-61. Such detailed findings and conclusions show that the Court did not fail to conduct its own analysis of the factual and legal issues present here and simply apply *Dep't. of Labor & Indus. v. Boudon*. Third, there is no evidence that the Superior Court applied *Dep't. of Labor & Indus. v. Boudon* as *binding* precedent.

Precedent is defined as a "decided case that furnishes a basis for determining later cases involving similar facts or issues." "Precedent," BLACK'S LAW DICTIONARY (9th ed. 2009). As this Court is

unquestionably aware, there are different types of precedent that have differing legal effects. Binding precedent is a “precedent that a court must follow. For example, a lower court is bound by an applicable holding of a higher court in the same jurisdiction.” *Id.* Declaratory precedent is a “precedent that is merely the application of an already existing legal rule.” *Id.* Finally, persuasive precedent is a “precedent that is not binding on a court, but that is entitled to respect and careful consideration.” *Id.*

Here, the Superior Court did not denote what type of precedential effect it gave *Dep't. of Labor & Indus. v. Boudon*. See CP at 60. Absent a notation by the Court that it considered *Dep't. of Labor & Indus. v. Boudon* to be binding precedent, this Court should not seek to reverse the Superior Court for mere notation of its consideration of the declaratory or persuasive impact of its prior decision. Indeed, the fact that the Superior Court carefully considered its prior *appellate* decision “is consistent with a fair and consistent application of the” Second Injury Fund. *Cowlitz Stud Co. v. Clevenger*, 157 Wn. 2d 569, 580, 141 P.3d 1 (2006). ““Consistent application of” the Second Injury Fund “lend[s] predictability to the law” for both Employers and previously disabled workers. *Capello v. State*, 114 Wn. App. 739, 749, 60 P.3d 620 (2002) (quoting *Canterwood Place L.P. v. Thande*, 106 Wash. App. 844, 850, 25 P.3d 495 (2001)). The

Superior Court's attempt to ensure that consistency should not be punished by this Court with reversal.

Finally, even if the Superior Court committed some inconsequential error in considering its prior decision in *Dep't. of Labor & Indus. v. Boudon*, this error does not require reversal and remand. Because there are no factual issues in dispute, this Court conducts its own *de novo* review of the legal issues presented here and does not rely on any of the Conclusions of the Superior Court. *Christensen v. Ellsworth*, 162 Wn. 2d 35. As a result, any purported error in the Superior Court's consideration of a prior Superior Court Judgment in reaching its Conclusions of Law has no effect on this Court's ability to conduct its own review and decide the legal issue presented by this case.

F. CONCLUSION

Based on the foregoing points and authorities, the Employer requests that this Court affirm the Superior Court's decision reversing the Board's Decision and ordering the Department to pay for the Claimant's ongoing medical treatment via the Second Injury Fund.

RESPECTFULLY SUBMITTED this 16th day of April, 2013.

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

DEPARTMENT OF LABOR &
INDUSTRIES, STATE OF
WASHINGTON,

Appellant,

v.

THE BOEING COMPANY and
PATRICIA DOSS

Respondents.

No. 69759-5-1

**CERTIFICATE OF
SERVICE**

I hereby certify that on the ____ day of April, 2013, I filed and served the **Respondent, The Boeing Company's, Brief and this Certificate of Service** upon the following parties, addressed as follows:

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