NO. 47604-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL L. SIMS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

A worker who is already permanently totally disabled as a result of one injury cannot additionally sustain a permanent partial disability as a result of a second injury that happened after the worker was already permanently totally disabled. The Industrial Insurance Act provides for two types of permanent disability classifications: workers who are permanently unable to work as a result of an injury are classified as having permanent *total* disability, while workers who remain capable of employment following an injury but who sustain a loss of function as a result of that injury are classified as having permanent *partial* disability. Our Supreme Court has held that a worker who has been classified as having permanent total disability cannot later be found to have additional disability as a result of an injury that took place after the worker had already become permanently and totally disabled because "a subsequent lesser disability cannot be superimposed on top of the maximum disability recognized by the law."[1] This, in the Court's words, prevents "double payment."[2]

This Court should affirm the trial court's decision rejecting "double payment" for Sims.

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[1] *Harrington v. Dep't of Labor & Indus.*, 9 Wn.2d 1, 8, 113 P.2d 518 (1941).
[2] *Id.*

II. STATEMENT OF THE ISSUES

1. May a worker receive a permanent partial disability award for an injury that occurred after the worker was classified to be permanently and totally disabled as a result of a prior injury, when the law allows a worker to receive a permanent partial disability award in addition to a permanent total disability award only when the injury for which a permanent partial disability award is sought occurred before the injury that resulted in permanent total disability?

2. May Sims receive an award of attorney fees on appeal, when RCW 51.52.130 provides for an award only if a decision of the Board is reversed and a fund managed by the Department is impacted by the litigation, and when Sims should not prevail on appeal and, in any event, cannot receive any remedy beyond a remand even if this Court accepts his legal arguments?

III. STATEMENT OF THE CASE

A. This Appeal Involves Permanent Partial Disability and Permanent Total Disability

This case involves a number of different workers' compensation terms and the interaction between two different types of disability classifications: permanent partial disability and permanent total disability. *See* RCW 51.08.150 (defining permanent partial disability); RCW 51.08.160 (defining permanent total disability).

An injured worker receives temporary benefits while he or she is receiving treatment; when the worker's condition becomes "fixed" and stable, then the Department of Labor and Industries (Department) decides whether the worker should receive either permanent partial disability or

permanent total disability benefits. RCW 51.32.055, .060, .080; *Franks v. Dep't of Labor & Indus.*, 35 Wn.2d 763, 766-67, 215 P.2d 416 (1950).

Permanent Partial Disability. A worker has a permanent partial disability if the worker has sustained a loss of function as a result of an injury, but remains capable of gainful employment. *See* RCW 51.08.150; RCW 51.32.080; *Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994). A worker who is permanently and partially disabled receives a fixed award of benefits, which is based on the percentage of the loss of function caused by the injury.[3] RCW 51.32.080.

Permanent Total Disability. A worker has permanent total disability if the injury proximately caused the worker to be permanently incapable of any type of gainful employment. RCW 51.08.160. A worker who is permanently and totally disabled receives a pension, which is a wage replacement benefit. RCW 51.32.060; *Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 262, 289 P.3d 720 (2012). Here, Sims was

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[3] RCW 51.32.080 provides a specific dollar amount that shall be awarded for a complete loss of function related to some types of conditions (such as hearing loss) but does not specify a specific dollar amount for other types of injuries (such as low-back injuries). When RCW 51.32.080 specifies an award for a specific type of injury, a physician provides an opinion regarding the percentage of the worker's loss of function, and the worker receives an award that corresponds to that percentage.

When RCW 51.32.080 does not specify the award for a given type of injury, the worker's impairment is measured using a category system that the Department adopted by rule. RCW 51.32.080; WAC 296-20-200 to -690. A physician provides an opinion as to which category of impairment best describes the worker's disability. WAC 296-20-200 to -690.

found to have become permanently and totally disabled as of September 2010 as a result of a 2003 injury, and he now he also seeks permanent partial disability benefits (in addition to pension benefits for his 2003 injury) for a March 2012 injury.

B. The Board Found in a Prior Case That Sims Had Become Permanently Totally Disabled as of September 2010 as a Result of a 2003 Industrial Injury

Before he had the injury that is the subject of the current appeal, Sims was injured in January 2003 when he injured his left arm reaching for a falling object while working as a professional mover. CP 38, 70-71. The Department allowed Sims's claim for that injury and provided him with benefits. CP 65. The Department ultimately closed his left arm claim in September 2010 with a permanent partial disability award. CP 66. Sims appealed that decision to the Board of Industrial Insurance Appeals (Board). CP 66.

While Sims's appeal from the 2010 order closing his left arm claim was pending, Sims went to work as a military "role-player" for Ho-Chunk, Inc. CP 66.[4] Sims injured himself while doing that work in March 2012.

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[4] Sims suggests that he engaged in only "limited work . . . that [did] not constitute a living wage," citing *Fochtman v. Department of Labor & Industries*, 7 Wn. App. 286, 294, 499 P.2d 255 (1972), which indicates that a claimant may work on such an extremely limited basis and nonetheless be permanently and totally disabled. *See* App's Br. at 4. However, nothing in the record indicates whether Sims's work for Ho-Chunk was limited work for less than a living wage. *See* CP 66-67 (stating that Sims was injured while working as a military role-player for Ho-Chunk but not stating what the extent of Sims's work for Ho- Chunk was nor what wages he earned from that work).

CP 66. The Department allowed Sims's claim for the March 2012 injury. CP 66, 87.

In August 2012, the Board found that Sims was permanently and totally disabled as a result of his left arm injury and ordered the Department to place Sims on the pension rolls effective September 2010. CP 66, 76-77. The Department did so shortly after the Board issued its decision. *See* CP 80.

C. The Board Decided That Sims Was Not Eligible for a Permanent Partial Disability Award for His 2012 Injury Because That Injury Occurred After He Had Already Become Permanently Totally Disabled, and the Superior Court Affirmed

The Department closed Sims's March 2012 injury claim in February 2013 based on a report it received from Sims's treating physician indicating that Sims's condition with regard to that injury had become fixed and stable. CP 92. The Department did not provide Sims with a permanent partial disability award for his March 2012 injury because he had been adjudicated to have permanent total disability as of September 2010 as a result of his prior injury. CP 92.

The Board affirmed the Department's decision, concluding that the case law does not allow a worker to receive permanent partial disability for an injury that happens after the worker became permanently and totally disabled, and concluding that the cases Sims relied on were

distinguishable from his circumstance and did not support his argument. CP 15, 36-39.

Sims appealed to superior court, raising the same arguments he did at the Board. CP 2-4, 164-73. The superior court granted summary judgment to the Department and affirmed both the Board's decision and the Department's order. CP 215-17.

Sims then appealed to this Court.

IV. STANDARD OF REVIEW

In a workers' compensation case, it is the decision of the trial court that the appellate court reviews, not the Board's decision.[5] *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). In an appeal from a superior court's decision to this Court, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). On review of a summary judgment order, the appellate court's inquiry is the same as the superior courts. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is appropriate if the record shows that there is no genuine issue as to any material fact and a moving party is entitled to judgment as a matter of law. CR 56(c).

[5] The Administrative Procedures Act does not apply to appeals involving disputes about what benefits an injured worker should receive under the Industrial Insurance Act. *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009).

The Department's interpretations of the Industrial Insurance Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994).

V. ARGUMENT

A worker who is already permanently totally disabled as a result of one injury cannot additionally sustain a permanent partial disability as a result of a second injury that happened after the worker was already permanently totally disabled. The Supreme Court in *Harrington* held that a worker who has been classified as having permanent total disability as a result of an injury cannot later be found to have additional disability as a result of an injury that took place after the worker had already become permanently and totally disabled because "a subsequent lesser disability cannot be superimposed on top of the maximum disability recognized by the law." *Harrington v. Dep't of Labor & Indus.*, 9 Wn.2d 1, 8, 113 P.2d 518 (1941). This prevents a double recovery as the worker is not compensated beyond the "total" compensation already received.

It is only in a narrow set of circumstances not present here that the law allows a worker to receive a permanent partial disability award *after* the worker has been granted an award for permanent total disability. A worker who becomes permanently and totally disabled as a result of one

injury may receive a permanent and partial disability award as a result of a *prior* injury even if the worker is permanently totally disabled from a subsequent injury.

The law makes no such allowance for workers, like Sims, who are permanently totally disabled as a result of a previous injury and who then seek a permanent partial disability award for an injury that occurred after they were already permanently and partially disabled by the prior injury. Sims, citing cases dissimilar to his, argues that he is entitled to a permanent partial disability award for an injury that occurred after he had become permanently and totally disabled as a result of a prior injury. His reliance on those cases is misplaced because each of those cases based its holding on the fact that the worker was seeking a permanent partial disability award for an injury that occurred *before* the worker sustained the injury that resulted in permanent total disability. Far from supporting Sims's appeal, those cases show that Sims is not entitled to the relief he seeks here.

A. Under *Harrington*, *Sorenson*, and *Peterson*, a Worker Who Is Permanently and Totally Disabled by an Injury Cannot Receive a Permanent Partial Disability Award for an Injury That Occurred After the Worker Was Already Permanently and Totally Disabled

Sims may not receive a permanent partial disability award for his 2012 injury because that injury occurred after the date that he was

classified to be permanently and totally disabled. In three separate decisions, the Supreme Court has recognized that once a worker has been classified as being permanently and totally disabled by an injury, the worker may not receive lesser disability awards for new injuries that occurred after the worker became permanently and totally disabled. Under these cases, Sims may not receive a permanent partial disability award for his 2012 injury because that injury happened after Sims had become permanently and totally disabled by his 2003 injury. *Harrington*, 9 Wn.2d at 7-8; *Sorenson v. Dep't of Labor & Indus.*, 19 Wn.2d 571,574-75, 577-78, 143 P.2d 844 (1943); *Peterson v. Dep't of Labor & Indus.*, 22 Wn.2d 647, 651-52, 157 P.2d 298 (1945).

In *Harrington*, a worker who was classified as permanently and totally disabled as a result of one injury went back to the workforce, after he had been classified as permanently totally disabled, and sustained a new injury, for which he sought temporary total disability benefits. *Harrington*, 9 Wn.2d at 2-4. The Supreme Court concluded that regardless of whether he was in fact temporarily unable to work as a result of his most recent injury, he was not eligible for temporary total disability benefits for it because he had already been classified as having the highest form of disability that is recognized by the Industrial Insurance Act based on his first injury. *Id.* at 7-8.

The *Harrington* court held that the prohibition against overlapping benefits prevents a double payment because additional disability is not "superimposed" on the maximum disability allowed:

> A subsequent lesser disability cannot be superimposed upon the maximum disability recognized by the law. A contrary conclusion would result in an overlapping of classifications and in the allowance of double payment.

Harrington, 9 Wn.2d at 8.

Sims, like the worker in *Harrington*, seeks to superimpose a subsequent lesser disability upon the maximum disability recognized by the law. *See id.* This would result in an improper overlapping of classifications and a double recovery of disability benefits. *See id.* Under *Harrington*, Sims may not receive permanent partial disability for an injury that happened after he was already permanently and totally disabled as a result of a prior injury. *See id.* at 7-9.

In *Sorenson*, an injured worker was classified as permanently and totally disabled and entered into a settlement with the Department for a payment for an amount that was less than the maximum allowed by the statute for permanent total disability. *See Sorenson*, 19 Wn.2d at 571-73; *Sorenson v. Dep't of Labor & Indus.*, 12 Wn.2d 355, 121 P.2d 978 (1942). After the settlement was reached, the worker then returned to his native country of Norway, and his condition subsequently improved such that

when he came back to America he was capable of resuming gainful employment. *Id.* at 572. However, the worker sustained a second injury after he returned to work and he sought a pension for it, arguing that the prior closure of his claim with a lump sum settlement was void[6] and that he therefore remained free to receive disability benefits for his later injury. *Sorenson*, 19 Wn.2d at 573.

However, at some point after the worker sustained his second injury, the Department paid the worker the difference between the lump sum it had originally given him when it settled his pension claim for his first injury and the maximum amount allowed by the statute for permanent total disability ($4,000). *See id.* at 572-73. The Department argued that because the worker had been fully compensated and had received the maximum amount allowed by law for an industrial injury, the worker could not receive a new disability award for his later injury. *Id.* at 573-74. The Supreme Court agreed, upholding the Department's decision to close the new claim without any additional disability benefits because the worker had ultimately been fully compensated for his first injury when the

[6] As the Supreme Court explained in a prior appeal involving the same worker, the settlement for less than the full amount of the pension was void because the Department's legal authority for settling a claim for less than the full amount of the pension only applied to workers who had actually returned to their native country, and, at the time of Sorenson's settlement, he was a resident of the United States, albeit one who intended to return to Norway (and who did, in fact, reside in Norway for a significant time before returning to the United States). *See Sorenson,* 12 Wn.2d at 362.

Department paid the worker the difference between the original settlement amount and the full amount allowed for a pension by statute. *Sorenson*, 19 Wn.2d at 577-78. Because he was already classified as permanently totally disabled he could not have further disability from the second injury. *Id.*

Here, Sims was found to have become permanently totally disabled by his first injury as of September 2010, well before his 2012 injury occurred. CP 66, 76-77. Sims has received and has continued to receive all of the compensation that he is entitled to as a worker who became permanently totally disabled as of September 2010, and, therefore, he cannot receive additional disability benefits for his 2012 injury. *See Sorenson*, 19 Wn.2d at 577-78. Furthermore, the *Sorenson* decision clarifies that it does not matter whether the worker receives full compensation for the first injury before or after the second injury occurs: so long as the worker has been fully compensated for the injury that resulted in permanent total disability, the worker is not eligible for a disability award for a second injury. *See id.* at 577-78.

In *Peterson*, a worker appealed the Department's decision to find him to be permanently and totally disabled, arguing that such a classification was incorrect and would result in him being denied benefits if he went back to work and sustained a new injury. *Peterson*, 22 Wn.2d at 648-49. The Department argued that the worker could not appeal its

order placing him on the pension rolls because the worker was not aggrieved by that order, as it granted him the highest form of disability benefits that are allowed by law. *Peterson*, 22 Wn.2d at 651. The Supreme Court agreed with the worker that he had the right to appeal the order that classified him as being permanently and totally disabled because that classification—if not overturned on appeal—would prevent the worker from being eligible for any additional disability benefits if he went back to work and sustained a new injury. *Peterson*, 22 Wn.2d at 651-52, 655.

Here, Sims seeks additional disability benefits for an injury that occurred after he became permanently and totally disabled by a prior injury. As *Peterson* explains, one of the consequences of a worker being classified as permanently and totally disabled by an injury is that a decision classifying a worker as having that form of disability, if final, "estops [the worker] from receiving and the department from paying compensation for subsequent injuries." *Id.* at 651.

Unlike the worker in the *Peterson* case, Sims appealed a finding that he was permanently and partially disabled and sought (and succeeded in obtaining) a pension for it. CP 66, 76-77. Having prevailed in obtaining that classification, he is bound by the consequences attached to it, one of which is that he is ineligible for a permanent partial disability award for the injury that happened after he was classified to be permanently and

totally disabled. *Peterson*, 22 Wn.2d at 651.

Under *Harrington*, *Sorenson*, and *Peterson*, Sims may not receive disability benefits for his 2012 injury because that injury occurred after he had become permanently and totally disabled as a result of a prior injury. *Harrington*, 9 Wn.2d at 7-8; *Sorenson*, 19 Wn.2d at 574-75, 577-78; *Peterson*, 22 Wn.2d at 651-52. Sims argues that his case is distinguishable from the above decisions because the workers in those cases went back to work after they were awarded permanent total disability benefits by the Department, and then sustained another injury, while the injury for which he seeks permanent partial disability benefits occurred before the Department issued the order that placed him on the pension rolls. App's Br. at 13. Although Sims does not couch it this way, he effectively contends that the key issue under *Harrington* is whether the worker is seeking permanent partial disability for an injury that occurred after the Department issued an order that declared the worker to be permanently and totally disabled, not whether that injury occurred after the worker actually became permanently and totally disabled. App's Br. at 12-16. Sims's argument fails for three reasons.

First, the reasoning behind the *Harrington* decision is that a worker who has been classified as being permanently and totally disabled has been classified as having the greatest form of disability that is recognized

by the Industrial Insurance Act, and, therefore, cannot receive additional disability awards for a subsequent injury, since doing that would superimpose a lesser type of disability on top of the greatest form of disability that the Act recognizes. *Harrington*, 9 Wn.2d at 7-8. That rationale applies to any injured worker who sustains an injury after he or she had already become permanently and totally disabled by a previous injury, regardless of when the Department happens to have issued an order that formally placed the worker on the pension rolls. This is because, regardless of when the Department issued its order placing a worker on the pension rolls, granting permanent partial disability to a worker after he or she in fact became permanently and totally disabled by a prior injury superimposes a lesser form of disability on top of the greatest form of disability that is recognized by the Act, which *Harrington* says cannot be done. *Harrington*, 9 Wn.2d at 7-8.

Sims stresses that he did not return to work after the Board decision, but this is of no moment. App's Br. at 14. *Harrington*'s legal ruling was not entered based on the idea that the worker in that case should be punished because he or she returned to work despite having received a pension from the Department, and therefore the worker should be denied benefits for having improperly returned to work. *See Harrington*, 9 Wn.2d at 7-8. Rather, *Harrington*'s ruling is grounded in

the recognition that a worker who is already permanently and totally disabled as a result of an injury cannot sustain additional disability based on an injury that happened after the worker had already become permanently and totally disabled because the Act does not recognize a disability over and above permanent and total disability. *See Harrington*, 9 Wn.2d at 7-8.

Second, it would make little sense to interpret *Harrington* as making the key issue the date that the Department issued an order placing a worker on the pension rolls rather than the date that the worker actually became permanently and totally disabled, because the date that a worker actually became permanently and totally disabled directly affects the worker's entitlement to benefits while the date that the Department issued an order placing the worker on the pension rolls has no impact on the worker's substantive legal rights. *Harrington*, 9 Wn.2d at 7-8; *see Sorenson*, 19 Wn.2d at 577-78. Here, the fact that Sims was found to be permanently and totally disabled as of September 2010 (as opposed to having become permanently and totally disabled as of some other date) meant that Sims was entitled to back payments of permanent total disability starting on September 2010.

Third, as the *Sorenson* decision shows, a worker may not receive additional disability benefits after having become permanently and totally

disabled by a prior injury regardless of when the Department actually made the payments that compensated the injured worker for his or her permanent total disability. *See Sorenson*, 19 Wn.2d at 577-78. In *Sorenson*, the injured worker was found to be permanently and totally disabled before he went back to work and sustained an additional injury, but the Department did not fully compensate the worker for the permanent total disability until after the second injury was sustained. *See id.* at 572-74. Nonetheless, the *Sorenson* Court concluded that the worker was ineligible for disability benefits for the later injury because the worker was ultimately fully compensated for the permanent total disability caused by his previous injury. *Id.* at 577-78.

Here, there is no dispute that Sims has received and is continuing to receive all of the permanent total disability benefits that he is entitled to based on his status as a worker who became permanently and totally disabled effective September 2010 by his 2003 injury. Since he ultimately has been granted all of the disability benefits that he was entitled to as a worker who became permanently and totally disabled as of September 2010, he cannot receive additional benefits for his later injury under *Sorenson* even though the Department did not make the payments for the permanent total disability benefits until after the second injury occurred. *See Sorenson*, 19 Wn.2d at 577-78.

B. *Clauson* and *McIndoe* Support the Department, Not Sims

In two cases, *Clauson v. Department of Labor & Industries*, 130 Wn.2d 580, 584-86, 925 P.2d 624 (1996), and *McIndoe v. Department of Labor & Industries*, 144 Wn.2d 252, 254, 257-58, 26 P.3d 903 (2001), the Supreme Court recognized that a worker may receive a permanent partial disability award for an injury that occurred *before* the worker sustained the injury that caused the worker to become permanently and totally disabled, relying on a provision in RCW 51.32.060 that allows workers to receive permanent and total disability benefits for a later injury notwithstanding a payment of permanent partial disability for a prior injury. Sims argues that *Clauson* and *McIndoe* show that he is entitled to benefits here (App's Br. at 8-11), but his argument fails because he ignores that *Clauson* and *McIndoe* relied on the fact that the workers in those cases were seeking permanent partial disability awards for *prior* injuries, not *subsequent* ones. *See Clauson*, 130 Wn.2d at 585-86; *McIndoe*, 144 Wn.2d at 254.[7] Far from supporting Sims, *Clauson* and *McIndoe* support the Department, as,

[7] At superior court, Sims argued that the *McIndoe* opinion did not actually indicate whether the workers' hearing loss occurred before or after the injuries that caused them to be permanently and totally disabled. CP 172-73. He did not raise that contention in his appellate brief, and has abandoned that as an argument. *See Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.2d 549 (1992) (ruling that an argument not raised in a party's opening appellate brief is waived and cannot be belatedly raised in a reply brief). In any event, *McIndoe* repeatedly emphasized that the workers' hearing loss was sustained before they incurred the injuries that caused them to be permanently and totally disabled, and any suggestion to the contrary would not survive scrutiny. *McIndoe*, 144 Wn.2d at 254, 256-59, 263-66.

while those cases did not expressly hold this, they strongly imply that a worker who is situated as Sims is situated may not receive the relief he seeks here. *Clauson*, 130 Wn.2d at 585-86; *McIndoe*, 144 Wn.2d at 254; *see Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 263 (explaining in dicta that, under *McIndoe*, a worker may only receive a permanent partial disability in addition to a pension for an injury or disease that occurred before the injury that caused permanent and total disability).

Both *Clauson* and *McIndoe* expressly framed the issue that was before them as whether a worker may receive a permanent partial disability for a *prior* injury after having been placed on the pension rolls for a subsequent injury, and each case expressly relied on the fact that the permanent partial disability was sought for a *prior* injury or disease in explaining its holding. *See Clauson*, 130 Wn.2d at 581-82; *McIndoe*, 144 Wn.2d at 256. The first sentence of the *Clauson* opinion states, "The issue in this case is whether a worker who has been awarded a permanent total disability pension under one worker's compensation claim may later receive a permanent partial disability award for a *prior* injury." *Clauson*, 130 Wn.2d at 581-82 (emphasis added). When explaining its holding that the worker could receive a permanent partial disability for the prior injury, the *Clauson* Court stated, "Mr. Clauson seeks a permanent partial disability award for an injury which was sustained *before* the injury

resulting in his permanent total disability and which was considered under a separate claim, *which was pending at the time he was classified as permanently totally disabled.*" *Clauson*, 130 Wn.2d at 585-86 (distinguishing worker's case from *Harrington*, 9 Wn.2d at 7-8, and other cases) (emphasis in original).

Furthermore, the *Clauson* court reached its conclusion based on RCW 51.32.060(4), which supports the conclusion that permanent partial disability is due when the permanent partial disability award is being sought for an injury that occurred before the injury that caused the worker to be permanently and totally disabled, but which does not support that conclusion when permanent partial disability is sought for an injury that occurred after the worker had become permanently and totally disabled by a prior injury. *See id.* at 584-85. RCW 51.32.060(4) provides, "Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury." *Id.* The court observed that this statute showed that the Legislature contemplated that a worker could be entitled to a permanent partial disability award for a *prior* injury and also be entitled to a pension for a later injury if the later injury caused a worker who was previously only partially disabled to become totally disabled. *See Clauson*, 130 Wn.2d

at 584-85.

Conversely, no statute in the Industrial Insurance Act provides that a worker who is permanently totally disabled by a prior injury may also receive a permanent partial disability award for a *later* injury that occurred after the worker had already become permanently and totally disabled. Indeed, such a proposed sequence of events does not make sense. While it is easy to imagine a partially disabled worker becoming totally disabled as a result of the combined effects of that injury and a later one, it does not make sense to posit that a worker who was permanently and totally disabled by an injury could later become only *partially* disabled by an injury that happened *after* the worker was already permanently and totally disabled.

In explaining its holding, the *Clauson* court also noted that the Department conceded that if the worker's first claim had been closed with a permanent partial disability award and the second claim was then closed with a pension that there is no question but that the worker would have the right to keep the permanent partial disability that had previously been granted on the first claim as well as the pension that was granted on the second one. *Clauson*, 130 Wn.2d at 584-85. The court concluded that the mere fact that the Department issued an order granting a pension on the second claim before it issued an order regarding permanent partial

disability on the first claim should not effect the worker's right to benefits because, regardless of which claim was closed first, RCW 51.32.060(4) contemplates that a worker can be entitled to a permanent partial disability award for a prior injury as well as a pension for a later injury. *Clauson*, 130 Wn.2d at 584-85.

Here, however, Sims would not be entitled to a permanent partial disability award for his second injury even if the Department had issued an order that closed that claim before it issued an order that placed Sims on the pension. Sims's eligibility or ineligibility for benefits for his second injury does not depend on which of the two claims is closed first. Rather, he is not eligible for a permanent partial disability award for his second injury because that injury happened after he had already become permanently and totally disabled by his previous injury, and neither RCW 51.32.060(4) nor another statute contemplates a worker who is permanently and totally disabled as a result of an injury also being entitled to a permanent partial disability award for an injury that happened after the worker was already permanently and totally disabled.[8]

While *Clauson* did not hold that a worker may not receive a

[8] Sims submits the hypothetical question of whether he would have had the right to a permanent partial disability award for his 2012 injury if the Department had closed his 2012 injury claim in May 2012, before the Board issued its order directing the Department to place him on the pension rolls effective September 2010 for his prior injury. App's Br at 14. The answer is that Sims would not be entitled to a permanent partial disability award in that instance.

permanent partial disability award for a second injury that occurred after the worker had already become permanently and totally disabled by a prior injury, the opinion strongly supports that conclusion. First, the opinion repeatedly stressed that the worker in that case, unlike the workers in *Harrington*, *Sorenson*, and *Peterson*, was seeking permanent partial disability for a prior injury, not a later one. *Clauson*, 130 Wn.2d at 585-86 (distinguishing *Harrington*, 9 Wn.2d at 7-8; *Sorenson*, 19 Wn.2d at 574-75, 577-78; *Peterson*, 22 Wn.2d at 651-52). The court's repeated emphasis and reliance on that fact would be a nonsequitur if the court thought the outcome would be the same regardless of whether a permanent partial disability award was being sought for the prior injury or the later one. *See Clauson*, 130 Wn.2d at 585-86. Second, the court, in explaining its opinion, relied on RCW 51.32.060(4), which, on its face, allows for a worker receiving a permanent partial disability award for a prior injury in addition to a pension for a later injury, but does not purport to provide for a worker receiving permanent partial disability for an injury that occurred after a worker was already permanently and totally disabled. *Clauson*, 130 Wn.2d at 584-85.

Sims admits that in *McIndoe* the court held that "a worker may received [PPD] benefits for a valid occupational injure or disease claim that *preexisted* and is unrelated to the worker's [PTD] claim if the [PPD]

claim is filed within the statute of limitation." App's Br. at 9 (emphasis added) (brackets in original). Sims' concession that *McIndoe* applies to "preexisting" injuries is correct. *McIndoe* expressly framed the issue in a way that emphasized that the workers in that case were seeking permanent partial disability awards for diseases that occurred *prior* to the injury that resulted in permanent total disability. *McIndoe*, 144 Wn.2d at 256. The *McIndoe* court stated, "The question presented here is whether a worker who received a permanent partial disability award for an unrelated occupational disease which developed prior to the pension award." *Id.*

The court explained that it was affirming the decision to grant the workers permanent partial disability awards "on the basis that the hearing losses were sustained *before* the unrelated injuries that resulted in the pensions and the [hearing loss] claims were filed within the statute of limitations." *McIndoe*, 144 Wn.2d at 254 (emphasis added). Thus, the court expressly based its holding on the fact that the workers in that case were seeking permanent partial disability awards for hearing loss that they sustained before they sustained the injuries that caused them to become permanently and totally disabled. *Id.* Sims tries to recast *McIndoe* as being solely about the fact that the "claim . . . was timely filed, allowed, and for a condition completely unrelated to the permanently disabled condition." App's Br. at 15. But this reads out of the Supreme Court's decision the

additional overriding fact that the occupational diseases for which permanent partial disability was sought occurred before the injuries that resulted in pensions.

One twist that was presented by the *McIndoe* case was that the workers sustained their occupational hearing loss before they sustained the injuries that caused them to be permanently and totally disabled, but they did not file their claims for occupational hearing loss with the Department until after they had been placed on the pension rolls. *See McIndoe*, 144 Wn.2d at 264-65. The *McIndoe* Court noted that *Clauson* allowed a permanent partial disability award for an injury that preceded the injury that caused the worker to be permanently and totally disabled, and concluded that the dispositive issue was the date that the workers actually sustained their occupational hearing loss, which occurred well before they sustained the injuries that caused them be placed on the pension rolls, not the date that they filed their hearing loss claims with the Department, which happened after that. *McIndoe*, 144 Wn.2d at 264-65 (citing *Clauson*, 130 Wn.2d at 582). Since the workers in the *McIndoe* case actually sustained the hearing loss before they incurred the injuries that caused them to be permanently and totally disabled, they were eligible for permanent partial disability awards for their hearing loss. *McIndoe*, 144 Wn.2d at 264-65.

Here, Sims, unlike the workers in *McIndoe*, seeks a permanent partial disability award for an injury that happened after he had already become permanently and totally disabled by a prior injury. *See McIndoe*, 144 Wn.2d at 254, 264-65. Sims's case would be analogous to the *McIndoe* case if he was seeking a permanent partial disability award for an injury that occurred before he sustained the injury that caused him to be permanently and totally disabled and he simply had not filed the claim for benefits for that injury until after the second injury occurred. *McIndoe*, 144 Wn.2d at 264-65. However, that is not true in his case. Rather, he seeks a permanent partial disability award for an injury that happened after the injury that caused him to be permanently and totally disabled and after he had become permanently and totally disabled by that prior injury. CP 66. His case is decidedly dissimilar to *McIndoe* and his reliance on it is misplaced. *McIndoe*, 144 Wn.2d at 264-65.

McIndoe, like *Clauson*, also based its holding on RCW 51.32.060(4),which, as noted, expressly allows for a worker receiving permanent partial disability for a prior injury and also receiving a pension for a later injury. *McIndoe*, 144 Wn.2d at 257-58; *Clauson*, 130 Wn.2d at 584-85. RCW 51.32.060(4) supports the *McIndoe* Court's holding because the workers in that case were seeking permanent partial disability for hearing loss that they sustained before they sustained the

injuries that caused them to be permanently and totally disabled, and RCW 51.32.060(4) supports the inference that a permanent partial disability award is appropriate in that instance. *McIndoe*, 144 Wn.2d at 257-58. However, RCW 51.32.060(4) does not support Sims here because he seeks a permanent partial disability award for an injury that happened after he had already become permanently and totally disabled by a prior injury.

C. *McIndoe* and *Clauson* Show That a Worker's Ability to Receive Permanent Partial Disability for an Injury in Addition to a Pension on Another Injury Depends on the Timing of When the Worker's Two Injuries Actually Occurred

In *McIndoe* and *Clauson*, the Supreme Court held that a worker was entitled to permanent partial disability for an injury or occupational disease so long as the injury for which permanent partial disability was sought occurred before the injury that resulted in permanent and total disability. *McIndoe*, 144 Wn.2d at 264-65; *Clauson*, 130 Wn.2d at 585-86. Although Sims does not expressly make this argument, the general tenor and tone of his briefing suggests that it is his view that the timing of a worker's two injuries cannot impact the worker's entitlement to benefits, and that either *McIndoe* or *Clauson* somehow support this assertion. *See* App's Br. at 9-10. Far from supporting that view, however, those cases show that the timing of when a worker sustained his or her injuries *does*

affect the worker's ability to receive benefits for those injuries.

McIndoe and *Clauson* expressly based their holding on the fact that the workers sustained the injury or disease for which permanent partial disability awards were sought before the worker was permanently and totally disabled, and they relied on that fact in distinguishing the case from *Harrington*, *Sorenson*, and *Peterson*. *See McIndoe*, 144 Wn.2d at 254, 258-60 (distinguishing *Harrington*, 9 Wn.2d at 8; *Sorenson*, 19 Wn.2d at 577-78; and *Peterson*, 22 Wn.2d at 651); *Clauson*, 130 Wn.2d at 585-86 (distinguishing cases). The timing of when the workers actually sustained the injury or disease for which permanent partial disability was sought was important to the court in *McIndoe* and *Clauson*, as the court relied on that fact in reaching its holding in each case. *See McIndoe*, 144 Wn.2d at 254; *Clauson*, 130 Wn.2d at 585-86. While it is true that both *McIndoe* and *Clauson* support the conclusion that the timing of *some things* are not a proper basis to deny permanent partial disability benefits to a worker, in neither case was the court referring to the timing of when the worker actually sustained an injury or disease. *McIndoe*, 144 Wn.2d at 265; *Clauson*, 130 Wn.2d at 585-86.

In *Clauson*, the court concluded that the timing of when the worker's two claims were closed should not operate to deprive the worker of benefits for an injury that was actually sustained before the worker

sustained the injury that caused the worker to be permanently and totally disabled. *Clauson*, 130 Wn.2d at 585-86. In that case, the Department placed the worker on a pension for the later of his two injuries before it issued an order that closed the worker's claim for his first injury. The court concluded that the worker was eligible for permanent partial disability for the first injury because it occurred before the injury that led to permanent total disability and the claim for the first injury was pending at the time that the worker was pensioned for his later injury. *Clauson*, 130 Wn.2d at 585-86. Although the court does not couch it this way, the court effectively concluded that it was the timing of when the worker's two injuries were actually sustained that mattered, not the timing of when the worker's two claims were closed. *See id.*

In *McIndoe*, the court concluded that the timing of when the workers filed applications for benefits for hearing loss should not affect whether the workers could receive permanent partial disability awards for hearing loss because the workers actually sustained their hearing loss before they sustained the injuries that led to permanent total disability. *McIndoe*, 144 Wn.2d at 264-65. Thus, it is the timing of when the workers sustained their various injuries or diseases that matters, not the timing of when the workers filed application for benefits with the Department for those injuries. *See id.*

Here, Sims is not being denied a permanent partial disability award based on the timing of when the Department issued the orders that closed his 2003 and 2012 injuries, nor is he being denied a permanent partial disability award based on the date that he filed an application for benefits for his 2003 or 2012 injury. Rather, he is not eligible for a permanent partial disability award for his 2012 injury because that injury *actually occurred* after he was already permanently and totally disabled as a result of his 2003 injury. *Harrington* held that a worker is not entitled to benefits in that instance, and neither *McIndoe* nor *Clauson* overruled *Harrington*. *Harrington*, 9 Wn.2d at 7- 8; *see McIndoe*, 144 Wn.2d at 254, 258-60 (distinguishing *Harrington* but not purporting to overrule it); *Clauson*, 130 Wn.2d at 585-86 (same).

On the contrary, *McIndoe* and *Clauson* distinguished *Harrington* on the grounds that the workers in *McIndoe* and *Clauson* were seeking permanent partial disability awards for injuries or diseases that were sustained before the worker sustained the injury that resulted in permanent total disability. *McIndoe*, 144 Wn.2d at 254, 258-60 (distinguishing *Harrington*, 9 Wn.2d at 7-8); *Clauson*, 130 Wn.2d at 585-86 (same).Sims's case cannot be distinguished from *Harrington* on those grounds, as his 2012 injury indisputably occurred after he was already permanently and totally disabled as a result of his 2003 injury.

Harrington, 9 Wn.2d at 7-8.

D. *Sulgrove* Has Been Overruled by *Clauson*, but in Any Event *Sulgrove* Would Support the Department, Not Sims

In the significant decision *In re Robert Sulgrove*, No. 88 08869, 1989 WL 164574 (Wash. Bd. of Ind. Ins. Appeals May 1, 1989), the Board concluded that whether an injured worker who is permanently and totally disabled by an injury is eligible for a permanent partial disability award for a different injury depends on which of the two claims became medically fixed and stable first. *But see Clauson*, 130 Wn.2d at 586 (stating, "we hold that the worker here should not be denied [permanent partial disability] benefits under his hip claim simply because his hip condition was not medically fixed and stable until one week after his back claim [under which he was pensioned] was resolved.").

Under the rule the Board proposed in *Sulgrove*, a worker may receive a permanent partial disability award as well as a pension if the medical conditions covered under the claim for which permanent partial disability is sought became fixed and stable before the medical conditions covered under the claim that caused the worker to be permanently and totally disabled became fixed and stable. *Sulgrove*, 1989 WL 164574 at *2; *but see Clauson*, 130 Wn.2d at 586. However, *Clauson* expressly rejected that legal test, stating "we hold" that a worker may not be denied

benefits "simply because" the claim for which permanent partial disability was sought became medically fixed and stable shortly after the claim that led to the pension. *Clauson*, 130 Wn.2d at 586.

Sims cites *Sulgrove* in support of his appeal (App's Br. at 11-12), but his reliance on it is doubly misplaced, as *Clauson* expressly rejected the legal test that the Board used in *Sulgrove*, and as, if *Sulgrove* was applied to Sims, he would not prevail under it. Applying the rule that the Board used in *Sulgrove* would require that Sims's request for permanent partial disability benefits be denied because the injury for which Sims seeks a permanent partial disability award became medically fixed and stable after the injury that caused him to become permanently and totally disabled. *See Sulgrove*, 1989 WL 164574 at *2; *but see Clauson*, 130 Wn.2d at 586. Sims's 2003 injury became fixed and stable as of September 2010, and his 2012 injury necessarily became fixed and stable after September 2010 because the 2012 injury happened after September 2010. Thus, even if *Sulgrove* survived *Clauson*, it would not help Sims.

E. The Liberal Construction Standard Does Not Assist Sims Here, as Sims Has Not Pointed to an Ambiguity in Any Relevant Statute

Sims is not entitled to a permanent partial disability award for his 2012 injury because he was already permanently and totally disabled as a

result of his 2003 injury when the 2012 injury occurred. Sims attempts to bolster his argument for a permanent partial disability award by noting that the Industrial Insurance Act is subject to liberal construction. App's Br. at 12.

It is true that the Industrial Insurance Act is subject to liberal construction, but that is of no aid to Sims here, because Sims has not pointed to any ambiguity in any statute that is relevant here. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.3d 1056 (1993) (liberal construction does not apply to unambiguous terms of Industrial Insurance Act); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n. 28, 286 P.3d 695 (2012) (same). On the contrary, the statute relevant here, RCW 51.32.060(4), supports an award of permanent partial disability in addition to a pension only if permanent partial disability is sought for an injury that occurred before the injury that caused the worker to be permanently and totally disabled. No matter how liberally that statute is construed, it does not support Sims's argument that he may receive a permanent partial disability award for an injury that occurred after he had already become permanently and totally disabled by a prior injury.

F. Sims Should Not Receive an Award of Attorney Fees

The Department properly concluded that Sims cannot receive a permanent partial disability award for his 2012 injury because that injury

happened after he had already become permanently and totally disabled by a 2003 injury. Sims seeks to overturn those decisions and requests an award of attorney fees under RCW 51.52.130. App's Br. at 16. This Court should deny his request for attorney fees for three reasons.

First, the Department's decision in this case should be affirmed. If this Court affirms, then no fee award would be appropriate. *See* RCW 51.52.130.

Second, Sims did not include his fee request in a separate section as required by RAP 18.1(b) and, therefore, this Court need not consider the request. *See* App. Br. at 47; *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-77, 303 P.3d 1065 (2013).

Third, even if this Court reverses the Department's decision in this case, a fee award would still not be appropriate, because the only remedy Sims may receive, even if this Court agrees with his arguments, is a remand to the Department to calculate how much, if any, permanent partial disability Sims has as a result of his 2012 injury. As *Sacred Heart Medical Center v. Knapp*, 172 Wn. App. 26, 29-30, 288 P.3d 675 (2012), held, a worker is not entitled to an attorney fee award if the only remedy he or she receives on appeal is a remand to the Department for further action rather than an award of industrial insurance benefits. *See also Dep't of Labor & Indus. v. Rowley*, 185 Wn. App. 154, 170, 340 P.3d 929

(2014), *review granted on other grounds*, 183 Wn.2d 1007 (2015) (denying worker's fee request where only relief granted was a remand to the trial court).

The plain language of RCW 51.52.130 establishes that an attorney fee award is only granted if a worker obtains additional benefits on appeal that impact the accident fund. RCW 51.52.130 provides:

> If in a worker or beneficiary appeal the decision and order of the board is reversed or modified *and if the accident fund or medical aid fund is affected by the litigation*, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained . . . the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

(Emphasis added.) *See Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 445, 262 P.3d 837 (2011).

Here, it is Sims, not the Department, who appealed the Board's decision. Therefore, Sims may receive an award of attorney fees only if the Board's decision is reversed *and* the accident fund or medical aid fund is affected by the litigation. RCW 51.52.130. A remand for a further decision by the Department, in and of itself, does not impact the accident fund or medical aid fund, and, therefore, merely securing a remand does not make a party entitled to an attorney fee award. *See Knapp*, 172 Wn. App. at 29-30.

Here, the only relief Sims seeks on appeal is a remand to the Department to determine how much, if any, permanent partial disability he has as a result of that injury.[9] *See* App's Br. at 16. Even if this Court concludes that the case should be remanded to the Department to decide this issue, a remedy of that kind does not warrant a fee award. *See Knapp*, 172 Wn. App. at 29-30.

VI. CONCLUSION

The Department properly concluded that Sims may not receive a permanent partial disability award for his 2012 injury because that injury occurred after he had already become permanently and totally disabled by a 2003 injury. In order to prevent a double recovery, the Industrial Insurance Act does not allow a worker who is pensioned by an injury to receive an additional permanent and partial disability award for an injury that happened after the worker became permanently and totally disabled from a prior injury. The cases Sims cites support the Department rather than Sims, as those cases emphasized that the worker's partially disabling injury occurred before the worker's totally disabling injury happened, while the opposite is true in his case. This Court should affirm.

[9] As the record contains no evidence establishing how much, if any, permanent partial disability Sims may have sustained as a result of his 2012 injury, there is no basis in the record to grant Sims a permanent partial disability award as opposed to simply remanding the case to the Department with directions that it consider that issue.

RESPECTFULLY SUBMITTED this 25th day of November, 2015.

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NO. 47604-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL L. SIMS, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Brief of Respondent and this Declaration of Service to all parties on the record as follows:

Via Email and First Class U.S. Mail, Postage Prepaid to:

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DATED this 25th day of November, 2015, at Tumwater, Washington.

Autumn Marshall

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WASHINGTON STATE ATTORNEY GENERAL

November 25, 2015 - 2:12 PM

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