SC#93520-3

No. 47604-5-II

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL L. SIMS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

PETITION FOR REVIEW
(Corrected with Signature)

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I. IDENTITY OF THE PETITONER

Comes now the petitioner, Michael L. Sims, Appellant and Plaintiff below, by and through his attorneys of record, The Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates per Ryan Johnson, and hereby asks this Court to accept review of the Court of Appeals' decision terminating review.

II. DECISION PRESENTED FOR REVIEW

Under RAP 13.4(b)(4), Mr. Sims seeks review of Opinion No: 47604-5-II. The Court of Appeals, Division II, filed its opinion on July 26, 2016.

III. ISSUE

Whether the Court of Appeals erred by determining that the effective date, rather than the decision date, was the relevant date for determining Mr. Sims' entitlement to permanent partial disability ("PPD") benefits for his March 2012 industrial injury?

Alternatively, whether the Court of Appeals erred in considering Mr. Sims' injury for which he filed his March 2012 claim as "further accident" under RCW 51.32.060(4)?

IV. STATEMENT OF THE CASE

This case originates under RCW Title 51, the Industrial Insurance Act ("the Act") from an administrative law review appeal of a July 29,

2014, Order denying Petition for Review. The Board of Industrial Insurance Appeals ("the Board") instead adopted a Proposed Decision and Order dated June 5, 2014 as its final Decision and Order. The decision held that Mr. Sims is not entitled to consideration for a PPD award for his March 13, 2012, industrial injury. The Department of Labor and Industries ("the Department") then closed Mr. Sims' March 2012 claim on the basis that he was not eligible for a PPD award[1] under this claim.

Mr. Sims appealed the Board's decision to Superior Court, asserting that the Board had erred in not requiring the Department to consider his eligibility for a PPD award under his March 13, 2012 industrial injury claim. The Superior Court held that the Board correctly granted summary judgment to the Department and entered its judgment order on April 24, 2015. The Court of Appeals, Division II, granted review and on July 26, 2016, affirmed the Superior Court's decision, holding that

[1] WAC 296-20-19000 provides that a permanent partial disability award is:

> ...a monetary award designed to compensate the worker for the amputation or loss of function of a body part or organ system. Impairment is evaluated without reference to the nature of the injury or the treatment given. To ensure uniformity, consistency and fairness in rating permanent partial disability, it is essential that injured workers with comparable anatomic abnormalities and functional loss receive comparable disability awards. As such, the amount of the permanent partial disability award is not dependent upon or influenced by the economic impact of the occupational injury or disease on an individual worker. Rather, Washington's Industrial Insurance Act requires that permanent partial disability be established primarily by objective physical or clinical findings establishing a loss of function.

because "Sims became permanently and totally disabled as of September 24, 2010 and received pension benefits retroactive to that date, he cannot obtain PPD benefits for an injury that occurred after that date."

Michael L. Sims suffered an industrial injury unloading a moving van while working for Ace Van & Storage, Inc. on January 6, 2003. CABR at 22.[2] Mr. Sims filed a claim with the Department for his industrial injury which was allowed and benefits were provided by the Department to Mr. Sims, including temporary total disability benefits. CABR at 22.

On October 10, 2009, the Department stopped providing Mr. Sims temporary total disability benefits. CABR at 22. The Department closed Mr. Sims' claim, determining that he was only a PPD worker who was capable of performing and obtaining reasonably continuous gainful employment. CABR at 22. Following a protest, this determination was affirmed on September 24, 2010. CABR at 22.

On November 22, 2010, Mr. Sims filed an appeal with the Board seeking additional benefits, including a determination that he was a permanently totally disabled ("PTD") worker as of September 24, 2010. CABR at 22. On March 13, 2012, while this appeal was pending, Mr.

[2] The record created at the Board of Industrial Insurance Appeals is the certified appeal board record and will be cited to as CABR followed by the page number.

Sims sustained a separate and additional injury working as a military role-player for Ho Chunk Inc. CABR at 70. Mr. Sims' claim for the March 2012 injury was allowed by the Department on April 2, 2012, and benefits were provided Mr. Sims in the form of medical treatment. CABR at 70.

On August 28, 2012, the Board determined that Mr. Sims was a PTD worker as of September 24, 2010. CABR at 59. On February 7, 2013, the Department closed Mr. Sims' March 2012 claim without a PPD rating examination and affirmed its determination after a protest on June 19, 2013. CABR at 49, 53.

V. ARGUMENT

First, the Supreme Court should accept review, pursuant to RAP 13.4(b)(1), because the decision of the Court of Appeals is in conflict with a decision of this Court. Specifically, *Clauson v. Department of Labor and Industries*, where this court held that "the timing of the closure of claims should not work to the disadvantage of an injured worker." 130 Wn.2d 580, 582, 925 P.2d 624 (1996).

Second, the Supreme Court should accept review, pursuant to RAP 13.4(b)(4), because the decision of the Court of Appeals addresses an issue that has substantial public interest in that it sets the effective date rather than the decision date as the determinative date for computation of worker's compensation claims in contravention of this court's construction

of the Industrial Insurance Act's ("IIA"). This court has stated that when construing the IIA, "courts must liberally construe the act for the purpose of reducing to a minimum the suffering and economic loss arising from injuries occurring in the course of employment." RCW § 51.12.010.

A. The Court of Appeals Committed Error when it Denied Mr. Sims a Permanent Partial Disability Award for his March 2012 Injury.

Washington courts have not addressed the precise issue in this case, but have examined similar issues and reasoned that a worker may receive a PPD award after being found PTD, as long as the PPD injury is part of a separate claim which occurred prior to the worker being found PTD. *Clauson*, 130 Wn.2d at 582.

In *McIndoe v. Department of Labor and Industries*, this Court held that a worker who was PTD could receive a PPD award for a claim which preexisted the PTD claim and is unrelated to the worker's PTD claim. 144 Wn.2d 252, 266, 26 P.3d 903 (2001). In *McIndoe*, three workers who incurred injuries which resulted in PTD awards, also sought PPD awards for unrelated hearing loss claims that developed before the PTD classification. *Id.* at 254-56. This Court found that the workers could receive the PPD award although they were already classified as PTD because they had "valid, preexisting, compensable claims for occupational

disease suffered before their totally disabling injuries." *Id.* at 265. This Court based its reasoning on "the principle that provision of the IIA be liberally construed in favor of injured workers, and that workers should not be penalized for the sequencing of the filing of claims... " *Id.* at 266.

In *Clauson v. Department of Labor and Industries*, this Court found that an injured worker was entitled to receive both PTD benefits under a 1983 claim and PPD benefits under a 1973 claim, which was reopened in 1987, because his PPD claim was open and pending with the Department when he was determined to be entitled to PTD benefits in 1989. 130 Wn.2d at 582. This Court based its decision on three factors: (1) whether the injury resulting in the PPD occurred before the injury resulting in the PTD, (2) whether the PPD was considered under a separate claim, and (3) whether the PPD claim was pending at the time the worker was classified as PTD. *Id.* at 586.

Following the factors established in *Clauson*, Mr. Sims is eligible for a PPD award. The first factor asks whether the injury resulting in PPD occurred before the injury resulting in PTD. *Id.* at 586. The Court of Appeals found that this depends on "whether the relevant date for determining Sims' entitlement to PPD benefits for his March 2012 injury is the effective date on which he became permanently and totally disabled (2010) or the date of DLI's decision stating that he became permanently

and totally disabled (2012)." *Sims v. Dep't of Labor & Indus.*, No. 47604-5-II, 2016 WL 3999884, at *4 (Wash. Ct. App. July 26, 2016). The Court of Appeals found that the effective date was the relevant date for determining *Sims* entitlement to a PPD award. The court had two bases for this decision. First, that Sims became PTD on September 24, 2010, as a result of the August 2012 decision, and that once he became totally disabled he could not become further disabled by the 2012 injury. *Id.* at 12-13. Second, the court reasoned that denying Sims a PPD award for the 2012 injury was consistent with the "rule that a worker cannot receive a PPD award for a subsequent injury to: to avoid double recovery." *Id.* at 13. The reasoning of the Court of Appeals is faulty because at the time of Mr. Sims' second injury (March 2012), his 2003 injury was only considered a PPD. Thus, at the time of the March 2012 injury, Mr. Sims was not PTD and could become more disabled.

Second, the March 2012 injury was considered under a separate claim. Mr. Sims was determined to be a PTD worker based upon the January 2003 injury to his low back and resulting mental health conditions related to that injury. CABR at 22. The March 2012 injury to Mr. Sims' knee and ankle were wholly independent of the January 2003 injury.

Lastly, in Mr. Sims' case, the March 2012 claim was allowed and was open with the Department prior to the ultimate PTD determination for

returned to work and was injured again on October 16, 1939 and filed a claim on November 24, 1939, over a year and a half after he had been awarded a pension. *Id.* at 3.

In *Sorenson,* the worker was injured on January 10, 1929 and was awarded a pension which was converted into a lump sum payment on July 21, 1936. *Sorenson v. Dep't of Labor & Indus.,* 19 Wn.2d 571, 571-72, 143 P.2d 844 (1943). The injured worker returned to work and worked from November of 1937 to May 25, 1938 when he was injured again. *Id.* at 572.

In *Peterson v. Dep't of Labor & Indus.,* 22 Wn.2d 647, 648, 157 P.2d 298 (1945), the worker was injured on January 8, 1940 and placed on the pension rolls on November 9, 1942. The worker successfully appealed for a determination that he was only a permanently partially disabled worker. Under that classification, he could continue to work and be covered by the Act.

These cases hold that a worker who receives compensation for PTD cannot return to the workforce and later obtain benefits for a subsequent injury. The facts of this case are inapposite. Here, Mr. Sims was determined by the Department to only be a PPD worker, and hence capable of working, when he went back to limited work and was injured in March of 2012. Mr. Sims did not return to work after he was determined to be a PTD worker like the injured workers in the *Harrington* line of

cases. While the effective date of his pension may have been in September of 2010, the determination had not been made until after his injury had taken place under this present claim. The determination had not been made when Mr. Sims' claim for his March 2012 was allowed by the Department.

What if Mr. Sims had received from the Department a PPD award for his March 13, 2012 industrial injury in May of 2012, well before the determination was made on August 28, 2012 that he was in fact PTD as of September 24, 2010? In that situation, Mr. Sims would have received both types of benefits under his claims. Mr. Sims should not be penalized by the timing and sequence of his claims.

Below, the Department argued that *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 26 P.3d 903 (2001) is distinguishable from the present case because the hearing loss claims in that case were suffered before the totally disabling injuries. However, the claimants in *McIndoe* suffered industrial injuries in 1987, 1989, and 1994, respectively. *Id.* 144 Wn.2d at 254-55. The hearing loss claims were all filed in 1996. *Id.* The benefits under the hearing loss claims were for wholly unrelated conditions. Thus, Mr. Sims case is analogous to *McIndoe* because he is seeking a PPD award (a benefit of a different character than PTD benefits), for a claim that was timely filed, allowed, and for a condition completely unrelated to the permanently disabling conditions.

In summary, Mr. Sims should not be punished by the Department's erroneous determination that he was only a PPD worker on September 24, 2010. This would be unfair. The Board's August 28, 2012 determination that he was PTD under his 2003 claim was wholly independent and unrelated to Mr. Sims conditions under his March 2012 claim. When the determination was made, Mr. Sims had an open and allowed claim pending at the Department. He is entitled to consideration for a PPD award under his March 2012 claim and the granting of a PPD award for this this separate and distinct claim would not amount to a double recovery. It is not the case that Mr. Sims was awarded a PTD pension, returned to work, got injured, and subsequently sought additional benefits which would amount to a double recovery. Rather, in March 2012 when Mr. Sims was working and suffered his subsequent and separate injury, he had only been determined to be a PTD worker. Thus, there is no improper double recovery. Fairness dictates a finding for Mr. Sims.

C. The Policy of the Industrial Insurance Act.

Finally, the rules of construction set forth by this court regarding the IIA necessitate that Mr. Sims' March 2012 claim be considered for a PPD award. The IIA is to be liberally construed by the Courts in favor of injured workers, RCW § 51.12.010. Indeed, this Court has repeatedly stated:

> The Industrial Insurance Act mandates that its provisions be 'liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and or death occurring during the course of employment.' RCW § 51.12.010. Courts, therefore, are to resolve doubts as to the meaning of the Act in favor of the injured worker.

McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 257, 26 P.3d 903 (2001), citing *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 230, 883 P.2d 1370 (1995); *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996) ("All doubts as to the meaning of the Act are to be resolved in favor of the injured worker."); *Dep't of Labor & Indus. v. Johnson,* 84 Wn. App. 275, 277-78, 928 P.2d 1138 (Div. II, 1996) (The Act "is to be construed liberally in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the employee.").

Washington courts have not addressed the precise circumstances at issue in this case. Pursuant to this Court's own language in *Clauson*, and doubt as to the meaning of the Act as it applies to the particular facts of this case must be "resolved in favor of the injured worker," Mr. Sims. 130 Wn.2d at 584. Here, in order to minimize Mr. Sims' economic suffering and to uphold the rules of construction for the Act, this Court must findi Mr. Sims' eligible to receive a PPD award for his March 2012 claim.

D. Alternatively, Mr. Sims' March 2012 Claim is Not "Further Accident" Contemplated by RCW 51.32.060(4)

This Court's prior interpretation of RCW 51.32.060(4) in *McIndoe* and *Clauson* is incorrect. In *McIndoe*, this Court held that "(p)ursuant to RCW 51.32.060(4), a worker who receives a permanent partial disability award before being classified permanently and totally disabled **based on an unrelated occupational injury or disease** is entitled to a full pension, "notwithstanding the payment of a lump sum for his . . . prior injury."" 144 Wn.2d at 257-258 (citing *Clauson*, 130 Wn2d at 586) (*emphasis added)*. However, RCW 51.32.060(4) reads "(s)hould **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." (*emphasis added*). Thus, this court has extended RCW 51.32.060(4) to apply to separate claims, when the plain language of the statute does not provide for such an interpretation. Rather, this Court should interpret the "any further accident" language of RCW 51.32.060(4) as pertaining to further accident or injury within the same claim.

As explained above, the Act "is to be construed liberally in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the

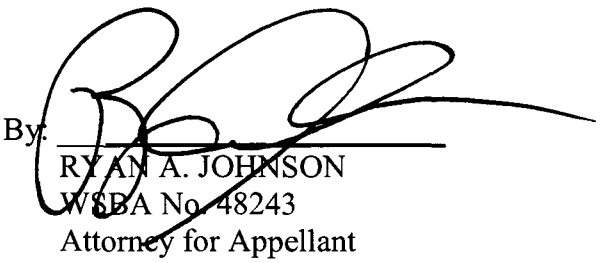
employee." *Johnson,* 84 Wn. App. at 277-78. Mr. Sims' proposed interpretation of RCW 51.32.060(4) is more effective at achieving this aim than this Court's interpretation in *McIndoe* and *Clauson*. From a common sense perspective, it makes sense that an injured worker who is paid a lump sum PPD award under a claim, and later is determined to be entitled to a PTD pension under the same claim, would have to reimburse the Department for the amount of the PPD award. However, under this Court's interpretation in *McIndoe* and *Clauson*, an injured worker awarded a PTD pension would have to pay back the Department for each and every previous PPD award. For example, a hypothetical worker who is awarded a PPD award for the loss of half of her left foot in 1990, another PPD award for the loss of her right hand in 1998, and then a PTD pension for the loss of her entire right leg in 2010 would be liable to the Department for the 1990 and 1998 PPD awards even though all three claims are separate and distinct. Thus, this Court should revise its interpretation of RCW 51.32.060(4) such that an injured worker who is awarded a PTD pension need only reimburse the Department for a prior PPD award under that same claim.

VI. CONCLUSION

For the foregoing reasons, Mr. Sims humbly asks this Court to accept review of the Court of Appeals' decision terminating review.

DATED this 25nd day of August, 2016.

VAIL, CROSS & ASSOCIATES



By: _____
RYAN A. JOHNSON
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Attorney for Appellant

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 26th day of August, 2016, the document to which this certificate is attached, Petition For Review (corrected with signature), was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Steve Vinyard
Assistant Attorney General
P.O. Box 40121
Olympia, WA 98504-0121

DATED this 26th day of August, 2016.

Lynn M. Venegas
LYNN M. VENEGAS, Secretary

Filed
Washington State
Court of Appeals
Division Two

July 26, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL L. SIMS, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	No. 47604-5-II PUBLISHED OPINION

MAXA, J. – Michael Sims appeals a superior court order affirming a Board of Industrial Insurance Appeals (Board) ruling denying permanent partial disability benefits. The Board ruled that Sims was unable to receive a permanent *partial* disability award for his March 2012 industrial injury because that injury occurred after the September 2010 effective date of a permanent *total* disability determination relating to a 2003 injury. Sims argues that the Board and the superior court erred because the Department of Labor & Industries (DLI) did not enter its decision regarding his permanent total disability until after his March 2012 injury.

A worker who has a permanent *partial* disability (PPD) because of an industrial injury receives a one-time award of benefits based on his or her loss of function. RCW 51.32.080. A worker who has a permanent *total* disability (PTD) receives a certain percentage of his or her wages as a monthly pension. RCW 51.32.060. Under settled Washington law, an injured worker who has been classified as being permanently and totally disabled and subsequently is injured

again cannot receive a PPD award for the second injury. *E.g.*, *Harrington v. Dep't of Labor & Indus.*, 9 Wn.2d 1, 7-8, 113 P.2d 518 (1941). However, a worker who suffers one injury and later is classified as being permanently and totally disabled because of another injury can receive a PPD award for the first injury. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 266, 25 P.3d 903 (2001).

Sims argues that under *McIndoe* he is entitled to a PPD award for the March 2012 injury because that injury occurred before DLI entered the decision that he was permanently and totally disabled. DLI argues that Sims is not entitled to a PPD award for the March 2012 injury because that injury occurred after the September 24, 2010 effective date of his permanent and total disability.

We agree with DLI. We hold that Sims is not entitled to a PPD award for the March 2012 injury because that injury occurred after the effective date of his PTD, as determined by the Board and DLI. Accordingly, we affirm the superior court's order.

FACTS

In 2003, Sims injured his left arm at work. He filed a workers' compensation claim, which DLI allowed. DLI provided Sims with time-loss benefits until October 2009.

In April 2010, DLI closed Sims's claim and determined that Sims was permanently and partially disabled because of the 2003 injury. After Sims protested, DLI affirmed its disability determination in a decision dated September 24, 2010. Sims appealed to the Board, claiming that he was permanently and totally disabled rather than partially disabled because of the 2003 injury.

While this appeal was pending before the Board, Sims was injured at work in March 2012. Sims filed another workers' compensation claim. DLI allowed the claim and determined that Sims was entitled to receive medical treatment and other benefits under this claim.

In August 2012, the Board reversed DLI's decision on Sims's appeal for the 2003 injury. The Board found that Sims was "unable to perform or obtain gainful employment on a reasonably continuous basis . . . as of September 24, 2010." Clerk's Papers (CP) at 76. The Board concluded that Sims "was a permanently totally disabled worker within the meaning of RCW 51.08.160, as of September 24, 2010." CP at 76. Finally, the Board remanded the matter to DLI to determine that Sims was totally and permanently disabled.

In September 2012, DLI issued a notice of decision correcting and superseding its September 24, 2010 order. The decision stated, "This worker is totally and permanently disabled and is placed on pension effective 9/24/2010." CP at 80.

In February 2013, DLI closed Sims's claim for the March 2012 injury without a PPD award. Sims protested the decision. DLI affirmed its decision and issued a letter stating that Sims was not entitled to a PPD award for the March 2012 injury because he was pensioned in 2010.

Sims appealed to the Board. Sims filed a motion for summary judgment and DLI filed a cross motion for summary judgment. An industrial appeals judge (IAJ) issued a proposed decision and order granting summary judgment to DLI. The proposed decision and order ruled that Sims was not entitled to consideration of a PPD award for his March 2012 injury because he was permanently and totally disabled as of September 2010.

Sims filed a petition for review of the proposed decision and order with the Board. The Board considered and denied the petition, adopting the IAJ's proposed decision and order as the Board's decision and order.

Sims appealed the Board's order to the superior court. The superior court affirmed the Board's order adopting the IAJ's proposed decision and order.

Sims appeals.

ANALYSIS

A. STANDARD OF REVIEW

Under the Industrial Insurance Act (IIA), the superior court's review of a Board order is de novo and based solely on the evidence and testimony presented to the Board. *Butson v. Dep't of Labor & Indus.*, 189 Wn. App. 288, 295, 354 P.3d 924 (2015); RCW 51.52.115. In the superior court, the Board's decision is prima facie correct and the party challenging the Board's decision must support its challenge by a preponderance of the evidence. *Butson*, 189 Wn. App. at 296; RCW 51.52.115.

In an industrial insurance case, we review the superior court's decision, not the Board's decision. *Butson*, 189 Wn. App. at 296; RCW 51.52.140. DLI is charged with administering the IIA, so we afford substantial weight to its interpretation of the act when the subject area falls within the agency's area of expertise. *Birrueta v. Dep't of Labor & Indus.*, 188 Wn. App. 831, 844, 355 P.3d 320 (2015), *review granted*, 184 Wn.2d 1033 (2016). However, we are not bound by DLI's interpretation. *Id.*

The superior court held that the Board correctly granted summary judgment to DLI. We review summary judgment orders de novo. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 311, 358 P.3d 1153 (2015). Summary judgment is appropriate if there are no genuine issues of

material fact and the moving party is entitled to judgment as a matter of law. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013); CR 56(c).

B. PERMANENT DISABILITY UNDER THE IIA

The right to workers' compensation benefits is statutory, and we look to the provisions of the IIA to determine whether a particular worker is entitled to compensation. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996). When construing the IIA, we must liberally construe the act "for the purpose of reducing to a minimum the suffering and economic loss arising from injuries . . . occurring in the course of employment." RCW 51.12.010; s*ee also Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 8, 201 P.3d 1011 (2009). Therefore, doubts as to the meaning of the IIA are resolved in favor of the injured worker. *McIndoe*, 144 Wn.2d at 257.

The IIA provides two types of classifications for a permanent disability: permanent partial disability and permanent total disability. Permanent *partial* disability involves a permanent injury or disease that does not prevent the worker from working. *See id.* Once DLI determines that the worker is permanently partially disabled, he or she is entitled to receive a specific amount as compensation, calculated under guidelines stated in RCW 51.32.080 and related administrative regulations. *Id.* PPD benefits are often referred to as "lump-sum" benefits because the benefit is a one-time award. *Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 262, 289 P.3d 720 (2012).

Permanent *total* disability involves certain specific injuries and an injury or disease that "permanently incapacita[tes] the worker from performing any work at any gainful occupation." RCW 51.08.160; *see also McIndoe*, 144 Wn.2d at 257. Once DLI determines that the worker is permanently and totally disabled, the worker is entitled to receive a monthly payment in an

amount based on a percentage of his or her wages. RCW 51.32.060; *Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015). PTD benefits are often referred to as "pension" benefits because the benefit represents a monthly wage replacement. *Stone*, 172 Wn. App. at 262.

A worker who receives a PPD award before being classified as permanently and totally disabled based on an unrelated injury is entitled to a full pension for the subsequent PTD, "notwithstanding the payment of a lump sum for his or her prior injury." RCW 51.32.060(4); *see also McIndoe*, 144 Wn.2d at 257-58. However, if the worker receives a PPD award for an injury and then is classified as permanently and totally disabled for the same injury, the amount of the PPD award is deducted from the PTD benefits. RCW 51.32.080(4).

C. RECOVERY OF BOTH PPD AND PTD BENEFITS

In *Harrington*, the Supreme Court held that a worker who has been classified as permanently and totally disabled for an industrial injury and has been awarded a PTD pension cannot recover disability benefits for a second injury that occurred *after* being classified as permanently and totally disabled. 9 Wn.2d at 7-8. The court stated, "[h]aving been classified as permanently and totally disabled, [the worker] could not, in law, be further disabled." *Id.* at 7. The court further stated,

> [The worker] has already received all the benefits that may be allowed for permanent and total disability. 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.

Id. at 8.

The Supreme Court acknowledged this rule in two cases decided shortly after *Harrington*. *See Peterson v. Dep't of Labor & Indus.*, 22 Wn.2d 647, 651-52, 157 P.2d 298 (1945); *Sorenson v. Dep't of Labor & Indus.*, 19 Wn.2d 571, 577-78, 143 P.2d 844 (1943). The

court also has confirmed the *Harrington* rule in more recent cases. *See McIndoe*, 144 Wn.2d at 259-60; *Clauson*, 130 Wn.2d at 585.

However, a worker can recover PPD benefits for an injury that occurred *before* he or she was classified as permanently and totally disabled because of a different injury, even if the PPD award had not yet been made at the time of the PTD classification. *McIndoe*, 144 Wn.2d at 266; *Clauson*, 130 Wn.2d at 586.

In *Clauson*, the worker injured his right hip in 1974 and injured his lower back and left hip in 1983. 130 Wn.2d at 582. DLI determined that the worker was permanently and totally disabled because of the 1983 back injury and awarded him a PTD pension. *Id.* Later, DLI determined that Clauson was permanently partially disabled because of the 1974 hip injury, but denied the worker PPD benefits because he already had been classified as permanently and totally disabled. *Id.* at 582-83. The Supreme Court held that Clauson was entitled to PPD benefits under the particular circumstances of that case. *Id.* at 586. The court distinguished *Harrington* because Clauson's injury resulting in the PPD occurred before the injury resulting in the PTD, the PPD was considered under a separate claim, and the PPD claim was pending at the time Clauson was classified as permanently and totally disabled. *Id.*

In *McIndoe*, three workers in consolidated cases suffered injuries for which they were classified as permanently and totally disabled, but also sought PPD awards for unrelated hearing loss that developed before the PTD classification. 144 Wn.2d at 254-56. The Supreme Court stated that unlike in *Harrington*, the workers were not seeking disability benefits for an injury suffered after they had been classified as permanently totally disabled. *Id.* at 259-60. Instead, the workers were seeking PPD awards for an occupational disease that occurred before their pension awards. *Id.* at 260. The court stated that "[a]s in *Clauson*, the workers in this case had

valid, preexisting, compensable claims for occupational disease suffered before their totally disabling injuries." *Id.* at 265. The court concluded:

> Based on the holding of *Clauson*, the principle that provisions of the IIA be liberally construed in favor of injured workers, and that workers should not be penalized for the sequencing of the filing of claims, we hold that a worker may receive permanent partial disability benefits for a valid occupational injury or disease claim that preexisted and is unrelated to the worker's permanent total disability condition if the permanent partial disability claim is filed within the statute of limitations.

Id. at 266.

In both *Clauson* and *McIndoe*, it was not material whether the date of DLI's decision and the effective date of the PTD were different; the injuries for which the workers were seeking a PPD award all occurred before the effective date of the PTD. Here, however, Sims's March 2012 injury occurred after the effective date of the PTD (September 24, 2010) but before the date of DLI's decision stating that Sims was permanently and totally disabled (September 11, 2012). The issue here is whether the relevant date for determining Sims's entitlement to PPD benefits for his March 2012 injury is the effective date on which he became permanently and totally disabled (2010) or the date of DLI's decision stating that he became permanently and totally disabled (2012).

D. DATE OF DISABILITY VS. DATE OF DLI DECISION

Sims argues that *Clauson* and *McIndoe* control and he is entitled to a PPD award because the March 2012 injury occurred and his claim was pending before DLI's decision that he was permanently and totally disabled. DLI argues that the *Harrington* rule controls and Sims is not entitled to a PPD award because the March 2012 injury occurred after the effective date of Sims's PTD and receipt of pension benefits. We agree with DLI.

Sims's argument finds some support in the language of *McIndoe* and *Clauson.* Both cases focus on when the worker was "classified" as permanently and totally disabled. *McIndoe*,

144 Wn.2d at 260; *Clauson* 130 Wn.2d at 585. As in those cases, DLI had not classified Sims as permanently and totally disabled when his March 2012 injury occurred. However, neither *Clauson* nor *McIndoe* involved the situation here, where DLI's PTD decision stated that the date on which Sims had become permanently and totally disabled was approximately two years earlier.

Focusing on the effective date of the PTD rather than the date of DLI's PTD decision is consistent with the reasoning in *Harrington*. As the Board and DLI determined, Sims actually became permanently and totally disabled on September 24, 2010. Once he became totally disabled, he could not become further disabled by another injury. *Harrington*, 9 Wn.2d at 7.

Focusing on the effective date of the PTD also is consistent with the purpose of the rule that a permanently and totally disabled worker cannot receive a PPD award for a subsequent injury: to avoid double recovery. *Id.* at 8. DLI's decision stated that Sims was entitled to a pension retroactive to September 24, 2010. A pension is the maximum benefits allowed for a permanent total disability. *See id.* at 7. Giving Sims a PPD award in addition to maximum PTD benefits would result in double recovery.

Sims argues that as in *Clauson*, he is entitled to a PPD award because the claim for his March 2012 injury was pending when the Board and DLI determined that he was permanently and totally disabled effective September 24, 2010. However, the proper question is whether the claim for the March 2012 injury was pending at the time Sims *actually* became disabled, not when DLI made its decision. Sims's March 2012 claim was not pending on the effective date of his disability and pension.

Sims also argues that he is being penalized because of DLI's erroneous initial decision that he was only partially disabled because of his 2003 injury and that denying a PPD award for

the 2012 injury would be unfair. But Sims does not explain why denying him a PPD award would be unfair. If DLI had correctly decided in September 2010 that Sims was permanently and totally disabled, he would have begun receiving a pension at that time and there would be no question under *Harrington*, *Clauson* and *McIndoe* that he could not recover a PPD award for the 2012 injury. DLI's corrected decision established the same result retroactively.

Finally, Sims argues that if DLI actually had awarded him PPD benefits for the March 2012 injury before the Board's August 2012 ruling, he would be able to retain those benefits. Although we need not decide this issue, it is not clear that Sims would be able to retain the PPD benefits in this situation. Because under DLI's corrected decision Sims received a PTD pension effective September 24, 2010, a reasonable argument may be made that allowing him to retain a PPD award in this situation would result in double recovery.

We hold that because Sims became permanently and totally disabled as of September 24, 2010 and received pension benefits retroactive to that date, he cannot obtain PPD benefits for an injury that occurred after that date.

E. ATTORNEY FEES

Sims requests an award of reasonable attorney fees pursuant to RCW 51.52.130. RCW 51.52.130(1) provides for an award of attorney fees to workers or beneficiaries when the superior court "decision and order is reversed or modified and additional relief is granted to a worker or beneficiary." Because we affirm the superior court's order, we do not award Sims attorney fees under RCW 51.52.130.

CONCLUSION

After the Board's decision on Sims's appeal, DLI determined that Sims was permanently and totally disabled as of September 24, 2010. Sims received a monthly wage-replacement

pension effective on that date. Sims's March 2012 injury occurred after he was permanently and totally disabled. Therefore, under settled law Sims was not entitled to a PPD award for the March 2012 injury. We affirm the superior court's order.

MAXA, J.

We concur:

BJORGEN, C.J.

LEE, J.