IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CROWN CORK & SEAL Company, Inc, Respondent, v. SYLVIA SMITH and THE DEPARTMENT OF LABOR & INDUSTRIES, Appellant.	No. 36921-4-II UNPUBLISHED OPINION

Penoyar, A.C.J. — The Department of Labor and Industries appeals the trial court decision granting Crown Cork & Seal access to the second injury relief fund. Because the trial court did not properly construe RCW 51.16.120(1) when reviewing the evidence, we reverse and remand.

FACTS

I. Work History at Crown

The dispute in this case is limited to whether Sylvia Smith had a "[preexisting] bodily disability" at the time of her 1997 industrial accident. Administrative Record (AR) at 32. Smith first started working at Crown Cork & Seal in 1980. At that time, Crown's medical evaluation of Smith found her to be in excellent health. Crown manufactures beer and soda cans and, over the 18 year period that Smith worked for Crown, she was primarily a "bagger." AR (Gorker) at 6.

A bagger stacks and bags beverage can lids. Smith's job was to push a string of the can

lids into a bag, physically take that bag off of the mandrel, fold the top of the bag over tightly, and then stack the bag onto a pallet. Smith repeated this pattern about every 20 seconds during each 12 hour shift, four days per week.

A number of baggers complained that they suffered from hand pain as a result of the required continuous hand movements. As a result, Crown redesigned the bagging machine in an attempt to mitigate the hand stress the baggers experienced.[1] Changes to the bagging machine did not eliminate Smith's hand pain.

Smith's supervisor, Gorker, acknowledged that Smith did not complain of hand pain any more than any other bagger at Crown and that she never requested any modification to her job duties or the equipment the baggers used at the plant to accommodate her hand pain. Smith periodically wore hand splints to mitigate the strain on her hands, but Gorker noted that Smith was always able to perform the duties her job required:

> Q: As compared to the other baggers, did [Smith] complain a lot?
> A: No.
> Q: . . . [W]as [Smith] ever unable to perform her job functions as a result of [hand pain]?
> A: No.

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[1] Smith was one of the workers who complained about the machine, but there is no direct evidence of her complaint:

> Q: Do you remember ever going to your supervisor asking for that [bagger] job to be modified?
> A[Smith]: . . . Directly I don't recall that, but we all talked about it in meetings and stuff like that and then one day they just changed [the bagging machine].

AR (Smith) at 41.

AR (Gorker) at 16. Gorker recalled that Smith never asked for specific workplace accommodation, that it did not appear she needed any accommodation, and that she was an excellent employee. Gorker never considered Smith "disabled" due to her hand pain, despite Smith wearing splints occasionally. AR (Gorker) at 17.

II. The Accident and Retraining

In 1997, Smith suffered an injury in the course of her employment with Crown when a forklift ran over her right leg and fractured it. Crown attempted to retrain Smith as an office helper, but the retraining was unsuccessful due to the occurrence of severe carpal-tunnel related symptoms from typing.[2] Dr. Atteridge, a consulting physician, determined that both Smith's use of crutches (required by the leg injury) and the keyboarding the retraining program required caused her carpel tunnel syndrome to evolve into a disabling condition.

Atteridge determined that Smith could not participate in the retraining plan and that she was not capable of obtaining and performing any form of reasonably continuous gainful employment. Atteridge found that this was due to the combined effects of Smith's leg fracture, her carpal tunnel syndrome (which "evolved" during the course of her vocational retraining), and her psychological traits, that left her unable to "cope with everyday stressors."[3] AR (Atteridge) at 27. Smith received a full pension for her disability.

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[2] Initially, Smith was medically cleared to perform the fine finger manipulations necessary for her retraining program. A physical capacities evaluation conducted on January 31, 2001, determined that Smith could undertake fine finger manipulations, handling, and grasping on a frequent basis.

[3] Smith's mental health is not at issue here. There has been no argument, nor has any tribunal found, that Smith had a preexisting mental health impairment.

III. Smith's Medical History of Hand and Wrist Complaints

In the 18 years Smith worked for Crown, she sought medical attention for her wrist and hand pain on two occasions. In 1982, Smith suffered an industrial injury to her right thumb and she filed a claim.[4] On the second occasion, in early 1994, Smith went to the emergency room due to hand and wrist pain.[5] The hospital doctor diagnosed Smith with tendonitis and provided her with wrist splints. Smith followed up with Atteridge, who diagnosed her hand/wrist condition as "tenosynovitis." AR (Atteridge) at 30.

Smith made a second appointment with Atteridge's office about one month from her first visit, this time seeing his associate, Dr. Michael Parker. Parker noted that Smith's wrist had gotten "significantly better." AR (Atteridge) at 30. His examination showed no swelling or tenderness and Smith's grip strength was good.

After the forklift accident, Smith saw Jennifer Coffee, an occupational therapist, who noted that Smith had "normal" upper extremity functions. AR (Berndt) at 21. Smith had another physical therapy evaluation done post-accident in 1997 that noted impairments related to her industrial injury, but it did not note any other medical difficulties. Several years later, in 2001, Smith again sought treatment for wrist and hand pain. This was the first time after the 1997 accident that Smith received treatment for upper extremity pain.

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[4] Smith's claim for the thumb injury closed without any award for permanent partial disability and did not result in any limitations on her work.

[5] Smith also filed a claim for this pain, but the evidence does not conclusively answer whether the claim was allowed and then closed without award or whether the claim was rejected. Crown does not contend that there was any award for permanent disability on the claim.

The record is unclear as to when Smith was officially diagnosed with carpal tunnel syndrome. A 1998 physical capacities report noted that Smith had "preexisting" carpal tunnel syndrome, but this was based on Smith's own injury characterization, not on any medical report. AR (McPhee) at 28.

IV. Proceedings Below

On May 11, 2005, the Department denied second injury fund relief to Crown. Crown appealed the Department's order and a Board of Industrial Appeals Judge issued a proposed order affirming the Department's order, holding that any preexisting condition Smith may have had did not constitute a "previous bodily disability" within the meaning of RCW 51.16.120(1), and that as a result, Crown was not entitled to second injury fund relief. AR at 32, 34. Crown petitioned the three member Board for review. The Board denied review and adopted the proposed decision as its final order.

Crown appealed the Board's ruling to the Thurston County superior court. Following de novo review of the Board's ruling in a bench trial, the trial court reversed the Board's ruling, granting Crown second injury fund relief due to Smith's "previous bodily disability." Clerk's Papers (CP) at 41.

The Department appeals.

ANALYSIS

The second injury fund is a State administered fund set up within the worker's compensation system. The fund offers financial relief to employers when a previously disabled worker is subsequently injured and the combined injuries result in permanent and total disability.

RCW 51.16.120(1); *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962). The fund's purpose is to encourage the hiring and retention of handicapped workers. *Jussila*, 59 Wn.2d at 778. The fund is a narrowly limited exception to the general rule of employer responsibility. *Jussila*, 59 Wn.2d at 779.

Our review is limited to record examination to see whether substantial evidence supports the findings made after the trial court's de novo review, and whether the trial court's conclusions of law "flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). We review the findings of fact under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. If substantial evidence supports a finding of fact, we should not substitute our judgment for the trial court's. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Before we review the findings of fact, however, we must first determine whether the trial court properly construed RCW 51.16.120 in making its conclusion. We review this question of law de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). There is no concrete test for determining what qualifies as a "disability" under RCW 51.16.120, however, our review of case law indicates that the trial court did not construe this statute properly and reversal of its decision is warranted.

RCW 51.16.120 of the Industrial Insurance Act contains three prerequisites that an employer must meet in order to obtain second injury fund relief.[6] The employer must show that the worker: (1) had a "previous bodily disability from any previous injury or disease"; (2) sustained an industrial injury; and (3) became totally and permanently disabled as a proximate result of the "combined effects" of the two. *Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 357, 804 P.2d 621 (1991) (quoting RCW 51.15.120(1)). As we noted, the dispute in this case is limited to whether Smith had a preexisting bodily disability at the time of her 1997 industrial accident.

The Industrial Insurance Act does not define the term "disability," but several cases interpret the term. In *Jussila*, the Washington Supreme Court noted that "[i]n the context of second injury fund relief, a 'preexisting disability' is more than a mere preexisting medical

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[6] RCW 51.16.120(1) states:

> Whenever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of an employer insured with the state fund at the time of said further injury or disease shall be charged and a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from said further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to such employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund. The department shall pass upon the application of this section in all cases where benefits are paid for total permanent disability or death and issue an order thereon appealable by the employer. Pending outcome of such appeal the transfer or payment shall be made as required by such order.

condition and must, in some fashion, permanently impact on the worker's physical and/or mental functioning." 59 Wn.2d at 778 (quoting *In re Norgren*, No. 04 18211 (Wash. Bd. of Indus. Ins. Appeals Jan. 12, 2006)). Further, as noted in *Henson v. Department of Labor and Industries*, the traditional meaning of "disability" in the context of workmen's compensation law means "the impairment of the workman's mental or physical efficiency. It embraces any loss of physical or mental functions which detracts from the former efficiency of the individual in the ordinary pursuits of life. It connotes a loss of earning power." 15 Wn.2d 384, 391, 130 P.2d 885 (1942) (citing *2 Schneider*, *Workmen's Compensation Law*, (2d Ed.), 1332, § 400). Although the term disability "connotes a loss of earning power," this is not absolutely required provided that the disability substantially and negatively impacts a worker's daily functioning and efficiency. *In re Norgren*, No. 04 18211 (Wash. Bd. of Indus. Ins. Appeals Jan. 12, 2006) (quoting *Henson*, 15 Wn.2d at 391) and *In re Powell*, No. 97 6424 (Wash. Bd. of Indus. Ins. Appeals July 21, 1999).

The Department argues that:

> Under [*Rothschild v. Department of Labor and Industries*, 3 Wn. App. 967, 969-70, 478 P.2d 759 (1971)] and the Board decisions in [*In re Funk*, No. 89 4156 (Wash. Bd. of Indus. Ins. Appeals Feb 4, 1991)] and [*In re Anderson*, Dckt. No. 88 4251 (Wash. Bd. of Indus. Ins. Appeals June 15, 1990)] full ability to do one's job at the time of the subsequent injury, an ability possessed here by Ms. Smith, precludes second-injury fund relief for the employer. Only by proving that a preexisiting medical condition substantially [a]ffected a worker's ability to do her job does the employer meet the narrow second-injury fund test for "previous bodily disability."

Appellant's Reply Br. at 5.

We do not agree. In some cases, individuals will suffer a loss of "daily functioning and efficiency" and have a loss in potential "earning power" but still be able to do their job at their

current place of employment. *In re Powell*, No. 97 6424 (Wash. Bd. of Indus. Ins. Appeals July 21, 1999; *Henson*, 15 Wn.2d at 391 (citing *2 Schneider*, *Workmen's Compensation Law*, (2d Ed.), 1332, § 400). The problem for Crown is that Smith's "daily functioning and efficiency" was not impacted by her wrist problems. While she suffered pain and difficulty, she still was able to cut her vegetables, mow her lawn, and do her housework. She was thus not disabled, either at work or in daily life.

There is no doubt that Smith had hand and wrist pain and perhaps even the onset of carpal tunnel syndrome. To receive relief under the second injury relief fund, however, the prior condition must be disabling under the statute. Difficulty with household chores and the presence of pain is simply not enough. Given that the trial court used an incorrect standard for determining whether Smith's injury qualified as a "previous bodily disability" under RCW 51.16.120, we reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.