

No. 35219-2-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

JAMES TOMLINSON, APPELLANT,

v.

PUGET SOUND FREIGHT LINES and
DEPARTMENT OF LABOR & INDUSTRIES, RESPONDENTS.

COURT OF APPEALS
DIVISION II
07 JAN 26 PM 1:33
STATE OF WASHINGTON
BY _____

RESPONDENT'S BRIEF OF
PUGET SOUND FREIGHT LINES

JERALD P. KEENE, WSB 22271
REINISCH, MACKENZIE, HEALEY,
WILSON & CLARK, P.C.
10260 SW Greenburg Road #1250
Portland OR 97223

(503) 245-1846

RESPONDENT'S BRIEF

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ANSWER TO ASSIGNMENTS OF ERROR AND RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 3

 A. Answer to Assignments of Error..... 3

 The Superior Court correctly interpreted and applied RCW 51.32.080(5) to the facts as found by the IAJ's Proposed Decision & Order and therefore correctly denied Appellant's Motion for Summary Judgment. The Court's decision to affirm all other aspects of the agency decision was entered by agreement of the parties and is not before this Court on review.

 B. Issues Pertaining to Assignments of Error 3

III. ANSWER TO STATEMENT OF THE CASE 4

IV. SUMMARY OF ARGUMENT 7

V. ARGUMENT 8

 A. Standard for review..... 8

 B. The trial court committed no error of law in his interpretation and application of the phrase "permanently partially disabled" from RCW 51.32.080(5) to the facts as found by the agency. 8

 1. *Adhering to the remedial purpose of the Act* 9

 2. *Discerning the "permanence" of disability associated with progressive arthritic conditions under RCW 51.32.080(5).* 12

 3. *Discerning the "permanence" of disability due to preexisting arthritis in joints subsequently excised by surgery* 15

V. CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Boeing v. Heidi, 147 P.2d 78, 51 P.3d 793 (2002)-----13
Cockle v. DLI, 142 Wn.2d 801, 811, 16 P.3d 583 (2001)----- 9
Health Ins. Pol. v. Health Care Auth., 129 Wn.2d 504, 507, 919 P.2d 62
(1996)----- 8
J.C. Beyer v. DLI, 17 Wn.2d 29, 134 P.2d 948 (1943) -----11
Lawrence v. Dep't of Health, 133 Wn. App. 665, 672, 138 P.3d 124
(2006).----- 2, 8

STATUTES

RCW 51.12.010 ----- 9
RCW 51.32.080(5)----- passim

BOARD OF INDUSTRIAL INSURANCE APPEALS DECISIONS

In re Bertha Ramirez, No. 03-1493 (BIIA, Sept. 1, 2004) -----13

OTHER AUTHORITIES

Dorland's Illustr. Medical Dictionary (28th ed 1988), -----17

RESPONDENT'S BRIEF OF PUGET SOUND FREIGHT LINES

I. INTRODUCTION

By way of introduction, Respondent emphasizes the narrow scope of the issues postured for appeal. It does so because, at times, the Appellant's Brief expresses disagreement with the agency's critical finding that Appellant's preexisting arthritis condition was, in fact, permanently disabling. Appellant has preserved no challenge to that finding on appeal.

The sole issue postured for review is whether the agency and trial court committed legal error in deeming RCW 51.32.080(5) applicable to the facts *as found* by the agency and trial court below. The pertinent "facts" were effectively stipulated once Appellant waived a *de novo* trial of the agency's factual findings after the trial judge denied his pre-trial motion for summary judgment. During that motion hearing, the Superior Court judge orally rejected Appellant's legal position. (VRP, pp. 8-9) Appellant's counsel then immediately advised the Court the parties were in agreement there was "nothing to have a trial about." (*Id.*, p. 9) By interlineation, counsel jointly amended Appellant's prepared order to reflect the summary judgment motion was denied and that the "Board's decision from which plaintiff appealed is affirmed." (CP, p. 50-52) The judge then signed the order, and it was duly entered. (*Id.*)

By virtue of his agreement there was “nothing to have a trial about,” Appellant waived further challenge to the IAJ’s factual findings.¹ Those findings are set forth in the Proposed Decision & Order. (CABR, pp. 7-10) The Appellant’s Brief acknowledges this when advising the Court its standard for review is to “review the law independently and then apply it to the facts found by the agency.” (App Br at 17, quoting *Lawrence v. Dep’t of Health*, 133 Wn. App. 665, 672, 138 P.3d 124 (2006).)

Those findings included the IAJ’s acceptance of medical testimony that Appellant’s pre-injury arthritic condition was permanently disabling prior to the date of the work injury. (CABR, pp. 8-9) The IAJ also accepted expert testimony that the pre-injury condition was capable of being rated for permanent partial disability under the AMA Guides at a level of 50%, compared to an ultimate total of 75% when the work injury claim was closed. (Id.) Accordingly, should this Court agree RCW 51.32.080(5) applies to the circumstances described in the uncontested agency findings, the procedural posture will compel a

¹ Appellant took this position advisedly. In summary judgment arguments to the trial court, Appellant’s counsel emphasized the absence of any issue of material fact. In particular, Appellant stated, “[The] condition of his knee before injury is (a) *not disputed*, and (b) not material (*emphasis added*).” (Plaintiff’s Summary Judgment Reply Memorandum, CP, p. 35)

decision affirming the decision of the trial court (and the IAJ) in all other particulars.

II. ANSWER TO ASSIGNMENTS OF ERROR AND RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Answer to Assignments of Error.

The Superior Court correctly interpreted and applied RCW 51.32.080(5) to the facts as found by the IAJ's Proposed Decision & Order and therefore correctly denied Appellant's Motion for Summary Judgment. The Court's decision to affirm all other aspects of the agency decision was entered by agreement of the parties and is not before this Court on appeal.

B. Issues Pertaining to Assignments of Error.

1. Is Appellant's argument that progressive arthritis cannot legally serve as the basis for a determination of preexisting "permanent" partial disability under RCW 51.32.080(5) properly before the Court given Appellant's agreement to waive a trial on the agency's factual findings?

2. Are degenerative arthritis conditions implicitly excluded from RCW 51.32.080(5) as a matter of law by virtue of being "progressive"?

3. Is RCW 51.32.080(5) rendered inapplicable as a matter of law where a work injury contributes to the worsening of an already

advanced, disabling degenerative arthritis condition and consequent replacement of the arthritic joint?

III. ANSWER TO STATEMENT OF THE CASE

The only issue preserved for this Court's review is whether RCW 51.32.080(5) applies to the facts as found in the IAJ's PDO and affirmed by the Superior Court. The IAJ determined Appellant's pre-injury arthritic knee was, as RCW 51.32.080(5) requires, "already ... permanently partially disabled" prior to the work injury. The IAJ's discussion and formal findings indicate he interpreted the evidence to support the following facts:

- By the time of the work injury, the ongoing arthritic condition was already symptomatic, progressive and had already caused claimant "longstanding difficulties" (CP, p. 10);
- Medical records dating years before the work injury established the condition had previously required medical treatment; triggered a disability award from the Veteran's Administration, and prompted medical providers to anticipate an eventual total knee replacement (CP, p. 9)
- Medical imaging studies and expert testimony persuasively established such difficulties reflected preexisting "advanced degenerative changes and bone spurs" resulting in "bone-on-bone contact" between the articulating joint surfaces (CP, pp. 9-10);
- Medical experts reviewed the evidence describing claimant's pre-injury arthritic condition and persuasively deemed it sufficient to determine it

qualified for a 50% left knee permanent partial disability rating under the AMA Guides. (CP, pp. 9-10)

The IAJ entered these findings in the face of Appellant's "lack of candor" about the extent of his preexisting disability at hearing and during medical interviews. (CP, p. 9)

Though mostly accurate, Appellant's statement of the case includes characterizations of the record that imply a challenge to one of the IAJ's critical findings of fact. Specifically, the Appellant's Brief excerpts selected portions of testimony by Drs. Smith and Chaplin to support the proposition, "December 15, 2000 is the earliest date at which any PPD of the leg was established." (App Br at 10) In argument, the Appellant's Brief likewise asserts, "Here, there is no evidence that before the industrial injury Tomlinson's arthritis was disabling." (App Br at 28 & footnote 77)

By contrast, the IAJ credited testimony by both of these experts² indicating Appellant's pre-injury treatment records and post-injury x-rays provided them with sufficient information to rate Appellant's permanent

² Dr. Smith also testified that Appellant's *pre-injury* medical records revealed arthritis of a type he termed "relentlessly progressive" and evinced no hesitance or uncertainty when assessing the pre-injury PPD at "50%" under the criteria established by the AMA Guides. (CABR Smith deposition, pp. 20, 31-33). Dr. Chapin provided parallel testimony. (CABR Chapin deposition, pp. 43-44)

disability at 50 percent utilizing the AMA Guides.³ (PDO, p. 3) The IAJ further found:

“Drs. Chapin and Smith have accurately assessed Mr. Tomlinson’s permanent partial disability of his left knee and Dr. Jiganti agreed with Dr. Chaplin’s assessment.”

(PDO, pp. 3-4)

As noted above, Appellant preserved no challenge to the IAJ's factual findings interpreting the medical evidence. Appellant’s extensive references to the deposition testimony are therefore mostly surplusage. He has preserved a challenge to whether pre-injury permanent impairment due to preexisting, progressive and permanently disabling arthritis is *legally* capable of satisfying the statutory elements for a PPD credit against an ultimate PPD under RCW 51.32.080(5). Assuming the Court rules RCW 51.32.080(5) may legally be applied to such conditions, Appellant has preserved no challenge to the IAJ’s determination that the

³ The Appellant's Brief sometimes cites or relies on statements by Dr. Smith in which he cited the absence of contemporaneous “weight-bearing” x-rays as a barrier to determining the extent of his preexisting disability due to arthritis. (App Br at 13-14), At the same time, it notes Dr. Smith joined other physicians in certifying the arthritis was “ongoing and progressive” and that such disability would have been rated as 50% under the AMA Guides. (App Br at 14) The IAJ entered findings based on his acceptance of the latter evidence, and those findings are not postured for any challenge on appeal.

pre-injury arthritis condition was, in fact, permanently disabling and supported a rating of 50% under the AMA Guides.

IV. SUMMARY OF ARGUMENT

To the extent Appellant's arguments would require the Court to disapprove, disregard or modify the agency's findings, they are not preserved on appeal. As to legal error, the trial court committed none in determining Appellant's preexisting arthritis condition was "permanently partially disabling" prior to the work injury for purposes of determining the applicability of RCW 51.32.080(5).

The fact the condition was progressive is not germane, given that the *level* of disability extant before the injury would not recede. Moreover, the workers' compensation system routinely recognizes and rates the permanence of disability associated with progressive disease conditions.

The fact Appellant's arthritic joint was excised and replaced after the work injury does not preclude the offset specified under RCW 51.32.080(5). That offset is premised on proof the injured body part was "*already*" permanently partially disabled "from whatever cause." That was certainly true no matter what happened during a subsequent surgery. Moreover, the statute expressly applies to situations where a work injury subsequently occasions the "amputation" of a previously

disabled body part. Such an amputation occurred in this case, triggering the statute *ipso facto*. The specific reference to amputations in RCW 51.32.080(5) also reflects a legislative intent that precludes Appellant's proposed interpretation.

V. ARGUMENT

A. Standard for review.

Respondent agrees the procedural posture of the case and the asserted error of statutory interpretation pose an issue of law that this Court reviews *de novo* based on the facts as found by the agency. *Health Ins. Pol. v. Health Care Auth.*, 129 Wn.2d 504, 507, 919 P.2d 62 (1996); *Lawrence v. Department of Health, supra*, 133 Wn. App. at 672.. The legal issue is reviewed *de novo*, not the factual findings. To the extent Appellant's arguments seek or require the Court to reject or modify the agency's interpretation of the medical evidence as reflected in the uncontested agency findings and adopted by agreement of the parties, they assert errors that were not preserved and are therefore not properly before the Court on appeal. *Id.*

B. The trial court committed no error of law in its interpretation and application of the phrase "permanently partially disabled" from RCW 51.32.080(5) to the facts as found by the agency.

Appellant asserts the trial court erred in interpreting RCW 51.32.080(5), and in particular the phrase “permanently partially disabled,” to contemplate a benefits offset based on Appellant’s preexisting arthritis condition. His discussion centers on three propositions:

1. The term “permanent” is ambiguous and should, therefore, be liberally interpreted in a manner that delivers compensation to the worker.

2. The statutory phrase “permanent partial disability” cannot, as a matter of law, be interpreted to include advanced degenerative arthritis conditions such as Appellant’s because, under the findings of fact, that disabling condition would progress in the future and therefore never be “fixed and stable” or “permanent.”

3. The statutory phrase “permanent partial disability” cannot, as a matter of law, be interpreted to apply to progressive degenerative arthritis conditions if the work injury contributes to a worsening of that condition and ensuing replacement of the arthritic joint.

Respondent will address each proposition in turn.

1. *Adhering to the remedial purpose of the Act.*

Washington law has long applied a principle of liberal construction in favor of accomplishing the remedial purpose of the Industrial Insurance Act where the meaning of statutory text is subject to reasonable doubt.

RCW 51.12.010; *Cockle v. DLI*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

Still, workers' compensation liability is a creature of statute, not the

common law. *Clauson v. DLI*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996)

(“The right to workers' compensation benefits is statutory, and a court will look to the provisions of the Act to determine whether a particular worker is entitled to compensation.”) The maxim is neither applicable nor needed where the text of a statute indicates its intent with reasonable clarity. In such situations, the general principle of liberal construction is subject to limitations clearly expressed in specific statutory text. The trial court, and all courts, must find the appropriate balance in individual cases.

This Court should, therefore, reject rhetoric designed to position Appellant as a person deprived of his rightful remedies under the Act. In fact, the remedial purpose of the Act was very much observed in this case. Under the agency findings, Appellant brought to this employment a longstanding, advanced and chronically problematic arthritic condition in his left knee. It had already required years of documented treatment, a Veteran's Administration disability award and a prognosis that included an eventual knee replacement independent of any additional injury. That history and the “bone-on-bone” contact of articular surfaces documented in imaging studies persuaded the medical experts and the IAJ that the pre-injury permanent disability existed and could readily be quantified under the AMA Guides at 50%.

Notwithstanding that history, when Appellant sustained a work injury that contributed incrementally to the preexisting arthritis,

Respondent voluntarily undertook workers' compensation responsibility for the entire condition. Appellant was and will continue to be afforded the panoply of workers' compensation benefits in the form of extensive medical treatment and knee replacement surgery, recuperative therapy, time loss and, if applicable, vocational assistance. Such benefits have or will be delivered as appropriate for a knee condition rated at 75%⁴ without discount or apportionment – just as if his work injury had originated the entire condition. Under such circumstances, the remedial purpose of the Act has been well and faithfully served.

The trial court here merely recognized a longstanding limitation on just one of the benefits, PPD, among the generous remedies otherwise available to the worker – a limitation plainly set forth in RCW 51.32.080(5). *See J.C. Beyer v. DLI*, 17 Wn.2d 29, 134 P.2d 948 (1943). That statute implicitly acknowledges how incongruous and inequitable it would be to order employers to provide a “remedy” to compensate a

⁴ The Appellant's Brief takes excessive license when it states the “Department ordered PPD of 25 percent.” (App Br at 11) The Department's Order and Notice of January 14, 2005 stated, “The self-insured employer is directed to pay you a permanent *partial disability award of 75%* of the amputation value above knee joint ... less preexisting 50.00% of the amputation value ...” For all benefit purposes other than the credit to be applied in calculating the actual payment, the Department order resulted in ultimate “PPD award” of 75%.

worker for a level of permanent, non-work disability that was, in the words of the statute “already” incurred before the work injury even happened. RCW 51.32.080(5) (offset applies where worker injures a body part that was “*already* ... permanently partially disabled”). Accordingly, the trial court’s decision effectuated *both* the general, beneficent purposes of the Act and the specific, equitable limitation stated in RCW 51.32.080(5).

2. Discerning the “permanence” of disability associated with progressive arthritic conditions under RCW 51.32.080(5).

Appellant asserts the trial court committed legal error when it interpreted “permanent partial disability” in RCW 51.32.080(5) to include preexisting disability caused by a degenerative arthritis condition that was “progressive and ongoing” in nature. (App Br at 14, 23) Appellant argues such conditions are legally incapable of supporting a factual finding that it is “permanent.” (Id.)

According to the uncontested findings of fact and the unanimous medical evidence, however, Appellant’s pre-injury condition qualified under the AMA *Guides for the Evaluation of Permanent Impairment* for a significant permanent partial disability rating. The Appellant's Brief itself acknowledges a determination of permanent disability in that context is a factual one to be based on testimony by medical experts drawing on

evidentiary record and their expertise in applying those standards. (App Br at 9 & n. 39, citing *In re Bertha Ramirez*, No. 03-1493 (BIIA, Sept. 1, 2004) To the extent Appellant’s arguments constitute a collateral attack on the experts’ factual conclusions the IAJ’s finding of permanence based upon them, Appellant has failed to preserve such issues.

That leaves Appellant in the awkward position of having conceded the trial court and IAJ *correctly* determined Appellant’s progressive arthritis condition was permanently disabling under the AMA Guides, yet committed reversible error in ruling that same condition qualified as permanently disabling under RCW 51.32.080(5). Respondent doubts this record leaves legal or logical room to accommodate both positions.

If it does, the argument nevertheless lacks merit – primarily because it proves too much. The definitional argument appellant constructs from sundry authorities collapses when one remembers the workers' compensation system recognizes “permanent” disability caused by any number of “relentlessly progressive”⁵ maladies. One prominent example is hearing loss conditions that include a preexisting, progressive, age-related presbycusis component. *See Boeing v. Heidi*, 147 P.2d 78, 51 P.3d 793 (2002). Asbestosis or occupationally accelerated multiple

⁵ Dr. Smith used this phrase to characterize the type of osteoarthritis present in claimant’s knee. (CABR, Smith deposition, p. 20)

sclerosis might represent other such conditions. Under Appellant's argument, legal error would occur every time such conditions were the basis for a permanent partial disability award because they never stopped progressing and therefore "never became permanent." (App Br at 16) The lack of intuitive appeal may be the reason Appellant's arguments present what he deems a question of "first impression" before the Court. (App Br at 19)

The practical answer to Appellant's pedagogical argument is that RCW 51.32.080(5) refers to preexisting permanent "disability," not to a preexisting, permanent (i.e. fixed and stable) "condition." Intractable diseases such as degenerative osteoarthritis qualify for PPD precisely because they are permanently and progressively disabling. The disability it currently causes can be quantified and compensated at any given time if there is sufficient medical testimony that it meets the AMA criteria. Such a determination is not precluded or rendered moot by the prospect the condition will ineluctably worsen and cause additional, equally permanent disability sometime in the future. The fact such a condition will continue to worsen in the future, and even require surgical intervention, does not detract from the permanence of the disability already determined to be present.

3. *Discerning the “permanence” of disability due to preexisting arthritis in joints subsequently excised by surgery.*

Appellant further challenges the trial court’s interpretation of “permanent” because the arthritic joint itself was surgically removed and replaced in the course of treatment for the subsequent work injury. By the time Appellant’s work injury was closed and capable of a PPD rating, the arthritic condition itself was no longer present. Therefore, Appellant argues, all of the permanent disability extant at closure was attributable to the work injury or associated treatment (surgery) and must therefore be fully compensated in the same fashion as an asymptomatic condition that a work injury aggravates. (App Br at 11-12, 23) According to Appellant, “The condition of the knee before surgery is irrelevant.” (App Br at 12)

This argument spins a creative theory but ultimately falters when tested against the concrete provisions of the statute. For ease of reference, here is the text of RCW 51.32.080(5):

Should a worker receive an injury to a member of part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability, *** his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or

extent of the aggravation or increase of disability thereof
(emphasis added).

Appellant interprets the statute to mandate a focus on the nature and sources of permanent disability *only* at the point in time the work injury claim is ultimately closed. If, at that time, there is no contribution to the permanent disability by a pre-injury condition, Appellant contends RCW 51.32.080(5) does not apply.

The statute itself says something quite different. It specifies an inquiry into whether the body part involved was “*already*” permanently partially disabled “from *whatever* cause” when the worker “*receive[d]*” the work injury (emphasis supplied). If so, then that “*previous* disability” is the subject of an offset from the ultimate, total disability extant in the injured body part. In other words, the statute addresses the calculation of PPD payments based on the respective *levels* of permanent disability *before and after* the injury, not on the respective *causes* of the permanent disability extant at the time the industrial claim is ultimately rated. *Accord Beyer v. DLI, supra* (PPD due to pre-injury blindness properly offset against ultimate PPD for work injury and associated denucleation surgery). Appellant’s proposed analysis cannot be reconciled with that expressly dictated by the statute.

The statutory text actually provides an even simpler answer to Appellant's argument. Even a cursory reading reveals RCW 51.32.080(5) unambiguously applies to situations where a previously disabled body part is subsequently injured by work and ultimately "amputated" as a result. According to Dorland's Illustr. Medical Dictionary (28th ed 1988), "amputated" means "to cut off or remove" a body part. In this case, the affected body part, an arthritic joint, was surgically removed. The statute applies *ipso facto*. The fact the knee was replaced with an artificial joint does not distinguish it from an amputation. An amputation does not cease to become an amputation once the limb is replaced with a prosthetic device.

More generally, the inclusion of such amputations necessarily evinces a legislative intent that is contrary to the analysis Appellant proposes. In every amputation, the work injury might be characterized as the entire cause of a worker's ultimate, post-amputation disability, yet the statute still contemplates an offset for permanent, pre-injury disability "from whatever cause." This was exactly the reasoning expressed by the trial court in denying Appellant's Motion for Summary Judgment. (VRP, pp. 8-9) Appellant has not provided the Court with an adequate basis to reverse it.

V. CONCLUSION.

The trial court committed no legal error in applying RCW 51.32.080(5) to the agency's uncontested findings of fact or in denying Appellant's Motion for Summary Judgment. For the reasons outlined above, Respondent respectfully requests an order affirming the trial court's decision.

Respectfully submitted,

for *Jerald P. Keene* WSBA #30661
Jerald P. Keene, WCB No. 22271
of Attorneys for Respondent, Puget
Sound Freight Lines, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served the foregoing
RESPONDENT'S BRIEF OF PUGET SOUND FREIGHT LINES on
the following individuals on January 24, 2007, by *first class mail* to said
individuals true copies thereof, certified by me as such, contained in
sealed envelopes, with postage prepaid, addressed to said individuals at
their last known addresses to wit:

Terry J. Barnett
Attorney at Law
P.O. Box 1156
Tacoma, WA 98401

FILED
COURT OF APPEALS
DIVISION II
01 JAN 25 PM 1:33
STATE OF WASHINGTON
BY [Signature]

I further certify that I filed the original of the foregoing
with:

David Ponzoha
Court Clerk
The Court of Appeals of the State of Washington
Division Two
950 Broadway
Suite 300, MS TB-06
Tacoma, WA 98402-4454

by *first class mail* on the 24th day of January, 2007.

**REINISCH, MACKENZIE, HEALEY
WILSON & CLARK, P.C.**

For *Reinisch* *WSBA # 30661*
Jerald P. Keene, WSBA # 22271
of Attorneys for Respondent,
Puget Sound Freight Lines