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NO. 36921-4-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

CROWN CORK & SEAL,

Respondent.

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENT OF ERROR.....	2
III.	ISSUE.....	3
IV.	STATEMENT OF THE CASE.....	3
	A. Facts.....	3
	1. Ms. Smith’s Employment History At Crown.....	3
	2. Ms. Smith’s Medical History Of Wrist And Hand Complaints.....	7
	3. Efforts At Vocational Rehabilitation Causing Disability.....	9
	B. Procedural Background.....	11
V.	STANDARD OF REVIEW.....	11
VI.	SUMMARY OF ARGUMENT.....	13
VII.	ARGUMENT.....	14
	A. Second Injury Fund Generally.....	14
	B. The Legal Definition Of “Previous Bodily Disability” Requires Proof Of Impact On Ability To Work.....	15
	C. Assuming That Ms. Smith Had Preexisting Carpal Tunnel Syndrome, It Did Not Become Disabling Until After Her 1997 Injury.....	18
	1. Crown failed to prove a prior condition as required by RCW 51.16.120 and case law.....	19
	2. Even If Ms. Smith Had Some Prior Condition, It Was Not Disabling As Required By RCW And Case Law.....	19
VIII.	CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Ackley-Bell v. Seattle School Dist.</i> , 87 Wn. App. 158, 940 P.2d 685 (1997).....	12
<i>City of Pasco v. Public Employment Relations Comm'n</i> , 119 Wn.2d 504, 833 P.2d 381 (1992).....	12
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	12
<i>Crites v. Koch</i> , 49 Wn. App. 171, 741 P.2d 1005 (1987).....	2
<i>Henson v. Department of Labor & Industries</i> , 15 Wn.2d 384, 130 P.2d 885 (1942).....	17, 18
<i>In re Alfred Funk</i> , BIIA Dec., 89 4156, 1991 WL 87432 (1991).....	17, 20
<i>In re Curtis Anderson</i> , BIIA Dec., 88 4251, WL 310624 (1990).....	17, 20
<i>In re Estate of Bowechop</i> , 52 Wn. App. 775, 764 P.2d 657 (1988).....	3
<i>Jussila v. Dep't of Labor & Indus.</i> , 59 Wn.2d 772, 370 P.2d 582 (1962).....	14
<i>Littlejohn Constr. Co. v. Dep't of Labor & Indus.</i> , 74 Wn. App. 420, 873 P.2d 583 (1994).....	12
<i>Lyle v. Dep't of Labor & Indus.</i> , 66 Wn.2d 745, 405 P.2d 251 (1965).....	15
<i>Rothschild International Stevedoring Company v. Department of Labor & Industries</i> , 3 Wn. App. 967, 478 P.2d 759 (1971).....	13, 16, 18, 19, 20
<i>Ruse v. Dep't of Labor & Indus.</i> , 138 Wn.2d, 977 P.2d 570 (1999).....	11

<i>Seattle School District No. 1 v. Dep't of Labor & Indus.</i> , 116 Wn.2d 352, 804 P.2d 621 (1991).....	13, 15
<i>Smith v. King</i> , 106 Wn.2d 443, 722 P.2d 796 (1986).....	3
<i>VanHess v. Dep't of Labor & Indus.</i> , 132 Wn. App. 304, 30 P.3d 902 (2006).....	14

Statutes

RCW 51.12.010	12
RCW 51.16.120	1, 2, 3, 11, 12, 13, 14, 16, 19
RCW 51.44.040	14
RCW 51.52.115	11
RCW 51.52.140	11
RCW 51.52.160	17

Other Authorities

<i>Larson's Workers' Compensation Law</i> , § 91.03[8] (2007).....	15
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I. INTRODUCTION

This case arises under RCW 51, the Industrial Insurance Act. The case does not involve a dispute over a worker's right to benefits. Rather, the case involves a dispute between self-insured employer, Crown, Cork & Seal Company, (Crown) and the Department of Labor and Industries (Department). In Crown's claim of a right to "second-injury fund" relief under RCW 51.16.120, Crown seeks relief from paying the pension benefits of its injured worker, Sylvia Smith.

Ms. Smith suffered an injury in 1997 in the course of employment when a forklift ran over her right leg and fractured it. Ultimately, the Department issued a pension order that found Ms. Smith totally and permanently disabled due to her injury. The Department then issued an order finding Crown was not entitled to second injury fund relief under RCW 51.16.120. The Department denied such relief because Ms. Smith did not suffer from any condition that both preexisted her 1997 injury and was previously disabling within the meaning of the "previous bodily disability" requirement of RCW 51.16.120. The Board of Industrial Insurance Appeals (Board) affirmed the Department.

Crown appealed to superior court, which reversed the Board and Department. The Department appealed to this Court. The superior court erred because the evidence in the record demonstrated two facts without dispute, either of which is a basis to deny second injury fund relief to Crown. First, Crown did not establish that Ms. Smith had a pre-existing

condition sufficient to invoke RCW 51.16.120. Second, even assuming that Crown provided some vague evidence of Ms. Smith's condition prior to the injury, Crown did not demonstrate that the pre-existing condition was disabling within the meaning of the "previous bodily disability" requirement of RCW 51.16.120. Therefore, on this record, the superior court erred as a matter of law and it should be reversed.

II. ASSIGNMENT OF ERROR

The superior court erred as a matter of law when it ruled in Conclusions of Law 2-5 that Crown is entitled to second injury fund relief pursuant to RCW 51.16.120. This was error because there is no evidence and there is no finding of fact that Ms. Smith suffered from any medical condition that constituted "previous bodily disability" prior to her 1997 industrial injury.

To the extent the superior court ruling is premised on any implied finding of fact, the Department assigns error to the ruling on that additional basis, too, as the evidence in the record does not support any finding that that Ms. Smith suffered from any medical condition that constituted "previous bodily disability" for purposes of RCW 51.16.120 prior to her 1997 industrial injury. "[T]he failure of the trial court to make an express finding on a material fact requires that the fact be deemed to have been found against the party having the burden of proof." *Crites v. Koch*, 49 Wn. App. 171, 176, 741 P.2d 1005 (1987). This rule applies, inter alia, where there is no evidence in the record to support the missing

finding. *Id.*; *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986); *In re Estate of Bowe chop*, 52 Wn. App. 775, 778, 764 P.2d 657 (1988).

III. ISSUE

RCW 51.16.120 requires proof by preponderance that an injured worker had a “*previous* bodily disability” to allow Crown to obtain coverage under the second injury fund. Did the superior court err by concluding that Ms. Smith had a “*previous* bodily disability” within the meaning of RCW 51.16.120 when the undisputed evidence shows:

(a) Ms. Smith was not diagnosed with carpal tunnel syndrome until nearly two years *after* her 1997 industrial injury,

(b) Ms. Smith did not seek any medical care for any wrist condition in the three years immediately *prior to* her industrial injury,

(c) Ms. Smith did not suffer from any permanent partial disability to her wrist *prior to* her industrial injury, and

(d) at the time of her industrial injury Ms. Smith was able to perform all of the essential duties of her job without any restrictions even though her job required her to use her upper extremities on a continuous basis?

IV. STATEMENT OF THE CASE

A. Facts

1. Ms. Smith’s Employment History At Crown

When Ms. Smith began working for Crown in November 1980, she was a healthy, 34-year-old woman. CABR Smith 33.¹ Crown conducted a medical evaluation in 1980 when it hired Ms. Smith, and the evaluator concluded that she was in excellent health. CABR Berndt 18.

Crown manufactures beer and soda cans. CABR Gorker 6. During her 18 years with the company, Ms. Smith held various jobs within the plant. At the time of her 1997 industrial injury, Ms. Smith worked as a "bagger." CABR Gorker 6. As a bagger, Ms. Smith's primary job duty was to bag and stack the lids of soda cans. Ms. Smith testified that the lids would gather, she would push a string of soda can ends into a bag, physically take that bag off the mandrel, fold the top of the bag over tightly, and then stack it onto a pallet. She would repeat this pattern about every 20 seconds during her entire 12-hour shift, four days per week. CABR Smith 34-37; CABR Gorker 6-7. Put another way, her job required her to make continuous hand movements three times a minute, 180 times an hour, and over 2000 times a day.

A number of baggers, including Ms. Smith, complained that they suffered from hand pain as a result of performing this same bagging task thousands of times per day. CABR Gorker 10-11. Ms. Smith's supervisor, Mr. Gorker, acknowledged that Ms. Smith did not complain about hand pain any more than any other bagger that worked at Crown,

¹ "CABR" references the Certified Appeal Board Record, which is the record on review in a court appeal. RCW 51.52.115. Witness testimony will be cited as "CABR [witness name] [page number of transcript]." Board documents will be cited as "CABR [Board-stamped page number in the lower right corner of the document]."

and that she never requested that any modification be made to either her job duties or to the equipment that was used at the plant. CABR Gorker 16.

As a result of the numerous complaints which had been made by all of its baggers, Crown redesigned the bagging machine in an attempt to mitigate the repetitive hand stress it was causing to its baggers. CABR Smith 41.² However, the modification did not eliminate Ms. Smith's problem of hand pain after performing the repetitive hand movements. CABR Smith 36.

Ms. Smith periodically³ wore hand splints to mitigate the strain on her hands. CABR Smith, 36; CABR Berndt 19-20, 80. However, Mr. Gorker acknowledged that Ms. Smith was never rendered unable to perform any of her job duties as a result of her hand pain:

Q: As compared to other baggers, did she complain a lot?

A: No.

Q: Was she ever unable to perform her job functions as a result of her carpal tunnel symptoms?

A: No.

CABR Gorker 16.

² Q: Do you remember ever going to your supervisor asking for the [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].

CABR Smith 41.

³ The trial court found that Ms. Smith wore splints "during" 1994 through 1997 (CP 40), but the trial court did not find that she always wore them during this period, nor would such a finding be supported by the evidence.

There is no evidence that Ms. Smith's hand pain or her use of hand splints interfered in any way with the performance of her job duties. Indeed, the undisputed evidence shows that Ms. Smith was an exemplary employee throughout her tenure at Crown. CABR Gorker 14. She was never reprimanded. CABR Smith 42. She was an enthusiastic and hard worker. CABR Smith 43. Indeed, she rarely called in sick, and she got along with her co-workers. CABR Gorker 14, 16; CABR Smith 42-43.

Although Mr. Gorker noted that Ms. Smith was high-strung, he offered it as a type of compliment, not a prior condition: he testified that her anxiety was something that actually *improved* her job performance, because it caused her to be more productive and attentive to her job duties. CABR Gorker 16.

Mr. Gorker acknowledged that during Ms. Smith's 18 years at Crown, she never asked for any individual workplace accommodations, nor did it appear she needed any. CABR Gorker 14; CABR Smith 43; CABR Berndt 31-32. The undisputed evidence was that Ms. Smith was an excellent employee and that she had *no* performance issues. CABR Gorker 14, 16, 17; CABR Berndt 32. Notably, Mr. Gorker specifically testified that he did not regard Ms. Smith as "disabled" at the time of her industrial injury of January 10, 1997.⁴

⁴ Q: Prior to Ms. Smith's 1997 injury, did you consider her disabled as a result of her carpal tunnel?

A [Gorker]: No, I did not.

(CABR Gorker 17.)

2. Ms. Smith's Medical History Of Wrist And Hand Complaints

Prior to her January 10, 1997 industrial injury, there were two occasions in which Ms. Smith sought treatment for symptoms relating to upper extremity pain. First, in 1982, Ms. Smith suffered an industrial injury to her right thumb and filed a claim. CABR Berndt 19. However, her claim for the right thumb injury was closed without any award for permanent partial disability, and it did not result in any limitations on her work.

Second, Ms. Smith sought medical treatment and filed a claim for wrist pain in early 1994. CABR Smith Ex. 1. Specifically, on January 5, 1994, Ms. Smith went to the emergency room because her wrists were hurting her. CABR Smith 44. The emergency room doctor diagnosed her with "tendonitis" and provided her with wrist splints/braces. CABR McPhee 19.

Ms. Smith then saw Dr. Sean T. Atteridge on January 31, 1994. Dr. Atteridge diagnosed her as having tenosynovitis – not carpal tunnel. CABR Atteridge 30.

Ms. Smith then made a follow-up visit to Dr. Michael Parker, an associate of Dr. Atteridge, on February 9, 1994. Dr. Parker noted that Ms. Smith's wrist complaints had gotten "*significantly better,*" and his examination showed no swelling or tenderness, and her grip strength was good. CABR Atteridge 30-31. Ms. Smith had no physical restriction

from her tenosynovitis, and she did not receive any permanent disability award on her claim. CABR Berndt 19-20.⁵

Following the February 9, 1994 visit, Ms. Smith did not seek *any* additional medical treatment for wrist and/or hand complaints until *after* her industrial injury. CABR Smith 44-45. CABR Atteridge 31. Ms. Smith did not see Dr. Atteridge again until May 26, 1998, which was almost a year and a half after her industrial injury. CABR Atteridge 30-31.

In fact, Ms. Smith saw Jennifer Coffee, an occupational therapist, shortly *after* her industrial injury, and the occupational therapist specifically noted that Ms. Smith had *normal* upper extremity functions at that time. CABR Berndt 21.

Ms. Smith had another physical therapy evaluation done on August 4, 1997. The August 4, 1997 evaluation noted impairments related to her forklift injury, but did not note any other medical difficulties. CABR Berndt 21-22.

Indeed, the first time that Ms. Smith sought treatment for wrist and forearm pain *after* her industrial injury in 2001. CABR Berndt 26. Prior to that, the record does reveals only by way of noting a history of Carpal Tunnel, not any treatment for it. CABR McPhee 29. A physical capacities report in September of 1998 noted that Ms. Smith had “pre-

⁵ The Board's Proposed Decision and Order notes that the evidence does not conclusively answer whether the claim was allowed and then closed without award, or whether the claim was rejected. CABR 31. But there is no evidence or contention by Crown that there was any award for permanent disability on the claim.

existing” carpal tunnel syndrome, but this was based on her own characterization. CABR McPhee 29. However, the record is unclear as to when it was that a medical doctor actually diagnosed the condition for the first time. It appears from the record that it could have been as late at 2002, because, prior to that, the condition was merely referred to as hand pain.⁶ CABR Atteridge 19; CABR McPhee 18, 29-30; CABR Berndt 28, 77.

In any event, there is no medical evidence that Ms. Smith had any medical condition that was disabling prior to her industrial injury. Indeed, Ms. Smith’s attending physician, Dr. Atteridge, admitted that he *did not know* whether or not Ms. Smith’s carpal tunnel condition was disabling at the time of her January 10, 1997 injury.⁷

3. Efforts At Vocational Rehabilitation Causing Disability

Crown assigned Erin McPhee, a vocational counselor, to evaluate Ms. Smith’s ability to work, and to determine whether or not Ms. Smith would benefit from some form of vocational retraining. CABR McPhee 5. Ms. McPhee initially opined that Ms. Smith would benefit from vocational

⁶ In January 17, 2001, Dr. Murray, a neurologist, assessed only lower extremity problems without upper extremity difficulties. CABR Berndt 26. A physical capacities evaluation conducted on January 31, 2001, determined that Ms. Smith could undertake fine finger manipulations, handling, and grasping on a frequent basis. CABR Berndt 27. Furthermore, Ms. Smith was medically cleared to perform the fine finger manipulations necessary for her retraining program. CABR Berndt 27.

⁷ Q: At the time she suffered the industrial injury, January 10th, 1997, was she, at that time, suffering symptomatic and disabling effects, as far as you know, as a result of her bilateral carpal tunnel condition?

A [Atteridge]: At the time she was injured?

Q: Yes.

A [Atteridge]: I don’t know.

(CABR Atteridge 15.)

retraining. CABR Berndt 38. Ms. McPhee drafted a retraining plan with a job goal of "office helper". CABR Berbdt 27. The retraining plan, among other things, required Ms. Smith to perform keyboarding. CABR Berndt 39, 43. Three different medical doctors cleared Ms. Smith to participate in the retraining plan. CABR Berndt 27.

However, almost immediately after Ms. Smith began participating in the retraining plan, she developed severe carpal tunnel-related symptoms. CABR McPhee 11-12. Dr. Atteridge testified that both Ms. Smith's use of crutches (which were necessary because of the leg injury) and the keyboarding that was required by her retraining plan caused her carpel tunnel syndrome to evolve into a disabling condition. CABR Atteridge 12, 16-17.

Ultimately, Dr. Atteridge opined that Ms. 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. CABR Atteridge 27. This status was due to the combined effects of her industrial injury of January 10, 1997, her carpal tunnel syndrome (which "evolved" during the course of her vocational retraining) and her psychological traits,⁸ which left her unable "to cope with everyday stressors." CABR Atteridge 27.

⁸ In regards to Ms. Smith's mental health, there is no dispute, and no tribunal has ever found, that Ms. Smith had a *pre-existing* mental health impairment. Rather, the testimony showed only that the combined effects of the industrial injury, the aggravation of the carpal tunnel syndrome, and her "personality traits" rendered her disabled. CABR Atteridge 24; CABR Berndt 21

B. Procedural Background

On May 11, 2005, the Department denied second injury fund relief to Crown. CABR 62. Crown timely appealed the Department's order. CABR 62. After holding hearings, the Board's Industrial Appeals Judge issued a proposed order affirming the Department order denying Crown second injury fund relief, holding that any pre-existing condition Ms. 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. CABR 27-37. Crown petitioned the 3-member Board for review. CABR 3-22. The Board denied review and adopted the proposed decision as its final order. CABR 2.

Crown timely appealed the Board's ruling to superior court. CP 4. Following *de novo* review of the Board record per RCW 51.52.115 in a bench trial, the superior court reversed the ruling of the Board. CP 38-42. The Department timely appealed to this Court. CP 43-49.

V. STANDARD OF REVIEW

Review in this case is under the ordinary standard for civil cases reviewing industrial insurance awards. RCW 51.52.140. Review involves "examination of the record to see whether substantial evidence supports the findings made after the superior court's *de novo* review, and whether the court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (internal citation omitted).

Here, the superior court made no explicit findings determining that Crown had shown a previous disability. However, it made conclusions of law 3 and 4 that reference a prior disability. The conclusions are challenged by the Department as an erroneous application and interpretation of RCW 51.16.120. Statutory construction is a question of law reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). However, to the extent Crown claims that the conclusions of law contain implicit findings, the Department shows in this brief that no evidence supports any findings of previous disability as required by law for a second injury fund claim.

When an administrative agency is charged with application of a statute, the court may give consideration and deference to the agency's interpretation of an ambiguous statute. *City of Pasco v. Public Employment Relations Comm'n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). Department and Board interpretations of the Industrial Insurance Act (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) (deference given to Department interpretation); *Ackley-Bell v. Seattle School Dist.*, 87 Wn. App. 158, 165, 940 P.2d 685 (1997) (deference given to both Department and Board interpretations). RCW 51.12.010's rule of liberal construction in favor of workers does not apply to employers raising issues under the second injury fund. *Seattle School*

District No. 1 v. Dep't of Labor & Indus., 116 Wn.2d 352, 360, 804 P.2d 621 (1991).

VI. SUMMARY OF ARGUMENT

Crown is not entitled to second injury fund relief under RCW 51.16.120 because there is no evidence that when Ms. Smith was seriously injured in 1997 she already suffered from "previous bodily disability" within the meaning of RCW 51.16.120. The record shows only that Ms. Smith experienced wrist and hand pain prior to her January 1997 industrial injury as a result of her performance of production speed work. But the record also shows that Ms. Smith's wrist and hand pain did not progress into a disabling condition until well *after* her industrial injury, when it was aggravated by her attempts to participate in a vocational retraining program that was provided under her industrial injury claim. At the time of the serious injury, Ms. Smith did not have a "previous bodily disability" as required by law.

Rothschild International Stevedoring Company v. Department of Labor & Industries, 3 Wn. App. 967, 969, 478 P.2d 759 (1971) holds that to prove that an injured worker suffered from a previously disabling condition, i.e., a condition that was disabling prior to the date of the industrial injury, the employer must show that the preexisting condition impacted a worker's ability to perform work duties. The evidence here indisputably shows that Ms. Smith's ability to work was not impaired or

restricted in any way as a result of her hand and wrist pain until after she suffered the 1997 industrial injury to her leg.

The superior court's decision to grant Crown second injury fund relief is wrong as a matter of law, and it must be reversed.

VII. ARGUMENT

A. Second Injury Fund Generally⁹

The second injury fund is a special fund set up within the framework of the workers' compensation system. It offers financial relief to employers, but only when the worker's disability that existed prior to the date of an industrial injury, in necessary combination with the current industrial injury, results 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 purpose of the second injury fund is to encourage the hiring and retention of handicapped workers. *Jussila*, 59 Wn.2d at 779. (second injury fund applies when permanent total disability arises from a combined effect of preexisting disability and the current injury).

RCW 51.16.120 contains three prerequisites that an employer must meet in order to obtain second injury fund relief. The employer must show that the worker: (1) had a "pre-existing bodily disability from a previous injury or disease"; (2) sustained an industrial injury; and (3) became totally and permanently disabled as a proximate result of the

⁹ A separate second injury fund is maintained for self-insurers. It is funded by assessments against all self-insurers. RCW 51.44.040(3). As with other RCW 51 funds, the Department acts as trustee of the second injury fund. *See generally VanHess v. Dep't of Labor & Indus.*, 132 Wn. App. 304, 310-11, 30 P.3d 902 (2006) (Department is trustee of the accident fund).

“combined effects” of the two. *Seattle School District No. 1 v. Dep’t of Labor & Indus.*, 116 Wn.2d at 357.

It is simple logic that the lower the threshold is set for employer eligibility for second injury fund relief, the greater the number of employers who will seek to qualify for relief. The leading treatise on workers’ compensation law notes that at some point, as the threshold is lowered, the expense of administering the second injury fund scheme begins to outweigh any useful purpose of the scheme. 5 A. Larson, L. Larson, *Larson’s Workers’ Compensation Law*, § 91.03[8] (2007). In recent years, perhaps due to this situation, a number of states have abolished or significantly restricted their second injury fund schemes. *Id.* The Court should take this legislative policy concern into consideration in assessing the employer’s definition of “previous disability” that would essentially extend such status to the vast majority of the subset of the work force who incur industrial injuries that become permanently totally disabling.

B. The Legal Definition Of “Previous Bodily Disability” Requires Proof Of Impact On Ability To Work

In order to be entitled to second injury fund relief, the employer must prove that there was a preexisting medical condition which was already both “symptomatic” and “disabling” at the time of the industrial injury or occupational disease. *See Lyle v. Dep’t of Labor & Indus.*, 66 Wn.2d 745, 747, 405 P.2d 251 (1965) (second injury fund relief denied as worker’s preexisting condition of degenerative arthritis was neither

symptomatic nor disabling prior to his injury). Therefore, if a worker had a preexisting medical condition but it was *not* disabling until after the worker's industrial injury, the employer is not entitled to second injury fund relief. *See, e.g., Rothschild International Stevedoring Co. v. Dep't of Labor & Indus.*, 3 Wn. App. at 969-70 (second injury fund relief denied when, despite several pre-injury medical conditions, the worker was doing "everything required of a longshoreman" at the time of the injury).

Rothschild held that a worker's preexisting medical condition is only "disabling" within the meaning of the second injury fund statute if the preexisting medical condition interfered in some way with a worker's ability to perform the essentials of his or her job. *Id.* at 969-70. The worker in *Rothschild* had incurred a previous industrial injury that resulted in a permanent partial impairment described by the examining physicians as ranging from 25 to 50 percent. *Id.* at 969. However, *Rothschild* noted that the undisputed testimony was that the claimant, despite his prior injuries, did "everything" required of a longshoreman." *Id.* The Court concluded, therefore, that the employer was not entitled to relief from the second injury fund. *Id.* at 969-70.

The Board's administrative decisions follow *Rothschild* and hold that previous disability for purposes of RCW 51.16.120 means disability that affected the ability to do one's job prior to the date of the industrial

injury. Thus, in the Board's Significant Decision¹⁰ in *In re Alfred Funk*, BIIA Dec., 89 4156, 1991 WL 87432 (1991), the claimant had suffered multiple prior injuries and had two preexisting conditions: a congenital heart condition and degenerative arthritis. The Board held nonetheless that the employer was not entitled to second injury fund relief because the claimant did not have a "preexisting bodily disability." *In re Funk*, 1991 WL 87432 at *2. The Board indicated that neither condition had been shown to have been symptomatic, but the Board also based its determination in part on the fact that the claimant was able to continue in his life-long occupation without any apparent limitations. *Id.* at 3.

Likewise, in the Board decision in *In re Curtis Anderson*, BIIA Dec.. 88 4251, WL 310624 (1990), the Board held that "previous disability" in this context means that the impairment has had a deleterious "effect upon an individual's performance of his employment." *In re Anderson*, 90 WL 310624 at *2. The Board relied in part on *Henson v. Department of Labor & Industries*, 15 Wn.2d 384, 391, 130 P.2d 885 (1942), which held in a different context that "disability" connotes a loss of earning power. The Board went on to explain:

The evidence indicates that none of the conditions cited by the employer affected Mr. Anderson's ability to be employed as a logger for approximately 36 years. While there was some evidence that Mr. Anderson missed some work due to his psoriasis in December of 1982, after that treatment he apparently was able to return to his employment until the industrial injury occurred on

¹⁰ In RCW 51.52.160, the Legislature has directed the Board to designate and publish its "significant decisions."

February 11, 1983. Indeed, despite prior injuries and conditions, Mr. Anderson was always able to return to work as a logger until the February 11, 1983 industrial injury. To paraphrase from *Rothschild Int'l v. Dep't of Labor & Indus.*, 3 Wn. App. 967, 969 (1970):

Most significantly however, there was no evidence that any injury sustained by [Mr. Anderson] had been other than temporarily disabling. Up to the time of his final disabling injury of [2/11/83] [Mr. Anderson] was doing "everything" required of a [timber faller].

We do not believe any of Mr. Anderson's pre-existing conditions were disabling prior to the industrial injury, within the meaning of *Henson* or *Rothschild*. That is, prior to the industrial injury, Mr. Anderson was fully able to perform his demanding job duties as a logger.

Id. at * 3-4.

C. Assuming That Ms. Smith Had Preexisting Carpal Tunnel Syndrome, It Did Not Become Disabling Until After Her 1997 Injury

In light of the relevant standard of law for second injury fund coverage, this Court should reverse the superior court for two separate reasons. First, the evidence is uncertain at best as to whether Ms. Smith had carpal tunnel syndrome before or after her industrial injury. There is no adequate finding of that preexisting condition and evidence would not support a finding if it had been made. Second, even if it is assumed for argument that she had carpal tunnel syndrome to some degree prior to her serious industrial injury in 1997, there is no evidence that her prior condition was "disabling" prior to her 1997 industrial injury to her leg.

1. Crown failed to prove a prior condition as required by RCW 51.16.120 and case law

Ms. Smith was not actually diagnosed with carpal tunnel syndrome either at the time of her 1982 thumb injury or during any of the three visits for hand pain in 1994. Rather, in 1994, Dr. Atteridge diagnosed Ms. Smith as having tendonitis, and he added during his testimony some 12 years later that the condition was “possible” carpal tunnel syndrome. CABR Atteridge 7, 30. Following those three visits in 1994, Ms. Smith did not receive any medical treatment for hand or wrist pain until after her 1997 industrial injury, and the first mention of carpal tunnel in Ms. Smith medical records occurred in September of 1998; however, the first reference to carpal tunnel treatment for Ms. Smith did not occur until 2001. CABR McPhee 8, 29. CABR Berndt 28. Indeed, two medical examinations that took place shortly *after* her industrial injury showed that Ms. Smith had good grip strength and that she did not have any upper extremity impairment. CABR Berndt 21-22.

2. Even If Ms. Smith Had Some Prior Condition, It Was Not Disabling As Required By RCW And Case Law

Even assuming Ms. Smith had carpal tunnel syndrome prior to her industrial injury, there is no evidence was “disabling” until after her industrial injury. As *Rothschild* explains, it is not sufficient for an employer to show that an injured worker had a medical condition prior to the industrial injury: the employer must also show that the preexisting condition resulted in some sort of impairment or interference with the

claimant's ability to work prior to the industrial injury. *Rothschild*, 3 Wn. App. at 969-70; *see also In re Funk*, 1991 WL 87432 at *2; *In re Anderson*, 90 WL 310624 at *2.

Here, there is no evidence that Ms. Smith's allegedly pre-existing carpal tunnel syndrome either resulted in any disability or that it interfered with her ability to perform her job duties as a bagger *in any way*. Ms. Smith did not ask for, and did not receive, any sort of accommodation to enable her to perform her job duties. There is no evidence that Ms. Smith's allegedly pre-existing carpal tunnel syndrome had any impact on Ms. Smith's ability to work in any capacity.

Indeed, no medical doctor put any restrictions on Ms. Smith's ability to work based on her hand or wrist complaints until well after her 1997 injury. CABR Berndt 19-20; CABR Atteridge 15, 31; CABR Gorker 16. This is particularly striking given that Ms. Smith's job was one that required a great number of repetitive hand and wrist movements.

As the Department's vocational expert, Ms. Berndt, noted, none of the usual warning signs as to possible disability manifested themselves prior to the 1997 leg injury:

[Ms. Smith] never sought treatment or required some of the usual things we tend to see, such as medication, physical or occupational therapy, a hand therapy program, a conditioning program, surgery, any of those kinds of things, time off, requests to change her job, or do anything like that. None of those occurred.

CABR Berndt 30.

Prior to Ms. Smith's industrial injury she was not suffering from anything more than the usual physical symptoms associated with aging and performing a repetitive, production speed job for 18 years. Rather, it was only when Ms. Smith attempted retraining that her carpal tunnel condition "evolved" and exacerbated her wrist condition to a point of disability. CABR Atteridge 12, 17.

Ms. Smith's supervisor at Crown, Mr. Gorke, specifically testified that he did *not* consider her disabled prior to her industrial injury. CABR Gorke 17. Perhaps more importantly, Mr. Gorke specifically testified that Ms. Smith was never rendered unable to perform her job as a result of her carpal tunnel symptoms at any time prior to her industrial injury. CABR Gorke 16.

It is also noteworthy that Dr. Atteridge could not say whether or not Ms. Smith was disabled due to her carpal tunnel at the time of her 1997 industrial injury. CABR Atteridge 15.

The testimony of the Department's vocational expert, Barbara Berndt, also demonstrates that there was no disability prior to the 1997 injury:

Ms. Smith came from another country, learned English, obtained work, stayed in the work, demonstrated the ability to be very successful. Her earnings note that she was able to stay in that job and be assigned for different jobs. So when I'm looking for something preexisting, I want to see something that thwarts that person's ability to do jobs or have to accommodate or modify or they're truncated in some sort of aspect of their life because they can't do things. It appears that she was able to function at work and do her job. It appears that she was able to function at

home, pay her bills, get back and forth to work, raise two sons. I couldn't find things that would show that there was an impact on her work or home or any kind of relationships due to physical, psychological, mental, emotional, cognitive, or any kind of limitations.

CABR Berndt 36-37.

Ms. Smith may have had wrist pain, but she simply was not disabled in any way until she was run over by a fork lift in 1997.

There is no evidence that Ms. Smith was "disabled" by any hand or wrist condition prior to her industrial injury. The only evidence of disability relating to Ms. Smith's hand or wrist condition – if any – is that it became disabling after her 1997 industrial injury to her leg, and that it became disabling as a direct result of her participation in a vocational retraining plan. CABR Atteridge 12, 16-17. The employer is not entitled to second injury fund relief.

Crown argued below that there is evidence of prior disability because, prior to Ms. Smith's 1997 injury, (1) she wore splints and (2) Crown modified the bagging machine. VRP 9. However, neither argument has any merit.

First, although Ms. Smith periodically wore wrist splints, there is no evidence that Ms. Smith's use of such splints interfered with either her ability to perform her job or her ability to perform the activities of her daily life. Notably, Ms. Smith was not directed by a doctor to wear the splints at all times; rather, this was something that she chose to do in an attempt to reduce her hand and wrist pain. CABR Berndt 56, 72, 80.

Furthermore, the fact that, in response to the complaints by the baggers as a group, Crown changed the bagging machine does not show that Crown "modified" the bagging job to individually accommodate Ms. Smith. Nor does it show that Ms. Smith's ability to work as a bagger was restricted or impaired in any way by the alleged "preexisting" medical condition.

VIII. CONCLUSION

The superior court's decision to grant Crown second injury fund relief is incorrect as a matter of law. Therefore, the Department respectfully requests that this Court reverse and direct the Superior Court to affirm the Board and Department decisions denying second injury fund relief to Crown.

RESPECTFULLY SUBMITTED this 26th day of March, 2008.

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**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND
INDUSTRIES,

Appellant,

v.

CROWN CORK AND SEAL,

Respondent.

DECLARATION
OF MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the ____ day of March 2008, I delivered the Brief of Appellant Department of Labor and Industries to all parties by ABC Legal Messenger addressed as follows:

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