

COURT OF APPEALS  
DIVISION II

No. 42456-8-II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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LOIS J. NELSON (DEC'D),

Appellant,

v.

STATE OF WASHINGTON AND DEPARTMENT OF  
LABOR & INDUSTRIES,

Respondents.

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BRIEF OF APPELLANT

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Philip A. Talmadge, WSBA #6973  
Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661

David B. Vail, WSBA #7452  
Law Offices of David B. Vail  
819 Martin Luther King Jr. Way  
Tacoma, WA 98415-0707  
(253) 383-8770

Attorneys for Appellant  
Lois J. Nelson

## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii-iv
A. INTRODUCTION .....	1
B. ASSIGNMENTS OF ERROR .....	2
(1) <u>Assignments of Error</u> .....	2
(2) <u>Issues Pertaining to Assignments of Error</u> .....	3
C. STATEMENT OF THE CASE.....	3
D. SUMMARY OF ARGUMENT .....	9
E. ARGUMENT .....	10
(1) <u>Standard of Review</u> .....	10
(2) <u>Nelson’s Estate Was Entitled to Receive a PPD Award Despite the Finding of PTD</u> .....	11
(a) <u>IIA Background and Relevant Authority</u> .....	11
(b) <u>The Timing of Department’s Actions and Its Substantive Decisions Worked to Nelson’s Disadvantage and to the Advantage of the Department and the Employer</u> .....	16
(3) <u>The Evidence Showed that Nelson Was Not Permanently Totally Disabled, and that She Had a Category 4 Lumbrosacral PPD</u> .....	19

(a) Nelson’s Mental Disability Was Partial, Not Total, Thus a Finding that She Was Mentally Permanently Totally Disabled Was Incorrect as a Matter of Law and Also Not Supported by the Evidence .....19

(b) Nelson’s Physical Disability Was a Permanent Partial Category 4 Lumbrosacral Impairment.....22

(4) Nelson Is Entitled to an Award of Attorney Fees at Trial and On Appeal .....24

F. CONCLUSION.....24

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<u>Washington Cases</u>	
<i>Brand v. Dep't of Labor &amp; Indus.</i> , 139 Wn.2d 659, 989 P.2d 1111 (1999).....	24
<i>Cayce v. Dep't of Labor &amp; Indus.</i> , 2 Wn. App. 315, 467 P.2d 879 (1970).....	13
<i>Clauson v. Dep't of Labor &amp; Indus.</i> , 130 Wn.2d 580, 925 P.2d 624 (1996).....	10, 11, 16
<i>Clayton v. Dep't of Labor &amp; Indus.</i> , 48 Wn.2d 754, 296 P.2d 676 (1956).....	23
<i>Dowell v. Dep't of Labor &amp; Indus.</i> , 51 Wn.2d 428, 319 P.2d 843 (1957).....	12
<i>Ellis v. Dep't of Labor &amp; Indus.</i> , 88 Wn.2d 844, 567 P.2d 224 (1977).....	13
<i>Fochtman v. Dep't of Labor &amp; Indus.</i> , 7 Wn. App. 286, 499 P.2d 255 (1972).....	14
<i>Grimes v. Lakeside Indus.</i> , 78 Wn. App. 554, 897 P.2d 431 (1995) .....	10
<i>Hamilton v. Dep't of Labor &amp; Indus.</i> , 111 Wn.2d 569, 761 P.2d 618 (1988).....	11
<i>Hi-Way Fuel Co. v. Estate of Allyn</i> , 128 Wn. App. 351, 115 P.3d 1031 (2005).....	24
<i>Hiatt v. Dep't of Labor &amp; Indus.</i> , 48 Wn.2d 843, 297 P.2d 244 (1956).....	19
<i>Hubbard v. Dep't of Labor &amp; Indus.</i> , 140 Wn.2d 35, 992 P.2d 1002 (2000).....	12, 13, 20
<i>Intalco Aluminum v. Dep't of Labor &amp; Indus.</i> , 66 Wn. App. 644, 833 P.2d 390 (1992), <i>review denied</i> , 120 Wn.2d 1031 (1993) .....	10
<i>McIndoe v. Dep't of Labor &amp; Indus.</i> , 144 Wn.2d 252, 26 P.3d 903 (2001).....	13, 14
<i>Page v. Dep't of Labor &amp; Indus.</i> , 52 Wn.2d 706, 328 P.2d 663 (1958).....	13
<i>Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.</i> , 102 Wn. App. 422, 10 P.3d 417 (2000), <i>review denied</i> , 142 Wn.2d 1018 (2001) .....	11

<i>Peterson v. Dep't of Labor &amp; Indus.</i> , 22 Wn.2d 647, 157 P.2d 298 (1945).....	15
<i>Seattle Sch. Dist. No. 1 v. Dep't of Labor &amp; Indus.</i> , 116 Wn.2d 352, 804 P.2d 621 (1991).....	8
<i>Young v. Dep't of Labor &amp; Indus.</i> , 81 Wn. App. 123, 913 P.2d 402, <i>review denied</i> , 130 Wn.2d 1009 (1996).....	11

Statutes

RCW 51.04.010 .....	11
RCW 51.08.150 .....	12
RCW 51.08.160 .....	12
RCW 51.12.010 .....	10, 11
RCW 51.16.130 .....	24
RCW 51.32.040(2)(a) .....	15, 18
RCW 51.32.060 .....	12, 14, 15
RCW 51.32.067 .....	8
RCW 51.32.080 .....	12, 18
RCW 51.32.080(4).....	14
RCW 51.32.090 .....	12
RCW 51.32.130 .....	14, 17
RCW 51.52.060 .....	8
RCW 51.52.115 .....	10
RCW 51.52.130 .....	24

Rules and Regulations

RAP 18.1.....	24
WAC 296-20-01002.....	13
WAC 296-20-200(4).....	13
WAC 296-20-280.....	23
WAC 296-20-330(1)(d) .....	23
WAC 296-20-680.....	23

## A. INTRODUCTION

The Department of Labor and Industries (“Department”), by a failure to timely resolve an industrial insurance claim, deprived Lois J. Nelson of the sure and certain relief guaranteed her under the law as a worker injured on the job. After she was injured in 2003, Nelson began receiving time loss and medical benefits as she tried to return to employment. In 2005, she was diagnosed as having a fixed and stable permanent partial disability (“PPD”) of her lower back, and a related ongoing mental disability that was not fixed and stable. Had the Department concluded Nelson’s mental condition was fixed and stable in 2005, she would have been entitled to a pension or a lump sum settlement. However, the Department did not so find, and she continued receiving time loss benefits for another year, when she suddenly died in 2006.

The Department then belatedly acted to define Nelson’s medical conditions posthumously. Based on the previous medical findings and the fact that Nelson was still receiving time loss payments at the time of her death, the natural conclusion was that she had a permanent partial disability of the lower back, and a temporary total mental disability. Had the Department so concluded, Nelson’s estate would have been entitled to the benefit for her back injury.

The Department instead concluded in two separate orders that Nelson was both permanently partially disabled *and* permanently totally disabled (“PTD”) at the time of her death. The Department then determined that her estate was entitled to no benefits. Instead, the Department ordered the employer to pay \$7,455.81 *to the Department* as a “cost experience” for her PPD. The Department’s actions were affirmed by the Board of Industrial Insurance Appeals (“Board”).

Nelson appealed to Pierce County Superior Court and the case was assigned to the Honorable Linda CJ Lee, who affirmed. The trial court here erred in affirming the decision of the BIIA. The Department’s actions here were designed solely to benefit the Department and the employer, and denied Nelson the relief to which she and her family were entitled.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in entering judgment on July 15, 2011 against Nelson and affirming the Department’s order that Nelson was permanently and totally disabled at the time of her death.
2. The trial court erred in entering conclusion of law 2.3.
3. The trial court erred in entering conclusion of law 2.5.
4. The trial court erred in entering conclusion of law 2.6.

5. The trial court erred in entering conclusion of law 2.7.

6. The trial court erred in entering an award of attorney fees to the Department in its judgment entered July 15, 2011.

(2) Issues Pertaining to Assignments of Error

1. Does the posthumous finding of PTD preclude the simultaneous award of PPD, even when there is no double payment because by law no pension is paid to the claimant's estate? (Assignments of Error Nos. 1, 3, 4, 5)

2. May the Department deprive a worker's estate of a PPD award by posthumously finding that the worker was simultaneously permanently totally disabled and permanently partially disabled, when there is no dispute that the PPD alone would not have precluded the worker from returning to work? (Assignments of Error Nos. 1, 3, 4, 5)

3. Was a posthumous finding that Nelson was both permanently totally disabled mentally, and permanently partially disabled physically at Category 2, supported by the evidence, which showed that her mental condition was not fixed and stable, and that her permanent back disability was at Category 4? (Assignment of Error No. 2)

4. Is Nelson entitled to an award of attorney fees at trial and on appeal? (Assignment of Error No. 6)

C. STATEMENT OF THE CASE

The industrial injury at issue here occurred on June 29, 2003 while Nelson was employed at Supported Living Services. CP 138. On that date, Nelson, while on duty, sat down on a patio chair that collapsed. *Id.* She fell onto a concrete floor, and experienced immediate low back pain; she did not return to work the next day. *Id.* at 139. The industrial injury aggravated Nelson's pre-existing back injury, and a pre-existing psychological condition. *Id.*

Nelson filed a claim under Title 51 RCW, the Industrial Insurance Act ("IIA"), on August 19, 2003. Her claim was allowed, and benefits were paid. On September 7, 2003, she returned to work and started treatment. CABR 07/28/08 transcript at 27. She received physical therapy for her back injury, and was paid time loss compensation for her temporary permanent disability intermittently between August 2003 and July 2006. She worked with doctors and counselors to return to work. *Id.*

In the first half of 2005, Nelson was evaluated by a number of physicians at the Department's behest. An orthopedic surgeon and a pain management and rehabilitation specialist conducted an independent medical examination ("IME") of Nelson. The examiners concluded that her back condition was fixed and stable, and said she could work in

sedentary or light category work conditions. *Id.* at 34, 39.<sup>1</sup> Her attending physician at the time noted that unrelated preexisting conditions were potential barriers to employment, but did not determine her to be totally and permanently disabled. *Id.* at 35; CABR 07/29/08 at 49. She had been using a walker. CABR 07/28/08 at 30.

Around the same time in May 2005, a psychological IME revealed her psychological disability was ongoing. *Id.* at 65. The IME concluded that based solely on her physical condition, she probably would have been employable. *Id.* However, her mental condition precluded employment at the time. *Id.*

Nelson was evaluated for a pain management program in March 2005, but was not accepted. However, only one in four patients referred to the program are ever accepted. CABR 07/29/08 transcript at 9-10. The vocational counselor for the pain management program certified that Nelson was employable in sedentary work. *Id.* at 28. Another vocational counselor who saw Nelson in March 2005 thought that she would not benefit from vocational retraining due to her numerous mental and

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<sup>1</sup> Had the back injury been considered on its own as the sole basis for her right to benefits, the fact that Nelson's back condition had reached maximum medical improvement or was fixed and stable would have entitled her to claim closure and a PPD award in 2005. However, the Department's position was that her back injury had caused her mental state to deteriorate to the point that she was not yet capable of gainful employment, so her claim was kept open and time loss continued as she worked in these issues.

physical conditions. However, the vocational counselor did not conclude in 2005 that Nelson was unemployable. *Id.* at 37, 40.

From June 2005 to August 2006, Nelson received little medical treatment. *Id.* at 21. There are some medical notes in early 2006, and she was vocationally evaluated in July 2006. But she did continue to receive time-loss compensation, presumably based on her mental disability since the IME had concluded her back injury was fixed and stable. CABR 43.

According to the physicians in the 2005 IMEs, and the Department's admissions, Nelson's back injury was fixed and stable as a PPD, a Category 4 lumbrosacral impairment. CABR 07/28/08 at 35; CABR 07/28/08 at 33; CABR 56. However, the Department did not pay her a PPD or other benefit for that permanent loss of bodily function before her death in August 2006. CP 43. In fact, the Department made no determination regarding Nelson's conditions, nor paid benefits for any permanent conditions to Nelson before her death. CP 43.<sup>2</sup> The Department continued to pay time loss benefits to Nelson until the day before her death, which occurred August 3, 2006.<sup>3</sup>

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<sup>2</sup> Time loss payments are only made for temporary total disability. The fact that Nelson continued to receive time loss payments indicates that the Department considered her disability to be temporary during that period.

<sup>3</sup> In July 2006, Nelson attended her family reunion in Las Vegas. She decided to move there to be nearer her family. CABR 07/28/08 at 4-5. She drove with her daughter and goddaughter from Washington to Las Vegas. She did some of the driving, at least four hours. CABR 07/28/08 at 9. She was no longer using her walker. *Id.* at 10.

After Nelson's death, the Department finally took steps to resolve her claim. As of the date of her death, the Department had an affirmative diagnosis from 2005 of a Category 4 lumbrosacral impairment that was fixed and stable. CABR 07/28/08 at 35; CABR 07/28/08 at 33; CABR 56; CP 43. The Department also apparently considered Nelson to have a temporary total disability based on her mental condition, as reflected in the continued time loss payments. *Id.*

However, the Department did not issue closing orders reflecting her status at the time of her death. Instead, the Department considered the issue *for a year*, and concluded she was *permanently* totally disabled by her mental condition as of August 3, 2006. Because Nelson had not been medically examined for more than a year, the Department looked at the 2005 medical records. CABR 7/29/08 at 5, 36. Despite the fact that those reports did not conclude that she was permanently totally disabled, and despite the fact that she continued to receive time loss benefits up until her death, the Department concluded in an order dated July 3, 2007, that at the time of her death Nelson was permanently totally disabled, and entitled to a pension. CABR 30. However, a pension is only paid after a worker's

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She had plans for her future, but they were cut short when she died 10 days after moving to Las Vegas on August 3, 2006. *Id.* at 9.

death if the worker has beneficiaries, and Nelson had no beneficiaries as that term is defined in the IIA. RCW 51.32.067.<sup>4</sup>

Two days later, on July 5, the Department issued another order. CABR 10/1/08 Ex. 2. This second order concluded that, for the purposes of reimbursing the Department's second injury fund,<sup>5</sup> Nelson's injury chargeable to her employer was a Category 2 lumbrosacral PPD. *Id.*<sup>6</sup> Her employer was required to pay the Department over \$7,000, but her estate received nothing.

Thus, the finding of PTD was used as a justification to deny Nelson's estate the PPD award. Because the Department said that the permanent total mental disability and permanent partial physical disability were related, and that Nelson had been "placed on pension" (despite the fact that she received nothing) the Department concluded that her estate was not entitled to payment for her PPD.<sup>7</sup>

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<sup>4</sup> Although a living worker may elect to receive a lump sum settlement payment rather than a pension, a worker's estate may not so elect. RCW 51.32.067.

<sup>5</sup> The second injury fund statute provides that, when a previously disabled employee suffers an on-the-job injury and the combined effect of the previous disability and the injury results in total and permanent disability, the employer pays only the accident cost attributable exclusively to the industrial injury. The second injury fund covers the remainder. *Seattle Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 356, 804 P.2d 621, 623 (1991).

<sup>6</sup> This order was not communicated to Nelson's estate, and as such is not final. RCW 51.52.060. The BIIA did rely upon that order in its findings of fact. CP 26.

<sup>7</sup> Had the Department considered Nelson's mental disability to be temporary at the time of her death, time loss payments would still have ceased, but her estate would

Nelson's estate challenged the Department's order finding her permanently totally disabled and paying nothing. CP 2. The Board of Industrial Insurance appeals affirmed the Department's order, and on de novo review to the Thurston County Superior Court, the trial court also affirmed the Board's ruling. CP 129-33. The estate timely appealed to this Court. CP 135.

D. SUMMARY OF ARGUMENT

Both the letter and spirit of the IIA were thwarted here when the Department made its belated, erroneous posthumous determination that Nelson was permanently totally disabled, and denied any payment to her estate. The Department's position was erroneous because it concluded for the purposes of its own second injury fund that Nelson was only permanently partially disabled. Nelson never received a pension for PTD, therefore she was entitled to the PPD award, consistent with the Department's second injury fund decision, which benefitted the Department.

The trial court's ruling upholding the Department's order was also unsupported by the evidence. There was no evidence that Nelson was

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have been entitled to payment for her permanent partial back disability. If her mental conditions would someday have improved to the point that she could return to work, the PPD of her back was diagnosed as fixed and stable, and separately compensable from lost wages. *See supra* Section E(2). The Department does not dispute that Nelson's back injury was a permanent partial disability. CABR 10/1/08 Ex. 2.

permanently totally disabled. A retroactive PTD determination was improper. Also, the evidence supported the view that her PPD was a Category 4 lumbrosacral impairment, not Category 2.

The superior court's order should be reversed, and Nelson's estate should be awarded a payment for her permanent partial Category 4 lumbrosacral impairment.

E. ARGUMENT

(1) Standard of Review

The IIA must be liberally construed “for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. Legal issues are always reviewed *de novo*, and all doubts as to the meaning of the Act must be resolved in favor of the injured worker. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

In an appeal of a decision of the BIIA, the BIIA's findings and conclusions are presumed correct. *Intalco Aluminum v. Dep't of Labor & Indus.*, 66 Wn. App. 644, 653, 833 P.2d 390 (1992), *review denied*, 120 Wn.2d 1031 (1993). The superior court holds a *de novo* hearing, but does not hear any evidence or testimony other than that contained in the BIIA record. *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995); RCW 51.52.115. This Court examines 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." *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402, *review denied*, 130 Wn.2d 1009 (1996). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. *Panorama Village Homeowners Ass'n v. Golden Rule Roofing, Inc.*, 102 Wn. App. 422, 425, 10 P.3d 417 (2000), *review denied*, 142 Wn.2d 1018 (2001).

(2) Nelson's Estate Was Entitled to Receive a PPD Award Despite the Finding of PTD

(a) IJA Background and Relevant Authority

The IJA is unique. *Hamilton v. Dep't of Labor & Indus.*, 111 Wn.2d 569, 572, 761 P.2d 618 (1988). It is remedial in nature, and its beneficial purpose must be liberally construed in favor of injured workers like Nelson, not employers or the Department. *Id.* It is mandatory that this Court construe the IJA liberally. RCW 51.12.010. All doubts as to the meaning of the Act must be resolved in favor of the injured worker. *Clauson*, 120 Wn.2d at 584. The IJA provides "sure and certain" remedies, including medical, time loss, and pension benefits, to workers who are injured on the job. RCW 51.04.010.

Worker's injuries are categorized under the IIA for the purposes of establishing the benefits workers are owed. Three of those injury categories are relevant here. "Temporary total disability" is a disability that currently prevents the worker from any gainful employment, but which is expected to improve. RCW 51.32.090. Time loss compensation (as opposed to a pension) may *only* be paid to a worker that is temporarily disabled. *Id.* "Permanent total disability," which entitles workers to a pension, means "inability to work at any gainful occupation." RCW 51.08.160. *Dowell v. Dep't of Labor & Indus.*, 51 Wn.2d 428, 433, 319 P.2d 843, 846 (1957). A Department finding of PTD entitles a worker to a pension. RCW 51.32.060. "Permanent partial disability" means "a partial incapacity to work as measured by loss of bodily function." RCW 51.08.150; *Dowell*, 51 Wn.2d at 433.<sup>8</sup> A worker who is permanently partially disabled is entitled to a one-time, lump sum award set out in a schedule of benefits. RCW 51.32.080.

Temporary total disability and PTD are two points on the same continuum. Workers in these two categories both receive benefits for the same reason: to compensate for their inability to work and earn a living.

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<sup>8</sup> Temporary partial or total disabilities are those injuries which interfere with ability to work, but which may improve over time such that the worker may be able to work in the future. RCW 51.32.090; *Hubbard*, 140 Wn.2d at 43.

*Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000).

However, PTD and PPD are *not* two points on a continuum. *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 261, 26 P.3d 903, 908 (2001). They are “two separate concepts.” *Ellis v. Dep't of Labor & Indus.*, 88 Wn.2d 844, 851, 567 P.2d 224 (1977).

Instead, PPD is awarded to compensate for loss of bodily function, not lost wages. *McIndoe*, 144 Wn.2d at 261. The Legislature established a specific cash award for specific amputations and losses of faculties to compensate workers “in accordance with loss of bodily function (as distinguished from partial loss of earning power).” *Page v. Dep't of Labor & Indus.*, 52 Wn.2d 706, 712, 328 P.2d 663 (1958); *see also*, WAC 296-20-01002 (“Permanent partial disability: ... under Washington law disability awards are based solely on physical or mental impairment due to the accepted injury or conditions *without consideration of economic factors*”) (emphasis added).

In fact, it is error to consider loss of earning power in fixing a PPD award. *Cayce v. Dep't of Labor & Indus.*, 2 Wn. App. 315, 317, 467 P.2d 879 (1970). Two individuals who have the same loss of function are entitled to the same PPD award, even if the impact on their earning capacity is different for each. WAC 296-20-200(4). For example, the loss

of a finger might have little disabling effect on a stevedore, but would be devastating to the earning ability of a pianist. *Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 294, 499 P.2d 255, 260 (1972). Nevertheless, both the stevedore and the pianist are entitled to the same PPD award. *Id.* Thus, PPD awards are not specifically tied to wage earning ability. *McIndoe*, 144 Wn.2d at 261-62.

If a worker is permanently partially disabled and paid a lump sum award for loss of bodily function, and then later is adjudged to be permanently totally disabled based on the same injury, the worker is still entitled to a pension. However, the lump sum previously paid is deducted from the PTD pension or lump sum (if elected) to avoid double payment. RCW 51.32.080(4).

Despite the clarity of the IIA's enumerated benefits, the timing of the Department's actions can materially affect a worker's rights. Specifically, the fact that a determination is made before a worker's death provides many more protections and options than when made after that worker's death.

When the Department adjudges a living worker to be permanently totally disabled, that worker can elect to receive a monthly pension, RCW 51.32.060, or take a lump sum settlement in lieu of the pension. RCW 51.32.130. If the worker is adjudged to be permanently totally disabled,

but believes he or she can still work, the worker may appeal that classification and argue that he or she is only permanently partially disabled. *Peterson v. Dep't of Labor & Indus.*, 22 Wn.2d 647, 651, 157 P.2d 298, 300 (1945). If a worker elects to receive a monthly pension, and then dies from a cause unrelated to the injury, only beneficiaries of the worker – spouses and dependent children – may continue receiving the pension. RCW 51.32.060. Of course, if the worker elected a lump sum in lieu of a pension before passing away, that money belongs to the worker's estate regardless of whether the worker has any beneficiaries as described in the statute.

However, if a worker dies while a claim is ongoing, before the Department has made any finding of disability, the situation is more complicated. If the Department adjudges that the worker was permanently partially disabled at the time of death, the worker's estate is entitled to the benefit for the worker's loss of bodily function. RCW 51.32.040(2)(a). If the Department concludes that the worker was permanently totally disabled, however, the worker's estate receives nothing. RCW 51.32.067.

This case demonstrates how critical the Department's timing can be to a worker's rights.

(b) The Timing of Department's Actions and Its Substantive Decisions Worked to Nelson's Disadvantage and to the Advantage of the Department and the Employer

Our Supreme Court has held that “the timing of the closure of claims should not work to the disadvantage of an injured worker.” *Clauson*, 130 Wn.2d at 582. In *Clauson*, a worker had two ongoing injury claims, one for a hip injury and one for a back injury. The Department closed the back claim finding PTD, while the hip claim was still ongoing. *Id.* at 583. Then the Department closed the hip claim, finding PPD of the leg. *Id.* The Department denied the worker a PPD award, concluding that because he was already on a pension for the back injury, he was not entitled to any more benefits. *Id.* Our Supreme Court disagreed, holding that had the orders been reversed, the worker would have been entitled to both benefits, and the Department's timing of the claim closure should not operate to the worker's disadvantage. *Id.* at 585-86.

Here, Nelson died from an unrelated cause while her claim was ongoing. In a strange pair of rulings, the Department posthumously adjudged her to be permanently totally disabled for the purposes of her claim, resulting in no award to her estate. CABR 30. However, two days later the Department issued an order stating that Nelson was permanently partially disabled with a Category 2 lumbrosacral impairment in

connection with the second injury fund calculation, resulting in payment to the Department but not to Nelson. CABR 10/1/08 Ex. 2.<sup>9</sup> The Department did not charge the employer's cost experience with the PTD, despite finding that, in the Department's view, the back injury directly caused Nelson's PTD.

The timing of the Department orders thwarted the beneficial purposes of the IIA. There is no explanation of the Department's inaction between June 2005 and August 2006. Had the Department acted to resolve her claim, Nelson would have been entitled to rights and choices regarding her benefits that were waived because of her intervening death. For example, she could have elected to receive a lump sum payment instead of a pension. RCW 51.32.130. Now, her estate is not entitled to make that election.

The Department's orders benefited the Department and the employer. Nelson was still receiving time loss benefits up until the date of her death, meaning that the Department still considered her temporarily totally disabled. Then, posthumously, the Department concluded that she was *permanently* totally disabled, despite the fact that no pension would actually be paid. As a consequence of this new finding of PTD, the

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<sup>9</sup> The second order also stated that Nelson was "placed on pension," which of course was incorrect. CABR 10/1/08 Ex. 2.

Department claimed that Nelson's estate is not entitled to any award for her PPD, claiming "the two are mutually exclusive." CP 16.

The IIA is intended to benefit workers, and should not have been abused to benefit the Department and the employer. If the Department considered Nelson's mental disability to be temporary on August 2, as reflected by the time loss payment for that date (CABR 43), that is the finding that should have prevailed. Instead, the Department worked for a year to make a case that Nelson was *permanently* totally disabled as of August 2, which is *impossible* as a matter of law.

Even assuming the Department's finding of PTD is correct, it does not preclude payment to Nelson's estate of the PPD award for her back injury. A finding of PTD does not preclude a PPD award as long as there is no double payment. RCW 51.32.080. Here, there is no double payment because Nelson's estate was precluded from collecting a pension. Therefore, the Department erred in denying Nelson's estate the PPD award for her back. RCW 51.32.040(2)(a).<sup>10</sup>

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<sup>10</sup> Even assuming the Department is correct, and that the PTD finding precluded Nelson's family from receiving the permanent partial disability award, the result here is not in keeping with the Department's duties to enforce the IIA. The Department reached the only conclusion that resulted in no payment to Nelson's family. Had the Department concluded that Nelson was only temporarily totally disabled mentally, but that her back injury was a PPD, Nelson's estate would have been entitled to the PPD award.

The Department erred in refusing to award Nelson's estate a PPD award. The trial court misapplied the law to this record, and its order affirming the BIIA should be reversed.

(3) The Evidence Showed that Nelson Was Not Permanently Totally Disabled, and that She Had a Category 4 Lumbrosacral PPD

The trial court affirmed that Nelson was permanently totally disabled as of the date of her death. CP 131.

The evidence does not support the trial court's findings. Nelson's mental impairment was not fixed and stable at the time of her death. The only physician to definitively categorize Nelson's back impairment said it was a Category 4 PPD. The trial court's order affirming the Department should be reversed.

(a) Nelson's Mental Disability Was Partial, Not Total, Thus a Finding that She Was Mentally Permanently Totally Disabled Was Incorrect as a Matter of Law and Also Not Supported by the Evidence

For a disability to be "permanent" it must be fixed, lasting, stable, and not remediable. *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 845-46, 297 P.2d 244, 246 (1956). Our Supreme Court has held that a disability should *only* be considered permanent unless it is "*appears pretty clearly* that the affliction will not yield to treatment, and that the workman

will never be able to work at any gainful occupation.” *Id.* (emphasis added).

The trial court concluded that the Department was correct in categorizing Nelson’s mental condition, aggravated by the permanent partially disabling back injury, as fixed, lasting, stable, and not remediable, because the Department found her to be permanently and totally disabled. CP 131.

As explained *supra* section E(2)(b), the findings that Nelson was both temporarily totally disabled and permanently totally disabled are incorrect as a matter of law. If the Department believed Nelson to be eligible for time loss compensation as of the date of her death, that is an implicit finding of temporary disability. Yet in closing her claim posthumously, the Department concluded that she was permanently disabled as of the date of her death. Nelson could not simultaneously be both temporarily and permanently disabled. *Hubbard*, 140 Wn.2d at 43.

There is no explanation of why, if Nelson was permanently totally disabled at the time of her death, she was still eligible to receive time loss compensation as of August 2. As the Department itself took pains to emphasize below, workers who are *permanently* totally disabled are ineligible to receive time loss compensation, which is only awarded for *temporary* total disability. CP 33. The Department asked the trial court,

and presumably will ask this Court, to believe that by passing away, Nelson transformed from being temporarily disabled to totally disabled. This is contrary to logic and the evidence.

Also, the evidence here supported, at best, a finding that her mental condition was not permanently totally disabling. The only medical evidence of her mental status by a doctor that actually examined Nelson was a May 27, 2005 psychological IME, which concluded that Nelson's mental condition was not fixed and stable. CABR 07/28/08 at 34, 65. Doctors conducting a June 20, 2005 vocational IME also suggested that her mental disability had not reached maximum medical improvement. *Id.* at 67. A witness for Nelson who viewed her medical records opined that her mental disability was fixed and stable, but was only *partially* disabling. *Id.* at 68.<sup>11</sup>

The Department's evidence that Nelson was permanently totally disabled was seriously undermined. For example, a pain management specialist the Department retained, Dr. Stephen Litsky, examined Nelson with his team in 2005. They issued a report concluding that she was, in fact, capable of gainful employment. CABR 7/29/08 at 28. However, when Dr. Litsky testified for the Department at the hearing, having never

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<sup>11</sup> A finding that her mental condition was only permanently partially disabling would have entitled Nelson's estate to a further PPD award for the residual mental disability she experienced.

re-examined Nelson, he opined that Nelson was not “capable of employment” at the time of her death. CABR 7/29/08 at 21.<sup>12</sup> When confronted with the contradiction between his testimony and the report of his own clinical team, the doctor stated that his team member was “a little bit liberal with the word medical.” *Id.*

From this evidence, it does not “appear pretty clearly” that Nelson was permanently incapable of employment at the time of her death, as required by our Supreme Court. *Hiatt*, 48 Wn.2d 843, 845-46. Not only is there no definitive medical finding regarding her employability during her life, but even the Department’s own posthumous opinion evidence is conflicting.

Although the evidence did not support a finding of PTD, the Department so found, and the trial court affirmed. Substantial evidence did not support a finding that Nelson was “pretty clearly” permanently totally disabled.

(b) Nelson’s Physical Disability Was a Permanent Partial Category 4 Lumbrosacral Impairment<sup>13</sup>

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<sup>12</sup> It is notable that Dr. Litsky never opined that Nelson was permanently totally disabled, only that she was allegedly incapable of employment “at the time of her death.” CABR 7/29/08 at 21.

<sup>13</sup> Again, although the Department’s order regarding Nelson’s permanent partial disability is not final, and thus not appealable, it is in the record and was adopted into the BIIA’s findings below. CABR 26. Nelson appeals this finding in an abundance of caution.

PPD awards for lumbrosacral impairments are valued by assessing the amount of disability the worker has incurred on a spectrum of categories. WAC 296-20-280. The categories refer strictly to the loss of body function, they are not related to the worker's ability or inability to work. *Id.* The categories of impairment are then classified as percentages of loss of body function, depending on the particular disability. WAC 296-20-680.

Although non-medical persons such as vocational counselors may testify generally to a worker's ability to return to work, only physicians may testify to the categorization, and thus a percentage, of disability. *Clayton v. Dep't of Labor & Indus.*, 48 Wn.2d 754, 757, 296 P.2d 676, 678 (1956); WAC 296-20-330(1)(d).

Here, the Board record demonstrates that Nelson suffered a permanent partial Category 4 lumbrosacral impairment at the time of her death. CABR 7/28/08 at 39. That was the only definitive testimony regarding her categorization. *Id.* A pain management specialist stated that she might have been category three, but he did not see an MRI and could not confirm this. CABR 7/29/08 at 20.

With only one medical categorization in the record putting her at Category 4, the trial court erred in affirming that Nelson had a Category 2 impairment. The finding should be reversed.

(4) Nelson Is Entitled to an Award of Attorney Fees at Trial and On Appeal

If the BIIA's decision and order are reversed or modified on appeal to the superior court or this Court and additional relief is granted to a worker, this Court must fix a reasonable attorney fee for the worker's attorney. RCW 51.52.130. This statute encompasses fees in both the superior and appellate courts when both courts review the matter. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999); *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1031 (2005). For the reasons set forth above, Nelson is entitled to payment for her PPD. The BIIA's decision and order, and the judgment on the jury verdict, should be reversed. Nelson is entitled to an award of attorney fees in both this Court and the trial court pursuant to RCW 51.16.130 and RAP 18.1.

F. CONCLUSION

The trial court erred in affirming the BIIA on this record. Both legally and factually, Nelson's estate was entitled to a PPD award for her category 4 lumbrosacral impairment. The Department inappropriately benefited from its posthumous decision regarding Nelson's conditions, which were not supported by the facts.

This Court should reverse the trial court, and remand for payment to Nelson's estate the proper benefits for her PPD.

DATED this 25<sup>th</sup> day of January, 2012.

Respectfully submitted,



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Philip A. Talmadge, WSBA #6973  
Sidney Tribe, WSBA #33160  
Talmadge/Fitzpatrick  
18010 Southcenter Parkway  
Tukwila, WA 98188-4630  
(206) 574-6661

David B. Vail, WSBA #7452  
Law Offices of David B. Vail  
819 Martin Luther King Jr. Way  
Tacoma, WA 98415-0707  
(253) 383-8770

Attorneys for Appellant  
Lois J. Nelson

DECLARATION OF SERVICE

On said day below I emailed and deposited in the U.S. Mail a true and accurate copy of the Brief of Appellant in Court of Appeals Cause No. 42456-8-II to the following parties:

David Vail  
Law Offices of David B. Vail  
PO Box 5707  
Tacoma, WA 98415-0707

Kay A. Germiot  
Assistant Attorney General  
Office of the Attorney General  
PO Box 2317  
Tacoma, WA 98401

Support Living Alternatives  sent by U.S. Mail only  
4145 SW Luana Beach Rd.  
Vashon, WA 98070-7318

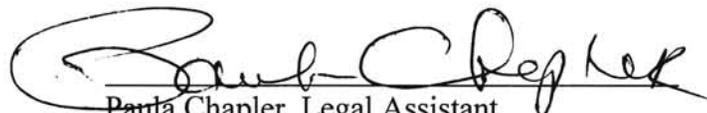
Ms. Yvette Nelson  sent by U.S. Mail only  
3708 Pyramid Drive  
Las Vegas, NV 89107

Original sent by ABC Legal Messengers for filing with:

Court of Appeals, Division II  
Clerk's Office  
950 Broadway, Suite 300  
Tacoma, WA 98402-4427

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: January 25, 2012, at Tukwila, Washington.

  
Paula Chapler, Legal Assistant  
Talmadge/Fitzpatrick

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