

No. 42456-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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LOIS J. NELSON (DEC'D),

Appellant,

v.

STATE OF WASHINGTON AND
DEPARTMENT OF
LABOR AND INDUSTRIES,

Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The Department of Labor and Industries (“Department”), by concluding that Lois J. Nelson (deceased) became permanently totally disabled as of the day she died, deprived Nelson of the sure and certain relief guaranteed her under the Industrial Insurance Act (“IIA”) as a worker injured on the job. It also deprived her of the opportunity to receive benefits and pass those benefits along to her family.

The Department approaches this case as if Nelson was still alive, and was simply attempting two bites at the apple of benefits. On the contrary, in this rather unique factual situation where the Department found a deceased claimant to be permanently partially disabled (“PPD”) long before her death, and then concluded she became permanently totally disabled (“PTD”) on the date of her death, Nelson seeks a single award of benefits, not a double payment.

The timing and nature of the Department’s findings, coupled with the deprivation of any relief to the worker and her family, are contrary to both the letter and spirit of the IIA. The trial court’s decision should be reversed, and an award of benefits should be allowed.

B. REPLY ON STATEMENT OF THE CASE

In her opening brief, Nelson recited the facts that supported a conclusion that she was temporarily totally disabled as of the date of her death, rather than permanently totally disabled. Br. of Appellant at 4-10.

The Department's factual recitation centers largely around the evidence it believes supports its finding of permanent total disability. Br. of Resp'ts at 2-16. However, the Department has admitted that Nelson was temporarily totally disabled as of August 2, 2006, and only "became" permanently totally disabled as of August 3, 2006, the day she died. Br. of Resp'ts at 39-41.

Thus, the Department's evidentiary recitation does not contravene the central factual issue in this appeal regarding the issue of the timing of the Department's finding, and whether it operated to Nelson's detriment. The Department manipulated the process by timing its finding of permanent total disability to coincide with the date of her death, rather than closing her claim with the temporary total disability ("TTD") status still in place. The Department also does not dispute that if it had closed her claim with findings of TTD and PPD, the PPD award would have been paid.

C. SUMMARY OF ARGUMENT

The IIA is primarily concerned with ensuring sure and certain relief, and resolving doubts in favor of the injured worker. In this unusual

factual circumstance, where (1) a worker is temporarily totally disabled and dies from an unrelated cause, (2) that worker is retroactively pronounced permanently and totally disabled as of the date of her death, and (3) the worker was undisputedly permanently partially disabled before her death, the IIA is ambiguous as to the right statutory result.

The timing of the Department's posthumous PTD finding operated to Nelson's detriment, in contravention of case law. Had the Department concluded that Nelson was temporarily totally disabled on the date of her death, the PPD award would have been payable. Also, there is nothing in the statutory framework to indicate that a PPD award should be withheld due to a simultaneous finding of PTD, when the pension that should have resulted from the PTD is not because the worker is deceased.

The PPD finding of a Category 2 back impairment was also incorrect, the Department's footnoted response notwithstanding. The only definitive medical rating of her back injury at the hearing placed it at Category 4. That finding is incorporated into the Board of Industrial Insurance Appeals ("Board") findings and conclusions, and is an issue in this appeal regardless of whether the notification letter to Nelson's employer was appealed.

Finally, Nelson as the worker and named party is entitled to attorney fees at the superior court and is this appeal.

D. ARGUMENT

(1) Standard of Review

As Nelson noted in her opening brief, 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).

The Department argues that Nelson should not be entitled to any favorable interpretation of the IIA, because “persons who claim rights [under the IIA] should be held to strict proof of their right to receive benefits under the act.” Br. of Resp’ts at 19.

However, it is indisputable that Nelson, had she lived, would have had a “right to receive benefits under the act.” The Department concluded she was permanently totally disabled, thus establishing her right to a pension, although the pension was not actually paid. CP 3. Also, had Nelson lived and finally recovered from her temporary total disability, she still would have been entitled to payment for the permanent partial disability of her lower back. Br. of Resp’ts at 42; RCW 51.32.040(2)(a). Thus, the strict standard of proof of her *right* to benefits has been met

here. At issue is merely the Department's legal conclusion that those benefits should not be paid.

The question here is not whether Nelson was entitled to benefits under the IIA, she clearly was. The question is whether this Court should interpret the IIA in a way that allows certain established benefits to be awarded posthumously. Nelson has demonstrated an ambiguity in the IIA that suggests she is entitled to actually receive benefits here. In regard to that legal question, Nelson is entitled to have any doubts resolved in her favor. *Clauson*, 130 Wn.2d at 584.

(2) The Department's Interpretation of the IIA Is Inconsistent with the Statute's Stated Purpose, and Deprived Nelson of a Remedy She Would Have Had in a Private Action that the IIA Forbids

In her opening brief, Nelson explained how the timing of the Department's simultaneous PTD findings, superimposed over the PPD finding, operated to deprive her of any award, and benefited both the Department and Nelson's employer. Br. of Appellant at 11-16. Nelson argued that because she did not receive a pension, nothing in the IIA precludes payment of the PPD award. *Id.*

The Department responds that simultaneous findings of PPD and PTD "make[] no sense," are "logically impossible," and are precluded by the IIA and case law. Br. of Resp'ts at 30-35. The Department notes that

under RCW 51.32.060 and RCW 51.32.080 and the cases defining those terms, a claimant cannot be simultaneously permanently totally disabled and permanently partially disabled by the same injury. Br. of Resp'ts at 28-30. Thus, the Department concludes, it is proper under the IIA that a worker who was in fact injured on the job is entitled to nothing.

The Department's argument cannot be sustained, because it deprives Nelson of relief that she and her heirs would have been entitled to in a private action. RCW 51.04.010. The relatively modest remedies of the IIA replace workers' rights to sue their employers when they are injured on the job. The compromise struck by the statute is that, in exchange for forgoing the right to sue, workers get "sure and certain relief," although it is likely less relief than they would obtain in a private suit. *Id.*

The Department's interpretation of the IIA here undermines the statute's fundamental purpose of "sure and certain" relief. The Department admits Nelson was temporarily totally disabled on the day before she died. Had the Department closed her claim in that status, she would have received a PPD award because nothing in the IIA precludes simultaneous findings of permanent partial disability and temporary total disability. It is only the fact that the Department also insisted on entering

a finding of PTD as of the day Nelson died that, in the Department's view, precluded a PPD award.

The Department also argues that the PPD finding was merely a bureaucratic technicality, and that Nelson was not actually entitled to a PPD award. Br. of Resp'ts at 36-38. It claims that it was "required to follow" RCW 51.16.120, the "second injury fund" statute,¹ and issue the PPD finding. It argues that the only injury attributable to Nelson's 2003 fall was a Category 2 lumbrosacral PPD, and that her PTD was a result of the back injury and her other pre-existing conditions. Br. of Resp'ts at 37.

RCW 51.16.120 does not apply here under its own plain language.

The statute states in relevant part:

Except as provided in subsection (2) of this section, the department shall pass upon the application of this section *in all cases where benefits are paid* for total permanent disability or death and issue an order thereon appealable by the employer.

RCW 51.16.120(1). Thus, the Department only makes an assessment under the statute when benefits are "paid."

¹ 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).

Here, no benefits were “paid” for total permanent disability or death. The pension that would have been paid was retained by the Department. Thus, there was no basis to invoke RCW 51.16.120 and charge Nelson’s employer for the “cost” of her PPD (which was never paid) and to charge “the balance of the pension” (which was never paid) to the second injury fund, other than to benefit the Department.

The Department also argues that the PPD finding is not at issue in this appeal, because *only* Nelson’s employer is “potentially aggrieved” by it. Br. of Resp’ts at 37.

Had Nelson actually been placed on a pension and received benefits, the Department’s conclusion that she is not aggrieved by the PPD finding may be accurate. However, when the Department is receiving payment from an employer to cover the “cost” of a disability that the Department never actually paid to her, she is aggrieved by that action and should be allowed to challenge it.²

The Department also responds by stating that the purpose of second injury fund awards is to “reimburse the employer for the portion of the pension costs attributable to pre-existing impairment not related to that employer.” Br. of Resp’ts at 37.

² Although the PPD order is in the record, and was relied upon by the BIA in its order, it was not communicated to Nelson’s estate, and as such is not final. RCW 51.52.060.

Of course, if the worker never receives a pension, then there is nothing to “reimburse.” The Department’s statement only reinforces the questionable nature of its second injury fund finding, which benefited the Department and the employer to the detriment of Nelson and her family.

The Department also argues that Nelson’s is not entitled to the PPD award because “a person cannot *receive* a pension and an award for permanent partial disability at the same time....” Br. of Resp’ts at 28 (emphasis added). Thus, the Department concludes it may withhold the PPD award because its finding of permanent total disability precludes payment of the PPD award. Br. of Resp’ts at 28-36. The Department relies on a number of appellate and industrial insurance appeals decisions in which workers were not allowed to receive simultaneous awards for both PPD and PTD were denied. Br. of Resp’ts at 30-31.

The Department ignores the fact that neither Nelson nor her heirs “received” either a PPD or a PTD award. Thus, statutory and case authority preventing receipt of both awards is inapposite. In fact, as the Department repeatedly concedes, the rule preventing payment of simultaneous PPD and PTD awards is predicated upon the assumption that the worker will receive one award or the other. For example, the Department cites *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 37, 992 P.2d 1002 (2000) for the proposition that “when a worker’s disability

goes from being temporary to permanent, the worker gets *either* a permanent partial disability award *or* a pension (depending on whether the disability is partial or total.” Br. of Resp’ts at 33 (emphasis in original).

None of the cases the Department cites stands for the proposition that, when a worker dies and the Department enters posthumous simultaneous findings of PTD and PPD, the correct result is that the worker receives *nothing*. The Department has only managed to demonstrate that, had Nelson lived, should would not have been entitled to receive *both* awards, which is not in dispute.

A finding of PTD does not preclude a PPD award as long as there is no double payment. RCW 51.32.080. The Department does not read RCW 51.32.080 to stand for this proposition, arguing merely that the statute “does not support” this contention. Br. of Resp’ts at 35. However, the statute provides in relevant part:

If permanent partial disability compensation is followed by permanent total disability compensation, all permanent partial disability compensation paid to the worker under the claim or claims for which total permanent disability compensation is awarded shall be, at the choosing of the injured worker, either: (a) Deducted from the worker's monthly pension benefits until the total award or awards paid are recovered; or (b) deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly.

RCW 51.32.080(4). Thus, the IIA does not preclude payments for both PPD and PTD, as long as the previous PPD payments are deducted from the pension that results from PTD. In other words, if a PPD finding is made but the worker has not actually received the PPD award, a full pension is awardable with no deduction.

Here, no pension for the PTD was paid, and thus nothing in the statute prevents payment for the PPD. Thus, there is no danger of double payment and no need for deduction of PPD payments from the non-existent pension. Therefore, the Department erred in denying Nelson the PPD award for her injury. RCW 51.32.040(2)(a).³

Even assuming the Department's finding of PTD is correct, it does not preclude payment of the PPD award for her back injury to Nelson. The Department erred in refusing to provide Nelson the PPD award. The trial court misapplied the law to this record, and its order affirming the BIIA should be reversed.

- (3) The Department Now Concedes that Nelson Only "Became" Permanently Totally Disabled the Day She Died; Liberal Construction of the IIA Warrants the PPD Award

³ Even assuming the Department is correct, and that the PTD finding precluded Nelson's family from receiving the PPD 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.* 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 trial court affirmed that Nelson was permanently totally disabled as of the date of her death. CP 131. Nelson argued in her opening brief that the evidence did not support the trial court's findings, because Nelson's mental impairments – the source of her supposed permanent total disability – were not fixed and stable at the time of her death. Br. of Appellant at 19-22. Nelson argued that, given the mandate of liberal construction of the IIA and these unusual facts that the IIA does not address, she should have received the PPD award.

The Department now admits that, on the day before her death, Nelson was temporarily totally disabled, and “became” permanently totally disabled the day she died. Br. of Resp'ts at 38-45. The Department also admits that Nelson was permanently partially disabled by her lower back injury long before her death. *Id.* at 38 n.6. The Department does not deny that, had it found her only permanently partially disabled, without the coinciding finding of permanent total disability, she would have been entitled to the PPD award. The Department argues however, that this unfortunate timing is a coincidence, despite the fact that it operates to deprive Nelson and her of benefits. Br. of Resp'ts at 43. The Department then faults Nelson for allegedly failing to provide sufficient evidence before the Board to refute its contention that she became permanently totally disabled on the day she died. *Id.*

The Department's admission reinforces the injustice that Nelson seeks to redress. "The timing of the closure of claims should not work to the disadvantage of an injured worker." *Clauson*, 130 Wn.2d at 582. The Department concedes that Nelson was temporarily totally disabled on the day before her death. If Nelson was permanently partially disabled before her death, and temporarily totally disabled as of the day before her death, then the proper result was *not* to posthumously find a permanent total disability on the day she died, thereby denying her the ability to contest the finding and denying a pension and a PPD award.

Instead, Nelson's claim should have been closed on the basis of her established permanent partial disability of the lower back. If that condition was the only condition that was fixed and stable as of the date of her death, then RCW 51.32.040(2)(a) mandates that the award be paid in accordance with the laws governing trusts and estates:

If any worker suffers (i) a permanent partial injury and dies from some other cause than the accident which produced the injury before he or she receives payment of the award for the permanent partial injury or (ii) any other injury before he or she receives payment of any monthly installment covering any period of time before his or her death, the amount of the permanent partial disability award or the monthly payment, or both, shall be paid to the surviving spouse or the child or children if there is no surviving spouse. If there is no surviving spouse and no child or children, the award or the amount of the monthly payment shall be paid by the department or self-insurer and distributed consistent with the terms of the decedent's will

or, if the decedent dies intestate, consistent with the terms of RCW 11.04.015.

RCW 51.32.040 (held unconstitutional on other grounds by *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 742, 57 P.3d 611, 620 (2002)).

The Department also responds that, despite the unusual facts of this case, it requires straightforward, routine application of the IIA, and there is no need to construe the IIA liberally. It argues there is no ambiguity here. Br. of Resp'ts at 45-47.

This is not a routine IIA case, it is quite exceptional, and there are a number of ambiguities arising from this case that must be addressed.

First, RCW 51.32.130, which allows for a worker to elect a lump sum in lieu of a pension, does not address the procedure for when a deceased worker is declared to be entitled to a pension posthumously. Thus, Nelson has argued, the Department's posthumous finding constituted a waiver of her rights under the IIA. Br. of Appellant at 17.

The Department skirts around this argument, claiming that there is no "testimony" that Nelson would have elected a lump sum. Br. of Resp'ts at 44. Therefore, the Department concludes, this Court need not address the issue.

The Department's suggestion that Nelson would not have elected a lump sum is pure speculation, and begs the question. The posthumous

ruling of PTD is precisely what *deprived* Nelson of the ability to make the election. For the Department to claim, after Nelson's death, that she should have presented evidence that she would have made a decision with which she was never presented, is nonsensical.

RCW 51.32.130 is ambiguous regarding its application to posthumous determination of PTD, and whether it constitutes a waiver of rights under the IIA. When a worker has certain statutorily protected rights that can only be exercised (1) after a finding is made by the Department, and (2) when the worker is alive, the statute does not clarify how those rights are affected when the finding is made after the worker dies.

Also, there is the ambiguity of the effect of RCW 51.32.040(2)(a) in a case involving a pre-death determination of PPD, and a posthumous determination of PTD. The statute provides that a PPD award is payable after death to the worker's estate. Had the Department entered only the PPD award, Nelson's would have been entitled to have that award distributed under terms of trust and estate law. RCW 51.32.040(2)(a). The effect of the Department's posthumous finding was to deny both a pension and a payment under RCW 51.32.040. It is not clear that the statute or the IIA envisions this result.

The IIA is also ambiguous on the issue of RCW 51.32.080(4)'s provision that partial PPD payments should be deducted from any subsequent PTD award. A reasonable reading of that statute suggests that the Legislature did not intend to preclude payment of a PPD award, even on the same injury claim, as long as the worker does not simultaneously receive a PTD award. Here, no PTD award was paid, therefore, nothing in the statutes or case law suggests that it would be inappropriate for the Department to pay the PPD award.

Finally, there is ambiguity regarding the issue of whether it is appropriate for the Department to demand benefits to be paid from an employer when those benefits will be retained by the Department and not the worker. The Department charged Nelson's employer for her PPD claim, *even though that claim was never paid by the Department to Nelson*. Thus, the Department retained benefits that rightly belonged to an injured worker and her family. This is contrary to the express purposes of the IIA, which is to "focus on achieving the best outcomes for injured workers." RCW 51.04.062.

Thus, ambiguities exist in the statutory scheme would should be resolved in Nelson's favor, and the PPD award should be paid.

(4) Nelson's Injury Was a PPD Category 4 Lumbrosacral Impairment

Nelson argued in her opening brief that she is entitled to a PPD award, and that the evidence showed her back injury to be a Category 4, not a Category 2 PPD, contrary to the Department's determination.

The Department first responds that its PPD ruling is not at issue here, and instructs this Court to disregard it. Br. of Resp'ts at 36. The Department claims that Nelson was not aggrieved by the PPD ruling.⁴ *Id.* at 37.

Nelson is not aggrieved by *entry* of the PPD award, but is aggrieved by denial of the payment of benefits that result from that award. Thus, she is aggrieved by the decision to deny the PPD award *based on* the PTD finding that is at issue in this appeal. If this Court reverses that PTD finding, then the direct result of the reversal (which the Department does not dispute) is payment to Nelson of the PPD award.

The issue of whether she was entitled to that payment was raised below, and the Board findings and conclusions address the finding of a Category 2 lumbrosacral impairment. CP 3, 16. It is at issue in this appeal.

⁴ The Department does not dispute the PPD order is not final, having never been received by Nelson.

On the merits of the PPD finding, the Department responds to Nelson's evidentiary arguments in a footnote. Br. of Resp'ts at 38 n.6. Arguments in footnotes are ambiguously raised and need not be considered. *State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993); *State v. N.E.*, 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993).

As argued in Nelson's opening brief, a Category 4 back injury was the only definitive testimony on this subject. CABR 7/28/08 at 39. A pain management specialist stated that she might have been Category 3, 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.

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

Nelson argued in her opening brief that if the Board's decision and order are reversed or modified on appeal to the trial 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.

The Department responds that the statute only allows attorney fees in a "worker or beneficiary" appeal, and thus Nelson is not entitled to fees. Br. of Resp'ts at 47. The Department makes no other response.

The Department's ruling in this case was against Nelson as the worker, not her estate. This appeal has been in the name of and on behalf of Nelson as the injured worker and claimant. It has not been brought in the name of the estate, although the estate is undoubtedly the proper recipient of her award under RCW 51.32.040(2)(a).

Nelson is the named party in interest, and the board and superior court captions and orders refer to her as such. CP 2-4; CABR 8. The estate is not the party appealing, and nothing in the record conflicts with that determination. Thus, this is an appeal by a worker, and RCW 51.52.130 applies.

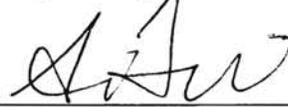
E. CONCLUSION

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 of the proper benefits for her PPD, and award attorney fees at the superior court and on appeal to this Court.

DATED this 16th day of May, 2012.

Respectfully submitted,



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DECLARATION OF SERVICE

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

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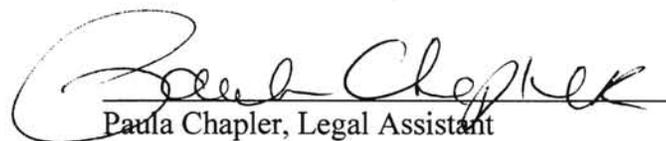
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: May 16, 2012, at Tukwila, Washington.


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