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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.

WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This case arises under RCW Title 51, the Industrial Insurance Act. The Estate of Lois Nelson (the Estate) appeals a Pierce County Superior Court order rejecting its assertion that Lois Nelson would have returned to work but for her unrelated death on August 3, 2006. The superior court held that at the time of her death, Ms. Nelson was a totally and permanently disabled worker, and so the Estate was not entitled to recover the permanent partial disability awards it sought from the Department of Labor and Industries (Department).<sup>1</sup>

The Estate's arguments should now be rejected by this Court because the superior court's findings of fact are supported by substantial evidence and the findings compel its decision upholding the decision of the Board of Industrial Insurance Appeals (Board). Ample evidence supports the finding that Ms. Nelson was permanently totally disabled as of August 3, 2006. That finding legally precludes a finding that the Estate is entitled to a permanent partial disability award, as a worker cannot be both partially and totally disabled at the same time. The superior court order should be affirmed.

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<sup>1</sup> This case concerns whether Ms. Nelson was permanently totally disabled at the time of her death or whether she was permanently partially disabled at her death. This is relevant because Ms. Nelson's estate would not receive any payment if she was permanently totally disabled (RCW 51.32.067; RCW 51.08.020), but would receive payment if she was permanently partially disabled. RCW 51.32.040(2)(a).

## **II. COUNTER STATEMENT OF THE ISSUES**

1. Whether the conclusion of law that Ms. Nelson was a totally and permanently disabled worker as a proximate cause of her industrial injury at the time of her death on August 3, 2006, is supported by the substantial evidence presented that Ms. Nelson was a totally and permanently disabled worker who was never going to return to work.
2. Whether the Estate is precluded from receiving a permanent partial disability award as a result of Ms. Nelson's industrial injury when she cannot be both a permanently partially and a permanently totally disabled worker.
3. Whether the Department was correct in not issuing a permanent partial disability award while her disability was still temporary because the claim was still open, Ms. Nelson was receiving treatment and temporary total disability benefits, and she was being assessed for vocational services.
4. Whether this Court should decline to apply the rule of liberal construction when the Estate has not identified any ambiguity in the law requiring construction.

## **III. DEPARTMENT'S COUNTER STATEMENT OF THE CASE**

### **A. Procedural Background**

In an order dated July 3, 2007, the Department found that Ms. Nelson had died on August 3, 2006, and that at the time of her death she was a totally and permanently disabled worker. BR at 30. The Department affirmed this order on August 31, 2007. BR at 31. Because

Ms. Nelson died without beneficiaries under the Act, no pension was awarded. BR at 30-31. The Estate appealed to the Board. The Board judge's proposed decision and order affirmed the August 31, 2007 Department order. BR at 22-28. After the Estate petitioned the full Board for review, the Board similarly affirmed the Department's order. CP at 137-42.

In its decision, the Board concluded that Ms. Nelson was physically incapable of working in any form of gainful employment as of August 3, 2006, and so determined that Ms. Nelson was totally and permanently disabled. BR at 4-5.

The Estate appealed from the Board decision to the Pierce County Superior Court, which affirmed the decision of the Board following a bench trial. CP at 1. The superior court found that Ms. Nelson was precluded from obtaining reasonably continuous gainful employment as a proximate result of her employment at the time of her death, and that the Estate had not met its burden of proof by a preponderance of the evidence to overcome any of the Board's findings. CP at 130-31.<sup>2</sup> The superior court concluded that at the time of her death she was a permanently totally disabled worker. CP at 131.

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<sup>2</sup> The Estate has not assigned error to this finding and it is a verity on appeal. *Baugh v. Dunstan & Dunstan, Inc.*, 67 Wn.2d 710, 712, 409 P.2d 658 (1966).

**B. Chronologic Facts**

Ms. Nelson had two industrial injuries, one on April 28, 2001, and the claim for the injuries now at issue of June 30, 2003. BR Johnson at 22. In April 2001, Ms. Nelson was accompanying a client to the bank when another customer had a seizure and fell on her, injuring her neck, left upper extremity, and low back. BR Johnson at 23-24. Despite several months of chiropractic treatment, Ms. Nelson continued to complain of pain. BR Johnson at 24. After more treatment and diagnostic studies, Ms. Nelson's first claim was eventually closed and she returned to work. BR Johnson at 24-25.

On June 30, 2003, Ms. Nelson injured her ear and low back while working as a personal support counselor when a chair collapsed under her. BR Johnson at 25. Ms. Nelson's right ear developed cellulitis and was treated with antibiotics. BR Johnson at 24-25. Ms. Nelson continued to complain of extreme pain in her low back, which was treated with medication. BR Johnson at 25. She returned to work with restrictions for a brief time in August 2003, but received time loss compensation (wage replacement) benefits because she was unable to work beginning August 22, 2003. BR Johnson at 25-27; BR at 42.

Ms. Nelson had increasing complaints of pain and right leg pain and numbness. BR Johnson at 26-27. She was evaluated by a

neurosurgeon and continued her treatment throughout 2004 for severe low back pain and some right leg pain and numbness. BR Johnson at 27-28. Ms. Johnson was seen in the emergency room multiple times in mid-2004, and ultimately ended up in an extended-care facility from mid-July to mid-August 2004. BR Johnson at 29.

On her discharge from the extended-care facility, Ms. Nelson was living with a friend, as she had difficulties caring for herself. BR Johnson at 30. She was using a walker. BR Johnson at 30. The pain medications Ms. Nelson was taking for her industrial injury caused her to have difficulties managing her blood pressure. BR Johnson at 31. Ms. Nelson began treating with Dr. Zhong, a physical medicine and rehabilitation specialist, in August 2004. BR Johnson at 30.

In September 2004, Ms. Nelson rested at home for a week, so depressed she did not want to eat and did not sleep. BR Hart at 57. She felt she could not do anything because of her back pain. BR Hart at 58. By November 2004, Ms. Nelson was taking anti-depressants and anti-anxiety medications, and attending classes for her depression. BR Johnson at 31. By December 2004, Ms. Nelson had added morphine to her list of medications and was experiencing pain into both lower extremities. BR Johnson at 31. She was discharged from physical therapy for lack of progress. BR Johnson at 32.

Dr. Zhong recommended that Ms. Nelson continue to stay off work and asked the Department to conduct a vocational assessment. BR Johnson at 32. In February 2005, Dr. Zhong recommended that Ms. Nelson be considered for a pain-management program. BR Johnson at 32. In March 2005, Ms. Nelson was taking methadone for her pain. BR Johnson at 32.

In early March 2005, the Department referred Ms. Nelson to vocational rehabilitation counselor Amanda Boley for an ability-to-work assessment. BR Boley at 36. When conducting such an assessment, Ms. Boley looks at the worker's work history and hobbies, and analyzes their skills using a variety of tools. BR Boley at 37. The analysis includes the worker's skills, abilities, and traits, and includes input from the attending physician regarding the worker's physical capacity. BR Boley at 38, 39. Based on all these sources of information, Ms. Boley determined that Ms. Nelson was not able to work. BR Boley at 37.

At the end of March, Ms. Nelson was evaluated by the Northwest Center for Integrative Medicine, a multi-disciplinary pain clinic, which determined that she would not benefit from their pain management program due to the combined effects of the industrial injury, unrelated problems, and observed memory and concentration problems.

BR Litsky at 9, 11-17; BR Johnson at 33; BR Hart at 58-59. Dr. Hart, the Estate's forensic psychiatrist, noted that the pain program questionnaire's answers indicated that Ms. Nelson's pain caused her to spend over half the day in bed, sometimes all day, that she had difficulty falling asleep due to her pain, and that she slept only two to three hours per night. BR Hart at 56-57. Ms. Nelson indicated that she had thoughts of suicide and worried about misusing or becoming addicted to her medications. BR Hart at 56-57.

During her evaluation with the physical therapist at Northwest Center, Ms. Nelson stated that she could be on her feet for sixty minutes at a time, but she demonstrated only three to five minutes. She could walk only five minutes without her walker, could lift only five pounds, and could walk only fifty feet. BR Litsky at 14. She was not capable of gainful employment in March 2005. BR Litsky at 16. Ultimately, Northwest Center determined that Ms. Nelson could not participate in their program because of her medical problems, self-limitation, depression, and the way she was coping with the combined effects of her numerous conditions. BR Litsky at 15-17.

Dr. Litsky, the medical director of Northwest Center, testified that the diagnoses they reached for Ms. Nelson were chronic pain syndrome, lumbar strain/sprain, probable degenerative disk disease, lumbar facet

arthropathy, debility, hypo and hypertension, pain disorder, mood disorder, and significant prescription to opioid pain medication. BR Litsky at 11-13. Dr. Hart testified that the interdisciplinary pain rehabilitation evaluation noted the following diagnoses for Ms. Nelson: chronic pain syndrome; a pain disorder associated with both psychological factors and a general medical condition; psychological factors, including many possible symptoms of depression, anxiety, general personality coping limitations, intermittent frustration, and irritability related to pain; and significant somatic pain and debility focus. Ms. Nelson had nonspecific mood disorder and reported multiple symptoms of depression, anxiety, and panic predating her injury. BR Hart at 58-59. Dr. Hart noted that the Northwest Center team considered Ms. Nelson unable to work in her job of injury. BR Hart at 59.

After Northwest Center determined that Ms. Nelson would not be a candidate for their program, Ms. Boley asked the Department to arrange an independent medical examination to determine Ms. Nelson's status. Once that information was available, Ms. Boley was asked to do another ability-to-work assessment. BR Boley at 37-38.

In April 2005, Dr. Zhong disapproved a job analysis proposed for Ms. Nelson due to her limited ability to lift and stand. BR Johnson at 33. Vocational services were closed as Ms. Nelson was determined to be

medically unstable. She was encouraged to move to Las Vegas to be with her family. BR Johnson at 33.

In May 2005, Ms. Nelson was evaluated by a psychologist, Wendy Woodard, who noted that Ms. Nelson had a low average to borderline level of overall intelligence, with borderline verbal and nonverbal abstract reasoning. Her reading level was fourth grade. Her logical deductive reasoning was impaired. BR Johnson at 33-34; BR Hart at 64. Ms. Nelson was diagnosed with depressive disorder, panic disorder, cognitive disorder, and pain disorder, and was not at maximum medical improvement, meaning her condition was not fixed and stable and she could still benefit from treatment. BR Johnson at 34; BR Hart at 65. During that evaluation, Ms. Nelson disclosed that after her June 2003 injury she planned to kill herself with a large overdose of cocaine and had actually obtained the drug to do so. BR Hart at 63. Ms. Nelson was frequently standing, wincing, and complaining a few times of getting stiff; she showed poor endurance and pace. BR Hart at 63.

In June 2005, Ms. Nelson underwent an independent medical examination by Dr. Richard Camp, an orthopedic surgeon, and Dr. Marvin Brooke, a physical medicine and rehabilitation specialist. She was observed by those examiners to have an unsteady gait, to stand with difficulty, and to hold on to furniture to move. They concluded that she

had permanent partial disability in her low back consistent with Category 2 lumbosacral impairment. BR Johnson at 34, 50.

Dr. Zhong saw Ms. Nelson in July 2005, at which time she was continuing to take methadone and using a wheeled walker. BR Johnson at 34. Dr. Zhong noted that Ms. Nelson continued to be unemployable; Ms. Nelson's care was transferred to her primary care provider. BR Johnson at 35.

As of March 2006, Ms. Nelson continued to complain of debilitating pain, noting that she was still unable to sleep at night and could not sit for any length of time due to her pain. BR Hart at 58.

In July 2006, vocational services were again provided to Ms. Nelson when vocational counselor Amanda Boley was asked to perform a second ability-to-work assessment. BR Boley at 39; BR Johnson at 35. Ms. Boley forwarded the independent medical exam report and proposed job descriptions to Dr. Zhong. BR Boley at 39; BR Johnson at 35. On August 3, 2006, Dr. Zhong disapproved of both jobs and recommended that Ms. Nelson's case be reviewed to determine whether she was eligible for a pension. BR Boley at 40; BR Johnson at 35.

Ms. Boley explained that an assessment of whether a person is capable of work is not confined to their physical condition. Such an

assessment includes a consideration of age, hobbies, interests, work traits, and the ability to be rehabilitated. BR Boley at 55.

On August 3, 2006, Ms. Nelson died of an accidental overdose of drugs, which included morphine, methadone, and cocaine, along with significant conditions of hypertensive cardiovascular disease and diabetes. BR Johnson at 46.

On August 18, 2006, Dr. Zhong completed a form for Ms. Boley, noting that Ms. Nelson was permanently disabled from returning to full-time gainful employment in any occupation, even at a sedentary level, due to unrelated medical conditions together with the effects of the industrial injury. BR Boley at 39-41; BR Hart at 66-67; BR Johnson at 35. On September 15, 2006, the Department claims manager wrote Ms. Nelson that vocational services were closed as they were unlikely to help her return to work. BR Johnson at 35; BR Hart at 66-67.

Ms. Boley was unaware that Ms. Nelson had died until shortly before she testified in this matter; her determination that Ms. Nelson was a totally disabled worker was premised on her belief that Ms. Nelson was still alive. BR Boley at 43.

After the Department was informed that Ms. Nelson had died on August 3, 2006, it issued the order now on appeal, finding Ms. Nelson permanently totally disabled and closing the claim. BR at 30-31.

**C. Expert Opinion Testimony**

**1. Dr. Johnson**

Dr. H. Richard Johnson, a retired orthopedic surgeon, testified at the request of the Estate. Dr. Johnson never met Ms. Nelson and based his opinion only on the medical records he reviewed. BR Johnson at 22.

Dr. Johnson noted that Ms. Nelson had a number of medical conditions that pre-dated her industrial injury. Ms. Nelson had asthma, gastroesophageal reflux disease, panic attacks, depression, hypertension, and she smoked. She was either taking medications or had limitations due to each of these conditions. BR Johnson at 36.

Ms. Nelson had a ninth-grade education, and obtained a GED in 1996. She attended a vocational school for two years. BR Johnson at 36. Her work experience was quite varied, and included barmaid, PBX operator, clerk typist, cage cashier, bingo caller, hotel maid, dishwasher, sandwich maker, receptionist, office assistant, and support counselor. She smoked one-half to one pack of cigarettes per day for forty-four years. BR Johnson at 37.

For Ms. Nelson's first industrial injury, Dr. Johnson diagnosed contusion of the left shoulder, contusion of the lumbosacral spine, lumbosacral strain/sprain, aggravation of lumbar spondylosis, left L5 lumbar radiculopathy, and aggravation of a major depressive disorder.

BR Johnson at 37. For the June 2003 injury, Dr. Johnson diagnosed contusion of the right ear, cellulitis of the right ear, lumbosacral strain/sprain, aggravation of preexisting lumbar spondylosis, aggravation of pre-existing depressive disorder, aggravation of pre-existing panic disorder, chronic pain syndrome, and pain disorder with both psychological factors and a general medical condition. BR Johnson at 38.

Dr. Johnson rated Ms. Nelson's low back permanent partial disability as a Category 4 low back impairment. BR Johnson at 39. He believed that Ms. Nelson's physical condition put her in the sedentary to sedentary light duty category. BR Johnson at 39. On the issue of whether Ms. Nelson was actually employable, Dr. Johnson deferred to a vocational counselor. BR Johnson at 39. Dr. Johnson's opinion did not include Ms. Nelson's psychological issues, nor did he consider her vocational limits. BR Johnson at 45.

Dr. Johnson testified that Ms. Nelson had been prescribed and taking methadone and morphine for her industrial injury and that her death certificate listed her cause of death as an accidental drug overdose; the drugs included methadone and morphine. BR Johnson at 45. The certificate also noted that Ms. Nelson had hypertensive cardiovascular disease and diabetes. BR Johnson at 45-46.

Dr. Johnson had no information indicating that Ms. Nelson was gainfully employed as of August 2, 2006, nor that she had successfully completed any vocational training as of that date. BR Johnson at 46. He agreed that injured workers who received time loss compensation are generally considered to be totally disabled persons who are not able to be gainfully employed. BR Johnson at 41-42, 47.

## **2. Dr. Hart**

Jeffrey Hart, a psychiatrist, also testified for the Estate, never met Ms. Nelson, and based his opinions only on the medical records he reviewed. BR Hart at 56. Dr. Hart opined that Ms. Nelson developed a pain disorder associated with both psychological factors and a general medical condition caused by the industrial injury. BR Hart at 67. Dr. Hart also opined that Ms. Nelson had pre-existing conditions of depressive disorder and panic disorder aggravated by her industrial injury. Dr. Hart believed that Ms. Nelson had permanent mental health impairment as a result of her industrial injury that would be rated a Category 4 mental health impairment. BR Hart at 68.

Dr. Hart also thought Ms. Nelson had a cognitive disorder and attention deficit disorder, which would interfere and complicate any attempts at new training or vocational rehabilitation. BR Hart at 68. Her attention deficit disorder would potentially complicate her ability to train

in an area that was new or unusual for her. BR Hart at 72. Her primary problem was the stress from being in chronic pain and the loss of physical capacity. BR Hart at 71. Dr. Hart had no reason to disagree with Dr. Zhong's assessment that Ms. Nelson was not going to return to work, nor with Ms. Boley's determination that Ms. Nelson was not going to be able to participate in vocational services. BR Hart at 72.

### **3. Dr. Litsky**

Dr. Steven Litsky testified at the request of the Department. He did not believe there were any other treatments available to aid in Ms. Nelson's recovery from her injuries. He would not have expected her condition to change from the time he saw her in March 2005 until August 2, 2006, and did not believe she would have been able to work as of the latter date. BR Litsky at 17. Injured workers receiving time loss compensation are those who are unable to work and whose claims are still open; he would not certify time loss for a worker he thought was able to return to gainful employment. BR Litsky at 21.

Dr. Litsky is familiar with the Department's disability rating process, and is asked to rate injured workers two to three times per week. Dr. Litsky thought he would rate Ms. Nelson's back at a Category 2 level of impairment, but that he would like to see her films first, as she might

meet the requirements for a Category 3 level of impairment. Category 3 impairment usually is for patients who have had surgery. BR Litsky at 20.

#### **4. Ms. Boley**

Ms. Amanda Boley, vocational counselor, also testified at the request of the Department. Given the nature of Ms. Nelson's transferrable skills and physical limitations, Ms. Boley determined that Ms. Nelson would not benefit from vocational retraining, and that she was a permanently and totally disabled worker. BR Boley at 40, 43. This is a determination that Ms. Boley has reached only five to ten times in her fifteen years working as a vocational counselor. BR Boley at 41.

Ms. Boley called Ms. Nelson's attorney on July 12, 2006; July 28, 2006; and August 3, 2006. She received a response from the attorney on August 4, 2006; Ms. Boley was informed that Ms. Nelson had moved to Las Vegas and that the Department was aware of the move. BR Boley at 42.

Ms. Boley believed Ms. Nelson was alive in August 2006, the time during which Ms. Boley was reaching her vocational determination that Ms. Nelson was not going to return to the workforce. BR Boley at 43.

#### **IV. STANDARD OF REVIEW**

In a case before the Board, the appealing party has the burden to present evidence against a contested order of the Department.

RCW 51.52.050; *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966). The Board reviews a Department order de novo, hearing testimony in the matter and entering findings of fact and conclusions of law. RCW 51.52.100; *McDonald v. Dep't of Labor & Indus.*, 104 Wn. App. 617, 623, 17 P.3d 1195 (2001).

The superior court reviews a Board decision de novo on the record developed at the Board. RCW 51.52.115. The Board's findings and conclusions are prima facie correct, and the party attacking the Board's decision carries the burden of overcoming that statutory presumption of correctness. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). In a workers' compensation appeal, the plaintiff bears the burden of producing "sufficient, substantial facts, as distinguished from a mere scintilla of evidence, to make a case for the trier of fact." *Sayler v. Dep't of Labor & Indus.*, 69 Wn.2d 893, 896, 421 P.2d 362 (1966); *Miller v. Dep't of Labor & Indus.*, 1 Wn. App. 473, 478, 462 P. 2d 558 (1969).

This Court's review of the superior court decision is under the ordinary standard for civil cases. RCW 51.52.140; *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). "A party seeking to reverse a trial court's finding of fact must meet a difficult standard. A reviewing court is constitutionally limited to determining

whether there is ‘substantial evidence’ to support the trial court’s findings.” *Garrett Freightlines, Inc. v. Dep’t of Labor & Indus.*, 45 Wn. App. 335, 340, 725 P.2d 463 (1986); *see also Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). This is because fact-finding is solely within the fact-finder’s province. *Johnson v. Dep’t of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993). Evidence is substantial when its character is such that it convinces an unprejudiced, reasoning person that the plaintiff is in fact entitled to the benefits that he claims. *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 597, 206 P.2d 787 (1949).

The substantial evidence standard of review mandates appellate deference to the trial court’s decision even if the appellate court would have resolved a factual dispute in another way. *Thorndike*, 54 Wn.2d at 575. In substantial evidence review, this Court cannot delve into a trial judge’s mental processes. *See State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 20, 482 P.2d 775 (1971); *Boeing Co. v. Heidy*, 147 Wn.2d 78, 87, 51 P.3d 793 (2002) (It is the sole province of the trier of fact to pass on the weight and credibility of evidence.). The trier of fact (here, the Pierce County Superior Court) may believe entirely the testimony of some of the witnesses and disbelieve entirely the testimony of others, as well as draw from the evidence any reasonable inference fairly deducible therefrom.

*Dempsey v. Joe Pignataro Chevrolet, Inc.*, 22 Wn. App. 384, 390, 589 P.2d 1265 (1979).

The rule of liberal construction does not apply to questions of fact. See *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56-57, 50 P.3d 627 (2002) (unambiguous statutes require no construction); *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 472 n.7, 474, 843 P.2d 1056 (1993) (Only if the statute is ambiguous would we be able to employ a liberal construction to it for the benefit of the injured worker.). Nor does the liberal construction rule dispense with the requirement that the plaintiff must produce competent evidence to prove the facts upon which it relies to substantiate entitlement to the benefits sought. *Ehman*, 33 Wn.2d at 595. That is, while the court should liberally construe the Industrial Insurance Act in favor of "those who come within its terms, persons who claim rights there under should be held to strict proof of their right to receive benefits under the act." *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); RCW 51.12.010.

## V. SUMMARY OF THE ARGUMENT

As the appealing party of a Department order in proceedings at the Board, the Estate had the burden to prove by a preponderance of the evidence that Ms. Nelson was capable of obtaining and retaining gainful employment at the time of her death in August 2006. RCW 51.52.050.

The Estate needed to present persuasive medical evidence to establish that Ms. Nelson was physically and mentally capable of gainful employment, and vocational evidence that she had the skills to perform work that was available and appropriate for her.

However, substantial medical and vocational evidence, admitted without objection, supports a contrary conclusion and supports the consistent findings of the Department, Board, and superior court below that as of August 3, 2006, Ms. Nelson was permanently and totally disabled.

Ms. Nelson had numerous medical and mental conditions both pre-dating and resulting from her industrial injury, and from a medical and vocational viewpoint was never going to return to gainful employment. She had not responded well to the treatment provided under her worker's compensation claim, and had moved out of state to live with an adult daughter. From these findings, well-settled law compels the legal conclusion that Ms. Nelson was totally permanently disabled at the time of her death. Well-settled law also establishes that a worker who is permanently totally disabled is not entitled to received a permanent partial disability award for the same claim; permanent partial and permanent total disability are legally mutually exclusive.

The Estate's argument boils down to an assertion that this Court is required to make assumptions not supported by the record. That is, the Estate asks this Court: (1) to assume a dastardly intent on the part of the Department to unfairly deprive the Estate of permanent partial disability awards, and (2) to assume that Ms. Nelson was capable of obtaining and retaining gainful employment. This approach is contrary to this Court's function to review the Superior Court's decision in accordance with the applicable standard of review, as discussed in Part IV of this brief.

The arguments advanced by the Estate fail on multiple grounds. First, the Estate almost entirely ignores the medical opinions regarding the extensive physical and mental health restrictions that prevented Ms. Nelson's return to gainful employment. Second, the Estate ignores or misapplies well-settled law establishing that a permanent total disability determination under a claim precludes a finding of permanent partial disability under the same claim. Finally, the Estate advances a conspiracy theory that not only does not comport with any evidence contained within the record, but is actually contrary to the facts presented.

## VI. ARGUMENT

### A. **Substantial Evidence Supports The Superior Court's Finding That At The Time Of Her Death, Ms. Nelson Was Permanently And Totally Disabled Due To The Combined Effects Of Her Pre-Existing Disabilities And The Residuals Of Her 2003 Industrial Injury**

A worker is eligible for total permanent disability benefits if she is permanently and totally disabled in accordance with RCW 51.08.160 and RCW 51.32.060. Permanent total disability means “loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation.” RCW 51.08.160. A person whose condition is “remedial” is not “permanently disabled” because the worker is expected to experience a full or partial recovery. *Hiatt v. Dep't of Labor & Indus.*, 48 Wn.2d 843, 846, 297 P.2d 244 (1956); *see also Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994).

Total disability is a hybrid quasi-medical concept intermingling the “medical fact of loss of function and disability, together with the inability to perform and the inability to obtain work as a result of his industrial injury.”

*Fochtman v. Dep't of Labor & Indus.*, 7 Wn. App. 286, 294, 499 P.2d 255

(1972). In *Fochtman*, the court concluded that:

[A] prima facie case of total disability may be established by medical testimony as to severe limitations imposed on claimant's ability to work coupled with lay testimony concerning his age, education, training and experience and the testimony of an employment or vocational expert as to whether he is able to maintain gainful employment in the labor market with a reasonable degree of certainty.

*Fochtman*, 7 Wn. App. at 298; see also *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914, 918, 640 P.2d 1 (1982). Proof of permanent total disability is individualized; it necessarily requires a study of the whole person and all of her skills and abilities, in addition to the effects of her industrial injury. *Fochtman*, 7 Wn. App. at 295.

For example, one worker with a fifteen percent total bodily impairment (loss of bodily function only) may be still capable of gainful employment, while another worker with a fifteen percent total bodily impairment may be adjudged to be totally and permanently disabled when taking into account the workers' age, education, work history, and transferable skills. See *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 130, 913 P.2d 402 (1996) (determination of permanent total disability depends on the effect of many factors on the individual worker); *Adams v. Dep't of Labor & Indus.*, 128 Wn.2d 224, 233, 905 P.2d 1220 (1995).

The substantial evidence standard of review compels affirming the trial court's finding that Ms. Nelson was permanently totally disabled as of August 3, 2006. CP at 130 (FOF 1.8; COL 2.3). Ms. Boley and Dr. Litsky testified unequivocally to this conclusion. BR Boley at 40-42; BR Litsky at 21. This is substantial evidence.

In fact, there is a wealth of evidence to support the superior court's finding. Physicians who actually saw and treated Ms. Nelson, and the vocational counselor who worked with her, provided evidence that support the Department, Board, and superior court's findings. *See supra* Part III.D.3, 4. Even the witnesses put on by Ms. Nelson's estate provided support for the conclusions that Ms. Nelson was a totally and permanently disabled worker. *See supra* Part III.D.1, 2.

In its case-in-chief, the Estate offered no evidence whatsoever to show that the Department's determination that Ms. Nelson was totally and permanently disabled was incorrect. Because the Estate presented insufficient medical and no vocational evidence from which a finder of fact could determine that Ms. Nelson was *not* totally and permanently disabled, it failed to make a prima facie case that the Department's order should be reversed.

Despite the Estate's implied assertion to the contrary, there is no evidence that Ms. Nelson was capable of working. Br. App. at 19-22.

Dr. Johnson's testimony regarding Ms. Nelson's ability to work in the sedentary to light category of work was made with reference only to her physical condition; he did not include mental/psychological or vocational issues in his opinion. BR Johnson at 45. Yet, total permanent disability accounts for the whole person, not just the worker's physical condition. *Fochtman*, 7 Wn. App. at 295. Dr. Johnson specifically deferred to a vocational counselor on the issue of Ms. Nelson's employability. BR Johnson at 39.

Dr. Hart said he had no reason to disagree with Dr. Zhong's or Ms. Boley's determination that Ms. Nelson was a totally and permanently disabled worker. BR Hart at 72. Dr. Zhong's opinion was that it was the combined effects of the industrial injury and Ms. Nelson's pre-existing conditions that rendered her permanently unemployable. BR Hart at 66.

The Estate argues that Ms. Nelson's mental health condition was not fixed and stable. Br. App. 19, 21. This is contrary to the record. Dr. Hart testified that he believed Ms. Nelson was fixed and stable, and provided a permanent partial disability rating for her mental condition. BR Hart at 68. There is no testimony in the record that Ms. Nelson was receiving treatment for her mental condition in August 2006. In any event, as is discussed in Part VI.C., if she was not fixed and stable (or at

maximum medical improvement) at the time of her death, then she would not receive permanent partial disability award for any condition. It is only when a worker is at maximum medical improvement that the worker is eligible for a permanent partial disability award. *See In re Bette Pike*, BIIA Dec., 88 3366, 1990 WL 304835 (1990) *discussed infra* Part VI.C.<sup>3</sup>

The Department did not make a finding that Ms. Nelson was “[m]entally [p]ermanently [t]otally [d]isabled” as the Estate argues. *See* Br. App. at 19 (heading (a)). Such a finding would not make sense, as permanent total disability is in regard to the whole person and not specific to one type of injury. Permanent partial disability is specific to the medical condition or injured body part. *Franks v. Dep’t of Labor & Indus.*, 35 Wn.2d 763, 774, 215 P.2d 416 (1950). Conversely, permanent total disability is in regard to the entire person, considering all of her physical restrictions together with her skills and abilities. *Fochtman*, 7 Wn. App. at 298. It is the presence of Ms. Nelson’s rateable mental health impairment, along with her low back condition and her lack of vocational options that supports the finding that at the time of her death she was totally and

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<sup>3</sup> The Board designates significant decisions pursuant to RCW 51.51.160 and publishes them on its website, <http://www.biiwa.gov/>. They are also available on Westlaw in the WAWC-ADMIN database and from the Westlaw citation provided herein. Although Board decisions are not binding on this Court, they are entitled to deference. *See Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991); *O’Keefe v. Dep’t of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

permanently disabled. By definition, any worker who is found to be permanently totally disabled due at least in part due to a work-related injury must have rateable impairment. Conversely, in the absence of a rateable impairment, a worker could not be adjudged to be permanently totally disabled and so entitled to benefits under the Act.

The Estate also misstates the standard of proof and the standard of review when it states that it must “appear pretty clearly” that Ms. Nelson was permanently totally disabled. Br. App. at 22. First, at the Board and superior court, Ms. Nelson had the burden to prove by a preponderance of the evidence that the Department’s order was incorrect. *See* RCW 51.52.050; *Lightle*, 68 Wn.2d at 510. Second, this Court reviews findings of fact to see if they are supported by substantial evidence in the record. *Garrett Freightlines, Inc.*, 45 Wn. App. at 340; *see also Thorndike*, 54 Wn.2d at 575. In workers’ compensation appeals such as this one, there is no clear and convincing standard as the Estate implies. And since Ms. Nelson has been the appealing party at every level, the Department has never had the burden of proof in this case.

Moreover, the case the Estate cites in support of its argument does not apply. *See* Br. App. at 22 (citing *Hiatt*, 48 Wn.2d at 845-46). In that case, the Supreme Court was quoting an out-of-state case from 1925, which was in turn discussing when disability goes from being temporary

to permanent. *Hiatt*, 48 Wn.2d at 845-46 (quoting *Standard Oil Co. of Ind. v. Sullivan*, 33 Wyo. 223, 237 P. 253 (1925)). That case did not alter the standard of proof in Washington, and it is irrelevant to the Estate's argument that Ms. Nelson's permanent partial disability prevents a finding of permanent total disability.

**B. Ms. Nelson Was Not Entitled To An Award For Permanent Partial Disability When The Department Closed Her Claim Because She Was Determined To Be Permanently And Totally Disabled**

Despite the uncontroverted finding that Ms. Nelson was permanently totally disabled as of August 3, 2006, the Estate argues that it is entitled to a permanent partial disability award. Br. App. at 11. The relief it seeks is not possible because a worker cannot be both partially and totally permanently disabled at the same time. Ms. Nelson's permanent partial disability rating was made solely for the purpose of awarding the employer second injury fund relief, which is irrelevant to issues raised in this appeal.

**1. A Claimant Cannot Be Deemed Both Partially And Totally Permanently Disabled At The Same Time**

A person cannot receive a pension and an award for permanent partial disability at the same time under the plain meanings of RCW 51.32.060 (permanent total disability) and RCW 51.32.080 (permanent partial disability), and the statutes defining these terms, RCW 51.08.150 and.160.

When interpreting a statute, the court's goal is to effectuate the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the statute's meaning is plain, the court gives effect to that plain meaning as the expression of the legislature's intent. *Id.* Plain meaning is determined from the ordinary meaning of the language used in the context of the entire statute in which the particular provision is found, related statutory provisions, and the statutory scheme as a whole. *Id.*

RCW 51.32.060 provides for a pension when permanent total disability is proximately caused by the industrial injury. *Dep't of Labor & Indus. v. Auman*, 110 Wn.2d 917, 919, 756 P.2d 1311 (1988). RCW 51.32.080 provides for an award when there is a permanent partial disability. *Auman*, 110 Wn.2d at 919. Permanent total disability means "means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." RCW 51.08.160. The definition contemplates total disability. In contrast, permanent partial disability does not contemplate total disability, as the term means "the loss of either one foot, one leg, one hand, one arm, one eye, one or more fingers, one or more toes, any dislocation where ligaments were severed where repair is not complete, or any other injury known in surgery to be permanent partial disability." RCW 51.08.150.

The definitions of the terms plainly provide that permanent total disability is for total disability and permanent partial disability is for partial disability. It makes no sense that a person would be both partially and totally disabled at the same time for the same injury.<sup>4</sup> *See In re Cheryl Austin*, BIIA Dckt. Nos. 05 217130 & 05 21730-A, 2007 WL 4565295, \*2 (2007) (industrial appeals judge erred in awarding both partial and total benefits “as an individual cannot logically be both simultaneously.”). The Legislature recognizes that a worker may not receive permanent partial disability and permanent total disability at the same time by providing for a recoupment method in the event the event permanent partial disability is awarded and then later followed by permanent total disability. *See* RCW 51.32.080(4).

Permanent partial disability is a loss of bodily function. *Franks*, 35 Wn.2d at 774; *Page v. Dep’t of Labor & Indus.*, 52 Wn.2d 706, 710-11, 328 P.2d 663 (1958); *Cayce v. Dep’t of Labor & Indus.*, 2 Wn. App. 315, 317, 467 P.2d 879 (1970). Two workers with identical injuries are to receive the same rating of permanent partial disability even though their respective earning power may be vastly different. *Franks*, 35 Wn.2d at 774; *Cayce*, 2

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<sup>4</sup> However, someone can receive permanent total disability and permanent partial disability for a partially disabling condition that is unrelated to the totally disabling injury. *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 263, 26 P.3d 903 (2001).

Wn. App. at 317; *see also* *McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 262, 26 P.3d 903 (2001). This is because the objective loss of bodily function is the same for two different people, and permanent partial disability does not account for ability to work, which is different from person to person. *Young*, 81 Wn. App. at 130.

In *Franks*, the worker appealed from an order closing her claim with an award for permanent partial disability. *Franks*, 35 Wn.2d at 764. The matter went to a jury trial, where Ms. Franks asked for and received both an increase in the disability award paid by the Department *and* additional time loss compensation for the period after her claim was closed. *Id.* at 765. The *Franks* court quite rightly noted that a worker cannot be at the same time entitled to receive a permanent partial disability award (partially disabled) and time loss compensation (totally disabled), and sent the matter back for a new trial. *Id.* at 767.

The *Franks* court specifically approved the instruction that a worker must be capable of some form of gainful employment in order to receive a permanent partial disability award; workers who are unable to return to the workforce due to their industrial injury receive a pension instead. *Id.* at 775-76.

In *Hubbard*, our Supreme Court agreed, concluding that permanent partial and permanent total disabilities are mutually exclusive remedies:

The Industrial Insurance Act, RCW Title 51, contemplates two separate and distinct disability classifications, temporary and permanent; it does not authorize the simultaneous payment of temporary and permanent disability benefits. *Hunter v. Department of Labor & Indus.*, 43 Wn.2d 696, 700-01, 263 P.2d 586 (1953). When an injured worker is classified as temporarily disabled, wage replacement benefits may be available under RCW 51.32.090. Such benefits are referred to as “time loss” benefits when the temporary disability is total and “loss of earning power” benefits when the worker is able to return to work but the worker’s former earning power is only “partially restored.” If a temporarily disabled worker does not fully recover but instead reaches a static impaired condition, the worker’s classification is changed from temporarily disabled to permanently disabled and the worker receives either a pension or a permanent partial disability award. See *Franks*, 35 Wn.2d at 766; RCW 51.32.060; RCW 51.32.080.

*Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 37 n. 1, 992 P.2d 1002 (2000) (emphasis added).

The Estate argues that a simultaneous finding of both permanent partial and permanent total disability is not inconsistent because the two concepts are not two points on a continuum, but are two different concepts. Br. App. at 13. It is true that the concepts are different because the former involves lack of bodily function and the latter includes an analysis of the worker’s ability to obtain employment. See *Fochtman*, 7 Wn. App. at 294 (explaining the difference).

However, our Supreme Court has also recognized that when a worker’s disability goes from being temporary to being permanent, the

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However, our Supreme Court has also recognized that when a worker’s disability goes from being temporary to being permanent, the

worker gets *either* a permanent partial disability award *or* a pension (depending on whether the disability is partial or total). *Hubbard*, 140 Wn.2d at 37 n.1. In this sense, it is like two points on a continuum—when a worker’s permanent disability goes from being partial to completely preventing the claimant from returning to any kind of gainful employment, the disability is no longer partial; it is total. *See Shea v. Dep’t of Labor & Indus.*, 12 Wn. App. 410, 415, 529 P.2d 1131 (1974) (when [permanent] disability crosses the line from partial to total, the essential standard applied . . . is converted from ‘loss of bodily function’ to ‘loss of earning power’) (emphasis added).

The Board has similarly recognized that a finding of permanent total disability precludes an award for permanent partial disability at the same time. *In re Esther Rodriguez*, BIIA Dec., 91 5594, 1993 WL 453615 (1993). In that case, the worker wished to elect a permanent partial disability award despite the unappealed Department finding that she was permanently totally disabled. The Board found that pension payments are mandatory once it is established that the worker is permanently totally disabled. *Rodriguez*, 1993 WL 453615, at \*2. The Board found “no authority” to award the permanent partial disability award instead, based on the worker’s preference. *Id.* Here, too, the Estate cannot elect

permanent partial disability instead of, or in addition to, the finding that Ms. Nelson was permanently totally disabled.

The Estate cites to *Clauson v. Department of Labor & Industries*, 130 Wn.2d 580, 925 P.2d 624 (1996), as a basis for receiving both a permanent partial and permanent total disability awards for a single claim. However, the facts in *Clauson* are quite different from Ms. Nelson's facts, and the case does not stand for that legal proposition. In *Clauson*, the Supreme Court determined that Mr. Clauson was entitled to receive a permanent partial disability award for his first claim, which was closed by the Department after it determined that he was totally permanently disabled solely due to the residuals of his second injury and claim. The first claim apparently did not contribute to the finding of total disability for the second claim. The Court did not, however, hold that a worker is ever entitled to permanent partial and permanent total disability award for the same injury under the same claim. *See Clauson*, 130 Wn.2d at 584-85 (recognizing that a pension can still be awarded even when there has been a permanent partial disability award "for his or her prior injury") (quoting RCW 51.32.060(4)).

In Ms. Nelson's case, the Estate is attempting to support its assertion that it is entitled to receive a permanent partial disability award for residuals from her 2003 industrial injury even though she was totally

and permanently disabled from that same injury. But the *Clauson* case does not support the proposition that a claimant can get a permanent partial disability and a permanent total disability award on the same claim. See *In re Joanne Lusk*, BIIA Dec., 89 2984, 1991 WL 246461 (1991) (recognizing that a permanent partial disability award is inappropriate for impairment to injuries or bodily conditions if the pension determination already accounted for those conditions).

The Estate correctly points out that a claimant may receive a permanent partial disability award and at some point in the future, on the same claim, be deemed permanently totally disabled. Br. App. at 14. This often arises when a claim has been closed, but later re-opens based on objective worsening. See, e.g., *In re Jean Wassmann*, BIIA Dec., 69953, 1986 WL 31842, at \*3 (1986) (recognizing that a worker with a previous permanent partial disability could have her claim reopened for objective worsening and prove that she was entitled to a pension). However, this does not change the fact that it is logically impossible for a claimant to be deemed both partially and totally permanently disabled at the same time. See *Franks*, 35 Wn.2d at 767.

The Estate argues that a person can be both partially and totally permanently disabled at the same time as long as there is no double recovery. Br. App. at 18 (citing RCW 51.32.080). The statute it cites does not support

the Estate's argument, and the argument ignores the law that one may not be both totally and partially disabled at the same time. *Franks*, 35 Wn. 2d, at 767. The two are mutually exclusive, and the Estate has cited no authority allowing both types of findings for the same injury under the same claim. Ms. Nelson's permanent partial disability rating is relevant only to the employer's entitlement to second injury fund relief, an issue not raised in this appeal.

**2. Ms. Nelson's Permanent Partial Disability Rating Is Relevant Only To Second Injury Fund Relief, An Issue Not Raised In This Appeal**

The Department order from which the Estate appealed closed Ms. Nelson's claim with a finding that at the time of her death in August 2006, Ms. Nelson was permanently totally disabled, and that her inability to work was caused by a combination of her industrially-related conditions and her pre-existing conditions. BR Ex. 2; *see also* BR Hart at 66. The Department assigned a permanent partial disability award of Category 2<sup>5</sup> for her low back impairment solely for the purpose of providing second injury fund relief and charging the employer's experience rating. *See* RCW 51.16.120; BR Ex. 2.

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<sup>5</sup> WAC 296-20-280 includes 8 categories of permanent partial disability for the low back, based on the level of objective impairment present. Category 2 requires mild low back impairment with mild intermittent objective clinical findings, while Category 4, which the Estate seeks, requires mild continuous or moderate intermittent clinical findings with significant x-ray findings and motor loss.

Second injury fund relief is appropriate when the Department finds a worker permanently and totally disabled due to the combined effects of an industrially-related condition and pre-existing conditions (called a combined effects pension). *See Jusilla v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 777, 370 P.2d 582 (1962). The purpose of such relief is to reimburse the employer for the proportion of the pension costs attributable to pre-existing impairment not related to that employer. *Id.*

However, such a finding does not mean that the Estate is entitled to a permanent partial disability award. When the Department issued an order declaring that Ms. Nelson was permanently totally disabled due to the combined effects of her industrial injury and pre-existing condition, it was required to follow the second-injury fund statute and calculate her level of pre-existing disability for the sole purpose of addressing the employer's experience rating. *See* RCW 51.16.120. Thus, the discussion regarding permanent partial impairment is largely academic in this case. The only party potentially aggrieved by the rating is Ms. Nelson's employer, who did not participate in these proceedings.

The Department followed these rules and issued the order assessing Ms. Nelson's employer for the cost of her disability relating solely to the 2003 industrial injury. The best medical information

available at that time was that Ms. Nelson's low back impairment was rated a Category 2, per WAC 296-20-280. BR Johnson at 34; Boley at 51.

In its case-in-chief, the Estate offered no evidence whatsoever to refute the Department's determination that Ms. Nelson was totally and permanently disabled. In the absence of such a showing, her estate has failed to make a prima facie case that it was entitled to receive any permanent partial disability award, as discussed above in section VI.B. Thus, the Department's Category 2 rating and the Estate's purported Category 4 rating are irrelevant to the issues presented in this appeal.<sup>6</sup>

**C. Ms. Nelson Was Not Entitled To An Award For Permanent Partial Disability While Her Claim Was Still Open Because She Was Still Receiving Medical And Vocational Services And Was Not Fixed And Stable**

The Estate asserts that the Department should have given Ms. Nelson a permanent partial disability award while her claim was still open and that the Department's delay worked to Ms. Nelson's disadvantage.

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<sup>6</sup> If the Court considers the merits of the Estate's permanent partial disability argument, substantial evidence supports the Category 2 rating, and the Estate's evidence is not persuasive. The Estate's Category 4 rating comes from Dr. Johnson, who neither met nor examined Ms. Nelson. Dr. Johnson asserted that Ms. Nelson had evidence of weakness in the right lower extremity, but that it ranged from normal to mild, and that she had no atrophy. BR Johnson at 39.

In contrast, Dr. Camp, an orthopedic surgeon, and Dr. Brooke, a physical medicine and rehabilitation specialist, examined Ms. Nelson on June 20, 2005, and determined that her low back best fit a Category 2 level of impairment. BR Johnson at 34. Ms. Nelson's attending physician Dr. Zhong concurred with that finding. BR Boley at 51. Dr. Litsky was somewhat equivocal: he agreed with the Category 2 rating, but also indicated that he would like to see her MRI, as that might put her into Category 3. BR Johnson at 20.

Br. App. at 16. This argument fails. The Department correctly waited to assess Ms. Nelson's level of permanent disability until vocational services were closed. At that time, she was declared permanently totally disabled, and a permanent partial disability award is inconsistent with that finding.

Temporary and permanent total disability differ only in the duration of the disability and not in their character. *Bonko v. Dept of Labor & Indus.*, 2 Wn. App. 22, 25, 466 P.2d 526 (1970). Temporary total disability (which entitles a worker to time loss benefits) is, therefore, a condition temporarily incapacitating the worker from performing any work at any gainful occupation. *Id.*; see also *Hunter v. Bethel Sch. Dist. & Educ. Serv.*, 71 Wn. App. 501, 859 P.2d 652 (1993). Temporary total disability terminates as soon as the worker's condition is medically fixed and stable or as soon as the worker is able to perform any kind of work. *Hunter*, 71 Wn. App. at 507.

A claimant's condition becomes fixed and stable when the condition reaches a state from which no further recovery is expected. WAC 296-20-01002. This state is also called maximum medical improvement. WAC 296-20-19000. A worker is entitled to proper and necessary medical treatment until her industrially related conditions are fixed and stable. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 716, 213 P.3d 591 (2009). After she reaches maximum medical improvement,

however, the Department is required to take action to close the claim, including assessing the worker for permanent disability benefits. *Id.* at 716.

Ms. Nelson received time loss compensation benefits until her death because no doctor certified that she was at maximum medical improvement for all conditions related to her industrial injury during that period of time. The Department had not yet determined her to be medically fixed and stable or her claim ready to be closed, based on the available medical opinions. Indeed, the vocational counselor finished her assessment finding Ms. Nelson ineligible for vocational services during the same month in which Ms. Nelson passed away. It was only after receiving the vocational assessment that the Department could terminate vocational services and, once it was established that Ms. Nelson was fixed and stable, close the claim with a permanent disability award. It was at this point that her disability went from being temporary to permanent.

The Estate argues that Ms. Nelson's receipt of time loss compensation, which is awarded for injured workers who are temporarily totally disabled, is somehow at odds with the subsequent finding that she was permanently totally disabled. Br. App. at 20-21. Actually, it is quite common for an injured worker, such as Ms. Nelson, who is unable to obtain and retain gainful employment due at least in part to an industrial injury, to receive time loss compensation up to the date when the

Department determines that worker to be permanently totally disabled. See, e.g., *In re Roger Neuman*, BIIA Dec., 97 7648, 1999 WL 756272 (1999).

In *Neuman*, the Board held that a worker is permanently totally disabled “effective the date the worker is both medically fixed and, as a vocational matter, is demonstrably permanently unable to be gainfully employed on a reasonably continuous basis as a proximate result of the worker’s industrial injury.” *Neuman*, 1999 WL 756272, at \*2. For Ms. Nelson, those findings were not made until the vocational counselor finished her assessment. The complicating factor in Ms. Nelson’s case is that she died before the Department could issue an order establishing that Ms. Nelson was permanently unable to be gainfully employed on a reasonably continuous basis as a proximate result of her industrial injury. But since the Department had gathered all of the necessary information to render its decision before Ms. Nelson passed away, it properly issued the order despite her coincidental and unfortunate death.

There is no testimony in this record from which one could determine that Ms. Nelson was going to physically and mentally improve her condition to the point that she could engage in retraining activities. The Estate certainly has made no effort to refute the finding that Ms. Nelson was entitled to temporary disability benefits, thus acquiescing

to the Department's determination that she was temporarily totally disabled up to the time of her death. The Board has also underscored that a claim cannot be closed, and permanent partial disability awarded, if a worker is still receiving treatment and time loss compensation for one condition. *In re Bette Pike*, BIIA Dec., 88 3366, 1990 WL 304835 (1990). That case involved facts very similar to the ones in this case. The Board judge had found that the worker's back injury was fixed and stable and that her psychiatric condition needed more treatment. The judge ordered the self-insured employer to issue an award for permanent partial disability of the back and keep the claim open for psychiatric treatment. The full Board disagreed, reasoning that the claim cannot be open and closed at the same time. *Pike*, 1990 WL 304835, at \*2 (citing *Franks*, 35 Wn.2d at 767). The Board held that the claim should remain open for further psychiatric treatment, and that no permanent partial disability award would be appropriate until the worker's industrially related injuries were fixed and stable. *Id.*

Similarly here, it would have been premature for the Department to award permanent partial disability for Ms. Nelson's low back condition while she was in need of treatment for her mental health condition and receiving time loss compensation for her temporary total disability.

The Estate asserts that the Department deliberately waited to make its determination that Ms. Nelson was totally and permanently disabled until after it received word that she had died, and that this was done to favor the Department and Employer over the Estate. Br. App. at 16-19. Not only does this not provide any legal basis to give the Estate the relief it seeks, there is no support in the record for this assertion. There is also no testimony that the Department was made aware in a timely manner that Ms. Nelson had died in August 2006.

In fact, the vocational counselor who reached the determination that Ms. Nelson was a permanently totally disabled worker in August 2006, in conjunction with Ms. Nelson's attending physician, was unaware that Ms. Nelson had died until shortly before she testified in this matter in 2008. BR Boley at 42. There is no evidence that Dr. Zhong was aware that Ms. Nelson had died when she responded to Ms. Boley's last request for information in August 2006. Ms. Boley called Ms. Nelson's attorney on August 3, 2006, and in a return call was told only that Ms. Nelson had moved to Las Vegas.

Ms. Boley made her determination that Ms. Nelson was totally permanently disabled after hearing from the attending physician and considering Ms. Nelson's industrially-related conditions, her pre-existing condition, and her transferable job skills. Ms. Boley believed Ms. Nelson

was alive when she reached this determination. Because Ms. Nelson died without any beneficiaries under the Act, there were no pension benefits to pay to anyone, nor was there anyone in a position to request a lump sum payment of benefits. Therefore, no benefits were waived, as the Estate argues (Br. App. at 17).

Nor is there any support in the record that the Department deliberately acted to deprive Ms. Nelson of her ability to convert her pension into a lump sum. RCW 51.32.130.<sup>7</sup> There is no testimony that Ms. Nelson would have contested a finding of permanent total disability, nor that she would have converted her life-long monthly pension benefit into an \$8,500.00 lump sum had she lived.

The Estate also seems to imply that the Department negligently delayed in taking action on Ms. Nelson's claim, ultimately depriving Ms. Nelson or her estate from a permanent partial disability award. Br. App. at 7, 16. The Department, however, did not pay her a permanent partial disability award because she was still temporarily and totally disabled (receiving time loss compensation) and being assessed for vocational services. The Estate seems to acknowledge this when it states that in 2005, Ms. Nelson's psychological disability was "ongoing" and prevented her from working. Br. App. at 5. The Estate also correctly

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<sup>7</sup> The maximum lump sum available to Ms. Nelson would have been \$8,500.00. Ms. Nelson's time loss compensation rate in 2004 was \$1,045.60 per month. BR at 42.

notes that a worker cannot be simultaneously temporarily and permanently disabled at the same time. Thus, by the Estate's own admissions, Ms. Nelson was not entitled to a permanent partial disability award until her disability was determined to be no longer temporary. This could not occur until the Department had the requisite medical information and vocational services were closed.

The Estate also argues that the Department's order is "impossible as a matter of law" because a worker cannot be both temporarily and permanently totally disabled at the same time. Br. App. at 18 (emphasis removed). As argued above, it is true that at any given time, a worker is either temporarily totally disabled or permanently totally disabled, but not both at the same time. *Franks*, 35 Wn.2d at 767. The Department, however, has never found Ms. Nelson to be temporarily and permanently disabled at the same time. The Department found Ms. Nelson to be temporarily totally disabled and paid her time loss through August 2, 2006, and found her to be permanently totally disabled as of August 3, 2006.

**D. The Rule Of Liberal Construction Does Not Apply To This Case**

The Estate asserts that the Industrial Insurance Act was established to protect and provide benefits for injured workers, and that the law should

be liberally construed in Ms. Nelson's favor. Br. App. at 11 (citing RCW 51.12.010). However, the Act also provides benefits and protections for employers; that is part of the great compromise created by the Act. *Birklid v. Boeing Co.*, 127 Wn. 2d 853, 859, 904 P.2d 278 (1995).

The rule of liberal construction in workers' compensation cases states that doubts about the meaning of the Act are to be liberally construed in favor of the injured worker. *See Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). Nothing in this rule implicates the Estate, as it is seeking relief that is distinct from the injured worker.

The Estate has not pointed to any provisions of RCW Title 51 relevant to this case that are ambiguous and in need of a liberal interpretation. Unambiguous statutes and regulations require no construction. *Cannon*, 147 Wn.2d at 56-57. Since there is nothing to construe, the rule of liberal construction does not apply.

The facts of a case are not liberally construed, and those seeking the benefit of the Act must present strict proof of their entitlement to benefits. *Cyr*, 47 Wn.2d at 97. The Estate fails to present such proof in this case. The Estate failed to present any evidence to support a finding that Ms. Nelson was capable of returning to work, and that the Estate was

therefore entitled to receive permanent partial disability awards. Inherent in the idea of partial disability is the notion that the worker is still capable of gainful employment, albeit not to the degree found before the industrial injury. *Hubbard*, 140 Wn.2d 35.

**E. The Estate Is Not Entitled To Attorney Fees**

Even if the Estate were the prevailing party, it is not entitled to attorney fees as it argues at Br. App. at 24. RCW 51.52.130 provides for attorney fees under certain circumstances for workers and beneficiaries:

If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation, or if in an appeal by the department or employer the worker or beneficiary's right to relief is sustained, or in an appeal by a worker involving a state fund employer with twenty-five employees or less, in which the department does not appear and defend, and the board order in favor of the employer is sustained, the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

Key to this statute is that it is only in a "worker or beneficiary appeal" that fees are awarded. RCW 51.52.130. The Estate is neither a worker nor a beneficiary (RCW 51.08.180, .020) and is not entitled to attorney fees.

**VII. CONCLUSION**

The Department respectfully requests that this Court affirm the superior court order dated July 15, 2011, for the reasons stated above.

RESPECTFULLY SUBMITTED this 30 day of March, 2012.

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

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STATE OF WASHINGTON  
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LOIS J. NELSON (DEC'D),  
  
Appellant,  
  
v.  
  
DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,  
  
Respondent.

DECLARATION OF  
MAILING

DATED at Tacoma, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Respondent's Brief counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail addressed as follows:

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DATED this 30<sup>th</sup> day of March, 2012.

  
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TRACY LANE-PATTON  
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