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SUPREME COURT NO. \_\_\_\_\_

COURT OF APPEALS NO. 61179-8-I

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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PUGET SOUND ENERGY, INC,

Respondent,

v.

ROBERT R. LEE,

Respondent, and

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

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**WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES'  
PETITION FOR REVIEW**

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**ORIGINAL**

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- RCW 51.52.160

The petitioner is the Department of Labor and Industries (Department), respondent at the Court of Appeals.

## I. COURT OF APPEALS DECISION

The Department seeks review of the decision of the Court of Appeals, Division One, in *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 205 P.3d 979 (2009). Citations to the decision in this Petition are to the ¶ numbers in the attached WESTLAW version of the decision (Appendix A).

## II. ISSUE PRESENTED

RCW 51.16.120 provides employers in workers' compensation cases with *second injury fund relief* from pension payment responsibility. The second injury fund pays for a workers' compensation pension if "previous bodily disability" combines with disability proximately caused by an industrial injury or occupational disease to cause permanent total disability. The test for relieving the employer is two-pronged: (1) Did the worker suffer from "previous bodily disability" at the time of the second injury? and (2) But for that "previous bodily disability," would the second injury not have produced the permanent total disability?

The superior court, on the Department's motion, determined there was no evidence in the record such that a fact-finder could find that Mr.

Lee had a “previous bodily disability.” The issue presented is whether a “previous bodily injury” for purposes of RCW 51.16.120 existed where the undisputed evidence shows that before and during the six-and-a-half months Lee worked for his employer prior to his injury he had no medical symptoms and was fully able to do his heavy-labor lineman job?<sup>1</sup>

The appeal does not affect Mr. Lee’s pension, which is not challenged by any party. The sole issue is whether Puget Sound Energy (PSE), or the second injury fund, should pay for Lee’s pension.<sup>2</sup>

### III. STATEMENT OF THE CASE

Robert Lee had been working as a lineman for various employers since 1970 when he went to work at self-insured employer, PSE, in 1992. PSE at ¶ 2. Lee had incurred industrial injuries in 1979 (neck injury), 1981 (low back injury), and 1987 (neck and back). Lee 55, 77, 86.<sup>3</sup> But the evidence is undisputed that at the time he began at PSE, he “was buffed up again, and in good shape . . . and had been working . . . for some

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<sup>1</sup> Statutes discussed in this petition are set forth in full in Appendix B.

<sup>2</sup> The employer who obtains second injury fund relief is required under RCW 51.16.120 to pay to the Department only “the accident cost which would have solely from said further injury . . . had there been no preexisting disability.” That amount is negligible in relation to the cost of a pension. Each self-insurer, regardless of whether the self-insurer ever receives second injury fund relief, is assessed to fund a self-insurance second injury fund that is administered by the Department. RCW 51.44.040(3). There is a separate second injury fund for “state fund” employers. RCW 51.44.040(1).

<sup>3</sup> Witness testimony is referred to by the witness’s surname and the page number of the transcript of the Board hearing in which the testimony was given. The transcript is located in the Certified Appeal Board Record (CABR). Documents in the CABR will be cited as “CABR” followed by the stamped page number in the lower right corner.

time without any relapse, or any effects from previous accidents.” Lee 97. Lee’s PSE crew won second place in a statewide lineman rodeo. Lee 99. Lee did not remember the previous accidents. Lee 94-95.

He never needed help from anyone during his time at PSE. Lee 100. Lee testified that during his time at PSE: “I was in good shape. I could do 50 one hand push-ups, do 50 on the other side, go back and do a second 50. I could do 1500 flutter kicks in the morning.” Lee at 101-02. He agreed that there was “nothing physical that he could not do” before the 1992 injury. Lee 105.

Six-and-a-half months after he began work at PSE, he suffered a serious injury to his neck and left upper extremity, from which he never recovered sufficiently to return to full duty as a lineman. PSE at ¶ 6. Between 1996 and 2000, he underwent four surgeries; from 1999 through 2003, he continued treatment and was being assessed for return to work. PSE at ¶¶ 7-8. In 2004, the Department awarded Lee a pension against PSE and by separate order denied PSE second injury fund relief.

PSE appealed both orders to the Board of Industrial Insurance Appeals (Board). CABR 2-8. The Board affirmed both Department orders. CABR 2-8. PSE appealed to superior court and filed a jury demand. CP 1-2, 118. Lee moved for partial summary judgment, asking the court to affirm the pension award. CP 86-88. PSE and the Department

did not contest the motion, leaving only the second injury fund relief dispute between the Department and PSE. CP 86-88.

The Department then moved to strike the jury on grounds that one dispositive fact was not disputed, namely, that at the time of the industrial injury any alleged pre-existing condition the worker might have suffered from was not symptomatic or disabling. CP 103-08. In granting the Department's motion, the superior court determined there is *no* evidence in the record of "previous bodily disability" because: (1) at the time of his 1992 industrial injury at PSE, Mr. Lee had no permanent medical condition that adversely affected his wage-earning ability; (2) during his six-and-a-half months of employment at PSE, Mr. Lee was not symptomatic from any medical condition; and he did not require, request, receive, or need any accommodation in order to perform all assigned job tasks required in his heavy labor position as a lineman. CP 120-21. After the superior court struck the jury, PSE unsuccessfully sought discretionary review by the Court of Appeals.

Following a bench trial, the superior court denied second injury fund relief to PSE on the ground that the record contained no evidence that could support a finding that Lee was suffering from a "previous bodily disability" for purposes of RCW 51.16.120 at the time of his 1992 industrial injury. CP 410-11. PSE appealed to the Court of Appeals,

which reversed by 2-1 vote and remanded the case for jury trial on “previous bodily disability.”<sup>4</sup>

The *PSE* majority opinion does not find that the evidence relied on by the superior court was in dispute. The majority opinion concludes, however, that a jury could nonetheless find that there was “previous bodily disability” based on disputed evidence that at the time of his 1992 injury: (1) Mr. Lee was suffering from lower back and neck conditions that had been intermittently symptomatic in the past and had flared up from time to time; and (2) during those past flare-ups, Mr. Lee would be affected in his daily living and work activities. *PSE* at ¶¶ 25, 26, 32.

In the alternative, the *PSE* majority opinion also concludes that a jury could infer that there was evidence of “previous bodily disability” based on disputed evidence that Mr. Lee’s prior injuries could, in retrospect, be rated as a “permanent partial disability” (PPD) for purposes of industrial insurance. *PSE* at ¶¶ 10, 27-29. This retrospective rating of pre-1992 PPD was based primarily on radiographic evidence. *Gritzka* 73, 77-79. The medical witness who provided that rating of neck and low back PPD explained that the rating is not inconsistent with the fact that

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<sup>4</sup> As the *PSE* majority opinion recognizes, there is also a “but for” question, the other prong of the two-pronged second injury fund relief test, that, assuming the Court of Appeals decision stands, a jury would now also need to address. *PSE* at ¶ 34.

there was nothing affecting Mr. Lee's wage-earning ability, and that he had no symptoms at the time of his final injury in 1992. Gritzka 96.

After the Court of Appeals issued its decision, this Court decided *Tomlinson v. Puget Sound Freight Lines, Inc.*, 168 Wn.2d 105, 206 P.3d 657 (2009). Both rationales for the *PSE* majority opinion's conclusion that the record contains disputed evidence of "previous bodily disability" – evidence of prior intermittent symptoms and of a rating of prior permanent partial disability – conflict with analysis in *Tomlinson*. Based in part on *Tomlinson*, the Department moved for reconsideration. The Court of Appeals denied reconsideration without comment. The Department now seeks review.

#### **IV. REASONS WHY REVIEW SHOULD BE GRANTED**

Review should be granted because the *PSE* majority opinion conflicts with decisions of this Court and the Court of Appeals, and because this case presents an issue of substantial public interest that this Court should decide. RAP 13.4(b)(1), (2) and (4).

##### **A. The Court Of Appeals Ruling Conflicts With This Court's Reasoning In *Tomlinson* And *Bennett***

*Tomlinson* applies RCW 51.32.080(5), which provides that, in making an award for injury-caused PPD, a "previous disability" is to be deducted from the post-injury level of "permanent partial disability":

(5) Should a worker receive an injury to a member or part of his or her body *already*, from whatever cause,

*permanently partially disabled*, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be *adjudged with regard to the previous disability* of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

RCW 51.32.080(5).<sup>5</sup>

One question addressed in *Tomlinson* is whether Mr. Tomlinson must be deemed to have been suffering from “previous disability” for purposes of a deduction from his PPD award under RCW 51.32.080(5) where: (A) he was suffering from functional impairment due to a degenerative/arthritis right knee condition for many years; (B) he had regular and continuing – not merely intermittent – symptoms; and (C) all doctors agreed that he had preexisting PPD from his bone-on-bone arthritic knee condition. *Tomlinson* at ¶¶ 13-18, 22. *Tomlinson* answers “yes,” but only because, at the time of his 1999 industrial injury, the worker had functional loss: (1) that was substantial and permanent, *and* (2) that was not merely intermittently symptomatic in nature. *Id.* (“Tomlinson contends that if arthritis can be a PPD, it qualifies only if it causes lack of functionality. We agree. The mere presence of degenerative

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<sup>5</sup> The analogy is not perfect. RCW 51.32.080(5) uses “previous” PPD, while RCW 51.16.120 uses “previous bodily disability” and nowhere mentions “PPD.” But the difference in wording only makes stronger the Board and Department view that a mere rating or award of prior PPD is not per se “previous bodily disability” under RCW 51.16.120.

arthritis that is “latent, or quiescent, and not disabling” is not enough to warrant reducing an industrial insurance award when the industrial injury simply “‘lighted up,’ or aggravated” the condition.”)

The *PSE* majority opinion cannot be reconciled with the ruling and analysis in *Tomlinson*. Instead, *PSE* assumes there may be a “previous bodily disability” under RCW 51.16.120 if the underlying medical condition is intermittently symptomatic, even if there are long-duration gaps (in light of the undisputed facts here, gaps of many months) between recurrences of symptoms. *PSE* at ¶¶ 25, 32. That assumption is not correct in light of the clear message of *Tomlinson* that “a preexisting condition that causes intermittent impairment of function is not a PPD for purposes of reduction of benefits.” *Tomlinson* at ¶ 18 (citations omitted); see also *id.* at ¶¶ 13, 22. Moreover, *Tomlinson*’s test under RCW 51.32.080(5) for “previous disability” essentially parallels Judge Becker’s *PSE* dissent. *PSE* at ¶¶ 38-44.

Furthermore, *Tomlinson* is based on the Board’s view that a mere rating of prior PPD is not per se a “previous bodily disability” under RCW 51.16.120. *Tomlinson* at ¶¶ 13, 18. *Tomlinson*: (1) discusses with approval and quotes from the Board’s decision in *In re Leonard Norgren*, BIIA Dec., 04 1811, 2006 WL 481048 \* 7 (2006) (decision designated “significant” by the Board per RCW 51.52.160), which in turn quoted

from *In re Forrest Pate*, BIIA Dckt. No. 90 4055, 1992 WL 160673 (May 7, 1992); (2) analogizes “previous bodily disability” under RCW 51.16.120 to “preexisting PPD” under RCW 51.32.080(5); (3) concludes that a mere rating or award of PPD is not per se evidence of a “preexisting PPD” under RCW 51.32.080(5); and (4) holds that a “preexisting condition that causes intermittent impairment of function is not a PPD for purposes of reduction of benefits [under RCW 51.32.080(5)].” *Tomlinson* at ¶ 18 (citing *Norgren*); see also *id.* at ¶¶ 13, 22. The reliance on these Board rulings in *Tomlinson* confirms that there is a conflict with *PSE*.

*Tomlinson* is also grounded in *Bennett v. Department of Labor & Industries*, 95 Wn.2d 531, 627 P.2d 104 (1981), which, like *Tomlinson*, construes the previous-PPD reduction provision of RCW 51.32.080. *Tomlinson* at ¶¶ 13, 17. In *Bennett*, the injured worker had previously incurred a back injury in Oregon and had received an Oregon PPD award, but he had recovered sufficiently to be able to return full time to his heavy labor carpentry work. 95 Wn.2d at 535 n. 1. After he incurred his subsequent injury in Washington, he reported to his attending physician that up to the time of the Washington back injury “he had experienced some weakness in his left leg.” *Id.* at 534.

*Bennett* holds that this evidence was not sufficient to trigger the deduction provision of RCW 51.32.080(5) because there was no evidence

the condition impacted the worker's performance of his heavy labor job at the time of his injury:

This weakness apparently was not disabling, since according to the testimony of the petitioner and that of his foreman, *he had been able to perform all the heavy duties of a carpenter on an industrial project without noticeable difficulty.*

*Id.* at 534 (emphasis added). Again, this ruling from *Bennett* is harmonious with Judge Becker's dissent in *PSE* relying in part on *Rothschild v. Department of Labor & Industries*, 3 Wn. App. 967, 969, 478 P.2d 759 (1970), *PSE* at ¶¶ 38-44 (Judge Becker's dissent); *see also* DLI Brief of Resp. (RB) 15, 19-22, 31, 34; DLI Motion for Recon. 19, 23.

To conclude that there is a genuine issue of fact, the *PSE* majority opinion relies on Dr. Gritzka's PPD rating, which was based on radiologic studies done several years prior to the 1992 injury at *PSE*. *PSE* at ¶¶ 10, 27; Gritzka 58, 73-74. But, as noted, *Tomlinson* explains that x-ray findings alone are not proof of a loss of function (*id.* at ¶ 21), much less proof of the "substantial" impairment required to trigger application of the deduction under RCW 51.32.080(5). *Id.* at ¶¶ 18, 22. Moreover, Dr. Gritzka himself admitted that his PPD rating did not mean there was impairment affecting wage-earning ability or even producing regular symptoms. Gritzka 76, 90. The *PSE* majority thus errs and creates a

conflict when it cites Gritzka's limited opinion as possibly showing "previous bodily injury."

In sum, under the undisputed relevant facts and applying the test from *Tomlinson* and *Bennett*, the evidence shows at most that Lee had only an intermittently symptomatic condition. There was no evidence that would allow a jury to find Lee had a "previous bodily disability" for purposes of eliminating his employer's responsibility for his Industrial Insurance pension because: (1) at the time of his 1992 injury at PSE, Lee had no permanent medical condition that adversely affected his wage-earning ability; and (2) during his employment at PSE, Lee was not symptomatic from any medical condition, and he did not require, request, receive, or need any accommodation in order to perform all assigned job tasks required in his heavy labor position as a lineman.

Review should be granted to address the conflict with *Tomlinson* and *Bennett*.

**B. The Court Of Appeals Opinion Conflicts With *Rothschild***

The *PSE* majority opinion notes in passing that the Court of Appeals in *Rothschild*, 3 Wn. App. at 969, found no previous disability where the longshore worker in that case was able to do all of his strenuous duties up to the time of his final injury. *PSE* at ¶ 23. This language in *Rothschild* confirms that permanent loss of earning power or ability to

work is necessary for a condition to be a “previous bodily disability” under RCW 51.16.120.

As illustrated by Judge Becker’s dissent, the *PSE* majority opinion conflicts with *Rothschild*. *PSE* at ¶¶ 38-44 (J. Becker, dissenting). “Lee was in exactly the same situation at the longshoreman described in *Rothschild* . . . . There was no evidence that any previous injury he sustained ‘had been other than temporarily disabling’, and up to the time of his final injury, he was doing everything required of his job.” *PSE* at ¶ 38 (Becker dissent, quoting from *Rothschild*, 3 Wn. App. at 969).

Review should be granted to address the conflict with *Rothschild*.

**C. The *PSE* Majority Opinion Incorrectly Suggests That The Board Agrees With The Majority’s View That A Mere Rating Of Prior PPD Is Per Se Evidence Of “Previous Bodily Disability” Under RCW 51.16.120**

The *PSE* majority opinion suggests that a mere rating of prior PPD is per se evidence of “previous bodily disability” under RCW 51.16.120. *E.g., id.* at ¶¶ 10-12, 27-28. The majority opinion declares that it is adopting the view of the Board on this point. *Id.* at ¶¶ 30-32. As was explained in the Department’s Brief of Respondent and Motion for Reconsideration, however, no Board decision has ever suggested that mere rating of prior PPD would alone constitute “previous bodily disability.” RB 20-27, 33-34; DLI Motion for Recon. 3-11.

As discussed in the Department's Brief of Respondent and Motion for Reconsideration, there are two conflicting lines of Board decisions. RB 20-27, 33-34; DLI Motion for Recon. 3-11. First, decisions such as *In re Alfred Funk*, BIIA Dec., 89 4156, 1991 WL 87432 (1991) (Significant Board Decision), and *In re Curtis Anderson*, BIIA Dckt. No. 88 4251, 1990 WL 310624 \* 2 (June 15, 1990), hold that a prior medical condition must have significantly affected the earning capacity of the worker in order to qualify as a "previous bodily disability." See RB 20-22. This makes sense in light of the purpose of the statute, which is to provide an incentive to employers to hire and retain those workers whose medical conditions impose a barrier to being hired and retained. There is no need for an incentive to hire or retain those workers who are *not* affected in their ability to work.

The other line of Board decisions discussed in the Department's briefing to the Court of Appeals appears to conclude that a prior medical condition may also qualify as a "previous bodily disability" if it significantly interferes with life activities outside of work. RB 23-27; DLI Motion for Recon. 3-11. These Board decisions appear to miss the mark because they fail to recognize that activity outside work is irrelevant to the statutory purpose just discussed. RB 23-27; DLI Motion for Recon. 3-11.

But perhaps the Board has merely failed to clearly articulate its rationale for using this life-activities standard for proving “previous bodily disability.” It is possible the Board’s rationale is that it is not always easy to prove prior effect of a condition on earning power, and that proof of a significant effect on life activities is a form of proof of a hidden effect on earning capacity. If that is the rationale, then the Board’s approach, though incorrect, is at least arguably consistent with legislative intent.

The *PSE* majority opinion ignores *Funk* and *Anderson*, and it misplaces reliance on the Board decisions it does address. The majority opinion appears to assert that the Board’s standard for proving “previous bodily disability” does not require that a prior condition had affected, significantly or otherwise, either earning capacity or life activities. *PSE* at ¶¶ 29-32. No Board decision, however, supports the idea that a mere rating of prior PPD would automatically qualify as “previous bodily disability” under the statute. Indeed, as the Department pointed out in its Brief of Respondent, the Board has expressly stated that “[A]n impairment rating is not in and of itself sufficient to prove the existence of pre-existing disability . . .” RB 34 (quoting *In re Leonard Norgren*, BIIA Dec., 04 18211, 2006 WL 481048 \* 7 (2006)); see also the Department’s detailed discussion of the Board cases in the Department’s Motion for Reconsideration 3-11.

**D. Because PPD Can Be Quite Minimal In Effect, It Is Inconsistent With The Purpose Of RCW 51.16.120 To Deem A Mere Rating Of Prior PPD To Be Per Se Evidence Of “Previous Bodily Disability”**

When considering whether a mere rating of prior PPD is per se evidence of “previous bodily disability” for purposes of RCW 51.16.120, it should be remembered that PPD can be a very minor condition, such as 1% monaural hearing loss or the severing of the tip of a pinky finger. If the majority’s test of loss of function applies, then a retrospective rating of such minor injuries will qualify as evidence of “previous bodily disability” with no need to show how the PPD affected the worker’s ability to work.

The majority opinion recognizes that the Legislature’s purpose in affording second injury fund relief under RCW 51.16.120 is to provide an incentive to employers to hire and retain<sup>6</sup> workers whose medical conditions might otherwise present a barrier to finding and retaining work. 2009 WL 1110307 at ¶¶ 18, 19. Implicit in this Court’s decision in *Jussila v. Department of Labor & Industries* addressing the “but for” prong of the test under RCW 51.16.120 is the proposition that this legislative purpose is not furthered where the second injury is so catastrophic as to produce permanent total disability by itself. 59 Wn.2d 772, 777-80, 370 P.2d 582

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<sup>6</sup> The *PSE* majority opinion speaks only of providing an incentive “to hire,” but in light of the fact that the date against which “previous bodily disability” is to be assessed is the date of the second injury, the purpose is clearly directed to both hiring and retention.

(1962). Likewise, as to the “previous bodily disability” prong of the test, the legislative purpose of providing an incentive to hire and retain such disabled workers is not furthered by making relief available where a worker had a condition that might qualify for a rating of prior PPD, but that did not previously affect the worker at all in obtaining or retaining work.

There is an infinite number of permutations of facts involving prior disability and second injury effects. In many cases where there previously existed only minor prior PPD, an employer will not be able to meet the “but for” prong, which, again, presents a separate question totally unrelated to the question of what constitutes a “previous bodily disability.” There will, however, be cases where employers are able to muster expert forensic witnesses to make a case that a very minor prior PPD combined with a subsequent injury to produce permanent total disability.

In such cases, the statutory purpose of encouraging employers to hire and retain workers facing barriers to hiring and retention will not be furthered by granting relief. Just as relief was denied in *Jussila* because the statutory purpose was not furthered where the “but for” test was not met, so should relief be denied here where the prior condition did not present any barrier to hiring or retention.

**E. This Case Presents Significant Additional Concerns Relating To Legislative Policy, And Thus Presents Significant Issues Of Broad Public Interest**

This case raises two matters of legislative policy in addition to the incentive question addressed above. First, legislative policy to encourage safety and to avoid unfairly burdening other employers generally requires that each employer pay for the results of injuries to its own employees. *Jussila*, 59 Wn.2d at 779. The PSE majority acknowledges this policy, as recognized in *Jussila*, but the result in *PSE* undermines this policy by making it more likely that the employer can be relieved of responsibility for the injury. PSE at ¶ 19. This is because the lower the threshold is set for employer eligibility for second injury fund relief, the greater the number of employers who will use the fund to essentially eliminate their responsibility for an industrial insurance pension.

The leading treatise on workers' compensation law further notes that as the threshold is lowered, at some point the expense of administering the second injury fund scheme begins to outweigh the useful purpose of the scheme. 5 A. Larson, L. Larson, *Larson's Workers' Compensation Law*, § 91.03[8] (2007). At the point when virtually every pension is a second injury fund pension (which is the direction that the *PSE* decision leads to), RCW 51.16.120 will serve only to generate work for Department adjudicators processing mountains of paper, only to reach,

in every case, the foregone conclusion of granting second injury fund relief.

In recent years, perhaps due to this situation (as well as in apparent recognition that most employers have no idea that a second injury fund statute even exists, and the knowledge by those same employers that, in any event, they are regulated by federal and state laws against disability discrimination), some states have abolished or significantly restricted their second injury fund schemes. *Id.* This Court should take these legislative policy concerns into consideration in assessing the *PSE* majority's definition of "previous bodily disability" that would essentially extend such status to virtually all members of the work force who incur industrial injuries that become permanently totally disabling.

Because the *PSE* majority opinion applies a substantially lowered standard for one prong of the second injury fund relief test, this case presents an issue of substantial public interest that this Court should decide.<sup>7</sup>

**F. The Department's Interpretation Of "Disability" In RCW 51.16.120 Is That The Term Connotes Some, Not Total, Permanent Lost Earning Power**

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<sup>7</sup> The question of what constitutes "previous bodily injury" under RCW 51.16.120 has been briefed and awaits decision in *Crown Cork & Seal Company v. Department of Labor & Industries*, No. 36921-4-II; and the issue is also presented in several cases pending at the Board of Industrial Insurance Appeals.

In response to the Department's argument that "previous bodily disability" connotes prior loss of earning power, the *PSE* majority suggests that the Department equates the concept of "previous bodily disability" with previous *total* disability. *PSE* at ¶ 28<sup>8</sup>; *see also id.* at ¶ 30.<sup>9</sup> Requiring prior total loss of earning power of course would be absurd and would defeat the legislative purpose of encouraging the hiring and retention of those with medical conditions that present barriers to obtaining and retaining jobs. The *PSE* majority opinion misunderstands the Department's argument.

The Department's argument is that the condition must have produced some identifiable and enduring limit on ability to work prior to the second injury. As the Board held in *Funk* and *Anderson*, the employer is required to prove that the condition produced a permanent *partial* limitation on earning power. *See* 1991 WL 87432 (*Funk*); 1990 WL 310624 (*Anderson*). Similarly, *Henson v. Department of Labor & Industries* explains that "disability connotes a loss of earning power." 15 Wn.2d 384, 391, 130 P.2d 885 (1942). That is a principal reason for the

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<sup>8</sup> "[The Department's] argument [is] that Lee's previous disability was not a disability *because it was not a total disability*, i.e., that it did not prevent him from working . . ." *PSE* at ¶ 28 (emphasis added).

<sup>9</sup> "While a 'previous bodily disability' must have a substantial negative impact on the worker's physical or mental functioning, it does not follow that it must have a substantial negative impact on the worker's ability to perform his or her current job. If it did, *the worker would be unemployable*, in direct contravention of the statute's purpose." *PSE* at ¶ 30 (emphasis added).

interpretation by the Board (at least in *Funk* and *Anderson*) and by the Department that a “previous bodily disability” should be more than an occasionally symptomatic condition, and should instead reflect permanent effect on the earning power of the worker.

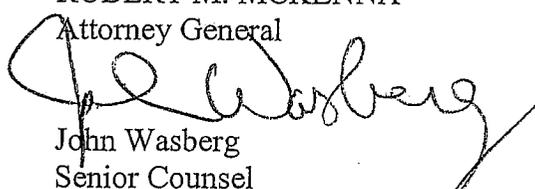
The *PSE* majority opinion quotes this language in *Henson*, *PSE* at ¶ 20, but the opinion is inconsistent with the quoted language from *Henson*. The *PSE* majority opinion does not explain its apparent view that loss of earning power is irrelevant to whether the worker has a previous disability for purposes of second injury fund relief.

#### V. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court grant review and affirm the superior court judgment for the Department.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of July, 2009.

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**H**

Court of Appeals of Washington,  
 Division 1.  
 PUGET SOUND ENERGY, INC, Appellant,  
 v.  
 Robert R. LEE, Respondent.  
 No. 61179-8-I.

April 27, 2009.

**Background:** After workers' compensation claimant was awarded a pension for a permanent total disability, employer requested second injury fund relief. The Board of Industrial Insurance Appeals denied relief, and employer appealed. The Superior Court, King County, Steven C. Gonzalez, J., struck employer's jury demand, and affirmed the Board decision. Employer appealed.

**Holding:** The Court of Appeals, Leach, J., held that employer was entitled to jury trial on whether claimant had a "previous bodily disability" at time he suffered disabling injury.

Reversed and remanded.

Becker, J., filed a dissenting opinion.

West Headnotes

**[1] Workers' Compensation 413 ↪1030.1(4.1)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(4) Proceedings

413k1030.1(4.1) k. In General.

Most Cited Cases

Employer presented substantial evidence that workers' compensation claimant had a "previous bodily disability" at time he suffered disabling industrial injury, and thus employer was entitled to jury trial to determine issue, so as to determine whether employer could obtain relief from second injury fund, after claimant was awarded pension for permanent total disability; physician who performed independent medical examination testified that claimant had two permanent partial disabilities resulting from prior industrial and non-industrial accidents, and claimant and treating physicians testified that claimant had intermittently been unable to work prior to totally disabling injury. West's RCWA 51.16.120, 51.52.115.

**[2] Workers' Compensation 413 ↪1726**

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(P) Hearing or Trial

413XVI(P)3 Questions of Law and Fact

413k1726 k. Proceedings to Secure Compensation. Most Cited Cases

**Workers' Compensation 413 ↪1939.1**

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(T) Review by Court

413XVI(T)12A Questions of Law or Fact, Findings, and Verdict

413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator

413k1939.1 k. In General; Questions of Law or Fact. Most Cited Cases

Whether a party in a workers' compensation case is entitled to a jury trial is a question of law that an appellate court reviews de novo. West's RCWA 51.52.115.

**[3] Workers' Compensation 413 ↪1727**

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(P) Hearing or Trial

413XVI(P)4 Jury Trial  
413k1727 k. In General. Most Cited

Cases

Either party in a workers' compensation case is entitled to a jury trial to resolve factual disputes on appeal from a decision by the Board of Industrial Insurance Appeals. West's RCWA 51.52.115.

**[4] Workers' Compensation 413 ↪11**

413 Workers' Compensation

413I Nature and Grounds of Employer's Liability

413k11 k. Purpose of Legislation. Most Cited

Cases

**Workers' Compensation 413 ↪1030.1(1)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(1) k. In General. Most

Cited Cases

The legislature created the second injury fund to encourage employers to hire previously disabled workers by providing that, if a disabled worker suffers a subsequent injury on the job, the employer is not liable for a greater disability than actually results from the subsequent injury. West's RCWA 51.16.120(1).

**[5] Workers' Compensation 413 ↪1030.1(1)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(1) k. In General. Most

Cited Cases

**Workers' Compensation 413 ↪1050.1**

413 Workers' Compensation

413XI Insurance and Public Funds

413XI(B) Public Funds

413k1050 Premiums and Rates

413k1050.1 k. In General. Most Cited

Cases

Elements of the Industrial Insurance Act that must be considered when interpreting the section governing the second injury fund include the premises that each industry should be responsible for costs arising out of industrial injuries suffered by its employees and that each employer's premium reflect its own cost experience to encourage safety and avoid an unfair burden upon other employers. West's RCWA 51.16.120.

**[6] Workers' Compensation 413 ↪847**

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)2 Total Incapacity

413k847 k. Incapacity for Work or Employment Generally. Most Cited Cases

In the worker's compensation context, "permanent total disability" is the inability to perform or obtain work suitable to the worker's qualifications and training.

**[7] Workers' Compensation 413 ↪856**

413 Workers' Compensation

413IX Amount and Period of Compensation

413IX(B) Compensation for Disability

413IX(B)3 Partial Incapacity

413k856 k. In General. Most Cited

Cases

**Workers' Compensation 413 ↪1417**

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(N) Weight and Sufficiency of Evidence

413XVI(N)1 In General

413k1415 Opinion Evidence

413k1417 k. Necessity of Expert Evidence. Most Cited Cases  
In the worker's compensation context, "permanent partial disability" is measured by the loss of bodily function and is established by medical testimony.

**[8] Workers' Compensation 413 ↪1030.1(2)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(2) k. Prior Injury or Impairment. Most Cited Cases

The mere existence of a previous permanent partial disability does not entitle an employer to second injury fund relief if a workers' compensation claimant later becomes totally disabled. West's RCWA 51.16.120.

**[9] Workers' Compensation 413 ↪1030.1(1)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(1) k. In General. Most Cited Cases

Where a workers' compensation claimant sustains a subsequent industrial injury, which combines with a previous permanent partial disability to cause permanent total disability, the employer is liable only for the costs that would have resulted from the industrial injury that occurred while working for that employer, and the costs proximately caused by the previous disability are assessed against the second injury fund. West's RCWA 51.16.120.

**[10] Workers' Compensation 413 ↪1030.1(2)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(2) k. Prior Injury or Impairment. Most Cited Cases

Fact that workers' compensation claimant was asymptomatic for six months prior to disabling injury, and had not received accommodations for previous disability, did not preclude employer from being entitled to relief from second injury fund, after claimant was awarded a pension for permanent total disability, since claimant had previously suffered injuries that had prevented him from being able to perform work, which could support a finding that claimant had a "previous bodily disability"; after his prior injuries, claimant could not perform his work about 30% to 40% of the time, with intermittent symptoms recurring at irregular, unpredictable intervals often several months apart. West's RCWA 51.16.120.

**[11] Workers' Compensation 413 ↪1030.1(2)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(2) k. Prior Injury or Impairment. Most Cited Cases

The fact that a workers' compensation claimant has not received accommodations for a previous disability does not eliminate the possibility that a previous bodily disability existed, so as to entitle employer to relief from second injury fund after claimant receives award for a permanent total disability. West's RCWA 51.16.120.

**[12] Workers' Compensation 413 ↪1030.1(2)**

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(2) k. Prior Injury or Impairment. Most Cited Cases

A worker's compensation claimant's prior permanent partial disability may be a "previous bodily disability," for purposes of determining whether an employer is entitled to relief from the second injury fund after claimant receives an award for a permanent total disability; since an employer must hire workers who are capable of substantially performing the jobs they are hired to perform, if "previous bodily disability" only encompassed impairments that substantially hindered a worker from performing the job for which he or she was to be hired, purpose of the second injury fund, to encourage employers to hire any worker with a previous bodily disability, would not be fulfilled. West's RCWA 51.16.120.

[13] Statutes 361 219(5)

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k213 Extrinsic Aids to Construction

361k219 Executive Construction

361k219(5) k. Particular Officers, Construction By. Most Cited Cases

Workers' Compensation 413 1095

413 Workers' Compensation

413XII Administrative Officers and Boards

413k1095 k. Rulings and Decisions in General.

Most Cited Cases

Although the decisions of the Board of Industrial Insurance Appeals are not binding on the courts, it is appropriate for a court to consider the Board's interpretation of the laws it is charged with enforcing, in addition to the relevant case law.

[14] Workers' Compensation 413 1030.1(4.1)

413 Workers' Compensation

413X Payment of Compensation and Compliance with Award

413X(C) Enforcement of Payment or Compliance

413k1030 Payment or Reimbursement from Special or Surplus Fund

413k1030.1 In General; Second or Subsequent Injury or Disability

413k1030.1(4) Proceedings

413k1030.1(4.1) k. In General.

Most Cited Cases

The determination of whether a workers compensation claimant's prior medical conditions constitute a "previous bodily disability," so as to entitle an employer to relief from the second injury fund after a claimant receives an award for a permanent total disability, is a highly fact-specific determination, requiring the trier of fact to determine whether the claimant had a previous permanent loss of function. West's RCWA 51.16.120.

[15] Workers' Compensation 413 598

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(B) Remote and Proximate Consequences

413k598 k. Two or More Causes. Most Cited Cases

An industrial injury may have more than one proximate cause, for purposes of determining a workers' compensation claimant's claim to benefits.

[16] Workers' Compensation 413 1717

413 Workers' Compensation

413XVI Proceedings to Secure Compensation

413XVI(P) Hearing or Trial

413XVI(R)3 Questions of Law and Fact

413k1717 k. Remote and Proximate Consequences. Most Cited Cases

It is the province of the jury to determine the weight of evidence regarding the proximate causes of a workers

compensation claimant's disability.

**\*\*980** Michael L. Hall, Vickie L. Wallen, Perkins Coie LLP, Seattle, WA, for Appellant.

Marta S. Lowy, Office of the Attorney General, Seattle, WA, for Respondent.

**\*\*981** LEACH, J.

**\*871** ¶ 1 Puget Sound Energy (PSE) appeals the denial of second injury fund relief as provided in RCW 51.16. PSE argues that it was entitled to a jury trial on its appeal from an adverse decision of the Board of Industrial Insurance Appeals. The superior court struck PSE's jury demand and ruled that PSE was not entitled to second injury fund relief as a matter of law because the worker, Robert R. Lee, did not have a previous bodily disability. Because the record presents a question of fact regarding whether Lee had a previous bodily disability, we reverse and remand for a jury trial.

#### Background

¶ 2 Lee began working as a lineman in 1970 and pursued that occupation for over 20 years. In 1992, he sustained an industrial injury that eventually led to his permanent total disability. However, earlier during his career as a lineman, he suffered two industrial injuries and one nonindustrial injury. PSE argues that, as a result of these previous incidents, Lee had a previous bodily disability that contributed to his becoming totally permanently disabled and that PSE is therefore eligible for relief from the second injury fund.

¶ 3 Lee's first industrial injury occurred in 1979, when he was climbing steel towers as a lineman for International Line Builders in Oregon. In that job, he was required to carry 40 or more pounds of bolts in bags around his waist, **\*872** over heavy clothing, and climb steel towers in freezing conditions. Due to his height, he had to stand on his toes, jump, and pull himself up on each steel bar. The strenuous activity eventually caused Lee to have neck and arm pain, which in turn made it even more difficult for him to climb and caused him to drop tools, creating a safety hazard for him and other members of his team. Lee testified that he was laid off because he could not keep up with his

team. He moved back to Washington and, although in pain, continued to seek work due to financial need.

¶ 4 Lee's second industrial injury occurred in 1981, when he was working on a team that was topping a pole for West Coast Electric. He was standing in the bucket, holding a chainsaw, when a four-foot chunk of pole he had just cut fell the wrong way and caught on his hand line, jerking his low back forward and slamming his body against the side of the bucket. Afterwards, he developed low back pain and sciatica, which were treated with pain medications and muscle relaxants. He continued to work despite his pain, although he required help from coworkers to complete his duties. He was treated at Stevens Hospital in Edmonds, Washington, for traumatic spondylosis and filed an accident claim. He did not work for about six months following the hospitalization. Eventually, he obtained a medical release to do less strenuous work so he could work in Alaska. With this release, he obtained a less physically demanding job as a foreman supervising other workers. While he was in Alaska, the Department closed Lee's 1981 claim, but he testified that he never received a copy of the order closing his claim. For the next three or four years, Lee had low back pain for which he needed to take medication in order to be able to work. He testified that from 1981 until his injury in 1992, he had back pain about 30 percent of the time. He described the pain as "something that I just grit my teeth and deal with." The pain sometimes would alter the way he performed his job and would require him to ask others for help.

¶ 5 His third injury occurred in 1987. As he bent over to pick up a carrot from the floor, he felt a searing, stabbing **\*873** pain in his neck and back, similar to the pain he had felt after the tower-climbing injury in 1979. Lee immediately took pain medication and went to bed for the entire weekend. Although experiencing severe pain, he returned to work the following Monday but used ice packs on his back every day for several weeks and sought chiropractic treatment. Following this injury, he had difficulty reaching overhead and lifting and relied on coworkers to help him with his job because of back and neck pain. He testified that this pain recurred frequently after 1987, and he experienced it about 30 to 40 percent of the time.

**\*\*982** ¶ 6 Lee's final industrial injury occurred while

he was working as a lineman for PSE. He began working for PSE on March 26, 1992. On October 5, 1992, while working on an electrical pole, Lee lost his footing, dropped about eight feet, and then caught himself by grabbing onto a cable with his right hand. He hung by his right arm from the cable for several moments until he regained his footing on the pole. Although he felt immediate pain in his right shoulder, he continued to work that day. A few days later, the pain became unbearable, and Lee began medical treatment. He was initially placed on light duty and eventually laid off on February 5, 1993. Shortly thereafter, he moved to California, where he obtained a job but let his coworkers do the heavy work.

¶ 7 Lee began seeing Dr. Dobkin on November 4, 1993. Between 1996 and 2000, Dr. Dobkin performed four surgeries to correct problems in Lee's cervical spine. After the third surgery in February 1999, Dr. Dobkin referred Lee to Dr. Stoney, a pain management specialist.

¶ 8 From February 1999 through April 2003, Dr. Stoney's records indicate that Lee had no low back problems and steady improvement in his neck. Dr. Stoney anticipated Lee would be able to return to work with some restrictions. In July of 2003, Dr. Stoney's records indicate that Lee reported recurring mid back and low back pain and also that Lee had a limited ability to sit, stand, or walk, due to pain. In the same report, Dr. Stoney stated, for the first time, that Lee was \*874 unable to maintain gainful employment due to his limited tolerance for sitting, standing, and lifting. Dr. Stoney testified that the mid back and low back pain did not result from the 1992 accident, but maintained that Lee's neck problems alone were totally and permanently disabling.

¶ 9 Throughout his treatment with Drs. Dobkin and Stoney, Lee never told his physicians that he had sustained two industrial injuries and one nonindustrial injury before 1992. He did not report any previous medical conditions affecting his low back, neck, or right arm. In addition, he did not disclose any previous injuries or conditions to Dr. Gritzka, the physician who conducted an independent medical exam (IME) on behalf of PSE. However, PSE discovered evidence of these injuries and questioned Lee and Dr. Gritzka about them in depositions. Lee described the three

previous injuries and symptoms resulting from them.

¶ 10 Dr. Gritzka testified that, in his opinion, Lee was partially permanently disabled before the 1992 accident as a result of his previous injuries and that these injuries combined with the 1992 injury to cause total permanent disability. He testified that Lee had two separate, ratable permanent impairments before 1992: a category two impairment of the lumbar spine under WAC 296-20-280 and a category two impairment of the cervical spine under WAC 296-20-240. He further testified that Lee's medical records indicated that his cervical spine had significant degenerative changes in 1988, with no appreciable change between 1988 and 1994. In addition, Dr. Gritzka stated that restrictions from Lee's previous low back impairment affected his ability to perform job functions:

Q: If Mr. Lee testifies that he has trouble sitting for long periods that he used to be able to do when he was a foreman of power line crews or running crews, and that he can't do so because of pain in his lower back, is that something that's more likely due to the neck injury he had in 1992 or to his pre-existing low back impairment?

\*875 A: It's more likely due to his pre-existing low back impairment.

Dr. Gritzka also testified that Lee would not be totally and permanently disabled if he had not had the previous impairment to his cervical spine:

¶ 11 Dr. Gritzka's initial IME report was prepared before Dr. Gritzka learned of Lee's previous injuries and before he had an opportunity to review medical records regarding those injuries. It indicated that Lee's previous impairment was "not disabling" but became disabling in combination with the 1992 injury. Dr. Gritzka explained this apparent discrepancy between his initial report and his later testimony as follows:

\*\*983 Well, the first problem is that disability and impairment aren't the same thing. As I understand Washington's use of the term disability, it's really more consistent with the AMA use of impairment. Disability means how something affects your ability to do activities of daily living that include work, and

impairment means what's physically wrong with you. They aren't the same thing. I think that Mr. Lee had impairment, using the AMA terms, prior to 1992, but it wasn't causing him to lose work. In other words, he didn't have a disability using the AMA Guides' terminology. But if impairment and disability are synonymous, as they seem to be in Washington, then he would have had a disability.<sup>[FN1]</sup>

FN1. We note that impairment and disability are not synonymous, and that the second injury fund statute requires that the worker have a previous bodily disability. However, we also note that Dr. Gritzka's testimony merely raises a question of fact regarding whether Lee had a previous bodily disability, which should be determined by a jury that has been instructed as to the correct legal standard.

In other words, Dr. Gritzka testified that by "not disabling," he meant Lee was able to work despite the condition and did not mean that Lee did not have a loss of function in his lower back that resulted in a ratable impairment that qualified as a permanent partial disability. Dr. Gritzka testified that Lee's level of impairment of his cervical spine increased to a category three impairment after the 1992 \*876 injury and that the 1992 injury was not the cause of any impairment to his lumbar spine.

¶ 12 Dr. Gritzka also testified that Lee's total disability consisted of the combined effects of impairment of his neck and of his lower back. In correspondence to Lee's counsel in 2003 and 2004, Dr. Dobkin expressed a similar assessment. Dr. Gritzka opined that without the preexisting lower back impairment Lee would not have been totally disabled as the result of his 1992 injury.

¶ 13 In 2004, the Department of Labor and Industries awarded Lee a pension as a permanently totally disabled worker. PSE requested second injury fund relief on the basis that Lee had a previous bodily disability that combined with his 1992 injury to cause his permanent total disability. The Department denied the request, and PSE appealed to the Board of Industrial Insurance Appeals. The industrial appeals judge af-

firmed the Department's orders. PSE appealed, and the Board affirmed in a 2-1 decision. The majority concluded:

A preponderance of credible evidence shows that prior to the 1992 industrial injury, Mr. Lee's lumbar and cervical spine conditions did not affect his ability to remain active and to perform vigorous, heavy labor. Even if he accomplished this level of activity through stoicism and working through pain, the fact remains that the level of pain that he lived with prior to the 1992 injury did not substantially impact his functioning. Mr. Lee's pre-existing lumbar and cervical conditions did not become disabling until after the 1992 industrial injury and, therefore, cannot be considered a "previous bodily disability," per RCW 51.16.120(1).<sup>[FN2]</sup>

FN2. In re Lee, Nos. 04 22408 & 04 22409, 2006 WL 3520114 (Wash. Bd. of Indus. Ins. Appeals Sept. 18, 2006).

The dissenting member concluded that second injury fund relief was appropriate:

[Dr. Gritzka] testified credibly that Mr. Lee's total disability was due to a combination of pre-existing disabilities and the industrial injury which should entitle Puget Sound Energy to \*877 second injury fund relief. Denial of second injury fund relief ignores the repeated instances in which Mr. Lee's ratable disabilities significantly affected his work performance. The fact that these problems were not clearly "manifest" at the time of the industrial injury does not eliminate second injury fund relief because his disabilities were permanent and manifested repeatedly over a period of many years. The legislative elimination of the requirement that a pre-existing disability be known to the employer for second injury fund relief to be granted supports the granting [sic] in circumstances such as these.<sup>[FN3]</sup>

FN3. Lee, 2006 WL 3520114.

\*\*984 PSE appealed the Board's decision in superior court and filed a timely demand for a jury of six.

¶ 14 Six months after PSE filed its jury demand and 24

days before trial, the Department moved to strike the jury demand on the ground that there were "no material facts in dispute and thus, no factual issues for determination by a jury. The issue is a question of law that should be tried to the court, not a jury." <sup>FN4</sup> The Department argued that the only remaining issue was the construction and interpretation of the second injury fund statute, RCW 51.16.120. It argued that

<sup>FN4</sup>. PSE did not object to the timing of this motion.

whether and how the second-injury fund statute applies to the facts of Mr. Lee's condition as it pre-existed the injury is the sole question in the case. In order to determine this, the court must perform the functions explicitly reserved for the judiciary; there is simply no role for a jury to play. PSE objected, arguing that it was entitled to a jury trial to review the Board's decision. Additionally, counsel for PSE provided jury instructions from a case that he had previously tried regarding an employer's entitlement to second injury fund relief, stating that he planned to submit similar instructions in this case.

¶ 15 The superior court granted the motion to strike the jury demand, ruling that there were no material issues of <sup>\*878</sup> fact in dispute that could establish a previous bodily disability. The superior court concluded that Lee did not have a previous bodily disability under RCW 51.16.120 as a matter of law because there was no evidence that he was symptomatic, required accommodation, or was limited in his ability to perform his job at the time of the injury. The court also concluded, in the alternative, that PSE was not entitled to second injury fund relief as a matter of law because there was no evidence that, before the 1992 injury, Lee suffered from a permanent disability that adversely affected his wage-earning ability. PSE argues that there were material facts in dispute and that it is, therefore, entitled to a jury trial.

#### Discussion

[1][2][3] ¶ 16 Whether PSE is entitled to a jury trial is a question of law that we review de novo. <sup>FN5</sup> Appeals to the superior court from decisions by the Board of Industrial Insurance Appeals are governed by RCW

51.52.115, which provides that "either party shall be entitled to a trial by jury upon demand, and the jury's verdict shall have the same force and effect as in actions at law." <sup>FN6</sup> Thus, either party is entitled to a jury trial to resolve factual disputes on appeal from a decision by the Board. <sup>FN7</sup> Therefore, we must determine whether there are any material facts in dispute here. We conclude that there are.

<sup>FN5</sup>. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wash.2d 873, 880, 73 P.3d 369 (2003).

<sup>FN6</sup>. RCW 51.52.115.

<sup>FN7</sup>. Romo v. Dep't of Labor & Indus., 92 Wash.App. 348, 353, 962 P.2d 844 (1998).

¶ 17 PSE argues that it presented substantial evidence that Lee had a previous bodily disability. The Department, on the other hand, argues that no trier of fact could have concluded that Lee had a previous bodily disability because under Rothschild International Stevedoring Co. v. Department of Labor & Industries, <sup>FN8</sup> the employer must show that <sup>\*879</sup> the preexisting condition impacted the worker's ability to perform work duties and that PSE failed to make this showing. Specifically, the Department argues that there was no evidence that Lee was symptomatic, required accommodation, or was limited in his ability to perform his job at the time of the injury. PSE argues that Rothschild does not require the employer to show that the worker was symptomatic, required accommodation, or was limited in his ability to perform his job at the time of the injury in order to establish a previous bodily disability.

<sup>FN8</sup>. 3 Wash.App. 967, 478 P.2d 759 (1970).

[4] ¶ 18 The legislature created the second injury fund to encourage employers to hire previously disabled workers by providing <sup>\*985</sup> that, if a disabled worker suffers a subsequent injury on the job, the employer is not liable for a greater disability than actually results from the subsequent injury. <sup>FN9</sup> The relevant statute, RCW 51.16.120(1), provides, in part:

<sup>FN9</sup>. Jussila v. Dep't of Labor & Indus., 59

Wash.2d 772, 778, 370 P.2d 582 (1962).

Whenever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof ... a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from said further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to such employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund.

In order for an employer to be eligible for second injury fund monies, the worker must have (1) a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, (2) suffer a further disability from injury or occupational disease in employment, and (3) \*880 become totally and permanently disabled from the combined effects of the previous bodily disability and the later industrial injury or occupational disease. Here, the parties dispute whether Lee had a previous bodily disability and, if so, whether his total and permanent disability resulted from the combined effects of the previous bodily disability and the 1992 industrial injury, or solely from the 1992 injury.

[5] ¶ 19 The legislature has not defined "previous bodily disability." A definition that makes it easier for an employer to recover from the fund will support the fund's purpose, while a definition making recovery too difficult will discourage an employer from hiring a previously disabled worker.<sup>FN10</sup> Our Supreme Court has cautioned that other elements of the Industrial Insurance Act must be considered when interpreting RCW 51.16.120.<sup>FN11</sup> These include the premises that each industry should be responsible for costs arising out of industrial injuries suffered by its employees and that each employer's premium reflect its own cost experience to encourage safety and avoid an unfair burden upon other employers.<sup>FN12</sup>

FN10. Jussila, 59 Wash.2d at 779, 370 P.2d 582.

FN11. Jussila, 59 Wash.2d at 779, 370 P.2d 582.

FN12. Jussila, 59 Wash.2d at 779, 370 P.2d 582.

¶ 20 Washington courts have not articulated a definition for "previous bodily disability." However, the Board of Industrial Insurance Appeals has articulated a number of times a definition that focuses on whether the worker has a history of a prior medical condition having a substantial negative impact upon the worker's physical or mental functioning, using the following definition for "disability":

the impairment of the workman's mental or physical efficiency. It embraces any loss of physical or mental functions which detracts from the former efficiency of the individual in \*881 the ordinary pursuits of life. It connotes a loss of earning power.<sup>FN13</sup>

FN13. See, e.g., In re Pate, No. 90 4055, 1992 WL 160673 (Wash. Bd. of Indus. Ins. Appeals May 7, 1992) (quoting Henson v. Dep't of Labor & Indus., 15 Wash.2d 384, 391, 130 P.2d 885 (1942)).

The historical context in which RCW 51.16.120 was adopted supports the Board's use of this definition of disability. In Henson v. Department of Labor & Industries,<sup>FN14</sup> the court considered the definition of "disability" in the context of 1937 and 1939 amendments to occupational disease provisions of the Workmen's Compensation Act. After noting that the legislature had used the word "disability" in these amendments but provided no definition, the court stated that it must assume that the legislature used "disability" "in the sense in which it was then \*986 understood in the law."<sup>FN15</sup> The court then defined "disability" as stated above. Less than four months after the Henson decision, the legislature adopted RCW 51.16.120, again using the word "disability" without providing a definition. We thus may presume

the legislature's acquiescence in the definition provided by the court less than four months earlier.<sup>FN16</sup>

FN14. 15 Wash.2d 384, 130 P.2d 885 (1942).

FN15. Henson, 15 Wash.2d at 390-91, 130 P.2d 885.

FN16. See Soproni v. Polygon Apartment Partners, 137 Wash.2d 319, 327 n. 3, 971 P.2d 500 (1999).

[6][7][8][9] ¶ 21 In the worker's compensation context, courts recognize two separate kinds of disability: permanent partial disability and permanent total disability.<sup>FN17</sup> Permanent total disability is the inability to perform or obtain work suitable to the worker's qualifications and training.<sup>FN18</sup> Permanent partial disability is measured by the loss of bodily \*882 function and is established by medical testimony.<sup>FN19</sup> The mere existence of a previous permanent partial disability does not entitle an employer to second injury fund relief if the worker later becomes totally disabled.<sup>FN20</sup> But where a worker sustains a subsequent industrial injury, which combines with a previous permanent partial disability to cause permanent total disability, the employer is liable only for the costs that would have resulted from the industrial injury that occurred while working for that employer, and the costs proximately caused by the previous disability are assessed against the second injury fund.<sup>FN21</sup>

FN17. Ellis v. Dep't of Labor & Indus., 88 Wash.2d 844, 851, 567 P.2d 224 (1977).

FN18. Fochiman v. Dep't of Labor & Indus., 7 Wash.App. 286, 294, 499 P.2d 255 (1972).

FN19. Fochiman, 7 Wash.App. at 294, 499 P.2d 255 (citing Franks v. Dep't of Labor & Indus., 35 Wash.2d 763, 215 P.2d 416 (1950); Page v. Dep't of Labor & Indus., 52 Wash.2d 706, 328 P.2d 663 (1958)).

FN20. Jussila, 59 Wash.2d at 777-80, 370 P.2d 582.

FN21. See Jussila, 59 Wash.2d at 777-78,

370 P.2d 582.

¶ 22 Our Supreme Court addressed whether a worker's previously existing condition qualified as a "previous bodily infirmity or disability"<sup>FN22</sup> for purposes of the second injury fund in Donald W. Lyle, Inc. v. Department of Labor & Industries.<sup>FN23</sup> There, the employer argued that it was entitled to second injury fund relief because the worker's total and permanent disability resulted from the combined effects of an industrial injury and a preexisting disease.<sup>FN24</sup> The preexisting disease was "a condition of degenerative arthritis," which was "latent, or quiescent, and not disabling" before the industrial injury but "was 'lighted up,' or aggravated, by the injury and the employee's permanent disability was due to the combined effects of both."<sup>FN25</sup> Even though the worker's permanent total disability was caused in part by the previous condition, the court held that the employer was not entitled to second injury fund relief \*883 because the worker's preexisting condition was "an unknown, preexisting and nondisabling condition."<sup>FN26</sup>

FN22. Former RCW 51.16.120 (Laws of 1961, ch. 23, § 51.16.120).

FN23. 66 Wash.2d 745, 405 P.2d 251 (1965).

FN24. Lyle, 66 Wash.2d at 746, 405 P.2d 251.

FN25. Lyle, 66 Wash.2d at 746, 405 P.2d 251.

FN26. Lyle, 66 Wash.2d at 748, 405 P.2d 251.

¶ 23 Six years later, in 1971, this court addressed whether a worker had a previous disability for purposes of the second injury fund in Roithschild. There, the worker

had from time to time sustained injuries including a back sprain in 1940 for which he wore a back brace for a short time, a back sprain in 1943, a left shoulder injury in 1948, an injury to his left foot in 1955, and a back sprain in 1957. Most significantly however, there was *no evidence that any injury*

sustained by [the worker] had been other than temporarily disabling. Up to the time of his final disabling injury of August 2, 1961, [he] was doing "everything" required of a longshoreman.<sup>[FN27]</sup>

FN27. *Rothschild*, 3 Wash.App. at 969, 478 P.2d 759 (emphasis added).

There, as in *Lyle*, the industrial injury had "triggered" a latent condition (a "traumatic neurosis"), which combined with the injury to \*\*987 cause permanent total disability.<sup>FN28</sup> This court held that the worker did not have a previous disability because he did not have a " 'known, preexisting disabling injury or condition...' " <sup>FN29</sup> Here, unlike in *Rothschild*, substantial evidence was offered to show that Lee had a permanent disability comprised of two separate conditions that substantially impaired his physical function. Dr. Gritzka testified that Lee had two permanent partial disabilities, and Lee's testimony regarding his previous injuries and symptoms supported Dr. Gritzka's opinion. The evidence does not show that Lee had a latent condition that was triggered by the injury, as in *Lyle* and *Rothschild*, but rather that Lee had ongoing intermittent symptoms from previous injuries that substantially impaired his ability to function before his 1992 injury: A jury could conclude that this partial loss of function was permanent, would continue to produce symptoms intermittently, thereby contributing\*884 to his permanent total disability, and that without this earlier permanent impairment the 1992 injury would not have been permanently disabling.

FN28. *Rothschild*, 3 Wash.App. at 970, 478 P.2d 759.

FN29. *Rothschild*, 3 Wash.App. at 970, 478 P.2d 759 (quoting *Lyle*, 66 Wash.2d at 748, 405 P.2d 251).

¶ 24 The version of RCW 51.16.120 in effect when *Lyle* and *Rothschild* were decided provided:

Whenever a workman has sustained a previous bodily infirmity or disability from any previous injury or disease and shall suffer a further injury or disease in employment covered by this title and become totally and permanently disabled from the combined ef-

fects thereof, then the accident cost rate of the employer at the time of said further injury or disease shall be charged only with the accident cost which would have resulted solely from said further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to the employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury account.<sup>[FN30]</sup>

FN30. Former RCW 51.16.120 (Laws of 1961, ch. 23, § 51.16.120).

Following *Rothschild*, the legislature made several changes to RCW 51.16.120, including removal of the word "infirmity" from the first sentence to clarify that the worker must have a previous bodily *disability* in order for the employer to qualify for second injury fund relief.<sup>FN31</sup> Later, in 1984, the legislature inserted "whether known or unknown to the employer" after the word "disease," thus eliminating any requirement that the employer know about the worker's previous bodily disability.<sup>FN32</sup> This change was made because the Department had "interpreted statutory and case law to require that an employer must have knowledge of an employee's previous injury in order to qualify for second \*885 injury fund relief." <sup>FN33</sup> The knowledge requirement was inconsistent with laws that limit employers' rights to inquire about an applicant's physical condition, and the legislature was concerned that employers may unfairly be denied use of the second injury fund.<sup>FN34</sup> In addition to clarifying that the statute does not require knowledge of the disability by the employer, the legislature's 1984 amendment in response to Board decisions also demonstrates its awareness of the Board's interpretation of the statute. Thus, just as legislative inaction following a court decision demonstrates its acquiescence in the same, the legislature's decision not to provide a definition for "previous bodily disability" in 1984 or in subsequent amendments to the second injury fund shows legislative acquiescence in the Board's interpretation of that term.

FN31. Former RCW 51.16.120 (Laws of 1977, 1st Ex.Sess., ch. 323 § 13). Minor changes not relevant here were also made in

Laws of 1972, 2d Ex.Sess., ch. 43, § 13.

FN32. Former RCW 51.16.120 (Laws of 1984, ch. 63, § 1).

FN33. 1984 FINAL LEGISLATIVE REPORT, 48th Wash. Leg., at 139.

FN34. 1984 FINAL LEGISLATIVE REPORT, 48th Wash. Leg., at 139.

**\*\*988** [10] ¶ 25 Neither the statute nor the common law requires that a worker be continually symptomatic, require accommodation, or be limited in his ability to perform his particular job *at the time of the injury* as the Department argues. By removing the word "infirmity" from the statute, the legislature merely ratified the primary holdings of Lyle and Rothschild, which require that the worker have a "disability" rather than a latent, nondisabling condition. While this excludes conditions that have never caused symptoms prior to the industrial injury, the legislature has not excluded disabilities characterized by intermittent symptoms that happen to be temporarily latent at the time of the injury. Here, Lee testified that after his 1987 nonindustrial injury he had symptoms that prevented him from being able to perform his work about 30 to 40 percent of the time. These intermittent symptoms recurred at irregular, unpredictable intervals often several months apart. PSE presented the expert testimony of Dr. Gritzka that these symptoms were caused by a permanent loss of function in Lee's lower back. Thus, the fact that Lee did not experience **\*886** symptoms during the six-month period preceding the injury could be consistent with a determination that he had a disability before the 1992 injury.

[11] ¶ 26 Similarly, the fact that a worker has not received accommodations for a previous disability does not eliminate the possibility that a disability existed. Since an employer must know of a worker's disability in order to provide accommodation, the legislature impliedly eliminated any requirement that the worker have received any accommodation for the previous disability when it clarified that the previous disability may be "unknown to the employer." <sup>FN35</sup> Lee testified that, when his symptoms flared up, he could not perform all of his duties without assistance

from his coworkers. Thus, despite the fact that the alleged disability was unknown to PSE before the industrial injury, a question of fact was raised as to whether Lee was actually able to perform all the duties required by his job.

FN35. Former RCW 51.16.120 (Laws of 1984, ch. 63, § 1).

¶ 27 PSE's medical expert testified that Lee was permanently partially disabled before the 1992 accident. Dr. Gritzka testified that Lee had category two impairments of the lumbar spine and cervical spine before 1992. A category two impairment of the lumbar spine is "[m]ild low back impairment, with mild intermittent objective clinical findings of such impairment but no significant X-ray findings and no significant objective motor loss. Subjective complaints and/or sensory losses may be present." <sup>FN36</sup> A category two impairment of the cervical spine is "[m]ild cervico-dorsal impairment, with objective clinical findings of such impairment with neck rigidity substantiated by X-ray findings of loss of anterior curve, without significant objective neurological findings." <sup>FN37</sup> This evidence directly contradicts the Department's contention that Lee did not have a previous bodily disability. By arguing that the court should decide this question as a matter of law, the Department **\*887** essentially contends that Dr. Gritzka's testimony should be ignored. Of course, the credibility of witnesses must be weighed by the trier of fact.

FN36. WAC 296-20-280.

FN37. WAC 296-20-240.

¶ 28 The Department argues that, even if a jury had been allowed to weigh Dr. Gritzka's testimony and found that Lee had a permanent partial disability, Lee did not have a previous bodily disability. The Department argues that a "permanent partial disability" is not a "disability" because it relates to loss of bodily function rather than to loss of earning power, and therefore the standard for permanent partial disability does not apply when determining whether a worker has a "previous bodily disability." However, the Department's distinction is misplaced. As discussed above, permanent *total* disability is the inability to perform or obtain work, <sup>FN38</sup> while permanent *partial*

disability is measured by the loss of bodily function.<sup>FN39</sup> The \*\*989 argument that Lee's previous bodily disability was not a disability because it was not a total disability, i.e., that it did not prevent him from working, begs the question whether the previous disability was a contributing factor in his total disability. By definition, a previous bodily disability must be partial.

FN38. *Fochtman*, 7 Wash.App. at 294, 499 P.2d 255.

FN39. *Fochtman*, 7 Wash.App. at 294, 499 P.2d 255 (citing *Franks v. Dep't of Labor & Indus.*, 35 Wash.2d 763, 215 P.2d 416 (1950); *Page v. Dep't of Labor & Indus.*, 52 Wash.2d 706, 328 P.2d 663 (1958)).

[12] ¶ 29 We decline to hold that a permanent partial disability is not a disability for purposes of the second injury fund. "Statutes should be interpreted to further, not frustrate, their intended purpose,"<sup>FN40</sup> and such an interpretation would frustrate the purpose of the second injury fund statute. The purpose of the second injury fund, as stated by our Supreme Court in 1962, is "to encourage the hiring of previously handicapped workmen by providing that the second employer will not, in the event such a workman suffers a subsequent injury on the job, be liable for a greater \*888 disability than actually results from the second accident."<sup>FN41</sup> But an employer must hire workers, whether disabled or not, who are capable of substantially performing the jobs they are hired to perform. If "previous bodily disability" only encompassed impairments that substantially hindered a worker from performing the job for which he or she was to be hired, employers would not be encouraged to hire any worker with a previous bodily disability. Thus, "previous bodily disability" must relate to loss of bodily function. This interpretation is consistent with previous Board decisions in second injury fund cases.

FN40. *Burnside v. Simpson Paper Co.*, 123 Wash.2d 93, 99, 864 P.2d 937 (1994).

FN41. *Jussila*, 59 Wash.2d at 778, 370 P.2d 582.

[13] ¶ 30 The Board has correctly adopted a definition of "previous bodily disability" that requires a permanent loss of physical or mental functioning. Although the Board's decisions are not binding on the courts, it is appropriate for us to consider the Board's interpretation of the laws it is charged with enforcing, in addition to the relevant case law.<sup>FN42</sup> In its decision here, the Board quoted from *In re Kaelin*,<sup>FN43</sup> where it held:

FN42. *Lynn v. Dep't of Labor & Indus.*, 130 Wash.App. 829, 836, 125 P.3d 202 (2005) (citing *Jensen v. Dep't of Ecology*, 102 Wash.2d 109, 113, 685 P.2d 1068 (1984)).

FN43. No. 04 13345, 2006 WL 2989433 (Wash. Bd. of Indus. Ins. Appeals May 10, 2006).

A worker must have a "previous bodily disability" in order for an employer to qualify for second injury fund relief. Disability means the impairment of the worker's mental or physical efficiency. It embraces any loss of physical or mental functions that detract from the former efficiency of the individual in the ordinary pursuits of life. However, something more than the existence of a prior condition requiring periodic medical attention is required. In the context of second injury fund relief, a pre-existing disability is more than a mere pre-existing medical condition and must, in some fashion, permanently impact the worker's physical and/or mental functioning.<sup>FN44</sup>

FN44. *Lee*, WL 3520114 (quoting *Kaelin*, 2006 WL 2989433).

\*889 In *In re Pate*,<sup>FN45</sup> the Board discussed the meaning of "disability" as interpreted in previous case law, including *Henson*, *Jussila*, *Lyle*, and *Rothschild*, concluding that "second injury fund relief is not made where the evidence shows that a worker has a history of prior medical conditions but does not show that they had a substantial negative impact on the worker's physical or mental functioning."<sup>FN46</sup> While a "previous bodily disability" must have a substantial negative impact on the worker's physical or mental functioning, it does not follow that it must have a substantial negative impact on the worker's ability to perform his or her current job. If it did, the worker would be unemployable, in direct contravention of the

statute's purpose.

FN45. No. 90 4055, 1992 WL 160673  
(Wash. Bd. of Indus. Ins. Appeals May 7,  
1992).

FN46. Pate, 1992 WL 160673.

[14] ¶ 31 A review of second injury fund decisions by the Board shows that the determination of whether a worker's medical conditions constituted a previous bodily disability\*\*990 is a highly fact-specific determination, requiring the trier of fact to determine whether the worker had a previous permanent loss of function. In the decisions denying second injury fund relief, the Board's factual findings show no significant loss of physical or mental function. For example, in *In re Olsen*,<sup>FN47</sup> second fund relief was denied where the Board's findings reflected that none of Olsen's previous conditions interfered with "her ability to engage in ordinary pursuits of daily living." Similarly, the Board denied relief in *In re Norgren*,<sup>FN48</sup> where it found that the conditions Norgren had before the industrial injury "did not have any negative effect on his ability to work, his social relationships, or activities of his daily living."

FN47. No. 06 16795, 2007 WL 4986259  
(Wash. Bd. of Indus. Ins. Appeals Nov. 13,  
2007).

FN48. No. 04 18211, 2006 WL 481048  
(Wash. Bd. of Indus. Ins. Appeals Jan. 12,  
2006).

\*890 ¶ 32 By contrast, decisions granting second injury fund relief show that the worker had a loss of function before the permanently disabling industrial injury. For example, in *In re McKee*,<sup>FN49</sup> the Board awarded second injury fund relief even though McKee was able to work despite preexisting conditions, which did not prevent her from working altogether but limited her vocational options. The Board stated that

FN49. No. 04 14107, 2007 WL 1413127  
(Wash. Bd. Of Indus. Ins. Appeals Mar. 26,  
2007).

[t]o be disabling, a pre-existing condition must have had a substantial permanent impact on a worker's functioning. The disability must have clearly detracted from an individual's ability to engage in the ordinary pursuits of life. While disability "connotes a loss of earning power," this is not absolutely required provided that the disability substantially and negatively impacts a worker's daily functioning and efficiency.<sup>FN50</sup>

FN50. McKee, 2007 WL 1413127.

In *In re Williams*,<sup>FN51</sup> the worker had a previous low back condition that was partially disabling prior to the industrial injury that ultimately led to him becoming permanently totally disabled. The worker "continued to experience the residual symptoms from a prior industrial injury that happened on February 8, 1989," when he sustained a subsequent injury in 1996.<sup>FN52</sup> Although the worker "was unable to recall the nature and extent of his prior treatment at the time of hearing," the evidence was sufficient to persuade the Board that the previous condition was partially disabling prior to the 1996 industrial injury. Moreover, just as in this case, the worker's symptoms were intermittent and the worker had not received accommodation or a permanent partial disability award for the previous disability. The Board recognized in *Williams* that an impairment need not "be reduced to a \*891 disability award in order to be considered a previous bodily disability or condition."<sup>FN53</sup>

FN51. No. 00 11219, 2001 WL 1755668  
(Wash. Bd. of Indus. Ins. Appeals Dec. 20,  
2001).

FN52. Williams, 2001 WL 1755668.

FN53. Williams, 2001 WL 1755668.

¶ 33 Whether the preexisting condition has permanently impacted the worker's physical and/or mental functioning is a question of fact. The legislature has mandated that the factual issues be decided by a jury on appeal, if requested by any party.<sup>FN54</sup> Thus, on appeal to the superior court, either party is entitled to a jury trial to resolve disputes regarding whether the worker had a previous bodily disability. The trial court

erred because PSE presented substantial evidence showing that Lee had a previous disability. PSE is entitled to a jury trial under RCW 51.52.115.

FN54. RCW 51.52.115.

[15][16] ¶ 34 Finally, if a jury determines that Lee had a previous bodily disability, the jury must also determine whether that disability was a proximate cause of Lee's total and permanent disability. An industrial injury may have more than one proximate cause.<sup>FN55</sup> It is the province of the jury to determine the weight of evidence regarding the proximate causes of a worker's disability. \*\*991<sup>FN56</sup> Dr. Gritzka testified that Lee's total permanent disability was caused by a combination of the 1992 injury and a previous bodily disability involving Lee's low back, while Dr. Stoney testified that the 1992 injury did not cause an impairment to Lee's low back and that Lee's neck injury alone is totally and permanently disabling. PSE is entitled to relief only if Lee's permanent total disability was a combined result of the 1992 injury and a previous bodily disability.<sup>FN57</sup> Because Drs. Stoney and Gritzka presented conflicting testimony regarding causation, this evidence also must be weighed by a jury.

FN55. *Wendt v. Dep't of Labor & Indus.*, 18 Wash.App. 674, 684, 571 P.2d 229 (1977).

FN56. See *Bennett v. Dep't of Labor & Indus.*, 95 Wash.2d 531, 533-35, 627 P.2d 104 (1981).

FN57. See *Jussila*, 59 Wash.2d at 776-78, 370 P.2d 582.

\*892 Conclusion

¶ 35 We reverse and remand for proceedings consistent with this opinion.

WE CONCUR: LAU, J.  
BECKER, J. (dissenting).

¶ 36 Under certain circumstances, a self-insured employer is allowed to avoid the full responsibility of paying benefits for an industrial injury sustained by a worker while working for that employer. To obtain relief from what is called the second injury fund, the

employer must prove that the injured has a "previous bodily disability." RCW 51.16.120. The majority defines this term as any condition that substantially impaired the worker's ability to function at some point in the past, even if the worker was fully functional at the time of the most recent injury. The majority opinion is not only inconsistent with precedent, it will have the fiscally unfortunate effect of depleting the second injury fund. I respectfully dissent.

¶ 37 The employee, Robert Lee, had a strenuous 22-year career as an electrical lineman. The injury that rendered him totally unable to work occurred in October 1992, while he was working for Puget Sound Energy (PSE). Before that, he sustained several back and upper body injuries and often had the experience of working through pain. Nevertheless, he kept on working at the hardest physical jobs, those that could be performed only by people in top physical shape.

¶ 38 At the time of his serious injury in October 1992, Lee was in exactly the same situation as the longshoreman described in *Rothschild Int'l v. Dep't. of Labor and Indus.*, 3 Wash.App. 967, 478 P.2d 759 (1970). There was no evidence that any previous injury he sustained "had been other than temporarily disabling", and up to the time of his final injury, he was doing everything required of his job. *Rothschild*, 3 Wash.App. at 969, 478 P.2d 759. Even Dr. Gritzka, the physician whose testimony is the principal \*893 support for PSE's position, agreed that Lee's physical condition in October 1992 was not such as to disable him from work.

¶ 39 In *Rothschild*, the worker had previously sustained several back sprains and injuries to his shoulder and foot. These previous injuries had left him with a "latent" non-disabling condition—"a traumatic neurosis which was a latent threat because of his age, general frailty, and general physical condition." *Rothschild*, 3 Wash.App. at 970, 478 P.2d 759. The employer at the time of the final injury was denied second injury fund relief because of a failure to show that the preexisting condition was actually disabling. Evidence of a prior infirmity is not enough.

¶ 40 The majority states that Lee's case is different from *Rothschild* because a jury might conclude that he had "ongoing intermittent symptoms from previous

injuries that substantially impaired his ability to physically function". Majority, at 987. The record, however, shows that Lee was a fully functional worker through the years up to the time of his 1992 accident. From time to time he had nagging pains but he did not take time off; he simply took medication, used ice packs, and kept on working.

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¶ 41 Lee did not experience a loss of earning power as a result of his earlier injuries. When he went to work for PSE he needed no accommodations, was not suffering backache or neck pain, was not taking medications, did not feel any effects from his previous accidents, and was performing \*\*992 heavy manual labor without restrictions or functional impairment. Dr. Gritzka testified that before October 1992 Lee was able to continue working at his usual job "in spite of whatever might have been diagnosably wrong with him ... some people can have terrible looking x-rays and might even have a ratable impairment by x-ray criteria, but nevertheless go about doing whatever they want."

¶ 42 PSE did not hire a handicapped person. Lee himself said there was nothing physical he could not do before the injury he sustained while working for PSE. He testified, "I have been hurt, obviously, throughout my life, but I was in \*894 good shape. I could do 50 one hand push-ups, do 50 on the other side, go back and do a second 50. I could do 1500 flutter kicks in the morning."

¶ 43 Counsel for PSE managed to elicit from Lee his acknowledgement that after the earlier injuries, from time to time he had to call upon his union brothers to help him do lifting and tugging. PSE makes far too much of this testimony. It would be a rare individual who, after a lifetime of physical labor, would not say the same. If such evidence is enough to establish that a worker has a "previous bodily disability", the door to second injury fund relief will be thrown wide open and there will be nothing left of it.

¶ 44 Following *Rothschild*, I would deny second injury fund relief to PSE because there is no evidence that the previous injuries suffered by Lee were more than temporarily disabling.

Wash.App. Div. 1,2009.

# APPENDIX B

## STATUTES

### RCW 51.16.120

(1) Whenever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof or die when death was substantially accelerated by the combined effects thereof, then the experience record of an employer insured with the state fund at the time of said further injury or disease shall be charged and a self-insured employer shall pay directly into the reserve fund only the accident cost which would have resulted solely from said further injury or disease, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The difference between the charge thus assessed to such employer at the time of said further injury or disease and the total cost of the pension reserve shall be assessed against the second injury fund. 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. Pending outcome of such appeal the transfer or payment shall be made as required by such order.

(2) The department shall, in cases of claims of workers sustaining injuries or occupational diseases in the employ of state fund employers, recompute the experience record of such employers when the claims of workers injured in their employ have been found to qualify for payments from the second injury fund after the regular time for computation of such experience records and the department may make appropriate adjustments in such cases including cash refunds or credits to such employers.

(3) To encourage employment of injured workers who are not reemployed by the employer at the time of injury, the department may adopt rules providing for the reduction or elimination of premiums or assessments from subsequent employers of such workers and may also adopt rules for the reduction or elimination of charges against such employers in the event of further injury to such workers in their employ.

(4) To encourage employment of injured workers who have a developmental disability as defined in RCW 71A.10.020, the department may adopt rules providing for the reduction or elimination of premiums or assessments from employers of such workers and may also adopt rules for the reduction or elimination of charges against their employers in the event of further injury to such workers in their employ.

### RCW 51.32.080

(1)(a) Until July 1, 1993, for the permanent partial disabilities here specifically described, the injured worker shall receive compensation as follows:

#### LOSS BY AMPUTATION

Of leg above the knee joint with short thigh stump (3 inches or

less below the tuberosity of ischium) .....	\$54,000.00
Of leg at or above knee joint with functional stump .....	48,600.00
Of leg below knee joint .....	43,200.00
Of leg at ankle (Syme) .....	37,800.00
Of foot at mid-metatarsals .....	18,900.00
Of great toe with resection of metatarsal bone .....	11,340.00
Of great toe at metatarsophalangeal joint .....	6,804.00
Of great toe at interphalangeal joint .....	3,600.00
Of lesser toe (2nd to 5th) with resection of metatarsal bone .....	4,140.00
Of lesser toe at metatarsophalangeal joint .....	2,016.00
Of lesser toe at proximal interphalangeal joint .....	1,494.00
Of lesser toe at distal interphalangeal joint .....	378.00
Of arm at or above the deltoid insertion or by disarticulation at the shoulder .....	54,000.00
Of arm at any point from below the deltoid insertion to below the elbow joint at the insertion of the biceps tendon .....	51,300.00
Of arm at any point from below the elbow joint distal to the insertion of the biceps tendon to and including mid-metacarpal amputation of the hand .....	48,600.00
Of all fingers except the thumb at metacarpophalangeal joints ...	29,160.00
Of thumb at metacarpophalangeal joint or with resection of carpometacarpal bone .....	19,440.00
Of thumb at interphalangeal joint .....	9,720.00
Of index finger at metacarpophalangeal joint or with resection of metacarpal bone .....	12,150.00
Of index finger at proximal interphalangeal joint .....	9,720.00
Of index finger at distal interphalangeal joint .....	5,346.00
Of middle finger at metacarpophalangeal joint or with resection of metacarpal bone .....	9,720.00
Of middle finger at proximal interphalangeal joint .....	7,776.00
Of middle finger at distal interphalangeal joint .....	4,374.00
Of ring finger at metacarpophalangeal joint or with resection of metacarpal bone .....	4,860.00
Of ring finger at proximal interphalangeal joint .....	3,888.00
Of ring finger at distal interphalangeal joint .....	2,430.00
Of little finger at metacarpophalangeal joint or with resection of metacarpal bone .....	2,430.00
Of little finger at proximal interphalangeal joint .....	1,944.00
Of little finger at distal interphalangeal joint .....	972.00

#### MISCELLANEOUS

Loss of one eye by enucleation .....	21,600.00
Loss of central visual acuity in one eye .....	18,000.00
Complete loss of hearing in both ears .....	43,200.00

Complete loss of hearing in one ear ..... 7,200.00

(b) Beginning on July 1, 1993, compensation under this subsection shall be computed as follows:

(i) Beginning on July 1, 1993, the compensation amounts for the specified disabilities listed in (a) of this subsection shall be increased by thirty-two percent; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the compensation amounts for the specified disabilities listed in (a) of this subsection, as adjusted under (b)(i) of this subsection, shall be readjusted to reflect the percentage change in the consumer price index, calculated as follows: The index for the calendar year preceding the year in which the July calculation is made, to be known as "calendar year A," is divided by the index for the calendar year preceding calendar year A, and the resulting ratio is multiplied by the compensation amount in effect on June 30 immediately preceding the July 1st on which the respective calculation is made. For the purposes of this subsection, "index" means the same as the definition in RCW 2.12.037(1).

(2) Compensation for amputation of a member or part thereof at a site other than those specified in subsection (1) of this section, and for loss of central visual acuity and loss of hearing other than complete, shall be in proportion to that which such other amputation or partial loss of visual acuity or hearing most closely resembles and approximates. Compensation shall be calculated based on the adjusted schedule of compensation in effect for the respective time period as prescribed in subsection (1) of this section.

(3)(a) Compensation for any other permanent partial disability not involving amputation shall be in the proportion which the extent of such other disability, called unspecified disability, shall bear to the disabilities specified in subsection (1) of this section, which most closely resembles and approximates in degree of disability such other disability, and compensation for any other unspecified permanent partial disability shall be in an amount as measured and compared to total bodily impairment. To reduce litigation and establish more certainty and uniformity in the rating of unspecified permanent partial disabilities, the department shall enact rules having the force of law classifying such disabilities in the proportion which the department shall determine such disabilities reasonably bear to total bodily impairment. In enacting such rules, the department shall give consideration to, but need not necessarily adopt, any nationally recognized medical standards or guides for determining various bodily impairments.

(b) Until July 1, 1993, for purposes of calculating monetary benefits under (a) of this subsection, the amount payable for total bodily impairment shall be deemed to be ninety thousand dollars. Beginning on July 1, 1993, for purposes of calculating monetary benefits under (a) of this subsection, the amount payable for total bodily impairment shall be adjusted as follows:

(i) Beginning on July 1, 1993, the amount payable for total bodily impairment under this section shall be increased to one hundred eighteen thousand eight hundred dollars; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the amount payable for total bodily impairment prescribed in (b)(i) of this subsection shall be adjusted as provided in subsection (1)(b)(ii) of this section.

(c) Until July 1, 1993, the total compensation for all unspecified permanent partial disabilities resulting from the same injury shall not exceed the sum of ninety thousand dollars. Beginning on

July 1, 1993, total compensation for all unspecified permanent partial disabilities resulting from the same injury shall not exceed a sum calculated as follows:

(i) Beginning on July 1, 1993, the sum shall be increased to one hundred eighteen thousand eight hundred dollars; and

(ii) Beginning on July 1, 1994, and each July 1 thereafter, the sum prescribed in (b)(i) of this subsection shall be adjusted as provided in subsection (1)(b)(ii) of this section.

(4) If permanent partial disability compensation is followed by permanent total disability compensation, any portion of the permanent partial disability compensation which exceeds the amount that would have been paid the injured worker if permanent total disability compensation had been paid in the first instance shall be, at the choosing of the injured worker, either: (a) Deducted from the worker's monthly pension benefits in an amount not to exceed twenty-five percent of the monthly amount due from the department or self-insurer or one-sixth of the total overpayment, whichever is less; or (b) deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly.

(5) Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting in the amputation thereof or in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof.

(6) When the compensation provided for in subsections (1) through (3) of this section exceeds three times the average monthly wage in the state as computed under the provisions of RCW 51.08.018, payment shall be made in monthly payments in accordance with the schedule of temporary total disability payments set forth in RCW 51.32.090 until such compensation is paid to the injured worker in full, except that the first monthly payment shall be in an amount equal to three times the average monthly wage in the state as computed under the provisions of RCW 51.08.018, and interest shall be paid at the rate of eight percent on the unpaid balance of such compensation commencing with the second monthly payment. However, upon application of the injured worker or survivor the monthly payment may be converted, in whole or in part, into a lump sum payment, in which event the monthly payment shall cease in whole or in part. Such conversion may be made only upon written application of the injured worker or survivor to the department and shall rest in the discretion of the department depending upon the merits of each individual application. Upon the death of a worker all unpaid installments accrued shall be paid according to the payment schedule established prior to the death of the worker to the widow or widower, or if there is no widow or widower surviving, to the dependent children of such claimant, and if there are no such dependent children, then to such other dependents as defined by this title.

(7) Awards payable under this section are governed by the schedule in effect on the date of injury.

**RCW 51.44.040**

(1) There shall be in the office of the state treasurer, a fund to be known and designated as the "second injury fund", which shall be used only for the purpose of defraying charges against it as provided in RCW 51.16.120 and RCW 51.32.250. The fund shall be administered by the director. The state treasurer shall be the custodian of the second injury fund and shall be authorized to disburse moneys from it only upon written order of the director.

(2) Payments to the second injury fund from the accident fund shall be made pursuant to rules adopted by the director.

(3)(a) Assessments for the second injury fund shall be imposed on self-insurers pursuant to rules adopted by the director. Such rules shall provide for at least the following:

(i) Except as provided in (a)(ii) of this subsection, the amount assessed each self-insurer must be in the proportion that the payments made from the fund on account of claims made against self-insurers bears to the total sum of payments from the fund.

(ii) Except as provided in section 2, chapter 475, Laws of 2005, beginning with assessments imposed on or after July 1, 2009, the department shall experience rate the amount assessed each self-insurer as long as the aggregate amount assessed is in the proportion that the payments made from the fund on account of claims made against self-insurers bears to the total sum of payments from the fund. The experience rating factor must provide equal weight to the ratio between expenditures made by the second injury fund for claims of the self-insurer to the total expenditures made by the second injury fund for claims of all self-insurers for the prior three fiscal years and the ratio of workers' compensation claim payments under this title made by the self-insurer to the total worker's compensation claim payments made by all self-insurers under this title for the prior three fiscal years. The weighted average of these two ratios must be divided by the latter ratio to arrive at the experience factor.

(b) For purposes of this subsection, "expenditures made by the second injury fund" mean the costs and charges described under RCW 51.32.250 and RCW 51.16.120 (3) and (4), and the amounts assessed to the second injury fund as described under RCW 51.16.120(1). Under no circumstances does "expenditures made by the second injury fund" include any subsequent payments, assessments, or adjustments for pensions, where the applicable second injury fund entitlement was established outside of the three fiscal years.

**RCW 51.52.160**

The board shall publish and index its significant decisions and make them available to the public at reasonable cost.