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NO. 61179-8

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

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PUGET SOUND ENERGY, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF  
WASHINGTON and ROBERT R. LEE,

Respondents.

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**BRIEF OF RESPONDENT  
DEPARTMENT OF LABOR AND INDUSTRIES**

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**Appendix**

RCW 51.16.120

## I. INTRODUCTION

This is a workers' compensation case brought under Washington's Industrial Insurance Act, Title 51 RCW. The case does not involve a dispute over a worker's right to benefits. Rather, the case involves a dispute between Puget Sound Energy ("PSE"), a self-insured employer, and the Department of Labor and Industries ("Department"). PSE seeks under RCW 51.16.120 to shift to the second injury fund PSE's responsibility to pay pension benefits to its injured worker, Robert R. Lee ("Lee.")

This case began when PSE appealed to the Board of Industrial Insurance Appeals ("Board") from two Department orders. The first Department order placed Lee on the pension rolls for permanent total disability. The second Department order denied PSE second injury fund relief because Lee did not have *previous bodily disability* (see RCW 51.16.120) that was a proximate cause of his permanent total disability. The Board affirmed both Department orders, and PSE appealed to superior court and requested a jury trial.

Lee moved the superior court for partial summary judgment, asking the court to affirm the Board's conclusion that Lee was a totally permanently disabled worker, *proximately caused by his industrial injury of October 5, 1992, and its residuals*. PSE conceded the issue and along

with the Department agreed to the entry of an order awarding Lee a pension. Accordingly, Lee has no direct interest in this appeal that will determine whether Lee's benefits are the responsibility of PSE, or instead the responsibility of the second injury fund.<sup>1</sup> After the Department moved to strike the jury, the case proceeded to a bench trial where the court affirmed the Board and denied second injury fund relief to PSE. Significantly, the trial court found that there were no material issues in dispute that could allow a factual finding of preexisting disability, such that PSE could invoke the second injury fund.

On appeal, PSE cites the testimony at the Board from Mr. Lee and from PSE's examining doctor and argues for a different interpretation of RCW 51.16.120 than applied by the Department, the Board, and the trial court. However, as will be shown below, the trial court's interpretation of RCW 51.16.120 is consistent with established Washington authority. Under that authority, there is no evidence that Lee's medical condition from the time he was hired at PSE through the time of his 1992 injury at PSE was either symptomatic or disabling within the meaning of the

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<sup>1</sup> Under RCW 51.16.120(1), "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[.]" The statute also provides that in such situations, "total cost of the pension reserve shall be assessed against the second injury fund."

Based on this statute, PSE's appeal seeks to identify a preexisting disability so that Mr. Lee's pension reserve will be assessed against the second injury fund, not against PSE.

“previous bodily disability” requirement of RCW 51.16.120. The trial court therefore properly struck the jury and denied second injury fund relief to PSE because as a matter of law this record cannot demonstrate a “previous bodily injury.”

## II. COUNTERSTATEMENT OF THE ISSUE

PSE disputes the Board, the Department, and the trial court’s interpretation of RCW 51.16.120. Based on PSE’s alternative interpretation of the statutory standard, it argues that evidence cited by PSE justifies a jury trial. PSE does not, however, argue that a jury review would be required if the trial court’s interpretation of RCW 51.16.120 was correct. The issues, therefore, turn primarily on a threshold question of law:

- (1) Does RCW 51.16.120 preclude second injury fund relief when:
  - (a) there is no evidence that Lee suffered from a pre-existing symptomatic and permanent disability prior to the 1992 injury while working at PSE;
  - and (b) there is no evidence that Lee suffered from any preexisting medical condition that actually affected his wage-earning ability?
- (2) If the trial court properly applied the legal standard to the record, did the trial court correctly strike the jury because on this record of undisputed facts there was no reason for a jury trial?

### III. COUNTERSTATEMENT OF THE CASE

#### A. Factual Background

##### 1. The PSE Injury

In March of 1992, Robert R. Lee, began working as a lineman for PSE. Lee 18<sup>2</sup>; CABR 113-14. On October 5, 1992, he was working on an electrical pole and lost his footing. Lee 21. He dropped six to eight feet and caught the telephone messenger cable and hung on to it until he was able to get his hooks back into the pole. Lee 21-22. He grabbed the cable with his right hand. Lee 22. He knew immediately that he was injured. Lee 22. He continued to work that day, but developed pain by the next day and obtained medical treatment. Lee 22, 43. He had injured his right shoulder and neck. Lee 23; Dobkin 8, 17. He was put on light duty. Lee 43. On February 5, 1993, PSE fired Lee. Lee 43-44.

##### 2. Lee's Treatment After The PSE Injury And His Treating Doctors' Determinations That It Was The Sole Cause Of His Permanent Total Disability

Eventually, Lee moved to California. Lee 45. On November 4, 1993, he began treatment with Dr. Dobkin, a neurosurgeon. Lee 45; Dobkin 8. On that day, Dr. Dobkin first evaluated the injuries Lee had

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<sup>2</sup> This brief refers to each witness's testimony 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 at "CABR" followed by the stamped page number in the lower right corner of the document in the CABR.

sustained to his neck and shoulders while working for PSE. Dobkin 8. Dr. Dobkin found that Lee had relative diffuse weakness in his right arm and decreased sensation from the C-7 distribution. Dobkin 8. Lee had "a lot of mechanical pain in his arm, in his right shoulder." Dobkin 9. Lee's right shoulder joint hurt, and the shoulder had a considerably limited range of motion. Dobkin 9.

Dr. Dobkin's diagnosis was right C6/C7 radiculopathy and right shoulder impingement syndrome or partial disruption of the rotator cuff tear. Dobkin 37. Dr. Dobkin ordered MRI studies and these revealed a degenerative joint disease process in Lee's shoulder and cervical spine. Dobkin 38-39.

Dr. Dobkin continued to treat Lee for the next thirteen years until March 2005. Dobkin 9. During this period, Dr. Dobkin operated on Lee four times: on February 27, 1996, Dr. Dobkin performed a decompression and fusion of Lee's cervical spine from C-4 to C-7. Dobkin 10. The fusion failed. Lee developed synarthrosis for non-union and non-healing of the spine at a level adjacent to his surgery. Dobkin 10-11. On August 21, 1998, Dr. Dobkin operated to remove the hardware and compression at the new level. Dobkin 11. He operated on Lee a third time on February 1, 1999. Dobkin 11.

Lee then developed problems with his left hand and had to undergo transposition and decompression of the ulnar nerve over the left elbow, which was the opposite extremity to his original 1992 industrial injury. Dobkin 12. By September 2004, Lee had developed low back pain, had atrophy of both arms, and chronic neck and shoulder pain. Dobkin 13-14.

Dr. Dobkin opined that as of September 13, 2004, Lee was unemployable as the result of the October 5, 1992 industrial injury's impact on Lee's neck and shoulder. Dobkin 1, 22. Dr. Dobkin attributed Lee's total permanent disability solely to the industrial injury of 1992 and its residuals, not any pre-existing disability. Dobkin 16, 22. Lee never told Dr. Dobkin during the entire thirteen years of treatment starting in 1993 that he, Lee, had had any episodes of symptoms to his neck or back in 1979, in 1981, in 1987, or at any other time. Dobkin 48, 51, 52; Lee 86. Lee told Dr. Dobkin that he had been in "good health most of his life." Dobkin 18. In Dr. Dobkin's opinion, Lee's inability to work was due to Lee's neck and shoulder condition for which he treated him, and not any low back condition. Dobkin 21-22.

After his third neck surgery in February 1999, Lee was referred to Dr. Scott Stoney, a pain management specialist. Stoney 7-8. Dr. Stoney, a physiatrist in California, testified on behalf of the Department. Stoney 5.

He treats patients with chronic pain problems. Stoney 5. Lee told Dr. Stoney he did not have medical problems before the PSE injury. Stoney 9.

Dr. Stoney first evaluated Lee on February 5, 1999. Stoney 8. Lee's right upper extremity was paralyzed. Stoney 11. Dr. Stoney's diagnosis was post cervical laminectomy and fusion with hardware removal and decompression, C5 radiculopathy, and chronic pain requiring narcotic pain medication. Stoney 12. He treated Lee's neck and upper extremity. Stoney 15. He also treated Lee's mood which was "really impaired." Stoney 15. Dr. Stoney attributed all of the conditions for which he was treating Lee exclusively to the October 5, 1992 industrial injury. Stoney 16.

By July 9, 2003, Dr. Stoney's opinion was that Lee was totally disabled and unable to work, attributable entirely to the 1992 industrial injury at PSE. Stoney 24, 60. Dr. Stoney explained that the reason he assigned cause exclusively to the 1992 PSE industrial injury is that Lee had been performing heavy manual labor without restrictions or functional impairment up until the date of his injury, October 5, 1992. Stoney 27.

Since that time, Lee had developed significant impairment to the point that he had become unemployable. Stoney 27. Dr. Stoney assigned "one hundred percent" of Lee's disability to the industrial injury of 1992. Stoney 27-28, 32. Dr. Stoney did not assign significance to neck and back

pain episodes in the past because at the time of the industrial injury Lee was able to perform at full function. Stoney 29.

**3. Dr. Gritzka's Hindsight Assessment Of Prior Functional "Impairment" And His Admission That Lee Was Not "Disabled" At The Time Of The 1992 PSE Injury**

Dr. Thomas L. Gritzka, an orthopedist, testified on behalf of PSE. Gritzka 3. He had examined Lee one time on January 23, 2004, twelve years after the industrial injury and four surgeries later. Gritzka 15, 89. Lee told Dr. Gritzka that he had had no prior major injuries. Gritzka 42. Dr. Gritzka, based on hypothetical questions, speculated that Lee had a pre-existing low back "impairment" (Gritzka 67) and a pre-existing cervical spine "impairment" (Gritzka 75). Gritzka admitted that the pre-existing impairment that he alone had assessed was not "disabling" because it did not prevent Lee from continuing to work as a lineman. Gritzka 76, 90. Dr. Gritzka explained that

*disability* means how something affects your abilities 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.*

Gritzka 90 (Emphasis added).

Dr. Gritzka agreed that nothing disabled Lee from doing all his job requirements at PSE, and Lee was not symptomatic before his injury at

PSE. Gritzka at 90, 91, 96, 100. Dr. Gritzka agreed that Lee did not require accommodations from his employers, and none were made before the date of his 1992 industrial injury. Gritzka at 91. Dr. Gritzka agreed that Lee was not rated or awarded a permanent partial disability for either a neck or low back condition before the October 1992 industrial injury. Gritzka at 92, 101.

In Dr. Gritzka's opinion, Lee's pre-existing, non-disabling "impairments" had combined with the effects of the October 1992 industrial injury, and had rendered Lee a totally permanently disabled worker. Gritzka 87.

**4. Lee's Failure To Report His Prior Injuries Or His Past Temporary Episodes Of Back Or Neck Pain To His Doctors Because He Had Forgotten About Them**

Lee testified about an injury to his low back in 1981. Lee 52, 55. He testified about a problem with his neck and arm in 1978. Lee 71. He also testified about an incident in 1987 when he bent down to pick up a carrot and felt a sharp pain in his back. Lee 77. He did not report these episodes to his doctors, the first of whom he began seeing shortly after his 1992 injury at PSE, because he had forgotten all about them. Lee 86.

Lee stated that when PSE hired him in the spring of 1992, he submitted to a medical examination. Lee 96. He was hired without any restrictions. Lee at 97. He needed no accommodations. Lee 97. When

he started work at PSE, he suffered no backache or neck pain. Lee 97. He stated that he was “buffed up.” Lee 97. He did not feel any effects from previous accidents. Lee 97. He was not taking any medication. Lee 98. The 1987 episode was fully resolved. Lee 98. While at PSE, he participated with his crew in a lineman contest, and the crew won second place in the state. Lee 99.

Lee never told his treating physicians, Dr. Dobkin and Dr. Stoney, anything about the remote incidents in 1978, 1981 and 1987. Lee 93, 94 Lee testified that he did not remember any of these episodes until talking to PSE’s attorney prior to the 2006 Board hearings. Lee 93-94. He did not report the existence of these episodes when he talked to Department’s counsel. Lee 93-94. He never received a permanent partial disability award for any previous injury. Lee 96. He did not file a workers’ compensation claim for the episode in the seventies. Lee 103-104. Lee testified that until the industrial injury of 1992, he was in very good shape. Lee 101. He loved his job. Lee 100. There was nothing physical that he could not do before the PSE injury. Lee 105.

## **B. Procedural Background**

### **1. Board Proceedings**

After the Department entered separate orders (1) placing Lee on the pension rolls and (2) denying second injury fund relief to PSE, the

self-insurer appealed to the Board where hearings were held. CABR 2-8. The final Decision and Order of the Board affirmed both Department orders. CABR 2-8. The Board thus awarded Lee a pension and, in a 2-1 decision (the Board's employer representative dissenting), denied second injury fund relief to PSE. CABR 2-8. The Board majority explained that Lee did not have "previous bodily disability" within the meaning of RCW 51.16.120, because Lee's prior injuries did not leave any residuals that "substantially impacted his functioning." CABR 2.

**2. Superior Court Proceedings**

PSE appealed the Board's Decision to superior court and requested a jury. CP 1-2, 11.

**a. PSE Concedes That Lee Is Entitled To A Pension**

Lee moved the superior court for partial summary judgment, asking the court to affirm the Board's conclusion that he was a totally permanently disabled worker, proximately caused by the industrial injury of October 5, 1992 and its residuals. CP 63-71. PSE abandoned its challenge to the pension issue and along with the Department agreed to the entry of the order granting Lee's motion on the pension award, reserving for trial only second injury fund relief issue under RCW 51.16.120. CP 86-88.

**b. The Department Moves To Strike The Jury**

The Department then filed a Motion to Strike the Jury because the only remaining issue for resolution was, on this particular record, a legal question that depended on the interpretation of RCW 51.16.120. CP 103-08. The court granted the Department's motion. CP 120-21. PSE filed a Motion for Reconsideration. CP 135-48, 286-87. The motion was denied. CP 288-97; 385-86. PSE then filed a Motion for Discretionary Review, and this Court denied PSE's motion. CP 400-07. The matter proceeded to a bench trial. CP 385-86.

**c. The Superior Court Decides The Case**

Following the trial, the court found as follows that there was no disputed evidence on any of the material factual questions:

5. The Court finds that the CABR contains *no evidence that Lee had a previous bodily disability that adversely affected his wage-earning ability from any previous injury or disease* which is a proximate cause of permanent total disability to Lee in combination with permanent impairment proximately caused by his industrial injury of October 5, 1992 during the course of his employment with Puget Sound Energy, Inc. ("PSE"). [Emphasis added.]
6. The Court finds that no evidence exists in the CABR to support that Lee was *symptomatic from any previous bodily disability* from any previous injury or disease at the time of his employment with PSE. [emphasis added]
7. No evidence exists in the CABR to either support or tend to support that *Lee required, requested, received, or needed any accommodation during the course of his employment with PSE*

*prior to the date of his injury* on October 5, 1992 in order to perform all assigned job tasks and duties required in his work position as a lineman. [emphasis added]

CP 410.

The Court then concluded as a matter of law that PSE was not entitled to second injury fund relief:

2. On April 11, 2007, this Court granted Lee partial summary judgment, ruling that, effective October 1, 2004, Lee was a permanently and totally disabled worker within the meaning of RCW 51.08.160, proximately caused by the October 5, 1992 industrial injury and its residuals.
3. Where, prior to the occurrence of a disabling industrial injury, a worker (a) *is not symptomatic at the time of commencing employment with an employer and does not become symptomatic during the performance of work duties for an employer*, nor (b) requires any *accommodation to perform his or her job*, nor (c) is *limited in the ability to perform his or her job* for an employer, such worker, as a matter of law, *does not have any previous bodily disability from any previous injury* or disease cognizable under RCW 51.16.120 which would entitle the employer at the time of a later-occurring industrial injury to such worker to second injury fund relief. [emphasis added]
4. Because no evidence in the CABR supports that Lee (a) was symptomatic at the time of commencing his employment as a lineman with Puget Sound Energy, and (b) did not require, request, receive, or need any accommodation in order to perform all assigned job tasks and duties in his work position as a lineman for PSE prior to the date of his injury on October 5, 1992, PSE is not entitled to second fund relief under the provisions of RCW 51.16.120.
5. Alternatively, as a matter of law, PSE is not entitled to second fund relief under the provisions of RCW 51.16.120 because there is no evidence that, prior to Lee's injury on October 5, 1992, he suffered

from permanent disability that adversely affected his wage-earning ability.

6. The Board's September 18, 2006 Decision and Order affirming the Department's orders dated September 13, 2004 and September 14, 2004 is correct and is affirmed.

CP 410-11.

The current appeal followed. CP 416.

#### IV. STANDARD OF REVIEW

At superior court, "RCW 51.52.110 and RCW 51.52.115 govern judicial review of matters arising under the Industrial Insurance Act." *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 857, 86 P.3d 826 (2004). Appellate court review is conducted as in other civil cases. RCW 51.52.140. This Court reviews issues of statutory interpretation, here interpretation of RCW 51.16.120, de novo. *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 730, 57 P.3d 611 (2002).

#### V. SUMMARY OF ARGUMENT

The court correctly concluded as a matter of law that PSE was not entitled to second injury fund relief under RCW 51.16.120 because there was no evidence in the Board's record that Lee suffered from a "previous bodily disability" within the meaning of RCW 51.16.120 at the time he was seriously injured at PSE in 1992.

*Rothschild International Stevedoring Company v. Dep't of Labor & Indus.*, 3 Wn. App. 967, 969, 478 P.2d 759 (1971) applies here. That case affirmed a motion to dismiss an employer's appeal, and held that to prove that an injured suffered from a previously disabling condition, i.e., a condition that was disabling prior to the date of the industrial injury, the employer must show that the pre-existing condition impacted a worker's ability to perform work duties. The evidence in the Board record, however, shows that throughout Lee's employment at PSE up to the time of his 1992 injury, Lee's ability to work was not impaired or restricted in any way as a result of episodes that took place fourteen, eleven, or five years before the serious injury in 1992 at PSE. The superior court's decision to deny PSE second injury fund relief is therefore correct as a matter of law.

Because the record did not present any dispute over material facts, the court correctly dismissed the jury. A jury reviews only contested issues of fact. RCW 4.44.090; CR 39(a)(2). Here, the record shows that there was no dispute that at the time of the industrial injury Lee was not symptomatic, did not need any accommodations to perform all his job duties as a lineman, and was free of pain. Lee did not report to any of his treating physicians or his one-time examiner past episodes of neck or back pain because he did not even remember them.

## VI. ARGUMENT

### A. **The Superior Court Properly Construed RCW 51.16.120 To Require Evidence Of A Preexisting Symptomatic Condition That Impacted Lee's Earnings Power Before The PSE Injury**

The threshold question in this appeal is whether the superior court properly construed RCW 51.16.120 to require evidence of a preexisting symptomatic condition that actually impacted Lee's earning power before his serious PSE injury. That is the standard that defines "previous...disability" under the statute. As will be shown below, the superior court correctly construed the statute.

#### 1. **The Second Injury Fund**

The second injury fund is a special fund set up within the framework of the workers' compensation system. It offers financial relief to employers, but only when the worker suffered from "disability" before the date of an industrial injury, which prior disability, in necessary combination with the current industrial injury, resulted in permanent and total disability. RCW 51.16.120(1); *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962). The purpose of the second injury fund is to encourage the hiring and retention of handicapped workers. *Jussila*, 59 Wn.2d at 779 (second injury fund applies when permanent

total disability arises from a combined effect of preexisting disability and the current injury).<sup>3</sup>

RCW 51.16.120 contains three prerequisites that an employer must meet in order to obtain second injury fund relief. The employer must show that the worker: (1) had a “pre-existing bodily disability from a previous injury or disease”; (2) sustained an industrial injury; and (3) became totally and permanently disabled as a proximate result of the “combined effects” of the two. *Seattle School District No. 1 v. Dep’t of Labor & Indus.*, 116 Wn.2d 352, 357, 804 P.2d 621 (1991).

The seminal Washington second injury fund decision, *Jussila*, in rejecting the “state fund” employer’s contention for a presumption of eligibility in certain circumstances, reminded that the general legislative rule under the Industrial Insurance Act is that employers pay their own way and that second injury fund relief is an exception to that rule. Consistent with standard rules of statutory construction, the exception is construed narrowly:

The basic premise of the Work[ers’] Compensation Act is that industry is to bear the burden of the costs arising out of industrial injuries sustained by its employees. Each

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<sup>3</sup> There are two second injury funds. One is maintained for smaller employers participating in the “state fund” and the other is maintained for self-insurers such as PSE. The second injury fund for self-insurers is funded by assessments against all self-insurers. RCW 51.44.040(3). As with other RCW 51 funds, the Department acts as trustee of the second injury fund. *See generally VanHess v. Dep’t of Labor & Indus.*, 132 Wn. App. 304, 310-11, 30 P.3d 902 (2006) (Department is trustee of the accident fund).

employer's premium should reflect his own cost experience in order to reward, and thereby encourage, safety, as well as to avoid an unfair burden on other employers. The Second-injury Fund law would conflict with this general principle if appellant's contention should prevail.

*Jussila*, 59 Wn.2d at 779 (citations omitted).

The leading treatise on workers' compensation law similarly notes as a legislative policy consideration that at some point, as the eligibility threshold is lowered, the expense of administering the second injury fund scheme begins to outweigh its useful purpose. 5 A. Larson, L. Larson, *Larson's Workers' Compensation Law*, § 91.03[8] (2007). A number of states have abolished or significantly restricted their second injury fund schemes. *Id.*

Accordingly, the legal issue in this case concerning the definition of "previous disability" should begin from the proposition that PSE is urging the application of an exception to its normal liability for an injury, and recognize that PSE's definition would include a broad number of pre-existing conditions such that the second injury fund would have to fund pensions for the vast majority of the work force who incur industrial injuries that become permanently totally disabling.

**2. Washington Court Decisions Interpret The "Previous . . . Disability" Element Of RCW 51.16.120 As Requiring Proof Of Impact On Earning Power In Order For An Employer To Qualify For Second Injury Fund Relief**

To be entitled to second injury fund relief, the employer must prove that there was a preexisting medical condition which was already both “symptomatic” and “disabling” at the time of the industrial injury or occupational disease. “Evidence of a prior ‘infirmity’ is not enough.” *Lyle v. Dep’t of Labor & Indus.*, 66 Wn.2d 745, 747, 405 P.2d 251 (1965) (second injury fund relief denied because worker’s preexisting condition of degenerative arthritis was neither symptomatic nor disabling prior to his injury). Therefore, if a worker had a preexisting medical condition but it was *not* disabling until after the worker’s industrial injury, the employer is not entitled to second injury fund relief.

*Rothschild International Stevedoring Co.* controls this case. In *Rothchild*, 3 Wn. App. at 969-70, the trial court granted a motion to dismiss a second injury fund claim by an employer where the Board record showed that the worker was doing “everything” required of a longshoreman” at the time of the injury, despite several pre-injury medical conditions. The appellate court affirmed and held that a worker’s pre-existing medical condition is only “disabling” within the meaning of the second injury fund statute if the preexisting medical condition interfered in some way with a worker’s ability to perform the essentials of his or her job. *Id.* at 969-70. The worker in *Rothschild* had incurred a previous industrial injury that resulted in a permanent partial impairment described

by the examining physicians as ranging from 25 to 50 percent. *Id.* at 969. However, *Rothschild* noted that the undisputed testimony was that the claimant, despite his prior injuries, did “‘everything’ required of a longshoreman.” *Id.* The Court concluded, therefore, that the employer was not entitled to relief from the second injury fund. *Id.* at 969-70.

**3. Board Decisions Correctly Agree With The Department In Focusing On The Effect Of Alleged Prior Disability On The Worker’s Earning Power**

As in this case, most of the Board’s administrative decisions follow *Rothschild* and hold that previous disability for purposes of RCW 51.16.120 means disability that affected the ability to do one’s job prior to the date of the industrial injury. Thus, in the Board’s Significant Decision<sup>4</sup> in *In re Alfred Funk*, BIIA Dec., 89 4156, 1991 WL 87432 (1991), the claimant had suffered multiple prior injuries and had two preexisting conditions: a congenital heart condition and degenerative arthritis. The Board held nonetheless that the employer was not entitled to second injury fund relief because the claimant did not have a “preexisting bodily disability.” *In re Funk*, 1991 WL 87432 at \*2. The Board noted that neither condition had been previously symptomatic, but the Board also based its determination in part on the fact that the claimant was

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<sup>4</sup> In RCW 51.52.160, the Legislature has directed the Board to designate and publish its “significant decisions.”

previously able to continue in his life-long heavy labor occupation of logger without any apparent limitations. *Id.* at 3.

Likewise, in the Board decision in *In re Curtis Anderson*, BIIA Dckt. No. 88 4251, WL 310624 (June 15, 1990), the Board held that “previous disability” in this context means that the impairment has had a deleterious “effect upon an individual’s performance of his employment.” *In re Anderson*, 90 WL 310624 at \*2. The evidence showed that none of the conditions cited by the employer affected Mr. Anderson’s ability to be employed as a logger for approximately 36 years. *Anderson* at \*2. While there was some evidence that Mr. Anderson missed some work due to his psoriasis in December of 1982, after that treatment he apparently was able to return to his employment until the industrial injury occurred on February 11, 1983. *Id.* Indeed, despite prior injuries and conditions, Mr. Anderson was always able to return to work as a logger until the February 11, 1983 industrial injury. *Id.* The Board paraphrased from *Rothschild Int’l v. Dep’t of Labor & Indus.*, 3 Wn. App. at 969:

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

*Id.*<sup>5</sup>

Finally on the question of previous disability under RCW 51.16.120, the Board explained that Anderson's prior ability to fully do his job disqualified the employer from second injury fund relief:

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

*Id.*

In *In re Lance Bartran*, BIIA Dec., 04 21232 & 04 23432, 2005 WL 3802552 (2005) (Significant Decision), on the other hand, the worker's pre-existing "schizoid personality disorder was symptomatic and disabling. It limited Mr. Bartran's ability to obtain and perform the full scope of his employment potential." *Id.* at \*4. Thus, the Board granted the employer second injury fund relief.

The Department order, the Board ruling, and the trial court decision in the instant case each correctly followed this well established precedent. PSE needed to show more than an infirmity or past temporary disability; it needed to show that the prior episodes resulted in a preexisting disability at the time of the 1992 injury. This requires proof

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<sup>5</sup> The Board relied in part on *Henson v. Department of Labor & Industries*, 15 Wn.2d 384, 391, 130 P.2d 885 (1942), which explained in a different context that "disability" connotes a loss of earning power.

that Lee suffered from a symptomatic injury that affected his ability to do his PSE job.

**4. Even Board Decisions That Erroneously Expand The “Previous . . . Disability” Standard Outside The Realm Of Industrial Disability Require Proof Of A Symptomatic Condition At The Time Of The Industrial Injury**

In some decisions, the Board has looked beyond the realm of employment to daily non-work functioning when interpreting RCW 51.16.120’s “previous . . . disability” standard. That is an erroneous expansion of the concept of disability under RCW 51.16.120 and under *Rothschild*. However, even on the rare occasion when the record was not sufficiently developed to establish impact on earning power, the Board has never dispensed with the requirement that an alleged pre-existing condition be symptomatic at the time of the industrial injury. *See, e.g., In re Marshall Powell*, BIIA Dec., 97 6424, 1999 WL 756228 (Significant Decision) at 5. Thus, even the Board cases that incorrectly expanded the “previous . . . disability” standard and imported aspects of a worker’s personal life into the analysis are of no avail to PSE. In those cases the pre-existing condition both was symptomatic when the worker was injured and impacted earning power.

In *In re Merry Sturm*, Dckt. No. 03 14217, 2004 WL 2920936 (October 18, 2004), the Board ruled that the employer had not established

that it was entitled to second injury fund relief. In *Sturm*, the claimant had a pre-existing patent, dependent personality disorder and low grade depression. The Board found that “these conditions were not disabling as evidenced by Ms. Sturm’s successful completion of high school; her receipt of an associate degree, performing at Dean’s List level; *her ability to obtain, perform and maintain employment in the criminal justice field for which she studied*; and her ability to enjoy a successful second marriage, subsequent to an abusive first marriage.” *Id.* at \*2 (emphasis added).

The Board concluded that she had no “previous bodily disability” within the meaning of RCW 51.16.120. *Id.* Thus, despite going outside the employment context and inquiring incorrectly into areas beyond employment, the Board nonetheless reached a correct decision. Ms. Sturm was not symptomatic and any preexisting condition did not affect her ability to succeed in her job.

Similarly, *In re Sandra McKee*, Dckt No. 04 14107, 2007 WL 1413127 (March 26, 2007), another case where the Board looked incorrectly to areas beyond employment in reaching its decision, employment was a consideration. The facts in *McKee* are distinguishable from the facts in the case at bar. There, the worker suffered from a

preexisting mental health condition and a learning disability. *Id.* at \*6.

The Board explained:

Before this claim was filed these conditions adversely affected her ability to do well in school, have successful marriages, and limited her employment options in the competitive labor market. They affected her earning capacity by limiting her employment choices to sign painting, a vocation she only pursued after 15 years of employment by a parent who had sexually abused her. These conditions were manifest prior to her developing occupational asthma, since she obtained treatment for both her mental health problems stemming from the abuse and for panic attacks.

*Id.* The Board concluded that because her preexisting conditions were “symptomatic and disabling before this claim was filed,” the employer was entitled to second injury fund relief. *Id.* at \*8. Those facts contrast starkly with the facts here: The Board record confirms that there is no dispute that Lee was not symptomatic when he was injured at PSE.

In *In re Carol A. Connor*, BIIA Dckt. No. 00 10267, 2002 WL 31427042 (Sept. 11, 2002), the Board relied on *Jussila, Rothschild*, and *In re Alfred Funk* and denied the employer second injury fund relief. Although the worker reported a history of some level of depression throughout her life, and there was medical testimony about a pre-existing mental condition, a dysthymic disorder, that condition “did not interfere that much with her life, because she was functional.” *Id.* at 4. The employer’s appeal from the order denying second injury fund relief was

dismissed because there was no evidence that the worker was “in any manner disabled or handicapped in her functioning before the industrial injury.” *Id.* at \*5. Lee, likewise, was not disabled before his PSE injury.

In *In re Marshall H. Powell*, 1999 WL 756228 (1999), the worker was an insulin dependent diabetic for twenty years. He had peripheral neuropathy in both feet as a result of diabetes. At the time of his industrial injury, the worker was symptomatic. *Id.* at 5. Although the record did not have “specific information about whether the diabetes, and visits to the doctor for the diabetic condition, caused Mr. Powell to miss work” the Board had sufficient evidence to conclude that the diabetes was disabling before the industrial injury. *Id.* Second injury fund relief was granted. *Id.* at \*7. Lee, in contrast, was not symptomatic before the PSE injury.

In *In re Leonard Norgren*, BIIA Dec., 04 18211, 2006 WL 481048 (2006) (SignificantDecision), the Board relied on the analysis in *Jussila* and *Henson*, and denied the employer second injury fund relief. The Board found that before his industrial injury, Norgren had numerous conditions: a neck condition, hearing loss, glaucoma, and a knee condition. *Id.* at 9. These conditions, however, “did not have any negative effect on his ability to work, his social relationships, or activities of his daily living.” *Id.* The Board correctly concluded, as it did here, that these pre-existing conditions did not constitute a “previous bodily

disability” under RCW 51.16.120 and denied the employer second injury fund relief. *Id.*

**5. If There Is A Conflict Between The Department’s “Previous . . . Disability” Standard And The Board’s “Expanded Standard” This Court Should Defer To The Department**

The trial court’s construction of the statute is correct, and consistent with the Department’s own interpretation of the statute. The Board has likewise adopted the correct standard in this case. However, the Department asks that the Court direct its attention to the question of whether the Court should defer to the Department’s interpretation<sup>6</sup> of RCW 51.16.120 to the extent that the interpretations of the Department and Board diverge. The courts give great weight to the Department’s interpretation of the provisions of RCW 51. *Dolman v. Dep’t of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986). The reason such deference is given to the Department is that the Department is the exclusive, first-line, policy-making agency that the Legislature has tasked with administering the Industrial Insurance Act. *Id.*; *see generally Port of*

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<sup>6</sup> While the Department has not adopted a formal rule or policy statement reflecting its interpretation of RCW 51.16.120, over a dozen Board decisions in WESTLAW, most of which are discussed in this brief, reflect that the Department has consistently argued over the past two decades that “previous disability” for second injury fund eligibility purposes is tied to proving effect of alleged previous conditions on earning power.

*Seattle v. Pollution Control Hr'gs Bd*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004).

Because the Board, on the other hand, is a quasi-judicial review agency, not a policy-making agency, its interpretations of Title 51 RCW should not be given judicial deference or at least should not be given the same deference as is given the Department's interpretations.<sup>7</sup> *Port of Seattle*, 151 Wn.2d at 593-94; *see also Kaiser Aluminum & Chemical Corp. v. Dep't of Labor & Indus.*, 45 Wn.2d 745, 747-748, 277 P.2d 742 (1954) (explaining the difference between the Department's operational role and the Board's quasi-judicial role).

No reported Washington decision has yet spoken to the question of whether, when there is disagreement between the Department and the Board in interpretation of the compensation provisions of RCW 51, it is the Department, as first-line administrative agency, or the Board, as the quasi-judicial reviewing entity, to whom greater deference should be given. However, it is well-established federal doctrine that only the

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<sup>7</sup> The Department acknowledges that, on occasion, the Washington courts have suggested that deference is due the Board's interpretations of Title 51 RCW. However, the Department contends that analysis of the underlying reasons for this rule of construction, as set out above, reveals that such deference to the Board is inappropriate. Also note that such appellate court comments appear to have been made without any consideration of the differing roles of the Department and the Board. *See, e.g., Weyerhaeuser Company v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991) (suggesting deference to a Board interpretation, by citing as support *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d at 566 (1986), a decision in which the Supreme Court in fact deferred to the interpretation of the Department).

decisions of policy-making, regulatory agencies are entitled to special deference in statutory interpretation. See *Potomac Electric Power Company v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 279, n. 18, 66 L.Ed.2d 446, 101 S.Ct. 509 (1980) (declaring that because the Benefits Review Board under the Federal Longshore Harbor Workers' Compensation Act (Longshore Act) "is not a policy-making agency . . . its interpretation of the [Longshore Act] thus is not entitled to any special deference from the courts"; *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (distinguishing between purely "umpiring" or quasi-judicial agencies, on the one hand, and "policy-making" agencies, on the other).

Because the Department is the state-agency equivalent of the "policy-making" agency in the cited Longshore Act cases, while the Board is the state-agency equivalent of the "umpiring," quasi-judicial agency in those cases, it is the Department, not the Board, whose interpretation should be given greater deference here. In *Port of Seattle*, the Washington Supreme Court held that, because the Department of Ecology was the agency that the Legislature had entrusted with administration of the environmental standards, the Court must defer to the Department of Ecology in its interpretation of statutes and its regulations relating to such standards, not to the Pollution Control Hearings Board, the quasi-judicial

review agency that reviews Department of Ecology decisions. *Port of Seattle*, 151 Wn.2d at 593-94. Similarly here, this Court should defer to the Department, not the Board, on interpretation of RCW 51.16.120.

**B. The Board's Record Did Not Provide Any Evidence Showing A "Preexisting Disability" At The Time Of The 1992 Injury**

As shown above, the trial court properly construed the requirements of RCW 51.16.120(1). When the statutory requirements are applied to the Board's record, PSE had no evidence to allow it to assign Lee's 1992 injury to the second injury fund.

**1. The Evidence Is Uncontradicted That Lee Was Not Symptomatic And Was Not Affected In His Capacity To Work During His Time At PSE Prior To His 1992 Injury**

In the present case, the evidence unambiguously establishes that up to the time of his 1992 injury at PSE Lee did not have a pre-existing disability as required by RCW 51.16.120. There is no evidence that he was symptomatic from any past injuries. And there is no evidence that he was limited in his ability to do his job, or, assuming for argument that it matters, that he was limited in his daily living activities. This is best shown by the undisputed testimony of the only witness with personal knowledge of Lee's history: Lee himself.

Lee testified that prior to talking to PSE's attorney in connection with this litigation he did not even remember the back pain episodes that

loom so important in PSE's contentions. Lee 94-95. When he began to work at PSE, he did not suffer from backache or neck pain. Lee 97, 99, 101. When he began to work at PSE, he did not have any physical limitation that interfered with his ability to perform exceedingly well at his job. Lee 101. He did not need nor seek any help with his assignments. Lee 100-01. On the contrary, he was always available to help his colleagues with their tasks. Lee 101. There was nothing physical that he could not do before the industrial injury of 1992. Lee 105. Notably, Lee never reported to his attending physicians anything about pre-existing medical conditions. Lee 92-94.

It is uncontroverted that Lee was not symptomatic at the time of the industrial injury. Lee 101, 105. Even Dr. Gritzka, PSE's witness, conceded that point. Gritzka 90. The fact that Lee was able to perform the essential duties of his employment and maintain employment establishes that he did not have a "previous disability" for purposes of second injury fund relief. *See Rothschild Int'l Stevedoring Co.*, 3 Wn. App. 967; *In re Alfred Funk*, 1991 WL 87432 at \*2 (1991). PSE attempts to show disputed facts by taking out of context Lee's answers to PSE's questioning where Lee recounted his temporary symptoms and limitations during periods after injuries in 1978, 1981, and 1987. AB 5-10, 26, 35 (citing Lee 34-37, 61-70, 74-76, 81-83, 108-09). But that testimony, as

just indicated, addressed only *temporary* symptoms and limitations following those prior injuries.

In context, when viewed in the light of all of his testimony, the Lee testimony that PSE cites and quotes does not permit the inferences of permanency of symptoms and limitations that PSE wants the Court to draw. Thus, there is no evidence supporting PSE's suggestion at AB 5-10, 26, and 35 that, when Lee came to work at PSE and thereafter through the date of his 1992 injury, he was able to keep working only with the help of prescription medication, chiropractic treatment, and on-the-job assistance from his fellow workers at PSE.

The trial court correctly concluded that Lee did not have a preexisting disability that affected his earning power. The undisputed facts in this case show that before his PSE injury, Lee was fully able to perform his demanding job as a lineman. Lee 101-102; Gritzka 76, 90. PSE has failed to show that Lee's long past injuries in 1978, 1981 and 1987 had more than a temporary effect on Lee's physical functioning and Lee's earning power.

*In re Forrest Pate*, Dckt. No. 90 4055, 1992 WL 160673 (May 7, 1992), a case PSE relies on, is illustrative. There, the Board determined that a worker's prior medical conditions that required periodic treatment for ailments, or having flare-ups of illness with temporary "disability"

were not a “preexisting disability” for second injury fund purposes. *Id.* at

3.

Likewise, Lee’s prior medical conditions only had a temporary effect in the past on Lee’s physical functioning and no impact on his earning power at the time of his injury. They did not constitute a “previous disability” within the meaning of RCW 51.16.120.

**2. PSE Offers No Authority For The Proposition That A Mere Rating Of Preexisting Impairment Need Not Impact Earning Power To Qualify As A “Previous Disability” Under RCW 51.16.120**

PSE’s alternative argument – and grounding for its claim for a jury trial – rests on hypothetical hindsight ratings of neck and low back impairment offered by Dr. Gritzka. This evidence is immaterial in the context of second injury fund relief. The statute requires the existence of a “disability,” not impairment. Dr. Gritzka explained the difference when he testified that “disability means interference with your activities of daily living, or specifically work,” and “impairment means what’s physically wrong with you. They aren’t the same thing.” Gritzka 75, 90.

The superior court was correct in concluding that whatever *impairment* Lee may have had, it was not cognizable as a “previous bodily disability” under RCW 51.16.120. The fact that an injured worker had suffered a previous industrial injury and received an award for permanent

partial disability for that prior claim is not sufficient to make the employer entitled to second injury fund relief. *In re Funk*, 1991 WL 87432, \*2 (“a preexisting condition is not the same as a pre-existing disability”) (citing, inter alia, *Jussila*, 59 Wn.2d at 778); *In re Norgren*, 2006 WL 481048 \* 7 (“[A]n impairment rating is not in and of itself sufficient to prove the existence of a pre-existing disability . . .”) (citing *Jussila*).

In the first section of its argument in its brief to this Court, PSE apparently concedes that the Board has correctly incorporated *Henson’s* earning power element into the standard for proving previous disability under RCW 51.16.120. AB 17-19. But later in its brief, PSE apparently asks this Court to reject the *Rothschild* Court’s focus on effect on employment, as well as the Board’s line of decisions that are grounded in *Henson’s* explanation, 15 Wn.2d at 391, that disability “connotes a loss of earning power.” AB 29-31. PSE apparently argues that if a medical rating of preexisting impairment is presented, then a prima facie case for “previous bodily disability” has been made. AB 29-31.

In neither PSE’s petition for review at the Board nor in its briefing at superior court did PSE argue that the mere fact that Dr. Gritzka opined on preexisting impairment created a fact dispute on “previous bodily disability. CABR 52-76 (petition for review); CABR 9-13 (Reply); CP 80-85 (trial court brief). By failing to raise this argument below, PSE

waived it and may not raise it for the first time in this appeal. RCW 51.52.104 (“Such petition for review shall set forth in detail the grounds therefore and the party . . . filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.”); RAP 2.5(a) (setting forth the general rule that an appellate court may refuse to review any claim of error not raised in the trial court); *Stelter v. Dep’t of Labor & Indus.*, 147 Wn.2d 702, 711, n.5, 57 P.3d 248 (2002) (declining to reach an issue that “was not raised or briefed to the Board or in judicial proceedings below”); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (“Notwithstanding the merits of her petition, Allan waived this objection because it was not set out in her petition for review of the ruling of the Industrial Appeals Judge as required by RCW 51.52.104.”); *Cosmopolitan Eng’g Group, Inc. v. Ondeo*, 128 Wn. App. 885, 893-94, 117 P.3d 1147 (2005) (raising an issue only in a footnote in a trial brief did not adequately preserve the issue under RAP 2.5(a)).

In any event, PSE’s argument fails because the statute requires proof of a “disability” not just impairment. A permanent partial disability relates exclusively to a loss of function, not necessarily disability from being able to do one’s job. See WAC 296-20-200(4), (6); *Franks v. Dep’t of Labor & Indus.*, 35 Wn.2d 763, 773-74, 215 P.2d 416 (1950). Lee was not “disabled” when he was injured at PSE.

As the evidence unequivocally demonstrates, Lee had fully recovered from the sporadic episodes that occurred many years before his PSE injury. Lee 97. He previously suffered temporary medical conditions, but they had resolved before he began to work at PSE. Lee 98, 105. Even if one were to accept Dr. Gritzka's retroactive, hindsight rating of impairment, any such impairment did not affect Lee's earning power.

PSE relies on *Gakovich v. Department of Labor & Industries*, 29 Wn.2d 1, 7, 184 P.2d 830 (1947) for its argument that a hindsight impairment rating establishes previous disability under RCW 51.16.120. AB 29-31. That reliance is misplaced. *Gakovich* is exclusively about rating impairment under the permanent partial disability statutes; it is not about determining "previous bodily disability" under the second injury fund provisions of RCW 51.16.120.

In *Gakovich*, a worker lost sight in one eye. *Id.* at 1-2. He received a permanent partial disability award for the loss. *Id.* at 3. He then sought and obtained a jury verdict awarding additional permanent partial disability compensation for a mental health condition on the grounds that the mental health condition was a direct result of his loss of sight. *Id.* The Supreme Court reversed the jury's additional award, however, holding that there must be objective evidence of a neurosis to

take a case to the jury, and determining that there was no such objective evidence in that case. *Id.*<sup>8</sup>

The *Gakovich* Court offered an additional reason why the jury's additional award should be overturned. The Court noted that *Henson*, 15 Wn.2d at 391, and *Harrington v. Department of Labor & Industries*, 9 Wn.2d 1, 7, 113 P.2d 518 (1941) lent support to the denial of additional compensation because the claimant was "'doing the same job' he 'had always done with [the same employer].'" This consideration of impact on earning power no longer appears to be good law in cases like *Gakovich* exclusively addressing rating of impairment for paying permanent partial disability awards.<sup>9</sup> But the unique nature of the second injury fund statute -- whose purpose, as noted above, is to provide an incentive to employers to hire and retain workers with disabilities that affect their earning power -- requires that earning power be tied to the concept of "disability" under RCW 51.16.120.

PSE argues that if Mr. Gakovich had lost the sight of his other eye in a subsequent industrial injury, thus rendering him a statutory pensioner

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<sup>8</sup> While not relevant to the instant case, the Department notes that *Gakovich's* objective evidence requirement for proving mental health impairment was overruled by *Price v. Department of Labor & Industries*, 101 Wn.2d 520, 527, 682 P.2d 307 (1984) (mental health impairment may be proved without evidence of objective findings of impairment).

<sup>9</sup> See *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 734-36, 57 P.3d 611 (2002) (permanent partial disability awards do not take into account or compensate for lost earning power).

under RCW 51.08.160, his employer automatically would have been entitled to second injury fund relief even though Mr. Gakovich's first injury had not affected his wage earning capacity. AB 30-31. The Department disagrees. If the loss of an eye (or a kidney, toe, or other body part) or other previous physical or mental health impairment did not affect earning power in a particular case, such as in *Gakovich*, then there would be no "previous . . . disability" under RCW 51.16.120, and the employer would not be entitled to relief.

Thus, consistent with established authority, the superior court correctly concluded that Lee was not *disabled* at the time of his PSE injury. Even if one were to assume for argument's sake that Lee may have had an *impairment* of his neck and back, the evidence is unambiguous that the assumed impairment did not affect Lee's ability to perform every aspect of his demanding job as a lineman at PSE. Lee 101-02.

**C. PSE Presents A Red Herring When It Suggests That The Superior Court Concluded That PSE Had To Have Knowledge Of Lee's Alleged Preexisting Disability**

PSE argues that, by requiring that a prior condition have been symptomatic prior to the industrial injury, and by taking into account that Lee did not require accommodation by PSE, the superior court somehow was importing an employer-knowledge test into RCW 51.16.120. AB 23.

PSE's argument is perplexing and mischaracterizes the trial court's conclusion.

Under RCW 51.16.120, an employer is entitled to second injury fund relief if a preexisting disabling condition "whether known or unknown" to the employer, in necessary combination with the current industrial injury, results in permanent and total disability. RCW 51.16.120(1); *Jussila*, 59 Wn.2d at 778. The evidence unequivocally shows that, at the time of his 1992 injury at PSE, Lee did not suffer from any effects of his 1978, 1981, or 1987 injuries. Lee 97. He did not receive any accommodations while at PSE because he needed none. Lee 97. Nowhere did the trial court suggest that an employer has to have knowledge of a preexisting disability to qualify for second injury fund relief. However, there must be evidence of previous permanent limitations. As discussed above, Lee had no symptoms and he had no restrictions in doing his heavy labor job at PSE; and Lee did not request accommodations from PSE or help from his fellow workers at PSE because he needed none. *See, e.g.*, Lee 97-98, 105.

There is simply no basis in law or logic for PSE's unsupported claim that the trial court ignored the plain language of the statute by incorporating into RCW 51.16.120 an element of required knowledge.

Rather, the trial court simply concluded, correctly, that there was no evidence of "previous bodily disability" under RCW 51.16.120.

**D. There Is No Right To Jury Trial Where There Are No Material Disputed Facts**

**1. Construction And Interpretation Of RCW 51.16.120 Is A Purely Legal Issue And Thus Not Appropriate For Jury Trial**

The right to a jury trial is tied to the presence of issues of fact. *Davidson v. State*, 116 Wn.2d 13, 27-29, 802 P.2d 1374 (1991). A jury reviews only contested issues of fact. RCW 4.44.090; CR 39(a)(2). It has been long held that cases involving questions upon which there is no factual conflict may be taken from the jury without denying one's right to a jury trial. *Creagh v. Equitable Life Assur. Soc.*, 19 Wash. 108, 109, 52 P. 526 (1898); *Furth v. Snell*, 13 Wash. 660, 664, 43 P. 935 (1896); see also *Davidson*, 116 Wn.2d at 27-29.

The Department does not dispute a self-insurer's right, as a general proposition in a case involving fact questions, to jury trial in an appeal from the Board. RCW 51.52.115. That right, however, is not unlimited. Once the issue of Lee's pension was resolved by stipulation, the trial court was left with two questions under the second injury fund statute - - (1) whether Lee had been suffering from previous disability at the time of his 1992 injury, and (2) whether, if he had been suffering from such previous

disability, the 1992 injury would have caused permanent total disability regardless of such previous disability. On the first of these two remaining questions, the issue of whether there was any evidence that would support a jury's finding of previous disability is a pure question of law requiring construction and interpretation of RCW 51.16.120.<sup>10</sup>

The judge, not the jury, decides all issues surrounding construction and interpretation of statutes and other writings as a matter of law. *King Cy. Water Dist. No. 75 v. Port of Seattle*, 63 Wn. App. 777, 782, 822 P.2d 331 (1992); *See also* RCW 4.44.080. All questions of law including constructions of statutes and other writings are to be decided at the court, and all discussion of law addressed to it). Moreover, when considering cases under the Industrial Insurance Act, the court has a duty to take the case away from the jury when only legal issues are to be decided. *Peterson v. Dep't of Labor & Indus.*, 40 Wn.2d 635, 637, 640-41, 245 P.2d 1161 (1952).

As shown above, it is uncontroverted that whatever pre-existing condition Lee might have had, it was not disabling at the time of the 1992 industrial injury. Because the law requires proof of the presence of a "symptomatic" and "disabling" condition at the time of the industrial

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<sup>10</sup> If this Court reverses the superior court and rules that there is evidence of previous disability sufficient for jury trial, then this Court should remand this case for jury trial on both the question of previous disability, and the question of whether the 1992 injury would have caused permanent total disability without such previous disability.

injury, see *Lyle*, 66 Wn.2d at 747-48, all that was left for trial was the application of the statute to these uncontradicted facts. This is a function for the bench, not the jury.

PSE is incorrect when it contends that a jury might have reached a different conclusion on the “previous . . . disability” question. There was no conflicting evidence to take to the jury because Dr. Gritzka stated unequivocally that Lee was not disabled at the time of the PSE injury. Gritzka at 76, 90, 91, 96, 100. And Lee, who knew best, left no doubt that he was not disabled before he fell off the pole at PSE in 1992. Lee 21, 93, 94, 96, 97, 98, 99, 100, 101, 105. As Lee did not have a pre-existing disability, there was no disability to combine with the PSE injury to trigger second injury fund relief. It would have been error to submit to the jury Dr. Gritzka’s opinion that Lee’s allegedly preexisting impairment which was not *symptomatic* or *disabling* combined with the new injury to cause Lee’s total disability. See *Lyle*, 66 Wn.2d at 747-48.

PSE relies on cases that do not support its position where PSE had no conflicting evidence to take the case to the jury. Cf. AB 36-37 with *Spalding v. Dep’t of Labor & Indus.*, 29 Wn.2d 115, 135, 186 P.2d 76 (1947) (medical witness testimony sufficiently competent to take to jury); *Hastings v. Dep’t of Labor & Indus.*, 24 Wn.2d 1, 10, 163 P.2d 142 (1945) (same); *Cyr v. Dep’t of Labor & Indus.*, 47 Wn.2d 92, 96-97, 286 P.2d

1038 (1955) (court properly withdrew the case from the jury where only medical testimony presented by appellant was that of an expert witness who had not examined the decedent, and whose only information concerning him was contained in a defective hypothetical question); *Wilson v. Dep't of Labor & Indus.*, 6 Wn. App. 902, 907, 496 P.2d 551 (1972) (testimony of medical expert which, standing alone, was of no more than "scintilla quality" was not substantial evidence and was insufficient to require submission to jury on the issue of permanent total disability).

In the instant case, the evidence was undisputed that Lee did not suffer from a "disabling" pre-existing condition at the time of his PSE injury. The trial court correctly struck the jury, exercised its obligation to apply the statute to this undisputed fact, and determined that PSE was not entitled to second injury fund relief.

The trial court should be affirmed.

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**VII. CONCLUSION**

For the reasons stated above, the Department respectfully asks this Court to affirm the trial court in every respect.

RESPECTFULLY SUBMITTED this 11 day of June, 2008.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "Marta Lowy", written in a cursive style.

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# APPENDIX

## **RCW 51.16.120**

### **Distribution of further accident cost.**

(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.

NO. 61179-8-I

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

PUGET SOUND ENERGY, INC.,

Appellant,

v.

DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON AND ROBERT R.  
LEE,

Respondents.

**CERTIFICATE OF  
SERVICE**

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that she caused a copy of the **Brief of Respondent Department of Labor and Industries and Certificate of Service** to be delivered via ABC Legal Services, counsel for all parties on the record, as follows:

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STATE OF WASHINGTON  
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