

**ORIGINAL**

83854-2

NO. 3692-4-II

369214

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

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

CROWN CORK & SEAL,

Respondent.

**RESPONDENT'S PETITION FOR REVIEW**

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## **I. PETITIONER**

COMES NOW the Petitioner, Crown Cork & Seal, by and through its attorney, Lee. E. Schultz, pursuant to RAP 13.4, and petitions the Court to grant discretionary review.

## **II. COURT OF APPEALS DECISION**

Petitioner requests that the decision of the Court of Appeals, Division II, entered herein on July 28, 2009, and order denying reconsideration entered on October 7, 2009, be reviewed.

## **III. ISSUES PRESENTED FOR REVIEW**

The issues presented for review are (1) whether the carpal tunnel syndrome suffered by Sylvia Smith prior to her industrial injury on January 10, 1997, constituted a “pre-existing disability” as contemplated by RCW 51.16.120; and if so, (2) did that prior disability when combined with the industrial injury make her totally and permanently disabled.

## **IV. STATEMENT OF THE CASE**

Sylvia Smith was an employee of Crown Cork & Seal in January of 1997 when a forklift driven by a fellow employee struck her, fracturing her right leg. A claim for an industrial injury was allowed and after the resulting condition of her leg was fixed and stable, a vocational evaluation of Ms. Smith concluded that she could not be retrained to engage in

gainful employment on a reasonably continuous basis due to the combined effects of her leg injury and her bilateral carpal tunnel syndrome. The Department then issued an Order on May 10, 2005, declaring Ms. Smith's disability to be total and permanent and placing her on the pension rolls. The Department issued a further Order on May 11, 2005, denying Crown Cork & Seal second injury fund relief under RCW 51.16.120 without further comment or explanation. Crown Cork & Seal appealed these determinations to the Board of Industrial Appeals and after hearings, a Proposed Decision and Order was issued sustaining the Department's prior Orders. On appeal to the full Board, the proposed order was adopted as the Decision and Order of the Board. Crown Cork & Seal then appealed to the Superior Court of Thurston County. After a review of the proceedings before the Board, the Honorable Gary R. Tabor found that Ms. Smith was totally and permanently disabled in part as a result of her pre-existing bilateral carpal tunnel syndrome and in part as a result of her leg injury of January 1997. Judge Tabor concluded as a matter of law that Crown Cork & Seal was entitled to second injury fund relief and ordered the Department to reverse its prior orders and enter an order consistent with his Order and Judgment. This is an appeal by the Department of Labor and Industries from Judge Tabor's Decision.

Sylvia Smith began working for Continental Can in 1980 prior to its later purchase by Crown Cork & Seal. She worked there continuously until her injury in January of 1997. She testified that she “had carpal tunnel real bad on both wrists” in 1994. She was working 12 hour shifts, four days on, four days off. Toward the end of a 12 hour shift on fourth day of work, she took off and went to a hospital emergency room for a swollen wrist. She was given wrist bands which she wore at home and at work. She would curtail her daily activities on the first day off after a four day work week because the constant movement in activities such as preparing meals, doing housework, or mowing would cause wrist pain. As she stated “when I worked the four-day shift, the first day I didn’t do nothing at home because the constant movement made it worse”. She also experienced tingling in her fingers at night. CABR Smith p.33-35. She wore the wrist bands either at work or at home as she was advised that wearing them continuously would result in weakening of the wrist. CABR Smith p. 38, l. 6-11.

At the time of her 1997 injury she was working on an assembly line as a bagger pushing lids for soda pop cans into bags. She would then load the bags onto pallets for shipping. CABR Smith p. 36, l. 19 to p. 37, l. 20. Although this position had been modified by her employer, she

never-the-less experienced pain pretty much all the time when performing her job-duties. She kept at it, however; because she had two children to support. CABR Smith p. 39, l. 14-22.

Douglas M. Gorker was an operations supervisor for Crown Cork & Seal during the period of Ms. Smith's employment. As such he supervised the day crew on the bagging line for 12-ounce beer and beverage container lids. He observed that Ms. Smith quite frequently wore wrist braces on both arms during her shift. CABR Gorker p. 5, l. 19 & p. 9, l. 10 to p. 10, l. 3. Mr. Gorker also testified that several employees complained of carpal tunnel syndrome and the company modified the position to try to reduce the strain on the wrist. CABR Gorker p. 10, l. 20 to p. 11, l. 5.

Ms. Smith's attending physician, Sean Atteridge, D.O., testified that a diagnosis of her condition in 1994 was tendinitis, but it could well have been carpal tunnel. She was treated with splints at the emergency room and he was in agreement with that treatment as well as the prescription of anti-inflammatory medication. CABR Atteridge p. 7, l. 10 to p. 8, l. 16. & p. 13, l. 11-25. Dr. Atteridge testified that many people learn to live with it (carpal tunnel) rather than continue with treatment. CABR Atteridge p. 11, l. 1. He also testified that after the leg injury in

1997, the use of crutches and of a keyboard during retraining classes exacerbated her carpal tunnel condition causing it to get worse. CABR Atteridge p. 16, l. 19 to -p. 17, l. 6. He then recommended that the keyboarding be discontinued which effectively eliminated any successful retraining for a new job with a new company. At the time her claim was closed in May of 2005, Dr. Atteridge was of the opinion that Ms. Smith was unable to work in any capacity. CABR Atteridge, p. 27, l. 7-8.

Erin McPhee was retained by Crown Cork & Seal as a vocational rehabilitation counselor to assess Ms. Smith's employability after her 1997 leg injury had become fixed and stable. She determined that Ms. Smith was not able to return to her former job due to the leg injury and that she did not have transferrable skills necessary for employment in a new job with a new employer. CABR McPhee p. 5, l. 16-20. Ms. McPhee concluded that Ms. Smith would be employable only after retraining. Ms. Smith's retraining program involved keyboarding a local community college and with an at home computer training opportunity. In both instances, she wore bilateral wrist braces and complained of pain. CABR McPhee p. 10, l. 7-11. After Dr. Atteridge advised against continued keyboarding for Ms. Smith, the office position training was discontinued. CABR McPhee p. 12, 11-8.

## V. ARGUMENT

Petitioner requests discretionary review of the Court of Appeals Decision on the basis that it is in conflict with decisions of this Court.

RAP 13.4(b)(1)

The review in an appeal of a Workers' Compensation case is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings. *Ruse v. Department of Labor & Indus.*, 138 Wn.2d 1, 977 P.2d 570 (1999).

Findings of fact are reviewed under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003)

The trial court made the following pertinent Findings of Fact:

1. ...Her work demanded constant repetitive movement of her hands. In January 1994, she experienced pain in her left and right wrists and swelling in both arms. She sought treatment at Providence St. Peters emergency room and received wrist splints/braces to wear while working and sleeping. She later on January 31, 1994 conferred with Dr. Sean Atteridge an osteopath who was certified in family practice concerning the pain in her wrist and forearms.

3. Erin McPhee testified, *and the court finds*, that the inability to restrain Ms. Smith resulted directly from her pre-existing carpal tunnel syndrome conditions and her industrial injury.

4. The claimant, Ms. Smith testified, *and the court finds*, that prior to her industrial injury her bilateral carpal tunnel conditions caused difficulty with day to day activities such as cutting vegetables, mowing her lawn, and most of her housework.

5. Smith also testified, *and the court finds*, that the position she performed with Plaintiff Crown Cork and Seal had been modified prior to her industrial injury because of wrist and hand complaints made by her and her fellow workers.

Disability in the context of workmen's compensation law means the impairment of the workman's mental or physical efficiency. It contemplates any loss of physical or mental functions which detract from the former efficiency of the individual in the ordinary pursuits of life. Loss of earning power is not an absolute requirement so long as the condition substantially and negatively impacts the worker in daily functions and efficiency. *Jussila v. Department of Labor & Industries*, 59 Wn.2d 772, 370 P.2d 582(1962) at 778; *Henson v. Department of Labor & Industries*, 15 Wn.2d 384, 130 P.2d 885(1942) ; *In re Leonard Norgren*, BIIA Dec. 04 18211 (2006); *In re Marshal H. Powell*, BIIA Dec. 97 6424.

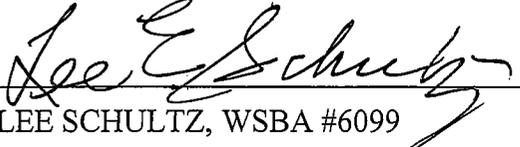
The trial court's findings that Sylvia Smith's carpal tunnel syndrome was a prior disability as defined by this court's decisions and those of the Board of Industrial Insurance Appeals is supported by substantial uncontroverted evidence. It is also uncontroverted that the prior disability when combined with the industrial injury in January of 1997 resulted in her total and permanent disability.

The Court of Appeals substituted its judgment for that of the trial court in disregard of the prohibition of *Ruse, supra*. In doing so, the Court of Appeals failed to give credence to the testimony of Sylvia Smith as to how the carpal tunnel syndrome affected her job performance (the job was modified to accommodate her condition) and her inability to enjoy the ordinary pursuits of life on the first day of her "weekend".

## VI. CONCLUSION

The decision of the Court of Appeals is not in accord with the prior decisions of this Court in *Ruse, Sunnyside, and Jussila, supra*. Petitioner respectfully asks this Court to grant discretionary review and to affirm the trial court's Order and Judgment in all respects by directing the Department of Labor and Industries to grant second injury fund relief to Crown Cork & Seal.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of November, 2009.

  
LEE SCHULTZ, WSBA #6099  
Attorney for Crown Cork & Seal

APPENDIX

Revised Code of Washington 51.16.120.....1, 2

RCWs > Title 51 > Chapter 51.16 > Section 51.16.120

51.16.110 << 51.16.120 >> 51.16.130

## **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.

[2004 c 258 § 1; 1984 c 63 § 1; 1980 c 14 § 7. Prior: 1977 ex.s. c 350 § 28; 1977 ex.s. c 323 § 13; 1972 ex.s. c 43 § 13; 1961 c 23 § 51.16.120; prior: 1959 c 308 § 16; 1945 c 219 § 1; 1943 c 16 § 1; Rem. Supp. 1945 § 7676-1a.]

#### **Notes:**

**Severability -- Effective date -- 1977 ex.s. c 323:** See notes following RCW 51.04.040.



Washington State Court of Appeals  
Division Two

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David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

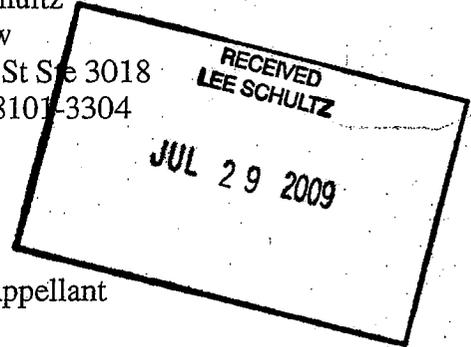
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July 28, 2009

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CASE #: 36921-4-II

Crown Cork & Seal, Respondent v. Dept of Labor & Industries, Appellant

Counsel:

An opinion was filed by the court today in the above case. A copy of the opinion is enclosed.

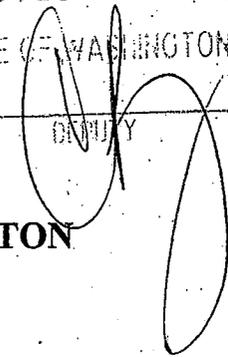
Very truly yours,

David C. Ponzoha  
Court Clerk

DCP:cjb  
Enclosure

cc: Judge Gary Tabor

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

No. 36921-4-II

CROWN CORK & SEAL COMPANY, INC,

Respondent,

v.

SYLVIA SMITH and THE DEPARTMENT  
OF LABOR & INDUSTRIES,

Appellant.

UNPUBLISHED OPINION

PENoyer, A.C.J. — The Department of Labor and Industries appeals the trial court decision granting Crown Cork & Seal access to the second injury relief fund. Because the trial court did not properly construe RCW 51.16.120(1) when reviewing the evidence, we reverse and remand.

**FACTS**

**I. WORK HISTORY AT CROWN**

The dispute in this case is limited to whether Sylvia Smith had a “[preexisting] bodily disability” at the time of her 1997 industrial accident. Administrative Record (AR) at 32. Smith first started working at Crown Cork & Seal in 1980. At that time, Crown’s medical evaluation of Smith found her to be in excellent health. Crown manufactures beer and soda cans and, over the 18 year period that Smith worked for Crown, she was primarily a “bagger.” AR (Gorker) at 6.

A bagger stacks and bags beverage can lids. Smith’s job was to push a string of the can lids into a bag, physically take that bag off of the mandrel, fold the top of the bag over tightly,

and then stack the bag onto a pallet. Smith repeated this pattern about every 20 seconds during each 12 hour shift, four days per week.

A number of baggers complained that they suffered from hand pain as a result of the required continuous hand movements. As a result, Crown redesigned the bagging machine in an attempt to mitigate the hand stress the baggers experienced.<sup>1</sup> Changes to the bagging machine did not eliminate Smith's hand pain.

Smith's supervisor, Gorker, acknowledged that Smith did not complain of hand pain any more than any other bagger at Crown and that she never requested any modification to her job duties or the equipment the baggers used at the plant to accommodate her hand pain. Smith periodically wore hand splints to mitigate the strain on her hands, but Gorker noted that Smith was always able to perform the duties her job required:

Q: As compared to the other baggers, did [Smith] complain a lot?

A: No.

Q: . . . [W]as [Smith] ever unable to perform her job functions as a result of [hand pain]?

A: No.

AR (Gorker) at 16. Gorker recalled that Smith never asked for specific workplace accommodation, that it did not appear she needed any accommodation, and that she was an

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<sup>1</sup> Smith was one of the workers who complained about the machine, but there is no direct evidence of her complaint:

Q: Do you remember ever going to your supervisor asking for that [bagger] job to be modified?

A[Smith]: . . . Directly I don't recall that, but we all talked about it in meetings and stuff like that and then one day they just changed [the bagging machine].

AR (Smith) at 41.

excellent employee. Gorker never considered Smith "disabled" due to her hand pain, despite Smith wearing splints occasionally. AR (Gorker) at 17.

## II. THE ACCIDENT AND RETRAINING

In 1997, Smith suffered an injury in the course of her employment with Crown when a forklift ran over her right leg and fractured it. Crown attempted to retrain Smith as an office helper, but the retraining was unsuccessful due to the occurrence of severe carpal-tunnel related symptoms from typing.<sup>2</sup> Dr. Atteridge, a consulting physician, determined that both Smith's use of crutches (required by the leg injury) and the keyboarding the retraining program required caused her carpal tunnel syndrome to evolve into a disabling condition.

Atteridge determined that Smith could not participate in the retraining plan and that she was not capable of obtaining and performing any form of reasonably continuous gainful employment. Atteridge found that this was due to the combined effects of Smith's leg fracture, her carpal tunnel syndrome (which "evolved" during the course of her vocational retraining), and her psychological traits, that left her unable to "cope with everyday stressors."<sup>3</sup> AR (Atteridge) at 27. Smith received a full pension for her disability.

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<sup>2</sup> Initially, Smith was medically cleared to perform the fine finger manipulations necessary for her retraining program. A physical capacities evaluation conducted on January 31, 2001, determined that Smith could undertake fine finger manipulations, handling, and grasping on a frequent basis.

<sup>3</sup> Smith's mental health is not at issue here. There has been no argument, nor has any tribunal found, that Smith had a preexisting mental health impairment.

### III. SMITH'S MEDICAL HISTORY OF HAND AND WRIST COMPLAINTS

In the 18 years Smith worked for Crown, she sought medical attention for her wrist and hand pain on two occasions. In 1982, Smith suffered an industrial injury to her right thumb and she filed a claim.<sup>4</sup> On the second occasion, in early 1994, Smith went to the emergency room due to hand and wrist pain.<sup>5</sup> The hospital doctor diagnosed Smith with tendonitis and provided her with wrist splints. Smith followed up with Atteridge, who diagnosed her hand/wrist condition as "tenosynovitis." AR (Atteridge) at 30.

Smith made a second appointment with Atteridge's office about one month from her first visit, this time seeing his associate, Dr. Michael Parker. Parker noted that Smith's wrist had gotten "significantly better." AR (Atteridge) at 30. His examination showed no swelling or tenderness and Smith's grip strength was good.

After the forklift accident, Smith saw Jennifer Coffee, an occupational therapist, who noted that Smith had "normal" upper extremity functions. AR (Berndt) at 21. Smith had another physical therapy evaluation done post-accident in 1997 that noted impairments related to her industrial injury, but it did not note any other medical difficulties. Several years later, in 2001, Smith again sought treatment for wrist and hand pain. This was the first time after the 1997 accident that Smith received treatment for upper extremity pain.

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<sup>4</sup> Smith's claim for the thumb injury closed without any award for permanent partial disability and did not result in any limitations on her work.

<sup>5</sup> Smith also filed a claim for this pain, but the evidence does not conclusively answer whether the claim was allowed and then closed without award or whether the claim was rejected. Crown does not contend that there was any award for permanent disability on the claim.

The record is unclear as to when Smith was officially diagnosed with carpal tunnel syndrome. A 1998 physical capacities report noted that Smith had "preexisting" carpal tunnel syndrome, but this was based on Smith's own injury characterization, not on any medical report. AR (McPhee) at 28.

#### IV. PROCEEDINGS BELOW

On May 11, 2005, the Department denied second injury fund relief to Crown. Crown appealed the Department's order and a Board of Industrial Appeals Judge issued a proposed order affirming the Department's order, holding that any preexisting condition Smith may have had did not constitute a "previous bodily disability" within the meaning of RCW 51.16.120(1), and that as a result, Crown was not entitled to second injury fund relief. AR at 32, 34. Crown petitioned the three member Board for review. The Board denied review and adopted the proposed decision as its final order.

Crown appealed the Board's ruling to the Thurston County superior court. Following de novo review of the Board's ruling in a bench trial, the trial court reversed the Board's ruling, granting Crown second injury fund relief due to Smith's "previous bodily disability." Clerk's Papers (CP) at 41.

The Department appeals.

#### ANALYSIS

The second injury fund is a State administered fund set up within the worker's compensation system. The fund offers financial relief to employers when a previously disabled worker is subsequently injured and the combined injuries result 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 fund's purpose is to encourage the hiring and retention of handicapped workers. *Jussila*, 59 Wn.2d at 778. The fund is a narrowly limited exception to the general rule of employer responsibility. *Jussila*, 59 Wn.2d at 779.

Our review is limited to record examination to see whether substantial evidence supports the findings made after the trial court's de novo review, and whether the trial court's conclusions of law "flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)). We review the findings of fact under a substantial evidence standard, which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. If substantial evidence supports a finding of fact, we should not substitute our judgment for the trial court's. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Before we review the findings of fact, however, we must first determine whether the trial court properly construed RCW 51.16.120 in making its conclusion. We review this question of law de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). There is no concrete test for determining what qualifies as a "disability" under RCW 51.16.120, however, our review of case law indicates that the trial court did not construe this statute properly and reversal of its decision is warranted.

RCW 51.16.120 of the Industrial Insurance Act contains three prerequisites that an employer must meet in order to obtain second injury fund relief.<sup>6</sup> The employer must show that the worker: (1) had a "previous bodily disability from any 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 Sch. Dist. No. 1 v. Dep't of Labor & Indus.*, 116 Wn.2d 352, 357, 804 P.2d 621 (1991) (quoting RCW 51.15.120(1)). As we noted, the dispute in this case is limited to whether Smith had a preexisting bodily disability at the time of her 1997 industrial accident.

The Industrial Insurance Act does not define the term "disability," but several cases interpret the term. In *Jussila*, the Washington Supreme Court noted that "[i]n the context of second injury fund relief, a 'preexisting disability' is more than a mere preexisting medical condition and must, in some fashion, permanently impact on the worker's physical and/or mental

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<sup>6</sup> RCW 51.16.120(1) states:

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.

functioning.” 59 Wn.2d at 778 (quoting *In re Norgren*, No. 04 18211 (Wash. Bd. of Indus. Ins. Appeals Jan. 12, 2006)). Further, as noted in *Henson v. Department of Labor and Industries*, the traditional meaning of “disability” in the context of workmen’s compensation law means “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 the ordinary pursuits of life. It connotes a loss of earning power.” 15 Wn.2d 384, 391, 130 P.2d 885 (1942) (citing 2 *Schneider, Workmen’s Compensation Law*, (2d Ed.), 1332, § 400). Although the term 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. *In re Norgren*, No. 04 18211 (Wash. Bd. of Indus. Ins. Appeals Jan. 12, 2006) (quoting *Henson*, 15 Wn.2d at 391) and *In re Powell*, No. 97 6424 (Wash. Bd. of Indus. Ins. Appeals July 21, 1999).

The Department argues that:

Under [*Rothschild v. Department of Labor and Industries*, 3 Wn. App. 967, 969-70, 478 P.2d 759 (1971)] and the Board decisions in [*In re Funk*, No. 89 4156 (Wash. Bd. of Indus. Ins. Appeals Feb 4, 1991)] and [*In re Anderson*, Dckt. No. 88 4251 (Wash. Bd. of Indus. Ins. Appeals June 15, 1990)] full ability to do one’s job at the time of the subsequent injury, an ability possessed here by Ms. Smith, precludes second-injury fund relief for the employer. Only by proving that a preexisting medical condition substantially [a]ffected a worker’s ability to do her job does the employer meet the narrow second-injury fund test for “previous bodily disability.”

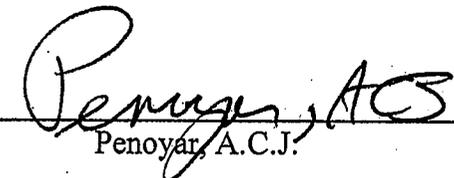
Appellant’s Reply Br. at 5.

We do not agree. In some cases, individuals will suffer a loss of “daily functioning and efficiency” and have a loss in potential “earning power” but still be able to do their job at their current place of employment. *In re Powell*, No. 97 6424 (Wash. Bd. of Indus. Ins. Appeals July 21, 1999; *Henson*, 15 Wn.2d at 391 (citing 2 *Schneider, Workmen’s Compensation Law*, (2d

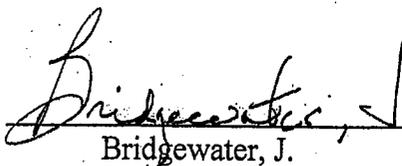
Ed.), 1332, § 400). The problem for Crown is that Smith's "daily functioning and efficiency" was not impacted by her wrist problems. While she suffered pain and difficulty, she still was able to cut her vegetables, mow her lawn, and do her housework. She was thus not disabled, either at work or in daily life.

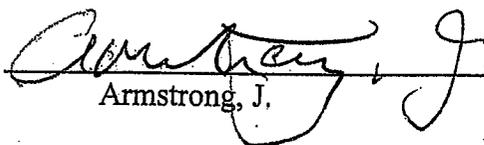
There is no doubt that Smith had hand and wrist pain and perhaps even the onset of carpal tunnel syndrome. To receive relief under the second injury relief fund, however, the prior condition must be disabling under the statute. Difficulty with household chores and the presence of pain is simply not enough. Given that the trial court used an incorrect standard for determining whether Smith's injury qualified as a "previous bodily disability" under RCW 51.16.120, we reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

  
Penoyer, A.C.J.

We concur:

  
Bridgewater, J.

  
Armstrong, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CROWN CORK & SEAL COMPANY,  
INC.,

Respondent.

No. 36921-4-II

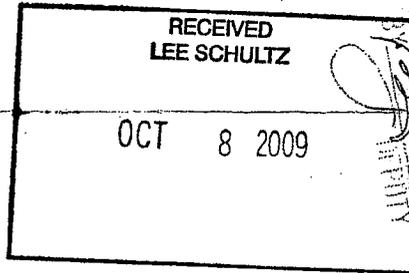
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v.

ORDER DENYING MOTION FOR  
RECONSIDERATION

SYLVIA SMITH and THE  
DEPARTMENT OF LABOR &  
INDUSTRIES,

Appellant.



FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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RESPONDENT moves for reconsideration of the Court's opinion, filed July 28, 2009.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Penoyar, Bridgewater, Armstrong

DATED this 7<sup>th</sup> day of October, 2009.

FOR THE COURT:

ACTING CHIEF JUDGE

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