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STATE OF WASHINGTON

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No. 83854-2

SUPREME COURT OF THE STATE OF WASHINGTON

CROWN CORK & SEAL,

Petitioner

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

CROWN CORK & SEAL CORPORATION'S

SUPPLEMENTAL BRIEF

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I. PETITIONER

COMES NOW Crown Cork & Seal, the Petitioner, by and through its attorney, Lee. E. Schultz, and pursuant to RAP 13.7(d) submits this Supplemental Brief in support of its Petition for Review of the Court of Appeals, Division II decision herein.

II. RELIEF REQUESTED

Crown Cork & Seal requests that the decision of the Court of Appeals, Division II, entered herein on July 28, 2009, and its order denying reconsideration entered on October 8, 2009, be reversed and the decision of the Superior Court for Thurston County entered on September 25, 2007 be affirmed.

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 of January 10, 1997, constituted a “previous bodily disability” as contemplated by RCW 51.16.120; and if so, (2) did that previous bodily disability when combined with the industrial injury of January 10, 1997 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 leg condition 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 pre-existing bilateral carpal tunnel syndrome. The Department of Labor & Industries then issued an Order on May 10, 2005, declaring Ms. Smith's disability to be total and permanent and placed her on the pension rolls. The Department of Labor & Industries 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 (hereafter Board); and, after an administrative hearing, a Proposed Decision and Order was issued by the Board of Industrial Insurance Appeals sustaining the Department of Labor & Industries prior Orders. On appeal to the full three member 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 De novo

review of the proceedings before the Board, the Honorable Gary R. Tabor found that Ms. Smith was totally and permanently disabled as a result of her pre-existing bilateral carpal tunnel syndrome when combined with her leg injury of January 10, 1997 at Crown Cork and Seal. Judge Tabor found Ms. Smith's carpal tunnel syndrome to be a previous bodily disability and concluded as a matter of law that Crown Cork & Seal was entitled to second injury fund relief. His decision ordered the Department of Labor & Industries to reverse its prior orders and enter an order consistent with his Order and Judgment. The Department of Labor and Industries appealed from Judge Tabor's decision to Division II of the Court of Appeals.

V. FACTUAL BACKGROUND

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 of January 10, 1997. She testified that she "had carpal tunnel real bad on both wrists" starting in 1994. At that time she was working four twelve hour shifts. Toward the end of a twelve hour shift on the fourth day of her work week, 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 testified that her work schedule was

four days of twelve hour shifts followed by three days off. She continued testifying as follows:

“...if I cut off vegetables or trying to mow, most anything, all kinds of housework affected me real bad. So usually on my four days – when I worked the four-day shift, the first day (off) I didn’t do nothing at home because the constant movement made it worse...I am not trying to do any movements the first day off.....(B)ut when I would go to sleep and wake up, my little finger was numb and it tingles...and you don’t have feeling and it usually affected the two little fingers on both hands on each side ...It’s extremely painful. Just never goes away; it just stays” AR (Smith) at 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 wrists. CABR Smith p. 38, l. 6-11.

At the time of her 1997 injury she was working on an assembly line pushing lids for soda pop and beer 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 at her

request and at the request of her co-employees because of wrist pain, 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 their wrists. 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 tendonitis, but it could well have been carpal tunnel. She was treated with bi-lateral splints at the emergency room and he was in agreement with that treatment as well as with 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 was enrolled in an office training program which involved keyboarding. The retraining program involved keyboarding at a local community college and with an at home computer. 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 training position was discontinued. CABR
McPhee p. 12, 11-8.

IV. ARGUMENT

Previous bodily disability in the context of the second injury fund statute means the impairment of the workman's mental or physical efficiency. It embraces any loss of physical or mental functions which detract from the former efficiency of the individual in the ordinary pursuits of life. It connotes a loss of earning power but as stated in *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 205 P.3d 979 (2009) at page 890 it is not required. *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 Lance Bartran*, BIIA Dec. 04 21232, 04 23432, 04 23522 (2005); *In re Leonard Norgren*, BIIA Dec. 04 18211 (2006); *In re Marshal H. Powell*, BIIA Dec. 97 6424 (1999); *In re Sandra M. McKee*, BIIA Dec. 04014107 (2007).

The *McKee* decision describes "previous bodily disability" under RCW 51.16.120 as an impairment that significantly impacts physical or mental functioning before the industrial injury. It is a condition that detracts from an individual's ability to engage in the ordinary pursuits of

life. The *McKee* decision holds that a loss of earning power is satisfied by a showing that the claimant's vocational options have been limited by a condition preexisting the industrial injury.

This is precisely the condition in which Sylvia Smith found herself immediately prior to her industrial injury in January of 1997. Her condition limited her vocational options. After her injury in January of 1997, Smith's pre-existing carpal tunnel condition prevented her from being retrained to perform the sedentary work her vocational counselor had identified as appropriate considering her physical and educational limitations.

The Supreme Court and Board of Appeals decisions which conclude that a previous bodily disability was present, and second injury fund relief proper, all describe conditions which have an impact on the individual's daily activities and affect loss of earnings only insofar as those conditions limit vocational opportunities.

Henson, supra, involved silicosis with shortness of breath, decreased chest expansion and lessened capacity for work; *McKee, supra*, involved mental health and learning disabilities; *Bartran, supra*, dealt with a schizoid personality disorder; *Powell, supra*, involved diabetes with bilateral neuropathy in the feet.

Only in those instances where the prior condition was latent or quiescent and rarely, or not at all, interfered with the individual's ordinary pursuits of life, was second injury fund relief denied to the employer, *In re Forrest Pate*, BIIA Dec. 90 4055 (1992), *In re Alfred Funk*, BIIA Dec. 89 4156 (1991), and *Rothschild International Stevedoring Company v. Department of Labor & Industries*, 3 Wn. App. 967, 478 P.2d 759 (1971)

The recent Court of Appeals Division I case of *Puget Sound Energy, Inc. v. Lee*, 149 Wn.App. 866, 205 P.3d 979 (2009) is illustrative of the issues and contentions herein. Mr. Lee was a lineman for Puget Power. He had been awarded prior permanent partial disability awards at the time of his last industrial injury. The employer sought second injury fund relief in an appeal to Superior Court. The trial court granted the Department's request to dispense with a trial by jury on the issue of previous bodily disability. On appeal it was held that the question of previous bodily disability was a question of fact and that it was error to deny the employer the benefit of a trial by jury. In discussing the Department's contention that a previous bodily disability must affect earning power and not simply be disabling the Court stated:

The argument that Lee's previous bodily disability was not a disability because it was not a total disability, i.e., that it

did not prevent him from working, begs the question whether the previous disability was a contributing factor in his total disability. By definition, a previous bodily disability must be partial... While a "previous bodily disability" must have a substantial negative impact on the worker's physical or mental functioning, it does not follow that it must have a substantial negative impact on the worker's ability to perform his or her current job. If it did, the worker would be unemployable, in direct contravention of the statute's purpose. *Lee, supra*, at 884 and 889.

As to the purpose of the statute the Lee Court stated:

“Statutes should be interpreted to further, not frustrate, their intended purpose,”... The purpose of the second injury fund, as stated by our Supreme Court in 1962, is “to encourage the hiring of previously handicapped workmen by providing that the second employer will not, in the event such a workman suffers a subsequent injury on the job, be liable for a greater disability than actually results from the second accident.” But an employer must hire workers, whether disabled or not, who are capable of substantially

performing the jobs they were hired to perform. If “previous bodily disability” only encompassed impairments that substantially hindered a worker from performing the job for which he or she was to be hired, employers would not be encouraged to hire any worker with a previous bodily disability. Thus “previous bodily disability” must relate to loss of bodily function. *Lee, supra*, at 887,888. *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 864 P.2d 937 (1994), *Jussila, supra*, at 778.

The *Lee* decision went on to approve of the following definition of previous bodily disability under RCW 51.16.120:

Disability means the impairment of the worker's mental or physical efficiency. It embraces any loss of physical or mental functions that detract from the former efficiency of the individual in the ordinary pursuits of life. However, something more than the existence of a prior condition requiring periodic medical attention is required. In the context of second injury fund relief, a pre-existing disability is more than a mere pre-existing medical condition and must, in some fashion, permanently impact

the worker's physical and/or mental functioning. *Lee, supra*, at 888.

In doing so, the Lee Court acknowledged the proposition that the decisions of the Board of Appeals should be given weight by the appellate court, citing *Lynn v. Washington State Dept. of Labor and Industries*, 130 Wn.App. 829, 125 P.3d 202 (2005)

Lastly, the *Lee* decision held that the determination of whether a previous bodily disability was present at the time of the industrial injury is a factual determination.

A review of second injury fund decisions by the Board shows that the determination of whether a worker's medical conditions constituted a previous bodily disability is a highly fact-specific determination, requiring the trier of fact to determine whether the worker had a previous permanent loss of function (emphasis added), *Lee, supra*, at 889.

V. CONCLUSION

The trial court's findings of fact were based upon the testimony of Sylvia Smith and Dr. Atteridge that her wrist problems substantially and negatively impaired her physical efficiency in following the ordinary pursuits of life such as meal preparation and maintenance of a household.

They also caused pain and discomfort. No evidence was presented to the contrary. The only evidence presented was of a sufficient quantum to support Judge Tabor's finding that Ms. Smith had a "previous bodily disability" within the meaning of RCW 51.16.120 and that it was a proximate cause of her total permanent disability. As such, it would be improper for an appellate court to substitute its judgment for that of the trial court. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 73 P.3rd 369 (2003).

There was also uncontroverted evidence that this "previous bodily disability" was a proximate cause of her total and permanent disability and that, but for the same, she could have been retrained to engage in gainful employment. The conditions for second injury fund relief under the applicable statute having been met, Judge Tabor was correct in his ruling.

Petitioner respectfully asks this Court to affirm the trial court's Order and Judgment in all respects.

RESPECTFULLY SUBMITTED this 28th day of May, 2010.



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