

**ORIGINAL**

83854-2  
No. 36921-4-II

---

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

---

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

CROWN CORK & SEAL,

Respondent.

BY *[Signature]*  
DEPUTY  
STATE OF WASHINGTON

08 MAY 27 PM 2:54

FILED  
COURT OF APPEALS  
DIVISION II

---

**BRIEF OF RESPONDENT**

---

LEE SCHULTZ, WSBA #6099  
One Union Square  
600 University Street, Suite 3018  
Seattle, WA 98101-3304  
(206) 447-9880

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	ISSUE.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	STANDARD OF REVIEW.....	6
V.	ARGUMENT.....	8
VI.	CONCLUSION.....	14

## TABLE OF AUTHORITIES

### Case Law

<i>Henson v. Department of Labor &amp; Industries,</i> 15 Wn.2d 384, 130 P.2d 885(1942).....	9,10
<i>Jussila v. Department of Labor &amp; Industries,</i> 59 Wn.2d 772, 370 P.2d 582(1962).....	9,10,11
<i>Lyle v. Department of Labor &amp; Industries,</i> 66 Wn.2d 745, 405 P.2d 251 (1965).....	12
<i>Rothschild International Stevedoring Company v. Department of Labor &amp; Industries,</i> 3 Wn. App. 967, 478 P.2d 759 (1971).....	12
<i>Ruse v. Department of Labor &amp; Industries,</i> 138 Wn.2d 1, 977 P.2d 570 (1999).....	6
<i>Sunnyside Valley Irrigation Dis't. v. Dickie,</i> 149 Wn.2d 873, 73 P.3d 369 (2003).....	6,8

### Administrative Decisions

<i>In re Alfred Funk,</i> BIIA Dec. 89 4156 (1991).....	13
<i>In re Leonard Norgren,</i> BIIA Dec. 04 18211 (2006).....	9,13

*In re Forrest Pate,*  
BIIA Dec. 90 4055  
(1992).....8

*In re Marshal H. Powell,*  
BIIA Dec. 97  
6424.....10

**Statutes**

RCW 51.16.120.....1, 2, 8,  
14

**Treatises**

*Larson's Workers' Compensation Law,*  
*(2007)*.....13

## I. INTRODUCTION

This is an appeal by the Department of Labor and Industries from a Superior Court decision ruling that Respondent Crown Cork & Seal Company, Inc. is entitled to Second Injury Fund relief pursuant to RCW 51.16.120.

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 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 placed 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 petition 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.

The Department appeals from that Order and Judgment claiming an error as a matter of law when in reality, the Department challenges the Findings of Fact by the trial court.

## **II. ISSUE**

The issue on appeal is whether the Claimant, Sylvia Smith, had a "previous bodily disability" as contemplated by RCW 51.16.120 at the time she suffered an industrial injury on January 10, 1997; and if so, did that prior disability when combined with the industrial injury make her totally and permanently disabled.

## **III. STATEMENT OF THE CASE**

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 a 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. 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 nevertheless 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 so 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 tendonitis, 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 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. 12, l. 16-18 & 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 at a local community college and at home. 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.

#### IV. STANDARD OF REVIEW

The review in this appeal 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 wrists and forearms.
3. Erin McPhee testified, *and the court finds*, that the inability to retrain 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.

6. Smith also testified, *and the court finds*, that although she did not seek active medical treatment between 1994 and her industrial injury in 1997 she wore her wrist splints during that entire period of time.

8. Sean Atteridge, DO Ms. Smith's attending physician testified, *and the court finds*, that Ms. Smith was wearing splints for her wrist complaints and he agreed that she should in fact wear such splints for the symptoms she was experiencing between 1994 and her industrial injury in 1997 and beyond.

10. Dr. Atteridge testified, *and the court finds*, that in his opinion Smith is totally and permanently disabled as of May 10, 2005 due in part to her industrial injury of January 10, 1997 and due in part to her pre-existing carpal tunnel syndrome. Dr. Atteridge's medical opinion is undisputed by any other medical testimony.

11. Dr. Atteridge testified, *and the court finds*, that Smith's severe industrial injury involving her leg makes her unable to

work in any capacity other than a sedentary office type position, and that due to her pre-existing bilateral carpal tunnel conditions she is unable to perform this type of work or be trained in these type of jobs.

(Emphasis added)

Based on the above findings, the trial court properly concluded as a matter of law that:

4. Ms. Smith's bilateral carpal tunnel conditions pre-existing her industrial injury constituted a "previous bodily disability" within the meaning of RCW 51.16.120(1) and when combined with the effects of the claimant's industrial injury of January 10, 1997 caused the claimant to be permanently and totally disabled, and the self insured employer, is therefore entitled to Second Injury Fund Relief pursuant to RCW 51.16.120.

## V. ARGUMENT

If the record of proceedings before the Board of Appeals contained a sufficient quantum of evidence from which a reasonable person could be persuaded that the above cited findings are true, then this court may not substitute its judgment for that of Judge Tabor and the findings must be accepted as true. *Sunnyside Valley Irrigation Dist., supra.*

A "previous bodily disability" under the Second Injury Fund statute has been defined in court decisions and in significant decisions by the Board of Appeals. *In re Leonard Norgren*, BIIA Dec. 04 18211 (2006) discusses

the meaning of "disability" within the statute and concludes as follows:

Unfortunately, the Industrial Insurance Act does not define the term "disability." The Supreme Court in *Jussila*, at 778-779, used the word "handicapped" to describe the type of disability meant by the Legislature. We have discussed the meaning of disability before. In *In re Forrest Pate*, Dec'd, Dckt. No. 90 4055 (May 7, 1992), we surveyed a number of court decisions interpreting the term "disability," including *Henson v. Department of Labor & Indus.*, 15 Wn.2d 384 (1942). Based on that case law we stated:

Disability 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. *Henson*, at 391.

In an effort to enhance understanding of the term "disability", the court in *Henson* related disability to its negative effect upon an individual's physical or mental functioning as well as his or her earning capacity. Something more than existence of prior conditions requiring periodic medical attention was contemplated. In 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 functioning. The court in *Jussila* restated this theme when it specifically used the word "handicapped" to describe the type of prior condition that must exist for second injury fund relief to be applied.

The Second-Injury Fund is a special fund set up within the administrative framework of the workmen's compensation system 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. *Jussila*, at 778.

(Emphasis added)

The disability described above is not limited to a workplace disability as the quotes from *Henson* indicate that interference with ordinary pursuits of life are included as well.

The contention of the Department that the employer must show that the pre-existing condition impacted the employee's ability to work is not supported by the controlling legal authorities. In *In re Powell*, BIIA Dec. 97 642 (1999) the Board of Appeals held that pre-existing diabetes with peripheral neuropathy being treated with insulin was a "pre-existing bodily disability". Second injury fund relief was given to the employer, Seattle School District #1, even though Mr. Powell was able to perform his duties as a janitor at the time of his industrial injury. Obviously, one must be able to perform his or her job duties at the time of the industrial injury. If he or she were not on the job, there would be no industrial injury and no second injury fund situation.

The record in this case clearly reflects objective indications that Ms. Smith's bilateral wrist condition was active, symptomatic, and disabling prior to her injury in January of 1997. Her carpal tunnel

condition affected her daily pursuits at home and on the job. She sought medical attention at a hospital emergency room. She wore appliances on both wrists. She took anti-inflammatory medication for her condition. Performing daily household duties caused her pain. CABR Smith p. 33-35. She, as well as her co-workers, complained of wrist and hand problems on the job to such a degree that the employer made modifications to their job. CABR Gorker p. 10, l. 20 to p. 11, l. 5. There is a sufficient quantum of evidence in the record to support the finding of a pre-existing bodily disability in accordance with the statute.

The second requirement for second injury fund relief is that the pre-existing bodily disability be a "but for" cause of the total permanent disability. *Jussila v. Department of Labor and Industries*, 59 Wn.2d 722, 370 P.2d 582 (1962) The testimony of Erin McPhee and Dr. Atteridge was to the effect that the worsening or exacerbation of Ms. Smith's pre-existing carpal tunnel condition made training for a sedentary office position impossible as all such positions required keyboarding/computer skills. CABR Atteridge p. 16, l. 19 to p. 17, l. 6. CABR McPhee p. 10, l. 7-11. The carpal tunnel condition did not allow Ms. Smith to participate in

such training. Therefore, “but for” the carpal tunnel condition, she could have been retrained to engage in gainful employment on a reasonably continuous basis, and would not be totally and permanently disabled. This testimony was not controverted and was of a sufficient quantum to support the trial court’s finding that the pre-existing carpal tunnel condition was a cause of Ms. Smith’s total permanent disability.

The Department’s claim that Dr. Atteridge testified that the carpal tunnel syndrome evolved into a disabling condition is a misstatement of the record. CABR Atteridge, p. 12, l. 16-17.

The following cases cited by the Department are distinguishable as they discuss pre-existing latent conditions with no evidence that the worker was impacted by them whether on the job or not prior to the industrial injury.

*Lyle v. Department of Labor & Indus.*, 66 Wn.2d 745, 405 P.2d 251(1965) and *Rothschild International Stevedoring Company v. Department of Labor and Industries*, 3 Wn. App. 967, 478 P.2d 759 (1971) are cases in which the injured worker was asymptomatic at the time of his industrial injury. In *Lyle*, the injury lit up a pre-existing latent

or quiescent degenerative arthritis condition; and in *Rothschild*, a pre-existing traumatic neurosis was triggered by the industrial injury. Prior thereto the worker was doing "everything" required of a longshoreman. *In re Alfred Funk*, BIIA Dec. 89 4156 (1991) concerned an injured logger who was able to perform his duties as a logger despite a pre-existing congenital heart defect and non symptomatic degenerative arthritis.

The Department's references to *Larson's Workers' Compensation Law* and to legislative policy should have no bearing on this appeal. The Washington Court and the Board of Appeals have ruled on what constitutes a "previous bodily disability" and discussed the legislative intent of the Washington statute under consideration. *In re Norgren, supra*.

The Department's contention that the court did not make a finding of a previous bodily disability is without merit. A determination that a "previous bodily disability" was present is a legal conclusion not a factual determination. The court did make findings as to the effect Ms. Smith's pre-existing carpal tunnel condition had on her ordinary pursuits of life; both on the job, and off. Findings 1, 4, 5, 6, and 8, were based on evidence in the record. These findings support the conclusion of law that

the pre-existing condition was a “previous bodily disability”.

The balance of the Department’s argument addresses factual issues. Such issues are not in play in this appeal. A sufficient quantum of evidence supports the trial court’s findings. This court may not substitute its judgement for that of Judge Tabor.

## **VI. CONCLUSION**

The trial court’s findings of fact were based upon the testimony in the record. There was no testimony offered to contradict the findings and opinions of Dr. Atteridge. The trial court’s findings support a conclusion that Ms. Smith had a “previous bodily disability” within the meaning of RCW 51.16.120. There was uncontroverted testimony that the “previous bodily disability” was a 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, the trial court was correct in its ruling. This Court should affirm the trial court’s Order and Judgment in all respects.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of May, 2008.



---

LAW OFFICE OF LEE SCHULTZ

LEE SCHULTZ WSBA #6099

Attorney for Respondent

No. 36921-4-II  
COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAY 29 PM 4:25  
STATE OF WASHINGTON  
BY DEPUTY

In Re: DEPARTMENT OF LABOR  
AND INDUSTRIES,

Docket No: 06 17715

Appellant,

DECLARATION OF SERVICE

v.

CROWN CORK AND SEAL,

Respondent.

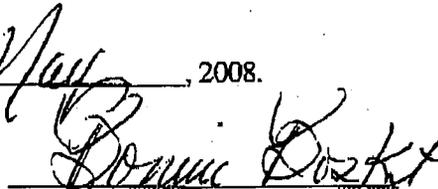
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the 27<sup>th</sup> day of May 2008, I delivered the Brief of Respondent, Crown Cork and Seal to all parties by ABC Legal Messenger addressed as follow:

Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA. 98402

Natalee Fillinger, AAG  
Office of the Attorney General  
7141 Cleanwater Dr.  
Turnwater, WA. 98501

Kathryn Comfort, Attorney  
Smart, Snell, Weiss & Comfort, PS  
4002 Tacoma Mall Blvd.  
Tacoma, WA. 98409

DATED THIS 27<sup>th</sup> DAY OF May, 2008.



Bonnie Bosket,  
Legal Assistant to Lee Schultz