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NO. 90304-2

SUPREME COURT OF THE STATE OF WASHINGTON

BOEING COMPANY,

Petitioner,

v.

PATRICIA DOSS,

Defendant,

and

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

**SUPPLEMENTAL BRIEF OF
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
Office Id. No. 90122
P.O. Box 40121
7141 Cleanwater Dr. SW
Olympia, WA 98504-0121
(360) 586-7715

ANNIKA SCHAROSCH
Assistant Attorney General
WSBA #39392
Office Id. No. 91106
1116 W. Riverside Avenue
Spokane, WA 99201
(509) 456-3123

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I. INTRODUCTION

When an employer, like Boeing, opts to become self-insured under the Industrial Insurance Act, the employer obtains the financial benefits of self-insurance but must also accept the responsibilities. One of these responsibilities includes the duty to directly pay for the medical costs of an injured employee.

Boeing seeks to avoid its responsibility by having the second injury fund pay for the medical costs of one of its permanently disabled former employees. But the statutes governing the use of the second injury fund plainly allow for only two types of payments: payments for a portion of the pension reserve and payments for job modification costs. Relevant here, the fund provides relief where a previously disabled worker suffers a subsequent injury on the job, and the combined effects of that injury and a previous disability result in permanent and total disability. In such cases, the second injury fund pays “the difference” between the total cost of the worker’s pension reserve (the estimated cost of the total of all of the worker’s monthly pension benefits) and the permanent disability that the worker would have suffered had the worker had no pre-existing disability. RCW 51.16.120. The fund, however, does not cover the cost of medical treatment, including medical treatment provided after a worker is placed

on the pension rolls and the employer has received second injury fund relief.

Because the second injury fund cannot be used to fund medical treatment, Boeing, as a self-insured employer, must directly pay post-pension medical costs for its injured employee. Contrary to the Court of Appeals' decision, requiring Boeing to compensate its injured employee for medical costs does not place self-insured employers at a financial disadvantage compared to employers insured through the state. Rather, Boeing pays these costs directly because it has chosen to self-insure whereas other employers pay these costs indirectly through the premiums they pay to the State. Simply put, the second injury fund cannot be used to excuse a self-insured employer from its obligation to pay for the medical treatment its injured workers need. The Court of Appeals erred when it concluded otherwise, and its decision should be reversed.

II. ISSUES

Does the Industrial Insurance Act allow a charge to the second injury fund for the cost of Patricia Doss's medical treatment under RCW 51.16.120, when RCW 51.16.120 only allows a charge for the difference between the pension reserve and the worker's permanent partial disability caused by the occupational exposure, and when neither the

pension reserve nor a permanent partial disability award include the cost of medical treatment?

III. STATEMENT OF THE CASE

A. **Patricia Doss Requires Lifelong Medical Treatment as a Proximate Result of Chemical Exposure at Boeing**

Patricia Doss suffered harmful chemical exposure, resulting in injury to her lungs, while employed by The Boeing Company, a self-insured employer. BR 43-46, 73-74, 80, 82-84. Doss had suffered from symptomatic asthma before working for Boeing, which restricted her ability to work. BR 66-67. Doss's exposure to harmful chemicals at Boeing permanently aggravated her pre-existing asthma. BR 67.

The Department of Labor and Industries (Department) placed Doss on a pension in 2008, finding that the combined effects of the permanent aggravation of her pre-existing asthma and a right knee injury rendered her permanently unable to work in any gainful capacity. BR 73, 83. A pension is a disability benefit. When a worker is pensioned, the worker receives a monthly wage-replacement benefit for the remainder of the worker's life. RCW 51.32.060. Normally, when the Department places the worker of a self-insured employer on a pension, the employer must make a payment into a "pension reserve" that is equal to the estimated cost of all of the worker's monthly pension benefits over the course of the

worker's life, based on an annuity. RCW 51.44.070. The pension reserve is used to pay for the worker's monthly pension benefits, but it is not used to pay for any other benefits to the worker, such as medical treatment. *See* RCW 51.44.070. In calculating the pension reserve, the estimated costs of the worker's future medical treatment needs are not taken into account. *See* RCW 51.44.070.

The second injury fund was created to encourage employers to hire previously injured workers. *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962). If a previously injured worker becomes permanently disabled at the current workplace, the Department grants an employer second injury fund relief whereby, instead of paying the full cost of the worker's estimated pension benefits into the pension reserve, the employer pays into the reserve fund only an amount equal to the disability that the worker would have suffered from the workplace exposure alone, had there been no pre-existing disability. RCW 51.16.120. The second injury fund covers the difference between the total cost of the pension reserve and the disability that would have been suffered from the injury alone. RCW 51.16.120. This is the permanent partial disability amount.

The Department granted Boeing second injury fund relief. BR 77. This meant that Boeing had to pay the cost of the permanent partial disability attributable to the workplace exposure at Boeing alone (here,

\$22,237.07), and the second injury fund covered the rest of the cost of Doss's pension reserve. BR 77.

The Department also authorized Doss to receive continued medical treatment for her asthma that is necessary to preserve her life: specifically, asthma medications and one medical visit a month to monitor her medications. BR 74. This ongoing treatment is necessary as a result of both Doss's harmful chemical exposure while working for Boeing and her pre-existing asthma. BR 67.

B. The Department and Board of Industrial Insurance Appeals Denied Boeing's Claim for Second Injury Relief for Medical Costs Because Treatment Costs Are Not Chargeable to a Pension Reserve, but the Courts Reversed

Boeing sought to have the second injury fund pay for the cost of Doss's treatment in addition to having that fund relieve Boeing of the full cost of Doss's estimated pension benefits. The Department denied Boeing's request. BR 89. Boeing appealed to the Board of Industrial Insurance Appeals (Board).

The Board affirmed the Department's decision and ordered Boeing to pay for the costs of Doss's treatment, citing its significant decision, *In re Crella Boudon*, No. 98 17459, 2000 WL 245825 (Wash. Bd. of Indus. Ins. Appeals Jan. 26, 2000), in which the Board, after analyzing the

relevant statutes, concluded that the second injury fund cannot be used to cover the cost of medical treatment. BR 2-5.

Boeing appealed to superior court. The superior court reversed the Board's determination, concluding Doss's post-pension medical costs should be paid out of the second injury fund. CP at 57-61. The Department appealed to the Court of Appeals, which affirmed.

The Department petitioned this Court for review, and this Court granted that request.

IV. ARGUMENT

A. The Plain Language of RCW 51.16.120 and RCW 51.44.040 Establishes That the Second Injury Fund Provides an Employer With Partial Relief From Its Obligation to Fund A Pension but Does Not Cover the Cost of Medical Treatment

Self-insured employers are generally responsible to pay for all benefits due to their injured workers as a proximate result of occupational exposure. *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 742, 630 P.2d 441 (1981); RCW 51.08.173; RCW 51.14.020(1); WAC 296-15-330; WAC 296-15-340. This default obligation applies here unless a statute excuses Boeing from the responsibility that it would normally bear as a self-insured employer to pay for the medical care needed by one of its injured workers. But no such statute exists.

Boeing claims that the second injury fund statute, RCW 51.44.040, excuses it from its responsibility to cover medical costs. Boeing is wrong. The plain meaning of RCW 51.44.040 must be “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). A close examination of the second injury fund statute demonstrates that the Legislature has carefully limited the use of that fund and has not authorized it to be used for medical costs.

RCW 51.44.040 creates the second injury fund, and states that it “shall be used *only* for the purpose of defraying charges against it as provided in RCW 51.16.120 and 51.32.250.” (Emphasis added). Neither statute applies here.

RCW 51.32.250 is inapplicable, as it provides for payments for job modifications that are needed to allow disabled workers to return to work. It does not apply to the cost of a worker’s medical treatment.

RCW 51.16.120 also does not apply as it allows only a charge to the second injury fund that reflects the difference between the worker’s permanent partial disability amount and the pension reserve amount:

- (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... then the experience record of an employer insured with the state fund at the time of the 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 the 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 the further injury or disease and *the total cost of the pension reserve* shall be assessed against the second injury fund.

(Emphases added.)

Thus, the only “charge” against the second injury fund that RCW 51.16.120 authorizes is a charge that covers “the difference” between two costs: “the total cost of the pension reserve” and “the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability.”

The “total cost of the pension reserve” is the estimated cost of a worker’s monthly pension payments. RCW 51.44.070; RCW 51.16.120. Whenever an injured worker is granted a pension, a one-time payment is made into the “reserve fund” in an amount equal to “the estimated present cash value of the monthly payments” that will be provided to the pensioned worker over the life of the pension, based on an annuity. RCW 51.44.070(1). The annuity is “based upon rates of mortality,

disability, remarriage, and interest as determined by the Department, taking into account the experience of the reserve fund in such respects.”

Id. Post-pension medical costs are not part of the total cost of the pension reserve because the pension reserve is based on an annuity that estimates future payments of wage replacement benefits. *See* RCW 51.44.070(1). The pension reserve fund is not used to pay for the costs of medical treatment, and it is not funded to do so.

Similarly, “the accident cost which would have resulted solely from” a worker’s injury or occupational disease does not include the cost of medical treatment. Boeing admits that “‘accident costs’ do not include the cost of the Claimant’s ongoing treatment.” Br. of Resp’t at 9. The “accident costs” are equal to the permanent partial disability that the worker would have developed, had the worker *not* suffered from a pre-existing disability. *In re Fred Dupre*, No. 97 4784, 1999 WL 756236 at *4 (Wash. Bd. of Ind. Ins. Appeals July 21, 1999). Permanent partial disability is determined based on a worker’s loss of physical function rather than a worker’s lost wages or lost earning power, and a worker who is permanently and partially disabled receives a defined payment rather than ongoing monthly benefits. RCW 51.32.080; *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 110, 206 P.3d 657 (2009). A permanent partial disability award does not include the estimated cost of a

worker's future medical treatment needs: it is based on statutorily set amounts and the percentage of loss of physical function. RCW 51.32.080.

Thus, unlike in a typical case of total and permanent disability, where the self-insured employer must pay the entire amount of the pension reserve fund to the Department to fund the worker's monthly pension benefits (see RCW 51.44.070), an employer who is granted second injury fund relief pays into the pension reserve fund only an amount of money equal to the disability that the worker would have suffered had the worker *not* had a pre-existing disability. RCW 51.16.120 reduces the amount that an employer must contribute to fund the worker's monthly pension benefits, but it does not purport to modify any of a self-insured employer's other legal responsibilities under the Industrial Insurance Act. RCW 51.16.120 does not state that when second injury fund relief is granted the employer shall have no responsibilities under the claim aside from paying the necessary amount into pension reserve fund. Rather, it says that the only thing the employer must *directly pay into the pension reserve fund* is an amount equal to the permanent partial disability that would have resulted from the industrial injury or occupational disease alone.

The Court of Appeals erroneously concluded that RCW 51.16.120 provides that the "only" thing a self-insured employer must do after it

receives second injury fund relief is make a payment into the pension reserve fund based on the permanent partial disability that would have resulted from the industrial injury or occupational disease alone. *See Boeing Co. v. Doss*, 180 Wn. App. 427, 435, 321 P.3d 1270 (2014). However, that is not what RCW 51.16.120 states: it limits what a self-insured employer must pay *into the pension reserve fund* but it does not affect other obligations of a self-insured employer. By omitting the language italicized above, the Court of Appeals distorted the statute's meaning. *Doss*, 180 Wn. App. at 435.

Indeed, had the Legislature intended for RCW 51.16.120 to excuse a self-insured employer from all of the responsibilities that it would otherwise have had under a claim, it could have easily drafted the statute to that effect. It did not do so.

In sum, the second injury fund can only be charged for payments into a pension reserve fund to cover "the difference" between the "total cost of the pension reserve" and "the accident cost which would have resulted solely from" the worker's industrial injury or disease alone. RCW 51.44.040; RCW 51.16.120. As neither "the total cost of the pension reserve" nor "the accident cost which would have resulted solely from" the worker's injury or disease includes the cost of the worker's medical care, the second injury fund cannot be used to pay for that care.

The Court of Appeals erred by concluding otherwise.

B. The Department's Interpretation of RCW 51.16.120 Leads to Comparable Treatment of State Fund and Self-Insured Employers

The second injury fund provides a comparable benefit to self-insured and state fund employers, contrary to the Court of Appeal's suggestion that the Department's interpretation of RCW 51.16.120 would result in disparate treatment between these types of employers. *Doss*, 180 Wn. App. at 437. With regard to a state fund employer, when second injury fund relief is granted, the Department charges the employer's experience record, which is used to calculate future premiums, based on the permanent partial disability that would have resulted from the industrial injury alone rather than the full amount of the pension reserve fund. *See* RCW 51.16.120. However, granting the state fund employer second injury fund relief from the full cost of the pension does not shield the state fund employer's experience record from the effects of any post-pension medical treatment that may be provided to the injured worker. *See* RCW 51.16.120.

Similarly, when second injury fund relief is granted to a self-insured employer, the employer must pay into the pension reserve fund only an amount equal to the permanent partial disability that would have resulted from the injury alone, instead of paying the full amount of the

pension reserve. RCW 51.16.120. The grant of second injury fund relief, however, does not shield the self-insured employer from its duty to pay for post-pension medical treatment.

The Court of Appeals erred when it inferred that the Department treated state fund employers more favorably than it treats self-insured employers. Relying on a statement that the Department made in its superior court brief in a different context, the court concluded that, under the Department's interpretation of RCW 51.16.120, the second injury fund statute operates to shield a state fund employer's experience ratings from being impacted by any post-pension medical treatment that is provided under the claim, while self-insured employers are not granted relief from the duty to provide post-pension treatment. *Doss*, 180 Wn. App. at 437; CP 45.

The Court based its erroneous conclusion on the Department's statement that in the case of a state fund employer, the cost of a worker's medical treatment "is spread to all state fund employers and employees." *See Doss*, 180 Wn. App. at 437; CP 45. This statement of the Department was made in the context of explaining that when post-pension treatment is provided on a state fund claim, the medical treatment is covered by the medical aid fund rather than the second injury fund. CP 45. RCW 51.44.020. The medical aid fund is funded by state fund employers

and their employees, and, thus, the cost of medical care “is spread” to all such employers and employees. RCW 51.16.140. However, payments for medical treatment, like all other claim costs, can impact a state fund employer’s experience record, which then impacts the amount of an employer’s premiums. *See* WAC 296-17-870. A state fund employer then may be charged the cost of the medical treatment. Whether the charges actually affect an experience rating depends on the timing of the payments in relation to the final valuation of the claim, which occurs between 35 and 47 months after the date of injury or exposure. *See generally* WAC 296-17-850, -855, -870.

Thus, any difference between self-insured employers and state fund employers in regards to post-pension medical costs does not arise from any difference in treatment under the second injury fund. Rather, the difference arises from the fact that self-insured employers choose to directly pay medical costs for their employees whereas state-insured employers choose to have medical costs paid from the medical aid fund and factored into their premiums. The Court of Appeal’s conclusion that Boeing must be granted second injury fund relief in this case because “a self-insured employer should not bear a financial burden different from a state fund employer” (*Doss*, 180 Wn. App. at 437) reflects a fundamental misunderstanding of the industrial insurance scheme and the differences

between state fund and self-insured employers. The choice to self-insure is an employer's, and the employer, who hopes to gain more benefits than liabilities as a result of self-insuring, should not be able to assert it has been unjustly burdened when it is held responsible for the medical costs of its injured workers. The Court of Appeals erred by concluding otherwise.

C. The Statutory Provisions Governing Assessments for the Second Injury Fund Do Not Support the Inference That the Second Injury Fund Must Cover the Cost of Medical Treatment

The rules governing the calculation of second injury fund assessments for self-insured employers do not support the inference that the second injury fund covers the cost of medical treatment. The Court of Appeals erroneously concluded that because the costs of medical treatment are taken into account when calculating the amount of a self-insured employer's second injury fund assessments, the second injury fund can be used to cover those costs. *Doss*, 180 Wn. App. at 436.

RCW 51.44.040, however, unambiguously provides the second injury fund can only be used to "defray[]" the charges authorized by the job modification statute, RCW 51.32.250, which does not apply here, or RCW 51.16.120, which does not apply to medical costs, as RCW 51.16.120 only provides that the second injury fund must make up the difference between the full amount of the worker's pension reserve

and the cost of the permanent partial disability that would have resulted had the employee not had a preexisting disability. As RCW 51.16.120 and RCW 51.44.040 unambiguously preclude the second injury fund from being used to cover the cost of medical treatment, it is not necessary to look to the provisions governing the calculation of assessments for the second injury fund to determine if the fund covers medical costs.

Furthermore, it is unhelpful to consider how second injury fund assessments are calculated because these assessments are based on several types of claim costs that are not covered by the second injury fund. Under RCW 51.44.040, a self-insured employer's second injury fund assessments are calculated based on two factors, each of which must be given "equal weight": (1) the ratio that the expenditures made by the second injury fund on behalf of a given self-insured employer bears to the expenditures made by the second injury fund for all self-insured employers, (2) the ratio that the "workers compensation payments made under this title" by a given self-insured employer (in other words, the employer's total claim costs) bears to the "total workers compensation payments made under this title" by all self-insured employers (in other words, the total claim costs of all self-insured employers). The Department, by rule, has defined "claim costs" to include a wide variety of

expenditures, including temporary total disability benefits and vocational rehabilitation expenses. WAC 296-15-221(4).

Although temporary total disability benefits and vocational rehabilitation benefits are included in calculation of the assessment, neither of these costs could be borne by the second injury fund. With the exception of job modification costs, which are not at issue here, second injury fund relief is only granted after a worker's claim has been closed and the worker has been placed on a pension. Temporary total disability payments and vocational payments, however, occur while the claim is open. *Hunter v. Dep't of Labor & Indus.*, 43 Wn.2d 696, 699-700, 263 P.2d 586 (1953); *see* RCW 51.32.095; RCW 51.32.099. As second injury fund assessments are calculated based in part on all of the self-insured employer's claim expenditures, including several claim costs that are not covered by the second injury fund itself, one cannot reasonably infer that the second injury fund covers the cost of medical treatment simply because medical treatment payments are one of the many types of payments that affect the calculation of an assessment. And, of course, the Department cannot by rule alter the plain language of the statute which strictly limits the types of costs that are eligible for second injury fund relief.

D. The Legislature Has Balanced the Need to Encourage Employment of Disabled Workers With Ensuring That Self-Insured Employers Provide a Safe Workplace and Take Care of Their Injured Employees

The Legislature has decided that self-insured employers may only use the second injury fund under narrow circumstances, which leaves intact the self-insured employer's responsibility to take care of its employees' occupationally related medical care. In deciding to limit the uses of the second injury fund, the Legislature has balanced the goal of promoting employment of injured workers with the goal of promoting worker safety by ensuring that self-insured employers have incentive to reduce medical costs by maintaining a safe workplace. "The basic premise of the Workmen's Compensation Act is that industry is to bear the burden of the costs arising out of industrial injuries sustained by its employees." *Jussila*, 59 Wn.2d at 779. By bearing the expense of injuries, employers are encouraged to keep their workers safe to lower their claim costs. *Id.* Although the second injury fund serves as a means to encourage hiring of previously disabled workers, it does not change this fundamental premise of workers' compensation law. *See id.*

The balance struck with the second injury fund also gives the self-insured employer the ongoing duty to administer the many bills that occur when post-pension medical treatment is provided, consistent with the

claim management responsibility that self-insured employers have voluntarily undertaken to save money. The Court of Appeals' decision erroneously shifts these administration and financing duties to the Department, which runs contrary to a key purpose of allowing employers to self-insure in the first place. And it is a significant burden to the Department because there are many employees of self-insured employers who have received authorization for post-pension treatment, not a mere handful as Boeing contends. Answer at 9. Self-insured employers have chosen to directly fund and self-administer their employees' claims, and this responsibility does not go away simply because an employer is entitled to second injury fund relief from the full cost of a pension reserve. Boeing's attempts to shirk its fiscal and administrative responsibilities are inconsistent with the plain language and purpose of the statute. The Court of Appeals' decision should be reversed and Boeing should be responsible for the costs of its injured employee's post-pension medical costs.

V. CONCLUSION

The second injury fund cannot be used to cover the cost of medical treatment. As no statute, including RCW 51.16.120, excuses Boeing from its duty to pay for necessary medical treatment for its injured workers, it is Boeing, not the second injury fund, which must bear that cost of

Ms. Doss's medical treatment. This Court should reverse the Court of Appeals' decision to the contrary.

RESPECTFULLY SUBMITTED this 3 day of November, 2014.

ROBERT W. FERGUSON
Attorney General


STEVE VINYARD
Assistant Attorney General
WSBA No. 29737

 *WSBA # 38391 for*
ANNIKA SCHAROSCH
Assistant Attorney General
WSBA No. 39392

OFFICE RECEPTIONIST, CLERK

To: Gross, Debora (ATG)
Cc: Vinyard, Steve (ATG)
Subject: RE: Boeing Co. v. Doss, Patricia v. DLI; 90403-2

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From: Gross, Debora (ATG) [mailto:DeboraG1@ATG.WA.GOV]
Sent: Monday, November 03, 2014 12:58 PM
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Cc: Vinyard, Steve (ATG)
Subject: Boeing Co. v. Doss, Patricia v. DLI; 90403-2

Attached for filing are the Department's Supplemental Brief, Declaration of Mailing and cover letter regarding the above matter.

Debora A. Gross

*Legal Assistant Supervisor
Office of the Attorney General
Labor & Industries Division
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7751*