90304-2

No. 69759-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DEPARTMENT OF LABOR AND INUSTRIES OF THE STATE OF WASHINGTON,

Appellant,

v.

THE BOEING COMPANY,
and
PATRICIA DOSS,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT, THE BOEING COMPANY

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A. INTRODUCTION

This Court has asked that the parties submit supplemental briefing to address the Court's questions regarding the economic impact of the Department's discretionary decision to award post-second-injury-fund-pension treatment costs and the legislative history of self-insured Employers' participation in the second injury fund.

B. ARGUMENT

1. STATE-FUND AND SELF-INSURED EMPLOYERS FACE DRASTICALLY DIFFERENT ECONOMIC CONSEQUENCES IN CASES WHERE THE DEPARTMENT AWARDS DISCRETIONARY POST-SECOND-INJURY-FUND-PENSION TREATMENT COSTS.

This Court has asked that the parties provide the Court with information regarding the economic impacts that Self-Insured and State Fund employers now face in cases where the Department awards discretionary post-pension medical costs. As shown below, Self-Insured and State Fund Employers face drastically different economic consequences as a result of the Department's discretionary award. In addition to being forced to pay for treatment costs that would not "have resulted solely from [the] further injury or disease, had there been no preexisting disability," self-insured employers face increased Second Injury Fund premiums as a direct consequence of their increased medical claims costs. RCW 51.16.120(1). In contrast, State Fund Employers face

no adverse economic consequences, as the discretionary treatment is covered by the State's Medical Aid Fund, is not charged to the Employer's State Fund account, and, therefore, has no effect on the Employer's Experience Rating, which governs future State Fund premiums. The Department's current position places a significant and inequitable burden on self-insured employers which it has inexplicably chosen not to place on State Fund employers. This Court should reject the Department's position.

a. The Department's interpretation of the Second Injury statute imposes two distinct economic consequences on Self-Insured Employers in cases where the Department awards discretionary post-second-injury-fund-pension treatment costs as compared to State Fund Employers.

Under the Second Injury Fund, as currently administered by the Department of Labor and Industries, Self-Insured employers face two direct adverse economic impacts from the imposition of discretionary post-second-injury-fund-pension treatment costs – first, paying the post pension treatment costs themselves, and second, increased Second Injury Fund premiums.

The most obvious and direct impact to the Self-Insured Employer is the requirement that it cover ongoing lifetime treatment for a condition that would not "have resulted **solely** from [the] further injury or disease, had there been no preexisting disability," in direct conflict with the

statutory directives of RCW 51.16.120. RCW 51.16.120(1). These costs in and of themselves are substantial – potentially hundreds of thousands to upwards of a million dollars or more for some Claimants – and undermine the Second Injury Fund's goal 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 v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 778, 370 P.2d 582 (1962) (Emphasis added)

In addition to those direct costs, however, the Self-Insured Employer will also face increased Second Injury Fund premiums as a result of its overall claims costs. Self-insured Employers pay assessments to the Second Injury Fund "in the proportion that the payments made from the fund on account of claims made against self-insurers bears to the total sum of payments from the fund." RCW 51.44.040(3)(a)(i). A self-insured Employer's assessments to the Second Injury Fund are based in part on its total claims costs, not just those costs related to wage replacement benefits (time loss) or permanent partial disability awards. Wash. Admin. Code 296-15-225 governs the Department's calculation of self-insured Employers' assessments to the Second Injury fund. In making those assessments the Department utilizes an experience rating formula that

includes, as a negative factor, the "[i]ndividual self-insurer's claim costs for the previous three fiscal years." Wash. Admin. Code 296-15-225(3) Wash. Admin. Code 296-15-221, which governs what constitutes those claim costs, provides that

> *[e]ach self insurer must submit*:
>
> (a) Complete and accurate quarterly reports summarizing worker hours and claim costs paid the previous quarter... *This report is the basis for determining the... second injury fund... trust assessments...*
>
> (ii) *Claim costs include, but are not limited to*:
>
> (A) Time loss compensation. Include the amount of time loss the worker would have been entitled to if kept on full salary.
>
> (B) Permanent partial disability (PPD) awards.
>
> (C) *Medical bills.*
>
> (D) *Prescriptions.*
>
> (E) *Medical appliances.*
>
> (F) Independent medical examinations and/or consultations.
>
> (G) Loss of earning power.
>
> (H) *Travel expenses for treatment or rehabilitation.*
>
> (I) Vocational rehabilitation expenses.
>
> (J) Penalties paid to injured workers.
>
> (K) Interest on board orders.

Wash. Admin. Code 296-15-221(4) (emphasis added). As a result, despite the Department's assertions to the contrary, (AB at 21-23), the Employer's assessments for the Second Injury Fund are based, in part, on **all** medical treatment costs it pays under its claims, including treatment costs it pays under a second injury fund pension where post pension treatment is ordered. In short, using the Department's approach, not only does the Self-Insured have to pay the post pension treatment costs, it is also being assessed Second Injury Fund premiums based, in part, on those benefits it is paying post pension.

In addition to being contrary to both the language and intent of the statute, requiring Self-Insured Employers to pay post-pension treatment costs after Second Injury Fund relief is granted would constitute a double assessment on the Employer and a windfall to the Department, **especially when state-fund Employers face no such consequences.** *See Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 425, 869 P.2d 14 (1994) (double recoveries should be avoided). Such an inequitable interpretation of RCW 51.16.120(1) should not be adopted by this Court.

b. State Fund Employers face no economic consequences in cases where the Department awards discretionary post-second-injury-fund-pension treatment costs.

In contrast to the dual adverse economic impacts that a discretionary award of post-second-injury-fund-pension treatment costs has on self-insured employers, such an award has ***no*** adverse economic impact on State Fund employers. As the Department has previously conceded, when post-pension treatment costs are ordered in a State Fund case, the cost of that treatment is "spread to all state fund employers and employees" and paid out of their general fund. CP at 45. Typically, a State Fund Employer's account is charged for actual and anticipated costs in allowed claims, including for pensions. Wash. Admin. Code 296-17-870. The costs charged to the State Fund Employer's account are then used to adjust their experience rating thereby resulting in rate increases to the State Fund Employer. Wash. Admin. Code 296-17-855. However, in those instances where a State Fund Employer's injured worker becomes totally disabled based on the combined effects of a pre-existing disabling condition and the industrially related condition, the State Fund Employer (just like a Self Insured Employer) is entitled to have the pension paid from the Second Injury Fund and not charged to their account or ultimately have it affect their experience rating. *See, e.g.,* Wash. Admin. Code 296-17-870(6).

The Department has already conceded that when post pension treatment is ordered in a State Fund second injury claim, the State Fund

Employer's account *is not charged.* CP at 45. In fact, for State Fund Employers, their experience rating, and therefore the amount ultimately paid by the State Fund Employer as a result of its claim costs, are unaffected by post-pension treatment costs. CP at 42. There is a good reason for this: RCW 51.16.120(1) mandates that "the experience record of an employer insured with the state fund at the time of the further injury or disease shall be charged... only the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability." As the Department itself notes, *see* AB at 18, "accident costs" **do not** include the cost of the Claimant's ongoing treatment. Therefore, those costs are not charged against the experience record of State Fund Employers. As the above shows, the Department's position in Self Insured cases is exactly the opposite of its position in State Fund cases. Indeed, the Department is arguing that Self-Insured Employers are and should be treated differently than State Fund Employers when it comes to the direct financial impact of post second injury fund pension treatment. *See* AB at 9-11.

The Department attempts to make this argument without acknowledging that there is no statutory authority that would support such discrimination between employers. Indeed, the full text of the statutory provision at issue here is "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**." RCW 51.16.120(1) (Emphasis Added) As the text of the statute makes clear, the same standard for determining individual employer liability for costs in second injury fund claims should be applied exactly the same to both State Fund and Self-Insured employers: that the cost is an "accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability." *Id.* There is simply no statutory support for the Department's attempt to manufacture two different standards for liability for State Fund and Self-Insured employers.

Instead, as the Department stated in Superior Court, "[a] self-insurer is entitled to the same kind of second injury fund relief that state fund employers are entitled to." CP at 38; *see also* CP at 47 ("disbursements from the second injury fund [must] be the same for self insureds as [they are] for employers insured by the state."). Self Insured Employers should be treated the same as State Fund Employers. They should receive the same relief from costs that are not "accident costs which would have resulted solely from the further injury or disease, had there been no preexisting disability" as the Department currently gives

State Fund Employers. RCW 51.16.120(1). The Department suggests that this Court reach the opposite conclusion and create a discrimination between types of employers that does not exist in the text of RCW 51.16.120(1) and that the Department has previously disclaimed. Such an inequitable result as advocated by the Department could not have been the intent of the Legislature and should not be the result reached by this Court. The Department is correctly not charging a State Fund Employer for post pension treatment costs in state fund claims, and they should apply the same standard with Self-Insured Employers.

2. NOTHING IN THE LEGISLATIVE HISTORY OF SELF-INSURED EMPLOYERS' PARTICIPATION IN THE SECOND INJURY FUND SUGGESTS THAT THE LEGISLATURE INTENDED SELF-INSURED EMPLOYERS TO PAY POST-SECOND-INJURY-PENSION TREATMENT COSTS.

This Court has also asked that the parties examine the legislative history of self-insured Employers' addition to the second injury fund system. Provisions regarding self-insured Employers were added to RCW 51.16.120 in 1977 by Laws of 1977, 1st Ex. Sess., ch. 323 § 13. In relevant part, Laws of 1977, 1st Ex. Sess., ch. 323 § 13, added language concerning self-insurers' right to second injury fund relief to RCW 51.16.120(1). The law, as enacted and as debated in the legislature, did not alter the standard for reducing or eliminating liability for costs for both State Fund and self-insured employers. That standard is, as it was before

1977, as it was after the addition of self-insured Employers to the second injury fund, and as it remains today, whether those costs are an "accident cost which would have resulted solely from [the] further injury or disease, had there been no preexisting disability." *Compare* Laws of 1977, 1st Ex. Sess., ch. 323 § 13 *with* RCW 51.16.120.

There is likewise nothing in the legislative history of Laws of 1977, 1st Ex. Sess., ch. 323 § 13, that would suggest that the Legislature intended to create different standards for State Fund and Self-Insured Employers. Laws of 1977, 1st Ex. Sess., ch. 323, was introduced as H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977). H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) was substituted by S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) on May 2, 1977 and was passed by the House on May 4, 1977. LEGISLATIVE DIGEST AND HISTORY OF BILLS, 1977 at 633 (Wash. 1977). S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) was eventually passed by the Senate as E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) on June 19, 1977, the House concurred in the Senate's amendments on June 21, 1977, and the bill was signed by the Governor on June 30, 1977. LEGISLATIVE DIGEST AND HISTORY OF BILLS, 1977 (Wash. 1977) at 633. Throughout this time, and despite the fact that changes were made to the bill in both the House and Senate, the relevant provision in controversy in RCW 51.16.120. remained the same. *Compare* H.B. 604 § 11, 1977, 1st Ex.

Sess. (Wash. 1977) *with* S.H.B. 604 § 11, 1977, 1st Ex. Sess. (Wash. 1977) *and* E.S.H.B. 604 § 12, 1977, 1st Ex. Sess. (Wash. 1977). *and* 1977, 1st Ex. Sess., ch. 323 § 13. As noted above, the language used in all three versions of the bill and the language passed by the Legislature did not alter the standard for either State Fund or Self-Insured Employers. Instead, its purpose was to include Self-Insurers in the second injury fund without making substantive changes to the fund.

Indeed, the Final Legislative Report, Legislative Digest and History, and Senate debate of E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977). show that the Legislature did not intend to alter the standard for second injury fund relief. First, the Final Legislative Report of E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) makes no mention of any such changes. *See* Final Leg. Rep., S.H.B. 604, *reprinted in* FINAL LEGISLATIVE REPORTS, 1997, Vol. II at 58 (Wash. 1977). Instead, the Final Legislative Report states that E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977), as passed, was intended to create "increased departmental latitude in adopting rules which encourage employers to hire injured workers" and that, to do so

> [w]hen a worker qualifies for compensation under the second injury fund, an employer may appeal, but pending the outcome of such appeal, payments shall be made to the injured worker. Assessments for second injury fund imposed on self insurers shall be in proportion to the

> payments made against their accounts. The department may adjust the experience record and assessments of employers when workers in their employ qualify for second injury payments.

Id. As the above shows, the Final Legislative Report contains nothing that would evidence an intent to create new or different standards for State Fund and Self-Insured Employers.

The Legislative Digest and History of E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) also makes no mention of any such changes. *See* LEGISLATIVE DIGEST AND HISTORY OF BILLS, 1977 (Wash. 1977) at 632-3 (Wash. 1977). In relevant part, the Legislative Digest and History of the bill states that it

> Requires recomputation of employers' experience records when any of their workers qualify for payments from the second injury fund after the regular time for computation of such experience records and make appropriate adjustments.
>
> Permits reduction or elimination of premiums assessments from subsequent employers of previously injured workers...
>
> Requires self-insurers' assessment for the second injury fund to be made on a proportionate basis.

Id. Again, though the Legislative Digest and History discusses elements of the second injury fund scheme that *were* altered by E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977), it contains *no* evidence that the Legislature intended for two different standards to be applied to State Fund and Self-

Insured employers in second injury fund cases. In fact, the purpose remained the same; to protect both State Fund and Self-Insured Employers from having to accept the liability for a pre-existing disabling condition, and to spread the risk for hiring such workers amongst all employers.

Finally, the brief Senate debate of E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) does not contain any evidence that even a single member of the Legislature intended to create such standards. *See* JOURNAL OF THE SENATE, 1977, 1st Ex. Sess. at 2841 to 49 (Wash. 1977). The President of the Senate, in ruling an attempted substantive amendment was out of order, described E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) as "a request of the Department of Labor and Industries which was submitted in order to clarify and streamline the enforcement of the present industrial insurance law." *Id.* at 2841 (statement of President Cherberg). One Senator described the bill as "essentially a housekeeping bill" that "deals with procedural aspects of making a self-insurance application and include[s] self-insurers in the second injury fund." *Id.* at 2842 (statement of Senator Ridder). Near the close of debate, the President of the Senate reiterated that "Engrossed Substitute House Bill No. 604 is merely a measure to clarify and streamline enforcement of the present industrial insurance law." *Id.* at 2848-49 (statement of President Cherberg). As the debate of E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977) in the Senate

shows, the Legislature viewed the bill as one that would allow the Department to streamline some procedures and add Self-Insured Employers to the system already in place for State Fund Employers. There is no evidence in the debate that the Legislature intended to make substantive changes to the standards used to evaluate individual employer liability in second injury fund cases, let alone create different standards for State Fund and Self-Insured Employers. Indeed there is no such evidence anywhere in the legislative history of E.S.H.B. 604, 1977, 1st Ex. Sess. (Wash. 1977). Instead, the standard remains, as it was prior to the 1977 addition of self-insured employers to the second injury fund system; whether the costs charged to a State Fund Employer's account or paid by a Self-Insurer are an "accident cost which would have resulted solely from [the] further injury or disease, had there been no preexisting disability." RCW 51.16.120(1)

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C. CONCLUSION

Based on the foregoing points and authorities, its prior briefing, and its oral argument, the Respondent/Employer requests that this Court affirm the Superior Court's decision reversing the Board's Decision and ordering the Department to pay for the Claimant's ongoing medical treatment by the Second Injury Fund.

RESPECTFULLY SUBMITTED this 2nd day of December, 2013.

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