

Norgren, Leonard

SECOND INJURY FUND (RCW 51.16.120)

Pre-existing disability

The mere existence of pre-existing conditions not sufficient to establish that there was a pre-existing disability for purposes of application of second injury fund relief. The record must establish that the pre-existing conditions were disabling. ...*In re Leonard Norgren*, BIIA Dec., 04 18211 (2006)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: LEONARD NORGRN**) **DOCKET NO. 04 18211**
2 **CLAIM NO. W-424433**) **DECISION AND ORDER**
3

4 **APPEARANCES:**

5 Claimant, Leonard Norgren, by
6 Law Offices of Albert R. Johnson, Jr., per
7 Albert R. Johnson, Jr.

8 Self-Insured Employer, Seattle Times, by
9 Keehn Arvidson, PLLC, per
10 Amy L. Arvidson

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Lisa V. Brock, Assistant

14 The self-insured employer, Seattle Times, filed an appeal with the Board of Industrial
15 Insurance Appeals on September 13, 2004, from an order of the Department of Labor and
16 Industries dated September 3, 2004. In this order, the Department affirmed an order dated
17 December 24, 2003, wherein the Department denied second injury fund relief to the self-insured
18 employer. The Department order is **AFFIRMED**.

DECISION

19 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
20 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed
21 Decision and Order issued on August 4, 2005, in which the industrial appeals judge affirmed the
22 Department order dated September 3, 2004.

23 We conclude that the disposition of this appeal that was contained within the Proposed
24 Decision and Order was correct. We have granted review to make the changes in the evidentiary
25 rulings set forth below and to further explain the rationale for our reaching this result. In order to do
26 so, it is necessary for us to set forth in some detail the evidence presented to us.

EVIDENTIARY MATTERS

28 We have reviewed the evidentiary rulings in the record of proceedings and affirm all of the
29 rulings, except as follows:

30 Exhibit No. 1 is rejected as hearsay. Exhibit No. 3 is rejected as cumulative and hearsay.
31 Exhibit No. 4 is rejected as cumulative.
32

1 In the deposition of Leonard Norgren the objection at page 32, line 17 is sustained and
2 testimony at lines 4-7 is stricken. The objection at page 33, line 23 is sustained and testimony is
3 stricken from page 32, line 25 to page 33, line 10. The objections at page 51, line 14; page 54, line
4 2; page 57, line 19; page 58, line 15; page 59, line 6; page 60, lines 1, 9, and 10; and page 61, line
5 10 are sustained.

6 In the deposition of Arthur Ginsberg, M.D., the objection at page 44, line 15 is sustained.

7 In the deposition of Kenneth Briggs, M.D., the objections at page 19, line 23 and at page 20,
8 lines 10 and 25 are overruled, but the evidence is admitted only insofar as a basis for the opinions
9 of the expert witness. The objections at page 21, line 23; page 26, line 8; page 29, line 13; page
10 34, line 5; page 44, line 24; page 45, line 4; page 46, line 6; and page 52, line 1 are sustained.

11 In the deposition of Richard Carter, M.D., the objections at page 65, line 25; page 66, line 17;
12 and page 67, line 12 are sustained. The objection at page 68, line 10 is sustained for lack of
13 foundation. The objection at page 82, line 1 is sustained.

14 In the deposition of William Burkhardt, Ph.D., the objection at page 47, line 5 is sustained

15 In the deposition of Barbara Berndt, the objections at page 27, line 8; page 32, line 8; and
16 page 43, line 15 are sustained. The objection at page 49, line 10 is overruled. The objections at
17 page 58, lines 17 and 22; page 66, line 18; page 72, line 12; page 77, line 25; page 80, line 4;
18 page 83, line 15; and page 88, line 8 are sustained.

19 In the transcript of the testimony of Kathy Keefe, the objection at page 29, line 12 is
20 sustained and testimony at lines 4-11 is stricken. The objections at page 40, line 6; page 46,
21 line 16; and page 49, line 15 are sustained.

22 **EVIDENCE PRESENTED**

23 Mr. Norgren was 63 years old when he was classified by Department order as a permanently
24 and totally disabled worker. He is bilingual; English, and Swedish. He received five years of
25 schooling in the U.S. and then his parents moved back to Sweden. Mr. Norgren received another
26 two years of education in Sweden, after which his schooling ended due to the way the Swedish
27 educational system is run rather than due to any intellectual deficiencies on his part. His spelling is
28 at the fourth grade level, arithmetic skills are at the third grade level, and he is able to read English
29 at the eighth to tenth grade level. Many years after his return to the U.S. he took approximately one
30 quarter of community college classes in automotive tune up and in adult general education, but he
31 has never obtained a GED.

1 Mr. Norgren began working in Sweden at age fourteen at a variety of jobs, but moved back
2 to the U.S. in hopes of greater opportunity. Mr. Norgren worked approximately sixty hours per
3 week for the Rainier Brewery for thirty-seven years as a forklift operator, delivery truck driver of
4 trucks of various sizes up to a semi-tractor, and also as a "relief foreman." In approximately 1992,
5 anticipating the loss of his employment with Rainier Brewery due to its financial difficulties, the
6 claimant took a part-time job with the self-insured employer, the Seattle Times (hereinafter referred
7 to as the Times) driving trucks at night delivering bundles of newspapers to locations where the
8 carriers would pick them up. During the seven years he held both jobs, the claimant worked up to
9 eighty hours per week. When Rainier Brewery finally closed in 1999, Mr. Norgren obtained a
10 full-time job as a dump truck driver for Pacific Topsoil. He worked for that company for less than
11 one month when, on October 3, 1999, while in the course of his employment with the Times, he
12 sustained the industrial injury that is the subject matter of this claim.

13 Mr. Norgren has been married once, for thirty-six years and counting. He testified that he
14 had no problems in his marriage until after the industrial injury occurred. He and his wife have two
15 adult children and several grandchildren. The claimant testified that his relationship with them has
16 been fine. The claimant has no criminal history, does not drink or smoke, and stated that his
17 relationship with his parents while growing up was good. Until the industrial injury, Mr. Norgren had
18 never sought or obtained mental health counseling of any sort or used antidepressant medications.

19 Before the October 3, 1999 industrial injury, Mr. Norgren missed no more than three or four
20 days from work at one time. He had at least one cervical strain and one low back strain for which
21 industrial insurance claims were allowed, but those conditions resolved shortly afterward. He has a
22 bad right knee for which surgery was recommended, but he did not undergo surgery. He testified
23 that prior to the industrial injury his right knee problems did not affect his jobs at all. If his right knee
24 bothered him, he went to a doctor for a cortisone injection that would clear up the problem. He filed
25 a claim in 1993 for right shoulder and hand pain, but the symptoms did not bother him at work and
26 the claim was rejected. He discovered he had glaucoma when he was having his eyes examined.
27 He took medication to control the glaucoma, but that condition did not affect his driving prior to the
28 October 3, 1999 industrial injury. Subsequent to the industrial injury, Mr. Norgren filed a claim for
29 occupational hearing loss, which was allowed with a date of manifestation on July 1, 1999 (prior to
30 this industrial injury) and which was closed with a permanent partial disability award of
31 16.88 percent complete loss of hearing in the left ear. The claimant first noticed the hearing loss in
32

1 1995, but it did not affect his ability to work in any way. Mr. Norgren had no problems with tinnitus,
2 with concentration, or with his memory before his industrial injury.

3 On October 3, 1999, around midnight, Mr. Norgren was driving a large delivery truck that had
4 stopped at an intersection in Mount Vernon, Washington, when a drunk driver plowed into the back
5 of his truck. The car was going approximately sixty miles per hour when it hit the claimant's truck,
6 which was knocked almost thirty feet into the intersection by the impact. Mr. Norgren received a
7 severe whiplash injury, but did not lose consciousness. Since that time he has suffered from back,
8 neck, and right arm pain, "floaters" in his left eye due to a torn retina, constant severe tinnitus,
9 headaches, and memory and concentration difficulties. He has nightmares about the crash and
10 flashbacks during the day about the crash. He is afraid to drive, and when he does, he is
11 constantly apprehensive that he is going to be rear-ended. He is depressed, anxious, irritable, and
12 his marriage has suffered. Mr. Norgren testified that sometime after the industrial injury his
13 glaucoma progressed and required more medication.

14 The Times provided Mr. Norgren with two light-duty job trials. One job trial was as a trainer
15 for truck drivers, but the claimant could not perform that due to anxiety and tinnitus and/or inability
16 to hear the engine so that he could tell when to shift the gears. The second job trial was a
17 telephone solicitor job in order to obtain subscriptions to the Times. The claimant stated that he
18 could not perform that job due to his tinnitus and memory loss, as well as his anxiety that he would
19 be irritable with customers. He never returned to any work thereafter and was found to be
20 permanently and totally disabled effective January 6, 2004.

21 Dr. Ginsberg, the neurologist who saw Mr. Norgren on several occasions from May 2000
22 until May 2003, testified that Mr. Norgren's low back and cervical conditions related to the industrial
23 injury each warranted a Category 2 permanent partial disability rating. Considering those
24 conditions alone, Dr. Ginsberg felt that Mr. Norgren was capable of some employment, but he also
25 testified that the post-injury psychological and cognitive symptoms were the main reasons why the
26 claimant was incapacitated. When asked if the claimant was totally disabled due to the combined
27 effects of the pre-existing hearing loss, glaucoma, and prior back and knee injuries, Dr. Ginsberg
28 stated that all of the symptoms rendered the claimant disabled.

29 Dr. Briggs found no permanent partial or total disability due to the industrial injury. He
30 believed that Mr. Norgren could have operated a forklift considering only the physical residuals of
31 the industrial injury. However, his testimony was contradictory regarding what effects, if any, the
32 pre-existing knee condition had on the claimant's ability to work. Answering a hypothetical

1 question, Dr. Briggs stated that the knee condition was not significant enough to prevent
2 Mr. Norgren from performing the job duties of driving. Later he testified that the knee condition
3 prevented Mr. Norgren from performing job duties of a forklift driver or of the job of injury,
4 "transportation driver." Dr. Briggs then went on to say that he had no reason to believe that
5 Mr. Norgren was unable to drive forklifts, dump trucks, or the delivery truck for the Times due to the
6 knee complaints as they existed before the industrial injury. Furthermore, he specifically stated that
7 the knee condition was **not** disabling prior to the industrial injury. We believe that this last
8 statement is most reflective of Dr. Briggs' true opinion regarding the effect of the pre-existing knee
9 condition on the claimant.

10 Dr. Burkhardt, a neuropsychologist who examined and tested (but did not treat) Mr. Norgren,
11 noted in 2000 when he first saw him that his post-traumatic stress disorder (PTSD) and major
12 depression made him incapable of gainful employment. Later, Dr. Burkhardt decided that the
13 claimant had a personality disorder that pre-existed the industrial injury. During his testimony he
14 stated that the psychological residuals of the industrial injury alone did not render him totally
15 disabled and that his pre-existing learning deficiencies and compulsive avoidant personality and
16 their contribution to his impatience and social anxiety prevented him from functioning in the
17 light-duty job trials or other work.

18 Dr. Carter, the psychiatrist who evaluated Mr. Norgren on two occasions, concluded that
19 prior to the industrial injury Mr. Norgren was functioning fine, both in employment and socially.
20 Dr. Carter did not agree with Dr. Burkhardt that the claimant had a personality disorder. He testified
21 that while Mr. Norgren might have personality traits such as stubbornness, they do not have any
22 impact diagnostically and would not impair the claimant's functioning or cause any disability.
23 Dr. Carter rated the claimant's mental health impairment related to the industrial injury at a
24 Category 2. He was never asked about the claimant's ability to work.

25 Kathy Keefe, the vocational counselor who conducted the vocational assessment of
26 Mr. Norgren, concluded that he was not eligible for vocational services due to the combined effects
27 of pre-existing conditions and the conditions related to this industrial injury. She concluded that
28 Mr. Norgren was not capable of reasonably continuous gainful employment based on his
29 pre-existing conditions and current injuries, as well as his limited education and singular work
30 history. The pre-existing conditions that Ms. Keefe cited were the claimant's worsened glaucoma
31 that prevented night driving, the hearing loss that prevented him from hearing the engine and
32 driving a truck properly, and the right knee injury that prevented him from driving without pain.

1 Barbara Berndt, a vocational counselor who conducted a record review as part of a
2 vocational assessment directed toward determining if this was a second injury fund case, testified
3 that Mr. Norgren was not employable based on the conclusion of his attending psychiatrist,
4 Dr. Salmon, that his mental health conditions alone were sufficient to prevent him from working.
5 She stated the claimant could not be retrained.

6 DISCUSSION

7 RCW 51.16.120(1) states, in relevant part:

8 Whenever a worker has a previous bodily disability from any
9 previous injury or disease, whether known or unknown to the employer,
10 and shall suffer a further disability from injury or occupational disease in
11 employment covered by this title and become totally and permanently
12 disabled from the combined effects thereof or die when death was
13 substantially accelerated by the combined effects thereof, then the
14 experience record of an employer insured with the state fund at the time
15 of said further injury or disease shall be charged and a self-insured
16 employer shall pay directly into the reserve fund only the accident cost
17 which would have resulted solely from said further injury or disease, had
18 there been no preexisting disability...

19 Based on the statutory language, there are three prerequisites to the application of the
20 second injury fund when permanent total disability benefits are awarded. The worker must have a
21 "previous bodily disability from a previous injury or disease," whether employment related or not,
22 and whether known to the employer or not. The worker must then sustain an industrial injury or
23 occupational disease. The worker must "become totally and permanently disabled from the
24 combined effects thereof . . ." *Seattle School Dist. No. 1. v. Department of Labor & Indus.*,
25 59 Wn.2d 87 (1990), *affirmed in part and reversed in part*, 116 Wn.2d 352 (1991).

26 In order for second injury fund relief to be afforded to an employer, a pre-existing, **disabling**
27 condition or conditions, along with a condition or conditions related to the subsequent industrial
28 injury or occupational disease, **must both be causes** of the permanent and total disability status of
29 the worker. The pre-existing condition must be disabling before the industrial injury occurred.
30 *Donald Lyle, Inc. v. Department of Labor & Indus.*, 66 Wn.2d 745 (1965); *Rothschild Internat'l*
31 *Stevedoring Co. v. Department of Labor & Indus.*, 3 Wn. App. 967 (1970). We noted in *In re Alfred*
32 *Funk*, BIIA Dec., 89 4156 (1991) that an employer must establish that the disability resulting from
the industrial injury would not have been total but for the pre-existing condition(s). [Citing *Jussila v.*
Department of Labor & Indus., 59 Wn.2d 772 (1962).]

1 Unfortunately, the Industrial Insurance Act does not define the term "disability." The
2 Supreme Court in *Jussila*, at 778-779, used the word "handicapped" to describe the type of
3 disability meant by the Legislature. We have discussed the meaning of disability before. In *In re*
4 *Forrest Pate, Dec'd*, Dckt. No. 90 4055 (May 7, 1992), we surveyed a number of court decisions
5 interpreting the term "disability," including *Henson v. Department of Labor & Indus.*, 15 Wn.2d 384
6 (1942). Based on that case law we stated:

7 Disability means the impairment of the workman's mental or physical
8 efficiency. It embraces any loss of physical or mental functions which
9 detracts from the former efficiency of the individual in the ordinary
10 pursuits of life. It connotes a loss of earning power. *Henson*, at 391.

11 In an effort to enhance understanding of the term "disability", the court in
12 *Henson* related disability to its negative effect upon an individual's
13 physical or mental functioning as well as his or her earning capacity.
14 Something more than existence of prior conditions requiring periodic
15 medical attention was contemplated. In the context of second injury fund
16 relief, a "preexisting disability" is more than a mere preexisting medical
17 condition and must, in some fashion, permanently impact on the
18 worker's physical and/or mental functioning. The court in *Jussila*
19 restated this theme when it specifically used the word "handicapped" to
20 describe the type of prior condition that must exist for second injury fund
21 relief to be applied.

22 The Second-injury Fund is a special fund set up within the administrative
23 framework of the workmen's compensation system to encourage the
24 hiring of previously handicapped workmen by providing that the second
25 employer will not, in the event such a workman suffers a subsequent
26 injury on the job, be liable for a greater disability than actually results
27 from the second accident. *Jussila*, at 778.

28 Thus, we must conclude that a case for second injury fund relief is not
29 made where the evidence shows that a worker has a history of prior
30 medical conditions but does not show that they had a substantial
31 negative impact on the worker's physical or mental functioning.

32 *Pate*, at 4-6. (Emphasis in text.)

 In *Funk*, at 4-5, we noted that in *Lyle* and *Rothschild* the worker's pre-existing conditions,
which were only temporarily disabling prior to the industrial injury, were not sufficient to support a
conclusion that those conditions were a cause of the permanent and total disability. This is
especially true in a "lighting up" situation such as existed in *Lyle* and which the Department
advocates is true in this case regarding the pre-existing cervical and low back arthritic conditions.

1 The Times is not entitled to second injury fund relief because it did not prove that
2 Mr. Norgren had any disabilities prior to the October 3, 1999 industrial injury, as defined and
3 described by *Jussila, Henson, and Pate*. There is no factual foundation that supports the existence
4 of any pre-existing handicap or permanent impact on the claimant's physical and/or mental
5 functioning or his earning capacity. A review of Mr. Norgren's work history, while not necessarily
6 proving the absence of pre-existing physical or psychological disabilities or limitations that affected
7 his ability to perform work, is strongly suggestive that no such pre-existing disability was present in
8 his case. **He worked medium-duty jobs, averaging over sixty hours per week for over**
9 **thirty-seven years.** The fact that he was able to anticipate the loss of a full-time job he held for
10 thirty-seven years and take steps to obtain another full-time job immediately before the industrial
11 injury shows that he had no pre-existing personality or psychological issues that would hamper his
12 ability to obtain gainful employment or otherwise be considered disabling. His pre-injury personal
13 life appears worthy of comparison to "Ozzie and Harriet." The record contains multiple statements
14 by witnesses that there were few or no pre-injury records for them to refer to or rely on regarding
15 the claimant's pre-injury status. The reason for that is obvious; Mr. Norgren was not seeing doctors
16 regularly for any conditions because he had none that were significant, and certainly none that
17 impaired his ability to work.

18 Nonetheless, it is helpful to discuss individually each of the pre-existing conditions cited by
19 the Times as constituting a disability. Mr. Norgren's occupational hearing loss was a pre-existing
20 condition inasmuch as the date of manifestation of that disease arose before the industrial injury.
21 This is true even though the claim for that condition was not filed until after the industrial injury
22 occurred. The Times cannot rely on proof of the permanent partial disability award given to
23 Mr. Norgren for the permanent impairment related to the hearing loss as proof of "disability" within
24 the meaning of RCW 51.16.120(1). Such an impairment rating is not in and of itself sufficient to
25 prove the existence of a pre-existing disability as a matter of law. *Jussila*. There is no evidence in
26 the record that the pre-existing hearing loss impacted the claimant's physical and/or mental
27 functioning or his earning capacity in any way.

28 We have reservations about considering the glaucoma condition at all because there is no
29 medical foundation regarding its existence, its cause, the course of that condition, or its
30 significance. The foundation for this condition appears to come from Mr. Norgren's testimony and
31 his statements to witnesses. From this limited foundation it appears that prior to the industrial injury
32 any glaucoma the claimant had did not prevent him from driving, even at night. That condition

1 worsened **after** the industrial injury, as evidenced by the need to increase the number of
2 medications to control it. Assuming that the claimant is correct that the glaucoma is medically
3 worse such that it now constitutes a disability, it is not relevant to the second injury fund issue. If
4 the worsening was caused by the industrial injury, then that disability was not pre-existing and the
5 Times cannot rely upon it to support second injury fund relief. If the post-injury worsening was not
6 related to the industrial injury, the Times cannot rely upon it simply because **it is post-injury**
7 **worsening**, just as Mr. Norgren could not have relied on an unrelated post-injury worsening of a
8 pre-existing condition to prove entitlement to total disability benefits. See, e.g., *Erickson v.*
9 *Department of Labor & Indus.*, 48 Wn.2d 458 (1956).

10 Mr. Norgren's pre-existing knee condition also was not a "disability" prior to the industrial
11 injury. The use of cortisone injections to treat it on rare occasions is not sufficient. As stated in
12 *Pate*, "something more than (the) existence of prior conditions requiring periodic medical
13 attention . . ." is necessary to prove that a disability existed prior to the industrial injury. *Pate*, at 4.
14 Again, the Times failed to present proof that this condition impacted the claimant's physical and/or
15 mental functioning or his earning capacity in any way.

16 The same reasoning is applicable to exclude the pre-existing cervical and lumbosacral
17 arthritic conditions as a basis for second injury fund consideration. The Times did not present proof
18 that those conditions were "disabilities" prior to the industrial injury. In addition, Dr. Ginsberg's
19 conclusion that permanent partial disability ratings were appropriate for both conditions as a result
20 of the industrial injury also supports the conclusion that the conditions were not disabling at the time
21 the injury occurred and were in fact "lit up" by that injury.

22 As noted earlier, we find that Mr. Norgren had pre-existing physical conditions, albeit
23 non-disabling conditions within the meaning of RCW 51.16.120(1). We specifically find that
24 Mr. Norgren did **not** have any pre-existing psychological or mental health condition. We believe
25 that Dr. Carter's conclusion on that score is entitled to greater weight than that of Dr. Burkhardt. In
26 particular, we find bemusing the logic of Dr. Burkhardt when reaching his conclusion that
27 Mr. Norgren had a pre-existing personality disorder. Mr. Norgren's exemplary family life, work, and
28 social history prior to the industrial injury simply do not support a finding of **any** mental health
29 disorder. If one posits that Mr. Norgren had such a disorder, then virtually everyone on the planet
30 would also have a personality disorder and every time a worker was rated as permanently and
31 totally disabled, second injury fund relief would be applicable. Such a result would be contrary to
32 *Jussila, Henson*, and common sense.

1 **FINDINGS OF FACT**

2 1. On October 20, 1999, the Department of Labor and Industries received
3 an application for benefits wherein the claimant, Leonard Norgren,
4 alleged he was injured on October 3, 1999, while in the course of
5 employment with the Seattle Times. The claim was allowed. On
6 December 23, 2003, the Department issued an order in which it
7 determined the claimant's conditions were fixed and stable and
8 classified Mr. Norgren as a permanently and totally disabled worker,
9 effective January 6, 2004, and entitled to the benefits consistent with
10 that status.

11 On December 24, 2003, the Department issued an order in which it
12 declined to grant second injury fund relief to the Seattle Times. In the
13 order, the Department determined that second injury fund relief was not
14 applicable because the claimant's permanent total disability was
15 predicated on the claimant's age, education, and work experience,
16 coupled with the conditions accepted under the claim, notwithstanding
17 previous disability, and therefore, the "but for" test had not been met.

18 On February 17, 2004, the self-insured employer filed a Protest and
19 Request for Reconsideration. On September 2, 2004, the Department
20 issued an order in which it corrected and superseded the order dated
21 December 23, 2003. In the September 2, 2004 order, the Department
22 further recited: Whereas the above named claimant sustained an injury
23 while in the employment of a self-insured employer, and it [h]as been
24 determined that the claimant's accepted condition(s) has reached a
25 fixed stage and the injury has resulted in total and permanent disability;
26 Therefore it is ordered that the clamant be so classified and placed on
27 the pension roles effective July 26, 2003.

28 On September 3, 2004, the Department issued an order in which it
29 affirmed the December 24, 2003 order. On September 13, 2004, the
30 self-insured employer filed a Notice of Appeal with the Board of
31 Industrial Insurance Appeals. On October 8, 2004, the Board granted
32 the appeal, assigned it Docket No. 04 18211, and directed that
proceedings be held.

2. Before October 3, 1999, Mr. Norgren had numerous conditions,
including a neck condition, sensorineural hearing loss, glaucoma, and a
knee condition. On October 3, 1999, these conditions, individually or in
combination, did not have any negative effect on his ability to work, his
social relationships, or activities of his daily living.
3. Mr. Norgren did not suffer from any mental health condition or disorder
prior to October 3, 1999.

1 4. The October 3, 1999 industrial injury was the proximate cause of low
2 back and cervical strains and other conditions, post-traumatic stress
3 disorder, major depression, somatoform disorder, tinnitus, and
4 post-concussion syndrome, which were permanently disabling to
Mr. Norgren.

5 5. On or about January 6, 2004, Leonard Norgren was precluded by the
6 residuals of his industrial injury of October 3, 1999, from engaging in
7 gainful employment on a reasonably continuous basis in occupations for
8 which he was qualified, by his education, training, experience, and age.
9 The industrial injury of October 3, 1999, in and of itself was the
proximate cause of Mr. Norgren's permanent total disability.

10 **CONCLUSIONS OF LAW**

- 11 1. The Board of Industrial Insurance Appeals has jurisdiction over the
12 parties to and the subject matter of this appeal.
- 13 2. None of the claimant's pre-existing physical conditions constituted a
14 "previous bodily disability" within the meaning of RCW 51.16.120(1).
- 15 3. The self-insured employer is not entitled to second injury fund relief
16 pursuant to RCW 51.16.120.
- 17 4. The order of the Department dated September 3, 2004, is correct and is
18 affirmed.

19 It is so **ORDERED**.

20 Dated this 12th day of January, 2006.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22
23 /s/ _____
24 THOMAS E. EGAN Chairperson

25
26 /s/ _____
27 FRANK E. FENNERTY, JR. Member