

Powell, Marshall

SECOND INJURY FUND (RCW 51.16.120)

Knowledge of disabling condition

Prior to a 1984 statutory change to RCW 51.16.120 there was no requirement, other than Department policy, that the employer have knowledge of a worker's pre-existing disability in order to qualify for second injury fund relief. The 1984 change was a clarification and employer knowledge is not a prerequisite to qualification for relief from the fund.*In re Marshall Powell, BIIA Dec., 97 6424 (1999)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 99-2-18528-5.]

Scroll down for order.

1 was presented demonstrating that the employer was aware at the time of hire that the injured
2 worker suffered from diabetes. We disagree with the legal conclusion that in order to prevail in a
3 second injury fund relief claim, the employer must show knowledge at the time of hire of the
4 claimant's disabling condition. We, therefore, reverse the proposed order dismissing the
5 employer's appeal pursuant to CR 41(b)(3). However, rather than remanding the matter for a
6 further hearing to receive evidence in the Department's defense, we conclude the Department has
7 waived their right to present evidence. The Department rested upon submission of its Motion to
8 Dismiss, deciding not to present any witnesses. The Department thereby waived the right to
9 present evidence in the event the motion was not granted. In essence, the Department chose to
10 rely upon the record as developed with the cross-examination of the witnesses presented by the
11 employer, and the submitted motion. We distinguish this from a case wherein at the completion of
12 the plaintiff's case, the defense moves to dismiss with a CR 41(b)(3) motion, and does not rest.
13 CR 41 clearly states that in that instance, there is not a waiver of the right to present evidence in
14 the event the motion is not granted. *Lonsdale v. Chesterfield*, 91 Wn.2d 189 (1978). We conclude
15 that the hearings process was complete with the testimony of Kathy Papac; Dr. Bruce Francis;
16 Dr. Edward L. Lurnen; Dr. Richard Marks; and Dr. Bruce Bradley. The evidence presented
17 supports granting the employer's second injury fund relief claim since the Seattle School District
18 met the requirements of RCW 51.16.120 as that statute existed in December 1983.

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37 The claimant, Marshall H. Powell, began his employment with the Seattle School District as
38 a custodian in September of 1966. He suffered an industrial injury to his knee on December 22,
39 1983. At the time of his injury, Mr. Powell had been a diabetic for over 20 years, and had been
40 insulin dependent since 1981. On March 26, 1997, the Department issued an order finding him
41 permanently and totally disabled as of November 26, 1996. The self-insured employer sought
42 second injury fund relief, maintaining that the combined effects of Mr. Powell's diabetes and his
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1 knee disability caused him to be permanently and totally disabled. The Department denied the
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3 employer second injury fund relief because the employer did not show that "but for" the previous
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5 disability, Mr. Powell would not have been permanently totally disabled. The Department further
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7 contends that the employer failed to show that the diabetes was disabling to Mr. Powell at the time
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9 he suffered an industrial injury on December 22, 1983, or that the employer had knowledge of the
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11 diabetes at the time of hire in 1966.

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13 Rights of the parties under the Industrial Insurance Act are governed by the law in effect on
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15 the date of the injury. *Seattle School District No. 1 v. Department of Labor & Indus.*, 116 Wn.2d
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17 352 (1991). On the date of Mr. Powell's industrial injury, the second injury fund statute,
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19 RCW 51.16.120, read in pertinent part as follows:

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21 Whenever a worker has a previous bodily disability from any previous
22 injury or disease and shall suffer a further disability from injury or
23 occupational disease in employment covered by this title and become
24 totally and permanently disabled from the combined effects thereof . . .
25 self-insured employer shall pay directly into the reserve fund only the
26 accident cost which would have resulted solely from said further injury or
27 disease, had there been no preexisting disability...The difference
28 between the charge thus assessed . . . and the total cost of the pension
29 reserve shall be assessed against the second injury fund.

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31 In *Jussila v. Department of Labor & Indus.*, 59 Wn.2d 772 (1962), the court discussed the legislative
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33 purpose of the second injury fund in the oft quoted statement that the second injury fund was set up
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35 to "encourage the hiring of previously handicapped workmen by providing that the second employer
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37 will not, in the event such a workman suffers a subsequent injury on the job, be liable for a greater
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39 disability than actually results from the second accident." However, the court articulated purposes
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41 other than encouraging employers to hire the handicapped. The court noted that the underlying
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43 premise in industrial insurance is for employers to bear the burden of the costs arising out of
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45 industrial injuries sustained by their own employees. The second injury fund and experience based
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47 premiums accomplish not only an inducement for workplace safety by rewarding employers with

1 reduced liability, but also avoid an unfair burden on other employers. In *Jussila*, the court noted
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3 that the second injury fund was not passed for the singular purpose of encouraging the hiring of
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5 handicapped, but was also designed to encourage workplace safety and avoid unfair financial
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7 burdens on employers.

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9 The *Jussila* court held that where a worker with an industrially caused disability suffers a
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11 subsequent injury resulting in permanent total disability, there is no presumption that the earlier
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13 injury was a cause of the total disability for establishing an employer's right to reimbursement from
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15 the second injury fund. The court required the burden of proof be upon the employer in an appeal
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17 before the Board to show that the worker's total disability was, in part, the result of a previous
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19 disability, and that the disability would not have been total **but for** the previous disability. In other
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21 words, the Legislature did not intend the second injury fund law to apply to a case wherein the later
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23 injury was, in itself, sufficient to produce total permanent disability. *Jussila*, at 778.

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25 In *Lyle v. Department of Labor & Indus.*, 66 Wn.2d 745 at 748 (1965), the Supreme Court
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27 held that:

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29 consistent with the purpose of the Second-injury Fund statute [*sic*], that
30 the phrase, 'previous bodily infirmity' cannot be isolated to contemplate
31 an unknown, preexisting and nondisabling condition. To effect the
32 legislative intent the statute must be construed to presuppose a known,
33 preexisting disabling injury or condition.

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35 The *Lyle* court did not identify **who** is to "know" of the preexisting disabling condition--the worker,
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37 his/her doctors, or the employer. Nor did the court identify **when** the disabling condition must be
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39 known. However, the obvious intention of the court in using the word "known" was to require that
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41 the preexisting condition be **manifest, symptomatic and patent** to someone at the time of the
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43 second injury, and not be latent and non-symptomatic.

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45 Even though these cases and the statute do not specifically delineate **employer** knowledge
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47 of a preexisting disability **at the time of hire** in order to obtain second injury fund relief, the

1 Department administratively construed these cases and the statute to require it. The Department
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3 maintained the position that the legislative purpose would be circumvented if employers, unaware
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5 of an existing disability at the time of hire, could seek the beneficent provisions of the second injury
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7 fund. According to the Department's argument, unless employers knew of the preexisting disability
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9 at the time of hire, they should not benefit from a fund whose purpose is to encourage employers
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11 hiring disabled workers in spite of that knowledge.

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13 The Board has never specifically decided in a significant decision whether the Department's
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15 interpretation of RCW 51.16.120 requiring employer knowledge at the time of hire was a correct
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17 interpretation of the statute and the case law. The main focus of self-insured employers' litigation
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19 before the Board at this time with regard to the second injury fund was whether self-insured
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21 employers were entitled to second injury fund relief between 1971 and July 1977. In 1971 the
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23 Legislature created a special class of employers known as self-insurers as defined in
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25 RCW 51.08.173, and as qualified in Chapter 51.14 RCW. The Legislature did not amend the
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27 statutes governing the second injury fund so as to distinguish between state fund and self-insured
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29 employers. Most importantly, the Legislature made no changes in the mechanism for funding the
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31 second injury fund so as to require contributions from the self-insurers. Modifications made in 1972
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33 to the funding statute for the second injury fund failed to provide the Director with authority to
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35 require self-insured employers to contribute to the second injury fund. Not until 1977 did the
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37 Legislature extend the funding provisions or benefits of RCW 51.16.120 to self-insured employers.
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39 The self-insurers sought through litigation both at the Board and in the appellate courts to have the
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41 provisions of RCW 51.16.120 applied to them retroactively, or pre-July 1,1977. Self-insureds
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43 argued that the critical date for fixing eligibility for second injury fund relief was the time when the
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45 total permanent disability becomes effective rather than the date of injury. *Seattle School*
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47 *Dist. No. 1 v. Department of Labor & Indus.*, 116 Wn.2d 352 (1991). The focus of the matters

1 litigated before the Board at this time rarely raised the issue of employer's knowledge of preexisting
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3 disability at the time of hire.

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5 In 1991, the Board issued a significant decision that analyzed the meaning of "combined
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7 effects" in the second injury fund statute and the *Jussila* and *Lyle* cases. *In re Alfred Funk*, BIIA
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9 Dec., 89 4156 (1991). In *Funk*, the employer-appellant **conceded** and the Board, without analysis,
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11 stated **in dicta** that "case law required an employer to 'know' that the worker had a preexisting
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13 disability at the time of hiring in order to qualify for second injury fund relief." The Board actually
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15 held in *Funk* that the statute required the employer to show more than that the worker had a
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17 preexisting condition, but must demonstrate that the preexisting condition was a disability that was
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19 an actual cause of the total disability. In this present decision, we do not disturb the actual *Funk*
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21 decision. However, we acknowledge as incorrect the aforementioned **dicta** in *Funk*. We do not
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23 interpret either case law or the second injury fund statute as it existed prior to 1984 to require
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25 employer knowledge of the worker's previous infirmity at the time of hire in order to qualify for
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27 second injury fund relief.

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29 In 1984, the Legislature amended RCW 51.16.120 by adding the words "whether known or
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31 unknown to the employer," referring to the worker's "previous bodily disability." RCW 51.16.120(1),
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33 as amended, Laws of 1984, ch. 63, § 1. The self-insured employer contends that the purpose of
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35 the 1984 amendment was to clarify the statute, and therefore that it should be applied
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37 retrospectively. While it is true that there is a presumption of prospective application from the
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39 effective date of an amendment, we conclude that the employer has presented ample and
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41 persuasive evidence of legislative intent that the 1984 amendment was a **clarification** of
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43 RCW 51.16.120. We, therefore, conclude that the 1984 amendment should be given retrospective
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45 application. Moreover, we conclude that there is no judicial interpretation of the statute requiring
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47 employer knowledge at the time of hire. *Jussila* and *Lyle* offer no such specific requirement.

1 Where the court has not previously interpreted the statute to mean something different and where
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3 the original enactment was ambiguous so as to generate dispute as to what the Legislature
4
5 intended, the subsequent amendment shall be **effective from the date of the original act**, even in
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7 the absence of a provision for retroactivity. *Overton v. Economic Assistance Authority*, 96 Wn.2d
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9 552, 557-558 (1981), citing *Carpenter v. Butler*, 32 Wn.2d 371 (1949); *Johnson v. Morris*, 87 Wn.2d
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11 922 (1976). (Emphasis added.)

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13 The Legislature's intent in passing the 1984 amendment can be gleaned from the Bill Report
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15 for Senate Bill 3118 that provided the following background:

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17 The Department requires that an employer have knowledge of the
18 previous injury in order to qualify for second injury fund relief. This
19 prerequisite is based on its interpretation of case law. Proponents
20 disagree with its interpretation and believe that employer knowledge of a
21 previous injury is not required by statute or case law.
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23 Thus, the Legislature considered *Jussila* and *Lyle*, and concluded that employer knowledge of the
24 preexisting disability **was not a requirement**, by either the express language of the former
25 RCW 51.16.120 or the case law in order for the employer to obtain second injury fund relief. Then
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27 Senator Philip Talmadge proposed SB 3118 to clarify that the statute never required employer
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29 knowledge of the preexisting disability at the time of hire. SB 3118 passed both the House and the
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31 Senate **unanimously**, further supporting that it was a clarifying amendment and it became effective
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33 June 7, 1984.
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37 The following excerpt from the Senate Committee Hearing further illuminates the clarifying
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39 intention of the Legislature. Senator Talmadge, the amendment's sponsor, explained the purpose
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41 of the 1984 amendment:

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43 The fund was created as an inducement to employers to hire workers
44 who were handicapped. The problem has been, in my judgment, that
45 through an administrative interpretation by the Department of Labor and
46 Industries, they have taken the position that the employer at the time of
47 hiring of the individual had to know of the existence of the disability. The
difficulty is quite frankly that some employees will not indicate that

1 they've had previous disabilities or disabling injuries, and absent a very
2 thorough pre-employment physical or a series of questions _____
3 to run a foul of guidelines now established by the State Human Rights
4 Commission with respect to the hiring of the handicapped, the employer
5 is not going to be able to know of the existence of the handicap. **I've**
6 **read the cases relating to the second injury fund and it's my**
7 **opinion that those cases say not that the employer has to know of**
8 **the existence of the specific disability, but rather that the disability**
9 **has to be something that has manifested itself, has to be known--it**
10 **can't be latent arthritis, or something like that. But the Department**
11 **takes the position that the employer actually has to know.**

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13 February 1, 1983 Senate Committee on Commerce and Labor hearing. (Emphasis added.)

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15 It is clear from this excerpt that the author of the 1984 amendment intended not to change
16 the substance of the statute or prior Supreme Court precedent, but rather to change prior
17 **interpretation by the Department of Labor and Industries.** Under these circumstances, the
18 1984 amendment is properly given retroactive effect. Because the amendment was a clarifying
19 amendment, RCW 51.16.120(1) has always meant that an employer is entitled to second injury
20 fund relief when the injured worker has a preexisting disability whether known or unknown to the
21 employer, and that preexisting disability combines with the residuals from the industrial injury to
22 cause permanent total disability.

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25 The record is persuasive that at the time of the 1983 industrial injury, Mr. Powell had been
26 an insulin dependent diabetic for several years, and probably had the beginnings of peripheral
27 neuropathy in both feet as a result of diabetes. In addition to the intake of insulin, Mr. Powell, as a
28 20-year diabetic, would have had to carefully monitor his nutritional intake to maintain the diabetes.
29 Clearly, Mr. Powell had received treatment for the diabetes, and that condition was known and
30 symptomatic at the time of his industrial injury. While the record is devoid of specific information
31 about whether the diabetes, and visits to his doctors for the diabetic condition, caused Mr. Powell to
32 miss any work, we still find the evidence sufficient to conclude that the diabetes was disabling to
33 Mr. Powell prior to the 1983 industrial injury. Dr. Bruce Bradley saw Mr. Powell within a year of the

1 industrial injury, noted the peripheral neuropathy, and felt that it most probably was present at the
2 time of the industrial injury. Insulin therapy is administered to diabetic patients with more difficulty
3 keeping their blood sugars in control. Even with the insulin therapy, just **before** the 1983 industrial
4 injury, Mr. Powell demonstrated elevated blood sugars. We conclude that the need for monitoring
5 diet and insulin level, and the peripheral neuropathy in both feet, had to have substantially and
6 negatively impacted Mr. Powell's daily functioning and efficiency. We conclude that the record
7 establishes that Mr. Powell's active micro-vascular disease of diabetes, more probably than not,
8 was disabling prior to 1983.

9 The next determination is whether the diabetic condition combined with the residuals from
10 Mr. Powell's 1983 industrial injury to his knee, and that the effects from both conditions combined to
11 render him totally permanently disabled as of November 26, 1996. The self-insured employer
12 established through the testimony of a vocational consultant and Dr. Marks that but for the effects
13 from the diabetes, Mr. Powell would have been capable of light, sedentary gainful employment in
14 1996, when the Department placed him on a pension. When the residuals from the industrial injury,
15 however, are combined with the effects of the diabetes, Mr. Powell was permanently totally
16 disabled. Given this record, we conclude that the employer is entitled to second injury fund relief
17 pursuant to RCW 51.16.120. The order denying the employer second injury fund relief is reversed
18 and remanded to the Department with direction to allow Seattle School District No. 1 second injury
19 fund relief in this claim.

20 **FINDINGS OF FACT**

- 21 1. The claimant, Marshall H. Powell, filed an application for benefits with
22 the Department of Labor and Industries on February 10, 1984, for an
23 injury sustained on December 22, 1983, during the course of
24 employment with Seattle School District No. 1. The claim was accepted
25 and benefits provided. On March 26, 1997, the Department issued an
26 order finding the claimant permanently and totally disabled effective
27 November 26, 1996. On July 3, 1997, the Department issued an order
28 affirming an order of March 26, 1997, that denied second injury fund

1 relief to Seattle School District No. 1. On August 20, 1997, Seattle
2 School District No. 1 filed an appeal with the Board of Industrial
3 Insurance Appeals from the July 3, 1997 order. On September 24,
4 1997, the Board granted the appeal, assigned it Docket No. 97 6424
5 and ordered that hearings be held.
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7 2. Mr. Powell sustained an industrial injury to his knee while working as a
8 janitor for Seattle School District No. 1 on December 22, 1983, for which
9 he received surgery. As of December 22, 1983 Mr. Powell had diabetes
10 for 20 years. He had to monitor his diabetes through diet and had been
11 to physicians to monitor his high level of sugars in the blood. He had
12 been insulin dependent since 1981. As a result of his diabetes, he had
13 peripheral neuropathy in both feet manifested by stocking-type
14 numbness.
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16 3. As of November 26, 1996, Mr. Powell was permanently totally unable to
17 engage in gainful employment as a result of the combined effects from
18 the preexisting and symptomatic diabetes mellitus and the left knee
19 residuals from the 1983 industrial injury. But for the disabling diabetes
20 condition that preexisted the December 22, 1983 injury, the residuals
21 from the industrial injury to the left knee would not have resulted in
22 Mr. Powell's permanent total disability as of November 1996.
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24 **CONCLUSIONS OF LAW**

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26 1. The Board of Industrial Insurance Appeals has jurisdiction over the
27 parties and the subject matter of this appeal.
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29 2. Prior to December 22, 1983, Mr. Powell had a previous bodily disability
30 from his known and active diabetes disease within the meaning of
31 RCW 51.16.120.
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33 3. Employer knowledge of the preexisting disability at the time of hire of the
34 injured worker is not required by RCW 51.16.120. The 1984
35 amendment to RCW 51.16.120 was a clarifying amendment, and
36 second injury fund relief has been available to self-insured employers
37 since 1977 whether the disabling condition was known or unknown to
38 the employer at the time of hire.
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40 4. Seattle School District No. 1 is entitled to second injury fund relief
41 pursuant to RCW 51.16.120.
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5. The Department order of July 3, 1997, is incorrect and is reversed. This claim is remanded with direction to the Department to allow the employer second injury fund relief pursuant to RCW 51.16.120.

It is so **ORDERED**.

Dated this 21st day of July, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

/s/ _____
JUDITH E. SCHURKE Member