Paliy, Veniamin

TIME-LOSS COMPENSATION (RCW 51.32.090)

Voluntary retirement

Where the worker was advised not to work by his physician because of an unrelated heart condition and filed an application for benefits shortly after stopping work, the fact that the worker was already totally disabled as a result of a non-occupational heart condition does not preclude him from receiving total disability benefits under the Industrial Insurance Act if he is also totally disabled due to an occupational condition. Here the worker was not voluntarily retired and RCW 51.32.090(8) does not prevent the worker from receiving benefits. ***….In re Veniamin Paliy*, BIIA Dec., 12 11639 (2013)** [*Editor's Note*: The Board's decision was appealed to Clark County Superior Court, No. 13-2-02278-1.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: VENIAMIN S. PALIY	)	**DOCKET NO. 12 11639**
	)	
CLAIM NO. AN-53877	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Veniamin S. Paliy, by
Busick Hamrick, PLLC, per
Douglas M. Palmer

Employer, US Digital Corporation WA, by
Robert Willoughby, Staff Counsel

Department of Labor and Industries, by
The Office of the Attorney General, per
John Barnes, Assistant

The claimant, Veniamin S. Paliy, filed an appeal with the Board of Industrial Insurance Appeals on February 9, 2012, from an order of the Department of Labor and Industries dated February 8, 2012. In this order, the Department assessed an overpayment of time-loss compensation benefits in the amount of $11,035.41 from May 13, 2010, through August 27, 2010, because the worker was voluntarily retired. The Department order is **REVERSED AND REMANDED.**

OVERVIEW

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a December 3, 2012 Proposed Decision and Order in which the industrial appeals judge affirmed the February 8, 2012 Department order. The employer, US Digital Corporation, filed a Response on February 5, 2013.

The Board has reviewed the evidentiary rulings in the record of proceedings. We find that no prejudicial error was committed and the rulings are affirmed.

The Department allowed Mr. Paliy's occupational disease claim for a right shoulder condition and paid time-loss compensation benefits for the period of May 13, 2010, through August 27, 2010. The Department now seeks repayment of those benefits based on its determination that Mr. Paliy was voluntarily retired because he stopped working in January 2010 due to an unrelated heart condition. The Department and the employer rely on RCW 51.32.090(8), which provides: "If the

supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section."[1]

The claimant argues that *Shea v. Department of Labor & Indus.*, 12 Wn. App. 410 (1974), *rev. denied*, 85 Wn.2d 1009 (1975) is controlling. Under *Shea,* a worker can be totally disabled as a result of two causes that are independent of each other. The fact that a worker is already totally disabled as a result of a non-occupational condition does not preclude him from receiving total disability benefits under the Industrial Insurance Act if he is also totally disabled due to an occupational condition.

As far as we have been able to ascertain, this appeal presents a question of first impression—how do *Shea* and RCW 51.32.090(8) relate to one another. We must give effect to both and, as explained below, we find no inherent conflict between the two. We conclude that Mr. Paliy was not voluntarily retired within the meaning of RCW 51.32.090(8) from May 13, 2010, through August 27, 2010, and, under *Shea*, he is entitled to the time-loss compensation benefits the Department is seeking to recoup.

DECISION

At the outset, we note that RCW 51.32.090(8) requires two determinations. The worker must be both "voluntarily retired" and "no longer attached to the workforce." In the current appeal, there is no question that Mr. Paliy was "no longer attached to the workforce" during the period for which the Department seeks repayment of time-loss compensation benefits. The question is whether he was "voluntarily retired."

At the August 30, 2012 hearing, the parties stipulated "Mr. Paliy voluntarily quit employment with US Digital in January 2010, his last official date [was] January 31st, 2010." 8/30/12 Tr. at 7. We do not believe the parties entered into this factual stipulation with the intent of defining the term "voluntarily retired" contained in RCW 51.32.090(8). If they did, then the stipulation is not binding with respect to the legal import of that phrase. It is the province of the Board and the courts to decide what the statutory language means. The parties cannot stipulate to its legal effect. *Rusan's, Inc. v. State*, 78 Wn.2d 601, 606-607 (1970); *State v. Drum*, 168 Wn.2d 23, 33 (2010).

We accept as true the employer's recitation of the "Applicable Facts" in its Response. Mr. Paliy is a Russian immigrant in his mid-forties. He moved to the United States about 18 years

[1] This subsection was re-numbered (10) in 2011, with the text remaining the same. The Proposed Decision and Order used the current numbering. The version of the statute in effect on the date of manifestation, January 27, 2010, applies here. We have therefore cited to RCW 51.32.090(8) throughout our decision.

ago and began working for US Digital in 1995. In 1996 Mr. Paliy was assigned to work on a press, assembling discs that go into optical encoders. This work involved thousands of repetitive motions a day using his hands and arms.

In 2006, 2007, and on October 8, 2009, Mr. Paliy suffered a series of non-work-related heart attacks. He has not worked or sought employment since the last attack. He had been hoping to return to work but suffered another heart incident in December 2009, after which "his heart was at twenty percent capacity." 8/30/12 Tr. at 80. Initially, his doctors thought he could undergo open-heart surgery but then they decided he would not survive an operation. The doctors advised Mr. Paliy's wife that he could not return to work, so she contacted the employer and began the termination process.

On January 14, 2010, the Paliys met with Robyn Bridgman, the Human Resources Administrator for US Digital, to work out the details of terminating employment based on the cardiologist's assessment that Mr. Paliy could not work. There was no mention of any shoulder problem at that time and there is no evidence Mr. Paliy ever complained about his shoulder to anyone at US Digital while he was working. He acknowledged that he never missed any work due to any shoulder complaints, and the employer, which is self-insured for medical coverage, never received notice of any health issues with respect to the shoulder.

In order to give Mr. Paliy the best severance package, Ms. Bridgman set January 31, 2010, as the official termination date. Shortly after the January 14, 2010 meeting, Mr. Paliy sought treatment for his right shoulder for the first time and ultimately filed an application for industrial insurance benefits. The claim was allowed as an occupational disease with a date of manifestation of January 27, 2010, based on a determination that that was the first date of treatment. The Department accepted conditions diagnosed as adhesive capsulitis and supraspinatus sprain in the right shoulder, as well as a right full thickness anterior distal supraspinatus tendon tear.

Only Mr. Paliy presented medical evidence. He saw Jaideep Iyengar, M.D., in February 2010 and again on May 13, 2010. On the latter date, Dr. Iyengar determined that Mr. Paliy was unable to work as a result of his shoulder condition, and the Department proceeded to pay time-loss compensation benefits for the period of May 13, 2010, through August 27, 2010. Mr. Paliy's other medical witness, David Karges, M.D., saw Mr. Paliy on November 13, 2010. He reviewed a job analysis for the job of injury and said Mr. Paliy could not perform that job due to his shoulder condition for the period of May 13, 2010, through August 27, 2010. Dr. Karges placed

significant restrictions on the use of the shoulder and said Mr. Paliy could potentially perform a one-handed sedentary job. There was no showing that such employment was available in the general labor market or that Mr. Paliy had the requisite skills and education to perform such limited work. Mr. Paliy has therefore shown that he was temporarily totally disabled for the disputed period of May 13, 2010, through August 27, 2010.

***Shea v. Department of Labor & Indus.*, 12 Wn. App. 410 (1974) *rev. denied*, 85 Wn.2d 1009 (1975):** In *Shea*, the superior court dismissed the worker's appeal, determining as a matter of law that there was insufficient evidence to establish permanent total disability. Because of the procedural posture of the case, the court of appeals viewed the evidence in the light most favorable to Mr. Shea and determined it was sufficient to show the following: Mr. Shea suffered an industrial injury on April 29, 1964. He had a preexisting vascular condition that worsened thereafter and effectively removed him from the labor market as of November 1965. His industrial condition also independently removed him from the labor market as of August 1971.

The court reversed the dismissal of Mr. Shea's appeal, holding that "if a worker's industrial injury, *considered separate and apart from his other bodily conditions*, renders him *totally disabled*, then he is entitled to total disability compensation, even though he may also be totally disabled solely as a result of a condition not related to his injury." *Wendt v. Department of Labor & Indus.*, 18 Wn. App. 674, 681-682 (1977) (Emphasis in original).

RCW 51.32.090(8): Subsection (8) was added to RCW 51.32.090 in 1986, and provides: "If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section." There is a comparable provision with respect to permanent total disability benefits, RCW 51.32.060(6). SHB 1875; Laws of 1986, ch. 59, §§ 1 and 2.

The Floor Synopsis of "SHB 1875—Part of Industrial Insurance package" indicated that the bill was the result of the recommendation of the Joint Select Committee and described the portions relevant here as follows: "(1) Benefits for temporary total disability or permanent total disability will not be paid if a worker had retired from the workforce." Under the section entitled "Why is it needed" the explanation was that the change was "in response to court cases. If a worker has retired the Department doesn't feel it should pay benefits to replace wages." No specific court cases were cited.

The House Bill Report indicated that the voluntary retirement language was added in response to an unnamed:

> . . . recent Board of Industrial Insurance Appeals case [that] concluded that a worker who had voluntarily retired from his occupation was entitled to temporary total disability (time-loss) compensation when an aggravation of a work-related injury caused a total and temporary inability to work. The board reasoned that because Washington law compensates for loss of earning capacity, it is irrelevant that the worker would not otherwise be earning wages. Previously, it had been the policy of the Department of Labor and Industries to limit time-loss benefits or the award of pension benefits for permanent disability to those claimants who would be earning wages if they were not disabled.

House Bill Report, SHB 1875.

An earlier version of the bill read as follows: "If the supervisor of industrial insurance determines that the worker is voluntarily retired, benefits shall not be paid under this section unless the worker shows that a bona fide attempt has been made to reenter the labor force." The amendment to RCW 51.32.060 contained similar language. But the language of the proposed amendment to RCW 51.32.090 was later changed to read: "If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section." A comparable change was made in the proposed language of the amendment to RCW 51.32.060.

According to the Department's February 5, 1986 Fiscal Note, one of its stated Assumptions was that: "The Department will develop definitions of the terms 'voluntary retirement' and 'no longer attached to the work force.'" After the passage of SHB 1875, the Department promulgated WAC 296-14-100, defining "voluntarily retired," as follows:

> (1) **What is voluntarily retired?** The worker is considered voluntarily retired if both of the following conditions are met:
>
> (a) The worker is not receiving income, salary or wages from any gainful employment; and
>
> (b) The worker has provided no evidence to show a bonafide attempt to return to work after retirement.
>
> . . .
>
> (2) **When is a worker determined not to be voluntarily retired?** A worker is not voluntarily retired when the industrial injury or occupational disease is a proximate cause for the retirement.

According to the rule, a worker is not voluntarily retired if the occupational condition is a proximate cause of the retirement. However, the rule is silent with respect to the issue before us: Is a worker who has had to leave the workforce because of an unrelated non-industrial condition voluntarily retired within the meaning of RCW 51.32.090(8)?

When the Legislature added subsection (8) to RCW 51.32.090 in 1986, it provided no accompanying statutory authority to promulgate rules interpreting the legislative phrase "voluntarily retired." In promulgating WAC 296-14-100, therefore, the Department must have relied on the general rulemaking authority provided by RCW 51.04.020(1). The resulting rule is an interpretive rule, as defined by RCW 34.05.328(5)(c)(ii), which provides: "An 'interpretive rule' is a rule, the violation of which does not subject a person to a penalty or sanction, that sets forth the agency's interpretation of statutory provisions it administers."

In general, substantial weight is given to an agency's interpretation of the law it administers. *Granger v. Department of Labor & Indus.*, 159 Wn.2d 752, 764 (2007). However, the Department's interpretation of "voluntarily retired" is not binding on us or the courts, and deference to its interpretation is inappropriate if the definition conflicts with the statute. *Granger*. *See*, *also*, *In re William Granger*, BIIA Dec., 02 17611 (2004).

Prior to the addition of RCW 51.32.090(8), Division Three of the Washington State Court of Appeals had held that a worker who "voluntarily remove[d] himself from the active labor force and opt[ed], despite the presence of sufficient physical capacities, to decline further employment activity" was not entitled to temporary or permanent total disability benefits. *Kaiser Aluminum v. Overdorff*, 57 Wn. App. 291, 296 (1990). Division One said much the same thing in *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 766 (1993), review denied, 123 Wn.2d 1017 (1994), describing the worker as having "voluntarily removed himself from the general labor force despite having the physical capacity to engage in gainful employment at the time he retired" and stressing that there was "no evidence showing that Farr wanted to engage in some form of gainful employment during this period but was physically unable to obtain employment."

After the 1986 amendment took effect, Division Three applied RCW 51.32.090(8) and WAC 296-14-100 in *Energy Northwest v. Hartje*, 148 Wn. App. 454 (Div. III 2009), re-affirming the *Farr* and *Overdorff* holdings. Most recently, Division Two explored the question of whether RCW 51.32.060(6), which contains language identical to RCW 51.32.090(8), applied to a worker's survivors, barring benefits because the worker was voluntarily retired. The court concluded that the

rights of the survivors were independent of the worker's. In its analysis, the court summarized the holdings in *Overdorff* and *Farr*, as follows: "Both cases determined that the voluntarily-retired person no longer earns wages, thus cannot suffer wage loss, and the legislature intended the benefit to protect the worker from wage loss. *Farr*, 70 Wn. App. at 763; *Overdorff*, 57 Wn. App. at 296-97." *Mason v. Ga.-Pac. Corp.*, 166 Wn. App. 859, 867 (Div II 2012).

For the period he is seeking to retain time-loss compensation benefits, Mr. Paliy was already unable to work because of his heart condition. Thus, he suffered no additional economic loss when he also became unable to work because of his shoulder. However, if economic loss were the sole criterion under RCW 51.32.090(8), there would be no need for the word "voluntarily" to modify "retired." And there is a critical factor that distinguishes this case from *Farr*, *Overdorff*, *Hartje*, and *Mason*. None of those cases involved a worker who had no choice but to stop working due to a non-occupational condition. Mr. Paliy would have continued his employment if he could have. He did not want to stop working—he has five children, is only in his mid-forties, and liked his job of 14 years.

Mr. Paliy testified: "That was my first job [in this country]; I liked it very much. I liked the company, I liked my boss, so there was no plans to leave work, and considering my age and I had a family that I had to support. I have five children." 8/30/12 Tr. at 45. His wife explained that she initiated the termination process "[b]ased on the doctor's words, and that was what I did, is I brought the doctor's words over to the company. My husband did not want to stop working, he loved his job. . . . It was not the decision that we made; the decision was made by the doctor." 8/30/12 Tr. at 75. Ms. Bridgman corroborated that Mr. Paliy's wife and daughter "told me that the doctor said he would not be able to come back; but, that he was having a hard time accepting that from the doctors, but that was inevitable." 8/30/12 Tr. at 80.

While not directly addressing the issue of what constitutes voluntary retirement, the court in *Mason* pointed out that WAC 296-14-100(1)(b) provides a mechanism for a "worker to reverse voluntary retirement" by seeking employment. *Mason*, at 866. That assumes, of course, that the failure to be employed is voluntary. Here, it would have been pointless for Mr. Paliy to seek employment, even though he would have preferred to continue working, given his heart condition.

In defining "voluntarily retired," WAC 296-14-100 incorporates some of the factors considered in the court cases, as well as echoing language that was initially included in the legislation regarding a worker's bona fide attempt to reenter the labor force. In many situations, if

someone is not working and is not seeking employment, that might be sufficient reason to say that they are voluntarily retired, so long as the occupational condition is not precluding them from working. By adding that caveat, the rule implicitly recognizes that if the occupational condition is a cause of the retirement it cannot be truly voluntary. The rule does not explicitly incorporate that concept with respect to non-occupational conditions. At the same time, RCW 51.32.090(8) contains no language that can be interpreted as overruling *Shea* nor does it define "voluntarily."

When the Legislature has not defined a term, we must "give the term its plain and ordinary meaning ascertained from a standard dictionary." *State v. Watson*, 146 Wn.2d 947, 954, (2002). The dictionary meaning of the word "voluntarily" connotes a "choice" based on the exercise of "free will." Merriam Webster On-line Dictionary (merriam-webster.com). The courts have said much the same thing in other contexts.

For example, with respect to imputing income to unemployed parents for child support purposes, RCW 26.19.071(6) provides: "The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. . . . Income shall not be imputed for an unemployable parent." This provision was interpreted in *In re Marriage of Blickenstaff*, 71 Wn. App. 489, 493-494 (1993). Mr. Blickenstaff had been incarcerated as a result of parole violations, and the issue was whether income should be imputed to him. In order to decide that question, the court had to decide whether he was "voluntarily unemployed" within the meaning of RCW 26.19.071(6). The court defined voluntary unemployment as follows:

> The statute fails to define "voluntary unemployment". Where a statutory term is undefined, a court is to give it its usual and ordinary meaning. [citation omitted] The usual and ordinary meaning of "voluntary", according to *Webster's New World Dictionary* 1592 (2d College ed. 1976) is "brought about by one's own free choice . . . intentional; not accidental." The usual and ordinary meaning of "voluntary unemployment" then is that the unemployment is brought about by one's own free choice and is intentional rather than accidental.
>
> Although clear at first blush, the term becomes ambiguous in the face of the parties' equally plausible meanings. Diane argues, and the trial court found, that Wasir's unemployment was "voluntary" because it resulted from his intentional parole violations. Wasir counters that the intentional act must be directly related to the employment decision itself; *i.e.*, one must have the option to work and intentionally forgo it.

In *Blickenstaff*, the court adopted the latter approach and determined that Mr. Blickenstaff was not voluntarily unemployed because his incarceration rendered him unemployable. He did not have the option to work and intentionally forego it.

Both *Farr* and *Overdorff* recognized this aspect of "voluntarily retired," by stressing that the worker has the physical capacity to work but chooses not to do so. Mr. Paliy did not have the physical capacity to continue working in January 2010. He had to terminate his employment due to his heart condition and he was later determined to be unable to work due to his shoulder condition as well. In light of the usual and ordinary meaning of "voluntarily," we conclude that Mr. Paliy was not voluntarily retired from May 13, 2010, through August 27, 2010, the period for which the Department is seeking recoupment. He did not have the option to work and intentionally forego it.

This result is consistent with *Shea*. It is well established that total disability as a result of one condition does not mean a worker cannot also be totally disabled as a result of another condition and receive time-loss compensation benefits on that basis. That rule has been in place since *Shea* was decided in 1974, long before *Farr* and *Overdorff* were decided, and has remained unchanged since then. Neither the 1986 amendment of RCW 51.32.090 nor the resulting case law overruled *Shea*.

Indeed, the Board has continued to apply *Shea* in the years since subsection (8) was added to RCW 51.32.090. In *In re Richard Underwood*, Dckt. No. 00 17035 (November 29, 2001), the Board held that the worker was entitled to time-loss compensation benefits during a period when an unrelated brain tumor also precluded him from working. In *Underwood*, the Board re-affirmed pre-1986 decisions, noting that it had repeatedly followed *Shea*, and citing *In re Carlton Hague*, BIIA Dec., 59,331 (1982) "in which we held that a worker's post-injury cardiovascular problems did not prevent him from receiving pension benefits, so long as he was simultaneously disabled due to his industrially related impairments." *Underwood*, at 3. The Board noted: "We have continued to hold that a worker who is totally disabled due to conditions proximately caused by an industrial injury is eligible for a pension even if he is also unemployable due to impairments caused by a subsequent unrelated condition. *In re Andrew Henderson*, Dckt. No. 95 3050 (September 6, 1996)." *Underwood*, at 3.

The facts in the current appeal are not distinguishable from the facts in *Shea*, which remains good law. We agree with Mr. Paliy's contention that the same analysis applies here. We conclude that Mr. Paliy did not voluntarily remove himself from the labor force within the meaning of

RCW 51.32.090(8). He was temporarily totally disabled from May 13, 2010, through August 27, 2010. Under *Shea*, he is not precluded from receiving time-loss compensation benefits for that period even though he may also have been unable to work due to his heart condition. The Department cannot avoid financial liability for Mr. Paliy's inability to work simply because a non-occupational condition also precludes him from working. The Department order seeking repayment of time-loss compensation benefits for the period of May 13, 2010, through August 27, 2010, is reversed.

FINDINGS OF FACT

1. On April 10, 2012, an industrial appeals judge certified that the parties agreed to include the Amended Jurisdictional History in the Board record solely for jurisdictional purposes.

2. As of January 27, 2010, Veniamin S. Paliy had conditions diagnosed as adhesive capsulitis and supraspinatus sprain in the right shoulder, as well as a right full thickness anterior distal supraspinatus tendon tear arising naturally and proximately out of the distinctive conditions of his employment with US Digital Corporation.

3. Mr. Paliy's last day of work at US Digital was October 8, 2009, after he suffered his third in a series of heart attacks beginning in 2006. On January 14, 2010, Mr. Paliy's wife and daughter communicated to US Digital that Mr. Paliy could not continue working due to his heart condition. Mr. Paliy's resignation from US Digital was effective January 31, 2010. Mr. Paliy's occupational disease was not a proximate cause of his retirement.

4. Mr. Paliy did not choose to decline further employment despite the presence of sufficient physical capacities to remain employed. He ceased employment on doctor's orders due to his heart condition.

5. Mr. Paliy did not seek employment after resigning from US Digital.

6. Mr. Paliy is a Russian immigrant in his mid-forties. He moved to the United States about 18 years ago and began working for US Digital in 1995, his first job in this country. In 1996 he was assigned to work on a press, assembling discs that go into optical encoders. This work involved thousands of repetitive motions a day using his hands and arms. He worked for US Digital for 14 years.

7. As of May 13, 2010, Mr. Paliy's treating physician restricted him from work as a result of his occupational disease. He was limited to one-handed sedentary employment from May 13, 2010, through August 27, 2010. There was no showing that such work was generally available in the labor market or that Mr. Paliy has the necessary skills and education to perform such work.

8. The Department paid time-loss compensation benefits from May 13, 2010, through August 27, 2010, on an interlocutory basis.

9. Mr. Paliy was unable to obtain or perform gainful employment on a reasonably continuous basis from May 13, 2010, through August 27, 2010, due to the residuals of the occupational disease and taking into account his age, education, and work history.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. From May 13, 2010, through August 27, 2010, Mr. Paliy was not "voluntarily retired" within the meaning of RCW 51.32.090(8).

3. From May 13, 2010, through August 27, 2010, RCW 51.32.090(8) did not bar Mr. Paliy from receiving time-loss compensation benefits.

4. Mr. Paliy was temporarily totally disabled from May 13, 2010, through August 27, 2010, within the meaning of RCW 51.32.090.

5. The Department is not entitled to recoupment of the time-loss compensation benefits paid from May 13, 2010, through August 27, 2010, under RCW 51.32.240(1)(b).

6. The February 8, 2012 Department order is incorrect and is reversed. The matter is remanded to the Department to determine that there was no overpayment of time-loss compensation benefits from May 13, 2010, through August 27, 2010.

DATED: May 24, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

Like the majority, I accept as true the recitation of the facts contained in the employer's response. The statutory language at issue here provides that time-loss compensation benefits shall not be paid "[I]f the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce. . . ." RCW 51.32.090(8). Like my colleagues, I believe RCW 51.32.090(8) requires two determinations—the worker must be both "voluntarily retired" and "no longer attached to the workforce." There is no question that Mr. Paliy was "no longer attached to the workforce" during the period for which the Department seeks repayment of time-loss compensation benefits. The question is whether he was "voluntarily retired."

According to the majority, Mr. Paliy did not retire voluntarily from US Digital because he was rendered unable to work by an unrelated heart condition. That determination does not comport with the Department's definition of "voluntarily retired" in WAC 296-14-100, which provides:

> (1) **What is voluntarily retired?** The worker is considered voluntarily retired if both of the following conditions are met:
>
> (a) The worker is not receiving income, salary or wages from any gainful employment; and
>
> (b) The worker has provided no evidence to show a bonafide attempt to return to work after retirement.
>
> . . .
>
> (2) **When is a worker determined not to be voluntarily retired?** A worker is not voluntarily retired when the industrial injury or occupational disease is a proximate cause for the retirement.

After he terminated his employment with US Digital in January 2010, Mr. Paliy was "not receiving income, salary or wages from any gainful employment" nor has he provided any "evidence to show a bonafide attempt to return to work after retirement." It is likewise clear that his occupational shoulder condition was not "a proximate cause for the retirement." Therefore, as the industrial appeals judge determined, Mr. Paliy was voluntarily retired within the meaning of WAC 296 14-100. The only way to avoid that result is to give no effect to the Department's rule.

As the legislative history reviewed by the majority demonstrates, when the Legislature amended RCW 51.32.090 it was well aware of the Department's position on voluntary retirement and that it was different from the Board's. The Legislature also knew that the Department intended to promulgate a rule defining "voluntarily retired." And, as the majority concedes, substantial weight is given to an agency's interpretation of the law it administers. *Granger v. Department of Labor &*

Indus., 159 Wn.2d 752, 764 (2007). While it is true that the courts will not defer to an agency interpretation if it conflicts with the statute, there is no conflict here. To the contrary, the rule is consistent with RCW 51.32.090(8) and the overriding purpose of time-loss compensation benefits, "to protect the worker from wage loss. *Farr*, 70 Wn. App. at 763; *Overdorff*, 57 Wn. App. at 296-97." *Mason v. Ga.-Pac. Corp.*, 166 Wn. App. 859, 867 (Div II 2012).

Because Mr. Paliy was already retired due to his unrelated heart condition, he suffered no economic impact due to his subsequent inability to work as a result of his occupational shoulder condition. Furthermore, his shoulder condition played no role in his retirement. This is precisely the situation that RCW 51.32.090(8) was intended to address—in the absence of any wage loss, there is nothing to compensate. The Department and the industrial appeals judge reached the correct result under WAC 296-14-100 and RCW 51.32.090(8). I would affirm the February 8, 2012 Department order.

Dated: May 24, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
JACK S. ENG Member