No. 45580-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D), Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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Attorney for Appellant, Aloys R. Wegleitner (Dec'd)/Janis K. Wegleitner

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I. ASSIGNMENT OF ERRORS

1. The Board of Industrial Insurance Appeals erred in its Decision and Order dated July 9, 2012, Findings of Fact 7, when it found that Mr. Wegleitner's July 19, 2004 industrial injury was not a proximate cause of disability that prevented him from performing or obtaining gainful employment on a reasonably continuous basis as of the time of his death in September 2005. CP 97.

2. The Board of Industrial Insurance Appeals erred in its Decision and Order dated July 9, 2012, Findings of Fact 8, when it found that Mr. Wegleitner did not file a timely Protest and Request for Reconsideration of the Department of Labor & Industries' June 3, 2005 order that closed his claim within 60 days of the date that order was communicated to him. CP 97.

3. The Board of Industrial Insurance Appeals erred in its Decision and Order dated July 9, 2012, Findings of Fact 9, when it found that Mrs. Wegleitner did not present objective evidence of worsening of Mr. Wegleitner's condition proximately caused by his industrial injury between June 3, 2005, and the date of his death on September 30, 2005. CP 97.

4. The Board of Industrial Insurance Appeals erred in its Decision and Order dated July 9, 2012, Conclusions of Law 2, when it found that Aloys

R. Wegleitner was not a permanently totally disabled worker within the meaning of RCW 51.08.160, at the time of death, due to conditions proximately caused by his July 19, 2004 industrial injury. CP 98.

5. The Board of Industrial Insurance Appeals erred in its Decision and Order dated July 9, 2012, Conclusions of Law 3, when it found that Mrs. Wegleitner failed to establish that Mr. Wegleitner's condition proximately caused by his industrial injury objectively worsened between June 3, 2005, and September 30, 2005, within the meaning of RCW 51.32.160. CP 98.

6. The Board of Industrial Insurance Appeals erred in its Decision and Order dated July 9, 2012, Conclusions of Law 4, when it found Mrs. Wegleitner failed to establish that she is entitled to survivor benefits as provided by RCW 51.32.050. CP 98.

7. The Board of Industrial Insurance Appeals erred in its Decision and Order dated July 9, 2012, Conclusions of Law 5, when it found that the Department of Labor and Industries order issued on December 9, 2008, is correct and is affirmed. CP 98.

8. The trial court erred in finding of fact 3, where it found the unprotested and unappealed June 3, 2005 order that closed Mr. Wegleitner's industrial injury claim is final and binding as to the parties in this action and has become the law of the case; and the substance of the June 3, 2005 closing order may not be subject to collateral attack by the surviving beneficiary;

and without there being a claim or an appeal of the June 3, 2005 closing order filed within the requisite 60-day appeal period there is not a basis for the beneficiary to proceed now; and that the Department of Labor and Industries is entitled to judgment as a matter of law. CP 926.

9. The trial court erred when it granted the Department's Summary Judgment motion and denied the Plaintiff i.e. Appellant Wegleitner's Summary Judgment Motion. CP 927.

II. STATEMENT OF ISSUES

1. Whether the deceased claimant's surviving spouse, Janis K. Wegleitner, is precluded from filing a beneficiary claim under the Industrial Insurance Act, solely based upon the non-appeal of her husband's closing order. (Assignment of Error 2, 6, 7, 8, and 9).

2. Whether the deceased claimant's surviving spouse, Janis K. Wegleitner, is entitled to widow's benefits under the Industrial Insurance Act (RCW 51) when a *prima facie* record goes unrebutted showing that her husband, the claimant, was a permanently and totally disabled worker under RCW 51.08.160 at the time of his death on September 30, 2005. (Assignment of Error 1, 3, 4, 5, 6, 7, 8, and 9).

3. Whether the deceased claimant's surviving spouse, Janis K. Wegleitner, needs to show that her husband's condition worsened to be entitled to

surviving spouse benefits under the Act. (Assignment of Error 1, 3, 4, 5, 7, 8, and 9).

4. Whether Summary Judgment against Wegleitner was proper for the reason that the trial court judge failed to apply the proper standard to construe the facts in a light most favorable to the non-moving responding party, i.e. Wegleitner. (Assignment of Error 8 and 9)

III. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Mr. Aloys R. Wegleitner (Dec'd) on August 27, 2004 filed an Application for Benefits for an industrial injury he sustained while in the course of his employment on July 19, 2004, with the Department of Labor and Industries of the State of Washington (Hereinafter "Department"). CP 20. This claim was allowed by an Order dated October 7, 2004, and given the claim number Y-982648. CP 20. This claim was closed on June 3, 2005. CP 21. A protest to this Order was dated and/or received per the Jurisdictional History on June 18, 2005 from the Claimant to any adverse orders issued within the last 60 days. CP 21.

Mrs. Wegleitner, on whose behalf this claim for surviving spousal benefits under Title 51 is being made, timely filed her claim for benefits within one year of the date of her husband's death as required under the statute. CP 23-5, 309-10. On April 12, 2006, the claim for benefits filed by

the worker's surviving spouse was denied because: the cause of death was not related to the injury or disease covered under this claim and the worker was not totally permanently disabled because of the condition(s) covered under this claim. CP 21. A Notice of Appeal dated June 5, 2006 was received to the April 12, 2006 Order. CP 21. A Board of Industrial Insurance Appeals (Hereinafter "Board") Order granting the appeal was dated June 21, 2006. CP 21.

An Agreement of Parties was entered on August 31, 2006 that based on the record and the agreement of the parties, the Board had jurisdiction to hear the appeals and the Department orders dated April 12, 2006 were reversed and the claims were remanded to the Department to take such actions as was appropriate under the law and facts. CP 54. The Department later brought a Motion to Vacate the Order on Agreement of Parties on September 12, 2006. CP 54. The Board denied the Department's Motion and issued an Order Denying Motion to Vacate Order on Agreement of Parties on December 5, 2006. CP 23-5, 73-4.

The beneficiary, Janis K. Wegleitner, filed a timely appeal with the Board on February 3, 2009, from an order of the Department dated December 9, 2008, which was an affirmance of the April 12, 2006 Order that denied Mrs. Wegleitner's claim. CP 29, 35-6, 37-44, 54. This appeal was granted by the Board. CP 45-6, 54.

The Department filed a Motion to Dismiss on September 18, 2009. CP 56-61. The Claimant filed a Reply to the Department's Motion to Dismiss on October 16, 2009. CP 62-76. The Department filed a Reply to the Claimant's Reply to its Motion to Dismiss on October 22, 2009. CP 77-9. After the hearing of evidence, the appeal was dismissed by Industrial Insurance Appeals Judge (Hereinafter "IAJ") Craig C. Stewart by way of a Proposed Decision and Order dated October 29, 2009. CP 29-34. A Petition for Review by Claimant was filed on December 9, 2009, and an Order Denying Petition for Review was issued by the Board on December 22, 2009 which adopted the IAJ's October 29, 2009 Proposed Decision and Order. CP 11-2, 13-28.

The Claimant filed an appeal to the superior court from the December 22, 2009 Order Denying Petition for Review. CP 80. That matter came before the court on February 4, 2011. CP 80-1. The superior court, per Judge Bryan Chushcoff, made the ruling by an Order dated April 22, 2011, that the ruling of the IAJ granting the defendant Department's CR 41(b)(3) motion was improper and was based on an incorrect reading of the law and the facts and the case was to be remanded for a hearing de novo. CP 80-1, 82-93.

After remand from the Superior Court, the de novo hearing was assigned to the same IAJ (Craig C. Stewart) and an Affidavit of Prejudice

was filed, denied, and a petition for a declaratory ruling was filed and the reassignment to another IAJ was eventually granted. CP 134-182. An Order Granting Affidavit of Prejudice was entered on July 12, 2011 by the Chief Industrial Appeals Judge Janet R. Whitney, and the case was reassigned to IAJ Greg J. Duras. CP 181-2.The Claimant filed a pre-hearing brief on August 8, 2011. CP 183-215. An Interlocutory Order Establishing Litigation Schedule was issued on August 15, 2011. CP 216-19. A letter dated October 18, 2011 was sent to the IAJ and the parties, requesting a pre-hearing conference in order to set the issues, as the Claimant received discovery materials from the Department that appeared to be raising issues that the Claimant felt were already resolved by the Superior Court and thus *res judicata* in the present case. CP 225.

A Proposed Decision and Order was issued by IAJ Greg J. Duras on April 19, 2012, which affirmed the Department Order of December 9, 2008. CP 124-133. The Claimant filed a Petition for Review on May 23, 2012, and the Board issued an Order Granting Petition for Review on June 8, 2012. CP 100-1, 102-120. The Board then issued a Decision and Order dated July 9, 2012. CP 96-9.

The second appeal from the Board came before the Superior Court under cause number 12-2-10734-9 for a hearing on June 7, 2013 on the parties' cross-motions for Summary Judgment. 902-3, 924. The

Plaintiff/Claimant Wegleitner filed a Motion for Summary Judgment pursuant to civil rule 56 on December 28, 2012. CP 573-651. The Department filed a Cross-Motion for Summary Judgment on March 21, 2013. CP 652-868. The Plaintiff filed a response to the Department's cross motion for Summary Judgment. CP 869-92. The Department then filed a Reply on June 3, 2013. CP 893-901. An Order dated October 25, 2013 signed by Superior Court Judge Jack Nevin ordered that the Department's motion was granted and the Plaintiff's motion was denied. CP 911-21, 924-32.

The October 25, 2013 Superior Court Order was appealed to the Court of Appeals, Division II, of the state of Washington and filed on November 12, 2013 by the Claimant. CP 922-24. A Designation of Clerk's Papers was filed on December 12, 2013. CP 936-38.

2. STATEMENT OF FACTS

a.) BOARD OF INDUSTRIAL INSURANCE APPEALS BEFORE SUPERIOR COURT REMAND

Mrs. Wegleitner, on whose behalf this claim for surviving spousal benefits under Title 51 is being made, timely filed her claim for benefits within one year of the date of her husband's death as required under the statute. CP 23-5. On April 12, 2006, the claim for benefits filed by the worker's surviving spouse was denied because: the cause of death was not

related to the injury or disease covered under this claim and the worker was not totally permanently disabled because of the condition(s) covered under this claim. CP 21. A Notice of Appeal dated June 5, 2006 was received to the April 12, 2006 Order. CP 21. A Board Order granting the appeal was dated June 21, 2006. CP 21.

An Agreement of Parties was entered on August 31, 2006 which stated that based on the record and the agreement of the parties, the Board had jurisdiction to hear the appeals. The Department orders dated April 12, 2006 were reversed and the claims were remanded to the Department to take such actions as was appropriate under the law and facts. CP 54. The Department then brought a Motion to Vacate Order on Agreement of Paries on September 12, 2006. CP 54. The Board denied the Department's Motion and issued an Order Denying Motion to Vacate Order on Agreement of Parties on December 5, 2006. CP 23-5, 73-4.

The beneficiary, Janis K. Wegleitner, filed an appeal with the Board of Industrial Insurance Appeals (Hereinafter "Board") on February 3, 2009, from an order of the Department dated December 9, 2008, which was an affirmance of the April 12, 2006 Order that denied Mrs. Wegleitner's claim. CP 29, 35-6, 37-44, 54. This appeal was granted by the Board. CP 45-6, 54.

As part of the record, and for informational purposes, on August 25, 2009, Janis K Wegleitner and H. Richard Johnson, M.D. initially testified at the first Board hearing in Tacoma, Washington, with IAJ Craig C. Stewart presiding. CP 281-351. Off the record, there was a discussion about the jurisdictional history concerning claim Y-982648. CP 283. After returning on the record, the IAJ stated that the parties agreed that he could go ahead and sign "this document" to show that the Board has jurisdiction over the present appeal. CP 283. Both parties orally agreed that this was correct. CP 283. The jurisdictional facts were then stipulated. CP 283.

The Department filed a Motion to Dismiss on September 18, 2009. CP 56-61. The Claimant filed a Reply to the Department's Motion to Dismiss on October 16, 2009. CP 62-76. The Department filed a Reply to the Claimant's Reply to its Motion to Dismiss on October 22, 2009. CP 77-9. After the hearing of evidence, the appeal was dismissed by Industrial Insurance Appeals Judge (Hereinafter "IAJ") Craig C. Stewart by way of a Proposed Decision and Order dated October 29, 2009. CP 29-34. A Petition for Review by Claimant was filed on December 9, 2009, and an Order Denying Petition for Review was issued by the Board on December 22, 2009 which adopted the IAJ's October 29, 2009 Proposed Decision and Order. CP 11-2, 13-28.

b.) PIERCE COUNTY SUPERIOR COURT REMAND FOR A DE NOVO HEARING AT THE BOARD OF INDUSTRIAL INSURANCE APPEALS.

On April 22, 2011, Judge Bryan Chushcoff sitting in the superior court of Washington in and for the county of pierce issued an order that remanded the case back to the Board of Industrial Insurance Appeals (Hereinafter "Board") for a de novo hearing. CP 80-1. Judge Chushcoff found that the ruling of the Industrial Appeals Judge's (Hereinafter "IAJ") granting the defendant's CR 41(b)(3) motion was improper and was based upon an incorrect reading of the law and the facts. CP 81. This was based upon the doctrine of judicial estoppel, an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. CP 82-92; 86.

c.) BOARD OF INDUSTRIAL INSURANCE APPEALS AFTER THE SUPERIOR COURT REMAND.

On the de novo hearing remand, IAJ Greg J. Duras issued a Proposed Decision and Order dated April 19, 2012. CP 124-32. The sole issue at the Board was, "Should the claimant's beneficiary's application for benefits be allowed?" CP 124. The claimant filed a pre-hearing brief on August 8, 2011. CP 183-215. An Interlocutory Order Establishing Litigation Schedule was issued on August 15, 2011. CP 216-19. A letter dated October 18, 2011 was sent to the IAJ and the parties, requesting a

pre-hearing conference in order to set the issues, as the claimant received discovery materials from the Department that appeared to be raising issues that the claimant felt were already resolved by the Superior Court and thus *res judicata* in the present case. CP 225.

At the de novo hearing following the superior court remand, Ms. Wegleitner again testified, as well as H. Richard Johnson, M.D. Additionally, Vocational Counselor Carl Gann was also called as part of Claimant's case-in-chief.

The evidence presented at the Board, upon remand was that Mrs. Janis K. Wegleitner was the surviving spouse of Mr. Aloys R. Wegleitner. CP 124, 354. Mr. Wegleitner was born on September 6, 1947 and on September 30, 2005, he passed away due to cancer. CP 124, 354, 355. He sustained an industrial accident on July 19, 2004, while working for Patrick Boring doing landscaping. CP 124. He filed a claim and it was allowed and benefits were paid under that claim. CP 124-25. The Wegleitner's were married in 1968 and they had two sons. CP 125, 356. Mr. Wegleitner attended school on through the eighth grade and worked on his family farm until he was drafted in the Army where he was a mechanic. CP 125. 357. He also held other jobs. CP 125. He started working for Patrick Boring in 1970 and stayed with that company for 34 years doing rockeries, lawns, sprinklers, mechanic work on loaders and

dump trucks, and other heavy work. CP 125, 359. Mr. Wegleitner worked full time, Monday through Friday, and he also worked on some weekends. CP 125, 362.

In 1988, Mr. Wegleitner, while in the course of his employment, was injured in an auto accident with a semi-truck and he hurt his mid and low back and was off work for two years. CP 125, 362. He eventually returned to work in 1990 and then worked an additional 14 years for Patrick Boring. CP 125, 363. Although Mrs. Wegleitner testified that they liked to go camping and fishing, she said that her husband had continuing problems after his workers' compensation auto accident and he would rest and ice his back in the evenings. CP 125, 365-66, 371.

The July 19, 2004 subsequent industrial injury occurred when Mr. Wegleinter was lifting a shrub or a tree and injured his back. CP 125, 372. Dr. Larson treated him and diagnostic studies, such as x-rays and a CAT scan, were taken. CP 125, 373. The doctor gave him some pain medication and he was taken off work in September 2004. CP 125, 373-74. He was also referred to a specialist and received steroid injections. CP 125, 374. Mrs. Wegleitner testified that after his industrial injury, Mr. Wegleitner's back problems were worse and he could not do chores or yard work and could only walk a few blocks. CP 125, 374-75. His pain medication did not help, and he spent much of his time sitting in a recliner and did not do

much physically. CP 125, 376. It affected their marriage and he stopped playing with his grandkids. CP 125, 376. In 2005 he saw a doctor who diagnosed him with lung cancer. CP 125, 377, 378, 380. When they got the diagnosis of cancer around May of 2005, Mrs. Wegleitner testified that she was "shocked." CP 382. Radiation and chemotherapy were prescribed. CP 125, 380. Mrs. Wegleitner testified that the radiation helped him a little and had a little less pain in one area, but as to his physical activity restrictions with respect to the back complaints, those did not improve with the cancer treatment. CP 382. She was able to visit with him pretty much until the late part of August/September of 2005. CP 383. Prior to his death, he spent 15 days in hospice. CP 384. Mrs. Wegleitner testified that by the time the cancer was discovered his physical abilities were greatly reduced and he died a few months later in September 2005. CP 125.

Additionally, Mrs. Wegleitner testified that her husband's time-loss checks from the Department of Labor and Industries did not stop on April 28, 2005. CP 393. She stated a man called the house sometime in June of 2005 and closed the back claim out, and said, "we'll claim it on the cancer instead of doing the back." CP 393. Mrs. Janis Wegleitner stated thereafter, "And I know nothing about how L & I works." CP 156-57, 393- 97.

Dr. H. Richard Johnson is an orthopedic surgeon who on remand from Superior Court re-reviewed Mr. Wegleitner's records. CP 126, 405-6. Mrs. Wegleitner also spoke with Dr. Johnson about how her husband was doing from the time that he was injured until he passed away. CP 388, 407, 416. Dr. Johnson noted that the August 2004 x-rays of the claimant's back showed curvature consistent with muscle spasms in his mid-back, and there were some bone spurs in the low back. CP 413-14. The August 2004 MRI showed a posterior disc protrusion at T5-6 that was large enough to indent the spinal cord, but there was no evidence of narrowing. CP 126, 413-14. There was also degenerative changes consistent with someone who had done heavy work for many years. CP 126, 415, 416. Dr. Johnson opined that the 2004 industrial injury caused a thoracic strain/sprain and a herniated disc that caused radicular symptoms. CP 419. Dr. Johnson noted that Mr. Wegleitner continued to work until September 2004 and in October 2004, he was still experiencing pain in his mid-back that radiated around to his chest. CP 419-20. In review of the records, Dr. Johnson noted that there was no evidence of cancer in Mr. Wegleitner's bones, but in November 2004 he stated that a "mottled" appearance was noted on radiological studies that prompted Mr. Wegleitner to seek a doctor specializing in cancer. CP 126, 423-24. The bone marrow aspiration study, and other medical records in 2004 did not reveal any

indication of cancer being present. CP 437-38. Dr. Johnson noted that the death certificate indicated lung cancer as the cause of death, but he said that there would have been residuals from the 2004 injury at the time of death including a herniated disc and related symptoms. CP 125, 438-39. Mr. Wegleitner continued to treat for his industrial injury in 2005. CP 439-40.

Dr. Johnson opined that Mr. Wegleitner's complaints following the industrial injury of July 19, 2004 of mid-back pain and the radiculopathy were related to the industrial injury. CP 426-27. Radiculopathy meaning the pain coming around his left side and associated numbness of his left side into the front of his chest, as well as into his armpit, were all consistent with a significant thoracic sprain-train injury with an accompanying herniated disc as seen on the MRI. CP 426-27. Dr. Johnson also opined that those symptoms caused permanent impairment that was not responding to aggressive management, was not amenable to surgical treatment and has resulted in permanent changes that affected his overall functional capacity. CP 450-51. Dr. Johnson also opined that Mr. Wegleitner was fixed and stable in January 2005, and Mr. Wegleitner was incapable of working full-time then due to those back conditions. CP 126, 452-53, 458-59. Dr. Johnson also opined that within the range of physical capabilities of Mr. Wegleitner, as related to his industrial injury, he met

the criteria for being able to work at a sedentary level, but that he could not sustain that on a regular continuous basis, meaning maximally he could do it part-time. CP 460.

Carl Gann is a rehabilitation/vocational counselor and life care planner who reviewed Mr. Wegleitner's case. CP 126, 480, 481. Mr. Gann has been doing vocational rehabilitation work in the state of Washington since May of 1983, and has many certifications. CP 481, 482. Mrs. Wegleitner spoke with Mr. Gann about her husband and his education and what he was able to do. CP 388, 487. Mr. Gann noted that Mr. Wegleitner was 56 years old at the time of his industrial injury, and he did not finish high school and did not have a GED. CP 126, 488-89, 494-95. He had a singular kind of work history with one long-term employer. CP 489. Mr. Gann said that following his injury, Mr. Wegleitner had physical capacities indicating he could work at only a sedentary level part-time, and his reading and writing skills were not good and he had no computer skills, and he did not even write checks or balance his checkbook and his wife did that for him. CP 126, 495, 496.

Mr. Gann testified that based upon Mr. Wegleitner's physical capacities and in review of his treatment records there was no one that released him to go back to work either at his job of injury in a landscaping capacity, or at his company for any other position, nor released for any

occupation or any work of any kind. CP 501. Mr. Gann opined that Mr. Wegleitner was not employable, with physical capacities that were less than sedentary and less than full time, nor was he seen as a viable vocational retraining candidate due to his 2004 injury at the time of early 2005, nor at the time of claim closure on June 3, 2005, nor at the time of his death on September 30, 2005. CP 126, 501, 502, 503-04.

The only medical witness called by the Department was Dr. Michael J. McDonough, who is a radiation oncologist who first saw Mr. Wegleitner on March 31, 2005, and he was treated with radiation from April 5, 2005 to April 28, 2005, and Dr. McDonough saw him twice during the treatment and two times afterward. CP 127, 531, 536. Dr. McDonough testified by deposition that diagnostic studies showed the presence of cancer in Mr. Wegleitner's back that was confirmed by a biopsy of the T6 vertebra. CP 127. Dr. McDonough opined that when he began treating Mr. Wegleitner, the cancer, which had started in his lungs, had metastasized into his thoracic spine and that there was tenderness in the mid-thoracic region to the touch and the left lateral ribs were also tender. CP 127. Dr. McDonough did not have any knowledge that anyone had advised Mr. Wegleitner or his widow that he had cancer into his spine prior to March of 2005. CP 547. Radiation was recommended to relieve the pain in Mr. Wegleitner's back and it helped. CP 127.

Robert Frost, a lay witness, testified by deposition on remand for the Department of Labor and Industries, of which he was employed as a workers' compensation adjudicator 4. CP 127, 558-59. He testified that he was familiar with Mr. Wegleitner's claim, which he said was closed by the Department order issued on June 3, 2005. CP 127, 560. He stated that the Department did not receive a protest or appeal of that order within 60 days. CP 127, 561. However, Mr. Frost testified that he did not personally enter the closing order of June 3, 2005, nor did he ever personally adjudicate Mr. Wegleitner's industrial insurance claim. CP 562-63. He mentioned that another claim was filed with the Department. CP 563-64. The Department in 2005 was still using Microfiche. CP 565. Mr. Frost did not know how a claim file is transmitted from the Department when an appeal is filed to the Board. CP 567.

IV. STANDARD OF REVIEW

Normally, review by the Court of Appeals in a workers' compensation case is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review of the decision by the Board of Industrial Insurance Appeals, and whether the superior court's conclusions of laws flow from the findings. *Hill v. Department of Labor & Indus*, 161 Wn. App. 286, 253

P.3d 430 (2011), *review denied,* 172 Wn.2d 1008, 259 P.3d 1108 (Table), (2011).

The first step in seeking review of the Department's decision is an appeal to the Board. RCW 51.52.060. Decisions of the Board may be appealed to superior court. RCW 51.52.110. In an appeal of the Board's decision, the superior court holds a de novo hearing but does not hear any evidence or testimony other than that included in the record filed by the Board. *Du Pont v. Department of Labor & Indus.*, 46 Wn. App. 471, 476, 730 P.2d 1345 (1986). The findings and decision of the Board are *prima facie* correct until the superior court, by a preponderance of the evidence, finds them incorrect. *Department of Labor & Indus. v. Moser*, 35 Wn. App. 204, 208, 665 P.2d 926 (1983).

In reviewing the superior court's decision, the role of the court of appeals "is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether the conclusions of law flow therefrom." *Du Pont*, 46 Wn. App at 476-77. Substantial evidence is evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987). The Court of Appeals reviews interpretation of the Industrial Insurance Act by the Board of

Industrial Insurance Appeals de novo under "error of law" standard and may substitute its judgment for that of the Board, although the court must accord substantial weight to the agency's interpretation. *Littlejohn Construction Company v. Department of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). When reviewing a workman's compensation case, the appellate court can evaluate the written record to test conclusions that have been drawn from the facts, explore for sufficiency of the probative evidence to support findings of fact and analyze findings when the evidence is undisputed, uncontradicted and unimpeached. *Gilbertson v. Department of Labor & Indus.*, 22 Wn. App. 813, 592 P.2d 665, (1979).

A claimant in workers' compensation cases need only establish probability of causal connection between the industrial injury and his disability; it is only when the claimant's medical witness leaves nothing of an objective nature in the record upon which a jury could reasonably rely to find the necessary causation between injury and disability that challenge to sufficiency of evidence should succeed. *Zipp v. Seattle School District No. 1*, 36 Wn. App. 598, 676 P.2d 538 (1984), *review denied*, 101 Wn.2d 1023 (1984).

The Court of Appeals' inquiry is the same as that of the Superior Court when a party appeals from a decision of the Board of Industrial

Insurance Appeals regarding workers' compensation claims and the Superior Court grants summary judgment affirming the Board's Decision, *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 117 P.3d 365 (2005), review granted, 156 Wn.2d 1024, 133 P.3d 473 (2006), affirmed 163 Wn.2d 133, 177 P.3d 692 (2008).

"[O]n appeal of a summary judgment order where no facts are in dispute and the only issue is a question of law, the standard of review is de novo." *Department of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993).

V. LEGAL AUTHORITY AND ARGUMENT

1. THE TRIAL COURT ERRED IN ENTERING SUMMARY JUDGMENT AGAINST APPELLANT WEGLEITNER BECAUSE THE APPELLANT MET HER BURDEN, AND THE JUDGE MISAPPLIED THE CASE LAW TO THE FACTS.

a.) INTRODUCTION

The Industrial Insurance Act of the State of Washington was enacted in 1911. The Industrial Insurance Act (Hereinafter "Act") essentially did away with the common law system governing the remedy of workers against employers for injuries received in the course of their employment, "finding that due to modern industrial conditions the remedies were economically unwise and unfair." RCW 51.04.010. The Act is a compromise between employers and their workers. *Dennis v. Department of Labor & Indus.*, 109

Wn.2d 467, 469, 745 P.2d 1295 (1987). In exchange for limited liability, the employer pays on some claims that have no common law liability. *Id.* at 469. And in exchange for a lower rate of recovery than he or she could have received in a civil action, the worker is assured of a remedy without having to fight for it. *Id.*

This case arises out of a workplace injury and thus the Act applies by and through RCW 51. The Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment. *Dennis,* 109 Wn.2d at 470, 745 P.2d 1295 (1987); see also RCW 51.12.010; see also *Montoya v. Greenway Aluminum Co.*, 10 Wn. App. 630, 634, 519 P.2d 22 (1974). In accordance with the Act, the Appellant herein, Janis K. Wegleitner, sought judicial review of the Board's decision of July 9, 2012, and the Summary Judgment Order of October 25, 2013 that granted the Department's Summary Judgment Motion.

The Industrial Insurance Act differs substantially from other administrative laws. The Act is the product of a compromise between employers and workers through which employers accepted limited liability for claims that might not have been compensable under the common law, and workers forfeited common law remedies in favor of sure and certain relief. RCW 51.04.010; *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 572-573,

141 P.3d 1 (2006). It is important to note that, "the Act was written to provide sure and certain relief to injured workers." *Dennis*, 109 Wn.2d at 470, 475 P.2d 1295 (1987). All doubts are to be resolved in favor of the injured worker. *Id.* at 470. It has been noted that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the entire statutory scheme that receives the benefits of liberal construction. Each statutory provision should be read in reference to the whole act. For instance, "We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions." *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff'd*, 144 Wn.2d 907, 32 P.3d 250 (2001).

In *Cockle v. Dept. of Labor & Indus.,*, 142 Wn.2d 801, 16 P.3d 583 (2001), the Court observed the "overarching objective" of Title 51 RCW is to reduce to a minimum "the *suffering* and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle,* 142 Wn.2d at 822, 16 P.3d 583 (quoting RCW 51.12.010) (Emphasis added). "Also, on a practical level, this Court has recognized that the workers' compensation system should continue "serv[ing] the goal of swift and certain relief for injured workers." *Cockle,* 142 Wn.2d at 822, 16 P.3d 583 (quoting *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 138, 814 P.2d 629 (1991)).

Additionally, "where reasonable minds can differ over what Title 51

provisions mean, in keeping with the legislation's fundamental purpose, the benefits of the doubt belongs to the injured worker." *Id.* at 811. *See Clauson v. Department of Labor and Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996); *see also McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

b.) THE COURT ERRED IN CONCLUDING THAT THE UNAPPEALED JUNE 3, 2005 CLOSING ORDER PRECLUDED MRS. WEGLEITNER FROM SEEKING SURVIVOR'S BENEFITS WHEN HER CLAIM WAS SEPARATE AND DISTINCT FROM THE INDUSTRIAL INJURY CLAIM OF MR. WEGLEITNER AND SHE WAS ONLY REQUIRED TO PROVE THAT MR. WEGLEITNER WAS TOTALLY AND PERMANENTLY DISABLE AT THE TIME OF HIS DEATH AND THAT THE INDUSTRIAL INJURY WAS "A" PROXIMATE CAUSE OF HIS TOTAL AND PERMANENT DISABILITY

The jurisdictional history of this claim for surviving spouse benefits by the claimant worker's spouse, Mrs. Janis Wegleitner, is extensive, as it has been before the Board several times, with a remand back to the Board by Pierce County Superior Court Judge Bryan Chushcoff in February of 2011 for a trial de novo, which occurred, and a subsequent appeal to the superior court which resulted in a summary judgment for the Department. For the purposes of this appeal, it is important to note a couple of facts. Mr. Wegleitner sustained an industrial injury to his low back in July of 2004, and allowed by the Department. His low back claim eventually closed, and his occupational claim was later

denied. Mr. Wegleitner passed away on September 30, 2005 in part because of non-related lung cancer. CP 103. Mrs. Wegleitner, on whose behalf this claim for surviving spousal benefits under Title 51 is being made, timely filed her claim for benefits within one year of the date of her husband's death as required under the statute. See RCW 51.32.040(2)(c). CP 23-5.

In order to prove she has rights to survivor's benefits Mrs. Wegleitner had to show that her husband was totally and permanently disabled at time of death and that the industrial injury was a proximate cause of his total and permanent disability; the Department does not have to previously determine that the injured worker was TPD prior to closing the time-loss claim. See *Department of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012) *review denied*, 177 Wn.2d 1006, 300 P.3d 415 (2013).

In *Shirley*, the widow made a claim for survivor's benefits after her husband died from simultaneously ingesting alcohol and prescriptions medications that were prescribed to treat the effects of an industrial injury for which he had made a claim and sought treatment for, and which was eventually closed with no award for permanent partial disability two years prior to his death. *Department of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012) *review denied*, 177 Wn.2d 1006, 300 P.3d 415

(2013). In the case, the court dealt with the issue of whether the tests developed in *McDougle v. Department of Labor and Industries* and *Scott Paper Co. v. Department of Labor and Industries*, that were used for determining if a claimant's behavior breaks the causal chain between the injury and the claimed condition when the claimant applies to reopen a claim based on aggravation, should be applied to death claims "where it is asserted that an injury or death following an original compensable industrial injury is compensable as a residual of the original injury." *Id.* at 883, see also *McDougle v. Department of Labor & Indus.*, 64 Wn.2d 640, 393 P.2d 631 (1964), *Scott Paper Co. v. Department of Labor & Indus.*, 73 Wn.2d 840, 440 P.2d 818 (1968).

The circumstances in Shirley are similar to the case at hand. The decedent's claim was closed with no Department-established disability and the surviving spouse was not seeking to reopen the claim and was not asserting an aggravation of the original injury; rather, her claim was for survivor's benefits. The court stated:

> Had the legislature intended to preclude benefits in circumstances like these, it could have done so—as it has in other circumstances. *See, e.g.,* RCW 51.32.020 (precluding benefits to a worker or his beneficiaries "[i]f injury or death results to a worker from the deliberate intention of the worker himself or herself to produce such injury or death...."); *see also Harris v. Dep't of Labor & Indus.,* 120 Wash.2d 461, 472–73, 843 P.2d 1056 (1993) (declining to read into the Act that which is absent)"

Shirley at 883-84. The courts application of *res judicata* in this case leads to an unjust result because it prevents Mrs. Wegleitner from proving the essential elements of her claim, which is separate and distinct to that of her husband's industrial injury claim. See *Curry v. Department of Labor & Indus.*, 49 Wn.2d 93, 298 P.2d 485 (1956) (holding that wife cannot be deemed party in interest to any proceeding instituted by her husband during his lifetime to enforce any claim for workmen's compensation; her rights as widow accrue when her husband dies). Mrs. Wegleitner *is not* trying to reopen her husband's industrial injury claim; rather, she is trying to establish her own claim for survivor's benefits by showing that he was totally and permanently disabled ("TPD") at the time of death due to residuals of his expected industrial claim.

The surviving spouse of a deceased worker is entitled to a monthly pension benefit if the worker was permanently and totally disabled at the time of death. See *Department of Labor & Indus. v. Freeman*, 87 Wn. App. 90, 940 P.2d 304 (1997). A surviving spouse's claim to receive benefits is a separate right and is not bound by the action or inaction of the claimant. The surviving spouse need only show that the claimant was totally and permanently disabled as of the time of his death, and that the industrial injury was "a" proximate cause of his total and permanent disability, not the sole cause of it. *Id.* At 94. It is long established law that

even though a worker may have other contributing causes (e.g. cancer) to his/her disability, if it is shown that the accepted injury is "a" contributing cause to total disability, the worker is entitled to benefits under the Act. See *Shea v. Department of Labor & Indus.*, 12 Wn. App. 410, 529 P.2d 1131 (1974). Additionally, Title 51 provides a remedy for a widow's pension if an injured worker is totally and permanently disabled at the time of death, regardless of the cause of death. RCW 51.32.050(6); RCW 51.32.040(2)(c); see also *Freeman*, 87 Wn. App. at 94. Under RCW 51.32.050(6), the cause of death is immaterial inasmuch as the claim for benefits is not predicated upon the death itself, but upon the decedent's industrial status at the time of death, to wit: his status of permanent total disability. Therefore, Mrs. Wegleitner seeks the death benefits allowed under RCW 51.32.050 as a result of her husband's total and permanent disability as defined by RCW 51.08.160.

For example, in *McFarland*, a widow's right accrued on date of death, as a new and original right independent of a workers' compensation claim, under former subsection 6, where she established that the decedent was in fact under permanent total disability as a proximate result of his industrial injury, during the period immediately prior to his death, and thus, she was not bound by previous order of the Department before the decedent's death fixing his status as permanent partial disability.

McFarland v. Department of Labor & Indus., 188 Wash. 357, 62 P.2d 714 (1936). The right of a surviving spouse is a new, original right, independent of the rights of the worker under any claim the injured worker might have had, and the surviving spouse's rights are not affected in any way by the failure of the injured worker to exercise his or her own rights. *Beels v. Department of Labor & Indus.*, 178 Wash. 301, 34 P.2d 917 (1934). Therefore, the trial court erred when it based its decision on the fact that the June 3, 2005 order was not protested or appealed, because this did not preclude the surviving spouse from filing a claim within the one year time limit after his death.

In *Beels*, the injured worker was a deputy sheriff who sustained an injury in December of 1931, but never filed a claim for benefits with the Department. *Id.* He passed away on January 14, 1933, and his spouse filed an application for compensation on February 27, 1933, which was well beyond the one-year time limit the injured worker had to file for benefits. *Id.* She filed the application for compensation on the claim normally reserved for filing for benefits, but did not file a formal application for a pension. *Id.* The Court held that, under the circumstances, her application was sufficient as a claim for a widow's pension. The Court also held that during her husband's life she could not be:

> "[A] party in interest to any proceeding by him for enforcement of any claim for compensation. Her rights accrued the instant her husband died. Her application for compensation was filed within one year after the day upon which her rights accrued, hence the claim was timely filed. Her husband's failure to make application for compensation within one year after the day upon which the injury occurred did not beneficially or detrimentally affect her claim, which was based on a new, original right arising from his death."

Beels, 178 Wash. at 919. In *McFarland v. Department of Labor & Industries*, the Court upheld the reasoning of the *Beels* Court in the case of a spouse seeking a pension after the injured worker, who sustained a leg fracture on April 2, 1930, appealed after his claim was closed with twenty percent permanent partial disability. *McFarland*, 188 Wash. 357, 62 P.2d 714 (1936). At first he appealed and the Board reversed, granting additional time loss but no additional PPD, after which the claim was closed again. *Id.* The injured worker appealed, the closing was upheld at the Board, and, at the Superior Court, the worker was granted additional PPD on July 24, 1933. *Id.* The worker did not appeal the judgment and did not make any further claims. On February 22, 1934, he committed suicide by hanging. *Id.* His wife filed an application for benefits, which was denied on the ground that his death was not the result of his injury or of trauma. *Id.* The Court held that, utilizing the *Beels* reasoning,

> "if the fact that the injured workman never made any claim whatever for compensation does not prejudice the right of the widow to apply for a pension, there must be equal, if not stronger,

> reason for holding that the failure of the injured workman to apply for an increase of compensation upon a claim originally allowed in part, does not bar the widow's right to apply for a pension upon the death of the workman, provided that her application be made within one year from the time that her right accrued."

Id. at 366-67. The Court stated that as long as the claim was a valid one, the worker's failure to establish his total and permanent disability in his lifetime would not detrimentally affect his spouse. *Id.* Here, it was error for the Superior Court to grant the Department's Summary Judgment on the basis that Mr. Wegleitner did not protest the closing order and precluded Mrs. Wegleitner's beneficiary claim.

Therefore, Mrs. Wegleitner had a proper and timely filed claim and she only needed to show that the her husband was totally and permanently disabled as of the time of his death, and that the industrial injury was "a" proximate cause of his total and permanent disability, not the "sole" cause of it. Mrs. Wegleitner timely filed a beneficiary's claim for benefits within a year of her husband's passing, which was denied by the Department on April 12, 2006 on the basis that her husband's cause of death was not related to the injury or disease allowed under his claim and that the claimant was not totally, permanently disabled because of the conditions under the claim. However, under RCW 51.32.050(6) and relevant case law, Mrs. Wegleitner does not have to show that her husband's injury was the cause of his death – she only needs to demonstrate that he was totally

and permanently disabled at the time of his death on September 30, 2005 under RCW 51.08.160. Mrs. Wegleitner met her burden and, thus, should be entitled to surviving spousal benefits.

Plaintiff's medical expert, Dr. H. Richard Johnson testified to that effect from a medical standpoint, and Carl Gann provided vocational testimony, as the Court found preferable in *Fochtman v. Department of Labor and Industries*, 7 Wn.App. 286, 294, 499 P.2d 255 (1972).

> "[W]e find that testimony of a vocational consultant or employment expert who would consider medical evidence of loss of function and physical impairment, his own findings obtained in testing the injured workman, facts relative to the labor market, and his conclusion as to whether the injured workman was so handicapped as a result of the injury that he could not be employed regularly in any recognized branch of the labor market, is desirable, relevant and admissible to establish total disability."

Fochtman v. Department of Labor & Indus., 7 Wn. App. at 295-96. The spouse's burden, as it was acknowledged by the Department in Superior Court, was to show by medical, lay and vocational testimony that the injured worker was a totally and permanently disabled worker at the time of his death, and that the industrial injury was a proximate cause of his total and permanent disability. The testimony of the claimant's surviving spouse, coupled with the expert medical testimony of Dr. Johnson and the vocational testimony of Carl Gann, made a *prima facie* case on the claimant's behalf. The Department did not provide any medical expert

who testified regarding the claimant's industrial injury and TPD as of the time of his death and the relationship to his industrial injury, nor did it provide any vocational testimony on this issue.

It is Mrs. Wegleitner's position that she presented a *prima facie* case that went unrebutted and, thus, should be entitled to a beneficiary pension, but this issue was not decided on appeal at the Superior Court as the court entered Summary Judgment for the Department on incorrect legal grounds of the failure to protest or appeal the June 3, 2005 closing order of Mr. Aloys Wegleitner. At the very least, this court should reverse and remand this case to a trial on the merits at the court below. However, it is Mrs. Wegleitner's contention that the Court, with the evidence before it, is able to find that Mrs. Wegleitner is not precluded from filing or obtaining her beneficiary benefits, and she respectfully requests that this Court also find that she presented a prima facie case that went unrebutted and award her beneficiary benefits in which she is entitled.

c.) THE APPELLANT DID NOT NEED TO SHOW EVIDENCE OF "WORSENING" OF HER HUSBAND'S MEDICAL CONDITION AND ONLY NEEDS TO SHOW THAT HE WAS TOTALLY AND PERMANENTLY DISABLED AT THE TIME OF DEATH; AND EVEN IF SHE NEEDED TO PRESENT WORSENING, SHE DID SO BECAUSE OF THE LEGAL EFFECT OF THE JUNE 3, 2005 ORDER CLOSING CLAIM WITHOUT PPD AND THE SUBSEQUENT *PRIMA FACIE* CASE SHOWING THAT HE WAS TOTAL PERMANET DISABILITY AT THE TIME OF DEATH IS PER SE WORSENING.

The Board was also incorrect in deciding that Mrs. Wegleitner must show objective worsening of Mr. Wegleitner's condition to prove that he was totally and permanently disabled at the time of death in order to establish that she was entitled to survivor's benefits under Title 51. The Department's argument, which was adopted by the Board order of April 19, 2012, was that, because the June 3, 2005 order became final, Mrs. Wegleitner must show objective evidence of worsening caused by the industrial injury between June 3, 2005 and the date of Mr. Wegleitner's death on September 30, 2005. As aforementioned, this is not the correct legal standard.

Assuming *arguendo*, if the claimant need to also show worsening, on top of already showing that he was total and permanently disabled at the time of his death, then the claimant has already presented evidence sufficient to meet this burden, and the Department failed to rebut it. The Department closed the claim on June 3, 2005, legally finding that Mr. Wegleitner did not have a permanent partial disability, therefore, the objective medical evidence presented, with no rebuttal evidence to the contrary, established that Mr. Wegleitner was totally and permanently disabled at the time of his death. This is legal *per se* worsening.

Claim closure with an award for permanent partial disability (PPD) means there is a *res judicata* determination that there is no ratable PPD

resulting from the particular injury at issue. The rule of the *White* case, is that where there has been no appeal taken from a Department order closing a claim it becomes *res judicata* as to the extent of the injury at the time of the closing order, but not *res judicata* as to subsequent aggravation. See *White v. Department of Labor & Indus.*, 48 Wn.2d 413 (1956). Thus, assuming *arguendo*, that he was not totally and permanently disabled at claim closure, Mrs. Wegleitner only needs to show that he was totally and permanently disabled at death, as this would show worsening of his industrial related condition that now caused him to be disabled. While Mrs. Wegleitner is in the belief that she put on a *prima facie* case that went unrebutted, the Superior Court decided this case on other grounds – that Mrs. Wegleitner was precluded in her claim because the June 3, 2005 closing order on her husband's claim went unprotested and unappealed. This is the incorrect legal standard, as the eligibility of an individual for benefits under the workmen's compensation act is determined as of the time of a workman's death. See *Eyle v. Department v. Labor and Indus.*, 10 Wn. App 449, 519 P.2d 1020 (1974).

d.) THE COURT ERRED IN CONCLUDING THAT THE DOCTRINE OF *RES JUDICATA* PROHIBITED MRS. WEGLEITNER FROM CHALLENGING THE JUNE 3, 2005 CLOSING ORDER WHEN IT IS WITHIN THE COURTS ABILITY TO EXERICE ITS EQUITY POWER.

The courts have the ability to exercise their equity power to relieve a party from the effects of *res judicata* in workers' compensation cases. *Department of Labor & Indus. v. Fields Corp.,* 112 Wn. App. 450, 45 P.3d 1121 (2002). The Department argued below in its brief that Mrs. Wegleitner is precluded from any equitable relief because she could not prove that, in accordance with *Kingery v. Department of Labor & Industries,* she lacked competency to understand the order and that there was not misconduct by the department in communication of the order to the claimant. See CP 248; *Kingery v. Department of Labor & Indus.,* 132 Wn.2d 162, 937 P.2d 565 (1997). However, while the courts have exercised equitable relief in limited circumstances, the principle has been applied beyond circumstances in which the claimant was incompetent or illiterate. *Fields Corp.,* 112 Wn. App at 459. Equitable relief has also been used to permit waiver of an untimely filing when the claimant was in shock and unable to comprehend the claims process, *Rabey v. Department of Labor & Industries of the state of Washington,* and where there is some circumstance that presents a barrier to filing a timely appeal. *Fields Corp.,* 112 Wn. App. at 460; see also *Rabey v. Department of Labor & Indus.,* 101 Wn. App. 390, 3 P.3d 217 (2000). In both cases the court determined that the claimant is entitled to equitable relief when (1) the circumstances excused the failure to appeal before the time for appeal expired; and (2)

the claimant diligently pursued his or her rights after the time for appeal expired. *Fields Corp.,* 112 Wn. App. at 459-60; *Rabey.* 101 Wn. App. at 398.

Here, applying the criteria in *Fields* and *Rabey* demonstrates that Mrs. Wegleitner was entitled to equitable relief for at least two reasons. First, Mrs. Wegleitner has shown that the circumstances prevented her from filing an appeal to the June 3, 2005 order closing Mr. Wegleitner's first claim. Second, Mrs. Wegleitner has shown that she diligently pursued her rights by filing a timely claim for survivor's benefits. CP 197.

Assuming *arguendo,* that *res judicata* prevented the beneficiary herein from challenging the June 3, 2005 closing order, she was entitled to equitable relief from its effects when the record showed that circumstances presented a barrier to filing a timely appeal and Mrs. Wegleitner diligently pursued her claim for survivor's benefits.

Equitable relief from the effects of *res judicata* is appropriate when it is necessary to avoid the harsh and unjust consequences not resulting from the plaintiff's failure to diligently pursue her claim, to wit: Janis K. Wegleitner. *See Rabey v. Dep't of Labor & Indus.,* 101 Wn. App. 390, 3 P.3d 217 (2000). In *Rabey*, the widow failed to file a timely application with the Department for survivor benefits and the court held that equitable relief was appropriate when the circumstances showed that the widow was

"shocked and disoriented" by her husband's death, communication with the Department fell through due to no fault of her own, and she diligently pursued her claim after the time for filing expired. *Id.* at 397-98. The court concluded that "to penalize [Mrs. Rabey] for failing to do more under these circumstances would promote" a harsh and unjust result. *Id.* at 398. In reaching its conclusion, the court found that, although it was not a case concerning the Department, *Cook v. State* was instructive on the appropriate application of equitable remedy. *Id.*, see also *Cook v. State,* 83 Wn.2d 599, 604, 521 P.2d 725 (1974). In *Cook*, the Supreme Court held that it would be "manifestly unjust and fundamentally unfair" to penalize the plaintiff for failing to file a timely claim when she was severely injured and hospitalized and it would be just as unconscionable to expect her grief-stricken and worried mother to proceed with filing a claim as her daughter's representative. *Id.*

Based on the rationale in *Rabey*, it would be "harsh and unjust" to penalize Mrs. Wegleitner for her husband's failure to file a timely appeal. First, Mrs. Wegleitner testified that she was in shock after learning of her husband's diagnosis of stage IV lung cancer and Mr. Wegleitner was experiencing debilitating pain, which rendered him sedentary and unable to do anything, including activities he participated in prior to his work injury. CP 304, 375-76, 382-83, 389. Additionally, Mr. Wegleitner was

prescribed heavy pain medications that did not help to improve his condition and Mrs. Wegleitner reported that her husband spent a lot of time in and out of the hospital during July and August of 2005 until he was eventually hospitalized prior to his death in September 2005. CP 331, 375, 381, 383-84.

Similarly, the court in *Fields* affirmed the trial courts grant of equitable relief to the employer who failed to file a timely appeal to an order opening the claimant's second claim when it was impossible for the employer to know an appeal was necessary. *Fields Corp.*, 112 Wn. App. at 460. Since information that indicated the first and second claims were for the same condition did not become apparent until after the 60-day time period for appeal expired, the court concluded that it was impossible for the employer to know the necessary facts to file a timely appeal and "as soon as it knew or could have known" the facts the employer diligently pursued its rights. *Id.*

Like *Fields*, the Wegleitner's could not have known that it was necessary to file an appeal on the first claim when a second claim had been opened, Mr. Wegleitner continued to receive time-loss benefits, and the Department did not reach a determination as to the second claim until days before Mr. Wegleitner's death.

Mr. Wegleitner injured his low back as a result of his employment as a landscaper on July 19, 2004. CP 103. The claim was allowed and assigned the claim number Y-982648. CP 103. Time-loss benefits were paid under the low back claim, but the claim was eventually closed on June 3, 2005 with no permanent partial disability (PPD) and time-loss benefits ending April 28, 2005. CP 103. Mr. Wegleitner was still disabled as a result of his low back injury, however, he was advised by the Department to file an occupational disease claim for lung disease related to his work, in which his time-loss would continue, but under a different claim. CP 103. Therefore, Mr. Wegleitner filed another claim on May 25, 2005, with the date of onset of April 4, 2005, and assigned a claim number AA-88171. CP 103. The Department began paying provisional time-loss benefits under the occupation disease claim beginning April 29, 2005, the day after his time-loss benefits were terminated under the low back claim. CP 103. These time-loss benefits continued until the occupational disease claim was terminated on September 22, 2005. CP 103.

There was much confusion as to when her husband's time-loss compensation stopped under his low back claim, as he continued to receive time-loss under his lung claim and was advised by a Department adjudicator. CP 393. Mrs. Wegleitner testified that her husband's time-loss checks from the Department of Labor and Industries did not stop on April

28, 2005. CP 393. She stated a man called the house sometime in June of 2005 and closed the back claim out, and said, "we'll claim it on the cancer instead of doing the back." CP 393. Mrs. Wegleitner stated thereafter, "And I know nothing about how L & I works." CP 393-97. Mrs. Wegleitner did not understand the significance of this change and had no reason to question it when her husband's time-loss compensation continued without any delay and thus detrimentally relied upon the aforementioned facts.

Additionally, similar to *Fields*, it was impossible for Mrs. Wegleitner to appeal the order closing her husband's claim. The Supreme Court has held that the injured worker's time-loss award and a subsequent survivor's benefits award after the worker's death are separate and distinct claims. *Miller v. Department of Labor & Indus.*, 1 Wn.2d 478, 480, 96 P.2d 579 (1939). Thus, Mrs. Wegleitner could not have appealed the order closing Mr. Wegleitner's back injury claim because her rights did not accrue until after her husband's death. Additionally, like the circumstances in *Fields*, it was impossible to know that it was necessary to file an appeal on the first claim when a second claim had been opened, Mr. Wegleitner continued to receive time-loss benefits, and the Department did not reach a determination as to the second claim until days before Mr. Wegleitner's death. CP 156-57.

In contrast, the courts have determined that equitable relief is not appropriate when the beneficiary fails to diligently pursue her claim. *See Kingery,* 132 Wn.2d at 176. In *Kingery*, the court determined that the beneficiary was not entitled to equitable relief when she failed to appeal an order closing her claim and did not diligently pursue her claim during the eight years it took her to apply for reconsideration. *Id.* at 176. The Court interpreted *Ames* and *Rodriguez* as limiting equitable relief to situations where the claimant lacked the competency to understand orders, procedures, and time limits and there was Department misconduct. *Kingery,* at 174; *Rodriguez v. Department of Labor & Indus.,* 85 Wn.2d 949, 540 P.2d 1359 (1975); *Ames v. Department of Labor & Indus.,* 176 Wash. 509, 30 P.2d 239 (1934). However, the Court was unable to reach agreement on the full rationale for its decision, thus, "the holding of the court is the position taken by those concurring on the narrowest grounds." *Pearson v. State Dep't of Labor & Indus.,* 164 Wn. App. 426, 437, 262 P.3d 837 (2011) (quoting *W.R. Grace & Co. v. Dep't of Revenue,* 137 Wn.2d 580, 593, 973 P.2d 1011 (1999)). The three opinions of the court show that at least five of the participating justices concluded that the claimant was not entitled to equitable relief when she was not diligent in pursuing her rights, *Kingery* at 176–78, and all the justices agreed that the

court could exercise its equitable power to provide relief in appropriate cases. *Id.* at 173, 178.

First, unlike the claimant in *Kingery*, Mrs. Wegleitner did not fail to timely file an appeal on her *own* claim; rather the right to appeal the time-loss claim was that her of her husband. Second, the record establishes that Mrs. Wegleitner diligently pursued her claim by filing a timely application for survivor benefits within the time limit as provided by law. CP 197. Third, the record does reveal that the Wegleitners were misled, whether by Department misconduct or not, as to the significance of the interplay between the two claims that Mr. Wegleitner filed with the Department as time loss compensation seamlessly transferred from one claim to another. CP 393- 97. Therefore, although the court in *Kingery* did not agree on the scope of cases where equitable relief is appropriate, the decisions in *Rabey* and *Fields* demonstrates that *res judicata* did not prohibit Mrs. Wegleitner from challenging the June 3, 2005 closing order because equitable relief was appropriate as the failure to timely appeal was caused by circumstances beyond her control and she did not exhibit a lack of diligence in pursuing her claim for survivor's benefits.

2. WEGLEITNER'S ATTORNEYS SHOULD BE ENTITLED TO AN AWARD OF FEES FOR WORK DONE AT SUPERIOR COURT AS WELL AS WORK DONE AT THE COURT OF APPEALS.

Rule 18.1 of the Rules of Appellate Procedure provides that if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review, the party must request the fees or expenses provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1

RCW 51.52.130 provides that in worker's compensation cases, if the worker appeals from a decision and order of the Board and the order is reversed or modified and additional relief is granted to the worker, the worker is entitled to attorney's fees for the work done before that court.

Aloys & Janis Wegleitner's attorneys therefore request that this Court overturn the decision of the Superior Court which affirmed the decision of the Board, and that they be awarded reasonable fees for the work done on this appeal before the Court.

VI. CONCLUSION

For the reasons stated above, Mrs. Wegleitner respectfully requests that the Court reverse the trial court's October 25, 2013 order and rule that Mrs. Wegleitner timely and properly filed her beneficiary claim, that she made a *prima facie* case that Mr. Wegleitner, her husband, was totally and permanently disabled at the time of his death, and that Mrs. Wegleitner is entitled to beneficiary benefits and to reverse and remand for the

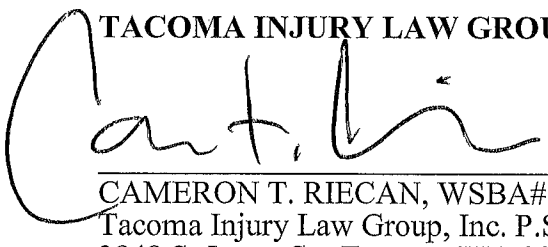
Department of Labor and Industries to take all proper and necessary actions consistent with the Court's findings and conclusions..

In the alternative, Mrs. Wegleitner respectfully requests that the court find that the trial court erred and because Mrs. Wegleitner properly and timely filed her beneficiary claim, that this case should be reversed and remanded to the trial court to hear her case on the merits, consistent with the Court's findings and conclusions.

Mrs. Wegleitner also respectfully asks this Court to grant her an award for attorney's fees for the work done before this Court under the provisions of RAP 18.1 and RCW 51.52.130.

Respectfully submitted this 11th day of April, 2014.

TACOMA INJURY LAW GROUP, INC., P.S.



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Case Name: Aolys R. Wegleitner (Dec'd) vs. Department of Labor and Industries
Court of Appeals Case Number: 45580-3

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellants'__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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Petition for Review (PRV)

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No. 45580-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D), Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

AFFIDAVIT OF SERVICE

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Attorney for Appellant, Aloys R. Wegleitner (Dec'd)/Janis K. Wegleitner

STATE OF WASHINGTON)
) ss.
COUNTY OF PIERCE)

DOUGLAS W. LOPEZ, being first duly sworn on oath, deposes and says: That he is a Paralegal employed by TACOMA INJURY LAW GROUP, INC., P.S., Attorneys for Appellant/Plaintiff in the above-entitled matter, and that on the 14th day of April, 2014, he caused to be served, by E-File, Email, Legal Messenger, Certified Mail, or First Class Mail, as indicated, Brief of Appellant to the following:

Paul M. Crisalli, AAG
Office of the Attorney General (via Regular U.S. Mail)
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

DATED this 14th day of April, 2014.

Douglas W. Lopez Paralegal of Tacoma
Injury Law Group, Inc., P.S.

SUBSCRIBED AND SWORN to before me this 14th day of April, 2014.

SARA M. WOOD COMMISSION EXPIRES NOTARY PUBLIC 07-30-15 STATE OF WASHINGTON

NOTARY PUBLIC in and for the State of Washington, residing at Tacoma, WA. My Commission expires 7/30/15.

TACOMA INJURY LAW GROUP INC PS

April 14, 2014 - 12:44 PM

Transmittal Letter

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