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NO. 72335-9-I

**COURT OF APPEALS, DIVISION I**
**OF THE STATE OF WASHINGTON**

JOHN R. GIBBONS, DEC'D,

Appellant,

v.

THE BOEING COMPANY AND DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

# BRIEF OF RESPONDENT DEPARTMENT OF LABOR AND INDUSTRIES

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## I. INTRODUCTION

Vivian Gibbons is not entitled to death benefits under the Industrial Insurance Act. Because she failed to appeal a June 26, 2008 order that denied her benefits, it is res judicata that she is not entitled to death benefits. Further, neither of the two situations in which a surviving spouse may receive death benefits under the Act is present here.

Under the first situation, a surviving spouse receives death benefits if the worker dies during a period of permanent total disability. RCW 51.32.067(1). A jury found that John Gibbons was partially disabled, not totally disabled, after his death in 2005. Because Ms. Gibbons did not appeal this decision, it is final and binding and precludes death benefits under RCW 51.32.067(1). Additionally, her husband's decision to voluntarily retire from Boeing is an independent basis precluding death benefits under this statute.

Under the second situation, a surviving spouse receives death benefits if death results from the injury. RCW 51.32.050(2). Here, Gibbons twisted his back at work but died from metastatic lung cancer 17 years later. His tobacco use contributed to his death. It strains credulity to suggest, as Ms. Gibbons does, that there remains an issue of material fact as to whether her husband's back injury caused his lung cancer. Thus, death benefits are not available to her under RCW 51.32.050(2).

The superior court correctly granted summary judgment against Ms. Gibbons. This Court should affirm.

## II. ISSUES

1. Does the fact that Ms. Gibbons failed to protest or appeal the June 26, 2008 order that unambiguously stated that her application for widow's benefits was denied preclude her from arguing in this appeal on res judicata grounds that she is entitled to those benefits?

2. Did the trial court correctly decide that Ms. Gibbons is not entitled to death benefits under RCW 51.32.067(1), when that statute allows a surviving spouse to receive benefits only if the worker dies during a period of permanent total disability and when a final superior court decision established that Mr. Gibbons only had permanent partial (and not total) disabilities after death?

3. Did the trial court correctly decide that Ms. Gibbons is not entitled to death benefits under RCW 51.32.067(1), when a worker cannot receive benefits for permanent total disability if the worker has voluntarily retired, when a final Court of Appeals decision in 2001 established that Mr. Gibbons had voluntarily retired, and when Ms. Gibbons presented no evidence on summary judgment that her husband made a bona fide attempt to resume employment at any time between 2001 and his death in 2005?

4. Did the trial court correctly decide that Ms. Gibbons is not entitled to death benefits under RCW 51.32.050(2), when that statute permits death benefits only where the worker's death results from the injury and when the only evidence in the record is that Mr. Gibbons died from metastatic lung cancer?

## III. STATEMENT OF FACTS

### A. John Gibbons Injured His Back at Work in 1988, Retired From Boeing in 1993, and Died From Lung Cancer in 2005

In 1988, John Gibbons worked as a carpenter at Boeing. BR 106, 117.[1,2] He injured his back at work when he twisted it while getting out of a pick-up truck. BR 117, 269. The Department allowed his worker's compensation claim. BR 118. In September 1993, he retired from Boeing at age 62. BR 106. In 1994, the Department closed his claim with a permanent partial disability award for a category 3 low back impairment. BR 106, 119-20, 270; *see also* WAC 296-20-280(3).

In 1995, the Department re-opened Mr. Gibbons's claim. BR 106, 121. After re-opening, the Department issued an order denying time-loss compensation benefits to Mr. Gibbons because he had voluntarily retired and was no longer attached to the workforce. *See* BR 106. Mr. Gibbons appealed this determination to this Court, which concluded in an unpublished opinion in 2001 that he had voluntarily retired and was not eligible for time-loss compensation. BR 106, 108. This Court noted that

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[1] This brief cites the certified appeal board record as "BR" followed by the page number. It cites the transcript from the December 14, 2012 summary judgment hearing as "Tr."

[2] The facts section of this brief cites this Court's unpublished opinion in *Gibbons v. Boeing Co.*, noted at 107 Wn. App. 1029 (2001), for evidence of facts established in earlier proceedings involving the same parties. *See State v. Seek*, 109 Wn. App. 876, 878 n.1, 37 P.3d 339 (2002). It does not cite the opinion for authority. *See* GR 14.1(a).

Mr. Gibbons had not sought or engaged in any gainful employment since he had retired in September 1993. BR 106.

Mr. Gibbons's claim remained open for medical treatment until he died from lung cancer in August 2005. *See* BR 124-26, 192, 270-71. Mr. Gibbon's death certificate, which was signed by a physician, listed the cause of death as "metastatic nonsmall cell lung cancer." BR 192. The certificate noted that tobacco use contributed to Mr. Gibbons's death. BR 192. The certificate did not list any other conditions contributing to his death. *See* BR 192. The interval between the onset of lung cancer and death was 3 months. BR 192.

### B. Ms. Gibbons Appealed the Order Closing Her Husband's Workers' Compensation Claim After He Died but She Did Not Assert That He Was Totally Disabled From His Work Injury at Death

After Mr. Gibbons's death, the Department issued an order on June 2, 2006 that closed his claim with a permanent partial disability award for category 3 low back impairment. BR 125. The next month, Ms. Gibbons filed a claim for death benefits as the surviving spouse with the Department.[3] BR 194. She also appealed, through counsel, the June 2,

[3] The Department and the courts use "widow's benefits" and "death benefits" interchangeably. Consistent with the statutory language, this brief uses the term "death benefits" throughout to describe the benefits available to a surviving spouse after a worker's death. *See* RCW 51.32.050, .067.

2006 closing order to the Board. *See* BR 253; *see also* App. Br. 5 (noting that Ms. Gibbons appealed the closing order through counsel).

After a scheduling conference with the parties regarding the appeal of the June 2, 2006 closing order, the Board identified the sole issue as whether an increased permanent partial disability award was warranted. *See* BR 253; *see also* BR 259. The issue of whether her husband was also permanently and totally (and not just partially) disabled was not identified as an issue in the Board's scheduling order. *See* BR 253.

Ms. Gibbons does not dispute that she did not raise the issue of whether her husband was permanently and totally disabled when she appealed the June 2, 2006 closing order. App. Br. 17. Rather, she asserts that there was "no reason for evidence to be presented" on this issue when she appealed the closing order. App. Br. 17.

At the subsequent evidentiary hearing on the correctness of the closing order, Ms. Gibbons reiterated that she was raising only the issue of permanent partial disability. *See* BR 264. She sought an increased award for permanent partial disability of the low back as well as an additional award for permanent partial disability for bowel and erectile dysfunction. BR 264. She did not assert that Mr. Gibbons was permanently and totally disabled. *See* BR 264.

On May 16, 2008, the Board reversed the closing order and awarded increased permanent partial disability (category 6) for the low back. *See* BR 133. The Board did not make any other awards. BR 132-33. Both parties appealed to superior court. BR 138-39. The Department did not participate in the superior court appeal. *See* BR 142.

While the parties' superior court appeals were pending, the Department issued an order on June 26, 2008 that both adopted the Board's decision and that denied Ms. Gibbon's application for widow's benefits:

> On 05/16/08, the Board of Industrial Insurance Appeals made the following decision on your appeal:
>
> The order and notice dated 06/02/06 is canceled.
>
> Labor and Industries is closing this claim because the covered medical condition(s) is stable.
>
> The self-insured employer is directed to pay you a permanent partial disability award of [category 6 for low back].
>
> Less prior permanent partial disability awards paid on this claim.
>
> The application for widow benefits is denied.
>
> This claim is closed.

BR 140-41. Ms. Gibbons never protested or appealed this order. BR 286; Tr. 19. Accordingly, it became final and binding. *See* RCW 51.52.050(1),

.060(1); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 544, 886 P.2d 189 (1994).

### C. A Jury Determined That Mr. Gibbons Was Permanently and Partially Disabled on June 2, 2006 and No Party Appealed That Determination

In March 2011, a jury determined that Mr. Gibbons had permanent partial disabilities of the low back and lower digestive tract on June 2, 2006. BR 143-44. Although the jury's verdict, as memorialized in the judgment, was internally inconsistent as to the category of low back impairment, the Department's order implementing the jury verdict awarded a category 3 low back impairment, and ultimately this determination was not protested or appealed. BR 143, 148-49.[4] The jury also awarded category 2 for lower digestive track impairment. BR 143-44. Because no party appealed the superior court judgment, the jury's determination that Mr. Gibbons was permanently partially disabled as of June 2, 2006 became final and binding. *See Marley*, 125 Wn.2d at 537-38, 544.

### D. The Department Issued Additional Orders Denying Widow's Benefits After the Superior Court Judgment

Following the entry of the superior court judgment, the Department issued an October 13, 2011 order stating that Boeing should pay awards of

[4] The judgment states that the jury found, inconsistently, that Mr. Gibbons had a category 6 and a category 3 low back impairment. *See* BR 143.

category 3 for the low back and category 2 for the digestive tract. BR 196-97. The October 13, 2011 also stated, like the June 26, 2008 order, that "[t]he application for widow benefits is denied." BR 197. Ms. Gibbons protested the October 13, 2011 order on the basis that it should not have included language about the application for widow's benefits because the superior court did not make any determination on this issue. BR 200. She asked the Department to issue two separate orders: one implementing the superior court judgment, and one denying widow's benefits. BR 200.

The Department complied with Ms. Gibbons's request. It reversed the October 13, 2011 order and issued an order stating that that Boeing should pay permanent partial disability awards of category 3 for the low back and category 2 for the digestive tract. BR 148-49. That order was not protested or appealed. Additionally, the Department issued an order dated January 13, 2012 stating that Ms. Gibbons's application for widow's benefits was denied. BR 146. She protested that order, and the Department issued an order on May 22, 2012 that affirmed the January 13, 2012 order. *See* BR 150.

## E. The Board Granted Summary Judgment to Boeing Because Ms. Gibbons Was Not Entitled to Death Benefits Under Either RCW 51.32.050 or RCW 51.32.067

Ms. Gibbons appealed the May 22, 2012 order to the Board. *See* BR 40. Boeing moved for summary judgment, arguing that Ms. Gibbons was not entitled to death benefits on multiple grounds, including because she did not appeal the June 26, 2008 order denying her application for widow's benefits, because her husband's claim was closed with a final determination that he was only permanently partially (not totally disabled), and because he was voluntarily retired at the time of his death. *See* BR 96-104. The industrial appeals judge agreed and granted summary judgment to Boeing. BR 49.[5] Ms. Gibbons petitioned for review to the three-member Board, which affirmed the hearings judge. BR 2-6, 14-21.

The Board found that Mr. Gibbon's death from lung cancer was unrelated to his work injury; that he was permanently partially disabled but not permanently totally disabled at death as a result of his work injury; and that he was voluntarily retired from the labor force from 1993 through

[5] The industrial appeals judge incorrectly stated that there were material facts at issue as to whether the June 26, 2008 order was final and binding. BR 48. There are no disputed facts at issue. The Department issued the order on June 26, 2008 and Ms. Gibbons did not protest or appeal it. BR 140-41, 286; Tr. 19. As explained in greater detail in section A of the argument, the failure to protest or appeal a Department order turns it into a final adjudication that cannot be later challenged. *Marley*, 125 Wn.2d at 538.

his death. BR 3. Thus, it concluded that Ms. Gibbons's was not entitled to death benefits under RCW 51.32.050 and RCW 51.32.067.

Ms. Gibbons appealed to superior court. CP 1-7. Boeing and the Department raised the same arguments that Boeing had made at the Board. CP 26-48. After a bench trial, the superior court adopted the Board's findings and affirmed the Board's decision to grant summary judgment to Boeing. CP 78-81. Ms. Gibbons now appeals. CP 82-89.

## IV. STANDARD OF REVIEW

In an appeal from a superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the decision of the trial court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.

Here, the superior court considered whether the Board's decision to grant summary judgment was correct. This Court reviews summary judgment motions de novo, engaging in the same inquiry as the trial court. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 466, 296 P.3d 800 (2013); *see also* RCW 51.52.140 ("Appeal shall lie from the judgment of the superior court as in other civil cases."). Summary judgment is proper

only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Ms. Gibbons challenges several of the superior court's findings of fact on the basis that they lack substantial evidence. App. Br. 17-19. But the superior court was acting in its appellate capacity in this case, determining de novo whether the Board's grant of summary judgment was correct. *See* RCW 51.52.115. Superior court findings of fact are superfluous on summary judgment and need not be considered. *Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 707 n.14, 50 P.3d 602, 606 (2002). This Court should decline to consider whether substantial evidence supports the challenged superior court findings. Rather, it should determine de novo whether summary judgment was appropriate.

## V. SUMMARY OF THE ARGUMENT

Under the Industrial Insurance Act, if a party fails to protest or appeal an adverse order within 60 days, it is final and binding. Ms. Gibbons failed to appeal an order dated June 28, 2006 that stated that her application for widow's benefits was denied. Therefore, she is precluded in this appeal from arguing that she is entitled to these benefits.

A surviving spouse receives death benefits under the Industrial Insurance Act in two situations. First, under RCW 51.32.067(1), a surviving spouse receives death benefits if the deceased worker was

permanently and totally disabled from the work injury at the time of death. Second, under RCW 51.32.050(2)(a), a surviving spouse receives death benefits if "death results from the injury."

Neither of these two situations applies here. With regard to RCW 51.32.067(1), it is res judicata that Mr. Gibbons was permanently *partially* disabled, not permanently *totally* disabled, at the time of his death. The jury made this determination in 2011 after Ms. Gibbons appealed the order closing her husband's claim, and that determination is final and binding for purposes of determining whether she is entitled to death benefits under RCW 51.32.067(1). Additionally, it is undisputed that Mr. Gibbons voluntarily retired from Boeing before he died. As a matter of law, a voluntarily retired worker cannot receive total permanent disability benefits. *See Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 765, 855 P.2d 711 (1993); *see also* RCW 51.32.060(6). Because Mr. Gibbons could not receive these benefits as a matter of law, Ms. Gibbons also cannot receive them under RCW 51.32.067(1) as his surviving spouse.

With regard to RCW 51.32.050(2)(a), it is undisputed that Mr. Gibbons died from metastatic lung cancer. Tobacco use contributed to his lung cancer, and no other cause was listed on the death certificate. His lung cancer in 2005 did not result from his back injury in 1988. Because

Ms. Gibbons is not entitled to death benefits under either statute, this Court should affirm.

## VI. ARGUMENT

### A. It Is Res Judicata That Ms. Gibbons Is Not Entitled to Death Benefits Because She Never Protested or Appealed the June 26, 2008 Order Denying Her Application for Benefits

Ms. Gibbons never appealed the Department's order in June 2008 denying her application for widow's benefits. Under well-established res judicata principles, that order became final and binding, and she is precluded in this appeal from arguing that she is entitled to those benefits.

A party has 60 days from the date that an adverse order is communicated to him or her to file either a protest and request for reconsideration with the Department or an appeal with the Board. RCW 51.52.050(1), .060(1)(a). If the party does not file a protest or appeal within 60 days of communication, the Department order becomes final. RCW 51.52.050(1). "The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim." *Marley*, 125 Wn.2d at 538; *accord Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 782, 271 P.3d 356 (2012).

Res judicata prevents a party from resurrecting the same claim in a subsequent action. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723,

737, 222 P.3d 791 (2009). Res judicata, or claim preclusion, "applies to a final judgment by the Department as it would to an unappealed order of a trial court." *Marley*, 125 Wn.2d at 537 (footnote omitted). Thus, "[a]n unappealed final order from the Department precludes the parties from rearguing the same claim." *Marley*, 125 Wn.2d at 538. An unappealed Department order is res judicata as to the issues encompassed within the terms of the order absent fraud in the entry of the order. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997) (plurality opinion); *accord Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 682, 279 P.3d 515 (2012); *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 433, 262 P.3d 837 (2011).

The Department's June 26, 2008 order denied Ms. Gibbons's application for benefits. It unambiguously stated, "The application for widow benefits is denied." BR 141. It further stated that it would become final 60 days after communication unless a protest or appeal was filed. BR 140. Ms. Gibbons's counsel received this order a few days later. BR 286. But Ms. Gibbons never protested or appealed the order. BR 286; *see also* Tr. 19. Accordingly, this order is res judicata as to all of the issues encompassed within the order, including the denial of death benefits, and she is precluded from now arguing that she is entitled to death benefits. *See* RCW 51.52.050(1), .060(1)(a); *Marley*, 125 Wn.2d at 538; *Kingery*,

132 Wn.2d at 169 (plurality opinion); *Leuluaialii*, 169 Wn. App. at 682; *Pearson*, 164 Wn. App. at 433.

Although the Department issued subsequent orders, including the October 13, 2011, January 13, 2012, and May 22, 2012 orders, that purported to deny her application for death benefits, the Department did not have legal authority to revise its final and binding determination on death benefits from June 26, 2008 in these orders, and they are without legal effect. The Department can only modify, reverse, or change an order during the time limited for appeal (60 days), or within 30 days after receiving a notice of appeal. RCW 51.52.060(4). The Department received no appeal to the June 26, 2008 order, nor did it modify, reverse, or change that order within the appeal period. *See* BR 286; Tr. 19. Consequently, the Department's determination in the June 26, 2008 order that Ms. Gibbons's application was denied is final and binding on all parties.

The superior court did not conclude that the June 26, 2008 order was res judicata as to Ms. Gibbons's entitlement to death benefits. *See* CP 78-81. However, this Court may affirm a superior court's decision on any grounds adequately supported in the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). Under well-established principles of res judicata, the unappealed June 26, 2008 order was a final determination of

Ms. Gibbons's entitlement to death benefits, and this Court should affirm the superior court on that basis.

### B. Under the Industrial Insurance Act, a Surviving Spouse Is Entitled to Benefits Only if the Worker Was Permanently and Totally Disabled at the Time of Death or if Death Results From the Injury

Even assuming this Court does not find that Ms. Gibbons's failure to appeal June 26, 2008 order disposes of this appeal, Ms. Gibbons is not entitled to death benefits. Before proceeding further, it is imperative to distinguish between the two types of death benefits available to a surviving spouse under the Industrial Insurance Act. Ms. Gibbons speaks generally of "widow's benefits" in the argument section of her appellant's brief, but nowhere in that section does she discuss the two statutory provisions—RCW 51.32.050(2)(a) and RCW 51.32.067(1)—that authorize death benefits to a surviving spouse. *See* App. Br. 13-19. Nor does she cite these statutes anywhere in her brief except in a single sentence in her introduction and in her assignments of error. App. Br. 1. Apart from these two provisions, there is no legal basis under the Act for the payment of death benefits to a surviving spouse.

There is an important distinction between these two provisions. Death benefits under RCW 51.32.067(1) are conditioned on the worker's disability status at the time of death. A surviving spouse is entitled to

death benefits under RCW 51.32.067(1) if and only if the deceased spouse was permanently and totally disabled from the industrial injury at the time of death. RCW 51.32.067(1); *see also* RCW 51.08.160. In contrast, the death benefits under RCW 51.32.050(2)(a) turn not on the worker's disability status but, instead, on the cause of the worker's death. If the worker's death results from the work injury, the surviving spouse is entitled to death benefits under RCW 51.32.050(2)(a).

The language of RCW 51.32.067(1) makes clear that the surviving spouse's death benefits are derivative of the worker's permanent total disability benefits, also called pension benefits. Under RCW 51.32.067(1), the surviving spouse cannot receive death benefits unless the deceased spouse was totally and permanently disabled from the industrial injury at the time of death. The Act contemplates that the worker chooses among three options for receiving monthly pension benefits. RCW 51.32.067(1), (2). If the worker chooses full benefits (option 1), then the worker's pension benefits cease with the worker's death and the surviving spouse and children receive no benefits upon the worker's death. RCW 51.32.067(1)(a). The worker's spouse must explicitly consent to this option. RCW 51.32.067(2). But if the worker chooses to receive an actuarially reduced pension benefit during his or her life (either option 2 or option 3), then his or her surviving spouse, child, or other dependent will

continue to receive the worker's pension benefits if the worker dies from a cause unrelated to the work injury:

> After a worker elects one of the options in (a), (b), or (c) of this subsection, that option shall apply only if the worker dies during a period of permanent total disability from a cause unrelated to the injury, leaving a surviving spouse, child, children, or other dependent.

RCW 51.32.067(1). Thus, the death benefits in RCW 51.32.067(1) derive entirely from the worker's disability status at the time of death. If the worker does not die during a period of permanent total disability, RCW 51.32.067(1) does not apply.[6]

Under RCW 51.32.050(2)(a), however, if the worker's death results from the injury, then the surviving spouse receives monthly death benefits for life or until remarriage according to a statutory schedule. RCW 51.32.050(2)(a); *see also* RCW 51.32.067(1). The worker's disability status at the time of death is irrelevant under RCW 51.32.050(2)(a).

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[6] It should be noted that RCW 51.32.067(1) does not directly provide for a survivor to receive benefits when the worker has not previously made the election provided in RCW 51.32.067(1) during his lifetime and then dies from a condition unrelated to the industrial injury. Read literally, Ms. Gibbons could not receive any benefits under RCW 51.32.067(1) because no election had been made. *See Freeman v. Dep't of Labor & Indus.*, 87 Wn. App. 90, 97, 940 P.2d 304 (1997). The Department, however, has not taken this position, and in *Freeman,* the Court agreed that when a worker dies from a cause unrelated to the injury, the Department may elect an option on the survivor's behalf after the worker's death, assuming the worker died while permanently totally disabled as a result of the injury. *Id.* at 97-98.

Ms. Gibbons fails to make this important distinction between the two death benefit statutes throughout her brief, including when she broadly asserts that "widow's benefits are different in character from an injured worker's pension benefits while the worker is living." App. Br. 15. Her imprecision undermines her analysis. In the case of RCW 51.32.067(1), she fails to perceive that the death benefits are the same in character as the worker's pension benefits. Indeed, the surviving spouse's benefits are entirely derivative of the worker's disability status at the time of death: what the surviving spouse receives after the worker's death is either the same actuarially reduced pension benefit that the worker received during life (option 2) or half the actuarially reduced pension benefit that the worker received during life (option 3). *See* RCW 51.32.067(1).

In contrast, the death benefit under RCW 51.32.050(2)(a) is different in character from the worker's pension benefits. The surviving spouse is entitled to this benefit if death results from the work injury. It depends on the cause of the worker's death, not on the status of the worker's disability at death. It does not matter if the worker is totally disabled, partially disabled, or not at all disabled from the work injury at death—as long as the work injury causes death, the benefit is payable.

The death benefit under RCW 51.32.050(2)(a) was the death benefit at issue in the case that Ms. Gibbons repeatedly cites for the "differences in character" between a worker's pension benefits and a widow's death benefits. *See* App. Br. 15-16 (citing *Mason v. Georgia Pacific Corp.*, 166 Wn. App. 859, 271 P.3d 381 (2012)). *Mason* will be discussed in greater detail in the next section, but the key distinction between that case and this one is that it was undisputed in *Mason* that the worker in *Mason* died as a result of the work injury. *See* 166 Wn. App. at 871 ("neither party contests the Department's finding that employment conditions caused William's death"). The worker died from a lung condition related to his exposure to asbestos and chemicals at work. *See id.* at 862, 871. Accordingly, the former version of RCW 51.32.050, which contained the same "death results from the injury" language as the current statute, authorized death benefits for his surviving spouse. *See id.* at 864 n. 7. *Mason* says nothing about the nature of the death benefit under RCW 51.32.067(1).

Some older cases have occasionally referred to a surviving spouse's "original" right to seek benefits under the Act, independent of the worker's claim. *See, e.g.*, *Purdy & Whitfield v. Dep't of Labor & Indus.*, 12 Wn.2d 131, 144, 120 P.2d 858 (1942); *McFarland v. Dep't of Labor & Indus.*, 188 Wash. 357, 366-67, 62 P.2d 714 (1936); *Beels v. Dep't of*

*Labor & Indus.*, 178 Wash. 301, 307, 34 P.2d 917 (1934). But, as our Supreme Court explained, all this means is that "a survivor's claim is independent from the worker's claim to the extent the worker cannot waive the survivor's rights to benefits." *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 228, 883 P.2d 1370 (1994). Thus, a worker's failure file an application for workers' compensation benefits during his life does not preclude the surviving spouse from later filing an application for death benefits and presenting medical testimony that death caused the injury. *See Beels*, 178 Wash. at 302, 307-08. Nor does a worker's failure to file a reopening application asserting permanent total disability during his life, where the claim had previously been closed for permanent partial disability, preclude the surviving spouse from asserting the worker's total permanent disability at death in a subsequent survivor's claim. *See McFarland*, 188 Wash. at 366-67.

This is not a case like *Beels or McFarland.* Ms. Gibbons was not precluded from asserting her right to death benefits after her husband's death. When she received the June 26, 2008 order denying her application for benefits, she had an opportunity to appeal that adverse order but she did not do so. When she appealed the order closing her husband's claim after her death, she had the opportunity to provide medical testimony that he was permanently totally disabled, not just permanently partially

disabled, but she did not do so. In her appeal of the closing order and the summary judgment proceeding in this appeal, she has never presented any evidence that her husband sought to return to the workforce after this Court's 2001 opinion determining that he had voluntarily retired. In short, Ms. Gibbons did not pursue her entitlement to death benefits when she had the opportunity to do so.

To summarize, the proper analytical framework in this case is to first ask whether Mr. Gibbons was totally and permanently disabled as a result of the industrial injury at death. If he was, then Ms. Gibbons may be entitled to receive death benefits under RCW 51.32.067(1). If he was not, then Ms. Gibbons is entitled to receive death benefits only if his "death result[ed] from the injury." RCW 51.32.050(2)(a).

### C. Ms. Gibbons Is Not Entitled to Benefits Under RCW 51.32.067(1) Because It Is Res Judicata That Her Husband Was Permanently and Partially Disabled at the Time of Death, Not Permanently and Totally Disabled

A jury has already decided that Mr. Gibbons was only partially disabled at the time of death and under res judicata principles this issue cannot now be revisited. In 2011, in response to Ms. Gibbons's appeal of the Department's order closing her husband's claim, a jury determined that he was permanently partially disabled as of June 2, 2006, a date that was several months after his death. She did not appeal the superior court

judgment, and the jury's determination is final and binding. Because Mr. Gibbons was partially disabled, not totally disabled, at death, Ms. Gibbons cannot receive benefits under RCW 51.32.067(1).

Res judicata, or claim preclusion, applies to an unappealed order of a trial court. *See Marley*, 125 Wn.2d at 537. Res judicata prevents a party from resurrecting the same claim in a subsequent action. *Gold Star Resorts*, 167 Wn.2d at 737. It prohibits the relitigation of claims and issues that were litigated, or that could have been litigated, in a prior action. *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 239, 118 P.3d 392 (2005).

Res judicata applies when there is a concurrence of identity between a prior order and a later action as to (1) "subject matter," (2) "cause of action," (3) "persons and parties," and (4) "quality of the persons for or against whom the claim is made." *Gold Star Resorts*, 167 Wn.2d at 737-38 (quoting *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008)). The fourth element "simply requires a determination of which parties in the second suit are bound by the judgment in the first suit." *Ensley v. Pitcher*, 152 Wn. App. 891, 905, 222 P.3d 99 (2009) (citing 14A Karl B. Tegland, *Washington Practice: Civil Procedure* § 35.27 (1st ed. 2007)).

The jury's determination that Mr. Gibbons was only partially disabled on June 2, 2006 binds Ms. Gibbons in this appeal. She appealed the closing order to superior court, and the jury determined that Mr. Gibbons had permanent partial disabilities of the low back and digestive tract. BR 139, 143-44. Her appeal involved the same subject matter and cause of action (the extent of her husband's permanent disability) and the same parties (Ms. Gibbons, Boeing, and the Department). These parties are bound by the jury's determination that Mr. Gibbons was permanently partially disabled on June 2, 2006.

Logically, if Mr. Gibbons was partially disabled on June 2, 2006, which was nearly a year after his death, he was likewise partially disabled on the date of his death. The nature of his disability could not have improved after death. He could not have been totally disabled at death but only partially disabled several months later. Accordingly, given the jury's binding determination, it is res judicata that Mr. Gibbons was permanently partially disabled, not permanently totally disabled, at death.

Because it is res judicata that Mr. Gibbons was only permanently partially disabled at the time of his death, Ms. Gibbons cannot obtain death benefits under RCW 51.32.067(1). Permanent partial and permanent total disabilities are mutually exclusive. When a worker is permanently disabled "the worker receives *either a pension or a*

*permanent partial disability award.*" *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 37 n.1, 992 P.2d 1002 (2000) (emphasis added); *see also Stone v. Dep't of Labor & Indus.*, 172 Wn. App. 256, 262, 289 P.3d 720 (2012). A final closing order awarding permanent partial disability makes it res judicata that the worker's disability at the time of the order was only partial, not total. *Farr*, 70 Wn. App. at 766. It establishes that the worker was capable of at least some form of gainful employment as of the date that his claim was closed. *See id.*

Ms. Gibbons incorrectly asserts that there was no reason for her to present evidence that her husband was totally and permanently disabled when she appealed the June 2, 2006 closing order. App. Br. 17. In her view, she did not need to present such evidence because Mr. Gibbons had previously been determined to be a voluntarily retired worker, and a voluntarily retired worker cannot receive permanent total disability benefits. App. Br. 17.

As explained in the next section, Ms. Gibbons is correct that a voluntarily retired worker cannot receive permanent total disability benefits. *See* RCW 51.32.060(6), .090(10); *Farr*, 70 Wn. App. at 765. But it does not follow that she had no reason to litigate whether her husband was totally permanently disabled at death when she appealed the closing order. Her ability to receive death benefits under RCW

51.32.067(1) depends entirely on her husband's disability status at death. It is a derivative death benefit. *See Kilpatrick*, 125 Wn.2d at 228 (a survivor's claim is derivative of the worker's claim for determining the applicable benefit schedule).

Ms. Gibbons had the opportunity to litigate the issue of her husband's total permanent disability when she appealed the closing order. She declined this opportunity for strategic reasons—namely, because she did not believe that she would be able to establish her husband's total and permanent disability because he had voluntarily retired. But the fact that Ms. Gibbons would have been unsuccessful in her appeal on this issue does not mean she lacked the opportunity to litigate it. Res judicata applies to issues that could have been litigated but that were not. *Chavez*, 129 Wn. App. at 239. Her strategic decision not to litigate total permanent disability binds her in the instant appeal and precludes her from receiving death benefits under RCW 51.32.067(1).

### D. Mr. Gibbons Voluntarily Retired Before He Died, Which Is an Independent Basis for Concluding That Ms. Gibbons Is Not Entitled to Death Benefits Under RCW 51.32.067(1)

Ms. Gibbons is also not entitled to death benefits under RCW 51.32.067(1) because this Court previously determined that her husband voluntarily retired from the workforce, and she has presented no evidence that he ever attempted to return to the workforce after he voluntarily

retired. *See* BR 106. A worker who voluntarily retires from the workforce is not entitled to permanent total disability benefits. *Farr*, 70 Wn. App. at 765. Therefore, because Mr. Gibbons was voluntarily retired, he could not be considered a totally and permanently disabled worker at his death, and Ms. Gibbons is not entitled to death benefits under RCW 51.32.067(1).

"Voluntary retirement" is a legal term of art in the workers' compensation context. A voluntarily retired worker is one who voluntarily detaches himself or herself from the work force and who ceases to engage in any form of employment related activity despite having the ability to work in some fashion at that time. *See Energy Nw. v. Hartje*, 148 Wn. App. 454, 466, 199 P.3d 1043 (2009); *Farr*, 70 Wn. App at 765-66, 768; *Kaiser Aluminum & Chem. Corp. v. Overdorff*, 57 Wn. App. 291, 295, 788 P.2d 8 (1990). A worker is voluntarily retired if (1) the worker is not receiving income, salary, or wages from any gainful employment, and (2) the worker has provided no evidence to show a bona fide attempt to return to work after retirement. *See* WAC 296-14-100; *see also Farr*, 70 Wn. App. at 763-67; *Overdorff*, 57 Wn. App. 295-96.

The Industrial Insurance Act bars workers who have voluntarily retired from receiving benefits that are intended to replace lost wages during periods of work-related disability. Wage replacement benefits

include temporary total disability benefits, also referred to as time-loss compensation, which replace the wages of workers who are unable to work for a finite period of time due to the residuals of an industrial injury. See RCW 51.32.090; *see Hubbard*, 140 Wn.2d at 37 n.1; *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *Overdorff*, 57 Wn. App. at 296. Wage replacement benefits also include permanent total disability benefits, also referred to as pension benefits. *See Williams v. Virginia Mason Med. Ctr.*, 75 Wn. App. 582, 586-87, 880 P.2d 539 (1994); *Farr*, 70 Wn. App at 765; *see also Overdorff*, 57 Wn. App. at 296.

Both RCW 51.32.090, the statute governing temporary total disability benefits, and RCW 51.32.060, the statute governing permanent total disability benefits, provide that a worker who voluntarily retires and withdraws from the work force is ineligible for those forms of benefits. RCW 51.32.060(6), .090(10); *see also* WAC 296-14-100. This is because, once a worker has removed himself or herself from the workforce, the worker has no wages to replace, and therefore, is ineligible for wage replacement benefits whether he or she has the capacity to work.

Mr. Gibbons removed himself from the work force in 1993 and ceased all employment-related activity at a time when he was capable of obtaining and performing some form of gainful employment. In 2001, this Court determined that he had voluntarily retired and noted that he had not

worked or sought work since he retired in 1993. BR 106-10. Since there is no evidence that he ever attempted to return to work after having voluntarily removed himself from the work force, he is ineligible for permanent total disability benefits as a matter of law. *See Farr*, 70 Wn. App at 766; WAC 296-14-100. Because he could not have received pension benefits at the time of his death, neither can Ms. Gibbons receive death benefits under RCW 51.32.067(1).

Ms. Gibbons appears to concede that her husband voluntarily retired before his death. See App. Br. 15-17. She acknowledges that "Mr. Gibbons could not receive pension benefits as a result of his voluntary retirement . . . ." App. Br. 16. And she cites no evidence from her response to Boeing's motion for summary judgment that would create an issue of material fact that her husband had attempted to return to the workforce after this Court determined that he was voluntarily retired. See App. Br. 14-17.

Instead, Ms. Gibbons cites Mason for the proposition that "[t]he fact that Mr. Gibbons was determined to have voluntarily retired and was not receiving a pension, i.e. permanent total disability benefits, does not render Mrs. Gibbons ineligible for widow's benefits." App. Br. 15. This argument is misplaced.

Ms. Gibbons's reading of Mason once again fails to distinguish between death benefits under RCW 51.32.067(1) and death benefits under RCW 51.32.050(2)(a). It is true that a finding of voluntary retirement does not preclude death benefits under RCW 51.32.050(2)(a) because the question under that statute is whether the death resulted from the work injury. A worker can voluntarily retire from the work force but later die as a result of the work injury, which would entitle the surviving spouse to death benefits under RCW 51.32.050(2)(a). Indeed, this is precisely what occurred in Mason. See 166 Wn. App. at 862, 871. But a finding of voluntary retirement precludes death benefits under RCW 51.32.067(1) because it means, as a matter of law, that Mr. Gibbons was not a permanently and totally disabled worker at the time of his death. And if a worker is not permanently and totally disabled at death, the surviving spouse does not receive benefits under RCW 51.32.067(1).

Mason applies only to death benefits under RCW 51.32.050(2)(a), not to death benefits under RCW 51.32.067(1). The worker in Mason filed a claim in 1988 for a lung condition caused by exposure at work to asbestos and caustic chemicals. 166 Wn. App. at 862. He had already voluntarily retired from the work force in 1986. Id. It was undisputed that the worker's work-related lung condition caused his death. See id. at 871. Because the worker died from a work-related asbestos and chemical

exposure, the death benefit provision in former RCW 51.32.050 applied. See id. at 861, 865 n. 7. The Mason Court specifically noted that when it used the term "death benefits," it was referring to the benefits in former RCW 51.32.050(2)(a). See id.at 865 n.7.

The Mason Court did not cite or discuss the death benefits authorized by RCW 51.32.067(1). Nor did it need to. That statute did not apply because the worker did not die "from a cause unrelated to the injury." To the contrary, the worker in Mason died from his work injury. See id. at 871. The issue in Mason was how to harmonize former RCW 51.32.050 with the statute defining occupational disease (RCW 51.32.180) when determining how to calculate the amount of the death benefit that the surviving spouse would receive under former RCW 51.32.050. See id. at 861.

Given Mason's context in which the worker died from the work injury, Ms. Gibbons misunderstands the Court's statements that "a surviving spouse's lifetime pension is different in character from the worker's wage replacement benefits" and "[A] worker's benefit benefits the worker and a survivor's benefit benefits the survivor." See App. Br. 15 (citing Mason, 166 Wn. App. at 866-67). The "survivor's benefit" and "lifetime pension" that the Court was referring to are the death benefits under RCW 51.32.050(2)(a). Unlike the benefits available to a surviving

spouse under RCW 51.32.067(1), which derive from a finding that the worker is totally and permanently disabled, the death benefits under RCW 51.32.050(2)(a) are not wage replacement benefits but rather an independent benefit to the surviving spouse.

Thus, although an injured worker's voluntary retirement is irrelevant to whether the surviving spouse is entitled to death benefits under RCW 51.32.050(2)(a), it is directly relevant to whether the worker was totally and permanently disabled at the time of death, which is the basis for death benefits under RCW 51.32.067(1). Contra App. Br. 15-16; see Mason, 166 Wn. App. at 865 (noting that the Legislature did not add a voluntary retirement provision to RCW 51.32.050). Ms. Gibbons's reliance on Kilpatrick is likewise misplaced because that case involved death benefits under RCW 51.32.050(2)(a), not RCW 51.32.067(1).

Contrary to Ms. Gibbons's arguments, there is no question of fact concerning her husband's "employability subsequent to the determination of his being a voluntarily retired worker in 2001, as it relates to Ms. Gibbons application for a widow's pension." App. Br. 17. She presented no evidence that her husband attempted to return to the work force after he voluntarily retired. See BR 171-201. Thus, he remained a voluntarily retired worker until his death such that he was not totally and permanently

disabled at death. Therefore, she cannot receive death benefits under RCW 51.32.067(1).

### E. Ms. Gibbons Is Not Entitled to Death Benefits Under RCW 51.32.050(2)(a) Because Her Husband Died From Lung Cancer, Not as a Result of His Back Injury At Work

Mr. Gibbons died from lung cancer in 2005. BR 192. The physician who signed the death certificate noted that tobacco use contributed to the death, and she did not note any other causes. BR 192. She noted a short interval of 3 months between onset and death. BR 192. Because Mr. Gibbons's twisting back injury in 1988 did not cause the 2005 onset of his lung cancer, Ms. Gibbons is not entitled to benefits under RCW 51.32.050(2)(a).

A worker's surviving spouse is entitled to monthly death benefits when "death results from the injury." RCW 51.32.050(2)(a). Here, Gibbons argues that a genuine issue of material fact remains as to whether his work injury caused metastatic lung cancer. *See* App. Br. 13-14. Although he is correct that Boeing did not present any evidence on his cause of his death in its motion for summary judgment, it strains credulity to suggest that Mr. Gibbons's twisting injury of the back in 1988, which resulted in low back and digestive tract impairment, caused the onset of metastatic lung cancer in 2005, especially when there is evidence in the record that tobacco use contributed to his death. *See* BR 192. The death

certificate supports a reasonable inference that Mr. Gibbons's death was not related to his work injury. Further, Ms. Gibbons did not present any medical evidence in her response to summary judgment to suggest that the back injury caused lung cancer. *See* BR 171-201. The summary judgment record as a whole supports the superior court's ruling.

### F. Because This Case Was Resolved on Summary Judgment, This Court Need Not Review the Superior Court's Findings for Substantial Evidence but, In Any Case, Substantial Evidence Supports the Challenged Findings

This Court need not review the superior court findings that Ms. Gibbons challenges for lack of substantial evidence. This case was resolved on summary judgment at the Board, and the superior court's role was limited to determining whether the grant of summary judgment was correct. *See* RCW 51.52.115.

In any case, substantial evidence supports the challenged factual findings for which Ms. Gibbons provides argument. Substantial evidence supports the superior court's finding of fact 2.C that Mr. Gibbons remained voluntarily retired through his death. *See* App. Br. 3, 18. This Court determined in 2001 that he was voluntarily retired and had not worked or sought work since 1993. BR 106-110. Ms. Gibbons provided no evidence that he attempted to return to the work force. *See* BR 171-201.

Additionally, substantial evidence supports finding of fact 2.D that Mr. Gibbons's death was unrelated to the industrial injury. *See* App. Br. 3, 18. He injured his back at work in 1988 but died from lung cancer in 2005. The physician noted that tobacco use contributed to his death but did not record any other cause. BR 192.

Ms. Gibbons also assigns error to finding of fact 2.B about the date and nature of her husband's work injury and the fact that it proximately caused low back and lower digestive tract injuries. App Br. 3. But she provides no argument as to why this finding is not supported by substantial evidence. *Compare* App Br. 3 *with* App. Br. 17-19. Therefore, it is waived. *See* RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The remaining findings that Ms. Gibbons challenges (finding of facts 2, 2.A, and 2.F) are conclusions of law and should be reviewed as such. App. Br. 2-3; *see Scott's Excavating Vancouver, LLC v. Winlock Props., LLC*, 176 Wn. App. 335, 342, 308 P.3d 791 (2013), *review denied,* 179 Wn.2d 1011 (2014). For the reasons previously explained, the trial court properly determined that Mr. Gibbons was permanently partially disabled, not totally permanently disabled, at death. And the trial court properly determined that no genuine issues of material fact remained that precluded summary judgment in Boeing's favor.

## G. Ms. Gibbons Is Not Entitled to Attorney Fees

This Court should reject Ms. Gibbons's request for attorney fees. *See* App. Br. 19. Any fees are available only for services before the court and are available only if (1) the Board decision is "reversed or modified" *and* (2) "*additional relief is granted* to" Ms. Gibbons. RCW 51.52.130(1) (emphasis added); *Jenkins v. Weyerhaeuser Co.*, 143 Wn. App. 246, 257, 177 P.3d 180 (2008).

Because the trial court correctly granted summary judgment to Boeing, Ms. Gibbons is not entitled to attorney fees. Even if this Court decides that a genuine issue of fact remains, the remedy would be remand for trial. Because the only relief would be remand for a new trial, there would be no "additional relief." *See Sacred Heart Med. Ctr. v. Knapp*, 172 Wn. App. 26, 29, 288 P.3d 675 (2012) (worker did not prevail when only relief was remand to director).

Finally, the Department is not responsible for any attorney fees because this case involves Boeing, a self-insured employer. In a case involving a self-insured employer, all costs, including attorney fees are "payable directly by the self-insured employer." RCW 51.52.130(1).

# VII. CONCLUSION

There are multiple reasons why Ms. Gibbons is not entitled to death benefits. She did not protest or appeal the June 26, 2008 order

denying these benefits so she is precluded from asserting her entitlement to them now. Even if she can raise this issue now, she is not entitled to death benefits under RCW 51.32.067(1) because her husband was not a totally and permanently disabled worker at death. A jury determined that he was partially, not totally disabled, at death and that determination binds her in this appeal. Additionally, because Mr. Gibbons voluntarily retired from the workforce before he died, he was not a totally and permanently disabled worker at death as a matter of law.

Ms. Gibbons is also not entitled to death benefits under RCW 51.32.050(2)(a) because her husband's death did not result from his back injury at work. Instead, he died from lung cancer.

This Court should affirm.

RESPECTFULLY SUBMITTED this 18th day of February, 2015.

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NO. 72335-9-I
**COURT OF APPEALS, DIVISION I**
**OF THE STATE OF WASHINGTON**

JOHN R. GIBBONS,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on February 18, 2015, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below-described manner:

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