72335-9-I

ORIGINAL

No. 72335-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHN R. GIBBONS, DEC'D,

Appellant,

v.

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

Respondents.

BRIEF OF RESPONDENT, THE BOEING COMPANY

PRATT, DAY & STRATTON, PLLC

Gibby M. Stratton, # 15423
Eric J. Jensen, # 43265
Attorneys for Respondent, The Boeing Company

Pratt Day & Stratton, PLLC
2102 N. Pearl Street, Suite 106
Tacoma, Washington 98406
(253) 573-1441

TABLE OF CONTENTS

A. INTRODUCTION 1

B. COUNTERSTATEMENT OF THE CASE 1

C. COUNTERSTATEMENT OF THE ISSUES 5

D. SCOPE AND STANDARD OF REVIEW 5

E. ARGUMENT 8

1. THE DOCTRINE OF "LIBERAL CONSTRUCTION" HAS NO IMPACT ON THIS CASE. 8

2. SUMMARY JUDGMENT REGARDING MRS. GIBBONS' ENTITLEMENT TO WIDOW'S BENEFITS UNDER RCW 51.32.050(2) IS APPROPRIATE BECAUSE THERE IS NO EVIDENCE SUPPORTING MRS. GIBBONS' POSITION THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT "CONCERNING MR. GIBBONS' DEATH AND HIS INDUSTRIAL INJURY.". 9

3. SUMMARY JUDGMENT REGARDING MRS. GIBBONS' ENTITLEMENT TO WIDOW'S BENEFITS UNDER RCW 51.32.067(1) IS APPROPRIATE BECAUSE THERE IS NO EVIDENCE SUPPORTING MRS. GIBBONS' POSITION THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT "CONCERNING MR. GIBBONS' EMPLOYABILITY AND THE NATURE OF HIS DISABILITY AT THE TIME OF HIS DEATH ON AUGUST 1, 2005." 11

4. MRS. GIBBONS' RELIANCE ON *MASON V. GEORGIA PACIFIC CORP.* IS MISPLACED AS MRS. GIBBONS IS NOT ENTITLED TO DEATH BENEFITS UNDER RCW 51.32.050. 13

   a. *Because* Mason *does not apply to RCW 51.32.067 and this Court has previously decided that Mr. Gibbons was a voluntarily retired worker, Mrs. Gibbons cannot receive benefits under RCW 51.32.067.* 15

5. MRS. GIBBONS' ARGUMENTS REGARDING "SUBSTANTIAL EVIDENCE" ARE INAPPLICABLE IN A CASE RESOLVED ON SUMMARY JUDGMENT AND ARE FACTUALLY UNSUPPORTABLE. 17

6. MRS. GIBBONS' APPLICATION FOR BENEFITS SHOLD BE DENIED BECAUSE A DEPARTMENT ORDER DENYING MRS. GIBBONS' APPLICATION FOR THOSE BENEFITS WAS NOT TIMELY APPEALED, AND THAT DENIAL IS NOW *RES JUDICATA.* 20

   a. *The June 26, 2008 Department order denying Ms. Gibbons' application for death benefits was not a ministerial order.* 21

   b. *The August 31, 2011 Department order reversing the June 26, 2008 order, and all subsequent orders, had no legal effect on the*

Department's decision denying Ms. Gibbons' application for benefits. 25

F. CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Boguch v. Landover Corp., 153 Wn. App. 595, 224 P.3d 795 (2009) . 7, 10

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) 6

Cyr v. Dep't of Labor & Indus., 47 Wn.2d 92, 286 P.2d 1038 (1955)..... 10

Del Guzzi Constr. Co. v. Global Northwest Ltd., 105 Wn.2d 878, 719 P.2d 120 (1986) 6

Dep't of Ecology v. City of Kirkland, 84 Wn.2d 25, 523 P.2d 1181 (1974) 21

Ehman v. Dep't of Labor & Indus., 33 Wn.2d 584, 206 P.2d 787 (1949).. 8

Fisher v. Aldi Tire, Inc., 78 Wn. App. 902, 902 P.2d 166 (1995) 5, 9, 18, 19

Gibbons v. The Boeing Company, 107 Wn.App. 1029 (2001) *amended on denial of reconsideration* (Sept. 6, 2001) 1, 16, 19

Gibbons v. The Boeing Company, 145 Wn.2d 1035 (2002) 16

Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355, 753 P.2d 517 (1988) 6

Guile v. Ballard Comm'ty Hosp., 70 Wn.App. 18, 27, 851 P.2d 689, *review denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993)..... 5

In re: Betty Wilson, BIIA Dec., 02 21517 (2004)..... 25

In re: Jason S. Honsowetz, BIIA Dec. 08 18940 (2009) 22

In re: John H. Simon, Dckt. No. 05 19649 (Jan. 17, 2007) 23

In re: Kenneth E. Osborne, BIIA Dec., 69,846 (1986)..... 26

In re: Lowrey Pugh, BIIA Dec., 86 2693 (1989)..... 12

In re: Randy M. Jundul, BIIA Dec., 98 21118 (1999)..... 26, 27

In re: Rick C. Yost, Sr., BIIA Dec., 01 24199 (2003)..... 21

In re: Steven W. Carrell, BIIA Dec., 99 11430 (1999)..... 22, 24

Kingery v. Dep't of Labor & Indus., 80 Wn. App. 704, 910 P.2d 1325 (1996) 20

Kustura v. Dep't of Labor & Indus., 142 Wn. App. 655, 175 P.3d 1117 (2008) 21

Las v. Yellow Front Stores, Inc., 66 Wn. App. 196, 831 P.2d 744 (1992) . 7

Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 886 P.2d 189 (1994) 20, 25, 26

Mason v. Georgia Pacific Corp.,166 Wn. App. 859, 271 P.3d 381 (2012) 13, 14, 15, 16, 17

Pearson v. Dep't of Labor & Indus., 164 Wn. App. 426, 262 P.3d 837 (2011) 21

Porter v. Dep't of Labor & Indus., 51 Wn. 2d 634, 320 P.2d 1099 (1958) 10

T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626 (9th Cir.1987) 6

Wells v. Olsten Corp., 104 Wn. App. 135, 15 P.3d 652 (2001) 21

Young v. Key Pharm., Inc., 112 Wn. 2d 216, 770 P.2d 182 (1989) 6, 7

Statutes

RCW 51.32.050 ..... 1, 8, 9, 10, 13, 14, 15, 17, 28

RCW 51.32.060 ..... 14, 15, 16

RCW 51.32.067 ..... 1, 8, 11, 12, 13, 15, 16, 17, 28

RCW 51.32.090 ..... 14, 15

RCW 51.32.180 15

RCW 51.52.050 ..... 21, 23

RCW 51.52.060 ..... 20, 26

Regulations

WAC 296-14-100 ..... 16, 19

Other Authorities

CR 56(e) 6

A. INTRODUCTION

This case is an appeal of a decision by the Superior Court affirming the Board of Industrial Insurance Appeals' granting of Respondent's Motion for Summary Judgment. The Superior Court determined that there were no genuine issues of material fact and found that John R. Gibbons died from a condition unrelated to his industrially related lower back injury and that he did not die during a period of permanent and total disability. On this basis the Superior Court concluded that the Board of Industrial Insurance Appeals had correctly denied Mr. Gibbons' spouse, Mrs. Gibbons, widow's benefits under RCWs 51.32.050 and 51.32.067.

B. COUNTERSTATEMENT OF THE CASE

This case has a lengthy litigation history, including a prior round of litigation in this Court. As this Court previously found in *Gibbons v. The Boeing Company*, 107 Wn.App. 1029 (2001) *amended on denial of reconsideration* (Sept. 6, 2001), the procedural history of the case is as follows. On or about September 24, 1988, Mr. Gibbons sustained an industrial injury to his lower back. BR at 117.[1] On January 9, 1989, the Department of Labor and Industries allowed the claim. BR at 118. On July 3, 1993, Mr. Gibbons was cleared and returned to work light duty.

[1] Citation to the Certified Appeal Board Record are to "BR" and the stamped page number in the lower right side of the page.

On September 1, 1993, Mr. Gibbons voluntarily retired from Boeing at the age of 62. On April 25, 1994, the Department affirmed an October 1993 order which closed the claim with a Category 3 low back impairment and with time loss as paid through July 2, 1993. BR at 119-120.

The claim was subsequently reopened, BR at 121, and Mr. Gibbons' subsequent claim that he was entitled to wage replacement benefits was rejected first by an Industrial Appeals Judge, and later by the Board, the King County Superior Court, and this Court. These multiple tribunals determined that because the post-retirement order that he was only permanently partially disabled was *res judicata*, he was not entitled to further wage replacement benefits under the claim as a matter of law and was voluntarily retired. The Washington Supreme Court denied Mr. Gibbons' Petition for Review.

Mr. Gibbons died on August 1, 2005. BR at 164. His death was the result of lung cancer, a condition wholly unrelated to his industrial injury. On June 2, 2006, the Department issued an order closing the claim and directing the Employer to pay a permanent partial disability award of Category 3 low back impairments. BR at 125. Mrs. Gibbons filed an Application for widow's benefits on July 21, 2006, and proceeded to appeal the closing order. Following litigation of the closing order, on May

16, 2008, the Board issued a decision awarding a Category 6 low back impairment. BR at 127-133. The Employer appealed to King County Superior Court on June 6, 2008, and the Claimant Cross-appealed on June 13, 2008. BR at 138-39.

On June 26, 2008, the Department issued an order that addressed two issues. The June 26, 2008 order was ministerial in part and confirmed the May 16, 2008 Board decision. However, the June 26, 2008 order also substantively adjudicated a portion of the claim and denied Mrs. Gibbons' application for benefits that she had submitted in July 2006. BR 140-41. Mrs. Gibbons never protested or appealed the June 26, 2008 order denying her application for benefits.

On August 19, 2011, the Superior Court entered a judgment after a jury trial, reversed the Board's May 16, 2008 Decision, and determined Mr. Gibbons' condition at the time of death was best described as a Category 3 low back impairment and Category 2 permanent impairment of the digestive tract. BR at 142-45. There was no further appeal, and throughout the litigation, Mrs. Gibbons never asserted or presented evidence that Mr. Gibbons was totally and permanently disabled under the claim, only that he was permanently partially disabled as a result of his industrial injury.

/

Despite having already issued the June 26, 2008 final and binding order rejecting Mrs. Gibbons' application for widow's benefits, on January 13, 2012, the Department issued another order again denying her application for widow's benefits. BR at 146. On January 18, 2012, the Department issued an order conforming to the August 16, 2011 Superior Court judgment. BR at 148-49. After the Claimant's protest, the Department issued an order on May 22, 2012, affirming the January 13 order. BR at 150. The May 22, 2012 Department order was then appealed to the Board seeking widow's pension benefits.

On January 22, 2013, Industrial Appeals Judge Robert H. Raymond, Jr. issued a Proposed Decision and Order granting the Employer's Motion for Summary Judgment and concluding that Mrs. Gibbons is not entitled to benefits. BR at 40-49. Following a Petition for Review filed by Mrs. Gibbons, the Board issued a Decision and Order adopting the January 22 Proposed Decision and Order and providing a minor correction to Finding of Fact No. 5. BR at 2-4. The April 1, 2013 Decision and Order of the Board was then appealed to Superior Court.

The Superior Court determined that there were no genuine issues of material fact and found that Mr. Gibbons died from a condition unrelated to his industrially related lower back injury and that he did not die during a period of permanent and total disability. On this basis the

Superior Court concluded that the Board of Industrial Insurance Appeals had correctly granted the Employer and Department's Motion for Summary Judgment and denied Mr. Gibbons' spouse, Mrs. Gibbons, widow's benefits. Mrs. Gibbons now appeals to this Court.

C. COUNTERSTATEMENT OF THE ISSUES

1. Was the Superior Court correct in finding the Board correctly concluded there were no issues of material fact and the Employer was entitled to judgment as a matter of law?

D. SCOPE AND STANDARD OF REVIEW

In this case, correctly articulating the standard of review is of paramount importance. This is because Appellant's fundamental misunderstanding of the standard of review for a Motion for Summary Judgment underpins the obvious flaws in her appeal.

> To merit summary judgment, the moving party must demonstrate that it is entitled to judgment as a matter of law and that there are no genuine issues of material fact. CR 56(c). A defendant may move for summary judgment by either (1) *pointing out the absence of competent evidence to support the plaintiff's case* or (2) establishing through affidavits that no genuine issue of material fact exists. *Guile v. Ballard Comm'ty Hosp.*, 70 Wn.App. 18, 27, 851 P.2d 689, *review denied*, 122 Wn.2d 1010, 863 P.2d 72 (1993).

Fisher v. Aldi Tire, Inc., 78 Wn. App. 902, 906, 902 P.2d 166 (1995) (emphasis added).

> If the moving party is a defendant and meets this initial showing, then the inquiry shifts to the party with the burden of proof at trial, the plaintiff. If, at this point, the plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," then the trial court should grant the motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *see also T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630–32 (9th Cir.1987)...
>
> In making this responsive showing, the nonmoving party cannot rely on the allegations made in its pleadings. CR 56(e) states that the response, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." At that point, the evidence and all reasonable inferences therefrom is considered in the light most favorable to the plaintiff, the nonmoving party. An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party. *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

Young v. Key Pharm., Inc., 112 Wn. 2d 216, 225-26, 770 P.2d 182 (1989). "The 'facts' required by CR 56(e) to defeat a summary judgment motion are evidentiary in nature. Ultimate facts or conclusions of fact are insufficient. Likewise, conclusory statements of fact will not suffice." *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (citation omitted). "To avoid summary judgment, the plaintiff must make out a prima facie case concerning the essential element of its

claim." *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795 (2009) (citing *Young*, 112 Wn.2d at 225).

While this statement of the standard of review is similar in many ways to the one proffered by Mrs. Gibbons, it is different in one important way; it does not omit the fact that a "defendant in a civil action is entitled to summary judgment when that party shows that there is an absence of evidence supporting an element essential to the plaintiff's claim. *The defendant may support the motion by merely challenging the sufficiency of the plaintiff's evidence as to any such material issue.*" *Las v. Yellow Front Stores, Inc.*, 66 Wn. App. 196, 198, 831 P.2d 744 (1992) (emphasis added) (footnotes omitted). Mrs. Gibbons' failure to recognize that this is a valid means of moving for Summary Judgment is the flawed foundation upon which her challenges to the decision of the Superior Court rest. *See Brief of Appellant* at 14 ("Boeing having failed to establish through any evidence, much less medical evidence from a doctor, that the cause of Mr. Gibbons' death was unrelated to his industrial injury, the burden to rebut this evidence would not shift to Mrs. Gibbons."); 18 (alleging that there is a genuine issue of material fact regarding Mr. Gibbons' retirement because "[t]here is no other evidence concerning Mr. Gibbons' status subsequent to [July 30, 2001]."). Because there is no evidence in the record supporting Mrs. Gibbons' entitlement

to widow's benefits under RCW 51.32.050 or RCW 51.32.067, because Mrs. Gibbons failed to appeal a Department Order that is now final and binding denying widow's pension benefits, and because Mrs. Gibbons, as the plaintiff at Superior Court, had the ultimate burden of proof to overcome the presumption that the Board's decision was correct and to demonstrate the Board was incorrect as a matter of law in granting summary judgment, this Court should affirm the Superior Court's decision appropriately affirming the Board's decision to grant summary judgment in favor of the Employer and the Department of Labor and Industries.

E. ARGUMENT

1. THE DOCTRINE OF "LIBERAL CONSTRUCTION" HAS NO IMPACT ON THIS CASE.

Mrs. Gibbons spends the "Introduction" section of her brief discussing the doctrine of "liberal construction." This doctrine is a rule of statutory construction and does not apply to the interpretation of facts. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 206 P.2d 787 (1949). Because this Court's inquiry in this case is one concerned with the presence or absence of genuine issues of material fact and the presence or absence of competent evidence to support Mrs. Gibbons' claims this doctrine is inapplicable here.

2. SUMMARY JUDGMENT REGARDING MRS. GIBBONS' ENTITLEMENT TO WIDOW'S BENEFITS UNDER RCW 51.32.050(2) IS APPROPRIATE BECAUSE THERE IS NO EVIDENCE SUPPORTING MRS. GIBBONS' POSITION THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT "CONCERNING MR. GIBBONS' DEATH AND HIS INDUSTRIAL INJURY."

Mrs. Gibbons' first argument is that "a genuine issue of material fact exists, as it relates to Mrs. Gibbons application for widow's benefits, concerning Mr. Gibbons' death and his industrial injury." *Brief of Appellant* at 13. In essence, Mrs. Gibbons' argument is that there is a genuine factual dispute regarding whether Mr. Gibbons' death from lung cancer was the result of Mr. Gibbons' industrially related lower back injury and, therefore, her entitlement to benefits under RCW 51.32.050(2). This statute provides that "[w]here death results from the injury, a surviving spouse of a deceased worker eligible for benefits under this title shall receive monthly for life or until remarriage." The Employer pointed out to the Superior Court and points out to this Court that there is no evidence whatsoever contained in the record that a lower back injury can cause lung cancer or, more specifically, that Mr. Gibbons' lower back injury caused Mr. Gibbons' lung cancer.

Because the Employer has "point[ed] out the absence of competent[, indeed any,] evidence to support the plaintiff's case," *Fisher v. Aldi Tire, Inc.*, 78 Wn. App. at 906, "[t]o avoid summary judgment,

[Mrs. Gibbons] must make out a prima facie case" regarding her allegation that Mr. Gibbons' lung cancer was caused by his lower back injury. *Boguch v. Landover Corp.*, 153 Wn. App. at 609.

As Mrs. Gibbons points out at page 14 of her Brief, "[t]he cause of death is a medical question upon which only a doctor is competent to testify." *Porter v. Dep't of Labor & Indus.*, 51 Wn. 2d 634, 636, 320 P.2d 1099 (1958) (citing *Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 286 P.2d 1038 (1955)). Therefore, to make out a prima facie case that she is entitled to widow's benefits under RCW 51.32.050(2), Mrs. Gibbons must present the expert opinion of a doctor stating that Mr. Gibbons' lung cancer and eventual death was the result of his industrially related lower back injury. The record contains no such opinion. This is likely because no competent medical professional would opine that lower back injuries cause lung cancer. Because there is no such opinion in the record and such an opinion is a required element of Mrs. Gibbons' claim for benefits under RCW 51.32.050(2), her claim must fail and the Employer is entitled to summary judgment. This was the finding of the Superior Court and there is no reason this Court should find any differently.

/

/

/

3. SUMMARY JUDGMENT REGARDING MRS. GIBBONS' ENTITLEMENT TO WIDOW'S BENEFITS UNDER RCW 51.32.067(1) IS APPROPRIATE BECAUSE THERE IS NO EVIDENCE SUPPORTING MRS. GIBBONS' POSITION THAT THERE IS A GENUINE ISSUE OF MATERIAL FACT "CONCERNING MR. GIBBONS' EMPLOYABILITY AND THE NATURE OF HIS DISABILITY AT THE TIME OF HIS DEATH ON AUGUST 1, 2005."

Mrs. Gibbons' second argument is that "there remains a question of fact, as it relates to Mrs. Gibbons' entitlement to widow's benefits, concerning Mr. Gibbons' employability and the nature of his disability at the time of his death on August 1, 2005." *Brief of Appellant* at 14. Again, in essence, Mrs. Gibbons' argument is that there is a genuine factual dispute regarding whether Mr. Gibbons was permanently totally disabled at the time of his death and, therefore, her entitlement to benefits under RCW 51.32.067(1). This statute provides that a worker's beneficiaries shall receive benefits "only if the worker dies *during a period of permanent total disability* from a cause unrelated to the injury." *Id.* (emphasis added). The Employer pointed out to the Superior Court and points out to this Court that there is no genuine issue of material fact regarding whether Mr. Gibbons was permanently totally disabled at the time of his death because there is a 2011 final, unappealed order of the Superior Court which determined that Mr. Gibbons' condition at the time of death was best described as permanent partial disabilities; a Category 3 low back impairment and Category 2 permanent impairment of the

digestive tract. That finding is *res judicata* and Mrs. Gibbons cannot now seek to relitigate that issue.

Indeed, in *In re: Lowrey Pugh*, BIIA Dec., 86 2693 (1989), the Board held that in a claim for survivor's benefits premised on the worker dying during a period of permanent total disability, a worker's surviving spouse must prove that the injured worker was permanently and totally disabled at the time of his death. Mr. Gibbons was never declared permanently and totally disabled; his claim was closed with a determination that his industrial injury left him only permanently partially disabled. That determination by the Superior Court is now final and can no longer be appealed. Therefore, under the plain language of the statute, Mrs. Gibbons cannot recover benefits as the surviving spouse of an injured worker as Mr. Gibbons did not die "during a period of permanent total disability." RCW 51.32.067(1).

Mrs. Gibbons offers no evidence to overcome this obvious deficiency in her argument. Instead, Mrs. Gibbons simply makes the bald assertion that "there remains a question of fact, as it relates to... Mr. Gibbons' employability and the nature of his disability at the time of his death on August 1, 2005." *Brief of Appellant* at 14. This statement, especially in the face of the August 19, 2011 Superior Court judgment determining that, as of June 2, 2006, almost a full year *after* Mr. Gibbons'

death, his claim should be closed with an award for *only* permanent *partial* disability, and not permanent *total* disability, boarders on frivolous. This Court should reject Mrs. Gibbons' baseless assertion that "there remains a question of fact, as it relates to Mrs. Gibbons' entitlement to widow's benefits, concerning Mr. Gibbons' employability and the nature of his disability at the time of his death on August 1, 2005." *Brief of Appellant* at 14.

4. MRS. GIBBONS' RELIANCE ON *MASON V. GEORGIA PACIFIC CORP.* IS MISPLACED AS MRS. GIBBONS IS NOT ENTITLED TO DEATH BENEFITS UNDER RCW 51.32.050.

At the same time Mrs. Gibbons ignores the final and unappealed Superior Court order establishing that Mr. Gibbons died while only partially permanently disabled and that she is, therefore, unable to establish any right to benefits under RCW 51.32.067(1), she erroneously places great emphasis on the Court of Appeals, Division II decision and its discussion in *Mason v. Georgia Pacific Corp.*,166 Wn. App. 859, 271 P.3d 381 (2012) regarding voluntary retirement and benefits *under RCW 51.32.050. Brief of Appellant* at 14-17. *Mason*, which deals with RCW 51.32.050, *the death benefit statute for survivors of workers who die from industrially-related conditions*, simply does not apply to benefits under RCW 51.32.067(1), which is how Mrs. Gibbons erroneously attempts to apply it.

In *Mason,* a voluntarily retired worker had an open and allowed claim when he died. The Department issued an order finding that the worker died *from an occupationally-related condition* and approved surviving spouse benefits *under RCW 51.32.050.* The *sole issue* before the Court was whether the rate should be based on wages at the time of death or be set at the statutory minimum because the worker had zero wages at the time of his death. The Court in *Mason* noted as follows:

> The 1986 Act provided to workers and their families four types of wage-based, periodically paid monetary benefits. These benefits included permanent total disability pension benefits, temporary total disability time loss compensation, loss of earning power benefits (also known as partial time loss compensation), and death benefits. In 1986, the legislature amended three of the four wage-based, periodically paid monetary benefits. The amendments provided that if the worker voluntarily retires then "benefits shall not be paid."

Mason, 166 Wn. App. at 864-865 (citing the former versions of RCW 51.32.060, RCW 51.32.090(1), RCW 51.32.090(3), and RCW 51.32.050, respectively).

By applying the maxim *expressio unius est exclusio alterius,* the Court determined the widow was entitled to pension benefits under RCW 51.32.050 based on her husband's wages at the time he retired because the Legislature had not amended RCW 51.32.050 to exclude wage replacement benefits for voluntarily retired workers and their survivors as

the Legislature had done under RCW 51.32.060 and 51.32.090. The Court also addressed a conflict between RCW 51.32.050, which provides a death benefit to spouses of workers who die as a result of a work related injury, based on the workers' wages at the time of the injury, and RCW 51.32.180(b), which provides that compensation for occupational diseases is based on wages at the time the disease manifests. *Id.* at 869 ("If a worker's occupational disease manifests during voluntary retirement when the worker does not actively earn wages, the statutes conflict"). As any reasonable reading of *Mason* shows, the Court's decision had absolutely nothing to do with benefits under RCW 51.32.067(1).

a. Because Mason *does not apply to RCW 51.32.067 and this Court has previously decided that Mr. Gibbons was a voluntarily retired worker, Mrs. Gibbons cannot receive benefits under RCW 51.32.067.*

Despite this, Mrs. Gibbons attempts to shoehorn the Court's determination regarding RCW 51.32.050, *the death benefit statute for survivors of workers who die from industrially-related conditions*, into RCW 51.32.067(1) because Mr. Gibbons was a voluntarily retired worker at the time of his death and, therefore, was ineligible for total permanent disability benefits which, in addition to the fact that Mr. Gibbons was adjudicated to be only partially permanently disabled, precludes Mrs. Gibbons from obtaining death benefits under RCW 51.32.067. This Court

determined in *Gibbons v. The Boeing Company*, 107 Wn.App. 1029 that Mr. Gibbons was a voluntarily retired worker and Mrs. Gibbons' Petition for Review to the Washington Supreme Court was appropriately denied. *Gibbons v. The Boeing Company*, 145 Wn.2d 1035 (2002). Mrs. Gibbons "has provided no evidence to show a bonafide attempt [by Mr. Gibbons] to return to work after retirement." WAC 296-14-100. He was, therefore, as a matter of law, a voluntarily retired worker at the time of his death. [2] Unlike death benefits provided to spouses of workers that die as a result of their injuries, RCW 51.32.067 provides survivor's benefits to the injured worker's spouse when the worker dies "*during a period of permanent total disability* from a cause *unrelated to the injury*." RCW 51.32.067(1) (emphasis added).

Despite Mrs. Gibbons' arguments to the contrary, the benefits Mrs. Gibbons seeks are not "different in character from the worker's wage replacement benefits", *Mason*, 166 Wn. App. at 866, because the benefits provided by RCW 51.32.067 are *derivative* of the total permanent disability benefits provided in RCW 51.32.060.[3] That RCW 51.32.067 requires a worker to elect an option for distribution of his or her total

[2] In light of this Court's finding and the lack of evidence presented by Mrs. Gibbons, her statement that "there remains an outstanding issue of material fact concerning Mr. Gibbons' employability subsequent to the determination of his being a voluntarily retired work in 2001" is without any support, in the record or elsewhere. *Brief of Appellant* at 17.

[3] Under RCW 51.32.067, Option II and Option III benefits are calculated based on the actuarially reduced benefits provided by RCW 51.32.060. RCW 51.32.067(1)(b), (c).

permanent disability benefits *presupposes that the worker is entitled to total permanent disability benefits in the first place.* Because Mr. Gibbons was not entitled to total permanent disability benefits, both because he was voluntarily retired and because he was not totally permanently disabled by his industrial injury, Mrs. Gibbons is not entitled to benefits under RCW 51.32.067.

The Court's analysis in *Mason* does not apply to this case because, as shown *supra*, Mrs. Gibbons is not entitled to death benefits under RCW 51.32.050, the only wage-replacement statute to which the voluntarily retirement exclusion does not apply and the only statute actually addressed in *Mason*. 166 Wn. App. at 864-865. The Court's decision in *Mason* is simply inapplicable to Mrs. Gibbons' argument regarding RCW 51.32.067(1) and her reliance on it is wholly misplaced.

5. MRS. GIBBONS' ARGUMENTS REGARDING "SUBSTANTIAL EVIDENCE" ARE INAPPLICABLE IN A CASE RESOLVED ON SUMMARY JUDGMENT AND ARE FACTUALLY UNSUPPORTABLE.

Mrs. Gibbons' final argument is that "there is not substantial evidence to support several of the Superior Court's findings of fact." *Brief of Appellant* at 17. First, because this case was resolved by way of summary judgment at the Board, and the Superior Court, acting in its appellate capacity, reviewed whether the Board was correct in finding

there were no issues of material fact and that the Employer was entitled to judgment as a matter of law, the "substantial evidence" standard is inapplicable to the Superior Court's findings and conclusions. Instead, the proper standard to apply to the Superior Court's findings and conclusions is whether, with the presumption that the Board's decision is correct, the facts in a light most favorable to the nonmoving party show either that there is an "absence of competent evidence to support the plaintiff's case or... that no genuine issue of material fact exists." *Aldi Tire, Inc.*, 78 Wn. App. at 906. The "substantial evidence" standard simply does not apply in a case resolved by summary judgment at the Board and reviewed by the Superior Court.

Even assuming such a standard did apply to the findings of the Superior Court, none of Mrs. Gibbons' assertions are supported by evidence. First, Mrs. Gibbons' asserts that the Court's finding of fact that there are no issues of material fact to preclude summary judgment is unsupported by substantial evidence. As shown *supra* and *infra*, there is overwhelming evidence that there are no issues of material fact precluding summary judgment in this case. Second, Mrs. Gibbons asserts that there is "no evidence upon which the Superior Court could find that Mr. Gibbons remained voluntarily retired through August 1, 2005." *Brief of Appellant* at 18. This assertion completely ignores this Court's determination in

Gibbons v. The Boeing Company, 107 Wn.App. 1029 that Mr. Gibbons was a voluntarily retired worker and the fact that Mrs. Gibbons "has provided no evidence to show a bonafide attempt [by Mr. Gibbons] to return to work after retirement." WAC 296-14-100. This Court's decision and Mrs. Gibbons' failure to present any evidence showing the Mr. Gibbons made a bonafide attempt to return to work following his voluntary retirement is more than sufficient evidence for the Superior Court to find that he was voluntarily retired at the time of his death. Finally, Mrs. Gibbons argues that "there is no evidence upon which the Court could base its decision that Mr. Gibbons' death was unrelated to his industrial injury." *Brief of Appellant* at 18. Again, as noted *supra*, this assertion incorrectly places the burden of proof in summary judgment proceedings, ignoring the fact that "absence of competent evidence to support the plaintiff's case," is one of the grounds upon which the Superior Court may grant summary judgment. *Aldi Tire, Inc.*, 78 Wn. App. at 906. This assertion is also factually unsupportable. Mrs. Gibbon's provided no evidence to support a theory that Mr. Gibbons' lung cancer was caused in any way by his low back injury. Additionally, it is self-evident that Mr. Gibbons, whose industrial injury was to his lower back and who died from lung cancer, did not die from a condition related to his industrial injury. Mrs. Gibbons was presented, at the Board, with the opportunity to offer

any medical evidence, if any exists, in favor of her assertion otherwise. She presented none, because none exists. In short, none of Mrs. Gibbons' assertions regarding "substantial evidence" are supported by the record and should be rejected both for that reason and because the "substantial evidence" standard is inapplicable in cases resolved by summary judgment.

6. MRS. GIBBONS' APPLICATION FOR BENEFITS SHOLD BE DENIED BECAUSE A DEPARTMENT ORDER DENYING MRS. GIBBONS' APPLICATION FOR THOSE BENEFITS WAS NOT TIMELY APPEALED, AND THAT DENIAL IS NOW *RES JUDICATA.*

Finally, in addition to the lack of merit to her claims, Mrs. Gibbons' application for benefits should be rejected because the Department issued an Order denying her application for those benefits, she failed to appeal that denial, and that denial is now *res judicata.* An unappealed final order of the Department is *res judicata* as to the issues encompassed in that order. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). A beneficiary aggrieved by an order of the Department must file an appeal with the Board within 60 days of the date that order was communicated. RCW 51.52.060. "Failure to appeal an adverse ruling at any level transforms the ruling into a final order." *Kingery v. Dep't of Labor & Indus.*, 80 Wn. App. 704, 708, 910 P.2d 1325 (1996) (citing *Marley*, 125 Wn.2d at 537 n. 2). "If a worker

fails to appeal within the 60 day time limit, the claim is deemed '*res judicata* on the issues the order encompassed, and the failure to appeal an order ... turns the order into a final adjudication, precluding any reargument.'" *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 433, 262 P.3d 837 (2011) (quoting *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 669, 175 P.3d 1117 (2008)). An order of the Department that denies a right is an appealable final order. *Wells v. Olsten Corp.*, 104 Wn. App. 135, 145, 15 P.3d 652 (2001) (citing *Dep't of Ecology v. City of Kirkland*, 84 Wn.2d 25, 30, 523 P.2d 1181 (1974)).

The June 26, 2008 Department order denied Mrs. Gibbons' application for widow's pension benefits. That order was an appealable order of the Department. Mrs. Gibbons did not file an appeal from that order, and that order is now *res judicata.*

a. The June 26, 2008 Department order denying Ms. Gibbons' application for death benefits was not a ministerial order.

A Department order that does no more than take that action directed by the Board in its Decision and Order is a ministerial order. *In re: Rick C. Yost, Sr.*, BIIA Dec., 01 24199 (2003). A ministerial order is not an "order, decision, or award" of the Department as set forth in RCW 51.52.050 and the Department cannot reconsider, and no appeal lies to the Board, from such an order. *In re: Steven W. Carrell*, BIIA Dec., 99 11430

(1999). Part of the June 26, 2008 Department order was ministerial, in that it took that action directed by the Board in its May 16, 2008 decision: closing the claim with a permanent partial disability award. However, the June 26, 2008 Department order went further; the order *also* denied Mrs. Gibbons' application for benefits.[4] BR 141. Mrs. Gibbon's counsel received the June 26, 2008 Department order on June 30, 2008, and no protest or appeal was filed from that order. BR 290.

Mrs. Gibbons' entitlement to death benefits was not an issue before the Board or Superior Court in the appeal that was ongoing at the time the Department issued the order. This action of the Department went beyond what was directed by the Board in its Decision and Order, and addressed an issue that had not previously been decided by the Department. The Department was free to adjudicate the issue of Mrs. Gibbons' entitlement to death benefits because that issue was independent of the issue on appeal to the Superior Court: what degree of disability best described Mr. Gibbons' condition. *See In re: Jason S. Honsowetz*, BIIA Dec. 08 18940 (2009) (when a Department order is on appeal to the Superior Court, the Department's ability to further adjudicate the claim is limited to those issues that are independent of issues pending on appeal). Mrs. Gibbons' failure to appeal the Department adjudication of her

[4] Mrs. Gibbons filed her application for benefits with the Department on July 21, 2006. BR 165.

entitlement to death benefits resulted in that determination becoming *res judicata*.

That the June 26, 2008 Department order that denied Mrs. Gibbons' application for death benefits was also ministerial in part does not shield Mrs. Gibbons, a party aggrieved by that order, from the necessity of appealing that order. In *In re: John H. Simon*, Dckt. No. 05 19649 (Jan. 17, 2007), the Board analyzed when a Department order is ministerial. Under RCW 51.52.050, an aggrieved party may appeal a Department order when "'the department has taken any action or made any decision relating to any phase of the administration' of the Industrial Insurance Act." *Id.* The Board in *Simon* analyzed two Department orders which were issued based on an Order on Agreement of Parties from the Board, and determined that, while parts of the Department orders at issue were ministerial, neither of the orders was purely ministerial because the Department "took independent action and addressed issues that were not resolved in the Order on Agreement of Parties." *Id.* Therefore, the Board determined that "Mr. Simon could have protested or appealed either order." *Id.*

The orders in *Simon* are almost identical to the order in this case. Although certain aspects of the June 26, 2008, Department order were ministerial, similar to the orders in *Simon*, the Department addressed an

issue that was not resolved in the May 16, 2008 Board decision. This independent action was an exercise of the Department's original jurisdiction. As a result, if Mrs. Gibbons disagreed with the denial of her application for benefits, she was required to file a protest or appeal from the June 26, 2008 Department order.

Further, the mere fact that an appeal is ongoing in Superior Court does not make it error for the Department to issue an order embodying the Board's decision. In *In re: Steven W. Carrell*, the Board recognized that the Department may enter ministerial orders enacting Board decisions even when an appeal is pending in the Superior Court, and that such ministerial orders may go beyond the directive of the Board. In *Carrell*, the Board advised the Department that it should include language in such orders explaining that "an aggrieved party should file a request for reconsideration or an appeal only if the party... considered the order to be beyond the Board's Decision and Order in an exercise of original Department jurisdiction." *Id.*

The Department's denial of Mrs. Gibbons' application for benefits went beyond the directive of the Board in its May 16, 2008 Decision and Order. Although the June 26, 2008, Department order did not include the language suggested by the Board in *Carrell*, it did apprise Mrs. Gibbons of the need to file an appeal within 60 days or the order would become final.

Mrs. Gibbons was represented at the time the June 26, 2008 order was issued, and the order reflects it was sent to her counsel. As a result, Mrs. Gibbons was well aware that the June 26 Department order represented an exercise of the Department's original jurisdiction, and that, as an aggrieved party, she had 60 days to protest or appeal that order before it became final. Mrs. Gibbons failed to do so, and the Department's decision is now *res judicata.*

Finally, even assuming it was error for the Department to deny Mrs. Gibbons' application for death benefits in its June 26, 2008 order, an erroneous order is still *res judicata* as to any issues encompassed in that order. "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; *see also In re: Betty Wilson,* BIIA Dec., 02 21517 (2004) (erroneously entered Department orders are not void for lack of subject matter jurisdiction, and must be appealed).

b. The August 31, 2011 Department order reversing the June 26, 2008 order, and all subsequent orders, had no legal effect on the Department's decision denying Ms. Gibbons' application for benefits.

The Department exercised its original jurisdiction when it denied Mrs. Gibbons' application for death benefits in its June 26, 2008 order. When the Superior Court entered a judgment on August 19, 2011, which

reversed the Board's decision, the Department was obliged to reverse its June 26, 2008 order, and enter an order conforming to the Superior Court's judgment. However, the reversal of the ministerial aspect of the June 26 Department order had no effect on the Department's denial of Mrs. Gibbons' application for death benefits, because, at that time, the Department had no authority to modify or reverse that decision.

Under RCW 51.52.060, the Department has the same time limit to modify or hold an order in abeyance as the "time limited for appeal." *In re: Kenneth E. Osborne*, BIIA Dec., 69,846 (1986). "The Department is without authority to affirm, modify or reverse an order once 60 days pass following its communication." *In re: Randy M. Jundul*, BIIA Dec., 98 21118 (1999). The Department issued the order denying Mrs. Gibbons' application for benefits on June 26, 2008, and mailed that order to both Mrs. Gibbons and her attorney. It is undisputed that Mrs. Gibbons failed to timely protest or appeal the June 26, 2008 Department order that denied her application for benefits. The effect of that failure to protest or appeal is that the Department's determination is *res judicata* as to the issue of Mrs. Gibbons' entitlement to benefits. *Marley*, 125 Wn.2d at 538.

RCW 51.52.060 imposed the same strict deadline on the Department as it did on Mrs. Gibbons. Once the time for protesting or appealing the June 26 order passed, the Department was without authority

to modify or reverse that decision. To the extent the August 31, 2011 Department order, and all subsequent orders, purported to reverse that portion of the June 26, 2008 order that denied Ms. Gibbons' application for pension benefits, the August 31 order is void *ab initio* because the Department lacked the subject matter jurisdiction to reverse that decision. *See In re: Randy M. Jundul* (Department lacked subject matter jurisdiction to enter order attempting to readjudicate issue decided in unappealed Department order, and such order is void *ab initio*). The Department's denial of Ms. Gibbons' application for death benefits is *res judicata*, and neither the Department, nor the Superior Court, nor this Court have subject matter jurisdiction to readjudicate that issue. The June 26 order was never protested or appealed, and Boeing is entitled to judgment as a matter of law.

/

/

/

/

/

/

/

/

F. CONCLUSION

Based on the foregoing points and authorities, the Employer requests that this Court affirm the Superior Court's decision which found the Board was correct is granting summary judgment in favor of the Employer and the Department, that there were no material issues of fact, and that Mrs. Gibbons was not entitled to benefits under RCWs 51.32.050 and 51.32.067.

RESPECTFULLY SUBMITTED this 19th day of February, 2015.

PRATT, DAY & STRATTON, PLLC

By _____
Gibby M. Stratton, # 15423
Eric J. Jensen, # 43265
Attorneys for Respondent, The Boeing Company

ORIGINAL

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

JOHN R. GIBBONS, Appellant, v. THE BOEING COMPANY and DEPARTMENT OF LABOR AND INDUSTRIES, Respondents.	No. 72335-9-I **DECLARATION OF SERVICE**

I HEREBY DECLARE under penalty of perjury of the laws of the State of Washington that on the 19th day of February, 2015, I served the **BRIEF OF RESPONDENT, THE BOEING COMPANY,** and **DECLARATION OF SERVICE**, upon all parties of record in this proceeding by arranging with ABC Legal Services to deliver the original and by mailing a copy thereof, properly addressed with postage pre-paid, to each party or his attorney or authorized representative listed below.

ORIGINALS TO:

Mr. Richard D. Johnson
Court Administrator/Clerk
Court of Appeals, Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

[VIA ABC LEGAL SERVICES]

///

COPIES TO:

Mr. Dorian D.N. Whitford **[VIA FIRST CLASS MAIL]**
Law Offices of David B. Vail, Jennifer Cross-Euteneier
Attorneys at Law
P. O. Box 5707
Tacoma, WA 98415-0707

Mr. Paul Weideman **[VIA FIRST CLASS MAIL]**
Assistant Attorney General
Office of the Attorney General
P O Box 2317
Tacoma, WA 98401-2317

DATED this 19th day of February, 2015, at Tacoma, Washington.

Brianna M. Larkin

Brianna M. Larkin