NO. 91632-2

SUPREME COURT OF THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D),

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

DEPARTMENT OF LABOR AND INDUSTRIES ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Paul M. Crisalli
Assistant Attorney General
WSBA No. 40681
Office No. 91018
800 Fifth Ave. Suite 2000
Seattle, WA 98104
206-464-7740

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. INTRODUCTION

Res judicata serves the parties' interests by ensuring finality and avoiding requiring parties repeatedly to prove facts. Aloys Wegleitner did not appeal a June 2005 order closing his claim and finding that he had no permanent partial disability, so it became final and binding.

After Mr. Wegleitner's death, his wife could obtain survivor's benefits if she proved that his condition worsened between claim closure and his death, such that he was permanently and totally disabled when he died. But she only controverted the June 2005 closing order—no evidence showed his condition worsened between closing and his death.

In its unpublished opinion, the Court of Appeals correctly held that because the June 2005 order was final and binding, it became res judicata as to Mr. Wegleitner's condition at closing. There was no evidence his condition worsened after closing, so she is not entitled to benefits.

This Court should not grant review as the Court of Appeals decision conflicts with no other appellate decisions. *See* Pet. at 14-18; *Shirley v. Dep't of Labor & Indus.*, 171 Wn. App. 870, 288 P.3d 390, *review denied*, 177 Wn.2d 1006, 300 P.3d 415 (2013); *Crabb v. Dep't of Labor & Indus.*, 181 Wn. App. 648, 326 P.3d 815, *review denied*, 181 Wn.2d 1012, 335 P.3d 940 (2014). Nor does this case present a substantial question of public interest, as the Court applied settled law to the facts.

II. ISSUES

Review is not warranted, but if it were granted the following issues would be presented:

1. Does res judicata preclude Ms. Wegleitner from challenging the order closing her husband's claim and awarding no disability, where there was no appeal from that decision within 60 days?

2. Is Ms. Wegleitner entitled to survivor's benefits when she presented no evidence that her husband's condition worsened between claim closure and his death?

III. STATEMENT OF THE CASE

1. Aloys Wegleitner Did Not Timely Protest the Department Order Closing His Industrial Injury Claim

Aloys Wegleitner worked for Patrick Boring doing landscaping for 34 years. CP 359. On July 19, 2004, he sustained an industrial injury to his back. CP 359, 372. He filed a claim for benefits, which the Department allowed, paying for treatment and time loss compensation after he stopped working in September 2004. CP 53-54, 373-74, 393-97.

In March 2005, doctors diagnosed Mr. Wegleitner with lung cancer. CP 382, 444. The cancer metastasized to his spine and rib cage, causing pain and tenderness. CP 442-43, 445. He underwent radiation and chemotherapy, which provided some relief. CP 382.

On June 3, 2005, the Department closed Mr. Wegleitner's claim. CP 522. The closure order stated that he was at maximum medical

improvement and that no disability would be awarded. CP 522. The order became final and binding 60 days later, when the Department received no protest or appeal from any party. CP 562.[1]

2. After Mr. Wegleitner Died from Unrelated Lung Cancer, His Wife Unsuccessfully Filed a Claim for Survivor Benefits with the Department

Mr. Wegleitner died from lung cancer on September 30, 2005. CP 520. His wife filed a claim for survivor benefits under Mr. Wegleitner's claim. CP 35. A surviving spouse receives pension benefits if the worker died from a cause related to the industrial injury or was permanently and totally disabled from the injury at the time of death. RCW 51.32.050(2), .067. A surviving spouse can receive benefits if the worker's condition from the injury worsened after claim closure to be permanently and totally disabling at death. RCW 51.32.067, .160.[2]

The Department denied her claim, finding that Mr. Wegleitner's injury was not a cause of his death and that he was not permanently and totally disabled because of his industrial injury when he died. CP 35-36. The Board affirmed, but the superior court reversed and remanded for a de novo hearing. CP 11, 29-33, 80-81.

---

[1]Ms. Wegleitner implies that the Department received a protest to this order on June 18, 2005, relying on a Board-created document entitled "Jurisdictional History." Pet. at 10 (citing CP 21). It is now undisputed that document is incorrect and that the Department did not receive a protest or appeal within 60 days of the closure order. CP 53-54, 561.

[2] See discussion *infra* at Part IV.2.

3. Ms. Wegleitner Presented No Medical Evidence that Mr. Wegleitner's Industrial Injury Objectively Worsened Between Claim Closure and His Death

On remand, Ms. Wegleitner called Dr. H. Richard Johnson, who testified that he never saw Mr. Wegleitner but reviewed records provided by Ms. Wegleitner's counsel.[3] Dr. Johnson agreed that Mr. Wegleitner sustained an industrial injury in July 2004 in his back. CP 419. Between July and November 2004, films showed that no changes occurred and that there was "no evidence of any aggressive process going on." CP 429. A March 2005 MRI revealed changes consistent with cancer, but the original trauma remained visible. CP 442-43.

Dr. Johnson agreed that by March 2005, Mr. Wegleitner had lung cancer that had metastasized. CP 444-45, 473. Dr. Johnson reviewed later films and records, but he never testified that those records provided new information relevant to Mr. Wegleitner's industrial injury. CP 446-47.

Dr. Johnson opined that Mr. Wegleitner's industrial injury became medically fixed and stable in January 2005. CP 452-53. Dr. Johnson believed that Mr. Wegleitner had permanent residuals from his injury that would have been present through September 2005, when he died. CP 454-55. Based on Dr. Johnson's conversations with Ms. Wegleitner and a

[3]The industrial appeals judge also heard testimony from rehabilitation counselor and life planner Carl Gann, Ms. Wegleitner, radiation oncologist Dr. Michael McDonough, and Department worker's compensation claims adjudicator Robert Frost. Because of the nature of the argument, only Dr. Johnson's testimony will be summarized.

vocational expert, Carl Gann, Dr. Johnson posited that the residuals of the industrial injury alone would have prevented Mr. Wegleitner from being physically capable to return to work as a landscaper or laborer between June 3, 2005, and September 30, 2005. CP 455-59. While Dr. Johnson testified that Mr. Wegleitner was not capable of working in early 2005 through claim closure on June 3, 2005, he never testified that Mr. Wegleitner's back condition objectively worsened between claim closure and Mr. Wegleitner's death. CP 460-62. He did not testify as to any objective finding at the time of death.

4. The Board Affirmed Denial of the Survivor Benefits Claim, And the Superior Court Agreed

The industrial appeals judge issued a proposed decision and order affirming the Department's order rejecting Ms. Wegleitner's survivor benefits claim. The three-member Board affirmed that decision, finding that Ms. Wegleitner presented no evidence that Mr. Wegleitner's industrial injury worsened between June 3, 2005 (the date of claim closure) and September 30, 2005 (the date of death). CP 97.

On Ms. Wegleitner's appeal to Pierce County Superior Court, the parties cross-moved for summary judgment. CP 573-74, 652-53. Ms. Wegleitner argued that the Department presented no evidence showing that the industrial injury was not a cause of Mr. Wegleitner's total and

permanent disability. CP 589-95. The Department argued that the industrial injury was not a cause of Mr. Wegleitner's death, that res judicata precluded Ms. Wegleitner from challenging the June 3, 2005 closure order, and that Ms. Wegleitner presented no evidence that Mr. Wegleitner's condition objectively worsened after claim closure. CP 663-73. The superior court granted the Department's motion and denied Ms. Wegleitner's, ruling that since the June 3, 2005 closing order was final and binding, Ms. Wegleitner could not collaterally attack it. CP 911-14.

5. The Court of Appeals Affirmed, Holding That at Most, Ms. Wegleitner Tried to Controvert the Final and Binding Closure Order, Which Was Res Judicata as to Mr. Wegleitner's Condition at Closing

In an unpublished decision, the Court of Appeals affirmed. *Wegleitner v. Dep't of Labor & Indus.*, No. 72763-0-I (Slip Op. Mar. 9, 2015). The Court agreed with the Department that while Ms. Wegleitner can seek a claim for survivor's benefits, the June 3, 2005 closing order is res judicata as to the extent of Mr. Wegleitner's injuries. Slip Op. at 6-7. The Court rejected her argument that it would be inequitable to apply res judicata because Ms. Wegleitner failed to raise her argument before the Board or the superior court. Slip Op. at 7-8. And the Court of Appeals held that Ms. Wegleitner offered no evidence that any aggravation of her husband's injury occurred after the June 3, 2005 order finding no

permanent disability. Slip Op. at 11. Instead, she presented evidence showing that his industrial injury "remained the same from January or February 2005, through closure of the claim on June 3, until his death in September 5." Slip Op. at 11 (emphasis in original). She controverted the Department's June 3 finding, but since she did not challenge that finding within 60 days, she cannot challenge it now. Slip Op. at 11.

IV. REASONS WHY REVIEW SHOULD BE DENIED

This case involves a worker who received an order finding that he had no disability related to his injury and he did not appeal that order. Well-settled case law holds that this order is final and binding. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994). He then died of causes unrelated to his injury. To obtain survivor's benefits, Ms. Wegleitner had to show that Mr. Wegleitner was permanently and totally disabled from his injury at the time of death. RCW 51.32.067. But Ms. Wegleitner never produced evidence that Mr. Wegleitner's condition was different at time of death than it was when the Department entered the final order finding no disability. The Court of Appeals correctly held that Ms. Wegleitner was not entitled to survivor's benefits.

Ms. Wegleitner presents no reason warranting Supreme Court review. The Court of Appeals decision does not conflict with other Court of Appeals' decisions in *Shirley* and *Crabb*. RAP 13.4(b)(2). *Shirley*

addresses a different legal and factual context involving a worker dying from causes *related* to the industrial injury and does not address the res judicata effect of an order in a case where a worker dies from causes *unrelated* to the Department order. *Shirely*, 171 Wn. App. at 880. *Crabb* reiterates that liberal construction does not apply to an unambiguous statutory scheme, as is present here. *See Crabb*, 181 Wn. App. at 654-55. The unpublished Court of Appeals decision furthers the purpose of the Industrial Insurance Act, such that it involves no issue of substantial public interest. RAP 13.4(b)(4). This Court should deny review.

1. Consistent with *Shirley*, the Court of Appeals Correctly Held That a Surviving Spouse Is Entitled to Benefits If the Worker Died from a Cause Related to the Industrial Injury or Was Totally Disabled from the Injury at Death

The Court of Appeals decision does not conflict with *Shirley*, so this petition does not warrant review. RAP 13.4(b)(2). *Shirley* addresses the factual scenario when a worker has died because of his industrial injury—in contrast this case involves a worker who did not die from his industrial injury. Additionally, *Shirley* did not address the effect of an unappealed order finding no disability in the context of a claim for benefits when the worker dies from causes unrelated to his injury. In *Shirley*, the Department closed a worker's claim in 2005, when he needed only ibuprofen to manage his pain. 171 Wn. App. at 874. Between 2005

and 2007, while his claim was still closed, he saw a doctor who prescribed several opioids to manage the effects of his industrial injury. *Id.* at 876. In 2007, the worker died as a result of ingesting a combination of those drugs and alcohol. *Id.* at 875. The Court of Appeals held that the industrial injury proximately caused the worker's death since the drugs used to treat his injury were a cause of his death. *Id.* at 879-91. Since the worker had died from a cause related to his industrial injury, his surviving spouse was entitled to benefits. *Id.* at 880. The Court nowhere addressed whether the earlier 2005 closure order had any res judicata effect.

Shirley has two relevant holdings applicable to this case: (1) that a surviving spouse has a separate claim for benefits; and (2) that to obtain survivor's benefits, the worker had to die from a cause related to the industrial injury or be totally and permanently disabled at the time of death. 171 Wn. App. at 879-84. The Court of Appeals here agreed and followed both of these propositions. The Court of Appeals held that a surviving spouse can bring a separate claim and may obtain benefits upon a worker's death, even if the worker dies from a cause unrelated to the industrial injury but the worker was totally and permanently disabled from the industrial injury. Slip Op. at 8-9. Contrary to Ms. Wegleitner's assertions, the Court of Appeals followed *Shirley*.

Ms. Wegleitner incorrectly implies that because Shirley's holding that the surviving spouse need only show that the industrial injury was a proximate cause of the worker's death to qualify for benefits means that she only needed to show that Mr. Wegleitner was permanently and totally disabled at the time of his death. Pet. at 14-15. First, *Shirley* deals with a different statute than the one presented here. *Shirley* addressed when a worker dies from a cause related to the industrial injury under RCW 51.32.050(2)(a). It did not address when the cause of death was unrelated but the worker was totally and permanently disabled from the industrial injury, under RCW 51.32.067. Since *Shirley* dealt with a different part of the surviving spouse statute, there can be no conflict with this decision.

Second, because *Shirley* dealt with the situation where the injury caused the worker's death, the earlier closure order could have no preclusive effect on the question whether the surviving spouse was entitled to benefits. It was a question to be resolved once the death occurred. But here, Mr. Wegleitner died from a cause unrelated to his injury. Since the Department's final and binding closure order stated that he had no permanent disability, the Court of Appeals correctly recognized that order must have some sort of preclusive effect on the extent of Mr. Wegleitner's injury as of that date. Slip Op. at 6.

Understanding the different circumstances here, the Court correctly held that Ms. Wegleitner had to show some evidence that her husband's industrial injury worsened, but the only evidence she presented was to dispute her husband's condition at claim closure. Slip Op. at 10-11. The Court's decision does not conflict with *Shirley*, where it properly applied a different statutory basis created by a different factual scenario for the survivor's benefits. This Court should deny review.

2. There Is No Conflict With Cases Holding That Courts Liberally Construe the Industrial Insurance Act

The Court of Appeals decision does not conflict with case law requiring that the Industrial Insurance Act be liberally construed. Pet. at 16-17 (citing *Crabb*, 181 Wn. App. 648). Liberal construction is not applicable here. Liberal construction does not apply to factual questions. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). And it does not apply when a statute is plain and unambiguous. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993); *Raum v. City of Bellevue*, 171 Wn. App. 124, 155 n.28, 286 P.3d 695 (2012). Even then, liberal construction does not authorize an interpretation that is unrealistic or unreasonable. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999).

Here, the Court of Appeals was not construing an ambiguous statute, RCW 51.32.067. It was applying a unique factual situation to the statute. Everyone agrees that Ms. Wegleitner is entitled to benefits if she can demonstrate that her husband was permanently and totally disabled from his industrial injury when he died. The factual problems for Ms. Wegleitner are (1) that the Department entered a final and binding order stating that Mr. Wegleitner had no disability at claim closure and (2) that Ms. Wegleitner presented no evidence showing that her husband's industrial injury worsened between the order closing his claim and his death. The Court of Appeals correctly considered those facts to conclude that the Department's final and binding order was res judicata until Ms. Wegleitner could present new evidence about her husband's condition after the closure order. Slip Op. at 6-7, 10-11. This is not a case of interpreting an ambiguous statute, but one of applying the law to the facts of this claim. The Court should deny review.

Ms. Wegleitner is wrong when she argues that the Court of Appeals used RCW 51.32.160, the aggravation statute, to create a "judicially added requirement" found nowhere in the statute. Pet. at 17; *see* Slip Op. at 10-11. The Court of Appeals did not use RCW 51.32.160 in its holding, but merely referenced it in describing the Department's argument. Slip Op. at 10.

In any event, reading RCW 51.32.067 in tandem with RCW 51.32.160 follows the rule of statutory construction that the statutory scheme be read as a whole. *See Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). RCW 51.32.067 allows benefits if a worker dies during a period of permanent total disability. Here, Wegleitner's claim was closed with no permanent partial disability, which is a finding of no disability. CP 522. The fact that the claim was closed with no permanent partial disability does not preclude Ms. Wegleitner from receiving benefits under RCW 51.32.160. RCW 51.32.160 allows a party, including a "beneficiary," to overcome the res judicata effect of a closed claim if "aggravation, diminution, or termination of disability takes place."[4] *See Marley*, 125 Wn.2d at 537; *See White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956); *Nagel v. Dep't of Labor & Indus.*, 189 Wash. 631, 635-36, 66 P.2d 318 (1937). RCW 51.32.160 is not a "judicially added requirement" but merely a part of the Industrial Insurance Act that must be read as a whole, just as RCW 51.32.067 must be read in conjunction with the other parts of the Act. By allowing a surviving spouse to show aggravation and obtain benefits, the Legislature

[4] To demonstrate an "aggravation," the "claimant must show objective medical evidence of worsening." *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 654, 656, 219 P.3d 711 (2009).

has given the surviving spouse the opportunity to have relief from the res judicata effect of the prior closing order.

Case law does not hold that RCW 51.32.160 does not apply. Ms. Wegleitner asserts the holding that a surviving spouse must show objective worsening conflicts "with prior case law addressing surviving spouse claims." Pet. at 18. Yet she cites no such case law. The only case she cites, *Shirley*, applies when the worker died from related causes, not unrelated causes, as here. 171 Wn. App. at 880. As noted above, it does not address a situation where it is res judicata that a worker is not disabled.

In fact, the case law shows that a beneficiary must comply with the statutory requirements to show aggravation. Well-settled case law supports the conclusion that the surviving spouse must comply with those same requirements as the claimant when seeking additional benefits related to a closed claim. *McFarland v. Dep't of Labor & Indus.*, 188 Wash. 357, 367, 62 P.2d 714 (1936) (survivor may make claim for permanent total disability if such disability is established *and* the survivor complies with "necessary essentials prescribed" in statute); *In re David Harvey, Dec'd*, No. 94 1271, 1996 WL 327325 (Wash. Bd. Indus. Ins. App., April 9, 1996) (surviving spouse is held to the same standard as a worker filing an aggravation application and first has to show permanent worsening); *In re Lowery Pugh, Dec'd*, No. 86 2693, 1989 WL 224965

(Wash. Bd. Ind. Ins. App. April 27, 1989) (in a survivor benefits claim premised on the worker being permanently and totally disabled at death, if the worker's claim was closed at that time, the surviving spouse must first establish a permanent worsening of the worker's condition between the date his claim was last closed and the date of his death); *see also Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 96, 286 P.2d 1038 (1955) (widow denied pension where she provided no objective medical evidence that the worker died from an industrial injury); *Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 589-90, 282 P.2d 765 (1953) (widow awarded a pension when she presented medical testimony that the worker's industrial injury worsened to a permanent and total disability after claim closure). There is no conflict with any appellate decision; to the contrary the decision is consistent with the case law.

Ms. Wegleitner seems to believe that the Department's position is that there needs to be an order finding the worker permanent totally disabled at the time of claim closure. Pet. at 17. This is not so. Rather, she needed to show worsening of the condition, and no further Department order was necessary. She also unsuccessfully tries to distinguish RCW 51.32.067 from RCW 51.32.060 by arguing that .060 states that a worker is entitled to benefits "[w]hen the supervisor of industrial insurance shall determines that permanent total disability results from the injury." Pet. at

17-18. But RCW 51.32.067 refers to RCW 51.32.060, showing that the two statutes are interrelated. Ms. Wegleitner's argument makes no sense. The Court should deny review.

3. The Court of Appeals Correctly Applied the Law to the Facts, So This Is Not a Case of Substantial Public Interest

Contrary to Ms. Wegleitner's assertions otherwise, this is not a case of substantial public interest under RAP 13.4(b)(4). As explained above, the Court of Appeals examined the facts unique to this case and concluded that she failed to produce any evidence that her husband's condition aggravated between the June 2005 closure order and his death. Slip Op. at 10-11. That holding does not apply to the public, and Ms. Wegleitner can point to no other specific case with similar evidence.

This case also does not provide an opportunity to provide much guidance on res judicata. *See* Pet. at 19. The Court of Appeals followed well-established legal principles that a party's failure to appeal or protest a closing order makes the decision final and is res judicata as to the extent of the injury. Slip Op. at 7 (citing *White*, 48 Wn.2d at 414); *see also Marley*, 125 Wn.2d at 537. There is no reason for this Court to grant review and deviate from these well-established principles.

Finally, that Ms. Wegleitner has chosen to litigate this case and seek a pension is no reason to grant review. Pet. at 19. The Department,

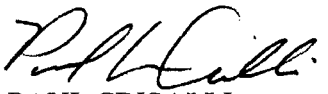
Board, superior court, and Court of Appeals all recognized the evidentiary flaw in Ms. Wegleitner's case. This Court should do the same.

V. CONCLUSION

As the Court of Appeals recognized, the Department found in an unappealed order that Mr. Wegleitner was not disabled. Ms. Wegleitner failed to show that this changed between the Department's June 2005 order closing the claim and his death. The Court of Appeals decision does not conflict with other appellate decision, and this case does not present an issue of substantial public interest. This Court should deny review.

RESPECTFULLY SUBMITTED this 30 day of June, 2015.

ROBERT W. FERGUSON
Attorney General



PAUL CRISALLI
Assistant Attorney General
WSBA No. 40681
Office No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

NO. 91632-2

SUPREME COURT OF THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D), 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, declares that on the below date, she caused to be served the Department of Labor and Industries Answer to Petition for Review and this Certificate of Service in the below described manner.

Via Email to:

The Hon. Ronald R. Carpenter
Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929
Supreme@courts.wa.gov

///

///

Via First Class United States Mail, Postage Prepaid to:

Cameron T. Rjecan
Tacoma Injury Law Group
PO Box 1113
Tacoma, WA 98409

DATED this 30th day of June, 2015.

KJRSTEN SWAN
Legal Assistant

OFFICE RECEPTIONIST, CLERK

To: Swan, Kjrsten (ATG)
Subject: RE: Aloys R. Wegleitner v. Washington State Dept. of Labor and Industries/Docket # 91632-2/Department's Answer to Petition for Review

Received 6/30/2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Swan, Kjrsten (ATG) [mailto:KjrstenS@ATG.WA.GOV]
Sent: Tuesday, June 30, 2015 2:47 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Crisalli, Paul (ATG)
Subject: Aloys R. Wegleitner v. Washington State Dept. of Labor and Industries/Docket #91632-2/Department's Answer to Petition for Review

Good Afternoon,

On behalf of Paul M. Crisalli, Assistant Attorney General, Washington State Bar Number 40681; please find attached the following pleadings for the Wegleitner v. Dept. of Labor and Industries; Docket Number 91632-2:

Department of Labor and Industries Answer to Petition for Review and Certificate of Service

If you have any questions, please feel free to contact Kjrsten Swan at (206) 389-2196 or kjrstens@atg.wa.gov.

Thank-you for your assistance,
Kjrsten

Kjrsten Swan
Legal Assistant
Attorney General's Office- Labor & Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-389-2196 -Direct
kjrstens@atg.wa.gov