No. 45580-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent.

REPLY BRIEF OF APPELLANT

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I. REPLY ARGUMENT

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

1. A Surviving Spouse Applying For Death Benefits Does Not Have To Prove Aggravation Of The Worker's Injury When The Statute And Case Law Demonstrate That She Need Only Show That The Worker Was Permanently Totally Disabled At The Time Of Death And The Work Injury Was A Proximate Cause Of The Permanent Total Disability.

Under RCW 51.32.067, the options providing for payment to a surviving spouse "apply only if the worker dies during a period of permanent total disability from a cause unrelated to the injury." RCW 51.32.067. While the statute does not deal with final and binding orders when awarding no permanent disability to the worker, Respondent/Department's argument that a surviving spouse must show objective worsening in such a situation is inconsistent with the intent of the Industrial Insurance Act, the plain language of the statute, and case law addressing surviving spouse claims.

First, the process for appealing a Department of Labor and Industries' (Hereinafter "Department") order under RCW 51.52.060(1)(a) states that it applies to "a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department." The Respondent/Department would have this statute read as

though a worker's failure to timely appeal an order that subsequently becomes final and binding has a *res judicata* effect as to the separate and distinct claims and rights of other parties enumerated in the statute. Resp't. Br. at 12-13. However, this reading of the statute fails, as does the Respondent/Department's argument. The court in *McFarland* concluded that the worker's failure to pursue his rights during his lifetime "does not bar the widow's right to apply for a pension upon the death of the work[er] . . . ." *McFarland v. Dep't of Labor & Indus.*, 188 Wash. 357, 367, 62 P.2d 714 (1936); *see also Schafer Bros. Logging Co. v. Dep't of Labor & Indus.*, 4 Wn.2d 720, 724, 104 P.2d 747 (1940) (holding worker's time loss award and subsequent death claim award were separate distinct claims and employer's failure to timely appeal time loss award did not have res judicata effect on employer's right to contest death claim).

Second, the court in *Wintermute* interpreted the "beneficiary" language in an earlier version of RCW 51.32.160(1) as allowing spouses to receive time loss compensation based on aggravation of the worker's disability, which had not been collected by the worker prior to his death. *Wintermute v. Dep't of Labor & Indus.*, 183 Wash. 169, 174, 48 P.2d 627 (1935). However, time loss claim awards are separate and distinct from death claim awards. *Schafer Bros. Logging Co.*, 4 Wn.2d at 724. Here, Mrs. Wegleitner *is not* seeking to obtain additional benefits under her husband's

time loss claim; rather, she has applied to obtain benefits under a death claim according to RCW 51.32.067. This statute only requires that the deceased worker be permanently totally disabled (Hereinafter "TPD") at the time of the death and does not state a requirement that a surviving spouse provide proof of objective worsening between the closing order and the worker's death.

Third, contrary to Respondent/Department's assertion that the reference in *McFarland* to "other necessary essentials prescribed by the statute" envisions that other provisions of the section be followed, but the court used the word "statute" in the singular, indicating that it intended to reference the particular requirements of Rem. Rev. Stat. § 7679(c)[1]. Furthermore, while the court did rely on *Beels* for the factual similarities between cases in determining that a widow has the right to establish TPD at the time of death after the worker's status had previously been fixed as PPD, the actual holding of the court encompasses cases, like Mrs. Wegleitner's,

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[1] Under Rem.Rev.Stat. § 7679(c), "'[i]f the injured workman die, during the period of permanent total disability, whatever the cause of death, leaving a widow, invalid widower or child under the age of sixteen years, the surviving widow or invalid widower shall receive thirty-five dollars ($35.00) per month until death or remarriage, to be increased per month for each child of the deceased under the age of sixteen years at the time any monthly payment is due, as follows.'" *McFarland* at 364. As the respondent points out in its brief, the closest analogy to Rem. Rev. Stat. § 7679(c) is RCW 51.32.067(1) providing death benefit payment options for an injured worker to elect from should he or she die during a period of permanent total disability from a cause unrelated to the injury. Resp't Br. at 17 (footnote 9).

where the worker's status had not previously been fixed by the Department as PPD. The court stated:

> [I]n proceedings to obtain a widow's pension, it may be shown that the workman, *at the time of his death*, was, in fact, laboring under 'permanent total disability,' as defined by the statute, and that, if such permanent total disability is the proximate result of the injury, the widow is entitled to a pension.

McFarland at 367 (quoting *Beels v. Dep't of Labor & Indus*, 178 Wash. 301, 34 P.2d 917 (1934)) (Emphasis added).

Additionally, the Court in *Noland* dealt with the issue of whether the surviving spouse had offered substantial evidence to sustain the jury's finding that the injured worker, at the time of his death, was TPD as a result of his work injury. *Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 262 P.2d 765 (1953). In *Noland*, the worker had applied to reopen his claim based on aggravation but died while a decision was pending and the widow subsequently filed an application for pension, which was denied. *Id.* at 589. On appeal, the superior court entered a judgment awarding the pension and the Department appealed. *Id.* The Court affirmed the judgment for the widow and agreed with the trial court's following of the holding in *McFarland*. *Id.* at 590. Further, while the Department argued that the evidence did not establish aggravation after the closing of the worker's original claim, the Court stated that "[i]f the establishment of such aggravation was material, an instruction to the effect should have been

requested; none was requested or given." *Id.* Thus, the Court concluded that there was substantial evidence for the jury to find that the worker was TPD at the time of his death and his disability was a result of his work injury. *Id.* at 591.

The Appellant, Mrs. Wegleitner, did not need to show evidence of "worsening" of her husband's medical condition and only needs to show that he was totally and permanently disabled at the time of his death to be entitled to survivor's benefits under her separate and distinct widow's claim. Additionally, the Respondent/Department asks the Court to give the Department deference in its interpretation of the statute. It is true that the courts generally defer to the Department's interpretation of Title 51 RCW. *Littlejohn Constr. Co. v. Dep't of Labor & Indus.,* 74 Wn. App. 420, 423, 873 P.2d 583 (1994). But this Court recently reaffirmed that, "This deference has limits however, and where the Department's reading "conflicts with a statutory mandate," deference is " 'inappropriate.'" " *Crabb v. Dep't of Labor & Indus., 326 P.3d 815, 820 (2014),* citing *Cockle v. Dep't v. Labor & Indus.*, 142 Wn.2d at 812, 16 P.3d 583 (quoting *Dep't of Labor & Indus. V. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991)). In *Crabb*, the court further went on to reaffirm the liberal construction doctrine of the Industrial Insurance Act in that, "The legislature has declared that the provisions of Title 51 RCW "shall be liberally construed for the

purpose of reducing to a minimum the suffering and economic loss arising from injuries and/ or death occurring in the course of employment." " *Crabb*, at 819, citing RCW 51.12.010; *Cockle*, 142 Wn.2d at 811, 16 P.3d 583. Further, "The Supreme Court has commanded that this legislative directive requires that we resolve all reasonable doubt in favor of the injured worker." *Crabb*, at 819, citing *See, e.g., Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996). The *Crabb* court, as to the facts of that case, stated, "Because Crabb makes at least a reasonable case for his entitlement to the higher benefit rate, we must resolve the Department's appeal in his favor, despite the canons of construction invoked by the Department." *Crabb*, 326 P.3d at 819, citing *See, e.g., Cockle,* 142 Wn.2d at 811-13, 16 P.3d 583.

Finally, the Respondent/Department cites to the case of *EK v. Dep't of Labor & Indus.*, to support their argument. *EK v. Dep't of Labor & Indus.*, 181 Wash. 91, 41, P.2d 1097 (1935). However this case is distinguishable from the present case that is in front of this court. The *Purdy* Court distinguished *E.K. v. Dep't of Labor & Indus.*, which held when a claim by the worker is rejected because he was not within the Industrial Insurance Act, and the time to appeal the judgment expires, it is final and binding on worker and anyone else claiming by and through him; "In other words, an adjudication as to the existence or absence of a fact which is essential to the

brining of a claim for injury within the workman's compensation act binds the workman himself, but also those who seek compensation as his beneficiaries or dependents." *Purdy & Whitfield v. Dep't of Labor & Indus.*, 12. Wn.2d 131, 145, 120 P.2d 858 (1942). Since Mr. Wegleitner had been previously determined to have a valid injury claim with a final and binding order as to that decision, *EK v. Dep't of Labor & Indus.*, *does not* apply in this case to bar his widow Ms. Wegleitner from pursuing her timely filed claim as it was based upon an accepted work related injury as established by the record.

II. CONCLUSION

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

In the alternative, Mrs. Wegleitner respectfully requests that the court find that the trial court erred and because Mrs. Wegleitner properly and timely filed her beneficiary claim, that this case should be reversed and

remanded to the trial court to hear her case on the merits, consistent with the Court's findings and conclusions.

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

Respectfully submitted this 11th day of July, 2014.

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) ss.
COUNTY OF PIERCE)

DOUGLAS W. LOPEZ, being first duly sworn on oath, deposes and says: That he is a Paralegal employed by TACOMA INJURY LAW GROUP, INC., P.S., Attorneys for Appellant/Plaintiff in the above-entitled matter, and that on the 11th day of July, he caused to be served, by E-File, Email, Legal Messenger, Certified Mail, or First Class Mail, as indicated, Reply Brief of Appellant to the following:

Paul M. Crisalli, AAG
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800 Fifth Avenue, Suite 2000
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DATED this 11th day of July, 2014.

Douglas W. Lopez Paralegal of Tacoma
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SUBSCRIBED AND SWORN to before me this 11th day of July, 2014.

COURTNEY E RIECAN NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 04-22-17

NOTARY PUBLIC in and for the State of Washington, residing at Pierce. My Commission expires 4/22/2017.

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