72335-9

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,

Respondent,

APPELLANT'S REPLY BRIEF

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I. ARGUMENT IN REPLY

A. The June 26, 2008 Department of Labor and Industries Order is Not Res Judicata

The Department of Labor and Industries ("Department") and Boeing both argue that the Department's June 26, 2008 order is res judicata on the issue of Mrs. Gibbons' entitlement to widow's benefits. This is incorrect. It is also clear from the record in this appeal that the order was canceled and superseded. Initially, it should be noted that Mrs. Gibbons was not given clear notice that the Department was exercising original jurisdiction in its June 26, 2008 order. The order's first sentence is "On 5/16/08, The Board of Industrial Insurance Appeals made the following decision on your appeal:". This indicates that all that follows is a part of the decision that the Board made. Included in the following part is the sentence, "The application for widow benefits is denied.". CABR 140-41. This, however, was not a part of any prior proceeding before the Board. There also was no language identifying or notifying Mrs. Gibbons that the Department was making anything other than a ministerial order.

The Board has suggested that when the Department creates orders which are ministerial, but are above and beyond strictly ministerial, that it includes language to convey to the parties that it was making an exercise of original jurisdiction such that it could become final and binding on the

parties. *See In re: Steven W. Carrell*, BIIA Dec., 99 11430 (1999). The Department failed to do that here. Mrs. Gibbons was not clearly on notice that the Board was making an original determination in its June 26, 2008 order. Without clear notice of what was being decided, the order cannot become entitled to res judicata effect. *King v. Dep't of Labor & Indus.*, 12 Wn. App. 1, 528 P.2d 271 (1974).

Moreover, the Department's June 26, 2008 order's failure to properly notify the interested parties of what it was doing with the order could have made the order *void ab initio*. While the Department has authority to administer Mr. Gibbon' claim, the Department did not have authority to create an order which stated that the Board denied her application for widow's benefits. That matter was not before the Board and the Board made no determination in that regard. Thus, if the order was determined void, then it also could not be entitled to res judicata effect.

In addition to not providing clear notice to Mrs. Gibbons, the Department's June 26, 2008 order was also canceled by subsequent Department orders dated October 13, 2011 and January 18, 2012. CABR 148-49, 196-97. Thus, the June 26, 2008 order could not become final and binding because it was canceled and superseded by subsequent Department orders. The most recent one was not protested or appealed by

anyone. If the June 26, 2008 order was given res judicata effect, the same effect should be given to the Department's January 18, 2012 order which reversed the June 26, 2008 order.

Nowhere in the Department's January 18, 2012 order which states "The order and notice dated 6/26/08 is reversed.", is the reversal limited to only certain portions of the order. CABR at 140. The whole order and notice is reversed. Therefore, if the June 26, 2008 Department order is deemed entitled to res judicata effect, there are two conflicting Department orders which were not protested or appealed and are final and binding. One that purports to deny widow's benefits and another that reverses that determination.

This situation would be untenable. Department orders which are in direct conflict cannot be allowed to simultaneously stand as appropriate final and binding orders. Parties would not know which order is actually in effect and binding upon them. This situation is also intensified with the arguments by the Department and Boeing that the Department's June 26, 2008 order was partly ministerial and partly an original determination. When it is not clear what action the Department is taking as original action in its orders, it creates confusion among the parties. To argue that parts of an order are original determinations which become res judicata when other

parts of an order are not and are superseded by other orders which reverse the underlying order creates a chaotic system that is untenable for injured workers and employers alike. To allow orders to be partially reversed and partially final without any clear indication of what on an order falls into which category creates an unworkable system. For many reasons, the Department's June 26, 2008 should not be given res judicata effect.

B. Boeing Moved for Summary Judgment Arguing No Question of Facts, Not an Absence of Facts in the Plaintiff's Case

Boeing argues that in moving for summary judgment it did so by pointing out that there was an absence of competent evidence to support the Plaintiff's case. Boeing Response Brief at 9. However, absent from Boeing's summary judgment motion to the Board is this standard for summary judgment nor is there anything specific pointed out by the employer as a lack of evidence to support Mrs. Gibbons' claim. Boeing's initial motion for summary judgment was based on the res judicata principles of Mr. Gibbon's past litigation and the Department's June 26, 2008 order. Boeing did not establish in its initial motion that there was no question of fact regarding the cause of Mr. Gibbons' death. It simply stated that there was no question of fact that he died. Thus, a question of fact remained following Boeings' initial motion, namely the cause of Mr. Gibbons' death, a crucial fact in deciding Mrs. Gibbons' entitlement to

widow's benefits under RCW 51.32.050. As the moving party, Boeing had the burden of establishing in its motion that no questions of fact exist, it failed to do so. Summary judgment should not have been granted by the Board and affirmed by the Superior Court.

C. Mrs. Gibbons' Rights are Independent Rights

Boeing and the Department also argue that Mrs. Gibbons cannot receive death benefits, survivor's benefits, or widow's benefits because her rights to such under RCW 51.32.067 are derivative of Mr. Gibbons' rights. Because he had not been declared entitled to permanent total disability benefits, Mrs. Gibbons cannot receive widow's benefits under RCW 51.32.067.

However, this argument does not account for the different relationship between death benefits and an injured worker's wage replacement benefit. The *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 866, 271 P.3d 381 (2012) court describes the difference between these types of benefits and that these benefits are treated differently. *See* Appellant's Opening Brief at 14-7.

Additionally, there have been other cases where widow's rights have been held to be new and original rights, independent of the rights of the injured worker. In the case *McFarland v. Dep't of Labor & Indus.*,

188 Wash. 357, 62 P.2d 714 (1936), the injured worker had been determined to be a permanently partially disabled worker with a final judgment by the Superior Court. *Id.* at 359. Thereafter, the injured worker died and his widow made a claim for widow's benefits. *Id.* at 360. The widow's claim was denied by the Department and the Joint Board. *Id.* Her claim was allowed on appeal at Superior Court. *Id.*

On review, the Supreme Court held that if an injured worker has been determined to be a permanently partially disabled worker by the Department or a Court and thereafter rendered permanently and totally disabled as a result of the injury as shown by the widow, a widow's pension should be allowed. *Id.* at 367. In arriving at this conclusion, the court noted that in view of the declared purpose of the Industrial Insurance Act, a claim for widow's benefits, shall, if reasonably possible, be favorably considered. *Id.* at 365.

Like the *McFarland* case, Mrs. Gibbons should be allowed to establish her own independent entitlement to widow's benefits even though Mr. Gibbons' entitlement has been declared as permanently partially disabled. Mrs. Gibbons should not have been precluded from establishing her husband's rights to permanent partially disability on the appeal to the Department's June 2, 2006 closing order and subsequently

establishing her own rights to widow's benefits because these are two independent rights and two independent benefits.

This is in line with the case *Wintermute v. Dep't of Labor & Indus.*, 183 Wash. 169, 48 P.2d 627 in which the widow was awarded increased benefits due her deceased husband and was awarded widow's benefits due her. Mrs. Gibbons' prior litigation concerning her husbands' entitlement to an increased permanent partial disability award does not preclude her from litigating her own entitlement to the denial of her widow's benefits. In fact, Mrs. Gibbons could not have sought a widow's pension in the prior appeal, which resulted in the 2011 Superior Court Judgment, because the Department had yet to take any action on her application for widow's benefits. Mrs. Gibbons must be allowed to establish her entitlement to a widow's pension or widow's benefits. It is not res judicata that she is not entitled to these benefits.

II. Conclusion

For the foregoing reasons, as well as those in her Opening Brief, Mrs. Gibbons respectfully requests that this Court find that summary judgment was improperly granted against her as genuine issues of material fact remain as it concerns her own entitlement to widow's benefits and that she is not barred by res judicata from pursing her rights.

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For the foregoing reasons, as well as those in her Opening Brief, Mrs. Gibbons respectfully requests that this Court find that summary judgment was improperly granted against her as genuine issues of material fact remain as it concerns her own entitlement to widow's benefits and that she is not barred by res judicata from pursing her rights.

Dated this 23rd day of March, 2015.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and ASSOCIATES

By: _____ for

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CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 23rd day of March, 2015, the document to which this certificate is attached, Appellant's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 23rd day of March, 2015.

LYNN M. VENEGAS, Secretary