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DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 39291-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

IRENE HOOD and the DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondents,

v.

WEYERHAEUSER COMPANY AND SUBSIDIARIES,

Appellant.

BRIEF OF RESPONDENT IRENE HOOD

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STATEMENT OF THE CASE

Leslie Hood worked for Weyerhaeuser from 1964 until his retirement on March 30, 1990. CABR 152.¹ During the course of his employment with Weyerhaeuser, Mr. Hood was exposed to airborne asbestos fibers. CABR 151. Mr. Hood's industrial exposure to asbestos was a proximate cause of his death, on August 28, 1999, at the age of 77. CABR 152.

Irene Hood filed an application for death benefits under Washington's Industrial Insurance Act (hereinafter "the Act") on June 4, 2001. On April 18, 2003, the Department of Labor and Industries (hereinafter "Department") allowed her claim for death benefits under former RCW 51.32.050(2) and established a date of manifestation of January 24, 1997. CABR 149. Weyerhaeuser appealed the Department's April 18, 2003 order allowing Mrs. Hood's claim, but the Board of Industrial Insurance Appeals (hereinafter "Board") affirmed the Department's allowance order and Weyerhaeuser did not appeal further. CABR 118-128; Brief of Appellant at 16.

The Department issued a "wage order" on April 22, 2003. CABR 60. The April 22, 2003 order based Mrs. Hood's benefit rate upon Mr. Hood's gross monthly wages at the time of his retirement. The

¹ "CABR" is the Certified Appeal Board Record, which is included as Clerk's No. 5 in the Clerk's Papers for both Superior Court cause numbers.

wage order properly included the value of Mr. Hood's dental coverage provided by Weyerhaeuser but failed to include the value of his employer provided health care benefits. CABR 60. The Department affirmed its April 22, 2003 wage order on June 30, 2005. CABR 83.

Weyerhaeuser appealed the Department's determination to the Board, arguing that Mrs. Hood's benefits should be based upon her husband's wages at the date of manifestation of his fatal occupational disease rather than his wages at the date of his retirement. CABR 62-63. Mrs. Hood cross-appealed, contending that the value of employer provided health care benefits should be included in the Department's wage order. CABR 83. The parties stipulated that the value of health care benefits Weyerhaeuser provided to Mr. Hood at the date of his March 30, 1990 retirement was \$200 per month. CABR 216-217.

The Board, in its September 6, 2006 Decision and Order, reversed the Department's determination. CABR 2-8. It found that Mrs. Hood's benefits should be based upon her husband's wages at the date of manifestation of his fatal occupation disease. CABR 4. Mr. Hood's wages as of the January 24, 1997 date of manifestation were zero because he was retired. Accordingly, the Board found that Mrs. Hood's monthly benefit rate should be \$185.00, the statutory minimum under former RCW 51.32.050(2)(a)(i). CABR 7.

Mrs. Hood and the Department timely appealed. The Superior Court for Cowlitz County reversed the Board, granting summary judgment in favor of Mrs. Hood and the Department. CP 149-153. It found the Act ambiguous regarding how death benefits should be calculated under the circumstances presented by this unique case and determined that the Department correctly based Mrs. Hood's benefits upon her husband's wages at the date of his retirement. CP 147-148. Weyerhaeuser has appealed.

STATEMENT OF THE ISSUES

1. Whether, when a deceased worker retired prior to the date of manifestation of his fatal occupational disease, the surviving spouse's death benefits under former RCW 51.32.050(2) are properly based on the injured workers last monthly wages.
2. Whether the Department's April 22, 2003 wage order correctly reflects Mr. Hood's monthly wages as of March 30, 1990.

ARGUMENT

A. A deceased injured worker's voluntary retirement does not bar his surviving spouse from receiving death benefits under former RCW 51.32.050(2)(a).

The Act has four distinct disability classifications and corresponding benefits available to injured workers. The first two of these provide temporary wage replacement benefits to injured workers.

Temporary *total* disability benefits, also known as time loss benefits, are provided to injured workers who are temporarily incapable of performing any kind of generally available work on a reasonably continuous basis. RCW 51.32.090(1); *Hunter v. Bethel School Dist.*, 71 Wn.App. 501, 506, 859 P.2d 652 (1993). Temporary *partial* disability benefits, or loss-of-earning-power benefits, are provided to injured workers who are able to work but whose earning power is only partially restored. RCW 51.32.090(3). An injured worker who returns to work on only a part time basis, for example, is entitled to loss-of-earning-power benefits.

The other two types of benefits available to injured workers themselves are for permanent disability. A permanent *partial* disability entitles a claimant who is able to return to some type of employment to a lump sum monetary award for suffering a loss of physical function. RCW 51.32.080. Permanent *total* disability means that a worker is permanently incapable of performing any kind of generally available work on a reasonably continuous basis. RCW 51.08.160. Such a worker is awarded pension benefits: monthly payments for the remainder of the worker's life and, depending on the payment election chosen by the worker, even continuing thereafter for the life of the worker's spouse. RCW 51.32.067. Appendix A.

In contrast to benefits available to injured workers themselves, the surviving spouse of an injured worker whose industrial injury or occupation disease results in death is independently entitled to death benefits under RCW 51.32.050(2). A surviving spouse's claim for death benefits is independent from the worker's rights under the Industrial Insurance Act to the extent the worker cannot waive the surviving spouse's right to benefits. *Kilpatrick v. Department of Labor and Industries*, 125 Wn.2d 222, 228, 883 P.2d 1370 (1994).

RCW 51.32.050 was amended by the 2007 legislature. Laws of 2007, ch. 284 § 4. Changes to the statute became effective July 1, 2008 and, therefore, do not apply to Mrs. Hood's claim for death benefits under the former RCW 51.32.050(2)(a). *Id.* The 2007 changes would not substantially alter the issues or outcome in this case even if the current statute was applied to Mrs. Hood's claim.

Former RCW 51.32.050(2) states, in part, as follows:

- (a) Where 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 payments according to the following schedule:
 - (i) If there are no children of the deceased worker, sixty percent of the wages of the deceased worker but not less than one hundred eighty-five dollars...

Appendix B. The plain language of this provision indicates that a surviving spouse is entitled to death benefits based on the worker's "wages" without regard to whether, when, and why the injured worker retired.

The two types of disability benefits precluded by voluntary retirement have been specifically identified by the legislature. Under RCW 51.32.090(8), voluntarily retired workers are precluded from receiving temporary total disability (time loss) benefits or temporary partial disability (loss-of-earning-power) benefits. Appendix C. Similarly, under RCW 51.32.060(6), voluntarily retired workers are precluded from receiving permanent total disability (pension) benefits. Appendix D. These provisions were both created by the 1986 Legislature, suggesting that specific consideration was given to each type of benefits available under the Act and whether it should be precluded by voluntary retirement or not. Laws of 1986, ch. 59 §§ 2-3 (51.32.090(8)); Laws of 1986, ch. 58 § 5 (RCW 51.32.060(6)).

Crucially, the 1986 Legislature did not add, and the Industrial Insurance Act does not contain, a similar provision stating that a worker's voluntary retirement disqualifies a surviving spouse from filing a claim for death benefits under RCW 51.32.050(2). Where certain language is used in one instance, but not in another instance, there is a

difference in legislative intent. *State ex rel. Evergreen v. WEA*, 140 Wn.2d 615, 632, 999 P.2d 602 (2000).

Monthly death benefit payments are the only type of benefits available to surviving spouses with claims allowed under RCW 51.32.050(2). If, as Weyerhaeuser contends, the legislature's only purpose in providing such benefits was to replace lost wages, it would have created a provision similar to RCW 51.32.090(8) (regarding time loss benefits) and RCW 51.32.060(6) (regarding pension benefits) explicitly stating that the spouse of a deceased worker who voluntarily retired is not eligible to file a claim for death benefits under RCW 51.32.050.

For these reasons, the Department allowed Mrs. Hood's claim for death benefits and, when Weyerhaeuser appealed, the Board affirmed the Department's April 18, 2003 order allowing her claim. CABR 149; CABR 118-128. Presumably, it is for also these reasons that Weyerhaeuser did not further appeal the Board's decision that Mrs. Hood's claim for death benefits under former RCW 51.32.050(2) was properly allowed. See Brief of Appellant at 16.

Given the plain language of former RCW 51.32.050(2) and the absence of a specific provision barring claims for death benefits when the worker has voluntarily retired, there can be little doubt that the

legislature intended that Mrs. Hood's claim for death benefits be allowed despite her husband having retired prior to the date of manifestation of his occupational disease.

B. The Industrial Insurance Act is ambiguous regarding how death benefits under former RCW 51.32.050(2)(a) are to be calculated.

An industrial "injury" is defined as "a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." RCW 51.08.100. An "occupational disease" is a condition that arises naturally and proximately out of distinctive conditions of one's employment. RCW 51.08.140; *Dennis v. Department of Labor & Indus.*, 109 Wn.2d 467, 745 P.2d 1295 (1987). Both types of medical conditions are covered by the Industrial Insurance Act.

Under RCW 51.32.180, a worker with an occupational disease (or his surviving family and dependants) shall receive the same benefits as a similar worker with an industrial injury. Appendix E. RCW 51.32.180, however, also contains the following exception to this rule:

... for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of

the contraction of the disease or the date of filing the claim.

RCW 51.32.180. The date that an occupational disease first requires medical treatment or becomes disabling is called its date of manifestation.

The language of RCW 51.32.180 is ambiguous in that it does not indicate whether it applies only to occupational disease claims filed by injured workers or also to death benefit claims filed by survivors of workers who have died as a result of an occupational disease. WAC 296-14-350, cited by Weyerhaeuser, is ambiguous in the same way. Brief of Appellant at 21-22. Interpreting RCW 51.32.180 to apply to claims for death benefits creates tension between it and RCW 51.32.050(2)(a). Further, while RCW 51.32.180 explicitly rejects fixing benefits based upon the date of the contraction of the disease or the date the claim was filed, it does not reject the use of a retirement date.

Former RCW 51.32.050(2)(a) is ambiguous regarding what is meant by the “wages of the deceased worker.” Where a worker has voluntarily retired, this phrase can be interpreted in at least three different ways:

- 1) Earnings as of the date of injury in industrial injury claims without regard to the date of retirement and earnings as of the date of

manifestation in occupational disease claims without regard to the date of retirement,

- 2) Earnings as of the date of injury in industrial injury claims without regard to the date of retirement and earnings as of the date of retirement in occupational disease claims without regard to the date of manifestation, or
- 3) Earnings as of the date of injury in industrial injury claims without regard to the date of retirement, earnings as of the date of manifestation in occupational disease claims where the disease manifested prior to retirement, and earnings as of the date of retirement in occupational disease claims where the disease manifested subsequent to retirement.

Weyerhaeuser urges this Court to adopt the first of these interpretations, under which Mrs. Hood would receive only the statutory minimum. Under the other two interpretations, Mrs. Hood would receive full benefits, equaling sixty percent of Mr. Hood's wages as of the date of his retirement.

C. Death benefits under former RCW 51.32.050(2) are not a simple wage replacement benefit.

Put broadly, the purpose of the Industrial Insurance Act is to provide "sure and certain relief" to injured worker and their families

while limiting employer liability for industrial injuries. RCW 51.040.010; *Dennis v. Labor and Industries*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). The Industrial Insurance Act is broad in scope and contains a mandate of liberal construction “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.” RCW 51.12.010.

Death benefits further this purpose even where an injured workers has voluntarily retired. When an occupational disease results in death, the surviving spouse’s social security and/or private pension benefits are likely to be reduced. For example, when a working or retired spouse dies, the surviving, non-working spouse may not be able to receive full social security benefits until retirement age, 66 or older. 42 U.S.C. § 402. Widow or widower benefits can be received as early as age 60, but only on a reduced basis. A loss or reduction of the surviving spouse’s social security benefits may also be accompanied by a loss or reduction of the surviving spouse’s medical and other benefits.

Such changes are likely to have a significant impact on the surviving spouse’s ability maintain a residence and cover other retirement costs. For these reasons, the rule urged by Weyerhaeuser would allow employers to escape costs brought about by fatal occupational diseases. Instead, these costs would be paid by the families

of those who have died from occupational diseases as well as other benefit programs. Such results would conflict with the primary purpose of the Industrial Insurance Act and with public policy generally.

Weyerhaeuser argues that death benefits are a wage replacement benefit because they are based on the worker's wages. If the legislature's only purpose in providing death benefits to surviving spouses was to replace the worker's lost wages, the benefit rate in former 51.32.050(2) would match the worker's earning capacity rather than representing only a reduced percentage of it and would end at the worker's retirement age. Instead, death benefits are paid at a reduced rate and until death or remarriage. Given these considerations, the legislature's use of the worker's wages to determine the benefit rate does not mean that the purpose of death benefits is to replace lost wages – much less that this is the *only* purpose of such benefits.

Again, if the legislature's only purpose in providing death benefits was to replace lost wages, it would have created a provision similar to RCW 51.32.090(8) (regarding time loss benefits) and RCW 51.32.060(6) (regarding pension benefits) explicitly stating that the spouse of a deceased worker who has voluntarily retired is not eligible to file a claim for death benefits under RCW 51.32.050.

Finally, any doubts and ambiguities in the language of the Act must be resolved in favor of the injured worker in order to minimize the suffering and economic loss that may result from work-related injuries. RCW 51.12.010; *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011, 1012 (2009). This well established principle requires the adoption of a broad interpretation of the purposes of death benefits. For all of these reasons, Weyerhaeuser's assertion that the only purpose of death benefits is the replacement of lost wages is untenable.

D. Current case law does not address the issue presented by this appeal.

Kilpatrick v. Department of Labor and Industries, 125 Wn.2d 222, 883 P.2d 1370 (1994), involved three consolidated appeals regarding asbestos claims and the 1988 amendments to RCW 51.32.050(2)(d). The amendments increased the maximum percentage of Washington's average monthly wage that a surviving spouse could receive as death benefits. Specifically, the amendments increased this amount from seventy five percent to one hundred percent of the state's average monthly wage. Laws of 1988, ch. 161, §§ 1-2.

The Supreme Court ruled that the applicable "benefit schedule" was that schedule in effect as of the date of manifestation of the worker's occupational disease. *Kilpatrick v. Department of Labor and*

Industries, 125 Wn.2d 222, 227, 883 P.2d 1370 (1994). The Supreme Court, however, also held that the correct date of manifestation is that of the disease that actually causes death rather than the first asbestos related disease to have been diagnosed. *Id.* This meant that the surviving spouses in *Kilpatrick* could receive up to one hundred percent of the state's average monthly wage because this was the figure contained in the 1988 amendments to RCW 51.32.050(2)(d) and the relevant dates of manifestation were after 1988. *Kilpatrick v. Department of Labor and Industries*, 125 Wn.2d 222, 227-229, 883 P.2d 1370 (1994).

Thus, the surviving spouses in *Kilpatrick* received, as a result of the decision, monthly benefits equaling more than seventy five percent of the state's average monthly wage and up to one hundred percent of the average monthly wage. The opinion does not address when each of the injured workers retired or whether retirement was voluntary. If one of the workers in *Kilpatrick* voluntarily retired prior to the date of manifestation of his asbestos-related occupational disease, this was not emphasized by any of the parties or discussed by the Court. For these reasons, the *Kilpatrick* decision is an inappropriate basis for the Board's decision here.

Kaiser Aluminum v. Overdorff, 57 Wn. App. 291, 788 P.2d 8 (1990) is of little assistance in this case because it addressed temporary

total disability (time loss) benefits rather than death benefits under former RCW 51.32.050(2)(a) and addressed the law operative prior to the Legislature's 1986 voluntary retirement provisions.

Weyerhaeuser also references *Leeper v. Labor and Industries*, 123 Wn.2d 803, 872 P.2d 507 (1994), but it addresses workers' pension benefits rather than death benefits under former RCW 51.32.050(2)(a) and does not address occupational disease claims nor voluntary retirement issues. *Weyerhaeuser Company v. Farr*, 70 Wn. App. 759, 855 P.2d 711 (1993), also addresses workers' pension benefits rather than death benefits under former RCW 51.32.050(2)(a).

Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009), and *Labor and Industries v. Landon*, 117 Wn.2d 122, 814 P.2d 626 (1991), are of no assistance in this case because they address the proper schedule of benefits for determining the amount of a worker's permanent partial disability award. Such an award is a lump sum payment to compensate an injured worker for loss of physical function and is not based upon the worker's wages at all. See RCW 51.32.080.

E. The rule urged by Weyerhaeuser would have absurd and unjust results.

The Industrial Insurance Act should not be interpreted in a manner resulting in absurd and fundamentally unjust results. *Flanigan*

v. Department of Labor and Industries., 123 Wn.2d 418, 426, 869 P.2d 14 (1994). The rule urged by Weyerhaeuser would create bizarre inequities that cannot have been the legislature's intent. The spouse of a claimant with an industrial injury who voluntarily retires, undergoes a surgical procedure related to the industrial condition, and dies as a result of surgical complications would receive full monthly death benefits because the date of injury preceded the date of voluntary retirement.

In this way, two voluntarily retired workers whose deaths were both work related would be treated differently based solely on one having an industrial injury and one having an occupational disease. Such a result is arbitrary, unjust, and inconsistent with the Act because "compensation and benefits provided for occupational diseases shall be paid and in the same manner as compensation and benefits for injuries under this title." RCW 51.16.040; *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011, 1017 (2009).

The expansion of *Kilpatrick* urged by Weyerhaeuser would also have absurd results with respect to the spouse of a worker who was forced to retire by one asbestos related condition, was diagnosed with a second asbestos related disease after medical retirement, and died as a result of the second disease. The surviving spouse would not be entitled to full benefits because the worker retired prior to the date of

manifestation of the fatal asbestos related disease. This result would be fundamentally unjust to the surviving spouse and clearly contrary to the intent of the legislature and purposes of the Industrial Insurance Act.

Finally, the rule urged by Weyerhaeuser would have absurd results with respect to the surviving spouse of a worker who manifested an occupational disease, voluntarily retired before the condition progressed, and subsequently died from the occupational disease. His or her spouse would be entitled to full death benefits because the date of manifestation was prior to the date of voluntary retirement. Such a surviving spouse and Mrs. Hood would be treated differently despite the fact that both of their spouses voluntarily retired rather than retiring early due to their medical condition. Importantly, Weyerhaeuser fails to acknowledge or discuss the consequences of the rule it asks this Court to adopt.

F. The Department of Labor and Industries' interpretation of RCW 51.32.050 is entitled to deference.

Washington courts give substantial weight to an administrative agency's interpretation of statutes and regulations within its area of expertise. *Roller v. Department of Labor and Industries*, 128 Wn. App. 922, 926-27, 117 P.3d 385 (2005). Here, deference should be given to the Department's interpretation that the beneficiary of a voluntarily

retired worker whose death is related to the covered injury or disease is entitled to full benefits under former RCW 51.32.050(2)(a).

It has been the Department's consistent policy, in surviving spouses' claims where the injured worker had voluntarily retired prior to the date of manifestation, to base the benefit rate on the worker's last monthly wages. CABR 177-178. Here, the Pension Adjudicator for the Chemically Related Illness Unit has certified that this has been her consistent practice since 1993 and that the wage order on appeal was issued in accordance with this policy. CABR 177-178. The Department also continues to participate in this litigation, defending its longstanding policy.

G. Doubt regarding the interpretation of the Industrial Insurance Act must be resolved in favor of Mrs. Hood.

As noted above, the Industrial Insurance Act "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." RCW 51.12.010. In other words, "where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker." *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 811, 16 P.3d 583 (2000).

“[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.” *Dennis v. Department of Labor and Industries*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987).

Here, any ambiguities contained in former RCW 51.32.050(2) and the other statutory provisions discussed above are to be resolved in favor of Mrs. Hood.

H. Mrs. Hood is entitled to reasonable attorney fees.

The award of attorney fees in this appeal is controlled by RCW 51.52.130, which applies to fees in both the superior and appellate courts when Board decisions are reviewed. *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 363-64, 115 P.3d 1031 (2005). Under RCW 51.52.130, Mrs. Hood is entitled to attorney fees for this appeal if her right to relief is sustained. *Brand v. Department of Labor and Industries*, 139 Wn.2d 659, 669-70, 989 P.2d 1111 (1999). Mrs. Hood’s attorney fees are payable directly by Weyerhaeuser because it is a self insured employer. RCW 51.52.130.

CONCLUSION

Mr. Hood died as a result of an asbestos-related disease and, as a result, Mrs. Hood is entitled to receive full death benefits under RCW 51.32.050. Her receiving the statutory minimum is especially unlikely to have been the legislature's intent.

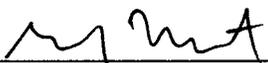
If the legislature has failed to contemplate the issues raised by this appeal, it did not fail to consider the possibility that the Act might contain ambiguities. In such circumstances, as mandated by the legislature, the Act is to be interpreted for the benefit of those who it was created to protect. It should be interpreted to provide Mrs. Hood with full benefits rather than the statutory minimum.

The Cowlitz County Superior Court properly held that Department's April 22, 2003 wage order should be modified to include the \$200 per month for health care benefits per *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2000), and the parties' stipulation in this matter.

Respectfully submitted this 1st day of December, 2009



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APPENDIX A

RCW 51.32.067

Permanent total disability — Death benefit options — Election.

(1) After a worker elects one of the options in (a), (b), or (c) of this subsection, that option shall apply only if the worker dies during a period of permanent total disability from a cause unrelated to the injury, leaving a surviving spouse, child, children, or other dependent. If, after making an election under this subsection, a worker dies from a cause related to the injury during a period of permanent total disability, his or her beneficiaries shall receive benefits under RCW 51.32.050 (2) through (5).

(a) **Option I.** An injured worker selecting this option shall receive the benefits provided by RCW 51.32.060, with no benefits being paid to the worker's surviving spouse, children, or others.

(b) **Option II.** An injured worker selecting this option shall receive an actuarially reduced benefit which upon death shall be continued throughout the life of and paid to the surviving spouse, child, or other dependent as the worker has nominated by written designation duly executed and filed with the department.

(c) **Option III.** An injured worker selecting this option shall receive an actuarially reduced benefit and, upon death, one-half of the reduced benefit shall be continued throughout the life of and paid to the surviving spouse, child, or other dependent as the worker has nominated by written designation duly executed and filed with the department.

(2) The worker shall make the election in writing and the worker's spouse, if any, shall consent in writing as a prerequisite to the election of Option I.

(3) If the worker's nominated beneficiary is the worker's spouse, and the worker and spouse enter into a dissolution of marriage after the nomination has been made, the worker may apply to receive benefits as calculated under Option I. This change is effective the date of the decree of dissolution of marriage, but no more than one year prior to the date application for the change is received in the department, provided the worker submits legally certified documentation of the decree of dissolution of marriage.

(4) If the worker's nominated beneficiary dies, the worker may apply to receive benefits as calculated under Option I. This change is effective the date of death, but no more than one year prior to the date application for the change is received in the department, provided the worker submits a certified copy of the death certificate.

(5) The change in benefits authorized by subsections (3) and (4) of this section is a one-time adjustment and will be permanent for the life of the worker.

(6) The department shall adopt such rules as may be necessary to implement this section.

APPENDIX B

RCW 51.32.050

Death benefits. (Effective until July 1, 2008.)

(1) Where death results from the injury the expenses of burial not to exceed two hundred percent of the average monthly wage in the state as defined in RCW 51.08.018 shall be paid.

(2)(a) Where 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 payments according to the following schedule:

(i) If there are no children of the deceased worker, sixty percent of the wages of the deceased worker but not less than one hundred eighty-five dollars;

(ii) If there is one child of the deceased worker and in the legal custody of such spouse, sixty-two percent of the wages of the deceased worker but not less than two hundred twenty-two dollars;

(iii) If there are two children of the deceased worker and in the legal custody of such spouse, sixty-four percent of the wages of the deceased worker but not less than two hundred fifty-three dollars;

(iv) If there are three children of the deceased worker and in the legal custody of such spouse, sixty-six percent of the wages of the deceased worker but not less than two hundred seventy-six dollars;

(v) If there are four children of the deceased worker and in the legal custody of such spouse, sixty-eight percent of the wages of the deceased worker but not less than two hundred ninety-nine dollars; or

(vi) If there are five or more children of the deceased worker and in the legal custody of such spouse, seventy percent of the wages of the deceased worker but not less than three hundred twenty-two dollars.

(b) Where the surviving spouse does not have legal custody of any child or children of the deceased worker or where after the death of the worker legal custody of such child or children passes from such surviving spouse to another, any payment on account of such child or children not in the legal custody of the surviving spouse shall be made to the person or persons having legal custody of such child or children. The amount of such payments shall be five percent of the monthly benefits payable as a result of the worker's death for each such child but such payments shall not exceed twenty-five percent. Such payments on account of such child or children shall be subtracted from the amount to which such surviving spouse would have been entitled had such surviving spouse had legal custody of all of the children and the surviving spouse shall receive the remainder after such payments on account of such child or children have been subtracted. Such payments on account of a child or children not in the legal custody of such surviving spouse shall be apportioned equally among such children.

(c) Payments to the surviving spouse of the deceased worker shall cease at the end of the month in which remarriage occurs: PROVIDED, That a monthly payment shall be made to the child or children of the deceased worker from the month following such remarriage in a sum equal to five percent of the wages of the deceased worker for one child and a sum equal to five percent for each additional child up to a maximum of five such children. Payments to such child or children shall be apportioned equally among such children. Such sum shall be in place of any payments theretofore made for the benefit of or on account of any such child or children. If the surviving spouse does not have legal custody of any child or children of the deceased worker, or if after the death of the worker, legal custody of such child or children passes from such surviving spouse to another, any payment on account of such child or children not in the legal custody of the surviving spouse shall be made to the person or persons having legal custody of such child or children.

(d) In no event shall the monthly payments provided in subsection (2) of this section exceed the applicable percentage of the average monthly wage in the state as computed under RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(e) In addition to the monthly payments provided for in subsection (2)(a) through (c) of this section, a surviving spouse or child or children of such worker if there is no surviving spouse, or dependent parent or parents, if there is no surviving spouse or child or children of any such deceased worker shall be forthwith paid a sum equal to one hundred percent of the average monthly wage in the state as defined in RCW 51.08.018, any such children, or parents to share and share alike in said sum.

(f) Upon remarriage of a surviving spouse the monthly payments for the child or children shall continue as provided in this section, but the monthly payments to such surviving spouse shall cease at the end of the month during which remarriage occurs. However, after September 8, 1975, an otherwise eligible surviving spouse of a worker who died at any time prior to or after September 8, 1975, shall have an option of:

(i) Receiving, once and for all, a lump sum of twenty-four times the monthly compensation rate in effect on the date of remarriage allocable to the spouse for himself or herself pursuant to subsection (2)(a)(i) of this section and subject to any modifications specified under subsection (2)(d) of this section and RCW 51.32.075(3) or fifty percent of the then remaining annuity value of his or her pension, whichever is the lesser: PROVIDED, That if the injury occurred prior to July 28, 1991, the remarriage benefit lump sum available shall be as provided in the remarriage benefit schedules then in effect; or

(ii) If a surviving spouse does not choose the option specified in subsection (2)(f)(i) of this section to accept the lump sum payment, the remarriage of the surviving spouse of a worker shall not bar him or her from claiming the lump sum payment authorized in subsection (2)(f)(i) of this section during the life of the remarriage, or shall not prevent subsequent monthly payments to him or to her if the remarriage has been terminated by death or has been dissolved or annulled by valid court decree provided he or she has not previously accepted the lump sum payment.

(g) If the surviving spouse during the remarriage should die without having previously received the lump sum payment provided in subsection (2)(f)(i) of this section, his or her estate shall be entitled to receive the sum specified under subsection (2)(f)(i) of this section or fifty percent of the then remaining annuity value of his or her pension whichever is the lesser.

(h) The effective date of resumption of payments under subsection (2)(f)(ii) of this section to a surviving spouse based upon termination of a remarriage by death, annulment, or dissolution shall be the date of the death or the date the judicial decree of annulment or dissolution becomes final and when application for the payments has been received.

(i) If it should be necessary to increase the reserves in the reserve fund or to create a new pension reserve fund as a result of the amendments in chapter 45, Laws of 1975-'76 2nd ex. sess., the amount of such increase in pension reserve in any such case shall be transferred to the reserve fund from the supplemental pension fund.

(3) If there is a child or children and no surviving spouse of the deceased worker or the surviving spouse is not eligible for benefits under this title, a sum equal to thirty-five percent of the wages of the deceased worker shall be paid monthly for one child and a sum equivalent to fifteen percent of such wage shall be paid monthly for each additional child, the total of such sum to be divided among such children, share and share alike: PROVIDED, That benefits under this subsection or subsection (4) of this section shall not exceed the lesser of sixty-five percent of the wages of the deceased worker at the time of his or her death or the applicable percentage of the average monthly wage in the state as defined in RCW 51.08.018, as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(4) In the event a surviving spouse receiving monthly payments dies, the child or children of the deceased worker shall receive the same payment as provided in subsection (3) of this section.

(5) If the worker leaves no surviving spouse or child, but leaves a dependent or dependents, a monthly payment shall be made to each dependent equal to fifty percent of the average monthly support actually received by such dependent from the worker during the twelve months next preceding the occurrence of the injury, but the total payment to all dependents in any case shall not exceed the lesser of sixty-five percent of the wages of the deceased worker at the time of his or her death or the applicable percentage of the average monthly wage in the state as defined in RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

If any dependent is under the age of eighteen years at the time of the occurrence of the injury, the payment to such dependent shall cease when such dependent reaches the age of eighteen years except such payments shall continue until the dependent reaches age twenty-three while permanently enrolled at a full time course in an accredited school. The payment to any dependent shall cease if and when, under the same circumstances, the necessity creating the dependency would have ceased if the injury had not happened.

(6) For claims filed prior to July 1, 1986, if the injured worker dies during the period of permanent total disability, whatever the cause of death, leaving a surviving spouse, or child, or children, the surviving spouse or child or children shall receive benefits as if death resulted from the injury as provided in subsections (2) through (4) of this section. Upon remarriage or death of such surviving spouse, the payments to such child or children shall be made as provided in subsection (2) of this section when the surviving spouse of a deceased worker remarries.

(7) For claims filed on or after July 1, 1986, every worker who becomes eligible for permanent total disability benefits shall elect an option as provided in RCW 51.32.067.

APPENDIX C

RCW 51.32.090

Temporary total disability — Partial restoration of earning power —
Return to available work — When employer continues wages —
Limitations.

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.

(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.

(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power

benefits are calculated upon reopening the claim.

(4)(a) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.

(b) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner.

(c) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.

(d) In the event of any dispute as to the worker's ability to perform the

available work offered by the employer, the department shall make the final determination.

(5) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(6) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

(7) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (7)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the

greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

(8) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

APPENDIX D

RCW 51.32.060

Permanent total disability compensation — Personal attendant.

(1) When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability:

(a) If married at the time of injury, sixty-five percent of his or her wages.

(b) If married with one child at the time of injury, sixty-seven percent of his or her wages.

(c) If married with two children at the time of injury, sixty-nine percent of his or her wages.

(d) If married with three children at the time of injury, seventy-one percent of his or her wages.

(e) If married with four children at the time of injury, seventy-three percent of his or her wages.

(f) If married with five or more children at the time of injury, seventy-five percent of his or her wages.

(g) If unmarried at the time of the injury, sixty percent of his or her wages.

(h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages.

(i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages.

(j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages.

(k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages.

(1) If unmarried with five or more children at the time of injury, seventy percent of his or her wages.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section:

(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if a worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (5)(b) is greater than

one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067.

APPENDIX E

RCW 51.32.180

Occupational diseases — Limitation.

Every worker who suffers disability from an occupational disease in the course of employment under the mandatory or elective adoption provisions of this title, or his or her family and dependents in case of death of the worker from such disease or infection, shall receive the same compensation benefits and medical, surgical and hospital care and treatment as would be paid and provided for a worker injured or killed in employment under this title, except as follows: (a) This section and RCW 51.16.040 shall not apply where the last exposure to the hazards of the disease or infection occurred prior to January 1, 1937; and (b) for claims filed on or after July 1, 1988, the rate of compensation for occupational diseases shall be established as of the date the disease requires medical treatment or becomes totally or partially disabling, whichever occurs first, and without regard to the date of the contraction of the disease or the date of filing the claim.

FILED
COURT OF APPEALS
DIVISION II

09 DEC -2 AM 11:26

STATE OF WASHINGTON

BY _____
DEPUTY

NO. 39291-7-II
**COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON**

IRENE HOOD and DEPARTMENT OF
LABOR AND INDUSTRIES OF THE
STATE OF WASHINGTON

Respondents,

v.

WEYERHAEUSER COMPANY &
SUBSIDIARIES

Appellant.

CERTIFICATE OF
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the date indicated below he caused to be mailed by United States Postal Service Mail, postage prepaid, the Brief of Respondent Irene Hood to the following:

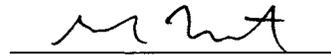
ORIGINAL TO: David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway Ste 300
Tacoma, WA 98402-4454

COPY TO: Eric Peterson
Office of the Attorney General
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Dated this 1 day of December, 2009 in Edmonds, Washington by:

A handwritten signature in black ink, appearing to read "Grady B. Martin", is written over a horizontal line.

Grady B. Martin