

ORIGINAL

NO. 41138-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WILLIAM MASON (DEC'D), MARY MASON and DEPARTMENT OF
LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Appellants,

v.

GEORGIA-PACIFIC CORPORATION,

Respondent

JOINT REPLY BRIEF OF APPELLANTS

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COURT OF APPEALS
DIVISION II

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I. INTRODUCTION

The central point of the opening brief of the Department of Labor and Industries (Department) and William Mason (Dec'd) (claimant) was that the Legislature intended to provide full death benefits to survivors of voluntarily retired workers. However, RCW 51.32.050 is in conflict with RCW 51.32.180. To resolve this conflict, this Court should utilize well-established tenets of statutory interpretation and the requirement of RCW 51.12.020 and case law that the statutes be liberally construed in favor of providing benefits to workers and their beneficiaries.

Georgia-Pacific has failed to refute (and in two important respects, even to respond to) the arguments set forth by Mr. Mason's surviving spouse and the Department in this case.

II. ARGUMENT IN REPLY

A. **Survivor Benefits Are Different Than Worker Time-Loss And Pension Replacement Benefits, And The Legislature Did Intend To Grant Them Based On The Worker's Final Wages, Despite A Worker's Prior Voluntary Retirement**

Georgia-Pacific argues that survivor pension rights should be treated the same as a worker's loss of the right to time-loss compensation and a worker's loss of the right to pension benefits, where a worker voluntarily retired and has not attempted to return to the workforce. *See, e.g.*, Brief of Respondent (RB) at 4-10. The employer cites *Kilpatrick v.*

Dep't of Labor & Indus., 125 Wn.2d 222, 230, 883 P.2d 1370 (1966) for the proposition that “[t]he purpose of workers’ compensation benefits, including survivor’s benefits, is to protect against the loss of future wage earning capacity.”

However, the *Kilpatrick* decision’s discussion cited by Georgia-Pacific makes no such reference to survivor’s benefits being limited to the worker’s future wage loss. Instead, the employer cites a section of *Kilpatrick* where the Court determines that the date of manifestation, rather than the date of exposure, is the correct date to determine a worker’s benefits, because the later date would likely result in higher benefits to the worker. *Id.* at 230.

In the instant context regarding survivor benefits, what is important about the *Kilpatrick* decision is that, in that case, the Court holds that a widow’s right to benefits is separate from a worker’s rights to benefits. *See Kilpatrick*, 125 Wn.2d at 228.

[W]e reaffirmed the rule that a survivor’s claim is independent from the worker’s claim to the extent that the worker cannot waive the survivor’s rights to benefits.

As was described at length in the opening joint brief of the survivor and the Department, a surviving spouse’s lifetime pension is different than mere wage replacement benefits. *See Appellants’ Opening Brief (AB)* at 8-15. The Legislature intended to treat survivor’s benefits differently than

worker time-loss compensation and worker pension benefits, presumably because when a worker dies as a proximate result of his or her work activities, the Legislature determined that was a circumstance that correctly should result in additional benefits being due to the surviving spouse of that worker. Georgia-Pacific's Brief of Respondent completely ignores the argument about apparent supporting legislative policy in the joint opening brief of Mrs. Mason and the Department, AB at 14-15. By factual necessity, survivors cannot reverse a worker's decision to voluntarily retire: the worker is dead. But while a worker lives, the worker can undo voluntary retirement by making a bona fide effort to return to employment. WAC 296-14-100(1)(b) (voluntary retirement is negated by evidence showing the worker's "bona fide attempt to return to work after retirement").

Thus, even in the absence of the 1986 statutory amendments to RCW 51.32.060 and RCW 51.32.090, but not to RCW 51.32.050, implied legislative policy arguments support curtailing loss of earning power, time-loss compensation, and pension benefits for voluntarily retired workers. The cessation of benefits is the worker's choice, and the choice is reversible while the worker lives. With death benefits, on the other hand, the survivor's death benefit rate should not similarly be reduced for a choice the survivor did not make and cannot reverse.

This is a reasonable, practical explanation for the Legislature's decision to amend RCW 51.32.060 and RCW 51.32.090, but not RCW 51.32.050. This also disposes of the hypotheticals that Georgia-Pacific poses at RB 15-16 and characterizes as showing absurdity in the interpretation by Mr. Mason's widow and the Department. In any event, survivors' independent rights to death benefits cannot be limited or waived by the worker. *Kilpatrick*, 125 Wn.2d at 228.

Georgia-Pacific's "classes of things" response at RB 20-21 to the *inclusio unius est exclusio alterius* argument of Mrs. Mason and the Department (*see* AB at 9-14) is conclusory and not logical. The Legislature's insertion of voluntary retirement provisions in certain monthly compensation benefits provisions and not in other monthly compensation benefits provisions is indicative of the Legislature's intent to exclude the latter from the effect of voluntary retirement. AB at 9-14.

Furthermore, Georgia-Pacific's suggestion at RB 20 that the principle of *inclusio unius exclusio alterius* does not apply unless supported by legislative history is not supported by case citation in the employer's brief. Mrs. Mason and the Department have found no such authority to support the employer's argument in this regard.

B. RCW 51.32.050 And RCW 51.32.180 Are In Conflict, And Therefore, Liberal Construction Applies

In their opening brief, Mrs. Mason and the Department argued that:

(1) RCW 51.32.050 (basing survivor benefits on worker wage rate) conflicts with RCW 51.32.180(b) (determining compensation rate based on the date a disease becomes manifest) in cases such as this, because a voluntarily retired worker has no current “wages;” and (2) under liberal construction principles, the conflict in the ambiguous statutory provisions should be resolved in favor of survivors. AB at 15-22.¹ Georgia-Pacific argues that RCW 51.32.050 and RCW 51.32.180 are not only in harmony, but are unambiguous such that liberal construction does not apply. RB at 12-16.

Georgia-Pacific’s purported harmony would be achieved only by placing at the statutory minimum pension rate each and every survivor of a voluntarily retired worker whose occupational disease became manifest after retirement. This money-saving result for Georgia-Pacific is a plausible reading of the statutes, but that does not make the statutory provisions unambiguous. Nothing plain in the statutory provisions of

¹ In addition, deference is due the interpretation of the relevant provisions of Title 51 RCW by the Department, as the exclusive, first-line, policy-making agency that the Legislature has tasked with administering the Industrial Insurance Act. *See generally Dolman v. Dep’t of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986) (deference to Department); *Port of Seattle v. Pollution Control Hr’gs Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004) (deference to first-line, policy-making agency not to quasi-judicial review agency).

RCW 51.52.050 and RCW 51.32.180(b) expresses a legislative intent to place at the statutory minimum every survivor who finds herself or himself in the categorical circumstances in which Mrs. Mason finds herself.

Also, Georgia-Pacific's brief does not respond to the appellants' argument and hypothetical at AB 20-21 that the employer's argument would create additional conflict in light of the provisions of the Act requiring injuries and occupational diseases be compensated under the same standards. *See* RCW 51.32.180(b) (workers and their beneficiaries "shall receive the same compensation benefits" for occupational diseases as for industrial injuries); RCW 51.16.040 (compensation for injuries and occupational diseases shall be paid "in the same manner").

Moreover, basic tenets of statutory construction mandate that specific statutes control over general ones. *See Hallauer v. Spectrum Prop. Inc.*, 143 Wn.2d 126, 146-47, 18 P.3d 540 (2001). As was noted in the appellants' opening brief at AB 17, RCW 51.32.050 is specific to death benefits, while RCW 51.32.180(b) is general to all benefits under occupational disease claims.

Finally, it defies common sense under the liberal construction principles of RCW 51.12.020 and under the grand compromise of the Industrial Insurance Act (*see* RCW 51.04.010) for Georgia-Pacific to

suggest that the Legislature intended that an employer who is responsible for a worker's death can avoid paying more than minimal benefits to survivors. *See Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 19, 201 P.3d 1011 (2009).

The core purpose of the [Industrial Insurance Act] is to allocate the costs of workplace injuries to the industry that produces them, thereby motivating employers to make workplaces safer.

The position maintained by Georgia-Pacific would effectively mean that an employer's unsafe working environment could be the proximate cause of a worker's death, yet they would have virtually no financial responsibility for that death. This position cannot be supported.

C. The *Tobin* And *Flanigan* Cases Decided Under The Third-Party Statute Have No Bearing On This Case

For the first time in this case, Georgia-Pacific argues that recent significant third-party recovery decisions support denying survivor benefits, RB at 17-19, discussing *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010); and *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994). *Tobin* and *Flanigan* relate to the Department's statutory reimbursement interests when an industrial insurance claimant recovers damages for his or her injury or occupational disease in a lawsuit against a tortfeasor who is a third party (i.e., not his or her employer or co-worker). Those decisions interpret chapter 51.24

RCW as precluding the Department from obtaining reimbursement from workers' loss of consortium and pain and suffering tort recoveries on the ground that none of the benefits under the Industrial Insurance Act pay for loss of consortium or pain and suffering.

A survivor's entitlement to a pension fits squarely within Title 51 as a benefit the Department compensates for, related to an industrial injury or occupational disease. Georgia-Pacific's argument might make sense if the Department were seeking to require that Georgia-Pacific pay some sort of loss of consortium or pain and suffering award to Mrs. Mason in addition to the survivor's pension. However, that is clearly not the case here. Georgia-Pacific's arguments on this issue are misplaced.

Georgia-Pacific appears to contend in its *Tobin-Flanigan* argument that if compensation cannot be shown (perhaps to the satisfaction of Georgia-Pacific under an as-yet undisclosed Georgia-Pacific test) to clearly be solely wage replacement, the compensation is not allowable under Title 51 RCW. Pension benefits for all workers and all survivors are generally *for life*, however, no matter how old the pensioner. It makes no sense to suggest that all *lifetime* pension benefits for all pensioners are solely wage replacement, whatever test Georgia-Pacific would have the Court apply. This Court should reject Georgia-Pacific's argument under *Tobin and Flanigan*.

D. The Attorneys Fees and Costs Awarded by the Superior Court Are Not Being Challenged

In their opening brief, Mrs. Mason and the Department requested that this Court address their right to attorney fees and costs at both the Superior Court and the Court of Appeals. AB at 23. The employer's Brief of Respondent correctly notes that attorney fees and costs were awarded under the Superior Court order and judgment. RB at 39-40. Mrs. Mason and the Department concede that attorney fees and costs at the Superior Court level are not at issue on appeal.

Mrs. Mason and the Department do, however, continue in their respective requests that, if this Court rules in their favor in this appeal, attorney fees and costs under RCW 51.32.130 should be awarded against Georgia-Pacific for the appeal to the Court of Appeals, and statutory attorney fees and other costs should be awarded to the Department for the appeal to the Court of Appeals.

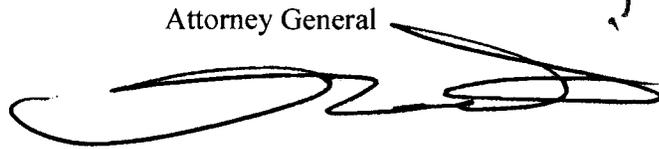
III. CONCLUSION

The Superior Court improperly based Mrs. Mason's death benefits on Mr. Mason's nonexistent wages at time of his disease's manifestation. For the reasons stated above and in their joint opening brief, Mrs. Mason and the Department respectfully request that this Court reverse the Superior Court's July 29, 2010 Order and Judgment and hold that

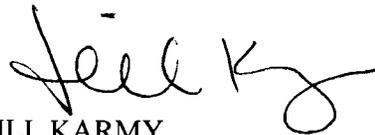
Mrs. Mason's survivor's benefits must be based on Mr. Mason's wage at the time he retired.

RESPECTFULLY SUBMITTED this 10th day of March, 2011.

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DATED this 10th day of March, 2011, at Tumwater, WA.



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