

COURT OF APPEALS
DIVISION II

NO. 41138-5-II

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

STATE OF WASHINGTON
BY CA
DEPUTY

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

Appellants,

v.

GEORGIA-PACIFIC CORPORATION,

Respondent.

**BRIEF OF RESPONDENT
GEORGIA-PACIFIC CORPORATION**

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I. INTRODUCTION

The Clark County Superior Court was correct in concluding that calculation of Mary Mason's death benefits should be based on the statutory minimum given William D. Mason's occupationally related condition or conditions became manifest at some point after April 30, 1986 when he was voluntarily retired and not earning a wage. This court, for the reasons enumerated below, should affirm the decision of the Superior Court.

II. STATEMENT OF THE ISSUES

Where the worker has voluntarily retired, subsequently has an occupational disease that becomes manifest and which is later a proximate cause of the worker's death, is the worker's surviving spouse entitled to survivor's benefits based upon the wage at the time the worker last worked, or the statutory minimum under RCW 51.32.050(2)?

III. STATEMENT OF THE CASE

William D. Mason worked for Georgia Pacific Corp., formerly James River and Crown Zellerbach, on a continuous basis from July 24, 1950 until his voluntary retirement on April 30, 1986. CABR Lorie L.

Lehman 104-105; CABR Mary J. Mason 67-69.¹ Mr. Mason did not seek any other gainful employment or earn any wages from employment and completely disassociated himself from the labor market after retirement. CABR Mary J. Mason 67-69.

During the course of Mr. Mason's employment, he was exposed to asbestos, chlorine dioxide, and other caustic chemicals. CABR Gary Collins 110-112; CABR Robert R. Reed 121-125. At the time of Mr. Mason's voluntary retirement, he was not suffering from any occupationally-related conditions. CP 39-45. Mr. Mason did not file for a claim for industrial insurance benefits until June 6, 1988 alleging bilateral lung conditions related to exposure during the course of his employment. CABR 87. The Department of Labor and Industries issued an order allowing the claim on May 5, 1989. CABR 87.

Mr. Mason's claim remained open until his death on December 14, 2006. CABR 88. Mary Mason was legally married to Mr. Mason for many years through the date of his death and has not remarried. CABR Mary J. Mason 5. Mr. Mason had no dependent children. CABR 88. The Department issued an order on April 19, 2007 finding that Mr. Mason's

¹ "CABR" stands for the Certified Appeal Board Record. Board documents cited as "CABR [Board-stamped page number]". Witness testimony cited as "CABR [witness name] [page number of transcript]". "CP" stands for Clerk's Papers.

death resulted from his occupational disease and approved survivor's benefits for the surviving spouse. CABR 88. A July 23, 2007 Department order established surviving spouse widow's pension amounts based on pre-retirement monthly wages. CABR 88. This order used a previously established arbitrary date of manifestation for Mr. Mason's occupationally related lung condition of April 30, 1986, the last day he had worked, to compute survivor's benefits. CABR 87-88. These orders were protested by Georgia-Pacific Corporation and affirmed by the Department. CABR 88. As a result, the orders were subsequently appealed to the Board of Industrial Insurance Appeals. CABR 88. The orders were affirmed by the Board after denying a petition for review and then appealed to Superior Court in Clark County. CABR 89-90; CABR 2.

The Superior Court of Clark County, after trial by jury, reversed and remanded the Board's decision with respect to survivor's benefits. CP 39-45. The jury concluded that Mr. Mason's occupationally related condition or conditions became manifest at some point after April 30, 1986 when Mr. Mason was voluntarily retired. CP 39-45. Accordingly, the Superior Court determined as a matter of law that Ms. Mason's pension benefits should have been set at the statutory minimum given Mr. Mason was voluntarily retired and not earning a wage when his occupational disease became manifest. CP 39-45. Ms. Mason and the

Department appealed to this Court for review of the Superior Court's legal conclusion. Brief of Appellants at 1-2. The appellants do not dispute the factual determination as to date of manifestation of Mr. Mason's occupational disease. Finally, the Superior Court set attorney fees and costs for Ms. Mason and not for the Department. CP 39-45.

IV. ARGUMENT

The Clark County Superior Court was Correct in Concluding that Calculation of Mary Mason's Survivor's Benefits Should be Based on the Statutory Minimum given William D. Mason's Occupationally Related Condition or Conditions Became Manifest at Some Point After April 30, 1986 when He was Voluntarily Retired and Not Earning a Wage.

A. The Purpose of Survivor's Benefits is for Wage- Replacement and Wage-Replacement Benefits are Not Available to Voluntarily Retired Workers and Their Survivors.

Coming to a consensus on the purpose of survivor's benefits must be accomplished before taking the analysis a step further. The purpose of workers' compensation benefits in general is to reflect future earning capacity rather than wages earned in past employment. *Kilpatrick v.*

Department of Labor and Industries, 125 Wn.2d 222, 230, 883 P.2d 1370 (1994) (citing *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289 (9th Cir. 1983)). This purpose is emulated through temporary total disability benefits and permanent total disability benefits. See RCW 51.32.090 (determining temporary total disability (time loss) benefits); RCW 51.32.060 (controlling permanent total disability (pension) benefits). These particular statutes authorize disability compensation based on a percentage of lost wages exclusively.

Similarly, death benefits, otherwise known as survivor's benefits, share the same wage-replacement purpose as temporary and permanent total disability benefits. Survivor's benefits are calculated based on the wages of the deceased worker in the same manner as disability benefits. RCW 51.32.050(2); compare RCW 51.32.090(1) and RCW 51.32.060(1). Moreover, RCW 51.32.050(2)(a) provides further support for the determination that survivor's benefits are to protect future earning capacity by forbidding a spouse who has remarried from continuing to receive benefits. Plainly, the purpose behind survivor's benefits represents a logical extension of the purposes behind disability benefits. Each individual benefit acts solely in a wage-replacement capacity.

In understanding the wage-replacement purpose behind the above mentioned benefits, the effect a worker's voluntary retirement has on those benefits must be explored. The Court of Appeals in *Kaiser Aluminum & Chem. Co. v. Overdorff*, ruled that temporary disability benefits are not available to a voluntarily retired worker.² *Kaiser Aluminum & Chem. Co. v. Overdorff*, 57 Wash.App. 291, 296, 788 P.2d 8 (1990) (1986 amendment to RCW 51.32 precluding temporary and permanent disability benefits for voluntarily retired workers was not applied to this case). In *Kaiser Aluminum*, a claimant sought benefits for temporary total disability under RCW 51.32.090. *Id.* at 292. The claimant sustained an industrial injury and subsequently voluntarily retired. *Id.* at 292. Several years later, the claimant had surgery performed on the industrial injury and requested temporary total disability benefits. *Id.* at 292. The Court took a hard look at how other jurisdictions dealt with temporary total disability benefits. *Id.* at 294-95. Particularly persuasive to the court were decisions from Oregon and Rhode Island courts given the similarity in statutory language and purpose behind temporary total disability benefits. *Id.* at 295. "Hence, the benefit is contingent upon the

² A worker is "voluntarily retired" if the worker is not receiving salary or wages from any gainful employment and the worker has provided no evidence to show a bonafide attempt to return to work after retirement. WAC 296-14-100. *See also Weyerhaeuser Company v. Farr*, 70 Wash.App. 759, 766, 855 P.2d 711 (1993) (legal question is whether the worker has voluntarily withdrew from the general work force).

loss of wages: “If the claimant has retired voluntarily following the injury, he can suffer no loss of wages, because, by definition, he has no expectation of receiving wages.” *Id.* at 296 (citing *Stiennon v. State Accident Ins. Fund Corp.*, 68 Or.App. 735, 683 P.2d 556, 558, review denied, 298 Or. 238, 691 P.2d 482 (1984)); see also *Mullaney v. Gilbane Bldg. Co.*, 520 A.2d 141 (R.I. 1987) (cited by the *Kaiser Aluminum* Court to support the holding). In applying this rule, the Court reasoned that because the claimant was voluntarily retired at the time of his surgery, the claimant did not suffer the potential adverse economic impact necessary to qualify for temporary total disability benefits. *Kaiser Aluminum*, 57 Wash.App. at 296.

The Court of Appeals extended this reasoning to permanent total disability benefits in a subsequent decision, *Weyerhaeuser Company v. Farr*.³ In this case, the claimant injured his back while working for Weyerhaeuser Company. *Weyerhaeuser Company v. Farr*, 70 Wash.App. 759, 760, 855 P.2d 711 (1993), review denied 123 Wn.2d 1017, 871 P.2d 600 (1994). The claim was closed after the claimant received a permanent partial disability benefit. *Id.* at 761. The claim was opened once again for aggravation of condition and closed with another permanent partial

³ Subsequently enacted 1986 amendment to RCW 51.32 precluding temporary and permanent disability benefits for voluntarily retired workers was not applied to this case as well.

disability award. *Id.* at 761. The claimant then took early retirement and did not seek other employment. *Id.* at 761. After retirement, the claimant filed an application to reopen the claim for aggravation of condition. *Id.* at 761. The Department reopened the claim and awarded the claimant a permanent partial disability award, which the claimant appealed to the Board claiming he was permanently and totally disabled. *Id.* at 761. The Board agreed with the claimant and Weyerhaeuser Company appealed to Superior Court. *Id.* at 761-62. The Superior Court reversed the Board decision concluding that voluntary retirement rendered the claimant ineligible for permanent disability benefits. Claimant appealed the Superior Court's decision. *Id.* at 762.

On appeal, the Court relied heavily on the reasoning in the *Kaiser Aluminum* decision stating there was no significant distinction between temporary and permanent total disability benefits. *Id.* at 763; *see also Bonko v. Dept. of Labor & Indus.*, 2 Wash.App. 22, 25, 466 P.2 526 (1970) (temporary total disability is different from permanent total disability only in duration of disability, not in its character). The Court went on to state that temporary and permanent total disability awards are determined on the same schedule under RCW 51.32.090(1), which is tied directly to a worker's wages. *Weyerhaeuser Company*, 70 Wash.App. at 765. A worker is defined under RCW 51.08.180 as one who is engaged in

the employment of an employer. *Id.* at 765. Therefore, a person who voluntarily retires and subsequently becomes totally disabled ceases to be a worker and is not entitled to permanent total disability benefits. *Id.* at 765 (citing *SAIF Corp. v. Stephen*, 308 Or. 41, 774 P.2d 1103 (1989)).

Survivor's benefits represent a logical extension of the reasoning employed by the Court of Appeals above and should be afforded similar treatment as temporary and permanent total disability benefits. The purpose of workers' compensation benefits, including survivor's benefits, is to protect against the loss of future wage earning capacity. *Kilpatrick*, 125 Wn.2d at 230. Temporary and permanent total disability statutes, along with the statute governing survivor's benefits, authorize disability compensation based on a percentage of lost wages. Compare RCW 51.32.090(1), RCW 51.32.060(1), and RCW 51.32.050(2). Where a worker has voluntarily withdrawn from the work force, that individual ceases to be a worker and is not protected against the loss of future wage earning capacity. *Weyerhaeuser Company*, 70 Wash.App. at 765.

Much like the claimant who had retired voluntarily following the industrial injury suffered no loss of wages in *Kaiser Aluminum* and was not entitled to temporary total disability benefits, so too can the same be said of Ms. Mason's request for wage-replacement survivor's benefits.

Kaiser Aluminum, 57 Wash.App. at 296. Ms. Mason did not have any expectation of receiving future wages, nor did Mr. Mason, after his voluntary retirement. Ms. Mason, by operation of law, cannot stand in the shoes of Mr. Mason and expect wage-replacement benefits when her husband no longer was a “worker” as defined under Title 51. RCW 51.08.180; *see also* RCW 51.32.050(2)(a) (authorizing survivor’s benefits for a deceased “worker”). Mr. Mason and his surviving spouse, given his death, had no recognizable claim to wage-replacement benefits after Mr. Mason’s voluntary retirement effectively took that recognized protection off the table. Accordingly, awarding survivor’s benefits based upon Mr. Mason’s pre-retirement wages when there was no expectation of his receiving future wages after he voluntarily retired, as requested by appellants, is inappropriate and runs counter to the purpose behind survivor’s benefits.

B. Survivor’s Benefits may Not Exceed the Statutory Minimum where the Worker was Voluntarily Retired on the Date of Manifestation of the Underlying Related Occupational Disease.

Survivor’s benefits in this case are governed by former RCW 51.32.050(2), which stated:

“(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.”⁴

In other words, where a surviving spouse was eligible for survivor’s benefits those benefits were to be calculated based on 60 percent of the deceased worker’s wages or at the very least one hundred and eighty-five dollars. The applicable date for establishing a deceased worker’s wages under this statute for an occupational disease as required by case law at the time was the date of disease manifestation.⁵ The evidence, as found by the jury, supported the finding that Mr. Mason’s occupational disease manifested itself after he had voluntarily retired,

⁴ Former RCW 51.32.050(2)(a) was applied by the Superior Court given the findings of fact made by the jury as to the date of manifestation of Mr. Mason’s occupational disease and given the Legislature’s amendment to RCW 51.32.050, effective July 1, 2008, was not applicable under the timeline presented in the current case.

⁵ The manifestation date is determined by the date the disease actually required medical treatment or interfered with the worker’s job performance. *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 201 P.3d 1011, 1015 (2009) (referencing the decision in *Dept. of Labor & Indus. v. Landon*, 117 Wash.2d 122, 125-126, 814 P.2d 626 (1991); see also RCW 51.32.180(b) (codified manifestation rule) and WAC 296-14-350.

which has not been contested by the appellants and represents a legally binding factual determination. CP 39-45. After April 30, 1986, Mr. Mason did not have work-related wages. CABR Mary J. Mason 67-69. In applying the above referenced statute, sixty percent of zero is zero. Therefore, Ms. Mason is entitled to the statutory minimum of one hundred and eighty-five dollars as a matter of law. The Superior Court correctly determined, based on the facts and applicable law, that Ms. Mason was entitled to survivor's benefits in the amount of one hundred and eighty-five dollars a month. CP 39-45.

C. RCW 51.32.050 and RCW 51.32.180 are Not in Conflict and are Unambiguous, which Mandates a Plain Meaning Approach with regard to Statutory Construction.

Appellants argue that for deaths due to occupational diseases that first manifest after voluntary retirement, RCW 51.32.050 and RCW 51.32.180 are in conflict because such a worker has no current "wages" to serve as the basis for determining the survivor's benefit amount under RCW 51.32.050. Brief of Appellants at 15, 17. Respondent fails to see a conflict between the above mentioned statutes. No recognized conflict arises while applying the plain meaning of RCW 51.32.050 and RCW

51.32.180 to the facts of this case. Finally, the interpretation advanced by the appellant would lead to an absurd result.

Foremost, merely asserting a conflict exists in the absence of an actual showing does not establish a true and genuine conflict. Respondent takes issue with appellant's assertion that RCW 51.32.050 conflicts with RCW 51.32.180 because a voluntarily retired worker has no "wages," which is the basis for computing a survivor's benefits rate. A person that does not have wages would have a wage rate of zero. Calculating survivor's benefits from a wage rate of zero leads to the statutory minimum and is a permissible utilization of the instructions detailed in RCW 51.32.050. The plain meaning approach to the application of RCW 51.32.050 and RCW 51.32.180 produces no ambiguity or conflict under the facts of this case and should be applied by this Court.

"The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005); *see also Flanigan*, 123 Wn.2d at 426 (absent a contrary legislative intent, the Court is to construe statutory language according to its plain and ordinary meaning). RCW 51.32.180 is

absolutely clear that “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 (also known as the date of manifestation). Once the manifestation date is known, survivor’s benefits can be calculated under RCW 51.32.050. Similarly, RCW 51.32.050, and the former RCW 51.32.050 applicable to this case, are unambiguous on their face and the plain meaning approach should govern the calculation of survivor’s benefits. In looking at former RCW 51.32.050(2), survivor’s benefits where there were no children of the deceased worker were to be calculated as “sixty percent of the wages of the deceased worker but not less than one hundred eighty-five dollars.” RCW 51.32.050(2). The language of the statute is apparent and does not lend itself to any other interpretations or applications. The uncontested date of manifestation for Mr. Mason’s occupational disease was determined to be at some point after April 30, 1986. CP 39-45. Mr. Mason did not earn wages after this date; therefore the appropriate wage rate should be set at zero. CABR Mary J. Mason 67-69. Taking the wage rate of zero and applying it to the calculations directed by former RCW 51.32.050(2), the survivor’s benefit would equal the statutory minimum of one hundred eighty-five dollars. Given there

has been no showing of a contrary legislative intent, the plain meaning approach employed by the Superior Court to arrive at the appropriate amount of monthly survivor's benefits for Ms. Mason was proper. CP 39-45.

Furthermore, the argument advanced by the appellants that insists survivor's benefits be calculated based on wages last earned by Mr. Mason would mandate an absurd result. Brief of Appellants at 18. "A statute must be read as a whole to effect its purpose; courts do not read statutes to have unlikely or absurd consequences." Brief of Appellants at 18; (*citing Watcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *Flanigan*, 123 Wn.2d at 426). It is evident that an individual is not entitled to permanent total disability benefits if the condition became manifest after voluntary retirement. Yet, under appellants' logic, a worker's survivors would then become eligible for full benefits based upon the time the worker last earned a wage were the worker to die. For example, assume we have two separate workers. Worker number one has a manifestation of a condition prior to retirement. Worker number two has a manifestation of a condition after voluntarily retiring. Worker number one would be entitled to permanent total disability benefits and worker number two would not. Benefits would continue unabated for the survivors of worker number one were worker number one to die for

reasons proximately related to his or her industrial condition. Applying the logic of the appellants, were worker number two to then pass away, the survivors would be placed in a position comparable to the survivors of worker number one, which would produce an absurd result. The differential treatment is justified because worker number one suffered wage loss whereas worker number two did not. To award survivor's benefits based on wages last earned, as demonstrated in this example, is unjust. The appellants' argument that survivor's benefits should be calculated based on Mr. Mason's wages at the time of retirement, rather than the date of manifestation, is unfair and finds no authority or validity in the law.

RCW 51.32.050 and RCW 51.32.180 are not in conflict as argued by the appellants. The Superior Court's application of the plain meaning of the above mentioned statutes to the facts as determined by the jury was correct in this matter. Additionally, it is appellants' reading of the above mentioned statutes that would lead to an absurd result. Liberal construction in favor of the worker does not apply when there is no doubt as to the meaning of the statutes in issue. *Gaines v. Dept. of Labor & Indus.*, 1 Wn. App. 547, 552, 463 P.2d 269 (1969); *see also* Brief of Appellants at 22.

D. Awarding Benefits in the Amount Requested by the Appellants would Effectively Compensate Ms. Mason with Benefits Not Contemplated or Allowed by the Industrial Insurance Act.

Given the wage replacement nature of survivor's benefits, an award in excess of the statutory minimum in this case would entitle Ms. Mason to a category of damages not allowed under Title 51. In fact, the Supreme Court has held that RCW 51.32.050, as well as RCW 51.32.060 and RCW 51.32.090, calculate benefits only on a percentage of salary and makes no reference to any other category of damages. *Tobin v. Dept. of Labor & Indus.*, pg. 1-13, 7, No. 81946-7 (Filed August 12, 2010) (referencing *Flanigan v. Dept. of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994)).⁶ Thus, benefits calculation under these statutes for noneconomic damages, like pain and suffering or loss of consortium, is not allowed. *Tobin*, No. 819467 at 7.

By pursuing survivor's benefits at a rate predicated upon wages whilst working, rather than wages when the condition became manifest, appellants effectively are arguing for noneconomic damages. The courts

⁶ In *Flanigan*, the Supreme Court held that the Department's right of reimbursement does not extend to a spouse's third party recovery for loss of consortium. *Flanigan*, 123 Wn.2d at 426. The *Flanigan* decision was later codified by RCW 51.24.030(5).

have expressly rejected this as indicated above in both *Tobin* and *Flanigan*. In other words, the appellants' interpretation of RCW 51.32.050 would impermissibly compensate Ms. Mason with a noneconomic type of benefit. The manifestation of Mr. Mason's occupational disease occurred after he had voluntarily retired. CP 39-45. After his voluntary retirement, Mr. Mason was neither earning a wage nor did he have an expectation of receiving future wages. CABR Mary J. Mason 67-69. Therefore, the wage calculation as defined by RCW 51.32.050 would, as a matter of law, provide the statutory minimum to his survivor Ms. Mason upon his death. Ms. Mason's receipt of an additional amount over the statutory minimum of one hundred and eighty-five dollars would provide her a noneconomic benefit not contemplated or allowed under Title 51. Survivor's benefits would effectively be paying Ms. Mason for noneconomic type damages, like loss of consortium and pain and suffering. Because Title 51 does not allow the Department to recover or pay benefits for noneconomic type damages, that type of benefit should not be extended to Ms. Mason as requested by the appellants in this case. Brief of Appellants at 1-2.

Put in another context, Mr. Mason did not receive temporary or permanent total disability benefits after filing his industrial insurance claim in June of 1988 through his death in December of 2006. Mr. Mason

was not awarded this type of benefit because he had not experienced any wage loss proximately related to his industrial exposure. The appellants are seeking to place Ms. Mason in a better position today than she otherwise would have occupied financially during the life of her husband. The only way to justify an award of survivor's benefits over the statutory minimum would be as compensation for noneconomic damages. It cannot be argued that the survivor's benefits sought by Ms. Mason are economic in nature. The relief sought by the appellants in this case must be classified as noneconomic damages because Mr. Mason was not earning a wage at the time his occupational disease became manifest. Noneconomic damages, as previously stated, are not permissible under Title 51 and should not be awarded to Ms. Mason in this case.

E. The Legislature Did Not Intend to Provide Full Survivor's Benefits to Survivors of Voluntarily Retired Workers.

Appellants argue that given the Legislature chose not to amend RCW 51.32.050, while it amended RCW 51.32.060 and RCW 51.32.090 in 1986 precluding voluntarily retired workers from receiving benefits, the Legislature must have intended that surviving spouses remain eligible for full survivor's benefits even if the worker had voluntarily retired as of the

date of manifestation. Brief of Appellants at 10. This argument is clearly invalid.

First, appellants' argument is premised on an improper assumption. The appellants' assumption is that the Legislature knew what it was doing when it amended RCW 51.32.060 and RCW 51.32.090 in 1986 precluding voluntarily retired workers from receiving benefits and intentionally chose not to amend RCW 51.32.050. Were this to be accurate, one would expect to see legislative history evidencing intent on behalf of the Legislature that surviving spouses remain eligible for full survivor's benefits despite a worker's voluntary retirement prior to the date of disease manifestation. The appellants' brief is completely devoid of any legislative history in support of their premise. The Legislature's failure to add a voluntary retirement provision to RCW 51.32.050 since the 1986 amendments is not a justification in and of itself that the Legislature intended no such provision as suggested by the appellants. A single unsupported premise justifying appellants' legal conclusion is invalid.

Second, appellants' contention that under the maxim *expressio unius est exclusio alterius*, survivors of voluntarily retired workers are entitled to full survivor's benefits is an improper application of statutory construction. Appellants argue that where a statute specifically designates

the “classes of things” on which it operates, an inference arises in law that the “classes of things” omitted from that statute were intentionally omitted by the legislature. Brief of Appellants at 11; *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969); *Davenport v. Wash. Educ. Ass’n*, 147 Wn. App. 704, 719, 197 P.3d 686 (2008), *review granted*, 166 Wn.2d 1005, 208 P.3d 1124 (2009) (cases cited by appellants as authority for the above mentioned rule). Hence, appellants’ claim that the Legislature’s failure to add a voluntary retirement provision to RCW 51.32.050 means that the Legislature intended no such provision.

The decision in *Jacobsen v. Dept. of Labor & Indus.*, 127 Wn. App. 384, 110 P.3d 253 (2005), *review denied*, 156 Wn.2d 1024, 132 P.3d 1094 (2006), cited by appellants to illustrate application of the above mentioned rule does not apply equally under the facts of this case. In *Jacobsen*, the Court of Appeals concluded that the statute in question, RCW 51.32.080(4), was not ambiguous. *Jacobsen*, 110 P.3d at 257. This statute clearly identified the classes of things upon which it operated, which were only permanent partial disability benefits. *Id.* at 257. Consequently, the Court was not going to expand RCW 51.32.080(4) to include temporary total disability awards. *Id.* at 257.

The reasoning in the *Jacobsen* decision was improperly applied by the appellants. First, RCW 51.32.050 designates the “classes of things” upon which it operates; computation of survivor’s benefits. It cannot be said that a voluntary retirement provision is the type of “classes of things” contemplated by the Court of Appeals in *Jacobsen*. Brief of Appellants at 13. More appropriately, it would be improper to extend temporary and partial disability benefits to the survivors of a deceased worker under the reasoning of the court in the *Jacobsen* decision, much like it was impermissible to deduct temporary total disability benefits from a worker’s pension reserve fund when the statute only identified permanent partial disability in *Jacobsen*. *Jacobsen*, 110 P.3d at 257. These types of benefits are clearly omitted from the survivor’s benefits statute, as they represent different “classes of things.” However, equating a voluntary retirement provision into the same “classes of things,” with a benefit type, is an improper application of the maxim *expressio unius est exclusio alterius*. This reasoning applies equally to *In re Wissink*, 118 Wn. App. 870, 81 P.3d 865 (2003), appellants’ second case cited in support of the contention under the maxim *expressio unius est exclusio alterius* survivors of voluntarily retired workers are entitled to full survivor’s benefits. Brief of Appellants at 12-13. If appellants’ application were permissible, then this maxim employed by the Court would have no limit.

F. Appellants are Not Entitled to Assessed Attorney Fees and Costs.

Assessed attorney fees and costs are authorized only when a party prevails on appeal. RCW 4.84.010; RCW 51.52.130. Even if appellants are successful, Ms. Mason's request that her attorney fees and costs at the Superior Court level of review be remanded by this Court is unnecessary given the Superior Court already set attorney fees and costs. CP 39-45. Ms. Mason's attorney fees were set at \$14,000.00 and costs were set at \$9,921.00. CP 39-45. Ms. Mason's requested fees at Superior Court were not reduced by the fact that she had prevailed on only a minority of the issues before the Superior Court.

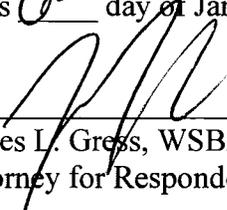
Moreover, the Department's request that this Court remand to Superior Court to set a cost award for the Department for that level of review is untimely. The Department waived assessed attorney fees and costs at the Superior Court level as a result of their failure to request that the Superior Court set a cost award for that level of review.

V. CONCLUSION

For the reasons stated above, respondent requests this Court affirm the July 29, 2010 order and judgment of the Clark County Superior Court in

this matter. The Superior Court was correct in ruling that calculation of Ms. Mason's survivor's benefits should be set at the statutory minimum given Mr. Mason's occupationally related condition or conditions became manifest at some point after April 30, 1986 when he was voluntarily retired and not earning a wage.

Respectfully submitted this 6th day of January, 2011.



James L. Gress, WSBA #25731
Attorney for Respondent

COURT OF APPEALS
DIVISION II

NO. 41138-5-II

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COURT OF APPEALS STATE OF WASHINGTON
DIVISION II BY _____
OF THE STATE OF WASHINGTON DEPUTY

WILLIAM MASON (DEC'D),)	
MARY MASON AND)	
DEPARTMENT OF LABOR AND)	CERTIFICATE OF
INDUSTRIES OF THE STATE)	MAILING
OF WASHINGTON)	
)	
Appellant,)	
)	
v.)	
)	
GEORGIA-PACIFIC)	
CORPORATION)	
)	
Respondent.)	
_____)	

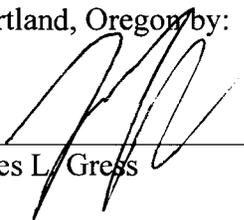
The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on the date indicated below he caused to be mailed by United States Postal Service Mail, postage prepaid, the Brief of Respondent Georgia-Pacific Corporation to the following:

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Dated this 6th day of January, 2011 in Portland, Oregon by:



James L. Gress