

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 41646-8-II

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

RICHARD ANDERSON (DEC'D),

Appellant,

vs.

WEYERHAEUSER CO., AND
DEPARTMENT OF LABOR AND INDUSTRIES,
a Washington State Agency,

Respondents.

REPLY BRIEF OF APPELLANT ANDERSON

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ORIGINAL

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I. STANDARD OF REVIEW

(1) Standard of Review

Judicial review of matters arising under the Industrial Insurance Act is governed by RCW 51.52.110 and RCW 51.52.115. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 849, 117 P.3d 365 (2005). The hearing in the superior court is de novo. RCW 51.52.115. When a party appeals from a decision of the Board and the superior court affirms the Board's decision, this Court's inquiry is the same as that of the superior court. *Littlejohn Construction Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). Appellate review is limited to the evidence and testimony presented to the Board. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

(2) Statutory Interpretation Under Title 51

Courts must liberally construe the Industrial Insurance Act in favor of the injured worker. Title 51 RCW has its own rule of statutory construction, in RCW 51.52.010, which provides, in relevant part:

This title 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.

In this state, injured workers' rights to benefits are statutory. Washington's workers' compensation law was enacted in 1911, the result

of a compromise between employers and workers such that “sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy.” RCW 51.04.010. Workers receive less than full tort damages but are spared the expense and uncertainty of litigation. *See Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 469-70, 745 P.2d 1295 (1987).

The Industrial Insurance Act mandates that its provisions 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. Courts, therefore, are to resolve doubts as to the meaning of the Act in favor of the injured worker. *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash.2d 222, 230, 883 P.2d 1370, 915 P.2d 519 (1994). Note that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the *entire statutory scheme* that receives the benefit of that construction.

Each statutory provision should be read by reference to the whole act. “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff'd*, 144 Wn.2d 907, 32 P.3d 250 (2001).

In addition to liberal construction, Washington courts have mandated that doubts as to the meaning of the workers' compensation law is resolved in favor of the worker. *See, Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580, 586, 925 P.2d 624 (1996) *see also, McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992).

(3) The Act's Purpose and Policies when Looking at this Case.

In order for a proper understanding of the importance of this case and the issues presented, it is important to first look at what brought about Washington's Industrial Insurance Act and the policies and presumptions that came with it.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. As noted for many years by the courts, the enactment of the Industrial Insurance Act in 1911 by the Washington State Legislature was due to a, "finding that the remedy of the injured workman had been uncertain, slow and inadequate. . . ." 1911 Wash. Law, ch. 74; *see, e.g. Lee v. Department of Labor and Industries*, 81 Wn. 2d 937, 506 P.2d 308, 309 (1973)(a case involving a Mandamus proceeding by injured workman to compel director of labor and industries to obey and carry out order of board of industrial insurance appeals directing department of labor and industries to provide workman

additional treatment). The declared purpose of the Act was to provide sure and certain relief for injured workmen. *Id.*

The Washington Supreme Court has long held that the Industrial Insurance Act is to be liberally applied in favor of the injured worker. The court stated in *Johnson v. Department of Labor and Industries*, 134 Wn. 2d 795, 953 P.2d 800 (1998), “We have previously recognized the change in the common law brought about by the Legislature’s enactment of the Industrial Insurance Act and that the Act is remedial in nature and ‘is to be **liberally applied** to achieve its **purpose of providing compensation to all covered persons injured** in their employment.’” 134 Wn. 2d at 799, 953 P.2d at 802. (Emphasis added)(Quoting *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635 (1979)).

As the cases above establish, the Industrial Insurance Act was enacted to compensate as fully as possible workers injured on the job. With the long standing policy of liberal construction of the Act in favor of the worker, the remedial nature of the act, in conjunction with the mandate that any doubt be resolved in favor of the worker, supports a finding by this Court reversing the superior court’s ruling as it relates to affirmance of the Board’s decision wherein the Board expanded its jurisdiction and dismissed the decedent’s appeal to an order which improperly denied

payment to the decedent's beneficiaries past due benefits, which is contrary to the underlying policies of the Industrial Insurance Act.

II. ADDITIONAL ARGUMENTS

a. Jurisdiction can be raised at any level.

Parties may not create, or vest the court with, subject matter jurisdiction that it does not otherwise have. Thus, subject matter jurisdiction will not be found on the basis of consent, stipulation, or waiver.

A challenge to subject matter jurisdiction may be asserted at any time during the course of the proceeding, may be asserted in a post-judgment motion to vacate, may be raised for the first time on appeal, or may be asserted collaterally in another proceeding. *See, e.g., Matter of Saltis*, 94 Wash. 2d 889, 621 P.2d 716 (1980) (A challenge to subject matter jurisdiction may be made at any time during the course of the proceedings); *Hunter v. Department of Labor and Industries*, 19 Wash. App. 473, 576 P.2d 69 (Div. 1 1978); *see also* RAP 2.5(a)(1); *Schiffman v. Hanson Excavating Co., Inc.*, 82 Wash. 2d 681, 513 P.2d 29 (1973) (Question of whether court in a prior proceeding had jurisdiction of subject matter can be raised collaterally).

An objection based upon noncompliance with a jurisdictional requirement will not be deemed waived, and may be asserted in a post-

judgment motion to vacate, or may be challenged for the first time on appeal. *See*, CR 12(h)(3), which allows a challenge to subject matter jurisdiction at any time. Moreover, RAP 2.5(a) states that the jurisdiction of the trial court may be challenged for the first time on appeal, regardless of whether an objection was made at the trial court level.

Courts have allowed a wide variety of issues to be raised on appeal pursuant to the above referenced provisions. *See the Author's Commentary following* RAP 2.5 in Tegland, 2A Washington Practice: Rules Practice (6th ed.), *see also*, *Peoples Nat. Bank of Washington v. Peterson*, 82 Wash. 2d 822, 514 P.2d 159, 13 U.C.C. Rep. Serv. 569 (1973); *Clark v. Selah School Dist. No. 119 by Bare*, 53 Wash. App. 832, 770 P.2d 1062, 52 Ed. Law Rep. 1254 (Div. 3 1989)(court considered for first time on appeal whether trial court had subject matter jurisdiction to hear appeal from administrative agency). Any order, judgment, or decree entered by a court that lacks subject matter jurisdiction is void.

In an administrative appeal regarding a Labor and Industries claim, the Board and superior court serve in a purely appellate function, this is based upon the principle that the Board's and superior court's jurisdictions are appellate in nature. Appellant in this case, pursuant to the Rules of Appellate Procedure and case law, appropriately challenged the Board's and subsequently the superior court's jurisdiction wherein the reviewing

tribunals changed the issue on appeal from one of the Department's authority to issue a non-compliance order into an issue of timeliness of a request for benefits. Nothing cited by the Department supports the contention that the Appellant was barred from raising jurisdiction. In fact the case law supports Appellant's position that as the Department had not passed upon the issue determined by the Board and subsequently the Superior Court, jurisdiction was inappropriately expanded.

The Department cites *Hill v. Department of Labor and Industries*, 90 Wash.2d 276, 580 P.2d 636 (1978) and *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983) to support its contention that as the Appellant did not specifically raise the issue of jurisdiction in a petition for review, the Appellant is precluded from raising the issue of jurisdiction in subsequent appeals, is not supported by either case.

Hill v. Department of Labor and Industries, 90 Wash.2d 276, 580 P.2d 636 (1978) is factually distinguishable from the case currently on appeal. In *Hill*, the Chairman of the Board of Industrial Insurance Appeals had been the prior supervisor of the Department of Labor and Industries when Ms. Hill's claim had been closed. The issue in *Hill* was whether or not the plaintiff, who raised for the first time a question regarding participation by the prior supervisor, violated the appearance of fairness. *Id.*, at 278. The court noted that the same common-law rules of

disqualification for conflict of interest as apply to judges also apply to administrative tribunals, citing, *Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. State Human Rights Comm'n*, 87 Wash.2d 802, 807, 557 P.2d 307 (1976)), but the objection must be raised or it will be deemed waived. See *Leschi Improvement Council v. State Highway Comm'n*, 84 Wash.2d 271, 274, 525 P.2d 774 (1974). Nowhere does the Court in *Hill* opine that the issue of jurisdiction is deemed waived if not raised initially in a petition for review. *Hill* is not on point.

Similarly, *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983), is distinguishable for the current appeal. The issue presented in *Upjohn* was whether an employer, who neglected to petition the Board for review of a hearing examiner's reversal of the Department of Labor and Industries' (Department) denial of employee benefits, is entitled to seek judicial review of the Board's decision, based on matters raised by the Department's petition for review, where the Department is precluded from appealing because the issues raised in its petition are purely factual. The court in *Upjohn* held that the failure by the employer to file a petition for review of the hearing examiner's proposed order amounted to a waiver of all errors pursuant to RCW 51.52.104. Like the holding in *Hill*, the holding in *Upjohn* does not support the Department's assertions that a challenge to jurisdiction is waived if not raised in a petition for review.

Such a broad reading of those cases will in essence negate the Rules of Appellate Procedure.

Based upon the Rules of Appellate Procedure and the above referenced cases Ms. Anderson had the right to challenge the Board and the Court's jurisdiction for the first time on appeal.

- b. A tribunal in a labor and industries case is limited to the issues decided by the Department of Labor and Industries the entity with original jurisdiction.

The Supreme Court's decision in *Ramsey v. Department of Labor and Industries*, 36 Wn.2d 410, 218 P.2d 765 (1950) was limited by the Court pursuant to the longstanding position that courts reviewing Labor and Industries cases are limited to the issues *actually* passed upon first by the Department of Labor and Industries. The *Ramsey* court noted, "Beginning with the case of *Cole v. Department of Labor & Industries*, 137 Wash. 538, 243 P. 7, we have repeatedly held that in industrial insurance appeals the *courts are limited to the question or questions which were actually decided by the department*. This rule has been specifically applied where the department has rejected a claim without consideration of its merits, upon the ground that the statute of limitations had operated against the application. *Taylor v. Department of Labor & Industries*, 175 Wash. 1, 26 P.2d 391. We are therefore limited to the one question, namely, whether the one-year limitation provision contained in

Rem.Rev.Stat. § 7686, is applicable to the claims of Mrs. Ramsay and Mrs. Miller for any compensation which was due their husbands at the time of the latter's deaths and remaining unpaid.” *Ramsay* at 412.

Nothing in *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 886 P.2d 189 (1994) or *Dougherty v. Department of Labor and Industries*, 150 Wn.2d 310, 76 P.3r 1183 (2003), support the Department’s contention that the Board and Superior Court had the jurisdiction to hear an issue not previously addressed by the Department of Labor and Industries.

Neither the holding in *Marley* or *Dougherty* change the court’s longstanding rule that the Board and Superior Court act solely in an appellate function in Labor and Industries appeals. The court in *Marley* was asked to determine whether or not a Department order was void and therefore not binding upon a widow who appealed a Department decision six years after it was issued. *Marley*, at 534-535, 886 P.2d at 190-191. The court in *Dougherty* had to determine if filing an appeal from a decision of the Board in the wrong county defeated subject matter jurisdiction and could that filing error be cured by a change of venue motion, overruling *Tennyson v. Department of Labor & Industries*, 189 Wash. 616, 66 P.2d 314 and its progeny to the extent they were inconsistent. Nothing in the *Marley* or *Dougherty* decisions support the

Department's assertion that the Board and Superior Court can hear any issue in "controversy" regardless of the fact that the issue had not yet been passed upon by the Department of Labor and Industries.

Neither *Marley* nor *Dougherty* change the court's longstanding rule that the Board and the Superior Court's jurisdiction to hear issues are limited to matters first addressed by the Department of Labor and Industries. As such, the Board and Superior Court in this case did not have jurisdiction to decide a matter not originally passed upon by the Department of Labor and Industries.

- c. The issue of payment of benefits is not moot.
- (1) The claim for benefits on behalf of the deceased worker's beneficiaries was filed timely pursuant to RCW 51.28.050 as the request for benefits was filed with the Department within one year of the dependent's rights being accrued.

RCW 51.28.050 entitled "Time limitations for filing application or enforcing claim for injury" specifically addresses the requirement regarding when a claim must be filed by an injured worker, a surviving spouse and a beneficiary. RCW 51.28.050 provides, "No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred **or the rights of dependents or beneficiaries accrued**, except as provided in RCW 51.28.055 and 51.28.025(5). (Emphasis added). Although an injured

worker must file a claim for an on the job injury within one year of the date of that injury the statute provides that a worker's beneficiaries must file within one year after their rights have accrued.

In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. To determine legislative intent, the courts look first to the language of the statute. If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition a court will give the term its plain and ordinary meaning ascertained from a standard dictionary. *State v. M.C. Websters*, 148 Wash.App. 968, 201 P.3d 413 (2009).

Title 51 does not define the term "accrue" either within RCW 51.28.050 or within the definition section, leaving the definition of the term as set forth in a standard dictionary. Webster's Dictionary defines the word accrued as, "To come into existence as a claim that is legally enforceable." The beneficiaries in this case filed a claim via letter within one year of their claim becoming legally enforceable, and therefore the July 8, 2005 letter complies with RCW 51.28.050.

As argued by the Department at the time of Mr. Anderson death, the Department had not "made a final decision to grant Mr. Anderson

any time-loss compensation or total and permanent disability benefits.” (RB at 16). In fact as of March 10, 2004, his case was on an employer appeal to the Supreme Court and it was not until July 13, 2004, the date when the Supreme Court issued its supplemental decision denying Weyerhaeuser’s motion for reconsideration, that Mr. Anderson’s minor children’s right to his past due benefits accrued. Prior to that decision, Weyerhaeuser was arguing that the Court of Appeals decision, which would have given rise to Mr. Anderson’s potential time loss benefits, should be overturned. Without a confirmation by the Supreme Court that the Court of Appeals Decision would be reaffirmed, Mr. Anderson’s beneficiaries had no benefits and / or rights to demand.

On July 8, 2005, within the year of the Supreme Court’s supplemental decision dated July 13, 2004, the Special Administrator of the Estate of Richard Anderson, Laurie Anderson, requested compliance with the non-cooperation statute as well as payment of the deceased worker’s past due benefits pursuant to the March 11, 2003 Court of Appeals decision. As such the beneficiaries complied with RCW 51.28.050.

- (2) Reliance upon *Ramsay v. Department of Labor and Industries* is not misplaced.

In *Ramsay v. Department of Labor and Industries*, 36 Wash.2d 410, 218 P.2d 765 (1950), the Supreme Court held that the provision of the Workmen's Compensation Act that no application shall be valid or claim enforceable, unless filed within year after the day on which injury occurred or dependents' or beneficiaries' rights accrued, refers to applications for compensation for injuries to and deaths of workmen and ***for increased compensation and reopening of closed claims***, not to a deceased worker's beneficiaries applications for compensation due to the employees at times of their deaths. The Supreme Court reviewed Rem.Rev.Stat. §§ 7684 and 7686(a-d), that were the statutory section which are the predecessors to RCW 51.28.020, RCW 51.28.030, RCW 51.28.050, and RCW 51.32.050. The main section which was at issue was Rem.Rev.Stat. § 7686(d) which provided that: "No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued." *Id.*, at 766-767. The wording of Rem.Rev.Stat. § 7686(d) was identical to RCW 51.28.050.

The *Ramsay* court was dealing with a factual scenario that is similar to the present case. Late in 1932 or early in 1933, Robert H.

Ramsay suffered industrial injuries while engaged in extrahazardous work in Spokane. The Department approved his claim for compensation and classified him as totally and permanently disabled. On July 11, 1934, the Department awarded him a lump sum settlement of \$750 in lieu of his monthly pension. On February 22, 1936, Mr. Ramsay died. In November, 1948, his widow, Minnie M. Ramsay, petitioned the Department for payment to her of the difference between this \$750 and the \$4,000 to which, she claimed in her petition, her husband was entitled under this court's decisions in *Booth v. Department of Labor & Industries*, 189 Wash. 201, 64 P.2d 505, and *Wintermute v. Department of Labor & Industries*, 183 Wash. 169, 48 P.2d 627.

On November 28, 1932, Henry Buhrig suffered an industrial injury while engaged in extrahazardous work in Spokane. His claim for compensation was approved by the Department and he was classified as temporarily totally disabled. He was paid time loss from December 2, 1932, to October 1, 1935. On October 10, 1935, upon petition of the workman, he was reclassified as totally and permanently disabled and awarded a lump sum settlement of \$1500 in lieu of a monthly pension. On February 20, 1945, Mr. Buhrig died. On May 5, 1948, his widow, who had remarried on July 7, 1945, filed with the department a petition similar to that which was later filed on behalf of Mrs. Ramsay.

The supervisor of industrial insurance rejected both widows' petitions upon the sole ground that they had not been made within one year after the deaths of the respective workmen; the joint board sustained the supervisor in both cases. Both widows appealed the denial of benefits. The Supreme Court reversed the board rejections of benefits holding, "the one-year limitation contained in Rem.Rev.Stat. § 7686, does not apply to the request of a widow, made under Rem.Rev.Stat. § 7684, for compensation which was owing to her husband and which was unpaid at the time of his death. **There is no statutory limit within which a widow must assert this right to an assignment of what was due her husband.**" *Id*, at 415. (Emphasis added).

The Supreme Court came to its holding based upon the following, "the workmen in question had already filed claims for compensation in full compliance with Rem.Rev.Stat. § 7686. Those claims had been approved by the Department. The widows of these workmen are now asking that the portion of their respective husbands' compensation which accrued but was unpaid during the husbands' lifetimes, be now paid to the widows. This is not the assertion of a new or original claim, as contemplated by subdivision (b) of Rem.Rev.Stat. § 7686. Neither appellant is seeking pension or any other allowance in her own right. Nor is it an attempt to obtain increased compensation or to

open a closed claim, pursuant to subdivision (c) of Rem.Rev.Stat. § 7686. Whatever unpaid compensation there may have been due to the husbands at the time of their deaths was not compensation provided by law for their beneficiaries. The widows became entitled to their husbands' compensation, and it passes to them, if at all, by virtue of a statutory assignment expressed in the provisos of Rem.Rev.Stat. § 7684." *Id.*, at 768.

Similarly to the widows in *Ramsay* Mr. Anderson's beneficiaries have requested payment of their father's past due benefits which were unpaid at the time of his death as well as compliance with the non-cooperation statute and case law. The beneficiaries are not asserting a new or original claim, such as pension benefits or ongoing time-loss benefits beyond the worker's death. Nothing in RCW 51.28.050, or elsewhere in the Act, suggests that a beneficiary must file an 'application' for any portion of the deceased worker's accrued but unpaid compensation to which they may be entitled under Title 51. As such, based upon the Supreme Court decision in *Ramsay*, even if the Board determines that the beneficiaries rights accrued as the date of their father's death, they are still entitled to demand payment of past due benefits at any time.

In addition to the right to demand payment of past due benefits pursuant to *Ramsay*, the deceased worker's beneficiaries were entitled to the protections of Title of 51. Mr. Anderson's beneficiaries respectfully request that this Court reverse and remand the Superior Court judgment and order and send his case back for proper claim's administration.

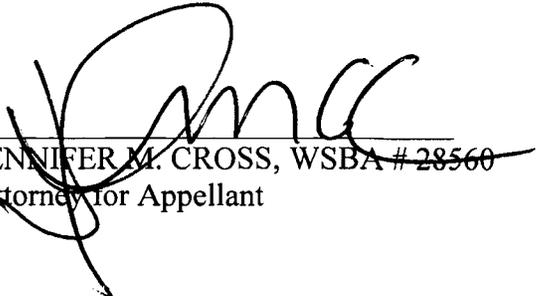
III. CONCLUSION

Washington's Industrial Insurance Act was enacted to provide injured workers sure and certain relief. As seen in the above cases, this relief was to be provided to the fullest extent possible as allowed under the Act. Pursuant to the above case law, the Court committed error when it adopted the Department's total disability jury instruction.

Mr. Anderson's heirs respectfully requests this Court for the above listed arguments to reverse the superior court's judgment and remand this matter back to the Superior Court for a new trial.

DATED this 22 day of September, 2011.

VAIL/CROSS & ASSOCIATES



JENNIFER M. CROSS, WSBA # 28560
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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

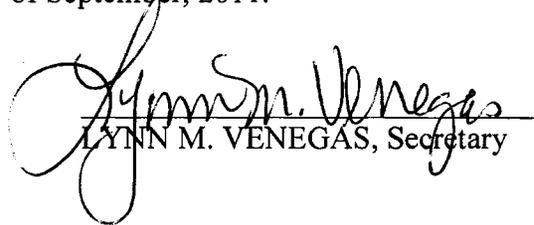
BY Cs
DEPUTY

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 22nd day of September, 2011, the document to which this certificate is attached, Reply Brief of Appellant Anderson, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 22nd day of September, 2011.


LYNN M. VENEGAS, Secretary