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NO. 41646-8

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

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RICHARD ANDERSON (DEC'D),

Appellant,

v.

WEYERHAEUSER CO. AND DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF WASHINGTON,

Respondents.

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**DEPARTMENT'S BRIEF OF RESPONDENT**

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**ORIGINAL**

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## I. NATURE OF THE CASE

This is a workers' compensation case under RCW 51 involving Richard Anderson, an injured worker who died for reasons unrelated to his industrial injury. Laurie Anderson is the administrator of Mr. Anderson's estate<sup>1</sup>, and she seeks review of a decision of the Department of Labor and Industries (Department) that denied benefits to Mr. Anderson on the grounds that he failed to cooperate with reasonable efforts at vocational rehabilitation without good cause.

The stipulated facts in this case demonstrate that the order to suspend Mr. Anderson's benefits was improper. However, the stipulated facts also reveal that neither Ms. Anderson, nor any other individual, requested payment of time-loss compensation or other benefits until more than a year had elapsed since Mr. Anderson's death. Under the plain language of RCW 51.32.040, an individual who seeks the payment of time loss on the behalf of a deceased injured worker must do so within a year, or else the request cannot be granted.

An appeal is moot, and should be dismissed, if there is no relief that a court may grant the parties. Here, as no timely request for benefits

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<sup>1</sup> Ms. Anderson and Mr. Anderson dissolved their marriage prior to Mr. Anderson's death. Thus, Ms. Anderson is not Mr. Anderson's widow, and she is not a beneficiary under the Industrial Insurance Act. She has standing to participate in this appeal as the legal guardian of Mr. Anderson's dependent children and as the administrator to Mr. Anderson's estate.

was made within a year of Mr. Anderson's death, there is no relief that Ms. Anderson or Mr. Anderson's children may receive regardless of whether the decision to suspend benefits were correct, and Ms. Anderson's appeal is moot. The Board of Industrial Insurance Appeals (Board) and the Thurston County Superior Court properly dismissed Ms. Anderson's appeal, and this Court should affirm.

## **II. ISSUES PRESENTED**

Ms. Anderson appealed a Department order dated December 9, 2005, which affirmed a prior order that suspended Mr. Anderson's benefits effective August 26, 2005 on the grounds that Mr. Anderson failed to cooperate with a vocational evaluation. The stipulated facts reveal that Ms. Anderson did not request benefits on the behalf of Mr. Anderson's estate until more than a year after Mr. Anderson died. The issues presented by this appeal are:

1. Did the superior court exceed its subject matter jurisdiction in this case when it dismissed Ms. Anderson's appeal based on its conclusion that her failure to comply with RCW 51.32.040 made it impossible to grant Mr. Anderson's children the relief she requested on their behalf?
2. Assuming the superior court acted within its subject matter jurisdiction, was it proper for the court to dismiss Ms. Anderson's appeal because her failure to request benefits within a year of Mr. Anderson's death rendered the appeal moot?

3. Assuming Ms. Anderson prevails in this appeal, is she entitled to an award of attorneys fees, when no additional benefits may be properly paid on remand *even if* she receives the relief she has requested in this case?

### III. COUNTERSTATEMENT OF THE CASE

This case was tried on stipulated facts.

#### 1. History of initial adjudication of claim

The claimant, Richard Anderson, suffered an industrial injury in the course of his employment with a self-insured employer, Weyerhaeuser Co., on April 19, 1993. *See* CABR 139.<sup>2</sup> At the time of his industrial injury, Mr. Anderson was married to Laurie Anderson and had three children, who were born in 1989, 1990, and 1992. *See* CABR, Exhibit (Ex.) No. 1.

On June 2, 1995, the Department determined that Mr. Anderson was eligible for vocational services. *See* CABR, Ex. 3. However, on September 1995, the Department reversed its decision to provide Mr. Anderson with vocational services based on its determination that Mr. Anderson had engaged in a pattern of failing to cooperate with his assigned vocational counselor. *See* CABR 139-140.

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<sup>2</sup> "CABR" refers to the Certified Appeal Board Record, which contains the evidence on which this case was tried. CABR page references are to the stamped page numbers on the lower right hand corner of the record.

**2. History of Mr. Anderson's *first* appeal, from an order that denied him vocational services**

Mr. Anderson appealed the Department's decision to deny him vocational services to the Board. CABR 139-140. The Board affirmed the Department's decision, and Mr. Anderson timely appealed the Board's decision to the superior court. CABR 139-140. The superior court affirmed as well. CABR 139-140.

Mr. Anderson then appealed to the Court of Appeals, which held that the Department could not terminate Mr. Anderson's vocational services based on allegations of him having failed to cooperate with the vocational process unless it first suspended his benefits under RCW 51.32.110, a statute which specifically authorizes the Department to suspend benefits to injured workers who fail to cooperate with such services without good cause. *See* CABR 139-140. *See also Anderson v. Weyerhaeuser*, 116 Wn. App. 149, 64 P.3d 669 (2003).

The Department and Weyerhaeuser each filed a petition for review from the Court of Appeals' decision. CABR 34. On March 10, 2004, while the petitions for review were pending, Mr. Anderson died of a myocardial infarction, a medical condition that was unrelated to his industrial injury. CABR 33.

At some time before his death on March 10, 2004, the marriage of Mr. Anderson and Laurie Anderson was dissolved. CABR 33. On March 12, 2004, Ms. Anderson was appointed the administrator of Mr. Anderson's estate. CABR 33.

On May 20, 2004, the Supreme Court denied the Department's petition for review on the grounds that Mr. Anderson's death rendered any further appeal moot. CABR 34. The Department and Weyerhaeuser each filed a motion for reconsideration, which the Supreme Court denied on July 13, 2004. CABR 34.

On June 9, 2005, the Thurston County Superior Court issued a judgment and order that remanded Mr. Anderson's claim to the Department for further action consistent with the Court of Appeal's decision. *See* CABR 34.

### **3. History of Department's adjudication of claim subsequent to Court of Appeals decision**

On July 8, 2005, Ms. Anderson, by and through her attorney, sent a letter to the Department asking that it direct Weyerhaeuser to pay time-loss compensation from October 27, 1993 through March 9, 2004 to Mr. Anderson's dependent children. *See* CABR 34.

On August 1, 2005 the Department issued a ministerial order on August 1, 2005, which noted that the claim had been remanded to it for further action. *See* CABR 141.

On August 12, 2005, the Department issued an order that suspended further action on Mr. Anderson's claim effective August 26, 1995 on the grounds that Mr. Anderson had failed to cooperate with an evaluation or examination for the purpose of vocational rehabilitation. CABR 141. Ms. Anderson filed a timely request for reconsideration of this decision, and the Department affirmed the August 12, 2005 order on November 8, 2005. *See* CABR 141-42.

**4. History of Mr. Anderson's appeal from the November 8, 2005 decision suspending his benefits for noncooperation to the Board**

Ms. Anderson filed a timely appeal from the decision to suspend Mr. Anderson's benefits based on noncooperative behavior to the Board. *See* CABR 141-142. The Board granted Ms. Anderson's appeal from the November 8, 2005 decision. *See* CABR 21-27. Weyerhaeuser and Ms. Anderson stipulated to a set of facts and submitted legal memorandum in support of their respective positions. CABR 33-35; CABR 139-143.

A Proposed Decision and Order was issued on June 9, 2008 that reversed the Department's November 8, 2005 order, concluding that the Department had failed to give the notice required by RCW 51.32.110

before suspending Mr. Anderson's benefits and concluding that the Department could not, in any event, suspend a worker's benefits under that statute retroactively. *See* CABR 86-94. The Proposed Decision and Order remanded the claim to the Department with directions that it give notice to Mr. Anderson that his benefits might be suspended and that it give him 30 days to respond to that letter. *See* CABR 86-94.

Weyerhaeuser filed a petition for review, arguing that a remand of the claim to the Department for the purpose of giving notice to Mr. Anderson would be a useless act, in light of the fact that he was deceased at that time. *See* CABR 76-77. The Board granted the petition for review, and vacated the Proposed Decision and Order and remanded the appeal to the Industrial Appeals Judge to take further evidence. *See* CABR 58-65. The Board noted that under RCW 51.32.040(2)(a), no benefits could be properly paid to Mr. Anderson's beneficiaries unless a request for such benefits was made within a year of his death. *See* CABR 58-65. Since the parties had not presented any information, by stipulation or otherwise, as to when a request for benefits on the behalf of Mr. Anderson's estate was first made, the Board remanded the claim to the Industrial Appeals Judge for further evidence regarding that issue. *See* CABR 58-65.

On remand, the parties stipulated that Ms. Anderson first requested payment of benefits on the behalf of Mr. Anderson's estate on July 8, 2005, more than a year after Mr. Anderson had died. *See* CABR 33-35.

The Industrial Appeals Judge then issued a new Proposed Decision and Order on April 8, 2009, that dismissed Ms. Anderson's appeal. *See* CABR 21-27. The April 8, 2009 Proposed Decision and Order dismissed the appeal because it determined that there was no relief the Board could grant Ms. Anderson, regardless of whether or not the decision to suspend Mr. Anderson's benefits was correct, in light of the fact that no timely request for benefits had been made. *See* CABR 21-27.

Ms. Anderson filed a petition for review, arguing that RCW 51.28.050, rather than RCW 51.32.040, governed her ability to seek benefits on the behalf of Mr. Anderson's estate. CABR 3-16. She further contended that, under that statute, her request for benefits was timely, because her right to seek benefits did not accrue until the Supreme Court denied the Department and Weyerhaeuser's Petitions For Review from the Court of Appeal's opinion. CABR 3-16. She also contended that, under *Ramsay v. Department of Labor & Industries*, 36 Wn. 410, 218 P.2d 765 (1950), there was no deadline that applied to her ability to seek benefits on Mr. Anderson's behalf. *See* CABR 3-16. Finally, she contended that the Department and Weyerhaeuser had failed to give Mr. Anderson the notice

required by RCW 51.32.110 before suspending his benefits, and also argued that the Department lacked the authority to apply that statute retroactively. *See* CABR 3-16. Ms. Anderson did *not* contend in her petition for review that the Board had exceeded the scope of its review, or that it exceeded its subject matter jurisdiction, by considering whether RCW 51.32.040 applied to her case. *See* CABR 3-16.

The Board denied Ms. Anderson's petition for review, thereby adopting the April 8, 2009 Proposed Decision and Order as its own Decision and Order. CABR 2.

#### **5. History of superior court appeal from Board decision**

Ms. Anderson filed a timely appeal from the Board's order denying her petition for review to the Thurston County Superior Court. *See* CP 5-7. Ms. Anderson, the Department, and Weyerhaeuser each filed trial briefs with the superior court judge. *See* CP 8-22 (Ms. Anderson's brief), CP 23-41 (Weyerhaeuser's brief), CP 42-59 (Department's brief).

In her initial trial brief, Ms Anderson made substantially the same arguments she made in her petition for review. *Compare* CP 8-22 with CABR 3-16.

Weyerhaeuser responded with briefing that argued that RCW 51.32.040, rather than RCW 51.28.050, governed Ms. Anderson's ability to seek benefits on the behalf of her husband's estate. *See* CP 23-

41. Weyerhaeuser also argued, in the alternative, that even if RCW 51.28.050 was applicable, that Ms. Anderson's request for benefits on the behalf of Mr. Anderson's estate would still be untimely since that statute also imposes a deadline on beneficiaries to request benefits within a year of the worker's death. *See* CP 23-41. Weyerhaeuser also noted that *Ramsay* did not apply to Ms. Anderson's case, because the worker in that case, unlike Mr. Anderson, had already been placed on the pension rolls at the time that he died. *See* CP 23-41. Finally, Weyerhaeuser argued that whether proper notice of suspension was given was irrelevant in light of the fact that Ms. Anderson had failed to make a timely request for benefits on the behalf of Mr. Anderson's estate, and, in any event, it argued that adequate notice was given. *See* CP 23-41.

The Department filed a trial brief that was generally in agreement with that of Weyerhaeuser, although the Department's brief did not comment on whether the notice required by RCW 51.32.110 had been provided prior to suspending Mr. Anderson's benefits. *See* CP 42-59.

During oral argument, for the first time, Ms. Anderson argued that the Board exceeded its subject matter jurisdiction by considering whether RCW 51.32.040 applied to her request for benefits on the behalf of her

husband's estate, because the Department order under appeal did not invoke that statute. *See* VRP 6-8.<sup>3</sup>

Weyerhaeuser responded to the argument that the Board had exceeded the proper scope of its review by noting that Ms. Anderson had waived that argument by not raising it in the prior briefing. VRP 15-21. Weyerhaeuser also noted that so long as the Department had the *opportunity* to address a legal issue, the Board has jurisdiction to consider that issue on appeal, regardless of whether or not the Department order under appeal explicitly referenced that statute. *See* VRP 15-21. Since the Department had the opportunity to consider whether RCW 51.32.040 rendered Ms. Anderson ineligible for further benefits, the Board properly considered that issue on appeal. VRP 15-21.

Following oral argument at a bench trial, the court permitted the parties to file supplemental briefing regarding the issues under appeal. *See* VRP 28-29. Thereafter, the parties filed briefs making arguments that were substantially similar to what they said during oral argument. *See* CP 64-68 (Department's Supplemental Trial Brief), CP 69-74

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<sup>3</sup> Ms. Anderson also argued that the Department should not have been permitted to participate in the superior court appeal. *See* VRP at 4-5. However, the plain language of RCW 51.52.110 gives the Department the right to participate in all superior court appeals, without restriction. In any event, Ms. Anderson has not assigned error to the superior court's ruling that the Department was permitted to participate in the appeal.

(Plaintiff's Post-Trial Memorandum of Law), CP 75-79 (Weyerhaeuser's Memorandum Re: Jurisdiction/Scope of Review).

The superior court ultimately issued a judgment which upheld the Board's dismissal of Ms. Anderson's appeal. CP 83-88 (Findings of Fact and Conclusions of Law), CP 89-92 (Judgment). Ms. Anderson filed a timely appeal to this Court.

#### IV. STANDARD OF REVIEW

This is an appeal under RCW 51.52.140, which provides that an appeal from a superior court decision is reviewed in the same fashion as applies "in other civil cases." The issues in this case relate to questions of law, which are reviewed de novo. *Estate of Friedman v. Pierce Cy.*, 112 Wn.2d 68, 75-76, 768 P.2d 462 (1989); *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 410, 27 P.3d 1149 (2001).

Applying the de novo standard to the statutory construction questions in this case, this Court should accord "substantial weight. . . to the agency's legal interpretation if, as here, it falls within the agency's expertise in a particular area of law." *Jefferson Cy. v. Seattle Yacht Club*, 73 Wn. App. 576, 588, 870 P.2d 987 (1994). This Court should defer to the Department's interpretation of the provisions of RCW 51. *Flanigan v. Dep't of Labor & Indus.*, 65 Wn. App. 119, 121, 827 P.2d 1082 (1992), *affirmed* 123 Wn.2d 418, 869 P.2d 14 (1994); *Dep't of Labor & Indus. v.*

*Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991) (deference is due the Department except where the Department's interpretation of the compensation provisions of RCW 51 directly conflicts with the statute). The reason such deference should be given to the Department is that the Department is the exclusive, first-line, policy-making agency the Legislature has tasked with administering the Industrial Insurance Act. See generally *Port of Seattle v. Pollution Control Hr'gs Bd.*, 151 Wn.2d 568, 593-94, 90 P.3d 659 (2004); *Dolman v. Dep't of Labor & Indus.*, 105 Wn.2d 560, 566, 716 P.2d 852 (1986).

The provisions of Washington's Industrial Insurance Act are "liberally construed." RCW 51.12.010; see also *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987). This rule of construction, however, does not authorize an unrealistic interpretation that produces strained or absurd results and defeats the plain meaning and intent of the Legislature. *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427, 833 P.2d 375 (1992); *Senate Republican Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997). The rule of liberal construction does not trump other rules of statutory construction. *Senate Republican Comm.*, 133 Wn.2d at 243.

## V. SUMMARY OF ARGUMENT

The superior court and the Board properly dismissed Ms. Anderson's appeal from the Department's order that suspended Mr. Anderson's benefits based on his alleged failure to cooperate with vocational services, because Ms. Anderson's failure to make a timely request for benefits on the behalf of Mr. Anderson's estate rendered her appeal moot.

An appeal is moot if it is impossible for the court to provide the appellant with meaningful relief. Under the plain language of RCW 51.32.040, a beneficiary seeking the payment of time-loss compensation must request that benefit within one year of the worker's death. Furthermore, under RCW 51.28.050, a beneficiary seeking total and permanent disability benefits allegedly due to a deceased injured worker must do so within one year of the date that the benefit accrues. The case law shows that such benefits "accrue", within the meaning of that statute, at the moment of the worker's death.

The stipulated facts in this case reveal that Ms. Anderson did not make a timely request for benefits on behalf of Mr. Anderson's estate under either RCW 51.32.040 or RCW 51.28.050. Therefore, there is no relief that the Department, the Board, or the superior court could grant her, *regardless* of whether or not the Department erred when it suspended Mr. Anderson's benefits based on his alleged failure to cooperate. Thus, the question of

whether Mr. Anderson failed to cooperate with vocational services is moot, and dismissal of Ms. Anderson's appeal from that order was correct. Indeed, it would be pointless for the Board to conduct hearings to present evidence on the issue of whether Mr. Anderson failed to cooperate with vocational services without good cause since any decision the Board might make in that regard would have no meaningful impact on any person, including Ms. Anderson as well as Mr. Anderson's dependent children.

Ms. Anderson contends that the Board and the superior court exceeded the scope of their subject matter jurisdiction when they considered whether there is any relief that she may receive under RCW 51.32.040 and RCW 51.28.050 because the only issue that the Department determined when it issued its order was whether Mr. Anderson had failed to cooperate with vocational services. *See* AB at 14-18.

Ms. Anderson's argument fails because a court acts within its subject matter jurisdiction whenever it decides the "type of controversy" that it has the authority to decide. Determining whether any meaningful relief may be granted in an appeal is a type of controversy that the courts may consider in a worker's compensation appeal. Therefore, the Board and the superior court acted within their subject matter jurisdiction when they dismissed Ms. Anderson's appeal on the grounds that there was no relief she could receive as a matter of law.

Ms. Anderson also contends that she did make a timely request for benefits on the behalf of Mr. Anderson's estate, based on the theory that the right to request benefits did not "accrue", within the meaning of RCW 51.28.050, until the Supreme Court denied the Department and Weyerhaeuser's petitions for review from a Court of Appeals decision. *See* AB at 18-26. This contention fails, however, as the case law shows that Mr. Anderson's children's rights "accrued", within the meaning of RCW 51.28.050, when Mr. Anderson died.

Ms. Anderson also contends that under *Ramsay* she did not have a duty to make a request for benefits on the behalf of Mr. Anderson's behalf at any time, and that she had an effectively infinite amount of time to make such a request. *Ramsay*, 36 Wn. 410. However, *Ramsay* is distinguishable, as it involved widows who sought the payment of benefits that had already been formally awarded to their deceased husbands by the Department through final orders. The Industrial Insurance Act has been substantially revised since the *Ramsay* Court issued its opinion, and its rulings are inapplicable under the current statutory system. Furthermore, in Mr. Anderson's case, unlike *Ramsay*, the Department had not made a final decision to grant Mr. Anderson any time-loss compensation or total and permanent disability benefits at the time that Mr. Anderson died. Her reliance on *Ramsay* is misplaced.

Finally, Ms. Anderson claims that she is entitled to an award of attorney fees if the trial court's decision is reversed.<sup>4</sup> See AB at 27. However, as an injured worker who has appealed a decision of the Department, she is eligible for a fee award *only* in the event that a decision of the Department is reversed *and* further medical benefits and or disability benefits are awarded as a result of that reversal. Here, even assuming for the sake of argument that Ms. Anderson is correct that the trial court should have narrowly confined the scope of its review to the issue of whether Mr. Anderson failed to cooperate with vocational services without good cause, no additional benefits may be paid on remand since no timely request for such benefits was made.

## VI. ARGUMENT

### A. **The Trial Court Properly Dismissed Ms. Anderson's Appeal Because Her Failure To Make A Timely Application For Benefits On The Behalf Of Her Dependents Renders The Issues Raised By Her Appeal Moot**

Because no person requested that any benefits be paid to Mr. Anderson's children until more than a year after Mr. Anderson's death, Mr. Anderson's children may not receive any additional benefits as a matter of law regardless of whether or not the Department acted properly

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<sup>4</sup> Ms. Anderson's brief references "Sagen", rather than Ms. Anderson, as the party who is entitled to an award of fees if she prevails in this appeal. The Department assumes this is simply a typographical error, and that Ms. Anderson requests a fee award to herself, rather than "Sagen", in the event that she prevails.

when it suspended Mr. Anderson's benefits for noncooperation. An appeal is moot if a court may not grant effective relief to the parties. *See Harbor Lands, LP v. City of Blaine*, 146 Wn. App. 589, 592-93, 191 P.3d 1282 (2008) (citing *Citizens For Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 350, 662 P.2d 845 (1983)). Since Ms. Anderson may not receive any additional relief regardless of whether or not the Department's decision to suspend Mr. Anderson's benefits for noncooperative behavior was correct, her appeal from that order is moot, and dismissal of her appeal was proper. *See id.*

- 1. Ms. Anderson's argument that the Board and the superior court lacked subject matter jurisdiction to consider whether any benefits were payable under RCW 51.32.040 fails, because the Board and the superior court's decision involved the "type of controversy" that they are empowered to decide**

Ms. Anderson did not, in her petition for review, argue that the Board erred when it considered the question of whether a timely application for benefits had been made by beneficiaries. *See* CABR 3-16. It is well settled that a party must raise an issue in a petition for review in order to preserve that argument for a court appeal. *See Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978); *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983). Thus, her failure to raise

that argument in her petition for review prevents her from raising that argument here. *See id.*

Ms. Anderson contends that it was not necessary for her to preserve her challenge to this aspect of the Board's decision through a petition for review because the Board exceeded its subject matter jurisdiction by addressing that question. AB 19-20. While it is true that RAP 2.5 (a) allows a party to raise an argument regarding subject matter jurisdiction at any time, Ms. Anderson fails to support her claim that the Board and the superior court lacked subject matter jurisdiction to decide her case in the way that they did.

- a. **The trial court acted within its subject matter jurisdiction when it dismissed Ms. Anderson's appeal, because the case involves the "type of controversy" that the courts have the power to decide**

The Supreme Court held in *Marley v. Department of Labor & Industries*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994), that the Department (and the Board and a court, on appeal) acts within its subject matter jurisdiction whenever it decides the "type of controversy" that it has the power to decide, regardless of whether or not its decisions were made based on legal errors. *See also Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 317, 76 P.3d 1183 (2003).

As *Marley* observed, courts have often confused the term “subject matter jurisdiction” with the court’s authority “to rule in a particular manner,” and this “has led to improvident and inconsistent use of the term.” *Marley*, 125 Wn.2d at 539, *citing* Restatement (Second) of Judgments, § 11. “A court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order.” *Marley*, 125 Wn.2d at 539. Instead, subject matter jurisdiction is the power to decide the “type of controversy,” and the “type” means “the general category *without regard to the facts of the particular case.*” *Dougherty*, 150 Wn.2d at 317 (citing Robert J. Martineau, *Subject Matter Jurisdiction as New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev. 1, 26-27 (1988) (emphasis added)).

Furthermore, as the Supreme Court observed in *Silver Surprise, Inc. v. Sunshine Mining Company*, 74 Wn.2d 519, 523, 445 P.2d 334 (1968), subject matter jurisdiction “is not a light bulb that can be turned on and off during the course of the trial.” Here, it cannot be seriously questioned that the Board acquired subject matter jurisdiction over Ms. Anderson’s appeal when she filed a timely appeal from the Department’s decision, nor that the trial court acquired subject matter jurisdiction over the case when Ms. Anderson appealed the Board’s decision. It also cannot be seriously questioned that a dispute over the

proper interpretation of the provisions of the Industrial Insurance Act, and the applicability of those provisions to the facts of a given worker's compensation dispute, are precisely the "kinds of controversies" that the Board and a trial court have the power to resolve upon the filing of a timely appeal.

Therefore, once the Board and the trial court obtained subject matter jurisdiction over Ms. Anderson's appeal, their subject jurisdiction could not be "turned off" like a light bulb based on the manner that they decided the case. *Id.* Even assuming for the sake of argument that the Board and the superior court erred by relying on RCW 51.32.040 when they dismissed Ms. Anderson's appeal (they did *not* err when they did so), this would not result in the Board or the court losing subject matter jurisdiction over Ms. Anderson's case.

**b. A question as to whether an appeal is moot is a kind of controversy that the Board and the court have the power to decide on appeal**

The Board and the trial court did not err when they dismissed Ms. Anderson's appeal, as the proper application of RCW 51.32.040 to the facts of this case shows that that statute rendered Ms. Anderson's appeal moot. While they did not expressly use this term in their decisions, the Board and the trial court effectively determined that the issues raised by Ms. Anderson's appeal were moot because there is no meaningful relief

that could be granted regardless of whether or not she prevailed in showing that the Department's decision to suspend Mr. Anderson's benefits was incorrect.

The question of whether an appeal is moot is one of the types of controversies that a trial court may properly decide in an appeal. *See, e.g., Harbor Lands*, 146 Wn. App. at 592-93. Indeed, an appeal is not justifiable if it is moot, and a court must dismiss a moot appeal unless it falls within the extremely narrow "public interest" exception, which is inapplicable here.<sup>5</sup> *See id;* *see also Citizens For Financially Responsible Gov't*, 99 Wn.2d at 350.

Since the issue of whether an appeal is moot is one of the types of controversies that a court may properly decide on appeal, neither the superior court nor the Board exceeded its subject matter jurisdiction in this case when it dismissed the appeal based on the conclusion that the worker's beneficiaries would be unable to obtain any relief under

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<sup>5</sup> The three factors that are "essential" to showing that the public interest exception to mootness applies are 1) whether the issue is public or private; 2) whether an authoritative determination is desirable to provide future guidance to public officers; and 3) whether the issue is likely to recur. *See Harbor Lands LP v. City of Blaine*, 146 Wn. App. at 594, *citing Hart v. Dep't of Social & Health Servs.*, 111 Wn.2d 445, 448, 759 P.2d 1206 (1988). The public interest exception does not apply here. This case involves a highly unusual procedural history, which includes a worker who appealed a decision to terminate his vocational benefits based on noncooperative behavior without having had his benefits formally suspended, who died while a petition for review from that decision was pending, and whose benefits were then formally suspended. This particular combination of facts is highly unlikely to recur, and any court ruling regarding whether the Department properly suspended the worker's benefits would be limited to this fact pattern. Therefore, an opinion would not provide helpful guidance to the Department. As the public interest exception does not apply, dismissal of the appeal is proper.

RCW 51.32.040 regardless of whether the decision to suspend Mr. Anderson's benefits was correct. *See Citizens For Financially Responsible Gov't*, 99 Wn.2d at 350.

Furthermore, since mootness may be raised for the first time before an appellate court, and may even be raised for the first time before the *Supreme Court*, this Court may properly affirm dismissal of Ms. Anderson's appeal if it determines that the appeal is moot, regardless of whether the Board and the superior court's decisions can be reasonably construed as dismissing the appeal on mootness grounds. *See id.*

It should also be borne in mind that it would result in a profound waste of judicial resources for this Court to hold that a superior court cannot dismiss a worker's compensation appeal, even if the appeal is moot, unless the Department expressly addressed the issue that rendered the appeal moot in the order that was under appeal. It is highly unlikely that the Department would address an issue through an order, and for it to then indicate, in the same order, that the issue it purported to address was, or might become, moot. Thus, as a practical matter, if a court may not dismiss an appeal in worker's compensation case even if it is moot unless the Department considered the very statute that rendered the appeal moot in the order that is under appeal, this would effectively prevent superior

courts from ever dismissing worker's compensation appeals based on mootness.

Ms. Anderson offers no legal authority that would support a ruling that bars trial courts from dismissing worker's compensation appeals that are moot. Moreover, the case law shows that the courts have not hesitated to dismiss workers' compensation appeals that are moot, regardless of whether the Department expressly commented on the statute that rendered the appeal moot in the order under appeal. *See, e.g., Anderson v. Weyerhaeuser*, 150 Wn.2d 1035, 84 P.3d 1229 (2004) (review granted February 4, 2004, but dismissed as moot June 16, 2004).

Indeed, in Mr. Anderson's own, prior appeal, the Supreme Court denied the Department and Weyerhaeuser's Petitions for Review from the Court of Appeal's opinion based on its conclusion that Mr. Anderson's death rendered the petitions for review moot. *See id.* The Department order that was under appeal in that case did not, of course, contain any discussion of what would happen in Mr. Anderson's case in the event that he died while his appeal was pending, but this did not bar the Supreme Court from determining that the appeal had become moot.

Furthermore, in *Cena v. Department of Labor & Industries*, 121 Wn. App. 915, 924, 91 P.3d 903 (2004) (citing, inter alia, *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490, 997 P.2d 960 (2000)),

*aff'd* 144 Wash.2d 403 (2001), the Court declined to consider an injured worker's argument regarding the correct calculation of his wages on the grounds that it had become moot. The worker sought to include the value of certain benefits provided by his employer in addition to his basic wage, which the Department had omitted in its formal calculation of the worker's wages under RCW 51.08.178. The *Cena* Court decided not to address the wage calculation issue, however, because the resolution of that issue could not have any practical effect on the claimant's right to benefits. *Id.* at 924. The Court determined that a "cap" on benefits (*see* RCW 51.08.018) applied that was lower than what the worker believed it should be, and it held that the worker was already over the cap even without considering the impact that increasing his wage calculation under RCW 51.08.178 would have on his benefits. *Id.* Therefore, the court concluded that any ruling on the wage calculation issue would be meaningless, since it would not alter the wage calculation or ultimate benefits, and it declined to consider the merits of the worker's argument regarding the correct calculation of his wages at the time of injury. *Id.*

Finally, it must be remembered that the chief reason that the courts dismiss moot appeals is that it is typically a waste of scarce judicial resources to entertain a moot appeal. *See, e.g., Kenneth W. Brooks Trust v. Pacific Media*, 111 Wn. App. 393, 399-400, 44 P.3d 938 (2002).

A moot worker's compensation appeal, like any other moot appeal, should be dismissed in the absence of a compelling reason to maintain it, in order to avoid wasting scarce judicial resources. As no compelling reason to entertain Ms. Anderson's moot appeal exists here, the superior court and the Board properly dismissed it, and this Court should affirm.

**c. Ms. Anderson has failed to establish that the Board or the trial court exceeded their subject matter jurisdiction**

Ms. Anderson cites *Hanquet v. Department of Labor & Industries*, 75 Wn. App. 657, 879 P.2d 326 (1994); *Leary v. Department of Labor & Industries*, 18 Wn.2d 532, 140 P.2d 292 (1943); *Merchant v. Department of Labor & Industries*, 24 Wn.2d 410, 165 P.2d 661 (1946); and *Puget Sound Bridge & Dredging Company v. Department of Labor & Industries*, 26 Wn.2d 550, 174 P.2d 957 (1946), in support of her contention that the Board and the superior court exceeded their subject matter jurisdiction by considering issues that had not been addressed by the Department. AB 16-18. The cases cited by Ms. Anderson stand for the proposition that the Board and superior court cannot properly consider an issue not first considered by the Department.

However, none of the cases cited by Ms. Anderson held that the Board or a court may not dismiss a worker's compensation appeal if it is moot, nor did they hold that a court may only find an appeal to be moot

based on statutory provisions that the Department expressly addressed within the order under appeal. As noted above, a rule of law that prevented the Board or a court from dismissing a moot appeal unless the Department order explicitly commented on the statute that rendered the appeal moot is legally unsupported and would lead to absurd results.

Furthermore, while the cases cited by Ms. Anderson distinguish the Department's "original" jurisdiction from the "appellate" jurisdiction of the Board and the courts, none of those cases held that the Board or a trial court deprives itself of *subject matter jurisdiction* by considering an issue that was not adjudicated by the Department. The terms "appellate" and "original" jurisdiction simply describe the different nature and scope of decision making authority of trial and appellate courts, but they do *not* constitute limits on the Board or the court's *subject matter jurisdiction*. See, e.g., *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 471-472, 24 P.3d 1079 (2001) ("original" and "appellate" jurisdictions "ordinarily are used in reference to courts," but the "scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them, not by applying an abstract definition of the word 'appeal'").

As *Marley* and *Dougherty* reveal, a court has subject matter jurisdiction to render a decision in a case so long as the case involves “the type of controversy” that a court has the power to resolve, and a court does not lose subject matter jurisdiction over the case even if it commits legal error in the course of deciding it. *Dougherty*, 150 Wn.2d at 316; *Marley*, 125 Wn.2d at 539. It follows that a court that committed legal error by considering an issue that was outside the proper scope of its review does not, thereby, deprive itself of subject matter jurisdiction to enter a decision in the case. Thus, the trial court’s decision in that instance, while perhaps erroneous, would not be *void* for lack of subject matter jurisdiction.

Since the issue of whether the Board and the trial court acted within the proper scope of their review does not determine whether they had subject matter jurisdiction to decide the appeal, a party who wishes to argue that the Board exceeded the proper scope of its review must preserve this issue by raising it in the petition for review. *See Upjohn*, 33 Wn. App. 777 (holding that a party must raise an issue in a petition for review to preserve it for a court appeal). As Ms. Anderson failed to argue that the Board exceeded the proper scope of its review in her petition for review, she has waived her right to make any argument in that regard. *Id.*

- d. **Although RCW 51.32.040 forbids the payment of benefits to a beneficiary unless a request for such benefits was made within a year of the worker's death, that statute does not place a limit on the subject matter jurisdiction of the Department, the Board, or the superior court**

Weyerhaeuser has argued that there is another reason why the Board could properly consider whether a timely request for benefits was made under RCW 51.32.040 even though the Department does not appear to have considered that issue in this case: Weyerhaeuser contended that RCW 51.32.040's requirement that an application for benefits be made within a year of the worker's death is a "jurisdictional" requirement, and, therefore, it is an issue that may be raised for the first time on appeal. *See* CP 76. While this argument has support in *Rabey v. Department of Labor & Indus.*, 101 Wn. App. 390, 3 P.3d 217 (2000),<sup>6</sup> and *Wilbur v. Labor & Industries*, 38 Wn. App. 553, 556, 686 P.2d 509 (1984), opinions, it, like Ms. Anderson's jurisdictionally-grounded argument, is in tension with the Supreme Court's decisions in *Marley* and *Dougherty*, which establish that the Department (and the Board and a reviewing court, on appeal) acts within its subject matter jurisdiction whenever it decides the type of controversy that it has the power to decide. Furthermore, it

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<sup>6</sup> *Rabey* specifically states that a court may properly consider whether a worker's beneficiaries are eligible for benefits under RCW 51.32.040, regardless of whether the Department had previously considered the applicability of that statute, since RCW 51.32.040 is a "jurisdictional" requirement and, as such, may be raised at any time during an appeal. *See id.* at 394-95.

should be noted that neither the *Rabey* Court nor the *Wilbur* Court had to determine whether the applicable statute of limitations were limits on the courts' subject matter jurisdiction, or whether it would simply be legally erroneous to grant benefits in violation of the statute of limitations. Therefore, the portions of those opinions suggesting that a statute of limitations is a limit on a court's subject matter jurisdiction are dicta.

Given the broad and sweeping nature of the Supreme Court's holding in *Marley* and *Dougherty* that a court's "subject matter jurisdiction is limited only by the inquiry of whether the dispute involves the "type of controversy" that the court may resolve, it seems unreasonable to argue that a statute of limitations serves as a limitation on a court's subject matter jurisdiction. A worker's eligibility for benefits under the Industrial Insurance Act is the "type of controversy" that the Department, the Board, and a reviewing court have the power to resolve. *See Dougherty*, 150 Wn.2d at 316-17; *Marley*, 125 Wn.2d at 537. Therefore, a decision to award a beneficiary benefits even though the beneficiary's request for benefits was untimely, while erroneous, would still be within the subject matter jurisdiction of those entities. *See Dougherty*, 150 Wn.2d at 316-17; *Marley*, 125 Wn.2d at 537.

Therefore, the Department does not agree that the Board or the trial court lacked subject matter jurisdiction to grant benefits to Mr. Anderson's

children based on the fact that no timely application for such benefits was made. Here, however, regardless of whether or not RCW 51.32.040 imposed a “jurisdictional” limit on the Board or the trial court, it was nonetheless proper for the Board and the trial court to dismiss Ms. Anderson’s appeal, because Ms. Anderson’s failure to comply with RCW 51.32.040’s filing requirements rendered her appeal moot. A moot appeal is ripe for dismissal. *See, e.g., Citizens For Financially Responsible Gov’t*, 99 Wn.2d at 851. Therefore, any error the trial court may have made in ruling that RCW 51.32.040 is a “jurisdictional” requirement is harmless, because the Board and the trial court’s decisions to dismiss Ms. Anderson’s appeal were legally correct.

It is well settled that a superior court decision may be affirmed by an appellate court for any reason supported by the record. *Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 347, 552 P.2d 184 (1976). Furthermore, a superior court decision which reached the correct result for an incorrect reason should be affirmed. *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 847 P.2d 428 (1993). Since dismissal of Ms. Anderson’s appeal was correct under the case law, the applicable statutes, and the stipulated facts, this Court should affirm.

Additionally, the Supreme Court has recognized that moot appeals are non-justiciable and that, therefore, a court lacks “jurisdiction” to

consider a moot appeal, unless the case presents matters of public interest. *See Citizens For Financially Responsible Gov't*, 99 Wn.2d at 851. *But cf. Marley*, 125 Wn.2d at 537. Since Ms. Anderson's failure to comply with RCW 51.32.040's filing requirements renders Ms. Anderson's appeal in the current matter moot, RCW 51.32.040 indirectly operates to deprive the court of "jurisdiction" to consider the merits of her appeal. *See id.* Therefore, it was not necessarily erroneous for the trial court in this case to state that RCW 51.32.040 is a "jurisdictional" requirement, at least under the unusual circumstances of this case.

In any event, even if the trial court's statement that RCW 51.32.040 imposes "jurisdictional" requirements is erroneous, dismissal of Ms. Anderson's appeal was proper here, since there is no relief that a court may provide to her or to Mr. Anderson's children regardless of whether or not the Department erred when it suspended Mr. Anderson's benefits based on his alleged failure to cooperate with vocational services. Since the record fully supports the trial court's ultimate disposition of the case, this Court should affirm the dismissal of her case.

**2. Under RCW 51.32.040, Mr. Anderson's beneficiaries had to make a request for benefits within one year of his death, and, having failed to do so here, they may not receive any benefits of any kind as a matter of law**

As noted above, the Board and the trial court properly dismissed Ms. Anderson's appeal because the parties' stipulated facts reveal that the issue of whether Mr. Anderson's benefits had been properly suspended was moot. The Department order under appeal determined that Mr. Anderson had failed to cooperate with vocational services and, therefore, it found him ineligible for any disability benefits from August 16, 1995 through November 8, 2005.

RCW 51.32.110 allows the Department—with notice to the worker—to suspend all further action on the worker's claim and to withhold all benefits (including time-loss compensation), while the noncooperative behavior continues. Ms. Anderson contends that the Department's decision to suspend Mr. Anderson's benefits for noncooperation was erroneous because it attempted to suspend his benefits retroactively and because it failed to give him notice before suspending his benefits. AB at 18-19.

However, the issue of whether Mr. Anderson's benefits were properly suspended based on an alleged failure to cooperate with vocational services is irrelevant because there is no form of relief that may

be properly granted to any of Mr. Anderson's beneficiaries, regardless of whether or not the decision to suspend his benefits was technically correct, because no timely request for such benefits was made.

- a. The plain language of RCW 51.32.040 reveals that Ms. Anderson failed to make a timely request for benefits on the behalf of Mr. Anderson's dependent children**

RCW 51.32.040(2)(a) provides that if a worker suffers a "permanent partial injury" or "any other injury" and dies for reasons unrelated to the injury "before he or she receives payment of the award for any monthly installment," the monthly installment (or permanent partial disability award, or both) shall be paid to the worker's surviving spouse, or to the worker's children if there is no surviving spouse. RCW 51.32.040(2)(c) further provides that "any application for compensation under this subsection (2) shall be filed with the department or self-insuring employer within one year of the date of death." (Emphasis added).

Ms. Anderson seeks payment of time-loss compensation to Mr. Anderson's children from the date that that benefit was last paid through the date that Mr. Anderson died. Time-loss compensation is a "monthly" benefit, and it is, therefore, subject to RCW 51.32.040, which unambiguously provides that a beneficiary seeking a payment pursuant to

that statute must request the benefit within a year of the worker's death. *See* RCW 51.32.090. The plain language of RCW 51.32.040 thus shows both that that statute applies to Ms. Anderson's case and that any demand for payment under that statute had to be made within a year of Mr. Anderson's death.

Ms. Anderson argues, without legal support, that that it is RCW 51.28.050, rather than RCW 51.32.040, that applies in this case. However, the plain language of RCW 51.32.040 establishes that it is the statute that applies to this situation, and Ms. Anderson offers no cogent explanation as to why RCW 51.28.050 rather than RCW 51.32.040 would apply in its stead.

In any event, *even assuming* that RCW 51.28.050 is the relevant statute, this would not change the proper outcome of this appeal, because RCW 51.28.050, like RCW 51.32.040, requires a beneficiary to make a request for payments within a year of the worker's death.

RCW 51.28.050 requires a beneficiary to request total and permanent disability benefits within a year of the date that the beneficiary's rights "accrue". In *Beels v. Dep't of Labor & Indus.*, 178 Wn. 301, 307, 34 P.2d 917 (1934), the Supreme Court, in interpreting a statute which is the predecessor to RCW 51.28.050, held that a worker's beneficiaries' rights accrued "the instant" that the worker died. Therefore,

Ms. Anderson would have to show that a request for benefits was made within a year of Mr. Anderson's death to show that she complied with RCW 51.28.050's requirements, and the stipulated facts in this case demonstrate that that did not occur.

Further support for the conclusion that a worker's beneficiaries' rights "accrue" under RCW 51.28.050 at the moment of the worker's death can be found in the *Rabey* opinion. *Rabey*, 101 Wn. App. at 394-95. In *Rabey*, a widow sought a survivor's pension, but she failed to make a request for such benefits until more than a year after her husband died. *See id.* Ms. Rabey argued, among other things, that RCW 51.28.050 rather than RCW 51.32.040 determined whether her request was timely. *See id.* The *Rabey* Court concluded that this was a distinction without a difference because RCW 51.28.050, like RCW 51.32.040, requires a beneficiary to make a request for benefits within a year of the worker's death, since the beneficiaries' rights accrue when the worker dies.<sup>7</sup> *See id.*

Ms. Anderson contends, without support, that Mr. Anderson's children did not "accrue" any rights under his claim when he died. AB 21-22. She contends that the children's rights only accrued in July 2004, when the Supreme Court denied the petitions for review filed

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<sup>7</sup> The *Rabey* Court found that Ms. Rabey was entitled to benefits under *equity*, but Ms. Anderson has not sought relief under an equitably grounded theory, nor does she have any basis for requesting equity under the record in this case. *See id.*

by the Department and Weyerhaeuser from the Court of Appeals decision which held that the Department could not terminate Mr. Anderson's vocational services without first having formally suspended his benefits under RCW 51.32.110. Her idea seems to be that if any litigation is pending at the time of a worker's death then the worker's children have no legal basis for seeking benefits as beneficiaries until that litigation has resolved.

Ms. Anderson offers no legal authority supporting the notion, even as a general matter, that the existence of some sort of pending litigation can have the effect of preventing a worker's beneficiaries' rights from accruing at the moment that the worker dies. As this argument is unsupported by legal authority, this Court should decline to consider it. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 828 P.2d 549 (1992). Moreover, her argument is contrary to the Supreme Court's decision in *Beels* that a beneficiary's rights "accrue" under that statute "the instant" that the worker dies, and it is also contrary to the analysis used by the Court of Appeals in *Rabey*. *See Beels*, 178 Wn. at 307; *Rabey*, 101 Wn. App. at 394-95. Therefore, this Court should reject it.

**3. Ms. Anderson's reliance on *Ramsay* is misplaced as that case is inapplicable to her appeal**

Ms. Anderson also argues that she had no duty to make an application for benefits on behalf of Mr. Anderson's children *at any time* based on her interpretation of the *Ramsay* case. *See* AB 22-26, citing *Ramsay*, 36 Wn.2d 410. However, *Ramsay* is readily distinguishable, and does not support Ms. Anderson's arguments in this case. *See id.*

*Ramsay* involved two consolidated cases involving injured workers who were determined to be totally and permanently disabled through a final, and unappealed, Department order. *See id.* at 411. In each case, the worker died at some point after a final determination of total and permanent disability had been made, and the worker's widow then requested payment of the award that had been granted to her husband more than a year after he died. *See id.*

At the time of the *Ramsay* decision, the closest predecessor to RCW 51.32.040, Rem. Rev. Stat. § 7684, provided that a worker's unpaid time-loss compensation would be assigned to his widow or to his surviving children. However, the statute did not place a duty on the widow or children to apply for those benefits within a year.

Furthermore, the statutory language that currently resides in RCW 51.28.050 was, at that time, contained in subsection (d) of

Rem. Rev. Stat. § 7686. Subsection (a) of Rem. Rev. Stat. § 7686 provided that a worker must file a claim for benefits within a year of the worker's injury. Subsection (b) provided that if a worker died as a result of an injury, the worker's widow's was required to file a claim for death benefits within a year of the worker's death. Subsection (c) provided that a worker could make an application for an increase or rearrangement of compensation in the event of a "change of circumstances." Subsection (d) provided that "No application shall be valid or claim enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued.

In *Ramsay*, the Department denied the widows' requests for the payment of the remainder of their husband's total and permanent disability awards, contending that Rem. Rev. Stat. § 7678(d) required that the applications be made within a year of the worker's death. *See id.* The *Ramsay* Court disagreed, concluding that Rem. Rev. Stat. § 7678 (d) did not apply to the widows in that situation. *See id.* at 413-15.

The *Ramsay* Court reasoned that subsection (d)'s language indicating that a "claim" is only enforceable if filed within a year only to the three types of claims for benefits identified in the immediately preceding subsections of that statute (i.e., subsections (a), (b), and (c)), and that there was no filing requirement for any sort of request for benefit

that did *not* fit within any of those subsections. *See id.* The *Ramsay* Court then noted that the widow in that case was neither an injured worker who was alleging an industrial injury, nor a widow seeking death benefits based on an allegation that her husband died as a result of his injury, nor was she a worker seeking a rearrangement or adjustment of compensation. *See id.* Rather, she was simply seeking the execution of a grant of total and permanent disability benefits that had been made to her husband before he died but which had not been paid in full. *See id.* Since her request for compensation did not fit within subsection (a), (b), or (c) of that statute, she was not bound by the one-year filing limitations set forth in subsection (d). *See id.* Furthermore, since no other statute that existed at the time purported to place a deadline on a widow's request for benefits that had been awarded but not paid to the injured worker as of the date of the worker's death, no filing deadline applied. *See id.*

*Ramsay* is readily distinguishable from the current appeal for at least three reasons. *See id.* First, as noted, RCW 51.32.040 did not exist at the time that *Ramsay* was decided. The closest statutory parallel to it, Rem. Rev. Stat. § 7684, did not place a deadline on a widow's ability to request the payment of benefits that were allegedly due and owing to her husband. *See id.* Here, RCW 51.32.040 applies to Ms. Anderson, and, unlike Rem. Rev. Stat. § 7684, it explicitly places a duty on a worker's

beneficiaries to request benefits from the Department within a year of the worker's death.

Second, the statute that was somewhat analogous to RCW 51.28.050 that existed at the time of *Ramsay* was subsection (d) of a larger statute. *See id.* The *Ramsay* Court's analysis of that statutory language was driven largely by the fact that it was subsection (d) of a larger statute. *Id.* The *Ramsay* Court concluded that the filing requirement contained in subsection (d) of that act only applied to the benefits provided for by subsections (a), (b), and (c) of that statute. *See id.* Here, however, it simply does not make any sense to apply the same rationale to RCW 51.28.050, as RCW 51.28.050 is not a mere subsection of a larger statute.

Third, the workers in *Ramsay* had been adjudicated to be totally and permanently disabled through final and unappealed orders prior to the time of their deaths. *See id.* In this case, in contrast, Mr. Anderson was not, prior to his death, found to be entitled to any of the benefits that Ms. Anderson is now asking be paid to Mr. Anderson's children. Therefore, unlike the widow in the *Ramsay* case, Ms. Anderson is not seeking the execution of a final award of benefits that simply has not yet been paid. *See id.*

Based on all of the above considerations, the *Ramsay* case is plainly inapplicable to the current appeal, and it provides no support for Ms. Anderson's arguments. *See id.*

**B. Even Assuming That This Court Reverses The Department Order Under Appeal And Directs The Department To Take Further Action, Attorney Fees Cannot Be Properly Awarded To Ms. Anderson Under RCW 51.52.130**

Ms. Anderson requests an award of attorney fees under RCW 51.52.130 in the event that she prevails. AB 27. Under RCW 51.52.130, if an injured worker prevails on appeal before either the superior court or an appellate court, *and the worker receives additional benefits or treatment as a result of the appeal*, then the injured worker is entitled to costs and fees which were incurred at the superior court and appellate courts.<sup>8</sup> When a case involves a self-insured employer, as this case does, the self-insured employer, not the Department, is responsible for the claimant's costs and fees. *See id.*

In this case, Ms. Anderson is not entitled to costs or fees from the self-insured employer even if this Court grants her the legal ruling and the remand that she is requesting. This is because an injured worker is not

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<sup>8</sup> It should be noted that a prevailing party does *not* receive costs and fees for time spent at the Board or the Department. RCW 51.52.130 authorizes the court to *fix* the fee that the injured worker's attorney receives from his or her client, but it does not authorize the court to order the Department or the self-insured employer to pay such fees. *Flanigan v. Dep't of Labor & Indus.*, 123 Wn. 2d 418, 869 P.2d 14 (1994); *Piper v. Dep't of Labor & Indus.*, 120 Wn. App. 886, 889, 86 P.3d 1231 (2004).

entitled to costs and fees under RCW 51.51.130 unless the appeal results in the worker obtaining additional benefits or treatment. Here, Ms. Anderson contends that the Board and the trial court exceeded their subject matter jurisdiction by basing their decision on RCW 51.32.040, a statute the Department had not considered at the time of its decision in this case, and contends that the issue under appeal should have been narrowly curtailed to deciding whether suspension of Mr. Anderson's benefits was correct. She seeks reversal of the suspension order, and a remand for further claims adjudication consistent with that ruling.

However, even if this Court remands the case to the Department for additional action as Ms. Anderson requests, the Department cannot, on remand, properly grant any benefits to Mr. Anderson's children, or any other person, because the stipulated facts demonstrate that a timely request for benefits as not made within the meaning of RCW 51.28.050 and RCW 51.32.040.

Even if it is assumed that it was outside the scope of the Board and the Superior Court to consider that statute at the time that they issued their respective opinions in this case, the Department would still be obligated to follow RCW 51.32.040's provisions on remand. Since the stipulated facts reveal that no timely request for benefits was made under the provisions of

that statute, no benefits will be properly payable on remand, even assuming that Ms. Anderson receives the relief she requests in this appeal.

Furthermore, even if this Court agrees with Ms. Anderson's argument, in the alternative, that she made a timely application for benefits on the behalf of Mr. Anderson's dependent children, even though she did not make such a request within one year of his death, it would still be premature to grant her an award of attorney's fees at this time, since such a decision would not guarantee that any additional disability benefits would actually be paid. In order to actually receive any additional disability benefits, Ms. Anderson would still need to demonstrate, on remand, that Mr. Anderson was temporarily and totally disabled as a proximate result of his industrial injury during the relevant time period, something that has not been demonstrated in this appeal. Any award of fees, therefore, would have to be contingent on Ms. Anderson actually securing additional industrial insurance benefits on remand, *even assuming* that this Court agrees with her argument that she made a timely application for benefits on the children's behalf.

Ms. Anderson's attorney fee request should be denied, or, at most, any such award must be contingent upon her actually securing additional disability benefits to Mr. Anderson's children on remand.

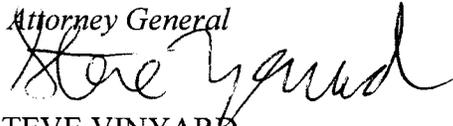
**VII. CONCLUSION**

For the reasons discussed above, the Department respectfully requests that this Court affirm the Superior Court decision affirming the decision of the Board.

RESPECTFULLY SUBMITTED this 11 day of July, 2011.

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

RICHARD ANDERSON (DEC'D),

Appellant,

v.

WEYERHAEUSER COMPANY AND  
DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondents.

DECLARATION OF  
MAILING

RECEIVED  
JUL 19 2011  
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The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Mailing to counsel for all parties on the record by depositing a postage prepaid envelope in the U.S. mail, addressed as follows:

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