NO. 45580-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D),

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

When the Department of Labor and Industries closes a workers' compensation claim awarding no permanent disability and no timely appeal follows, that order is res judicata to both the worker and the beneficiaries. A spouse may seek survivor benefits if the worker was totally and permanently disabled from the industrial injury at the time of death. But to overcome the res judicata effect of the closure order, the spouse, like a worker claiming an aggravation, must present objective medical testimony showing that the industrial injury worsened between the closure order and the worker's death.

Janis Wegleitner presented medical testimony that her husband Aloys Wegleitner's industrial injury caused him to be totally and permanently disabled several months before the Department closed his claim (awarding no disability). The doctor testified that Mr. Wegleitner was totally and permanently disabled before claim closure until he died from unrelated lung cancer. But the doctor provided no testimony comparing Mr. Wegleitner's objective symptoms between those two dates.

The superior court correctly concluded that Ms. Wegleitner failed to show objective worsening and granted summary judgment to the Department. This Court should not review her unpreserved and meritless request for equitable relief. This Court should affirm.

II. ISSUES

1. When a workers' compensation claim is closed with no permanent partial disability, it is res judicata that he or she has no disability, and a worker must show that his or her condition objectively worsened in order to overcome the res judicata effect of the closing order. Where the Department entered an order closing a worker's claim with no award for a disability, must the worker's surviving spouse provide objective evidence of worsening between claim closure and the worker's death to receive survivor benefits?

2. To prove worsening, a claimant must present medical testimony comparing objective finding between the closing order and time of death that show a worsening of the condition. Did the superior court correctly grant summary judgment to the Department, where the medical testimony did not demonstrate objective worsening between claim closure and the worker's death?

3. Should the Court exercise its equitable power and overlook the closure order when this issue is raised for the first time on appeal and there was no evidence that Aloys Wegleitner or Janis Wegleitner acted diligently regarding the closing order or were unable to comprehend the appeal process?

III. STATEMENT OF THE CASE

A. Aloys Wegleitner Did Not Timely Protest the Department's Order Closing His Industrial Injury Claim

Aloys Wegleitner worked for Patrick Boring doing landscaping for 34 years. CP 359. On July 19, 2004, he sustained an industrial injury to his middle back. CP 359, 372. He filed a claim for benefits, which the Department allowed, paying benefits for treatment and time loss compensation after Mr. Wegleitner stopped working in September 2004. CP 53-54, 373-74, 393-97.

In March 2005, doctors diagnosed Mr. Wegleitner with lung cancer. CP 382, 444. The cancer metastasized to his spine and rib cage, causing pain and tenderness. CP 442-43, 445. He underwent radiation and chemotherapy, which provided some relief. CP 380, 382.

On June 3, 2005, the Department issued an order closing Mr. Wegleitner's claim. CP 522. The order stated that he was at maximum medical improvement and that no disability would be awarded. CP 522. That order became final and binding 60 days later, when the Department received no protest or appeal from any party.[1] CP 562.

B. Following Mr. Wegleitner's Death from Unrelated Lung Cancer, His Wife Unsuccessfully Filed a Claim for Survivor Benefits with the Department and Appealed to the Board

Mr. Wegleitner died from lung cancer on September 30, 2005.[2] CP 520. His wife filed a claim for survivor benefits under Mr. Wegleitner's claim. CP 35. The Department denied her claim, finding that Mr. Wegleitner's injury was not a cause of his death and that he was not permanently and totally disabled because of his industrial injury when

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[1] Ms. Wegleitner implies that the Department received a protest to this order on June 18, 2005, relying on a Board-created document entitled "Jurisdictional History. App. Br. at 4 (citing CP 21). It is now undisputed that document is incorrect and that the Department did not receive a protest or appeal within 60 days of the closure order. *See* App. Br. at 19, 35; CP 53-54, 561.

[2]The Department stopped paying time loss compensation to Mr. Wegleitner under this claim on April 28, 2005, but continued paying it until he died under another claim. CP 103, 393; App. Br. at 41. That other claim is not presently before this Court nor relevant to its disposition.

he died. CP 35-36. The Board affirmed, but the superior court reversed and remanded for a de novo hearing. CP 11, 29-33, 80-81.

C. Although a Doctor Testified That Mr. Wegleitner Was Totally and Permanently Disabled from His Industrial Injury, the Doctor Did Not Testify to Medical Evidence of Objective Worsening Between Claim Closure and Mr. Wegleitner's Death

On remand, Ms. Wegleitner called Dr. H. Richard Johnson, who testified that he never saw Mr. Wegleitner but reviewed records provided by Ms. Wegleitner's counsel.[3] CP 405-06. Dr. Johnson agreed that Mr. Wegleitner sustained an industrial injury in July 2004 in the form of a thoracic sprain-strain and a herniated disc. CP 419. Between July 2004 and November 2004, films showed that no changes occurred and that there was "no evidence of any aggressive process going on." CP 429. A March 2005 MRI revealed multiple changes consistent with cancer, though the original trauma remained visible. CP 442-43. Dr. Johnson agreed that by March 2005, Mr. Wegleitner had lung cancer, which had metastasized to the spine and rib cage. CP 444-45, 473. Dr. Johnson testified to reviewing subsequent films and records, but he never testified that those

[3]In addition to Dr. Johnson, the industrial appeals judge also heard testimony from Dr. Johnson, rehabilitation counselor and life care planner Carl Gann, Ms. Wegleitner, radiation oncologist Dr. Michael McDonough, and Department of Labor and Industries worker's compensation claims adjudicator Robert Frost. Because of the nature of this appeal, only Dr. Johnson's testimony will be summarized here.

records provided new information relevant to Mr. Wegleitner's industrial injury. CP 446-47.

Dr. Johnson opined that Mr. Wegleitner's industrial injury became medically fixed and stable in January 2005. CP 452-53. Dr. Johnson believed that Mr. Wegleitner had permanent residuals from his industrial injury that would have been present through mid-2005 and through September 2005, when he died. CP 454-55. Dr. Johnson talked to Ms. Wegleitner and a vocational expert, Carl Gann.[4] CP 455-59. Based on those conversations, Dr. Johnson posited that the residuals of his industrial injury alone would have prevented Mr. Wegleitner from being physically capable to return to work as a landscaper or laborer between June 3, 2005 and September 30, 2005. CP 455-59. Dr. Johnson testified that Mr. Wegleitner was not capable of employment on a regular continuous basis in early 2005 through claim closure on June 3, 2005, and when he died in September 2005. CP 460-62. But Dr. Johnson never mentioned a medical record showing objective worsening of Mr. Wegleitner's industrial injury to his back between claim closure and Mr. Wegleitner's death. He did not testify as to any objective finding at the time of death.

[4]Consistent with Dr. Johnson's testimony, Gann opined that based on Mr. Wegleitner's physical capacities, his education, and the job market, Mr. Wegleitner was not employable or a viable vocational retraining candidate. CP 501.

D. The Board Affirmed Denial of the Claim for Survivor Benefits, Concluding That Ms. Wegleitner Provided No Evidence of Objective Worsening

The Industrial Appeals Judge issued a proposed decision and order affirming the Department's order rejecting Ms. Wegleitner's survivor benefits claim. CP 106-14. Ms. Wegleitner petitioned for review to the three-member Board, which affirmed the Department's order and supplemented the findings of fact. CP 96-98, 102-116.

The Board found (1) that Mr. Wegleitner's claim closed on June 3, 2005, when he had reached maximum medical improvement; (2) that Mr. Wegleitner did not file a timely protest to the Department's June 3, 2005 order closing his claim; and (3) that Ms. Wegleitner presented no objective evidence that Mr. Wegleitner's industrial injury worsened between June 3, 2005, and the date of his death on September 30, 2005. CP 97. The Board concluded that she failed to establish that Mr. Wegleitner's "condition proximately caused by his industrial injury objectively worsened between June 3, 2005, and September 30, 2005, within the meaning of RCW 51.32.050" and that she failed to establish that she was entitled to survivor benefits. CP 98.

E. The Superior Court Granted the Department's Summary Judgment Motion, Ruling That Ms. Wegleitner Was Not Now Entitled to Benefits

Following Ms. Wegleitner's appeal to Pierce County Superior Court, the parties cross-moved for summary judgment. CP 573-74, 652-53. Ms. Wegleitner argued that the Department provided no evidence rebutting that Mr. Wegleitner's industrial injury was a cause of his total and permanent disability. CP 589-95. The Department argued that the industrial injury was not a cause of Mr. Wegleitner's death, res judicata precluded Ms. Wegleitner from challenging the June 3, 2005 closure order, and Ms. Wegleitner presented no evidence that Mr. Wegleitner's condition objectively worsened after claim closure. CP 663-73.

The superior court granted the Department's motion and denied Ms. Wegleitner's. CP 911-14. The superior court ruled that the undisputed facts showed that (1) on June 3, 2005, the Department issued a closing order on Mr. Wegleitner's claim indicating that he had no permanent disability resulting from the industrial injury; (2) Mr. Wegleitner did not file a timely protest within 60 days of the date the June 3, 2005 order was communicated to him; and (3) cancer—not the industrial injury—caused his death. CP 912-13. The court concluded that the June 3, 2005 order was final and binding and not subject to collateral attack. CP 913. "Without there being a claim or an appeal of the June 3,

2005 closing order filed within the requisite 60-day appeal period, there is not a basis for the beneficiary to proceed now." CP 913. The court entered judgment for the Department, resulting in this appeal. CP 914, 919, 922-23.

IV. STANDARD OF REVIEW

On appeal, this Court reviews the superior court's decision rather than the Board's. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009). This Court reviews the superior court's decisions using ordinary civil standards of review. RCW 51.52.140; *Rogers*, 151 Wn. App. at 180. As this arises from summary judgment, this Court reviews the superior court's decision de novo, conducting the same inquiry as the trial court. *Dep't of Labor & Indus. v. Frankhauser*, 121 Wn.2d 304, 308, 849 P.2d 1209 (1993); *Adams v. Johnston*, 71 Wn. App. 599, 608, 860 P.2d 423 (1993). Summary judgment is appropriate when the undisputed material facts entitle the moving party to judgment as a matter of law. CR 56(c); *Frankhauser*, 121 Wn.2d at 304.

Persons seeking industrial insurance benefits must prove their entitlement to such benefits. *Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942); *Jenkins v. Dep't of Labor & Indus.*, 85 Wn. App. 7, 14, 931 P.2d 907 (1996). Although the Industrial Insurance Act is to be liberally construed, such construction "only applies

in favor of persons who come within the Act's terms" and "does not apply to defining who those persons might be." *Berry v. Dep't of Labor & Indus.*, 45 Wn. App. 883, 884, 729 P.2d 63 (1986). Liberal construction does not apply to factual questions. *Ehman v. Dep't of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). Courts give deference to interpretations of Title 51 by both the Department and the Board. *Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000); *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

V. ARGUMENT

A. The Superior Court Correctly Granted Summary Judgment to the Department, Where Ms. Wegleitner Failed to Present Evidence of Objective Worsening of Mr. Wegleitner's Condition

The superior court correctly granted summary judgment to the Department because Ms. Wegleitner had to present evidence of objective worsening in order to overcome the res judicata effect of the closure order and obtain a permanent total disability finding, but she failed to do so. This Court should affirm.

1. Overview of survivor benefit statutes

The Industrial Insurance Act provides four ways for surviving spouses to obtain benefits upon their spouses' death. First, RCW 51.32.050(2) provides for survivor benefits if death results from a cause

related to the injury: "Where death results from the injury, a surviving spouse of a deceased worker eligible for benefits under this title."

Second, RCW 51.32.050(6) provides for benefits for causes *unrelated* to the injury pre-1986 cases: "For claims filed prior to July 1, 1986, if the injured worker dies during the period of permanent total disability, whatever the cause of death . . . the surviving spouse or child or children shall receive benefits as if death resulted from the injury." Before 1986, a surviving spouse could obtain benefits if the worker died from a cause related to the injury or if the worker was totally and permanently disabled from a cause related to the industrial injury. Former RCW 51.32.050(6) (1985); Laws of 1986, ch. 58, § 3.

Third, in 1986, the Legislature enacted RCW 51.32.067, which applies when a worker dies from causes *unrelated* to the industrial injury. This statute allows a worker to elect benefits for his or her survivor upon becoming totally and permanently disabled. Laws of 1986, ch. 58 § 4. The worker can elect to receive the full pension with no spousal award or to set aside an actuarially reduced portion for the surviving spouse. RCW 51.32.067(1). The spouse must consent in writing if the worker elects to not pay benefits to the surviving spouse. RCW 51.32.067(2).

Fourth, no statute provides directly for a survivor to receive benefits when the worker has not made the election provided in RCW

51.32.067 during his lifetime and then dies from a condition *unrelated* to the industrial injury. But the appellate courts filled this gap by holding that, if the worker dies before making the election under RCW 51.32.067, the Department could make such election for the spouse. *Freeman v. Dep't of Labor & Indus.* 87 Wn. App. 90, 97-98, 940 P.2d 304 (1997). In *Freeman*, a permanently and totally disabled worker died before making an election, so the Department made one for him, awarding the spouse benefits. *Id.* at 92. The surviving spouse contended that because the worker made no election, she should receive benefits under RCW 51.32.050. *Id.* at 93-94. The Court rejected her argument, reasonably concluding that the Legislature's larger goal in enacting RCW 51.32.067 was "to design two separate schemes for calculating spousal benefits based on the date the claim was filed." *Id.* at 97-98. Thus, the Department can make an election to ensure that the survivor spouse receives benefits. *Id.* at 98. This case involves this fourth option.[5]

[5]Ms. Wegleitner's citation to RCW 51.32.050(6) as the source for a survivor benefits award is incorrect. App. Br. at 29, 32-33. That provision applies only if the worker sustained an industrial injury before July 1, 1986. RCW 51.32.050(6). Here, the parties agree Mr. Wegleitner's industrial injury occurred on July 19, 2004. Because RCW 51.32.050 does not apply, where Mr. Wegleitner's death resulted from causes unrelated to the injury and occurred after 1986, RCW 51.32.067 applies. RCW 51.32.067 provides for an election of pension benefits made by the worker if permanently totally disabled. Read literally, RCW 51.32.067(1) would not apply to Ms. Wegleitner because no election had been made. *Freeman*, 87 Wn. App. at 97. The Department, however, has not taken this position, and in *Freeman,* the Court agreed that when a worker dies from a cause unrelated to the injury, the Department may elect an option on the survivor's behalf.

2. If a surviving spouse seeks death benefits on a claim that was closed with no permanent partial disability, the spouse must first present objective evidence of worsening

Reading Title 51 as a whole, a surviving spouse must present objective medical evidence of worsening if there was an underlying final and binding closure order awarding no permanent disability. RCW 51.32.067 provides that a worker receiving a pension can elect to award part of the pension to the surviving spouse "if the worker dies during a period of permanent total disability from a cause unrelated to the injury." RCW 51.32.067(1).

Although RCW 51.32.067 is silent on what happens if the Department had issued a final and binding closure order awarding no permanent disability to the worker, other statutes and case law require the spouse to show objective worsening in these circumstances.[6] RCW 51.52.060(1) provides that a worker or beneficiary must file a notice of appeal to the Board of Industrial Insurance Appeals "within sixty days from the day on which a copy of the order, decision, or award was communicated to such person." If a party fails to comply with this statute

[6]Well-settled case law holds that courts determine the plain meaning of a statute from looking at the provision in the context of the statutory scheme as a whole. *See Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007) (plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole"); *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

and file a timely appeal, the Department's decision is final and binding, and all parties are bound by the res judicata effects of the Department orders that become final. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994); *Nagel v. Dep't of Labor & Indus.*, 189 Wash. 631, 635-36, 66 P.2d 318 (1937); *Ek v. Dep't of Labor & Indus.*, 181 Wash. 91, 94, 41 P.2d 1097 (1935) (the Department's rejection order became final and binding on the claimant and his spouse, so she is not entitled to a pension); RCW 51.52.060(1). A finding of no permanent disability at closure is res judicata to the extent of the injury. *White v. Dep't of Labor & Indus.*, 48 Wn.2d 413, 414, 293 P.2d 764 (1956).[7]

To overcome the res judicata effect, RCW 51.32.160(1) provides the mechanism for any beneficiary to obtain additional benefits resulting from a closed claim: "Upon application of the beneficiary," the Department may award additional benefits "[i]f aggravation, diminution, or termination of disability takes place." RCW 51.32.160(1); *see White*, 48 Wn.2d at 414-15; *Nagel*, 189 Wash. at 635-36 (a final order has res judicata effect, but workers may reopen the claim for an aggravation).

By its own terms, RCW 51.32.160(1) applies to beneficiaries, not just the worker. A beneficiary includes a spouse. RCW 51.08.020. The

[7]While Ms. Wegleitner disagrees that she has to show objective worsening, she agrees that the Department order closing the claim has res judicata effect as to the extent of the injury at the time of closure. App. Br. at 35-36 (citing *White*, 48 Wn.2d 413).

surviving spouse does not have to file an actual application to reopen the worker's claim, but rather can claim worsening of the condition in a separate survivor claim application.[8] *In re David Harvey, Dec'd*, No. 94 1271, 1996 WL 327325 (Wash. Bd. Indus. Ins. App., April 9, 1996). But the "beneficiary" language in RCW 51.32.160(1) evidences the Legislature's plain intent to require surviving spouses to prove aggravation when the underlying claim closed with no permanent and total disability award.

To demonstrate an "aggravation," the "claimant must show objective medical evidence of worsening." *Eastwood v. Dep't of Labor & Indus.*, 152 Wn. App. 652, 654, 656, 219 P.3d 711 (2009). Thus, a claimant must prove three elements to reopen the claim: (1) the causal relationship between the injury and the subsequent disability must be established by medical testimony; (2) the claimant must prove by medical testimony, some of it based upon objective symptoms, that an aggravation of the injury resulted in increased disability; and (3) the medical testimony must show that the increased aggravation occurred between the date the claim was last closed and the application for reopening. *Id.* at 657-58; *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117

[8]Case law under the former RCW 51.32.050 treated the survivor's claim for benefits when the worker died from an unrelated condition as a separate claim for benefits. *McFarland v. Dep't of Labor & Indus.*, 188 Wash. 357, 366-67, 62 P.2d 714 (1936). With the repeal of that portion of the statute, this case law does not apply.

(1956); *Grimes v. Lakeside Indus.*, 78 Wn. App. 554, 561, 897 P.2d 431 (1995). Mere assertions by a medical expert that the claimant has a disability are insufficient—there must be evidence of objective symptoms. *Eastwood*, 152 Wn. App. at 657-58; *see also White*, 48 Wn.2d at 415-16 (holding that comparative studies of x-ray films taken between the two terminal dates was objective evidence of worsening).

Well-settled case law supports the conclusion that the surviving spouse must comply with those same requirements as the claimant when seeking additional benefits related to a closed claim. *McFarland*, 188 Wash. 357, 367, 62 P.2d 714 (1936); *Harvey*, 1996 WL 327325; *In re Lowery Pugh, Dec'd*, No. 86 2693, 1989 WL 224965 (Wash. Bd. Ind. Ins. App. April 27, 1989); *see also Cyr v. Dep't of Labor & Indus.*, 47 Wn.2d 92, 96, 286 P.2d 1038 (1955) (widow denied pension where she provided no objective medical evidence that the worker died from an industrial injury); *Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 589-90, 282 P.2d 765 (1953) (widow awarded a pension when she presented medical testimony that the worker's industrial injury worsened to a permanent and total disability after claim closure).

McFarland, which holds that a surviving spouse must comply with the statutory requirements, including that a worsening (to a permanent and total disability) occurs after the closure order awarding a permanent partial

disability, provides the best controlling authority on the issue. There, the Department closed the worker's claim and awarded a permanent partial disability. *McFarland*, 188 Wash. at 359. After the worker's death, his widow filed a claim seeking death benefits. *Id.* The Department argued that upon closing the claim, the worker's status became fixed, and thus, there was no basis for allowing a pension. *Id.* at 364. The Court rejected that argument, holding that the widow could show that the worker was permanently and totally disabled during the period immediately prior to his death, or whether, on the contrary, his status continued to be that of previously fixed by the Department. *Id.* at 364.

The Court explained that a spouse can receive benefits by showing that the worker was rendered permanently and totally disabled after the closure order, if she complies with the "other" statutory requirements:

> [I]f the injured workman, whose status has been fixed by the department or by the court as one of permanent partial disability *is thereafter*, as the result of the injury, *rendered permanently and totally disabled*, those facts may be established by the widow, and when so established, *in conjunction with the other necessary essentials prescribed by the statute*, make a case for the allowance of a widow's pension.

Id. at 367 (emphasis added).[9] By using the "thereafter. . . rendered permanently and totally disabled" language, the Court articulated that the worsening of the disability must occur after the closure order. *McFarland*, 188 Wash. at 367. The spouse met that standard when the superior court found that "[h]is disability became aggravated by reason of the development of phlebitis . . . ." *Id.* at 360. And the requirement that the spouse follow the "other necessary essentials prescribed by the statute" envisions that the other provisions, including the aggravation statute, be followed. *Id.* at 367. *McFarland* thus supports the holding that a spouse must show that the permanent total disability occurred after the closure order.[10]

Further, returning back to the present statute, RCW 51.32.067 is likely silent on the question because it explicitly only addresses the question of a worker electing benefits while the worker is alive. *Freeman*, 87 Wn. App. at 97. If a worker were alive, in order to be declared permanently totally disabled, after an earlier order finding no permanent disability, he would have to show worsening of his or her condition.

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[9]The Court analyzed the case under former Rem. Rev. Stat. § 7679(c), which no longer exists. *McFarland*, 188 Wash. at 364. The closest analogy to that statute would be RCW 51.32.067(1). *See Freeman*, 87 Wn. App. at 94-98 (explaining historical context of RCW 51.32.067).

[10]Consistent with *McFarland*, a surviving spouse also needs to demonstrate that the worsening is permanent. 188 Wash. at 367. Because Dr. Johnson testified that Mr. Wegleitner was at maximum medical improvement, that is not at issue here.

RCW 51.32.160. Thus, implicit in *Freeman*'s holding that the Department may make an election, is also a requirement that other statutory requirements be followed.

The Board follows this line of reasoning.[11] In *Pugh*, the Board held that in a survivor benefits claim premised on the worker being permanently and totally disabled at death, if the worker's claim was closed at that time, the surviving spouse must first establish a permanent worsening of the worker's condition between the date his claim was last closed and the date of his death. *Pugh*, 1989 WL 224965, at *2.

The Board approved of that analysis in *Harvey*. There, the worker sustained an industrial injury in 1984, and the claim closed without a disability award in 1986. 1996 WL 327325, at *2. In 1993, the worker filed an aggravation application, which the Department denied. *Id.* at *3. While that order was on appeal to the Board, the worker died from unrelated congestive heart failure. *Id.* The surviving spouse sought survivor benefits, and the Department denied the request for failing to show that the worker was permanently and totally disabled. *Id.* The Department issued the order denying survivor benefits before the order denying the aggravation application became final. *Id.*

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[11]Board decisions are nonbinding but persuasive authority for this Court. *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn. App. 760, 766, 109 P.3d 484 (2005); *see also Weyerhaeuser Co.*, 117 Wn.2d at 138 ("While the Board's interpretation of the Act is not binding upon this court, it is entitled great deference").

Relying on *Pugh* and the case law, the Board explained that the surviving spouse is held to the same standard as a worker filing an aggravation application and first has to show permanent worsening:

> "[I]n a claim for survivor's benefits premised on the worker being permanently and totally disabled at the date of death, if the worker's claim was closed at the time of death, the widow must first establish a permanent worsening of the worker's condition between the date his claim was last closed and the date of his death. Essentially the widow is held to the same burden as the worker with respect to the need to prove aggravation of condition.

Id. at 2. The Board held that because the worker's aggravation application was not final when the Department denied the survivor benefit claim, the Department incorrectly acted upon the survivor benefit claim.[12] *Id.* The Board remanded the case to the Department to determine whether the worker's "industrial injury became objectively worse" between the date the Department denied the aggravation application and the date of his death, indicating the importance the Board placed on requiring the spouse to show objective worsening. *Id.* at 3. Persuasive Board decisions thus require a surviving spouse to show objective worsening.[13]

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[12]In this case, there was no aggravation application, so the Department correctly addressed Ms. Wegleitner's application for survivor benefits.

[13]Here, the Board's Decision and Order states that the IAJ's Proposed Decision and Order is "correct as a matter of law." CP 96. The IAJ's Proposed Decision and Order relies on *Pugh* and *Harvey* to conclude that Ms. Wegleitner had to provide objective evidence of worsening. CP 130. That legal reasoning should be given deference as well.

Policy considerations also favor requiring a surviving spouse to meet the same requirements as a worker seeking to reopen the claim when there has been a closure order with no permanent disability award. First, this requirement is consistent with ensuring finality of Department decisions. Neither workers nor their beneficiaries should collaterally attack a final and binding closure order solely because they disagree with it. *See Marley*, 125 Wn.2d 537-38 ("The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim"). Following Ms. Wegleitner's argument, a spouse could be entitled to a pension so long as the worker was totally and permanently disabled at any point in time, even if there are earlier Department orders to the contrary.

Second, following Ms. Wegleitner's argument would favor surviving spouses over the injured worker, rather than place them on equal footing. To obtain additional benefits on a closed claim, a worker undoubtedly has to show objective worsening. RCW 51.32.160(1). There is no reason why the surviving spouse should have a lesser burden than the injured worker.

In short, if there has been a closure order with no permanent disability award, a surviving spouse is subject to the same requirements as a worker seeking to reopen that claim—he or she must present objective

evidence that the worker's condition worsened between the closure order and the worker's death.

3. Ms. Wegleitner presented no objective evidence showing that Mr. Wegleitner's industrial injury worsened between the time of claim closure and his death

Here, the superior court correctly granted summary judgment, where Ms. Wegleitner presented no objective evidence that Mr. Wegleitner's industrial injury worsened between claim closure and his death. Mr. Wegleitner sustained an industrial injury in July 2004, and the Department closed the claim on June 3, 2005. CP 359, 372, 522. It is undisputed that the Department received no timely protest to that closure order. CP 562. The failure to appeal within 60 days renders that closure order final and binding, which means that it has res judicata effect to Ms. Wegleitner's subsequent request for survivor benefits. RCW 51.52.060(1); *Marley*, 125 Wn.2d at 537. When Ms. Wegleitner filed a survivor benefits claim after Mr. Wegleitner's death, she had to provide objective medical evidence showing that Mr. Wegleitner's condition worsened between claim closure and his death. RCW 51.32.160(1); *Harvey*, 1996 WL 327325, at *2; *Pugh*, 1989 WL 224965, at *2.

She failed to do so. To prove aggravation, the claimant must produce evidence showing "objective symptoms" of a changed condition.

See Phillips, 49 Wn.2d at 197. "A claimant's medical testimony must show that the increased aggravation occurred between the terminal dates of the aggravation period." *Id.*

Dr. Johnson never testified that objective medical evidence showed that Mr. Wegleitner's industrial injury worsened between claim closure and his death. CP 444-62. Dr. Johnson opined only that, in January 2005, Mr. Wegleitner was at maximum medical improvement and he was permanently and totally disabled. CP 452-55, 460-62. He testified that Mr. Wegleitner's condition remained that way through claim closure and at the time of his death. CP 460-62. Dr. Johnson never testified to objective evidence showing a change in Mr. Wegleitner's condition between claim closure and his death. No other medical expert testified to a change during this time period. Dr. Johnson also did not testify as to any objective findings as of the time of death. *See* CP 400-77. As no objective medical evidence shows a worsening of Mr. Wegleitner's industrial injury, Ms. Wegleitner failed to overcome the res judicata effect of the June 3, 2005 closure order, and the Department was entitled to judgment as a matter of law. The superior court did not err.

B. Ms. Wegleitner's Arguments Lack Merit

Ms. Wegleitner argues (1) that she only had to show that Mr. Wegleitner was totally and permanently disabled at the time of his death

for her to be eligible for a survivor's benefits; (2) that even if she needed to show evidence of objective worsening, Dr. Johnson's testimony that Mr. Wegleitner was totally and permanently disabled when he died was per se worsening; and (3) that the court should exercise its equitable power to overlook the res judicata effect of the closure order. Neither case law nor the undisputed testimony supports her arguments.

1. Ms. Wegleitner had to show more than simply that Mr. Wegleitner was totally and permanently disabled at the time of death

Ms. Wegleitner first argues that because spousal benefits are separate and distinct from the worker's benefits, she only had to prove that Mr. Wegleitner was permanently and totally disabled from the industrial injury when he died. App. Br. at 25-34. While a surviving spouse does have a distinct and separate right to benefits, it does not follow that the spouse is exempt from the res judicata effect of a claim closure order. As explained above, the statutory scheme, case law, and Board decisional law require surviving spouses to comply with the same requirements as workers when seeking additional benefits related to a closed claim. *Supra*, section V.A.1.

Ignoring *Pugh* and *Harvey*, Ms. Wegleitner cannot cite to any authority—controlling or persuasive—explicitly supporting her position. Instead, she relies on *Beels v. Dep't of Labor & Indus.*, 178 Wash. 301,

307, 34 P.2d 917 (1934); *McFarland*; and *Dep't of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012). *See* App. Br. at 26-32. But these cases are inapposite or support the Department's position. For instance, in *Beels*, there was no closure order because the worker never filed an application for benefits. 178 Wash. at 302. The Court thus held that although the statute of limitations for the worker to file a claim for benefits had passed, the widow timely sought death benefits because she had a separate claim. *Id.* at 307-09. Unlike here, she was entitled to benefits because she presented medical evidence that the industrial injury caused the worker's death. *Id.* at 301-02, 308.

As explained above, in *McFarland*, the Supreme Court held that if a worker has a permanent partial disability, but is later rendered permanently and totally disabled, "those facts may be established by the widow, and when so established, in conjunction with the other necessary essentials prescribed by the statute, make a case for the allowance of a widow's pension." 188 Wash. at 367. The surviving spouse is held to the same standard as a worker seeking to reopen the claim. *McFarland* does not stand for the proposition that the elements of worsening need not be shown in the case of a widow, but instead says the opposite.

Shirley is similarly inapposite, where the widow sought benefits because her husband died from a cause related to the industrial injury—a

different compensation scheme than the one presented here. *Shirley*, 171 Wn. App. at 874-77; *see Freeman*, 87 Wn. App. at 97. But the logic underlying *Shirley* also supports the Department's position. Although an order closed the claim with no permanent partial disability award, the widow overcame the res judicata effect of closure order by presenting objective medical testimony that the worker died from a cause related to his industrial injury. *Shirley*, 171 Wn. App. at 874-77. Death resulting from an industrial injury is obviously worsening of the injury. While the *Shirley* Court went on to hold that a proximate cause analysis found in aggravation cases did not apply to claims for death benefits because she had a separate claim for benefits, the Court did not hold that the claim closure order had no significance to the surviving spouse. *Id.* at 882-84.[14] Ms. Wegleitner's position that she only had to show that Mr. Wegleitner was permanently and totally disabled at death is unsupported by case law and the statutes.

[14]Ms. Wegleitner's reliance on *Freeman* is also misplaced. App. Br. at 28. The *Freeman* Court held that if a worker dies when the claim is open (and thus the worker made no selection under RCW 51.32.067 for payment of benefits) but the worker was permanently and totally disabled at death, the spouse is still entitled to benefits under RCW 51.32.067. 87 Wn. App. at 94-98. The Department can make the election under RCW 51.32.067 on the worker's behalf. *Id.* at 98.

2. Dr. Johnson never provided objective evidence that Mr. Wegleitner's condition worsened

Ms. Wegleitner next argues that even if she had to show objective evidence worsening, there was per se worsening when the closure order found no permanent disability and Dr. Johnson testified that Mr. Wegleitner was permanently and totally disabled when he died. App. Br. at 35-36. But this argument ignores the substance of Dr. Johnson's testimony.[15] Dr. Johnson did not testify that medical records showed that Mr. Wegleitner's back strain and herniated disc proximately caused by his industrial injury worsened between claim closure and his death.

Rather, Dr. Johnson testified that Mr. Wegleitner was permanently and totally disabled in January 2005 (before claim closure) through claim closure, and to his death. It is not per se worsening (nor objective worsening), since there was no comparison of findings between the two terminal dates to warrant the conclusion that Mr. Wegleitner's industrial injury objectively worsened. *Eastwood*, 152 Wn. App. at 657-65 (a doctor's blanket subjective statement that a worker's condition worsened was not sufficient); *see also White*, 48 Wn.2d at 415-16. Dr. Johnson's

[15]It also presents a logistical problem. RCW 51.32.060(1) provides that pension benefits are paid when a "permanent total disability results from the injury." Dr. Johnson opined that Mr. Wegleitner was permanently and totally disabled as of January 2005, but the closure order found no permanent disability. CP 455-59, 522. It is unclear whether the pension should have started in January 2005, at claim closure, or when Mr. Wegleitner died. This problem reflects the flaw in the underlying logic of Ms. Wegleitner's argument. To prevail, she has to ignore both the testimony of her doctor and the closure order.

testimony documented no objective symptoms showing aggravation in the relevant time period, and therefore showed no worsening. *See Phillips*, 49 Wn.2d at 197 (claimant's burden to show objective symptoms of worsening). To buy Ms. Wegleitner's argument, a court would have to ignore the crux of Dr. Johnson's opinion. Ms. Wegleitner's argument that she showed objective worsening fails.

3. The Court should reject Ms. Wegleitner's unpreserved request that it exercise equitable powers and ignore the closure order

For the first time, Ms. Wegleitner argues that the Court should exercise its equitable power to relieve her from res judicata effect of the closure order. App. Br. at 36-44. This Court should not review this argument, where she failed to raise this in her petition for review to the Board or to the superior court. *See* CP 102-16, 575-96, 869-90. A party waives an issue by not raising it in her petition for review of the Board's decision. *See* RCW 51.52.104 ("petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein."); *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012), *review denied,* 297 P.3d 706 (2013); *Allan*

v. Dep't of Labor & Indus., 66 Wn. App. 415, 422, 832 P.2d 489 (1992).[16] Absent a manifest error affecting a constitutional right, the court should not consider an issue when the party raises it for the first time at the appellate level. *See* RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). As the Board and superior court never had the opportunity to address this argument, this Court should not review it.

In any event, Ms. Wegleitner's argument lacks merit. "The equitable exceptions that have been allowed by this state's courts are limited." *Pearson v. Dep't of Labor & Indus.*, 164 Wn. App. 426, 262 P.3d 837 (2011). Such exceptions occur only when the party (1) was diligent in pursuing his or her rights, and (2) was either incompetent or otherwise unable to understand a Department order or the appeals process, or where circumstances outside the party's control rendered it impossible to timely appeal. *Id.* at 443-45 (analyzing *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997); *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 175 P.3d 1117 (2008); *Dep't of Labor & Indus.*

[16] The Board has no power to grant equity as it is not a court; however, it will apply equitable principles under stare decisis. *In re Isaias Chavez, Dec'd.*, No 85 2867, 1987 WL 61372 (Wash. Bd. Ind. Ins. App. July 17, 1987). It cannot apply equity to dissimilar facts that than those presented in the case law, but it can rule on whether a case applies. Here Ms. Wegleitner argues that she is entitled to relief under *Rabey v. Department of Labor & Industries*, 101 Wn. App. 390, 3 P.3d 217 (2007). App't Br. at 38. It was incumbent upon her to obtain a ruling from the Board as to whether this case applied. This advances important principles underlying administrative appeals, where the record is developed at the Board-level. *See* RCW 51.52.102, .104, .115.

v. Fields Corp., 112 Wn. App. 450, 45 P.3d 1121 (2002); *Rabey v. Dep't of Labor & Indus.*, 101 Wn. App. 390, 3 P.3d 217 (2000)).

Here, Ms. Wegleitner has failed to meet both prongs. While she diligently filed her claim for survivor's benefits, there is no evidence explaining why she or Mr. Wegleitner failed to challenge the closure order. App. Br. at 38-39, 43. While she stated that someone told her that time loss payments would continue on another claim, that is not an excuse for failing to challenge the closure order. CP 393. Ms. Wegleitner fails to meet the first prong.

She also fails to meet the second prong. Ms. Wegleitner essentially argues (1) that she was in shock after learning the cancer diagnosis, (2) that Mr. Wegleitner was in such pain that he was unable to do anything, (3) that she did not understand the Department process, (4) that it was impossible for her to challenge the Department order, and (5) that the Department misled her about the meaning of the closure order. App. Br. at 39-42, 44. First, Ms. Wegleitner never testified that the shock from the cancer diagnosis rendered her incompetent or otherwise unable to understand the appeal process—she just testified that she was in shock. CP 382. This argument fails.

Second, while Ms. Wegleitner testified that Mr. Wegleitner suffered pain that limited his physical abilities, she never testified that Mr.

Wegleitner's mental faculties diminished to the point that he could not understand his surroundings. CP 375-76, 382-83, 389; App. Br. at 39-40. She agreed that Mr. Wegleitner was lucid. CP 383. There is no evidence that Mr. Wegleitner was precluded from appealing.

Third, her statement that she "kn[ew] nothing about how L&I works" is not a valid justification, where courts have held that it does not matter if the recipient did not understand the order. CP 393; *Pearson*, 164 Wn. App. at 444 (holding only that it does not matter whether the claimant understands the Department's order, so long as he or she received it); *see Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 540 P.2d 1359 (1975); App. Br. at 41-42.

Fourth, although Ms. Wegleitner could not file her claim for survivor's benefits until Mr. Wegleitner's death, it was not impossible for Mr. Wegleitner to timely protest the closure order. *Contra* App. Br. at 42. And Ms. Wegleitner could have filed the protest on Mr. Wegleitner's behalf. There was no impossibility here.

Finally, there is no evidence that the Department misled Ms. Wegleitner. App. Br. at 44. When talking about time loss payments, Ms. Wegleitner testified that someone told her that the claim would close and that "we'll claim it on the cancer instead of doing the back." CP 393. Ms. Wegleitner presents no evidence that the Department acted differently.

CP 393. This argument fails. Even if Ms. Wegleitner had preserved her argument below, she fails to demonstrate that equitable relief is appropriate here.

C. This Court Should Not Award Attorney Fees

This Court should deny Ms. Wegleitner's attorney fee request. App. Br. at 44-45. Attorney fees may be awarded to a worker who prevails in court only if (1) the Board decision is "reversed or modified" and (2) the litigation's result affected the Department's "accident fund or medical aid fund." RCW 51.52.130(1); *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010).[17] Because Ms. Wegleitner should not prevail in this appeal, this Court should deny her attorney fee request.

VI. CONCLUSION

To prevail, Ms. Wegleitner had to provide objective evidence that her husband's condition worsened between claim closure and his death to overcome the res judicata effect of the closure order. She did not. This Court should affirm.

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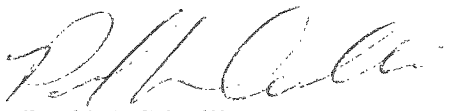
[17]Ms. Wegleitner cites to the wrong part of the statute when she argues that she is entitled to fees if the Board decision is reversed or modified and additional relief is granted to the worker. App. Br. at 45. That part in the first sentence applies to the fixing of attorney fees. The proper source for the attorney fee award would be the language cited above in the fourth sentence, if she prevails.

RESPECTFULLY SUBMITTED this 1st day of June, 2014.

ROBERT W. FERGUSON
Attorney General



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APPENDIX A

The Honorable Jack Nevin
Department No. 6
Hearing: October 25, 2013, at 9:00 a.m.

STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

ALOYS R. WEGLEITNER (DEC'D), Plaintiff, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Defendant.	NO. 12-2-10734-9 ORDER GRANTING DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT AND JUDGMENT

This matter came before the Court for hearing on June 7, 2013, on the Parties' Cross-Motions for Summary Judgment. In their motions the Plaintiff and the Department asserted there were no material issues of fact in dispute; the Department contended that the July 9, 2012 Order issued by the Board of Industrial Insurance Appeals should be affirmed as a matter of law.[1] The Court reviewed the entire Certified Appeal Board Record filed by the Board of Industrial Insurance Appeals, the briefs and pleadings on file and heard argument by the parties.

Based on the argument and the evidence presented, the Court determines:

1. The Court has jurisdiction over the parties to, and the subject matter of, this appeal.

///

[1] A copy of the Board of Industrial Appeals July 9, 2012 Decision is incorporated herein by reference and attached as Exhibit 1.

OFFICE OF THE ATTORNEY GENERAL
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The following material facts are not disputed by the parties:

2.1 On August 25, 2009, an industrial appeals judge certified that the parties agreed to include the Amended Jurisdictional History in the Board record solely for purpose of determining the Board's jurisdiction to hear Ms. Wegleitner's appeal.

2.2 On July 19, 2004, Aloys R. Wegleitner sustained an industrial injury during the course of his employment with Patrick Boring when he was lifting a shrub or a tree, and felt pain in his back.

2.3 Aloys R. Wegleitner, the injured worker, was born in 1947 and he died due to a non-industrially related cancer on September 30, 2005. He was married to Janis Wegleitner in 1968, they had two children, and they remained married until Mr. Wegleitner's death. Aloys R. Wegleitner attended school only through the eighth grade, and he worked on his family farm until he was drafted into the Army, where he worked as a mechanic. He worked at the ASARCO smelter as a laborer. He performed lawn maintenance and landscaping for 34 years for Patrick Boring starting in 1970, which included building rockeries, installing lawns and sprinklers, and performing mechanical work on loaders and dump trucks. For Patrick Boring, Mr. Wegleitner performed other heavy work, and he sometimes drove dump trucks. He had a prior industrial injury in 1988 when he was rear-ended by a semi-truck, injuring his mid and low back. Mr. Wegleitner was off work for 2 years following that injury.

2.4 As a proximate result of the July 19, 2004 industrial injury, Mr. Wegleitner sustained a thoracic strain/sprain and a T5-6 herniated disc.

2.5 On June 3, 2005, the Department issued its order closing Mr. Wegleitner's July 19, 2004 industrial injury claim (Claim No. Y982648) and indicated that Mr. Wegleitner had no permanent disability as a result of the July 19, 2004 industrial injury;

2.6 Mr. Wegleitner did not file a timely Protest and Request for Reconsideration of the Department's June 3, 2005 order that closed his claim within 60 days of the date the June 3, 2005 order was communicated to him.

2.7 Approximately February or March 2005 Mr. Wegleitner was diagnosed with Stage IV small cell carcinoma that had metastasized to other parts of Mr. Wegleitner's body including his thoracic spine and rib cage. Mr. Wegleitner's July 19, 2004 industrial injury was not the cause of his death. He had lung cancer that metastasized and caused his death.

3. No genuine issue of material fact exists with respect to the Application for Survivor's Benefits filed by the Janis Weglietner, widow of Aloys R. Wegleitner. The unprotested and unappealed June 3, 2005 order that closed Mr. Wegleitner's industrial injury claim is final and binding as to the parties in this action and has become the law of the case. The substance of the June 3, 2005 closing order may not be subject to collateral attack by the surviving beneficiary. Without there being a claim or an appeal of the June 3, 2005 closing order filed within the requisite 60-day appeal period, there is not a basis for the beneficiary to proceed now. The Department is entitled to judgment as a matter of law.

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Based on the foregoing determination, IT IS ORDERED:

1. The Department's motion is granted; Plaintiff's motion is denied.

2. Judgment shall be entered in favor of the Department and the Department is awarded $200 in statutory attorney fees.

DATED this 25 day of October, 2013.

JACK NEVIN
Judge

Presented by:

ROBERT W. FERGUSON
Attorney General

PAT L. DeMARCO
Senior Counsel
WSBA No. 16897

Notice of Presentation Waived:

TACOMA INJURY LAW GROUP

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WSBA No. 46330

FILED
DEPT. 6
IN OPEN COURT
OCT 25 2013
Pierce County Clerk
By DEPUTY

BEFORE THE)ARD OF INDUSTRIAL INSURAN : APPEALS
STATE OF WASHINGTON

IN RE: ALOYS R. WEGLEITNER, DEC'D) DOCKET NO. 09 11117
)
CLAIM NO. Y-982648) DECISION AND ORDER

APPEARANCES:

Beneficiary, Janis K. Wegleitner, by
George M Riecan & Associates, Inc., P.S., per
George M. Riecan

Employer, Patrick Boring,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Pat L. DeMarco, Assistant

The beneficiary, Janis Wegleitner, filed an appeal with the Board of Industrial Insurance Appeals on February 3, 2009, from an order of the Department of Labor and Industries dated December 9, 2008. In that order, the Department affirmed its April 12, 2006 Department order in which it denied the claimant's beneficiary's Application for Benefits. The Department order is AFFIRMED.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The beneficiary filed a timely Petition for Review of a Proposed Decision and Order issued on April 19, 2012, in which the industrial appeals judge affirmed the Department order dated December 9, 2008.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The issue presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law. However, we grant review to supplement the findings of fact.

Exhibit No. 1 80 7/9/12

A - 5

FINDINGS OF FACT

1. On August 25, 2009, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. On July 19, 2004, Aloys R. Wegleitner sustained an industrial injury during the course of his employment with Patrick Boring when he was lifting a shrub or a tree, and felt pain in his back.

3. Aloys R. Wegleitner, the injured worker, was born in 1947 and he died due to cancer on September 30, 2005. He was married to Janis Wegleitner in 1968, they had two children, and they remained married until Mr. Wegleitner's death. Aloys R. Wegleitner attended school only through the eighth grade, and he worked on his family farm until he was drafted into the Army, where he worked as a mechanic. He worked at the ASARCO smelter as a laborer. He performed lawn maintenance and landscaping for 34 years for Patrick Boring starting in 1970, which included building rockeries, installing lawns and sprinklers, and performing mechanical work on loaders and dump trucks. For Patrick Boring, Mr. Wegleitner performed other heavy work, and he sometimes drove dump trucks. He had a prior injury in 1988 when he was rear-ended by a semi-truck, injuring his mid and low back. Mr. Wegleitner was off work for 2 years following that injury.

4. As a proximate result of the July 19, 2004 industrial injury, Mr. Wegleitner sustained a thoracic strain/sprain and a T5-6 herniated disc.

5. As of June 3, 2005, Mr. Wegleitner's conditions proximately caused by his June 19, 2004 industrial injury had reached maximum medical improvement.

6. Mr. Wegleitner's July 19, 2004 industrial injury was not the cause of his death. He had lung cancer that metastasized and caused his death.

7. Mr. Wegleitner's July 19, 2004 industrial injury was not a proximate cause of disability that prevented him from performing or obtaining gainful employment on a reasonably continuous basis as of the time of his death in September 2005.

8. Mr. Wegleitner did not file a timely Protest and Request for Reconsideration of the Department's June 3, 2005 order that closed his claim within 60 days of the date that order was communicated to him.

9. Ms. Wegleitner did not present objective evidence of worsening of Mr. Wegleitner's condition proximately caused by his industrial injury between June 3, 2005, and the date of his death on September 30, 2005.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. Aloys R. Wegleitner was not a permanently totally disabled worker within the meaning of RCW 51.08.160, at the time of his death, due to conditions proximately caused by his July 19, 2004 industrial injury.

3. Ms. Wegleitner failed to establish that Mr. Wegleitner's condition proximately caused by his industrial injury objectively worsened between June 3, 2005, and September 30, 2005, within the meaning of RCW 51.32.160.

4. Ms. Wegleitner failed to establish that she is entitled to survivor benefits as provided by RCW 51.32.050.

5. The Department order issued on December 9, 2008, is correct and is affirmed.

Dated: July 9, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

DAVID E. THREEDY Chairperson

JACK S. ENG Member

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

CB1

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Dated at Olympia, Washington 7/9/2012
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: _____
J. SCOTT TIMMONS
Executive Secretary

In re: ALOYS R WEGLEITNER DEC'D

APPENDIX B

RCW 51.08.020
"Beneficiary."

"Beneficiary" means a husband, wife, child, or dependent of a worker in whom shall vest a right to receive payment under this title: PROVIDED, That a husband or wife of an injured worker, living separate and apart in a state of abandonment, regardless of the party responsible therefor, for more than one year at the time of the injury or subsequently, shall not be a beneficiary. A spouse who has lived separate and apart from the other spouse for the period of two years and who has not, during that time, received, or attempted by process of law to collect, funds for maintenance, shall be deemed living in a state of abandonment.

[1977 ex.s. c 350 § 10; 1973 1st ex.s. c 154 § 91; 1961 c 23 § 51.08.020. Prior: 1957 c 70 § 6; prior: (i) 1939 c 41 § 2, part; 1929 c 132 § 1, part; 1927 c 310 § 2, part; 1921 c 182 § 2, part; 1919 c 131 § 2, part; 1917 c 120 § 1, part; 1911 c 74 § 3, part; RRS § 7675, part. (ii) 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

Notes:

Severability -- 1973 1st ex.s. c 154: See note following RCW 2.12.030.

RCW 51.32.050
Death benefits.

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

(2)(a) Where death results from the injury, a surviving spouse of a deceased worker eligible for benefits under this title shall receive monthly for life or until remarriage payments according to the following schedule:

(i) If there are no children of the deceased worker, sixty percent of the wages of the deceased worker;

(ii) If there is one child of the deceased worker and in the legal custody of such spouse, sixty-two percent of the wages of the deceased worker;

(iii) If there are two children of the deceased worker and in the legal custody of such spouse, sixty-four percent of the wages of the deceased worker;

(iv) If there are three children of the deceased worker and in the legal custody of such spouse, sixty-six percent of the wages of the deceased worker;

(v) If there are four children of the deceased worker and in the legal custody of such spouse, sixty-eight percent of the wages of the deceased worker; or

(vi) If there are five or more children of the deceased worker and in the legal custody of such spouse, seventy percent of the wages of the deceased worker.

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

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

(d) In no event shall the monthly payments provided in subsection (2) of this section:

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

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

(ii) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month for a surviving spouse and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (2)(d)(ii) is greater than one hundred percent of the wages of the deceased worker as determined under RCW 51.08.178, the monthly payment due to the surviving spouse shall be equal to the greater of the monthly wages of the deceased worker or the minimum benefit set forth in this section on June 30, 2008.

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

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

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

(B) If a surviving spouse is the surviving spouse of a member of the law enforcement officers' and firefighters' retirement system under chapter 41.26 RCW or the state patrol retirement system under chapter 43.43 RCW, the surviving spouse may receive a lump sum of thirty-six times the monthly compensation rate in effect on the date of remarriage allocable to the spouse for himself or herself pursuant to subsection (2)(a)(i) of this section and RCW 51.32.075(3) or fifty percent of the remaining annuity value of his or her pension provided under this chapter, whichever is the lesser: PROVIDED, That if the injury occurred prior to July 28, 1991, the lump sum benefit shall be as provided in the remarriage benefit schedules then in effect; or

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

she has not previously accepted the lump sum payment.

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

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

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

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

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

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

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

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

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

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

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

[2010 c 261 § 3; 2007 c 284 § 1; 1995 c 199 § 6; 1993 c 521 § 1; 1991 c 88 § 2; 1988 c 161 § 2; 1986 c 58 § 3; 1982 c 63 § 18; 1977 ex.s. c 350 § 42; 1975-'76 2nd ex.s. c 45 § 2; 1975 1st ex.s. c 179 § 1; 1973 1st ex.s. c 154 § 96; 1972 ex.s. c 43 § 19; 1971 ex.s. c 289 § 7; 1965 ex.s. c 122 § 1; 1961 c 274 § 1; 1961 c 23 § 51.32.050. Prior: 1957 c 70 § 30; 1951 c 115 § 1; prior: 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1941 c 209 § 1; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

Notes:

Effective date -- 2007 c 284: "This act takes effect July 1, 2008." [2007 c 284 § 4.]

Severability -- 1995 c 199: See note following RCW 51.12.120.

Effective date -- 1993 c 521: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 521 § 4.]

Benefit increases -- Application to certain retrospective rating agreements -- 1988 c 161: "The increases in benefits in RCW 51.32.050, 51.32.060, 51.32.090, and 51.32.180, contained in chapter 161, Laws of 1988 do not affect a retrospective rating agreement entered into by any employer with the department before July 1, 1988." [1988 c 161 § 15.]

Effective dates -- 1988 c 161 §§ 1, 2, 3, 4, and 6: "Section 4 of this act shall take effect on June 30, 1989. Sections 1, 2, 3, and 6 of this act shall take effect on July 1, 1988." [1988 c 161 § 17.]

Effective date -- 1986 c 58 §§ 2 and 3: See note following RCW 51.32.080.

Effective dates -- Implementation -- 1982 c 63: See note following RCW 51.32.095.

Legislative intent -- 1975 1st ex.s. c 179: "The legislative intent of chapter 179, Laws of 1975 1st ex. sess. (2nd SSB No. 2241) was in part to offer surviving spouses of eligible workmen two options upon remarriage; such options to be available to any otherwise eligible surviving spouse regardless of the date of death of the injured workman. Accordingly this 1976 amendatory act is required to clarify that intent." [1975-'76 2nd ex.s. c 45 § 1.]

Severability -- 1973 1st ex.s. c 154: See note following RCW 2.12.030.

RCW 51.32.060
Permanent total disability compensation — Personal attendant.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%

June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if a worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (5)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

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

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

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

[2007 c 284 § 2; 1993 c 521 § 2; 1988 c 161 § 1. Prior: 1986 c 59 § 1; 1986 c 58 § 5; 1983 c 3 § 159; 1977 ex.s. c 350 § 44; 1975 1st ex.s. c 224 § 9; 1973 c 147 § 1; 1972 ex.s. c 43 § 20; 1971 ex.s. c 289 § 8; 1965 ex.s. c 122 § 2; 1961 c 274 § 2; 1961 c 23 § 51.32.060; prior: 1957 c 70 § 31; 1951 c 115 § 2; prior: 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

Notes:

Effective date -- 2007 c 284: See note following RCW 51.32.050.

Effective date -- 1993 c 521: See note following RCW 51.32.050.

Benefit increases -- Application to certain retrospective rating agreements -- Effective dates -- 1988 c 161: See notes following RCW 51.32.050.

Effective date -- 1975 1st ex.s. c 224: See note following RCW 51.04.110.

RCW 51.32.067
Permanent total disability — Death benefit options — Election.

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

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

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

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

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

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

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

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

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

[2006 c 154 § 1; 1986 c 58 § 4.]

RCW 51.32.160
Aggravation, diminution, or termination.

(1)(a) If aggravation, diminution, or termination of disability takes place, the director may, upon the application of the beneficiary, made within seven years from the date the first closing order becomes final, or at any time upon his or her own motion, readjust the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: PROVIDED, That the director may, upon application of the worker made at any time, provide proper and necessary medical and surgical services as authorized under RCW 51.36.010. The department shall promptly mail a copy of the application to the employer at the employer's last known address as shown by the records of the department.

(b) "Closing order" as used in this section means an order based on factors which include medical recommendation, advice, or examination.

(c) Applications for benefits where the claim has been closed without medical recommendation, advice, or examination are not subject to the seven year limitation of this section. The preceding sentence shall not apply to any closing order issued prior to July 1, 1981. First closing orders issued between July 1, 1981, and July 1, 1985, shall, for the purposes of this section only, be deemed issued on July 1, 1985. The time limitation of this section shall be ten years in claims involving loss of vision or function of the eyes.

(d) If an order denying an application to reopen filed on or after July 1, 1988, is not issued within ninety days of receipt of such application by the self-insured employer or the department, such application shall be deemed granted. However, for good cause, the department may extend the time for making the final determination on the application for an additional sixty days.

(2) If a worker receiving a pension for total disability returns to gainful employment for wages, the director may suspend or terminate the rate of compensation established for the disability without producing medical evidence that shows that a diminution of the disability has occurred.

(3) No act done or ordered to be done by the director, or the department prior to the signing and filing in the matter of a written order for such readjustment shall be grounds for such readjustment.

[1995 c 253 § 2; 1988 c 161 § 11; 1986 c 59 § 4; 1973 1st ex.s. c 192 § 1; 1961 c 23 § 51.32.160. Prior: 1957 c 70 § 38; prior: 1951 c 115 § 5; 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

No. 45580-3-II

COURT OF APPEALS FOR DIVISION II
OF THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D), Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on June 11, 2014, she caused to be served the Brief of Respondent Department of Labor & Industries and this Certificate of Service in the below-described manner:

Via E-Mail Filing:

David Ponzoha
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Court of Appeals, Division II
950 Broadway, Suite 300
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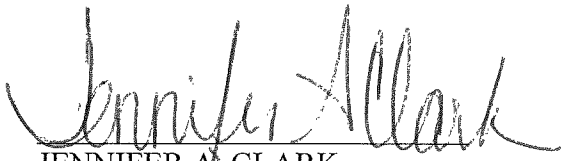
Cameron T. Riecan
Tacoma Injury Law Group
PO Box 1113
Tacoma, WA 98409

DATED this 11th day of June, 2014.



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WASHINGTON STATE ATTORNEY GENERAL

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