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Court of Appeals Cause No. 72763-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D), Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES
OF THE STATE OF WASHINGTON, et al.,

Respondent.

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

PETITION FOR REVIEW

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COURT OF APPEALS
DIVISION ONE
APR 30 2015

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A. IDENTITY OF PETITIONER(S)

Petitioners Aloys R. Wegleitner (Dec'd) and Janis K. Wegleitner, widowed spouse, (Hereinafter "Wegleitner"), the petitioners in the Court of Appeals proceeding below, hereby petition the Supreme Court of the State of Washington and seek review of the opinions, findings, and decisions designated in Section B, below.

B. COURT OF APPEALS DECISIONS

Wegleitner respectfully requests that this Court review the decision of the Court of Appeals of the State of Washington, Division One, in *Wegleitner v. Dep't of Labor & Indus.*, 72763-0-I, 2015 WL 1034319 (Wash. Ct. App. Mar. 9, 2015), which affirmed the judgment of the superior court which granted the Department of Labor Industries' motion for summary judgment and denied survivor benefits under RCW 51.32.050. Wegleitner filed a timely motion for reconsideration and motion to publish on March 27, 2015, both of which were denied by the Court of Appeals per an order on March 31, 2015. Copies of the unpublished opinion and denial of reconsideration are attached at Tabs 1 and 2 of the Appendix, respectively.

C. ISSUES PRESENTED FOR REVIEW

- I. Whether the surviving spouse of an injured worker is precluded from filing a beneficiary claim under the Industrial Insurance

Act, solely based upon the non-appeal of the injured worker's closing order when the surviving spouse has a separate and distinct claim; and

- II. Whether a surviving spouse applying for death benefits has to prove the additional requirement of "aggravation" of the worker's injury when the statute and case law demonstrate that she need only show that the worker was permanently totally disabled at the time of death and the work injury was a proximate cause of the permanent total disability.

D. STATEMENT OF THE CASE

This matter arises out of Wegleitner's appeal of the Pierce County Superior Court's granting of the Department of Labor and Industries' motion for summary judgment and affirmance of the denial of survivor benefits under RCW 51.32.050.

I. Factual Background

a. Board of Industrial Insurance Appeals Before Superior Court Remand.

Aloys Wegleitner, now deceased, injured his mid-back as a result of his employment as a landscaper on July 19, 2004. He filed a claim with the Washington State Department of Labor and Industries (Hereinafter "Department"), and received benefits for treatment and time-loss

compensation under claim number Y-982648 under the Industrial Insurance Act, RCW 51. He had residuals from his industrial injury from the time it occurred up until the time of his death on September 30, 2005.

The Department eventually closed his mid-back claim on June 3, 2005 with no permanent partial disability (“PPD”), and time-loss benefits ended on April 28, 2005 (but continued under a different claim). As of April 28, 2005, Petitioner Wegleitner was still disabled as a result of his mid-back injury but was advised by the Department to file an occupational disease claim for lung disease related to his work, in which his time-loss compensation would continue, albeit under a different claim. Therefore, Mr. Wegleitner filed two separate Industrial Insurance Claims *in toto*. The occupational disease claim for suspected lung disease was filed on May 25, 2005, with the date of onset of April 4, 2005 and assigned claim number AA-88171.¹ Mr. Wegleitner passed away on September 30, 2005 due to non-related lung cancer. Mrs. Janis Wegleitner subsequently filed a timely claim for surviving spousal benefits under Washington State’s Industrial Insurance Act, Title 51, which was denied on April 12, 2006. CP 21, 23-5.

¹ The Department began paying provisional time loss benefits under the occupational disease claim beginning April 29, 2005, the day after his time loss benefits were terminated under the mid back claim. The original time loss benefits continued under the occupational disease claim and were terminated on September 22, 2005, eight days prior to the plaintiff’s death from unrelated lung cancer.

b. Pierce County Superior Court Remand For a De Novo Hearing at The Board of Industrial Insurance Appeals of the State of Washington.

On April 22, 2011, Pierce County Superior Court Judge Bryan Chushcoff issued an order that remanded the case back to the Board of Industrial Insurance Appeals (Hereinafter "Board") for a de novo hearing. CP 80-1. Judge Chushcoff found that the ruling of the Industrial Appeals Judge's (Hereinafter "IAJ") granting the defendant's CR 41(b)(3) motion was improper and was based upon an incorrect reading of the law and the facts. CP 81. This was based upon the doctrine of judicial estoppel, an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. CP 82-92; 86.

c. Board of Industrial Insurance Appeals After The Superior Court Remand.

On the de novo hearing remand, IAJ Greg J. Duras issued a Proposed Decision and Order dated April 19, 2012. CP 124-32. The sole issue at the Board was, "Should the claimant's beneficiary's application for benefits be allowed?" CP 124. The claimant filed a pre-hearing brief on August 8, 2011. CP 183-215. An Interlocutory Order Establishing Litigation Schedule was issued on August 15, 2011. CP 216-19. A letter dated October 18, 2011 was sent to the IAJ and the parties, requesting a pre-

hearing conference in order to set the issues, as the claimant received discovery materials from the Department that appeared to be raising issues that the claimant felt were already resolved by the appeal to Pierce County Superior Court and thus *res judicata* in the present case. CP 225.

At the de novo hearing following the Pierce County Superior Court remand, Mrs. Wegleitner, H. Richard Johnson, M.D. and Vocational Counselor Carl Gann testified as part of Claimant's case-in-chief. The evidence presented at the Board upon remand, in short and limited for purposes of this Petition for Review, was that Mrs. Janis K. Wegleitner was the surviving spouse of Mr. Aloys R. Wegleitner. CP 124, 354. Mr. Wegleitner was born on September 6, 1947 and on September 30, 2005, he passed away due to cancer. CP 124, 354, 355. He sustained an industrial accident on July 19, 2004, while working for Patrick Boring doing landscaping. CP 124. He filed a claim and it was allowed and benefits were paid under that claim. CP 124-25. The July 19, 2004 industrial injury occurred when Mr. Wegleitner was lifting a shrub or a tree and injured his back. CP 125, 372.

Mr. Wegleitner was treated extensively for his back injury and had multiple diagnostic tests. See CP 125, 373-380. In 2005 he saw a doctor who diagnosed him with lung cancer. CP 125, 377, 378, 380. When the Wegleitners got the diagnosis of cancer around May of 2005, Mrs.

Wegleitner testified that she was “shocked.” CP 382. Radiation and chemotherapy were prescribed. CP 125, 380. Mrs. Wegleitner testified that the radiation helped him a little and had a little less pain in one area, but as to his physical activity restrictions with respect to the back complaints, those did not improve with the cancer treatment. CP 382. Mrs. Wegleitner testified that by the time the cancer was discovered his physical abilities were greatly reduced and he died a few months later in September 2005. CP 125.

Additionally, Mrs. Wegleitner testified that her husband’s time-loss checks from the Department of Labor and Industries did not stop on April 28, 2005. CP 393. She stated a man with the Department called the house sometime in June of 2005 and closed the back claim out, and said, “we’ll claim it on the cancer instead of doing the back.” CP 393. Mrs. Janis Wegleitner stated thereafter, “And I know nothing about how L & I works.” CP 156-57, 393- 97.

Dr. H. Richard Johnson is an orthopedic surgeon who on remand from superior court re-reviewed Mr. Wegleitner’s records. CP 126, 405-6. Mrs. Wegleitner also spoke with Dr. Johnson about her husband’s conditions. CP 388, 407, 416. Dr. Johnson noted that the August 2004 x-rays of the claimant’s back showed curvature consistent with muscle spasms in his mid-back, and there were some bone spurs in the low back. CP 413-

14. The August 2004 MRI showed a posterior disc protrusion at T5-6 that was large enough to indent the spinal cord, but there was no evidence of narrowing. CP 126, 413-14. There was also degenerative changes consistent with someone who had done heavy work for many years. CP 126, 415, 416. Dr. Johnson opined that the 2004 industrial injury caused a thoracic strain/sprain and a herniated disc that caused radicular symptoms. CP 419. Dr. Johnson noted that Mr. Wegleitner continued to work until September 2004 and in October 2004, he was still experiencing pain in his mid-back that radiated around to his chest. CP 419-20. In review of the records, Dr. Johnson noted that there was no evidence of cancer in Mr. Wegleitner's bones, but in November 2004 he stated that a "mottled" appearance was noted on radiological studies that prompted Mr. Wegleitner to seek a doctor specializing in cancer. CP 126, 423-24. The bone marrow aspiration study, and other medical records in 2004 did not reveal any indication of cancer being present. CP 437-38. Dr. Johnson noted that the death certificate indicated lung cancer as the cause of death, but he said that there would have been residuals from the 2004 injury at the time of death including a herniated disc and related symptoms. CP 125, 438-39. Mr. Wegleitner continued to treat for his industrial injury in 2005. CP 439-40.

Dr. Johnson opined that Mr. Wegleitner's complaints following the industrial injury of July 19, 2004 of mid-back pain and the radiculopathy

were related to the industrial injury. CP 426-27. It was consistent with a significant thoracic sprain-strain injury with an accompanying herniated disc as seen on the MRI. CP 426-27. Dr. Johnson also opined that those symptoms caused permanent impairment that was not responding to aggressive management, was not amenable to surgical treatment, and had resulted in permanent changes that affected his overall functional capacity. CP 450-51. Dr. Johnson also opined that Mr. Wegleitner was fixed and stable in January 2005, and Mr. Wegleitner was incapable of working full-time then due to those back conditions. CP 126, 452-53, 458-59. Dr. Johnson opined that within the range of physical capabilities of Mr. Wegleitner, as related to his industrial injury, he met the criteria for being able to work at a sedentary level, but that he could not sustain that on a regular continuous basis, meaning maximally he could do it part-time. CP 460.

Mr. Carl Gann is a rehabilitation/vocational counselor and life care planner who reviewed Mr. Wegleitner's case. CP 126, 480, 481. Mr. Gann has been doing vocational rehabilitation work in the state of Washington since May of 1983, and has many certifications. CP 481, 482. Mrs. Wegleitner spoke with Mr. Gann about her husband and his education and what he was able to do. CP 388, 487. Mr. Gann noted that Mr. Wegleitner was 56 years old at the time of his industrial injury, and he did not finish

high school and did not have a GED. CP 126, 488-89, 494-95. He had a singular kind of work history with one long-term employer. CP 489. Mr. Gann said that following his injury, Mr. Wegleitner had physical capacities indicating he could work at only a sedentary level part-time, and his reading and writing skills were not good, he did not have computer skills, and he did not even write checks or balance his checkbook and his wife did that for him. CP 126, 495, 496.

Mr. Gann testified that based upon Mr. Wegleitner's physical capacities and in review of his treatment records there was no one that released him to go back to work either at his job of injury in a landscaping capacity, or at his company for any other position, nor released for any occupation or any work of any kind. CP 501. Mr. Gann opined that Mr. Wegleitner was not employable, with physical capacities that were less than sedentary and less than full time, nor was he seen as a viable vocational retraining candidate due to his 2004 injury at the time of early 2005, nor at the time of claim closure on June 3, 2005, nor at the time of his death on September 30, 2005. CP 126, 501, 502, 503-04.

II. Procedural History

Mr. Aloys R. Wegleitner (Dec'd) filed an Application for Benefits on August 27, 2004 for an industrial injury he sustained while in the course of his employment on July 19, 2004, with the Department of Labor and

Industries of the State of Washington (“Department”). CP 20. This claim was allowed by an Order dated October 7, 2004, and given the claim number Y-982648. CP 20. This claim was closed on June 3, 2005. CP 21. A protest to this Order was dated and/or received per the Jurisdictional History on June 18, 2005 from the Claimant to any adverse orders issued within the last 60 days. CP 21.

Ms. Wegleitner, on whose behalf this claim for surviving spousal benefits under RCW 51 was made, timely filed her claim for benefits within one year of the date of her husband’s death as required under statute. CP 23-5, 309-10. On April 12, 2006, the claim for benefits filed by Mrs. Wegleitner was denied because: the cause of death was not related to the injury or disease covered under this claim and the worker was not totally permanently disabled because of the condition(s) covered under this claim. CP 21. A Notice of Appeal by Wegleitner dated June 5, 2006 was received to the April 12, 2006 Order. CP 21. A Board of Industrial Insurance Appeals Order granting the appeal was dated June 21, 2006. CP 21.

An Order on Agreement of Parties (“OAP”) was entered on August 31, 2006 that the Board had jurisdiction to hear the appeals and the Department orders dated April 12, 2006 were reversed and the claims were remanded to the Department to take such actions as was appropriate under the law and facts. CP 54. The Department later brought a Motion to Vacate

the Order on Agreement of Parties on September 12, 2006. CP 54. The Board denied the Department's Motion and issued an Order Denying Motion to Vacate Order on Agreement of Parties on December 5, 2006. CP 23-5, 73-4.

The beneficiary, Mrs. Janis K. Wegleitner, filed a timely appeal with the Board on February 3, 2009, from an order of the Department dated December 9, 2008, which was an affirmance of the April 12, 2006 Order that denied Mrs. Wegleitner's claim. CP 29, 35-6, 37-44, 54. This appeal was granted by the Board. CP 45-6, 54.

The Department filed a Motion to Dismiss on September 18, 2009. CP 56-61. After the hearing of evidence, the appeal was dismissed by IAJ Craig C. Stewart by way of a Proposed Decision and Order dated October 29, 2009. CP 29-34. A Petition for Review by Claimant was filed on December 9, 2009, and an Order Denying Petition for Review was issued by the full Board on December 22, 2009 which adopted the IAJ's October 29, 2009 Proposed Decision and Order. CP 11-2, 13-28.

Mrs. Wegleitner filed an appeal to the Superior Court from the December 22, 2009 Order Denying Petition for Review. CP 80. That matter came before the court on February 4, 2011. CP 80-1. The superior court made the ruling by an Order dated April 22, 2011, that the ruling of the IAJ granting the defendant Department's CR 41(b)(3) motion was improper and

was based on an incorrect reading of the law and the facts and the case was to be remanded for a hearing de novo. CP 80-1, 82-93.

After remand from superior court, the de novo hearing was assigned to the same IAJ (Craig C. Stewart) and an Affidavit of Prejudice was filed, denied, and a petition for a declaratory ruling was filed and the reassignment to another IAJ was eventually granted. CP 134-182. An Order Granting Affidavit of Prejudice was entered on July 12, 2011 by the Chief Industrial Appeals Judge Janet R. Whitney, and the case was reassigned to IAJ Greg J. Duras. CP 181-2.

A Proposed Decision and Order was issued by IAJ Greg J. Duras on April 19, 2012, which affirmed the Department Order of December 9, 2008. CP 124-133. Mrs. Wegleitner filed a Petition for Review on May 23, 2012, and the Board issued an Order Granting Petition for Review on June 8, 2012. CP 100-1, 102-120. The Board then issued a Decision and Order dated July 9, 2012. CP 96-9.

The second appeal from the Board came before the Superior Court under cause number 12-2-10734-9 for a hearing on June 7, 2013 on the parties' cross-motions for Summary Judgment. CP 902-3, 924.

An Order dated October 25, 2013 signed by superior court Judge Jack Nevin ordered that the Department's motion was granted and Mrs. Wegleitner's motion was denied. CP 911-21, 924-32. On November 12,

2013, Ms. Wegleitner appealed the decision of the Superior Court to the Court of Appeals, Division II, of the state of Washington. CP 922-24. The case was transferred to Division I on December 22, 2014. On March 9, 2015, the Court of Appeals affirmed the Superior Court order granting the Department of Labor and Industries' motion for summary judgment and denial of survivor benefits under RCW 51.32.050. *Wegleitner v. Dep't of Labor & Indus.*, 72763-0-I, 2015 WL 1034319 (Wash. Ct. App. Mar. 9, 2015). Mrs. Wegleitner timely filed a motion for reconsideration and motion to publish on March 27, 2015, which the Court of Appeals denied on March 31, 2015. Appendix 2. Mrs. Wegleitner now seeks review of these decisions as contained in this Petition for Review.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A petition for review may be accepted by this Court if the decision of the Court of Appeals (1) conflicts with another decision of the Supreme Court; (2) conflicts with another decision of the Court of Appeals; or (3) if the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(1), (2) and (4).

This Court should review this matter for two reasons. First, the Court of Appeals' decision affirming the superior court order granting the Department's summary judgment motion and denial of survival benefits under RCW 51.32.050 creates a conflict with *Dep't of Labor & Indus. v.*

Shirley, 171 Wn. App. 870, 883-84, 288 P.3d 390 (2012) *review denied*, 177 Wn.2d 1006, 300 P.3d 415 (2013) and conflicts with this Court's reaffirmation of the liberal construction doctrine of the Industrial Insurance Act in *Crabb v. Dep't of Labor & Indus.*, 326 P.3d 815, 820 (2014). Second, the issue of the effect of a final and binding closure order awarding no permanent disability on a beneficiary's claim for survivor benefits under RCW 51.32.067 is an issue of substantial public interest that should be determined by this Court.

I. This Court Should Accept Review to Resolve the Conflict between the Appellate Court Decision *Shirley* and with this Court's recognition of the liberal construction doctrine of the Industrial Insurance Act in *Crabb v. Dep't of Labor & Industries*.

In the courts earlier decision in *Department of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 288 P.3d 390 (2012) *review denied*, 177 Wn.2d 1006, 300 P.3d 415 (2013), the court determined that a beneficiary was entitled to survivor's benefits despite the injured worker having no Department-established disability when his claim closed, neither the worker nor beneficiary sought to reopen the claim and the beneficiary was not asserting an aggravation of the original injury; the court acknowledged that the legislature did not intend to preclude benefits under these circumstances. *Shirley* at 883-84. The court did not require that the beneficiary show that her spouse had a Department-established disability at the time of his death

or that he experienced an aggravation of the industrial injury prior to his death. Rather, the court *only required* the beneficiary to show that the industrial injury was a proximate cause of the injured worker's death to qualify for survivor's benefits under RCW 51.32.050(2)(a).

In the case at hand, RCW 51.32.067 does not require that permanent total disability ("TPD") be established prior to a closing order, thus, following the court's reasoning in *Shirley*, as long as the surviving spouse can show that the injured worker was TPD and the industrial injury was a proximate cause of the TPD, the surviving spouse would be entitled to survivor benefits. However, in this case, the court imposed requirements that it held were not necessary under circumstances similar to those in *Shirley*. Specifically, that in order to qualify for death benefits when the injured worker dies during a period of TPD from a cause unrelated to the industrial injury, the beneficiary must show either that the Department established TPD prior to the closing order or there was subsequent aggravation of the industrial injury.

Likewise, the Court of Appeals decision is in conflict with this Court's decision in *Crabb v. Dep't of Labor & Indus.*, 326 P.3d 815, 820 (2014), which reaffirmed the decades long liberal construction doctrine of the Industrial Insurance Act, when in this case, the court interpreted RCW 51.32.067 as including an additional requirement that a surviving spouse

prove TPD with “objective medical evidence of worsening” subsequent to the Department’s closing order without a finding of TPD. While the courts generally defer to the Department’s interpretation of Title 51 RCW, *Littlejohn Constr. Co. v. Dep’t of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994), this Court recognized that, “[t]his deference has limits . . . and where the Department’s reading ‘conflicts with a statutory mandate,’ deference is ‘inappropriate.’” *Crabb v. Dep’t of Labor & Indus.*, 326 P.3d 815, 820 (2014) (citing *Cockle v. Dep’t v. Labor & Indus.*, 142 Wn.2d 801, 812, 16 P.3d 583 (2001)) (quoting *Dep’t of Labor & Indus. v. Landon*, 117 Wn.2d 122, 127, 814 P.2d 626 (1991)).

In *Crabb*, this Court further went on to state that, “[t]he legislature has declared that the provisions of Title 51 RCW ‘shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/ or death occurring in the course of employment.’” *Crabb*, at 819, citing RCW 51.12.010; *Cockle*, 142 Wn.2d at 811, 16 P.3d 583. Furthermore, this Court has “[c]ommanded that this legislative directive requires that we resolve all reasonable doubt in favor of the injured worker.” *Crabb*, at 819, citing *Clauson v. Dep’t of Labor & Indus.*, 130 Wn.2d 580, 586, 925 P.2d 624 (1996).

In this case, contrary to this Court’s recognition of the liberal construction doctrine of the Industrial Insurance Act in *Crabb*, the court

instead liberally construed the statute against the injured worker and in favor of the Department. *See Wegleitner* at *5. The court interpreted RCW 51.32.067 by taking from a different statute, RCW 51.32.160, which relates to reopening a claim based on aggravation, and applying it to the statute at issue in this case; **such a judicially added requirement is found nowhere in the statute.**

Furthermore, the statute does not state an intent to treat a claim where the worker died from a cause unrelated to the injury from a claim where the worker died from a cause related to the injury. Rather, under RCW 51.32.067, a surviving spouse is entitled to death benefits when the worker dies during a period of permanent total disability from a cause unrelated to the injury. Like the statute in *Shirley*, there are no additional requirements that a beneficiary must meet to establish entitlement to benefits. Furthermore, the term “permanent total disability” is not defined as a disability that must be established as such by an order of the Department.²

If the legislature intended to subject surviving spouses to the additional requirement that the TPD must be determined by the Department

² RCW 51.08.160 defines “Permanent Total Disability” as the “[l]oss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation.

prior to the closing order it could have expressly stated so as it did in RCW 51.32.060, which specifically states that a worker shall receive monthly compensation according to the percentages enumerated in the statute “[w]hen the supervisor of industrial insurance shall determine that [the] permanent total disability results from the injury. . . .” Thus, like the court stated in *Shirley*, the legislature did not intend to preclude benefits under these circumstances, nor did it intend to subject survivors to the additional burden of proving aggravation under RCW 51.32.160 where the TPD was not determined by the Department prior to a final and binding order closing the claim. Thus, the court’s determination that a surviving spouse must show objective worsening in such a situation conflicts with prior case law addressing surviving spouse claims, the intent of the Industrial Insurance Act, and the plain language of the statute.

II. This Court Should Accept Review Because this Case Presents an Issue of Substantial Public Interest.

This issue meets the “substantial public interest” requirement set forth in RAP 13.4(b)(4) because it could affect every determination of entitlement to survivor’s benefits under RCW 51.32.067 in circumstances where the surviving spouse is able to show “objective medical evidence of worsening” subsequent to the Department’s closing order when the injured worker did not receive an award of permanent disability prior to the closing

order, did not file an application to reopen for aggravation prior to the time of death, and died from a cause unrelated to the industrial injury. It is of substantial public interest to protect surviving spouses, like Mrs. Wegleitner, who face significant suffering and economic loss from being denied surviving spouse benefits based on an interpretation of the statute that contradicts its plain language and intended purpose.

Secondly, this case presents the opportunity to clarify the *res judicata* effect of a prior order on subjects like closing a claim without an award of permanent disability to the worker, when a worker is found to be TPD at death, or on subsequent aggravation when a beneficiary can show “objective medical evidence of worsening” and that the deceased worker was TPD at the time of death. It is of substantial public interest to provide an authoritative determination for future guidance of courts addressing such claims of surviving spouse benefits under RCW 51.32.067.

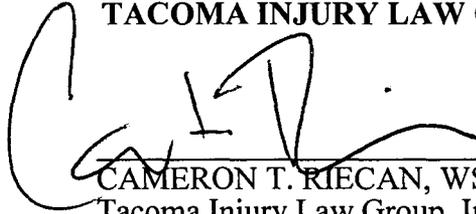
Finally, this case involves a fundamental issue of broad importance to surviving spouses who until today have been forced to go through unnecessary litigation to access benefits designed to protect the surviving spouses of injured workers, who were TPD at the time of death, regardless of the cause of death. It is thus paramount to resolve this question so that future widows and widowers do not go through the kind of protracted litigation that has been involved in this case.

F. CONCLUSION

For the reasons set forth *supra*, without waiver of issues or arguments made in the lower courts and made herein, including but not limited to attorney fees and expenses, the Petitioners Wegleitner respectfully request that this Court grant this petition for review. See RAP 18.1 and RCW 51.32.130.

Respectfully submitted this 29th day of April, 2015.

TACOMA INJURY LAW GROUP, INC., P.S.



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COURT OF APPEALS, DIVISION I
IN AND FOR THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D),)
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 Petitioner,)
)
)
 v.)
)
 DEPARTMENT OF LABOR AND)
 INDUSTRIES OF THE STATE OF)
 WASHINGTON)
)
 Defendants.)

NO. 72763-0-I

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss
 COUNTY OF PIERCE)

SARA M. WOOD, being first duly sworn on oath, deposes and says:

That she is a legal assistant employed by TACOMA INJURY LAW GROUP, INC., P.S., attorneys for Petitioner in the above-entitled matter, and that on the 30th day of April, 2015, she caused to be served, by Legal Messenger, Certified Mail, or First Class Mail, as indicated, Petitioner's Petition for Review, to the following:

COURT OF APPEALS
DIVISION ONE

APR 30 2015

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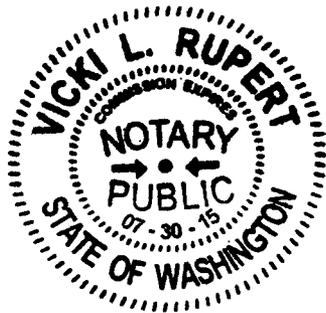
(via Legal Messenger)

12 DATED this 30th day of April, 2015.



13 Sara M. Wood
14 Legal Assistant to Tacoma Injury Law Group

15 SUBSCRIBED AND SWORN to before me this 30th day of April, 2015.




29 NOTARY PUBLIC in and for the
30 State of Washington, residing
31 at Tacoma. My Commission
32 expires 7-30-15

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APPENDIX

TAB	DOCUMENT
1	Unpublished Opinion in <i>Wegleitner v. Department of Labor & Industries</i> , No. 72763-0-I (Wash. Ct. App. March 9, 2015)
2	Court of Appeals Order Denying Appellant's Motion for Reconsideration and Motion to Publish dated March 31, 2015

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D),)	
)	No. 72763-0-1
Appellant,)	
)	DIVISION ONE
v.)	
)	
DEPARTMENT OF LABOR & INDUSTRIES, STATE OF WASHINGTON, and PATRICK BORING,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: <u>March 9, 2015</u>

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SPEARMAN, C.J. — Janice Wegleitner, the beneficiary and surviving spouse of Aloys R. Wegleitner, appeals a superior court order granting the Department of Labor and Industries' motion for summary judgment and affirming the denial of survivor benefits under RCW 51.32.050. Finding no error, we affirm.

FACTS

Aloys Wegleitner sustained an industrial injury while doing landscaping work on July 19, 2004. He filed a claim with the Washington State Department of Labor and Industries (Department), and received benefits for treatment and time loss compensation. He stopped working in September 2004 and continued receiving benefits until June 2005.

During this time, Wegleitner was diagnosed with lung cancer, which had metastasized to his spine and rib cage. Wegleitner filed a second claim with the Department for occupational disease.¹ On June 3, 2005, the Department issued an order closing Wegleitner's industrial injury claim, finding that "treatment is no longer necessary and there [is] no permanent partial disability." Clerk's Papers (CP) at 522. The order informed Wegleitner that it would "become[] final 60 days from the date it [was] communicated to [him]" unless he filed a written request for reconsideration with the Department or filed a written appeal with the Board of Industrial Insurance Appeals (Board). *Id.* The Department has no record of Wegleitner filing a request for reconsideration with the Department or a written appeal to the Board within the sixty-day period.²

Wegleitner passed away from lung cancer on September 30, 2005. His wife, Janice Wegleitner, filed a claim for survivor benefits under the industrial injury claim. The Department denied the claim on April 12, 2006, because the "cause of death was not related to the injury or the disease covered under this claim and the worker was not totally permanently disabled because of the condition(s) covered under this claim." CP at 35. Mrs. Wegleitner appealed the denial to the Board. In August 2006 the parties filed an order on agreement that stipulated that the Board had jurisdiction to hear the appeal, reversed the April 12, 2006 orders, and remanded the claims to the Department.

¹ Wegleitner's claim for occupational disease is not part of this appeal.

² Mrs. Wegleitner claims that the Department received a protest to this order on June 18, 2005, based on an entry in the claim's jurisdictional history. The entry has since been corrected to reflect the correct date that Mrs. Wegleitner filed her claim for survivor's benefits, October 18, 2005.

On December 9, 2008, the Department affirmed the April 12 order. Mrs. Wegleitner appealed to the Board again. At the hearing on August 25, 2009, the Board heard testimony from Mrs. Wegleitner and orthopedic surgeon, Dr. H. Richard Johnson. Dr. Johnson testified that he reviewed Wegleitner's medical records and that based on his review, Wegleitner "had arrived at a maximum medical improvement" in February 2005. CP at 337. He also testified that "from January or February 2005 until the closure date in early June of 2005, [Wegleitner's] persistent midback pain precluded him from returning to work at any level on a regular continuous basis," and that "he met the criteria for the state of Washington for permanent and total disability." CP at 341-42. Dr. Johnson did not provide any testimony about Wegleitner's condition from June 3, 2005 to September 30, 2005.

The Board dismissed Mrs. Wegleitner's appeal on October 29, 2009. In its dismissal, the Board stated that in order to receive any survivor's benefits from this claim, Mrs. Wegleitner was required to "prove that the industrial injury was a proximate cause of his death," or to "show that at the time of his death he had reached maximum medial improvement and was permanently and totally disabled because of the injury." CP at 30. The Board found that "no evidence was presented to demonstrate that [Wegleitner's] death was proximately caused by the July 19, 2004 industrial injury." CP at 32. With regard to the alternate basis for survivor's benefits, the Board found that permanent and total disability could not be proven by the beneficiary, because the June 3, 2005 order "became final

as to the extent of Mr. Wegleitner's disability at the time of his September 30, 2005 death." CP at 33.

Mrs. Wegleitner filed a petition for review of the Board's decision and a subsequent appeal to the Pierce County Superior Court. On April 22, 2011, Judge Bryan Chushcoff found that the Board's dismissal was "improper and was based on an incorrect reading of the law and the facts," and remanded for a de novo hearing.³ CP at 11. In his oral ruling, Judge Chushcoff indicated that the Department was not precluded from arguing the res judicata effect of the June 3, 2005 order, but that any such effect would not prevent Mrs. Wegleitner from presenting evidence of total and permanent disability at the time of Wegleitner's death, resulting from the industrial injury.

The Board heard additional testimony from Mrs. Wegleitner and Dr. Johnson, along with testimony from vocational counselor Carl Gann, radiation oncologist, Dr. Michael McDonough, and Department Adjudicator, Robert Frost. Mrs. Wegleitner testified that in 2005, her husband's condition was "really severe," and that he "couldn't do anything once the cancer set him." CP at 389. She also testified that he had pain from head to toe and that she noticed some difference in his complaints with the cancer around June 2005. This time Dr. Johnson testified that Wegleitner was "not capable of employment on a regular continuous basis even at a sedentary level in early 2005," and that those

³ Mrs. Wegleitner claims that the Superior Court's decision was based on "the doctrine of judicial estoppel." Br. of Appellant at 11. While the trial court's oral ruling contained considerable discussion about the doctrine, it remanded the case for a hearing de novo because it found that the entry of the June 3, 2005 order did not preclude Mrs. Wegleitner's claim for benefits. The court did not rule that the Department was estopped from claiming that the June 3, 2005 order was final.

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limitations did not “change any up until the time of his death on September 30th, 05.” CP at 461-462. Mr. Gann also testified that if Wegleitner’s medical condition and the residuals from his industrial injury remained the same from February 2005, up to the time of the closing of his claim on June 3, 2005, he “would not be employable.” CP 502. Additionally, Mr. Gann testified that if the limitations had persisted, Wegleitner would have been unemployable, permanently, at the time of his death on September 30, 2005.

The Board found that the testimony of Dr. Johnson and Mr. Gann “was not convincing,” because they had “never personally evaluated Mr. Wegleitner and only did a records review.” CP at 128. In particular, “neither of them adequately explained how they could distinguish between Mr. Wegleitner’s cancer-related spine problems and the residuals of his industrial injury.” *Id.* On April 9, 2012, the Board affirmed the 2008 order, finding that 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.” CP at 131. Additionally, the Board found that Mrs. 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.” *Id.* After Mrs. Wegleitner’s petition for review was denied, the Board issued its decision and order on July 9, 2012.

Mrs. Wegleitner appealed the Board’s decision to the Pierce County Superior Court. The parties filed cross-motions for summary judgment in which

each asserted that there were no material issues of fact in dispute. The trial court reviewed the record and concluded that the Department was therefore entitled to judgment as a matter of law. Mrs. Wegleitner appeals.

DISCUSSION

We review a lower court's grant of summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. Pearson v. State, Dep't. of Labor & Indus., 164 Wn. App. 426, 431, 262 P.3d 837 (2011). Summary judgment is proper if there is no genuine issue of material fact and the evidence fails to establish the existence of an essential element of the plaintiff's case. Knight v. Dep't. of Labor & Indus., 181 Wn. App. 788, 795-6, 321 P.3d 1275 (2014), review denied, ___ Wn.2d ___, 339 P.3d (2015).

At the outset, Mrs. Wegleitner argues that the trial court erred when it found that the June 3, 2005 precluded her from bringing her claim for survivor's benefits. She argues that order has no effect on her ability to seek survivor's benefits, because her claim is separate and distinct from her husband's industrial injury claim. The Department does not dispute that she has the ability to bring a claim for benefits, but maintains that the order is res judicata as to the extent of the injury.

We agree with the Department. The trial court's order did not preclude Mrs. Wegleitner's claim for benefits. The court found that the June 3, 2005 order was final and binding, subjecting her claim to the Department's assessment of the extent of Wegleitner's injury as of that date. It is undisputed that Wegleitner did not file a request to reconsider or a written appeal within the sixty-day period

designated under RCW 51.52.060(1). As a result, the decision became final, the case was closed, and the finding of no permanent disability became res judicata to the extent of the injury. See White v. Dep't. of Labor & Indus., 48 Wn.2d 413, 414, 293 P.2d 764 (1956). Mrs. Wegleitner is therefore bound by the law of the case, and she cannot challenge that finding after failing to file a timely appeal.

Mrs. Wegleitner argues that it would be inequitable to uphold the order's res judicata effect in this case, because the circumstances surrounding the June 3, 2005 order prevented her from filing an appeal. She also argues that she is entitled to equitable relief because she diligently pursued her rights by filing a timely claim for survivor's benefits. The Department argues that Mrs. Wegleitner cannot raise this argument for the first time on appeal, and that she fails to meet the requirements for equitable relief.

An appellate court has the ability to exercise its equitable power to relieve a party from the effect of res judicata in workers' compensation cases. Dep't. of Labor & Indus. v. Fields Corp., 112 Wn. App. 450, 460, 45 P.3d 1121 (2002). A claimant may be entitled to equitable relief when (1) circumstances excused the failure to appeal before the time for appeal expired; and (2) the claimant diligently pursued his or her rights after the time for appeal expired. Id.; Rabey v. Dep't. of Labor & Indus., 101 Wn. App. 390, 3 P.3d 217 (2000).

Under RAP 2.5, however, an appellate court may refuse to review any claim of error which was not raised in the trial court. Mrs. Wegleitner failed to ask the trial court, sitting in an appellate capacity, to exercise its equitable powers. She also did not raise the argument in her petition for review of the Board's

decision. Under RCW 51.52.104, a petition for review must set forth in detail the grounds for the review and the filing party “shall be deemed to have waived all objections or irregularities not specifically set forth therein.” While the Board has very limited ability to apply equitable principles to relieve a party from a final order, it may by stare decisis apply those equitable principles determined by appellate courts, to fact situations comparable to cases where the courts have exercised their equitable powers. See In re Robert Trevino, No. 01 22676, 2002 WL 31959091, at *2 (Wash. Bd. of Indus. Appeals Nov. 7, 2002), quoting In re Seth Jackson, No. 61,088, 1982 WL 591170 (Wash. Bd. of Indus. Appeals Nov. 30, 1982).⁴ Because Mrs. Wegleitner failed to raise her equitable argument before the Board or the trial court, we decline to consider it on appeal.

Mrs. Wegleitner next argues that she met her burden under RCW 51.32.050, and is entitled to survivor’s benefits. According to her, the medical testimony established a prima facie case that was unrebutted by the Department. The Department argues that she failed to obtain a permanent total disability finding, because the June 3, 2005 order finding Wegleitner to have no permanent partial disability was final. The Department argues that in order to overcome that finding, she was required to present evidence of objective worsening of her husband’s injury-related condition, and she failed to do so.

Under the Industrial Insurance Act, a surviving spouse of a worker eligible for permanent total disability benefits may obtain benefits upon a worker’s death, even if he or she dies from causes unrelated to the industrial injury. RCW

⁴ Board decisions are not binding on this court but may be cited as persuasive authority. O’Keefe v. Dep’t of Labor & Indus., 126 Wn. App. 760, 766, 109 P.3d 484 (2005).

51.32.050; RCW 51.32.067. These statutes allow a totally and permanently disabled worker to elect benefits for his or her spouse. If the worker's death is from a cause related to the injury, his or her spouse shall receive benefits under RCW 51.32.050(2) through (5). If, during the disability period, the worker dies from a cause unrelated to the injury, then the spouse may receive benefits under RCW 51.32.050(7) and RCW 51.32.067(1). The worker may choose to receive his or her full pension with no spousal award (with the spouse's written consent), or to set aside a portion for the surviving spouse. Id. If a worker has not made an election under RCW 51.32.067, the Department is permitted to select an option for the spouse. Dep't. of Labor & Indus. v. Freeman, 87 Wn. App. 90, 97-98, 940 P.2d 304 (1997).

An individual's eligibility for survivor's benefits is determined as of the time of the worker's death. Eyle v. Dep't. of Labor & Indus., 10 Wn. App. 449, 519 P.2d 1020 (1974). A spouse may file a separate claim for survivor benefits even if a case has been closed. See Dep't. of Labor & Indus. v. Shirley, 171 Wn. App. 870, 288 P.3d 390 (2012) review denied, 177 Wn.2d 1006, 300 P.3d 415 (2013).

Mrs. Wegleitner argues that the trial court applied the incorrect legal standard when it required her to prove objective worsening of her husband's condition due to the industrial injury. According to her, she was only required to show that Wegleitner was totally and permanently disabled at the time of his death, and that the industrial injury was a proximate cause of his total and permanent disability. Mrs. Wegleitner argues that even if she were required to show worsening, the testimony establishing total permanent disability was in and

of itself objective evidence of worsening that would entitle her to survivor benefits.

Mrs. Wegleitner is correct that she is required to show total permanent disability that was proximately caused by the industrial injury. RCW 51.32.067. But the statute also requires that she show that her husband died during a period of permanent total disability. Because the June 3, 2005 order was final, she must overcome the res judicata effect of the order's finding of no permanent partial disability. RCW 52.32.067 is silent with regard to the effect of such a final and binding closure order awarding no permanent disability to the worker. The Department urges the court to adopt the approach set forth in RCW 51.32.160(1). This statute allows a beneficiary, including a spouse, to obtain additional benefits from an already-closed claim if "aggravation, diminution, or termination of disability takes place." RCW 51.32.160; see also White, 48 Wn.2d at 414-5; Nagel v. Dep't. of Labor & Indus., 189 Wash. 631, 635-36, 66 P.2d 318 (1937). In order 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, 219 P.3d 711 (2009).⁵

While Mrs. Wegleitner provides no authority for an alternate standard, she asserts in her brief that the June 3, 2005 orders' res judicata effect does not extend to subsequent aggravation. But even by her own standard, Mrs.

⁵ The Department cites two Board decisions, In re David Harvey, Dec'd., No. 941271, 1995 WL 327325, (Wash. Bd. of Indus. Ins. Appeals Apr. 9, 1996), and In re Lowery Pugh, Dec'd. No. 86 2693, 1989 WL 224965 (Wash. Bd. of Indus. Ins. Appeals Apr. 27, 1989), where in order to determine the spouse's right to survivor benefits, the Department was required to find objective worsening of the condition related to the industrial injury since the last date of claim closure.

Wegleitner's claim fails because she offered no evidence that any aggravation of her husband's injury occurred after the June 3, 2005 order finding no permanent disability. Instead, the testimony offered on her behalf established that Wegleitner's condition, with respect to his industrial injury, remained the same from January or February of 2005, through closure of the claim on June 3, until his death in September 2005. Thus, in effect, Mrs. Wegleitner's proof controverts the Department's June 3 finding that Wegleitner was not totally and permanently disabled. But having failed to do so within the sixty days permitted by statute, she cannot challenge that finding now. We therefore affirm the trial court's order granting summary judgment in favor of the Department, and affirm the Board's order denying an award of benefits.

Affirmed.

WE CONCUR:

Trickey, J.T.

Speckman, C.T.

Jan, J.

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ALOYS R. WEGLEITNER (DEC'D),)	
)	No. 72763-0-1
Appellant,)	
)	
v.)	
)	ORDER DENYING APPELLANT'S
DEPARTMENT OF LABOR &)	MOTION FOR
INDUSTRIES, STATE OF)	RECONSIDERATION AND
WASHINGTON, and PATRICK)	MOTION TO PUBLISH
BORING,)	
)	
Respondent.)	

Appellant, Aloys R. Wegleitner filed a motion for reconsideration and a motion to publish the opinion filed on March 9, 2015 in the above matter. A majority of the panel has determined the motion for reconsideration and the motion to publish should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration and motion to publish is denied.

DATED this 31st day of March, 2015.

FOR THE PANEL:

Speeman, C.J.
Presiding Judge

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