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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JOHN R. GIBBONS,

Petitioner,

v.

THE BOEING COMPANY AND DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondents.

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**ANSWER TO PETITION FOR REVIEW**

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ROBERT W. FERGUSON  
Attorney General

Paul Weideman  
Assistant Attorney General  
WSBA No. 42254  
Office Id. No. 91018  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
(206) 389-3820

 ORIGINAL

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## I. INTRODUCTION

The Industrial Insurance Act allows death benefits only when the work injury results in the worker's death (RCW 51.32.050) or the worker's permanent total disability at death (RCW 51.32.067). Neither occurred here. The Court of Appeals correctly concluded in this fact-specific case that because John Gibbons's work injury to his low back did not cause either his death from lung cancer or his total disability at death, his surviving spouse could not receive death benefits. And the correct application of the death benefits statutes to the facts of this case is not a matter of substantial public interest.

John Gibbons died from smoking-related lung cancer, not from his back injury at work. When his surviving spouse, Vivian Gibbons, appealed the order closing his claim, a jury determined that Gibbons was partially disabled, not totally disabled, at death. These facts preclude death benefits under RCW 51.32.050 and RCW 51.32.067, as the Court of Appeals, superior court, and Board of Industrial Insurance Appeals all correctly recognized. Ms. Gibbons has shown no conflict with this Court's decisions and this case only affects whether she can receive benefits under the Act, which she cannot. This Court should deny review.

## II. COUNTERSTATEMENT OF THE ISSUES

Discretionary review is not warranted in this case, but if the Court were to grant review the following issues would be presented:

1. Can Gibbons's surviving spouse receive death benefits under RCW 51.32.067(1) when that statute allows a surviving spouse to receive benefits only if the worker dies during a period of permanent total disability and when a final superior court decision established that Gibbons had only permanent partial (and not total) disabilities at death?

2. Can Gibbons's surviving spouse receive death benefits under RCW 51.32.050(2) when that statute permits death benefits only where the worker's death results from the injury and when the only evidence in the record is that Gibbons died from metastatic lung cancer, not from his low back injury?

## III. COUNTERSTATEMENT OF THE CASE

### A. **John Gibbons Injured His Back at Work in 1988, Retired From Boeing in 1993, and Died From Lung Cancer in 2005**

In 1988, John Gibbons, a Boeing carpenter, twisted his back at work. BR 106, 117, 269. He filed a workers' compensation claim, which the Department allowed. BR 118. In 1993, he retired from Boeing at age 62. BR 106. In 1994, the Department closed his claim with a permanent

partial disability award for a category 3 low back impairment. BR 106, 119-20, 270; *see also* WAC 296-20-280(3).

In 1995, the Department re-opened Gibbons's claim. BR 106, 121. After re-opening, the Department issued an order denying time-loss compensation benefits to Gibbons because he had voluntarily retired. *See* BR 106. A voluntarily retired worker cannot receive time-loss benefits, which are intended to replace lost wages. *See Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 37 n.1, 992 P.2d 1002 (2000); *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966). Gibbons appealed the determination that he was voluntarily retired to the Court of Appeals, which concluded in an unpublished opinion in 2001 that he had voluntarily retired and was not eligible for time-loss compensation. BR 106, 108.

Gibbons's claim remained open for medical treatment until he died from lung cancer in August 2005. *See* BR 124-26, 192, 270-71. A physician listed the cause of death as "metastatic nonsmall cell lung cancer" on his death certificate. BR 192. The only contributing factor to his death listed in the death certificate was "tobacco use." BR 192.



**B. Ms. Gibbons Appealed the Order Closing Her Husband's Workers' Compensation Claim After He Died but She Did Not Assert That He Was Totally Disabled From His Work Injury at Death**

On June 2, 2006, after Gibbons's death, the Department closed his claim with a permanent partial disability award for a category 3 low back impairment. BR 125. The next month Ms. Gibbons filed a claim for death benefits as his surviving spouse. BR 194. She also appealed the June 2, 2006 closing order to the Board. *See* BR 253; *see also* Pet. 3.

In her appeal of the closing order to the Board, she did not assert that her husband was permanently totally disabled from his work injury. *See* BR 253, 264. Instead, she sought additional awards for permanent partial disabilities. *See* BR 264. At the 2007 administrative hearing, Ms. Gibbons's attorney agreed that the issue was whether her husband was "entitled to an increased permanent partial disability award." BR 264. At the hearing, Ms. Gibbons presented medical evidence that in addition to low back impairment, the work injury caused her husband to have bowel and erectile dysfunction. *See* BR 127-33.

The Board awarded an increased permanent partial disability for the low back, but gave no permanent partial disability awards for any other condition. *See* BR 133. Both parties appealed to superior court. BR 138-39.

While the parties' superior court appeals were pending, the Department issued an order on June 26, 2008, that adopted the Board's decision and that stated, "The application for widow benefits is denied." BR 140-41. Ms. Gibbons never protested or appealed this order. BR 286; Tr. 19.

**C. A Jury Determined That Gibbons Was Permanently Partially Disabled on June 2, 2006, and No Party Appealed That Determination**

After a jury trial in March 2011, a jury determined that Gibbons had permanent partial disabilities of the low back and lower digestive tract as of June 2, 2006. BR 143-44. The jury found that Gibbons had a category 3 permanent partial disability of the low back and category 2 permanent partial disability of the lower digestive tract. BR 143-44, 148-49. Because no party appealed the judgment, the jury's factual determination that Gibbons was permanently partially disabled as of June 2, 2006, became final and binding. *See Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537-38, 544, 886 P.2d 189 (1994).

**D. The Department Issued Additional Orders Denying Death Benefits After the Superior Court Judgment**

Following entry of judgment, the Department issued an order directing Boeing to pay the permanent partial disability awards that the jury had awarded. BR 196-97. In early 2012, the Department denied her

application for benefits. BR 146, 197. She appealed that decision to the Board. *See* BR 40.

**E. The Court of Appeals Concluded in an Unpublished Opinion That Ms. Gibbons Was Not Entitled to Death Benefits Under Either RCW 51.32.050 or RCW 51.32.067**

At the Board, Boeing moved for summary judgment. *See* BR 96-104. The Board granted summary judgment to Boeing because Gibbons died of lung cancer, a condition unrelated to his work injury; because he was partially (not totally) disabled at death; and because he was voluntarily retired from the workforce at death. BR 2-6. After the superior court affirmed, Ms. Gibbons appealed to the Court of Appeals. CP 82-89.

The Court of Appeals, Division One, affirmed in an unpublished opinion. *Gibbons v. The Boeing Co.*, No. 72335-9-I, slip op. at 1 (Aug. 17, 2015). The court held that because Gibbons was only partially disabled at death, he was not entitled to benefits under RCW 51.32.067. Slip op. at 7. The Court also held that because there was no evidence that Gibbons died as a result of the work injury, Ms. Gibbons could not receive death benefits under RCW 51.32.050. Slip op. at 8.

**IV. ARGUMENT**

This Court should decline review because the Court of Appeals applied well-established law about death benefits to the specific facts of this case to conclude that Ms. Gibbons could not receive death benefits

under RCW 51.32.050 or RCW 51.32.067. Ms. Gibbons does not appear to dispute that lung cancer caused her husband's death or that, based on the jury's verdict, he was partially (not totally) disabled at death. As the Board, superior court, and Court of Appeals all correctly recognized, these two facts preclude an award of death benefits to the surviving spouse under the plain language of RCW 51.32.050 and RCW 51.32.067. The routine application of the plain language of these statutes to the facts of this case affects only Ms. Gibbons and is not a matter of substantial public interest.

The application of the plain language of RCW 51.32.050 and RCW 51.32.067 is wholly consistent with this Court's opinions in *McFarland v. Department of Labor & Industries*, 188 Wash. 357, 62 P.2d 714 (1936), and *Wintermute v. Department of Labor & Industries*, 183 Wash. 169, 48 P.2d 627 (1935). Although those cases referred to a surviving spouse's "original" and "independent" right to seek death benefits, both still required that the surviving spouse prove that the work injury caused the worker's death or permanent total disability at the time of death. There is no conflict with those cases warranting this Court's discretionary review.

Finally, contrary to Ms. Gibbons's repeated assertions, this case affects only her, not "many spouses of deceased injured workers" in Washington. Pet. 7. The reason she cannot receive benefits is because the

facts of her case do not allow it: her husband's twisting back injury in 1988 did not cause his death or total disability in 2005. This is a fact-specific determination unique to her. Surviving spouses in other cases will continue to receive death benefits under RCW 51.32.050 if their spouse died as a result of a work injury and under RCW 51.32.067 if the work injury rendered their spouse permanently totally disabled at the time of death. That the facts of her case do not allow her to receive death benefits does not warrant this Court's review under RAP 13.4.

**A. This Case Does Not Involve a Matter of Substantial Public Interest Because The Court of Appeals Correctly Applied RCW 51.32.050 and RCW 51.32.067**

Under the facts of this case, Ms. Gibbons is not entitled to death benefits. The Legislature allows death benefits to a surviving spouse only when the work injury results in death or causes the worker to be permanently totally disabled at death. RCW 51.32.050; RCW 51.32.067. Neither situation is present here. Gibbons died from smoking, not his work injury. And a jury determined that he was permanently partially (not totally) disabled at death. Ms. Gibbons thus does not meet either of the two statutory prerequisites for death benefits. This case has no bearing on other surviving spouses who, unlike Ms. Gibbons, will be able to obtain death benefits by presenting evidence that meets these prerequisites. The

outcome of this case affects only Ms. Gibbons and is not a matter of substantial public interest.

The Industrial Insurance Act contains two types of death benefits for a surviving spouse. First, a surviving spouse is entitled to death benefits under RCW 51.32.067(1) if the deceased spouse was permanently totally disabled from the industrial injury at the time of death. RCW 51.32.067(1); *see also* RCW 51.08.160. Second, a surviving spouse is entitled to death benefits under RCW 51.32.050(2)(a) if the worker's death results from the work injury. Throughout her petition, Ms. Gibbons speaks of her independent "claim" or "entitlement" to "widow's benefits," but apart from these two statutory provisions, there is no legal basis under the Act for the payment of death benefits to a surviving spouse. *See* Pet. 1, 7, 10-14. Ms. Gibbons appears to concede as much because she cites no other statutory provision that would allow her to receive surviving spouse benefits as a result of her husband's death. *See* Pet. 1, 10, 13. Because she does not meet the requirements of either statutory provision and because neither provision allows a survivor to circumvent a jury verdict finding of no permanent total disability at death, she cannot receive death benefits.

**1. Because Gibbons Was Not Totally Disabled at Death From The Work Injury, His Spouse Cannot Receive Benefits Under RCW 51.32.067**

It is res judicata that Gibbons was partially disabled, not totally disabled, at death. A jury made that determination in 2011 when Ms. Gibbons appealed the order closing her husband's claim. In that appeal, she had the opportunity to present medical evidence that her husband was totally disabled at death from his work injury, not just partially disabled. But she did not do so and, after considering the medical evidence, a jury found that he was partially disabled. She did not appeal the jury's determination of partial disability. Under res judicata principles, the jury's finding of partial disability is final and binding and cannot now be revisited.

Res judicata, or claim preclusion, applies to an unappealed order of a trial court. *See Marley*, 125 Wn.2d at 537. Res judicata prevents a party from resurrecting the same claim in a subsequent action. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 737, 222 P.3d 791 (2009). It prohibits the relitigation of claims and issues that were litigated, or that could have been litigated, in a prior action. *Chavez v. Dep't of Labor & Indus.*, 129 Wn. App. 236, 239, 118 P.3d 392 (2005).

The jury's determination that Gibbons was only partially disabled on June 2, 2006, binds Ms. Gibbons in this appeal. She concedes in her

petition that there is “a final determination wherein the injured worker was determined to only be a permanently *partially* disabled worker.” Pet. 7-8 (emphasis added). Her appeal of the closing order involved the same subject matter and cause of action (the extent of her husband’s permanent disability) and the same parties (Ms. Gibbons, Boeing, and the Department). *See* BR 253, 264. These parties are bound by the jury’s determination that Gibbons was permanently partially disabled on June 2, 2006. Because it is res judicata that Gibbons was only permanently partially disabled at the time of his death, Ms. Gibbons cannot receive death benefits under RCW 51.32.067(1). Permanent partial and permanent total disabilities are mutually exclusive. When a worker is permanently disabled “the worker receives *either a pension or a permanent partial disability award.*” *Hubbard*, 140 Wn.2d at 37 n.1 (emphasis added); *see also Stone v. Dep’t of Labor & Indus.*, 172 Wn. App. 256, 262, 289 P.3d 720 (2012). A final closing order awarding permanent partial disability makes it res judicata that the worker’s disability at the time of the order was only partial, not total. *Weyerhaeuser Co. v. Farr*, 70 Wn. App. 759, 766, 855 P.2d 711 (1993). It establishes that the worker was capable of at least some form of gainful employment as of the date that his claim was closed. *See Farr*, 70 Wn. App. at 766.



Ms. Gibbons incorrectly suggests that she could not have sought death benefits when she appealed the order closing her husband's claim "because the Department had yet to take any action on her application for such benefits." Pet. 12. When she appealed the order closing her husband's claim, she could have presented medical evidence that he was permanently totally disabled, which would have entitled her to benefits under RCW 51.32.067, but she did not. It was not "beyond [her] control" to present medical testimony to establish these facts; she just did not do so. Pet. 15. Her claim that she had an "independent right" to bring a survivor claim and therefore escape the application of res judicata is not supported by any authority. Pet. 15. Under res judicata principles, she is bound by the determination of an order that adjudicates a fact directly at issue and she has not claimed that she was not a party to the superior court action where the jury found that Gibbons was only permanently partially disabled. Indeed it was her appeal.<sup>1</sup>

Ms. Gibbons's briefing at the Court of Appeals suggests that she did not present evidence of her husband's permanent total disability for a strategic reason—because she understood that her husband's voluntarily retirement in 1993 precluded him from receiving permanent total

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<sup>1</sup> Her claim for an "independent" right to claim permanent total disability notwithstanding the jury verdict is discussed further below in Part.IV.B.

disability benefits.<sup>2</sup> App. Br. 17. It is true that his retirement precludes her from receiving death benefits under RCW 51.32.067; *see Farr*, 70 Wn. App. at 765. But her strategic decision not to litigate permanent total disability because of that issue when she appealed the closing order binds her here and precludes her from receiving death benefits under RCW 51.32.067(1). Her argument ignores that *res judicata* applies to issues that could have been litigated but that were not. *Chavez*, 129 Wn. App. at 239. She cannot belatedly revive an issue that she declined to litigate. Her strategic litigation approach in this case is unique to her and not a matter of substantial public interest.

**2. Because Gibbons Died From Lung Cancer, Not His Low Back Injury, His Spouse Cannot Receive Benefits Under RCW 51.32.050**

Gibbons's 1988 work injury did not cause his death. He died in 2005 from lung cancer, and tobacco use was the only contributing factor listed on the death certificate. BR 192. The physician who certified his death noted a short interval of three months between the onset of lung cancer and death. BR 192. Because Gibbons's twisting back injury in 1988 did not cause the onset of his lung cancer in 2005, Ms. Gibbons is

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<sup>2</sup> Although the Court of Appeals did not address the issue, Ms. Gibbons is also not entitled to death benefits under RCW 51.32.067(1) because this Court previously determined that her husband voluntarily retired from the workforce, and she has presented no evidence that he ever attempted to return to the workforce after he voluntarily retired. *See* BR 106. A worker who voluntarily retires from the workforce is not entitled to permanent total disability benefits. *Farr*, 70 Wn. App. at 765.

not entitled to benefits under RCW 51.32.050(2)(a). This fact-specific determination of Gibbons's cause of death is not a matter of substantial public interest and will not affect other death benefits cases. It is a determination that affects only Ms. Gibbons.

Ms. Gibbons does not appear to dispute that lung cancer unrelated to her husband's work injury caused his death. *See* Pet. 13-14. Instead, she elevates form over substance to argue that because the death certificate identifying the cause of death was submitted in response to summary judgment, rather than with Boeing's summary judgment motion, summary judgment could not be granted to Boeing as the moving party. *See* Pet. 13-14.

This argument ignores that a moving party in a summary judgment action may meet its initial burden to show the absence of an issue of material fact by demonstrating the absence of evidence to support the nonmoving party's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 n.1, 770 P.2d 182 (1989). It was sufficient for Boeing to assert in its motion that Gibbons's low back injury in 1988 did not cause his death from lung cancer in 2005. It was then incumbent on Ms. Gibbons to present some medical evidence that his back injury caused lung cancer. But, as the Court of Appeals correctly noted, she did not do so and summary judgment was therefore proper. Slip op. at 7-8; *see also* BR 171-

201. This is a routine application of summary judgment principles and not a matter of substantial public interest, especially where Ms. Gibbons has never identified any medical evidence that her husband's low back injury in 1988 caused lung cancer 17 years later.

Finally, the doctrine of liberal construction does not apply in this case because there is no ambiguous statute to construe. Under that doctrine, the court liberally construes the terms of the Industrial Insurance Act. RCW 51.12.010. Ms. Gibbons misstates the doctrine when she asserts that the Act's "beneficial purpose" should be liberally construed (Pet. 8) or that courts should apply liberal construction "when questions arise as to how the Act should be applied in a given situation." (Pet. 9). Liberal construction applies only to the construction of ambiguous statutes. *See Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). It does not apply, as here in this case, to the application of unambiguous statutes.

**B. The Court of Appeals' Decision is Consistent With This Court's *McFarland* and *Wintermute* Decisions**

The Court of Appeals' routine application of the death benefits statutes in this case does not conflict with this Court's decision in *McFarland* or *Wintermute*. Those cases stand for the proposition that a worker cannot waive his or her survivor's right to benefits by failing to

apply to re-open a closed claim during the worker's lifetime (*McFarland*) or by dying during a pending appeal on the application to re-open a closed claim (*Wintermute*). But that is not what occurred here. Ms. Gibbons was able to seek and obtain death benefits either by appealing the closing order and proving that her husband was totally disabled or by submitting evidence in response to summary judgment that her husband's work injury caused her death. *McFarland* and *Wintermute* are factually distinguishable and do not conflict with the Court of Appeals' decision.

In *McFarland*, unlike here, when the worker died, his claim had been finally closed with a permanent partial disability award. *McFarland*, 188 Wash. at 359. Therefore, unlike in this case, his surviving spouse could not appeal the order closing the claim because that order was final. *Id.* Lacking an order to appeal, she had no way to assert that her husband's partial disability had become total at the time of his death. It was in this context that this Court held that the surviving spouse could still assert her husband was totally and permanently disabled at death and thus entitled to pension benefits under the predecessor statute to RCW 51.32.067. *Id.* at 367. Her husband's failure to apply to re-open her claim during his life did not waive her rights to seek death benefits. *See id.* But, like Ms. Gibbons in this case, the surviving spouse in *McFarland* still had to prove that her husband was permanently totally disabled at death. *See id.*

Here, unlike in *McFarland*, Ms. Gibbons had the opportunity to litigate whether her husband was permanently totally disabled at the time of death. His claim was still open when he died. When she appealed the order closing her husband's claim after her death, she had the opportunity to provide medical testimony that he was permanently totally disabled, not just permanently partially disabled, but she did not do so. As this Court has made clear, *McFarland*'s reference to a surviving spouse's "original" right to seek benefits under the Act, means that "a survivor's claim is independent from the worker's claim to the extent the worker cannot waive the survivor's rights to benefits." *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wn.2d 222, 228, 883 P.2d 1370 (1994). Thus, the worker's failure to file a reopening application in *McFarland* asserting permanent total disability during his life did not preclude the surviving spouse from asserting the worker's permanent total disability at death in a subsequent survivor's claim. *See McFarland*, 188 Wash. at 366-67. That is not what occurred in this case. Ms. Gibbons had the opportunity to litigate permanent total disability, and she is bound by the jury's determination of partial disability.

Ms. Gibbons makes only passing mention of *Wintermute*, but that case is entirely consistent with the Court of Appeals' decision because the surviving spouse in that case had to prove that the work injury caused

death, as the current version of RCW 51.32.050 requires. *See* Pet.12; 183 Wash. at 175. This Court found that substantial evidence supported the jury's verdict in that case that death caused the injury. *See id.* That is unlike this case because Ms. Gibbons has presented no evidence that her husband's back injury caused lung cancer. There is no conflict with prior decisions of this Court. This Court's decisions do not support that a survivor can circumvent a jury's verdict that a worker was not permanently totally disabled at the time of death. Nor do they support a conclusion that a spouse can obtain death benefits when the work injury did not cause death.

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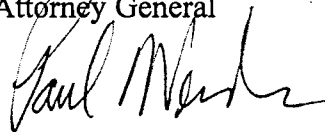
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## V. CONCLUSION

This is a fact-specific case that will not affect other surviving spouses seeking death benefits under the Industrial Insurance Act. As the Board, superior court, and Court of Appeals all determined, Ms. Gibbons cannot receive death benefits under either RCW 51.32.050 or RCW 51.32.067 because the facts of her case do not meet the requirements under these statutes. Her husband died from lung cancer, not his back injury at work, so he cannot receive benefits under RCW 51.32.050. And a jury determined that he was partially disabled after death, so he cannot receive benefits under RCW 51.32.067. Nothing in this case warrants this Court's review.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of November,  
2015.

ROBERT W. FERGUSON  
Attorney General



PAUL WEIDEMAN  
Assistant Attorney General  
WSBA No. 42254  
Office Id. No. 91018  
800 Fifth Ave., Suite 2000  
Seattle, WA 98104  
(206) 389-3820



No. 92270-5

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

JOHN M. R. GIBBONS,

Petitioner,

v.

THE BOEING COMPANY AND  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondents.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department of Labor & Industries Answer to Petition for Review and this Certificate Service in the below-described manner:

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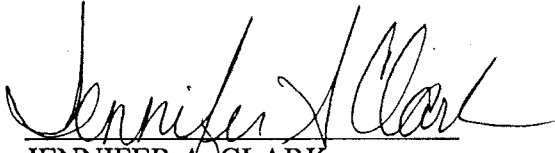
Ronald R. Carpenter  
Supreme Court Clerk  
Supreme Court  
supreme@courts.wa.gov

**via First Class United States Mail, Postage Prepaid to:**

Gibby M. Stratton  
Pratt, Day & Stratton PLLC  
2102 N Pearl Street, Suite 106  
Tacoma, WA 98406-2550

Dorian Whitford  
Vail-Cross & Associates  
PO Box 5707  
Tacoma, WA 98415

DATED this 18<sup>th</sup> day of November, 2015, Seattle, Washington.

  
JENNIFER A. CLARK  
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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**Subject:** 92270-5; John R. Gibbons v. The Boeing Company & DLI

**RE: *John R. Gibbons v. The Boeing Company and Department of Labor and Industries***  
Case Number: 92270-5

Dear Mr. Carpenter,  
Please file the Department's Answer to Petition for Review in the above referenced matter.

*Sincerely,*

*Jennifer A. Clark*  
*Legal Assistant to Attorney*  
*Paul Weideman*  
*Attorney's General Office*  
*Office ID No. 91018*  
*(206) 389-3820*