

72335-9

72335-9

No. 72335-9-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JOHN R. GIBBONS, DEC'D,

Appellant,

v.

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

Respondent.

APPELLANT'S OPENING BRIEF

2011 DEC 9 10:17
COURT OF APPEALS
DIVISION I
CLERK'S OFFICE

Dorian D.N. Whitford, WSBA# 43351
Vail, Cross-Euteneier & Associates
819 Martin Luther King Jr. Way
P.O. Box 5707
Tacoma, WA 98415-0707
(253) 383-8770
Attorney for John R. Gibbons

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	i
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	2
III. ISSUES.....	4
IV. STATEMENT OF THE CASE.....	4
V. STANDARD OF REVIEW.....	8
VI. ARGUMENT.....	11
A. Introduction:.....	8
B. There Remain Genuine Issues of Material Fact Precluding Summary Judgment.....	12
C. There is Not Substantial Evidence in the Record To Support Several of the Superior Court’s Findings of Fact.....	17
VII. CONCLUSION.....	19

TABLE OF AUTHORITIES

A. Table of Cases

Washington Cases

<i>Adams v. Great Am. Ins. Co.</i> , 87 Wn. App. 883, 942 P.2d 1087 (1997).....	10
--	----

	<u>Pages</u>
<i>Cantu v. Dep't of Labor and Indus.</i> , 168 Wn. App. 14, 277 P.3d 685 (2012).....	10
<i>Clauson v. Dep't of Labor and Indus.</i> , 130 Wn.2d 580, 925 P.2d 624 (1996).....	12
<i>Grimes v. Lakeside Industries.</i> , 78 Wn. App. 554, 897 P.2d 431 (1995).....	10
<i>Hash v. Children's Orthopedic Hosp.</i> , 110 Wn.2d 912, 757 P.2d 507 (1988).....	9
<i>Hastings v. Dep't of Labor and Indus.</i> , 24 Wn.2d 1, 163 P.2d 142 (1945).....	11
<i>Hilding v. Dep't of Labor and Indus.</i> , 162 Wash. 168, 298 P. 321 (1931).....	11
<i>Hunter v. Dep't of Labor and Indus.</i> , 43 Wn.2d 696, 263 P.2d 586 (1953).....	18
<i>Kahn v. Salerno</i> 90 Wn. App. 110, 951 P.2d 321 (1998).....	12
<i>Kilpatrick v. Dep't of Labor and Indus.</i> , 125 Wn.2d 222, 883 P.2d 1370 (1994).....	16
<i>Mason v. Georgia-Pacific Corp.</i> , 166 Wn. App. 859, 271 P.3d 381 (2012).....	10, 15, 16
<i>Nelson v. Dep't of Labor and Indus.</i> , 9 Wn.2d 621, 115 P.2d 1014 (1941).....	11
<i>Omeitt v. Dep't of Labor and Indus.</i> , 21 Wn.2d 684, 152 P.2d 973 (1944).....	17
<i>Porter v. Dep't of Labor and Indus.</i> , 51 Wn.2d 634, 320 P.2d 1099 (1958).....	14

	<u>Pages</u>
<i>Romo v. Dep't of Labor and Indus.</i> , 92 Wn. App. 348, 962 P.2d 844 (1998).....	9, 10, 12
<i>White v. Kent Medical Center, Inc., P.S.</i> , 61 Wn. App. 163, 810 P.2d 4 (1991).....	14
<i>Wilber v. Dep't of Labor and Indus.</i> , 61 Wn.2d 439, 378 P.2d 684 (1963).....	11

B. Statutes, Regulations, and Court Rules

Wash. Rev. Code 51.04.010.....	11
Wash. Rev. Code 51.12.010.....	11
Wash. Rev. Code 51.32.050.....	1, 9
Wash. Rev. Code 51.32.067.....	1
Wash. Rev. Code 51.52.050(2)(a).....	9
Wash. Rev. Code 51.52.060.....	8
Wash. Rev. Code 51.52.090(8).....	17
Wash. Rev. Code 51.52.115.....	9, 10
Wash. Rev. Code 51.52.130.....	19
Wash. Rev. Code 51.52.140.....	10
Wash. Admin. Code 296-14-100(1)(b).....	15
Wash. Admin. Code 296-20-280.....	5
Civil Rule 56.....	9, 12

I. INTRODUCTION

Comes now the Appellant, John R. Gibbons (deceased), proceeding through his widow and beneficiary, Vivian Gibbons, Plaintiff below, by and through his attorneys of record, The Law Offices of David B. Vail, Jennifer M. Cross-Euteneier and Associates per Dorian D.N. Whitford, and hereby offers this brief in support of his appeal.

This case originates under RCW Title 51, the Industrial Insurance Act from an Administrative Law Review appeal from a April 1, 2013 Decision and Order of the Board of Industrial Insurance Appeals (“the Board”) which granted summary judgment for the Employer, the Boeing Company (“Boeing”). Ultimately, the Board found that there were no genuine issues of material fact that would prevent the granting of Boeing’s motion for summary judgment as the declarations, affidavits and exhibits showed that Mr. Gibbons died from a condition unrelated to his September 24, 1998 industrial injury and he died during a period when he was not permanently and totally disabled as a result of such industrial injury. The Board concluded that the Department correctly denied Mrs. Gibbons widow’s benefits under RCW 51.32.050 and RCW 51.32.067.

Mrs. Gibbons appealed that decision to Superior Court asserting that the Board had erred in granting summary judgment for Boeing when there remained genuine issues of material fact.

The Superior Court affirmed the Board's decision after considering briefing and oral argument. Judgment was entered on June 6, 2014. Following Boeing's motion to correct a clerical error and inconsistency, an amended judgment was entered on July 14, 2014.

As will be described further below, the law and policy of the Act and evidence submitted to the Board leads to the conclusion that there remains genuine issues of material fact which should have precluded summary judgment. The Board erred in granting summary judgment to Boeing and the Superior Court erred in upholding that determination.

II. ASSIGNMENTS OF ERROR

- A. The Superior Court erred in entering Finding of Fact 2 determining that the Board of Industrial Insurance Appeals' April 1, 2013 Decision granting Boeing's motion for summary judgment is correct and adopting the Board's findings as its own.
- B. The Superior Court, and the Board, erred in entering Finding of Fact 2.A. determining that the declarations, affidavits, and exhibits submitted by the parties and contained in the Certified Appeal Board record demonstrate there were no issues of material fact that would preclude granting a motion for summary judgment.

- C. The Superior Court, and the Board, erred in entering Finding of Fact 2.B. determining that the Claimant, John R. Gibbons, was injured on September 24, 1988 while in the course of his employment with The Boeing Company when he twisted his back while exiting a vehicle. That injury proximately caused low back and lower digestive tract conditions.
- D. The Superior Court, and the Board, erred in entering Finding of Fact 2.C. determining John R. Gibbons, voluntarily retired and removed himself from the labor force on September 1, 1993. He remained voluntarily retired through August 1, 2005.
- E. The Superior Court, and the Board, erred in entering Finding of Fact 2.D. determining on August 1, 2005, John R. Gibbons died of lung cancer, a condition unrelated to his September 24, 1988 industrial injury.
- F. The Superior Court, and the Board, erred in entering Finding of Fact 2.F. determining on August 1, 2005, John R. Gibbons was permanently partially disabled, but was not permanently totally disabled, as a result of his September 24, 1988 industrial injury.
- G. The Superior Court, and the Board, erred in holding that as August 1, 2005, John Gibbons was a voluntarily retired worker as that term is defined by RCW 51.32.060(6) and WAC 296-14-100 in Conclusion of Law 2.
- H. The Superior Court, and the Board, erred in holding that Vivian Gibbons is not entitled to death benefits within the meaning of RCW 51.32.050 in Conclusion of Law 3.
- I. The Superior Court, and the Board, erred in holding that Vivian Gibbons is not entitled to death benefits within the meaning of RCW 51.32.067 in Conclusion of Law 4.

- J. The Superior Court erred in holding that the Decision and Order of the Board of Industrial Insurance Appeals dated April 1, 2013 that affirmed the Department Order dated May 22, 2012 is correct and is affirmed in Conclusion of Law 5.

III. ISSUES

Whether the Superior Court erred in upholding the Board's decision granting summary judgment in favor of Boeing when genuine issues of material fact exist.

Whether there is substantial evidence to support the Superior Court's Findings of Fact when there is no evidence to support several of its findings.

IV. STATEMENT OF THE CASE

In late September of 1988, John R. Gibbons suffered an industrial injury when he twisted his back getting out of a pickup truck while working as a carpenter for The Boeing Company ("Boeing"), a self-insured employer. CABR¹ at 117. Mr. Gibbons filed an industrial injury claim which was allowed on January 9, 1989 under claim number T-321420 by the Department of Labor and Industries ("Department"). CARB at 118. Benefits were provided and on October 12, 1993, Mr. Gibbons' claim was closed with a permanent partial disability award for

¹ The record created at the Board of Industrial Insurance Appeals is the certified appeal board record and will be cited to as CABR followed by the page number.

low back impairment of category 3 under WAC 296-20-280, which amounted to \$9,000. CABR at 119.

Mr. Gibbons' condition resulting from his industrial injury became aggravated and his claim was reopened for further treatment effective April 6, 1995. CABR at 121. Mr. Gibbons died on August 1, 2005. CABR at 122. On June 2, 2006, the Department again closed Mr. Gibbons' claim with no additional permanent partial impairments. CABR 125-26. Prior to this claim closure, there had been a determination that Mr. Gibbons had voluntarily retired, and was thus not entitled to wage replacement benefits. CABR 106-110; 184.

On July 26, 2006, Mrs. Gibbons, through counsel, appealed the June 2, 2006 closing order alleging that Mr. Gibbons was entitled to an increased permanent partial disability award. At that time, the parties agreed that the issues on appeal were limited to increased permanent partial impairment and allowance of certain conditions. CABR 187. On May 16, 2008, the Board issued a Decision and Order which reversed the June 2, 2006 Department order, and directed Boeing to pay Mr. Gibbon a permanent partial disability award for Category 6 permanent lumbosacral impairment. CABR 127-137. The Board did not make any findings or conclusions regarding any entitlement to widow's benefits. *Id.* Ultimately, after cross-appeals to Superior Court, the Department issued a

January 18, 2012 order awarding Mr. Gibbons multiple permanent partial disability awards, as described below. CABR 148-49. Mr. Gibbons was never placed on a pension for permanent total disability.

Vivian Gibbons is the widow and beneficiary of Mr. Gibbons. CABR 190, 192. Mrs. Gibbons applied for widow's benefits under Mr. Gibbons' claim with the Department on July 21, 2006. CABR 194. This was after the Department issued its closing order dated June 2, 2006. On June 26, 2008, the Department issued a ministerial order that carried out the instructions of the Board contained in the Board's May 16, 2008 Decision and Order (As of the Department's June 26, 2008 order, the Board's May 16, 2008 Decision and Order was still on appeal in King County Superior Court.); the Department's June 26, 2008 order also denied Mrs. Gibbons' application for widow's benefits. CABR 140-41.

On October 13, 2011, the Department issued an order that carried out the instructions of the Superior Court, reversing the June 26, 2008 Department order, closing the claim, and ordering the payment of permanent partial disability awards of category 3 for low back impairment and category 2 for lower digestive tract impairment; the October 13, 2011 Department order also denied Mrs. Gibbons' application for widow's benefits. CABR 196-97. That order was protested by Mrs. Gibbons. CABR 200.

Following Mrs. Gibbons' protest of the Department's October 13, 2011 order, the Department issued two orders: on January 13, 2012, the Department issued an order denying widow's benefits, CABR 146, and on January 18, 2012, the Department issued an order reversing the October 13, 2011 order and again carrying out the instructions of the Superior Court (i.e. reversing the June 26, 2008 Department order, closing the claim, and ordering payment of permanent partial disability awards of category 3 for the low back and category 2 for the lower digestive tract). CABR 148-49.

Mrs. Gibbons protested the Department's January 13, 2012 order, and on May 22, 2012, the Department issued an order affirming its January 13, 2012 order, CABR 150. Mrs. Gibbons appealed the Department's May 22, 2012 order, which affirmed the Department's denial of widow's benefits, to the Board, CABR 53. This appeal was granted, CABR at 298.

After the scheduling of the case, Boeing moved for summary judgment claiming that Mrs. Gibbons is precluded from obtaining a widow's pension because Mr. Gibbons had voluntarily retired, the Department denied her claim for widow's pension on June 26, 2008, and post-mortem litigation resulted in a judgment finding Mr. Gibbons

permanently partially disabled as of his death and all of these determinations were res judicata. CABR at 96-104.

Following briefing and argument, an Industrial Appeals Judge issued a proposed decision and order granting Boeing's motion for summary judgment holding that Mrs. Gibbons was not entitled to widow's benefits because Mr. Gibbons did not die during a period of permanent total disability and Mr. Gibbons died from a condition unrelated to his September 24, 1988 industrial injury. CABR at 40-9.

Mrs. Gibbons petitioned the Board to review the proposed decision and order and the Board ultimately upheld the summary judgment ruling in favor of Boeing, thereby affirming the Department's May 22, 2012 order that affirmed the Department's January 13, 2012 order that denied Mrs. Gibbon's application for widow's benefits. CABR 2-4. The Board's decision was appealed to the King County Superior Court.

Following briefing and argument, the Honorable Julia L. Garratt found that the Board's granting of Boeing's motion for summary judgment was proper and affirmed the Board's decision. Mrs. Gibbons has appealed this decision to the Washington State Court of Appeals, Division one.

V. STANDARD OF REVIEW

The initial step in seeking review of a decision of the Department is to appeal that decision to the Board. RCW 51.52.060. At the Board, the

appealing party, in this case Mrs. Gibbons, had the burden of presenting a prima facie case for the relief it seeks. RCW 51.52.050(2)(a).

However, when a motion for summary judgment is filed, the burden is on the party seeking summary judgment to establish its right to judgment as a matter of law, and the court must consider facts and reasonable inferences from the facts in favor of the nonmoving party. *Romo v. Dep't of Labor and Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). In this case, Boeing, the non-appealing party at the Board filed for summary judgment and had the burden of establishing its right to the judgment it sought. Summary judgment is appropriate when the facts are not in dispute and therefore, the issue is one of law. CR 56(c). If the moving party does not sustain its burden, summary judgment should not be granted. *Hush v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

When deciding an appeal from a decision of the Board, the Superior Court conducts a de novo review of the Board's decision but relies exclusively on the certified board record. RCW 51.52.115. The Board's findings and decision are prima facie correct and the party challenging the decision has the burden of proof. *Id.* The presumption of correctness is a limited one, meaning that the decision will be overturned if the trier of fact finds from a preponderance of the credible evidence that

the findings and decision of the Board are incorrect. *Cantu v. Dep't of Labor and Indus.*, 168 Wn. App. 14, 20-21, 277 P.3d 685 (2012) (internal citations omitted) *see also* RCW 51.52.115. Only if it finds the evidence to be equally balanced does the presumption require the findings to stand. *Id.*

Unlike other administrative decisions, under the Industrial Insurance Act, the Court of Appeals reviews appeals from the Superior Courts in the same fashion as other civil cases. RCW 51.52.140; *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 863, 271 P.3d 381 (2012).

In reviewing the decision from the Superior Court, the role of the Court of Appeals is to determine whether the trial court's findings, to which error is assigned, are supported by substantial evidence and whether conclusions of law flow therefrom. *Grimes v. Lakeside Industries*, 78 Wn. App. 554, 560, 897 P.2d 431 (1995). Questions of law are reviewed de novo. *See Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997) (Superior court's legal conclusions are reviewed de novo). A superior court's granting of summary judgment, or here the court's upholding the Board's granting of summary judgment, is reviewed de novo. *Romo v. Dep't of Labor and Indus.*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998).

Here, there is a legal question to be reviewed de novo. Namely, whether summary judgment was properly granted by the Board and affirmed by the Superior Court such that Boeing is entitled to judgment as a matter of law. There is also a question as to whether there is substantial evidence to support the Superior Court's findings of fact

VI. ARGUMENT

A. Introduction.

This case arises under the Industrial Insurance Act which was established to protect and provide benefits for injured workers. It has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and its beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Dep't of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Dep't of Labor and Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945); *Nelson v. Dep't of Labor and Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941); *Hilding v. Dep't of Labor and Indus.*, 162 Wash. 168, 298 P. 321 (1931).

Furthermore, RCW 51.04.010 declares that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault." Similarly, RCW 51.12.010 indicates that the Act "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.” Thus, any doubts that arise when interpreting or applying the Act must be resolved in favor of the worker. *Clauson v. Dep’t of Labor and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

B. There Remain Genuine Issues of Material Fact Precluding Summary Judgment.

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). The burden is on the party seeking summary judgment to establish its right to judgment as a matter of law, and the court *must* consider facts and reasonable inferences from the facts in favor of nonmoving party. *Romo v. Dep’t of Labor and Indus.*, 92 Wn. App. at 354 (emphasis added). Here, the nonmoving party is Mrs. Gibbons.

An order granting summary judgment will be affirmed if there are no genuine issues of material fact, i.e., if from all of the evidence reasonable persons could only reach one conclusion and the moving party is entitled to judgment as a matter of law. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998).

Here, a genuine issue of material fact exists, as it relates to Mrs. Gibbons application for widow's benefits, concerning Mr. Gibbons' death and his industrial injury. Summary judgment should not have been granted as Boeing did not meet its burden.

The Superior Court entered a finding of fact that Mr. Gibbons died from a condition unrelated to his industrial injury. That condition was lung cancer. However, there is absolutely no evidence establishing that this condition was unrelated to Mr. Gibbons' industrial injury. As the moving party, Boeing had the obligation to show that there was no question of fact as to Mr. Gibbons' death and its relationship to his industrial injury. Boeing did not meet this burden.

In its motion for summary judgment, Boeing stated "John Gibbons died on August 1, 2005. Exhibit F. His death was unrelated to the industrial injury." C'ABR at 98. The only evidence offered by Boeing to support this crucial assertion concerning Mr. Gibbons' death was a snippet of testimony, at Exhibit F, which was presented to the Board in the appeal of the June 2, 2006 closing order concerning Mr. Gibbons' estate's entitlement to benefits for Mr. Gibbons wherein Mrs. Gibbons testified that her husband died on August 1, 2005. C'ABR at 124. There was no evidence offered to support the medical determination that Mr. Gibbons' death was unrelated to the industrial injury.

The cause of Mr. Gibbons' death is a medical question upon which only a doctor is competent to testify. *Porter v. Dep't of Labor and Indus.*, 51 Wn.2d 634, 636, 320 P.2d 1099 (1958). Boeing having failed to establish through any evidence, much less medical evidence from a doctor, that the cause of Mr. Gibbons' death was unrelated to his industrial injury, the burden to rebut this evidence would not shift to Mrs. Gibbons. It was improper for summary judgment to be granted on Mrs. Gibbons' entitlement to widow's benefits because Mr. Gibbons' death was unrelated to his industrial injury. *See White v. Kent Medical Center, Inc., P.S.*, 61 Wn. App. 163, 170, 810 P.2d 4 (1991) (If the moving party does not meet its initial burden, summary judgment may not be entered, regardless of whether the opposing party responded.). There remains a question of fact on this issue.

Similarly, there remains a question of fact, as it relates to Mrs. Gibbons' entitlement to widow's benefits, concerning Mr. Gibbons' employability and the nature of his disability at the time of his death on August 1, 2005. While it is true that in 2011 the Superior Court determined what Mr. Gibbons', or his estate's, entitlement to benefits under his claim was as of the Department's closing order dated June 2, 2006, that determination is a separate and distinct determination from Mrs. Gibbons' entitlement to widow's benefits.

The fact that Mr. Gibbons was determined to have voluntarily retired and was not receiving a pension, i.e. permanent total disability benefits, does not render Mrs. Gibbons ineligible for widow's benefits. *See Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 866, 271 P.3d 381 (2012).

The *Mason* Court held that the fact that pension benefits are not available to a voluntarily retired worker does not result in the conclusion that death benefits, such as a widow's pension, are not available to the surviving spouse of a voluntarily retired worker. *Mason*, 166 Wn. App. at 864-67.

In reaching that holding the *Mason* Court observed that "a surviving spouse's lifetime pension is different in character from the worker's wage replacement benefits...[A] worker's benefit benefits the worker...[while] a survivor's benefit benefits the survivor." *Mason*, 166 Wn. App. at 866-67. In other words, widow's benefits are different in character from an injured worker's pension benefits while the worker is living. The Court points out that while a worker who has voluntarily retired can choose to return to work, a surviving spouse has no way to reverse the deceased spouse's voluntary retirement. *Id.*; *cf.* WAC 296-14-100(1)(b). Therefore, an injured worker's voluntary retirement from the

workforce is irrelevant to the issue of whether the injured worker's spouse is eligible for, or entitled to, a widow's pension.

In further examining the impact of an injured worker's voluntary retirement upon a surviving spouse's eligibility for widow's benefits, the *Mason* Court highlighted another difference between a widow's pension and an injured worker's pension benefits during life, namely, an injured worker cannot waive the surviving spouse's rights to benefits. *Mason*, 166 Wn. App. at 866-67; see also *Kilpatrick v. Dep't of Labor and Indus.*, 125 Wn.2d 222, 228, 883 P.2d 1370 (1994).

Given the differences in character of widow's benefits and an injured worker's wage replacement benefits during life, such as pension benefits, the Court of Appeals held that the fact that pension benefits are not available to a voluntarily retired worker does not result in the conclusion that death benefits, such as a widow's pension, are not available to the surviving spouse of a voluntarily retired worker. *Mason*, 166 Wn. App. at 867. Hence, in Mrs. Gibbons' case, even though Mr. Gibbons could not receive pension benefits as a result of his voluntary retirement, it does not follow that Mrs. Gibbons is not entitled to widow's benefits. She remains eligible for widow's benefits, and as will be explained below, her entitlement to such benefits remains a material issue of fact.

In the litigation concerning the June 2, 2006 Department order, there was no reason for evidence to be presented on Mr. Gibbons', or his estate's, entitlement to permanent total disability benefits because he had previously been determined to be a voluntarily retired worker. CABR at 106-110: 184. There would be no benefits to be realized for Mr. Gibbons, or his estate, as he would not have been entitled to receive those benefits as a voluntarily retired worker. RCW 51.32.090(8). Thus, there remains an outstanding issue of material fact concerning Mr. Gibbons' employability subsequent to the determination of his being a voluntarily retired worker in 2001, as it relates to Mrs. Gibbons application for a widow's pension.

C. There Is Not Substantial Evidence in The Record to Support Several of The Superior Court's Findings of Fact.

Substantial evidence, as opposed to a mere scintilla, is evidence of such a character and substance as to convince an unprejudiced, thinking mind of the truth of that to which the evidence is directed. *Omeitt v. Dep't of Labor and Indus.*, 21 Wn.2d 684, 686, 152 P.2d 973 (1944).

Here, there is not substantial evidence to support several of the Superior Court's findings of fact. For finding of fact 2A, the Superior Court found that the CABR demonstrated that there was no issues of material fact to preclude summary judgment, but as the discussion in the

previous sections indicate, the record establishes questions of fact that remain which should have precluded summary judgment.

For finding of fact 2.C, there is no evidence upon which the Superior Court could find that Mr. Gibbons remained voluntarily retired through August 1, 2005. The only evidence concerning Mr. Gibbons' voluntary retirement consists of an order issued on June 8, 1999 where Mr. Gibbons was determined to have voluntarily retired which appears to have been based upon a Board determination in 1999 which ultimately was affirmed by the Court of Appeals on July 30, 2001. CABR at 106-110, 184. There is no other evidence concerning Mr. Gibbons' status subsequent to that date. However, there is testimony from Mrs. Gibbons discussing the difficulties Mr. Gibbons had from a physical perspective in the months prior to his death. CABR at 271-78.

For finding of fact 2.D., there is no evidence upon which the Court could base its decision that Mr. Gibbons' death was unrelated to his industrial injury. As noted above, such a determination requires a medical doctor's opinion, and there is no such opinion in the record to support this finding. *See supra*.

There is not sufficient evidence in the record as presented which would convince an unprejudiced and reasonable person of the truth of these findings of fact. Because there is not substantial evidence to support

these findings of fact, the Superior Court's decision cannot be affirmed.
The decision should be reversed.

VII. CONCLUSION

Mrs. Gibbons respectfully requests that the Court reverse the Superior Court's affirmance of the Board's Decision and Order, which granted summary judgment in favor of Boeing because there are outstanding issues of material fact which need to be resolved and because the record as presented does not include substantial evidence to support several of the Superior Court's, and the Board's, findings of fact.

The Appellant further requests attorney's fees pursuant to RCW 51.52.130.

Dated this 17th day of December, 2014.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and
ASSOCIATES

By: 

DORIAN D.N. WHITFORD
WSBA No. 43351
Attorney for Appellant

CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 17th day of December, 2014, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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

Steve Vinyard
Assistant Attorney General
P.O. Box 40121
Olympia, WA 98504-0121

DATED this 17th day of December, 2014.


LYNN M. VENEGAS, Secretary