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STATE OF WASHINGTON
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No. 72335-9-1

SUPREME COURT OF THE STATE OF WASHINGTON

JOHN R. GIBBONS, DEC'D,

Appellant,

v.

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

Respondents,

PETITION FOR REVIEW

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SEP 22 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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I. IDENTITY OF THE PETITIONER

Comes now the petitioner, Vivian Gibbons, the surviving spouse of John R. Gibbons (deceased), Appellant and Plaintiff below, by and through her attorneys of record, The Law Offices of David B. Vail, Jennifer Cross-Euteneier and Associates per Dorian D.N. Whitford, and hereby asks this court to accept review of the Court of Appeals' decision terminating review.

II. DECISION PRESENTED FOR REVIEW

Mrs. Gibbons seeks review of Opinion No: 72335-9-I. The Court of Appeals, Division I, filed its opinion on August 17, 2015.

III. ISSUE

Whether the Court of Appeals erred by affirming the Superior Court's decision which affirmed the Board of Industrial Insurance Appeals' granting of The Boeing Company's motion for summary judgment finding that Mrs. Gibbons is not entitled to death benefits under RCW 51.32.067 and RCW 51.32.050 when genuine issues of material fact remain concerning Mr. Gibbons' permanent disability as it relates to Mrs. Gibbons' independent claim for death benefits and the cause of his death?

IV. STATEMENT OF THE CASE

This case originates under RCW Title 51, the Industrial Insurance Act ("the 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”). The Board found that there were no genuine issues of material fact that would prevent the granting of Boeing’s motion as 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.

In late September of 1988, Mr. Gibbons suffered an industrial injury when he twisted his back getting out of a pickup truck while working as a carpenter for 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 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

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.

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, such as permanent total disability 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. Gibbons 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. During the litigation concerning the closing order of Mr. Gibbons' claim, no determination had been made by the Department on Mrs. Gibbons' independent claim for widow's benefits.

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; the Department's June 26, 2008 order also denied Mrs. Gibbons' application for widow's benefits. CABR 140-41. 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.

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 appealed this decision to the Washington State Court of Appeals, Division one. The Superior Court's decision was affirmed. Appendix A1.

Mrs. Gibbons' now petitions the Supreme Court for review and requests, that the Court of Appeals' opinion be reversed, and this matter be remanded to the Board for her case regarding widow's benefits to be heard in order to adhere to the underlying purpose and policy of the Act of reducing the economic harm to injured workers and their families arising

from injuries and/or death occurring in the course of employment in the State of Washington.

The Court of Appeals' opinion, which affirmed the Superior Court's decision, undercuts the purpose and policy of the Act by holding that Mrs. Gibbons is not entitled to death benefits, or widow's benefits, her independent right, because there was a final determination concerning Mr. Gibbons' claim which found him only permanently partially disabled. This is also inconsistent with prior decisions of this Court. This causes Mrs. Gibbons, and will cause other similarly situated widows of injured workers in the State of Washington, to suffer an unjust economic loss. The Court of Appeals' holding in this matter is inconsistent with the Act's stated policy and prior Supreme Court opinions. This is a matter of substantial public interest that affects many spouses of deceased injured workers in the State of Washington.

V. ARGUMENT

The Supreme Court should accept review, pursuant to RAP 13.4(b)(1) and RAP 13.4(b)(4). This case involves an opinion of the Court of Appeals dealing with the legal issue of whether a surviving spouse is entitled to present her case, concerning her independent right and claim to death, or widow's benefits, when the deceased injured worker's claim has reached a final determination wherein the injured worker was determined

to only be a permanently partially disabled worker. This case was decided in contradiction to rulings of this Court. Additionally, the Court of Appeals' opinion addresses an issue that has substantial public interest as it relates to surviving spouses of deceased injured workers in the State of Washington.

A. Introduction: The Policy of the Industrial Insurance Act.

The Industrial Insurance Act ("Act") was established to protect and provide benefits for injured workers and their families. 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. Department of Labor and Industries*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963).

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, or the beneficiary. *See Clauson v. Department of Labor and Industries*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

From these statements of policy and interpretations of the Act it is clear that the overarching purpose of the Act is to minimize suffering and economic loss by injured workers and their families and that when the Act is interpreted, or when questions arise as to how the Act should be applied in a given situation, the Act should be construed liberally to reach a favorable outcome for the injured worker or the beneficiary. *See e.g. Wilber*, 61 Wn.2d at 446.

For all injured workers and beneficiaries, these guiding principles are critical to interpretation of statutes in cases such as this one. In order to effectuate the purposes of the Act and reduce the economic harm suffered by Mrs. Gibbons, and similarly situated survivors of deceased injured workers, the survivors' claims should not be bound by final determinations concerning the injured worker's distinct, independent claim.

B. Death Benefits Under the Industrial Insurance Act.

Under the Act, a surviving spouse has a separate and independent right to death benefits. *McFarland v. Department of Labor and Industries*, 188 Wash. 357, 62 P.2d 714 (1936). These death benefits are a separate character than an injured worker's wage replacement benefits. *Mason v. Georgia-Pacific Corp.*, 166 Wn. App. 859, 271 P.3d 381 (2012).

Under RCW 51.32.067, a surviving spouse is entitled to death benefits if the injured worker dies during a period of total disability. Under

RCW 51.32.050, a surviving spouse is entitled to death benefits if the death is a result an industrial injury.

C. Summary Judgment Standard

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. *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

D. The Court of Appeals Incorrectly Determined that Mrs. Gibbons' Independent Claim for Death Benefits was Properly Dismissed on Summary Judgment Concerning RCW 51.32.067.

The Court of Appeals held that because Mr. Gibbons was only determined to be partially disabled at the time of his death, and this determination was not appealed, Mrs. Gibbons was bound by this determination and could not challenge that finding in her own independent claim for death benefits. A1 pg. 6-7. However, this determination was only as it related to Mr. Gibbons' claim for benefits, not Mrs. Gibbons' claim for benefits, which was not at issue in the prior determination.

This is in contradiction to this Court's rulings in the *McFarland* case. There, the injured worker had been determined to be a permanently partially disabled worker with a final judgment by the Superior Court. *Id.*, 188 Wash. at 359. Thereafter, the injured worker died and his widow made a claim for widow's benefits. *Id.* at 360. The widow's claim was denied by the Department and the Joint Board. *Id.* Her claim was allowed on appeal at Superior Court. *Id.*

On review, the Supreme Court held that if an injured worker has been determined to be a permanently partially disabled worker by the Department or a Court and thereafter rendered permanently and totally disabled as a result of the injury as shown by the widow, a widow's pension should be allowed. *Id.* at 367. In arriving at this conclusion, the court noted that in view of the declared purpose of the Industrial Insurance Act, a claim for widow's benefits, shall, if reasonably possible, be favorably considered. *Id.* at 365. This is a substantial public interest as expressed by the Legislature.

Like the *McFarland* case, Mrs. Gibbons should be allowed to establish her own independent entitlement to widow's benefits even though Mr. Gibbons' entitlement has been declared as only permanently partially disabled. Mrs. Gibbons should not have been precluded from establishing her husband's rights to permanent partial disability on the appeal to the

Department's June 2, 2006 closing order on his claim for benefits and subsequently establishing her own right to death benefits because these are two independent rights and two independent benefits.

This is in line with this Court's decision in the case *Wintermute v. Department of Labor & Industries*, 183 Wash. 169, 48 P.2d 627 (1935) in which the widow was awarded increased benefits due her deceased husband, the injured worker, and was awarded widow's benefits due to herself, the surviving spouse. Mrs. Gibbons' prior litigation concerning her husbands' claim for entitlement to an increased permanent partial disability award does not preclude her from litigating her own entitlement to the denial of her claim for death benefits.

In fact, Mrs. Gibbons could not have sought death benefits in the prior appeal, which resulted in the 2011 Superior Court Judgment, because the Department had yet to take any action on her application for such benefits. Mrs. Gibbons must be allowed to establish her own entitlement to death benefits. It is not *res judicata* that she is not entitled to these benefits because of the prior determination that Mr. Gibbons was only partially disabled at the time of his death.

Simply put, because there was a prior determination concerning Mr. Gibbons' claim, this does not foreclose Mrs. Gibbons' independent claim. There remains a question of fact concerning Mr. Gibbons' employability as

it relates to Mrs. Gibbons' claim for death benefits. Summary judgment was improperly granted.

E. The Court of Appeals Incorrectly Determined that Mrs. Gibbons' Independent Claim for Death Benefits was Properly Dismissed on Summary Judgment Concerning RCW 51.32.050.

The Court of Appeals also erroneously found that summary judgment dismissal was proper concerning Mrs. Gibbons' entitlement to death benefits under RCW 51.32.050.

Under this statute the cause of Mr. Gibbons' death is crucial to the analysis. This is a medical question upon which only a doctor is competent to testify. *Porter v. Department of Labor and Industries*, 51 Wn.2d 634, 636, 320 P.2d 1099 (1958).

As the moving party for summary judgment, 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, Boeing stated "John Gibbons died on August 1, 2005. Exhibit F. His death was unrelated to the industrial injury." CABR 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. CABR at 124. There was no evidence offered to support the medical determination that Mr. Gibbons' death was unrelated to the industrial injury.

Thus, Boeing 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. While the death certificate was submitted in response to Boeing's motion by the Appellant below, 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.

F. This Case Involves a Substantial Public Interest in Protecting All Survivors of Deceased Injured Workers From Suffering Unnecessary and Unjust Economic Harm.

This case involves a substantial public interest that should be decided by the Supreme Court. There is a substantial public interest in protecting the families of workers injured in the State of Washington as well as protecting their economic livelihood and reducing to a minimum the

economic harm that results from industrial injuries. This Court noted in *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 822, 16 P.3d 583 (2001) that “Title 51’s overarching objective is ‘reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.’”

This case serves as an example of how surviving spouses, or dependents, of injured workers can suffer unnecessary and unjust economic harm as a result of an industrial injury. A surviving spouse should not be precluded from establishing its own claim and rights to benefits because of a final determination concerning the injured worker’s claim and rights to benefits. Death benefits are for the benefit of the survivor, not the injured worker. The injured worker, if it had voluntarily retired, could voluntarily choose to return to work, but the survivor cannot reverse an injured worker’s decision to voluntarily retire. *See Mason v. Georgia-Pacific Corp.*, 166 Wn. App. at 866-67.

Survivors of workers injured in the State of Washington should not be penalized beyond their control for the final resolution of an injured worker’s own claim for benefits. A surviving spouse should be able to pursue its own independent right to benefits despite the fact that there is a final determination concerning the deceased injured worker’s right to benefits. This is consistent with the primary purpose of the Act and other

decisions of this Court. Protecting injured workers' survivors economically is a substantial public interest. For these reasons, this Petition should be granted and the Court of Appeals' opinion should be reversed.

VI. CONCLUSION

Mrs. Gibbons respectfully requests that this Petition be accepted and the Court of Appeals' opinion in the case be reversed with this matter being remanded back to the Board for the hearing of her claim for death benefits as summary judgment was improperly granted and affirmed as outstanding questions of material fact need to be resolved. Lastly, Mrs. Gibbons also respectfully requests fees and costs to be awarded pursuant to RCW 51.52.130.

Dated this 16th day of September, 2015.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and
ASSOCIATES

By: _____



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WSBA No. 43351
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APPENDIX A1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JOHN R. GIBBONS, DEC'D,
Appellant,
v.
THE BOEING COMPANY, AND
DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,
Respondents.

No. 72335-9-1
DIVISION ONE
UNPUBLISHED OPINION
FILED: August 17, 2015

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COURT OF APPEALS
STATE OF WASHINGTON

SCHINDLER, J. — Under the Washington Industrial Insurance Act, Title 51 RCW, a surviving spouse of an injured worker is entitled to death benefits under RCW 51.32.067 if the worker is permanently and totally disabled at the time of death, or under RCW 51.32.050 if the worker dies as a result of an industrial injury. Vivian Gibbons, the surviving spouse of John R. Gibbons, appeals summary judgment dismissal of her claim for death benefits under RCW 51.32.067 and RCW 51.32.050. We affirm.

John R. Gibbons worked as a carpenter for The Boeing Company. On September 24, 1988, John¹ twisted his back at work. John filed a claim with the Washington State Department of Labor and Industries (Department) for time-loss

¹ We refer to John Gibbons and Vivian Gibbons by their first names for clarity. No disrespect is intended.

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compensation benefits. In 1993, John returned to work at Boeing doing computer data entry.

On September 1, 1993, John retired from Boeing. One month later, the Department issued an order awarding John payment for a "Category 3" low back impairment permanent partial disability and closed his time-loss compensation claim. The Department affirmed the closing order. John did not appeal.

At John's request, the Department reopened the claim in 1995 for authorized medical treatment. John also sought additional time-loss compensation. The Industrial Appeals Judge (IAJ) found that John had voluntarily retired and was therefore not entitled to time-loss compensation benefits under former RCW 51.32.090(8) (1993). The Board of Industrial Insurance Appeals (Board) affirmed. John appealed the order denying time-loss compensation benefits to superior court. This court affirmed the Board and held that John was ineligible for time-loss compensation because he was voluntarily retired, Gibbons v. Boeing Co., 107 Wn. App. 1029 (2001).

John's claim remained open for medical treatment until he died of lung cancer on August 1, 2005. On June 2, 2006, the Department issued an order closing John's claim and awarding permanent partial disability for "category 3" low back impairment in the amount of \$9,000.

John's spouse Vivian Gibbons appealed the June 2 closing order and filed a claim for spousal death benefits. After a scheduling conference, the Board identified the sole issue as, "Whether for conditions proximately caused by the September 24, 1988 industrial injury, the claimant (now deceased) is entitled to an increased permanent partial disability award." At the July 2007 administrative hearing, Vivian's attorney

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agreed that the issue was whether John was "entitled to an increased permanent partial disability award." Vivian presented medical evidence that in addition to low back impairment, the industrial injury caused bowel and erectile dysfunction.

The Board reversed the closing order and awarded an additional permanent partial disability payment. The Board concluded the weight of the evidence demonstrated that the permanent partial disability on June 2, the date the Department issued the second order of closure, "was best represented by Category 6, WAC 296-20-280, and that the June 2, 2006 order must be reversed to provide the correct category of impairment." In June 2008, Vivian and Boeing both filed an appeal of the decision.

At the conclusion of a jury trial in March 2011, the jury found that as of June 2, 2006, John had a "Category 3" permanent partial disability of the low back and a "Category 2" permanent partial disability of the lower digestive tract. Following entry of the judgment on the jury verdict, the Department issued an order directing Boeing to pay a "category 3" permanent partial disability award for the low back impairment and a "category 2" permanent partial disability award for the lower digestive tract impairment.

On January 13, 2012, the Department issued an order denying Vivian's claim for death benefits. Vivian filed a request for reconsideration of the order denying her claim for death benefits. The Department affirmed the order. Vivian appealed the decision to the Board.

Boeing filed a motion for summary judgment arguing Vivian was not entitled to death benefits under RCW 51.32.067 because John voluntarily retired and was not permanently and totally disabled at the time of his death. In opposition, Vivian argued

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there were issues of material fact as to whether she was entitled to death benefits.

Vivian submitted a number of documents including John's death certificate.

The IAJ issued a proposed decision and order affirming the decision of the Department to deny death benefits. The IAJ concluded Vivian was not entitled to death benefits under either RCW 51.32.067 or RCW 51.32.050. On April 1, 2013, the Board granted Vivian's petition for review "solely to correct a typographical error," and affirmed the proposed decision and order.

Vivian filed an appeal of the Board's final order. The superior court adopted the Board's findings and affirmed the decision granting Boeing's motion for summary judgment. The amended findings of fact state, in pertinent part:

- B. 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.
- C. John R. Gibbons voluntarily retired and removed himself from the labor force on September 1, 1993. He remained voluntarily retired through August 1, 2005.
- D. On August 1, 2005, John R. Gibbons died of lung cancer, a condition unrelated to his September 24, 1988 industrial injury.
- E. Vivian Gibbons is John R. Gibbons' surviving spouse.
- F. 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.

Vivian appeals. Vivian contends the court erred in affirming summary judgment dismissal of her claim for death benefits. Vivian asserts there are genuine issues of material fact as to whether she is entitled to death benefits under RCW 51.32.067 or RCW 51.32.050.

Standard of Review

In an appeal from a decision of the Board, the superior court acts in an appellate capacity, reviewing the decision de novo. Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 5, 977 P.2d 570 (1999). The Board decision is prima facie correct, and the burden of proof is on the party attacking the decision. RCW 51.52.115;² Ruse, 138 Wn.2d at 5. RCW 51.52.140 governs our review of the superior court decision. RCW 51.52.140 states that an “[a]ppeal shall lie from the judgment of the superior court as in other civil cases.”

We review summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. Pearson v. Dep't of Labor & Indus., 164 Wn. App. 426, 431, 262 P.3d 837 (2011).³ Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. CR 56(c). If reasonable minds could reach only one conclusion, summary judgment is appropriate. Hansen v. Friend, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). “A party may not rely on mere allegations, denials, opinions, or conclusory statements, but, rather must set forth specifics indicating material facts for trial.” Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co., 122 Wn. App. 736, 744, 87

² RCW 51.52.115 states, in pertinent part:

The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board in the superior court as provided in RCW 51.52.110 In all court proceedings under or pursuant to this title the findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same. If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed.

³ Because we review summary judgment de novo, the superior court's findings of fact are superfluous and need not be considered. Hubbard v. Spokane County, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002). Accordingly, we do not address Vivian's argument that the superior court's findings of fact are not supported by substantial evidence.

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P.3d 774 (2004) (citing CR 56(e); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359, 753 P.2d 517 (1988)).

Death Benefits under the Industrial Insurance Act

A surviving spouse has a separate right to death benefits under Washington's Industrial Insurance Act, Title 51 RCW. A surviving spouse of an injured worker eligible for permanent total disability is entitled to death benefits under RCW 51.32.067 or, if the death is the result of an industrial injury, RCW 51.32.050.

RCW 51.32.067

Under RCW 51.32.067, a surviving spouse may receive death benefits if the injured worker "dies during a period of permanent total disability from a cause unrelated to the injury." RCW 51.32.067(1).

Vivian argues there are genuine issues of material fact as to whether John was permanently and totally disabled at the time of his death. However, there is no dispute that the jury found John permanently partially disabled as of June 2, 2006. There is also no dispute Vivian did not appeal the 2011 superior court judgment on the jury verdict finding that John had a "permanent partial disability." The finding of partial disability is res judicata as to the extent of the injury as of June 2, 2006. See Dinnis v. Dep't of Labor & Indus., 67 Wn.2d 654, 657, 409 P.2d 477 (1965) (fact of permanent partial disability determined in prior proceeding is res judicata as to worker's condition on that date); Weyerhaeuser Co. v. Farr, 70 Wn. App. 759, 766, 855 P.2d 711 (1993) (same); see also Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 538, 886 P.2d 189 (1994) ("[F]ailure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim."). Vivian is

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bound by the law of the case and cannot challenge that finding after failing to file a timely appeal. Because John was only partially disabled and not permanently totally disabled at the time of his death, the court did not err in concluding Vivian is not eligible for benefits under RCW 51.32.067 and affirming summary judgment dismissal of her claim for benefits on that ground.

RCW 51.32.050

Under RCW 51.32.050, the surviving spouse is eligible for death benefits “[w]here death results from the [industrial] injury.” RCW 51.32.050(2). A surviving spouse’s death benefits under RCW 51.32.050 have “a separate character” from a worker’s wage replacement benefits. Mason v. Ga.-Pac. Corp., 166 Wn. App. 859, 866-67, 271 P.3d 381 (2012) (citing Kilpatrick v. Dep’t of Labor & Indust., 125 Wn.2d 222, 228, 883 P.2d 1370 (1994) (noting a “survivor’s claim is independent from the worker’s claim to the extent the worker cannot waive the survivor’s rights to benefits [under RCW 51.32.050].”)). Consequently, a spouse may file a separate claim for death benefits under RCW 51.32.050 even if the worker’s claim for benefits has been closed. Dep’t of Labor & Indust. v. Shirley, 171 Wn. App. 870, 883-84, 288 P.3d 390 (2012).

There is no dispute that John died of lung cancer in 2005. The death certificate states the cause of death as “metastatic nonsmall cell lung cancer.” The certifying physician notes that “tobacco use” contributed to John’s death. The certifying physician does not list any “significant conditions contributing to death,” and there was no evidence the 1988 twisting low-back injury caused the lung cancer.

Mason is inapposite. In Mason, it was undisputed that the worker died as a result of a lung condition related to chemical exposure during his employment. Mason,

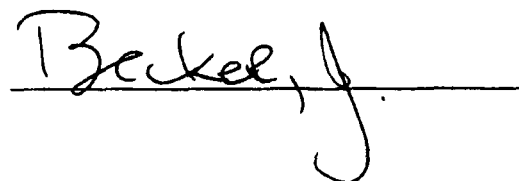
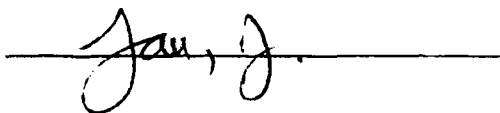
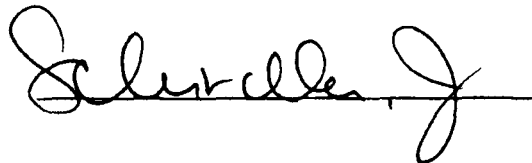
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166 Wn. App. at 862. The Department found that an occupationally related condition caused the worker's death and awarded the surviving spouse death benefits under former RCW 51.32.050 (1986). Mason, 166 Wn. App. at 862. The employer appealed the benefit amount arguing the surviving spouse was entitled to only the statutory minimum survivor pension rate because the worker voluntarily retired before manifestation of his lung condition. Mason, 166 Wn. App. at 862. The court concluded that under former RCW 51.32.050 and the statute defining occupational disease, RCW 51.32.180, the surviving spouse's death benefits should be based on the worker's wages at the time of his retirement. Mason, 166 Wn. App. at 870-71.

Here, unlike in Mason, there is no evidence that John died as a result of an industrial injury. The superior court did not err in concluding that Vivian is not eligible for death benefits under RCW 51.32.050 and affirming summary judgment dismissal on that ground.

We affirm the superior court decision affirming the Board's decision on summary judgment to deny Vivian's claim for death benefits under RCW 51.32.067 and RCW 51.32.050.

WE CONCUR:



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 16th day of September, 2015, the document to which this certificate is attached, Petition For Review, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

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DATED this 15th day of September, 2015.


LYNN M. VENEGAS, Secretary

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