

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 41646-8-II

COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON

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RICHARD ANDERSON (DEC'D),

Appellant,

vs.

WEYERHAEUSER CO.. AND  
DEPARTMENT OF LABOR AND INDUSTRIES,  
a Washington State Agency.

Respondents.

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BRIEF OF APPELLANT ANDERSON

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## I. ASSIGNMENTS OF ERROR

### A. Assignments

1. Finding of Fact number 1.3 in so far as it states that an application for benefits was filed more than one year after the deceased worker's death. 1
2. Conclusion of Law number 2.1 in so far as it states that the Court has jurisdiction over the parties and the subject matter of this appeal, and the authority to address the issues raised before the court, including whether the beneficiaries' claim from time loss benefits was timely.
3. Conclusion of Law number 2.2 in so far as it states that RCW 51.32.040(2)(c) not RCW 51.28.050 contains the applicable deadline for beneficiaries of a deceased worker to seek payment of time loss compensation allegedly due to him at the time of his death.
4. Conclusion of Law number 2.3 in so far as it states that the application by the beneficiaries for time loss compensation allegedly due to Richard Anderson at the time of his death was untimely under RCW 51.32.040(2)(c) because the application was not submitted within one year of the date of Mr. Anderson's death.
5. Conclusion of Law number 2.5 in so far as it states that the appeal for the beneficiaries should be dismissed because there was no timely application for benefits filed by the beneficiaries.

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1. Although designated a "Finding of Fact" the portion of Finding of Fact Number 1.3 to which Mr. Anderson's heirs assigns error is actually a conclusion of law. The court will treat a conclusion of law as a legal conclusion, even if it is labeled a finding of fact. *McClendon v. Callahan*, 46 Wn. 2d 733, 740-41, 284 P.2d 323 (1955). Assigning error to the misdesignated "Finding of Fact" Number 4 therefore does not raise a question of material fact, nor does it alter the *de novo* standard of review that the court will apply to the legal questions in this case.

6. Conclusion of Law number 2.6 in so far as it states that the dismissal is appropriate because the statute of limitations is jurisdictional and can be raised for the first time on appeal.
7. Conclusion of Law number 2.7 in so far as it states that the Department of Labor and Industries is statutorily entitled to appear and participate in these proceedings, and is not dependent upon participation below.
8. Conclusion of Law number 2.8 in so far as it states that the Board's June 1, 2009 order that adopted the April 8, 2009 Proposed Decision and Order is correct and should be affirmed.

(1) Assignments of Error

1. The trial court erred in entering Conclusion of Law Number 2.1.2
2. The trial court erred in entering Conclusion of Law Number 2.2.
3. The trial court erred in entering Conclusion of Law Number 2.3.
4. The trial court erred in entering Conclusion of Law Number 2.4.
5. The trial court erred in entering Conclusion of Law Number 2.5.
6. The trial court erred in entering Conclusion of Law Number 2.6.
7. The trial court erred in entering Conclusion of Law Number 2.7.

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<sup>2</sup> The trial court's Judgment and Order contains separate paragraphs with what amount to conclusions of law. In order to comply with RAP 10.4(a), appellant Anderson has assigned error to each.

8. The trial court erred in entering Conclusion of Law Number 2.8.
9. The trial court erred in entering the Judgment and Order of December 10, 2010 affirming the Board of Industrial Appeals Decision and Order.

## **II. APPELLANT'S STATEMENT OF THE ISSUES**

1. Whether the Court and the Board below committed error by expanding its jurisdiction when it dismissed the beneficiaries appeal based upon a matter not first addressed by the Department of Labor and Industries?

2. Whether the Court below committed error when determining that RCW 51.32.040(2)(c) not RCW 51.28.050 contains the applicable deadline for beneficiaries of a deceased worker to seek payment of time loss compensation allegedly due to him at the time of his death.

3. Whether the Court below committed error when it applied RCW 51.32.040(2)(c) to affirm the Board of Industrial Insurance Appeals decision, contrary to the holding in *Ramsay v. Department of Labor and Industries*?

## **III. APPELLANT'S STATEMENT OF THE CASE**

On April 19, 1993 the Claimant, Richard Anderson, suffered an injury to his right shoulder, neck, back, left leg and hips while in the course of his employment at the Weyerhaeuser Company. Certified Appeal Board Record (hereinafter "CABR"), at 139, *see also* Exhibit 1. His claim was allowed on September 13, 1993. (CABR at 139, *see also* Exhibit 2).

Due to his injuries, Mr. Anderson was determined to be eligible for vocational services on June 2, 1995. (CABR at 139, *see also* Exhibit 3). However, on February 1, 1996 the Department of Labor and Industries (hereinafter “Department”) issued a subsequent determination which found Mr. Anderson ineligible for vocational serviced due to the workers own actions. (CABR at 140, *see also* Exhibit 4).

On September 20, 1999 the Board of Industrial Insurance Appeals (hereinafter “Board”) issued a Decision and Order which affirmed the February 1, 1996 determination. (CABR at 140, *see also* Exhibit 5). On March 11, 2003 the Court of Appeals issued a decision which determined that the Department could terminate Mr. Anderson’s vocational benefits only under RCW 51.32.110, and since the Department did not terminate benefits pursuant to RCW 51.32.110, the Court reversed and remanded Mr. Anderson’s case back to the Department for further proceedings consistent with the opinion. (CABR at 140, *see also* Exhibit 6).

On March 10, 2004 the injured worker, Richard Anderson, died due to dilated cardiomyopathy, a medical condition unrelated to his industrial injury. (CABR at 33). At the time of Richard Anderson’s death he had two minor dependents. (CABR at 35).

On March 12, 2004 an Order Appointing Special Administrator as well as Letters of Administration was issued to Ms. Laurie Anderson which appointed her as Special Administrator of the Estate of Richard Anderson. (CABR at 33).

At the time of his death, Richard Anderson's labor and industries case was pending an employer and Department appeal to the Washington State Supreme Court from the decision of the Court of Appeals in *Anderson v. Weyerhaeuser*, 116 Wn. App. 149 decided on March 11, 2003. (CABR at 34).

On May 20, 2004 the Supreme Court following oral argument on the merits issued a decision terminating review of the employer's and the Department appeal finding the appeal to be moot due to the death of Richard Anderson and thereby let stand the decision of the Court of Appeals issued on March 11, 2003. *Id.* On July 13, 2004 the Supreme Court issued a supplemental decision which denied the employers and the Department motion for reconsideration and reaffirmed the March 11, 2003 the Court of Appeals decision. *Id.*

On June 9, 2005 based upon the Court of Appeals' decision the Thurston County Superior Court signed a Judgment and Order which ordered that the matter be remanded back to the Department to take action consistent with the Court of Appeals decision. *Id., see also*, Exhibit 7.

On July 8, 2005 Laurie Anderson, the Special Administrator of the Estate of Richard Anderson, by and through her attorney of record, sent a letter requesting that the Department issue an order instructing Weyerhaeuser to pay time loss benefits from October 27, 1993 through March 9, 2004 on behalf of his dependent children. (CABR at 34-35).

On August 12, 2005 the Department issued an Order which suspended further action and compensation on the claim retroactively to 8-26-95 because the worker refused or hindered an evaluation or examination for the purpose of vocational rehabilitation. (CABR at 131, *see also*, Exhibit 9). The August 12, 2005 order was protested by the Claimant citing non-compliance with RCW 51.32.110 and *In re McCauley*. (CABR at 142). On November 8, 2005 the Department issued an Order affirming the August 12, 2005 Order. *Id.*

On December 9, 2005 the claimant's beneficiaries by and through their attorney filed an appeal of the November 8, 2005 order to the Board. (CABR at 123).

On June 9, 2008 the Industrial Appeal Judge (hereinafter IAJ) issued a Proposed Decision and Order. (CABR at 86-93). The following were the pertinent findings of material fact and conclusions of law as found by the IAJ in 2008:

Finding of Facts (CABR at 92)

7. The Department did not follow the requirements of RCW 51.32.110 and WAC 296-14-410 when it issued its August 12, 2005 order because it did not request in writing from the worker or his representative the reasons for his alleged non-cooperation.
8. The Department order dated August 12, 2005, retroactively suspended the claimant's benefits back to August 16, 1995 due to his alleged non-cooperation, and while that suspension was after he was notified by the Department on June 2, 1995 that he was eligible for vocational services, it was before he was advised by the Department on September 6, 1995 that he was not cooperating and was not

eligible for services, as indicated in the Department's February 1, 1996 letter.

Conclusions of Law (CABR at 92-93)

2. The Department failed to comply with RCW 51.32.110 WAC 296-14-410, the Court of Appeals' decision in *Anderson v. Weyerhaeuser*, 116 Wn. App. 149 (2003), and the Board's Significant Decision in *In re Ronnie McCauley*, BIIA Dec., 89 3189 (1991), when it, without prior notice to the claimant, retroactively suspended further action and compensation on this claim effective August 12, 2005 order that was affirmed on November 8, 2005.
3. The order dated November 8, 2005 is incorrect and is reversed. This matter is remanded to the Department with directions to comply with RCW 51.32.110, WAC 296-14-410, the Court of Appeals' decision in *Anderson v. Weyerhaeuser*, 116 Wn. App. 149 (2003), and the Board's Significant Decision in *In re Ronnie McCauley*, BIIA Dec., 89 3189 (1991), by first sending a letter to him advising that his benefits may be suspended under RCW 51.32.110 and asking for an explanation for the non-cooperation and giving him 30 days to respond, and to not retroactively suspend his benefits.

On July 30, 2008, Weyerhaeuser filed a petition for review with the Board. CABR, at 79-80 and 82. On August 14, 2008, the Board issued an Order Granting Weyerhaeuser's Petition for Review. CABR, at 75. On September 8, 2008 the Board issued an Order Vacating Proposed Decision and Order and Remanding Appeal for Further Proceedings. CABR, at 58-63. For the first time on appeal the Board raised the issue of an application for retroactive benefits and RCW 51.32.040(2)(a).

Upon remand, the parties submitted additional briefing and stipulated facts as set forth in the Board's September 8, 2008 Order. (CABR 29-49). On April 8, 2008 the assigned IAJ issued a second Proposed Decision and Order. (CABR at 21-26). The following were the pertinent findings of material fact and conclusions of law as found by the IAJ in 2008:

Finding of Fact(s) (CABR at 24-26)

6. The application of benefits was filed by the special administrator of the estate of Richard Anderson on behalf of the dependent children more than one year after his death.

Conclusion of Law (CABR at 26)

1. The Board of Industrial Insurance Appeals does not have jurisdiction over the parties to and subject matter of this appeal.
2. The special administrator for Mr. Anderson did not file a timely application for benefits within one year of his death as required by RCW 51.32.040.
3. The appeal must be dismissed because there was no timely application for benefits filed by the special administrator for the estate of Mr. Anderson.

On May 19, 2009, Mr. Anderson's beneficiaries submitted a Petition for Review. (CABR at 3-16). On June 1, 2009 the Board issued an Order Denying the Appellant's Petition for Review. (CABR at 2). Pursuant to RCW 51.52.110, on July 1, 2009, Appellant filed a Notice of

Appeal in Superior Court from the Board's June 1, 2009 Order Denying Petition for Review. (Clerks Papers, hereinafter CP, at 5-7). The case was filed in Thurston County Superior Court and assigned to the Honorable Carol Murphy. (Verbatim Report of Proceedings, hereinafter VRP 3/28/2011, at 1.)

A bench trial was then held on February 12, 2010 in Thurston County Superior Court. VRP 3/28/2011 at 1. After oral arguments, the Court requested post-hearing briefing on the issues raised. VRP 9/25/08 at 29. After oral arguments and briefing by the Appellant, Weyerhaeuser and the Attorney General's office, the Honorable Carol Murphy issued a formal opinion on May 17, 2010 affirming the Board's Decision and Order. (CP at 80-82). On December 3, 2010 Judgment was filed in Superior Court. (CP at, 83-88.)

On January 11, 2011 Mr. Anderson's heirs filed a Notice of Appeal to this Court. (CP at 93-103).

#### **IV. STANDARD OF REVIEW**

##### (1) Standard of Review

Judicial review of matters arising under the Industrial Insurance Act is governed by RCW 51.52.110 and RCW 51.52.115. *Ball-Foster Glass Container Co. v. Giovanelli*, 128 Wn. App. 846, 849, 117 P.3d 365 (2005). The hearing in the superior court is de novo. RCW 51.52.115.

When a party appeals from a decision of the Board and the superior court affirms the Board's decision, this Court's inquiry is the same as that of the superior court. *Littlejohn Construction Co. v. Dep't of Labor & Indus.*, 74 Wn. App. 420, 423, 873 P.2d 583 (1994). Appellate review is limited to the evidence and testimony presented to the Board. *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002).

(2) Statutory Interpretation Under Title 51

Courts must liberally construe the Industrial Insurance Act in favor of the injured worker. Title 51 RCW has its own rule of statutory construction, in RCW 51.52.010, which provides, in relevant part:

This title 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.

In this state, injured workers' rights to benefits are statutory. Washington's workers' compensation law was enacted in 1911, the result of a compromise between employers and workers such that "sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy." RCW 51.04.010. Workers receive less than full tort damages but are spared the expense and uncertainty of

litigation. *See Dennis v. Dep't of Labor & Indus.*, 109 Wash.2d 467, 469-70, 745 P.2d 1295 (1987).

The Industrial Insurance Act mandates that its provisions 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.” RCW 51.12.010. Courts, therefore, are to resolve doubts as to the meaning of the Act in favor of the injured worker. *Kilpatrick v. Dep't of Labor & Indus.*, 125 Wash.2d 222, 230, 883 P.2d 1370, 915 P.2d 519 (1994). Note that it is not any particular portion of Title 51 that is to be liberally construed. Rather, it is the *entire statutory scheme* that receives the benefit of that construction.

Each statutory provision should be read by reference to the whole act. “We construe related statutes as a whole, trying to give effect to all the language and to harmonize all provisions.” *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 792, 6 P.3d 583 (2000), *aff'd*, 144 Wn.2d 907, 32 P.3d 250 (2001). The Supreme Court noted:

Historically, this Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. “The purpose of reading statutory provisions in *pari materia* with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provision “as constituting a unified whole, to the that a harmonious, total statutory scheme evolves, which maintains the integrity of the respective statutes.”

*In re Estate of Kerr*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998), *citing State v. Williams*, 94 Wn.2d 531, 547, 617 P.2d 1012 (1980).

In addition to liberal construction, Washington courts have mandated that doubts as to the meaning of the workers' compensation law is resolved in favor of the worker. *See, Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580, 586, 925 P.2d 624 (1996)(where a worker who had been awarded a permanent total disability pension under one worker's compensation claim received a permanent partial disability award for a prior injury under a separate, pre-existing claim. Where the court held that the timing of the closure of claims should not work to the disadvantage of an injured worker.); *see also, McClelland v. ITT Rayonier Inc.*, 65 Wn. App. 386, 828 P.2d 1138 (1992)(a case involving an employee's claim for worker's compensation benefits for an aggravation of his psychological condition of major depression coupled with simple phobia).

(3) The Act's Purpose and Policies when Looking at this Case.

In order for a proper understanding of the importance of this case and the issues presented, it is important to first look at what brought about Washington's Industrial Insurance Act and the policies and presumptions that came with it.

The Industrial Insurance Act was established to protect and provide benefits for injured workers. As noted for many years by the courts, the enactment of the Industrial Insurance Act in 1911 by the Washington State Legislature was due to a, “finding that the remedy of the injured workman had been uncertain, slow and inadequate. . . .” 1911 Wash. Law, ch. 74; *see, e.g. Lee v. Department of Labor and Industries*, 81 Wn. 2d 937, 506 P.2d 308, 309 (1973)(a case involving a Mandamus proceeding by injured workman to compel director of labor and industries to obey and carry out order of board of industrial insurance appeals directing department of labor and industries to provide workman additional treatment). The declared purpose of the Act was to provide sure and certain relief for injured workmen. *Id.*

The Washington Supreme Court has long held that the Industrial Insurance Act is to be liberally applied in favor of the injured worker. The court stated in *Johnson v. Department of Labor and Industries*, 134 Wn. 2d 795, 953 P.2d 800 (1998), “We have previously recognized the change in the common law brought about by the Legislature’s enactment of the Industrial Insurance Act and that the Act is remedial in nature and ‘is to be **liberally applied** to achieve its **purpose of providing compensation to all covered persons injured** in their employment.’” 134 Wn. 2d at 799,

953 P.2d at 802. (Emphasis added)(Quoting *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 635 (1979)).

As the cases above establish, the Industrial Insurance Act was enacted to compensate as fully as possible workers injured on the job. With the long standing policy of liberal construction of the Act in favor of the worker, the remedial nature of the act, in conjunction with the mandate that any doubt be resolved in favor of the worker, supports a finding by this Court reversing the superior court's ruling as it relates to affirmance of the Board's decision wherein the Board expanded its jurisdiction and dismissed the decedent's appeal to an order which improperly denied payment to the decedent's beneficiaries past due benefits, which is contrary to the underlying policies of the Industrial Insurance Act.

#### **V. ARGUMENT FOR REVERSAL**

- (1) The Board and the Superior Court exceeded their respective scopes of review.
  - a. The Superior Court and the Board of Industrial Insurance Appeals' jurisdiction is appellate in nature, and therefore limited to the issues first passed upon by the Department of Labor and Industries.

When a Court analyzes its scope of review the Court should be mindful of RCW 51.52.060 and 51.52.115 which provides that both the Board and the superior court serve a purely appellate function, and the

principle that the Board and superior court's jurisdiction are appellate only.

It is well established that the Board and subsequently the superior court's appellate authority is strictly limited to reviewing the specific Department action. The Board hears appeals de novo. RCW 51.52.100. The superior court reviews the Board action on the Board's record. *See Hanquet v. Department of Labor & Indus.*, 75 Wash.App. 657, 661-64, 879 P.2d 326 (1994), *review denied*, 125 Wash.2d 1019, 890 P.2d 20 (1995) *citing*, *Lenk v. Department of Labor & Indus.*, 3 Wash.App. 977, 982, 478 P.2d 761 (1970) (“[I]f a question is not passed upon by the Department, it cannot be reviewed either by the Board or the superior court.”). “[W]e find no warrant in the statutory enumeration of the Board's powers, past or present, for the contention that the board can, on its own motion, change the issues brought before it by a notice of appeal and enlarge the scope of the proceedings.” *Brakus v. Department of Labor & Indus.*, 48 Wash.2d 218, 223, 292 P.2d 865 (1956).

To ascertain whether the board and / or the superior court acted within its proper scope of review this Court must look to the provisions of the order appealed to the Board. The questions the Board and superior court may consider and decide are fixed by the order from which the appeal was taken (*See Woodard v. Department of Labor and Indus.*, 188

Wash. 93, 61 P.2d 1003 (1936)) as limited by the issues raised by the notice of appeal (*See Brakus v. Department of Labor and Indus.*, 48 Wash.2d 218, 292 P.2d 865 (1956)). Further in *Leary v. Department of Labor & Indus.*, 18 Wash.2d 532, 540-41, 140 P.2d 292 (1943), the Court held that the Act confers purely appellate authority upon the Board and the courts in cases under Title 51.

Based upon the statutory sections as well as the well-established case law, if a question is not passed upon by the Department, it cannot be reviewed by either the Board or the superior court.

- b. Hanquet v. Department of Labor and Industries 75 Wash.App. 657, 661-64, 879 P.2d 326 (1994), review denied, 125 Wash.2d 1019, 890 P.2d 20 (1995)

In *Hanquet*, the Department had rejected Mr. Hanquet's industrial claim on the basis that he was a sole proprietor, not a worker, and therefore not entitled to coverage under Title 51. *Hanquet*, 75 Wash.App., at 660. Mr. Hanquet appealed the rejection of his claim and proceeded to provide evidence at the Board that he was a worker, not a sole proprietor contrary to the Department's decision. *Id.* The IAJ found by a preponderance of the evidence that Mr. Hanquet was a worker within the definition of RCW 51.08.180. *Id.* The Department petitioned the Board for further review. The Board subsequently denied Mr. Hanquet's claim by invoking a different basis for exclusion from

coverage. The *Hanquet* Court noted that the Board's error in raising a new issue on its own motion was prejudicial to the injured worker, Mr. Hanquet. *Id.*, at 662.

Based upon the superior court's decision which affirmed the Board on an issue not properly before the Board, the *Hanquet* Court held that the court exceeded the proper scope of review. *Id.*, at 663.

In its decision, the *Hanquet* Court noted that RCW 51.52.115 provides that the superior court's review on appeal from an order of the Board is de novo. *Id.* However, the Court pointed out that, "after this de novo review provision was added to section 7697, Rem.Rev.Stat. (the predecessor to RCW 51.52.115) and the superior court's scope of review was thereby broadened, the Supreme Court has consistently held that the superior court may not consider a question that was not properly before the board." *Hanquet at* 663, see e.g., *Puget Sound Bridge & Dredging Co. v. Department of Labor & Indus.*, 26 Wash.2d 550, 554-55, 174 P.2d 957 (1946) (the question of whether or not the employer's office employees should be classified under Rem.Rev.Stat. § 7676, class 9, was not before the joint board of the Department and therefore could not be considered by either the trial court or the Supreme Court); *Merchant v. Department of Labor & Indus.*, 24 Wash.2d 410, 165 P.2d 661 (1946) ("[T]he jurisdiction of the superior court is limited to a review of 'a

question or questions which have been actually decided by the department.' " *Merchant*, at 413, 165 P.2d 661 (quoting *Leary v. Department of Labor & Indus.*, 18 Wash.2d 532, 541, 140 P.2d 292 (1943)).

The cases as set forth above indicate that the authority of the superior court to determine an issue in a workers' compensation matter depends upon whether or not the Board properly addressed that issue. *Hanquet*, at 664. As in *Hanquet* the Board in this current appeal exceeded the proper scope of its review by addressing an issue beyond the August 12, 2005 Department order. As held by the Court in *Hanquet*, this Court should hold that the Board and superior court below exceeded the proper scope of their authority.

c. Application of the case law to Mr. Anderson's heirs' appeal.

As indicated in oral arguments to the Superior Court, the only issue on appeal to the Board and subsequently superior court was the August 12, 2005 order issued by the Department which **suspended further action and compensation on the claim retroactively to 8-26-95 because the worker refused or hindered an evaluation or examination for the purpose of vocational rehabilitation.** That order was protested by the injured workers heirs citing non-compliance with RCW 51.32.110 and *In*

*re McCauley*. As the cases cited above suggest, the Board and superior court are limited to the issues passed upon by the Department as set forth by the provisions of that particular order. In this case, the Department's order only suspended Mr. Anderson's benefits retroactively based upon the non-cooperation statute; at no time did the Department address the issue regarding an application for beneficiary benefits being "untimely."

Based upon the above referenced statutory sections as well as the well-established case law, this Court must reverse the superior court and the Board's decisions in this case as neither had the authority to expand the issues on appeal and render a decision on an issue not first passed upon by the Department.

d. Appellate Rules Applicable to Jurisdiction

As noted above the superior court acts in an appellate capacity when reviewing an appeal taken from the Board. If one looks to the Rules of Appellate Procedure it is well established that the issue of jurisdiction can be raised for the first time on appeal. Rule of Appellate Procedure 2.5. Circumstances Which May Affect Scope Of Review, states in pertinent part:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, **a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction**, (2) failure to establish facts upon which relief

can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction.

Pursuant to RAP 2.5(a)(1) the Plaintiff was able to raise for the first time the issue of jurisdiction regarding the decision of the Board as well as the superior court jurisdiction regarding any issue not first addressed by the Department.

- (2) The claim for benefits on behalf of the deceased worker's beneficiaries was filed timely pursuant to RCW 51.28.050 as the request for benefits was filed with the Department within one year of the dependent's rights being accrued.

Even if it is determined that the Board and the superior court had the authority to expand the issues on appeal and render a decision on an issue not first passed upon by the Department, the decedent's heirs did timely file a request for benefits for the injured worker, Richard Anderson's, past due benefits.

RCW 51.28.050 provides. "No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred **or the rights of dependents or beneficiaries accrued**, except as provided in RCW 51.28.055 and 51.28.025(5). (Emphasis added). Although an injured worker must file a claim for an on the job injury within one year of the date of that injury

the statute provides that a worker's beneficiaries must file within one year after their rights have accrued.

In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the legislature in creating the statute. To determine legislative intent, the courts look first to the language of the statute. If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone. Legislative definitions included in the statute are controlling, but in the absence of a statutory definition a court will give the term its plain and ordinary meaning ascertained from a standard dictionary. *State v. M.C. Websters*, 148 Wash.App. 968, 201 P.3d 413 (2009).

Title 51 does not define the term "accrue" either within RCW 51.28.050 or within the definition section, leaving the definition of the term as set forth in a standard dictionary. Webster's Dictionary defines the word accrued as, "To come into existence as a claim that is legally enforceable." The beneficiaries in this case filed a claim via letter within one year of their claim becoming legally enforceable, and therefore the July 8, 2005 letter complies with RCW 51.28.050.

At the time of Mr. Anderson death, on March 10, 2004, his case was on an employer appeal to the Supreme Court. It was not until July 13, 2004, the date when the Supreme Court issued its supplemental

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decision denying Weyerhaeuser's motion for reconsideration, that Mr. Anderson's minor children's right to his past due benefits accrued. Prior to that decision, Weyerhaeuser was arguing that the Court of Appeals decision, which would have given rise to Mr. Anderson's potential time loss benefits, should be overturned. Without a confirmation by the Supreme Court that the Court of Appeals Decision would be reaffirmed, Mr. Anderson's beneficiaries had no benefits and / or rights to demand.

On July 8, 2005, within the year of the Supreme Court's supplemental decision dated July 13, 2004, the Special Administrator of the Estate of Richard Anderson, Laurie Anderson, requested compliance with the non-cooperation statute as well as payment of the deceased worker's past due benefits pursuant to the March 11, 2003 Court of Appeals decision. As such the beneficiaries complied with RCW 51.28.050.

- (3) Pursuant to *Ramsay v. Department of Labor and Industries* the beneficiaries were not required to file a formal application for benefits as the benefits being requested were already due and owing to the injured worker at the time of his death.

In *Ramsay v. Department of Labor and Industries*, 36 Wash.2d 410, 218 P.2d 765 (1950), the Supreme Court held that the provision of the Workmen's Compensation Act that no application shall be valid or claim enforceable, unless filed within year after the day on which injury

occurred or dependents' or beneficiaries' rights accrued, refers to applications for compensation for injuries to and deaths of workmen and for increased compensation and reopening of closed claims, not to a deceased worker's beneficiaries applications for compensation due to the employees at times of their deaths. The Supreme Court reviewed Rem.Rev.Stat. §§ 7684 and 7686(a-d), that were the statutory section which are the predecessors to RCW 51.28.020, RCW 51.28.030, RCW 51.28.050, and RCW 51.32.050. The main section which was at issue was Rem.Rev.Stat. § 7686(d) which provided that: "No application shall be valid or claim thereunder enforceable unless filed within one year after the day upon which the injury occurred or the rights of dependents or beneficiaries accrued." *Id.*, at 766-767. The wording of Rem.Rev.Stat. § 7686(d) was identical to RCW 51.28.050.

The *Ramsay* court was dealing with a factual scenario that is similar to the present case. Late in 1932 or early in 1933, Robert H. Ramsay suffered industrial injuries while engaged in extrahazardous work in Spokane. The Department approved his claim for compensation and classified him as totally and permanently disabled. On July 11, 1934, the Department awarded him a lump sum settlement of \$750 in lieu of his monthly pension. On February 22, 1936, Mr. Ramsay died. In November, 1948, his widow, Minnie M. Ramsay, petitioned the

Department for payment to her of the difference between this \$750 and the \$4,000 to which, she claimed in her petition, her husband was entitled under this court's decisions in *Booth v. Department of Labor & Industries*, 189 Wash. 201, 64 P.2d 505, and *Wintermute v. Department of Labor & Industries*, 183 Wash. 169, 48 P.2d 627.

On November 28, 1932, Henry Buhrig suffered an industrial injury while engaged in extrahazardous work in Spokane. His claim for compensation was approved by the Department and he was classified as temporarily totally disabled. He was paid time loss from December 2, 1932, to October 1, 1935. On October 10, 1935, upon petition of the workman, he was reclassified as totally and permanently disabled and awarded a lump sum settlement of \$1500 in lieu of a monthly pension. On February 20, 1945, Mr. Buhrig died. On May 5, 1948, his widow, who had remarried on July 7, 1945, filed with the department a petition similar to that which was later filed on behalf of Mrs. Ramsay.

The supervisor of industrial insurance rejected both widows' petitions upon the sole ground that they had not been made within one year after the deaths of the respective workmen; the joint board sustained the supervisor in both cases. Both widows appealed the denial of benefits. The Supreme Court reversed the board rejections of benefits holding, "the one-year limitation contained in Rem.Rev.Stat. § 7686,

does not apply to the request of a widow, made under Rem.Rev.Stat. § 7684, for compensation which was owing to her husband and which was unpaid at the time of his death. **There is no statutory limit within which a widow must assert this right to an assignment of what was due her husband.**” *Id.* at 415. (Emphasis added).

The Supreme Court came to its holding based upon the following, “the workmen in question had already filed claims for compensation in full compliance with Rem.Rev.Stat. § 7686. Those claims had been approved by the Department. The widows of these workmen are now asking that the portion of their respective husbands' compensation which accrued but was unpaid during the husbands' lifetimes, be now paid to the widows. This is not the assertion of a new or original claim, as contemplated by subdivision (b) of Rem.Rev.Stat. § 7686. Neither appellant is seeking pension or any other allowance in her own right. Nor is it an attempt to obtain increased compensation or to open a closed claim, pursuant to subdivision (c) of Rem.Rev.Stat. § 7686. Whatever unpaid compensation there may have been due to the husbands at the time of their deaths was not compensation provided by law for their beneficiaries. The widows became entitled to their husbands' compensation, and it passes to them, if at all, by virtue of a

statutory assignment expressed in the provisos of Rem.Rev.Stat. § 7684.” *Id.*, at 768.

Similarly to the widows in *Ramsay* Mr. Anderson’s beneficiaries have requested payment of their father’s past due benefits which were unpaid at the time of his death as well as compliance with the non-cooperation statute and case law. The beneficiaries are not asserting a new or original claim, such as pension benefits or ongoing time-loss benefits beyond the worker’s death. Nothing in RCW 51.28.050, or elsewhere in the Act, suggests that a beneficiary must file an ‘application’ for any portion of the deceased worker’s accrued but unpaid compensation to which they may be entitled under Title 51. As such, based upon the Supreme Court decision in *Ramsay*, even if the Board determines that the beneficiaries rights accrued as the date of their father’s death, they are still entitled to demand payment of past due benefits at any time.

In addition to the right to demand payment of past due benefits pursuant to *Ramsay*, the deceased worker’s beneficiaries were entitled to the protections of Title of 51. Mr. Anderson’s beneficiaries respectfully request that this Court reverse and remand the Superior Court judgment and order and send his case back for proper claim’s administration.

- (4) Anderson's beneficiaries are entitled to attorney fees on appeal

If the Court agrees with Sagen that the trial court here should be reversed, Sagen is entitled to an award of reasonable attorney fees on appeal. RAP 18.1; RCW 51.52.130; *Brand v. Dep't of Labor & Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999).

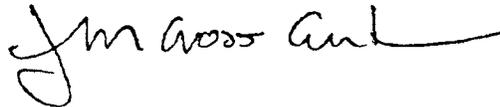
## VI. CONCLUSION

Washington's Industrial Insurance Act was enacted to provide injured workers sure and certain relief. As seen in the above cases, this relief was to be provided to the fullest extent possible as allowed under the Act. Pursuant to the above case law, the Court committed error when it adopted the Department's total disability jury instruction.

Mr. Anderson's heirs respectfully requests this Court for the above listed arguments to reverse the superior court's judgment and remand this matter back to the Superior Court for a new trial.

DATED this 12<sup>th</sup> day of May, 2011.

VAIL/CROSS & ASSOCIATES



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