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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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

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RICHARD ANDERSON (DEC'D)

Appellant,

v.

WEYERHAEUSER COMPANY and the  
DEPARTMENT OF LABOR & INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondents.

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**WEYERHAEUSER'S BRIEF OF RESPONDENT**

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Craig A. Staples, WSBA #14708  
P.O. Box 70061  
Vancouver, WA 98665  
(360) 887-2882

Attorney for Weyerhaeuser Company

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## I. RESPONSE TO ASSIGNMENTS OF ERROR

### A. Response to Assignments of Error

1. The record supports the trial court's finding that Ms. Anderson, the special administrator for claimant's estate, did not apply for time loss compensation within one year of claimant's death.<sup>1</sup>

2. The trial court correctly concluded that it had jurisdiction over the parties and the authority to address the issue whether Ms. Anderson's application for benefits was timely.

3. The trial court correctly concluded that RCW 51.32.040(2)(c), not RCW 51.28.050, provides the applicable deadline for the beneficiaries of a deceased worker to apply for time loss compensation allegedly due him, and that application must be filed within one year of the worker's death.

4. The trial court correctly concluded that the beneficiaries'

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<sup>1</sup> Ms. Anderson assigns this finding as error, but argues it represents a conclusion of law. (BA 1, n. 1). The finding addresses when claimant died and when Ms. Anderson filed the application for time loss compensation. These are issues of fact – to which the parties stipulated before the Board. (CARB 22). Ms. Anderson's essential position is that she did not need to file the application within one year of claimant's death. That position requires no challenge to this particular finding of fact. Since Ms. Anderson's assignment of error to this finding does not actually raise a challenge to the court's finding as to when claimant died and when the application was filed, Weyerhaeuser agrees with Ms. Anderson that it raises no material issue of fact.

application for time loss compensation allegedly due claimant was untimely under RCW 51.32.040(2)(c) because it was not submitted within one year of his death.

5. The trial court correctly concluded that the appeal by claimant's beneficiaries should be dismissed because the beneficiaries did not timely file an application for benefits allegedly due claimant.

6. The trial court correctly concluded that dismissal is appropriate because the statute of limitations is jurisdictional and can be raised for the first time on appeal before the Board.

**B. Issues Pertaining to Assignments of Error**

1. Did the Board and superior court have subject matter jurisdiction over the parties and the authority to address the issue whether Ms. Anderson's application for benefits was timely.

2. Does RCW 51.32.040(2)(c), rather than RCW 51.28.050, provide the applicable deadline for the beneficiaries of a deceased worker to apply for time loss compensation allegedly due him, and must that application be filed within one year of the worker's death?

3. Was the beneficiaries' application for time loss compensation allegedly due claimant untimely under RCW

51.32.040(2)(c) because it was not submitted within one year of his death?

4. Should the appeal by claimant's beneficiaries be dismissed because the beneficiaries did not timely file an application for benefits allegedly due claimant?

5. Is dismissal appropriate because the statute of limitations is jurisdictional and can be raised for the first time on appeal before the Board?

## II. STATEMENT OF THE CASE

### A. Procedural History

This workers' compensation case arises under Washington's Industrial Insurance Act ("IIA"). The claimant, Richard Anderson, died on March 10, 2004 due to a heart condition that was unrelated to his April 19, 1993 industrial injury. (CABR 22).<sup>2</sup> On March 12, 2004, claimant's former wife, Laurie Anderson, was appointed special administrator of his estate. (*Id.*) Ms. Anderson was divorced from claimant at the time of his death. (*Id.*) By letter dated July 9, 2005, Ms. Anderson requested the Department of Labor and Industries to order Weyerhaeuser to pay claimant's

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<sup>2</sup> CABR is the certified appeal board record.

beneficiaries time loss compensation allegedly due claimant for the period October 27, 1993 through March 9, 2004. (*Id.*).

On August 12, 2005, the Department issued an order suspending further action on the claim because claimant previously had refused or hindered evaluation for the purpose of vocational rehabilitation. (CABR 25). (See "Factual History" below.) Following Ms. Anderson's protest, the Department affirmed its decision by order dated November 8, 2005. (*Id.*). Ms. Anderson appealed to the Board of Industrial Insurance Appeals.

The appeal was presented to the Board on stipulated facts. (CABR 22). By proposed decision and order dated April 8, 2009, the appeals judge dismissed the appeal on the basis Ms. Anderson had not filed her application for benefits within one year of claimant's death, as required by RCW 51.32.040(2). (CABR 26). Ms. Anderson petitioned the Board for review and the Board affirmed and adopted the proposed decision by order issued June 1, 2009. (CABR 2-3). Ms. Anderson appealed to the Thurston County Superior Court from the Board's decision.

A bench trial was held before The Honorable Carol Murphy on February 12, 2010. (VRP 1). At oral argument, counsel for the

Appellant raised, for the first time, the issue of the Board's authority to address the timeliness of the application for benefits. (CP 82, n. 1; VRP 4-7). At the request of Judge Murphy, the parties subsequently provided additional briefing on the issues of the Board's authority to address this jurisdictional issue, as well as the Department's right to participate in the proceedings. (VRP 29; CP 64, 69, 75). On May 17, 2010, Judge Murphy issued a letter opinion in which she adopted the Board's factual findings and concluded that RCW 51.32.040(2)(c), not RCW 51.28.050, applies to Ms. Anderson's application for benefits. (CP 82). Judge Murphy also concluded that the statute of limitations issue was jurisdictional and could be raised for the first time on appeal before the Board, and that the application for benefits was untimely because it was not filed within one year of claimant's death. (*Id.*). She therefore concluded that dismissal was appropriate. (*Id.*). On December 10, 2010, findings of fact, conclusions of law and a judgment were entered. (CP 83, 89).

Ms. Anderson filed this appeal on January 11, 2011. (CP 93).

**B. Factual History**

On April 19, 1993, claimant sustained an injury while working for Weyerhaeuser. (CABR 24). He filed a claim, which was allowed. (*Id.*). The Department later found him eligible for vocational services. (*Id.*).

On September 6, 1995, the Department determined that claimant was not eligible for further vocational services on the basis he had failed to cooperate and participate with vocational assistance efforts. (*Id.*). Claimant filed a dispute of that decision. (*Id.*). On November 9, 1995, the director of the Department determined that claimant's own actions were a barrier to the successful provision of vocational services and therefore terminated such services. (*Id.*). Claimant, through his former attorneys, protested that decision and submitted information for the Department's consideration. (Ex. 4). On February 1, 1996, the Department affirmed the determination that claimant was ineligible for further vocational services due to his own actions. (CABR 24). Claimant appealed that decision to the Board.

The Board affirmed the Department's decision by order dated September 20, 1999. (CABR 25). The Board's decision was

affirmed on claimant's appeal to the Thurston County Superior Court by judgment entered April 9, 2001. (*Id.*). Claimant appealed to the Court of Appeals.

By decision issued March 12, 2003, the Court of Appeals concluded the Department had not complied with the procedural safeguards of RCW 51.32.110 in terminating claimant's vocational services and therefore remanded the claim to the Department for further action. (*Id.*). The Supreme Court granted Weyerhaeuser's petition for review on February 4, 2004. *Anderson v. Weyerhaeuser Co*, 150 Wn.2d 1035, 84 P.3d 1229 (2004).

As noted, claimant died on March 10, 2004 and Ms. Anderson was appointed special administrator of his estate on March 12, 2004. (CABR 22). On May 20, 2004, the Supreme Court terminated review on the basis claimant's death had rendered it moot, and thereby affirmed the Court of Appeals' decision. (*Id.*). The Supreme Court denied a motion for reconsideration on July 13, 2004. (*Id.*). A June 9, 2005 Thurston County Superior Court judgment and order remanded the claim to the Department to take action consistent with the Court of Appeals' decision.

On July 8, 2005, Ms. Anderson filed, for the first time, a request for time loss compensation that allegedly was due claimant at the time of his death. (*Id.*).

By order issued August 12, 2005, the Department suspended further action on the claim because claimant had refused or hindered an evaluation for the purpose of vocational rehabilitation. (CABR 25). As noted, the Department later affirmed that decision and the Board and superior court ultimately concluded that the matter must be dismissed because Ms. Anderson's application for benefits was untimely.

### III. STANDARD OF REVIEW

The trial court had *de novo* review over the decision of the Board. RCW 51.52.115; *Romo v. Department of Labor and Industries*, 92 Wn. App. 348, 353, 962 P.2d 844 (1998). The Board's decision was considered *prima facie* correct and the appealing party had the burden of proving the Board's decision was incorrect. *Intalco Aluminum v. Department of Labor and Industries*, 66 Wn.App. 644, 833 P.2d 390 (1992), *rev den*, 120 Wn.2d 1031 (1993); *Romo*, 92 Wn. App. at 353. Matters of statutory construction and other issues of law were subject to *de novo*

review. *DuVon v. Rockwell International*, 116 Wn.2d 749, 753, 807 P.2d 876 (1991).

Upon appeal from the superior court's decision, review in this court is limited to whether the record supports the superior court's findings of fact and whether the court's conclusions flow from the findings. *Groff v. Department of Labor and Industries*, 65 Wn.2d 35, 41, 395 P.2d 633 (1964); *Young v. Department of Labor and Industries*, 81 Wn.App. 123, 128, 913 P.2d 402 (1996). The court reviews matters of statutory construction and other issues of law *de novo*. *DuVon, supra*.

#### **IV. SUMMARY OF ARGUMENT**

Ms. Anderson did not timely raise the issue of the Board's authority to address whether her application for benefits was timely. She therefore waived that issue.

The Department had the opportunity, and the obligation, to address the timeliness of Ms. Anderson's application. Therefore, the scope of the Board's review authority extended to that issue. More important, because compliance with the statute of limitations presents a jurisdictional question, the Board properly addressed the issue even *assuming* the Department had not considered it.

The terms of RCW 51.32.040 must be applied according to their plain and ordinary meaning. Because those terms are clear and unambiguous, application of statutory construction principles – including the liberal construction doctrine – is not appropriate. The terms of RCW 51.32.040 clearly demonstrate that it applies where, as here, a survivor makes a claim for benefits to which a deceased worker allegedly was entitled at the time of his death. The terms of the statute also clearly establish that such a claim must be filed within one year of the worker's death. Ms. Anderson's failure to file this claim within one year of claimant's death constituted a jurisdictional defect that requires dismissal of this appeal.

No authority supports Ms. Anderson's assertion that RCW 51.28.050 applies here. That statute applies when a survivor pursues her own, separate claim for benefits, not when she seeks benefits to which the claimant allegedly was entitled. Further, RCW 51.28.050 plainly requires that an application for benefits be filed within one-year of the claimant's death. No authority supports Ms. Anderson's contention that the one-year limitations period is tolled by pending litigation on an issue that is separate from that raised by the application. Therefore, even under RCW 51.28.050, Ms.

Anderson's application was untimely, thus warranting dismissal.

Ms. Anderson's reliance on *Ramsay v. Department of Labor and Industries*, 36 Wn.2d 410, 218 P.2d 765 (1950) disregards the fact, established in the proceeding below, that the *Ramsay* court based its decision on a predecessor to RCW 51.32.040 that did not contain any limitations period for filing a claim. The one-year limitations period was not added to RCW 51.32.040 until 1971, after *Ramsay* was decided. *Ramsay* therefore provides no valid authority for Ms. Anderson's position that she did not need to file her application within one year of claimant's death.

Ms. Anderson is not entitled to assessed attorney fees because she should not prevail on appeal and, even if she did prevail before this court, that would not directly or necessarily result in an award of additional benefits.

## V. ARGUMENT

### A. The Board and Trial Court Correctly Addressed Whether Jurisdiction Existed to Consider Ms. Anderson's Application For Benefits.

1. Ms. Anderson Did Not Timely Raise Her Challenge to the Board's Authority to Consider the Jurisdictional Issue. The Court Should Therefore Conclude Ms. Anderson Waived That Issue.

Ms. Anderson contends that the Board and superior court exceeded their review authority by addressing whether her claim for time loss benefits was untimely. She first raised this issue during oral argument at the superior court level. (VRP 4-7; CP 82 n. 1). Because Ms. Anderson did not raise this issue before the Board, the court should not consider it on appellate review.

This court and the superior courts review Board decisions only in an appellate capacity and, therefore, may not consider any issue or argument that was not raised before the Board. RCW 51.52.115; *Sepich v. Department of Labor and Industries*, 75 Wn.2d 312, 316-17, 450 P.2d 940 (1969); *Wilbur v. Department of Labor and Industries*, 38 Wn.App. 553, 513-14, 686 P.2d 509 (1984). A party may not raise an issue for the first time on appellate review in the superior court, much less at oral argument. RAP 2.5(a); *Allen v. Asbestos Corp, Ltd.*, 138 Wn.App. 564, 578, 157 P.3d 406 (2007); *Wilbur, supra*. Issues or arguments that are not raised before the Board, either at hearing or in a party's petition for review, are deemed waived. RCW 51.52.104; *Hill v. Department of Labor and Industries*, 90 Wn.2d 276, 279, 580 P.2d 636 (1978); *Wilbur v. Department of Labor and Industries*, 38 Wn.App. 553, 513-14, 686

P.2d 509 (1984); *Homemakers Upjohn v. Russell*, 33 Wn.App. 777, 658 P.2d 27 (1983). Because Ms. Anderson did not raise before the Board the issue of the Board's authority to consider the timeliness of her claim, the court should conclude she waived that issue.

Ms. Anderson concedes that she raised this issue for the first time in oral argument before the superior court. (BA 19-20). However, she asserts that the court may nevertheless review the issue because, she contends, it is an "issue of jurisdiction." (BA 20). Ms. Anderson conflates two similar, but distinct issues: subject matter jurisdiction and the authority to address an issue based on the reviewing tribunal's scope of review.

Subject matter jurisdiction exists when a tribunal is authorized to decide a particular type of controversy. *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 539, 886 P.2d 189 (1994). The Department of Labor and Industries has subject matter jurisdiction to consider industrial insurance claims and the issues those claims present. *Marley*, 125 Wn.2d at 539-40. The Board of Industrial Insurance Appeals has appellate jurisdiction to review Department orders and the issues they present. RCW 51.52.010. *Calihan v. Department of Labor and Industries*, 10

Wn.App. 153, 516 P.2d 1073 (1973).

The Department and Board therefore had the jurisdiction to consider this matter. Ms. Anderson's challenge to the Board's decision does not implicate a jurisdictional issue. Instead, she challenges the Board's authority to consider a particular issue based on the scope of its appellate review power. Ms. Anderson's argument thus raises an "appellate review" or "scope of review" issue, not a jurisdictional issue. Ms. Anderson effectively recognizes the nature of her challenge by using the terms "appellate authority" and "scope of review" in arguing the merits of the Board's authority to address the timeliness issue. (BA 14-18). She uses the term "jurisdiction" only in defending against the position, taken by Weyerhaeuser below, that she waived her challenge to the Board's exercise of its authority by not raising that issue before the Board. (BA 19-20). Neither Ms. Anderson's choice of words nor the nature of her challenge to the Board's decision raises a jurisdictional question. Rather, she raises only an issue regarding the scope of the Board's review authority. Ms. Anderson needed to raise that issue before the Board in order to preserve it

for appellate review. Because she failed to do so, the court should conclude she waived the issue.

2. The Board and Superior Court Correctly Exercised Their Review Authority in Addressing Whether Ms. Anderson Timely Filed This Claim.

Ms. Anderson's challenge to the Board's exercise of its review authority is also unfounded. She contends the Board did not have the authority to consider whether her claim was timely filed because, she contends, the Department did not address that issue. The timely filing of a claim for compensation is a jurisdictional limitation on the claimant's right to receive benefits and on the Department's authority to award such benefits. *Wheaton v. Department of Labor and Industries*, 40 Wn.2d 56, 58, 240 P.2d 567 (1952); *Wilbur, supra*, 38 Wn.App. at 556. Therefore, in considering any claim for benefits, the Department necessarily has the opportunity and the obligation to address whether the claim was timely in order to determine whether it has the jurisdiction to decide the issues presented by the claim. This included Ms. Anderson's July 8, 2005 claim for time loss benefits.

The Department did not – and could not – preclude the Board from reviewing the timeliness issue simply because it did not

explicitly address that issue in its August 1, 2005 order that denied further compensation on the claim. The scope of the Board's review authority extends to all issues that the Department either expressly considered or had the opportunity to consider when it issued the order under appeal. *Nelson v. Department of Labor and Industries*, 9 Wn.2d 621, 627-28, 115 P.2d 1014 (1941). Even when the Department expressly declines to consider an issue, the Board has the authority to review that issue because the Department had the opportunity to address it. *Id.* at 631-32. Accordingly, even *assuming* the Department did not address the timeliness of Ms. Anderson's claim, it clearly had the opportunity to do so. The Board was therefore authorized to address that issue on review.

More important, the issue whether Ms. Anderson's claim was timely filed presents a question of the Department's and Board's subject matter jurisdiction. The appellate authorities clearly establish that compliance with a statute of limitations presents a jurisdictional issue that can be raised at any time. *Wheaton, supra* (unappealed orders allowing and reopening a claim later declared void on the basis the original claim was not timely filed); *Hutchins v. Department of Labor and Industries*, 44 Wn.App. 571, 576-77, 723

P.2d 18 (1986) (denial of a reopening application upheld on the basis the application was untimely even though the statute of limitations issue was first raised on appeal in the superior court). Therefore, even *assuming* the timeliness issue was not presented to the Department, the Board had the authority and the obligation to address that issue on review of the Department's order.

Ms. Anderson erroneously relies on *Hanquet v. Department of Labor and Industries*, 75 Wn.App. 657, 879 P.2d 326 (1994) to support her contention that the Board had no authority to address the jurisdictional issue. *Hanquet* is a "review authority" or "scope of review" case, not one involving a jurisdictional question. There, the Department denied the worker's claim on the basis he was a sole proprietor, not a worker. 75 Wn.App. at 659. The Board affirmed the denial, but on a different basis – namely, that claimant's work was subject to the "private home" statutory exclusion. *Id.* The superior court affirmed the denial on both grounds. *Id.* On appeal, the Court of Appeals noted that the Board's "scope of review" is limited to those issues that the Department had decided. 75 Wn.App. at 661. The court held that because the Department had not addressed the issue of the private home exclusion, the Board

and superior court had no “authority” to do so. 75 Wn.App. at 663-64.<sup>3</sup> The court therefore reversed the Board and superior court decisions to the extent they were based on that issue. 75 Wn.App. at 664.

*Hanquet* thus addressed the “scope of review” or “review authority” of the Board and superior courts to consider issues not decided by the Department. It did not address a statute of limitations question or any other jurisdictional issue. Therefore, *Hanquet* does not support Ms. Anderson’s contention that the Board erred by addressing the jurisdictional issue of her failure to comply with the statute of limitations found in RCW 51.32.040(2)(c).

For the above reasons, the court should either not consider Ms. Anderson’s belated challenge to the Board’s review authority or reject that challenge on its merits.

**B. The Trial Court and Board Correctly Concluded That RCW 51.32.040(2)(c) Applies Here and Requires Dismissal Because Ms. Anderson Did Not File an Application For Time Loss Compensation Within One Year of Claimant’s Death.**

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<sup>3</sup> There was no contention that the Department necessarily had considered the statutory exclusion on which the Board had relied.

1. The Terms of RCW 51.32.040(2)(c) Must Be Applied According to Their Plain Meaning. The Liberal Construction Doctrine May Not Be Applied If the Statutory Terms are Plain and Unambiguous.

The question whether Ms. Anderson's application for time loss complied with the statutory limitations period presents an issue of statutory construction. The primary objective of statutory construction is to effectuate the legislature's intent. *Cena v. Department of Labor and Industries*, 121 Wn.App. 915, 919, 91 P.3d 903 (2004). In determining the meaning of a statute, the court must first look to the relevant statutory language. *Everett Concrete Products, Inc. v. Department of Labor and Industries.*, 109 Wn.2d 819, 821, 748 P.2d 1112 (1988). The court must give words in a statute their plain and ordinary meaning unless a contrary intent is demonstrated in the statute or related provisions. *Department of Ecology v. Gwinn*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). A statute that is clear on its face is not subject to the doctrines of statutory construction and must be applied according to its terms. *Harris v. Department of Labor and Indus.*, 120 Wn.2d 461, 472, n. 7, 474, 843 P.2d 1056 (1993). Accordingly, the doctrine of liberal construction may not be applied unless the terms of the statute are ambiguous. *Id.* The liberal construction doctrine

does not authorize amendment of a statute under the guise of construction or otherwise sanction disregard of its terms. *Courtright v. Sahlberg Equipment, Inc.*, 88 Wn.2d 541, 563 P.2d 1257 (1977).

2. RCW 51.32.040(2) Clearly and Unambiguously Required Ms. Anderson to File an Application For Benefits Within One Year of Claimant's Death. Because She Failed to Do So, the Board Correctly Dismissed Her Appeal.

Ms. Anderson seeks time loss benefits to which, she contends, *claimant* was entitled before his death. This is distinguished from a claim for *survivors* benefits that is separate from (and in some respects independent of) the claimant's right to benefits. See *Rabey v. Department of Labor and Industries*, 101 Wn.App. 390, 394, 3 P.3d 217 (2000) (distinguishing between a claim for spousal survivors benefits and a claim to benefits for which the claimant was eligible before his death); see also *Ramsay v. Department of Labor and Industries*, 36 Wn.2d 410, 414, 218 P.2d 765 (1950) (distinguishing between a widow's pursuit of an award of compensation that had been granted to the claimant and a new, separate claim for widow's benefits)

The appellate courts have held RCW 51.32.040(2) governs this specific situation where a surviving spouse or beneficiary seeks to recover benefits payable to the claimant that had not been

granted at the time of his death. *Rabey, supra; citing Levang v. Department of Labor and Industries*, 18 Wn.App. 13, 14-15, 566 P.2d 573 (1977). The terms of the statute confirm this.

RCW 51.32.040(2) provides in relevant part:

“(a) If any worker suffers (i) a permanent partial injury and dies from some other cause than the accident which produced the injury before he or she receives payment of the award for the permanent partial injury or (ii) any other injury before he or she receives payment of any monthly installment covering any period of time before his or her death, the amount of the permanent partial disability award or the monthly payment, or both, shall be paid to the surviving spouse or the child or children if there is no surviving spouse. \* \* \*”

“\* \* \* \* \*”

“(c) **Any application for compensation under this subsection (2) shall be filed with the department or self-insuring employer within one year of the date of death.**

\* \* \*” (Emphasis added.)

The terms of subsection (a) clearly and unambiguously apply where, as here, the claimant dies from a cause unrelated to the compensable injury and the surviving spouse or children seek monthly installment benefits (*i.e.*, time loss compensation) payable to the claimant for a period before his death. *Rabey, supra; Levang, supra*. By contrast, RCW 51.28.050 applies where the surviving spouse or children pursue their own, separate claim to benefits. *Beels v. Department of Labor and Industries*, 178 Wash. 301, 307, 34 P.2d 917 (1934).

As noted, this claim is solely one for benefits to which claimant, not his beneficiaries, allegedly was entitled before his death. Therefore, the trial court and Board correctly concluded that RCW 51.32.040(2)(c) governs the resolution of this matter. *Rabey, supra; Levang, supra; see also Ramsay, supra*, 36 Wn.2d at 414 (holding that the spouse's claim to benefits for which her deceased husband was eligible was actionable, if at all, only under the predecessor to RCW 51.32.040).

The terms of RCW 51.32.040(2)(c) clearly and unambiguously require that an application for payment of monthly installment benefits allegedly due the claimant be made "within one

year of the death” of the claimant. Because these terms are clear and unambiguous, the liberal construction doctrine may not be applied to extend the filing period beyond one year from the claimant’s death. *Harris v. Department, supra*.

Claimant died on March 10, 2004 from a cause unrelated to his compensable injury. (CABR 22, 33). Ms. Anderson was appointed special administrator of claimant’s estate two days later. (*Id.*). However, despite representation by counsel, she did not file a claim for the time loss benefits now in question until nearly 16 months later on July 9, 2005. (CABR 22). Because this claim was not filed within one year of claimant’s death, it was untimely. Therefore, the Department had no jurisdiction to grant the time loss benefits and the Board and trial court correctly dismissed this appeal. RCW 51.32.040(2); *Wheaton, supra*; *Wilbur, supra*.

3. RCW 51.28.050 Does Not Apply Here. Ms. Anderson Also Did Not Comply With the One-Year Filing Requirement of That Statute.

Ms. Anderson does not contend that she complied with the one-year filing requirement of RCW 51.32.040(2). Instead, she asserts that RCW 51.28.050 applies here and that her July 9, 2005 claim was timely because the beneficiaries’ right to benefits did not

“accrue,” as contemplated by that provision, until the Supreme Court dismissed the previous appeal on July 13, 2004. (BA 20-22). RCW 51.28.050 does not apply here.

RCW 51.28.050 states:

“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) (claims for occupational diseases and involving employer suppression of a claim).”

By its terms, RCW 51.28.050 deals with claims that seek to enforce “the rights of dependents or beneficiaries.” An example is a surviving spouse’s claim for death benefits, as noted above. See *Rabey v. Department of Labor and Industries, supra*, 101 Wn.App. at 394; citing *Beels v. Department of Labor and Industries*, 178 Wash. 301, 307, 34 P.2d 917 (1934). That is, RCW 51.28.050 applies where the surviving spouse or children pursue their own separate claim to benefits under the Act that is distinguishable from the claimant’s right to benefits. *Rabey, supra; Beels, supra*. Here, Ms. Anderson does not pursue any separate claim to benefits by

the beneficiaries. Instead, she seeks compensation for which claimant was eligible, but which had not been awarded when he died. RCW 51.28.050 does not apply to that situation; RCW 51.32.040(2) does. The trial court and Board correctly so found.

Even *assuming* that RCW 51.28.050 applied here, Ms. Anderson's claim was untimely. That statute requires that a claim for benefits be filed "within one year after the day upon which . . . the rights of dependents or beneficiaries accrued." The rights of a surviving spouse or dependent child "accrue" upon the claimant's death. *Rabey, supra*, 101 Wn.App. at 394 (so holding for a surviving spouse's claim); *Beels v. Department of Labor and Industries, supra*, 178 Wash. at 306 (stating, "[the claimant's widow's] rights accrued the instant her husband died"). Because Ms. Anderson's application was filed more than one year after claimant's death, it was untimely – even under RCW 51.28.050.

Ms. Anderson cites no authority for her assertion that the rights of the beneficiaries here did not accrue until the Supreme Court dismissed the previous appeal on July 13, 2004. (See BA 21-22). As stated, the appellate courts consistently have held that the triggering event for the assertion of such rights is the death of the

claimant. See *Rabey, supra*; *Beels, supra*; *Curry v. Department of Labor and Industries*, 49 Wn.2d 93, 94-95, 298 P.2d 485 (1956).

Ms. Anderson, who was then represented by counsel, knew or should have known that she had one year from claimant's death to file a claim. Regardless, even if the right to pursue such benefits was unclear or not yet apparent, that does not toll the running of the one-year statute of limitations. See *Rector v. Department of Labor and Industries*, 61 Wn.App. 385, 810 P.2d 1363 (1991) (holding the one-year limitations period for filing claims was not tolled because the claimant had not discovered he had been injured). The previous appeal had no impact on the right of claimant's beneficiaries to seek the time loss benefits now in dispute. That appeal involved only claimant's right to vocational services. Supreme Court review of the Court of Appeals' decision – in claimant's favor – in no way impaired the right of his beneficiaries to pursue the current, separate issue of time loss compensation once claimant died. Because that right accrued upon claimant's death, and no claim was made for time loss benefits within one year thereafter, the claim was untimely, even under RCW 51.28.050.

4. The Trial Court and Board Correctly Concluded That Ramsay v. Department of Labor and Industries Does Not Apply Here.

Ms. Anderson erroneously contends that under *Ramsay v. Department of Labor and Industries, supra*, she was not required to file a formal application for the time loss benefits within one year of claimant's death. (BA 22-26). *Ramsay* involved a predecessor to RCW 51.32.040 that did not contain the current requirement for filing an application within one year of the claimant's death. The one-year limitations period referenced in *Ramsay* involved a different statute, which the court expressly found was not applicable in that case. The court also expressly concluded that there was no limitations period on the widows' claims in *Ramsay* because the applicable statute – the processor to RCW 51.32.040 – did not contain one at that time. Under these circumstances, it is not tenable to argue, as Ms. Anderson does, that *Ramsay* supports the conclusion that the one-year limitations now found in RCW 51.32.040(2)(c) does not apply to a claim by beneficiaries for benefits owed to the claimant at the time of his death.

*Ramsay* was issued in 1950 and addressed injuries sustained in the 1930s. 36 Wn.2d at 411. The widows of the two

deceased workers sought benefits for which the workers were eligible at the time of their deaths. *Id.* The Board and superior court had rejected the claims on the basis the one-year limitations period contained in Rem.Rev.Stat. § 7686 was applicable and the claims had not been filed within one year of the workers' deaths. 36 Wn.2d at 412. On review, the court noted that § 7686 established three types of claims to which it applied: (1) a worker's application for compensation for an injury (subsection (a); now RCW 51.28.020); (2) a beneficiary's application for compensation for the death of a worker resulting from an injury (subsection (b); now RCW 51.28.030); and (3) a worker's application for compensation or claim reopening based on a change in circumstances (subsection (c); now RCW 51.28.040). 36 Wn.2d at 412-13. The court stated that the widow's claims fell into none of these categories of claims and that they were instead seeking benefits allegedly owed to the deceased workers at the time of their deaths. 36 Wn.2d at 413-14. The court therefore concluded that § 7686, and the one-year limitations period found in subsection (d) of that statute, did not apply to the widows' claims. 36 Wn.2d at 414.

The *Ramsay* court proceeded to find that the widows were entitled to their husbands' compensation, if at all, only under Rem.Rev.Stat. § 7684, which is now codified under RCW 51.32.040. 36 Wn.2d at 414. As stated, Rem.Rev.Stat. § 7684 did not contain a one-year limitations period when *Ramsay* was decided in 1950. That provision, now contained in RCW 51.32.040(2)(c), was not added to the statute until 1971. (Attached App-A.) Laws 1971, ch. 289, § 43.<sup>4</sup> For this reason, the court stated in *Ramsay* that there then existed "no statutory limit within which a widow must assert this right to an assignment of what was due her husband." 36 Wn.2d 414. Similarly, the court noted that nothing in the former version of Rem.Rev.Stat. § 7684 (and § 7686) "suggests that a widow must file an 'application' for any portion of her husband's accrued but unpaid compensation to which she may be entitled under . . . § 7684." *Id.* The court therefore held that the widows' claims for their husband's benefits were not barred by their failure to file the claims within one year of the husbands' deaths. 36 Wn.2d at 414-15.

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<sup>4</sup> This fact was brought to the attention of the court and counsel below. (CP 60-61; see also CP 31-33).

In short, the holding in *Ramsay* clearly was based on a predecessor of RCW 51.32.040 that did not contain any provision requiring that a surviving spouse or child file an application for benefits payable to the claimant within one-year of his death. Equally clearly, RCW 51.32.040(2)(c) now contains such a provision that is applicable to this claim. *Ramsay* is therefore inapplicable here and provides no valid authority for excusing Ms. Anderson's failure to claim the time loss benefits within one year of claimant's death. Because Ms. Anderson did not comply with the one-year filing requirement, this claim is barred for lack of jurisdiction. *Wheaton, supra; Wilbur, supra*. The superior court and Board therefore properly dismissed this appeal.

**C. The Beneficiaries are Not Entitled to Assessed Attorney Fees and Costs.**

Attorneys fees for appeals in workers' compensation matters are controlled by RCW 51.52.130 and may be awarded only as the statute expressly authorizes. *Camation Co. v. Hill*, 115 Wash.2d 184, 188, 796 P.2d 416 (1990). Under RCW 51.52.130, an award of fees and costs is authorized only when (1) the claimant prevails on the appeal and (2) the court's decision directly results in the claimant receiving benefits. *Flanigan v. Department of Labor and*

*Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994); *Ziegler v. Department of Labor and Industries*, 42 Wn.App. 39, 708 P.2d 1212 (1985). Neither element is present here.

As discussed, the beneficiaries should not prevail on this appeal. Further, even *assuming* the beneficiaries were to prevail, the court's decision would not directly or necessarily result in *any* award of benefits. *At most*, the beneficiaries might have the opportunity on remand to litigate and prove that the compensable injury had rendered claimant temporarily and totally disabled during the period for which benefits are sought. That is, the beneficiaries would have to litigate and prevail on the merits of that issue before any benefits could be awarded. Since a decision by this court in favor of the beneficiaries would not directly or necessarily result in any award of benefits, no assessed attorneys fees and costs may be granted. RCW 51.52.130; *Flanigan, supra*; *Ziegler, supra*.

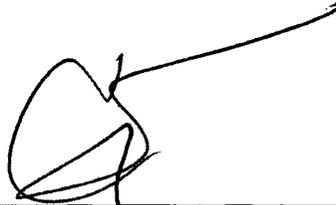
## VI. CONCLUSION

For the above reasons, the court should affirm the trial court's decision.

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DATED this 14<sup>th</sup> day of July, 2011.

A handwritten signature in black ink, consisting of a large, stylized loop followed by a long, thin horizontal stroke extending to the right.

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Craig A. Staples, WSBA # 14708  
Attorney for Weyerhaeuser

Sec. 42. Section 51.32.020, chapter 23, Laws of 1961 and RCW 51.32.020 are each amended to read as follows:

If injury or death results to a workman from the deliberate intention of the workman himself to produce such injury or death, or while the workman is engaged in the attempt to commit, or the commission of, a ((crime)) felony, neither the workman nor the widow, widower, child, or dependent of the workman shall receive any payment ((whatsoever out of the accident fund)) under this title.

An invalid child, while being supported and cared for in a state institution, shall not receive compensation under this chapter.

No payment shall be made to or for a natural child of a deceased workman and, at the same time, as the stepchild of a deceased workman.

Sec. 43. Section 51.32.040, chapter 23, Laws of 1961 as amended by section 2, chapter 165, Laws of 1965 ex. sess. and RCW 51.32.040 are each amended to read as follows:

No money paid or payable under this title ((out of the accident fund or out of the medical aid fund)) shall, prior to the issuance and delivery of the check or warrant therefor, be capable of being assigned, charged, or ever be taken in execution or attached or garnished, nor shall the same pass, or be paid, to any other person by operation of law, or by any form of voluntary assignment, or power of attorney. Any such assignment or charge shall be void: PROVIDED, That if any workman suffers a permanent partial injury, and dies from some other cause than the accident which produced such injury before he shall have received payment of his award for such permanent partial injury, or if any workman suffers any other injury and dies from some other cause than the accident which produced such injury before he shall have received payment of any monthly installment covering any period of time prior to his death, the amount of such permanent partial award, or of such monthly payment or both, shall be paid to his widow, if he leaves a widow, or to his child or children if he leaves a child or children and does not leave a widow: PROVIDED FURTHER, That, if any workman suffers an injury and dies therefrom before he shall have received payment of any monthly installment covering time loss for any period of time prior to his death, the amount of such monthly payment shall be paid to his widow, if he leaves a widow, or to his child or children, if he leaves a child or children and does not leave a widow: PROVIDED FURTHER, That any application for compensation under the foregoing provisions of this section shall be filed with the department or self-insuring employer within one year of the date of death: PROVIDED FURTHER, That if the injured workman resided in the United States as long as three years prior to the date of the injury, such payment shall not be made to any widow or child who was at the time of the injury a nonresident of

the United States: PROVIDED FURTHER, That any workman receiving benefits under this title who is subsequently confined in, or who subsequently becomes eligible therefor while confined in any institution under conviction and sentence shall have all payments of such compensation canceled ((by the department)) during the period of confinement but after discharge from the institution payment of benefits thereafter due shall be paid if such workman would, but for the provisions of this proviso, otherwise be entitled thereto: PROVIDED FURTHER, That if such incarcerated workman has during such confinement period, any beneficiaries, they shall be paid directly the monthly benefits which would have been paid to him for himself and his beneficiaries had he not been so confined. Any lump sum benefits to which the workman would otherwise be entitled but for the provisions of this proviso shall be paid on a monthly basis to his beneficiaries.

Sec. 44. Section 51.32.100, chapter 23, Laws of 1961 and RCW 51.32.100 are each amended to read as follows:

If it is determined ((by the department)) that an injured workman had, at the time of his injury, a preexisting disease and that such disease delays or prevents complete recovery from such injury, ((the said department)) it shall be ascertained, as nearly as possible, the period over which the injury would have caused disability were it not for the diseased condition and the extent of permanent partial disability which the injury would have caused were it not for the disease, and ((award)) compensation shall be awarded only therefor.

Sec. 45. Section 51.32.140, chapter 23, Laws of 1961 and RCW 51.32.140 are each amended to read as follows:

Except as otherwise provided by treaty, whenever compensation is payable to a beneficiary who is an alien not residing in the United States, ((the department)) there shall ((pay)) be paid fifty percent of the compensation herein otherwise provided to such beneficiary. But if a nonresident alien beneficiary is a citizen of a government having a compensation law which excludes citizens of the United States, either resident or nonresident, from partaking of the benefit of such law in as favorable a degree as herein extended to nonresident aliens, he shall receive no compensation. No payment shall be made to any beneficiary residing in any country with which the United States does not maintain diplomatic relations when such payment is due.

NEW SECTION. Sec. 46. There is added to chapter 51.32 RCW a new section to read as follows:

(1) One purpose of this title is to restore the injured workman as near as possible to the condition of self-support as an able-bodied workman. Benefits for permanent disability shall be

**CERTIFICATE OF MAILING**

I certify that on July 14, 2011, I served the foregoing WEYERHAEUSER's BRIEF OF RESPONDENT on the following persons by mailing them each a true copy by first class mail with the U.S. Postal Service at Portland, OR in a sealed envelope, with postage prepaid, and addressed to the following:

Jennifer Cross-Euteneier  
Vail Cross-Euteneier & Assoc.  
P.O. Box 5707  
Tacoma, WA 98415-0707

Steve Vinyard, AAG  
Office of the Attorney General  
Labor and Industries Division  
P.O. Box 40121  
Olympia, WA 98504-0121

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11 JUL 18 AM 10:17  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

I further certify that I filed the original and a true copy of the same document by first class mail on the above date in a sealed envelope, with postage prepaid, and addressed to the following:

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

By:   
\_\_\_\_\_  
Craig A. Staples WSBA #14708  
Attorney for Weyerhaeuser