IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RICHARD ANDERSON, deceased, Appellant, v. WEYERHAEUSER CO. and DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Respondents,	No. 41646-8-II UNPUBLISHED OPINION

Laurie Anderson, on behalf of Richard Anderson's dependent children/beneficiaries (collectively, Beneficiaries), appeals the superior court's and Board of Industrial Insurance Appeals's (Board) orders affirming a Washington Department of Labor and Industries' (Department) order. The contested order suspended further action on the Beneficiaries' claim for time loss benefits owed to Anderson before he died. The Beneficiaries argue that the Board improperly considered whether the Beneficiaries had made a timely application for compensation when that question had not been considered below. The Department argues that the appeal is moot and must be dismissed due to the Beneficiaries' failure to timely apply. Because the Beneficiaries were not required by the statute to file a separate claim for time loss benefits and were entitled to continue to pursue Anderson's ongoing claim, we reverse and remand to the Board for further proceedings.

FACTS

I. Anderson's Injury, Claim for Benefits, and Appeal

Richard Anderson was working for Weyerhaeuser in 1993 when a falling tree injured him.

Anderson v. Weyerhaeuser Co., 116 Wn. App. 149, 152, 64 P.3d 669 (2003), *review granted*, 150 Wn.2d 1035 (2004), *review dismissed as moot* (May 20, 2004) ("*Anderson I*"). Two years later, he was unable to return to his job and Weyerhaeuser referred him to vocational services.[1, 2] *Anderson I*, 116 Wn. App. at 152. In June 1995, the Department found Anderson eligible for vocational services. *Anderson I*, 116 Wn. App. at 152. But in September 1995, the Department found him ineligible for the vocational services program, contending that he failed to participate in plan development, did not keep scheduled appointments, and did not develop a suitable alternative plan with his own vocational counselor.[3, 4] *Anderson I*, 116 Wn. App. at 152.

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[1] RCW 51.32.095(1) provides for vocational rehabilitation services in some circumstances.

[2] It is well-settled law in Washington that the rights of claimants under the Industrial Insurance Act (IIA) are determined and controlled by the law in effect at the time of the injury. *Cena v. Dep't of Labor & Indus.*, 121 Wn. App. 915, 917, 921, 91 P.3d 903 (2004); *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22, 25, 380 P.2d 730 (1963). Several of the statutes at issue in this case have been amended several times throughout the time these proceedings have been pending. Because the subsequent amendments do not materially affect our analysis, we will cite to the current statutes throughout this opinion unless we indicate otherwise.

[3] The Department originally determined that Anderson was entitled to both time loss benefits and vocational rehabilitation services. During the first appeal, the Department formally suspended only vocational benefits. But, at some point, Weyerhaeuser stopped paying time loss benefits. It is not clear from the record when Weyerhaeuser stopped payments. The Board declined to address the appropriateness of that suspension of time loss benefits because it did not have jurisdiction to address the question without a written order by the Department suspending payment of those benefits.

[4] The Department or a self-insured employer may, with notice, deny any compensation for any period where the worker refuses or obstructs certain rehabilitation activities. RCW 51.32.110(2). Therefore, termination, with proper notice, from vocational rehabilitation for noncooperation can also result in termination of time loss benefits.

Anderson unsuccessfully appealed the decision through various department levels to the Board and finally to the superior court, which ruled that the Department properly terminated Anderson under RCW 51.32.095. *Anderson I*, 116 Wn. App. at 152. Anderson appealed to this court. *Anderson I*, 116 Wn. App. at 151.

On appeal, Anderson argued that because the Department had already made a decision that he was eligible for vocational benefits, it could not terminate him under the discretionary eligibility statute, RCW 51.32.095; rather, according to Anderson, the Department could terminate him only under the non-cooperation statute, RCW 51.32.110, with its added procedural rights. *Anderson I*, 116 Wn. App. at 152. On March 11, 2003, we reversed the Board, holding that the Department, after finding Anderson eligible for vocational benefits, was required to follow RCW 51.32.110's procedural requirements prior to terminating benefits. *Anderson I*, 116 Wn. App. at 152, 157-58.

The Department and Weyerhaeuser each filed a petition for review, which the Supreme Court granted. *Anderson v. Weyerhaeuser, Co.*, 150 Wn.2d 1035, 84 P.3d 1229 (2004).

On March 10, 2004, Anderson died due to a medical condition unrelated to his industrial injury. Anderson's former wife, Laurie Anderson, was appointed the administrator of Anderson's estate.

The Supreme Court held oral argument on the merits of the case. On May 20, 2004, the Supreme Court dismissed the case as moot and affirmed our March 11, 2003 decision. On July 13, 2004, the Supreme Court issued a supplemental decision finding the appeal to be moot and denying Weyerhaeuser's and the Department's motion for reconsideration and reaffirmed our decision.

On June 9, 2005, consistent with our order remanding the case for further proceedings, the superior court ordered that the matter "be remanded back to the [Department] to take action consistent with the Court of Appeals decision." Administrative Record (AR) at 34.

II. Beneficiaries' Request for Payment of Benefits and Appeal

On July 8, 2005, Laurie Anderson, on behalf of Anderson's dependent children, sent a letter to the Department requesting that the Department issue an order instructing Weyerhaeuser to pay time loss benefits[5] from October 27, 1993 to March 9, 2004 to his dependent children.

The Department issued an order that suspended further action on the claim because Anderson had refused or hindered an evaluation or examination for the purposes of vocational rehabilitation.[6] The Beneficiaries protested. The Department affirmed the order. The Beneficiaries appealed to the Board. An industrial appeals judge issued a proposed decision and order reversing the Department's 2005 order, concluding that the Department had failed to give Anderson notice as RCW 51.32.110 requires before suspending his benefits. The judge concluded that the Department could not, in any event, suspend a worker's benefits under that

[5] Washington's IIA grants time loss compensation to a worker who is temporarily disabled due to an industrial injury. RCW 51.32.090(1), (3); *Cockle v. Dep't of Labor & Indus.*, 96 Wn. App. 69, 72, 977 P.2d 668 (1999). The ultimate goal of time loss compensation is to provide temporary financial support until the injured worker is able to return to work. *Cockle*, 96 Wn. App. at 75. Indeed, it is for that reason that time loss compensation terminates when the injured worker's disability ceases or becomes permanent. RCW 51.32.090(1), (3); *Cockle*, 96 Wn. App. at 75; *see also Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966) ("Time loss compensation resulting from a compensable injury is that temporary compensation which a workman is entitled to receive from the fund while totally incapacitated to perform work for his employer, and before his disability condition has been fixed or determined.").

[6] The Department's order stated, "Labor and Industries is suspending further action and compensation on this claim effective 08/26/95 because the worker: Refused or hindered an evaluation or examination for the purpose of vocational rehabilitation." AR Ex. J.

statute retroactively. The proposed decision and order remanded the claim to the Department with directions that it give notice to Anderson that his benefits might be suspended and that it give him 30 days to respond to that notice.

Weyerhaeuser petitioned for review. Weyerhaeuser argued that issuing a letter as the industrial appeals judge ordered would be a useless act and that because the Department could not send a letter asking Anderson for his reasons for noncooperation, the Department's 2005 order should be affirmed.

The Board granted review. At that time, the Board raised for the first time whether the Beneficiaries had properly filed application for benefits under RCW 51.32.040(2).[7, 8] The Board vacated the industrial appeal judge's proposed order and remanded with instructions for the industrial appeal judge to take further evidence as to the date of Anderson's death, whether Laurie Anderson was a statutory beneficiary, and whether the Beneficiaries had filed an

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[7] RCW 51.32.040(2)(a) states:

> 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. If there is no surviving spouse and no child or children, the award or the amount of the monthly payment shall be paid by the department or self-insurer and distributed consistent with the terms of the decedent's will or, if the decedent dies intestate, consistent with the terms of RCW 11.04.015.

[8] Our Supreme Court held that another portion of this statute, not at issue here, is unconstitutional. *See Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 742, 57 P.3d 611 (2002) ("We therefore hold RCW 51.32.040(3)(a), as applied to prisoners by [RCW] 72.60.102, violates equal protection.").

application for benefits in accordance with RCW 51.32.040(2)(c).

On remand, the parties submitted additional briefing to the industrial appeals judge. The parties stipulated that the Beneficiaries first requested payment of benefits on July 8, 2005, more than a year after Anderson had died. An industrial appeals judge issued a proposed order dismissing the Beneficiaries' appeal. The industrial appeals judge concluded the following:

> 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.

AR at 26.

The Beneficiaries petitioned for review. The Beneficiaries did not contend in their petition for review that the Board had exceeded the scope of its review, or that it had exceeded its subject matter jurisdiction, by considering whether RCW 51.32.040 applied to their case. The Board denied the petition. The Beneficiaries appealed to the superior court. After a bench trial, the superior court affirmed the Board. The Beneficiaries appeal.

ANALYSIS

I. Standard of Review

Washington's IIA, chapter 51.52 RCW, provides that the superior court review the Board's determination de novo. RCW 51.52.115. On review to the superior court, the Board's decision is prima facie correct, and the burden of proof is on the party challenging the decision. RCW 51.52.115; *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999). Our

review is governed by RCW 51.52.140, which provides that an "[a]ppeal shall lie from the judgment of the superior court as in other civil cases." We do not sit in the same position as the superior court; we review only "'whether substantial evidence supports the trial court's factual findings and then review, de novo, whether the trial court's conclusions of law flow from the findings.'" *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 180, 210 P.3d 355 (2009) (quoting *Watson v. Dep't of Labor & Indus.*, 133 Wn. App. 903, 909, 138 P.3d 177 (2006); *see also Ruse*, 138 Wn.2d at 5.

II. Timeliness

The Department argues that the appeal is moot because the Beneficiaries did not timely file an application for compensation within one year after Anderson's death as RCW 51.32.040(2) requires and therefore a court can no longer provide effective relief.[9] Weyerhaeuser also contends that the Beneficiaries failed to make a timely application of benefits. The Beneficiaries argue that they were not required to file a formal application for benefits where the benefits being requested were already due and owing to the injured worker at the time of his death, relying on *Ramsay v. Department of Labor and Industries*, 36 Wn.2d 410, 218 P.2d 765, *adhered to on reh'g*, 222 P.2d 855 (1950). We agree with the Beneficiaries.[10]

RCW 51.32.040(2)(c) states:

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[9] A case is moot if a court can no longer provide effective relief. *Orwick v. City of Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984).

[10] The Beneficiaries also argue that although they did not file their application for compensation within a year of the worker's death under RCW 51.32.040, they filed within one year of when their rights "accrued" under RCW 51.28.050, and therefore their application was timely and the appeal is not moot. Because we hold that the Beneficiaries were not required to file an application for compensation under RCW 51.32.040(2)(c), we need not determine when their rights accrued.

> 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. The department or self-insurer may satisfy its responsibilities under this subsection (2) by sending any payment due in the name of the decedent and to the last known address of the decedent.

The *Ramsay* court interpreted Rem. Rev. Stat. § 7686(d),[11] the predecessor to RCW 51.28.050. 36 Wn.2d at 412. In those two consolidated cases, the injured workers died after the Department had made a final determination that they were each entitled to compensation due to a total and permanent disability and awarded a lump sum settlement. *Ramsay*, 36 Wn.2d at 411. Each widow requested payment of the award more than a year after her husband died. *Ramsay*, 36 Wn.2d at 411. The Department denied the widows' requests, contending that Rem. Rev. Stat. § 7686(d) required that the applications be made within a year of the worker's death. *Ramsay*, 36 Wn.2d at 411. Our Supreme Court disagreed, concluding that

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[11] Rem. Rev. Stat. § 7686 stated in part:

> (a) Where a workman is entitled to compensation under this act he shall file with the department, his application for such, together with the certificate of the physician who attended him, and it shall be the duty of the physician to inform the injured workman of his rights under this act and to lend all necessary assistance in making this application for compensation and such proof of other matters as required by the rules of the department without charge to the workman.
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> (b) Where death results from injury the parties entitled to compensation under this act, or someone in their behalf, shall make application for the same to the department, which application must be accompanied with proof of death and proof of relationship showing the parties to be entitled to compensation under this act, certificates of attending physician, if any, and such proof as required by the rules of the department.
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> (c) If change of circumstances warrants an increase or rearrangement of compensation, like application shall be made therefor. No increase or rearrangement shall be operative for any period prior to application therefor.
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> (d) 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.

the one year limitation in Rem. Rev. Stat. § 7686(d) did not apply to a widow's request for compensation which was owed to her husband and unpaid at the time of his death and that no other statutory limit applied limiting when widows must seek the award. *Ramsay*, 36 Wn.2d at 414. The court reasoned:

> 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.

Ramsay, 36 Wn.2d at 414 (emphasis in original). The court also stated:

> Nothing in Rem. Rev. Stat. §§ 7684, 7686, or elsewhere in the act, suggests that a widow must file an "application" for any portion of her deceased husband's accrued but unpaid compensation to which she may be entitled under these statutory assignment provisos of Rem. Rev. Stat. § 7684.

Ramsay, 36 Wn.2d at 414.

The Department and Weyerhaeuser contend that RCW 51.32.040 now contains a time filing requirement and therefore *Ramsay* is inapplicable. The time limitation for filing an application for compensation now contained in RCW 51.32.040(2)(c) was not added to the statute until 1971. *See* Laws of 1971, 1st Ex. Sess., ch. 289, §43 (amending RCW 51.32.040 to add, "[A]ny application under the foregoing provisos of this section shall be filed with the department or self-insuring employer within one year of the date of death."). But that subsection

relates only to filing applications for compensation. Filing an application only means filing a written document with the Department or self-insured employer that reasonably directs attention to the fact that an injury, with its particulars, has been sustained and that compensation is claimed. *Nelson v. Dep't of Labor & Indus.*, 9 Wn.2d 621, 629, 115 P.2d 1014 (1941) (interpreting Remington Revised Statutes, section 7686, the statutory predecessor to RCW 51.28.050).

Like in *Ramsay*, Anderson already filed such an application. The Department ordered payment of time loss benefits. Although Weyerhaeuser apparently ceased paying those benefits at some point, the record does not reflect a formal Department order suspending time loss compensation until August 12, 2005, after Anderson's death. That order was purportedly retroactive, suspending benefits from August 26, 1995. Like in *Ramsay*, any available benefits were all due and owing to Anderson prior to his death. Like in *Ramsay*, the Beneficiaries were not required to start a new, independent claim, but rather assumed Anderson's right to those payments. *See Lightle*, 68 Wn.2d at 513 ("We hold that the legislature, in enacting the questioned proviso, intended that the widow's right to the deceased workman's time loss compensation does survive, and that the court did not err in directing that respondent be substituted for the purpose of litigating the time loss claim to its final conclusion."). Therefore, no filing of a new application of compensation was required.

We hold that the statute of limitations in RCW 51.32.040(2)(c) applies only where the injured, deceased worker had not previously filed an application for compensation. Where such application has been filed, the Beneficiaries need not file a new application for compensation.

The Department argues that *Ramsay* is distinguishable because the injured workers in that case had obtained a final award of benefits before they died. This is not persuasive. First, as set

forth above, Anderson had filed an application and there was no requirement for the beneficiaries to do so again. Also, a final determination of benefits is not required for a statutory beneficiary to obtain compensation owed the worker prior to death. *See Powell v. Dep't of Labor & Indus.*, 79 Wn.2d 378, 386-87, 485 P.2d 990 (1971) ("We hold that under the provisions of RCW 51.32.040, a widow of a workman who has suffered an industrial injury and has died from some other cause, is entitled to receive the compensation to which her husband was entitled but which he did not receive, whether or not a decision in his favor was rendered by the department prior to his death.").

The Department may be able to defend its retroactive denial of time loss benefits on remand, so the Beneficiaries may not ultimately obtain benefits. But we review here only whether the Beneficiaries failed to assert a timely claim. Because Anderson asserted a timely claim and no additional application for compensation is required, the Board erred as a matter of law and we remand to the Department for further proceedings.[12]

III. Attorney Fees

The Beneficiaries seek attorney fees under RAP 18.1, RCW 51.52.130, and *Brand v. Department of Labor and Industries*, 139 Wn.2d 659, 989 P.2d 1111 (1999). The Department and Weyerhaeuser contend that the Beneficiaries are not entitled to fees because the statute requires that the appeal result in the worker obtaining additional benefits or treatment. The Department and Weyerhaeuser claim that the Beneficiaries would still need to demonstrate, on remand, that Anderson was temporarily and totally disabled as a proximate result of his industrial

[12] The parties dispute whether the Board had the authority to consider the timeliness of the application where it had not been previously considered by the Board. Because we reverse the Board's order on the timeliness issue, we need not consider the Beneficiaries' argument.

injury during the relevant time period.

The relevant portion of RCW 51.52.130(1) provides:

> If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary . . . a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

Here, although we reverse, our holding does not necessarily result in additional relief. Our narrow holding only permits the Beneficiaries to proceed with their claim. It is for the Board to determine whether that claim has any value. At this point, the Beneficiaries are not yet entitled to fees under RCW 51.52.130.

We reverse and remand to the Board for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Hunt, J.

Johanson, J.