McShane, James, Dec'd

BENEFICIARIES

Permanent partial disability benefits

Permanent total disability benefits

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Beneficiaries

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Beneficiaries

Fixity of condition at time of death from unrelated cause (RCW 51.32.050(6) & 51.52.067)

A beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if it is established that the disability would have been permanent even if the worker had not died from unrelated causes before treatment was complete. ***….In re James McShane, Dec'd,* BIIA Dec., 05 16629 (2006)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JAMES J. MCSHANE, DEC'D	)	**DOCKET NOS. 05 16629 & 05 16630**
	)	
CLAIM NO. Y-310056	)	**DECISION AND ORDER**

APPEARANCES:

Beneficiary, Linda L. McShane, by
Walthew, Warner, Thompson, Eagan, Kindred & Costello, P.S., per
Michael J. Costello

Employer, Bertram & Sons, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Richard Becker, Assistant

Linda L. McShane, the beneficiary, filed two appeals with the Board of Industrial Insurance Appeals on June 14, 2005. These appeals are consolidated. In **Docket No. 05 16629**, Ms. McShane appealed from an order of the Department of Labor and Industries dated April 13, 2005, which she received on April 15, 2005. In this order, the Department affirmed orders dated November 17, 2004 and November 18, 2004. In the November 17, 2004 order, the Department directed that $55.57 be reimbursed to the Department for overpayment for a contended duplicate payment. In the November 18, 2004 order, the Department closed the claim with time loss compensation as paid through July 31, 2004, and without award for permanent partial disability. The Department order is **REVERSED AND REMANDED**.

In **Docket No. 05 16630**, Ms. McShane appealed from an order of the Department of Labor and Industries dated April 14, 2005, which she received on April 18, 2005. In that order, the Department denied her request for spouse's benefits; determined that the cause of death was unrelated to the injury or disease covered under this claim; and determined that the injured worker was not permanently totally disabled because of the conditions covered under this claim. The Department order is **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY MATTERS

The industrial appeals judge affirmed both appealed Department orders in a Proposed Decision and Order issued on June 29, 2006. Linda L. McShane, the beneficiary, filed a timely Petition for Review. Therefore, these matters are now before the Board for review and decision pursuant to RCW 51.52.104 and RCW 51.52.106.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

ISSUES

Contested issues addressed in this Decision and Order include whether the injured worker's widow, Linda L. McShane, is entitled to pension benefits, or in the alternative, whether she is entitled to an award based on her husband's permanent partial disability.

DECISION

James J. McShane sustained the covered industrial injury on May 15, 2003, while working as a driver for Bertram & Sons, Inc., a contractor delivering for Federal Express. Mr. McShane died of cardiac arrest on August 1, 2004, just short of age 56. At the time of his death, Mr. McShane's claim was still open for treatment and other benefits. Linda L. McShane, widow of James J. McShane, does not contend that her husband's death was caused by his industrial injury.

We have granted review of the Proposed Decision and Order because the industrial appeals judge premised his determination to affirm the appealed Department orders on an incorrect legal assumption—that lack of medical fixity of an industrial injury at the time of a worker's death from causes unrelated to the industrial injury precludes a worker's beneficiary from receiving either permanent total disability (pension) benefits or awards for permanent partial disability. In Ms. McShane's case, we find that she is entitled to an award based on her husband's permanent partial disability consistent with Category 3 of WAC 296-20-240, the categories of permanent cervical and cervico-dorsal impairments.

The Board, in a prior case, reversed a Proposed Decision and Order in which the industrial appeals judge concluded that the worker must have reached medical fixity before he could be determined permanently and totally disabled for purposes of the widow's pension claim:

> We hold that when an injured worker dies due to causes unrelated to the industrial injury, in order to receive benefits under RCW 51.32.050(6), the beneficiary must establish that at the time of death, disability caused by the industrial injury caused the worker to be totally disabled and, although further proper and necessary treatment was contemplated, that treatment would not be expected to return the worker, had he survived, to employment.

In re Russell C. Fredericks, Dec'd, Dckt. No. 05 18867 (June 30, 2006) at 1-2. In *Fredericks*, the Board reviewed cases in which appellate courts denied widow's pensions that were predicated on

the worker being permanently and totally disabled at the time of death. See *Hiatt v. Department of Labor & Indus.*, 48 Wn.2d 843 (1956) and *Wilson v. Department of Labor & Indus*., 6 Wn. App. 902 (1972). The Board, in *Fredericks*, further examined three of its own decisions, *In re Larry Alfano, Dec'd*, BIIA Dec*.,* 86 1384 (1988); *In re Mabel Gates, Dec'd*, BIIA Dec., 63,850 (1984); and *In re Ronald Cowell, Dec'd*, BIIA Dec., 62,207 (1984). Two concurring Board members in *Alfano* (in which the Board found the worker's industrial injury-related condition was, in fact, medically fixed and stable at the time of death) criticized the prior Board cases in which permanent total disability benefits were contemplated in the absence of such medical fixity.

In *Fredericks*, the Board noted that in *Hiatt* and in *Wilson* the appellate courts denied permanent total disability benefits because the evidence showed that, but for the workers' deaths, the industrial conditions were remedial such that the workers could have been expected to again become capable of gainful employment. The definition of "permanent" used by the *Hiatt* court was suggestive to the Board that the focus ought to be on the character of the disability at the time of death—that is, whether or not the disability is permanent, not just whether the medical condition caused by the industrial injury is medically fixed and stable.

In *Fredericks*, the Board noted that focusing on the character of the disability at the time of a worker's death was not inconsistent with our Supreme Court's holding in *Pend Orielle Mines & Metals Co. v. Department of Labor & Indus*., 64 Wn.2d 270 (1964). The court addressed the issue of whether a worker's status was appropriately determined as permanently totally disabled. The employer wanted the worker's status changed to permanent total disability, which would have relieved the employer of medical treatment obligations. The employer contended that once the industrially related condition has reached the point where the worker will never be employable, the condition is properly defined as permanently totally disabling. The court determined that the worker, who was still alive when the orders under appeal were issued, should **not** be declared permanently totally disabled. The court focused directly on the concern that, if a permanently disabled worker is given a lump sum settlement or is placed on permanent total disability benefits, the moment he comes under this definition of permanent total disability, he conceivably could be denied medical care and attention when he is in the greatest need because the right to medical aid under the Act would terminate at that time. The *Pend Orielle Mines* court was convinced that such a construction would make the Act an absurdity by emasculating one of its primary objectives—that of providing sure and certain relief for injured workers. The court held that the Act should therefore be construed, in the light of its declared purpose and intent, by providing that a worker may not be

rated for permanent total disability until his condition becomes static or fixed, thereby affording him beneficial care and treatment from the time of his injury. *Pend Oreille Mines*, at 272.

The Board, in *Fredericks*, noted that the purpose of waiting until a worker's industrial condition is fixed before assigning the status of permanent total disability is to allow the worker ongoing treatment even if it is clear the worker would not return to gainful employment when treatment is concluded. The purpose served by this construction of the Act is not, however, served when the worker is deceased. And, conversely, such a construction, when a worker is deceased, would thwart the purpose of the Act—to provide deserved relief to workers and their families. The Board, in *Fredericks*, determined then that when the worker has, in fact, died due to conditions unrelated to the industrial injury, the appropriate focus is whether the worker would have otherwise been permanently prevented from obtaining gainful employment due to the effects of the industrial injury. The fixity of the condition is irrelevant if it is established that the deceased worker's total disability was permanent. This highlights the crucial distinction already noted. The courts in *Hiatt* and *Wilson* were not considering the circumstance where it could be demonstrated that even if the rehabilitation from the industrial injury had been completed, the worker would not, on a more probable than not basis, be able to return to employment.

Before turning to the evidence in Linda L. McShane's appeal, we further state our reasons for holding, on the corresponding question related to awards for permanent **partial** disability, that lack of medical fixity of an industrial injury at the time of a worker's death from causes unrelated to the industrial injury does not preclude a worker's beneficiary from receiving an award for the deceased worker's otherwise permanent partial disability. First, the same analysis applied in *Fredericks* to permanent **total** disability is equally appropriate to consideration of permanent **partial** disability. In circumstances of a worker's death from causes unrelated to the industrial injury, it is consistent with, and serves the beneficial purposes of, the Act to focus on the character of the disability.

Second, proper interpretation of the statute governing awards for permanent partial disability upon a worker's death from unrelated causes compels the view that awards are payable to the surviving spouse, or child or children if there is no surviving spouse, including in instances where the industrially related condition was not medically fixed before death.

> 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.

RCW 51.32.040(2)(a). The statute is mandatory. The statute is arguably unambiguous. It contemplates, and accounts for, situations in which a worker dies from causes unrelated to an industrial injury. The statute makes no mention of "fixity," but rather indicates that if a worker suffers "permanent partial injury" and dies before payment therefor, the surviving spouse or children are entitled to an award for permanent partial disability. The phrase "before he or she receives payment of the award" logically encompasses **both** situations in which medical fixity has already occurred before death and situations in which assessment of permanent impairment arises only due to death of the injured worker—in either instance payment has not yet been made for permanent impairment, if any exists. The statute certainly does not explicitly indicate in any manner that the death of an injured worker from unrelated causes should result in the further misfortune of an injured worker's beneficiaries being denied awards for permanent partial disability that inevitably would have been provided the injured worker had he or she survived to medical fixity.

We recognize that some might argue that the statutory reference to "payment" limits the statute's application to only those situations in which fixity had been determined before death, but "payment" simply had not yet been made. While we disagree with this argument for reasons stated above, we note that the argument points, at most, to potential ambiguity. If we were to agree that such ambiguity exists, we would be guided by the requirement that we construe the Act liberally for the purpose of reducing suffering and economic loss due to industrial injuries. This principle is embodied in statutory and case law.

> The 1971 Legislature also codified a principle already long recognized by our courts: "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." RCW 51.12.010. In other words, where reasonable minds can differ over what Title 51 RCW provisions mean, in keeping with the legislation's fundamental purpose, the benefit of the doubt belongs to the injured worker:
>
> > [T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, with doubts resolved in favor of the worker.

> *Dennis v. Dep't of Labor & Indus.,* 109 Wn.2d 467, 470, 745 P.2d 1295 (1987) (citing cases both predating and postdating the 1971 codification of this principle); *see also Double D Hop Ranch v. Sanchez*, 133 Wn.2d 793, 798, 947 P.2d 727, 952 P.2d 590 (1997).

Cockle v. Department of Labor & Indus., 142 Wn.2d 801, 811 (2001).

For reasons stated above, lack of medical fixity of an industrial injury at the time of a worker's death from causes unrelated to the industrial injury does not preclude a worker's beneficiary from receiving an award for the deceased worker's otherwise permanent partial disability. Whether an award is due depends on the character of the disability had the worker not died from unrelated causes before treatment was complete. The requirement for showing a beneficiary's entitlement to an award for permanent partial disability is a corollary of the requirement stated earlier for showing a beneficiary's entitlement to pension benefits for permanent total disability. We hold that when an injured worker whose industrial condition(s) had not reached medical fixity dies due to causes unrelated to the industrial injury, in order to receive a permanent partial disability award under RCW 51.32.040(2)(a), the beneficiary must establish that at the time of death, the industrial injury caused a particular impairment that, even after contemplated proper and necessary treatment, would have still remained such that it would have, but for his or her death, entitled the injured worker to an award for permanent partial disability.

The evidence in Linda L. McShane's appeal establishes that at the time of his industrial injury in May 2003, James J. McShane felt a twinge in his neck and shoulder as he was reaching overhead for a parcel. It is not disputed that the industrial injury caused a herniated disc at C3-4 with myleopathy and that discectomy and fusion would have been proper and necessary treatment. This treatment plan was proposed by Timothy D. Steege, M.D., a neurosurgeon to whom Mr. McShane was referred by his chiropractor. Gary R. Schuster, M.D., an internal and sports medicine specialist, who reviewed records and testified for Ms. McShane, agreed with the treatment plan. James J. McShane was to stop smoking and have the surgery, but he died of cardiac arrest a month before the date planned for surgery.

The evidence established that James J. McShane possessed a high school diploma and an Associate of Arts degree in business. He appears to us to have been quite constant and resourceful in his varied work history, which included restaurant management, holiday mall-photo management, street sweeper operation and mechanic work, and school janitor work—all before his job of injury as a FedEx delivery driver.

Dr. Schuster, based on his records review, did not believe that the planned surgery would have allowed Mr. McShane to be gainfully employed. Dr. Schuster listed a number of limitations that he believes would have remained, such as limitations on extension, flexion, rotation, standing, and lifting. Contrary to the suggestion by the industrial appeals judge in the Proposed Decision and Order, Dr. Schuster did not rate a more-probable-than-not, projected post-surgery impairment category higher than Category 3 of WAC 296-20-240, the categories of permanent cervical and cervico-dorsal impairments. Dr. Schuster's Category 4 rating reflected Dr. Schuster's opinion of Mr. McShane's impairment before his contemplated surgery, as opposed to that projected to have likely remained after surgery. Dr. Schuster indicated that Mr. McShane's impairment would have at least been ratable at a Category 3 level post-surgery.

Ms. McShane presented the testimony of John F. Berg, a vocational rehabilitation counselor. Mr. Berg testified to his opinion that Mr. McShane would not have been employable had he lived and underwent the contemplated surgery. Mr. Berg relied entirely on Dr. Schuster's limitations, an interview with Linda L. McShane, and on job analyses of various occupations contained in the record as Exhibit Nos. 1 through 5, job analyses that Mr. Berg himself had previously prepared. Mr. Berg based his opinion, particularly that James J. McShane would not have been employable in lighter duty work, on an assumption that Mr. McShane was an introvert as opposed to an extrovert. Mr. Berg also based his opinion on a premise that James J. McShane had a history of mostly heavy labor that would prevent retraining.

The Department presented Dr. Steege, who had examined James J. McShane in December 2003 and again on June 9, 2004. After both examinations, Dr. Steege recommended the cervical discectomy and fusion surgery. Mr. McShane had accepted the recommendation and had set himself about a program to stop smoking in preparation for the surgery. Dr. Steege was clear in his testimony that he expected that post-surgery he would have not placed any restrictions on Mr. McShane and that Mr. McShane could have returned to his former work. We do not understand Dr. Steege, by this testimony, to have expressed a view one way or the other on the matter of whether post-surgery Mr. McShane was expected to have permanent impairment for purposes of evaluating entitlement to an award for permanent partial disability. Dr. Steege's opinions were directed toward restrictions on employability.

The Department also presented the testimony of Barbara Berndt, a vocational counselor. Ms. Berndt expressed her opinion that Mr. McShane would have been employable. She based her opinion on her review of Mr. McShane's work history, Dr. Steege's views, and her knowledge of the labor market in Mr. McShane's area.

Although we construe the Act liberally, Ms. McShane, as the claiming beneficiary, bears the burden of producing evidence that establishes entitlement in her individual case. *Olympia Brewing Co. v. Department of Labor & Indus.,* 34 Wn.2d 498 (1949). The evidence before this Board does not convince us that the effects of his industrial injury would have prevented James J. McShane from engaging in reasonably continuous gainful employment. Dr. Steege is a more highly qualified physician, examined Mr. McShane twice, and has extensive experience in surgery of the type contemplated and observing outcomes. Dr. Steege anticipated a good outcome and that Mr. McShane would be employable after surgery. We disagree with the premises upon which Mr. Berg based his negative view of Mr. McShane's employability. Mr. McShane had a relatively good education, including an Associate of Arts degree in business, and he had a varied work history. His work history was not primarily limited to heavy labor, as suggested by Mr. Berg. Mr. Berg himself had described the jobs considered (similar to those actually held by Mr. McShane) as, at most, medium in physical demand. We found nothing in this record to support Mr. Berg's assumption that James J. McShane was introverted. Mr. Berg indicated that, without more, he inferred this from the fact that Mr. McShane had left the restaurant business in the past. Nothing in Linda L. McShane's testimony, or other evidence in the record, suggested that James J. McShane was introverted. Making such an inference from the mere fact of a worker leaving the restaurant business is unjustified. In our view, such an inference ignores the common requirements of other jobs held by James J. McShane, including that of delivery driver. And, that unjustified inference raises doubts about expert objectivity in assessing employability.

In short, the evidence before us leads to the conclusion that James J. McShane was a resourceful individual with anticipated viable opportunities in the labor market. Given his age of only 56, his high school diploma and Associate of Arts degree in business, a good, varied work history, and anticipated good outcome from surgery, we are not convinced that James J. McShane would have been unemployable due to the effects of his industrial injury. We, therefore, find that Linda L. McShane is not entitled to permanent total disability benefits under this claim.

On the other hand, Linda L. McShane has established by expert medical testimony, without contradiction, that James J. McShane's impairment following his surgery would have been properly rated as within Category 3 of WAC 296-20-240, the categories of permanent cervical and cervico-dorsal impairments.

The Board has considered the Proposed Decision and Order and Ms. McShane's Petition for Review. We have considered as well the Department's Response to Petition for Review. Based upon a thorough review of the entire record before us, we make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On August 5, 2003, the injured worker, James J. McShane, filed an Application for Benefits with the Department of Labor and Industries, in which he alleged he sustained an injury to his neck and shoulder on May 15, 2003, while working in the course of his employment with Bertram & Sons, Inc.

   On November 17, 2004, the Department issued an order in which it determined that the injured worker received $12,823.34; that the injured worker was entitled to $12,767.77; that the injured worker was to reimburse the Department of Labor and Industries $55.57; that the assessment was from December 10, 2003 through July 31, 2004; that the overpayment resulted because of a duplicate payment; that there was no benefit eligibility for the person's date of death; that the claim remained open for treatment; and that the employer's account has been credited for this overpayment amount.

   On November 18, 2004, the Department issued an order in which it determined that time loss compensation is ended as paid through July 31, 2004; that the claim is closed effective November 18, 2004; that treatment is no longer necessary; and that there is no permanent partial disability.

   On January 18, 2005, a Protest and Request for Reconsideration was filed on behalf of the deceased injured worker from the Department orders dated November 16, 2004; November 17, 2004; and November 18, 2004.

   On April 13, 2005, the Department issued an order in which it affirmed its orders dated November 17, 2004 and November 18, 2004.

   On April 14, 2005, the Department issued an order in which it denied the request for spouse's benefits because the cause of death was not related to the injury or disease covered under this claim and the injured worker was not permanently totally disabled because of the conditions covered under this claim.

The Department order dated April 13, 2005, was received by the injured worker's attorney on April 15, 2005. The Department order dated April 15, 2005, was received by the injured worker's attorney on April 18, 2005. On June 14, 2005, the beneficiary filed a Notice of Appeal with the Board of Industrial Insurance Appeals from Department orders dated April 13, 2005 and April 14, 2005.

On July 13, 2005, the Board of Industrial Insurance Appeals issued an Order Granting Appeal (subject to proof of timeliness), assigned the appeal from the April 13, 2005 order, Docket No. 05 16629, and ordered that further proceedings be held.

On July 13, 2005, the Board of Industrial Insurance Appeals issued an Order Granting Appeal (subject to proof of timeliness), assigned the appeal from the April 14, 2005 order, Docket No. 05 16630, and ordered that further proceedings be held.

2. On May 15, 2003, during the course of his employment with Bertram & Sons, Inc., James J. McShane felt a twinge in his neck and shoulder as he reached overhead for a package he was about to deliver. This industrial injury proximately caused a herniated disc at C3-4 with myleopathy.

3. Mr. McShane received treatment from an attending chiropractor, Dr. Eby, and a neurosurgeon, Dr. Steege. After examining Mr. McShane and viewing the results of an MRI examination, in December 2003, Dr. Steege recommended Mr. McShane undergo a discectomy with fusion at C3-4. Before the operation, Dr. Steege recommended the injured worker quit smoking. Dr. Steege made these same recommendations again, after examining Mr. McShane on June 9, 2004. Mr. McShane accepted these recommendations and planned to have surgery.

4. On August 1, 2004, approximately one month before the planned discectomy with fusion surgery at C3-4, James J. McShane died as a result of cardiac arrest, and not from the residuals of the industrial injury of May 15, 2003. Linda L. McShane is Mr. McShane's surviving widow. He left no minor children.

5. The planned discectomy and fusion surgery more probably than not would have produced a good outcome and, had he not died prior to the surgery and had he obtained the surgery as planned, James J. McShane's impairment from this industrial injury, upon reaching medical fixity, would have been best characterized as mild cervico-dorsal impairment with objective clinical findings of such impairment as described by Category 3 of 296-20-240, the categories of permanent cervical and cervico-dorsal impairments. This impairment would not have resulted in restrictions from working at his job of injury.

6. James J. McShane was born October 31, 1948, and died just short of age 56. He possessed a high school diploma and an Associate of Arts degree in business. His work history included restaurant management, holiday mall-photo management, street sweeper operation and mechanics, school janitor work, and his job at the time of injury as a package delivery driver for Bertram & Sons, Inc., a contractor for FedEx.

7. Considering any anticipated residual impairment from his industrial injury after surgery, and his age, education, work history and experience and other aspects of his whole person, James J. McShane more probable than not would have been able to be gainfully employed on a reasonably continuous basis had he not died from causes unrelated to the industrial injury. His industrial injury would not have precluded him from being gainfully employed on a reasonably continuous basis.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of these appeals.

2. James J. McShane would not have become a permanently totally disabled worker within the meaning of RCW 51.08.160 and RCW 51.32.060. Linda L. McShane is not entitled survivor's benefits under RCW 51.32.050.

3. The covered industrial injury, after contemplated medical treatment was complete, would have resulted in entitlement to an award for permanent partial disability consistent with Category 3 of WAC 296-20-240, the categories of permanent cervical and cervico-dorsal impairments, within the meaning of RCW 51.08.150 and RCW 51.32.080. Linda L. McShane, the surviving widow and beneficiary, is entitled to this award under RCW 51.32.040(2).

4. In regards to Docket No. 05 16629, the Department of Labor and Industries order dated April 13, 2005, is incorrect and is reversed insofar as it affirmed an order of November 18, 2004, in which the Department closed the claim without an award for permanent partial disability. In regards to Docket No. 05 16630, the Department of Labor and Industries order dated April 14, 2005, is incorrect and is reversed insofar as it denied benefits to the surviving spouse. These matters are remanded to the Department with directions to deny Linda L. McShane, as the surviving spouse, permanent total disability benefits under RCW 51.32.050, and with directions to provide Linda L. McShane an award based on her husband's permanent partial disability consistent with Category 3 of WAC 296-20-240, the categories of permanent cervical and cervico-dorsal impairments, less the overpayment balance

remaining if any for the overpayment stated in the November 17, 2004 Department order.

It is so **ORDERED**.

Dated this 30th day of October, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member