

Hood, Leslie, Dec'd

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits -- beneficiary of deceased worker

When the worker dies from an occupational disease that became manifest after voluntary retirement, RCW 51.32.050(2)(a)(i) requires the wage for pension calculation be set as of the date of manifestation and the wages should be set at the statutory minimum when the worker has no wages as of the date of manifestation. ...***In re Leslie Hood, Dec'd, BIIA Dec., 05 19216 (2006)*** [*Editor's Note: The Board's decision was appealed to superior court under Cowlitz County Cause No. 06-2-01910-6 & 06-2-01943-2. The superior court reversed the Board's decision. Division I of the Washington State Court of Appeals, in an unpublished opinion, Cause No. 64974-4-I filed January 10, 2011, affirmed the superior court. GR 14.1 provides that "A party may not cite as an authority an unpublished opinion of the Court of Appeals".]*

Scroll down for order.

1 The facts in this matter are simple and undisputed. Leslie W. Hood retired in 1990 at the
2 age of 67. His retirement was motivated purely by his age and his desire to relax. At the time of his
3 retirement, he was healthy. After his retirement in 1990, he did not hold any gainful employment
4 whatsoever, nor did he make any attempt to obtain gainful employment.

5 In 1997, Mr. Hood was diagnosed with mesothelioma, and he died on August 28, 1999. His
6 widow, Irene Hood, filed a timely claim for benefits as the surviving spouse.

7 On April 18, 2003, the Department issued an order in which it determined that Mr. Hood had
8 died on August 28, 1999, and that his death was due to asbestos-related disease resulting from
9 past injurious exposure to asbestos fibers in the course of his employment, that his last injurious
10 exposure to asbestos was during his employment with Weyerhaeuser, and finally, it approved
11 payment of benefits effective August 26, 1999, with a date of manifestation of January 24, 1997.

12 This order was appealed by the self-insured employer, and was litigated. A Proposed
13 Decision and Order was issued on October 29, 2004, and in that order our industrial appeals judge
14 specifically stated that the issue was whether the surviving spouse was entitled to pension benefits
15 when the worker had voluntarily retired. The self-insured employer argued that because Mr. Hood
16 had voluntarily retired, he was thus not eligible for pension benefits, and further that his surviving
17 spouse was not eligible for death benefits pursuant to RCW 51.32.050.

18 In the Proposed Decision and Order issued on October 29, 2004, our industrial appeals
19 judge determined that Mr. Hood died of an occupational disease and that his surviving spouse was
20 entitled to death benefits pursuant to RCW 51.32.050. We note, parenthetically, this is exactly the
21 same issue as that of *In re Dick T. Burness, Dec'd*, Dckt. Nos. 94 0988 & 94 0989 (July 24, 1995).
22 This decision is not a Significant Decision; moreover, the only substantive discussion is in the
23 dissent. As in the previous *Hood* matter, the exact issue was whether the surviving spouse was
24 entitled to death benefits, where death occurred due to an occupational disease but after voluntary
25 retirement. In neither case did the issue involve how much those death benefits would be; clearly,
26 this issue was not before the Board in either situation. Finally, in the Proposed Decision and Order
27 dated October 29, 2004, our industrial appeals judge also determined that the date of manifestation
28 was January 24, 1997.

29 On April 19, 2003, the Department issued an order in which it set forth the benefit rate at
30 which death benefits would be paid. On April 22, 2003, the Department issued another order
31 superseding the order of April 19, 2003, in which the Department changed the benefit rate very
32 slightly, and stated that benefits for this claim are based on monthly wages of \$4,223.60; based on

1 an hourly wage of \$23.589; dental insurance valued at \$73.52 per month; and status as married
2 with no dependents. The self-insured employer duly protested the April 19, 2003 order, and did not
3 protest the April 22, 2003 order until July 16, 2004. On November 1, 2004, the Department issued
4 an order in which it declined to reconsider the order of April 22, 2003, due to the fact that the
5 protest was not timely filed. On appeal, the parties entered into an Order on Agreement of Parties
6 that Weyerhaeuser's protest of the April 22, 2003 order was timely filed, and remanded the matter
7 to the Department for reconsideration. On June 30, 2005, the Department issued an order in which
8 it affirmed the order of April 22, 2003, and this order is the subject matter of this appeal.

9 The Department order of April 22, 2003, was based on a Department policy that directs the
10 Department to use RCW 51.32.050(6) to determine benefits for the surviving spouse of a worker
11 who dies as a result of the occupational disease, even though the worker was voluntarily retired at
12 the time. RCW 51.32.050(6) provides that for claims filed prior to July 1, 1986, if the worker dies
13 during a period of permanent total disability, the surviving spouse is entitled to benefits as if the
14 death resulted from the injury as provided in subsections (2) through (4) of that section. Those
15 sections again refer to what portion of the worker's wages shall be paid. The Department, however,
16 interprets this policy to mean that where a worker dies as a result of the occupational disease or
17 industrial injury, even though he or she had voluntarily retired, the wages upon which death benefits
18 shall be calculated are those earned by the worker at the time of his retirement.

19 The self-insured employer appealed this order, and moved for summary judgment to reverse
20 the Department order and to direct the Department to calculate benefits using the date of
21 manifestation, pursuant to RCW 51.32.180 and *Kilpatrick v. Department of Labor & Indus.*, 125
22 Wn.2d 222 (1994). Since the date of manifestation is January 24, 1997, Mr. Hood did not have
23 earnings, and the provisions of RCW 51.32.050(2)(a)(i) control:

24 (2)(a) Where death results from the injury, a surviving spouse of a
25 deceased worker eligible for benefits under this title shall receive
26 monthly for life or until remarriage payments according to the following
schedule:

27 (i) If there are no children of the deceased worker, sixty percent of the
28 wages of the deceased worker but not less than one hundred eighty-five
29 dollars;

30 Thus, the self-insured employer takes the position that the benefits accruing to Ms. Hood shall be
31 \$185 per month.

1 In response to this, the claimant moved for partial summary judgment, arguing that the order
2 was incorrect, since Mr. Hood also had health care benefits equal to \$200 per month, that the order
3 should be reversed and this matter remanded and for an order to issue that again bases the
4 survivor's benefits on Mr. Hood's wages at the time of retirement, including the \$200 in health care
5 benefits.

6 Our industrial appeals judge correctly determined that the Department order was wrong.
7 While the policy may direct the pension adjudicator to use RCW 51.32.050(6), that section, by its
8 very terms, limits its application to those claims filed prior to 1986, which is not the case herein.
9 Moreover, those sections again make reference to "wages of the deceased worker." For purposes
10 of calculating the base wages for calculation of monthly benefits, the statute and the case law is
11 clear: the Department must use the wages at the time of injury, or, in the case of occupational
12 disease, the date of manifestation. Since Mr. Hood had voluntarily retired prior to the date of
13 manifestation, and was receiving no wages, the provisions of RCW 51.32.050(2)(a)(i) control.

14 The surviving spouse argues that the Proposed Decision and Order issued on October 29,
15 2004, is res judicata for the proposition that Ms. Hood should receive benefits using the wages at
16 the time of retirement; this, however, is not the case. In the Proposed Decision and Order of
17 October 29, 2004, our industrial appeals judge determined only that Ms. Hood should receive
18 benefits; she did not, however, address the rate at which death benefits should be paid. This issue
19 is properly before the Board at this time. Similarly, the decision in *Burness* addresses only the
20 issue whether benefits should be paid, not the rate at which they should be paid.

21 Finally, both the Department and the surviving spouse argue that the statute concerning this
22 matter is ambiguous, and that as such, it should be liberally construed to effect the goals of the
23 Industrial Insurance Act, and thus the Board should permit use of the worker's wages at the time of
24 retirement. We agree that the statute is to be liberally construed, but we find no ambiguity. This
25 matter is clearly controlled by RCW 51.32.050(2)(a)(i), and the benefits accruing to the surviving
26 spouse shall be those specified in the statute.

27 Accordingly, the claimant's Motion for Summary Judgment is denied, and the self-insured
28 employer, Weyerhaeuser Co. & Subsidiaries, is entitled to summary judgment as a matter of law,
29 pursuant to CR 56, and the Department order of June 30, 2005 is incorrect, and should be reversed
30 and this matter remanded to the Department with direction to issue a further order in which it
31 determines that the monthly benefits to accrue to the surviving spouse, Ms. Hood, shall be those
32 specified in RCW 51.32.050(2)(a)(i).

FINDINGS OF FACT

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1. On August 28, 1999, Leslie W. Hood died. On June 4, 2001, the claimant's spouse, Irene M. Hood, filed an application for death benefits with the Department of Labor and Industries. The claim was allowed and the date of manifestation was established as January 24, 1997. On April 19, 2003, the Department issued an order in which it determined the benefits for the claim are to be based on monthly wages of \$4,225.12 based on an hourly wage of \$23.589, dental insurance of \$73.52 per month, and married with no dependents. On April 22, 2003, the Department issued an order in which it corrected and superseded its prior order dated April 19, 2003, and held that benefits for the claim are to be based on monthly wages of \$4,223.60 based on an hourly wage of \$23.589, dental insurance of \$73.52 per month, and married with no dependents. On April 30, 2003, the Department received a Protest and Request for Reconsideration filed on behalf of the self-insured employer from the original April 19, 2003 Department order.

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On July 16, 2004, the Department received a Protest and Request for Reconsideration filed on behalf of the self-insured employer from the April 22, 2003 Department order. On November 1, 2004, the Department issued an order in which it held that the Department denied reconsideration of the order dated April 22, 2003, for lack of jurisdiction as the protest was not received within the statutory time limitations and held that the order was considered final and binding. On November 29, 2004, the Board of Industrial Insurance Appeals received a Notice of Appeal filed on behalf of the self-insured employer from the November 1, 2004 order. On June 22, 2005, an Order on Agreement of Parties was issued in which the Board directed the Department to find that the self-insured employer's protest of the April 22, 2003 order was timely filed, to reconsider the order dated April 22, 2003, and to take such further action as is appropriate under the laws and the facts. On June 30, 2005, the Department issued an order in which it affirmed the provisions of the April 22, 2003 Department order. On August 19, 2005, the Board received a Notice of Appeal filed on behalf of the self-insured employer from the June 30, 2005 order. On August 29, 2005, the Board issued an Order Granting Appeal. On September 13, 2005, the petitioner/beneficiary, Irene M. Hood, filed a cross-appeal from the June 30, 2005 order. The cross-appeal was granted on September 23, 2005.

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2. The evidence submitted by the parties establishes that there are no genuine issues as to any material fact in these appeals.
3. Leslie W. Hood voluntarily retired in 1990 and did not hold any gainful employment from the date of his retirement until his death in 1999.
4. The date of manifestation for Mr. Hood's occupational disease of mesothelioma is January 24, 1997.

1 5. Irene M. Hood is the surviving spouse of a deceased worker eligible for
2 benefits.

3 **CONCLUSIONS OF LAW**

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

6 2. There being no genuine issue of material fact in dispute with respect to
7 the issues presented by the self-insured employer's Motion for Summary
8 Judgment and the claimant's Motion for Partial Summary Judgment, the
9 matter is appropriate for resolution pursuant to Civil Rule 56.

10 3. Irene M. Hood is entitled to death benefits of \$185 per month pursuant
11 to RCW 51.32.050(2)(a)(i).

12 4. The Motion for Summary Judgment filed by the surviving spouse, Irene
13 M. Hood, is denied.

14 5. Weyerhaeuser Co. & Subsidiaries is entitled to summary judgment as a
15 matter of law, as contemplated by Civil Rule 56, and the order of the
16 Department of Labor and Industries dated June 30, 2005, is incorrect
17 and is reversed. This matter is remanded to the Department with
18 direction to issue an order in which the self-insured employer is required
19 to pay death benefits to Irene M. Hood, the surviving spouse of Leslie
20 W. Hood, pursuant to RCW 51.32.050(2)(a)(i).

21 It is so **ORDERED**.

22 Dated this 6th day of September, 2006.

23 BOARD OF INDUSTRIAL INSURANCE APPEALS

24 /s/ _____
25 THOMAS E. EGAN Chairperson

26 /s/ _____
27 CALHOUN DICKINSON Member