

Varner, Clemma, Dec'd

SECOND INJURY FUND (RCW 51.16.120)

Pre-existing disability

When the worker dies from complications related to surgery required by the industrial injury, a pre-existing disease that causes a significant disability in the body's ability to withstand the surgery is a pre-existing disability for purposes of second injury fund relief. *...In re Clemma Varner, Dec'd, BHA Dec., 06 11288 (2007)*

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: CLEMMMA K. VARNER, DEC'D.**) **DOCKET NO. 06 11288**
2)
3 **CLAIM NO. Y-513835**) **AMENDED DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, Clemmma K. Varner (Dec'd), by
6 Small, Snell, Weiss & Comfort, P.S., per
7 Richard E. Weiss

8 Employer, Regency at Tacoma Rehabilitation Center, by
9 Employer Resources Northwest, Inc., per
10 Erin J. Dickinson

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Kay A. Germiot, Assistant

14 The employer, Regency at Tacoma Rehabilitation Center, filed an appeal with the Board of
15 Industrial Insurance Appeals on February 3, 2006, from an order of the Department of Labor and
16 Industries dated January 10, 2006. In this order, the Department affirmed the order dated
17 July 25, 2005, which denied Second Injury Fund benefits. The Department order is **REVERSED**
18 **AND REMANDED.**

19 **PRELIMINARY AND PROCEDURAL MATTERS**

20 On April 6, 2007, the Department filed a motion for reconsideration of our March 26, 2007
21 Decision and Order. The Department requested that we deny the employer second injury fund
22 relief because claimant did not suffer from a pre-existing disability. After consideration of the
23 Department's motion, the response of the employer, and the record of this appeal, we determine
24 that we properly determined that the employer is entitled to second injury fund relief. In reviewing
25 this matter in response to the Department's motion, it became apparent that the Findings of Fact
26 and Conclusions of Law did not clearly reflect our determination that Ms. Varner suffered from a
27 pre-existing disability within the meaning of RCW 51.16.120. Accordingly, we issue this amended
28 order and amend the Findings of Fact and Conclusions of Law to reflect our determination that
29 Ms. Varner's cardiovascular disease was a significant pre-existing disability because it diminished
30 her body's ability to withstand the surgery necessitated by the industrial injury.
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1 **DECISION**

2 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
3 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
4 Order issued on December 21, 2006, in which the industrial appeals judge affirmed the order of the
5 Department dated January 10, 2006.

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

8 The party appealing a Department order to the Board is required to establish the Board's
9 jurisdiction to hear the appeal. In this case, as in most cases, that was accomplished by a
10 stipulation from the parties that the Jurisdictional History was accurate and a determination by an
11 industrial appeals judge that the actions reflected therein were sufficient to establish that the Board
12 had jurisdiction to proceed with the appeal. However, our review of the Jurisdictional History raised
13 an issue that was not dealt with at hearing that must be dealt with in this decision. In order to
14 determine our jurisdiction, we conducted a review of the Department record pursuant to
15 *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965).

16 Department action relevant to our jurisdiction is as follows:

17 A Department order issued on July 22, 2005 stated: "This worker died
18 on 05/28/2005. The cause of death was unrelated to the claim, but the
19 worker was totally and permanently disabled as a result of this covered
injury or disease.

20 The claim for benefits filed by the worker's spouse, Larry Varner, is
21 approved."

22 A Department order issued on July 25, 2005 stated: "Second injury fund
23 benefits have been considered by Labor and Industries and are denied."

24 On September 21, 2005, the employer filed protests to the orders dated
25 July 22, 2005 and July 25, 2005.

26 On January 10, 2006, the Department affirmed the denial of Second
27 Injury Fund benefits order dated July 25, 2005.

28 On February 3, 2006, the employer filed a Notice of Appeal from the
29 January 10, 2006 order.

30 On April 20, 2006, the Department affirmed the order dated
31 July 22, 2005, which allowed benefits to the injured worker's surviving
32 spouse and declared her death unrelated to the industrial injury. No
appeal was filed from that order.

1 Our concerns regarding jurisdiction surface because the Department denied Second Injury
2 Fund benefits before it issued its final decision finding Ms. Varner's surviving spouse was entitled to
3 pension benefits. Difficulty is posed by the content of that order, dated April 20, 2006, which was
4 not appealed by the employer. As we will discuss in greater detail below, the Second Injury Fund is
5 available to an employer in one of two ways, either when the worker becomes permanently totally
6 disabled as a result of conditions caused by the injury combined with pre-existing disabilities, or, as
7 is the case here, when the worker's death is substantially accelerated by the injury combined with
8 the effects of pre-existing conditions. RCW 51.16.120.

9 When the Department issued the April 20, 2006 order that affirmed the July 25, 2005 order, it
10 ruled on an issue -- whether the death was unrelated to the industrial injury -- which it had
11 previously ruled on, and that was before this Board for decision in the context of the employer's
12 eligibility for Second Injury Fund relief.

13 We have often held that the Department can continue to administer a claim while a
14 Department order is on appeal to the Board or to an appellate court, but the Department cannot
15 issue further orders on questions pending before an appellate body. Inasmuch as the employer's
16 eligibility for Second Injury Fund relief depends on whether the claimant's death is related to the
17 industrial injury, the relationship of Ms. Varner's death with the industrial injury is an issue before
18 this Board. For that reason, we hold that the Department did not have authority to issue the portion
19 of the April 20, 2006 order that held the claimant's death was unrelated to the industrial injury.
20 *In re Betty Wilson*, BIIA Dec., 02 21517 (2004).

21 The record before us is sparse. We know the industrial injury occurred on
22 November 4, 2002, when Ms. Varner fainted and broke both ankles in the ensuing fall. Ms. Varner
23 worked in a laundry, in a medium activity level job. We do not know how old Ms. Varner was when
24 this injury occurred, but we do know that she had fairly significant, pre-existing, cardiovascular
25 disease and other problems. She had had vascular bypass surgery in both legs, aortic stenosis
26 and congestive heart failure, as well as hypertension, hypercholesterolemia and low back problems
27 with attendant surgery.

28 We are aware that the only expert called to testify in this appeal stated that the industrial
29 injury alone would not have made Ms. Varner permanently, totally disabled. That witness,
30 Jos A. Cové, M.D., is an orthopedic surgeon who treated Ms. Varner for a short time for low back
31 complaints soon after the injury occurred. Dr. Cové is a qualified physician, his testimony is
32 credible and we accept his opinion as medically sound. His testimony also clearly establishes the

1 severity of Ms. Varner's multiple pre-existing medical problems, and it is certainly possible that
2 while Ms. Varner was able to perform her laundry job, these problems would have disabled her
3 from performing a number of other jobs. However, we do not base our Second Injury Fund decision
4 on that consideration.

5 Ms. Varner died on May 28, 2005, the day after surgery to remove the hardware used during
6 the open reduction surgery to repair her fractured ankles. According to Dr. Cové, the significant
7 cardiovascular condition that pre-existed the industrial injury made the surgical procedure to
8 remove hardware risky. That is to say, Ms. Varner's known cardiovascular disease represented a
9 significant disability in her body's ability, which otherwise would have existed, to withstand surgery.
10 With hindsight, we can say the surgery was in fact too risky and we accept his opinion that Ms.
11 Varner's death was substantially accelerated by the combined effects of the treatment for the
12 industrial injury and her pre-existing conditions.

13 The record demonstrates the employer's entitlement to Second Injury Fund relief. The
14 Department order denying relief is incorrect and is reversed. The claim is remanded to the
15 Department with instructions to provide the employer with that relief according to the terms of
16 RCW 51.16.120.

17 **FINDINGS OF FACT**

- 18 1. On November 5, 2002, the claimant, Clemma K. Varner (Dec'd), filed an
19 Application for Benefits with the Department of Labor and Industries,
20 alleging an injury to both ankles on November 4, 2004, during the
21 course of her employment with Regency at Tacoma Rehabilitation
Center. The claim was allowed and benefits provided.

22 On July 22, 2005, the Department issued an order that stated "This
23 claimant died on 05/28/2005. The cause of death was unrelated to the
24 claim but the claimant was totally and permanently disabled as a result
25 of this injury. The claim for benefits filed by the claimant's spouse, Larry
Varner, is approved."

26 On July 25, 2005, the Department issued an order that stated: "Second
27 injury fund benefits have been considered by Labor and Industries and
28 are denied."

29 On September 21, 2005, the employer filed a protest and request for
30 reconsideration of the orders dated July 22, 2005 and July 25, 2005.

31 On January 10, 2006, the Department issued an order that affirmed the
32 order dated July 25, 2006.

1 On February 3, 2006, the employer filed an appeal from the order dated
2 January 10, 2006, with the Board of Industrial Insurance Appeals.

3 On February 27, 2006, the Board issued an Order Granting Appeal and
4 assigned the appeal Docket No. 06 11288.

5 On April 20, 2006, the Department issued an order that affirmed the
6 order dated July 22, 2005.

- 7 2. On November 4, 2002, the claimant sustained an industrial injury when
8 she fell during the course of her employment with Regency at Tacoma
9 Rehabilitation Center.
- 10 3. Ms. Varner's job of injury was laundry worker, a medium activity level
11 job, which the claimant performed without modification or restriction.
- 12 4. Prior to the November 4, 2002 industrial injury, Ms. Varner had
13 significant cardiovascular disease. She had had vascular bypass
14 surgery in both legs, aortic stenosis, congestive heart failure,
15 hypertension, hypercholesterolemia, as well as low back surgery. This
16 pre-existing cardiovascular disease was disabling because it diminished
17 her body's ability to withstand surgery.
- 18 5. Ms. Varner died on May 28, 2005, the day after a surgical procedure
19 necessitated by the industrial injury.
- 20 6. The claimant's death on May 28, 2005, was substantially accelerated by
21 the combined effects of the industrial injury and the pre-existing
22 cardiovascular disease.

CONCLUSIONS OF LAW

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the
24 parties to and the subject matter of this appeal.
- 25 2. Ms. Varner's death on May 28, 2005, was substantially accelerated by
26 the combined effects of the industrial injury and pre-existing disability
27 within the meaning of RCW 51.16.120.
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1 3. The Department order dated January 10, 2007, is incorrect and is
2 reversed. The claim is remanded to the Department with instructions to
3 provide the employer, Regency at Tacoma Rehabilitation Center,
4 Second Injury Fund relief according to the provisions of RCW 51.16.120.

5 It is so **ORDERED**.

6 Dated: July 10, 2007.

7 BOARD OF INDUSTRIAL INSURANCE APPEALS

8 /s/ _____
9 THOMAS E. EGAN Chairperson

10
11 /s/ _____
12 CALHOUN DICKINSON Member

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