

## Nickolai, Bernard, Dec'd

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### ABATEMENT

At the time of the worker's death no specific disability rating had been communicated to the Department but all the evidence necessary to rate disability was available through the attending physician, who had found the worker's condition fixed and ratable prior to the worker's death. The Department should have secured such evidence and, if disability was found, paid the award therefore to the surviving beneficiary. ...*In re Bernard Nickolai, Dec'd, BIIA Dec., 38,266 (1971)*

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

1 **IN RE: BERNARD J. NICKOLAI, DEC'D. ) DOCKET NO. 38,266**  
2 )  
3 **CLAIM NO. F-322792 ) DECISION AND ORDER**  
4 \_\_\_\_\_ )

5 **APPEARANCES:**

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7 Widow-petitioner, Wilma B. Nickolai, by  
8 William J. Van Natter

9  
10 Employer, The Boeing Company, by  
11 Perkins, Coie, Stone, Olsen & Williams, per  
12 Fred S. Merritt

13  
14 Department of Labor and Industries, by  
15 The Attorney General, per  
16 Edward G. Gough, Assistant

17  
18 Appeal filed by the widow-petitioner on March 9, 1971, from a letter of the Supervisor of  
19 Industrial Insurance dated February 26, 1971, rejecting petitioner's claim as the surviving widow of  
20 the decedent herein to both temporary and permanent partial disability compensation. **REVERSED**  
21 **AND REMANDED.**

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24 **DECISION**

25 This appeal is before the Board pursuant to a timely Statement of Exceptions filed by the  
26 petitioner to a Corrected Proposed Decision and Order issued on June 9, 1971, upholding the  
27 petitioner's claim in major part as to certain temporary disability compensation, but rejecting it as to  
28 permanent partial disability compensation. Since only issues of law were presented, the case was  
29 submitted for decision on the basis of the Department file.

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31 At this juncture, the inquiry is reduced to two questions, to wit:

- 32  
33 (1) Is the supervisor's letter of February 26, 1971 appealable by the  
34 petitioner?  
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36 (2) If so, under the provisions of RCW 51.32.040, is she entitled to the  
37 permanent partial disability compensation to which the decedent would  
38 have been entitled had he lived?  
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40 We answer both questions in the affirmative, as detailed below.

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42 On February 19, 1971, the petitioner's attorney wrote the Department of Labor and Industries  
43 requesting that certain time loss compensation be paid to the widow, and further requesting "the  
44 establishment of a disability award for Mr. Nickolai's disc surgery and the payment of the same to  
45 his widow." The supervisor's letter of February 26, 1971, the letter here in question, was in direct  
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1 response to the afore-said letter and expressly rejected by requests on the ground that none of the  
2 decedent's benefits survived to his widow.  
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4 Quite clearly, we think this rejection constituted, at the very least, Departmental "action"  
5 within the purview of RCW 51.52.050, which "may", as distinguished from "must" (as prescribed in  
6 RCW 51.52.060), be appealed. Stated somewhat differently, the petitioner had the right to appeal  
7 the letter in question, but was not required to do so in order to avoid the decisive effects thereof,  
8 since the letter did not meet the "final" requirements of an "order, decision or award" as provided in  
9 RCW 51.52.050.  
10

11 As for the question of petitioner's right under RCW 51.32.040 to a permanent partial disability  
12 award, it is to be first noted that the decision of Powell v. Department of Labor and Industries, 79  
13 Wn. 2d 378, construing that statute, was handed down on June 10, 1971, one day subsequent to  
14 the issuance of the Corrected Proposed Decision and Order in this matter which denied the  
15 petitioner permanent partial disability compensation under the authority of Urban v. Department of  
16 Labor and Industries, 75 Wn. 2d 787, and cases falling within what may be termed the Urban line of  
17 authority. However, Powell expressly overruled Urban and its judicial forerunners, and in so doing,  
18 the court, speaking in regard to RCW 51.32.040, stated:  
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20 ". . . this statute contains no language to indicate a legislative intent that  
21 the widow's right to collect her husband's compensation should be made  
22 contingent upon his success in getting his evidence before the  
23 Department of Labor and Industries and receiving a favorable decision  
24 prior to his death. We cannot assume that the legislature intended a  
25 valuable right to depend upon such a fortuity as the length of time  
26 between an accident and the death of the victim from some other  
27 cause."  
28

29 The court then went on to state its holding as follows:  
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31 "We hold that under the provisions of RCW 51.32.040, a widow of a  
32 workman who has suffered an industrial injury and has died from some  
33 other cause, is entitled to receive the compensation to which her  
34 husband was entitled but which he did not receive, whether or not a  
35 decision in his favor was rendered by the department prior to his death."  
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37 The outer reaches of the Powell decision are, of course, not yet discernible. However, it seems  
38 clear therefrom that if the situation presented in Urban were to be presented today, a different result  
39 would obtain. Factually, the instant case can be distinguished from Urban primarily in that Mr.  
40 Nickolai expired while his claim was still before the Department and prior to all the evidence of his  
41 disability having been presented to the Department; whereas in Urban, the workman died while his  
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1 case was before this tribunal and after all evidence of his disability had been presented to the  
2 Board, but prior to any final determination of such our mind, as a practical matter the question of  
3 disability was as readily determinable by the Department at the time of Mr. Nickolai's death as it  
4 was by the Board at the time of death in the Urban matter.  
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7 More specifically, the Department file discloses that Dr. Ivan K. Loughlen became the  
8 decedent's attending doctor in early 1969, following an orthopedic consultation examination by him  
9 of the decedent. On March 11, 1969, Dr. Loughlen performed a surgical procedure on the  
10 decedent's back and followed him postoperatively until late March, 1970, at which time the doctor  
11 advised the Department that the decedent's condition was fixed and that he did have a permanent  
12 partial disability. The doctor noted that he preferred not to rate his own patients. Accordingly, the  
13 Department proceeded to schedule an examination with Dr. Irving Tobin for June 16, 1970. Mr.  
14 Nickolai unexpectedly expired on April 19, 1970, from causes unrelated to his industrial injury.  
15 Under the law as it then existed (urban, supra), any permanent partial disability award to which the  
16 decedent may have been entitled had he lived, died with him. Thus, the Department made no  
17 further attempt to secure a disability evaluation from Dr. Loughlen, even though he was the  
18 decedent's attending doctor at the time of death and had indicated to the Department shortly prior  
19 thereto that the decedent's condition was fixed and that he did have a permanent partial disability.  
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27 Due to the intervention of Powell, supra, just one day following the Corrected Proposed  
28 Decision and Order in this matter, the case came to us for review in a decidedly different posture  
29 than that presented to either the Department or our hearing examiner. From the above-recited  
30 history, it was immediately apparent to us that Dr. Loughlen was in a uniquely advantageous  
31 position to evaluate the decedent's disability, and we accordingly proceeded to elicit from him a  
32 written report thereon. This report, dated September 13, 1971, rated the decedent's industrially  
33 related permanent partial disability at 20 per cent of the maximum allowable for unspecified  
34 disabilities. After review thereof, all parties, by way of separate letters to the Board, agreed that this  
35 report could be incorporated into the record as an exhibit and that the appeal could thereupon be  
36 submitted to the Board for decision without the necessity of further proceedings (both the  
37 Department and the employer expressly reserving their position as to the legal question of the  
38 survival of such an award to the widow).  
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45 Accordingly, the report of Dr. Ivan K. Loughlen dated September 13, 1971, is hereby  
46 incorporated into the record as Exhibit No. 1. based thereon, and the Department file, we find that  
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1 the decedent's industrially related back condition was fixed at the time of death and that his  
2 permanent partial disability attributable thereto was 20 per cent of the maximum allowable for  
3 unspecified disabilities. Where, as here, no specific disability rating has been expressly  
4 communicated to the Department prior to the workman's death, so that no "decision" upon the  
5 disability question has been made by the Department prior to the date of death, but all the evidence  
6 necessary to make such a "decision" is available to the Department at the time of death through a  
7 doctor who treated and personally witnessed the workman's condition, found it to be fixed and  
8 therefore rateable prior to the time of death, we think under the Powell doctrine, that it becomes  
9 incumbent upon the Department to secure such evidence, render a "decision," and, if disability is  
10 found make payment therefor to the surviving widow.

11  
12 Technically, if jurisdictional dictates were to be slavishly followed, this case should be  
13 remanded to the Department with instructions to rate the decedent's disability as it existed when his  
14 condition became fixed and make payment therefor to the petitioner. The case is unique, however,  
15 in light of the Powell decision having intervened between the Department's disposition and ours,  
16 and we trust that any violence done to the law by virtue of our having proceeded to gather the  
17 necessary evidence and making the original disability adjudication (which is the only credible rating  
18 that could ultimately be made by the Department upon remand) and thereby hopefully expediting  
19 the award, will be outweighed by consideration for the widow herein, who has already waited over  
20 one and one-half years for her compensation.

#### 21 **FINDINGS OF FACT**

22 Based upon the record, the Board makes the following findings:

- 23 1. On June 7, 1965, Bernard J. Nickolai sustained an injury during the  
24 course of his employment with The Boeing Company. On November  
25 23, 1965, the Department of Labor and Industries issued an order  
26 allowing and closing the claim for medical treatment only. On December  
27 27, 1965, Mr. Nickolai filed a notice of appeal. On January 5, 1966, the  
28 Department issued an order reassuming jurisdiction of the claim for  
29 further consideration. On January 7, 1966, the Board issued an order  
30 denying the appeal in light of the Department's reassuming jurisdiction  
31 of the claim. On December 20, 1966, the Department issued an order  
32 adhering to the provisions of its order of November 23, 1965, allowing  
33 and closing the claim for medical treatment only. On December 29,  
34 1966, Mr. Nickolai filed a notice of appeal and on March 1, 1967, the  
35 Board issued an order granting the appeal. On March 10, 1969, a  
36 Proposed Decision and Order was issued sustaining the Department's  
37 allowance and closure of the claim for medical treatment only. On April  
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1 24, 1969, the Board issued an order adopting the Proposed Decision  
2 and Order of March 10, 1969.

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4 2. On March 3, 1969, the Department received a medical report upon Mr.  
5 Nickolai's condition dated February 17, 1969, from Dr. Ivan K. Loughlen,  
6 his attending doctor.
- 7  
8 3. On March 26, 1969, the Department received a letter from the claimant's  
9 legal counsel dated March 25, 1969, requesting that the claim be  
10 reopened for aggravation of condition, and advising that a formal  
11 application to reopen the claim would be forthcoming, supported by the  
12 attending doctor's report (the report of February 17, 1969, by Dr.  
13 Loughlen).
- 14  
15 4. On April 17, 1969, the Department received a formal application to  
16 reopen the claim signed by Dr. Loughlen and accompanied by a copy of  
17 his medical report of claimant's condition dated February 17, 1969.
- 18  
19 5. On May 14, 1969, the Department issued an order denying the  
20 application to reopen the claim. On May 27, 1969, the claimant filed a  
21 notice of appeal and on June 19, 1969, the Board issued an order  
22 granting the appeal. On September 23, 1969, the Board issued an  
23 order on agreement of the parties reopening the claim for treatment and  
24 such other and further action as might be indicated.
- 25  
26 6. On October 29, 1969, the Department issued an order reopening the  
27 claim pursuant to the Board's order of September 23, 1969. On  
28 November 12, 1969, the Department issued an order paying the  
29 claimant time loss compensation for the period from April 15, 1969, to  
30 August 17, 1969, inclusive. On June 9, 1970, the Department issued an  
31 order closing the claim with time loss as paid to August 17, 1969, and  
32 without award for permanent partial disability.
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34 7. On November 12, 1969, the Department received a certificate of  
35 disability card signed by the claimant and Dr. Loughlen certifying to time  
36 loss from February 28, 1969, to August 18, 1969.
- 37  
38 8. By "final report card" dated March 23, 1970, Dr. Loughlen advised the  
39 Department that the claimant's condition was fixed and that he did have  
40 permanent partial disability. The doctor further advised the Department  
41 that he preferred not to rate his own patients for permanent partial  
42 disability. Accordingly, the Department scheduled a rating examination  
43 with Dr. Irving Tobin for June 16, 1970.
- 44  
45 9. On April 19, 1970, Bernard J. Nickolai expired from causes unrelated to  
46 his industrial injury.
- 47  
48 10. By letter dated February 19, 1971, legal counsel for Wilma B. Nickolai,  
49 surviving widow of Bernard J. Nickolai and petitioner herein, requested  
50 the Department to pay time loss compensation and permanent partial  
51 disability compensation to which the decedent would have been entitled  
52 had he lived.

- 1 11. By letter of the Supervisor of Industrial Insurance dated February 26,  
2 1971, the Department rejected the petitioner's request upon the ground  
3 that none of the decedent's benefits survived his death.
- 4  
5 12. On March 9, 1971, the petitioner filed a notice of appeal from the letter  
6 of the Supervisor of Industrial Insurance dated February 26, 1971. On  
7 April 8, 1971, the Board issued an order granting the appeal. On May  
8 28, 1971, a Proposed Decision and Order was issued by a hearing  
9 examiner of the Board, followed by a Corrected Proposed Decision and  
10 Order issued on June 9, 1971, and on June 25, 1971, petitioner filed a  
11 Statement of Exceptions thereto.
- 12 13. On or about February 11, 1970, Bernard J. Nickolai's industrially related  
13 condition was fixed and his permanent partial disability attributable  
14 thereto was equal to 20% of the maximum allowable for unspecified  
15 disabilities.

**CONCLUSIONS OF LAW**

Based on the foregoing findings of fact, this Board concludes as follows:

- 18 1. The letter of the Supervisor of Industrial Insurance dated February 26,  
19 1971, is appealable by the petitioner.
- 20  
21 2. The Board has jurisdiction of the parties and subject matter of this  
22 appeal.
- 23  
24 3. Time loss compensation for the period from March 26 1969, through  
25 April 14, 1969, to which Bernard J. Nickolai would have been entitled  
26 had he lived, survives to the petitioner and is payable to her.
- 27  
28 4. Permanent partial disability compensation in the amount of 20% of the  
29 maximum allowable for unspecified disabilities, to which Bernard J.  
30 Nickolai would have been entitled had he lived, survives to the petitioner  
31 and is payable to her.
- 32  
33 5. This claim should be remanded to the Department of Labor and  
34 Industries with instructions to pay Wilma B. Nickolai, the petitioner, time  
35 loss compensation for the period from March 26, 1969, through April 14,  
36 1969, and to further pay to her a permanent partial disability award  
37 equal to 20% of the maximum allowable for unspecified disabilities.

It is so ORDERED.

Dated this 17th day of November, 1971.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ \_\_\_\_\_

ROBERT C. WETHERHOLT Chairman

/s/ \_\_\_\_\_

R.H. POWELL Member

/s/ \_\_\_\_\_

R.M. GILMORE Member