

## **Mindenbergs, Harijs, Dec'd**

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### **RES JUDICATA**

#### **Surviving beneficiary's claim affected by prior adjudication on the merits in worker's claim**

A widow's claim for a survivor's pension based on the contention that the worker was permanently totally disabled at the time of his death, is not barred by a prior determination that the worker's claim for an occupational disease was not timely filed. The prior determination in the worker's claim was not a final adjudication on the merits which, under *Ek* (181 Wash. 91), would bind the widow as well as the worker. ...*In re Harijs Mindenbergs, Dec'd, BIIA Dec., 48,426 (1977)*

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

**IN RE: HARIJS MINDENBERGS, DEC'D ) DOCKET NO. 48,426**  
**CLAIM NO. G-312772 ) DECISION AND ORDER**

**APPEARANCES:**

Petitioner, Benita E. Mindenbergs, by  
Jackson, Ulvestad, Goodwin and Grutz, per  
James E. Grutz

Employer, Foremost Foods Company, by  
Bernard E. Roberts, Personnel Manager

Department of Labor and Industries, by  
The Attorney General, per  
David Robinson, Assistant

This is an appeal filed by the petitioner, Benita E. Mindenbergs, surviving widow of Harijs Mindenbergs, Dec'd., on June 16, 1976, from an order of the Department of Labor and Industries dated May 14, 1976, which adhered to a prior order dated April 8, 1976, rejecting her claim for a widow's pension based on her husband's death on December 23, 1975. **REVERSED AND REMANDED.**

**DECISION**

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing examiner for this Board on May 30, 1977, in which the order of the Department dated May 14, 1976 was reversed, and the widow's claim remanded to the Department with direction to place Benita Mindenbergs, surviving widow of Harijs Mindenbergs, on the pension rolls of the Department of Labor and Industries.

The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The nature and background of this appeal are as set forth in the Proposed Decision and Order and shall not be repeated in detail herein. The Proposed Decision and Order found that the decedent was suffering from an occupational disease within the meaning of the Act, and that as a result thereof, he was totally and permanently disabled at the time of his death on December 23, 1975. Addressing ourselves first to the merits of these determinations, we find the testimony of the decedent's long-time attending physician, Dr. Paul Koro, to be clearly the more persuasive, and we

1 therefore concur in the hearing examiner's findings that the decedent sustained an occupational  
2 disease and was totally and permanently disabled therefrom at the time of his death.  
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4 The primary challenge in the Department's Petition for Review is addressed to the Board's  
5 jurisdiction over the merits of this appeal. In the regard, it is to be noted that in a prior appeal filed  
6 by the decedent during his lifetime, this Board dismissed the matter on the ground of no jurisdiction  
7 to consider the case on its merits, because the claim for an occupational disease had not been filed  
8 by decedent with the Department within one year from the date the decedent had been notified by a  
9 physician that he was suffering from an occupational disease (In re Harijs Mindenbergs, Claim  
10 Number G-312772; Docket No. 42,344; Board decision on January 23, 1975, currently still on  
11 appeal to King County Superior Court on the issue of timeliness of his claim). It is the Department's  
12 position that the decedent's failure to file his claim within the statutory one-year time limitation bars  
13 the petitioner's claim for a widow's pension, and this is particularly so where there has been a  
14 formal adjudication, as here, barring the decedent's claim. As authority for this proposition, the  
15 Department cites Ek v. Department of Labor and Industries, 181 Wn. 91 (1935).  
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22 As noted by the hearing examiner, the Ek case is simply not in point. In Ek, there was a  
23 formal final adjudication rejecting the therein decedent's claim on its merits prior to his death, which  
24 bound him, and also his widow in her claim filed after his death. In the case here before us, there  
25 has been no final adjudication in the decedent's claim on its merits. The Board rejected his claim  
26 on the legal ground of untimely filing, and dismissed the appeal for lack of jurisdiction. The  
27 question of whether or not the decedent had actually sustained an occupational disease was never  
28 addressed in any binding determination in his lifetime. Given this distinction, we, like the hearing  
29 examiner, feel the case of Beels v. Department of Labor and Industries, 178 Wn. 301 (1934), is  
30 controlling. In Beels, the court held that the failure of the injured workman to file his claim for  
31 compensation within one year as required by statute, could not prejudice or bar his widow's claim  
32 for a pension filed within one year of his death, inasmuch as her claim was based on a new and  
33 original right arising from, and at the time of, the workman's death. The rationale of Beels applies  
34 here.  
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1 Finally, the Department argues that the Board has no jurisdiction in this appeal to adjudicate  
2 whether the decedent was permanently totally disabled at the time of his death resulting from his  
3 occupational disease, inasmuch as the Board's jurisdiction is appellate only and the scope of its  
4 review is limited to those questions decided by the Department. Thus, so the argument goes,  
5 because the Department did not adjudicate the extent of the decedent's disability at time of his  
6 death from his occupational disease, the Board is without power to do so in the instant appeal.  
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10 This argument on scope of review may well have been waived by Department's counsel, in  
11 light of the previous stipulations as to issues and hearing procedures herein, as agreed to by all  
12 parties. In any event the argument, we think, is answered by the very nature of a claim for widow's  
13 pension. The Department is fully aware that any widow's pension claim must be based either on a  
14 workman's death being caused by an occupational injury or disease, or on a status of permanent  
15 total disability at time of death due to an occupational injury or disease. In this case, the  
16 Department did not simply reject the widow's claim on the ground that decedent, during his lifetime,  
17 had failed to file his claim within the statutory time limitation. It also considered her claim on its  
18 merits and rejected it on the further grounds that the decedent's condition did not constitute an  
19 industrial injury or an occupational disease; all with full knowledge that petitioner was specifically  
20 claiming her husband was permanently totally disabled before he died by reason of occupational  
21 disease. Under the circumstances, the Department must be deemed to have passed upon all  
22 questions necessarily presented by the merits of a widow's claim. It would be of no avail to the  
23 widow to simply determine that the decedent had sustained an occupational disease. As pointed  
24 out above, a widow's pension claim is necessarily premised on either one of two grounds: (1)  
25 death of the workman due to injury or occupational disease; or (2) that the workman was totally and  
26 permanently disabled as the result of an injury or occupational disease at the time of death. In the  
27 instant case, the widow's contention was clearly predicated on the second ground, and everyone  
28 knew it. In denying the claim on any grounds other than the jurisdictional one, the Department  
29 necessarily must be deemed to have passed upon and rejected this contention. She then  
30 appealed, again specifically raising the contention in her notice of appeal.  
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34 In short, we hold that a finding of total and permanent disability herein does not exceed the  
35 Board's scope of review. To hold otherwise would be a classic example of encouraging piecemeal  
36 litigation, which should be avoided where reasonably possible. See the Beels case, supra, at pg.  
37 309; and see Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970).  
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1 The hearing examiner's proposed findings, conclusions and order are hereby adopted as this  
2 Board's findings, conclusions and order, and are incorporated herein by this reference.  
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4 It is so ORDERED.  
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6 Dated this 2nd day of November, 1977.  
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8 BOARD OF INDUSTRIAL INSURANCE APPEALS  
9

10 /s/  
11 PHILLIP T. BORK Chairman

12 /s/  
13 SAN KIMVILLE Member

14 /s/  
15 WILLIAM C. JACOBS Member  
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