

## **Gilmore, Leo, Dec'd**

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### **ABATEMENT**

Where the worker died leaving no surviving beneficiaries after the proposed decision and order granting him a pension had been issued, but before it had been adopted by the Board, the worker's accrued pension benefits were not payable to his estate. ...*In re Leo Gilmore, Dec'd, BIIA Dec., 57,759 (1981)* [*Editor's Note: Consider the effect of 1999 Legislative changes to RCW 51.32.040 which make accrued benefits payable to the estate.*]

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

1	<b>IN RE: LEO GILMORE, DEC'D</b>	)	<b>DOCKET NO. 57,759</b>
2		)	
3	<b>CLAIM NO. G-941955</b>	)	<b>DECISION AND ORDER</b>
4			

5 APPEARANCES:

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7 Son-Petitioner, Gary Lee Gilmore, by  
8 Schroeter, Goldmark & Bender, per  
9 James Hailey

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11 Employer, Hope Cement Finishing, Inc.,  
12 None

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14 Department of Labor and Industries, by  
15 The Attorney General, per  
16 William Bailey, Assistant

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18 This is an appeal filed by the heir-petitioner on September 29, 1980 from an order of the  
19 Department of Labor and Industries dated July 23, 1980, which adhered to a prior order dated June  
20 26, 1980, which denied payment of benefits to the estate of the claimant for the reason that there  
21 was no surviving spouse or children who were eligible to receive benefits under RCW 51.32.040  
22 and closed the claim with no benefits payable of any kind. **AFFIRMED.**  
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24 style="text-align:center">**DECISION**

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26 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
27 and decision on a timely Petition for Review filed by the heir-petitioner to a Proposed Decision and  
28 Order issued by a hearings examiner for this Board on March 9, 1981, in which the order of the  
29 Department dated July 23, 1980 was sustained.

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31 The facts presented before us are uncontested and were stipulated by the parties to clarify  
32 the legal issues raised by this appeal. However, for purposes of the foregoing discussion, a brief  
33 summary is included herein.

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35 Leo Gilmore, now deceased, was injured on September 13, 1976 during the course of his  
36 employment with Hope Cement Finishing, Inc. His claim was eventually closed with permanent  
37 partial disability awards for impairment of the left leg and left arm. Upon an appeal to this Board, he  
38 was declared to be permanently totally disabled in a Proposed Decision and Order dated May 13,  
39 1980. Mr. Gilmore died on June 9, 1980, leaving no surviving spouse or eligible dependent children  
40 as contemplated under the Workers' Compensation Act. On June 11, 1980 the Board, not aware of  
41 Mr. Gilmore's death, issued its order adopting the hearings examiner's Proposed Decision and  
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1 Order, there having been no petition for review filed thereto. RCW 51.52.104. Thereafter, the  
2 Department of Labor and Industries determined that Mr. Gilmore left no surviving eligible  
3 beneficiaries and closed the claim with no benefits being payable pursuant to RCW 51.32.040. The  
4 Department's action in so denying benefits following Mr. Gilmore's death gives rise to the instant  
5 appeal.  
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9 In the Proposed Decision and Order in the appeal now before us, the hearings examiner  
10 specifically found that Mr. Gilmore died leaving no surviving spouse nor children eligible as  
11 beneficiaries. In addition, the examiner's short decision indicates the estate of Leo Gilmore,  
12 Deceased, would not be a "beneficiary" under the Act. Ray v. Industrial Insurance Commission, 99  
13 Wash. 176 (1917). We agree with the examiner's reasoning insofar as it determines that the estate  
14 cannot be a beneficiary.  
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18 However, the claimant's Petition for Review incorporating an argument first advanced in a  
19 hearing brief filed prior to the issuance of the Proposed Decision and Order raises a further legal  
20 question. In short, the issue can be stated as follows:  
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22 Was the prior appeal declaring the claimant to be permanently totally  
23 disabled, reduced to judgment prior to the claimant's death so that a  
24 property right was thereby created which would descend to the  
25 deceased's estate?  
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27 In support of its contention the petitioner cites for our consideration Calkins v. Department of Labor  
28 & Industries, 10 Wn. 2d 565 (1941) and Carl v. Department of Labor & Industries, 38 Wn. 2d 890  
29 (1951). In Calkins, the workman died following entry of a judgment in superior court based on a  
30 jury verdict in his favor that supported his request to reopen his claim for aggravation. Upon his  
31 death, he left no widow or children but had not received any compensation since an appeal had  
32 been taken by the Department and the employer to the Supreme Court. The court held that the  
33 administrator of the estate could properly be substituted as a party to the action because the claim  
34 had been reduced to judgment at the superior court level creating a property right which would  
35 descend to the deceased workman's estate.  
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39 In the Carl case, the legal representative of the claimant's estate was found to be the proper  
40 party to be substituted following appellant Carl's death pending his appeal to the Supreme Court  
41 from the dismissal non obstante verdicto after a jury found him permanently totally disable. Citing  
42 the Calkins case the court held that:  
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1 "In actions at law, where the action would otherwise abate upon death of  
2 one of the parties, the rule is established that, if the jury verdict has  
3 been entered prior to death, a judgment, the entry of which is delayed by  
4 the trial court or the opposing party, will be entered nunc pro tunc as of  
5 that date, for the purpose of avoiding abatement."  
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7 From these cases the petitioner argues that an award which is reduced to judgment becomes a  
8 property right for which the personal representative of the deceased worker can properly be  
9 substituted to marshal that property in the administration of the deceased's estate.  
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11 The cases cited by the petitioner are not in point with the appeal before us as they both deal  
12 with the question of superior court judgments being entered and the worker's death occurring  
13 during the pendency of an appeal to the Supreme Court. Petitioner provides no authority to support  
14 the proposition that Mr. Gilmore's claim had been reduced to judgment before his death. It is clear  
15 from the facts before us that the Board had not entered its final order as required by RCW  
16 51.52.104 since the period for filing a Petition for Review had not expired. We hold that in the  
17 circumstances before us no property right was created because no claim had been reduced to  
18 judgment at the time of Mr. Gilmore's death. Cf. Lutch v. Department of Labor & Industries, 54 Wn.  
19 2d 373 (1959).  
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### 25 **FINDINGS OF FACT**

- 26 1. On or about September 13, 1976, the Department received an accident  
27 report from the claimant, Leo R. Gilmore, now deceased, alleging the  
28 occurrence of an industrial injury of September 8, 1976, during the  
29 course of his employment with Hope cement Finishing, Inc. Following  
30 allowance of the claim, the Department issued an order closing the  
31 claim with a permanent partial disability award of 10% of the amputation  
32 value of the left leg at or above the knee joint with a functional stump.  
33 Following subsequent reopenings of the claim and consolidation with a  
34 second injury, the Department issued an order closing the claim on  
35 March 29, 1979, with a further permanent partial disability award of 20%  
36 of the amputation value of the left arm at or above the deltoid insertion  
37 or by disarticulation at the shoulder. On June 1, 1979, following  
38 reassumption of jurisdiction over the claim the Department entered an  
39 order adhering to the provisions of its order of March 29, 1979. On July  
40 3, 1979 the Board of Industrial Insurance Appeals received a notice of  
41 appeal filed by the claimant. On August 1, 1979 the Board issued an  
42 order granting the appeal under Docket No. 54,810.  
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- 44 2. Following hearings under that prior appeal, a Proposed Decision and  
45 Order was issued by a hearings examiner for the Board on May 13,  
46 1980, which contained an order declaring the claimant to be  
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1 permanently totally disabled as of June 1, 1979 and directing the  
2 Department to place the claimant on the pension rolls accordingly.

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4 3. On June 9, 1980 Leo R. Gilmore died leaving no surviving spouse nor  
5 children eligible as beneficiaries under the workmen's compensation  
6 statute.
- 7 4. On June 11, 1980 the Board of Industrial Insurance Appeals issued an  
8 order adopting the Proposed Decision and Order of May 13, 1980 in the  
9 prior appeal, Docket No. 54,810. On June 26, 1980 the Department  
10 entered an order effectively determining that Leo Gilmore was a single  
11 worker leaving no surviving spouse nor children eligible to receive  
12 benefits under RCW 51.32.040 and the claim was closed with no  
13 benefits payable of any kind. On July 15, 1980 an attorney for the  
14 deceased protested the order of June 26 making reference to the fact  
15 that Mr. Gilmore left a surviving son, Gary Lee Gilmore. On July 25,  
16 1980 the Department issued an order adhering to the provisions of its  
17 order of June 26, 1980. On September 29, 1980 the Board received a  
18 notice of appeal filed on behalf of Leo R. Gilmore, Deceased. On  
19 October 15, 1980 the Board issued an order granting the appeal and  
20 directed that proceedings be held on the issues raised by the appeal.

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22 **CONCLUSIONS OF LAW**

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties  
24 and subject matter to this appeal.
- 25 2. At the time of the death of Leo R. Gilmore, there were no beneficiaries to  
26 his rights under an appeal from the Department order of June 1, 1979,  
27 which had been the subject of a prior appeal under Board Docket No.  
28 54,810 as contemplated under the Industrial Insurance Act of this state.
- 29 3. As of the date of the death of Leo R. Gilmore, no final order under prior  
30 appeal Docket No. 54,810 had been entered and the matter had not  
31 been reduced to judgment.
- 32 4. The order of the Department of Labor and Industries issued herein on  
33 July 23, 1980, effectively affirming the non-payment of benefits to any  
34 surviving spouse or child is correct, and should be affirmed.

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37 It is so ORDERED.

38 Dated this 11th day of May, 1981.

39 BOARD OF INDUSTRIAL INSURANCE APPEALS

40  
41 /s/  
42 MICHAEL L. HALL Chairman

43  
44 /s/  
45 AUGUST P. MARDESICH Member  
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