Cowell, Ronald, Dec'd

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Fixity of condition at time of death from unrelated cause (RCW 51.32.050(6) & 51.52.067)

Where, at the time of the worker's death from an unrelated cause, the worker's condition causally related to the industrial injury was not fixed but there was no reasonable likelihood that he would ever have been able to return to gainful employment, the surviving spouse was entitled to benefits pursuant to RCW 51.32.050(6). ***….In re Ronald Cowell, Dec'd,* BIIA Dec., 62,207 (1984)** [dissent] [*Editor's Note*: *Contra In re Larry Alfano*, BIIA Dec., 86 1384 (1988), followed *In re James McShane, Dec'd*, BIIA Dec., 05 16629.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD E. COWELL, DEC'D	**)**	**DOCKET NO. 62,207**
	)	
CLAIM NO. H-246400	**)**	**DECISION AND ORDER**

APPEARANCES:

Widow-petitioner, Mary L. Cowell, by
Calbom and Schwab, per
G. Joe Schwab

Employer, Diebold, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
Tina E. Kondo, Maureen Mannix, and Donna Walker, Assistants

Appeal filed on May 21, 1982 by Mary L. Cowell, the widow of the deceased worker, Ronald E. Cowell, from an order of the Department of Labor and Industries dated April 19, 1982 which adhered to the provisions of a prior order denying the petitioner's claim for widow's benefits. **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 widow-petitioner to a Proposed Decision and Order issued on July 12, 1983, in which the order of the Department dated April 19, 1982 was affirmed.

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

It will be noted that the Department order under appeal, dated April 19, 1982, adhered to the provisions of an earlier Department order which had been issued March 12, 1982. The preludial paragraphs of the March 12, 1982 order set forth the scope of issues included in the Department's adjudication of Mrs. Cowell's claim for benefits. The penultimate paragraph of the March 12 order states:

> "WHEREAS it appears the cause of death was unrelated to the injury of November 10, 1977, and further, that the deceased's condition was not fixed or rateable, and he was not permanently and totally disabled as a result of the injury of November 10, 1977..."

Initially, Mrs. Cowell's appeal to this Board raised only two contested issues: (1) whether Ronald Cowell was permanently totally disabled due to his injury at the time of his death on January 15, 1982, and (2) whether any benefits were due Mr. Cowell, but unpaid at the time of his death. See RCW 51.32.040 and 51.32.050(6). Mrs. Cowell later filed an amended notice of appeal which raised an additional issue, whether the death of Ronald E. Cowell on January 15, 1982 resulted from conditions causally related to his industrial injury of November 10, 1977. See RCW 51.32.050(2).

Although the operative section of the order adjudicating Mrs. Cowell's claim mentioned only RCW 51.32.040 and 51.32.050(6) as provisions under which the claim was considered, we believe the paragraph quoted above included within the scope of issues appealable to this Board the question of Mrs. Cowell's entitlement under RCW 51.32.050(2) which was raised by her amended notice of appeal. Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970), Beels v. Department of Labor and Industries, 178 Wash. 301 (1934). We will deal first with that issue.

In an appeal from a Department order denying or rejecting benefits, the appellant (here the widow-petitioner) carries the burden of presenting a prima facie case before the Board. RCW 51. 52.050. Faces with countervailing evidence, the widow-petitioner is held to strict proof of her entitlement to benefits. She must prove her claim by a preponderance of the evidence. Stafford v. Department of Labor and Industries, 33 Wn. App. 231, 234 (1982).

The record does contain sufficient evidence which, if accepted, would permit recovery. Such evidence, however, sets forth alternative theories of causal relationship in opinions advanced by Dr. A. W. Stevenson and Dr. G. T. Wandschneider.

Dr. Stevenson is an orthopedic surgeon who at no time ever saw Mr. Cowell. After reviewing the medical records of Mr. Cowell, Dr. Stevenson advanced the opinion that he had developed blood clots in the lung following his second and/or third low back surgeries producing either a vascular embolism in the lung, as well as pneumonia and lung congestion or a mild myocardial infarction with chronic pericarditis. Dr. Stevenson stated that Mr. Cowell probably had a coronary thrombosis, caused by post-operative complications of his third low back surgery. The coronary occlusion then produced the cardiac arrest, which was the immediate cause of death.

On the other hand, Dr. Wandschneider, a family medicine practitioner, stated that Mr. Cowell had been admitted to the hospital on January 15, 1982 in cardiorespiratory arrest, and could not be resuscitated. Dr. Wandschneider believed that the precipitating factor of the cardiac arrest was

most probably a cardiac arrhythmia which in turn was most likely caused by arteriosclerotic cardiovascular disease. Dr. Wandschneider went on to testify that Mr. Cowell had been known to have been a heavy smoker and most probably had a genetic pre-disposition toward those cardiovascular findings. Dr. Wandschneider added, however, that in addition to those multiple risk factors which could have led to cardiac arrhythmia resulting in sudden death, one strongly contributing factor probably was Mr. Cowell's emotional state attributable to his multiple back surgeries, his poor prognosis therefrom, and his multiple hospitalizations for causally unrelated medical problems. His view of Mr. Cowell's medical problems tended to refute Dr. Stevenson's embolism theory. Dr. Wandschneider was of the opinion Mr. Cowell did not have an embolus in the lung as a result of extensive bed rest and hospitalizations between March of 1981 and December 1981. In the absence of such, Dr. Stevenson"s suppositions concerning causal relationship to the industrial injury fail in foundation.

In essence, Dr. Wandschneider was causally relating Mr. Cowell's death from cardiac arrhythmia to the emotional stress attendant in part from his industrial injury. Given Mr. Cowell's history and known multiple risk factors for heart disease, we cannot accept that opinion as dispositive. It is a tenuous and speculative theory which is not supported by the weight of reasoned medical knowledge. With respect to this issue, we accept the opinions expressed by the only heart disease specialist who testified herein, Dr. Michael Golden, which are well-summarized in the Proposed Decision and Order and we believe appropriate weight is accorded thereto.

More troublesome to deal with are the issues raised under RCW 51. 32.040 and 51.32.050(6). In Hiatt v. Department of Labor and Industries, 48 Wn. 2d 843 (1956), the court was presented with the issue of whether the total disability of a deceased worker was permanent at the time of his death. The court interpreted the provisions of RCW 51.08.160, defining "permanent total disability", and its relationship to the forerunner of what is now RCW 51.32.050 (6), and concluded that "permanent total disability" contemplated a situation where the condition of the injured worker has reached a fixed state from which full recovery was not expected. The court reasoned that a person whose condition is remediable is not permanently disabled, and went on to state:

> "At the time of decedent's death, he was not permanently totally disabled as a result of his injury. His condition was not fixed, lasting or stable. His disability would have continued for only four to six months longer, except for the intervention of death. His condition resulting from the injury was temporary rather than permanent.
>
> * * *

> Decedent, subsequent to his injury and prior to his death, could not have received monthly payments under RCW 51.32.060 because he was not then under permanent total disability resulting from the injury. The permanent total disability which serves as a basis for a widow's pension must necessarily be that for which a workman may seek compensation during his lifetime. The widow must establish that, at the time of his death, he was permanently, totally disabled as a result of an industrial injury. That condition was not established in this case." 48 Wn. 2d 843, 847.

The transcript in this appeal contains no medical testimony providing fully documented foundation that the claimant's causally related condition was fixed and stable at the time of his death on January 15, 1982.

What the entire record of proceedings does show is that, regardless of the characterization of Mr. Cowell's disability as of the date of his death, i.e., temporary total or permanent total, there was no reasonable likelihood that he would have ever been able to return to gainful employment. In Hiatt, the evidence showed that the claimant's temporary total disability was anticipated for another four to six months at the time of his death. Presumably, if Mr. Cowell would have been expected to similarly recover in a reasonable length of time and return to gainful employment, then his widow's claim for pension benefits cannot be allowed.

Dr. Jack Watkins, an orthopedist, performed the claimant's final two low back surgeries on June 9, 1981 and October 27, 1981. After the June 1981 surgery, Mr. Cowell wa discharged with what Dr. Watkins described as a "satisfactory post-operative course, no complications". When seen in July 1981, he had no pain and was doing very well. His knee reflex was returning and he had no specific muscle weakness. As of August 1981, he started to again have pain in his right leg; the reflex was again absent, and he had some hypesthesia but no weakness in his foot. He was advised to rest as Dr. Watkins felt he was being too active. Later that month, his condition was about the same. As of September 8, Mr. Cowell described his condition to Dr. Watkins as "much better". However, on September 25, 1981, he was admitted to the hospital with a flare-up of back and leg symptoms. He had been progressing satisfactorily until two days prior to his admission when a sudden onset of pain occurred without a specific aggravating incident. Conservative treatment was attempted, but he was once again admitted to the hospital on October 19, 1981, where a myelogram revealed a defect consistent with a recurrent herniated disc.

His final back surgery was performed on October 27, 1981 when it was noted that Mr. Cowell had developed a complete foot drop rather suddenly due to the recurrent disc. The post-operative diagnosis was that the claimant indeed had a recurrent disc at the L5/S1 area with migration, indicating that the disc had ruptured and moved toward the previous area of surgery. He was discharged from the hospital following this final surgery on November 5, 1981.

As of November 19, 1981, Dr. Watkins described Mr. Cowell's condition as "improving". the foot drop was eliminated but there was weakness in certain muscles affecting his ability to pull up his toes. Hypesthesia was lessened but still present to some extent in the foot. As of December 7, 1981, he had developed some pain in the back into the buttocks which was of recent origin. He had been otherwise feeling well. Dr. Watkins did not see Mr. Cowell after that visit. However, upon learning of Mr. Cowell's death in January 1982, Dr. Watkins was strongly of the opinion that Mr. Cowell would have been totally disabled from any work still at that time. He didn't feel the condition was fixed in that Mr. Cowell "was improved somewhat after his last surgery". Of particular importance was Dr. Watkins' answer to the following question:

> "Q What was your feeling at the time as to whether or not this gentleman would have been able to return to work?
>
> A After disc surgery we give the patient about six months and hope that he is able to return to work."

During cross-examination, Dr. Watkins described this hope as being less than certain:

> Q Doctor, in terms of discussing this gentleman's improvement, are we not talking in terms of what we hoped would have occurred following his last surgery?
>
> A Yes.
>
> Q And, doctor, in light of the problems which had been encountered in the treatment of Mr. Cowell would it be also fair to state that assessment of his improvement beyond your last evaluation of him is or enters the realm of being speculative?
>
> A yes, I think it is speculative."

The majority of the Board thinks it is speculative, too. We are especially strong in that view given the state of facts which occurred <u>following</u> Dr. Watkins' last visit with Mr. Cowell. On December 27, 1981, Mr. Cowell was hospitalized with a condition of upper abdomen distress, related to an adverse reaction to medication prescribed for the industrial injury. However, during the course of his attendance for that condition, Dr. Wandschneider had noted that the claimant's reflexes at the

knee and the ankle were absent on the right. The recurrence of this absent reflex apparently came about after Dr. Watkins last saw Mr. Cowell. When he was questioned whether Mr. Cowell's reflex had returned following his last surgery, Dr. Watkins responded that he would have recorded the fact if any reflexes were diminished.

Consequently, it is reasonable for this Board as the trier of fact to find that the claimant's back condition worsened following his final visit to Dr. Watkins with such worsening being evidenced by an objective finding. This, coupled with the knowledge of the claimant's prior unsuccessful course of treatment and necessity for three low back surgeries, as well as Dr. Watkins' pure speculation about improvement, leads to the inescapable conclusion that Mr. Cowell would not likely have returned to gainful employment within six months or any reasonable period thereafter.

When he died Mr. Cowell was two and one-half months postoperative from his third major back surgery. Even if he had had a non-complicated and completely successful eventual result, his condition would not have become truly medically stable until he was at least six months post-operative.

Thus, we are presented with an unfortuitous state of facts insofar as Mr. Cowell's survivors are concerned. Mr. Cowell was not entitled as of his date of death to a declaration that his condition had resolved to a "stable" impairment classifiable as a permanent partial disability. The reason for this was well expressed by our Supreme Court in Franks v. Department of Labor and Industries, 35 Wn. 2d 763, 766 (1955) where it was stated:

> "Usually, during a period of temporary total disability, the workman is undergoing treatment. In any event, such classification contemplates that eventually there will be either complete recovery or an impaired bodily condition which is static. Until one or the other of these conditions is reached, the statutory classification is temporary total disability. Permanent partial disability, on the other hand, contemplates a situation where the condition of the injured worker has reached a fixed state from which full recovery is not expected." (Citation omitted)

Thus, a strict and literal reading of the first proviso of RCW 51.32. 040 would prevent Mr. Cowell's beneficiaries from receiving any award under that section since his condition had not reached a point of fixed stability, i.e., permanency.

Similar to permanent partial disability, permanent total disability contemplates that an injured worker's condition requires no further medical treatment designed to lessen one's impairment.

Clearly, Mr. Cowell's back condition and complications from back surgery still required medical attention and management when he suffered the cardiac arrest resulting in his death.

Immediately preceding the death-producing event, the only reasonable analysis of his status would have led his physicians and the Department's claims adjudicators to conclude he was still temporarily totally disabled. With the benefit of 20/20 hindsight and necessary emphasis on portions of the medical records and testimony comprising this Board's record, we could attempt to support a conclusion that Mr. Cowell was actually permanently totally disabled from his injury on the date of his death. To do so would create a neat package fitting within the framework of the Hiatt case and a strict reading of RCW 51.32.050(6). However, to hold from our ex post facto view that Mr. Cowell was in fact permanently totally disabled as that term is fully contemplated under the Act, would be a bald fiction.

Does this mean that Mr. Cowell's widow and dependent children are to be left with no statutory remedy? Does this mean that they are to suffer further from the misfortune of Mr. Cowell's passing because of an apparent hiatus in statutory coverage? We think not.

The relevant provision under which recovery must be made, if at all, reads:

> "If the injured worker dies during the period of permanent total disability, whatever the cause of death, leaving a surviving spouse, or child, or children, the surviving spouse or child or children shall receive benefits as if death resulted from the injury as provided in subsections (2) through (4) of this section... " RCW 51.32.050(6)

We are well apprised that all provisions of the Industrial Insurance Act are to be liberally construed in favor of those who come within its terms. Nelson v. Department of Labor and Industries, 9 Wn. 2d 621 (1941). We also understand that strict proof is required of one claiming benefits under the Act. Olympia Brewing Company v. Department of Labor and Industries, 34 Wn. 2d 498 (1949).

Under the facts in the Hiatt case, the court noted that the length of time of the decedent's disability could reliably be determined. Except for the intervention of Ned Hiatt's death, he would likely have recovered in four to six months. No such certainty of recovery is presented by the facts of Mr. Cowell's post-surgical course. We do not believe Dr. Watkins' suppositions, his "hoped-for" result following a third surgical insult, amounts to the level of certainty of recovery that was shown in Hiatt.

To the contrary, the pattern of Mr. Cowell's previous postsurgical course following his first two surgeries was being repeated within a month and a half after his third surgery. By December 7,

he had developed back pain radiating into his buttocks. By late December, right knee and ankle reflexes were absent. We think it unlikely that Mr. Cowell would have accepted a fourth surgical insult even if offered to remedy his deteriorating condition. Similarly, we assume the Department would not easily have authorized a fourth major surgery. In short, objective evidence of a permanently disabling condition was developing in the days and weeks preceding Mr. Cowell's death. Simply because enough time had not passed before Mr. Cowell's "hoped-for" recovery could be seen as illusory is no reason in our view for penalizing Mr. Cowell's widow and dependent children. Nor do we believe the legislature so intended.

We believe the phrase "during the period of permanent total disability" in RCW 51.32.050(6) encompasses that period where it is established that an injured worker's condition, though still requiring medical attention and treatment (and therefore technically temporarily totally disabled), is in a state of decline from which recovery to the point of eventual employability is not a reasonable likelihood. If a worker dies, during such period of decline, from causes unrelated to the accepted injury, the surviving spouse and dependent children should be allowed benefits under RCW 51.32.050(6) as if the deceased had been declared permanently totally disabled nunc pro tunc.

Clearly, the facts of Mr. Cowell's post-surgical course show his industrially-related condition was in a state of decline. Had there only been a single failure to surgical repair, we might feel less confident in finding no reasonable likelihood of recovery to the point of employability for Mr. Cowell. But where, as here, there is a repeated pattern of failure of surgical intervention with objective evidence of deterioration in condition, we have no difficulty making such a conclusion. The widow-petitioner should be allowed the benefits she seeks under RCW 51.32.050(6).

FINDINGS OF FACT

1. On December 6, 2977, the Department of Labor and Industries received an accident report in which it was alleged that the claimant, Ronald E. Cowell, had sustained an industrial injury on November 10, 1977, during the course of his employment with Diebold, Inc. The claim was accepted, treatment provided, and time-loss compensation payments were initiated. On August 14, 1978, the Department issued an order closing the claim with no award for permanent partial disability. However, on that same date, August 14, 1978, an adjudicator for the Department wrote a letter to the claimant stating that a further medical examination of claimant was being arranged by the Department. On November 29, 1978 the Department issued an order setting aside and holding for naught its previous order dated August 14, 1978, and closed

the claim with a permanent partial disability award equal to 10% as compared to total bodily impairment.

2. On February 2, 1981 the claimant filed with the Department an application to reopen the claim for aggravation of condition. On february 6, 1981 the department issued an order reopening the claim, effective December 2, 1980, for further treatment. The payment of time-loss compensation was reinstated. On January 15, 1982, the claimant died. On March 8, 1982 Mary L. Cowell, the widow of the deceased worker, filed with the Department a claim for benefits. On March 12, 1982 the Department issued an order denying the claim for benefits under the provisions of RCW 51.32.040 and RCW 51.32.050(6), on the grounds that the cause of the death of Ronald E. Cowell was unrelated to the injury of November 10, 1977, and that at the time of his death, the deceased's condition was not fixed nor rateable, and he was not permanently and totally disabled as a result of the injury of November 10, 1977. On March 31, 1982 the widow-petitioner filed a notice of appeal with the Board of Industrial Insurance Appeals. On April 7, 1982 the Department issued an order holding in abeyance its previous order dated March 12, 1982, pending further consideration. On April 19, 1982, the Department issued an order adhering to the provisions of its previous order dated March 12, 1982, denying the widow's claim. On May 14, 1982, the Department received a notice of appeal from the widow-petitioner, which the Department transmitted to the Board on May 21, 1982. On June 2, 1982, the Board issued its order granting the appeal, assigning it Docket No. 62,207, and directed that proceedings be held on the issues raised therein. On August 5, 1982, the widow-petitioner filed with the Board an amended notice of appeal from that order issued by the Department on April 19, 1982. The amended notice of appeal alleged that Ronald E. Cowell had died as a result of conditions causally related to his industrial injury of November 10, 1977, and prayed for relief based thereon.

3. On November 10, 1977, Ronald E. Cowell injured his low back while in the course of his employment with Diebold, Inc. Thereafter, Mr. Cowell underwent three low back intervertebral disc surgeries on November 23, 1977, June 9, 1981, and October 27, 1981. At the last operation, a diagnosis of a recurrent disc problem between the 5th lumbar and 1st sacral vertebrae with migration was made.

4. On December 27, 1981, Mr. Cowell was hospitalized for treatment of a gastric ulcer which was secondary to the medication treatment Mr. Cowell had received for his causally related low back condition. Mr. Cowell was subsequently discharged from the hospital on December 29, 1981.

5. On January 15, 1982, Mr. Cowell died from a condition described as cardiopulmonary arrest as a result of cardiac arrhythmia. Mr. Cowell had the pre-existing condition of cardiovascular disease or hardening of the coronary arteries.

6. Prior to his death, Mr. Cowell had been a heavy smoker for many years. He was genetically predisposed to a cardiac arrest.

7. Mr. Cowell's cardiopulmonary arrest and resultant death was not proximately caused by his industrial injury of November 10, 1977 or any sequelae thereof.

8. At the time of his death on January 15, 1982, Mr. Cowell was unable to work as a result of his industrial injury of November 10, 1977. His condition causally related to that industrial injury was not fixed and stationary at the time of his death, but was in a state of decline in that it had worsened following his third low back surgery, and required further medical attention and management.

9. As of January 15, 1982, Mr. Cowell was not likely to recover from the effects of his industrial injury to an extent that would permit his return to work in any capacity for which he had training and experience, even though further treatment was necessary for management of conditions directly related to his injury and treatment therefor.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the following conclusions are entered:

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and the subject matter of this appeal.

2. Within the meaning and contemplation RCW 51.32. 050(2), the death of the claimant, Ronald E. Cowell, on January 15, 1982 was not causally related to his industrial injury of November 10, 1977.

3. Within the meaning and contemplation of RCW 51.32.080, the claimant, Ronald E. Cowell, at the time of his death on January 15, 1982, was not entitled to a permanent partial disability award as a result of his industrial injury of November 10, 1977; and therefore, under RCW 51.32.040, such an award could not be paid to his widow.

4. At the time of his death on January 15, 1982, Ronald Cowell was temporarily totally disabled as a result of his industrial injury of November 10, 1977, but would eventually have become permanently totally disabled as a result of the effects of his industrial injury.

5. The order of the Department of Labor and Industries issued April 19, 1982, adhering to the provisions of a previous order dated March 12, 1982, which denied the claim for benefits filed by Mary L. Cowell under the provisions of RCW 51.32.040 and RCW 51.32.050(6) on the grounds that the cause of the injured worker's death was unrelated to the injury of November 10, 1977 and that at the time of his death, the

> deceased's condition was not fixed or rateable, and he was not permanently and totally disabled as the result of the injury of November 10, 1977, is incorrect and should be reversed and the claim remanded to the Department to award Mary Cowell a widow's pension.

It is so ORDERED.

Dated this 7th day of February, 1984.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENTING OPINION

The Board majority, in its attempt to find for this widow at all costs, has managed to avoid the plain meaning of RCW 51.32.050(6) and the clear rule laid down in Hiatt v. Department of Labor and Industries, 48 Wn. 2d 843 (1956), and to create a new rule for providing benefits which simply has no foundation in the workers' compensation law.

RCW 51.32.050(6) provides for widow's benefits if "the injured worker dies during the period of permanent total disability..." The application of this statutory provision was the precise issue faced by the Court in Hiatt, and (as admitted by the Board's majority) the Court reasoned that "permanent" contemplates a situation where the injured worker's condition has reached a fixed state and that a person whose condition is remediable is not classified as permanently disabled. The Court then held in Hiatt:

> "Decedent, subsequent to his injury and prior to his death, could not have received monthly payments under RCW 51.32.060 because he was not then under permanent total disability resulting from the injury. The permanent total disability which serves as a basis for a widow's pension must necessarily be that for which a workman may seek compensation during his lifetime. The widow must establish that, at the time of his death, he was permanently, totally disabled as a result of an industrial injury. That condition was not established in this case." (Emphasis added)

The Board majority recognizes the force of this holding, by admitting that there is no evidence herein establishing that Mr. Cowell's injury-related condition was fixed and stable at the time of his death, and by making a specific finding (No. 8) and a specific conclusion (part of No. 4) that his condition was not fixed and his disability at the time of his death was one of temporary total and not

permanent total. To me, this clearly should end the matter of the widow's right to benefits under RCW 51.32.050(6).

But the majority seizes upon some testimony of Dr. Watkins as to being "speculative" about the extent of improvement expected in Mr. Cowell's condition, and jumps from that observation to the "inescapable conclusion" that he would not have ever returned to gainful employment had he lived longer. This is reflected in Finding No. 9; and in the last part of Conclusion No. 4 which concludes that eventually after his death he would have become permanently totally disabled.

I submit that, regardless of the characterization of Dr. Watkins' testimony as "speculative", there is absolutely no medical evidence that the claimant's low back condition, at such "eventual" time as it would have become fixed and stable, would then be permanently totally disabling. Thus, the majority's above-noted conclusion is itself extremely "speculative".

In any event, that conclusion is irrelevant as a matter of law. The majority has contrived to call a period of temporary disability when medical treatment was necessary a nunc pro tunc period of permanent total disability, because it was a "period of decline" in the worker's condition! What new disability classification is this? The effect of these mental gyrations is clear. The majority has amended and added language to RCW 51.32.050(6), to provide that "If the injured worker dies during the period of permanent total disability or during a period of temporary total disability which may have become permanent total disability at some later time had not death intervened," then the surviving spouse should receive pension benefits. Such statutory amendment is solely the province of the Legislature, and is not within the powers of this Board.

I would adopt in toto the findings, conclusions and order in the Proposed Decision and Order of July 12, 1983, and thereby affirm the Department's order of April 19, 1982 rejecting the widow's claim.

Dated this 7th day of February, 1984.

/s/
PHILLIP T. BORK Member