

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.*]

Scroll down for order.

1 Initially, Mrs. Cowell's appeal to this Board raised only two contested issues: (1) whether Ronald
2 Cowell was permanently totally disabled due to his injury at the time of his death on January 15,
3 1982, and (2) whether any benefits were due Mr. Cowell, but unpaid at the time of his death. See
4 RCW 51.32.040 and 51.32.050(6). Mrs. Cowell later filed an amended notice of appeal which
5 raised an additional issue, whether the death of Ronald E. Cowell on January 15, 1982 resulted
6 from conditions causally related to his industrial injury of November 10, 1977. See RCW
7 51.32.050(2).
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11 Although the operative section of the order adjudicating Mrs. Cowell's claim mentioned only
12 RCW 51.32.040 and 51.32.050(6) as provisions under which the claim was considered, we believe
13 the paragraph quoted above included within the scope of issues appealable to this Board the
14 question of Mrs. Cowell's entitlement under RCW 51.32.050(2) which was raised by her amended
15 notice of appeal. Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970), Beels v.
16 Department of Labor and Industries, 178 Wash. 301 (1934). We will deal first with that issue.
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20 In an appeal from a Department order denying or rejecting benefits, the appellant (here the
21 widow-petitioner) carries the burden of presenting a prima facie case before the Board. RCW 51.
22 52.050. Faces with countervailing evidence, the widow-petitioner is held to strict proof of her
23 entitlement to benefits. She must prove her claim by a preponderance of the evidence. Stafford v.
24 Department of Labor and Industries, 33 Wn. App. 231, 234 (1982).
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28 The record does contain sufficient evidence which, if accepted, would permit recovery. Such
29 evidence, however, sets forth alternative theories of causal relationship in opinions advanced by Dr.
30 A. W. Stevenson and Dr. G. T. Wandschneider.
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33 Dr. Stevenson is an orthopedic surgeon who at no time ever saw Mr. Cowell. After reviewing
34 the medical records of Mr. Cowell, Dr. Stevenson advanced the opinion that he had developed
35 blood clots in the lung following his second and/or third low back surgeries producing either a
36 vascular embolism in the lung, as well as pneumonia and lung congestion or a mild myocardial
37 infarction with chronic pericarditis. Dr. Stevenson stated that Mr. Cowell probably had a coronary
38 thrombosis, caused by post-operative complications of his third low back surgery. The coronary
39 occlusion then produced the cardiac arrest, which was the immediate cause of death.
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43 On the other hand, Dr. Wandschneider, a family medicine practitioner, stated that Mr. Cowell
44 had been admitted to the hospital on January 15, 1982 in cardiorespiratory arrest, and could not be
45 resuscitated. Dr. Wandschneider believed that the precipitating factor of the cardiac arrest was
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1 most probably a cardiac arrhythmia which in turn was most likely caused by arteriosclerotic
2 cardiovascular disease. Dr. Wandschneider went on to testify that Mr. Cowell had been known to
3 have been a heavy smoker and most probably had a genetic pre-disposition toward those
4 cardiovascular findings. Dr. Wandschneider added, however, that in addition to those multiple risk
5 factors which could have led to cardiac arrhythmia resulting in sudden death, one strongly
6 contributing factor probably was Mr. Cowell's emotional state attributable to his multiple back
7 surgeries, his poor prognosis therefrom, and his multiple hospitalizations for causally unrelated
8 medical problems. His view of Mr. Cowell's medical problems tended to refute Dr. Stevenson's
9 embolism theory. Dr. Wandschneider was of the opinion Mr. Cowell did not have an embolus in the
10 lung as a result of extensive bed rest and hospitalizations between March of 1981 and December
11 1981. In the absence of such, Dr. Stevenson's suppositions concerning causal relationship to the
12 industrial injury fail in foundation.
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19 In essence, Dr. Wandschneider was causally relating Mr. Cowell's death from cardiac
20 arrhythmia to the emotional stress attendant in part from his industrial injury. Given Mr. Cowell's
21 history and known multiple risk factors for heart disease, we cannot accept that opinion as
22 dispositive. It is a tenuous and speculative theory which is not supported by the weight of reasoned
23 medical knowledge. With respect to this issue, we accept the opinions expressed by the only heart
24 disease specialist who testified herein, Dr. Michael Golden, which are well-summarized in the
25 Proposed Decision and Order and we believe appropriate weight is accorded thereto.
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30 More troublesome to deal with are the issues raised under RCW 51. 32.040 and
31 51.32.050(6). In Hiatt v. Department of Labor and Industries, 48 Wn. 2d 843 (1956), the court was
32 presented with the issue of whether the total disability of a deceased worker was permanent at the
33 time of his death. The court interpreted the provisions of RCW 51.08.160, defining "permanent total
34 disability", and its relationship to the forerunner of what is now RCW 51.32.050 (6), and concluded
35 that "permanent total disability" contemplated a situation where the condition of the injured worker
36 has reached a fixed state from which full recovery was not expected. The court reasoned that a
37 person whose condition is remediable is not permanently disabled, and went on to state:
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42 "At the time of decedent's death, he was not permanently totally
43 disabled as a result of his injury. His condition was not fixed, lasting or
44 stable. His disability would have continued for only four to six months
45 longer, except for the intervention of death. His condition resulting from
46 the injury was temporary rather than permanent.
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1 Decedent, subsequent to his injury and prior to his death, could not have
2 received monthly payments under RCW 51.32.060 because he was not
3 then under permanent total disability resulting from the injury. The
4 permanent total disability which serves as a basis for a widow's pension
5 must necessarily be that for which a workman may seek compensation
6 during his lifetime. The widow must establish that, at the time of his
7 death, he was permanently, totally disabled as a result of an industrial
8 injury. That condition was not established in this case." 48 Wn. 2d 843,
9 847.

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11 The transcript in this appeal contains no medical testimony providing fully documented foundation
12 that the claimant's causally related condition was fixed and stable at the time of his death on
13 January 15, 1982.
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15 What the entire record of proceedings does show is that, regardless of the characterization of
16 Mr. Cowell's disability as of the date of his death, i.e., temporary total or permanent total, there was
17 no reasonable likelihood that he would have ever been able to return to gainful employment. In
18 Hiatt, the evidence showed that the claimant's temporary total disability was anticipated for another
19 four to six months at the time of his death. Presumably, if Mr. Cowell would have been expected to
20 similarly recover in a reasonable length of time and return to gainful employment, then his widow's
21 claim for pension benefits cannot be allowed.
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26 Dr. Jack Watkins, an orthopedist, performed the claimant's final two low back surgeries on
27 June 9, 1981 and October 27, 1981. After the June 1981 surgery, Mr. Cowell was discharged with
28 what Dr. Watkins described as a "satisfactory post-operative course, no complications". When
29 seen in July 1981, he had no pain and was doing very well. His knee reflex was returning and he
30 had no specific muscle weakness. As of August 1981, he started to again have pain in his right leg;
31 the reflex was again absent, and he had some hypesthesia but no weakness in his foot. He was
32 advised to rest as Dr. Watkins felt he was being too active. Later that month, his condition was
33 about the same. As of September 8, Mr. Cowell described his condition to Dr. Watkins as "much
34 better". However, on September 25, 1981, he was admitted to the hospital with a flare-up of back
35 and leg symptoms. He had been progressing satisfactorily until two days prior to his admission
36 when a sudden onset of pain occurred without a specific aggravating incident. Conservative
37 treatment was attempted, but he was once again admitted to the hospital on October 19, 1981,
38 where a myelogram revealed a defect consistent with a recurrent herniated disc.
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1 His final back surgery was performed on October 27, 1981 when it was noted that Mr. Cowell
2 had developed a complete foot drop rather suddenly due to the recurrent disc. The post-operative
3 diagnosis was that the claimant indeed had a recurrent disc at the L5/S1 area with migration,
4 indicating that the disc had ruptured and moved toward the previous area of surgery. He was
5 discharged from the hospital following this final surgery on November 5, 1981.
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9 As of November 19, 1981, Dr. Watkins described Mr. Cowell's condition as "improving". the
10 foot drop was eliminated but there was weakness in certain muscles affecting his ability to pull up
11 his toes. Hypesthesia was lessened but still present to some extent in the foot. As of December 7,
12 1981, he had developed some pain in the back into the buttocks which was of recent origin. He
13 had been otherwise feeling well. Dr. Watkins did not see Mr. Cowell after that visit. However, upon
14 learning of Mr. Cowell's death in January 1982, Dr. Watkins was strongly of the opinion that Mr.
15 Cowell would have been totally disabled from any work still at that time. He didn't feel the condition
16 was fixed in that Mr. Cowell "was improved somewhat after his last surgery". Of particular
17 importance was Dr. Watkins' answer to the following question:
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22 "Q What was your feeling at the time as to whether or not this gentleman
23 would have been able to return to work?
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25 A After disc surgery we give the patient about six months and hope that he
26 is able to return to work."
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28 During cross-examination, Dr. Watkins described this hope as being less than certain:

29 Q Doctor, in terms of discussing this gentleman's improvement, are we not
30 talking in terms of what we hoped would have occurred following his last
31 surgery?
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33 A Yes.
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35 Q And, doctor, in light of the problems which had been encountered in the
36 treatment of Mr. Cowell would it be also fair to state that assessment of
37 his improvement beyond your last evaluation of him is or enters the
38 realm of being speculative?
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40 A yes, I think it is speculative."
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42 The majority of the Board thinks it is speculative, too. We are especially strong in that view given
43 the state of facts which occurred following Dr. Watkins' last visit with Mr. Cowell. On December 27,
44 1981, Mr. Cowell was hospitalized with a condition of upper abdomen distress, related to an
45 adverse reaction to medication prescribed for the industrial injury. However, during the course of
46 his attendance for that condition, Dr. Wandschneider had noted that the claimant's reflexes at the
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1 knee and the ankle were absent on the right. The recurrence of this absent reflex apparently came
2 about after Dr. Watkins last saw Mr. Cowell. When he was questioned whether Mr. Cowell's reflex
3 had returned following his last surgery, Dr. Watkins responded that he would have recorded the fact
4 if any reflexes were diminished.
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7 Consequently, it is reasonable for this Board as the trier of fact to find that the claimant's
8 back condition worsened following his final visit to Dr. Watkins with such worsening being
9 evidenced by an objective finding. This, coupled with the knowledge of the claimant's prior
10 unsuccessful course of treatment and necessity for three low back surgeries, as well as Dr.
11 Watkins' pure speculation about improvement, leads to the inescapable conclusion that Mr. Cowell
12 would not likely have returned to gainful employment within six months or any reasonable period
13 thereafter.
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17 When he died Mr. Cowell was two and one-half months postoperative from his third major
18 back surgery. Even if he had had a non-complicated and completely successful eventual result, his
19 condition would not have become truly medically stable until he was at least six months post-
20 operative.
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24 Thus, we are presented with an unfortuitous state of facts insofar as Mr. Cowell's survivors
25 are concerned. Mr. Cowell was not entitled as of his date of death to a declaration that his
26 condition had resolved to a "stable" impairment classifiable as a permanent partial disability. The
27 reason for this was well expressed by our Supreme Court in Franks v. Department of Labor and
28 Industries, 35 Wn. 2d 763, 766 (1955) where it was stated:
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31 "Usually, during a period of temporary total disability, the workman is
32 undergoing treatment. In any event, such classification contemplates
33 that eventually there will be either complete recovery or an impaired
34 bodily condition which is static. Until one or the other of these
35 conditions is reached, the statutory classification is temporary total
36 disability. Permanent partial disability, on the other hand, contemplates
37 a situation where the condition of the injured worker has reached a fixed
38 state from which full recovery is not expected." (Citation omitted)
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40 Thus, a strict and literal reading of the first proviso of RCW 51.32. 040 would prevent Mr. Cowell's
41 beneficiaries from receiving any award under that section since his condition had not reached a
42 point of fixed stability, i.e., permanency.
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45 Similar to permanent partial disability, permanent total disability contemplates that an injured
46 worker's condition requires no further medical treatment designed to lessen one's impairment.
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1 Clearly, Mr. Cowell's back condition and complications from back surgery still required medical
2 attention and management when he suffered the cardiac arrest resulting in his death.
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4 Immediately preceding the death-producing event, the only reasonable analysis of his status
5 would have led his physicians and the Department's claims adjudicators to conclude he was still
6 temporarily totally disabled. With the benefit of 20/20 hindsight and necessary emphasis on
7 portions of the medical records and testimony comprising this Board's record, we could attempt to
8 support a conclusion that Mr. Cowell was actually permanently totally disabled from his injury on
9 date of his death. To do so would create a neat package fitting within the framework of the Hiatt
10 case and a strict reading of RCW 51.32.050(6). However, to hold from our ex post facto view that
11 Mr. Cowell was in fact permanently totally disabled as that term is fully contemplated under the Act,
12 would be a bald fiction.
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18 Does this mean that Mr. Cowell's widow and dependent children are to be left with no
19 statutory remedy? Does this mean that they are to suffer further from the misfortune of Mr. Cowell's
20 passing because of an apparent hiatus in statutory coverage? We think not.
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22 The relevant provision under which recovery must be made, if at all, reads:
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24 "If the injured worker dies during the period of permanent total disability,
25 whatever the cause of death, leaving a surviving spouse, or child, or
26 children, the surviving spouse or child or children shall receive benefits
27 as if death resulted from the injury as provided in subsections (2)
28 through (4) of this section..." RCW 51.32.050(6)
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30 We are well apprised that all provisions of the Industrial Insurance Act are to be liberally construed
31 in favor of those who come within its terms. Nelson v. Department of Labor and Industries, 9 Wn.
32 2d 621 (1941). We also understand that strict proof is required of one claiming benefits under the
33 Act. Olympia Brewing Company v. Department of Labor and Industries, 34 Wn. 2d 498 (1949).
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35 Under the facts in the Hiatt case, the court noted that the length of time of the decedent's
36 disability could reliably be determined. Except for the intervention of Ned Hiatt's death, he would
37 likely have recovered in four to six months. No such certainty of recovery is presented by the facts
38 of Mr. Cowell's post-surgical course. We do not believe Dr. Watkins' suppositions, his "hoped-for"
39 result following a third surgical insult, amounts to the level of certainty of recovery that was shown
40 in Hiatt.
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44 To the contrary, the pattern of Mr. Cowell's previous postsurgical course following his first
45 two surgeries was being repeated within a month and a half after his third surgery. By December 7,
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1 he had developed back pain radiating into his buttocks. By late December, right knee and ankle
2 reflexes were absent. We think it unlikely that Mr. Cowell would have accepted a fourth surgical
3 insult even if offered to remedy his deteriorating condition. Similarly, we assume the Department
4 would not easily have authorized a fourth major surgery. In short, objective evidence of a
5 permanently disabling condition was developing in the days and weeks preceding Mr. Cowell's
6 death. Simply because enough time had not passed before Mr. Cowell's "hoped-for" recovery
7 could be seen as illusory is no reason in our view for penalizing Mr. Cowell's widow and dependent
8 children. Nor do we believe the legislature so intended.

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10 We believe the phrase "during the period of permanent total disability" in RCW 51.32.050(6)
11 encompasses that period where it is established that an injured worker's condition, though still
12 requiring medical attention and treatment (and therefore technically temporarily totally disabled), is
13 in a state of decline from which recovery to the point of eventual employability is not a reasonable
14 likelihood. If a worker dies, during such period of decline, from causes unrelated to the accepted
15 injury, the surviving spouse and dependent children should be allowed benefits under RCW
16 51.32.050(6) as if the deceased had been declared permanently totally disabled nunc pro tunc.

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

24 FINDINGS OF FACT

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

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4 2. On February 2, 1981 the claimant filed with the Department an
5 application to reopen the claim for aggravation of condition. On february
6 6, 1981 the department issued an order reopening the claim, effective
7 December 2, 1980, for further treatment. The payment of time-loss
8 compensation was reinstated. On January 15, 1982, the claimant died.
9 On March 8, 1982 Mary L. Cowell, the widow of the deceased worker,
10 filed with the Department a claim for benefits. On March 12, 1982 the
11 Department issued an order denying the claim for benefits under the
12 provisions of RCW 51.32.040 and RCW 51.32.050(6), on the grounds
13 that the cause of the death of Ronald E. Cowell was unrelated to the
14 injury of November 10, 1977, and that at the time of his death, the
15 deceased's condition was not fixed nor rateable, and he was not
16 permanently and totally disabled as a result of the injury of November
17 10, 1977. On March 31, 1982 the widow-petitioner filed a notice of
18 appeal with the Board of Industrial Insurance Appeals. On April 7, 1982
19 the Department issued an order holding in abeyance its previous order
20 dated March 12, 1982, pending further consideration. On April 19,
21 1982, the Department issued an order adhering to the provisions of its
22 previous order dated March 12, 1982, denying the widow's claim. On
23 May 14, 1982, the Department received a notice of appeal from the
24 widow-petitioner, which the Department transmitted to the Board on May
25 21, 1982. On June 2, 1982, the Board issued its order granting the
26 appeal, assigning it Docket No. 62,207, and directed that proceedings
27 be held on the issues raised therein. On August 5, 1982, the widow-
28 petitioner filed with the Board an amended notice of appeal from that
29 order issued by the Department on April 19, 1982. The amended notice
30 of appeal alleged that Ronald E. Cowell had died as a result of
31 conditions causally related to his industrial injury of November 10, 1977,
32 and prayed for relief based thereon.

33 3. On November 10, 1977, Ronald E. Cowell injured his low back while in
34 the course of his employment with Diebold, Inc. Thereafter, Mr. Cowell
35 underwent three low back intervertebral disc surgeries on November 23,
36 1977, June 9, 1981, and October 27, 1981. At the last operation, a
37 diagnosis of a recurrent disc problem between the 5th lumbar and 1st
38 sacral vertebrae with migration was made.

39 4. On December 27, 1981, Mr. Cowell was hospitalized for treatment of a
40 gastric ulcer which was secondary to the medication treatment Mr.
41 Cowell had received for his causally related low back condition. Mr.
42 Cowell was subsequently discharged from the hospital on December 29,
43 1981.
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- 1 5. On January 15, 1982, Mr. Cowell died from a condition described as
2 cardiopulmonary arrest as a result of cardiac arrhythmia. Mr. Cowell
3 had the pre-existing condition of cardiovascular disease or hardening of
4 the coronary arteries.
- 5 6. Prior to his death, Mr. Cowell had been a heavy smoker for many years.
6 He was genetically predisposed to a cardiac arrest.
- 7 7. Mr. Cowell's cardiopulmonary arrest and resultant death was not
8 proximately caused by his industrial injury of November 10, 1977 or any
9 sequelae thereof.
- 10 8. At the time of his death on January 15, 1982, Mr. Cowell was unable to
11 work as a result of his industrial injury of November 10, 1977. His
12 condition causally related to that industrial injury was not fixed and
13 stationary at the time of his death, but was in a state of decline in that it
14 had worsened following his third low back surgery, and required further
15 medical attention and management.
- 16 9. As of January 15, 1982, Mr. Cowell was not likely to recover from the
17 effects of his industrial injury to an extent that would permit his return to
18 work in any capacity for which he had training and experience, even
19 though further treatment was necessary for management of conditions
20 directly related to his injury and treatment therefor.

CONCLUSIONS OF LAW

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

- 22 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
23 and the subject matter of this appeal.
- 24 2. Within the meaning and contemplation RCW 51.32. 050(2), the death of
25 the claimant, Ronald E. Cowell, on January 15, 1982 was not causally
26 related to his industrial injury of November 10, 1977.
- 27 3. Within the meaning and contemplation of RCW 51.32.080, the claimant,
28 Ronald E. Cowell, at the time of his death on January 15, 1982, was not
29 entitled to a permanent partial disability award as a result of his
30 industrial injury of November 10, 1977; and therefore, under RCW
31 51.32.040, such an award could not be paid to his widow.
- 32 4. At the time of his death on January 15, 1982, Ronald Cowell was
33 temporarily totally disabled as a result of his industrial injury of
34 November 10, 1977, but would eventually have become permanently
35 totally disabled as a result of the effects of his industrial injury.
- 36 5. The order of the Department of Labor and Industries issued April 19,
37 1982, adhering to the provisions of a previous order dated March 12,
38 1982, which denied the claim for benefits filed by Mary L. Cowell under
39 the provisions of RCW 51.32.040 and RCW 51.32.050(6) on the
40 grounds that the cause of the injured worker's death was unrelated to
41 the injury of November 10, 1977 and that at the time of his death, the
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1 permanent total. To me, this clearly should end the matter of the widow's right to benefits under
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3 RCW 51.32.050(6).

4 But the majority seizes upon some testimony of Dr. Watkins as to being "speculative" about
5 the extent of improvement expected in Mr. Cowell's condition, and jumps from that observation to
6 the "inescapable conclusion" that he would not have ever returned to gainful employment had he
7 lived longer. This is reflected in Finding No. 9; and in the last part of Conclusion No. 4 which
8 concludes that eventually after his death he would have become permanently totally disabled.
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11 I submit that, regardless of the characterization of Dr. Watkins' testimony as "speculative",
12 there is absolutely no medical evidence that the claimant's low back condition, at such "eventual"
13 time as it would have become fixed and stable, would then be permanently totally disabling. Thus,
14 the majority's above-noted conclusion is itself extremely "speculative".
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18 In any event, that conclusion is irrelevant as a matter of law. The majority has contrived to call
19 a period of temporary disability when medical treatment was necessary a nunc pro tunc period of
20 permanent total disability, because it was a "period of decline" in the worker's condition! What new
21 disability classification is this? The effect of these mental gyrations is clear. The majority has
22 amended and added language to RCW 51.32.050(6), to provide that "If the injured worker dies
23 during the period of permanent total disability or during a period of temporary total disability which
24 may have become permanent total disability at some later time had not death intervened," then the
25 surviving spouse should receive pension benefits. Such statutory amendment is solely the province
26 of the Legislature, and is not within the powers of this Board.
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30 I would adopt in toto the findings, conclusions and order in the Proposed Decision and Order
31 of July 12, 1983, and thereby affirm the Department's order of April 19, 1982 rejecting the widow's
32 claim.
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35 Dated this 7th day of February, 1984.

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37 /s/
38 PHILLIP T. BORK Member
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