

## **McIlrath, Robert, Dec'd**

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### **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 the worker's refusal to undergo treatment was reasonable because of the limited prospect for success, and where even if the worker had undergone surgery it would not have affected his ability to return to gainful employment, the worker's condition was fixed at the time of his death and the surviving spouse was entitled to benefits pursuant to RCW 51.32.050(6). ...*In re Robert McIlrath, Dec'd, BIIA Dec., 65,592 (1984)*

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 **IN RE: ROBERT McILRATH, DEC'D** ) **DOCKET NO. 65,592**  
2 )  
3 **CLAIM NO. H-530434** ) **DECISION AND ORDER**  
4

5 APPEARANCES:  
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7 Widow-petitioner, Betty McIlrath, by  
8 Patrick R. McMullen  
9

10 Employer, Gordon H. Dills and Sons,  
11 None  
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13 Department of Labor and Industries, by  
14 The Attorney General, per  
15 Paula Selis, Assistant  
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17 This is an appeal filed by the widow-petitioner on August 17, 1983 from an order of the  
18 Department of Labor and Industries dated July 26, 1983 which corrected and superseded  
19 Department order of April 4, 1983 and adhered to the provisions of a Department order dated May  
20 26, 1982 which denied the widow-petitioner's claim for benefits under RCW 51.32.040 and  
21 51.32.050(6) for the reasons that the cause of death was unrelated to the industrial injury of June  
22 20, 1979, that at the time of death the decedent's condition was not fixed nor ratable, and he was  
23 not permanently and totally disabled as a result of the industrial injury of June 20, 1979.  
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28 **REVERSED AND REMANDED.**

29 **DECISION**

30 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
31 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
32 issued on June 11, 1984 in which the order of the Department dated July 26, 1983 was sustained.  
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35 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
36 no prejudicial error was committed and said rulings are hereby affirmed.  
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38 The issues presented by this appeal and the evidence presented by the parties are  
39 adequately set forth in the Proposed Decision and Order. However, this Board reached an ultimate  
40 conclusion opposite to that arrived at in the proposed order. In support of this conclusion, we feel  
41 further discussion of the facts and the legal analysis is necessary:  
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44 In order for the widow-petitioner to prevail, she must by a preponderance of the evidence  
45 prove either of the following:  
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- 1 (1) That the death of her husband, Robert McIlrath, on May 6, 1982, was  
2 caused by his industrial injury of June 20, 1979, within the meaning of  
3 RCW 51.32.050(2); or  
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5 (2) That at the time of his death, the deceased worker was permanently  
6 totally disabled as a result of the industrial injury, within the meaning and  
7 contemplation of RCW 51.32.050(6).

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9 The evidence contained in the transcript indisputably shows that the cause of death on May 6, 1982  
10 of Robert McIlrath was systemic leukemia (a form of cancer). The widow-petitioner cannot recover  
11 under the provisions of RCW 51.32.050(2). However, after a careful study of all of the evidence,  
12 this Board concludes that Mrs. McIlrath has proven her entitlement to recovery under the provisions  
13 of RCW 51.32.050(6).  
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16 All of the physicians who testified were agreed that prior to his industrial injury of June 20,  
17 1979, Mr. McIlrath had significant pre-existing abnormalities in his lumbar spine. Dr. Donald  
18 Stainsby, the neurosurgeon who testified for the Department, referred to a condition of lumbar  
19 spinal stenosis (narrowing of the spinal canal). Dr. Kenneth R. Lang, an orthopedic surgeon who  
20 testified for the widow-petitioner, interpreted x-ray films and identified diffuse lumbar arthrosis with  
21 osteophytic bridging, narrowing of the L-3/L-4 disc space, and the development of vacuum signs.  
22 Expanding on these observations, Dr. Land described Mr. McIlrath's conditions as lumbar arthrosis,  
23 degenerative disc disease, herniated nucleus pulposus at the L-4/L-5 interspace, and degenerative  
24 disc disease at the same level.  
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30 Dr. Dean Dietrich, a general practitioner who also testified on behalf of the appellant, had  
31 served as Mr. McIlrath's attending physician since 1976. He testified his office records showed Mr.  
32 McIlrath had not complained prior to his industrial injury of June 20, 1979 of any problems in his low  
33 back or neck. His chart did show some complaints indicative of gout and joint pains in the right  
34 elbow and right foot. Dr. Stainsby defined gout as a metabolic disease, the deposit of uric acid  
35 crystals, very commonly in the great toe. He stated it may also develop in the earlobe, but only  
36 occasionally in the spine. It was Dr. Stainsby's opinion that Mr. McIlrath's industrial injury had not  
37 aggravated the pre-existing spinal stenosis.  
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42 Dr. Dietrich provided an opposite view relative to the aggravation of the pre-existing  
43 degenerative disc disease and osteoarthritis in the lumbar spine, which was shared and  
44 corroborated by Dr. Lang.  
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1 We conclude that the weight of the evidence shows that conditions in the low back pre-  
2 existing the industrial injury were indeed exacerbated, lighted up, or made active by the industrial  
3 injury. This view of the evidence is supported by our understanding that Mr. McIlrath received no  
4 treatment for any low back condition prior to the occurrence of the industrial injury. Bennett v.  
5 Department of Labor and Industries, 95 Wn. 2d 531, 532 (1981). Therefore, Mr. McIlrath's pre-  
6 existing lumbar spine condition should be deemed a condition upon which the industrial injury  
7 operated, and any impairment and consequent disability attributable to the lighting up of such  
8 conditions should be considered as a disability caused by the industrial injury.  
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13 It is undisputed that the claimant's systemic leukemia had been diagnosed, and  
14 chemotherapy (leukeran) treatment initiated therefor, over one year prior to the occurrence of the  
15 industrial injury. Dr. Dietrich testified that the claimant's leukemia condition began advancing in the  
16 summer and fall of 1980. All of the physicians who testified were agreed that the leukemia  
17 condition was causally unrelated to the industrial injury.  
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21 On December 8, 1980, following three physical examinations that were exhaustive in scope,  
22 Dr. Lang recommended that Mr. McIlrath undergo a posterior laminectomy to remove disc  
23 fragments which were compressing the spinal canal. He found that there was little or no evidence  
24 to indicate that the leukemia had infiltrated the lumbar spine. Dr. Lang testified that Mr. McIlrath  
25 initially did not want surgery but agreed to think about it. Dr. Lang was certain that Mr. McIlrath  
26 needed further treatment in the form of the recommended surgery during 1980, and that his  
27 condition was not therefore medically stable, but remained unchanged between November 1980  
28 and October 1981. He further testified that Mr. McIlrath's permanent impairment attributable to the  
29 causally related condition, if surgery was not done, would be classified in Category 5 or 6 of WAC  
30 296-20-280. The record also supports that Dr. Lang felt that Mr. McIlrath was totally disabled  
31 during this time-frame solely from causes related to the industrial injury.  
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37 Dr. Dietrich testified that Dr. Lang on December 8, 1980 had recommended low back surgery  
38 to Mr. McIlrath. On October 12, 1981, Dr. Dietrich made a note in the hospital chart that Mr.  
39 McIlrath had been advised to have low back surgery, but was hesitant to accept, stating that he  
40 might consider it in the future. Dr. Dietrich had obtained a second opinion as to the feasibility of  
41 the surgery from a Dr. Clancey, whose report was dated September 28, 1981. Dr. Clancey's report  
42 indicated that surgery might have a very slim chance of relieving the claimant's pain from nerve root  
43 involvement. In his report, Dr. Clancey recommended further diagnostic studies including a CAT  
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1 scan and a myelogram. The widow-petitioner testified that Mr. McIlrath had been considering low  
2 back surgery, in conformity with Dr. Lang's advice, but that he had not undergone the  
3 recommended surgery because he became bedridden from the systemic leukemia in September of  
4 1981.  
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7 Based entirely upon Hiatt v. Department of Labor and Industries, 48 Wn. 2d 843, 847 (1956),  
8 the Proposed Decision and Order found that at Mr. McIlrath's death, his causally related condition  
9 was not fixed, his permanent impairment was not ratable, and therefore he was not permanently  
10 totally disable. We believe further fundamental questions, however, must be addressed. It is the  
11 answers we find to those questions which lead us to a different conclusion.  
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14 Initially, we must examine the record to determine what the prospects were for Mr. McIlrath  
15 to return to employment had he undergone the recommended low back surgery. Dr. Dietrich  
16 testified that at the time of Mr. McIlrath's death on May 6, 1982, medical attention of a symptomatic  
17 nature was indicated. Dr. Stainsby testified that in May of 1982, Mr. McIlrath was in need of some  
18 further treatment, if not curative treatment. When questioned as to whether the injured worker's  
19 back condition would have kept him from working on May 6, 1982 (disregarding the presence and  
20 effect of leukemia), Dr. Stainsby answered that the claimant would work but only at very sedentary  
21 employment. At best, it would appear that the recommended surgery might have eliminated some,  
22 but certainly not all, of the claimant's pain, and may have physically permitted Mr. McIlrath to  
23 perform a highly sedentary occupation. Still, physical ability does not pre-suppose the ability to  
24 provide other talents required by specific sedentary occupations. This state has long recognized  
25 that even the impairment of an acknowledged "partial" disability may result in permanent total  
26 disability when considered in light of socio-economic factors such as an injured worker's age,  
27 education, training and experience. Pacific Car and Foundry v. Coby, 5 Wn. App. 547 (1971).  
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30 In addition it is an understood, if not commonly acknowledged, fundamental of workers'  
31 compensation law that an injured worker may reasonably refuse to undergo a hazardous form of  
32 treatment or one that has a limited prospect for success. Such refusal may not be used as a basis  
33 to limit or curtail such worker's compensation benefits. See, e.g., Miller v. Department of Labor and  
34 Industries, 200 Wn. 674 (1939), RCW 51.32.110, and see generally §13-22 Larsen, Law of  
35 Workmen's Compensation.  
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38 Like the Miller court, we feel Mr. McIlrath was justified in initially declining the recommended  
39 surgery considering its prospect for success may have been "very slim". Additionally, we note the  
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1 facts that Mr. McIlrath was 63 years of age when he died, had not completed high school, and had  
2 a work history limited to hard manual labor as a logger throughout his lifetime. Given those facts,  
3 we are persuaded that even had the surgery been performed and succeeded in reducing his  
4 symptoms of pain Mr. McIlrath still would not have been able to offer himself to a more limited  
5 sedentary work market.  
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9 We do not view this case as one falling within the framework of the Hiatt case relied on in the  
10 Proposed Decision and Order. In Hiatt the deceased worker was totally disabled, but recovering  
11 from his injury, when he died from unrelated causes. There was no suggestion in the trial court's  
12 findings that recovery hinged on the success of the administration of any particular mode of  
13 treatment. In Hiatt, it appears that with the mere passage of time (46 months) the worker would  
14 have "recovered from the effects of his industrial injury to the extent that he could return to a gainful  
15 employment". 48 Wn. 2d at 844. This is not the picture in the appeal before us. Clearly Mr.  
16 McIlrath's condition was not remediable by the mere passage of time. Nor is it "reasonable to  
17 expect" as the trial court found in Hiatt, that the surgery recommended for Mr. McIlrath would have  
18 effected an ability to return to a gainful occupation.  
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24 The facts of this case to us present a picture most closely resembling that in Wendt v.  
25 Department of Labor and Industries, 18 Wn. App. 674 (1977). Preliminary, we note that the fact  
26 that Mr. McIlrath became totally disabled toward the end of his life from his leukemia, does not  
27 prevent his widow from receiving compensation if the effects of his industrial injury, considered  
28 separate and apart from his other bodily conditions, rendered him permanently totally disabled.  
29 Shea v. Department of Labor and Industries, 12 Wn. App. 410 (1974). We place the case before us  
30 as coming within those parameters. The fact that the claimant's pre-existing conditions were major  
31 contributors to this "independent" total disability is immaterial. Mr. McIlrath's injury lighted up pre-  
32 existent back abnormalities and so became a proximate cause of his permanent total disability.  
33 Under the law of this state, this is sufficient.  
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39 The proposed findings, conclusions and order are hereby stricken and replaced by those that  
40 follow.  
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#### 42 **FINDINGS OF FACT**

- 43 1. On June 26, 1979, the Department of Labor and Industries received an  
44 accident report in which it was alleged that the claimant, Robert McIlrath  
45 had sustained an industrial injury on June 20, 1979, while in the course  
46 of his employment with Gordon H. Dills and Sons. The claim was  
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1 accepted, treatment provided, and time-loss compensation was paid.  
2 On May 13, 1980, the Department issued its order closing the claim with  
3 time-loss compensation as paid to September 9, 1979 and with no  
4 award for permanent partial disability. On May 29, 1980, the claimant  
5 filed with the Department an application to reopen the claim for  
6 aggravation of condition. The Department treated this application as a  
7 request for reconsideration of its closing order dated May 13, 1980. On  
8 June 16, 1980, the Department issued an order which held in abeyance  
9 its previous order dated May 13, 1980, pending further consideration.  
10 On September 22, 1980, the Department issued an order which set  
11 aside and held for naught its previous order dated May 13, 1980, and  
12 ordered the claim to remain open for authorized treatment and action as  
13 indicated. On May 17, 1982, the Department issued an order which  
14 terminated time-loss compensation as paid to April 30, 1982, inclusive,  
15 and closed the claim with no award for permanent partial disability.  
16 Also, on May 17, 1982, Betty McIlrath filed with the Department an  
17 application for widow's benefits, stating that her husband, Robert  
18 McIlrath, had died on May 6, 1982. On May 26, 1982, the Department  
19 issued an order which denied the widow-petitioner's claim for benefits on  
20 the grounds that the cause of death was unrelated to the injury of June  
21 20, 1979, that at the time of his death the deceased's condition was not  
22 fixed nor ratable, and that he was not permanently totally disabled as a  
23 result of his injury of June 20, 1979. On July 7, 1982, the widow-  
24 petitioner filed a request with the Department for reconsideration of the  
25 order dated May 26, 1982. Following further investigating, the  
26 Department on July 26, 1983 issued an order which adhered to the  
27 provisions of its previous order dated May 26, 1982. On August 17,  
28 1983, the widow-petitioner filed a notice of appeal with the Board of  
29 Industrial Insurance Appeals. On September 1, 1983, this Board issued  
30 its order granting the appeal, assigning it Docket No. 65,592, and  
31 directing that proceedings be held on the issues raised therein.

- 32 2. On June 20, 1979, while in the course of his employment with Gordon  
33 H. Dills and Sons, Robert McIlrath sustained an industrial injury to his  
34 neck, left shoulder, right hand, right leg, and low back when a guy wire  
35 snapped and he was thrown from a falling tower to the ground.
- 36 3. At all of the times between June 20, 1979 and May 6, 1982, Betty  
37 McIlrath was the lawful spouse of, and was cohabiting with, the injured  
38 worker, Robert McIlrath.
- 39 4. On and prior to June 20, 1979, Robert McIlrath had a low back condition  
40 described as follows: lumbar spinal stenosis (narrowing of the spinal  
41 canal); diffuse lumbar arthrosis with osteophytic bridging; narrowing of  
42 the intervertebral disc space between the third and fourth lumbar  
43 vertebrae; the development of vacuum signs; degenerative joint  
44 disease; a herniated nucleus pulposus with degenerative disc disease at  
45 the intervertebral interspace of the fourth and fifth lumbar vertebrae. At  
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1 all times prior to June 20, 1979, the foregoing conditions were  
2 asymptomatic and required no medical treatment. With the exception of  
3 the spinal stenosis, the foregoing conditions were lighted up and made  
4 active and disabling by Mr. McIlrath's industrial injury of June 20, 1979.

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6 5. On and prior to June 20, 1979, Robert McIlrath had a condition  
7 diagnosed as systemic leukemia (or chronic lymphocytic leukemia which  
8 was diagnosed, and for which chemotherapy treatment was initiated, in  
9 the summer of 1978. This condition began advancing in the summer  
10 and fall of 1980, causing Mr. McIlrath eventually to become bedridden in  
11 September of 1981. On and prior to May 6, 1982, this condition  
12 constituted a highly significant disability. This condition was neither  
13 caused nor aggravated by Mr. McIlrath's industrial injury of June 20,  
14 1979.
- 15 6. The death of Mr. McIlrath on May 6, 1982 was proximately caused by  
16 his systemic leukemia condition. His death was causally unrelated to the  
17 industrial injury of June 20, 1979.
- 18 7. At the time of his death, Mr. McIlrath was 63 years of age, had received  
19 an eleventh grade education, and his history of employment was limited  
20 to heavy manual labor as a logger throughout his lifetime.
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22 8. On and shortly prior to May 6, 1982, Mr. McIlrath's condition attributable  
23 to his industrial injury of June 20, 1976 was diagnosed as a cervical  
24 spine disease with radiculopathy into the right upper extremity and  
25 lumbar spinal disease with disc degeneration and nerve root  
26 impingement. Medical examination included a finding of marked  
27 narrowing at the vertebral interspace between the fourth and fifth  
28 vertebrae with nerve root cutoff at the interspace between the fifth  
29 lumbar and the first sacral vertebrae, and weakness of the foot muscles  
30 indicative of a nerve root lesion at the interspace between the fifth  
31 lumbar and the first sacral vertebrae. Low back surgery in the form of a  
32 posterior laminectomy had been medically recommended to Mr. McIlrath  
33 in December of 1980, the success thereof being slim. Mr. McIlrath  
34 initially declined the surgery and thereafter agreed to further consider it.  
35 In view of the problematical chances of the surgery's success and Mr.  
36 McIlrath's reasonable refusal thereof, as of May 6, 1982, the condition  
37 causally related to the industrial injury of June 20, 1979 was fixed and  
38 ratable.
- 39 9. As of May 6, 1982, as a result of his industrial injury of June 20, 1979,  
40 Mr. McIlrath had a permanent impairment in his lumbar spine most  
41 commensurate with and analagous to Category 5 of WAC 296-20-280,  
42 which under WAC 296-20-680(3) equaled a permanent partial disability  
43 of 25% as compared to total bodily impairment.
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45 10. As of May 6, 1982, when Mr. McIlrath's permanent disability causally  
46 related to his industrial injury of June 20, 1979 is considered with the  
47 factors of his age, education, and lifetime history of employment, Mr.



1 McIlrath was permanently prevented thereby from performing a gainful  
2 occupation on a reasonably continuous basis.

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4 **CONCLUSIONS OF LAW**

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

- 6 1. This Board has jurisdiction of the parties and the subject matter of this  
7 appeal.
- 8 2. Within the meaning of RCW 51.32.050(2), the death of Mr. McIlrath on  
9 May 6, 1982 was not proximately caused by any condition causally  
10 related to his industrial injury of June 20, 1979.
- 11 3. Within the meaning and contemplation of RCW 51.08.160 and  
12 51.32.050(6), on and immediately prior to May 6, 1982, Mr. McIlrath was  
13 a permanently totally disabled worker as a result of his industrial injury  
14 of June 20, 1979.
- 15 4. The order of the Department of Labor and Industries dated July 26,  
16 1983, which corrected and superseded a previous order issued April 4,  
17 1983, and adhered to the provisions of a prior order dated May 26,  
18 1982, which had denied the widow-petitioner's claim for benefits under  
19 RCW 51.32.040 and 51.32.050(6) for the reasons that the cause of Mr.  
20 McIlrath's death was unrelated to the industrial injury of June 20, 1979,  
21 that at the time of his death the condition was not fixed nor ratable, and  
22 that he was not permanently totally disabled as a result of the industrial  
23 injury of June 20, 1979, is incorrect and should be reversed and the  
24 claim remanded to the Department with direction to grant a widow's  
25 pension to Betty McIlrath as the surviving spouse of the deceased  
26 permanently totally disabled worker, Robert McIlrath.

27 It is so ORDERED.

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30 Dated this 27th day of September, 1984

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32 BOARD OF INDUSTRIAL INSURANCE APPEALS

33  
34 /s/  
35 MICHAEL L. HALL Chairman

36  
37 /s/  
38 FRANK E. FENNERTY, JR. Member