

Pugh, Lowrey, 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)

RES JUDICATA

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

SURVIVOR'S BENEFITS

Aggravation

In a claim for survivor's benefits premised on the worker being permanently and totally disabled at the date of death, the widow must first establish a permanent worsening of the worker's condition between the date his claim was last closed with a permanent partial disability award and the date of his death. The widow is held to the same burden as the worker with respect to the need to prove aggravation of condition. *...In re Lowrey Pugh, Dec'd, BIIA Dec., 86 2693 (1989)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 89-08880-1.]

Scroll down for order.

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

1 **IN RE: LOWREY PUGH, DEC'D**) **DOCKET NOS. 86 2693, 86 2695, 86 2897 &**
2) **86 2899**
3)
4 **CLAIM NOS. H-132102 & J-356666**) **DECISION AND ORDER**
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6 **APPEARANCES:**

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8 Surviving Spouse-Petitioner, Judith A. Pugh, by
9 Fitch and Ludwick, per
10 Graham Fitch

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12 Employer, DDL Construction,
13 None

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15 Department of Labor and Industries, by
16 The Attorney General, per
17 Laurel Anderson, Paralegal, and William Hochberg and Barbara Gary, Assistants

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19 The appeals in Docket Nos. 86 2693 and 86 2897 were filed by the surviving
20 spouse-petitioner, Judith A. Pugh, on July 24, 1986 from orders of the Department of Labor and
21 Industries dated July 16, 1986. The order which is the subject of the appeal docketed under No. 86
22 2693 denied the surviving spouse-petitioner's application for benefits for the reason that the deceased
23 worker, Lowrey Pugh, was not permanently and totally disabled at the time of his death and that his
24 death was not caused by or related to the industrial injury which is the subject of this claim. The order
25 which is the subject of the appeal docketed under No. 86 2897 adhered to the provisions of an order
26 dated September 18, 1985 which closed the claim with no additional award for permanent partial
27 disability. Both orders are **AFFIRMED**.

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29 The appeals in Docket Nos. 86 2695 and 86 2899 were filed by the surviving
30 spouse-petitioner, Judith A. Pugh, on July 24, 1986 from orders of the Department of Labor and
31 Industries dated July 16, 1986. The order which is the subject of the appeal docketed under No. 86
32 2695 denied the application for benefits of the surviving spouse-petitioner for the reason that the
33 cause of Lowrey Pugh's death was unrelated to the injury for which the claim was filed and at the time
34 of death the worker was not totally and permanently disabled. The order which is the subject of the
35 appeal docketed under No. 86 2899 adhered to the provisions of an order dated April 15, 1985 which
36 closed the deceased worker's claim with no award for permanent partial disability. Both Department
37 orders are **AFFIRMED**.

1 **DECISION**

2 Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are before the Board for
3 review and decision on timely Petitions for Review filed by the surviving spouse-petitioner to Proposed
4 Decisions and Orders issued on January 10, 1989 in which the four orders of the Department dated
5 July 16, 1986 were affirmed.
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8 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
9 prejudicial error was committed and said rulings are hereby affirmed.
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11 By Board order dated September 19, 1988 the Industrial Appeals Judge was directed to clarify
12 the extent to which these four appeals were consolidated. At the hearing held on October 25, 1988
13 the parties specifically agreed to consolidate these four appeals both for hearing and for decision.
14 Inexplicably, the Industrial Appeals Judge then proceeded to issue two separate Proposed Decisions
15 and Orders. In accordance with the parties' agreement, we are issuing one Decision and Order.
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18 The appeals in Claim No. J-356666 involve a back injury of December 7, 1983. The Proposed
19 Decision and Order incorrectly states that Claim No. J-356666 was previously remanded by Board
20 Order on Agreement of Parties so that it could be considered along with Claim No. H-132102. In fact,
21 it was the H claim which was remanded by Board Order on Agreement of Parties dated February 19,
22 1986 so that it could be considered in conjunction with the then open J claim.
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25 Otherwise, we concur in the result reached in the Proposed Decision and Order with respect to
26 Claim No. J-356666. Mrs. Pugh was required to prove that her husband's back condition was fixed at
27 the time of death and that he was permanently totally disabled as a result. Hyatt v. Department of
28 Labor and Industries, 48 Wn.2d 843 (1956). Mr. Pugh was still undergoing chiropractic treatment at
29 the time of his death with Dr. Andrew Isaacs. Dr. Isaacs was making reports to the Department
30 indicating that Mr. Pugh's condition was continuing to improve. Like the Industrial Appeals Judge, we
31 find these contemporaneous reports far more persuasive than Dr. Isaacs' after-the- fact testimony to
32 the contrary.
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35 Since Mr. Pugh's back condition was clearly not fixed and permanent at the time of his death,
36 we need not reach the question of whether he was permanently totally disabled. That status is
37 inconsistent with a finding that his condition was not fixed. However, it appears eminently clear from
38 the record before us that Mr. Pugh was not totally disabled at the time of his death. We therefore
39 concur with the result reached in the Proposed Decision and Order on that question.
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1 With respect to the appeals in Docket Nos. 86 2693 and 86 2897, Claim No. H-132102, the
2 threshold question is whether claimant's right rotator cuff injury of March 30, 1977 permanently
3 worsened between August 25, 1980 and May 24, 1986, the date of Mr. Pugh's death. Since the
4 Department reopened for temporary aggravation and reclosed with no permanent disability award, it is
5 incumbent upon the widow to prove permanent worsening. Dinnis v. Department of Labor and
6 Industries, 67 Wn.2d 654 (1965).¹

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10 As correctly pointed out in the Proposed Decision and Order, no such evidence was presented.
11 Therefore, since the widow has not shown any permanent increase in her husband's disability as of
12 the date of his death, the question of whether Mr. Pugh was permanently totally disabled as of that
13 date is not technically before us. However, in order to avoid piecemeal litigation and further remand
14 from Superior Court, we have reviewed the record in light of this issue. We conclude that Mr. Pugh
15 was not permanently totally disabled as of May 24, 1986 as a result of his right rotator cuff injury of
16 March 30, 1977, and have entered Findings and Conclusions accordingly.

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20 In Docket Nos. 86 2695 and 86 2899, proposed Findings of Fact Nos. 1 through 6 and
21 proposed Conclusions of Law Nos. 1 through 4 are hereby adopted as this Board's final Findings,
22 Conclusions and Order and are incorporated herein by this reference. Proposed Findings of Fact Nos.
23 7 and 8 are stricken and in their stead the following are entered:

24 **FINDINGS OF FACT**

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29 7. On the date of his death, May 24, 1986 Lowrey Pugh was sixty-one years
30 old. He had limited education as a child but had secured a G.E.D. through
31 attending classes at the Edison Vocational Institute, including the
32 successful completion of courses in English composition and
33 Mathematics. Between 1950 and 1965, Mr. Pugh was employed by the
34 City of Seattle Water Department at a series of progressively more
35 responsible jobs, his last position being as a senior pipe man. After he left
36 city employment in 1965, Mr. Pugh was self-employed as a journeyman
37 plumber in three different companies, each of which he owned and
38 operated either alone or jointly. As a result of experience in the Armed
39 Forces and during employment with the City of Seattle and during
40 self-employment Mr. Pugh developed the skills necessary to perform the

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¹It is not entirely clear from the case law whether the widow must prove aggravation or simply that her husband was permanently totally disabled at the time of death. However, we see no reason why the surviving spouse should not be held to the same burden as the worker with respect to proof of aggravation. See McFarland v. Department of Labor and Industries, 188 Wn. 357 (1936); Russell v. Department of Labor and Industries, 194 Wn. 565 (1938); and Noland v. Department of Labor and Industries, 43 Wn.2d 588 (1953).

1 tasks of a journeyman plumber and those skills necessary to successfully
2 manage and run a plumbing business.

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4 8. On the date of his death, May 24, 1986, Lowrey Pugh was capable, in light
5 of the disability caused by the industrial injury of December 7, 1983, and
6 any disability caused by conditions which preexisted that injury, of walking
7 one mile over uneven terrain carrying a light knapsack, sitting in a seat
8 with no back support for two and one-half hours and using his arms in a
9 manner necessary to fish for five hours.
- 10 9. The deceased worker, Lowrey Pugh, was not on May 24, 1986 prevented
11 from performing certain forms of continuous gainful employment by the
12 disability attributable to the industrial injury of December 7, 1983 when
13 considered in light of any preexisting disability and his age, training,
14 education and experience.

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16 With respect to Docket No. 86 2693 and 86 2897 the following Findings and Conclusions are
17 entered:

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19 **FINDINGS OF FACT**

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21 1. On April 7, 1977 an accident report was filed alleging that Lowrey Pugh
22 had suffered an injury during the course of his employment with DDL
23 Plumbing Company on March 30, 1977. The claim was allowed for a right
24 arm and shoulder injury and on August 25, 1980 an order was issued by
25 the Department of Labor and Industries closing the claim with a
26 permanent partial disability award equal to 25% of the amputation value of
27 the right arm and with time-loss compensation as paid.
- 28 In March of 1984 the claimant, Lowrey Pugh, filed an application to reopen
29 his claim for aggravation of condition and the claim was reopened. On
30 September 18, 1985 a Department order was issued closing the claim with
31 no additional permanent partial disability award. On September 25, 1985
32 a protest and request for reconsideration from the Department order dated
33 September 18, 1985 was filed on behalf of the claimant and on October
34 15, 1985 the Department issued an order directing that the claim remain
35 closed pursuant to the provisions of the Department order dated
36 September 18, 1985. On October 31, 1985 a Notice of Appeal was filed
37 with the Board of Industrial Insurance Appeals from the Department order
38 dated October 15, 1985. On December 2, 1985 the Board issued an order
39 granting the appeal subject to proof of timeliness and assigned it Docket
40 No. 85 2499. On February 19, 1986 the Board issued an Order on
41 Agreement of Parties which reversed the Department order dated October
42 15, 1985 and remanded the claim to the Department in order to evaluate
43 this claim in connection with Claim No. J-356666.
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1 During June of 1986 the Department received an application for benefits
2 filed on behalf of the surviving spouse-petitioner, the worker, Lowrey
3 Pugh, having died on May 24, 1986. On July 16, 1986 the Department of
4 Labor and Industries issued the orders which are the subject of these
5 appeals. The order which is the subject of the appeal docketed under No.
6 86 2693 denied the surviving spouse-petitioner's application for benefits
7 for the reason that the deceased worker, Lowrey Pugh, was not
8 permanently totally disabled at the time of his death and that his death
9 was not caused by or related to the industrial injury which is the subject of
10 this claim. The order which is the subject of the appeal docketed under
11 No. 86 2897 adhered to the provisions of an order dated September 18,
12 1985 which closed the claim with no additional award for permanent partial
13 disability.

14 On July 24, 1986 Notices of Appeal were filed on behalf of the surviving
15 spouse-petitioner from the Department orders dated July 16, 1986. On
16 August 15, 1986 the Board issued orders granting these appeals under
17 Docket Nos. 86 2693 and 86 2897 and directing that hearings be held on
18 the issues raised by the Notices of Appeal.

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20 2. On September 21, 1987 an industrial appeals judge issued a Proposed
21 Decision and Order in this matter, which was mailed to the parties on
22 September 28, 1987, and on October 8, 1987 a Petition for Review from
23 that Proposed Decision and Order was filed on behalf of the surviving
24 spouse- petitioner. On October 27, 1987 the Board issued an Order
25 Denying the Petition for Review and adopting the Proposed Decision and
26 Order. On August 11, 1988, following a timely appeal, the Superior Court
27 of the State of Washington for King County issued an order remanding the
28 appeals to the Board with instructions to take certain further testimony.
29 On September 19, 1988 the Board issued an order setting aside its
30 Decision and Order and remanding the appeals to the hearing process
31 pursuant to the order of the Superior Court.
- 32 3. On May 24, 1986 Lowrey Pugh died as the result of drowning while fishing
33 in Eastern Washington.
- 34 4. The death of Lowrey Pugh was not caused by or related to the effects of
35 the industrial injury which occurred on March 30, 1977 or any other
36 industrial injury.
- 37 5. Immediately prior to his death from drowning on May 24, 1986, the
38 worker's conditions due to the right arm and shoulder injury of March 30,
39 1977 were fixed and stable and not in need of further medical treatment.
- 40 6. The worker's disability attributable to his right arm and shoulder condition
41 causally related to the industrial injury of March 30, 1977 did not
42 permanently worsen between August 25, 1980 and May 24, 1986.
- 43 7. On the date of his death, May 24, 1986 Lowrey Pugh was sixty-one years
44 old. He had limited education as a child but had secured a G.E.D. through
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1 attending classes at the Edison Vocational Institute, including the
2 successful completion of courses in English composition and
3 Mathematics. Between 1950 and 1965, Mr. Pugh was employed by the
4 City of Seattle Water Department at a series of progressively more
5 responsible jobs, his last position being as a senior pipe man. After he left
6 city employment in 1965, Mr. Pugh was self-employed as a journeyman
7 plumber in three different companies, each of which he owned and
8 operated either alone or jointly. As a result of experience in the Armed
9 Forces and during employment with the City of Seattle and during
10 self-employment Mr. Pugh developed the skills necessary to perform the
11 tasks of a journeyman plumber and those skills necessary to successfully
12 manage and run a plumbing business.

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- 14 8. On the date of his death, May 24, 1986, Lowrey Pugh was capable, in light
15 of the disability caused by the industrial injury of March 30, 1977, and any
16 disability caused by conditions which preexisted that injury, of walking one
17 mile over uneven terrain carrying a light knapsack, sitting in a seat with no
18 back support for two and one-half hours and using his arms in a manner
19 necessary to fish for five hours.
- 20 9. The deceased worker, Lowrey Pugh, was not on May 24, 1986 prevented
21 from performing certain forms of continuous gainful employment by the
22 disability attributable to the industrial injury of March 30, 1977 when
23 considered in light of any preexisting disability and his age, training,
24 education and experience.

25 **CONCLUSIONS OF LAW**

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- 27 1. This Board has jurisdiction of the parties and the subject matter of these
28 appeals.
- 29 2. Between August 25, 1980 and May 24, 1986 claimant's right shoulder and
30 arm disability attributable to the industrial injury of March 30, 1977 did not
31 become aggravated on a permanent basis within the meaning of RCW
32 51.32.160.
- 33 3. At the time of his death from other causes, the deceased worker, Lowrey
34 Pugh, was not permanently and totally disabled within the meaning of
35 RCW 51.08.160 and 51.32.050.
- 36 4. The order of the Department of Labor and Industries dated July 16, 1986,
37 which is the subject of the appeal docketed under No. 86 2693, which
38 denied the surviving spouse-petitioner's application for benefits for the
39 reason that the deceased worker, Lowrey Pugh, was not permanently
40 totally disabled at the time of his death and that his death was not caused
41 by or related to the industrial injury which is the subject of this claim, is
42 correct and is hereby affirmed.
- 43 5. The order of the Department of Labor and Industries dated July 16, 1986,
44 which is the subject of the appeal docketed under No. 86 2897, which
45 adhered to the provisions of an order dated September 18, 1985 which
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1 closed the claim with no additional award for permanent partial disability, is
2 correct and is hereby affirmed.

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4 It is so ORDERED.

5 Dated this 27th day of April, 1989.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS
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10 /s/
11 SARA T. HARMON Chairperson

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13 /s/
14 PHILLIP T. BORK Member
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