

Kilpatrick, William, Dec'd

OCCUPATIONAL DISEASE (RCW 51.08.140)

Schedule of benefits -- beneficiary of deceased worker

The appropriate schedule of benefits is that in effect on the date of the first manifestation of the worker's disease related to occupational exposure. The date of manifestation of disease or disability is the point in time when contemporaneous medical evidence of disability or need for treatment is coupled with knowledge on the worker's part, that a disease or disability exists. *Citing Department of Labor & Indus. v. Landon*, 117 Wn.2d 122 (1991).***In re William Kilpatrick, Dec'd, BIIA Dec., 89 5200 (1991)*** [Editor's Note: Reversed sub nom, *Kilpatrick v. Department of Labor & Indus.*, 125 Wn.2d 222 (1994). Holding on workers' knowledge requirement reversed, *In re Boeing Co. v. Heidi* 147 Wn.2d 78 (2002).]

Scroll down for order.

1 A Correction to Stipulation of Parties was received by facsimile on October 17, 1990, correcting
2 Item 5 of the original Stipulation of the Parties and clarifying that Marilyn Kilpatrick's application for
3 widow's benefits was received by the Department on May 17, 1989. The Correction to Stipulation of
4 Parties is accepted and considered as part of the record in this appeal.
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8 **DECISION**

9 The issue presented in this appeal is whether computation of Marilyn Kilpatrick's benefits as
10 survivor of the deceased worker should be determined by reference to: (1) the date of the worker's last
11 injurious exposure, December 31, 1982, as indicated in the Department's order; or, (2) the date
12 Marilyn Kilpatrick filed her claim for survivor's benefits, May 17, 1989; or, (3) the date of manifestation
13 of the deceased worker's disability. We hold that Marilyn Kilpatrick's benefits are determined by the
14 schedule in effect on the date of first manifestation of her husband's disease related to his
15 occupational exposure. On the evidence before us, we find that date to be January 19, 1983.
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19 This case arises out of William Kilpatrick's occupational exposure to asbestos fibers and
20 eventual death due to intra-abdominal mesothelioma. The parties have stipulated he suffered his last
21 injurious exposure on December 31, 1982. His claim for benefits, which was received by the
22 Department on January 19, 1983, was allowed by the Department order under appeal. Mr. Kilpatrick
23 died on December 29, 1988. The Postmortem Examination Final Report concluded that ". . . it is
24 certain that this patient had asbestosis. The mesothelioma, pleural plaques, and at least to some
25 degree, the patient's pulmonary disease were a result of asbestos exposure. Factors contributing to
26 the patient's demise were the organizing pneumonitis and cerebral infarct. . . ." Exhibit No. 11, page 3,
27 CLINICOPATHOLOGICAL CORRELATION FOR 88-A- 132.
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33 Consistent with its order, the Department argues that Mrs. Kilpatrick's benefits should be
34 determined with reference to the schedule in effect on the date Mr. Kilpatrick was last injuriously
35 exposed to asbestos fibers in his occupation. In so arguing, the Department acknowledges that the
36 Board has rejected the last injurious exposure rule, and adopted the date of manifestation rule, for
37 purposes of determining applicable benefit schedules. All of the Department's arguments raised in the
38 present case with regard to this limited issue have been fully addressed in the following cases: In re
39 Charles Jones, BIIA Dec., 87 2790 (1989); In re Kenneth R. Alseth, BIIA Dec., 87 2937 (1989); and In
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1 re Milton L. May, BIIA Dec., 87 4016 (1989). We will not revisit this issue here.¹ As between the date
2 of last injurious exposure and date of manifestation, the date of manifestation controls to set benefits.
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4 Mrs. Kilpatrick contends that the date for determining the schedule of her benefits is a date after
5 July 1, 1988. July 1, 1988 is the effective date of Chapter 161, Laws 1988 (HB 1396) which, in part,
6 amended RCW 51.32.050(2)(d) and RCW 51.32.060(5) to increase maximum periodic benefits from
7 75% to 100% of the state average monthly wage. Mr. Kilpatrick's wages were high enough so that the
8 amendment, if applicable in this case, would apparently increase Mrs. Kilpatrick's monthly benefit.
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10 Toward this end, Mrs. Kilpatrick specifically urges, "the date which should be used is the date Mrs.
11 Kilpatrick filed her claim for benefits [May 17, 1989] or the date Mr. Kilpatrick first required treatment,
12 for his mesothelioma, which was November, 1988." Petition for Review, page 2.
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15 In support of using the date of claim filing, Mrs. Kilpatrick argues that her claim did not accrue
16 until after Mr. Kilpatrick's death and reminds us that a death beneficiary's claim is separate and distinct
17 from the worker's claim. She cites: Purdy & Whitfield v. Dep't of Labor & Indus., 12 Wn.2d 131, 120
18 P.2d 858 (1942); McFarland v. Dep't of Labor & Indus., 188 Wash. 357, 62 P.2d 714 (1936); and
19 Beels v. Dep't of Labor & Indus., 178 Wash. 301, 34 P.2d 917 (1934). This argument, however, has
20 been fully considered and rejected previously by our Supreme Court. Barlia v. Dep't of Labor & Indus.,
21 23 Wn.2d 126, 160 P.2d 503 (1945) and Lynch v. Dep't of Labor & Indus., 19 Wn.2d 802, 145 P.2d
22 265 (1944). Barlia and Lynch also dispose of an additional, separate argument of Mrs. Kilpatrick, that
23 the amendments to RCW 51.32.050 and .060 which were effective July 1, 1988 should apply
24 retroactively to her husband's claim.
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31 It is a fundamental rule in this state that a statute will be presumed to
32 operate prospectively only, and that it will not be held to apply
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34 ¹ It appears this issue is presently squarely before our Supreme Court. By Order
35 Denying Petition for Review dated August 7, 1989 we adopted the Proposed Decision and
36 Order, relying upon Alseth, supra, in In re Robert A. Landon, Dckt. No. 88 3777 (August 7,
37 1989). The Department subsequently appealed to superior court, King County Cause No.
38 89-2-17180-3, wherein summary judgment was entered on November 8, 1989 in favor of Mr.
39 Landon and specifically finding that the date of manifestation rule applies for compensation
40 purposes. The Department then appealed to the Court of Appeals, Division I, Docket No.
41 25286-1- I. The Court certified the matter as one of substantial public interest to our
42 Supreme Court on August 21, 1990 where the matter is pending as Department of Labor &
43 Industries v. Landon, Supreme Court No. 57483-9. It is our understanding that oral
44 argument was scheduled in this matter for February 26, 1991 and that a decision has not yet
45 been issued.
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1 retrospectively in the absence of language clearly indicating such
2 legislative intent. [Citations omitted]

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4 It is also the general rule in this state that awards made payable under the
5 workmen's compensation act are governed by the law in effect at the time
6 the injury to the workman occurred." [Citations omitted]

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8 Lynch, 19 Wn.2d at 807.

9 Lynch specifically rejected a widow's attempt to take advantage of a statutory
10 increase in benefits effective after the date of her husband's injury and death. In Barlia, as
11 in the present case, the widow sought to take advantage of an increase in benefits which
12 occurred after the worker's injury but before his death. The court held that:

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14 . . . In [Lynch] we called attention to our well- established rule that a
15 statute is presumed to operate prospectively and will not be held to apply
16 retroactively in the absence of language which clearly indicates such
17 legislative intent. Attention was also called to the rule that awards payable
18 under our compensation act are governed by the law in effect at the time
19 the injury of the workman occurred.
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22 Barlia, 23 Wn.2d at 128. The court specifically considered McFarland and Purdy & Whitfield:

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24 Those cases, when analyzed, do not have a bearing upon the situation
25 present here. They simply hold that the rights of the widow are never
26 waived by the neglect of her husband to insist upon his rights.

27 The new independent right given to the widow at the time of the death of
28 the workman relates not to the pension, but to the rights which were those
29 of her husband during his lifetime.
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31 Barlia, 23 Wn.2d at 129. The same analysis would apply to Beels.

32 Mrs. Kilpatrick's counsel urges that Barlia should not be followed, because it is "old, tired law".
33 Petition for Review at 5. The more specific arguments against following Barlia, although stated only in
34 a cursory manner, are alleged to rest upon legislative history, common sense, and what appear to be
35 public policy grounds.² However, our Supreme Court has made clear its view that such arguments are
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41 ² We are particularly puzzled by the following language: ". . . There has been no
42 rationale to justify why Mrs. Kilpatrick's claim should be treated differently than a widow
43 whose husband did not file a claim. It seems rather unconscionable to treat two beneficiaries
44 quite differently (some \$400 per month) when there is no rationale supporting such a
45 difference." Petition for Review at 4. This argument appears based upon a false premise.
46 Although the content of a deceased worker's previous claim filing may be of some evidentiary
47 value in determining the date of manifestation (see factual analysis in this particular case,

1 more appropriately taken up with the Legislature and, until that time, will not alter judicial interpretation
2 of the law.
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5 It has been firmly established in this state, by a consistent series of
6 decisions of this court, that the rights of claimants under the Workmen's
7 Compensation Act are controlled by the law in force at the time of the
8 person's injury, rather than by a law which becomes effective
9 subsequently. [citations, including to Barlia and Lynch, omitted]

10 It is a fundamental rule in this state that a statute will be presumed to
11 operate prospectively only, and that it will not be held to apply
12 retrospectively in the absence of language clearly indicating such
13 legislative intent [citation to Lynch omitted]

14 Another rule of statutory construction which the courts observe is that the
15 law-making body is presumed to be familiar not only with its own prior
16 legislation relating to the subject of legislation, but also with the court
17 decisions construing such former legislation [citations omitted]

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19 Ashenbrenner v. Dep't of Labor & Indus., 62 Wn.2d 22, 25-27, 380 P.2d 730 (1963). See also Seattle
20 School Dist. v. Dep't of Labor & Indus., 116 Wn.2d 352, 358, ____ P.2d ____ (1991); Ellis v. Dep't of
21 Labor & Indus., 88 Wn.2d 844, 851, 567 P.2d 224 (1977); and, Kaiser Aluminum v. Overdorff, 57
22 Wash. App. 291, 293-294, 788 P.2d 8 (1990). We are confident, then, that under the laws of this state
23 Mrs. Kilpatrick's benefits must be set according to the schedule in effect on the date Mr. Kilpatrick's
24 occupational disease first became manifest. We next determine that date of manifestation in view of
25 the facts put before us.
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27 A disease or disability is not manifest unless it is evident, in some fashion, to the worker. This
28 knowledge need not necessarily be tied to the notice that the disease or disability is occupationally
29 induced. The date of manifestation of disease or disability is the point in time when contemporaneous
30 medical evidence of disability or need for treatment is coupled with knowledge on the worker's part,
31 that a disease or disability exists. See, supra, In re Charles Jones; In re Kenneth R. Alseth; and, In re
32 Milton L. May.
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34 Mrs. Kilpatrick contends her husband's occupational disease did not become manifest until
35 November, 1988. In part she argues that we should focus exclusively upon Mr. Kilpatrick's
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43 infra), whether or not the deceased worker previously filed a claim has no other legal
44 significance of which we are aware relevant to the issues in this case. We do not find
45 anything in Barlia or Lynch, supra, or any other authority which would direct that the rate of
46 benefits be legally tied to whether or not a deceased worker had filed a claim.
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1 intra-abdominal mesothelioma which was not definitively diagnosed until November, 1988 and which
2 significantly contributed to his death due to respiratory arrest in late December, 1988. See, Certificate
3 of Death, Exhibit No. 9. Mrs. Kilpatrick would have us ignore any previous manifestation of
4 occupationally-related asbestos disease.
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7 We cannot find any support in the law or the facts of this case for Mrs. Kilpatrick's position. An
8 injury previously sustained or an occupational disease previously manifest does not become a new
9 and separate injury or occupational disease merely because it later manifests in additional symptoms
10 which may have been unknown originally. Crabb v. Dep't of Labor & Indus., 186 Wash. 505, 58 P.2d
11 1025 (1936). The rule from Ashenbrenner and the associated line of cases still applies. Workers who
12 sustain an injury or an occupational disease" at the same time receive the same compensation for
13 equal disabilities" regardless of whether the particular condition considered arose immediately or
14 made a delayed appearance as a result of aggravation. Corak v. Dep't of Labor & Indus., 2 Wn. App.
15 792, 800, 469, P.2d 957 (1970). See also, Seattle School Dist. v. Labor & Indus., supra, 116 Wn.2d at
16 358.
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19 The specific information supplied to the Department on Mr. Kilpatrick's accident report is most
20 helpful in determining the date of manifestation in this particular case. On that report, Mr. Kilpatrick
21 stated: "I was exposed to asbestos for 30 years. I worked for contractors in Wash., Ore., Idaho &
22 Alaska on schools, hospitals, defense installations, refineries & ships." He also explained that the
23 employer was not notified because this was an "illness not accident". Exhibit No. 3. On the same
24 report, the physician noted the complaint or physical finding of dyspnea on exertion and diagnoses of
25 "1) coronary a.[artery] disease 2) asbestos-related lung disease". He noted x-ray findings "mild pleural
26 thickening . . ."and checked "yes" in response to the question of whether the condition diagnosed was
27 the result of the incident described. Ibid.
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30 We are comfortable with the inference from this information that Mr. Kilpatrick had become
31 aware of his asbestos-related disease, and at least some associated disability in the form of dyspnea,
32 no later than the date he arranged to have his accident report finally forwarded to the Department.
33 The employee's and physician's portions of the report were completed on two different dates. The
34 Department received the report on January 19, 1983. This latter date, then, best approximates the
35 date of manifestation of Mr. Kilpatrick's occupational disease.³ In so concluding we emphasize our
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46 ³ From Exhibit No. 1, the historical/jurisdictional facts agreed to by the parties, we are
47 aware that the Department neither finally rejected nor allowed Mr. Kilpatrick's claim. Had

1 reliance is upon the evidentiary value of the content and timing of the accident report and not upon the
2 legal act of filing a claim for benefits.
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4 Our conclusion in this regard is further supported by a medical report of Dr. Terry R. Rogers
5 dated July 27, 1983 in which Dr. Rogers states:
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7 IMPRESSION: This man gives a story consistent with mild to perhaps
8 moderate lung problems with exertional breathlessness suggesting either
9 pulmonary emphysema or perhaps mild fibrosis. The final diagnosis will
10 await the review of the pulmonary function tests.
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12 In light of his occupational history and his chest x-ray changes, at least
13 part of these abnormalities are related to his asbestos exposure.
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15 Exhibit No. 4, page 2. From a review of subsequent medical reports we are fully aware that there
16 ensued a long period of medical uncertainty with regard to the exact nature and extent of the effects
17 from Mr. Kilpatrick's asbestos exposure. Nevertheless, the reports from August of 1987 (Exhibit No. 5)
18 and all of the later reports provided us (Exhibit Nos. 6-11) make it unmistakably clear that the original
19 diagnosis contained in Mr. Kilpatrick's accident report and Dr. Roger's report of July 27, 1983 were
20 correct. Mr. Kilpatrick's occupational disease had become manifest by January 19, 1983. This date
21 determines the schedule of benefits appropriate to Mrs. Kilpatrick's claim for survivor's benefits.
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23 We adopt from the Proposed Decision and Order Findings of Fact Nos. 1, 3 and 4 and
24 Conclusion of Law No. 1. In addition, we make the following Findings of Fact and Conclusions of Law.
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27 orders rejecting the claim become final, it could have, depending upon the circumstances,
28 become appropriate to apply principles of res judicata against the Department to the effect
29 that the Department had determined that the occupational disease had not yet become
30 manifest. Nevertheless, that is clearly not the case before us. It appears that Mr. Kilpatrick
31 was represented by counsel throughout and that the Department's proposed rejection of the
32 claim came before this Board by way of appeals filed in November, 1984 and again in July,
33 1985. The first appeal was resolved by an Order on Agreement of Parties which remanded
34 to the Department and directed that the matter would be put in abeyance until the claimant
35 requested final adjudication or the Department determined that a final adjudication was
36 appropriate. Likewise, the second appeal was resolved also by an Order on Agreement of
37 Parties which directed the Department to hold further adjudication in abeyance pending
38 further investigation. It appears that delay of final adjudication of Mr. Kilpatrick's claim was
39 mutually agreeable. We do not perceive any unfairness in finding upon the evidence before
40 us that Mr. Kilpatrick's occupational disease was manifest no later than the date on which he
41 filed the accident report containing evidence of manifestation.
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43 We further note that we found manifestation on the basis of similar medical evidence, and
44 ordered the claim allowed, in a case not involving survivor's benefits. In re Marion A.
45 Funston, Dckt. No. 87 0248 (April 10, 1989).
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1 **FINDINGS OF FACT**

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- 3 2. Between 1951 and 1982 the claimant was exposed to asbestos fibers in
- 4 employment which caused him to develop asbestos-related disease in the
- 5 form of lung disease by January 19, 1983 and intra-abdominal
- 6 mesothelioma at an undetermined time before his death.
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- 8 5. On January 19, 1983, William Kilpatrick's asbestos- related occupational
- 9 disease was evident to him. He had knowledge of the disease, that it was
- 10 causing some disability and that it required further medical monitoring.

11 **CONCLUSIONS OF LAW**

- 12 2. The 1988 amendments to RCW 51.32.050(2)(d) and .060(5) and .180 do
- 13 not apply to this case.
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- 15 3. Mrs. Kilpatrick's benefits as surviving spouse are determined by reference
- 16 to the schedule of benefits in effect on January 19, 1983.
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- 18 4. The order of the Department of Labor and Industries dated November 6,
- 19 1989 which adhered to the provisions of an order dated July 20, 1989
- 20 which adhered to the provisions of an order dated June 15, 1989, which
- 21 determined that Mr. Kilpatrick died on December 29, 1988 as a result of an
- 22 occupational disease resulting from exposure to asbestos fibers in
- 23 covered employment, and which set aside orders of the Department dated
- 24 March 23, 1984, September 14, 1984 and May 28, 1985, and which
- 25 allowed Mr. Kilpatrick's claim for benefits and which approved Mrs.
- 26 Kilpatrick's claim as surviving spouse for payment of benefits and which
- 27 determined the date of injury and last injurious exposure for compensation
- 28 purposes as December 31, 1982, is incorrect and is reversed. The matter
- 29 is remanded to the Department of Labor and Industries to issue an order
- 30 stating that Mr. Kilpatrick died on December 29, 1988 as the result of an
- 31 occupational disease resulting from exposure to asbestos fibers in
- 32 covered employment, allowing Mr. Kilpatrick's claim for benefits and
- 33 allowing Mrs. Kilpatrick's claim as surviving spouse, and establishing the
- 34 date of January 19, 1983 as the date upon which Mr. Kilpatrick's
- 35 occupationally related asbestos disease became manifest and as the
- 36 determinative date for schedule of benefits purposes.

37 It is so ORDERED.

38 Dated this third day of April, 1991.

39 BOARD OF INDUSTRIAL INSURANCE APPEAL

40 /s/

41 SARA T. HARMON

Chairperson

42 /s/

43 PHILLIP T. BORK

Member