

Harvey, David, Dec'd

SURVIVOR'S BENEFITS

Aggravation

In a surviving spouse's appeal of a Department order denying the claim for spousal benefits on the basis the worker was not totally permanently disabled on the date of his death, the Board cannot reach the issue of permanent total disability when the worker's appeal of an order denying an application to reopen was pending at the time of death. *Citing Reid v. Department of Labor & Indus.*, 1 Wn.2d 430 (1939).***In re David Harvey, Dec'd, BIIA Dec., 94 1271 (1996)***

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

1 IN RE: DAVID HARVEY, DEC'D)	DOCKET NO. 94 1271
2)	
3 CLAIM NO. J-486136)	DECISION AND ORDER
4		

5 **APPEARANCES:**

6
7 Petitioner/Beneficiary, Joanne Harvey, by
8 Law Office of Robert M. Keefe, per
9 Robert M. Keefe

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11 Employer, Alaska Terminals Company,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Mary V. Wilson and Amanda J. Goss, Assistants

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19 The widow/beneficiary, Joanne Harvey, filed an appeal with the Board of Industrial
20 Insurance Appeals on July 18, 1994, from an order of the Department of Labor and Industries
21 dated July 12, 1994. The order denied the widow/beneficiary's claim for benefits for the reasons
22 that the cause of death was not related to the injury or disease covered under the claim and the
23 worker was not permanently and totally disabled because of conditions under the claim.
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29 **REVERSED AND REMANDED.**

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31 **DECISION**

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33 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
34 and decision on a timely Petition for Review filed by the widow//beneficiary to a Proposed Decision
35 and Order issued on October 18, 1995, in which the order of the Department dated July 12, 1994,
36 was affirmed.
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41 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
42 no prejudicial error was committed and the rulings are affirmed. For clarification of a stipulation
43 entered into by the parties on August 2, 1995, the Board assumes the parties intended that the
44 transcript of Mr. Harvey's testimony taken in Docket No. 93 2372 shall become part of the record in
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1 this proceeding, with the understanding that questions concerning Mr. Harvey's ability to work were
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3 not posed because it was not an issue in that prior appeal.
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5 After review of all of the jurisdictional facts in this matter, we must conclude that the
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7 Department prematurely denied Mrs. Harvey's claim for spousal benefits. At the time the
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9 Department entered the order denying her spousal claim, Mr. Harvey had an appeal pending in
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11 superior court from a Department order dated May 19, 1993, denying his application to reopen his
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13 claim for aggravation of condition. On October 23, 1995, Superior Court for King County upheld
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15 the Department order.
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17 Mrs. Harvey based her claim for survivor's benefits on the premise that Mr. Harvey was
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19 totally and permanently disabled as a result of the industrial injury at the time of his death. She did
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21 not claim that Mr. Harvey died as a result of the industrial injury; nor was any evidence presented to
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23 that effect. We have previously held that in a claim for survivor's benefits premised on the worker
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25 being permanently and totally disabled at the date of death, if the worker's claim was closed at the
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27 time of death, the widow must first establish a permanent worsening of the worker's condition
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29 between the date his claim was last closed and the date of his death. Essentially the widow is held
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31 to the same burden as the worker with respect to the need to prove aggravation of condition. *In re*
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33 *Lowery Pugh, Dec'd*, BIIA Dec., 86 2693 (1989). *Pugh* relies on a long series of cases that hold
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35 the surviving spouse must comply with the same requirements as the claimant. *See, McFarland v.*
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37 *Department of Labor & Indus.*, 188 Wash. 357 (1936) and *Noland v. Department of Labor & Indus.*,
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39 43 Wn.2d 588 (1953) and *Cyr v. Department of Labor & Indus.*, 47 Wn.2d 92, 96 (1955).
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41 Thus, in Mrs. Harvey's claim for survivor benefits, she must not only show that at the time of
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43 his death her husband was permanently totally disabled as a result of the industrial injury, she must
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45 first establish that Mr. Harvey's condition related to the industrial injury had objectively worsened
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1 since the Department finally closed his claim or denied his reopening application. *Dinnis v.*
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3 *Department of Labor & Indus.*, 67 Wn.2d 654, 657 (1965).
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5 Because Mr. Harvey appealed from the earlier Department determination that his condition
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7 related to his industrial injury had not objectively worsened between February 22, 1989 and
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9 May 19, 1993, and that issue had yet to be finally decided, there was no final determination of
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11 whether Mr. Harvey's condition related to the industrial injury had worsened and had resulted in
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13 permanent partial disability. At the time the Department decided whether Mrs. Harvey was entitled
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15 to survivor benefits, the Department merely determined whether Mr. Harvey died as a result of his
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17 industrial injury and whether at the time of his death he was totally permanently disabled as a result
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19 of the industrial injury. We must remand the matter to the Department in order for a determination
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21 to be made if there was any permanent aggravation of the condition related to the industrial injury
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23 between May 19, 1993, and the date of Mr. Harvey's death.
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25 In *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430, 437 (1939), the Washington
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27 Supreme Court stated that:
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29 It is a condition prerequisite to the reopening of a claim for . . .
30 aggravation of disability that there be a determination as to the disability
31 and the rate of compensation to be awarded therefor, and the further
32 condition that there be a change in the claimant's condition since that
33 determination. That is to say, until there has been a final determination
34 as to the amount of the award to which a claimant is entitled, there
35 cannot be entertained a claim for aggravation; as the standard by which
36 to determine the award for aggravation, . . . is the difference between
37 [the] original award and the amount to which he would be entitled
38 because of his condition subsequent thereto.
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40 The *Reid* court recognized that the Department's authority to act upon the aggravation
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42 application is suspended or tolled until such time as there is a final determination of what the
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44 claimant's condition was on the earlier date. The Department is unable to adjudicate aggravation
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46 issues so long as the most recent claim closure is pending in a higher court. The Department
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incorrectly acted upon Mrs. Harvey's application for survivor's benefits since her husband's

1 aggravation application was still pending in a higher court, and the Department had no way of
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3 determining whether Mr. Harvey's condition related to his industrial injury had objectively worsened
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5 at the time of his death. No comparison of findings could be made since there was no final
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7 determination as to what Mr. Harvey's findings were in May 1993. Now that the Department has a
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9 final determination as to what Mr. Harvey's condition was in May 1993, related to the industrial
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11 injury, that is, he had findings best described by Category 1 lumbosacral impairment, the
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13 Department is able to make a determination whether his condition related to the injury was
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15 objectively worse at the time of his death, such that he was permanently totally disabled.

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17 **FINDINGS OF FACT**
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- 19 1. On October 8, 1984, the Department of Labor and Industries received
20 an application for benefits from David Harvey, alleging an industrial
21 injury on October 3, 1984, while employed by Alaskan Terminal. The
22 claim was allowed and benefits paid. The claim was closed in 1986,
23 without permanent partial disability award. In 1988, Mr. Harvey filed to
24 have his claim reopened for aggravation of condition. On February 28,
25 1989, the Department issued a final order denying the aggravation
26 application. This order was appealed and subsequently affirmed by the
27 Board.
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29 In May, 1993, Mr. Harvey filed an application to reopen his claim for
30 aggravation of condition. On May 19, 1993, the Department issued an
31 order denying the aggravation application and keeping the claim closed.
32 Mr. Harvey appealed to the Board of Industrial Insurance Appeals from
33 the order of May 19, 1993, and the Board subsequently held hearings
34 and issued a final order on June 17, 1994, affirming the Department
35 order denying the aggravation application. That order was subsequently
36 appealed to the King County Superior Court and was upheld in King
37 County Superior Court on October 23, 1995.
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39 In June 1994, Joanne Harvey filed a claim with the Department for
40 survivor's benefits. On July 12, 1994, the Department issued an order
41 denying the widow/beneficiary's claim for benefits for the reasons that
42 the cause of death was not related to the injury or disease covered
43 under the claim and the worker was not totally and permanently
44 disabled because of conditions under the claim. On August 4, 1994, the
45 Board of Industrial Insurance Appeals received a Notice of Appeal filed
46 on behalf of the widow/beneficiary.
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2. On January 10, 1994, David Harvey died of congestive heart failure related to dilated cardiomyopathy, that was not proximately caused by the October 3, 1984 industrial injury.

3. At the time the Department determined Mrs. Harvey's right to survivor's benefits, there was an appeal pending in superior court on the issue of whether Mr. Harvey's condition related to the industrial injury objectively worsened between February 28, 1989 and May 19, 1993. Because there was no final determination as to what findings existed as of May 19, 1993, the Department was unable to determine if Mr. Harvey's condition related to the industrial injury became objectively worse between May 19, 1993, and his death, such that he was permanently totally disabled as a result of the industrial injury at the time of his death.

CONCLUSIONS OF LAW

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

2. The Department incorrectly determined that Mr. Harvey was not permanently totally disabled as a result of the industrial injury at the time of his death, since the Department had to first determine whether his condition related to the industrial injury had become objectively worse since the date of last claim closure. The matter is remanded to the Department to make a determination as to whether Mr. Harvey's condition related to the industrial injury became objectively worse

1 between May 19, 1993, and the date of his death, such that as of his
2 death he was totally permanently disabled as a result of his industrial
3 injury.
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5 It is so ORDERED.
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7 Dated this 9th day of April, 1996.
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9 BOARD OF INDUSTRIAL INSURANCE APPEALS

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13 /s/ _____
14 S. FREDERICK FELLER Chairperson
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18 /s/ _____
19 FRANK E. FENNERTY, JR. Member
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