

## 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, BHA Dec., 94 1271 (1996)***

Scroll down for order.



1 this proceeding, with the understanding that questions concerning Mr. Harvey's ability to work were  
2  
3 not posed because it was not an issue in that prior appeal.  
4

5         After review of all of the jurisdictional facts in this matter, we must conclude that the  
6  
7 Department prematurely denied Mrs. Harvey's claim for spousal benefits. At the time the  
8  
9 Department entered the order denying her spousal claim, Mr. Harvey had an appeal pending in  
10  
11 superior court from a Department order dated May 19, 1993, denying his application to reopen his  
12  
13 claim for aggravation of condition. On October 23, 1995, Superior Court for King County upheld  
14  
15 the Department order.  
16

17         Mrs. Harvey based her claim for survivor's benefits on the premise that Mr. Harvey was  
18  
19 totally and permanently disabled as a result of the industrial injury at the time of his death. She did  
20  
21 not claim that Mr. Harvey died as a result of the industrial injury; nor was any evidence presented to  
22  
23 that effect. We have previously held that in a claim for survivor's benefits premised on the worker  
24  
25 being permanently and totally disabled at the date of death, if the worker's claim was closed at the  
26  
27 time of death, the widow must first establish a permanent worsening of the worker's condition  
28  
29 between the date his claim was last closed and the date of his death. Essentially the widow is held  
30  
31 to the same burden as the worker with respect to the need to prove aggravation of condition. *In re*  
32  
33 *Lowery Pugh, Dec'd*, BIIA Dec., 86 2693 (1989). *Pugh* relies on a long series of cases that hold  
34  
35 the surviving spouse must comply with the same requirements as the claimant. *See, McFarland v.*  
36  
37 *Department of Labor & Indus.*, 188 Wash. 357 (1936) and *Noland v. Department of Labor & Indus.*,  
38  
39 43 Wn.2d 588 (1953) and *Cyr v. Department of Labor & Indus.*, 47 Wn.2d 92, 96 (1955).  
40

41         Thus, in Mrs. Harvey's claim for survivor benefits, she must not only show that at the time of  
42  
43 his death her husband was permanently totally disabled as a result of the industrial injury, she must  
44  
45 first establish that Mr. Harvey's condition related to the industrial injury had objectively worsened  
46  
47

1 since the Department finally closed his claim or denied his reopening application. *Dinnis v.*  
2  
3 *Department of Labor & Indus.*, 67 Wn.2d 654, 657 (1965).  
4

5 Because Mr. Harvey appealed from the earlier Department determination that his condition  
6  
7 related to his industrial injury had not objectively worsened between February 22, 1989 and  
8  
9 May 19, 1993, and that issue had yet to be finally decided, there was no final determination of  
10  
11 whether Mr. Harvey's condition related to the industrial injury had worsened and had resulted in  
12  
13 permanent partial disability. At the time the Department decided whether Mrs. Harvey was entitled  
14  
15 to survivor benefits, the Department merely determined whether Mr. Harvey died as a result of his  
16  
17 industrial injury and whether at the time of his death he was totally permanently disabled as a result  
18  
19 of the industrial injury. We must remand the matter to the Department in order for a determination  
20  
21 to be made if there was any permanent aggravation of the condition related to the industrial injury  
22  
23 between May 19, 1993, and the date of Mr. Harvey's death.  
24

25 In *Reid v. Department of Labor & Indus.*, 1 Wn.2d 430, 437 (1939), the Washington  
26  
27 Supreme Court stated that:  
28

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.  
39

40 The *Reid* court recognized that the Department's authority to act upon the aggravation  
41  
42 application is suspended or tolled until such time as there is a final determination of what the  
43  
44 claimant's condition was on the earlier date. The Department is unable to adjudicate aggravation  
45  
46 issues so long as the most recent claim closure is pending in a higher court. The Department  
47  
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  
2  
3 determining whether Mr. Harvey's condition related to his industrial injury had objectively worsened  
4  
5 at the time of his death. No comparison of findings could be made since there was no final  
6  
7 determination as to what Mr. Harvey's findings were in May 1993. Now that the Department has a  
8  
9 final determination as to what Mr. Harvey's condition was in May 1993, related to the industrial  
10  
11 injury, that is, he had findings best described by Category 1 lumbosacral impairment, the  
12  
13 Department is able to make a determination whether his condition related to the injury was  
14  
15 objectively worse at the time of his death, such that he was permanently totally disabled.

16  
17 **FINDINGS OF FACT**  
18

- 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.  
28

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.  
38

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.  
47

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

- 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.  
4

5 It is so ORDERED.  
6

7 Dated this 9th day of April, 1996.  
8

9 BOARD OF INDUSTRIAL INSURANCE APPEALS  
10

11  
12 /s/ \_\_\_\_\_  
13 S. FREDERICK FELLER Chairperson  
14  
15

16  
17 /s/ \_\_\_\_\_  
18 FRANK E. FENNERTY, JR. Member  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47