

Christian, Gary, Dec'd

BENEFICIARIES

Permanent total disability benefits

Spousal benefits are derived from the worker's pension reserve and are not calculated separately. When a worker is found totally and permanently disabled and dies prior to making an election pursuant to RCW 51.32.067, a previously paid permanent partial disability award must be taken out of the pension reserve and the Department has authority to select the spousal option. ...*In re Gary Christian, Dec'd, BIIA Dec., 96 4751 (1998)* [*Editor's Note: The Board's decision was appealed to superior court under Grant County Cause No. 98-2-00106-9.*]

Scroll down for order.

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

1	IN RE: GARY CHRISTIAN, DEC'D)	DOCKET NO. 96 4751
2)	
3	<u>CLAIM NO. K-309881</u>)	DECISION AND ORDER
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5 APPEARANCES:

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7 Petitioner/Beneficiary, Kora L. Christian, by
8 Calbom & Schwab, P.S.C., per
9 G. Joe Schwab

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11 Employer, George Washington Orchards,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Lesley A. Allan, Assistant
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19 The petitioner/beneficiary, Kora L. Christian, the surviving spouse of Gary Christian,
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21 deceased, filed an appeal with the Board of Industrial Insurance Appeals on July 19, 1996, from an
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23 order of the Department of Labor and Industries dated June 7, 1996, and remailed on June 20,
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25 1996, that corrected the order of March 20, 1992; terminated time loss compensation as paid
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27 through August 22, 1990; declared Gary Christian totally permanently disabled effective August 23,
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29 1990; found that Gary Christian died in September 1991 from causes unrelated to the industrial
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31 injury; approved the claim for spousal benefits filed by Kora L. Christian; and, directed that the
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33 permanent partial disability award previously awarded be charged against the pension reserve and
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35 the monthly payment reduced accordingly. **AFFIRMED.**

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37 **DECISION**
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39 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
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41 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a
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43 Proposed Decision and Order issued on June 20, 1997, in which the order of the Department dated
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45 June 20, 1996, was reversed and remanded to the Department with direction to allow
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1 Kora L. Christian's spousal claim for benefits without offset for the prior permanent partial disability
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3 award of \$10,125, including interest paid to Mr. Christian.
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5 The Board has reviewed the stipulated facts on which the parties requested the Board enter
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7 its decision. Review has been granted to enable the Board to review the impact of a recent
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9 decision of the Washington Court of Appeals in *Freeman v. Department of Labor & Indus.*, 87 Wn.
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11 App. 90 (1997), an opinion published subsequent to the issuance of the Proposed Decision and
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13 Order.
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15 The widow of Mr. Christian raises the issue of whether the Department has correctly
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17 calculated the surviving spouse's benefits pursuant to RCW 51.32.067(1)(b) by deducting the
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19 permanent partial disability award previously awarded to the injured worker from the pension
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21 reserve. In an earlier appeal before the Board, Mr. Christian successfully had the Department's
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23 earlier finding of permanent partial disability changed to permanent total disability. The Department
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25 then issued a ministerial order awarding Mr. Christian permanent total disability benefits.
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27 Mrs. Christian also appealed the ministerial order dated March 20, 1992. The parties agreed to
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29 have the appeal from the order dated March 20, 1992, held in abeyance at the Department
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31 pending the final decision in another case dealing with a similar issue by the Washington Supreme
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33 Court. The decision in *Stuckey v. Department of Labor & Indus.*, 129 Wn.2d 289 (1996) was then
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35 issued wherein the court held that RCW 51.32.080(4) is applicable to all situations where
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37 permanent partial disability is followed by permanent total disability and that the recoupment of the
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39 partial disability award is obtained by reducing the pension reserve.
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41 However, in this present appeal, the spouse seeks to avoid the application of *Stuckey*,
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43 contending that Mr. Christian died prior to his **finally** being accorded the status of a permanently
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45 totally disabled worker. Mrs. Christian maintains that the spousal pension reserve was effectively
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47 created at the time of Mr. Christian's death, **before** he was finally accorded the status of

1 permanently totally disabled. Essentially, Mrs. Christian believes that her spousal pension should
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3 be calculated as a separate entity from that of her husband's pension reserve because her
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5 husband died before his pension reserve was established, and, further, he never elected an option
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7 pursuant to RCW 51.32.067. RCW 51.32.067 states, as follows:
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9 **Permanent total disability-Death benefit options-Election.** (1) After
10 a worker elects one of the options in (a), (b), or (c) of this subsection,
11 that option shall apply only if the worker dies during a period of
12 permanent total disability from a cause unrelated to the injury, leaving a
13 surviving spouse, child, children, or other dependent. If, after making an
14 election under this subsection, a worker dies from a cause related to the
15 injury during a period of permanent total disability, his or her
16 beneficiaries shall receive benefits under RCW 51.32.050(2) through
17 (5).
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19 (a) **Option I.** An injured worker selecting this option shall receive
20 the benefits provided by RCW 51.32.060, with no benefits being paid to
21 the worker's surviving spouse, children, or others.
22

23 (b) **Option II.** An injured worker selecting this option shall
24 receive an actuarially reduced benefit which upon death shall be
25 continued throughout the life of and paid to the surviving spouse, child,
26 or other dependent as the worker has nominated by written designation
27 duly executed and filed with the department.
28

29 (c) **Option III.** An injured worker selecting this option shall
30 receive an actuarially reduced benefit and, upon death, one-half of the
31 reduced benefit shall be continued throughout the life and paid to the
32 surviving spouse, child, or other dependent as the worker has
33 nominated by written designation duly executed and filed with the
34 department.
35

36 (2) The worker shall make the election in writing and the worker's
37 spouse, if any, shall consent in writing as a prerequisite to the election
38 of Option I.
39

40 (3) The department shall adopt such rules as may be necessary
41 to implement this section.
42

43 We assume that the logic of Mrs. Christian's argument is rooted in the idea that as of the
44 date of Mr. Christian's death no deduction had yet been taken from his (still to be determined)
45 pension reserve. Continuing on, since the spouse's benefits come into being at the death of the
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1 worker, Mrs. Christian contends that her pension reserve should be calculated as of the date of
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3 Mr. Christian's death, ignoring the earlier payment of permanent partial disability.
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5 The law and the facts simply do not support the spouse's contention. The Department order
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7 issued in accordance with the final Board order awarding Mr. Christian total permanent disability
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9 benefits, noted his death and approved the claim for spousal benefits. The order awarded
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11 Mr. Christian permanent total disability benefits effective August 23, 1990. While these benefits for
12
13 permanent total disability were paid to Mr. Christian's spouse because of his death, the Department
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15 calculated the rate of the permanent total disability benefits for Mr. Christian and paid permanent
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17 total disability benefits for the period of August 23, 1990 through September 20, 1991, the day he
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19 died. The rate for permanent total disability benefits established for Mr. Christian was reduced by
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21 the permanent partial disability payment from his pension reserve in conformity with *Stuckey*. The
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23 Department then paid spousal benefits to Mrs. Christian as of September 21, 1991, selecting
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25 Option II under RCW 51.32.067, and calculated her spousal benefits utilizing Mr. Christian's
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27 pension reserve amount already established. Thus, the Department, pursuant to RCW
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29 51.32.080(4), acted appropriately in reducing Mr. Christian's pension reserve and monthly benefit
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31 amount by the permanent partial disability awarded.
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33 As noted in *Freeman*, in general, the Industrial Insurance Act provides that the surviving
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35 spouse of a deceased worker is entitled to a monthly benefit for permanent total disability if the
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37 worker was permanently and totally disabled at the time of death or if the injury caused the death.
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39 RCW 51.32.050(2), (6) and (7); RCW 51.32.067. Prior to July 1, 1986, the cause of the worker's
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41 death did not affect the amount of the benefits provided to the surviving spouse, and the spouse
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43 received essentially the same benefits the worker had received prior to death. In 1986, the
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45 Legislature amended RCW 51.32.067, differentiating between the benefits available to surviving
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47 spouses, depending upon the cause of the worker's death and the date of the worker's original

1 claim. The Legislature left intact the prior compensation scheme for claims filed prior to July 1,
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3 1986. For claims filed on or after July 1, 1986, RCW 51.32.050(7) was added, requiring that every
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5 worker who becomes eligible for permanent total disability benefits shall elect an option as
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7 provided in RCW 51.32.067. RCW 51.32.050(6) and (7) state, as follows:
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10 (6) For claims filed prior to July 1, 1986, if the injured worker dies
11 during the period of permanent total disability, whatever the cause of
12 death, leaving a surviving spouse, or child, or children, the surviving
13 spouse or child or children shall receive benefits as if death resulted
14 from the injury as provided in subsections (2) through (4) of this section.
15 Upon remarriage or death of such surviving spouse, the payments to
16 such child or children shall be made as provided in subsection (2) of this
17 section when the surviving spouse of a deceased worker remarries.

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19 (7) For claims filed on or after July 1, 1986, every worker who
20 becomes eligible for permanent total disability benefits shall elect an
21 option as provided in RCW 51.32.067.

22 The options set forth in RCW 51.32.067 significantly changed the calculation of benefits of
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24 permanent total disability for surviving spouses of claims filed on or after July 1, 1986. Where
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26 RCW 51.32.067 is applied to calculate the spousal benefit, the spouse receives an actuarially
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28 reduced benefit depending upon the option elected by the worker.
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30 Mr. Christian filed his claim for industrial insurance benefits after July 1, 1986. Because of
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32 RCW 51.32.050(6) and (7), his spouse must have her benefits calculated pursuant to
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34 RCW 51.32.067. Although Mr. Christian did not elect an option as provided in RCW 51.32.067, the
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36 Department constructively elected Option II. The *Freeman* court held that the Department is
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38 permitted to elect Option II on the spouse's behalf where the injured worker has died before
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40 making the election, as it maximizes the benefits she can receive under RCW 51.32.067.
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42 In *Freeman*, the spousal benefit did not have the permanent partial disability award
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44 deducted from the pension reserve because the Department calculation was done prior to *Stuckey*,
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46 when the Department practice was to deduct the previously paid permanent partial disability award
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from time loss compensation paid to the widow as an overpayment pursuant to RCW 51.32.240(3).

1 The result of this calculation method employed by the Department pre-*Stuckey*, thus, did not affect
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3 the underlying rate of permanent total disability benefits for the worker, and derivatively for the
4
5 spouse.
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7 We conclude that Mrs. Christian's spousal benefits are appropriately calculated pursuant to
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9 RCW 51.32.067 and that they are derived from Mr. Christian's pension reserve, and not separately
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11 calculated as she contends. Pursuant to *Stuckey*, the Department has correctly deducted the
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13 permanent partial disability award from Mr. Christian's pension reserve. This reduction must,
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15 accordingly, modify Mrs. Christian's monthly benefit amount for her spousal benefit because it is
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17 derived from Mr. Christian's pension reserve. The Department order under appeal is correct and is
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19 hereby affirmed.
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21 **FINDINGS OF FACT**

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- 23 1. On July 22, 1986, the claimant, Gary L. Christian, sustained an
24 industrial injury while in the course of employment with George
25 Washington Orchards. He filed a timely claim for industrial insurance
26 benefits with the Department of Labor and Industries. The claim was
27 allowed and benefits paid. On August 22, 1990, the Department issued
28 an order closing the claim with time loss compensation as paid and a
29 permanent partial disability equal to Category 4 lumbosacral impairment
30 paid at 75 percent of the monetary value. The claimant filed a timely
31 appeal with the Board from the Department order dated August 22,
32 1990.
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34 On March 6, 1992, the Board entered an order adopting the Proposed
35 Decision and Order that ordered the Department to pay time loss
36 compensation through August 23, 1990, and thereafter provide
37 Mr. Christian a permanent total disability award. The Department
38 issued a ministerial order on March 20, 1992, in which time loss
39 compensation was paid from November 3, 1989 through August 22,
40 1990, the previously paid permanent partial disability award was
41 converted to time loss compensation, Mr. Christian was awarded
42 permanent total disability benefits effective August 23, 1990, and
43 because he had died on September 20, 1991, and the cause of death
44 was unrelated to the claim, the claim for benefits made by the worker's
45 spouse was approved. On March 30, 1992, Mrs. Christian filed an
46 appeal with the Board from the March 20, 1992 order. On
47 August 5, 1992, the Board entered an agreement of the parties

1 remanding the matter to the Department pending final outcome of
2 *Stuckey v. Department of Labor & Indus.*, in the appellate courts.
3

4 On June 7, 1996, the Department issued an order in accordance with
5 *Stuckey v. Department of Labor & Indus.*, 129 Wn.2d. 289 (1996),
6 wherein the order of March 20, 1992 was corrected, time loss
7 compensation terminated as paid through August 22, 1990, awarding
8 Mr. Christian permanent total disability benefits effective August 23,
9 1990, charging the previously paid permanent partial disability award
10 against the pension reserve and reducing the monthly payment
11 accordingly, and approving the claim for benefits filed by the worker's
12 spouse because the worker died September 20, 1991, due to causes
13 unrelated to the claim. This order was redated and remailed to the
14 spouse on June 20, 1996. On July 19, 1996, the spouse filed an appeal
15 with the Board from the order dated June 20, 1996. On August 16,
16 1996, the Board granted the appeal and assigned it Docket No. 96
17 4751.
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- 19 2. On June 20, 1996, as a result of the *Stuckey* decision, the Department
20 issued an order paying time loss benefits to Kora Lee Christian without
21 a deduction of the permanent partial disability award earlier recovered
22 from time loss benefits owing; charged the permanent partial disability
23 award against the pension reserve, reducing the monthly benefits for
24 permanent total disability effective August 23, 1990; and, approved the
25 claim for benefits filed by Kora Lee Christian.
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- 27 3. The time loss benefits and the permanent total disability benefits from
28 August 23, 1990 through September 20, 1991 (the date of Gary
29 Christian's death) pursuant to the June 20, 1996 order, were paid to
30 Kora Lee Christian as Gary Christian was deceased. Kora Lee
31 Christian received widow's benefits for the period September 21, 1991
32 to the present, that were calculated based on the rate of Gary
33 Christian's benefits and the application of RCW 51.32.067(1)(b).
34

35 **CONCLUSIONS OF LAW**

- 36
- 37 1. The Board of Industrial Insurance Appeals has jurisdiction over the
38 parties and the subject matter to this appeal.
39
- 40 2. The Department of Labor and Industries correctly offset the permanent
41 partial disability award paid to Gary Christian from his pension reserve
42 and the monthly benefit amount was reduced accordingly pursuant to
43 RCW 51.32.080(4). Kora Lee Christian's spousal benefit has been
44 correctly calculated by the Department based upon the rate of Gary
45 Christian's benefits for permanent total disability and the application of
46 RCW 51.32.067(1)(b).
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3. The Department order redated and remailed on June 20, 1996, that corrected and superseded the order of March 20, 1992; terminated time loss compensation as paid through August 22, 1990; awarded Gary Christian permanent total disability benefits effective August 23, 1990 as a totally permanently disabled worker; charged the previously paid permanent partial disability award against the award for permanent total disability benefits, and reduced the monthly payment accordingly; and, approved the claim for benefits filed by the worker's spouse, Kora L. Christian, effective September 21, 1991, is correct and is affirmed.

It is so **ORDERED**.

Dated this 21st day of January, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
S. FREDERICK FELLER Chairperson

/s/ _____
JUDITH E. SCHURKE Member