Gates, Mabel, 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)

Where, at the time of the worker's death from an unrelated cause, the worker's condition causally related to the industrial injury was neither fixed nor in a state of decline which further treatment could not remedy, and the medical evidence did not establish that she would ultimately be permanently totally disabled, her surviving spouse was not entitled to pension benefits.In re Mabel Gates, Dec'd, BIIA Dec., 63,850 (1984) [special concurrence] [Editor's Note: The Board's decision was appealed to superior court under Grant County Cause No. 84-2-00138-7.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: MABEL GATES, DEC'D) DOCKET NOS. 63,850 & 64,697
)
CLAIM NO. H-670029) DECISION AND ORDER

APPEARANCES:

Widower-Petitioner, Claude Gates, the surviving spouse of Mabel Gates, Deceased, by Calbom and Schwab, per G. Joseph Schwab

Employer, Public Hospital District No. 3, None

Department of Labor and Industries, by The Attorney General, per Donna L. Walker, Assistant

This is an appeal filed by the widow-petitioner, Claude Gates, surviving spouse of Mabel Gates, Deceased, on January 19, 1983, (Docket No. 63,850) from an order of the Department of Labor and Industries dated January 5, 1983, which denied his application for surviving spouse's benefits; the widower-petitioner filed a further appeal on April 29, 1983, (Docket No. 64,697) from an order of the Department of Labor and Industries dated April 20, 1983, which adhered to a prior order closing the claim with time-loss compensation as paid to August 23, 1982 and with no award for permanent partial disability. The Department orders are **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the widower-petitioner to a Proposed Decision and Order issued on December 2, 1983, in which the orders of the Department dated January 5, 1983 and April 20, 1983 were affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The issues presented by these appeals and the evidence presented by the parties are quite adequately set forth in the Proposed Decision and Order, and we agree with the proposed disposition.

We have granted review to distinguish the result in this appeal from that reached in the case of Ronald E. Cowell, Dec'd., Docket No. 62,207, Decision and Order of February 7, 1984. At the time of his death on January 15, 1982, Mr. Cowell was unable to work as a result of the back condition

caused by his industrial injury of November 10, 1977. His condition, which was indisputably causally related to that industrial injury, while not fixed and stationary at the time of his death, was in a state of decline in that it had worsened following his third low back surgery, and required further medical attention and management even though recovery to the point of employability was not likely. We observed in <u>Cowell</u> that he would eventually have become <u>permanently</u> totally disabled <u>as a result of</u> the effects of such injury and resultant surgery had he not died from unrelated causes.

In Mrs. Gates' case, the surgery, which led to her death from post-surgical complications on August 23, 1982, was <u>not</u> for a condition which resulted from the industrial injury as in the <u>Cowell</u> case. The gastric surgery which she underwent was only one method of attacking her gross obesity, which was a condition pre-existing her <u>left knee</u> injury of March 16, 1980. The medical evidence is unconvincing that her <u>knee</u> condition was deteriorating or declining or that it would ultimately cause her to be permanently totally disable. At the time of her death, her knee condition was not yet fixed, as clearly testified to by petitioner's own medical witnesses, and it would require gross speculation to assert that <u>possible</u> later surgery to her knee would have resulted in permanent total disability. The facts before us simply do not support that Mrs. Gates' industrial injury was in a precipitant and unremitting state of decline which further treatment could not remedy. Under such circumstances a declaration of <u>permanent</u> total disability as of the date of her death would be unwarranted. <u>Hiatt v. Department of Labor and Industries</u>, 48 Wn. 2d 843 (1956).

Mrs. Gates recognized that she was extremely obese, and that her knees (<u>both</u> of which had undergone patellectomies some years before her 1980 left knee injury) would hopefully get better if she reduced her weight. Dr. Richard B. Freese, Mrs. Gates' attending physician, testified as follows concerning the reasons Mrs. Gates elected to undergo the gastric stapling procedure:

"A She indicated that she had been giving it some thought for quite awhile; that her reasons were multifaceted. In other words, there wasn't a single thing that was making her do it.

It was the conglomerate of the fact that she did not like herself this overweight, the fact that being a medical person she knew that her diabetes would be under better control. She knew the legs would get better, and she knew that it would probably help her blood pressure, and inferentially indicated it might help her chest pains."

The widower-petitioner's theory seems to be that the only way of treating Mrs. Gates' knee was by a knee joint replacement. The theory also seems to be that before any replacement could be accomplished it would be necessary to perform the gastric surgery which would hopefully result in a

weight reduction; therefore, the gastric surgery itself, petitioner asserts, was necessitated by the knee injury.

The medical testimony simply does not support these speculative theories. There were several reasons for her <u>election</u> to undergo the gastric surgery, all of the <u>un</u>related to the left knee injury except for the one reason, among many, that reduction in weight could by that fact alone hopefully improve her knees bilaterally. Thus, the <u>possible</u> left knee joint replacement -- which was all that petitioner's orthopedic witness testified to, <u>not</u> a definite or positive recommendation -- might not ever have taken place. It is obvious that there were several more major reasons for Mr. Gates to undergo the gastric stapling procedure, all regarding expected help for her other <u>unrelated</u> medical problems -- and in addition perhaps beneficially affecting her left knee condition, which was the <u>only</u> condition related to her 1980 industrial injury.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are convinced that the Proposed Decision and Order is correct in determining that the death of Mrs. Gates was not causally related to her industrial injury; that her condition resulting from that injury was not fixed at the time of her death; and that she was not in a status of either permanent total or permanent partial disability due to the injury, at the time of her death.

The proposed findings, conclusions and order are hereby adopted as this Board's final findings, conclusions and order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 19th day of March, 1984.

BOARD OF INDUSTRIAL INSURANG	CE APPEALS
/s/	
MICHAEL L. HALL	Chairman
/s/	
PHILLIP T. BORK	Member
SPECIAL CONCURRING STATEMENT	

I have signed the foregoing Decision and order, because it should be clearly understood that the Board majority is in agreement as to the final disposition of this case, and as to the final findings of fact, conclusions of law, and order. However, I want to make it plain that I do not join in the discussion in this Decision, wherein my colleague found it necessary to distinguish the result reached in this case from the result reached in Ronald E. Cowell, Dec'd, Docket No. 62,207, Decision of February 7, 1984.

While there are distinguishing factual features in the two cases, they are <u>not</u> distinguishable, in my view, on the <u>legal</u> issue on which the Board majority decided in the surviving spouse's favor in <u>Cowell</u>, i.e., whether the injured worker was permanently totally disabled due to the injury at the time of unrelated death.

For the reasons fully set forth in my dissent in <u>Cowell</u> I think it was an error of law for the Board majority to decide in that case that the surviving spouse was entitled to benefits under RCW 51.32.050(6). The worker's injury-caused condition in <u>Cowell</u> was clearly not fixed and the status was thus one of <u>temporary</u> disability at time of death -- exactly as is the case here.

Thus, in <u>Cowell</u>, as here, the provisions of RCW 51.32.050(6) were not fulfilled as a matter of law, and I maintain that we should not have had to "distinguish" that result from this one.

Dated this 19th day of March, 1984.

<u>/s/</u> PHILLIP T. BORK Member