

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.]

Scroll down for order.

1 caused by his industrial injury of November 10, 1977. His condition, which was indisputably causally
2 related to that industrial injury, while not fixed and stationary at the time of his death, was in a state of
3 decline in that it had worsened following his third low back surgery, and required further medical
4 attention and management even though recovery to the point of employability was not likely. We
5 observed in Cowell that he would eventually have become permanently totally disabled as a result of
6 the effects of such injury and resultant surgery had he not died from unrelated causes.
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10 In Mrs. Gates' case, the surgery, which led to her death from post-surgical complications on
11 August 23, 1982, was not for a condition which resulted from the industrial injury as in the Cowell
12 case. The gastric surgery which she underwent was only one method of attacking her gross obesity,
13 which was a condition pre-existing her left knee injury of March 16, 1980. The medical evidence is
14 unconvincing that her knee condition was deteriorating or declining or that it would ultimately cause
15 her to be permanently totally disable. At the time of her death, her knee condition was not yet fixed, as
16 clearly testified to by petitioner's own medical witnesses, and it would require gross speculation to
17 assert that possible later surgery to her knee would have resulted in permanent total disability. The
18 facts before us simply do not support that Mrs. Gates' industrial injury was in a precipitant and
19 unremitting state of decline which further treatment could not remedy. Under such circumstances a
20 declaration of permanent total disability as of the date of her death would be unwarranted. Hiatt v.
21 Department of Labor and Industries, 48 Wn. 2d 843 (1956).
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25 Mrs. Gates recognized that she was extremely obese, and that her knees (both of which had
26 undergone patellectomies some years before her 1980 left knee injury) would hopefully get better if
27 she reduced her weight. Dr. Richard B. Freese, Mrs. Gates' attending physician, testified as follows
28 concerning the reasons Mrs. Gates elected to undergo the gastric stapling procedure:
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31 "A She indicated that she had been giving it some thought for quite awhile;
32 that her reasons were multifaceted. In other words, there wasn't a single
33 thing that was making her do it.
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36 It was the conglomerate of the fact that she did not like herself this
37 overweight, the fact that being a medical person she knew that her
38 diabetes would be under better control. She knew the legs would get
39 better, and she knew that it would probably help her blood pressure, and
40 inferentially indicated it might help her chest pains."
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44 The widower-petitioner's theory seems to be that the only way of treating Mrs. Gates' knee was
45 by a knee joint replacement. The theory also seems to be that before any replacement could be
46 accomplished it would be necessary to perform the gastric surgery which would hopefully result in a
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1 weight reduction; therefore, the gastric surgery itself, petitioner asserts, was necessitated by the knee
2 injury.
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4 The medical testimony simply does not support these speculative theories. There were several
5 reasons for her election to undergo the gastric surgery, all of the unrelated to the left knee injury
6 except for the one reason, among many, that reduction in weight could by that fact alone hopefully
7 improve her knees bilaterally. Thus, the possible left knee joint replacement -- which was all that
8 petitioner's orthopedic witness testified to, not a definite or positive recommendation -- might not ever
9 have taken place. It is obvious that there were several more major reasons for Mr. Gates to undergo
10 the gastric stapling procedure, all regarding expected help for her other unrelated medical problems --
11 and in addition perhaps beneficially affecting her left knee condition, which was the only condition
12 related to her 1980 industrial injury.
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18 After consideration of the Proposed Decision and Order and the Petition for Review filed
19 thereto, and a careful review of the entire record before us, we are convinced that the Proposed
20 Decision and Order is correct in determining that the death of Mrs. Gates was not causally related to
21 her industrial injury; that her condition resulting from that injury was not fixed at the time of her death;
22 and that she was not in a status of either permanent total or permanent partial disability due to the
23 injury, at the time of her death.
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27 The proposed findings, conclusions and order are hereby adopted as this Board's final findings,
28 conclusions and order and are incorporated herein by this reference.
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30 It is so ORDERED.

31 Dated this 19th day of March, 1984.

32 BOARD OF INDUSTRIAL INSURANCE APPEALS

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34 /s/
35 MICHAEL L. HALL Chairman

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37 /s/
38 PHILLIP T. BORK Member

39 **SPECIAL CONCURRING STATEMENT**

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41 I have signed the foregoing Decision and order, because it should be clearly understood that
42 the Board majority is in agreement as to the final disposition of this case, and as to the final findings of
43 fact, conclusions of law, and order.
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