

Hoerner, Johanna, Dec'd

ABATEMENT

Where the widow died leaving no surviving beneficiaries after the Board had granted the Department's petition for review from a proposed decision and order granting the widow a pension, but before the Board had issued its decision and order, the widow's accrued pension benefits were not payable to her estate. **...In re Johanna Hoerner, Dec'd, BIIA Dec., 70,575 (1986)** [Editor's Note: Consider the effect of 1999 Legislative changes to RCW 51.32.040 which make accrued benefits payable to the estate. The Board's decision was appealed to superior court under Benton County Cause No. 86-2-00646-7.]

BOARD

Nunc pro tunc order

The Board is without authority to issue an order nunc pro tunc directing the Department to pay a widow's estate her accrued pension benefits where the widow dies after the Board has granted the Department's petition for review from a proposed decision and order granting the widow's pension, but before the Board has issued its decision and order. (RCW 51.32.040) **...In re Johanna Hoerner, Dec'd, BIIA Dec., 70 575 (1986)** [Editor's Note: *Clingan v. Department of Labor & Indus.*, 71 Wn. App. 590 (1993) addresses court authority to issue nunc pro tunc order. The Board's decision was appealed to superior court under Benton County Cause No. 86-2-00646-7.]

Scroll down for order.

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3. Mr. Hoerner died on December 21, 1983 as a result of suicide. At the time of his death he was survived by his spouse, Johanna J. Hoerner, who timely filed an application for widow's benefits.
 4. By order of February 28, 1984 the Department of Labor and Industries (the "Department") denied widow's benefits to Mrs. Hoerner pursuant to RCW 51.32.020.
 5. Mrs. Hoerner timely filed an appeal with the Board of Industrial Insurance Appeals (the "Board") by notice of appeal dated March 16, 1984.
 6. The case was tried on the basis of stipulated facts and briefs submitted by both parties. Industrial Appeals Judge Steven G. Erwood issued a Proposed Decision and Order dated July 20, 1984. This proposed order concluded:

"The order of the Department of Labor and Industries dated February 28, 1984 denying benefits to the widow-petitioner pursuant to RCW 51.32.020 is incorrect and should be reversed and the claim remanded to the Department of Labor and Industries with instructions to award Johanna Hoerner a widow's pension." Proposed Decision and Order at page 4-5.
 7. After obtaining a ten day extension to August 20, 1984, the Department timely filed a petition for review of the proposed order issued by Judge Erwood. By order of September 7, 1984, the Board granted the Department's petition for review.
 8. On September 14, 1984, Mrs. Hoerner died, leaving no dependents.
 9. On February 15, 1985, the Board issued a final Decision and Order adopting the Findings, Conclusions, and Order of the Proposed Decision and Order of July 20, 1984.
 10. After further consideration, the Department issued an order on April 15, 1985, which stated, in part:

"Whereas Johanna Hoerner was a single person at the time of death and left no dependents eligible to receive benefits pursuant to the provisions of RCW 51.32.040.

It is therefore ORDERED that the claim be closed as paid."
 11. On May 15, 1985 a representative of Mrs. Hoerner's estate timely filed an appeal with this Board. The representative seeks payment of widow's benefits between the date Mr. Hoerner died, December 21, 1983, and the

1 date of Mrs. Hoerner's death, September 14, 1984, to be paid into her
2 estate.
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4 The Department order of April 15, 1985 closed this claim pursuant to RCW 51.32.040, which
5 provides, in part:
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7 "No money paid or payable under this title shall, prior to the issuance and
8 delivery of the check or warrant therefore, be capable of being assigned,
9 charged, or ever be taken in execution or attached or garnished, nor shall
10 the same be passed, or be paid to any other person by operation of law, or
11 by any form of voluntary assignment, or power of attorney. Any such
12 assignment or charge shall be void...
13

14 "This statute has repeatedly been interpreted as establishing that the claim of an injured worker who
15 dies during the pendency of his or her claim, and before it has been adjudicated or reduced to
16 judgment, has not survived to his or her personal representative. See e.g., Lutch v. Department of
17 Labor and Industries, 54 Wn.2d 373, 340 P.2d 786 (1959); Curry v. Department of Labor and
18 Industries, 49 Wn.2d 93, 298 P.2d 485 (1956).
19

20 In Re Cassel, 63 Wn.2d 751, 388 P.2d 952 (1964), held that RCW 51.32.040 also
21 extinguished the unadjudicated claim of a deceased widow.
22

23 At the time of her death, Johanna Hoerner's claim for widow's benefits was unadjudicated.
24 Once this Board receives a timely Petition for Review from a Proposed Decision and Order, it must
25 take affirmative action for final adjudication to occur. Pursuant to RCW 51.52.106 and WAC
26 263-12-145, that action may consist of denying the Petition for Review within twenty days of its being
27 received by the Board, in which case the Proposed Decision and Order becomes the final order of the
28 Board. If a Petition for Review is not denied by the Board within twenty days from the date it is filed, it
29 shall be deemed granted. In that case, or if the Board acts by granting the Petition for Review within
30 twenty days of its receipt, the Board shall issue a final Decision and Order based upon its review of the
31 record or of any part thereof deemed necessary. Ibid; also WAC 263-12-155. Until one of these
32 events occurs, the Proposed Decision and Order is only a recommended decision and is not not a
33 final adjudication.
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35 Having granted the Department's Petition for Review in this case, the final adjudication of
36 Johanna Hoerner's claim for widow's benefits had not occurred at the time of her death.
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38 Because this Board ultimately, after discussion of the legal issue involved, entered its final
39 Decision adopting the Findings, Conclusions and Order of the Proposed Decision and Order, the
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1 estate urges the Board to interpret its final Decision and Order as an order nunc pro tunc, awarding
2 widow's benefits as of July 20, 1984, the date the Proposed Decision and Order was issued. It relies
3 on In Re Cassel, supra.
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5 In that case, the Department of Labor and Industries rejected Mrs. Cassel's claim for widow's
6 benefits. She appealed to this Board, but before hearings were concluded, Mrs. Cassel died.
7 Although the executor of her estate asked to be substituted for further hearing and final determination
8 of the claim, the Board dismissed the claim, based on RCW 51.32.040. On appeal, the estate
9 contended that (1) the Board had a duty to render a decision on the facts before it and enter such
10 decision nunc pro tunc as of the date of the last hearing; and (2) a widow's claim for death benefits
11 survived to her personal representatives. The Supreme Court rejected the latter contention, stating
12 that the widow's claim for benefits did not survive to her personal representative when hearings on the
13 issue were not complete. Regarding the first issue, the court assumed, without deciding, that an
14 administrative tribunal may, without statutory authority, grant the equivalent of judgment nunc pro tunc
15 when the cause at the time of death is "ripe for judgment". The court found, however, that the cause
16 was not "ripe for judgment" because all evidence had not yet been submitted.
17

18 Mrs. Hoerner's estate distinguishes the Cassel claim from its own by arguing that, in this case,
19 all of the evidence had been submitted to the Board at the time of Johanna Hoerner's death and, in
20 fact, a Proposed Decision and Order had been entered before the date of death. Thus, it argues, this
21 Board had the power to enter an order nunc pro tunc since the case was "ripe for judgment" when
22 Mrs. Hoerner died.
23

24 While it may be that, given that set of circumstances, a Superior Court could enter an order
25 nunc pro tunc in order to equitably avoid abatement of Mrs. Hoerner's claim for widow's benefits, the
26 question before us concerns the authority of this Board to enter such an order.
27

28 An administrative tribunal possesses no inherent powers and it may exercise only those
29 powers granted to it by the document which creates it. Tacoma v. Civil Service Board of Tacoma, 6
30 Wn. App. 600, 494 P.2d 1380 (1972); State v. Higher Education Personnel Board, 16 Wn. App. 642,
31 558 P.2d 1364 (1976). Neither the statute nor the administrative code which set forth the duties and
32 powers of this Board contain any provision authorizing the entry of an order nunc pro tunc.
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34 To the extent that the statutes and rules regarding procedures in Superior Court are followed
35 in proceedings before this Board, this Board has the same powers as a Superior Court. WAC
36 263-12-125. However, the authority to enter an order nunc pro tunc in Superior Court in order to avoid
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1 abatement is derived from common law, not from statute or court rule. Garrett v. Byerly, 155 Wash.
2 351 (1930). While that power may be inherent in the Superior Courts, it is not inherent in this Board.
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4 No statute or rule can be found which gives the Board the power to enter an order nunc pro tunc.
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6 Thus, we conclude that we must affirm the Department's April 15, 1985 order.

7 **FINDINGS OF FACT**

- 8
9 1. On August 4, 1959, the Department of Labor and Industries received a
10 report of accident alleging that John Hoerner sustained an injury on April
11 29, 1959, while in the course of his employment with George A. Grant,
12 Inc.. The claim was ultimately allowed and on April 22, 1970, the Board of
13 Industrial Insurance Appeals issued an order adopting a Proposed
14 Decision and Order remanding the case to the Department with orders to
15 place Mr. Hoerner on the pension rolls as a totally and permanently
16 disabled worker. The Department subsequently issued an order pursuant
17 to the Board order of April 22, 1970, placing the claimant on the pension
18 rolls.

19 On December 21, 1983, John Hoerner died as a result of suicide. On
20 January 5, 1984, a claim for widow's benefits was filed with the
21 Department by the widow-petitioner, Johanna Hoerner. On February 28,
22 1984, the Department issued an order denying benefits for the spouse,
23 pursuant to RCW 51.32.020, because John Hoerner died as a result of
24 suicide. On March 19, 1984 a notice of appeal by the widow-petitioner
25 was filed with this Board. On April 10, 1984, the Board issued an order
26 granting the appeal, assigning it Claim No. 7006840, and directing that
27 proceedings be held. On February 15, 1985, the Board issued a final
28 Decision and Order which, after discussing the legal issue presented,
29 adopted the Findings, Conclusions, and Order of a Proposed Decision and
30 Order of July 20, 1984, thereby reversing the Department order of
31 February 28, 1984 and remanding the claim to the Department with
32 instructions to award Johanna Hoerner a widow's pension.

33 On April 15, 1985, the Department issued an order stating that, pursuant
34 to the order of the Board dated February 15, 1985, the Department order
35 of February 28, 1984 was set aside and held for naught. It also provided
36 that because Johanna Hoerner, the surviving spouse of John Hoerner,
37 died on September 14, 1984, and because she was a single person at the
38 time of her death and left no dependents eligible to receive benefits
39 pursuant to RCW 51.32.040, that the claim be closed as paid. On May 15,
40 1985, a notice of appeal was filed by the personal representative of the
41 estate of Johanna Hoerner from the Department order of April 15, 1985.
42 On June 14, 1985, the Board issued an order granting the appeal,
43 assigning it Docket No. 70,575 and directing that proceedings be held.
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- 45 2. On April 29, 1959, the claimant, John Hoerner, injured himself while in the
46 course of his employment with George Grant, Inc.
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