

## **Alfano, Larry, Dec'd**

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### **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)**

Through special concurring opinion the Board majority rejects the holding in *Cowell* that a surviving spouse may be entitled to pension benefits even if the worker's condition was not fixed at the time of his death. ...***In re Larry Alfano, Dec'd, BIIA Dec., 86 1384 (1988)*** [concurrence] Majority of Board accepts holding in *Cowell, In re James McShane, Dec'd, BIIA Dec., 05 16629*. [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No.88-2-01192-3.*]

Scroll down for order.



1 Dec., 62,207 (1984). The employer argues that Cowell was wrongly decided, essentially reiterating  
2 the reasons set forth in the Cowell dissent. Because we conclude that Mr. Alfano's psychiatric  
3 condition was in fact fixed at the time of his death, we need not reach the question of whether  
4 Cowell was correctly decided. However, because the question has significance beyond this  
5 particular appeal, a special concurring opinion has been appended.  
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9 The widow-petitioner, Suellen Alfano, had been married to Mr. Alfano for fourteen years at  
10 the time of his death on May 29, 1984, at age 53.

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12 Mr. Alfano had worked as a truck driver for Associated Grocers his entire adult working life  
13 and had a high school equivalency diploma. Mrs. Alfano stated that he had been in very good  
14 health prior to his injury in January of 1979. He had been active with his children and engaged in  
15 various activities including hunting, fishing, camping bowling and remodeling houses.  
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18 On January 23, 1979 Mr. Alfano injured his low back at work while attempting to lift a loading  
19 platform. His condition rapidly worsened. Dr. John C. Callahan placed Mr. Alfano in the hospital for  
20 traction, prescribed muscle relaxants, and directed him to stay home and relax. Because Mr.  
21 Alfano experienced little or no improvement, Dr. Callahan recommended and performed  
22 decompressive laminotomy surgery. Mr. Alfano slowly recovered after surgery and attempted to  
23 return to work in October of 1979. The attempt was unsuccessful and after two weeks his severe  
24 back pain forced him to quit once again.  
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29 In March or April of 1980 Mr. Alfano's back pain began worsening, he started dragging his  
30 foot, often stubbing his toe and he was unable to wear a shoe. He continued to deteriorate and  
31 Mrs. Alfano was forced to find work in order to support the family. Mr. Alfano became upset  
32 because he was no longer able to provide for his family. At this time his daily activities were  
33 severely limited; he spent most of the time reading and watching television while sitting or lying  
34 down. He began experiencing sexual functional problems at the end of 1981. He apparently  
35 became angry and depressed and had lost much of his self esteem. He became verbally abusive,  
36 frustrated, depressed and alienated from other people.  
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41 Lung cancer, unrelated to the industrial injury, was diagnosed in September, 1982. Mr.  
42 Alfano began seeing a psychiatrist, Dr. Robert B. Olsen, on July 22, 1983. Following psychiatric  
43 treatment with Dr. Olsen he appeared to improve. However, his psychiatric condition was  
44 characterized by large swings in overall adjustment.  
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1 Peter W. Wright, M.D., an oncologist, treated Mr. Alfano with chemotherapy starting in  
2 October of 1982. In January of 1983 he had a portion of his right lung removed and then received  
3 radiation and additional chemotherapy. In the fall of 1983 Mr. Alfano developed a tumor in his left  
4 hip, his condition continued to deteriorate and on May 29, 1984 Mr. Alfano passed away as a result  
5 of the cancer. John C. Callahan, M.D., an orthopedic surgeon, first saw Mr. Alfano in 1975 for a  
6 minor back injury. Dr. Callahan began treating Mr. Alfano again in 1979 for the industrial injury of  
7 January, 1979. Dr. Callahan's opinion was that Mr. Alfano was a well motivated individual who tried  
8 to go back to work in spite of a seriously disabling back injury. Dr. Callahan originally attempted  
9 conservative treatment but in February of 1979 a myelogram demonstrated a narrowing of the L4-5  
10 interspace on the left side and a narrowing of the width of the spinal canal. In April of 1979 Dr.  
11 Callahan performed a decompressive laminotomy. Dr. Callahan stated that the recovery took  
12 longer than usual. In the fall of 1979 Dr. Callahan released Mr. Alfano to work. However, as  
13 indicated above, this attempt to return to work was unsuccessful.

14 Dr. Callahan stated that Mr. Alfano's condition continued to deteriorate and he believed that,  
15 by the end of 1979, Mr. Alfano was physically disabled from performing any kind of work as a result  
16 of conditions causally related to his industrial injury. It was further Dr. Callahan's opinion that by  
17 1982 Mr. Alfano still would not have been able to return to any form of work. In May of 1983 Dr.  
18 Callahan's opinion was that Mr. Alfano was permanently disabled from doing the work of a truck  
19 driver, although he somewhat equivocally stated that Mr. Alfano might have been able to perform  
20 some form of gainful occupation. He rated Mr. Alfano's permanent disability as equal to 40% as  
21 compared to total bodily impairment for his low back.

22 Anthony Choppa, a vocational rehabilitation counselor, reviewed the medical records and  
23 interviewed Mrs. Alfano in December of 1986. It was Mr. Choppa's opinion that, excluding the  
24 effects of the cancer, Mr. Alfano would not have been capable of working on a reasonably  
25 continuous basis, taking into account his age, work history, education and physical and emotional  
26 problems.

27 Dr. Philip Grisham, a neurologist, examined Mr. Alfano on March 17, 1983. He stated that  
28 Mr. Alfano's low back condition was fixed and stable and best described by Category 5 of  
29 permanent dorso-lumbar and lumbosacral impairments. In his opinion, Mr. Alfano could have been  
30 employed on a reasonably continuous basis based only upon the residuals of his low back  
31 injury.

1 Joseph A. Moisan, a rehabilitation counselor, based his opinions upon a review of records  
2 and information supplied to him. He felt that, with the assistance of vocational rehabilitation  
3 services, Mr. Alfano would have been capable of gainful employment on a reasonable continuous  
4 basis.  
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7 There is no question that Mr. Alfano's back condition was fixed and in need of no further  
8 treatment at the time of his death. The critical question is whether Mr. Alfano's psychiatric condition  
9 causally related to the industrial injury was fixed at the time of his death. The witnesses who gave  
10 psychiatric opinions, Dr. John E. Hamm, Dr. Robert B. Olsin, Dr. Arthur A. Murray and Dr. Lesley J.  
11 Barnette, are consistent in that they agree that Mr. Alfano did suffer from a psychiatric condition  
12 causally related to his industrial injury, diagnosed as severe depression and dysthymic disorder. It  
13 was clear to all these doctors that the symptomatology of the depression began appearing well  
14 before the diagnosis of cancer was ever made.  
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19 However, while Dr. Hamm and Dr. Olsen were of the opinion that Mr. Alfano was precluded  
20 from employment due in part to his psychiatric condition at the time of his death, they both felt that if  
21 he had lived he would have improved psychiatrically to the point where he could engage in gainful  
22 employment. In contrast, Dr. Murray and Dr. Barnette were of the opinion that psychiatric treatment  
23 was unlikely to reduce Mr. Alfano's psychiatric impairment and that his psychiatric condition was  
24 therefore fixed at the time of his death.  
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28 Overall the evidence establishes that based on Mr. Alfano's age, his work history, his lack of  
29 transferrable skills, his education, his chronic pain syndrome, his severe physical restrictions,  
30 excluding any due to his cancer condition, he was unemployable at the time of his death. The  
31 question is whether this inability to work was temporary or permanent, i.e., whether his psychiatric  
32 condition was amenable to treatment at the time of his death.  
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36 We feel that the most persuasive testimony is that Mr. Alfano's psychiatric condition would  
37 not have been made less disabling through treatment. Dr. Olsen and Dr. Hamm were of the  
38 opinion that Mr. Alfano's psychiatric condition was treatable and would improve with a prescription  
39 of anti-depressive drugs. However, their opinions are inconsistent with their own state view that Mr.  
40 Alfano's chronic low back pain and physical inability to return to his prior lifelong employment as a  
41 truck driver were the cause of his psychiatric problems. Because Mr. Alfano was unable to avoid the  
42 chronic pain and unable to return to his past employment, it is unlikely that further psychiatric  
43 treatment would have improved his condition.  
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1 Furthermore, Dr. Olsen conceded that for psychiatric treatment to be successful, it should be  
2 started as close as possible to the initial injury and that if treatment for chronic pain is started more  
3 than two years after the industrial injury, the likelihood of success considerably decreases. In light  
4 of this statement, it is significant that in this case psychiatric treatment was not started until three-  
5 and-a-half years after the initial injury.  
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9 Further, Dr. Olsen does not adequately explain how psychiatric treatment would be  
10 successful given Mr. Alfano's failed attempt to return to work, which Dr. Olson characterized as a  
11 severe and significant psychological blow. Similarly, Dr. Hamm does not adequately explain how  
12 Mr. Alfano would have overcome his psychiatric problems, given the fact that a strong work history  
13 was closely tied to his emotional health. It should be noted that Dr. Hamm did not feel that the  
14 depression could have been cured, but only that it would have been kept mild with continuing  
15 treatment.  
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19 The more persuasive psychiatric opinions are those of Dr. Murray and Dr. Barnette, who  
20 realized that no amount of psychiatric treatment could change the fact that Mr. Alfano would  
21 continue to experience chronic pain due to this low back condition and that he would never be able  
22 to return to the only employment he had ever known. Dr. Barnette's assessment that Mr. Alfano  
23 would not be amenable to psychiatric treatment is particularly persuasive because of his realistic  
24 view of Mr. Alfano as an individual. According to Dr. Barnette, Mr. Alfano was a very "macho" male  
25 who had found his identity in his role as a truck driver, and had lost his sense of self worth as a man  
26 and a human being due to his inability to work. It was Dr. Barnette's opinion that Mr. Alfano was  
27 convinced he was by nature a truck driver and could not learn anything new and did not have the  
28 essential energy to do so. While Dr. Barnette believed that Mr. Alfano needed psychiatric  
29 treatment, he concluded that he would not have been successful with this treatment due to his "old  
30 world" view of mental disease, i.e., that he would have been a "loonie" in order to need psychiatric  
31 treatment.  
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35 For all the foregoing reasons, we are convinced that Mr. Alfano's psychiatric condition was  
36 fixed and stable and that he was permanently totally disabled as a result of the industrial injury of  
37 January 23, 1979 at the time of his death due to unrelated causes on May 29, 1984. Therefore, the  
38 Department order appealed from should be affirmed.  
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**FINDINGS OF FACT**

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3 1. On February 15, 1979 an accident report was filed on behalf of the  
4 claimant alleging an industrial injury on January 23, 1979, during the  
5 course of his employment with the self-insured employer, Associated  
6 Grocers, Inc. On May 9, 1980 the Department issued an order closing  
7 the claim with a permanent partial disability award equal to 25% as  
8 compared to total bodily impairment for unspecified disabilities. On  
9 June 5, 1980, a Notice of Appeal was filed on behalf of the claimant with  
10 the Board of Industrial Insurance Appeals. On June 10, 1980 an  
11 application to reopen for aggravation of conditions was filed with the  
12 Department. On June 20, 1980, a cross-appeal was filed on behalf of  
13 the employer. On July 1, 1980 the Board issued orders granting the  
14 appeal and the cross-appeal. On April 3, 1981 the Board issued an  
15 order dismissing the employer's appeal and on April 7, 1981 the Board  
16 issued an order dismissing the claimant's appeal.

17 On July 30, 1981 the Department issued an order denying the  
18 application to reopen for aggravation of conditions filed on June 10,  
19 1980. On August 7, 1981 a Notice of Appeal was filed with the Board of  
20 Industrial Insurance Appeals on behalf of the claimant. On August 26,  
21 1981 the Board issued an order granting the appeal. On April 21, 1982  
22 a Proposed Decision and Order was issued reopening the claim. On  
23 May 25, 1982 the Board issued a Decision and Order adopting the  
24 Proposed Decision and Order. On June 2, 1982 the Department issued  
25 an order reversing the July 30, 1981 order and reopened the claim for  
26 treatment effective June 4, 1980 and providing other benefits as  
27 required by law.

28 On May 17, 1985 a claim for pension benefits by the deceased worker's  
29 spouse and children was filed with the Department, based on the fact of  
30 the worker's death on May 29, 1984. On July 19, 1985 the Department  
31 issued an order denying second injury fund relief to the employer. On  
32 July 23, 1985 the Department issued an order determining that the  
33 surviving spouse was entitled to a spouse's pension. On September 10,  
34 1985 a letter of protest and request for reconsideration was filed with the  
35 Department on behalf of the employer to the Department orders of July  
36 19, 1985 and July 23, 1985. The February 19, 1986 the Department  
37 issued an order adhering to the provisions of its prior orders and notices  
38 dated July 19, 1985 and July 23, 1985. The February 19, 1986 order  
39 was received by the employer on April 21, 1986. On April 29, 1986, a  
40 Notice of Appeal was filed with the Board on behalf of the employer from  
41 the Department order of February 19, 1986. On May 6, 1986 the Board  
42 issued an order granting the appeal subject to proof of timeliness,  
43 assigned it Docket No. 86 1384 and directed that further proceedings be  
44 held in the matter.

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46 2. On January 23, 1979, while in the course of employment with  
47 Associated Grocers, Inc., Larry Alfano injured his back while attempting

1 to lift a loading platform. As a result of this injury, he required medical  
2 treatment, including a decompressive laminotomy, physical therapy and  
3 medications.

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5 3. At the time of his death on May 29, 1984 Mr. Alfano's lumbosacral  
6 condition proximately caused by his industrial injury was fixed and stable  
7 and in no need of further treatment, and his permanent impairment as a  
8 result of the industrial injury was best described by Category 6 of  
9 permanent dorso-lumbar and lumbo sacral impairments.
- 10 4. At and prior to the time of his death on May 29, 1984 Mr. Alfano suffered  
11 from a psychiatric condition diagnosed as severe depression and  
12 dysthymic disorder, which conditions were proximately caused by his  
13 industrial injury of January 23, 1979.
- 14 5. At the time of Mr. Alfano's death on May 29, 1984 his psychiatric  
15 condition proximately caused by the industrial injury was fixed and  
16 permanent.
- 17 6. On September 21, 1982 Mr. Alfano was diagnosed as suffering from  
18 lung cancer. On May 29, 1984, he died as a result of this cancer, which  
19 was unrelated to his industrial injury of January 23, 1979.
- 20 7. Mr. Alfano was fifty-three years of age at the time of his death, had a  
21 high school G.E.D. and had worked as a truck driver for a single  
22 employer his entire adult working life.
- 23 8. Taking into consideration Mr. Alfano's age, training, education, and work  
24 experience, together with the severe physical and psychiatric residuals  
25 of his industrial injury, Mr. Alfano was permanently unable to be gainfully  
26 employed on a reasonably continuous basis at the time of his death on  
27 May 29, 1984.
- 28 9. Mr. Alfano did not have any preexisting bodily disability from any  
29 pervious injury or disease at the time of his January 23, 1979 industrial  
30 injury.

### 31 **CONCLUSIONS OF LAW**

- 32 1. The self-insured employer's appeal was timely filed and the Board of  
33 Industrial Insurance Appeals has jurisdiction over the parties and subject  
34 matter of this appeal.
- 35 2. Mr. Alfano's death on May 29, 1984, was not caused by the industrial  
36 injury of January 23, 1979, within the meaning and contemplation of  
37 RCW 51.32.050(2).
- 38 3. At the time of his death on May 29, 1984 Mr. Alfano was permanently  
39 and totally disabled within the meaning of RCW 51.32.050(6) and RCW  
40 51.08.160 as a result of his industrial injury on January 23, 1979.
- 41 4. The self-insured employer is not entitled to second injury fund relief  
42 pursuant to RCW 51.16.120.
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1 5. The order of the Department of Labor and Industries dated February 19,  
2 1986, which adhered to the provisions of orders and notices dated July  
3 19, 1985 and July 23, 1985, which determined that the surviving spouse,  
4 Suellen Alfano, was entitled to receive a spouse's pension and denied  
5 the employer second injury fund relief, is correct and should be affirmed.  
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7 It is so ORDERED.

8 Dated this 8th day of January, 1988.

9 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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11  
12 /s/ \_\_\_\_\_  
13 SARA T. HARMON Chairperson  
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16 /s/ \_\_\_\_\_  
17 FRANK E. FENNERTY, JR. Member  
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20 /s/ \_\_\_\_\_  
21 PHILLIP T. BORK Member  
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23 **CONCURRING OPINIONS**

24 In re Ronald E. Cowell, Dec'd, BIIA Dec., 92,207 (1984), is a good example of the maxim  
25 that hard cases make bad law. Indeed, within a month of deciding Cowell, the majority of the Board  
26 at that time found it necessary to distinguish that decision. See In re Mabel Gates, BIIA Dec.,  
27 93,850 (1984). The Cowell majority quite straightforwardly conceded that its interpretation of RCW  
28 51.32.060 was not supported by the specific language of the statute itself. We agree. Rather than  
29 repeating the dissenting and concurring opinions in Cowell and Gates here, we incorporate them  
30 into by this reference.  
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32 Thus, we feel that, while the result reached by the Proposed Decision and Order in the  
33 current appeal was correct, its reliance on Cowell to reach that result was not. Had we not  
34 determined that the preponderance of the evidence supports the conclusion that Mr. Alfano's  
35 psychiatric condition was in fact fixed at the time of his death, we would have been constrained to  
36 reach a different result.  
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39 Dated this 8th day of January, 1988.

40 /s/ \_\_\_\_\_  
41 SARA T. HARMON Chairperson  
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43 /s/ \_\_\_\_\_  
44 PHILLIP T. BORK Member  
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