

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

**IN RE: STEPHEN G. FOSTER (DEC'D) ) DOCKET NO. 22 13711**  
**CLAIM NO. AK-03040 ) DECISION AND ORDER**

In 2009, Stephen Foster injured his back in the course of employment with Schmidt Contractors. The Department of Labor and Industries allowed the claim. The Department then closed the claim by order of January 4, 2011, with a \$9,069.30 award for permanent partial disability. The Department later reopened the claim, and on February 3, 2022, issued an order placing Mr. Foster on an industrial insurance pension. In that order, the Department also ordered Mr. Foster to repay the \$9,069.30 it previously paid him for permanent partial disability. Mr. Foster filed this appeal to dispute the overpayment. Mr. Foster and the Department filed cross-motions for summary judgment, although Mr. Foster died while this appeal was pending. His counsel filed a Notice of Appearance on behalf of his widow, Tandi Brayson-Foster.

After considering the summary judgment motions and argument, our industrial appeals judge affirmed the Department order. Mr. Foster's surviving spouse, Tandi Brayson-Foster, filed a Petition for Review and an Amended Petition for Review. We granted review and by letter we acknowledged that the industrial appeals judge had proceeded as if Ms. Brayson-Foster had been properly substituted as the party in interest for Mr. Foster; but we requested the filing of a formal motion for substitution under CR 25(a) with supporting declarations and/or documentations. We received the CR 25(a) motion with supporting declarations and documentation. We grant Ms. Brayson-Foster's CR 25(a) motion to substitute Tandi Brayson-Foster for Stephen G. Foster, Dec'd, as the party in interest. The February 3, 2022 Department order is **AFFIRMED**. We also emphasize that matters outside the scope of that order, such as selection of pension option, are not presently before the Board.

**DISCUSSION**

**Substitution of Party**

This Board has previously discussed requirements for substitution as a party in interest pursuant to court rule in the case of a party's death in our Significant Decision, *In re William Zygarliski, Dec'd*.<sup>1</sup> The applicable court rule, CR 25(a), is not explicit regarding all requirements but we believe at a minimum requires the filing of a formal motion. A notice of appearance alone is not sufficient. Circumstances, such as the relationship of the substituting party to the deceased and nature of the

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<sup>1</sup> BIIA Dec., 89 1094 (1990).

1 claimed interest, may differ from case to case. In this instance, by letter, we required a motion  
2 accompanied, at a minimum, by: (a) documentation of the marriage; (b) proof of death; and (c) a  
3 declaration or other proof that Ms. Brayson-Foster retains some legitimate interest in pursuing the  
4 appeal. We are satisfied that Ms. Brayson-Foster's subsequent motion and accompanying  
5 documents met these requirements. Tandi Brayson-Foster is substituted for Stephen  
6 G. Foster, Dec'd, as a party in interest in this appeal.  
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## 10 **Summary Judgment**

11 We rely upon the same documents in the record of proceedings as relied upon by the industrial  
12 appeals judge:  
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- 14 • The February 3, 2022 Department order on appeal
- 15 • Jurisdictional History stipulated by the parties
- 16 • Claimant's Motion for Summary Judgment
- 17 • Declaration of Chris Carlisle, with exhibits
- 18 • A copy of the Proposed Decision and Order issued in *Anna Maria A. Silva* filed by the
- 19 claimant
- 20 • Department's Motion for Summary Judgment and Memorandum in Support, with
- 21 attachments
- 22 • Claimant's Response to Department's Motion for Summary Judgment
- 23 • Department's Response to Claimant's Motion for Summary Judgment, with exhibits
- 24 • Transcript of proceeding held February 9, 2023

25 We have also considered the Proposed Decision and Order issued on April 5, 2023;  
26 Tandi Brayson-Foster's Petition for Review and Amended Petition for Review; and Notice of  
27 Appearance/Motion for Tandi Brayson-Foster, with declaration and exhibits.  
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30 After careful consideration of the pleadings and argument, we find there are no disputed  
31 material facts and the Department of Labor and Industries is entitled to judgment, that is affirmance  
32 of the appealed Department order, as a matter of law.<sup>2</sup> We explain below.  
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## 35 **Scope of Review/Pension Option Selection**

36 Ms. Brayson-Foster requests this Board intervene in the matter of a pension death benefit  
37 option selection.<sup>3</sup> However, there is no evidence in the record that the Department has passed on  
38 this issue. The matter is not within the scope of our review authority and the present appeal cannot  
39 be enlarged to encompass the matter.<sup>4</sup>  
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45 <sup>2</sup> CR 56; *In re David Potts*, BIIA Dec., 88 3822 (1989), and cases cited therein.

46 <sup>3</sup> See, RCW 51.32.067.

47 <sup>4</sup> RCW 51.52.060; *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App 977 (1970).

## Mandatory Recovery of Permanent Partial Disability Compensation

The Industrial Insurance Act requires the Department to recover previously paid permanent partial disability awards when an injured worker is placed on the pension rolls due to permanent total disability.<sup>5</sup> Ms. Brayson-Foster argues the Department should not recover all previously paid permanent partial disability awards under the current statute because Mr. Foster's covered injury occurred in 2009, before the statute effective date. A rule of general application is that a claimant's rights under the industrial insurance laws are controlled by the law in force at the time of the claimant's covered injury—referred to as the "*Ashenbrenner*" rule or principle.<sup>6</sup> Ms. Brayson-Foster's argument, however, overlooks our Supreme Court's qualification in *Ashenbrenner*, that this rule or principle applies where there is an absence of legislative intent otherwise. Here, in the current governing statute, the Legislature has made abundantly clear that the statute applies to "all permanent total disability determinations issued on or after July 1, 2011."

If permanent partial disability compensation is followed by permanent total disability compensation, **all** permanent partial disability compensation paid to the worker under the claim or claims for which total permanent disability compensation is awarded **shall be**, at the choosing of the injured worker, either: (a) Deducted from the worker's monthly pension benefits until the total award or awards paid are recovered; or (b) deducted from the pension reserve of such injured worker and his or her monthly compensation payments shall be reduced accordingly. Any interest paid on any permanent partial disability compensation may not be deducted from the pension benefits or pension reserve. **The provisions of this subsection apply to all permanent total disability determinations issued on or after July 1, 2011.**<sup>7</sup>

(Emphasis added.)

We reject Ms. Brayson-Foster's argument. The appealed February 3, 2022 Department order that requires recovery of previously paid permanent partial disability awards upon pensioning is correct because the permanent total disability determination was made after July 1, 2011.

### DECISION

In Docket No. 22 13711, the claimant, Stephen G. Foster, filed an appeal with the Board of Industrial Insurance Appeals on March 31, 2022, from an order of the Department of Labor and Industries dated February 3, 2022. Upon motion, Tandi Brayson-Foster is substituted for Mr. Foster as a party in interest in this appeal pursuant to CR 25(a). In the February 3, 2022 order the Department stated time-loss compensation benefits would end as paid through March 15, 2022, and

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<sup>5</sup> RCW 51.32.080(4).

<sup>6</sup> *Ashenbrenner v. Dep't of Labor & Indus.*, 62 Wn.2d 22 (1963).

<sup>7</sup> RCW 51.32.080(4).

determined Mr. Foster should be placed on the pension roles as a totally and permanently disabled worker effective March 16, 2022. The Department order also stated \$9,069.30, which was previously paid for permanent partial disability, must be recovered by either deduction from future benefits until fully recovered or deducted from the pension reserve, which would permanently reduce the monthly pension benefit. This order is correct and is affirmed.

### **FINDINGS OF FACT**

1. On July 11, 2022, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. The Department previously provided the injured worker, Stephen Foster, an award for permanent partial disability equal to \$9,069.30.
3. On February 3, 2022, the Department issued an order in which it declared Mr. Foster permanently totally disabled and placed him on an industrial insurance pension effective March 16, 2022, with time-loss compensation to be terminated as paid through March 15, 2022. The Department also declared that because it previously paid \$9,069.30 to Mr. Foster for permanent partial disability, and he was later permanently totally disabled, the Department must recover the \$9,069.30. In that order, the Department did not determine whether Mr. Foster selected Option I, Option II, or Option III pension payments under RCW 51.32.067.
4. Tandi Brayson-Foster and Stephen Foster were married at the time of Mr. Foster's industrial injury of August 19, 2009, and they remained so married until Mr. Foster's death on October 10, 2022.
5. The pleadings and evidence establish that there is no genuine issue as to any material fact.

### **CONCLUSIONS OF LAW**

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. Based upon the stipulated Jurisdictional History, within the meaning of RCW 51.52.060, the matter of death benefit option selection is not within the scope of the Board's review authority in the present appeal.
3. Tandi Brayson-Foster qualifies to substitute as the party in interest in lieu of Stephen Foster, Dec'd, under CR 25(a) and is substituted.
4. The provisions of RCW 51.32.080(4), which require the Department of Labor and Industries to recover previously paid permanent partial disability amounts when an injured worker is determined to be permanently totally disabled, applies in this claim.
5. The question of whether Mr. Foster's pension should be administered under Option 1, Option II, or Option III under RCW 51.32.067 is not within

1 this Board's scope of review in this appeal under *Lenk v. Department of*  
2 *Labor & Indus.*, 3 Wn. App 977 (1970).

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4 6. The Department of Labor and Industries' Motion for Summary Judgment  
5 is granted as material facts are not in dispute and the Department is as a  
6 matter of law entitled to a decision in its favor as contemplated by CR 56.

7 7. The Department order dated February 3, 2022, is affirmed.

8 Dated: September 8, 2023.  
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10 BOARD OF INDUSTRIAL INSURANCE APPEALS

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12 HOLLY A. KESSLER, Chairperson

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14 JACK S. ENG, Member  
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**Addendum to Decision and Order  
In re Stephen G. Foster (Dec'd)  
Docket No. 22 13711  
Claim No. AK-03040**

**Appearances**

Claimant, Stephen G. Foster (Dec'd) and Substituting Beneficiary, Tandi Brayson-Foster, by Carlisle + Byers, per Christopher S. Carlisle

Employer, Schmidt Contractors, (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Kevin C. Elliott

**Petition for Review**

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. Tandi Brayson-Foster filed a timely Petition for Review of a Proposed Decision and Order issued on April 5, 2023, in which the industrial appeals judge affirmed the Department order dated February 3, 2022.

**Evidentiary and Procedural Rulings**

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