

## 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: Consider the effect of 1999 legislative changes to RCW 51.32.040 that make accrued benefits payable to the estate and *Clingan v. Department of Labor & Indus.*, 71 Wn. App. 590 (1993) that addresses court authority to issue nunc pro tunc orders. The Board's decision was appealed to superior court under Benton County Cause No. 86-2-00646-7.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON

1 IN RE: JOHANNA J. HOERNER, DEC'D ) DOCKET NO. 70,575  
2 )  
3 CLAIM NO. 7006840 ) DECISION AND ORDER  
4

5 APPEARANCES:

6  
7 Petitioner, Ronald G. Hoerner, representative of estate of  
8 Johanna J. Hoerner, Dec'd., by  
9 Raekes, Rettig, Osborne, Forgette and O'Donnell, per  
10 Philip M. Raekes and James Hurson  
11

12 Employer, Atomic Energy Commission, by  
13 Clyde T. Fitz  
14

15 Department of Labor and Industries, by  
16 The Attorney General, per  
17 Lesley A. Allan and Craig McDonald, Assistants  
18

19 This is an appeal filed by Ronald G. Hoerner, representative of the estate of Johanna J.  
20 Hoerner, on May 15, 1985 from an order of the Department of Labor and Industries dated April 15,  
21 1985. That order set aside and held for naught an order of February 28, 1984 which had denied  
22 widow's benefits to Johanna Hoerner; and laso, because she died on September 14, 1984, prior to the  
23 issuance of a Board Decision and Order allowing her widow's benefits, and at her death was single  
24 with no dependents, the April 15, 1985 order closed the claim and no money was disbursed.  
25

26 **AFFIRMED.**  
27  
28

29 **DECISION**  
30

31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
32 and decision on a timely Petition for Review filed by the Department of Labor and Industries to a  
33 Proposed Decision and Order issued on March 14, 1986. In the Proosed Decision and Order, the  
34 order of the Department dated April 15, 1985 was reversed and the claim remanded to the  
35 Department with direction to pay to the estate of Johanna J. Hoerner those benefits which would have  
36 been paid to her between December 21, 1983 and September 14, 1984, the date of her death.  
37

38 The facts upon which this appeal was predicated were presented by the following stipulation:  
39

- 40
- 41 1. John Hoerner sustained an industrial injury on April 29, 1959.
  - 42
  - 43 2. During his lifetime, Mr. Hoerner received pension benefits as a
  - 44 permanently and totally disabled worker and on the date of his death was
  - 45 totally and permanently disabled as a result of his industrial injury.
  - 46
  - 47

- 1 3. Mr. Hoerner died on December 21, 1983 as a result of suicide. At the time  
2 of his death he was survived by his spouse, Johanna J. Hoerner, who  
3 timely filed an application for widow's benefits.  
4
- 5 4. By order of February 28, 1984 the Department of Labor and Industries  
6 (the "Department") denied widow's benefits to Mrs. Hoerner pursuant to  
7 RCW 51.32.020.  
8
- 9 5. Mrs. Hoerner timely filed an appeal with the Board of Industrial Insurance  
10 Appeals (the "Board") by notice of appeal dated March 16, 1984.  
11
- 12 6. The case was tried on the basis of stipulated facts and briefs submitted by  
13 both parties. Industrial Appeals Judge Steven G. Erwood issued a  
14 Proposed Decision and Order dated July 20, 1984. This proposed order  
15 concluded:  
16  
17 "The order of the Department of Labor and Industries dated  
18 February 28, 1984 denying benefits to the widow-petitioner  
19 pursuant to RCW 51.32.020 is incorrect and should be  
20 reversed and the claim remanded to the Department of  
21 Labor and Industries with instructions to award Johanna  
22 Hoerner a widow's pension." Proposed Decision and Order  
23 at page 4-5.  
24
- 25 7. After obtaining a ten day extension to August 20, 1984, the Department  
26 timely filed a petition for review of the proposed order issued by Judge  
27 Erwood. By order of September 7, 1984, the Board granted the  
28 Department's petition for review.  
29
- 30 8. On September 14, 1984, Mrs. Hoerner died, leaving no dependents.  
31
- 32 9. On February 15, 1985, the Board issued a final Decision and Order  
33 adopting the Findings, Conclusions, and Order of the Proposed Decision  
34 and Order of July 20, 1984.  
35
- 36 10. After further consideration, the Department issued an order on April 15,  
37 1985, which stated, in part:  
38  
39 "Whereas Johanna Hoerner was a single person at the time  
40 of death and left no dependents eligible to receive benefits  
41 pursuant to the provisions of RCW 51.32.040.  
42 It is therefore ORDERED that the claim be closed as paid."  
43
- 44 11. On May 15, 1985 a representative of Mrs. Hoerner's estate timely filed an  
45 appeal with this Board. The representative seeks payment of widow's  
46 benefits between the date Mr. Hoerner died, December 21, 1983, and the  
47

1 date of Mrs. Hoerner's death, September 14, 1984, to be paid into her  
2 estate.  
3

4 The Department order of April 15, 1985 closed this claim pursuant to RCW 51.32.040, which  
5 provides, in part:  
6

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.  
34

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.  
37

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  
40  
41  
42  
43  
44  
45  
46  
47

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.  
4

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

19 Mrs. Hoerner's estate distinguishes the Cassel claim from its own by arguing that, in this case,  
20 all of the evidence had been submitted to the Board at the time of Johanna Hoerner's death and, in  
21 fact, a Proposed Decision and Order had been entered before the date of death. Thus, it argues, this  
22 Board had the power to enter an order nunc pro tunc since the case was "ripe for judgment" when  
23 Mrs. Hoerner died.  
24

25 While it may be that, given that set of circumstances, a Superior Court could enter an order  
26 nunc pro tunc in order to equitably avoid abatement of Mrs. Hoerner's claim for widow's benefits, the  
27 question before us concerns the authority of this Board to enter such an order.  
28  
29

30 An administrative tribunal possesses no inherent powers and it may exercise only those  
31 powers granted to it by the document which creates it. Tacoma v. Civil Service Board of Tacoma, 6  
32 Wn. App. 600, 494 P.2d 1380 (1972); State v. Higher Education Personnel Board, 16 Wn. App. 642,  
33 558 P.2d 1364 (1976). Neither the statute nor the administrative code which set forth the duties and  
34 powers of this Board contain any provision authorizing the entry of an order nunc pro tunc.  
35  
36

37 To the extent that the statutes and rules regarding procedures in Superior Court are followed  
38 in proceedings before this Board, this Board has the same powers as a Superior Court. WAC  
39 263-12-125. However, the authority to enter an order nunc pro tunc in Superior Court in order to avoid  
40  
41  
42  
43  
44  
45  
46  
47

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.  
3  
4 No statute or rule can be found which gives the Board the power to enter an order nunc pro tunc.  
5

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.  
44

- 45  
46 2. On April 29, 1959, the claimant, John Hoerner, injured himself while in the  
47 course of his employment with George Grant, Inc.

