NO. 870025-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Estate of Olabamiji M. Idowu (Dec'd),

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

BRIEF OF APPELLANT

Spencer D. Parr, Attorney for Appellant:
Estate of Olabamiji M. Idowu (Dec'd),
by and through Marta Idowu, Estate
Representative.

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I. INTRODUCTION

Comes now, Marta Idowu as named representative of the estate of Olabamiji M. Idowu, Jr. (Dec'd), her son, and respectfully requests reversal of Superior Court's pre-trial, interlocutory order dated April 2, 2024 (see Index Item 3). Said order granted partial summary judgment to the Department of Labor & Industries on the question of whether Mr. Idowu suffered permanent partial disability ("PPD") to his low back.

Superior Court's April 2, 2024 order failed to review the evidence contained in the Certified Appeals Board Record ("CABR") from the underlying Board of Industrial Insurance Appeals ("Board") bench trial in the light most favorable to the Idowu estate. It failed to take into full and appropriate consideration the medical expert testimony presented by the Orthopedic Surgeon who testified on behalf of the Appellant estate. It imposed an incorrect and fundamentally unworkable standard of law that requires an impossibly-high, likely impossible burden of proof for injured workers in most posthumous PPD cases. In these ways, it denied the Idowu estate its constitutional right to a jury trial concerning all issues placed into legitimate contest within a Board of Industrial Insurance Appeals record. The Court of Appeals should reverse and remand with a published decision that reminds posterity that only "bare minimum" evidence is needed to defeat a motion for summary judgment.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1. - Failure To View Evidence in Proper Light

Superior Court failed to review the evidence in the Board's trial record in the light most favorable to the Idowu estate when granting the Department's summary judgment request in regard to his low back condition. Specifically, the Idowu estate presented the expert testimony of an Orthopedic Surgeon who testified to a low back permanent partial disability rated at Category 2 in severity pursuant to WAC 296-20-280.

Normally, the presentation of such expert opinions on an ultimate issue automatically precludes the award of summary judgment to the opposing party. *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)). However, here the Superior Court inexplicably failed to follow that normal rule, resulting in nothing less than the denial of a highly-venerated and constitutional jury trial right.

Meanwhile, the grant of summary judgment may be upheld only if "there is no genuine issue as to any material fact and…the moving party is entitled to a judgment as a matter of law." CR 56(c). Here, as the non-moving party, the Idowu estate was entitled to have both the facts and all

reasonable inferences drawn therefrom determined in its favor by Superior Court. *O'Keefe v. Dep't of Labor & Indus.*, 126 Wn.App. 760, 765, 109 P.3d 848 (2005). Superior Court committed reversible error by failing to evaluate the available evidence, including expert medical testimony directly pertaining to the ultimate conclusion, in this required fashion.

Assignment of Error No. 2. – **Failure to Apply a Workable Rule of Law**

Superior Court failed to apply a proper and workable rule of law for determining an injured worker's posthumous permanent partial disability where there is no evidence presented that any additional treatment has been authorized or is even under genuine contemplation for authorization at the time of the injured worker's death.

Here, Mr. Idowu's trial evidence showed that he had already suffered from ongoing low back difficulties for a period of three years prior to his untimely death (CABR 206). It showed that his low back symptoms were not likely to change without additional authorization of medical treatment (CABR 223). It showed that his symptoms were sufficiently chronic that they were not likely to change even with treatment (CABR 218-219 and 222-223). It showed that in the opinion of his estate's medical expert, a well-qualified and properly informed Orthopedic Surgeon, a Category 2 permanent partial disability to Mr. Idowu's low back resulted (CABR 212). Meanwhile, the Department presented no evidence that it had

recently or would ever again authorize any further low back treatments to Mr. Idowu, so Superior Court's determination that there is no bare minimum of evidence necessary to reach a jury trial is plainly incorrect. This Court of Appeals should hold that Mr. Idowu's estate was not required to prove what condition his low back would have obtained had he been authorized additional, hypothetical and unspecified medical treatments that weren't even under consideration for authorization by the Department.

The Superior Court's grant of partial summary judgement adopted a legal rule framework that is unworkable, nowhere prescribed or supported by statute or binding case law, and should be swiftly rejected. It is unthinkable that an injured worker's burden of proof should make them responsible to speculate as to what treatment the Department of Labor & Industries might ultimately authorize and then state the probable results of such hypothetically "available" treatment in terms of a precise permanent partial disability rating. Imposing this legal standard before injured workers can obtain statutorily-authorized posthumous PPD benefits is not appropriate and not in conformance with the remedial purposes of the Industrial Insurance Act. Thus, Superior Court's grant of partial summary judgment was plainly incorrect and constitutes reversible error.

Article 1, section 21 of our Washington Constitution guarantees litigants the right to have a jury determine all questions of disputed material

facts. *Haley v. Amazon.com Servs.*, LLC, 25 Wn. App. 2d 2017, 218, 522 P.3d 80 (2022). Whether Mr. Idowu suffered permanent partial disability related to his industrial low back injury was a disputed question of material fact in the Board's trial record. Because Superior Court's grant of partial summary judgment in its order of April 2, 2024 abandoned the rule of construing all facts and reasonable inferences in favor of the non-moving party, ignored qualified and informed expert medical testimony in favor of the non-moving party, and set the burden of proof impermissibly high, that order must now be reversed and this case remanded for a new jury trial.

III. STATEMENT OF THE ISSUES

1. **Was Summary Judgment Properly Granted?**

   Answer: No, a claim for PPD need only be supported by expert medical testimony having a rational and reasonably-informed basis. When reviewing the Idowu estate's evidence in the light most favorable to it, a *prima facie* case was presented in the Board of Industrial Insurance Appeals' trial record below, so CR 56 was misapplied.

2. **Must A Deceased Worker Prove The Effects of Medical Care Never Authorized Nor Even Earnestly Contemplated For Authorization By The Department?**

Answer: No, to force an injured worker to produce such evidence about only hypothetically-available medical treatments would elevate the worker's burden of proof beyond what is either practical or tolerable, given the remedial purposes of the Industrial Insurance Act and the established rule that the evidence upon which an injured worker must rely to prove their case must not be excessively speculative.

IV. STATEMENT OF THE CASE

A. Jurisdictional/Procedural History

The following procedural history is not in dispute: Mr. Olabamiji Idowu was industrially injured on November 28, 2018 (CABR 7). He died three years later, on November 21, 2021, after being stabbed to death in a racially-motivated attack by a previously-unknown assailant (CABR 124-125). His death is therefore unrelated to his industrial injury.

Mr. Idowu's untimely death raised the possibility that his estate would be entitled to a posthumous Permanent Partial Disability ("PPD") in his Labor & Industries ("L&I") claim pursuant to RCW 51.32.040(2) and the rule of *Powell v. Dep't of Labor & Indus.*, 79 Wn.2d 378, 485 P.2d 990 (1971) (expressly rejecting all prior precedents to the contrary and

holding that posthumous PPD is available even for injured workers whose degree of impairment has not been adjudicated on or before the date of their death). However, upon consideration of that claim, the Department of Labor & Industries ("DLI") issued a claim closure order dated March 24, 2022 (see Index Item 1) which denied Mr. Idowu's estate any form of PPD award. The estate appealed that order to the Board of Industrial Insurance Appeals ("Board") and a bench trial was thereupon held.

In the Board's bench trial proceedings, Mr. Idowu's estate claimed posthumous PPD from both his primary physical injury to his low back and from his consequential mental health conditions arising therefrom. The Board's Industrial Appeals Judge found that DLI's closing order of March 24, 2022 should be reversed and remanded for further consideration given that the Department's closing order presumed no PPD was available due to Mr. Idowu not yet being at maximum medical improvement for all claim-related conditions. Specifically, the Board's trial judge determined that in contrast to the findings in the Department's closing order, "medical fixity is not a prerequisite for a finding of permanent partial or total disability" as of the time of an injured worker's death (CABR 29-30).

Unhappy with the Industrial Appeals Judge's incremental approach, Mr. Idowu's undersigned attorney filed a *Petition for Review* ("PFR") to the full Board, arguing among other things that the Board's record was complete and all issues had been joined, so remand to DLI was

inappropriate because the Board is required to make its own findings pursuant to RCW 51.52.106 under those circumstances (CABR 11).

The full Board granted review and reversed its Industrial Appeals Judge, holding that Mr. Idowu's estate had failed to present a *prima facie* case in support of any posthumous PPD entitlement (see Index Item 2). The Board's reasoning was that Mr. Idowu's estate had failed to prove what his PPD ratings would be if he had been authorized all conceivable medical treatments that could have theoretically been provided to him were he not murdered in the interim.

The Idowu estate appealed the full Board's holding to King County Superior Court, taking the position that the Board applied an unfair and improper legal standard, especially where under the facts of Mr. Idowu's claim, the Department of Labor & Industries had been withholding additional medical benefits to Mr. Idowu prior to his untimely demise. Idowu's estate also contended, as the Board's original Industrial Appeals Judge had found, that a worker is at maximum medical improvement as a matter of law as soon as they are deceased, so the Idowu estate should not have been put to the burden of proving the results of hypothetic treatment never earnestly considered for authorization. Mr. Idowu's estate further contended that an injured worker cannot be deprived of statutory posthumous benefits where the Department has withheld authorization for additional curative medical treatments in the period prior to the injured worker's death, as well as where the Department has made no evidentiary

showing that further and specific medical benefits were even in the process of earnest consideration for being granted.

The Department disagreed with the Idowu estate's contentions and filed a motion for summary judgment ("MSJ"), arguing that the Superior Court should adopt the Board's ultimate conclusion that no *prima facie* case for posthumous benefits had been presented in the Board's bench trial record. In the Department's view, this precluded allowing the Idowu estate to proceed to the requested jury trial.

Superior Court granted DLI's MSJ in-part, but it also denied it in-part, ultimately concluding that the estate's evidence was legally-sufficient only as to its claim for Mr. Idowu's *consequential* mental health impairments, but not as to its claim for his *primary* (inciting) industrial injury to his low back (See Index Item 3). The estate's procedurally whittled-down claim was then allowed to proceed to trial. Thereupon, a King County jury found in favor of the Idowu estate.

The jury rejected the Board's determinations that Mr. Idowu's causally-related mental health condition would have been rated as a Category 3 mental health impairment as of the time of his death, as well as that Mr. Idowu's mental health condition was likely to improve with necessary and proper mental health treatment. (see Index Item 4). Undersigned counsel had contended in closing arguments that the Board's finding of likely improvement could not be sustained because there was no proof any further treatments were going to be timely provided. It is

unknown if this argument ultimately persuaded the jury to make the findings as it did.

The resulting, jointly-stipulated Superior Court Judgment reversed and remanded the Department's March 24, 2022 closing order and the Board's September 14, 2023 Decision and Order to the Department with directions to award Mr. Idowu's estate a Category 4 mental health PPD award. The jointly-stipulated judgment also provided that Mr. Idowu's estate could further appeal the issue of whether "Plaintiff presented a prima facie case for low back permanent partial disability and should have been allowed to present that issue" to the jury. This Court of Appeals action then timely followed entry of Superior Court's stipulated judgment.

B. Statement of Facts / Pertinent Testimony

Thomas Degan, MD, a Board-Certified Orthopedic Surgeon with a Certificate of Added Qualifications in Orthopedic Sports Medicine (CABR 196-99), performed a record review of Mr. Idowu's L&I records and testified before the Board of Industrial Insurance Appeals on behalf of Mr. Idowu's estate (CABR 202-203).

Dr. Degan testified that Mr. Idowu was "injured while working as an educator, a para-educator, on November 28, 2018. He was assaulted at

that time by a coworker and struck multiple times in the area of the mid to lower back." (CABR 204)[1].

Dr. Degan testified to his opinion of Mr. Idowu's causally-related diagnoses as follows: "I felt he had lumbar – lumbar contusions and soft tissue injury strain to the muscles, which were related, more probably than not to the injury of record." (CABR 207)[2].

Dr. Degan was asked during his testimony to consider the three-year, ongoing length of Mr. Idowu's open L&I claim from the date of industrial injury until the date of Mr. Idowu's death, whereupon Dr. Degan testified: "His symptomology from the back injury had not completely resolved throughout the period I saw." (CABR 206)[3]. Dr. Degan followed this testimony with an explanation that, "Certainly most soft tissue injuries resolve within a couple of months. However, there are a subset of people in which…do, in fact, have ongoing symptoms….So I think that would be – more likely be the situation here." (CABR 208)[4].

When directly asked "whether or not there was, more likely than not, some degree of permanent partial disability that Mr. Idowu *would have* suffered as a result of his industrial injury?", Dr. Degan responded, "I did.

[1] Medical Expert Testimony To Establish The Industrial Injury History.
[2] Medical Expert Testimony To Itemize Causally-Related Low Back Injury Diagnoses.
[3] Medical Expert Testimony To Show That Ongoing Low Back Symptomology Persisted.
[4] Medical Expert Testimony That Low Back Symptomology Never Resolved.

I felt he would probably best fit into Category 2 of lumbosacral impairments." (CABR 210)[5]. This is a reference to the Washington Administrative Code ("WAC") section by which injured workers with low back injuries may contend for permanent partial disability awards based upon the standardized criteria set forth therein[6]. See WAC 296-20-280.

Dr. Degan then went on to explain his rational supporting his specific Category 2, permanent partial disability rating: "I thought he best fit Category 2 in that he had no significant x-ray findings, no significant motor loss. I felt that he had mild to intermittent objective findings in that he had consistent tenderness in the lower lumbar area from examiner to examiner, and from time to time. Over a period of time, I think – certainly I felt that the – a – it can be characterized as an objective finding….and because he did not have the mild, continuous, intermittent or objective findings with reflex or sensory losses that would typically be noted as Category 3, I felt he best fit Category 2." (CABR 212)[7]. Dr. Degan also testified there to exist objective evidence over time in terms of intermittent muscle tightness in Mr. Idowu's lumbar paraspinal muscles, continued

[5] Medical Expert Testimony That Permanent Low Back Impairment More Likely Than Not Existed.
[6] WAC 296-20-280.
[7] Medical Expert Testimony Explaining the Rational for Finding a Specific PPD.

tenderness, and muscle spasms noted over time with different examiners. (CABR 217-218).

When Dr. Degan was asked what would happen if Mr. Idowu were authorized no additional treatment, Dr. Degan responded, "Well, typically, what I have stated in the past with similar soft tissue injury cases is, is if he is – at this point treatment is going to be, you know, cut off, no further treatment is going to be authorized, then I think, you know, ***what you have is what you have***. (emphasis added). I can't say more probably than not that it would resolve. So I think that ***the impairment at the time is the impairment at the time, and it would probably be ongoing***….[and also "yes," this opinion is being expressed on a more probable than not basis]." (emphasis added) (CABR 223)[8].

When the Department's counsel, during cross-examination, asked Dr. Degan: "Do you feel that any further treatment could resolve any of the documented symptoms that led you to your Category 2 impairment rating, perhaps resulting in a lower rating if that treatment had been available?" Dr. Degan responded, "It's possible that – it's possible that it would have allowed the symptoms of tenderness to resolve. It's difficult to say on a more probable than not basis in that he had the symptoms for two to three

[8] Medical Expert Testimony That PPD Would Exist Absent Additional Treatment.

years. And oftentimes if that's the case, they persist for a number of years, possibly on an ongoing basis…So, I can't say, you know, more probably than not, one way or the other,…it would have cured it. More probably than not it wouldn't have cured it. Certainly it was an option." (CABR 218-219)[9].

On re-direct exam, Dr. Degan was specifically asked to address what would be the likely outcome if the Department failed to provide any "additional treatment modalities to treat this thing that's been going on…[and]…are you able to say that he would likely just have his symptoms resolve?" (CABR 222-223). Dr. Degan's response was, "Well, typically, what I have stated in the past with similar soft tissue injury cases is,…if…at this point treatment is going to be, you know, cut off, no further treatment is going to be authorized, then I think, you know, ***what you have is what you have***….I can't say more probably than not that it would resolve. So ***I think that the impairment at the time is the impairment at the time, and it would probably be ongoing.***" (CABR 223) (emphasis added)[10]. Dr. Degan also confirmed in his testimony that based upon his review of the available

[9] Medical Expert Testimony That Additional Treatment Would Only "Possibly" Help But Not Likely Be Curative or Result in Material Change in Mr. Idowu's Case.
[10] Medical Expert Testified That Without Additional Treatment, The Impairment Would Simply Continue.

records, he didn't "see any evidence that further treatment was authorized for the claimant." (CABR 222).

During the Board's bench trial, DLI never presented any evidence that it had made any recent authorizations for low back treatments for Mr. Idowu in the months immediately prior to his death. Similarly, DLI never presented any evidence it even considered authorizing any diagnostic or medical care for Mr. Idowu's industrially-related low back condition during the approximately one-year-long period preceding Mr. Idowu's death. The Department presented no evidence it was planning earnestly to provide any further medical treatment to Mr. Idowu whatsoever. Indeed, even Oscar Romero, MD (Psychiatrist), who testified before the Board at the Department's request, indicated that there was no information in the Idowu L&I files he reviewed to indicate to him that Mr. Idowu was going to be authorized any further treatment to improve his ongoing low back pain (CABR 295). Thus, all witness who were asked testified that no further treatment authorizations were in the works for at least a period of months immediately preceding Mr. Idowu's death, and the Department failed to submit any evidence to the contrary to the Board's trial record.

Meanwhile, our Superior Court jury trial conclusively established that Mr. Idowu's ***consequential*** mental health condition was "severe" (a 4 on a scale of 1-5 under WAC 296-20-340) at the time of his death and that

mental health condition resulted in a posthumous permanent partial disability at Category 4 in the applicable listing of severity criteria.

V. ARGUMENT

A. The Liberal Construction Doctrine Applies:

Title 51 RCW, was written to provide swift and certain relief to injured workers. *Dennis v. Department of Labor & Industries*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001) (emphasis added). The "overarching objective" of the Act is to reduce to a minimum "the suffering and economic loss arising from injuries and/or death occurring in the course of employment." *Cockle,* 142 Wn.2d at 822 (quoting RCW 51.12.010)(emphasis added). The Act is remedial in nature and is therefore to be construed liberally in order to achieve its purpose. RCW 51.12.010; *Sacred Heart Med. Ctr. V. Carrado*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); *Street v. Weyerhaeuser*, 189 Wn.2d 187, 195, 399 P.3d 1156 (2017). The Act is "grounded in such humanitarian impulse" (rephrased for grammatical conformity) as to allow findings "included within the reason, although outside the letter, of the statute." *Ross v. Erickson Const. Co.*, 89 Wn. 634, 639-641, 155 P. 153 (1916) (consequences of medical malpractice are covered as consequential injuries under the IIA). When interpreting the

Act, all doubts regarding the law are to be resolved in favor of the injured worker. *Dennis*, 109 Wn.2d at 470; *Sacred Heart*, 92 Wn.2d at 635; *Cockle*, 142 Wn.2d at 811.

With this liberal remediation principle in mind, both the legislature and the courts have traditionally expanded, not restricted or prohibited, coverage under the IIA. *Street*, 189 Wn.2d at 195. Accordingly, the Superior Court's partial grant of summary judgment against an injured worker who has supplied qualified and non-speculative medical expert testimony in favor of an entitlement to the Act's statutorily-prescribed benefits is not a correct outcome in this case and should be reversed.

B. The Proper CR 56 Standard Must Apply:

"The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court." *Romo v. Dep't of Labor & Indus.*, 92 Wn.App. 348, 353, 962 P.2d 844 (1998); *Herron v. Tribune Pub'g Co.*, 108 Wn.2d 162, 169, 736 P.2d 249 (1987). Summary judgment may then be upheld only if "there is no genuine issue as to any material fact and…the moving party is entitled to a judgment as a matter of law." CR 56(c). In conducting a de novo review, the facts and reasonable inferences available from them are to be considered in the light most favorable to the non-moving party. *O'Keefe v. Dep't of*

Labor & Indus., 126 Wn.App. 760, 765, 109 P.3d 848 (2005). The estate of Olabamiji Idowu here is the non-moving party, so given that it presented a fully-informed, expert opinion on the ultimate question from Dr. Degan, Superior Court's grant of partial summary judgment should be swiftly reversed.

When properly drawing all appropriate inferences from Dr. Degan's testimony, it is clear that the Idowu estate's medical expert demonstrated appropriate knowledge of the pertinent case facts based upon a record review covering the entire three years Mr. Idowu had an open L&I claim prior to his untimely death (CABR 202-203). Dr. Degan knew and testified to the specific mechanism of Mr. Idowu's industrial injury involving a traumatic assault to Mr. Idowu's low back (CABR 204). Dr. Degan's testimony provided that Mr. Idowu suffered contusions and soft tissue damages and muscle strains from that industrial injury (CABR 207), the symptoms of which ultimately became persistent and chronic and failed to resolve over an extended period of three years (CABR 206). Dr. Degan also testified that such a situation where an industrial injury results in a chronic and symptomatic condition can and does occur (CABR 208). This testimony gives credence, conclusive in this summary judgment context, to the likelihood that this is exactly what occurred in Mr. Idowu's case.

The result in Mr. Idowu's case is that a reasonable jury may find him to have suffered a chronic, ongoing and unresolved industrial low back condition as of when he died. Furthermore, according to Dr. Degan's testimony and all reasonable inference drawn therefrom, a reasonable jury may find that Mr. Idowu's industrial accident resulted in a Category 2 permanent partial disability per WAC 296-20-280 (CABR 210-212).

Dr. Degan's specific expert testimony directly upon the ultimate question, by itself, here presented a *prima facie* case of posthumous PPD entitlement which should have prevented Superior Court's grant of partial summary judgment to the Department. *Eriks v. Denver*, 118 Wn.2d 451, 457, 824 P.2d 1207 (1992) (citing *Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 352, 588 P.2d 1346 (1979)). Drawing all other facts and inferences in the Idowu estate's favor, Superior Court plainly should have allowed the estate to present Mr. Idowu's low back PPD case to the jury.

But Dr. Degan's testimony also went further than necessary and made the estate's posthumous PPD entitlement case even more persuasive. When properly evaluating Dr. Degan's testimony as a qualified and well-informed Orthopedic Surgeon in the context of the Department's summary judgment motion, Dr. Degan's testimony provides that, on a more-probable-than-not basis, there was no treatment available that would have likely cured Mr. Idowu of his low back impairment, nor likely changed his ongoing and

chronic impairment to something materially different than it was at the time of his death (CABR218-219). The mere "possibility" of additional treatment options in no way proved that any specific treatment would also "likely" be provided and yield material improvement in Mr. Idowu's nagging, chronic low back condition. Yet, without any additional care authorized by the Department, which the Department never proved it was even considering (earnestly or not), Dr. Degan's testimony makes clear that the severity of Mr. Idowu's low back condition had no real chance to improve from a Category 2 rating of severity (CABR 222-223). Thus, in the words of Dr. Degan, ***what you have is what you have***….and the Category 2 impairment…***would probably be ongoing.***" (CABR 223).

Mr. Idowu's estate presented at least a "bare-minimum," meaning "*prima facie"* case of posthumous PPD entitlement via the expert medical testimony Thomas Degan, MD provided. But, a reasonable inference also exists that it would be rare and anomalous for there to exist a severe consequential mental health PPD, which here our King County jury did find, without there also being any enduring physical injury to incite such a recalcitrant mental health anguish as our jury has established. So again, when drawing all reasonable inferences from the available trial record, Superior Court's grant of partial summary judgment to the Department was

plainly gratuitous and improper and must now be reversed in favor of allowing a rightful, constitutionally-protected jury trial.

C. Speculative Testimony Is To Be Precluded:

It has long been held that an injured worker cannot satisfy their burden of proof in an L&I claim by presenting speculative and otherwise unfounded or improperly-founded expert testimony. *Parr v. Dep't of Labor & Indus.*, 46 Wn.2d 144, 278 P.2d 666 (1955); *Sayler* v. Dep't of Labor & Indus., 69 Wn.2d 893, 421 P.2d 362 (1966). In all fairness to the preservation of this principled rule (that almost uniformly works against the claims of injured workers), this Court of Appeals should now hold that the same principles pertain when the Department, Board or Superior Courts set the burden of proof that may be expected of beneficiaries claiming posthumous PPD awards in Industrial Insurance Act matters. Here, because there is no evidentiary basis within the Board's trial record to support an inference that the Department was engaged in any process of authorizing Mr. Idowu further diagnostic and medical treatment benefits for his low back condition, his estate cannot be forced to speculate as to what treatment benefits may have been authorized in the future and what the results of those hypothetical authorizations would have been. Thus, it was error here that Superior Court placed such an excessive burden on Mr. Idowu's estate in denying the estate appropriate, constitutionally-protected jury trial access.

D. Attorney Fees Should Be Reserved:

The Idowu estate requests an award of reasonable attorney's fees and costs should it now make a further recovery as a result of conducting this appeal. RCW 51.52.130(1) provides:

> "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary, or in cases where a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

Thus, under RCW 51.52.130(1) and RAP 18.1(b), any reverse and remand determination by this Court of Appeals should contain a statement that further financial recovery by the Idowu estate shall therefore result in an appropriate award of attorney fees and costs fixed by the Superior Court.

VI. CONCLUSION

Olabamiji Idowu's estate clearly presented a prima facie case for posthumous low back PPD entitlement in the bench trial record preserved at the Board. On de novo appeal to Superior Court, he was therefore entitled to present his case for low back PPD to the jury. The portion of the jury trial that was allowed to proceed is also instructive in that it likely shows that denial of a jury trial right with respect to Mr. Idowu's low back

condition was improper. Superior Court's gratuitous grant of partial summary judgment to the Department must now be reversed in favor of conducting a new jury trial with respect to Mr. Idowu's industrially-related, low back condition. Remand for that purpose should now be ordered.

If such a trial is ordered and Mr. Idowu's estate recovers further benefits, the estate should then be found entitled to entry of judgment for the reasonable attorney fees and expenses incurred in this present appeal.

CERTIFICATION OF COMPLIANCE:

Pursuant to RAP 18.17, the number of countable words in this document is 5081 as determined by word processing software.

RESPECTFULLY SUBMITTED this 9th day of December, 2024.

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DEPARTMENT OF LABOR AND INDUSTRIES
PENSION ADJUDICATOR SECTION
PO BOX 44281
OLYMPIA, WA 98504-4281

MAILING DATE	03/24/2022
CLAIM NUMBER	BE51971
INJURY DATE	11/28/2018
CLAIMANT	IDOWU
	OLABAMIJI M
EMPLOYER	LEARNING LAND I
UBI NUMBER	602 300 935
ACCOUNT ID	837, 158-02
RISK CLASS	6103
SERVICE LOC	Seattle

MARTA IDOWU
% WASHINGTON LAW CENTER
PO BOX 88806
TUKWILA WA 98138-2806

NOTICE OF DECISION

This worker died on 11/21/2021. The cause of death was unrelated to the claim. As the worker was not fixed and stable there is no permanent partial disability and the worker was not totally and permanently disabled as a result of this covered injury.

This claim is closed effective 03/23/2022.

Supervisor of Industrial Insurance

By Troy A Gruhn
Pension Adjudicator
PHONE: 360-902-5119

MAILED TO: RECPNT - MARTA IDOWU
** N/A **

	THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS	
	COMMUNICATED TO YOU UNLESS YOU DO ONE OF THE FOLLOWING: FILE	
	A WRITTEN REQUEST FOR RECONSIDERATION WITH THE DEPARTMENT OR	
	FILE A WRITTEN APPEAL WITH THE BOARD OF INDUSTRIAL INSURANCE	
	APPEALS. IF YOU FILE FOR RECONSIDERATION, YOU SHOULD INCLUDE THE	
	REASONS YOU BELIEVE THIS DECISION IS WRONG AND SEND IT TO:	
	DEPARTMENT OF LABOR AND INDUSTRIES, PO BOX 44291, OLYMPIA, WA	
	98504-4291. WE WILL REVIEW YOUR REQUEST AND ISSUE A NEW ORDER.	
	IF YOU FILE AN APPEAL, SEND IT TO: BOARD OF INDUSTRIAL INSURANCE	
	APPEALS, PO BOX 42401, OLYMPIA WA 98504-2401 OR SUBMIT IT ON AN	
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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: OLABAMIJI M. IDOWU JR. DEC'D	)	**DOCKET NO. 22 14702**
	)	
CLAIM NO. BE-51971	)	**DECISION AND ORDER**

In 2018, Olabamiji Idowu Jr. was injured while working for Learning Land II. He died for reasons unrelated to the industrial injury in November 2021, before his work-related conditions had reached maximum medical improvement. In March 2022, the Department of Labor and Industries issued an order closing Mr. Idowu's workers' compensation claim without an award for permanent disability. Mr. Idowu's beneficiaries appealed the closing order. After a hearing, our industrial appeals judge reversed and remanded the matter to the Department to reconsider whether the beneficiaries were entitled to an award for a permanent partial disability. The beneficiaries filed a Petition for Review, asserting that the evidence presented at the Board was sufficient to award them amounts for Mr. Idowu's injury-related physical and mental health impairments. Because a preponderance of the evidence presented does not show that the order closing the claim without awards for permanent partial disabilities was incorrect, it is **AFFIRMED**.

DISCUSSION

Olabamiji Idowu Jr. was injured at work on November 28, 2018, when a coworker assaulted him. His workers' compensation claim was allowed and, on November 23, 2021, the Department entered an order accepting responsibility for the condition diagnosed as specified trauma and stressor related disorder. But Mr. Idowu died on November 21, 2021, as a result of a violent act unrelated to his work. On March 24, 2022, the Department issued an order closing his claim without awarding an amount for permanent partial or total disabilities because he was not fixed and stable when he died.

Mr. Idowu's beneficiaries appealed the order closing his claim, and asserted that he was permanently partially disabled when he died. The evidence they presented on appeal focused on whether Mr. Idowu was fixed and stable and what rating of impairment was warranted when he died.

After the beneficiaries rested, the Department asked our industrial appeals judge to dismiss the appeal, asserting that they failed to make a prima facie case. The Department argued that even if the beneficiaries' evidence was sufficient to show that Mr. Idowu was fixed and stable as to his injury-related physical conditions, the evidence showed he needed additional mental health treatment and, therefore, under *In re Bette Pike*,[1] he could not receive an award for a permanent partial

[1] BIIA Dec., 88 3366 (1990).

disability. In the *Pike* case, in which the claimant was alive, the Board held that the Department could not be directed to pay for treatment and pay an award for a permanent partial disability at the same time.

Our industrial appeals judge denied the Department's request for a dismissal, and instead reversed the closing order and remanded the claim to the Department to consider whether Mr. Idowu was permanently partially disabled or was permanently totally disabled when he died, even if he was not fixed and stable, based upon the Board's significant decision in *In re James McShane, Dec'd.*[2]

Mr. Idowu's beneficiaries filed a timely Petition for Review, and asserted that the Department should not be given another opportunity to address whether the beneficiaries are entitled to awards for Mr. Idowu's permanent impairments. The beneficiaries asked the Board to instead remand the matter to the Department to pay amounts for Mr. Idowu's permanent partial physical and mental health impairments. Because the evidence presented is sufficient to determine whether Mr. Idowu's beneficiaries were entitled to permanent partial disability awards under *James McShane*, we granted the Petition for Review.

In *James McShane,* the Board determined that an injured worker who dies for a reason unrelated to the work injury may be entitled to an award for permanent disabilities, even though his conditions were not fixed and stable when he died. The Board rejected earlier authority that required medical fixity for a deceased worker's beneficiaries to be compensated for the worker's permanent impairments. When a worker has died, the Board reasoned, waiting until his condition was fixed before assigning the status of permanent disability did not serve the purpose of the Industrial Insurance Act, which is to provide relief to workers and their families. In cases where the worker dies for reasons unrelated to the industrial injury, the Board determined that the appropriate focus is on the character of the disability, rather than on fixity:

> We hold that when an injured worker whose industrial condition(s) had not reached medical fixity dies due to causes unrelated to the industrial injury, in order to receive a permanent partial disability award under RCW 51.32.040(2)(a), the beneficiary must establish that at the time of death, the industrial injury caused a particular impairment that, even after contemplated proper and necessary treatment, would have still remained such that it would have, but for his or her death, entitled the injured worker to an award for permanent partial disability.[3]

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[2] BIIA Dec., 05 16629 (2006).
[3] *McShane*, at 6.

The *James McShane* Board concluded that, because the industrial injury would not have prevented Mr. McShane from engaging in reasonably continuous, gainful employment, his beneficiary was not entitled to a permanent disability benefit.

In the case before the Board, the Department incorrectly declined to award amounts for any permanent partial disabilities because Mr. Idowu's injury-related conditions were not fixed and stable when he died. But on appeal, the burden was on the beneficiaries to show that the decision to close the claim without permanent partial disability awards was incorrect. They did not establish that Mr. Idowu likely would have had permanent physical or mental health impairments, even after further necessary and proper treatment.

Orthopedic surgeon Thomas J. Degan, M.D., testified on behalf of the beneficiaries that Mr. Idowu had Category 2 permanent lumbosacral impairments when he died, but the rating was based upon Dr. Degan's opinion that ongoing tenderness constituted an objective finding. As orthopedic surgeon Darin Davidson, M.D., explained when testifying for the Department, Mr. Idowu's subjective complaint of tenderness did not become an objective finding merely because Mr. Idowu repeatedly complained about it. Furthermore, Dr. Degan could not say more probably than not that the Category 2 lumbosacral impairments would remain after necessary and proper treatment, and he concluded that Mr. Idowu was capable of working full time in some capacity.

Similarly, Stephanie Hanson, Ph.D., who has a doctorate in clinical psychology and is a licensed psychologist, testified that Mr. Idowu had Category 4 permanent partial mental health impairments when she evaluated him shortly before he died, but she thought his condition would improve with treatment. She did not articulate, however, on a more-probable-than-not basis what level of impairment was likely to remain, if any, if Mr. Idowu received necessary and proper treatment. Regardless, she concluded that he was capable of working full time, although not at his job of injury.

Psychiatrist Oscar Romero, M.D., testified on behalf of the Department that Mr. Idowu had Category 3 permanent mental health impairments when he died, but like Dr. Hanson, Dr. Romero concluded that Mr. Idowu would improve with psychiatric treatment. Dr. Romero was not asked what level of mental health impairment would have remained if Mr. Idowu had received necessary and proper treatment.

Mr. Idowu's beneficiaries had the burden, as the party who appealed the Department's order, to show that the order on appeal was incorrect.[4] But a preponderance of the evidence presented does not show that Mr. Idowu was entitled to an award for a permanent partial disability or a pension when the claim was closed. The record does not establish that, even if he had received necessary and proper treatment, he would have had permanent physical or mental health impairments as a result of the industrial injury that entitled him to a disability award. Moreover, Mr. Idowu's own experts considered him to be capable of reasonably continuous gainful employment when he died.

Besides asking the Board to award amounts for Mr. Idowu's permanent partial disabilities, the Petition for Review asks the Board to issue a significant decision that licensed psychologists like Dr. Hanson are qualified to rate permanent mental health impairments. The beneficiaries cite to a Department letter explaining that Dr. Hanson's rating of Mr. Idowu's level of permanent mental health impairment was outside of her scope of practice. Because the Department letter is not part of the record on appeal, we do not address the issue. Whether or not Dr. Hanson was qualified to rate Mr. Idowu's permanent impairment, Dr. Romero explained persuasively that Mr. Idowu's impairment was moderate, not severe, when he died and, therefore, a Category 3 rating was appropriate.

In summary, the basis for the Department's decision to close the claim without awarding amounts for permanent physical or mental health impairments was incorrect, but the decision itself was correct. The order on appeal is affirmed.

DECISION

In Docket No. 22 14702, the beneficiary, Marta R. Idowu, filed an appeal with the Board of Industrial Insurance Appeals on April 26, 2022, from an order of the Department of Labor and Industries dated March 24, 2022. In this order, the Department closed the claim effective March 23, 2022 without an award for a permanent partial disability or a pension. The order dated March 24, 2022, is correct, and it is affirmed.

FINDINGS OF FACT

1. On June 22, 2022, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

1. Olabamiji Idowu Jr. was injured on November 28, 2018, in the course of his employment with Learning Land II.

[4] *See Olympia Brewing Co. v. Dep't of Labor & Indus.*, 34 Wn.2d 498 (1949), overruled on other grounds*, Windust v. Dep't of Labor & Indus.*, 52 Wn.2d 33 (1958).

2. Mr. Idowu died of a cause unrelated to his industrial injury on November 21, 2021.

3. When Mr. Idowu died on November 21, 2021, he had no permanent physical impairments as a result of the November 28, 2018 industrial injury.

4. At the time of his death, Mr. Idowu's mental condition would have been rated at Category 3 mental health impairment as a result of the November 28, 2018 industrial injury, but his injury-related mental health condition was likely to improve with necessary and proper mental health treatment.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.

2. On November 21, 2021, Olabamiji Idowu Jr. did not have a permanent partial disability, within the meaning of RCW 51.32.080, proximately caused by the industrial injury.

3. The Department order dated March 24, 2022, is correct, and it is affirmed.

Dated: September 14, 2023.

BOARD OF INDUSTRIAL INSURANCE APPEALS

HOLLY A. KESSLER, Chairperson

JACK S. ENG, Member

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Addendum to Decision and Order
In re Olabamiji M. Idowu Jr. Dec'D
Docket No. 22 14702
Claim No. BE-51971

Appearances

Beneficiary, Marta R. Idowu, by Washington Law Center, PLLC, per Spencer D. Parr

Employer, Learning Land II, by Sherie Credle (did not participate at hearing)

Department of Labor and Industries, by Office of the Attorney General, per Michael E. Duggan

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. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on May 30, 2023, in which the industrial appeals judge reversed and remanded the Department order dated March 24, 2022.

The Honorable Hillary Madsen
Hearing Date: March 22, 2024
Hearing Time: 11:00 am
With oral argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

OLABAMIJI M IDOWU (DEC'D), PLAINTIFF, V. LEARNING LANDS II AND WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, DEFENDANTS.	No. 23-2-19073-4 KNT ORDER GRANTING DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on the Department of Labor and Industries' Motion for Summary Judgment claiming the Department was entitled to summary judgment because Plaintiff Olabamiji M. Idowu, deceased, presented insufficient evidence to prove entitlement to an award for permanent partial disabilities.

The Court heard the oral argument of counsel for the Department, Michael Duggan, and counsel for the Plaintiff, Spencer Parr. The Court considered the pleadings filed in the action, and those portions of the Certified Appeals Board Record cited in the parties' pleadings.

Based on the argument of counsel and the evidence presented, the Court finds:

Background

1. Plaintiff Olabamiji M. Idowu graduated from Eastern Washington University. His chosen career involved working with children. Mr. Idowu was injured in the course of his employment at Learning Land II, a childcare center, when he was assaulted by a co-worker. Mr. Idowu submitted a claim for workers compensation benefits. A few years

later, while Mr. Idowu's claim was still open, Mr. Idowu was murdered. The Department of Labor and Industries closed Mr. Idowu's claim without making a permanent partial disability award. Mr. Idowu's mother and beneficiary, Marta R. Idowu, believed the Department's closure order was wrong. This appeal follows.

Permanent Partial Disability—Categories of Impairment

2. A "permanent partial disability" is a loss of bodily function to a part or parts of the body, proximately caused by a workplace injury. In Washington, the Department has created "categories of impairment" for classifying various disabilities. An evaluator must assess the level of impairment by (1) comparing the condition of the injured worker (2) with the condition described in the categories of impairment, and then (3) selecting the most appropriate rating or level of category of impairment.
3. In this case, Mr. Idowu's disabilities included a back injury and mental health condition.
4. The categories of impairment for back injury and mental health are found in WAC 296-20-220. The ratings descriptions are Category 1 (minimal); Category 2 (mild); Category 3 (moderate); Category 4 (severe); and Category 5 (extreme). *Id.*
5. It is unclear whether the appropriate time to assess Mr. Idowu's loss of bodily function was at the time of his death or the date the Department closed the claim. The timing does not make a difference in this case because Mr. Idowu had multiple exams leading up to his death, including a mental health exam just ten days before his death.

Procedural History

6. On November 28, 2018, Mr. Idowu was injured at work.
7. On November 21, 2021, Mr. Idowu was murdered.

8. On November 23, 2021, the Department of Labor and Industries entered an order accepting responsibility for Mr. Idowu's condition.

9. On March 24, 2022, the Department issued a closure order without making an award for permanent partial or total disabilities. The Department determined it could not make an award because Mr. Idowu's condition was not fixed and stable at the time of his death; further treatment would have been required to determine the appropriate rating. The Department relied upon *In re Bette Pike,* BIIA Dec., 88 3366 (1990).[1]

10. On May 30, 2023, Ms. Idowu, as Mr. Idowu's beneficiary, filed an appeal to the Board of Industrial Insurance Appeals. Industrial Insurance Appeals Judge John Dalton presided over a contested hearing and received all the evidence in this case. Judge Dalton issued a Proposed Decision and Order, which reversed the Department closure order and remanded the case to the Department to consider Mr. Idowu's claim again. Judge Dalton instructed the Department to determine whether Mr. Idowu was permanently partially disabled or permanently totally disabled at the time of his death. Judge Dalton disagreed with the Department's reliance on *Pike*; instead, he determined *In re James McShane, Dec'd*, BIIA Dec., 05 16629 (2006)[2] was the controlling authority. Ms. Idowu agreed with Judge Dalton's decision to reverse, but disagreed the Department should consider the claim again. Ms. Idowu believed the Department should have been instructed by Judge Dalton to make an award based on Mr. Idowu's permanent partial disability: Category 2 back impairment and Category 4 mental health impairment.

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[1] In *Pike,* the injured worker experienced a back injury and psychiatric disorder(s). The Board concluded even if the worker's back impairment *might* be fixed, the worker was still receiving treatment for her mental health impairment, so the Department was precluded from making an award for permanent partial disability. *Pike* stands for the general principle all conditions must be fixed and stable to make an award.

[2] In *McShane*, the Board held a beneficiary may be entitled to benefits under RCW 51.32.050 and RCW 51.32.067 if the worker's beneficiaries can establish the worker's disability *would have been* permanent *even if* the worker had not died from unrelated causes before treatment was complete.

11. On July 3, 2023, the Board granted Ms. Idowu's Petition for Review.

12. On September 14, 2023, the Board of Industrial Insurance Appeals issued its Decision and Order, which affirmed the Department closure order. The Board reviewed the *Pike* and *McShane* decisions and, applying *McShane*, found the Department incorrectly declined to make an award based on fixity. However, the Board reviewed the record and determined the Department closure order was factually correct because Mr. Idowu did not establish that he likely would have had permanent physical or mental health impairments, even after further necessary and proper treatment. The Board expressed skepticism about Mr. Idowu's medical expert's rating of Category 2, but more importantly, the Board found the expert failed to offer a rating after treatment:

> [He] could not say more probably than not that the Category 2 lumbosacral impairments would remain after necessary and proper treatment, and he concluded that Mr. Idowu was capable of working full time in some capacity.

Similarly, the Board found Mr. Idowu's mental health expert (1) offered no evidence about the level of mental health impairment that would have remained if Mr. Idowu had received necessary and proper treatment, and (2) concluded Mr. Idowu would return to work. As the party challenging the Department's closure order, the Board observed Mr. Idowu carried the burden of proof. The Board found insufficient evidence was presented that Mr. Idowu's disability was permanent, so Mr. Idowu was not entitled to benefits.

13. On October 24, 2023, Ms. Idowu filed this appeal to the King County Superior Court.

14. On October 31, 2023, the Certified Appeal Board Record ("CABR") was filed into this case record, including the Board Decision and Order dated September 14, 2023; Order Granting Petition for Review; Claimant's Petition for Review; Proposed Decision and

Order; Mr. Idowu's Response in Opposition to the Department's Oral Motion to Dismiss and the Department's Reply; Jurisdictional History; and Transcript.

15. On February 13, 2024, the Department filed a Motion for Summary Judgement. Mr. Idowu filed a timely Response in Opposition, the Department filed a timely Reply, and this Court heard oral argument on March 22, 2024.

Dispute

16. Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Stelter v. Dep't of Labor & Indus.*, 147 Wn.2d 702, 707, 57 P.3d 248 (2002). A material fact is one on which the outcome of the controversy depends. *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wash.2d 780, 789, 108 P.3d 1220 (2005).

17. The Department moves for summary judgment because it claims there is no factual issue to decide when Mr. Idowu failed to present sufficient evidence of permanent partial disability proximately caused by the industrial injury.

18. The Department and Mr. Idowu agree this Court is presented with a legal question about the sufficiency of the evidence. Under the summary judgment standard in CR 56, if the Court determines Mr. Idowu did not present sufficient evidence, then the Court should dismiss the case. Alternatively, if Mr. Idowu presented sufficient evidence he may be entitled to benefits, then the case should proceed to trial.

19. During the contested hearing, after the conclusion of Dr. Hanson's testimony, the Department made an oral motion to dismiss "on the basis that despite the significant evidence of the nature and extent of a potential rating had the worker not passed, that rating is inappropriate in the context of an open claim where a worker is not yet fixed and

stable or at maximum medical improvement." CABR 183-184 (emphasis added). Mr. Idowu argues this concession defeats the logic of the Department's arguments about the sufficiency of the evidence now.

Legal Analysis

Fixity

20. Generally, a worker's condition must be determined to be at maximum medical improvement, meaning that it is stable or non-progressive at the time an evaluation is made. WAC 296-20-19000. However, a worker may die from a cause unrelated to the workplace injury *before* maximum medical improvement can be achieved. The worker may still be entitled to benefits if the worker's condition would have been permanent.

21. The Department issued the closure order due to lack of medical fixity so most of the testimony and argument in the contested hearing below involved the question of fixity; Mr. Idowu argued his condition was permanent because it was never going to improve while the Department argued his condition was not permanent because it would have improved with treatment. The parties were right to focus on permanency, but the parties seem to have mixed up permanency with improvement and medical fixity.

22. This Court agrees with the Board that *McShane* is directly on point. In *McShane*, the worker suffered a back injury that required surgery. The worker died one month before the surgery. The worker's medical expert testified the surgery, while appropriate, would not have enabled the worker to return to gainful employment; the medical expert selected a rating of Category 4 before surgery and Category 3 after surgery. The Department's medical expert did not offer a rating before or after the surgery, but instead focused on whether the worker could have been returned to gainful employment. The Board made

two important decisions. First, the Board agreed with the Department's medical expert that the worker could have been returned to gainful employment after the surgery. As a result, the worker was not entitled to permanent total disability (pension) benefits. Second, the Board found the uncontroverted evidence was the worker would have had a rating of Category 3 back impairment post-surgery. The Board concluded the worker's beneficiary was entitled to an award for permanent partial disability consistent with the rating of Category 3. The Board in *McShane* rejected the Department's argument the lack of medical fixity at the time of a worker's death precludes the worker's beneficiary from receiving any benefits or award. Rather than fixity, the Board held the appropriate focus is the nature of the worker's disability:

> [W]hen an injured worker whose industrial condition(s) had not reached medical fixity dies due to causes unrelated to the industrial injury, in order to receive a permanent partial disability award under RCW 51.32.040(2)(a), the beneficiary must establish that at the time of death, the industrial injury caused a particular impairment that, even after contemplated proper and necessary treatment, would have still remained such that it would have, but for his or her death, entitled the injured worker to an award for permanent partial disability.

(emphasis added). The only reasonable interpretation of *McShane* is injured workers in Washington do not have to reach medical fixity if they die from unrelated causes before they can reach medical fixity.

23. In keeping with *McShane*, the burden of proof rests with the worker as the party seeking benefits to show the reasonable likelihood of disability after treatment as follows:

    a. If the worker's disability would have been the same before and after treatment, then the Department should make an award.

    b. If the worker's disability would have resolved after treatment, then the Department should not make an award.

c. If the worker's disability would have improved – in other words lessened in severity – after treatment but the worker would still be disabled, then the Department should analyze the categories of impairment to determine what rating would most likely reflect the worker's impairment after treatment.

Improvement

24. Evidence a worker would have "improved" with proper and necessary treatment does not preclude the worker's beneficiary from receiving an award for permanent partial disability. In *McShane*, for example, the worker's medical expert opined the worker would improve (Category 4 to Category 3); the Board allowed the claim because the worker would still be disabled even after treatment. Improvement just means the rating of impairment could have reasonably been expected to change after treatment. The degree of change is what matters.

Return to Work

25. The fact an injured worker can return to gainful employment does not preclude an award for partial permanent disability. In *McShane,* for example, the Board determined the worker would return to gainful employment, so the worker's beneficiaries were not entitled to permanent total disability benefits but rather an award for partial permanent disability. Partial permanent disability assumes the worker will return to work. To the extent return to work is relevant, return to work may help the evaluator to assess the accurate rating or level of category of impairment after treatment.

Rating After Treatment

26. To establish the worker's disability would have been permanent even if the worker had not died from unrelated causes before the proposed treatment could be completed, the

worker must prove the rating or level of category of impairment the worker would have been reasonably certain to experience after treatment.

27. The parties dispute whether it is speculation for a medical expert to opine about a rating after treatment. Just like the medical expert in *McShane*, a medical expert may opine on reasonable expectations for the outcome of any proposed treatment. Medical experts are frequently expected to explain any proposed treatment, the risks and benefits of the proposed treatment, alternative possibilities to the proposed treatment, and the risks and benefits of declining the proposed treatment. Medical experts may not always be able to accurately predict when complications will arise during treatment or the degree of patient compliance with treatment, and it may be harder to accurately predict outcomes for more complex treatment regimens, but our courts do not require absolute certainty.

Evidence about Back Injury and Mental Health

Back Injury

28. Dr. Degan testified Mr. Idowu experienced lumbar contusions and soft tissue injury strain to the muscles. Dr. Degan testified this type of back injury should have resolved within months, but Mr. Idowu experienced ongoing discomfort for over three years. Dr. Degan testified when a patient expresses a complaint that is unchanging over time, especially a long period of time with different providers, then the patient's complaint may constitute the basis for an "objective finding." Dr. Degan also testified about the medical images and scans performed on Mr. Idowu and palpation during medical exams. He testified a rating of Category 2 was appropriate.

29. Dr. Degan suggested different therapies may have relieved Mr. Idowu's discomfort. He testified these therapies may have relieved the discomfort, but he could not say whether

the therapies would have fully resolved the discomfort. Dr. Degan acknowledged most of his treatment recommendations had not been tried, but he was skeptical about treatment because no real progress had been made in over three years. Mr. Idowu's physical limitations when at the time of his death included not sitting and standing for prolonged periods of time, bending or twisting.

30. Dr. Degan testified treatment would probably have *improved*, but not *cured* Mr. Idowu's back impairment. Dr. Degan did not testify with any specificity about how much Mr. Idowu's back impairment would have improved. Dr. Degan did not offer a rating or level of category of impairment after treatment.

31. The inference that Mr. Idowu would like the factfinder to draw from Dr. Degan's testimony is Mr. Idowu would continue to experience a Category 2 back impairment even after treatment. As the old saying goes: the best predictor of the future is the past. It is possible Mr. Idowu could have experienced a Category 2 back impairment before *and* after treatment. The problem is Mr. Idowu had to prove more something than a possibility. Dr. Davidson testified a rating of Category 1 was more accurate. A second, equally reasonable inference could be drawn that Mr. Idowu's back injury would have improved to the point he was no longer entitled to benefits.

Mental Health

32. Dr. Hanson testified Mr. Idowu was experiencing a severe mental health disorder; she testified a rating of Category 4 was appropriate. She testified she did not believe Mr. Idowu's mental health would have improved from the time that she examined him until the time of his death (ten days). Dr. Hanson testified long-term psychotherapy would have helped Mr. Idowu. Dr. Hanson did not testify about what rating of impairment

would have been warranted after long-term psychotherapy. Regarding return to work, during and after treatment, Dr. Hanson testified:

> Well, I for sure think he couldn't have done the preschool job. Because he didn't have the patience at that point, and the ability to accurately assess what was going on, to be able to have that job. But with his education, with his interest in working and doing something, I think that work could have been found for him that would minimize his need to – minimize a need to be with other people and have to interact with them and get along with them. I think that a job would have been able to have found for him.

CABR 180. She testified he would require accommodations.

33. On cross-examination, Dr. Hanson was asked if "ongoing treatment would have been able to return this claimant to his pre-injury status?". CABR 183. She testified "I can't say that with the certainty. There are too many variables in it to know if treatment would have been successful to that extent." *Id.* She again testified Mr. Idowu would likely have required long-term treatment for one year to reach maximum medical improvement:

> I would say at least a year of intensive, consistent work with a follow-up after that. This would be a long-term – a long-term treatment. And in my work, one year was short-term. Because I saw people for many years. But I would say that it is needed – that treatment was necessary for at least one year.

Id. In other words, Dr. Hanson rejected the possibility of full recovery after treatment.

34. The Department called their own expert, Dr. Romero, to testify about Mr. Idowu's mental health. Like Dr. Hanson, Dr. Romero never testified about what rating would have most likely reflected Mr. Idowu's impairment after treatment. Like Dr. Hanson, Dr. Romero was cautious about the possibility of recovery. CABR 275 ("He will have responded to some degree…"), CABR 296 ("When I did a recommendation for psychiatric treatment for him is because I believe that he could improve psychiatrically. Whether they could treat him, I didn't know…"). Dr. Romero seemed even more cautious about the possibility of recovery than Dr. Hanson because Dr. Romero referenced the lack of tools

available to treat Mr. Idowu. *Id.* Dr. Romero testified a rating of Category 3 would have been appropriate. Under cross-examination, Dr. Romero eventually agreed that Mr. Idowu's impairment could have increased in severity from a rating of Category 3 to Category 4 due to the time lag between examinations and lack of treatment.

35. On return to work, Dr. Romero stated: "In my opinion his psychiatric condition was not a maximum medical improvement at the time. And I – I opined that he would benefit from psychiatric treatment on a temporary basis as meant for him to recover and return to work." CABR 275. Dr. Romero did not provide any details about reasonable expectations for return to work and whether accommodations would be required; his testimony started and stopped at the fact Mr. Idowu would return to work one day.

36. In considering the testimony from Dr. Hanson and Dr. Romero, it becomes clear Mr. Idowu was experiencing a serious mental health condition. Dr. Hanson and Dr. Romero hoped Mr. Idowu would experience relief from his symptoms with treatment, but neither expert testified Mr. Idowu would fully recover. The unrefuted testimony from Dr. Hanson was Mr. Idowu's interactions with people would have remained limited and he would have continued to require supervision because of his mental health condition even after treatment. A reasonable inference could be drawn that the weight of the evidence demonstrates Mr. Idowu had a permanent partial disability and his permanent partial disability was most accurately represented by a rating of Category 3 in WAC 296-20-340 ("…exhibits periodic lack of appropriate emotional control…").

Conclusions

37. The Court is persuaded by the Department and agrees with the Board that Mr. Idowu did not present sufficient evidence his back injury would have been permanent even if he had not died before treatment was complete.

38. The Court is not persuaded by the Department and does not agree with the Board that Mr. Idowu did not present sufficient evidence his mental health condition would have been permanent even if he had not died before treatment was complete.

Based on the above findings, IT IS ORDERED:

1. The Department's motion is granted in part.
2. The undisputed factual record establishes Mr. Idowu's beneficiaries did not prove Mr. Idowu was permanently partially disabled from his back injury at the time of his death, so no genuine issue of material fact exists with respect to Mr. Idowu's beneficiaries' entitlement to permanent partial disability benefits. The Department is entitled to judgment as a matter of law that the Board of Industrial Insurance Appeals order of September 14, 2023, that affirmed the Department's March 24, 2022, order, is affirmed regarding Mr. Idowu's back injury.
3. A genuine issue of material fact exists with respect to Mr. Idowu's mental health condition, so the Department is not entitled to judgment as a matter of law regarding Mr. Idowu's mental health condition.

DATED this 2nd day of April, 2024.

Judge Hillary Madsen

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

OLABAMIJI M. IDOWU (DEC'D), Plaintiff, v. LEARNING LAND II AND WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Defendants.	NO. 23-2-19073 KNT JUDGMENT

JUDGMENT SUMMARY (RCW 4.64.030)

1. Judgment Creditor:	Estate of Olabamiji M. Idowu (Dec'd), Marta Idowu, as Personal Representative
2. Judgment Debtor:	State of Washington Department of Labor and Industries
3. Principal Amount of Judgment:	- 0 -
4. Interest to Date of Judgment:	- 0 -
5. Attorney Fees:	$55,000
6. Costs:	$11,968.40
7. Other Recovery Amounts:	$0.00

8. Principal Judgment Amount shall bear interest at 0% per annum.

9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.

10. Attorney for Judgment Creditor: Spencer Parr

11. Attorney for Judgment Debtor: Michael Duggan

This matter came on regularly for jury trial on June 3-7, 2024, before the Honorable Josephine Wiggs, a judge in the above-entitled court. The Estate of Olabamiji Idowu, Jr. was represented by Spencer Parr; the defendant, Department, was represented by Robert W. Ferguson, Attorney General, per Michael Duggan, Assistant Attorney General. A jury of twelve persons was impaneled and sworn to try the cause, and evidence in the form of the Certified Appeal Board Record herein was read to the jury. The court instructed the jury, arguments of counsel were made, and the jury retired to consider its verdict. Thereafter, the jury returned as its verdict the following answers to the following questions:

QUESTION NO. 1:

Was the Board of Industrial Insurance Appeals correct in deciding that at the time of his death, Mr. Idowu's mental condition would have been rated at Category 3 mental health impairment?

ANSWER: No

QUESTION NO. 2:

Was the Board of Industrial Insurance Appeals correct in deciding that at the time of his death, Mr. Idowu's injury related mental health condition was likely to improve with necessary and proper mental health treatment.

ANSWER: No

No post-trial motions having been interposed, and the court being fully advised, NOW, THEREFORE,

IT IS HEREBY ORDERED that the September 14, 2023, order of the Board of Industrial Insurance Appeals, thereby sustaining the March 24, 2022 order of the Department

of Labor and Industries, be and the same is hereby reversed, and the claim is remanded to the Department of Labor and Industries with instructions to provide an award for Category 4 of mental health permanent partial disability to the Estate of Olabamiji Idowu, Jr..

If, as a result of the court's decision the accident fund or medical aid fund is affected, the worker's attorney's fee fixed by the court, for services before this court only, the fees of medical and other witnesses, and costs, shall be payable out of the Department's administrative fund per RCW 51.52.130.

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The Court finds that a reasonable fee for the services of the Estate of Olabamiji M. Idowu's attorney before this court is $55,000. The Court further finds that Estate of Olabamiji M. Idowu incurred the following witness fees and costs: $11,968.40.

Interest on witness fees and costs awarded shall begin to run from the date of entry of this judgment as provided by RCW 4.56.110.

This judgment and remand order should not be read to preclude Plaintiff from further timely appeal to the Court of Appeals herefrom, but any such further appeal by Plaintiff shall be limited to Plaintiff's preserved contentions that Plaintiff did present a prima facie case for low back permanent partial disability and should have been allowed to present that issue to our Superior Court jury for its resolution.

DONE IN OPEN COURT this 10th day of July, 2024.

Electronic Signature Attached
JUDGE
Hon. Josephine Wiggs

Presented by:
ROBERT W. FERGUSON
Attorney General

MICHAEL DUGGAN
Assistant Attorney General
WSBA No. 44910

Copy received,
approved as to form and
notice of presentation waived:

WASHINTON LAW CENTER

Spencer Parr
Attorney for Plaintiff
WSBA No. 42704

King County Superior Court
Judicial Electronic Signature Page

Case Number:	23-2-19073-4
Case Title:	IDOWU VS LEARNING LAND II ET ANO
Document Title:	ORDER
Signed By:	Josephine Wiggs
Date:	July 10, 2024

Judge： Josephine Wiggs

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	909C46BF1D9D217C3C0226B7205F26FD0A000719
Certificate effective date:	4/26/2022 11:56:20 AM
Certificate expiry date:	4/26/2027 11:56:20 AM
Certificate Issued by:	C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA, O=KCDJA, CN="Josephine Wiggs: dum3wMmN7BGboJP7fRvR+g=="