Larson, Walter

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Combined effects of preexisting and subsequent disabilities

A worker cannot establish permanent total disability by combining the effects of the industrial injury with unrelated preexisting dormant conditions which only became symptomatic and disabling after the injury. To establish that the industrial injury was the proximate cause of permanent total disability under a combined effects theory, the worker must show that the injury combined with disability existing at the time of the injury. **….*In re Walter Larson*, BIIA Dec., 21,004 (1966)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: WALTER W. LARSON	)	**DOCKET NO. 21,004**
	)	
CLAIM NO. C-913187	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Walter W. Larson, by
Fredrickson, Maxey & Bell, per
Leo H. Fredrickson and Robert L. Bell

Employer, Kaiser Engineers,
None

Department of Labor and Industries, by
The Attorney General, per
Otto M. Allison, Jr., Frederick B. Hayes, and John T. Krall, Assistants

This is an appeal filed by the claimant, Walter W. Larson on October 29, 1963, from an order of the Supervisor of Industrial Insurance dated October 9, 1963, closing this claim with a permanent partial disability award of 10 per cent of the maximum allowable for unspecified disabilities, and with no award for time-loss compensation. **REVERSED AND REMANDED**.

DECISION

This matter is before the Board for review on the basis of the Statement of Exceptions filed by the claimant to a Proposed Decision and Order issued by a hearing examiner for this Board on May 27, 1965, reversing the order of the Supervisor of Industrial Insurance dated October 9, 1963, which had closed this claim with a permanent partial disability award of 10 per cent of the maximum allowable for unspecified disabilities and with no award for time-loss compensation, and remanding the claim to the Department of Labor and Industries with direction to pay the claimant a permanent partial disability award equal to 35 per cent of the maximum allowable for unspecified disabilities, less the prior award paid, but finding that he was not, on the basis of the record, entitled to an award for time-loss compensation. The primary issue presented for the Board's consideration is the extent of the claimant's permanent disability on the date his claim was closed proximately resulting from the injury he sustained on July 26, 1962, when a gust of wind which struck a panel he was carrying, caused him to lose his balance and fall, injuring his low back, while in the course of his employment with the Kaiser Engineers, the employer herein. A subsidiary question to be decided is whether or not he is entitled to time-loss compensation for any period of time prior to the closing of his claim.

The question of time-loss compensation must be decided against the claimant, since there is no medical evidence in the record to establish that he was temporarily totally disabled for any period of time following his injury and prior to the closing of his claim. His own medical witness, Dr. Richard E. Elston, a specialist in surgery, saw him for the first time on November 20, 1963, about six weeks after his claim had been closed, and thereafter became his attending physician for several conditions that were unrelated to his injury. Neither he nor the Department's medical witness, Dr. James P. Dunlap, a specialist in orthopedic surgery, who was the claimant's attending physician for his low back condition from August of 1962 to December of 1963, was asked for, or expressed an opinion as to whether or not he had been temporarily totally disabled at any time prior to the date his claim was closed.

It appears from the claimant's Statement of Exceptions that the claimant's principal contention in this appeal is that when his claim was closed on October 9, 1963, he was permanently and totally disable within the meaning of the Workmen's Compensation Act as a proximate result of his disability in his low back attributable to his industrial injury, superimposed upon, and combined with his disability resulting from "all his pre-existing conditions." In the Board's opinion, this contention is not supported by the record. It is apparently based on the testimony of Dr. Elston, who, as previously noted, did not examine the claimant until November 20, 1963, at which time he noted, in addition to some findings of low back disability, that the claimant's blood pressure was elevated and that he had a stasis dermatitis in his lower extremities. He then testified further concerning this examination as follows:

> "Q Doctor, did he tell you how he had been before he had this injury?
>
> A He led me to believe that he had been in <u>good health prior to his injury</u>, with no complaints referable to his back and that he had been doing heavy construction work.
>
> Q Doctor, did he have other physical troubles that were determinable by you?
>
> A Yes, he did. <u>Some of these findings occurred at a later date</u>, but as I stated, he initially had a marked elevation of his blood pressure or hypertension, 115 to 120, and through some later examinations when he was admitted to the Deaconess Hospital he was found to have diabetes and fairly severe coronary heart disease." (Emphasis added)

The disabling effects of the claimant's diabetes and heart condition are apparent from Dr. Elston's testimony that an electrocardiogram subsequently taken in a hospital showed that the claimant was

suffering from myocardial insufficiency due to a narrowing of the coronary arteries, that the claimant's diabetes contributed to this condition and that considering this condition alone, he would discourage the claimant from doing any heavy work.

When asked what his opinion was as to the claimant's ability to engage in a gainful occupation, taking into consideration "all his physical findings, including the pre-existing conditions of the heart trouble and the diabetes and the arthritis and aggravation of the arthritis," Dr. Elston answered:

> "I certainly don't think he could be employed with all the diseases that he has now, in a gainful regular type of work." (Emphasis added)

The record reveals that Dr. Elston continued to see and treat the claimant for his diabetes and heart condition until shortly before he testified at a hearing on January 19, 1965, and it is apparent that his testimony as above quoted concerning the claimant's inability to work referred to his condition at that time.

Although Dr. Elston stated that he thought the claimant's diabetes and heart condition pre-existed his industrial injury, there is no testimony in the record, nor any inference that may be drawn therefrom, that such conditions were symptomatic or disabling prior to such injury. On the contrary, the history given to Dr. Elston by the claimant that he had been in "good health" prior to his injury, the claimant's own testimony as to his condition and the type of heavy work he had been performing regularly in the construction industry without difficulty - all negate any inference or assumption that his diabetes and heart condition, if they did pre-exist his injury, were in any way symptomatic or disabling. We must therefore conclude that such conditions must have progressed and become symptomatic and disabling subsequent to his injury.

The law is well settled that where a workman with an existing permanent partial disability, from whatever cause, suffers, as the result of an industrial injury, a further permanent partial disability that combines with his pre-existing disability to make him permanently totally disabled, he is entitled to a pension under the Workmen's Compensation Act. The workman's industrial injury would, in such case, be the proximate cause of his permanent total disability, his pre-existing disability being merely the condition upon which the injury acted as proximate cause to produce the total disability. It is not enough, however, for the workman to show that he had, prior to his injury, a pre-existing quiescent or dormant condition, the natural progression of which, unaffected by his injury, resulted in subsequent disability. In order for the claimant to establish his right to a pension

on the basis of a "combined effects" disability, he must show that his injury combined with a then existing disability. (See Erickson v. Department of Labor and Industries, 48 Wn. 2d 458; Lyle, Inc., v. Department of Labor and Industries, 66 Wn. 2d 745.) We conclude, therefore, that the claimant's contention that he became permanently totally disabled as a result of the combined effects of his industrial injury to his back and his diabetes and coronary heart disease is unsupportable as a matter of law.

Turning next to the question of the claimant's permanent disability due to his back condition resulting from his injury, it is undisputed that the claimant suffered an aggravation of a pre-existing osteoarthritic condition in his low back as a result of that injury and that he has some residual permanent disability by reason thereof. There is no significant variance between the findings pertaining to this condition revealed by the examination conducted by Dr. James P. Dunlap on September 5, 1963 and those disclosed by Dr. Elston's examination on November 20, 1963. They both agreed that x-rays of the claimant's back taken shortly after his injury showed a marked amount of hypertrophic changes extending from the second to the fifth lumbar vertebra with marked narrowing of the intervertebral disc space between the fifth lumbar vertebra and the first sacral segment with a natural fusion of the lower thoracic spine through anterior ossific formation, which conditions pre-existed his industrial injury. While Dr. Elston stated that at the time of his examination, forward flexion was limited to at least 20 degrees and that there was "fairly marked limitation of lataral flexion and limitation of the spine with tenderness in the lower back and pain in the lower back on all motions," Dr. Dunlap noted that the claimant had "marked restriction of motion in all ranges of the back," and "some tenderness in the lower thoracic and entire lumbar spine." Dr. Elston found that straight leg raising could be accomplished to 80 degrees bilaterally with "perhaps" a loss of 10 per cent of motion in the hip joints, while Dr. Dunlap noted merely that straight leg raising caused no distribution of pain in the lower extremities. Neither of the doctors mentioned any finding of muscle spasm.

While there was no significant variance between the actual findings of disability made by Drs. Dunlap and Elston, it is, we think of some significance that Dr. Elston felt that there was a possibility of "nerve root compression of the nerves running into the claimant's legs." He admitted, on cross-examination, that he had no notes as to the results of any neurological tests he may have carried out to confirm his opinion in this regard and that it was based solely on the fact that the claimant stated that he had pain in his legs. On the other hand, Dr. Dunlap did perform neurological tests

which revealed that all "reflexes and sensation are normal" and found no evidence of nerve root compression. Dr. Elston did not refer to any complaint of leg pain when relating the complaints which the claimant had at the time of his examination on November 20, 1963, and in this connection, the following testimony of the claimant is pertinent:

> "Q This difficulty you have in the low part of your back, is there any other difficulty you have physically other than your back?
>
> A Well, no.
>
> Q Does it extend in your legs or anything like that?"
>
> .....
>
> "A I have a little stiffness in my legs once in awhile, but I have had that for years.
>
> BY MR. FREDRICKSON:
>
> Q Has that been changed in any way since your back injury?
>
> A I would say, no."

He later indicated that this was not a pain, but a stiffness, which he had had when he was in the army. He located this stiffness at a point just about the knees, and stated that it came on after he was off work for awhile, but didn't bother him enough to keep him from working.

Although Dr. Elston stated that he had no record of any finding, or any history of swelling in the claimant's legs, he did find a stasis dermatitis in the lower legs, which, he stated, is frequently associated with swelling, and expressed the opinion that this was probably due to the claimant's obesity and to some poor "vena" return, not related to his injury. The same condition was present at the time of Dr. Dunlap's examination, although at that time he noted actual "pitting edema, " or swelling to the extent that a pressure mark would remain after release of pressure, and he agreed that this condition was not in any way related to the claimant's injury.

Dr. Elston has not asked to evaluate the claimant's back disability in terms of a statutory permanent partial disability award, but he stated that his back condition was "one of the main reasons why he cannot do certain types of work, although he has limitations for medical reasons because of his diabetes and coronary heart disease also." (Emphasis added) When asked his opinion as to whether the claimant was disabled as a result of his injury, Dr. Elston answered:

> "A My opinion would be that he is disabled from doing the heavy work with his back which requires any lifting or bending type of motions, or prolonged standing."

We are convinced that the claimant's back disability is not such as would preclude him from engaging in work of a light nature generally available. In fact, it appears from his own testimony that he had worked intermittently following his injury until at least October, 1963, except for two or three months in the summer of 1962. In October of 1963, when his claim was closed, he was working at a job requiring him to shovel dirt and run a light tamping machine. Although he testified, on direct examination, that he had been laid off on this job after about six weeks because he could not do the work, his testimony, on cross-examination, was to the effect that this was light work for him and did not bother his back.

On the other hand, Dr. Dunlap's evaluation of the claimant's disability as being equal to 10 per cent of the maximum allowable for unspecified disabilities was based upon his opinion, which is not supported by the record, that the claimant's osteoarthritic condition must have been disabling before the injury and that only about one-third of his back disability could be attributed to his injury. The claimant's testimony that he had never had any back trouble prior to his injury is unrebutted and is actually confirmed by the type of heavy work in which he had been engaged in for many years in the construction industry. It is well settled that if a non-disabling and asymptomatic condition is aggravated and lighted up and made symptomatic by an injury, the entire resulting disability is attributable to the injury. Miller v. Department of Labor and Industries, 200 Wash. 674. When asked to "rate" the claimant's "over-all disability," Dr. Dunlap testified as follows:

> "A Well, taking into consideration the edema in his legs, in regard to which he had some complaints and some limitations in his abilities, and taking into consideration entire status of his spine as seen on X-rays and all factors concerned, I would say this man had a total bodily disability of approximately 35 per cent compared to the non-specified."

The Hearing Examiner in this case apparently based his finding as to the extent of the claimant's disability due to his injury on the above-quoted testimony. This, we believe, was erroneous in that it is undisputed that the condition of stasis dermatitis with edema in the claimant's legs is entirely unrelated to his injury. However, apart from the fact that the Department filed no exceptions to the Hearing Examiner's finding, we are persuaded that an award of 35 per cent of the maximum allowable for unspecified disabilities is reasonable and proper for the claimant's low back disability due to his injury. In estimating the claimant's total disability, Dr. Dunlap did not attempt to make any segregation between the claimant's low back condition and his leg conditions, but it is apparent that he felt that most of his disability was due to his low back condition. The doctor's

testimony concerning the claimant's physical limitations with respect to employment due to his back condition is somewhat ambiguous, but it is the sense of his testimony that the claimant could no longer be expected to engage in heavy construction work. Further, his statement that he would not have given the claimant any disability award if he had felt that he could return to his usual work, shows an obvious lack of understanding of the proper basis for evaluating permanent partial disability, which is not loss of earning power, but involves only loss of bodily function. Franks v. Department of Labor and Industries, 35 Wn. 2d 763. However, our Supreme Court in the Franks case also stated that it is proper, and in many cases helpful, in determining the degree of permanent partial disability, to consider whether the claimant is able to do his usual work. In the instant case, considering the objective findings of low back disability and the subjective complaints substantiated thereby, together with the fact that the claimant would be limited to lighter forms of work by his low back disability, it seems apparent that the claimant has substantial disability attributable to is injury and, in our opinion, as heretofore indicated, a permanent partial disability award of 35 per cent of the maximum allowable for unspecified disabilities is reasonable and proper.

The Board has reviewed the evidentiary rulings of the Hearing Examiner adverse to the claimant and, finding no prejudicial error involved, hereby affirms said rulings.

FINDINGS OF FACT

Based upon the record, the Board finds:

1. On August 3, 1962, the claimant herein, Walter W. Larson, filed a report of accident with the Department of Labor and Industries alleging that he had sustained an industrial injury on July 26, 1962, in the course of his employment with Kaiser Engineers. On October 17, 1962, the Supervisor of Industrial Insurance entered an order rejecting the claim on the ground that there was no proof of a specific incident at a particular time and place during the course of employment. On November 7, 1962, the claimant field a notice of appeal, and thereafter, on February 25, 1963, the Board entered an order reversing the Supervisor's order of October 17, 1962, and directing that the claim be allowed. Pursuant thereto, the Supervisor entered an order on April 10, 1963, allowing the claim. Thereafter, on October 9, 1963, the Supervisor entered an order closing the claim with a permanent partial disability award of 10% of the maximum allowable for unspecified disabilities. On October 29, 1963, the claimant filed a notice of appeal from this order, and on November 15, 1963, this Board entered an order granting the appeal.

2. On May 27, 1965, a hearing examiner for this Board entered a Proposed Decision and Order reversing the order of the Supervisor of Industrial Insurance dated October 9, 1963, and remanding this claim to the Department of Labor and Industries with direction to pay the claimant a permanent partial disability award of 35% of the maximum allowable for unspecified disabilities, less and prior award paid. Thereafter, within the time provided by law, the claimant filed a Statement of Exceptions to said Proposed Decision and Order.

3. On July 26, 1962, the claimant, while in the course of his employment with Kaiser Engineers, sustained an industrial injury to his low back when the wind struck a panel which he was carrying, causing him to fall to the ground.

4. Pre-existing his industrial injury of July 26, 1962, the claimant had asymptomatic and non-disabling conditions of arteriosclerosis of the coronary arteries and diabetes which were unrelated to and unaffected by his industrial injury of July 26, 1962. These conditions remained asymptomatic and non-disabling in October of 1963, when this claim was closed, but subsequently became symptomatic and disabling.

5. Pre-existing his industrial injury of July 26, 1962, the claimant had a quiescent asymptomatic and theretofor non-disabling osteoarthritic condition in the lumbar and thoracic areas of his spine. As a proximate result of his industrial injury of July 26, 1962, the claimant's theretofor asymptomatic and non-disabling osteoarthritic condition of his spine was lighted up and made symptomatic with resulting permanent disability.

6. On October 9, 1963, when this claim was closed, the claimant had a condition of stasis dermatitis with pitting edema, which condition was entirely unrelated to his industrial injury of July 26, 1962.

7. On October 9, 1963, the claimant's low back condition attributable to his industrial injury of July 26, 1962, was fixed, and his permanent partial disability resulting therefrom, manifested primarily by marked limitation of all back motions and tenderness and pain in the lower thoracic and lumbar spine, was then equal to 35% of the maximum allowable for unspecified disabilities.

8. There is no medical testimony in this record in support of the claimant's allegation that he was temporarily and totally disabled and entitled to time-loss compensation for any period of time between July 26, 1962 and October 9, 1963.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Board concludes:

1. This Board has jurisdiction of the parties and subject matter of this appeal.

2. The order of the Supervisor of Industrial Insurance dated October 9, 1963, should be reversed and this claim should be remanded to the Department of Labor and Industries with direction to reopen the claim to pay the claimant a permanent partial disability award equal to 35% of the maximum allowable for unspecified disabilities, less the award previously paid, and thereupon to close the claim.

It is so ORDERED.

Dated this 26th day of September, 1966.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R. H. POWELL Member

/s/_____
R. M. GILMORE Member