

Larsen, Lawrence

EXPERT TESTIMONY

Vocational expert testifying by hypothetical

There is no requirement that a vocational expert see or interview a worker before offering an opinion as to the worker's employability. The fact that the expert testimony is based purely on a hypothetical question goes only to its weight and not to its admissibility. ...*In re Lawrence Larsen, BIA Dec., 54,979 (1980)*

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Vocational testimony

An opinion by a vocational expert that the worker is unemployable must be based on physical limitations or restrictions imposed by a medical expert. An opinion based on the worker's own statement of limitations is insufficient. ...*In re Lawrence Larsen, BIA Dec., 54,979 (1980)*

Scroll down for order.

1 disability of the low back. Dwight J. Cheff, D.C., who attended the claimant from a chiropractic
2 standpoint for his injury of July 9, 1977, testified:
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4 "Q Based on your review of Dr. Dreyer's examinations and reports of what
5 he had done for Mr. Larsen, did you feel that the low back condition that
6 he had prior to the '77 injury was disabling?
7

8 A No.

9 Q Has that condition gotten any worse as you've see Mr. Larsen over the
10 years, the low back condition I'm referring to?

11 A No, it's been essentially the same."
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13 By like token, Dr. Francis M. Brink, the claimant's treating orthopedist and his medical
14 witness herein, testified in regard to the claimant's low back as follows:
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16 "Q What were your findings referable to the low back?
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18 A I couldn't find too much."
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20 As for the claimant's cervical injury, it has not left him with any particular restrictions in regard
21 to his upper body. Dr. Jack B. Watkins, orthopedist, described the strength through the claimant's
22 shoulders and arms as being "excellent." The claimant has no neurological deficits, and all reflexes
23 are normal. Dr. Watkins further found that muscle strength in the claimant's lower extremities was
24 "excellent." Likewise, Dr. Brink testified that the claimant had no restrictions in regard to walking,
25 standing or sitting. Both Drs. Brink and Watkins were of the view that the claimant could return to
26 his usual occupation as a truck driver with the only limitation being to avoid heavy lifting on a
27 repetitive basis. As a parenthetical note, we would point out that the opinion of the claimant's
28 vocational expert, Mr. Lawrence R. Belka, that the claimant is unemployable in today's labor market
29 was based upon physical limitations and restrictions which the claimant recited to him, rather than
30 upon any physical limitations or restrictions which had been placed upon the claimant by a medical
31 expert. Consequently, we consider that opinion to be of little moment. cf. Fochtman v. Department
32 of Labor and Industries, 7 Wn. App. 286 (1972).
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40 As for the extent of permanent partial disability resulting from the claimant's cervical injury,
41 we accept the rating of Dr. Brink inasmuch as he was more familiar with the claimant's cervical
42 disability than Dr. Watkins. Dr. Brink rated the claimant's cervical disability in Category II of
43 Cervical and Cervico-Dorsal Impairments.
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1 As a final note, the hearing examiner's evidentiary ruling excluding the opinion of Dr. Dennis
2 Pollack, the Department's vocational expert, as to the claimant's employability, is hereby overruled.
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4 Contrary to the argument advanced by the claimant, we do not read the Fochtman case as
5 prescribing any rule relating to the competency of a vocational expert to testify. To our mind, the
6 fact that Dr. Pollack did not personally see or interview the claimant and based his opinion on a
7 hypothetical question, would go to the weight but not the competency or admissibility of his
8 testimony.
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11 **FINDINGS OF FACT**

12 Based upon the record, the Board makes the following findings:

- 13 1. On July 26, 1977, the claimant filed an accident report with the
14 Department of Labor and Industries wherein he alleged that he
15 sustained an industrial injury to his upper body on July 9, 1977. His
16 claim was allowed, time-loss compensation paid, and on May 10, 1979,
17 the Department issued an order closing the claim with a permanent
18 partial disability award of 3% as compared to total bodily impairment.
19 On July 23, 1979, the claimant filed a notice of appeal to the Board. On
20 August 2, 1979, the Board issued an order granting the appeal subject
21 to proof of timeliness.
22
- 23 2. The Department's closing order of May 10, 1979, was not
24 communicated to the claimant until May 22, 1979. July 21, 1979 was a
25 Saturday and the next business day was Monday, July 23, 1979.
26
- 27 3. The claimant's injury of July 9, 1977, was medically diagnosed as a
28 cervical strain. This injury did not aggravate a prior low back injury
29 sustained by the claimant on December 29, 1973.
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- 31 4. On or about May 10, 1979, when the Department closed this claim, the
32 claimant's condition resulting from his industrial injury of July 9, 1977,
33 was fixed, and his permanent partial disability attributable thereto was
34 consistent with Category II of Categories of Permanent Cervical and
35 Cervico-Dorsal Impairments. (WAC 296-20-240(2)).
36
- 37 5. The claimant is able to engage in gainful employment on a reasonably
38 continuous basis.
39

40 **CONCLUSIONS OF LAW**

41 Based upon the foregoing findings, the Board makes the following conclusions:

- 42 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
43 and the subject matter of this appeal.
- 44 2. The claimant is not permanently and totally disabled within the meaning
45 of the Workers' Compensation Act.
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- 1 3. The order of the Department of Labor and Industries dated May 10,
2 1979, closing the claim with a permanent partial disability award of 3%
3 as compared to total bodily impairment, is incorrect and should be
4 reversed, and this claim remanded to the Department with instructions
5 to reopen the claim and award the claimant a permanent partial
6 disability award concomitant with Category II of WAC 296-20-240(2)
7 (10% as compared to total bodily impairment) less the prior award, and
8 thereupon to close the claim.
9

10 It is so ORDERED.

11 Dated this 24th day of November, 1980.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

13
14 /s/
15 MICHAEL L. HALL Chairman

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17 /s/
18 AUGUST P. MARDESICH Member
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