Inman, Frank

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Combined effects of preexisting and subsequent disabilities

Preexisting disability is segregated only when the worker is determined to be permanently partially disabled, not permanently totally disabled. [RCW 51.32.080(3).] ***….In re Frank Inman*, BIIA Dec., 65,119 (1984)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FRANK E. INMAN	)	**DOCKET NO. 65,119**
	)	
CLAIM NO. H-559195	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Frank E. Inman, by
Kafer, Good, St. Mary & Mitchell, per
Stephen Good

Employer, Summit Timber Company
None

Department of Labor and Industries, by
The Attorney General per
Paula Selis and Meredith Lehr, Assistants

This is an appeal filed by the claimant on June 13, 1983, from an order of the Department of Labor and Industries dated April 15, 1983. The order adhered to the provisions of a Department order dated March 20, 1981 which denied responsibility for a pre-existing condition described as degenerative arthritis of the lumbar spine, and closed the claim with time-loss compensation as paid to December 29, 1980 and no increased permanent partial disability above that paid in Claim No. H-146553. The Department order is **REVERSED** and the claim is **REMANDED**.

PROCEDURAL STATUS AND EVIDENTIARY RULINGS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on May 14, 1984, in which the order of the Department dated April 15, 1983 was affirmed.

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

ISSUES

The issues presented for resolution in this appeal are:

(1) Whether Mr. Inman's degenerative spinal osteoarthritis, as it existed prior to the accepted industrial injury of June 29, 1979, has any causal relationship to that injury.

(2) Whether, as of April 15, 1982, the industrial injury of June 29, 1979 was productive of permanent physical impairment.

(3) Whether, as of April 15, 1983, the residual impairment from Mr. Inman's industrial injury of June 29, 1979, viewed in light of his age, education,

training and experience, had combined with the fixed residuals of his five earlier industrial injuries to render him permanently and totally disabled.

DECISION

The evidence presented by the parties is quite adequately set forth in the Proposed Decision and Order and will not be reiterated extensively herein.

We agree with the proposed determination that Mr. Inman's pre-existing degenerative osteoarthritis condition was both symptomatic and disabling to him prior to the industrial injury of June 29, 1979, and that therefore the condition, in its pre-1979-injury state, is not the Department's responsibility under Claim No. H-559195. Miller v. Department of Labor and Industries, 200 Wash. 674 (1939); Goehring v. Department of Labor and Industries, 40 Wn. 2d 701 (1952); Austin v. Department of Labor and Industries, 6 Wn. App. 394 (1971). The substantial weight of the evidence in this record so indicates.

We also agree that as of the date of the Department's last action closing the claim here in issue the claimant's condition causally related to his June 29, 1979 industrial injury was fixed and medically stationary. Review has been granted because the evidence demonstrates to our satisfaction that such injury increased the claimant's permanent physical impairment, and that this impairment, superimposed upon and combined with the residuals of the claimant's five previous industrial injuries, produced permanent total disability.

We state at the outset that it is clear that Mr. Inman cannot any longer work on a reasonably continuous basis at any job for which he has the education or qualifications. He is 53 years old, has had a heavy labor background, and his second-grade education has not enabled him to read or write. A poor eye for visual detail and reduced sensation in his hands prohibit work requiring finger dexterity. He is not a viable candidate for retraining because of two primary reasons. He has memory problems probably attributable to a head injury, and has virtually no skills transferable to a non-laboring position. The heavy preponderance of the medical and vocational opinion in this record establishes that without retraining, there are no jobs which Mr. Inman can perform continuously. It should be mentioned in this connection that this employer did not offer the claimant a special, tailored job subsequent to the June 1979 injury. cf. Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191 (1942); Fochtman v. Department of Labor and Industries, 7 Wn. App. 286 (1972); Allen v. Department of Labor and Industries, 16 Wn. App. 692 (1977).

Citing Miller, supra, the Proposed Decision and Order concludes that because the claimant's pre-existing degenerative disc disease was symptomatic rather than latent or quiescent prior to June, 1979, the disease is not causally related to his 1979 industrial injury, and Mr. Inman has therefore failed to show he is permanently totally disabled as a result of that injury. It is true that the claimant's active degenerative disc disease, as it existed prior to June 29, 1979, is not causally related to the claimant's latest industrial injury. It is likewise true that if this were a permanent partial disability case, the "segregation" principle set forth in RCW 51.32.080(3) and discussed in Miller (but ultimately rejected under the facts there) would apply, and only the additional permanent low back impairment, if any, would be compensated under the statute. But by the express terms of RCW 51.32.080(3), the segregation principle is not applicable where permanent total disability has resulted:

> (3) Should a worker receive an injury to a member or part of his or her body already, from whatever cause, permanently partially disabled, resulting... in an aggravation or increase in such permanent partial disability but not resulting in the permanent total disability of such worker, his or her compensation for such permanent partial disability shall be adjudged with regard to the previous disability of the injured member or part and the degree or extent of the aggravation or increase of disability thereof. (Emphasis supplied)

In a permanent total disability case, if the industrial injury is productive of permanent total disability, albeit even a minor cause, the segregation concept is not applicable (except as to second-injury fund application, see RCW 51.16.120). Rather, the "combined effects rule" discussed in Erickson v. Department of Labor and Industries, 48 Wn. 2d 458 (1956) and Wendt v. Department of labor and Industries, 18 Wn. App. 674 (1977) applies, and the industrial injury is the legal cause of permanent total disability. The Miller court in fact addressed itself to this circumstance. The commonly accepted principle that one "takes the worker as he is" on the date of the injury which evinces total disability is most eloquently set forth at pp. 682-3 of the opinion:

> As we have many times stated, the provisions of the workmen's compensation act are not limited in their benefits to such persons only as approximate physical perfection, for few, if any, workmen are completely free from latent infirmities originating either in disease or in some congenital abnormality. It is a fundamental principle which most, if not all, courts accept, that, if the accident or injury complained of is the proximate cause of the disability for which compensation is sought, the previous physical condition of the workman is immaterial and recovery may be had for the full disability independent of any pre-existing or

congenital weakness; the theory upon which that principle is founded is that the workman's prior physical condition is not deemed the cause of the injury, but merely a condition upon which the real cause operated. (Emphasis supplied)

In this case, then, if the claimant has effectively been removed from the labor market by the 1979 industrial injury, superimposed upon and combined with the claimant's pre-existing disabling conditions (regardless of the causes of those pre-existing conditions), and if but for the effects of the 1979 industrial injury Mr. Inman could have continued working, then under Washington law he is entitled to permanent total disability status. Wendt, supra.

We have decided that Mr. Inman is now permanently unable to perform work for which he is qualified on a reasonably continuous basis. We have also stated that compensation in recognition of that status is appropriate if the subject industrial injury is a proximate cause of the claimant's ultimate inability to work. It remains to decide the proximate cause issue.

When the medical testimony is reviewed and it is observed that it was not until the June 1979 industrial injury occurred that Mr. Inman quit working, we are left with the clear impression that it was the effects of that injury which brought about further deprivation of physical ability which in turn rendered the claimant unable to work. This impression is buttressed by the fact that despite his symptomatic and disabling degenerative spinal osteoarthritis, he had returned to work after each successive previous industrial injury. We view the 1979 industrial injury as the ultimate cause of the claimant's disability in that but for this injury the claimant could have continued working at his then lighter-duty job. Still, it is likewise true that Mr. Inman's pre-existing degenerative osteoarthritis would not have precluded gainful employment but for his six industrial injuries, and it is the combined effects of all six of the claimant's industrial injuries which have effectively finally removed him from the competitive labor market. Wendt, supra.

Based upon the foregoing, and after a careful review of the entire record before us, including the Proposed Decision and Order, the claimant's Petition for Review filed thereto, and the Department's Response to the Petition for Review, we hereby enter the following:

FINDINGS OF FACT

1. On August 16, 1979, the Department of Labor and Industries received an accident report alleging that Frank E. Inman had sustained a low back injury on June 29, 1979, during the course of his employment with Summit Timber Company. By order of August 29, 1979, the Department rejected the claim. A protest and request for reconsideration of the

Department's reject order was filed on behalf of the employer and on October 4, 1979, the Department set aside its reject order and allowed the claim. By order dated March 20, 1981, the Department denied responsibility for a pre-existing condition diagnosed as degenerative arthritis of the lumbar spine, and closed the claim with time-loss compensation as paid to December 29, 1980, and no increased permanent partial disability award for low back residuals over and above that paid in prior Claim No. H-146553. A protest and request for reconsideration of the Department's March 20, 1981 order was timely filed, and on April 23, 1981, the Department issued its order holding the March 20, 1981 order in abeyance. On May 4, 1982, the Department issued an order adhering to the provisions of its March 20, 1981 order, and on June 11, 1982, the claimant filed a notice of appeal; however, by order dated June 5, 1982, the Department had reassumed jurisdiction of the claim, holding the order of May 4, 1982 in abeyance. On April 15, 1983, the Department issued an order which again adhered to the provisions of its March 20, 1981 order, and on June 10, 1983 a notice of appeal was filed on behalf of the claimant. On July 13, 1983, the Board of Industrial Insurance Appeals issued an order granting the appeal, assigned it Docket No. 65,119, and directed that proceedings be held on the issues raised in the notice of appeal.

2. On June 29, 1979, during the course of his employment with Summit Timber Company, Frank E. Inman severely sprained his back while extinguishing a fire in the area of a chipper machine.

3. Prior to June 29, 1979, Mr. Inman sustained five separate and distinct injuries to his back during the course of his employment. The injuries occurred on July 30, 1968, June 30, 1971, August 11, 1976, March 1, 1977, and March 19, 1979. The injuries also produced significant permanent impairments in other areas of the claimant's body, including his neck (rigidity and reduced sensation in both hands), head (memory and learning dysfunction), and right hand (reduced manual dexterity).

4. As a result of the March 1, 1977 injury to his lumbar spine during the course of his employment as a logger with Summit Timber Company, Mr. Inman missed approximately six months of work and exhibited permanent residuals in his lumbosacral spine and one lower extremity. An application for benefits was filed, and that claim was allowed and assigned number H-146533. The claim was ultimately closed with a permanent partial disability award for low back residuals equal to 30% as compared to total bodily impairment.

5. Prior to the year 1979, claimant Inman had developed progressive degenerative osteoarthritis of the lumbar spine. During 1979 prior to June 29, 1979, this condition was symptomatic and required periodic medical treatment, but it did not prevent Mr. Inman from continuing to work at a somewhat lighter job for this employer on a reasonably continuous basis.

6. After each of the five injuries sustained by the claimant prior to June 29, 1979, he returned to full-time gainful employment, sometimes at lighter duty jobs.

7. As of April 15, 1983, claimant Inman was exhibiting the following abnormalities which did not exist prior to the June 29, 1979 injury that is the subject of this claim: (a) paraspinal muscle spasm, (b) marked tenderness to percussion and palpation across the mid and lower spine, and (c) diminished left patellar tendon reflex. These conditions are permanent, and are causally related to the industrial injury of June 29, 1979, which injury also diminished the claimant's range of low back motion.

8. Frank E. Inman is a 53 year old man with a heavy labor background, and his second grade education and subsequent training has not enabled him to read or write. A poor eye for visual detail and reduced sensation in his hands prohibit work requiring fine-finger dexterity. Mr. Inman is not a viable candidate for retraining because of his lack of education, poor learning abilities, memory problems, and an almost complete lack of skills transferable to a non-laboring job. Claimant Inman can no longer perform laboring jobs, and without retraining there are no jobs regularly available in the competitive labor market which he can perform continuously. This employer did not offer Mr. Inman a special job, tailored to meet his severe limitations, subsequent to the June 29, 1979 injury.

9. As of April 15, 1983, there was no medical treatment available calculated to either improve the claimant's physical condition or restore him to employability.

10. As of April 15, 1983, the permanent residuals of the industrial injury of June 29, 1979, combined with and superimposed upon Mr. Inman's pre-existing degenerative spinal osteoarthritis as well as the permanent impairment and loss of function attributable to his five earlier industrial injuries, when considered in light of the claimant's age, education, training and experience, have rendered him permanently unable to continuously perform gainful employment which is within his qualifications and available in the competitive labor market.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, this Board hereby concludes as follows:

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

2. As of April 15, 1983, Frank E. Inman is permanently totally disabled within the meaning of the Industrial Insurance Act. This permanent total disability is due to the combined effects of the permanent residuals of the June 29, 1979 industrial injury, superimposed upon the claimant's

five previous industrial injuries, and his pre-existing degenerative disc disease.

3. The order of the Department of Labor and Industries dated April 15, 1983, which adhered to the provisions of a prior Department order denying responsibility for a pre-existing condition of degenerative arthritis of the lumbar spine and closing the claim with time-loss compensation as paid to December 29, 1980 and no increased permanent partial disability over and above that paid in Claim No. H-146553, is incorrect, should be reversed, and this claim remanded to the Department with direction to reopen the claim to accord the claimant the status of a permanently totally disabled worker and grant him benefits in accordance with that status.

It is so ORDERED.

Dated this 20th day of September, 1984.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
MICHAEL L. HALL Chairman

/s/
FRANK E. FENNERTY, JR. Member

/s/
PHILLIP T. BORK Member