Furlong, Daniel

BOARD

Response to petition for review

The ten day time period set forth in WAC 263-12-145(3) for filing a response to a petition for review is not jurisdictional. The Board may therefore consider a response filed after the ten day period has elapsed. **….*In re Daniel Furlong*, BIIA Dec., 65,138 (1985)**

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Availability of work in geographical area

Where an injured worker has moved from Washington to another state and subsequently becomes an "odd lot" on the labor market due to aggravation of the industrial injury, the employer cannot meet its burden of establishing that some kind of suitable work is regularly and continuously available to the worker by offering him a job at his former jobsite in the state of Washington. **….*In re Daniel Furlong*, BIIA Dec., 65,138 (1985)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re:DANIEL T. FURLONG	)	**DOCKET NO. 65,138**
	)	
CLAIM NO. S-220840	)	**DECISION AND ORDER**
	)	

APPEARANCES:

Claimant, Daniel T. Furlong, by
Walthew, Warner, Keefe, Arron, Costello & Thompson, per
Robert H. Thompson

Self-insured Employer, Associated Grocers, by
Schwabe, Williamson, Wyatt, Moore & Roberts, per
Gary D. Keehn

This is an appeal filed by the claimant on June 15, 1983 from an order of the Department of Labor and Industries dated May 6, 1983 which closed the claim with a permanent partial disability award equal to 15% as compared to total bodily impairment from which was deducted the amount of $2,157.88 which was previously paid for time-loss compensation for the period of December 18, 1981 to February 28, 1982 inclusive. Reversed and remanded.

DECISION

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 employer to a Proposed Decision and Order issued on December 27, 1984 in which the order of the Department dated May 6, 1983 was reversed, and the matter remanded to the Department of Labor and Industries with direction to pay the claimant time-loss compensation for the period of December 18, 1981 to February 28, 1982

inclusive and to grant the claimant the status of a permanently totally disabled worker and accord him all benefits concomitant to that status.

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

PROCEDURAL MATTERS

Employer's Petition for Review in this matter was filed with the Board on January 31, 1985 and granted on February 20, 1985. On June 28, 1985 a response to this petition was filed by claimant. The employer has objected to the Board considering this response on the ground that it was not filed within ten days as required by WAC 263-12-145(3). We do not view that period as being jurisdictional, but rather only permissive. The Board will ordinarily not take final action after granting a Petition for Review until such reply period has expired. Moreover, WAC 263-12-145 (3) provides that the Board may, on its own motion, require the parties to submit briefs, or to present statements of position or oral argument regarding matters to which objections are made, within such time and on such terms as the Board may prescribe. The purpose of this rule was to allow flexibility for receipt of information necessary or helpful in aiding the Board to reach its decision. Although the Board took note of the reply, it does not provide the basis for our decision. The employer's objection is overruled.

DISCUSSION

The issue presented by this appeal and the evidence presented by

the parties are, for the most part, adequately set forth in the Proposed Decision and Order, but the Petition for Review filed by the employer raises a question we feel requires further discussion.

The claimant's evidence establishes his position as an "odd lot" in the labor market capable of performing only special work not generally available. Having done so, the burden shifts to the self-insured employer to establish that some kind of suitable work is regularly and continuously available to him. Kuhnle v. Department of Labor and Industries, 12 Wn.2d. 191 (1942).

In Allen v. Department of Labor and Industries, 16 Wn.App. 692 (1977) the court set forth what it deemed "an appropriate statement of the law" to be given to the tryer of fact in an "odd lot" case:

> "If, as the result of an industrial injury, a workman is able to perform only special work not generally available, then he is totally disabled, unless you find that some special kind of workwhich he can perform is, nevertheless, available to him on a reasonably continuous basis."

Following his injury on February 15, 1977, Mr. Furlong retired from his position with Associated Grocers and moved to Alaska in October of 1977. Mr. Furlong has resided in Anchor Point, Alaska since 1979. His claim was closed in March of 1978 with no award for permanent partial disability. In 1980 Mr. Furlong sustained an aggravation of his industrially related condition, and his claim was reopened as of October 21, 1980 for treatment, and two surgical procedures were performed on the claimant's low back.

Mindful of the fact that Mr. Furlong was probably an "odd lot", and aware of the requirements of Allen, supra, the self-insured

employer offered Mr. Furlong the job of a "returns checker" at its Seattle work site. Based upon a description of the job, and the physical limitations placed upon Mr. Furlong by the medical witnesses, it would appear that Mr. Furlong would be physically capable of performing this job.

The salient issue raised by these circumstances may be stated as follows: Where an injured worker has moved from Washington to another state to establish residency there and subsequently becomes an "odd lot" in the labor market due to aggravation of an industrial injury, is a job which he can perform in the State of Washington "available" to him under the terms of Allen?

This question is one of first impression in the body of workers' compensation law. A review of the law in other areas of insurance, social security and unemployment compensation discloses no cases with the same circumstances presented by this appeal. Under these conditions the best that can be done is to reason by analogy.

Other jurisdictions have held that a claimant need not move from his residence to seek work, but these all appear to be cases where the claimant is still living in the state or geographical area which was the situs of his original injury. In Lyons v. Industrial Special Indemnity Fund, 98 Ind. 403 (1977), it was held that the burden of showing suitable work was available (much the same as the Washington burden of Allen) could be met by showing that there was "an actual job within a reasonable distance from the workman's home." In those jurisdictions where the worker has the burden of showing that suitable work is not available, the worker is generally not required to seek work beyond the general area where he or she lives. In Arizona it

has been held that this means the worker's "local community" Phelps Dodge v. Industrial Commission, 90 Ariz. 248, 367 P.2d 270 (1961). The same principle was set forth by the Minnesota court in Reese v. Preston Marketing Association, 274 Minn. 150, 142 N.W.2d. 721 (1966). The Florida court has held that a claimant may be considered totally and permanently disabled though he refuses to move from his city of residence to a larger city where jobs may be available to him. McManus v. Mad-Ray Modulars, Inc. 289 So.2d 715 (1974).

Cases involving total disability under social security law accept the same principle. In Hodgson v. Celebreeze, 35 F.2d. 750 (3rd Cir.1966), the court recognized that "available" work means the reasonable possibility of employment as distinguished from mere theoretical existence of the opportunity for employment. If a claimant is only able to perform certain types of work the court held that it must be shown this type of job exists in the "relevant" geographical area in which the claimant might reasonably be expected to market his labor. This principle has been accepted by all of the other circuits.

Although none of the cited cases address the precise circumstance of Mr. Furlong's case, they are fully consistent with the conclusion that a job prepared for Mr. Furlong in Seattle is not "available" as that term is used in Allen, when he has previously established his residence in Alaska and can only perform the job by giving up that residency and moving back to the State of Washington. Of more than tangential interest is the recent recognition by this

state's highest court that one's constitutional right to travel will weigh greater than the state's interest in a worker's compensation classification tending to exclude workers in migratory labor from statutory coverage. See Macias v. Department of Labor and Industries, 100 Wn.2d. 263 (1983). The roots of such a right extend deep and may too have a bearing on the degree of compensation of covered workers who choose to exercise that right.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

The proposed findings, conclusions and order are hereby adopted as this Board's findings, conclusions and order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 16th day of July, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
FRANK E. FENNERTY, JR. Member

DISSENT

I cannot agree with the majority's conclusion in this matter. It simply overlooks the definition of permanent total disability set forth in RCW 51.08.160. That statute provides that " "permanent total disability" means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis, or other condition permanently incapacitating the worker from performing any work at any gainful occupation." (Emphasis supplied). Kuhnle and Allen do not change that definition. The clear import of these cases is to require a showing that there is a "gainful occupation" which the worker can perform on a reasonably continuous basis. The self-insured employer has shown that there is such a job waiting for this claimant. The evidence establishes that this claimant is not permanently incapacitated from performing, on a continual basis, the work made available to him by the employer. I would give the word "available" its usual meaning: "That one can avail himself of; that can be used". Webster's New World Dictionary, the World Publishing Company, 1964. As the Virginia Supreme Court of Appeals stated in United Mineworkers v. Unemployment Commission, 192 Va. 463 (1951):

> "Available for work implies ... willing to accept any suitable work which may be offered to him, without attaching thereto restrictions or conditions ... which he may desire because of his particular needs or circumstances."

I would find that full-time work is available to Mr. Furlong, but

he simply does not choose to avail himself of it.

Dated this 16th day of July, 1985.

/s/_____
PHILLIP T. BORK Member