Hague, Carlton

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Combined effects of preexisting and subsequent disabilities

Where the worker was developing significant medical problems at the time of the industrial injury and those problems subsequently limited his capacity to be employed, he may still be found to be permanently totally disabled as a result of the industrial injury if the injury, independently or superimposed upon the pre-existing circumstances and conditions, was a significant contributing cause of his inability to perform reasonably obtainable work. **….*In re Carlton Hague*, BIIA Dec., 59,331 (1982)** [dissent] [*Editor's Note*: To the extent the decision held that the industrial injury must be a significant contributing cause, it was overruled by *In re Sista Leetta*, BIIA Dec., 15 24959 (2017).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CARLTON HAGUE	**)**	**DOCKET NO. 59,331**
	)	
CLAIM NO. G-901225	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Carlton Hague, by
Small, Winther and Snell, per
Hollis B. Small and Gregory F. Logue, Walter S. Corneille, and Richard Weiss

Employer, Coastcraft,
None

Department of Labor and Industries, by
The Attorney General, per
Anthony B. Canorro, Carol J. Molchior, and Janet R. Whitney, Assistants

This is an appeal filed by the claimant on April 24, 1981 from an order of the Department of Labor and Industries dated April 16, 1981, which adhered to a prior order closing the claim with a permanent partial disability award for unspecified disabilities equal to 5% as compared to total bodily impairment. **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 claimant to a Proposed Decision and Order issued on April 12, 1982 in which the order of the Department dated April 16, 1981 was sustained.

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.

This appeal was brought before the Board to determine the nature and extent of Mr. Hague's permanent disability causally related to an industrial injury of June 8, 1976, as of the date the Department of Labor and Industries closed his claim on April 16, 1981. Mr. Hague was injured while assisting a co-worker in the unloading of a heavy thermal-insulated window weighing "approximately 200 pounds". In the injury the claimant's lower back and legs were affected so that during the weekend he was barely able to move from bed. He sought the attention of a chiropractor, a Dr. Milasich.

As of the date the claim was closed, Mr. Hague complained of lower back pain with his right leg feeling partially numb and tingling effects in his left leg constantly In addition, he claims to stumble a lot while attempting to walk and to have difficulty sitting because of pain in his buttocks

and in the lower portion of his back. He claims to have physical limitations in bending, stooping, and lifting. Following his injury, Mr. Hague did return to work and on March 12, 1977, had occasion to jump over a ditch in a drain field and exacerbated his low back by the incident. It does not appear from the record that Mr. Hague attempted to establish this as a new industrial injury and it appears that he received treatment for that exacerbation from his chiropractor but it was not sufficient in and of itself to keep him from returning to work at the time of its occurrence.

In addition to the industrial injury and its exacerbation in 1977, Mr. Hague has had substantial other medical problems. In 1955, he had a heart attack. He has suffered from high blood pressure for 22 to 25 years and suffered a stroke in 1975, which affected his speech for a time but apparently caused little motor impairment. In 1977, he underwent artery bypass surgery in his groin to accomplish better circulation to his feet. The underlying cause for this surgery is not entirely clear from the record but it does not appear to have any relation to the industrial injury. In 1978, Mr. Hague suffered another stroke and shortly before his claim was closed began medication for diabetes.

What develops from the evidence in the record before us is a picture of a man who has had significant medical problems since the mid-1950's which now have progressed to a matter of obvious medical concern. Independent from his non-traumatic medical problems, Mr. Hague had suffered some prior injuries to the one for which the claim in this appeal was filed, but there is no evidence that those injuries resulted in substantial impairment.

In evaluating a worker's permanent disability, the trier of fact must be cognizant of more than the simple residuals of physical injury. Where the extent of physical impairment is the only issue for evaluation that is one thing, but where the ability to perform gainful employment is at issue, as it is here, we must look at the whole person. We must consider not only the physical infirmities from injury but superimpose those limitations upon the injured worker's pre-existent physical condition and give consideration to his age, education, employment history, retraining potential and other important socio-economic considerations. Pacific Car and Foundry v. Coby, 5 Wn App. 547 (1971); Fochtman v. Department of Labor and Industries, 7 Wn.App. 286 (1972).

The difficulty presented by the evidence from Drs. Bridgeford and Marks, as well as the claimant's testimony, is that it is difficult to determine precisely what abnormal medical conditions pre-existed the industrial injury, and to what extent those conditions presented limiting factors for the claimant's employability subsequent to the industrial injury. Despite the court of appeals

observation in Allen v. Department of Labor and Industries, 30 Wn. App. 693 (1981) that Erickson v. Department of Labor and Industries, 48 Wn. 2d 458 (1956), appears to be sui generis, i.e., peculiar to itself, we do not understand the law to be that events and disabilities occurring wholly subsequent to the industrial injury should be considered and combined with the effects of the industrial injury in evaluating permanent disability. On the other hand, we do understand it to be the law of this state that even if an individual is unable to work because of conditions independent from and occurring subsequent to an industrial injury, that worker may still be found to be permanently totally disabled under the Workers' Compensation Act if a significantly contributing cause of the inability to perform reasonably obtainable work suitable to a circumstances and conditions. Shea v. Department of Labor and Industries, 12 Wn. App. 410 (1974); Allen v. Department of Labor and Industries, supra.

Viewing the evidence in the record in light of this understanding of the law, we cannot be blind to the fact that the claimant had to have had significant concurrently developing medical problems which necessitated bypass surgery subsequent to the industrial injury and necessitated the taking of diabetic medications subsequent to the industrial injury. We feel it a fair inference to conclude that the claimant was having significant circulation problems prior to his 1976 industrial injury, did suffer from high blood pressure, and was susceptible to cerebral vascular accidents or strokes. It is true that specific events resulting in employment limitations from those underlying problems occurred subsequent to the industrial injury. Still, it would be legally inappropriate to view those events as if in a vacuum and as if they had their inception from causes completely subsequent to the industrial injury.

The record is abundantly clear to us that Mr. Hague can no longer feasibly be considered for offering services in the competitive labor market. Although his limitations stem in major part from conditions which pre-existed the industrial injury and which worsened subsequent to the industrial injury, his 1976 injury is a significant contributing cause to his resultant disability. For this disability he deserves to be granted the status of a permanently totally disabled worker.

FINDINGS OF FACT

After a careful review of the entire record, the following findings are made:

1. On June 28, 1976, the Department of Labor and Industries received an accident report in which it was alleged that the claimant, Carlton Hague, had sustained an industrial injury on June 8, 1976, while working for

Coastcraft. The claim was allowed, treatment provided, and time-loss compensation payments were initiated.

On June 29, 1979, the Department issued its order closing its claim with a permanent partial disability award equal to 5% of total bodily impairment. Following interlocutory action which held in abeyance that closing order, the Department issued an order on April 16, 1981 which adhered to the provisions set forth in its prior order of June 29, 1979. On April 24, 1981, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On May 21, 1981 the Board issued an order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

2. On and prior to June 8, 1976, claimant had moderate degenerative changes in his lumbar spine, which were aggravated and caused to become symptomatic by his industrial injury of June 8, 1976.

3. On April 16, 1981, claimant was 63 years of age, a high school graduate, and had spent his working life as a glazier. Mr. Hague was not a suitable candidate for vocation retraining.

4. Prior to his industrial injury the claimant had suffered a heart attack in 1955, had high blood pressure, and had a stroke affecting for a while his speech. Following the injury, Mr. Hague underwent arterial bypass surgery to improve circulation to his legs, had another stroke in 1978, and began taking medication to control diabetes.

5. In March of 1977, while jumping over a ditch in the performance of his work with Coastcraft, Mr. Hague exacerbated his low back condition attributable to the industrial injury of June 8, 1976.

6. As of April 16, 1981, when viewed as a whole man, Mr. Hague was totally and permanently prevented from engaging in full-time gainful occupation on a reasonably continuous basis.

7. On April 16, 1981, as a result of his industrial injury of June 8, 1976, Mr. Hague had among others a condition diagnosed as the aggravation of pre-existing degenerative changes between the 4th lumbar and 1st sacral vertebrae, producing persistent pain in the low back and radiating pain into the legs. Said condition was fixed and further treatment was not indicated. Said condition was a significant contributing cause of claimant's total and permanent inability to work, when considered with the factors of his age, education, history of employment and lack of retraining potential.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the following conclusions are reached:

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

2. On April 16, 1981, as a result of his industrial injury of June 8, 1976, Carlton Hague was a permanently totally disabled worker as defined by RCW 51.08.160.

3. The order issued by the Department of Labor and Industries on April 16, 1981, adhering to the provisions of a prior order which had closed the claim with a permanent partial disability award equal to 5% as compared to total bodily impairment, was incorrect, should be reversed and remanded to the Department with direction to award the claimant totally the status of a permanently totally disabled worker effective April 16, 1981 and to grant him all benefits concomitant to that status.

It is so ORDERED.

Dated this 22nd day of July, 1982.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

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

DISSENTING OPINION

The Board majority recognizes that the claimant has a number of serious physical conditions which are completely unrelated to his low back injury of June 8, 1976. These include, among other things, long-standing cardiovascular disease necessitating iliac bypass surgery, cervical spine abnormalities, the residuals of two strokes, and the disease of diabetes with attendant peripheral neuropathy in his legs. Of particular importance, one of the strokes, the bypass surgery, and development of the diabetes have occurred in the years since the relatively minor 1976 low back injury.

The majority says that these unrelated "concurrently developing" conditions played a "major part" in producing his ultimate employment limitations. I well unhesitatingly go further. I believe these unrelated conditions are completely responsible for his permanent total disability status finally existing in 1981.

The majority states that "...we do not understand the law to be that events and disabilities occurring wholly subsequent to the industrial injury should be considered and combined with the effects of the industrial injury in evaluating permanent disability." With this statement I agree, noting (as does the majority) Erickson v. Department of Labor and Industries, 48 Wn. 2d 458 (1956).

The majority then states: "On the other hand, we do understand it to be the law of this state that even if an individual is unable to work because of conditions independent from and occurring subsequent to an industrial injury, that worker may still be found to be permanently totally disabled under the Workers' compensation Act if a significantly contributing cause of the inability to perform reasonably obtainable work suitable to a person's qualifications and training is in fact the industrial injury viewed independently or viewed as superimposed upon pre-existent circumstances and conditions." Cited in support of this statement is Shea v. Department of Labor and Industries, 12 Wn. App. 410 (1974), and Allen v. Department of Labor and Industries, 30 Wn. App. 693 (1981). With this understanding of the law, I disagree. Specifically, I disagree with the notion that a prima facie case for permanent total disability can be made based on an industrial injury being a "significantly contributing cause" of an ultimate permanent total disability. I do not view the Shea case as so holding. Nor did this Board in the recent case of In re V. Pearl Howes, Docket Nos. 58,356, 59,006 and 59,180, Decision and Order dated April 15, 1982. We there discussed the meaning of Shea and Allen, in part as follows:

> "Still, the Shea case did not deal with the combined effects of an industrial injury and a subsequent condition.
>
> Rather, it concerned a condition (vascular disease) which had its inception prior to the industrial injury and was totally disabling in and of itself. The impairment from the industrial injury (back condition), if believed, progressed independent from and subsequent to the disabling vascular disease to itself alone be responsible for causing Mr. Shea to be permanently totally disabled, even if the vascular condition did not exist.
>
> The Allen case to us merely would permit a jury to find that as of 1977 the disabling effects of an injury which occurred in 1965 was the proximate cause of permanent total disability. Prior to Allen, it would have been argued that an injury which had occurred in 1970 had to be supportable as the proximate cause of the resultant total disability, and the 1965 injury merely a condition upon which the ultimate cause operated. We understand the court in Allen to say that evidence will be sufficient to support permanent total disability if the disabling effects of an earlier injury progressed independent from the effects of a later less serious injury and such progression eventually results in preventing the worker from gainful employment.
>
> Clearly in Allen the facts, if believed, showed the earlier injury was the proximate cause of disability which progressed to total disability separate from the effects of a subsequent injurious event.

> Nowhere in the reported cases in this jurisdiction can we discover a fact pattern where a prima facie case for permanent total disability is based upon the effects of one or more industrial injuries combined with the effects of another condition, non-industrial in nature, which had its inception subsequent to the industrial injury or injuries for which compensation is sought." (Emphasis mine)

In short, in Howes we did not depart from the "proximate cause" test for some new and undefined test called "significantly contributing cause."

Of further importance, the appellate court which issued the Shea decision did not, and did not intend to, depart from the "proximate cause" test either. This was made clear by the court's subsequent decision in Wendt v. Department of Labor and Industries, 18 Wn. App. 674, at page 681, (1977). There, the court held as follows regarding a proposed jury instruction incorporating the "significantly contributing cause" phrase which had been used in Shea:

> "Wendt argues that he was entitled to these instructions under the rule enunciated in Shea v. Department of Labor and Industries, 12 Wn. App. 410, 529 P. 2d 1131 (1974). In Shea it was held that if a workman's industrial injury, considered separate and apart from his other bodily conditions, renders him totally disabled, then he is entitled to total disability compensation, even though he may also be totally disabled solely as a result of a condition not related to his injury. We do not agree that the Shea decision supports the giving of these instructions. Proposed instruction No. 12 simply lifts language from the Shea opinion at page 415; this language was intended only as an explanation for the holding therein and not for use as an instruction; to employ it in such a manner would only tend to confuse the jury on the terms "proximate cause" and "contributing cause." Proposed instruction No. 14 was also inappropriate because, while there was evidence from the Department's doctors that Wendt was totally disabled solely because of conditions not causally related to his industrial injury (left arm injury, cerebral vascular, and pulmonary deficiencies), there was no evidence whatsoever that he was totally disabled because of his industrial injury alone. On the contrary, as Wendt has so vigorously urged, his own medical evidence was designed to prove that his total disability was caused by his lighted-up preexisting arthritic condition superimposed on his non injury-caused conditions. Therefore, the Shea doctrine was not applicable and the trial court correctly refused the proposed instructions." (Emphasis by the court).

The court's further discussion in Wendt makes it clear that the vague and indefinite test of "significantly contributing cause" is not appropriate, and the test of "proximate cause" between an industrial injury and an ultimate status of permanent total disability is still a requirement of our law.

Applying the foregoing principles, there is no evidence which persuades me that the claimant's 1976 low back injury was a proximate cause of total disability in 1981.

If the findings testified to by claimant's medical witness, Dr. Bridgeford, and his attribution of many of those findings to the low back injury, were to be totally accepted, I suppose it could be argued that the injury-caused back disability did indeed produce claimant's ultimate permanent total disability. But I do not accept Dr. Bridgeford's conclusions, particularly as to any sensory, reflex, or pain problems in the claimant's legs being related to the low back injury. Dr. Richard E. Marks, neurosurgeon, convincingly testified that such findings are related to the later-developing diabetes and/or vascular problems. It is the subsequent problems and disabilities which are the proximate cause of the claimant's 1981 unemployability.

I am persuaded by Dr. Marks' testimony that the claimant's injury-caused low back permanent impairment is mild, is not a proximate cause of his 1981 unemployability, and is best equated just to the impairment described in Category 2 of Dorso-lumbar and Lumbosacral Impairments. Thus, the Department's closure of this claim with the permanent partial disability award of 5% as compared to total bodily impairment, per WAC 296-20-680(3), is correct. I would affirm that order.

Accordingly, I dissent from the Board's majority decision.

Dated this 22nd day of July, 1982.

/s/
PHILLIP T. BORK Member