House, James

PERMANENT PARTIAL DISABILITY (RCW 51.32.080)

Rating by Board

In a non-category case, the Board may rate the worker's permanent partial disability greater than any percentage testified to by the medical witnesses. ***….In re James House,* BIIA Dec., 17,857 (1965)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JAMES R. HOUSE	**)**	**DOCKET NOS. 17,857 and 17,857-A**
	)	
CLAIM NO. B-901347	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, James R. House, by
Fredrickson, Maxey and Bell, per
Leo H. Fredrickson

Employer, Western Electric, Inc., by
Schweppe, Reiter, Doolittle & Krug, per
Mary Ellen Krug and Robert R. Beezer

Department of Labor and Industries, by
The Attorney General, per
Marcus M. Kelly, Otto M. Allison, Jr., and Wesley G. Hohlbein, Assistants

This is an appeal filed by the claimant, James R. House, on May 17, 1962, assigned Docket No. 17,857, to which a cross-appeal was filed by the employer, Western Electric, Inc., on June 20, 1962, assigned Docket No. 17,857-A, from an order of the supervisor of industrial insurance dated May 1, 1962, closing this claim with a permanent partial disability award of 35 per cent of the maximum allowable for unspecified disabilities. **REVERSED AND REMANDED**.

DECISION

The claimant herein, James R. House, who was then about nineteen years of age, sustained an injury to his back on September 27, 1951, while in the course of his employment with Western Electric, Inc., when he fell about seven feet from a ladder, striking his back on a concrete floor and suffering severe contusions and sprains of the lumbodorsal muscles and a fracture of the tip of the 1st lumbar vertebra. The claim based upon this injury was allowed by the department of labor and industries and, following a course of conservative treatment, it was closed on February 1, 1952, with no award for permanent partial disability. In October of 1956, the claimant filed an application to reopen his claim for aggravation of condition. This application was denied by an order of the supervisor of industrial insurance dated November 21, 1956, whereupon the claimant appealed to this Board. On October 31, 1957, the Board entered an order remanding the claim to the department for further medical treatment of a conservative nature for the claimant's low back disability and for such other and further action as might be indicated. This order was based upon a stipulation, entered into between the claimant and the employer, which provided that the Board

might, in accordance with the recommendations contained in a medical report of an examination of the claimant conducted by Dr. Robert L. Romano, a specialist in orthopedic surgery, on July 18, 1957, remand the claim to the department for conservative treatment only, not to include surgery, and such other action as might be indicated. The department declined to enter into this stipulation, but stated that it had no objection to the entry of an order based thereon.

Following a course of further conservative treatment and certain procedural steps not important to this discussion, the claim was eventually closed again on February 18, 1959, with no award for permanent partial disability. The claimant appealed from this order to the Board. Pending the disposition of his appeal, he went to the Veterans Hospital in Spokane, Washington, for further treatment of his low back condition. On May 20, 1960, an operation was performed upon his low back for the purpose of affecting a spinal fusion from the 4th lumbar vertebra to the sacrum. This was followed by another operation performed in August of 1961, to correct a pseudoarthrosis resulting from a failure of fusion. On November 8, 1961, this Board entered an order in connection with the claimant's appeal, determining that his condition was not fixed when his claim had last been closed, reversing the order of the supervisor dated February 18, 1959, and remanding the claim to the department with direction to provide the claimant with further treatment for his low back condition, that is, to accept responsibility for the treatment that claimant had obtained after his claim had been closed, and to take such other and further action in connection with the claim as might be indicated. No appeal was taken by the employer from this order.

By an order dated May 1, 1962, the supervisor again closed the claim, this time with a permanent partial disability award of 35 per cent of the maximum allowable for unspecified disabilities. On May 17, 1962, the claimant filed a notice of appeal from this order and on June 20, 1962, the employer filed a notice of cross-appeal. Both appeals were granted by the Board and were consolidated for hearings. Thereafter, on January 25, 1965, a hearing examiner for the Board entered a Proposed Decision and Order in connection with these appeals, sustaining the order of the supervisor dated May 1, 1962. Within the period of time prescribed by law, both the claimant and the employer filed written statements of exceptions to said Proposed Decision and Order.

Apart from a subsidiary issue as to whether or not the claimant is entitled to time-loss compensation for the period from February 18, 1959 to June 8, 1959, the essential issue presented in this case, as stipulated by all the parties hereto, is the extent of the claimant's permanent residual disability, if any, on May 1, 1962, attributable to his industrial injury of September 27, 1951.

Involved in the determination of this issue is the question of the causal relationship between the claimant's admittedly disabling low back condition and his industrial injury. It may be noted in this connection that it is apparent that this is actually an aggravation case, the terminal dates of the aggravation herein being February 1, 1952 and May 1, 1962. It is further apparent that despite the May 1, 1962 order closing this claim with a higher award than the claimant had theretofore received, the rule set forth in the cases of Picich v. Department of Labor and Industries, 59 Wn. 2d 467, and Collins v. Department of Labor and Industries, 50 Wn. 2d 194, obviating, in the situations presented by those cases, the necessity of proving aggravation of condition, would not be applicable to the situation in the present case, in view of the employer's cross-appeal, inasmuch as the order of the supervisor would not be binding upon the employer. It is abundantly clear, however, from the medical testimony in the record, undisputed in this regard, that the condition for which the claimant was awarded 35 per cent of the maximum allowable for unspecified disabilities by the supervisor's order of May 1, 1962, had worsened since the first terminal date with a resulting increased permanent disability. See White v. Department of Labor and Industries, 48 Wn. 2d 413.

The claimant contends that a causal relationship between his industrial injury and his disabling low back condition has been established and became res judicata by the order entered by this Board on November 8, 1961. He also contends that he is entitled to time-loss compensation for the period from February 18, 1959, the date of the closing order next preceding the one at issue in this appeal, and June 8, 1959, the date for which time-loss compensation was next paid. He further contends in his statement of exceptions, as he had in his notice of appeal and as he has throughout this case, that he was no longer able to engage in any gainful occupation when his claim was last closed and was therefore at that time permanently and totally disabled within the meaning of the workmen's compensation act.

The employer's contentions, which it has maintained throughout the course of this case, supported by a brief submitted before the Proposed Decision and Order was issued and by its statement of exceptions thereto, essentially are (1) that there has been no causal relationship established between the claimant's industrial injury and his low back condition leading to his spinal fusion, or to his postoperative disability, and (2) that compensation for his post-fusion residual permanent disability in his low back is, in any event, barred by the terms of the stipulation entered into between the claimant and the employer, through their respective counsel, on October 29, 1957, upon which this Board's order of October 31, 1957, was based, stipulating that the claimants

appeal, then at issue, from the supervisor's order of November 21, 1956, might be disposed of by an order remanding the claim to the department for conservative treatment only, excluding surgery.

It has been the department's contention in this case, which was adopted by the hearing examiner in his Proposed Decision and Order, that the claimant, on May 1, 1962, had a permanent partial disability resulting from his postoperative low back condition attributable to his industrial injury of September 27, 1951, which was then equal to 35 per cent of the maximum allowable for un-specified disabilities.

The Board has made a thorough review of the record in this case and has given careful consideration to the Proposed Decision and Order, the claimant's and employer's statements of exceptions thereto and the brief submitted by the employer. We have concluded from this review that none of the contentions of the parties set forth above, aside from the claimant's contention respecting the legal effect of the Board's order of November 8, 1961, is fully supported by the record. In the opinion of the Board, the record made in this case establishes a causal relationship between the claimant's industrial injury and the aggravation of a pre-existing but theretofore asymptomatic and non-disabling congenitally weakened condition in his low back, characterized by a neuro-arch defect at the lumbosacral level. The record further establishes that as a proximate result of the effects of his injury on his congenitally weakened back, his resulting low back condition progressively deteriorated to the extent that on or about February 18, 1959, he was in need of further medical treatment for said condition in the form of the corrective surgery that was subsequently performed in May of 1960 and August of 1961. It is further the opinion of the Board that on May 1, 1962, the claimant's postoperative condition in his low back, proximately resulting from his industrial injury, was fixed and that his permanent partial disability resulting therefrom was then equal to 50 per cent of the maximum allowable for unspecified disabilities. See Miller v. Department of Labor and Industries, 200 Wash. 674. In the opinion of the Board, the legal effect of this Board's order of November 8, 1961, is to make it res judicata that the claimant's disabling condition in his low back is causally related to his industrial injury of September 27, 1951. Apart from the theory of res judicata, however, it is apparent that the medical evidence contained in the present record is sufficient to establish the necessary causal relationship between the claimant's postoperative permanent disability and his industrial injury.

The medical evidence in the record, it may be noted, consists of the testimony of witnesses who testified at hearings held in connection with the present proceedings, of testimony incorporated

into the present record from the record made in connection with the claimant's appeal from the supervisor's order of February 18, 1959, upon which this Board's order of November 8, 1961, was based, and of the report of the medical examination of the claimant made July 18, 1957, which was incorporated into this record by stipulation of the parties. Dr. Romano's report, which was the basis for the stipulation resulting in this Board's order of October 31, 1957, remanding the claim for conservative treatment, is to the effect that the claimant had a neuro-arch defect at the lumbosacral level that was probably aggravated by his industrial injury and that because of this defect and the superimposed injury, he was having residual difficulty and was in need of further treatment. His recommendations were that the claimant "be treated conservatively with physical therapy including diathermy and massage to the low back and a good muscle building program. He also should have a low back support. Depending upon his response to these measures, he should be further re-evaluated for treatment." He added that "It may be that this matter will eventually come to spine fusion, but I would be hesitant to carry out any surgical procedure on this man without further evaluation."

Dr. James P. Dunlap, a specialist in orthopedic surgery, presented as a witness by the department, testified, on the basis of his medical examination of March 23, 1962, that the claimant had a permanent partial disability equal to 35 per cent of the maximum allowable for unspecified disabilities, resulting from a condition he diagnosed as "post-operative spine fusion extending from L4-5 Sl with subjective complaints and objective findings commensurate with this diagnosis." He testified that this post-operative condition upon which he had based his disability rating "was related to the industrial injury; the accepted condition by the department." In this connection, it may be noted that Dr. Romano's medical report, on a more probable than not basis, related this condition accepted by the department to the claimant's industrial injury. Also in this connection, it may be noted that Dr. Leonard A. Dwinnell, a specialist in orthopedic surgery, whose testimony as a witness for the employer in a prior appeal was incorporated into the record in this case, stated that on his first examination of the claimant in November of 1956, he found congenital defects of the lumbosacral area and that he thought that fusion might be beneficial but did not think it advisable because of the claimant's history of nervousness. He stated that the x-rays he viewed did not establish a spondylolysis (neuro-arch defect), and added that if the x-rays had shown this defect, which it will be recalled was found by Dr. Romano, he would have recommended a fusion. On cross-examination, he explained that it is possible to have one film that shows a spondylolysis and

another that does not, and that he would defer to Dr. Romano's judgment if he said that he found a spondylolysis, "which is the neuro-arch defect he mentions in his report." While Dr. Dwinnell stated at one point on direct examination that he felt there was no causal relation between the claimant's symptoms which he found on examination in 1956, 1958 and 1959, and his industrial injury, he later testified on direct examination as follows:

> "Q Doctor, would that spinal fusion [which he would have recommended had he found the neuro-arch defect on x-ray] or treatment have been causally related or connected to his injury of 1951?
>
> A If he hadn't had difficulty before.... and he sustained an injury to his low back and had had back pain, pain in his low back since that time, then I would believe there was a causal relationship."

On cross-examination, Dr. Dwinnell was asked to assume that the claimant had no back complaints prior to is injury and had such complaints after the injury, which continued up to the time of his operation in 1960. On the basis of this assumption, he was asked if he had an opinion as to whether the injury was more likely than not "an aggravating factor producing the symptoms and necessitating the spinal fusion." In reply, he stated: "My opinion would be that it was aggravated by the injury."

There is no evidence in the record, it may be noted, that the claimant's congenital weakness in his low back had ever been symptomatic prior to this injury. The testimony, incorporated into this record from a prior appeal, of the employer's witness, Dr. Harvey G. Copsey, a specialist in internal medicine, and the only witness presented who had seen the claimant prior to his injury, is to the effect that the claimant, in 1949, two years prior to his industrial injury, suffered from a psychiatric disturbance diagnosed as a hysterical conversion reaction manifested by bizarre symptoms throughout his body, including his back. Dr. Copsey testified that after undergoing psychiatric treatment, the claimant's physical symptoms disappeared entirely. He further stated that x-rays taken in 1949 indicated that the claimant then had what he termed a "pre-spondylolysis," but that there were no indications that the physical symptoms he then manifested were related to this condition. The testimony, incorporated into this record from the prior appeal, of the employer's witness, Dr. Warren E. Tupper, a general practitioner, who was the claimant's attending physician in the period immediately following his 1951 injury, is to the effect that the symptoms for which he treated him were in the lumbodorsal area of his spine rather than in the lumbosacral area. In view of the progressive nature of an aggravated spondylolysis, as indicated by the evidence in this

record, this testimony of Dr. Tupper, who was evidently unaware of the claimant's spondylolysis while he was treating him, does not appear inconsistent with the opinions on causal relation noted above, since it is apparent that both Dr. Romano and Dr. Dwinnell were aware of the essential facts testified to by Dr. Tupper. Nor, in the opinion of the Board, is there any persuasive evidence in the record negating a causal relationship between the claimant's low back disability and his industrial injury.

The employer also presented the testimony of Dr. Michael Lovezzola, a specialist in surgery, who assisted Dr. William E. Grieve, a specialist in orthopedic surgery, who testified for the claimant, in performing surgery upon the claimant's low back in May of 1960 and August of 1961. Dr. Lovezzola, who had seen the claimant on numerous occasions at the Veterans Hospital in Spokane, expressed the opinion that there was no causal relationship between the claimant's condition for which he was treated at the Veterans Hospital and his industrial injury. His final diagnosis of the claimant's condition, made in March of 1963, after the two operations he assisted in had been performed, was "chronic low back pain, etiology undetermined, possible conversion reaction." He explained his diagnosis of possible conversion reaction by stating that "despite the maximum of surgery the patient still had the complaints and I came to the conclusion that since he had corrected all the conditions which were correctible and still had difficulties, he must have a fixation of his back pain."

It may be noted that all the doctors who have examined the claimant have noted that he has psychological problems. Apart from Dr. Lovezzola, however, none has suggested that the claimant's disability in his low back does not have an organic basis. Dr. Dunlap's testimony, it will be recalled, was that the claimant's disability resulted from the postoperative condition in his low back that was causally related to the condition that had been accepted by the department. He testified that he was aware that the claimant had psychological problems, but felt that the disability that he rated was due to the organic condition. Dr. John M. Lambert, a specialist in neuropsychiatry, whose testimony for the claimant was incorporated into the record from the prior appeal, testified that he felt that the claimant had psychiatric problems, some of which had been affected by the injury, but that his disability in his low back was on a physical basis, and, at the time of his examination of the claimant in 1958, required physical treatment.

The order of this Board entered November 8, 1961, has not been made a part of this record; it was, however, stipulated by all the parties to this appeal that "On November 8, 1961, the Board of

Industrial Insurance Appeals entered an order reversing the order of the Department of Labor and Industries dated February 18, 1959 and remanding the claim to the Department with directions to provide the Claimant with treatment for a low back condition and take such further action as indicated by law." It is clear from the testimony of Drs. Dwinnell, Copsey, Tupper and Lambert, which has been incorporated into the present record from the record made in the appeal culminating in this Board's order of November 8, 1961, that two issues were litigated in that appeal, (1) the causal relationship between the claimant's low back condition and spinal fusion and his injury, and (2) the causal relationship of his psychiatric condition. It is further apparent that the Board found the claimant's low back condition to be causally related to his injury and found his psychiatric condition not to be related. It is clear, therefore, that the issue of causal relationship sought to be litigated in this appeal had been determined in the claimant's favor by the Board's order of November 8, 1961, and is now res judicata, no appeal having been taken from that order. LeBire v. Department of Labor and Industries, 14 Wn. 2d 407.

It cannot be determined from the record presently before the Board whether the question of the effect of the stipulation entered into between the claimant and the employer on October 29, 1957, was litigated in the prior appeal culminating in this Board's order of November 8, 1961. While the basic issue before the Board at that time was the status of the claimant's condition on February 18, 1959, the date the order appealed from was entered (Hyde v. Department of Labor and Industries, 46 Wn. 2d 31), it is apparent that the claimant's need for the surgery he obtained subsequent to the entry of this order was then in issue and litigated by the parties, and that this Board's order entered November 8, 1961, remanding this claim to the department for further treatment for the claimant's low back condition, in effect directed the department to accept responsibility for his post-operative condition resulting from surgery. It would appear, therefore, either that this matter was litigated n the prior appeal and determined against the employer, or that the employer by not raising the question on the prior appeal has, in effect, waived this defense and is now barred by the doctrine of res judicata from asserting that the claimant violated the terms of the stipulation in obtaining surgical treatment for his low back and has therefore forfeited any right he might have to compensation for the effects of his postoperative disability. See Symington v. Hudson, 40 Wn. 2d 331; Youngquist v. Thomas, 196 Wash. 444; Large v. Shively, 194 Wash. 608, 624.

Apart from considerations based upon the doctrine of res judicata, the Board, in any event, sees no merit in this defense. The stipulation, the medical report of Dr. Romano upon which it was based, and the order of this Board dated October 31, 1957, based upon this stipulation, have, as indicated, been incorporated into the present record. It is apparent from a review of these documents that it was recognized that the claimant had a low back condition, involving an aggravated neuro-arch defect, causally related to his industrial injury, that was then in need of conservative treatment and might in the future, require surgery. It was on this basis that it was agreed that the appeal then pending could be disposed of by remanding the claim to the department for conservative treatment only. It may be agreed, as contended by the employer, that this stipulation formed a proper basis for the October 31, 1957 order, disposing of the claimant's appeal from the supervisor's order dated November 21, 1956, denying the claimant's application to reopen his claim, but if it be contended that the stipulation was intended to bar the claimant from ever obtaining surgery for his low back condition resulting from his industrial injury, whatever its progress might be, then it must be noted that to the extent that this was the stipulation of the parties, it would, as pointed out by the hearing examiner in his Proposed Decision and Order, be invalid by virtue of RCW 51.04.060, which provides that:

> "No employer or workman shall exempt himself from the burden or waive the benefits of this title by any contract, agreement, rule, or regulation and any such contract, agreement, rule or regulation shall be pro tanto void."

The employer's argument based upon his citation of the case of LeBire v. Department of Labor and Industries, supra, is not in point. In the LeBire case, the stipulation before the court, which was based upon medical reports, was that the department might segregate and deny responsibility for a pre-existing condition as being unrelated to the injury. As stated by the court: "The stipulation was not a waiver of any future right to compensation for an aggravation of an arthritic condition, but rather was it a recognition that in reality such condition was not due to the injury." (Emphasis by the court). As correctly stated by the employer in his statement of exceptions, RCW 51.04.060 "does not prevent an employee from stipulating that his injury was not caused by an industrial accident or that the disability complained of was not related to a prior industrial injury." No intended segregation of condition, however, can properly be inferred from the terms of the stipulation presently before us.

In its statement of exceptions, the employer appears further to contend that even though the claimant may not have been barred by the stipulation from obtaining surgery for his low back condition, had such surgery been authorized by the department or by this Board, he should, nevertheless, in the absence of such prior authorization, be barred from thereafter asserting a right to compensation for his postoperative disability for the reason that this would merely be an attempt to prove from the fact that he had the operation that it was required by a condition related to his industrial injury and that, therefore, his postoperative disability resulted from his injury. In support of this position, the employer argues that "The claimant's unilateral action in obtaining surgical treatment, even if necessary, was contrary to the established practices of the industrial insurance program." This may be conceded, but it does not follow therefrom that a workman who had been denied authorization for medical treatment and thereafter privately obtains such treatment would be barred from asserting his right to compensation for disability caused by his industrial injury. In the case of Elliott v. Department of Labor and Industries, 187 Wash. 656, modified in 188 Wash. 703, a workman with a congenital weakness in his low back, due to the presence of a 6th lumbar vertebra, one more than is ordinarily found, sustained an industrial injury affecting this area. After his claim had been closed with a permanent partial disability award, he appealed to the joint board of the department of labor and industries. While his appeal was pending before the joint board, the workman, without authority from the department, obtained surgical treatment, presumably a spinal fusion, to correct the congenital defect in his back. Insofar as is pertinent to the present discussion, the holding of the court in the Elliott case was that the claimant was entitled to compensation for the postoperative disability in his low back attributable to his industrial injury. It may be noted that the court also held that the department would not be responsible for the disability directly attributable to the workman's spinal defect, or, therefore, for the operation required to correct it, and that his compensation for his residual disability in his low back should be adjusted in accordance with the provisions of Rem. Rev. Stat. Sec. 7679 (g), now to be found in RCW 51.32.120(4). This interpretation of the provisions of what is now RCW 51.32.120(4), and the holding that the statute was applicable to a disability resulting from an injury superimposed upon a congenital weakness, which had not prior to injury been disabling, was rejected by the court in the later case of Miller v. Department of Labor and Industries, supra, which overruled the Elliott case specifically on this point without disturbing, however, its holding that a workman, who had without authority from the

department, obtained surgical treatment subsequent to the closing of his claim, is entitled to compensation for his postoperative disability attributable to his industrial injury.

While we have concluded from our review of the record in this case that a causal relationship has been established between the claimant's postoperative disability in his low back and his industrial injury, we do not believe that the record supports his contention that at the time his claim was closed on May 1, 1962, he was permanently and totally disabled within the meaning of the workmen's compensation act. In support of this contention, the claimant presented the medical testimony of Dr. Grieve, who had performed surgery on his back in May of 1960, and again in August of 1961. Dr. Grieve, it may be noted, did not express the opinion that the claimant was permanently and totally disabled.

On direct examination, he testified as follows:

"Q Doctor, in mid-1962, did you feel that Mr. House was able to go out and perform a normal, regular, gainful occupation?

A I thought he might do some selling or something like that. He couldn't do any stooping or lifting or carrying anything heavy.

Q Would this rule out any type of manual work?

A Yes."

On cross-examination by the department, he testified as follows:

"Q Doctor, do you think that Mr. House would be able to perform jobs other than selling, such as an insurance adjustor, if it didn't involve stooping and lifting?

A Yes, I should think he could, if he was educated for it.

Q Or as a draftsman?

A Yes."

Dr. Grieve qualified his opinion concerning the claimant's physical limitations with respect to employment by testifying further to the effect that in periods when his condition was in a state of exacerbation, he would have difficulty working; that "probably he would have times when he couldn't work," and that if he were to work as a draftsman, leaning over a "drafting table for long periods of time, he would have to get up and move around and possibly lie down some during the day."

In urging that this testimony is sufficient to establish permanent total disability, the claimant relies upon the rule set forth in the case of Kuhnle v. Department of Labor and Industries, 12 Wn.

2d 191, that where it appears that the injured workman, as a proximate result of his industrial injury, is fitted only to perform "odd" jobs or special work not generally available, as distinguished from light work of a general nature, he is entitled to be classified as permanently totally disabled, unless it can be shown that there is special work, within his physical limitations, that he can in fact obtain. The workman in the Kuhnle case, who was about forty-seven years of age when his claim was closed, had, as the court stated, "had little schooling and none whatever after coming to this country at the age of fourteen years. He had worked in the woods at hard manual labor practically all his life.

He was not fitted by training or experience to do work of any kind, except that of manual labor." It is apparent from the testimony of the claimant in the present case, who was approximately thirty years of age when his claim was last closed, that he has had varied training and experience at many forms of employment not involving manual labor in the sense in which that term is generally used. It does not appear that he has ever worked at hard manual labor. Since his graduation from high school in 1951, he has had 800 hours' training as a draftsman, completing about two-thirds of the prescribed course he was enrolled in, and has successfully completed a course in insurance adjusting. He has also had training and experience doing typewriter repairs. An incomplete list of the jobs he has held shows that he has had four and one-half years' experience as a movie projectionist, has worked as a night manager for a motel and has done office work of several types, including work as a mail clerk for the Washington State Ferries and office work for the Western Electric Company, the employer herein. He has worked as a carpenter's helper and testified that he is skilled at woodwork and has made furniture. At the time he testified, he was self-employed on a part-time basis in a rubber stamp business that he had recently established.

In the case of Naillon v. Department of Labor and Industries, 65 W.D. 2d 527, it was held that the testimony of a medical witness to the effect that the workman was unable to engage in gainful employment because his working experience had been entirely at hard labor, which he was no longer able to perform, and because of his lack of education and inability to be trained for lighter work was sufficient to present an issue to the jury under the Kuhnle case. It is evident that the facts in the present case do not meet this test and that the testimony of Dr. Grieve would be insufficient, in the light of the claimant's past work experience, training and education, to bring this case within the rule stated in the Kuhnle case so as to support a finding of permanent total disability.

The only medical testimony in the record on the extent of the claimant's disability on the date his claim was last closed, aside from that given by Dr. Grieve, was that given by Dr. Dunlap, the department's medical witness, who testified that he felt the claimant was able to work but would be limited in the types of manual work he could do. He further testified, as noted above, that his permanent partial disability attributable to his industrial injury was equal to 35 per cent of the maximum allowable for unspecified disabilities. Dr. Dunlap's opinion on disability was thus expressed both in terms of the claimant's physical limitations and in terms of the percentage of permanent partial disability represented by these physical limitations. Dr. Grieve's opinion on disability, on the other hand, was expressed only in terms of physical limitation.

In his Proposed Decision and Order, the hearing examiner took the position that he had no alternative but to accept the opinion on permanent partial disability expressed by Dr. Dunlap in terms of percentage of disability, inasmuch as Dr. Grieve did not testify that the claimant was permanently totally disabled and did not rate his permanent partial disability in terms of percentage.

The law is well settled that a finding of disability in excess of that fixed by the department must be based upon medical testimony. See Page v. Department of Labor and Industries, 52 Wn. 2d 706, and the cases therein cited. Where there is a difference of opinion among the medical witnesses who have testified concerning a workman's disability, a finding of disability may be made that lies between the opinions of the experts; if, however, all the expert's opinions are in substantial agreement as to the maximum compensation to be allowed, a finding of disability cannot be supported that would exceed the maximum amount testified to by the experts. Page v. Department of Labor and Industries, supra; Dowell v. Department of Labor and Industries, 51 Wn. 2d 428. In the Dowell case, where the workman's medical witness had testified on direct examination that he was "totally disabled" but then, as stated by the court, "modified his testimony on cross-examination by saying that respondent could work at something, but was unable to do any stooping or heavy lifting, and could not stand or sit for any length of time," the court remarked that "This testimony described a very high degree of permanent partial disability, even though it was not expressed in terms of percentages," and held that it would support a finding of disability in excess of that awarded by the department, although there was no medical testimony in the record, in terms of percentage, as to any higher permanent partial disability.

In the Proposed Decision and Order, the opinion was expressed that the holding in the Dowell case could not be applied to the present case, since the testimony of the medical witness in

that case, given on direct examination, that the workman was "totally disabled" was only qualified on cross-examination by his statement that he could do some types of work, while in the present case, Dr. Grieve's testimony is not to that effect, since he at no time stated that the claimant was totally disabled. The Board does not believe that the suggested interpretation of the Dowell case, implying that the court in that case gave probative effect to the testimony that the workman was totally disabled, or the attempted distinction, based upon this interpretation, between that case and the present case, is sound. It is evident that the medical witness in the Dowell case retracted, not merely qualified, his earlier opinion that the workman was totally disabled. It would appear, therefore, that the final effect of his testimony was substantially similar to that given by Dr. Grieve in the present case.

The holding in the Dowell case is contained in the following statement by the court:

> "The testimony of Dr. Dugaw that respondent was 'totally disabled' was contradicted by his statement, on cross-examination, that there were jobs which respondent could probably do. However, in adding that respondent could do no heavy lifting or stooping, and, in fact, could not even stand or sit continuously for any length of time, he supplied evidence which supports the jury's award of an additional sixty per cent of the maximum allowed for unspecified disabilities. There is nothing in our decisions to justify appellant's contention that Dr. Dugaw's testimony was value-less because he did not testify in terms of per-centage. The jury in this case was not limited to an award of twenty per cent in the face of substantial medical testimony, based upon repeated examinations which disclosed objective symptoms, describing a higher degree of disability." (Emphasis added)

It is clear that this holding was not based upon the theory that simply because Dr. Dugaw had stated on direct examination that the claimant was "totally disabled," the jury could therefore reach a verdict somewhere between a rating of permanent total disability and the rating of 20 per cent of the maximum allowable for unspecified disabilities given by the department's medical witness. It may be noted in this connection that in the case of Dotson v. Department of Labor and Industries, 48 Wn. 2d 855, the court quoted with approval the following statement from Halder v. Department of Labor and Industries, 44 Wn. 2d 537:

> "If, however, indispensable testimony is, in effect, retracted or completely negated as a result of inconsistencies and contradictions in the other testimony of the same witness, that fact is to be considered in passing upon the motion." [for judgment n.o.v.]

and then held in effect that testimony given on direct examination that is retracted on cross-examination may be disregarded. This is obviously what the court did in the Dowell case, as it is clear from the entire opinion that the court considered that Dr. Dugaw had retracted his opinion stated on direct examination that the claimant was "totally disabled."

It is apparent, therefore, that the Dowell case stands for the proposition that where there is a difference of opinion among medical witnesses respecting the extent of a workman's permanent disability, whether expressed in terms of percentages of disability or in terms of physical limitations, the trier of facts may make a finding of disability that lies somewhere between the opinions expressed by the experts.

The case of Page v. Department of Labor and Industries, supra, is distinguishable from the Dowell case in that all the medical witnesses in that case agreed that the claimant's disability did not exceed 35 per cent of the unspecified, and the case was obviously tried on the theory, rejected by the court, that given the facts or findings of disability testified to by medical experts, the jury could properly, based upon lay and medical witnesses, determine the amount of permanent disability.

In the present case, the claimant alleged in his notice of appeal that he was permanently totally disabled, and in his exceptions, that the medical testimony presented would justify a finding of permanent total disability under Kuhnle v. Department of Labor and Industries, supra. His medical witness, Dr. Grieve, testified to more findings of disability than did Dr. Dunlap, the department's medical witness, and there is an obvious difference of opinion between Dr. Grieve and Dr. Dunlap as to the limitations imposed on the claimant's working ability by his low back condition. Dr. Grieve, for example, stated that, although the claimant could engage in some forms of employment, he could not do any work involving stooping or heavy lifting or any manual labor, while Dr. Dunlap's testimony in this regard was merely that the claimant would be limited in the types of manual labor he could do. It is the conclusion of this Board that the evidence in the record indicates and will support a finding that the claimant's permanent disability attributable to his industrial injury was on the date his claim was last closed, equal to 50 per cent of the maximum allowable for unspecified disabilities.

With respect to the claimant's contention that he is entitled to time-loss compensation for the period from February 18, 1959 to June 8, 1959, the Board concludes from the evidence in the record that it will support a finding of temporary total disability only for the period following May 1,

1959. The medical evidence presented by the claimant on this issue consists of the following testimony of Dr. Grieve:

> "Q Doctor, if we assume that his complaints had been the same back to February 18, 1959, and that he had been in the Veterans Hospital on occasions before you saw him, with the same difficulty with his back, could you tell us, do you have an opinion whether it would be more likely or less likely than not this employability extended back to February of 1959?
>
> A I think he was probably unable to work <u>when he went to the Veterans Hospital the first time</u>.
>
> Q So, then, from February of 1959 up through the time you saw him, he was unable to work as far as you could discern?
>
> A I would <u>surmise</u> that was a fact.
>
> Q Would you say whether it would be more likely or less likely than not, based upon the way you found him in 1960, Doctor?
>
> A More likely." (Emphasis supplied)

While the precise date he entered the hospital was not given, it is apparent from the testimony of the claimant and Dr. Lovezzola that it was in May of 1959. It would appear that Dr. Grieve's opinion with respect to the period prior to May of 1959, based upon his examination made in May of 1960, was no more than conjecture and has insufficient probative force to support a finding of temporary total disability for this prior period. It may be noted also that the claimant was apparently attending trade school during much of the period in issue. His testimony on direct examination was that he "was dropped completely" from school in October of 1959, but was out of school in June, July and August of 1959.

The Board has also reviewed the record in connection with the parties' exceptions to the evidentiary rulings of the hearing examiner. The medical testimony admitted into evidence and incorporated into this record from the prior appeal held in connection with this claim was admitted by the hearing examiner only so far as it pertained to the issue of time-loss compensation for the period at issue. As indicated by its above discussion of this testimony, the Board believes that this ruling was too narrow and the Board hereby reverses said ruling, insofar as it limited the evidence admitted to the issue stated. The Board has also reviewed the other evidentiary rulings of the hearing examiner and finding that no prejudicial error was committed therein, has determined that said rulings should be, and the same are hereby, affirmed.

In view of the foregoing and after a careful review of the entire record herein, the Board has concluded that the order of the supervisor of industrial insurance dated May 1, 1962, should be reversed and this claim should be remanded to the department of labor and industries with direction to pay the claimant a permanent partial disability award of 50 per cent of the maximum allowable for unspecified disabilities, less the prior award paid, plus time-loss compensation for the period from May 1, 1959 to June 8, 1959.

FINDINGS OF FACT

Based upon the record, the Board finds:

1. On September 27, 1951, the claimant, James R. House, sustained an injury to his back while in the course of his employment with Western Electric, Inc., when he fell about seven feet from a ladder, striking his back on a concrete floor and suffering severe contusions and sprains of the lumbodorsal muscles and a fracture of the tip of the 1st lumbar vertebra. The claim based upon the report of accident filed in connection with this injury was allowed ime-loss compensation was paid, and medical treatment was provided. On February 1, 1952, the supervisor of industrial insurance entered an order closing the claim with no award for permanent partial disability.

2. On October 16, 1956, the claimant filed an application to reopen his claim for aggravation of condition. On November 21, 1956, the supervisor entered an order denying the application. On December 31, 1956, the claimant filed a notice of appeal with this Board, which on January 17, 1957, entered an order granting the appeal. On October 31, 1957, the Board entered an order on agreement of the parties remanding the claim to the department of labor and industries for conservative medical treatment for the claimant's low back condition and for such other and further action as might be indicated. This agreed order was based upon a stipulation entered into between the claimant and the employer, and not objected to by the department, on October 29, 1957, stipulating that the claim might be remanded to the department for conservative treatment only in accordance with the recommendations contained in a report of a medical examination of the claimant conducted by Dr. Robert L. Romano on July 18, 1957.

3. Pursuant to this Board's order of October 31, 1957, this claim was reopened and further medical treatment was provided. On May 12, 1958, the supervisor entered an order closing the claim with time-loss compensation as paid to March 4, 1958, and with no award for permanent partial disability. On June 5, 1958, the claimant filed a notice of appeal with this Board, and on July 1, 1958, the supervisor entered an order holding the order of May 12, 1958, in abeyance pending further investigation. Accordingly, this Board, on July 2, 1958, entered an order denying the appeal. On February 18, 1959 the

supervisor entered an order adhering to the provisions of the prior order dated May 12, 1958. On March 20, 1959, the claimant filed a notice of appeal with this Board, which, on April 2, 1959, entered an order granting the appeal.

4. On November 8, 1961, this Board entered an order finding that the claimant's low back condition, involving the aggravation with resulting disability of a congenital defect at the lumbosacral level described as a neuro-arch defect (spondylolysis), was causally related to his industrial injury of September 27, 1951, reversing the order of the supervisor dated February 18, 1959, and remanding the claim to the department with direction to provide the claimant with treatment for his low back condition, and to take such other and further action as might be indicated.

5. Pursuant to the Board's order of November 8, 1961, the claim was reopened and on January 5, 1962, the supervisor entered an order paying time-loss compensation for the period from June 8, 1959 to August 19, 1961. Thereafter, on May 1, 1962, the supervisor entered an order closing the claim with a permanent partial disability award of 35% of the maximum allowable for un-specified disabilities. On May 17, 1962, the claimant filed a notice of appeal from the supervisor's order of May 1, 1962, which was granted by an order of this Board entered May 31, 1962, and assigned Docket no. 17,857. On June 20, 1962, the employer filed a notice of cross-appeal, which was granted by an order of this Board dated June 28, 1962, and assigned Docket No. 17,857-A.

6. On January 25, 1965, a hearing examiner for this Board entered a Proposed Decision and Order sustaining the order of the supervisor dated May 1, 1962. Thereafter, within the period of time prescribed by law, the claimant and the employer filed written statements of exceptions to said Proposed Decision and Order.

7. Pre-existing his industrial injury of September 27, 1951, the claimant had a theretofore asymptomatic and non-disabling condition in his low back involving a neuro-arch defect at the lumbosacral level. As a proximate result of said injury, the claimant's said pre-existing low back condition was aggravated and made symptomatic with resulting low back disability. As a further proximate result of said industrial injury, the claimant's low back condition attributable to his industrial injury progressively worsened subsequent to February 1, 1952, to the extent that he was required to undergo surgery in May of 1960, for the purpose of affecting a spinal fusion extending from the 4th lumbar vertebra to the sacrum and again in August of 1961, for the purpose of correcting a pseudoarthrosis resulting from a failure of fusion.

8. On or about May 1, 1962, when his claim was last closed, the claimant's condition attributable to his industrial injury of September 27, 1951, was fixed, and he was then able to engage in gainful employment on a

reasonably continuous basis. His permanent partial disability resulting from his postoperative condition attributable to his industrial injury of September 27, 1951, was on or about May 1, 1962, equal to 50 per cent of the maximum allowable for unspecified disabilities.

9. In the period from May 1, 1959 to June 8, 1959, the claimant was temporarily unable to engage in any gainful employment. He was not incapacitated from engaging in some form of employment in the period from February 18, 1959 to May 1, 1959.

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. By virtue of the order of this Board entered in connection with this claim on November 8, 1961, it is now res judicata that the claimant's industrial injury of September 27, 1951, aggravated and made symptomatic a congenital spinal defect at the lumbosacral area, proximately resulting in a low back condition requiring surgical intervention.

3. The order of the supervisor of industrial insurance dated May 1, 1962, should be reversed and this claim should be remanded to the department of labor and industries with direction to pay the claimant time-loss compensation for the period from May 1, 1959 to June 7, 1959, inclusive and, further, to pay the claimant a permanent partial disability award equal to 50% of the maximum allowable for unspecified disabilities, less the prior award paid, and thereupon to close the claim.

It is so ORDERED.

Dated this 29th day of November, 1965.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R.H. POWELL Member

/s/_____
R.M. GILMORE Member