Taylor, Sterling

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Part-time employment

Steady employment at skilled work on a regular basis of four hours per day, five days per week, commencing two days after the closing date and continuing through the hearing date, constitutes work at a gainful occupation within the meaning of RCW 51.08.160 and, as a matter of law, disqualifies the worker from a pension. ***….In re Sterling Taylor,*** **BIIA Dec., 19,725 (1965)** [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: STERLING J. TAYLOR	**)**	**DOCKET NO. 19,725**
	)	
CLAIM NO. C-497367	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Sterling J. Taylor, by
Elliott, Schneider and Smythe, per
James L. Salley

Employer, Holroyd Company,
None

Department of Labor and Industries, by
The Attorney General, per
Frederick B. Hayes, Floyd V. Smith
Raymond E. Brown and Andrew J. Young, Assistants

Appeal filed by the claimant, Sterling J. Taylor, on March 5, 1963, from an order of the supervisor of industrial insurance dated January 9, 1963, closing this claim with a permanent partial disability award of 50 per cent of the maximum allowable for un-specified disabilities. **REVERSED AND REMANDED**.

DECISION

On April 9, 1958, the claimant sustained an industrial injury when a piece of concrete weighing between five and ten pounds fell from a height of about twenty feet and struck him in the low back during the course of his employment for the Holroyd Company as an operator of a machine that produced concrete blocks. After a course of conservative treatment, the claimant returned to his job but his back condition forced him to terminate his employment permanently with Holroyd's in June, 1958. On March 26, 1960, surgery was performed on his low back for the removal of a herniated disc.

In August, 1960, the claimant commenced employment as a repairman of vacuum cleaners for a Mr. Mears. Initially, he limited his workday to four hours, and subsequently attempted to lengthen it to six. However, he found the longer shift caused him too much difficulty with his back

and he accordingly settled upon a four-hour workday. He worked the remainder of 1960 on a regular four-hour shift, five days a week, and followed this same schedule in 1961 until July 11, 1961, when a fusion was performed on his low back. Following a period of convalescence of about three months, he returned to his repairman job for Mr. Mears - working one to two hours a day at first, and gradually increasing to his regular four hours per day, five days per week. He continued so working until June, 1962, when he laid off until September, 1962. He worked eight days in September and then attended the Rehabilitation Center in Seattle from September 24, 1962 to November 16, 1962. He returned to his job of repairing vacuum cleaners for Mr. Mears sometime in January, 1963 - the 11th being suggested as the precise date. He has since worked continuously on a schedule of four hours per day, five days per week, and was so employed at the time of the original hearing in this matter on November 18, 1963. During the time that the claimant was working prior to the closure of his claim on January 9, 1963, he was not paid regular time-loss compensation as a temporarily totally disabled workman, but was paid loss of earning power compensation pursuant to RCW 51.32.090(3).

The department closed this claim with an award of 50 per cent of the maximum allowable for unspecified disabilities. The hearing examiner increased the award to 90 per cent in a Proposed Decision and Order issued on July 22, 1964. The department and the claimant have duly filed statements of exceptions thereto. Exceptions were also filed on behalf of the employer by its lay representative. Under Rule 3.1(b) of the Board's Rules of Practice and procedure, the participation of lay representatives in proceedings before the Board is expressly limited to informal conferences. Accordingly, the exceptions filed on behalf of the employer will not be considered. (We note, parenthetically, that if considered, they would have no bearing on the Board's decision as they are based on the legal misconception that the Board must accept either the conclusions of the claimant's medical witness or those of the department's medical witness in their entirety.)

The department takes no issue with the hearing examiner's increased award, but merely challenges a factual finding, which it contends contains an inference that the claimant could not work more than four hours a day. The question for decision is raised by the claimant's contention that he is entitled to permanent total disability benefits.

Insofar as material, RCW 51.08.160 defines "permanent total disability" as any "condition permanently incapacitating the workman from performing any work at any gainful occupation." (Emphasis supplied) Under this statute, our court has held that the purpose of the act is to insure against loss of wage earning capacity, and the fact that a workman owns a business or farm from which he derives an income by supervising the work of others and performing minor tasks himself, does not necessarily establish that he has wage earning capacity. Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191. In the instant case, there can be no question but that the claimant has wage earning capacity – he is steadily employed for wages at a skilled job. The Kuhnle case is primarily concerned with pointing up a distinction between income and wages with respect to resolving the question of whether or not a workman possesses wage earning capacity. However, with respect to the broader question of permanent total disability, the court quoted from the Tennessee case of White v. Tennessee Consolidated Coal Company, 36 S. W. 2d 902, in part as follows:

> "The authorities draw a distinction between cases in which it appears that the injured employee can do light work of a general nature and where he is only fitted to do 'odd' jobs, or special work, not generally available. In the former, the burden is on the petitioner, the presumption being that his inability to obtain employment is due to the fluctuations in the labor market and not to the consequences of the accident. In the latter, the burden is on the employer to show that such special work is available to the petitioner."

In other words, even though a workman possesses wage earning capacity, he might still be classed as permanently totally disabled if his injury has impaired such capacity to the extent that he can only perform odd jobs or special work not generally available. Of course, the applicability of this rule is contingent upon the workman being unemployed, and even then, only if the defense fails to satisfy the burden of showing that work is available to the workman that he can perform within his physical limitations. Assuming this rule presides in Washington, it obviously can be of no benefit to the claimant. He is steadily employed.

The case of Turner v. Department of Labor and Industries, 41 Wn. 2d 739, further supports the proposition that the claimant cannot be classed as permanently totally disabled. It was there held that a workman was not permanently totally disabled as a matter of law where he was steadily employed at the time his claim was closed and there was no evidence that working caused him "serious" pain or endangered his health. Evidence was there produced that the workman was only

able to hold down his job because his foreman gave him the "breaks" and that he was forced to cease working permanently because of his industrial condition within one and one-half months after the supervisor of industrial insurance closed his claim. The court commented upon this aspect of the case as follows:

> ".....whether by grace of appellant's foreman or otherwise, he was steadily employed at the time of the supervisor's order and, therefore, could not then have been held to be unemployable or permanently totally disabled within the statutory definition of permanent total disability."

By implication, the Turner case takes cognizance of the general rule that ability to work per se will not defeat a workman's claim for permanent total disability benefits in he can only do so under continuous pain and suffering, or at danger to his health. See e.g. U. S. Gypsum Co. v. Raugh, 318 P. 2d 865; Oklahoma Gas & electric co. v. Hardy, 67 P. 2d 445; Carter v. U.S., 49 F. 2d 221. In his exceptions, the claimant attempts to bring his case within the above rule through various assertions of fact that are either exaggerated or wholly unsupported by the evidence.

The severity of the claimant's pain and suffering is best reflected by his work history. The record shows that he has always limited his work hours to suit his condition. When he first returned to work following a back operation, he found that four hours per day was too much, and he accordingly limited himself to one or two hours and gradually increased his time back up to four hours. He has found that he cannot work beyond four hours without suffering substantial pain and difficulty - in his words, "It's not worth it." The four hour per day schedule was settled upon by the claimant as being within his capabilities. We are not about to tell him his capacity for work is less than what his own conduct has demonstrated it to be. The whole theory of the claimant's case, as framed and dictated by the evidence, is that he cannot work a full eight-hour day. The claimant filed his own notice of appeal as he was not represented by counsel at the time. In his notice of appeal, he did not allege that he could no longer work, but rather that he could not work a full eight hours per day. Nor did he testify that his back condition was such that he could not continue working as he has on a regular four hour per day basis. The sum total of his testimony is that his back condition precludes him from working more than four hours per day. For all that appears, he will continue working at his job indefinitely regardless of whether or not he receives a pension.

Our research fails to uncover any authority from our own or any other jurisdiction that would support a proposition that inability to regularly work a full eight-hour day entitles the workman to permanent total disability benefits. To the contrary, under our own statute, a workman is rendered ineligible for a pension if he is capable of performing "any" work at a gainful occupation. Taken literally, the statute would foreclose the workman whose ability was limited to performing the most trivial of tasks if he received compensation therefor. However, the rule of reasonable construction and the common law doctrine of deminimis would not permit such a result. The Kuhnle case, supra, offers insight to the proper application of the statute. The court therein quoted with approval from the Minnesota case of Green v. Schmahl, 278 N.W. 157, as follows:

> "'Furthermore and important, sporadic competence, occasional, intermittent, and much limited capacity to earn something somehow, does not reduce what is otherwise total to a partial disability. The statutory phrase 'working at an occupation which brings him an income,' like that of insurance 'following any occupation,' implies at least a reasonable degree of continuity of occupational capacity.'" (Emphasis supplied)

The claimant's employment is steady and regular as opposed to sporadic, occasional or intermittent. The evidence does not support the suggestion of his counsel that his job is not permanent and only available to him while Mr. Mears' son is away at college. Although the claimant was not working on January 9, 1963, the date the department closed his claim, he returned to his job within a matter of days thereafter and worked steadily through the date of original hearing in this matter which clearly demonstrates his ability to work on or about the date the department closed his claim.

We are firmly of the view that steady employment at skilled work on a regular basis of four hours per day, five days per week, constitutes work at a gainful occupation within the meaning and intent of RCW 51.08.160, and legally disqualifies the claimant from a pension.

No contention is raised that the claimant's permanent partial disability is in excess of that awarded by the hearing examiner. Accordingly, his award of 90 per cent of the maximum allowable for unspecified disabilities is affirmed.

FINDINGS OF FACT

Based upon the foregoing and after carefully reviewing the entire record, the Board makes the following findings:

1. On April 9, 1958, the claimant sustained an industrial injury during the course of his employment for Holroyd Company, when a chunk of cement weighing between five and ten pounds fell from a height of approximately twenty feet and struck the claimant in the low back while he was in a bent-over position. His claim was allowed, and on January 9, 1963, the department issued an order closing the claim with a permanent partial disability award of 50% of the maximum allowable for unspecified disabilities. On March 5, 1963, the claimant filed a notice of appeal, and on April 4, 1963, the Board issued an order granting the appeal.

2. On July 22, 1964, a Proposed Decision and Order was issued in this matter. Statements of exceptions thereto were duly filed by the claimant and the department of labor and industries. Exceptions were also filed on behalf of the employer by its lay representative.

3. In August, 1960, the claimant commenced employment for Mears Vacuum Service as a repairman of vacuum cleaners on a basis of four hours per day, five days per week. He worked on this basis the remainder of 1960 and the first six months of 1961. Following surgery to his low back and a recuperative period of about three months, the claimant returned to his job as a vacuum cleaner repairman, starting back gradually with an hour or two a day and eventually working back to his regular schedule of four hours per day. The claimant did not work during the months of June, July and August, 1962. The reason for this temporary layoff is not disclosed by the record. He worked eight days in September, 1962, and then attended the Rehabilitation Center in Seattle from September 24, 1962 to November 16, 1962. He returned to his work as a vacuum cleaner repairman on or about January 11, 1963, and has steadily worked his regular schedule of four hours per day, five days per week thereafter.

4. On or about January 9, 1963, the claimant's condition resulting from his industrial injury of April 9, 1958, was fixed and his permanent partial disability attributable thereto, as manifested by residuals of two surgeries, atrophy of the left calf and left thigh, limited straight leg raising bilaterally, complaints of low back pain radiating into both legs, particularly on the left, difficulty in squatting and inability to do heavy lifting, was equal to 90% of the maximum allowable for unspecified disabilities.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Board makes the following conclusions:

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

2. The claimant was not permanently totally disabled on or about January 9, 1963, within the meaning of the workmen's compensation act.

3. The order of the supervisor of industrial insurance dated January 9, 1963, should be reversed and this claim remanded to the department of labor and industries with instructions to reopen the claim to award the claimant a permanent partial disability award equal to 90% of the maximum allowable for unspecified disabilities, less the prior award.

It is so ORDERED.

Dated this 8th day of September, 1965.

BOARD OF INDUSTRIAL INSURANCE APPEALS

_____

J. HARRIS LYNCH Chairman

_____

R. M. GILMORE Member

DISSENTING OPINION

This claimant is, by reason of permanent disability causally related to an industrial injury, unable to work full time. He is fortunate to have found an employer willing to buy his labor on a half-time (four hours a day) basis. He remains at his job four hours a day as a vacuum cleaner repairman under the severe handicap of pain and discomfort. I am persuaded that he is not physically able to engage in work for any longer hours and in fact that he remains at this job through perseverance which would not be encountered in many people with similar physical disability.

I am, therefore, in disagreement with the view of the majority. I cannot agree that employment of four hours a day, performed under these circumstances, constitutes work at a gainful occupation within the meaning of RCW 51.08.160 so as to legally disqualify this claimant from a pension.

I would find that his employment at four hours a day is of an "odd job" nature, which is not readily available in the labor market, and that his performance thereof in pain and discomfort is not persuasive evidence which invalidates his claim for permanent total disability under the act.

I believe the evidence, taken as a whole, requires the finding that this claimant is permanently and totally disabled within the meaning of RCW 51.08.160 as interpreted by our State Supreme Court in the cases of Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191, and Turner v. Department of Labor and Industries, 41 Wn. 2d 739.

Dated this 8th day of September, 1965.

BOARD OF INDUSTRIAL INSURANCE APPEALS

_____

R. H. POWELL Member