

Dezellem, Lester

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Availability of work in geographical area

Whether a worker is permanently totally disabled does not turn on employment opportunities present in the worker's particular community, but on the worker's ability to engage in gainful employment. A different result may obtain in an "odd lot" case. ...***In re Lester Dezellem, BIIA Dec., 23,765 (1966)*** [*Editor's Note: Statement concerning employment opportunities in worker's particular community held "incorrect as a matter of law" by In re Arden Breth, BIIA Dec., 89 2211 (1990).*]

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1 L-4, L-5 (pseudoarthrosis) and the opinions of the Department's medical witnesses, Drs. Michael
2 Lewiski and Darrell Leavitt, who testified that the x-rays interpreted by claimant's medical witness
3 were of poor radiograph density and penetration and inadequate to make such a diagnosis and who
4 also interpreted other x-rays especially taken of the back in flexion and extension and, based
5 thereon, testified that the fusion at L-4, L-5 was stable. We accept the opinion of the Department's
6 medical witnesses on this point and conclude that the claimant's medical witness' evaluation of
7 permanent disability was based, in part, on an erroneous impression.
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11 It is also apparent that the opinion of Dr. Leavitt, as to claimant's permanent disability, is
12 based, to some extent, on error. Dr. Leavitt testified that he recommended the closure of this claim
13 with a rating of "40% of the unspecified disability to the spine." He also testified that he felt that the
14 work the claimant could do was "actually within his 60% ability to work." It is apparent from the
15 testimony that he was erroneously equating unspecified disability with permanent total disability and
16 that his rating of 40 per cent unspecified disability to the spine was really a measure of claimant's
17 ability to engage in gainful employment. It is proper to note that 100 per cent unspecified disability
18 is a partial disability which assumes an ability to continue to engage in some gainful employment
19 and is not synonymous with permanent total disability as Dr. Leavitt's testimony would imply.
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22 We are persuaded that the weight of the evidence supports the Hearing Examiner's finding
23 that the claimant is able to engage in light types of work. It appears from the record that some
24 difficulty in finding light work may prevail in the area where the claimant now resides, as he alleges.
25 One of the facets of the issue before this Board is whether he is physically able to engage in gainful
26 employment, not whether such employment is or is not presently available in his community. This
27 is a socio-economic matter. The Act does not intend that the decision, on a question of whether an
28 injured workman is permanently totally disabled or not, should turn on employment opportunities
29 then present in any particular community. If this were the law, we would have a fluctuating and
30 variable standard, dependent not on the injured workman's ability to engage in gainful employment,
31 but rather, dependent on the economic condition in different communities at different times. This is
32 not to say that the "odd job" rule of Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191 is
33 not valid. There is a clear distinction between the ability to perform only "odd jobs" and the "ability
34 to perform light forms of gainful employment" as the Hearing Examiner has found in this case.
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37 The Hearing Examiner has determined that the evidence warrants an award equal to 55 per
38 cent of the maximum allowable for unspecified disabilities. We concur.
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1 The proposed findings, conclusions and order are hereby adopted as this Board's findings,
2 conclusions and order and incorporated herein by this reference.
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4 It is so ORDERED.

5 Dated this 28th day of November, 1966.
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7 BOARD OF INDUSTRIAL INSURANCE APPEALS
8

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10 /s/
11 R. H. POWELL Member
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14 /s/
15 R. M. GILMORE Member
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