Musick, Lawrence

EVIDENCE

Collateral source rule

Since motivation to work is a factor in the permanent total disability determination, evidence of receipt of social security benefits is relevant and admissible to show the worker's financial motivation not to work. ***….In re Lawrence Musick*, BIIA Dec., 48,173 (1978)** [concurrence and dissent] [*Editor's Note:* Holding on collateral source rule overruled by *Johnson v. Weyerhaeuser*, 134 Wn.2d 795 (1998).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: LAWRENCE MUSICK	**)**	**DOCKET NO. 48,173**
	)	
CLAIM NO. G-695895	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Lawrence Musick, by
H. Frank Stubbs

Employer, Woodworth & Company, by
Thomas Kuchman and Norman Cohen

Department of Labor and Industries, by
The Attorney General, per
Joseph A. Albo, Gerald L. Casey, and Dinah Pomeroy, Assistants

This is an appeal filed by the claimant on May 7, 1976, from an order of the Department of Labor and Industries dated March 12, 1976, which closed this claim with an unspecified permanent partial disability award, for low back disability, equal to 10% 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 by a hearing examiner for this Board on July 28, 1977, in which the order of the Department dated March 12, 1976, was sustained.

The issue presented by the merits of this appeal is the extent of the claimant's permanent disability proximately resulting from his industrial low back injury of January 29, 1975, as such disability existed on March 12, 1976. The hearing examiner has, for the most part, set forth the pertinent evidence on this issue, but we disagree with his proposal to sustain the Department order.

It is clear that claimant has had some low back problems for many years, as evidenced by x-ray evidence of long-standing degenerative disc disease at the L4-L5 and L5-S1 intervertebral spaces. He lost about a month from work in 1955 because of back trouble; had industrial injuries in 1959 and 1965 which, together, caused a few weeks off work and resulted in permanent partial disabilities; and he had a more severe period of trouble following an accident at home in 1972, when he was off work for six months, and had a chymopapain injection by Dr. Kirk Anderson to resolve pressure from a protruding disc at the fifth lumbar level, which was affecting his right leg. He also obtained chiropractic

treatments for a couple of years before, and for a period of time after, the January 29, 1975 injury for which this claim was filed. He was off work for six weeks after this injury, then attempted to return to work again, until finally terminating completely on May 2, 1975. Since this latter date he has not had any work, and said he doesn't think he can return to heavy equipment operating jobs, or to anything else he had previously done.

The medical evidence -- Dr. Otis Bridgeford for claimant, and Dr. Anderson and Dr. Lynn Staker for the Department -- is quite similar in that, except for the severe degenerative disc disease shown by x-rays, there are not a great deal of objective clinical findings. Nevertheless, it is clear that none of the doctors doubt in the least that claimant has significant impairment and that his complaints are justified. In this regard, the testimony of Dr. Anderson is probative, since he treated the claimant on a number of occasions from 1972 to February of 1974, prior to this injury, and again in June of 1975, following this injury. His testimony was clear that, on objective medical findings alone, claimant's back impairment was not much worse after this injury than it had been prior thereto. However, he did note claimant's complaints for the first time involved radiation down the left leg, whereas only the right leg was involved in 1972. Dr. Bridgeford's examination in December 1975 made confirming findings of sciatic nerve root involvement into the left leg. This then brings into significant focus the following testimony of Dr. Staker:

> "...He had been having back pain and problems for several years. He had been able to work. He had been motivated to work and in this particular case the fact that there were not that much additional objective findings available at the time of my examination (February 18, 1976). I would say I would have the feeling he, because of the continued long-period of pain and difficulty he had, he more or less, so to speak, ran out of gas and didn't want to work any more and the majority of the reason he didn't want to work any more in the future is because he has got a bad back, he has got marked degenerative changes in his spine, and people who have that usually will have intermittent episodes of severe pain with manual labor and my assessment of 10 per cent disability then would be that most of his problems pre-dated and pre-existed his injury and I would allow that much for aggravation, so on that trend I think I had to evaluate the overall motivation problem. As I have mentioned I felt that he probably just ran out of gas over the years and didn't want to continue working."

Much of this record was taken up with exhaustive testimony of two vocational consultants -- one presented by the claimant, and one presented by the employer. Suffice to say that the clear preponderance of this evidence is to the effect that the physical activity limitations imposed by

claimant's back disability, viewed in light of his age, lack of education, prior experience in only heavy labor jobs, slight or non-existent retraining prognosis, and no capacity for any sedentary jobs shown to be obtainable, have rendered him in all practical effect to be permanently totally disabled. Employer's vocational witness opined that claimant could maybe be a gate tender, or a production machine operator "might possibly be accessible" to claimant but this "would be suspect at this stage." This is weak proof of employability.

What was the proximate cause of such total disability status? We believe it must be held to be the residual effects of the 1975 injury herein. Mild though such residuals were, in terms of hard physical findings, they were in our view the "straw that broke the camel's back" in light of the total record. Claimant's severe, but intermittent, back problems prior to this injury were changed into continuous and more limiting and painful problems by said injury; and the claimant -- in Dr. Staker's words -- has "run out of gas," as the result of this worsening effect. This, to us, appears to be the real import of this evidence: Claimant had always been well motivated to return to work in spite of his intermittent problems, but the further impact of this last injury "did him in," so far as continued working ability was concerned.

It is necessary to comment in depth on certain evidentiary issues raised by claimant's counsel in his Petition for Review.

He takes exception to the hearing examiner's ruling, over his objection, admitting into evidence the fact that claimant is receiving social security disability benefits. Claimant contends that such evidence is not relevant and violates the so-called "collateral source" rule as set forth in Stone v. Seattle, 64 Wn. 2d 166 (1964). The Court there stated the rule as follows:

> "It is well established that the fact a plaintiff receives, from a collateral source, payments of this nature which have a tendency to mitigate the consequences of the injury that he otherwise would have suffered, may not be taken into consideration when assessing the damages that the defendant must pay." (Emphasis supplied)

The claimant argues that "in a Workmen's Compensation case, the issue is the damages which a defendant (either the Department of Labor and Industries, which is, in effect the defendant, or any self-insured employer) must pay."

We do not accept claimant's equating a workmen's compensation case with a personal injury civil lawsuit. The Workmen's Compensation Act is remedial legislation which abolished, industrial injury situations, common law tort actions for "damages" based on negligence and liability. RCW

51.04.010. Here, the claimant seeks a classification of permanent total disability, and the amount of his recovery will be set in monthly payments according to mandatory statutory provisions. There are no "damages" to be assessed or calculated by the trier of the fact based on evidence presented as to such damages, as would be the case in a civil personal injury action.

Income from "collateral sources" in these cases of course has no bearing on computing of monetary damages, but it may have a bearing on a claimant's motivation to return to work, and thus is relevant. In Ladley v. St. Paul Fire & Marine Insurance Company, 73 Wn. 2d 928 (1968), the Court recited the general rule: "any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary." Under this rule, the Court held that evidence concerning the plaintiff's disability retirement pension as compared with a greater amount he would receive for a normal retirement, in litigation where the factual issue was whether plaintiff was totally disabled, was relevant and admissible within the discretion of the trial court to show "financial motivation" to work. Obviously, logic requires that if evidence tending to show financial motivation to work is relevant to an issue of total disability, so too is evidence tending to show financial motivation not to work. See also, Fleming v. Mulligan, 3 Wn. App. 951 (1970), wherein the Court of Appeals, while recognizing the Stone v. Seattle rule on evidence of collateral source benefits not being allowed for the purpose of mitigating "damages," nevertheless upheld the trial court's admission of such evidence as relevant to the issue of a period of claimed total disability.

Obviously, if the instant case was one of permanent partial disability, the question of social security benefits would be irrelevant. However, the issue is claimant's permanent and total disability, which includes a number of socioeconomic factors together with his physical impairment. As stated in Fochtman v. Department of Labor and Industries, 7 Wn. App. 286 (1972):

> "Proof of total disability is more individualized than proof of permanent partial disability. The testimony necessarily requires a study of the whole man as an individual -- his weakness and strengths, his age, education, training and experience, his reaction to his injury, his loss of function and other relevant factors that build toward the ultimate conclusion of whether he is, as a result of his injury, disqualified from employment generally available in the labor market." (Emphasis supplied)

Clearly, it appears that evidence bearing on work motivation is one "other relevant factor" in the study of "weakness and strengths" of the "whole man," in order to reach the ultimate determination as to whether he should be classed as permanently totally disabled. In fact, claimant's own medical witness and his vocational expert witness both admit that motivation is a factor in determination of

employability. Even Stone v. Seattle, supra, the apparent leading Washington case on the "collateral source" rule, did not say the evidence about collateral benefit payments was inadmissible. The only question raised in the Supreme Court was whether the trial judge's instruction to the jury properly advised them as to not considering such payments on the mitigation of damages issue.

Claimant argues that evidence showing receipt of social security benefits is prejudicial and likely to be misused by a jury. The reason for this argument is clear -- "misuse by a jury" is the only basis for the two decisions he cites to us which have held evidence of collateral benefit sources to be inadmissible. These are the Federal cases of Eichel v. New York Central Railroad Co., 84 S. Ct. 316, 375 U.S. 253 (1963), and Caughman v. Washington Terminal Company, 345 F. 2d 434 (1965), both of which were civil cases involving litigation over the traditional issues of liability based on negligence and assessment of the amount of money damages. In those cases, the defendants introduced at the trials evidence of the plaintiffs' receipt of disability pension payments under the Railroad Retirement Act, not to be considered in mitigation of damages, but as tending to show motive for not returning to work. It was held that such evidence should not be admitted -- not, however, because it was irrelevant, but because "the likelihood of misuse by the jury outweighs the value of this evidence." (Emphasis supplied)

We point out that the intent of our law is that cases before this Board be decided by us; and we feel that, in applying our expertise in evaluating evidence in these records, we are quite capable of placing the evidence on other benefit sources into its proper perspective when considered in light of all evidence in the record. We have obviously done so in the instant case, and have accorded such evidence little persuasiveness. But that is not the same as saying the evidence is completely inadmissible. As to review of the case at the "jury level," evidence of social security disability payments may or may not prejudice claimant's case. Conceivably, a jury could just as well decide that if claimant has been declared totally disabled by one government bureaucracy, there is no reason that another government agency should decide the other way. In any event, under our appellate review system, if "misuse by a jury" is the valid reason for excluding evidence of receipt of other benefits, the remedy is quite apparent. If and when the case goes to Superior Court, the objection to the evidence can be renewed before the Judge and he can and will exercise his own independent sound judicial discretion as to whether such evidence be excluded, unfettered by the ruling that was made at this Board's level.

Claimant has not cited, and we have not discovered, any judicial opinions on workers' compensation cases in this or other jurisdictions, where evidence of income from other sources has been held inadmissible on the issue of work motivation, which issue, as expert testimony herein clearly shows, is pertinent to the question of total disability. The hearing examiner ruled correctly on this evidentiary matter, and his ruling is affirmed.

The claimant has also challenged a ruling by the hearing examiner in which he sustained an objection to the testimony of claimant's expert vocational consultant where the consultant recited the history given to him by the claimant. We feel this testimony is admissible, not for the truth of the matters asserted, but to show in part the basis upon which the expert witness formed his opinion. Accordingly, the ruling on page 103, lines 28 through 30, is reversed, and the succeeding testimony by the witness is removed from colloquy and considered as valid testimony.

A further ruling by the hearing examiner on page 171, lines 27 and 28, wherein he granted a motion to strike an answer to a question as being unresponsive, is reversed and the motion is denied. The balance of the examiner's evidentiary rulings are hereby affirmed.

FINDINGS OF FACT

In view of all the foregoing, and after thorough review of the entire record, the Board finds as follows:

1. On February 6, 1975, the Department of Labor and Industries received a report of accident alleging an injury on January 29, 1975, to the claimant while in the employ of Woodworth and Company, and involving his back. The claim was allowed, treatment and time-loss compensation provided, and on March 12, 1976, the Department of Labor and Industries issued an order closing the claim with an award for unspecified permanent partial disabilities of 10% as compared to total bodily impairment. On May 7, 1976, a notice of appeal was filed with the Board of Industrial Insurance Appeals, and by order dated May 20, 1976, this Board entered an order granting the appeal.

2. The claimant is a 52 year old man with an eighth grade education, who for his entire working life has been engaged in heavy manual labor. For the 25 years immediately preceding the industrial accident of January 29, 1975, claimant was engaged solely in the operation and maintenance of heavy vehicles and equipment.

3. The claimant has had substantial, but intermittent, impairment and difficulties in his low back for many years prior to the injury herein, as shown by x-ray evidence of serious degenerative disc disease at the L4-L5 and L5-S1 intervertebral spaces; and he had prior industrial injuries to his back in 1959 and 1965, which produced temporary periods off work

and awards for permanent partial disabilities. He had a further severe worsening of his back condition due to a home accident in 1972, necessitating about six months off work, and chymopapain injections for resolving a protruded lumbar disc which was affecting the sciatic nerve in his right leg.

4. Following the injury of January 29, 1975, and as a result thereof, claimant suffered further aggravation of his pre-existing degenerative condition in his spine, and developed subjective and objective indication of sciatic nerve root involvement, for the first time, into his left leg. After attempting to return to work again he finally terminated employment completely on May 2, 1975.

5. Claimant's condition was fixed by March 12, 1976, and no treatment of a corrective or curative nature is indicated.

6. As a result of the additional permanent disability proximately caused by this injury of January 29, 1975, superimposed on the degenerative disc disease and the prior injuries outlined in Finding No. 3, and taking into consideration claimant's age, limited education, prior work experience in only heavy labor, slight or non-existent retraining prognosis, and no real capacity for any sedentary job which could be obtained or performed, he has been rendered incapable of regular gainful employment on a reasonably continuous basis.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the Board concludes:

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

2. Claimant is a totally permanently disabled worker, within the meaning of the Workmen's Compensation Act, as the proximate result of his industrial injury herein of January 29, 1975.

3. The order of the Department dated March 12, 1976, closing this claim with a permanent partial disability award of 10% as compared to total bodily impairment, is incorrect and should be reversed, and this claim remanded to the Department with direction to classify him as permanently and totally disabled, and to take such further action as indicated based on said disability classification.

It is so ORDERED.

Dated this 20th day of March, 1978.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
PHILLIP T. BORK Chairman

CONCURRING OPINION, IN PART

I dissent from that part of the above decision that upholds the hearing examiner's ruling to admit testimony showing that the claimant was receiving Social Security disability benefits. The possible probative value of this testimony, weighed against its likely risk of prejudice, leads me to conclude that it should not be admitted.

I concur with that part of the above decision that reverses the hearing examiner's ruling made on Page 171, Lines 27 and 28.

I concur with and adopt that part of the above decision that declares this claimant as permanently and totally disabled, including the formal findings, conclusions, and order.

Dated this 20th day of March, 1978.

/s/_____
SAM KINVILLE Member

DISSENTING OPINION

The evidence in the Board record clearly supports the decision of the hearing examiner to affirm the Department's order of March 12, 1976, closing the claim with an award for permanent partial disability equal to 10% total bodily impairment.

I concur with, and adopt, the Chairman's opinion affirming the hearing examiner with regard to admissibility of collateral source questions. However, it is obvious that a review of the evidence bearing on collateral source benefits and its relation to motivation, is considerably more persuasive to this Board member than such evidence is to the Chairman. Further, I believe that the weight of the evidence assigned to the various witnesses clearly supports the Proposed Decision and Order of the hearing examiner.

I therefore dissent from the majority decision of the Board, particularly in the matter of Findings Nos. 5 and 6, and Conclusions Nos. 2 and 3.

Dated this 20th day of March, 1978.

/s/_____
WILLIAM C. JACOBS Member