

Howes, V. Pearl

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Combined effects of preexisting and subsequent disabilities

A worker is not permanently totally disabled as a result of an industrial injury where only by considering the effects of subsequent unrelated conditions can she be said to be incapable of gainful employment.*In re V. Pearl Howes*, BIIA Dec., 58,356 (1982) [dissent]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: V. PEARL HOWES**) **DOCKET NOS. 58,356, 59,006 &59,180**
2)
3 **CLAIM NOS. H-205058, G-582281 &**)
4 **H-398335**) **DECISION AND ORDER**
5 _____

6 **APPEARANCES:**

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8 Claimant, V. Pearl Howes, by
9 Nashem, Prediletto, Schussler & Halpin, per
10 William L. Halpin

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12 Employer, Independent Foods, by
13 Rolland & O'Malley, per
14 Thomas O'Malley

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16 Employer, Mojonnier & Sons, Inc.
17 None

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19 Department of Labor and Industries, by
20 The Attorney General, per
21 Robert C. Milhem and Gary Keehn, Assistants

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23 This matter comes on appeals filed in three claims by the claimant. One was filed March 18,
24 1981 from an order of the Department of Labor and Industries dated March 4, 1981 closing Claim No.
25 G-582281 with a permanent partial disability award equal to 10% of the amputation value of the right
26 arm at or above the deltoid insertion or by disarticulation at the shoulder (Docket No. 59,006); another
27 was filed on December 18, 1980 from an order dated December 12, 1980 closing claim No. H-205058
28 with a permanent partial disability award equal to 10% as compared to total bodily impairment (Docket
29 No. 58,356); and the third was filed on April 6, 1981 from an order of the Department dated March 24,
30 1981 closing Claim No. H-398335 with a permanent partial disability award equal to 105 as compared
31 to total bodily impairment (Docket No. 59,180). **AFFIRMED** as to all three appeals.

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DECISION

48 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
49 and decision on timely Petitions for Review filed by the employer and Department of Labor and
50 Industries to a Proposed Decision and Order issued on January 5, 1982 in which the orders of the
51 Department dated December 12, 1980, March 4, 1981 and March 24, 1981 were reversed and the
52 claims were remanded to the Department with direction to place the claimant on the pension rolls as a
53 totally and permanently disabled worker.

1 The Board has reviewed the evidentiary rulings in the record and finds that no prejudicial error
2 was committed and said rulings are hereby affirmed.
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4 By these appeals Ms. Howes is apparently contending that she had no remaining capacity for
5 employment on March 24, 1981 as the result of the combined disability causally related to industrial
6 injuries she sustained on May 1 1974, August 31, 1977, and September 28, 1978. She maintains she
7 should therefore be granted the benefits of a permanently totally disabled worker by the Department of
8 Labor and Industries.
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11 The three industrial injuries resulted in injuries to her right shoulder, arm and hand, right ankle,
12 low back, head and neck. In addition to the industrial injuries, she also was involved in three
13 automobile accidents, one in 1968 which injured her back, one in 1974 in which she cut her head,
14 suffered four broken ribs and injured one of her knees, and one in 1979 at which time she broke a
15 finger on the right hand and in which her head was cut. In addition to her other difficulties, she has
16 had 23 surgeries unrelated to her industrial injuries, most of them of a serious nature, involving various
17 parts of her body. Subsequent to her most recent industrial injury she developed a condition
18 diagnosed as "Dupuytren's contracture" in her right hand for which surgery was performed.
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23 In addition to the physical traumas from injury she has also had to adjust to several life events
24 producing emotional upset and distress which events occurred before, between, and after, the
25 industrial injuries on appeal. These various emotional "traumas" over the years have caused sufficient
26 mental distress such that on occasion she became quite depressed.
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30 In spite of the above tragedies, the claimant continued to work until June of 1980, at which time
31 she felt impelled to quit work at a restaurant because she could no longer lift those things which her
32 job required.
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34 A careful examination of the medical testimony discloses that none of the doctors could
35 separate the disabilities caused by each of the industrial injuries, one from another. Neither could they
36 state what effect individually the various automobile accidents and other traumas occurring both
37 before and after the industrial injuries had on her overall condition. One of the doctors were asked
38 whether the claimant could have been able to work solely as the result of the disabilities resulting from
39 the three industrial injuries combined with the disabilities causally related to the other occurrences
40 prior to September 28, 1978, the date of her last industrial injury. Only one doctor felt she was unable
41 to work at all and that was the attending physician, Dr. Donald Woods. All of the other doctors thought
42 there was something she could do to earn a living.
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1 Despite the vagueness of the claimant's disabilities attributable to individual injuries there is
2 substantial doubt that Ms. Howes is now or was capable of gainful employment as of the time the
3 claims on appeal were closed. There is no question that the loss of function resulting from these
4 industrial injuries significantly contributes to the disability she now claims. These physical impairments
5 must be viewed by superimposing their effects upon the claimant as a whole person, i.e., giving
6 consideration to her age, education, and work experience, as well as all her prior infirmities and pre-
7 existing impairments.
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9 The issue presented by Ms. Howes' situation is made more complicated because the record
10 shows that a major element in her current overall disability is traceable to injuries or conditions that
11 occurred subsequent to the three industrial claims before us.
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13 We have long understood it to be the law of this state that a person could not be found to be
14 permanently totally disabled if in order to reach that conclusion an industrially-related disability had to
15 be combined with an impairment which occurred subsequent to the industrial injury. Our Supreme
16 Court gave indication of that logic in Erickson v. Department of Labor and Industries, 48 Wn.2d 458
17 (1956). However, at least one division of our court of appeals is of the opinion that Erickson is sui
18 generis and thus may be of little precedential value. Allen v. Department of Labor and Industries, 30
19 Wn. App. 693 (1981). In Allen, the court found a prima facie case for permanent total disability to be
20 supported even though the last injury of two successive industrial injuries was not a proximate cause
21 of the disability. From the same division of the court of appeals, there is language in an earlier opinion
22 which when read most broadly would seem to support that if an industrial injury is a "significantly
23 contributing cause" of total disability, compensation must follow "regardless of other causes." Shea v.
24 Department of Labor and Industries, 12 Wn. App. 410 (1974).
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26 Still, the Shea case did not deal with the combined effects of an industrial injury and a
27 subsequent condition. Rather, it concerned a condition (vascular disease) which had its inception
28 prior to the industrial injury and was totally disabling in and of itself. The impairment from the industrial
29 injury (back condition), if believed, progressed independent from and subsequent to the disabling
30 vascular disease to itself alone be responsible for causing Mr. Shea to be permanently totally disabled,
31 even if the vascular condition did not exist.
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33 The Allen case to us merely would permit a jury to find that as of 1977 the disabling effects of
34 an injury which occurred in 1965 was the proximate cause of permanent total disability. Prior to Allen,
35 it would have been argued that an injury which had occurred in 1970 had to be supportable as the
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1 proximate cause of the resultant total disability, and the 1965 injury merely a condition upon which the
2 ultimate cause operated. We understand the court in Allen to say that evidence will be sufficient to
3 support permanent total disability if the disabling effects of an earlier injury progressed independent
4 from the effects of a later less serious injury and such progression eventually results in preventing the
5 worker from gainful employment. Clearly in Allen the facts, if believed, showed the earlier injury was
6 the proximate cause of disability which progressed to total disability separate from the effects of a
7 subsequent injurious event.
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12 Nowhere in the reported cases in this jurisdiction can we discover a fact pattern where a prima
13 facie case for permanent total disability is based upon the effects of one or more industrial injuries
14 combined with the effects of another condition, non-industrial in nature, which had its inception
15 subsequent to the industrial injury or injuries for which compensation is sought.
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18 Such is the fact pattern of Ms. Howes' appeals which are now before us. The most reasonable
19 interpretation of the evidence in the appeals before us is that Ms. Howes cannot be found incapable of
20 gainful employment unless we add into the industrial injuries the effects of her 1979 automobile
21 accident and her development of Dupuytren's contractures. There is no convincing evidence from
22 which we can conclude that the claimant's inability to work is due to disabilities causally related to the
23 three industrial injuries superimposed on disabilities related to her earlier automobile accidents or
24 other traumas occurring prior to the date of her last industrial injury. For us to take such a step to view
25 Ms. Howes' injuries in relation to subsequent conditions requires a large stretching of the dicta in Allen
26 and Shea, far beyond the fact patterns present in those cases.
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31 Surely the impairing effects of the industrial injury, either individually or collectively, may
32 progress independent of her unrelated subsequent disabilities and become permanently totally
33 disabling to her. However, the preponderance of credible evidence in the record before us does not
34 adequately support that conclusion presently. Such independent progression of the effects of her
35 injuries, i.e., aggravation of disability, is clearly what the court was seeking to establish by its decisions
36 in Allen and Shea. We see no legitimate purpose in extending that reasoning beyond its logical
37 bounds.
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42 The claimant has, therefore, not established a right to permanent total disability benefits based
43 upon her three industrial injuries that she had, or in any combination of them. The Department's order
44 should be affirmed as there is no showing that she is entitled to any greater permanent partial disability
45 awards than that already granted by the Department.
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FINDINGS OF FACT

After a careful review of the record, the Board finds as follows:

1. On May 1, 1974 the claimant, V. Pearl Howes, sustained injuries to her right upper extremity and right ankle while working for Mojonnier & Sons, Inc. The Department of Labor and Industries assigned Claim No. G-582281 and allowed the claim. On March 4, 1981 the Department issued an order closing the claim with a permanent partial disability award equal to 10% of the amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. On March 18, 1981, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On April 7, 1981, the Board issued an order granting the appeal, assigned it Docket No. 59,006 and directed that proceedings be held on the issues raised by the appeal.
2. On August 31, 1977, the claimant sustained injuries to her right shoulder and low back while in the employ of Independent Foods. On September 7, 1977 the claimant filed a report of accident and application for benefits with the Department. The claim was assigned Claim No. H-205058 and thereafter allowed. On December 12, 1980, the Department entered an order closing the claim with a permanent partial disability award equal to 10% as compared to total bodily impairment. On December 18, 1980, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On January 16, 1981, the Board issued an order granting the appeal, assigning it Docket No. 58,356, and directed that proceedings be held on the issues raised by the appeal.
3. On September 28, 1978 the claimant sustained injuries to her right elbow, head, neck and low back, while employed by Independent Foods. On October 4, 1978 she filed a report of accident and application for benefits with the Department of Labor and Industries. The Department assigned it Claim No. H-398335 and allowed the claim. On March 24, 1981 the Department issued an order closing the claim with a permanent partial disability award equal to 10% as compared to total bodily impairment. On April 6, 1981 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On April 30, 1981 the Board issued an order granting the appeal, assigned it Docket No. 59,180, and directed that proceedings be held on the issues raised by the appeal.
4. In 1968 the claimant was involved in an automobile accident and injured her back. In 1974 she was involved in an automobile accident and suffered injuries to her right knee, head and ribs. In 1979 she was involved in an automobile accident in which her finger was broken on her right hand and she received injuries to her head.
5. Subsequent to September 28, 1978 the date of her most recent industrial injury, the claimant developed Dupuytren's contractures involving her right hand and surgery was performed thereon. The claimant was able to work until June, 1980, at which time she was forced to quit working in a

1 restaurant because she could no longer lift heavy objects because of the
2 disabilities involving her upper extremities.

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4 6. The claimant was unable to obtain and retain gainful employment on a
5 reasonably continuous basis on or about December 12, 1980, March 4,
6 1981, and March 24, 1981.
- 7 7. Claimant's inability to work on or about the above dates was due to the
8 combined disabilities causally related to the three industrial injuries, the
9 automobile accidents, and the Dupuytren's contracture.
- 10 8. The claimant's inability to work was not due solely to the permanent
11 disabilities causally related to the three industrial injuries, combined with
12 the two automobile accidents occurring prior to September 28, 1978, and
13 to any pre-existing disabilities that she had.
- 14 9. On March 4, 1981 the claimant's condition causally related to the industrial
15 injury of May 1, 1974 (G-582281) was fixed and her disability did not
16 exceed 10% of the amputation value of the right arm at or above the
17 deltoid insertion or by disarticulation at the shoulder.
- 18 10. On December 12, 1980 the claimant's condition causally related to the
19 August 31, 1977 industrial injury (Claim No. H-205058) was fixed and her
20 disability did not exceed 10% as compared to total bodily impairment.
- 21 11. On March 24, 1981 the claimant's condition causally related to the
22 September 28, 1978 industrial injury (Claim No. H-398335) was fixed and
23 her disability causally related thereto did not exceed 10% as compared to
24 total bodily impairment.

25 **CONCLUSIONS OF LAW**

26 Based on the foregoing findings of fact, the Board concludes as follows:

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29 1. The Board of Industrial Insurance Appeals has jurisdiction of the parties
30 and subject matter of these appeals.
- 31 2. The claimant was not permanently totally disabled within the meaning of
32 the Workers' Compensation Act as the result of the industrial injury
33 occurring on May 1, 1974 (Claim No. G-582281), as of March 4, 1981.
- 34 3. The claimant was not permanently totally disabled on December 12, 1980
35 as the result of the August 31, 1977 industrial injury (Claim No. H-205058).
- 36 4. The claimant was not permanently totally disabled within the meaning of
37 the Workers' Compensation Act on March 24, 1981 as the result of the
38 September 28, 1978 industrial injury (Claim No. H-398335).
- 39 5. The order of the Department dated March 4, 1981, closing claim No. G-
40 582281 with permanent partial disability award equal to 10% of the
41 amputation value of the right arm at or above the deltoid insertion or by
42 disarticulation at the shoulder, is correct and should be affirmed.
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6. The order of the Department issued on December 12, 1980, closing the claim in No. H-205058 with a permanent partial disability award equal to 10% as compared to total bodily impairment, is correct and should be affirmed.
 7. The order of the Department dated March 24, 1981, in Claim No. H-398335 closing the claim with a permanent partial disability award equal to 10% as compared to total bodily impairment, is correct and should be affirmed.

10 It is so ORDERED.

11 Dated this 15th day of April, 1982.

12 BOARD OF INDUSTRIAL INSURANCE APPEALS

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16 /s/
17 MICHAEL L. HALL Chairman

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20 /s/
21 PHILLIP T. BORK Member

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