

Hague, Carlton

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Combined effects of preexisting and subsequent disabilities

Where the worker was developing significant medical problems at the time of the industrial injury and those problems subsequently limited his capacity to be employed, he may still be found to be permanently totally disabled as a result of the industrial injury if the injury, independently or superimposed upon the pre-existing circumstances and conditions, was a significant contributing cause of his inability to perform reasonably obtainable work. ...*In re Carlton Hague*, BIIA Dec., 59,331 (1982) [dissent]

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

1 **IN RE: CARLTON HAGUE**) **DOCKET NO. 59,331**
2)
3 **CLAIM NO. G-901225**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

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7 Claimant, Carlton Hague, by
8 Small, Winther and Snell, per
9 Hollis B. Small and Gregory F. Logue, Walter S. Corneille, and Richard Weiss

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11 Employer, Coastcraft,
12 None

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Anthony B. Canorro, Carol J. Molchior, and Janet R. Whitney, Assistants
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18 This is an appeal filed by the claimant on April 24, 1981 from an order of the Department of
19 Labor and Industries dated April 16, 1981, which adhered to a prior order closing the claim with a
20 permanent partial disability award for unspecified disabilities equal to 5% as compared to total
21 bodily impairment. **REVERSED AND REMANDED.**

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23 **DECISION**

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25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
26 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
27 issued on April 12, 1982 in which the order of the Department dated April 16, 1981 was sustained.

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29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
30 no prejudicial error was committed and said rulings are hereby affirmed.

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32 This appeal was brought before the Board to determine the nature and extent of Mr. Hague's
33 permanent disability causally related to an industrial injury of June 8, 1976, as of the date the
34 Department of Labor and Industries closed his claim on April 16, 1981. Mr. Hague was injured
35 while assisting a co-worker in the unloading of a heavy thermal-insulated window weighing
36 "approximately 200 pounds". In the injury the claimant's lower back and legs were affected so that
37 during the weekend he was barely able to move from bed. He sought the attention of a
38 chiropractor, a Dr. Milasich.

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40 As of the date the claim was closed, Mr. Hague complained of lower back pain with his right
41 leg feeling partially numb and tingling effects in his left leg constantly In addition, he claims to
42 stumble a lot while attempting to walk and to have difficulty sitting because of pain in his buttocks
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1 and in the lower portion of his back. He claims to have physical limitations in bending, stooping,
2 and lifting. Following his injury, Mr. Hague did return to work and on March 12, 1977, had occasion
3 to jump over a ditch in a drain field and exacerbated his low back by the incident. It does not
4 appear from the record that Mr. Hague attempted to establish this as a new industrial injury and it
5 appears that he received treatment for that exacerbation from his chiropractor but it was not
6 sufficient in and of itself to keep him from returning to work at the time of its occurrence.
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10 In addition to the industrial injury and its exacerbation in 1977, Mr. Hague has had
11 substantial other medical problems. In 1955, he had a heart attack. He has suffered from high
12 blood pressure for 22 to 25 years and suffered a stroke in 1975, which affected his speech for a
13 time but apparently caused little motor impairment. In 1977, he underwent artery bypass surgery in
14 his groin to accomplish better circulation to his feet. The underlying cause for this surgery is not
15 entirely clear from the record but it does not appear to have any relation to the industrial injury. In
16 1978, Mr. Hague suffered another stroke and shortly before his claim was closed began medication
17 for diabetes.
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22 What develops from the evidence in the record before us is a picture of a man who has had
23 significant medical problems since the mid-1950's which now have progressed to a matter of
24 obvious medical concern. Independent from his non-traumatic medical problems, Mr. Hague had
25 suffered some prior injuries to the one for which the claim in this appeal was filed, but there is no
26 evidence that those injuries resulted in substantial impairment.
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30 In evaluating a worker's permanent disability, the trier of fact must be cognizant of more than
31 the simple residuals of physical injury. Where the extent of physical impairment is the only issue for
32 evaluation that is one thing, but where the ability to perform gainful employment is at issue, as it is
33 here, we must look at the whole person. We must consider not only the physical infirmities from
34 injury but superimpose those limitations upon the injured worker's pre-existent physical condition
35 and give consideration to his age, education, employment history, retraining potential and other
36 important socio-economic considerations. Pacific Car and Foundry v. Coby, 5 Wn App. 547 (1971);
37 Fochtman v. Department of Labor and Industries, 7 Wn.App. 286 (1972).
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42 The difficulty presented by the evidence from Drs. Bridgeford and Marks, as well as the
43 claimant's testimony, is that it is difficult to determine precisely what abnormal medical conditions
44 pre-existed the industrial injury, and to what extent those conditions presented limiting factors for
45 the claimant's employability subsequent to the industrial injury. Despite the court of appeals
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1 observation in Allen v. Department of Labor and Industries, 30 Wn. App. 693 (1981) that Erickson v.
2 Department of Labor and Industries, 48 Wn. 2d 458 (1956), appears to be sui generis, i.e., peculiar
3 to itself, we do not understand the law to be that events and disabilities occurring wholly
4 subsequent to the industrial injury should be considered and combined with the effects of the
5 industrial injury in evaluating permanent disability. On the other hand, we do understand it to be the
6 law of this state that even if an individual is unable to work because of conditions independent from
7 and occurring subsequent to an industrial injury, that worker may still be found to be permanently
8 totally disabled under the Workers' Compensation Act if a significantly contributing cause of the
9 inability to perform reasonably obtainable work suitable to a circumstances and conditions. Shea v.
10 Department of Labor and Industries, 12 Wn. App. 410 (1974); Allen v. Department of Labor and
11 Industries, supra.

12 Viewing the evidence in the record in light of this understanding of the law, we cannot be
13 blind to the fact that the claimant had to have had significant concurrently developing medical
14 problems which necessitated bypass surgery subsequent to the industrial injury and necessitated
15 the taking of diabetic medications subsequent to the industrial injury. We feel it a fair inference to
16 conclude that the claimant was having significant circulation problems prior to his 1976 industrial
17 injury, did suffer from high blood pressure, and was susceptible to cerebral vascular accidents or
18 strokes. It is true that specific events resulting in employment limitations from those underlying
19 problems occurred subsequent to the industrial injury. Still, it would be legally inappropriate to view
20 those events as if in a vacuum and as if they had their inception from causes completely
21 subsequent to the industrial injury.

22 The record is abundantly clear to us that Mr. Hague can no longer feasibly be considered for
23 offering services in the competitive labor market. Although his limitations stem in major part from
24 conditions which pre-existed the industrial injury and which worsened subsequent to the industrial
25 injury, his 1976 injury is a significant contributing cause to his resultant disability. For this disability
26 he deserves to be granted the status of a permanently totally disabled worker.

27 **FINDINGS OF FACT**

28 After a careful review of the entire record, the following findings are made:

- 29 1. On June 28, 1976, the Department of Labor and Industries received an
30 accident report in which it was alleged that the claimant, Carlton Hague,
31 had sustained an industrial injury on June 8, 1976, while working for

1 Coastcraft. The claim was allowed, treatment provided, and time-loss
2 compensation payments were initiated.

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4 On June 29, 1979, the Department issued its order closing its claim with
5 a permanent partial disability award equal to 5% of total bodily
6 impairment. Following interlocutory action which held in abeyance that
7 closing order, the Department issued an order on April 16, 1981 which
8 adhered to the provisions set forth in its prior order of June 29, 1979.
9 On April 24, 1981, the claimant filed a notice of appeal with the Board of
10 Industrial Insurance Appeals. On May 21, 1981 the Board issued an
11 order granting the appeal and directed that proceedings be held on the
12 issues raised by the appeal.

- 13 2. On and prior to June 8, 1976, claimant had moderate degenerative
14 changes in his lumbar spine, which were aggravated and caused to
15 become symptomatic by his industrial injury of June 8, 1976.
- 16 3. On April 16, 1981, claimant was 63 years of age, a high school
17 graduate, and had spent his working life as a glazier. Mr. Hague was
18 not a suitable candidate for vocation retraining.
- 19 4. Prior to his industrial injury the claimant had suffered a heart attack in
20 1955, had high blood pressure, and had a stroke affecting for a while his
21 speech. Following the injury, Mr. Hague underwent arterial bypass
22 surgery to improve circulation to his legs, had another stroke in 1978,
23 and began taking medication to control diabetes.
- 24 5. In March of 1977, while jumping over a ditch in the performance of his
25 work with Coastcraft, Mr. Hague exacerbated his low back condition
26 attributable to the industrial injury of June 8, 1976.
- 27 6. As of April 16, 1981, when viewed as a whole man, Mr. Hague was
28 totally and permanently prevented from engaging in full-time gainful
29 occupation on a reasonably continuous basis.
- 30 7. On April 16, 1981, as a result of his industrial injury of June 8, 1976, Mr.
31 Hague had among others a condition diagnosed as the aggravation of
32 pre-existing degenerative changes between the 4th lumbar and 1st
33 sacral vertebrae, producing persistent pain in the low back and radiating
34 pain into the legs. Said condition was fixed and further treatment was
35 not indicated. Said condition was a significant contributing cause of
36 claimant's total and permanent inability to work, when considered with
37 the factors of his age, education, history of employment and lack of
38 retraining potential.

39 **CONCLUSIONS OF LAW**

40 Based upon the foregoing findings of fact, the following conclusions are reached:

- 41 1. The Board of Industrial Insurance Appeals has jurisdiction over the
42 parties and the subject matter of this appeal.

- 1 2. On April 16, 1981, as a result of his industrial injury of June 8, 1976,
2 Carlton Hague was a permanently totally disabled worker as defined by
3 RCW 51.08.160.
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5 3. The order issued by the Department of Labor and Industries on April 16,
6 1981, adhering to the provisions of a prior order which had closed the
7 claim with a permanent partial disability award equal to 5% as compared
8 to total bodily impairment, was incorrect, should be reversed and
9 remanded to the Department with direction to award the claimant totally
10 the status of a permanently totally disabled worker effective April 16,
11 1981 and to grant him all benefits concomitant to that status.

12 It is so ORDERED.

13 Dated this 22nd day of July, 1982.

14 BOARD OF INDUSTRIAL INSURANCE APPEALS

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16 /s/ _____
17 MICHAEL L. HALL Chairman

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19 /s/ _____
20 FRANK E. FENNERTY, JR. Member

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23 **DISSENTING OPINION**

24 The Board majority recognizes that the claimant has a number of serious physical conditions
25 which are completely unrelated to his low back injury of June 8, 1976. These include, among other
26 things, long-standing cardiovascular disease necessitating iliac bypass surgery, cervical spine
27 abnormalities, the residuals of two strokes, and the disease of diabetes with attendant peripheral
28 neuropathy in his legs. Of particular importance, one of the strokes, the bypass surgery, and
29 development of the diabetes have occurred in the years since the relatively minor 1976 low back
30 injury.
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32 The majority says that these unrelated "concurrently developing" conditions played a "major
33 part" in producing his ultimate employment limitations. I well unhesitatingly go further. I believe
34 these unrelated conditions are completely responsible for his permanent total disability status finally
35 existing in 1981.

36 The majority states that "...we do not understand the law to be that events and disabilities
37 occurring wholly subsequent to the industrial injury should be considered and combined with the
38 effects of the industrial injury in evaluating permanent disability." With this statement I agree,
39 noting (as does the majority) Erickson v. Department of Labor and Industries, 48 Wn. 2d 458
40 (1956).
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1 The majority then states: "On the other hand, we do understand it to be the law of this state
2 that even if an individual is unable to work because of conditions independent from and occurring
3 subsequent to an industrial injury, that worker may still be found to be permanently totally disabled
4 under the Workers' compensation Act if a significantly contributing cause of the inability to perform
5 reasonably obtainable work suitable to a person's qualifications and training is in fact the industrial
6 injury viewed independently or viewed as superimposed upon pre-existent circumstances and
7 conditions." Cited in support of this statement is Shea v. Department of Labor and Industries, 12
8 Wn. App. 410 (1974), and Allen v. Department of Labor and Industries, 30 Wn. App. 693 (1981).
9 With this understanding of the law, I disagree. Specifically, I disagree with the notion that a prima
10 facie case for permanent total disability can be made based on an industrial injury being a
11 "significantly contributing cause" of an ultimate permanent total disability. I do not view the Shea
12 case as so holding. Nor did this Board in the recent case of In re V. Pearl Howes, Docket Nos.
13 58,356, 59,006 and 59,180, Decision and Order dated April 15, 1982. We there discussed the
14 meaning of Shea and Allen, in part as follows:

15 "Still, the Shea case did not deal with the combined effects of an
16 industrial injury and a subsequent condition.

17 Rather, it concerned a condition (vascular disease) which had its
18 inception prior to the industrial injury and was totally disabling in and of
19 itself. The impairment from the industrial injury (back condition), if
20 believed, progressed independent from and subsequent to the disabling
21 vascular disease to itself alone be responsible for causing Mr. Shea to
22 be permanently totally disabled, even if the vascular condition did not
23 exist.

24 The Allen case to us merely would permit a jury to find that as of 1977
25 the disabling effects of an injury which occurred in 1965 was the
26 proximate cause of permanent total disability. Prior to Allen, it would
27 have been argued that an injury which had occurred in 1970 had to be
28 supportable as the proximate cause of the resultant total disability, and
29 the 1965 injury merely a condition upon which the ultimate cause
30 operated. We understand the court in Allen to say that evidence will be
31 sufficient to support permanent total disability if the disabling effects of
32 an earlier injury progressed independent from the effects of a later less
33 serious injury and such progression eventually results in preventing the
34 worker from gainful employment.

35 Clearly in Allen the facts, if believed, showed the earlier injury was the
36 proximate cause of disability which progressed to total disability
37 separate from the effects of a subsequent injurious event.

1 Nowhere in the reported cases in this jurisdiction can we discover a fact
2 pattern where a prima facie case for permanent total disability is based
3 upon the effects of one or more industrial injuries combined with the
4 effects of another condition, non-industrial in nature, which had its
5 inception subsequent to the industrial injury or injuries for which
6 compensation is sought." (Emphasis mine)
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8 In short, in Howes we did not depart from the "proximate cause" test for some new and undefined
9 test called "significantly contributing cause."
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11 Of further importance, the appellate court which issued the Shea decision did not, and did not
12 intend to, depart from the "proximate cause" test either. This was made clear by the court's
13 subsequent decision in Wendt v. Department of Labor and Industries, 18 Wn. App. 674, at page
14 681, (1977). There, the court held as follows regarding a proposed jury instruction incorporating the
15 "significantly contributing cause" phrase which had been used in Shea:
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18 "Wendt argues that he was entitled to these instructions under the rule
19 enunciated in Shea v. Department of Labor and Industries, 12 Wn. App.
20 410, 529 P. 2d 1131 (1974). In Shea it was held that if a workman's
21 industrial injury, considered separate and apart from his other bodily
22 conditions, renders him totally disabled, then he is entitled to total
23 disability compensation, even though he may also be totally disabled
24 solely as a result of a condition not related to his injury. We do not
25 agree that the Shea decision supports the giving of these instructions.
26 Proposed instruction No. 12 simply lifts language from the Shea opinion
27 at page 415; this language was intended only as an explanation for the
28 holding therein and not for use as an instruction; to employ it in such a
29 manner would only tend to confuse the jury on the terms "proximate
30 cause" and "contributing cause." Proposed instruction No. 14 was also
31 inappropriate because, while there was evidence from the Department's
32 doctors that Wendt was totally disabled solely because of conditions not
33 causally related to his industrial injury (left arm injury, cerebral vascular,
34 and pulmonary deficiencies), there was no evidence whatsoever that he
35 was totally disabled because of his industrial injury alone. On the
36 contrary, as Wendt has so vigorously urged, his own medical evidence
37 was designed to prove that his total disability was caused by his lighted-
38 up preexisting arthritic condition superimposed on his non injury-caused
39 conditions. Therefore, the Shea doctrine was not applicable and the trial
40 court correctly refused the proposed instructions." (Emphasis by the
41 court).
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44 The court's further discussion in Wendt makes it clear that the vague and indefinite test of
45 "significantly contributing cause" is not appropriate, and the test of "proximate cause" between an
46 industrial injury and an ultimate status of permanent total disability is still a requirement of our law.
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1 Applying the foregoing principles, there is no evidence which persuades me that the
2 claimant's 1976 low back injury was a proximate cause of total disability in 1981.
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4 If the findings testified to by claimant's medical witness, Dr. Bridgeford, and his attribution of
5 many of those findings to the low back injury, were to be totally accepted, I suppose it could be
6 argued that the injury-caused back disability did indeed produce claimant's ultimate permanent total
7 disability. But I do not accept Dr. Bridgeford's conclusions, particularly as to any sensory, reflex, or
8 pain problems in the claimant's legs being related to the low back injury. Dr. Richard E. Marks,
9 neurosurgeon, convincingly testified that such findings are related to the later-developing diabetes
10 and/or vascular problems. It is the subsequent problems and disabilities which are the proximate
11 cause of the claimant's 1981 unemployability.
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13 I am persuaded by Dr. Marks' testimony that the claimant's injury-caused low back permanent
14 impairment is mild, is not a proximate cause of his 1981 unemployability, and is best equated just to
15 the impairment described in Category 2 of Dorso-lumbar and Lumbosacral Impairments. Thus, the
16 Department's closure of this claim with the permanent partial disability award of 5% as compared to
17 total bodily impairment, per WAC 296-20-680(3), is correct. I would affirm that order.
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19 Accordingly, I dissent from the Board's majority decision.
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21 Dated this 22nd day of July, 1982.
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28 /s/
29 PHILLIP T. BORK Member
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