Chase, Richard

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Employment on closing date

Turner (41 Wn.2d 739) does not preclude a pension in the situation where the worker was employed full-time on the date his claim was closed, but in an odd lot position causing "much discomfort" from which he was laid off two months later. ***….In re Richard Chase*, BIIA Dec., 60,114 (1982)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RICHARD B. CHASE	**)**	**DOCKET NO. 60,114**
	)	
CLAIM NO. H-520040	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Richard B. Chase, by
Vance, Davies, Roberts, Reid and Anderson, per
Finley Young and Denny Anderson

Employer, Seattle Door Company, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
Verlaine Keith-Miller, Assistant

This is an appeal filed by the claimant on July 28, 1981, from an order of the Department of Labor and Industries (Department) dated June 11, 1981. The order appealed from closed this claim with awards for unspecified disabilities of 30% of the amputation value of the right leg at the ankle, and the full amputation value of the left arm at any point from below the deltoid insertion to below the elbow joint at the insertion of the biceps tendon. The Department order is **REVERSED AND THE CLAIM IS REMANDED**.

PROCEDURAL AND EVIDENTIARY RULINGS

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 on July 9, 1982 in which the Department order dated June 11. 1981 was sustained.

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

The deposition of Richard Allen Zorn, M.D. taken on April 8, 1982, is hereby published and incorporated into the record, not as an exhibit thereto. The Board has considered the subject deposition, and considered the objections and motions made therein. Those objections and motions are hereby overruled or denied, with the following exception: the objections to Exhibits No. D2 through D6 are hereby sustained; Exhibits No. D2 through D6, as well as Exhibit No. D7 (which was marked for identification but not offered into evidence) are hereby rejected.

ISSUE

The single issue presented by this appeal is whether the loss of function and physical impairment resulting from his industrial injury on June 4, 1979, coupled with his age, education, training and experience, have rendered Richard B. Chase permanently unable to perform on a reasonably continuous basis in the competitive labor market.

DECISION

The Proposed Decision and Order reaches the conclusion that the doctrine espoused in Turner v. Department of Labor and Industries, 41 Wn. 2d, 739 (1953) precludes a finding that Mr. Chase is a permanently totally disabled worker. We disagree.

Considering the evidence in this matter, we find the following facts established. Richard B. Chase sustained an industrial injury when the forklift he was operating toppled, crushing his right ankle and left forearm. Surgical intervention saved the claimant's ankle, but his left arm was amputated just below the elbow. Mr. Chase was left-handed at the time of the accident.

Before taking the job on which he was injured, Mr. Chase's work experience included the repair of small firearms in the Marine Corps, feeding a planer in a lumber mill, and performing repair and maintenance tasks. The small arms repair required considerable manual dexterity. The millwork required heavy lifting.

At the time of the injury, the claimant was working for Seattle Door Company, Inc. as the only maintenance and repair man on his shift. He was in excellent health. Performance of his job with Seattle Door Company required what all journeymen maintenance men jobs require, i.e., dexterity and strength, the ability to climb, crawl, dig holes, and use and repair tools and machinery of virtually all types. Mr. Chase was on his feet throughout a normal workday.

Following an extensive rehabilitation period marshalled by attending orthopedic surgeon Zorn, the claimant returned to work for Seattle Door Company as a maintenance helper on a different shift. He worked an eight-hour shift, 40 hours per week from January to August, 1981. The Department closed his claim on June 11, 1981, with awards equal to 30% of the amputation value of the right leg at the ankle, and the full amputation value of the left arm below the elbow joint. In August 1981, Mr. Chase was laid off. He has not worked since.

In Turner, the state Supreme Court held that because the worker was steadily employed on the date of the Department's closing order, and had been so employed for several months prior thereto, he was not, as a matter of law, permanently totally disabled on the terminal date for fixing

compensation. The court was careful to note in its opinion that claimant Turner: "Had steady employment; he was not merely fitted to do odd jobs or special work not generally available. Nor did [Turner] produce any evidence that his working caused him serious discomfort or pain...". 41 Wn. 2d at 743 (Emphasis the court's). Turner is readily distinguishable.

The evidence in this case shows that the day shift job as maintenance helper was created especially for Mr. Chase. According to the claimant and a co-worker, Mr. Chase was in effect a superfluous third person "assisting" in the performance of a two-person job. The job had required only two persons before January 1981, and became a two-person job again when the claimant was laid off two months after the Department closed his claim. The claimant was for the most part unable to work without supervision after the injury, and he found even the lighter duties as helper, in his own words, "frustrating", "awkward", "hard", "slow", "painful", "dangerous", "tiring", and "scary". A significant increase in workload at Seattle Door Company did not dictate the claimant's hiring in January, 1981. The evidence establishes that a third maintenance man was not needed on day shift before, during or after the claimant's return to work. This, we think qualifies this job as special work not generally available, an "odd lot" position.

The conclusion drawn from the foregoing facts is that as of June 11, 1981, the claimant did not have "steady employment"; he was merely fitted to do only special work not regularly available at Seattle Door Company; and performance of this special work caused Mr. Chase much discomfort. Under these circumstances, we feel the Turner doctrine is inapplicable, and we turn to a consideration of expert testimony bearing on the extent of Mr. Chase's permanent disability.

The ability to perform odd jobs or special work not generally available does not preclude a finding that a worker is permanently totally disabled, unless such work is regularly and continuously, in fact, available to him. Kuhnle v. Department of Labor and Industries,12 Wn. 2d 191 (1942). Once a prima facie case is made the burden is upon the Department or the employer to prove availability of such special work. This record is devoid of evidence tending to show that a reasonably stable market exists for special maintenance jobs like the one created for Mr. Chase by this employer. Indeed, according to Frank C. Swinehart, called as a vocational witness for the claimant, maintenance helper jobs are classified as "heavy work", whereas journeyman maintenance jobs are classified as "medium work". In the normal situation, the maintenance helper would be doing more physically demanding tasks than the journeyman.

We are convinced that Mr. Chase is permanently totally disabled within the meaning of the Workers' Compensation Act. It is undisputed that Mr. Chase's left arm and ankle disabilities are causally connected to the industrial injury, and that as of June 11, 1981, the claimant's condition was fixed and medically stationary. Although treating physician Zorn warns that Mr. Chase's ankle condition is likely to deteriorate with use and the passage of time, he agrees that no known treatment will improve it. From the standpoint of physical impairment only, Dr. Zorn stated Mr. Chase would be extremely limited in what he could do on a reasonably continuous basis. In Dr. Zorn's opinion, Mr. Chase should not walk any more than absolutely necessary, and cannot lift even light weights continuously.

Mr. Swinehart based his opinion upon the claimant's physical limitations as well as his age, training and work experience. After an interview and rather extensive testing, Mr. Swinehart saw the claimant as a 57 year old male with a high school education whose experience is in jobs requiring heavy work or fine finger dexterity. He noted the claimant had lost his dominant forearm and hand, and had a permanently disabled ankle with residual traumatic arthritis which will worsen with time and activity, especially walking. According to Mr. Swinehart, "I think it would take nothing less than a miracle to achieve gainful employment" for claimant Chase despite his obviously high motivation to work. Although Helen Stroklund, an employee of the Division of Vocational Rehabilitation, noted significant improvement in the claimant's attitude and dexterity during the 61 days he spent in Ms. Stroklund's vocational rehabilitation program, the jobs she feels Mr. Chase can do are, in our judgment as well as Mr. Swinehart's, beyond the claimant's capabilities, absent vocational re-education. At 57 years of age, the record shows Mr. Chase is not a likely candidate for successful completion of existing vocational retraining programs.

Based upon the foregoing, and after a careful review of the entire record, we hereby enter the following:

FINDINGS OF FACT

1. On June 4, 1979, while in the course of his employment with Seattle Door Company, Inc., claimant, Richard B. Chase, suffered a crush-type injury to his right ankle and left forearm when the forklift he was operating toppled onto him. A report of that accident was filed on June 7, 1979. The claim was accepted by the Department, treatment and time-loss compensation were provided, and on June 11, 1981, the Department issued an order closing the claim with permanent partial disability awards equal to 30% of the amputation value of the right leg at the ankle, and the full amputation value of the left arm at any point from

below the deltoid insertion to below the elbow joint at the insertion of the biceps tendon. A notice of appeal from that order was filed on July 28, 1981, and on August 18, 1981, this Board issued its order granting the appeal and directing that proceedings be held on the issues raised by the appeal.

2. As of June 11, 1981, the claimant suffered from a condition diagnosed: healed comminuted fracture of the malleoli of the right ankle; traumatic arthritis of the right ankle; and amputated left arm just below the elbow joint.

3. The condition diagnosed in the preceding paragraph is causally related to the industrial injury of June 4, 1979.

4. As of June 11, 1981, the claimant's condition causally related to his industrial injury was fixed and no further curative treatment was indicated or required.

5. Before taking the job on which he was injured, claimant Chase had repaired small firearms, fed a planer in a lumber mill, and performed repair and maintenance tasks. The small arms repair required considerable manual dexterity, the mill work required heavy lifting.

6. At the time of his industrial injury, claimant Chase was employed as the only maintenance and repair man on his work shift. His duties required dexterity and strength, the ability to climb, crawl, dig holes, and use and repair tools and machinery of virtually all types. Claimant Chase was required to remain on his feet throughout a normal workday.

7. Between January, 1981 and August, 1981, claimant Chase was employed by Seattle Door Company as a maintenance helper on a different work shift. The job as maintenance helper was created especially for claimant Chase. His hiring was not dictated by any increase in workload at Seattle Door company. Between January and August, 1981, claimant Chase was a superfluous third person "assisting" in the performance of a two-person job. This special work was not regularly available at Seattle Door Company, nor was it regularly available elsewhere in the labor market.

8. Richard B. Chase is a 57 year old man with a high school education. He was left-handed at the time of his industrial injury on June 4, 1979. The loss of his dominant arm resulted in a loss of manual dexterity as well as the ability to continuously left even light weights. Mr. Chase's age makes him an unlikely candidate for admission and successful completion in existing vocational rehabilitation programs.

9. The loss of function and physical impairment resulting from the claimant's industrial injury, coupled with his age, education, training, and experience, have rendered him unable on a reasonably continuous basis to maintain gainful employment regularly available in the competitive labor market.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, this Board concludes as follows:

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

2. As of June 11, 1981, Richard Chase was a permanently totally disabled worker within the purview of the Workers' Compensation Act of this state.

3. The order of the Department of Labor and Industries dated June 11, 1981, which closed Mr. Chase's claim with permanent partial disability awards equal to 30% of the amputation value of the right leg at the ankle, and the full amputation value of the left arm below the elbow joint, is incorrect, should be reversed, and this claim remanded to the Department with direction to reopen the claim to accord the claimant the status of a totally permanently disabled worker and grant him all benefits concomitant to that status.

It is so ORDERED.

Dated this 29th day of September, 1982.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL D. HALL Chairman

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

DISSENTING OPINION

I dissent from the Board majority's decision. The majority says that the case of Turner v. Department of Labor and Industries, 41 wn. 2d 739 (1953), is readily distinguishable. I disagree.

In my view, the Turner case is remarkably similar in its pertinent facts to the instant case, and its legal holding must be here applied. On the date of the department's order in issue in this case, June 11, 1981, this claimant was regularly employed in a full-time job and had been so employed for several months prior thereto. As a matter of law, therefore, he was not permanently totally disabled on the terminal date here in issue.

Turner is factually very similar to the instant case. Turner involved a claimant who was injured in 1947 when he fell from scaffolding and struck his head against a concrete wall thirty feet below. He suffered traumatic brain damage. Following treatment, he returned to work off and on as a millwright (he had been a carpenter prior to the injury). From September 1947 through

December, 1947 he was so employed. He did not work much in 1948. In July, 1949 he again worked as a millwright and was so employed when his claim was closed in March 1950. He decided to quit work permanently in May 1950 approximately two months after his claim was closed.

In Turner, the claimant advanced two arguments in support of a finding of permanent total disability:

1) He was able to hold his job solely because he was getting "the breaks" from his foreman:

2) He would have difficulty proving any subsequent aggravation of his disabilities if his pension allegation as of the closing date was denied, in that his physical condition was fixed at the time the supervisor closed his claim. The Supreme Court rejected these arguments. As to the first argument, the court noted:

> "We cannot, however, ignore the intent of the legislature to create the board of industrial insurance appeals as an appellate body whose duty is to review the supervisor's order. Nor can we ignore the fact that, whether by grace of appellant's foreman or otherwise, he was steadily employed at the time of the super- visor'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." (Emphasis added)

Turner, supra, at 744.

As to the aggravation argument, the court stated:

> "The question of aggravation is not now before us, but, in view of appellant's contention, we must assume that if, since March 17, 1950, he has become so nervous and disabled from his injuries that he cannot be gainfully employed, that fact may be proved by his own testimony together with that of competent medical experts based, at least in part, upon objective symptoms."

Turner, supra, at 744.

This case, like Turner, represents nothing more than a particularized application of a well-settled principle of Washington law. Specifically, the issue to be determined is the claimant's disability on the date of closure. Hyde v. Department of Labor and Industries, 46 Wn. 2d 31 (1955). A changed or worsened condition subsequent to closure, if such in fact occurs, is properly addressed by the filing of an application to reopen for aggravation of disability, per RCW 51.32.160.

The case of Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191 (1942), cited in the Board's majority decision, and other cases discussing and delineating the "odd lot" doctrine of permanent total disability, such as Fochtman v. Department of Labor and Industries, 7 Wn. App. 286 (1972), and Wendt v. Department of Labor and Industries, 18 Wn. App. 674, at 681 (1977), (both cited in claimant's Petition For Review herein) are distinguishable and do not apply to this case because, in none of those cases, was the claimant steadily engaged in full-time gainful employment on the closing date in issue.

I would adopt the findings and conclusions of the Proposed Decision and Order of July 9, 1982; and thereby affirm the Department's order of June 11, 1981, closing the claim with the permanent partial disability awards therein made.

Dated this 29th day of September, 1982

/s/_____
PHILLIP T. BORK Member