

## 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]

Scroll down for order.



1 **ISSUE**

2  
3 The single issue presented by this appeal is whether the loss of function and physical  
4 impairment resulting from his industrial injury on June 4, 1979, coupled with his age, education,  
5 training and experience, have rendered Richard B. Chase permanently unable to perform on a  
6 reasonably continuous basis in the competitive labor market.  
7

8 **DECISION**

9  
10 The Proposed Decision and Order reaches the conclusion that the doctrine espoused in  
11 Turner v. Department of Labor and Industries, 41 Wn. 2d, 739 (1953) precludes a finding that Mr.  
12 Chase is a permanently totally disabled worker. We disagree.  
13

14  
15 Considering the evidence in this matter, we find the following facts established. Richard B.  
16 Chase sustained an industrial injury when the forklift he was operating toppled, crushing his right  
17 ankle and left forearm. Surgical intervention saved the claimant's ankle, but his left arm was  
18 amputated just below the elbow. Mr. Chase was left-handed at the time of the accident.  
19

20  
21 Before taking the job on which he was injured, Mr. Chase's work experience included the  
22 repair of small firearms in the Marine Corps, feeding a planer in a lumber mill, and performing repair  
23 and maintenance tasks. The small arms repair required considerable manual dexterity. The  
24 millwork required heavy lifting.  
25

26  
27 At the time of the injury, the claimant was working for Seattle Door Company, Inc. as the only  
28 maintenance and repair man on his shift. He was in excellent health. Performance of his job with  
29 Seattle Door Company required what all journeymen maintenance men jobs require, i.e., dexterity  
30 and strength, the ability to climb, crawl, dig holes, and use and repair tools and machinery of  
31 virtually all types. Mr. Chase was on his feet throughout a normal workday.  
32

33  
34 Following an extensive rehabilitation period marshalled by attending orthopedic surgeon  
35 Zorn, the claimant returned to work for Seattle Door Company as a maintenance helper on a  
36 different shift. He worked an eight-hour shift, 40 hours per week from January to August, 1981.  
37 The Department closed his claim on June 11, 1981, with awards equal to 30% of the amputation  
38 value of the right leg at the ankle, and the full amputation value of the left arm below the elbow joint.  
39 In August 1981, Mr. Chase was laid off. He has not worked since.  
40

41  
42 In Turner, the state Supreme Court held that because the worker was steadily employed on  
43 the date of the Department's closing order, and had been so employed for several months prior  
44 thereto, he was not, as a matter of law, permanently totally disabled on the terminal date for fixing  
45  
46  
47

1 compensation. The court was careful to note in its opinion that claimant Turner: "Had steady  
2 employment"; he was not merely fitted to do odd jobs or special work not generally available. Nor  
3 did [Turner] produce any evidence that his working caused him serious discomfort or pain...". 41  
4 Wn. 2d at 743 (Emphasis the court's). Turner is readily distinguishable.  
5  
6

7 The evidence in this case shows that the day shift job as maintenance helper was created  
8 especially for Mr. Chase. According to the claimant and a co-worker, Mr. Chase was in effect a  
9 superfluous third person "assisting" in the performance of a two-person job. The job had required  
10 only two persons before January 1981, and became a two-person job again when the claimant was  
11 laid off two months after the Department closed his claim. The claimant was for the most part  
12 unable to work without supervision after the injury, and he found even the lighter duties as helper, in  
13 his own words, "frustrating", "awkward", "hard", "slow", "painful", "dangerous", "tiring", and "scary".  
14 A significant increase in workload at Seattle Door Company did not dictate the claimant's hiring in  
15 January, 1981. The evidence establishes that a third maintenance man was not needed on day  
16 shift before, during or after the claimant's return to work. This, we think qualifies this job as special  
17 work not generally available, an "odd lot" position.  
18  
19

20 The conclusion drawn from the foregoing facts is that as of June 11, 1981, the claimant did  
21 not have "steady employment"; he was merely fitted to do only special work not regularly available  
22 at Seattle Door Company; and performance of this special work caused Mr. Chase much  
23 discomfort. Under these circumstances, we feel the Turner doctrine is inapplicable, and we turn to  
24 a consideration of expert testimony bearing on the extent of Mr. Chase's permanent disability.  
25  
26

27 The ability to perform odd jobs or special work not generally available does not preclude a  
28 finding that a worker is permanently totally disabled, unless such work is regularly and continuously,  
29 in fact, available to him. Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191 (1942).  
30 Once a prima facie case is made the burden is upon the Department or the employer to prove  
31 availability of such special work. This record is devoid of evidence tending to show that a  
32 reasonably stable market exists for special maintenance jobs like the one created for Mr. Chase by  
33 this employer. Indeed, according to Frank C. Swinehart, called as a vocational witness for the  
34 claimant, maintenance helper jobs are classified as "heavy work", whereas journeyman  
35 maintenance jobs are classified as "medium work". In the normal situation, the maintenance helper  
36 would be doing more physically demanding tasks than the journeyman.  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

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

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

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

#### 25 **FINDINGS OF FACT**

- 26 1. On June 4, 1979, while in the course of his employment with Seattle  
27 Door Company, Inc., claimant, Richard B. Chase, suffered a crush-type  
28 injury to his right ankle and left forearm when the forklift he was  
29 operating toppled onto him. A report of that accident was filed on June  
30 7, 1979. The claim was accepted by the Department, treatment and  
31 time-loss compensation were provided, and on June 11, 1981, the  
32 Department issued an order closing the claim with permanent partial  
33 disability awards equal to 30% of the amputation value of the right leg at  
34 the ankle, and the full amputation value of the left arm at any point from  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1 below the deltoid insertion to below the elbow joint at the insertion of the  
2 biceps tendon. A notice of appeal from that order was filed on July 28,  
3 1981, and on August 18, 1981, this Board issued its order granting the  
4 appeal and directing that proceedings be held on the issues raised by  
5 the appeal.

- 6  
7 2. As of June 11, 1981, the claimant suffered from a condition diagnosed:  
8 healed comminuted fracture of the malleoli of the right ankle; traumatic  
9 arthritis of the right ankle; and amputated left arm just below the elbow  
10 joint.
- 11 3. The condition diagnosed in the preceding paragraph is causally related  
12 to the industrial injury of June 4, 1979.
- 13 4. As of June 11, 1981, the claimant's condition causally related to his  
14 industrial injury was fixed and no further curative treatment was  
15 indicated or required.
- 16 5. Before taking the job on which he was injured, claimant Chase had  
17 repaired small firearms, fed a planer in a lumber mill, and performed  
18 repair and maintenance tasks. The small arms repair required  
19 considerable manual dexterity, the mill work required heavy lifting.
- 20 6. At the time of his industrial injury, claimant Chase was employed as the  
21 only maintenance and repair man on his work shift. His duties required  
22 dexterity and strength, the ability to climb, crawl, dig holes, and use and  
23 repair tools and machinery of virtually all types. Claimant Chase was  
24 required to remain on his feet throughout a normal workday.
- 25 7. Between January, 1981 and August, 1981, claimant Chase was  
26 employed by Seattle Door Company as a maintenance helper on a  
27 different work shift. The job as maintenance helper was created  
28 especially for claimant Chase. His hiring was not dictated by any  
29 increase in workload at Seattle Door company. Between January and  
30 August, 1981, claimant Chase was a superfluous third person  
31 "assisting" in the performance of a two-person job. This special work  
32 was not regularly available at Seattle Door Company, nor was it  
33 regularly available elsewhere in the labor market.
- 34 8. Richard B. Chase is a 57 year old man with a high school education. He  
35 was left-handed at the time of his industrial injury on June 4, 1979. The  
36 loss of his dominant arm resulted in a loss of manual dexterity as well as  
37 the ability to continuously lift even light weights. Mr. Chase's age  
38 makes him an unlikely candidate for admission and successful  
39 completion in existing vocational rehabilitation programs.
- 40 9. The loss of function and physical impairment resulting from the  
41 claimant's industrial injury, coupled with his age, education, training, and  
42 experience, have rendered him unable on a reasonably continuous  
43 basis to maintain gainful employment regularly available in the  
44 competitive labor market.
- 45  
46  
47

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

**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

1 December, 1947 he was so employed. He did not work much in 1948. In July, 1949 he again  
2 worked as a millwright and was so employed when his claim was closed in March 1950. He  
3 decided to quit work permanently in May 1950 approximately two months after his claim was  
4 closed.  
5  
6

7 In Turner, the claimant advanced two arguments in support of a finding of permanent total  
8 disability:  
9

- 10 1) He was able to hold his job solely because he was getting "the breaks"  
11 from his foreman:
- 12 2) He would have difficulty proving any subsequent aggravation of his  
13 disabilities if his pension allegation as of the closing date was denied, in  
14 that his physical condition was fixed at the time the supervisor closed his  
15 claim. The Supreme Court rejected these arguments. As to the first  
16 argument, the court noted:  
17

18 "We cannot, however, ignore the intent of the legislature to create the  
19 board of industrial insurance appeals as an appellate body whose duty  
20 is to review the supervisor's order. Nor can we ignore the fact that,  
21 whether by grace of appellant's foreman or otherwise, he was steadily  
22 employed at the time of the super-visor's order and, therefore, could not  
23 then have been held to be unemployable or permanently totally disabled  
24 within the statutory definition of permanent total disability." (Emphasis  
25 added)  
26

27 Turner, supra, at 744.

28 As to the aggravation argument, the court stated:  
29

30 "The question of aggravation is not now before us, but, in view of  
31 appellant's contention, we must assume that if, since March 17, 1950,  
32 he has become so nervous and disabled from his injuries that he cannot  
33 be gainfully employed, that fact may be proved by his own testimony  
34 together with that of competent medical experts based, at least in part,  
35 upon objective symptoms."  
36

37 Turner, supra, at 744.

38 This case, like Turner, represents nothing more than a particularized application of a well-  
39 settled principle of Washington law. Specifically, the issue to be determined is the claimant's  
40 disability on the date of closure. Hyde v. Department of Labor and Industries, 46 Wn. 2d 31 (1955).  
41 A changed or worsened condition subsequent to closure, if such in fact occurs, is properly  
42 addressed by the filing of an application to reopen for aggravation of disability, per RCW 51.32.160.  
43  
44  
45  
46  
47



1 The case of Kuhnle v. Department of Labor and Industries, 12 Wn. 2d 191 (1942), cited in  
2 the Board's majority decision, and other cases discussing and delineating the "odd lot" doctrine of  
3 permanent total disability, such as Fochtman v. Department of Labor and Industries, 7 Wn. App.  
4 286 (1972), and Wendt v. Department of Labor and Industries, 18 Wn. App. 674, at 681 (1977),  
5 (both cited in claimant's Petition For Review herein) are distinguishable and do not apply to this  
6 case because, in none of those cases, was the claimant steadily engaged in full-time gainful  
7 employment on the closing date in issue.  
8

9  
10  
11 I would adopt the findings and conclusions of the Proposed Decision and Order of July 9,  
12 1982; and thereby affirm the Department's order of June 11, 1981, closing the claim with the  
13 permanent partial disability awards therein made.  
14

15 Dated this 29th day of September, 1982

16  
17  
18 /s/  
19 PHILLIP T. BORK Member  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47