

## **Furlong, Daniel**

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### **BOARD**

#### **Response to petition for review**

The ten day time period set forth in WAC 263-12-145(3) for filing a response to a petition for review is not jurisdictional. The Board may therefore consider a response filed after the ten day period has elapsed. ....*In re Daniel Furlong, BIIA Dec., 65,138 (1985)*

### **PERMANENT TOTAL DISABILITY (RCW 51.08.160)**

#### **Availability of work in geographical area**

Where an injured worker has moved from Washington to another state and subsequently becomes an "odd lot" on the labor market due to aggravation of the industrial injury, the employer cannot meet its burden of establishing that some kind of suitable work is regularly and continuously available to the worker by offering him a job at his former jobsite in the state of Washington. ....*In re Daniel Furlong, BIIA Dec., 65,138 (1985)* [dissent]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

1  
2 **In Re: DANIEL T. FURLONG** ) **DOCKET NO. 65,138**  
3 )  
4 **CLAIM NO. S-220840** ) **DECISION AND ORDER**  
5 )  
6 \_\_\_\_\_ )

7 APPEARANCES:

8  
9 Claimant, Daniel T. Furlong, by  
10 Walthew, Warner, Keefe, Arron, Costello & Thompson, per  
11 Robert H. Thompson

12  
13 Self-insured Employer, Associated Grocers, by  
14 Schwabe, Williamson, Wyatt, Moore & Roberts, per  
15 Gary D. Keehn  
16

17 This is an appeal filed by the claimant on June 15, 1983 from an  
18 order of the Department of Labor and Industries dated May 6, 1983  
19 which closed the claim with a permanent partial disability award equal  
20 to 15% as compared to total bodily impairment from which was deducted  
21 the amount of \$2,157.88 which was previously paid for time-loss  
22 compensation for the period of December 18, 1981 to February 28, 1982  
23 inclusive. Reversed and remanded.

24 DECISION

25 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before  
26 the Board for review and decision on a timely Petition for Review  
27 filed by the employer to a Proposed Decision and Order issued on  
28 December 27, 1984 in which the order of the Department dated May 6,  
29 1983 was reversed, and the matter remanded to the Department of Labor  
30 and Industries with direction to pay the claimant time-loss  
31 compensation for the period of December 18, 1981 to February 28, 1982

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1 inclusive and to grant the claimant the status of a permanently  
2 totally disabled worker and accord him all benefits concomitant to that  
3 status.

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

7 PROCEDURAL MATTERS

8 Employer's Petition for Review in this matter was filed with the  
9 Board on January 31, 1985 and granted on February 20, 1985. On June  
10 28, 1985 a response to this petition was filed by claimant. The  
11 employer has objected to the Board considering this response on the  
12 ground that it was not filed within ten days as required by WAC  
13 263-12-145(3). We do not view that period as being jurisdictional,  
14 but rather only permissive. The Board will ordinarily not take final  
15 action after granting a Petition for Review until such reply period  
16 has expired. Moreover, WAC 263-12-145 (3) provides that the Board  
17 may, on its own motion, require the parties to submit briefs, or to  
18 present statements of position or oral argument regarding matters to  
19 which objections are made, within such time and on such terms as the  
20 Board may prescribe. The purpose of this rule was to allow  
21 flexibility for receipt of information necessary or helpful in aiding  
22 the Board to reach its decision. Although the Board took note of the  
23 reply, it does not provide the basis for our decision. The  
24 employer's objection is overruled.

25 DISCUSSION

26 The issue presented by this appeal and the evidence presented by

1 the parties are, for the most part, adequately set forth in the  
2 Proposed Decision and Order, but the Petition for Review filed by the  
3  
4 employer raises a question we feel requires further discussion.

5 The claimant's evidence establishes his position as an "odd lot"  
6 in the labor market capable of performing only special work not  
7 generally available. Having done so, the burden shifts to the  
8 self-insured employer to establish that some kind of suitable work is  
9 regularly and continuously available to him. Kuhnle v. Department of  
10 Labor and Industries, 12 Wn.2d. 191 (1942).

11 In Allen v. Department of Labor and Industries, 16 Wn.App. 692  
12 (1977) the court set forth what it deemed "an appropriate statement of  
13 the law" to be given to the trier of fact in an "odd lot" case:  
14 "If, as the result of an industrial injury, a  
15 workman is able to perform only special work not  
16 generally available, then he is totally disabled,  
17 unless you find that some special kind of work which  
18 he can perform is, nevertheless, available to him on  
19 a reasonably continuous basis."  
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21 Following his injury on February 15, 1977, Mr. Furlong retired  
22 from his position with Associated Grocers and moved to Alaska in  
23 October of 1977. Mr. Furlong has resided in Anchor Point, Alaska  
24 since 1979. His claim was closed in March of 1978 with no award for  
25 permanent partial disability. In 1980 Mr. Furlong sustained an  
26 aggravation of his industrially related condition, and his claim was  
27 reopened as of October 21, 1980 for treatment, and two surgical  
28 procedures were performed on the claimant's low back.

29 Mindful of the fact that Mr. Furlong was probably an "odd lot",  
30 and aware of the requirements of Allen, supra, the self-insured

1 employer offered Mr. Furlong the job of a "returns checker" at its  
2 Seattle work site. Based upon a description of the job, and the  
3 physical limitations placed upon Mr. Furlong by the medical witnesses,  
4 it would appear that Mr. Furlong would be physically capable of  
5 performing this job.

6 The salient issue raised by these circumstances may be stated as  
7 follows: Where an injured worker has moved from Washington to  
8 another state to establish residency there and subsequently becomes an  
9 "odd lot" in the labor market due to aggravation of an industrial  
10 injury, is a job which he can perform in the State of Washington  
11 "available" to him under the terms of Allen?

12 This question is one of first impression in the body of workers'  
13 compensation law. A review of the law in other areas of insurance,  
14 social security and unemployment compensation discloses no cases with  
15 the same circumstances presented by this appeal. Under these  
16 conditions the best that can be done is to reason by analogy.

17 Other jurisdictions have held that a claimant need not move from  
18 his residence to seek work, but these all appear to be cases where the  
19 claimant is still living in the state or geographical area which was  
20 the situs of his original injury. In Lyons v. Industrial Special  
21 Indemnity Fund, 98 Ind. 403 (1977), it was held that the burden of  
22 showing suitable work was available (much the same as the Washington  
23 burden of Allen) could be met by showing that there was "an actual job  
24 within a reasonable distance from the workman's home." In those  
25 jurisdictions where the worker has the burden of showing that suitable  
26 work is not available, the worker is generally not required to seek  
27 work beyond the general area where he or she lives. In Arizona it

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3 has been held that this means the worker's "local community" Phelps  
4 Dodge v. Industrial Commission, 90 Ariz. 248, 367 P.2d 270 (1961).  
5 The same principle was set forth by the Minnesota court in Reese v.  
6 Preston Marketing Association, 274 Minn. 150, 142 N.W.2d. 721  
7 (1966). The Florida court has held that a claimant may be considered  
8 totally and permanently disabled though he refuses to move from his  
9 city of residence to a larger city where jobs may be available to  
10 him. McManus v. Mad-Ray Modulars, Inc. 289 So.2d 715 (1974).

11 Cases involving total disability under social security law accept  
12 the same principle. In Hodgson v. Celebreeze, 35 F.2d. 750 (3rd  
13 Cir.1966), the court recognized that "available" work means the  
14 reasonable possibility of employment as distinguished from mere  
15 theoretical existence of the opportunity for employment. If a claimant  
16 is only able to perform certain types of work the court held that it  
17 must be shown this type of job exists in the "relevant" geographical  
18 area in which the claimant might reasonably be expected to market his  
19 labor. This principle has been accepted by all of the other circuits.

20 Although none of the cited cases address the precise  
21 circumstance of Mr. Furlong's case, they are fully consistent with the  
22 conclusion that a job prepared for Mr. Furlong in Seattle is not  
23 "available" as that term is used in Allen, when he has previously  
24 established his residence in Alaska and can only perform the job by  
25 giving up that residency and moving back to the State of Washington.  
26 Of more than tangential interest is the recent recognition by this

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state's highest court that one's constitutional right to travel will weigh greater than the state's interest in a worker's compensation classification tending to exclude workers in migratory labor from statutory coverage. See Macias v. Department of Labor and Industries, 100 Wn.2d. 263 (1983). The roots of such a right extend deep and may too have a bearing on the degree of compensation of covered workers who choose to exercise that right.

After consideration of the Proposed Decision and Order and the Petition for Review filed thereto, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

The proposed findings, conclusions and order are hereby adopted as this Board's findings, conclusions and order and are incorporated herein by this reference.

It is so ORDERED.

Dated this 16th day of July, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ \_\_\_\_\_  
MICHAEL L. HALL Chairman

/s/ \_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

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6 DISSENT  
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9 I cannot agree with the majority's conclusion in this matter. It  
10 simply overlooks the definition of permanent total disability set  
11 forth in RCW 51.08.160. That statute provides that " "permanent total  
12 disability" means loss of both legs, or arms, or one leg and one arm,  
13 total loss of eyesight, paralysis, or other condition permanently  
14 incapacitating the worker from performing any work at any gainful  
15 occupation." (Emphasis supplied). Kuhnle and Allen do not change  
16 that definition. The clear import of these cases is to require a  
17 showing that there is a "gainful occupation" which the worker can  
18 perform on a reasonably continuous basis. The self-insured employer  
19 has shown that there is such a job waiting for this claimant. The  
20 evidence establishes that this claimant is not permanently  
21 incapacitated from performing, on a continual basis, the work made  
22 available to him by the employer. I would give the word "available"  
23 its usual meaning: "That one can avail himself of; that can be  
24 used". Webster's New World Dictionary, the World Publishing Company,  
25 1964. As the Virginia Supreme Court of Appeals stated in United  
26 Mineworkers v. Unemployment Commission, 192 Va. 463 (1951):  
27 "Available for work implies ... willing to accept any  
28 suitable work which may be offered to him, without  
29 attaching thereto restrictions or conditions ... which  
30 he may desire because of his particular needs or  
31 circumstances."  
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33 I would find that full-time work is available to Mr. Furlong, but



1 he simply does not choose to avail himself of it.

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5 Dated this 16th day of July, 1985.

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/s/ \_\_\_\_\_  
PHILLIP T. BORK Member