Helm, Betty

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Odd lot

Once it is proved that a worker is precluded from performing light or sedentary work of a general nature, the burden shifts to the Department or employer to prove not only that specific "odd lot" work is available to the worker, but also that such employment would allow the worker to be gainfully employed on a reasonably continuous basis.
….*In re Betty Helm*, BIIA Dec., 87 1511 (1988)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BETTY J. HELM	**)**	**DOCKET NO. 87 1511**
	)	
CLAIM NO. J-168782	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Betty J. Helm, by
Richard R. Roth

Employer, Colby Manor Inc.
None (account finaled)

Department of Labor and Industries, by
The Attorney General, per
Ann Silvernale and Loretta J. Lopez, Assistants

This is an appeal filed by the claimant on May 12, 1987 from an order of the Department of Labor and Industries dated May 5, 1987 which adhered to the provisions of an order dated January 13, 1987. The order closed the claim with time-loss compensation as paid through January 9, 1987 and without an award for permanent partial disability. The Department order is **REVERSED AND REMANDED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the Department to a Proposed Decision and Order issued on May 5, 1988 in which the order of the Department dated May 5, 1987 was reversed and the matter remanded to the Department to pay the claimant a permanent partial disability award equal to 5% as compared to total bodily impairment, payable at 75% of the monetary value pursuant to RCW 51.32.080(2) and thereupon close the claim effective May 5, 1987 with time-loss compensation as paid through January 9, 1987.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed. However, the Department, in its Petition for Review, asserts that the qualifications of Frederick A. Tokarchek were inadvertently omitted from the record of his deposition taken December 31, 1987 in Seattle, Washington. This assertion is supported by the affidavit of the court reporter who recorded the deposition. Based on this, it is concluded that the qualifications of Dr. Tokarchek as they appear in Attachment A to the

Department's Petition for Review shall be included as part of the record. Attachment A is remarked Exhibit No. 3 and hereby admitted.

In the Proposed Decision and Order the Industrial Appeals Judge determined that: "Dr. Tokarchek's opinions are given no weight whatsoever because his qualifications to give those opinions are not in evidence." Proposed Decision and Order, at 7. Because we now have Dr. Tokarchek's qualifications before us as part of the record, we will consider his opinions in weighing the evidence.

The issues presented by this appeal and the evidence presented by the parties are adequately set forth in the Proposed Decision and Order. We have granted review because the medical and vocational testimony convinces us that claimant is a totally and permanently disabled worker. The testimony is adequately discussed in the Proposed Decision and Order and we will only discuss the more pertinent aspects of that testimony herein.

The claimant, Betty Helm, was a 50 year old woman at the time of hearing. She has a high school education and has spent most of her adult life as a housewife. The only three jobs outside the home which she has held since high school were the five years she worked as a nurse's aide, a few months as a kitchen aide helper in a hospital, and a few months she worked as a wire assembler. At the latter position she failed miserably.

Before the industrial injury Ms. Helm suffered from a number of conditions, including childhood tuberculosis, adolescent polio, an abnormal heart which required open heart surgery, alcoholism, extensive left leg injuries from an automobile accident, unusual speech patterns or impediments, bilateral hearing loss, poor vision, borderline intellectual functioning, exaggerated spinal curvatures, a nervous breakdown and/or dependent personality disorder, hysterectomy, and bilateral per cavus deformities. There was no medical evidence presented at hearing that the tuberculosis, polio, heart condition, alcoholism, nervous breakdown or dependent personality disorder, hysterectomy or bilateral per cavus deformities were disabling. There was medical evidence that the left leg injuries, the speech, hearing and vision problems, the abnormal spinal curvatures and poor intellectual functioning pre-existed the September 12, 1982 industrial injury. On that date claimant injured herself when attempting to lift a heavy patient. Medical testimony establishes that due to that industrial injury she sustained dorsal and lumbosacral strains.

Dr. Brian Buchea, an osteopath, diagnosed dorsal strain. In his opinion, Ms. Helm's impairment causally related to the industrial injury was best described by Category 2 of the Categories for Dorsolumbar and Lumbosacral Impairments and she was unemployable. Dr. Peter Fisher, an internist,

rated claimant's impairment as best described by Category 6 and also felt that she was unemployable. Dr. Thomas M. Murphy, a neurologist, indicated that Ms. Helm is mildly mentally retarded. Dr. Phillip A. Ballard, also a neurologist, diagnosed a sprain, but rated her impairment as best described by Category 1 because the degenerative arthritis pre-existed her industrial injury. Similarly, Dr. Frederick M. Tokarchek rated her impairment as best described by Category 1.

In the Proposed Decision and Order the Industrial Appeals Judge concluded, and we agree, that claimant's impairment is best described by Category 2 of WAC 296-20-280, Categories for Dorsolumbar and Lumbosacral Impairment. Such a rating of Ms. Helm's impairment is supported by the objective clinical finding of intermittent moderate muscle spasm, as found by Dr. Buchea and verified by Dr. Fisher.

Steven Hayes, a vocational rehabilitation counselor, worked with the claimant when she was referred to him for vocational services by the Department of Labor and Industries. Based on his work with the claimant, the results of testing which show claimant to have borderline intellectual functioning, the presence of claimant's speech and hearing impairments, and the physical limitations imposed by the industrial injury as documented by Dr. Buchea, Mr. Hayes concluded that Ms. Helm would be employable only in a sheltered workshop situation. During his vocational work with the claimant Mr. Hayes had placed her in several work stations, all of which involved clerical or cashier skills. Each trial work attempt was unsuccessful. In his opinion, Ms. Helm was unsuccessful because of her poor clerical skills, difficulty in learning new skills, her speech and hearing impairments, and her level of intellectual functioning.

Carl Gann, a vocational rehabilitation counselor who had never personally met the claimant, concluded that claimant's physical capacities limited her to sedentary to light work which would require little or no lifting and which would allow her to stand at will. He concluded that Ms. Helm could work as a feeder within a nursing home system, as an engraver operator, or at assembly or packaging labor positions.

The jobs recommended by Mr. Gann were similar to the trial work situations which Ms. Helm had tried with little success during the vocational rehabilitation process with Steven Hayes and the Department of Labor and Industries. The position of engraver operator and the assembly or packaging labor positions all appear to be beyond Ms. Helm's abilities. While showing a good motivation to work, as exhibited by her enrollment in clerical courses at Everett Community College, her inability to work in these jobs was shown by her repeated failure at the job stations and her inability

to complete the college course work. Her sight and hearing problems, along with her borderline intelligence, make it highly unlikely that she could absorb even minimal training instruction involved in most jobs. Her back impairment now keeps her from being able to do the unskilled nurse's aide work she had done in the past.

Only the job of nursing home "feeder" recommended by Mr. Gann appears to be within the abilities of Ms. Helm. However, we do not agree with the conclusion reached in the Proposed Decision and Order that this type of job is not an "odd lot" or special work job, as described by Kuhnle v. Department of Labor and Industries, 12 Wn.2d 191 (1942).

In determining that the feeder job was not an odd lot position, the Proposed Decision and Order focused solely on the following language in Kuhnle:

> . . . if an accident leaves the workman in such a condition that he can no longer follow his previous occupation or any other similar occupation, and is fitted only to perform "odd jobs" or special work, not generally available, the burden is on the department to show that there is special work that he can in fact obtain.

Kuhnle, at 198-199 (Emphasis added). Because the feeder job is obviously "similar" to the nurse's aide position, since it is one component of that job, the Industrial Appeals Judge concluded that the odd lot doctrine was inapplicable.

While we agree that the feeder position is a similar occupation, we feel that the inquiry must be broader. For the court in Kuhnle went on to quote approvingly from White v. Tennessee Consolidated Coal Co., 162 Tenn. 380, 385, 36 S.W. 2d 902 as follows:

> `If the accident has left the workman so injured that he is incapable of becoming an ordinary workman of average capacity in any well-known branch of the labor market,--if, in other words, the capacities for work left to him fit him only for special uses, and do not, so to speak, make his powers of labor a merchantable article in some of the well-known branches of the labor market,--I think it is incumbent on the employer to show that such special employment can, in fact, be obtained by him. If I might be allowed to use such an undignified phrase, I should say that if the accident leaves the workman's labor in the position of an "odd lot" in the labor market, the employer must show that a customer can be found who will take it.'

Kuhnle, at 199.

In addition, in Spring v. Department of Labor and Industries, 96 Wn.2d 914, 919 (1982), the court stated: "Under Kuhnle the injured worker need not show that he cannot perform any light or

sedentary work, but must prove only that he is incapable of performing light or sedentary work of a general nature." In that case the court held that once the claimant had met his burden of proving that he could not obtain or maintain employment of a general light and/or sedentary nature, the burden of proof then switches to the Department to show that specific light and/or sedentary work is available. In this case, the vocational testimony, along with the physical limitations established by the medical testimony, prove that claimant could only return to light or sedentary work of a specific nature, i.e., the "feeder" position. Light or sedentary work of a general nature is unavailable to Ms. Helm due to her limited abilities, coupled with the residuals of her industrial injury. This being the case, the burden is placed upon the Department to show that a specific type of position is available.

However, just because the position is available does not establish that it is gainful employment, regularly and continuously available to the worker. Permanent total disability is defined by RCW 51.08.160 as follows: "Permanent total disability" means loss of both legs, or arms, or one leg and one arm, total loss of eyesight, paralysis or other condition permanently incapacitating the worker from performing any work at any gainful occupation." (Emphasis added) Thus in rebutting claimant's showing that the industrial injury precludes her from performing any light or sedentary work of a general nature, the Department must not only show the availability of a particular job within the claimant's capabilities, but must also show that the job constitutes gainful employment. That is, the Department must not only demonstrate that the feeder job is available, but also that it is gainful employment.

There is no case law directly on point defining the term "gainful employment" or "gainful occupation," but a few cases touch on this question at least peripherally. The appellate court in Allen v. Department of Labor and Industries, 16 Wn. App. 692, 694 (1977) indicates that under the odd lot doctrine the trier of fact must evaluate the worker's ability to command regular income as a result of his personal labor. Construing RCW 51.08.160, the Court of Appeals in Nash v. Department of Labor and Industries, 1 Wn. App. 705 (1969) implied that an odd job in special work not generally available cannot be considered a "gainful occupation" unless the Department or the employer shows that such a particular job is available, and that even then, to qualify as gainful employment, there must be "a reasonable degree of occupational continuity." Nash, at 709.

In Kuhnle, the Supreme Court approved Foglesong v. Modern Brotherhood of America, 121 Mo. App. 548, 97 S.W. 240, which held that "a farmer who could direct the work to be done on his farm and could perform some light labor himself, but was disabled from carrying on, other than

partially, the occupation of farmer and equally disabled from carrying on any other gainful occupation" was totally disabled. Kuhnle, at 200 (Emphasis added).

In Fochtman v. Department of Labor and Industries, 7 Wn. App. 286 (1972), the Court of Appeals, relying on Kuhnle, reiterated the principle that "sporadic" work and irregular employment do not qualify as gainful employment. The court there stated:

> "A workman may be found to be totally disabled, in spite of sporadic earnings, if his physical disability caused by the injury, is such as to disqualify him from regular employment in the labor market."

Fochtman, at 294 (Emphasis added).

These cases do not state an absolute rule that part-time employment, as a matter of law, cannot be considered gainful employment. Nor do we. However, in this case the testimony of Mr. Gann does not establish that Ms. Helm could command a regular income as a result of obtaining employment as a feeder in a nursing home. In fact his testimony indicates that this work would only be available in three two-hour shifts, spread over a 12-14 hour period. We agree with the Proposed Decision and Order's determination that, realistically, claimant could only work two two-hour shifts per day. Whether such arrangement would allow claimant to command a regular income is not established. Mr. Gann never indicates that the feeder position should be considered "gainful" employment. He indicates only his belief that claimant could combine enough shifts at enough nursing homes to allow her to work a 40 hour week. Without information as to the wage she would be earning or how to overcome the logistics of scheduling 20 two- hour shifts per week, particularly for a worker who cannot drive, the Department has failed to convince this Board that Ms. Helm could command a regular income working as a feeder. Clearly, it would be very sporadic and irregular at best. Thus, we are left with the opinion of Mr. Hayes that Ms. Helm is not capable of gainful employment on a regular and continuous basis.

In sum, because Ms. Helm has established that she is incapable of light or sedentary work of a general nature, the burden is upon the Department to show that special work or an odd lot job is available and that such a job would allow Ms. Helm the ability to command a regular income. Although the Department has proven that the feeder job would be available and within Ms. Helm's physical limitations and abilities, the Department has not proven that this would be gainful employment under the circumstances here.

This is not to say that proof of the availability of part-time work could never satisfy the Department's burden of showing that an odd lot position is available to a claimant. But, where the employment is a part-time, unskilled, two hour split-shift job, likely requiring shuttling between employers by a claimant who cannot drive, and, where the Department has failed to present evidence establishing what the claimant, who was employed full-time as a nurse's aide at the time of the industrial injury, could earn in this part-time position of nursing home feeder, we must conclude that the Department has failed to meet its burden of proving that the nursing home feeder job constitutes gainful employment.

Ms. Helm has proven that the industrial injury precludes her from performing light or sedentary work of a general nature. The Department has not proven that specific work is available and would allow her to be gainfully employed on a reasonably continuous basis. For that reason the Department order of May 5, 1987 must be reversed and remanded to the Department with direction to place the claimant on the pension rolls effective May 5, 1987 and to pay time-loss compensation from January 10, 1987 through May 4, 1987.

FINDINGS OF FACT

1. On September 16, 1982 the claimant, Betty J. Helm, filed an accident report with the Department of Labor and Industries, alleging the occurrence of an industrial injury on September 12, 1982 while in the course of her employment with Colby Manor Inc. The claim was allowed and benefits were paid. On January 13, 1987 the Department issued an order closing the claim with time-loss compensation as paid through January 9, 1987 and without an award for permanent partial disability. On March 4, 1987 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On March 25, 1987 the Department issued an order placing the January 13, 1987 order in abeyance. On March 27, 1987 the Board returned the case to the Department. On May 5, 1987 the Department issued an order adhering to the provisions of the January 13, 1987 Department order and directing that the claim remain closed pursuant thereto. On May 12, 1987 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals from the Department order of May 5, 1987. On June 11, 1987 the Board issued an order granting the appeal, assigning it Docket No. 87 1511 and directing that further proceedings be held in the matter.

2. On September 12, 1982, during the course of her employment as a nurse's aide for Colby Manor, Inc., Ms. Helm and another nurse's aide were lifting a heavy patient when the other lady lost her grip on the patient and the claimant had to support his full weight. She felt immediate pain throughout her back and required conservative medical treatment.

3. As a result of the September 12, 1982 industrial injury the claimant sustained a dorsal and lumbar strain which resulted in continual back pain and intermittent muscle spasm and back motion limitations.

4. At the time of the industrial injury of September 12, 1982, the claimant suffered from pre-existing conditions including the effects of left leg injuries caused by an automobile accident, speech, hearing and vision problems, and abnormal spinal curvatures which were nondisabling but which, when stressed by the industrial injury, made her spine less stable and retarded recovery from the injury.

5. As of May 5, 1987 the claimant's dorsolumbar strain condition causally related to the September 12, 1982 industrial injury was fixed with no curative medical treatment available.

6. As of May 5, 1987 claimant's impairment in her upper spine was best described as a mild dorsolumbar impairment with clinical findings consistent with and most adequately expressed by Category 2 of WAC 296-20-280, Categories for Permanent Dorsolumbar and Lumbosacral Impairment. There were no marked objective clinical findings of such impairment.

7. As of May 5, 1987 claimant was a 50 year old woman with a high school education and some college class work. She has spent most of her adult life as a housewife. Her past work experience outside the home was limited to a job in wire assembly, where she failed to perform adequately; a job for a few months as a kitchen aide helper in a hospital; and work as a nurse's aide in nursing and convalescent homes. Claimant also has borderline intellectual functioning.

8. From January 10, 1987 through May 4, 1987 and as of May 5, 1987, due to the residuals of the September 12, 1982 industrial injury, the claimant was limited to sitting, standing and walking two hours at a time and three hours in an eight hour day, except for standing which is limited to two hours in an eight hour day. Claimant can occasionally lift and carry up to 20 pounds, bend or squat and frequently can reach above shoulder level. All other motions are normal.

9. Between January 10, 1987 and May 4, 1987, inclusive, and considering the disabilities and physical limitations causally related to the September 12, 1982 industrial injury, claimant was unable to perform reasonably continuous work at a gainful occupation in light of her age, education, work experience, disabilities which pre-existed the September 12, 1982 industrial injury, and borderline intellectual functioning.

10. As of May 5, 1987, when considering the disabilities and physical limitations causally related to the industrial injury of September 12, 1982, claimant was unable to perform reasonably continuous work at a gainful occupation in light of her age, education, work experience, pre-existing disabilities, and borderline intellectual functioning.

CONCLUSIONS OF LAW

1. Claimant's appeal of the May 5, 1987 Department order was timely filed with the Board of Industrial Insurance Appeals. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this proceeding.

2. Between January 10, 1987 and May 4, 1987, inclusive, the claimant was a totally and temporarily disabled worker within the meaning of the Industrial Insurance Act and RCW 51.32.090.

3. As of May 5, 1987, the claimant was a permanently and totally disabled worker within the meaning of the Industrial Insurance Act and RCW 51.08.160.

4. The order of the Department of Labor and Industries dated May 5, 1987 which adhered to the provisions of a January 13, 1987 order closing the claim with time-loss compensation as paid through January 9, 1987 and without a permanent partial disability award, is incorrect and is reversed and this claim is remanded to the Department to pay claimant time- loss compensation from January 10, 1987 through May 4, 1987, inclusive, and place the claimant on the pension rolls effective May 5, 1987.

It is so ORDERED.

Dated this 7th day of December, 1988.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

/s/_____
PHILLIP T. BORK Member