Breth, Arden

PERMANENT TOTAL DISABILITY (RCW 51.08.160)

Availability of work in geographical area

The worker's residence and particular labor market is a relevant factor, among many, in determining whether a worker is permanently and totally disabled. Rationale of *Dezellem* (BIIA Dec., 23,765 (1966)), that the question of whether an injured worker is permanently totally disabled should not turn on "employment opportunities then present in any particular community," is incorrect as a matter of law. ***….In re Arden Breth*, BIIA Dec., 89 2211 (1990)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ARDEN V. BRETH	)	**DOCKET NOS. 89 2211 & 89 2214**
	)	
CLAIM NO. J-578161	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Arden V. Breth, by
Patrick R. McMullen

Employer, Totem Trail Restaurant, by
None

Department of Labor and Industries, by
The Attorney General, per
Jeffrey Boyer and Douglas D. Walsh, Assistants

These are consolidated appeals. The appeal assigned Docket No. 89 2211 is an appeal filed by the claimant on June 28, 1989 from an order of the Department of Labor and Industries dated June 16, 1989 which terminated time loss compensation on March 7, 1989. **REVERSED AND REMANDED.**

The appeal assigned Docket No. 89 2214 is an appeal filed by the claimant on June 28, 1989 from an order of the Department of Labor and Industries dated June 20, 1989 which closed the claim with time loss compensation as paid and with a permanent partial disability award for back impairment equal to 5% as compared to total bodily impairment, paid at 75% of the monetary value pursuant to RCW 51.32.080(2). 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 a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on March 30, 1990. The Proposed Decision and Order affirmed the Department order dated June 16, 1989, in the appeal assigned Docket No. 89 2211, which terminated time loss compensation effective March 7, 1989. In Docket No. 89 2214, the order dated June 20, 1989, which closed the claim with time loss compensation as paid and a permanent partial disability award equal to 5% as compared to total bodily impairment for back impairment, was reversed, and the claim remanded to the Department to pay a permanent partial disability award equal to 10% as compared to total bodily impairment (Category 3 of WAC 296-20-280), to be paid at 75% of the monetary value pursuant to RCW 51.32.080(2), and close the claim.

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.

The Proposed Decision and Order exhaustively and accurately sets forth the evidence presented. We are not inclined to reiterate the discussion of the evidence relating to the extent of the permanent partial disability suffered by Mr. Breth or the limitations placed on him as a result of the industrial injury. We concur with our Industrial Appeals Judge that Mr. Breth's condition causally related to the industrial injury of May 2, 1985 is fixed and stable and has produced a permanent partial disability equal to a Category 3 impairment for a low back condition. The Department has not petitioned for review of that determination. We also concur with our Industrial Appeals Judge that Mr. Breth's industrial injury now limits him to sedentary work. Both vocational witnesses so testified.

The difficult question raised by this appeal is whether Mr. Breth is permanently and totally disabled as a result of the industrial injury. In resolving that question, we must determine whether a worker's geographical location or labor market plays any role in deciding whether that worker is permanently totally disabled.

The issue of Mr. Breth's geographical location or labor market arose for the first time, almost incidentally, during the Department's cross-examination of the claimant's vocational expert. During direct examination of the Department's vocational expert, the Department's representative once again raised the issue. As a result, the industrial appeals judge requested and received post-hearing briefs. In his Proposed Decision and Order, he specifically rejected geographical location as a relevant factor in the permanent total disability equation.

The claimant has been careful to point out that the medical and vocational testimony establishes he is entitled to a pension, regardless of the labor market question. That is, Mr. Breth argues that the single factor of where he resides should not determine his eligibility for a workers' compensation pension, one way or the other. He does contend, however, that since the Department has raised the issue of the claimant's residence, that factor should be considered along with all other relevant factors.

Our Industrial Appeals Judge relied on a previous Board decision, In re Lester R. Dezellem, BIIA Dec., 23,765 (1966), and rejected any consideration of the location of Mr. Breth's residence as a factor in determining permanent total disability. In Dezellem, the Board stated: "The [Industrial Insurance] Act does not intend that the decision, on a question of whether an injured workman is permanently totally disabled or not, should turn on employment opportunities then present in any

particular community." Dezellem, at 3. Based in part upon Dezellem, the Industrial Appeals Judge found that Mr. Breth had failed to establish permanent and total disability.

The rationale set forth in Dezellem is incorrect as a matter of law. The worker's particular labor market is a relevant factor, among many, in determining whether a worker is permanently and totally disabled. We conclude that Mr. Breth is permanently and totally disabled as a result of his industrial injury.

Mr. Arden Breth is 58 years old with an 11th grade education. He has always worked in medium to heavy labor, working in a paint factory; as an abalone diver; as a truck farmer; and in construction. He also has experience as a cook on fishing vessels, and for a short period of time worked as a chef in a restaurant in the Seattle area. In 1980, five years prior to this industrial injury, Mr. Breth purchased a home in Marblemount, Washington. Marblemount is a community located on the Skagit River in Skagit County, approximately 70 miles northeast of Everett, Washington.[1] While living in Marblemount, Mr. Breth was employed for a time, weaving commercial fishing nets in his home for a business located on Bainbridge Island, Washington. This was medium to heavy work. In addition, he worked in various jobs, including woodcutting and construction. Mr. Breth injured his low back while working as a cook in a restaurant located in Rockport, Washington, a community approximately eight miles from Marblemount. As we have previously indicated, Mr. Breth suffers a permanent partial disability to the low back equal to a Category 3 impairment and is limited to sedentary work as a result of the industrial injury. With this composite picture of Mr. Breth we must determine whether he is permanently and totally disabled as a result of the industrial injury.

The concept of permanent total disability was discussed at some length in Fochtman v. Dep't of Labor & Indus., 7 Wn.App. 286 (1972). The court stated that:

> Total disability is inability, as the result of a work-connected injury, to perform or obtain work suitable to the workman's qualifications and training. Total disability is not a purely medical question. It is a hybrid quasi-medical concept in which there are intermingled in various combinations, the medical fact of loss of function and disability, together with the inability to perform and the inability to obtain work as a result of his industrial injury.

Fochtman, at 294 (Emphasis added). The court went on to state that:

[1]Pursuant to ER 201 we have taken judicial notice of a number of geographical facts in this appeal, relying on the Official Washington State Highway Map published by the Department of Transportation.

> Proof of permanent total disability is more individualized than proof of permanent partial disability. The testimony necessarily requires a study of the whole man as an individual -- his weakness and strengths, his age, education, training and experience, his reaction to his injury, his loss of function and other relevant factors that build toward the ultimate conclusion of whether he is, as a result of his injury, disqualified from employment generally available in the labor market.

Fochtman, at 295 (Emphasis added).

Thus, the court in Fochtman specifically considered whether the industrial injury had precluded the worker "from employment generally available in the labor market". Fochtman, at 295.

Cynthia Backlund, a vocational consultant, testified that sedentary work within Mr. Breth's capabilities was not available in the Marblemount area. Thus, according to Ms. Backlund, the claimant's place of residence is a barrier to his employability.

Mr. Carl Gann, a vocational rehabilitation counselor, believed Mr. Breth could work in sedentary employment as an order clerk in a wholesale food warehouse. While he believed positions were available in western Washington, he candidly admitted that he was unaware of any such businesses in Skagit County.

This Board has addressed the labor market issue in two previous decisions. In Dezellem, the Board rejected any consideration of the local labor market as a factor in determining permanent total disability. In In re Daniel T. Furlong, BIIA Dec., 65,138 (1985), the Seattle employer offered an "odd lot" job to the worker, who had moved to Alaska. The Board held that the "odd lot" job was not "available" to the worker and found him permanently totally disabled.

We have been unable to locate any court decisions in our state which directly address this issue. We have therefore examined case law in other jurisdictions. In those states where a worker is required to show that he has actually looked for work in order to justify the inability to find employment, the courts have refused to require the worker to move from his residence or search outside of his immediate community. See, McMannis v. Mad-Ray Modulars, Inc., 289 So.2d 715 (Fla. 1974); Genelus v. Boran, Craig, Schreck Const. Co., 438 So.2d 964 (Fla. App. 1st Dist.1983). In those jurisdictions the worker is entitled to total disability benefits if he is unable to find employment within his immediate community. Phelps Dodge Corp., Morenci Branch v. Industrial Commission, 90 Ariz. 248 (1961); Reese v. Preston Marketing Association, 274 Minn. 150 (1966).

Those jurisdictions only require the worker to look in his immediate community for employment opportunities. Our Act does not contemplate such a limited approach. While the relevance of the worker's labor market and its effect on continued employment has not been specifically addressed by our courts, under Fochtman the only logical approach is to consider the worker's residence as one of the "other relevant factors" in determining whether a worker is permanently totally disabled.

The Department itself requires a worker's labor market to be considered when the worker is evaluated vocationally. WAC 296-18A-450 specifically requires vocational rehabilitation plans to contain: "(c) Labor market information indicating the employability of the injured worker at plan completion." In addition, it is the Department, not the claimant, which has stressed the availability of employment in the western Washington labor market, particularly Snohomish County, as an appropriate factor to be considered. As Mr. Gann testified:

> One of the things that vocational rehabilitation counselors do is look at Employment Security publications or data which tells us about numbers of job openings in different geographical areas. In Snohomish county, which is the county below where Marblemount is located, there were five openings reported by job service and that is recorded in Employment Security's latest publication in October, 1987. What that indicates to me is that there were five job opening (sic) that were called in and requested by employers. That does not mean that they were all job openings that existed because an employer is not required to report a job opening with job service, but it is one way of look (sic) to see if there are any openings or people working in that specific occupation or DOT title number.

Tr. 1/29/90, at 19.

It seems fairly obvious that a worker's employability cannot be discussed in the abstract. There must be some reference to jobs which are generally available in a particular labor market. There is quite a bit of difference between an injured Washington worker who is capable of performing a job which is generally available in another state, and an injured Washington worker who is capable of employment generally available in the local area where he resides. As the geographical area narrows and gets closer to home, the determination of what constitutes the relevant labor market becomes more difficult.

For example, does the labor market for a worker who resides in King County include Spokane County? Does the labor market for a worker who resides in Skagit County include Jefferson County? Does it matter how much money a worker is able to make? Does it matter if the worker is accustomed to employment involving travel?

There simply is no hard and fast rule regarding what constitutes the relevant labor market. What is clear, however, is that a vocational counselor's opinions are meaningless without some reference to real jobs which are available in a real labor market, accessible to the particular worker. As the court stressed in Fochtman, the determination of whether a worker is permanently totally disabled requires an individualized analysis of the particular worker.

Mr. Breth's residence in Marblemount, Washington is a factor to consider in determining his ability to perform or obtain work on a reasonably continuous basis. The testimony of both vocational consultants persuades us that the labor market associated with Marblemount, Washington lacks sedentary jobs within Mr. Breth's capacity. Although Mr. Gann's testimony consistently refers to sedentary jobs available in western Washington, we do not believe our Act requires Mr. Breth to abandon his home in Marblemount. Nor do we believe it is reasonable to require Mr. Breth to commute the considerable distance to the metropolitan areas of western Washington in order to find sedentary work. Mr. Breth was able to work most of his life in medium to heavy types of employment. He did this for five years while living in the area where he has chosen to make his home, Marblemount, Washington. It is the industrial injury which now precludes him from continued employment in the location of his residence.

In the final analysis, Mr. Gann's testimony does not convince us that Mr. Breth is employable. His testimony is based solely on a review of records; he had no personal contact with Mr. Breth. He identified only one job which he felt Mr. Breth could perform -- an order clerk in the wholesale food industry. He reviewed Employment Security data for that position in Snohomish County only. That data revealed five job openings as of October, 1987, not June, 1989, when the orders under appeal were issued.

Claimant's vocational expert testified that he had no transferable skills and was not employable. Mr. Gann's testimony does not persuade us otherwise. We are convinced that "as a result of his injury" Mr. Breth is "disqualified from employment generally available in the labor market." Fochtman, at 295. Thus, he was entitled to a pension as of June 20, 1989, and to time loss compensation for the periods of July 15, 1988 through October 15, 1988 and March 8, 1989 through June 19, 1989.

FINDINGS OF FACT

1. On May 15, 1985 the Department of Labor and Industries received an accident report alleging that on May 2, 1985 the claimant injured his back during the course of his employment with Totem Trail Restaurant. Benefits were provided. On June 16, 1989 the Department issued an

order terminating claimant's time loss compensation with the payment for the period beginning January 17, 1989 and ending March 7, 1989. On June 28, 1989 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On July 19, 1989 the Board issued an order granting the appeal, assigning it Docket No. 89 2211 and directing that proceedings be held.

On June 20, 1989, the Department issued an order closing the claim with time loss compensation as paid and with a permanent partial disability award for unspecified disabilities of 5% as compared to total bodily impairment, paid at 75% of the monetary value, pursuant to RCW 51.32.080(2). On June 28, 1989 the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On July 19, 1989 the Board issued an order granting the appeal, assigning it Docket No. 89 2214 and directing that proceedings be held.

2. On May 2, 1985 the claimant did a substantial amount of lifting and cleaning, slipped twice on wet floors, and experienced pain in his low back during the course of his employment as a cook for Totem Trail Restaurant.

3. As the result of his industrial injury of May 2, 1985, claimant sustained myoligamentous back pain and aggravated preexisting degenerative arthritis in his thoracolumbar spine.

4. Claimant was born on August 6, 1932. He terminated his formal education in the 11th grade. Claimant spent three years in the Marine Corps, where he taught weapons. Claimant has had a varied work history, in medium to heavy labor. He was a laborer in a paint factory; an abalone diver; he worked in construction; he was a truck farmer; he worked as a cook on fishing vessels, tugboats and research vessels; he was a chef at a restaurant where he supervised 36 other workers; and he wove fishing nets. As a cook on fishing and research vessels he was responsible for filling out paperwork necessary to obtain ship stores and for planning and preparing meals.

5. In 1980, five years prior to the industrial injury, Mr. Breth purchased a home in Marblemount, Washington. Marblemount is a community located on the Skagit River in Skagit County, approximately 70 miles northeast of Everett, Washington. While living in Marblemount, Mr. Breth was employed for a time, weaving commercial fishing nets in his home for a business located on Bainbridge Island, Washington. This was medium to heavy work. Mr. Breth also worked in various jobs, including woodcutting and construction. Mr. Breth injured his low back while working as a cook in a restaurant located in Rockport, Washington, a community approximately eight miles from Marblemount.

6. As a result of his industrial injury of May 2, 1985, claimant is restricted to sedentary occupations where he can change positions at will. Claimant can use his hands for simple grasping, some pushing and pulling, and fine

finger manipulation. He can use his feet for repetitive movements and can occasionally bend, squat and crawl, and reach above shoulder level.

7. As of June 20, 1989, the claimant had a permanent partial disability resulting from his industrial injury of May 2, 1985 which is most consistent with that described by Category 3 of WAC 296-20-280, permanent dorso-lumbar and lumbosacral impairments. His disability was not substantiated by marked objective clinical findings.

8. There are no sedentary jobs available in Mr. Breth's labor market which are consistent with Mr. Breth's physical limitations and transferable skills.

9. As of June 20, 1989, the claimant's condition causally related to his industrial injury was fixed and not in need of treatment.

10. For the periods of July 15, 1988 through October 15, 1988 and March 8, 1989 through June 19, 1989, the claimant, given his age, education, work experience, and labor market, together with the residuals of his industrial injury, was precluded from engaging in gainful employment on a reasonable continuous basis.

11. As of June 20, 1989, taking into consideration claimant's age, education, training, work experience, and his labor market, together with the residuals of his industrial injury, the claimant was not capable of gainful employment on a reasonably continuous basis.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to these appeals.

2. For the periods of July 15, 1988 through October 15, 1988 and March 8, 1989 through June 19, 1989, the claimant was a temporarily totally disabled worker within the meaning of RCW 51.32.090.

3. As of June 20, 1989, the claimant was a totally and permanently disabled worker within the meaning of RCW 51.08.160.

4. In the appeal assigned Docket No. 89 2211, the order of the Department of Labor and Industries dated June 16, 1989 which terminated claimant's time loss compensation with the payment for the period of January 17, 1989 through March 7, 1989 is incorrect and is reversed and this claim is remanded to the Department with instructions to pay time loss compensation for the periods July 15, 1988 through October 15, 1988 and March 8, 1989 through June 19, 1989.

5. In the appeal assigned Docket No. 89 2214, the order of the Department of Labor and Industries dated June 20, 1989 which closed the claim with time loss compensation as paid and with a permanent partial disability award for unspecified disabilities of 5% as compared to total bodily impairment paid at 75% of the monetary value pursuant to RCW 51.32.080(2) is incorrect and is reversed and this claim is remanded to the Department with instructions to place the claimant, Arden Breth, on the

pension rolls as a permanently and totally disabled worker as of June 20, 1989.

It is so ORDERED.

Dated this 10th day of December, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

DISSENT

The Board majority candidly admits that there are no court decisions in this state which address the issue of what constitutes an injured worker's relevant or reasonable labor market, insofar as that issue may affect the determination of whether such injured worker is permanently totally disabled. The majority then states that the only "logical approach" to this issue, under Fochtman at 295, is to consider the worker's residence as one of the "other relevant factors" in determining whether a worker is permanently totally disabled.

The majority has examined case law from other jurisdictions where the courts have refused to require the worker to move from his residence or search for work outside of his immediate community. In those jurisdictions -- Florida, Arizona, Minnesota -- the worker has been held, not surprisingly, to be entitled to total disability benefits if he is unable to find employment he can perform within his immediate community.

The majority says that our Act does not contemplate such a "limited approach." However, there follows considerable discussion and rhetorical questions about labor markets in general, and about there being "no hard and fast rule" on what constitutes a relevant labor market. Then, Mr. Breth's individual situation in Marblemount is discussed, concluding with the statement that "It is the industrial injury which now precludes him from continued employment in the location of his residence."

Thus, in spite of its statement about our Act not following such a limited approach, the majority has done exactly that, i.e., adopted the viewpoint of the other cited jurisdictions that the worker is entitled to total disability compensation if unable to find work he can perform" within his immediate community." In sum, says the majority, his labor market consists of the town of Marblemount, pure and simple.

I disagree, and will not adopt such a viewpoint. Rather, I choose to adopt the earlier significant decision of this Board, In re Lester R. Dezellem, BIIA Dec., 23,765 (1966), in which this issue was directly met by distinguished prior Board members, as follows:

> We are persuaded that the weight of the evidence supports the Hearing Examiner's finding that the claimant is able to engage in light types of work. It appears from the record that some difficulty in finding light work may prevail in the area where the claimant now resides, as he alleges. One of the facets of the issue before this Board is whether he is physically able to engage in gainful employment, not whether such employment is or is not presently available in his community. This is a socio-economic matter. The Act does not intend that the decision, on a question of whether an injured workman is permanently totally disabled or not, should turn on employment opportunities then present in any particular community. If this were the law, we would have a fluctuating and variable standard, dependent not on the injured workman's ability to engage in gainful employment, but rather, dependent on the economic condition in different communities at different times.

I do not agree with the majority's view that this rationale is incorrect as a matter of law. Neither Fochtman, nor any other Washington appellate court decision, can be taken to so hold.

In the other prior Board decision referred to by the majority, In re Daniel T. Furlong, BIIA Dec., 65,138 (1985), I dissented. Although the facts there are somewhat different from the instant case, my comments on the availability of light or sedentary work which the worker could physically perform, are also pertinent here:

> I would give the word "available" its usual meaning: "That one can avail himself of; that can be used". Webster's New World Dictionary, the World Publishing Company, 1964. As the Virginia Supreme Court of Appeals stated in United Mineworkers v. Unemployment Commission, 192 Va. 463 (1951): "Available for work implies . . . willing to accept any suitable work which may be offered to him, without attaching thereto restrictions or conditions . . . which he may desire because of his particular needs or circumstances."

I would find that light or sedentary work which Mr. Breth, with his mild Category 3 low back disability, can perform on a reasonably continuous basis is available to him. He simply will not avail himself of it, by choosing to "stay put" in the town of Marblemount.

The Industrial Appeals Judge's findings, conclusions, and order, as set forth in his Proposed Decision and Order of March 30, 1990, should be adopted.

Dated this 10th day of December, 1990.

/s/_____
PHILLIP T. BORK Member