Total Disability

Time Loss and Pension

Benefits

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About the Author

Christine A. Foster's practice is devoted to representing workers who have been injured in the workplace. Prior to beginning her own private practice in 1992, she worked with Justice Robert Utter of the Washington Supreme Court on special research projects and with the Office of the Washington State Attorney General representing the Department of Labor & Industries in appeals before he Board of Industrial Insurance Appeals, superior courts and courts of appeal in Washington State.

In addition to representing worker before the Board of Industrial Insurance Appeals, Ms. Foster has also successfully represented injured workers in the appellate courts relative to significant Industrial Insurance issues, which include *Brand v. Department of Labor & Industries*, 91 Wn.App.280, 959 P.2d 133 (1998) rev'd. 139 Wn.2nd 659,989 P.2d 1111 (1999) and *Somsak v. Crition Industries*, 75 Wn.Spp. 657, 879 P.2d 326 (1994) (regarding jurisdictional limitations on appeals from Department orders.)

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PERMANENT TOTAL DISABILITY

1 Introduction

The Industrial Insurance Act has four disability classifications of which "permanent total disability" is the most substantial. The four classifications are "temporary total disability" (entitling a worker time loss compensation), "temporary partial disability" (entitling a worker to loss of earning power benefits), "permanent partial disability" (entitling a worker to an impairment award for loss of function) and "permanent total disability" (entitling a worker to a pension). More specifically, permanent total disability entitles an injured worker to receive monthly payments for the remainder of the worker's life or, depending on the payment election chosen by the worker, the pension payments can continue for the life of the worker's spouse.[1]

An injured worker can be considered for permanent total disability benefits only when the conditions caused or aggravated by the industrial injury or occupational disease have reached maximum medical improvement from which no further treatment is expected to improve the industrially related conditions and yet the worker is left with residual impairment. With residual impairment at maximum medical improvement, an injured worker's disability is deemed

[1] RCW 51.32.067.

permanent and such permanent disability is either partial or total. Except for certain specified medical conditions, the primary qualitative distinction between permanent partial and permanent total disability is whether a worker is capable of "performing any work at any gainful employment" as this phrase has been interpreted by case law. If a worker is not capable of performing any work at any gainful employment, the worker is permanently totally disabled; otherwise the worker is permanently partially disabled and entitled to an impairment award for loss of function.[2]

The phrase permanent total disability is misleading with respect to the extent of disability that qualifies a worker to receive pension benefits. The phrase is unfortunate for many reasons, the most significant of which is it reasonably implies complete and total incapacity and therefore a benefit suitable only for those workers with no ability to perform any work whatsoever. Jurors, physicians, and others not knowledgeable about the Industrial Insurance Act understandably envision a permanently totally disabled worker as one who is bedridden and useless for all purposes, which can be in stark contrast to the appearance of a worker seeking these benefits at the Department of Labor & Industries (Department), Board of Industrial Insurance Appeals (Board) or trial court. While the assumption may

[2] *Williams v. Virginia Mason Medical Center*, 75 Wn. App. 582, 880 P.2d 539 (1994); RCW 51.32.055; RCW 51.32.080.

be reasonable that permanent total disability means just that – total disability – this assumption is not legally correct. Quite ironically, to qualify for permanent total disability benefits, the law does not require a worker's disability to be either permanent or total, at least with respect to how these words are commonly understood outside of the Industrial Insurance Act.

2 Statutory Definition

The legislature, at RCW 51.08.160, defined permanent total disability as follows:

> Loss of both legs, 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 employment.

This statute creates two categories of total disability – total disability based on specified medical conditions, e.g., loss of both legs or arms, etc., and a general ambiguous standard based on whether the worker is incapacitated "from performing any work at any gainful employment." Note that this inquiry is not limited to whether a worker is capable of performing the job of injury but also includes any similar work suitable to the worker's qualifications and training.[3]

[3] *Allen v. Department of Labor and Industries*, 30 Wn. App. 693, 698, 638 P.2d 104, 106 (1981).

When a worker does not suffer from one of the specified disabilities, as in the vast majority of litigated claims, a worker is permanently totally disabled only when incapacitated from "performing any work at any gainful employment" and such incapacity is expected to continue for the foreseeable future.[4] Since permanent total disability regarding medical conditions expressly specified in RCW 51.08.160 is generally straightforward and undisputed, the remainder of this Chapter addresses permanent total disability with respect to the "other [medical] conditions[s] permanently incapacitating the worker from performing any work at any gainful employment." Therefore, all further references to permanent total disability refer to the medically unspecified conditions dependent on the worker's ability to perform any work at any gainful employment which, significantly, is also the basis for a worker's entitlement to time loss compensation because the only difference between temporary total disability and permanent total disability is the duration of the disability.[5]

A worker is entitled to temporary total disability benefits when temporarily unable to perform any work at any gainful employment. The worker's total disability is temporary generally because the

[4] As stated above, permanent total disability is not necessarily permanent. The worker need only establish that total disability will probably continue for the foreseeable future. In the event the worker's condition improves beyond the foreseeable future, and the worker is able to perform work at a gainful occupation, the Act provides a worker the right to file an application pursuant to RCW 51.32.160(1), which provides for aggravation or diminution of disability. This statute would be inconsistent with requiring a worker to establish that the total disability is truly permanent.

[5] *Bonko v. Department of Labor and Industries*, 2 Wn. App. 22, 25, 466 P.2d 526 (1970).

worker's medical condition is not yet fixed and stable and further medical treatment, rehabilitation or training may enable the worker to return to gainful employment.[6] A worker is permanently totally disabled when the industrially related condition is fixed, stable and non-remediable yet, at the time of claim closure and for the foreseeable future thereafter, the worker is unable to perform any work at any gainful occupation.

The legislature, at RCW 51.08.160, did not provide much, if any, detail about what should be considered in determining whether a worker is capable of performing any work at any gainful employment. As such, the statute is clearly ambiguous and has been subjected to statutory construction by the courts in Washington since at least 1942.[7] This has resulted in a definition of total disability that has evolved, and may continue to evolve, with changing realities of the labor market and medical technology.[8]

3 Case Law Development

Our Supreme Court first wrestled with the ambiguous non-injury specified definition of permanent total disability in *Kuhnle v.*

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[6] RCW 51.32.090(1).

[7] *Kuhnle v. Department of Labor and Industries*, 12 Wn.2d 191, 120 P.2d 1003 (1942).

[8] *Leeper v. Department of Labor and Industries*, 123 Wn.2d 803, 811, 872 P.2d 507, 511 (1994) ("The language of the statute acknowledges proof of a disability will evolve with the development of new industries, the sophistication of medical diagnoses and treatment and the changing composition of the labor market. When the Legislature enacted the workers' compensation program in 1911, it did not forever limit eligibility to the prevailing notions of disability. The Legislature adopted a standard, subject to interpretation and development which the Department, the Board of Industrial Insurance Appeals and the courts have delineated case by case."

Department of Labor and Industries, 12 Wn.2d 191, 120 P.2d 1003 (1942). *Kuhnle* primarily held that permanent total disability does not mean the worker "must be absolutely helpless or physically broken and wrecked for all purposes except merely to live."[9] *Kuhnle* essentially construed permanent total disability as involving more than a medical assessment regarding the extent of a worker's impairment; it requires a broader assessment as to whether the extent of the worker's impairment results in the loss of his or her gainful wage earning capacity, which involves economic considerations.

The facts in *Kuhnle* are illustrative of the undesirable name associated with the quantum of disability necessary to qualify a worker to receive pension benefits. In *Kuhnle*, the worker sustained a serious neck injury working as a logger for Simpson Logging Company. The evidence established he was no longer capable of returning to his physically demanding work and was otherwise not fit by training or experience to do work of any kind, except manual labor. The troublesome fact for the lower court was that Mr. Kuhnle had income from a farm he owned which consisted of one hundred sixty acres, twenty-five or thirty which were cleared. He also had livestock, a vegetable garden and raised hay on the land. He testified he was able to do practically none of the work on the farm but his wife and children

[9] *Kuhnle v. Department of Labor & Industries*, 12 Wn.2d at 197, 120 P.2d at 1006. (Permanent total disability does not necessarily mean the worker is totally physically disabled.

did all of the physical work under his direction and supervision. And, while the farm did produce income, he testified that such income was not enough to support him and his large family. The trial court dismissed Mr. Kuhnle's claim for permanent total disability owing to the fact the uncontroverted evidence established he was deriving income from the farm. Despite Mr. Kuhnle's limited physical capacity and limited earnings, the trial court nevertheless held that Mr. Kuhnle failed to present a *prima facie* case of permanent total disability.

The Supreme Court reversed the trial court's dismissal of Mr. Kuhnle's appeal and held that permanent total disability does not require near abject helplessness or complete incapacity. Moreover, sporadic competence or an ability to derive some income does not necessarily prove the worker has gainful wage earning capacity and as such does not reduce what is otherwise total disability to partial disability. Gainfully employable means a worker has an ability to work with a reasonable degree of success and continuity.[10]

The Court also provided persuasive instructive guidance regarding the quality, quantum and character of what constitutes gainful employment as contemplated by the statute. Indeed, the Court wrote that even when a worker has residual capacity to work with success and continuity, such worker must also have the ability to

[10] *Id*., at 197, 120 P.2d at 1006.

obtain work; otherwise the worker really has no meaningful wage earning capacity. Therefore, when a worker has the physical ability to perform a gainful occupation but is not capable of obtaining one, the worker is properly classified as totally disabled. Furthermore, when a worker's limitations are such that they qualify the worker to perform and obtain work that is not generally available or, in other words, when the limitations qualify him or her to perform only special or odd lot work not generally available, then the worker is permanently totally disabled unless the Department or self-insured employer can show that such special or odd lot job is available to the worker on a reasonably continuous basis. When a worker is limited to performing only odd lot or special work, the burden of proof shifts from the worker to the Department or self-insured employer.[11] This has become known as the "odd lot doctrine."[12] Its focus is on the irregularity and unpredictability of a worker's ability to work given his/her limited capacity for work fit only for special uses.[13]

The odd lot doctrine underscores the focus of the total disability determination on the impact of an injury or disease on a worker's

[11] *Id*., at 199, 120 P.2d at 1007.

[12] The phrase "odd lot doctrine" was coined in an early King's Bench case by Judge Moulton who actually acknowledged that it was an "undignified phrase." *Cardiff Corp. v. Hall* (1911) 1 K.B. 1009. Undignified as the phrase may be, the doctrine, with its awkward name, has endured and is now accepted in virtually every state. 2 A. Larson, *Workers' Compensation Law*, Desk Edition, § 83.01 (2004).

[13] *Young v. Department of Labor and Industries*, 81 Wn. App. 123, 131, 913 P.2d 402, 407 (1996). (Special work is work that is not generally available in the competitive labor market.) The Court has not held whether special work is the same as an odd lot job but it would be difficult to conceive of a distinction between the two. Special work may be the Court's translation of the undignified or awkward term, "odd lot", to a more understandable and elegant phrase.

actual loss of earning capacity which involves both medical considerations regarding the extent of physical impairment as well as economic considerations regarding the effect of such physical impairment on the worker's wage earning capacity. The inclusion of economic considerations in permanent total disability not surprisingly raised the issue whether experts in fields other than medicine may be better suited to address the impact of impairment on a worker's wage earning capacity.[14]

4 Vocational Evidence and Individualized Assessment

After *Kuhnle*, the Court was asked to address the use of vocational evidence in determining whether a worker is totally disabled. In *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286, 499 P.2d 255 (1972), the Court held that vocational evidence is desirable, relevant and admissible in determining whether a worker is permanently totally disabled.[15] Permanent total disability differs from permanent partial disability because it is not limited to a medical question regarding loss of function.[16] Permanent total disability requires consideration of the impact an injury or disease has

[14] The medical testimony excerpted by the Court within the *Kuhnle* decision evidences the challenge that medical experts may have in testifying how medical impairment actually impacts a worker's earning capacity in the competitive labor market. *Kuhnle*, 12 Wn.2d 191, 194-195, 120 P.2d 1003, 1004-1005 (1942).
[15] *Fochtman v. Department of Labor and Industries*, 7 Wn. App. 286, 295-296, 499 P.2d 255, 261 (1972).
[16] *Franks v. Department of Labor and Industries*, 35 Wn.2d 763, 215 P.2d 416 (1950).

on a worker's wage earning capacity and, therefore, necessarily involves a more individualized assessment involving "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."[17] The Court described the required individualized assessment as follows:

> 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. In the ultimate determination of whether the injured workman can maintain gainful employment in the labor market with reasonable continuity we find the testimony of a vocational or employment expert both relevant and admissible . . . Although we do not exclude other testimony, we find that the testimony of a vocational consultant or employment expert who would consider medical evidence of loss of function and physical impairment, his own findings obtained in testing the injured workman, facts relative to the labor market and his conclusion as to whether the injured workman was so handicapped as a result of the injury that he could not be employed regularly in any recognized branch of the labor market, is desirable, relevant and admissible to establish total disability.[18]

[17] *Fochtman,* 7 Wn. App. at 294, 499 P.2d at 260.
[18] *Id*, at 295-96, 499 P.2d at 261.

Fochtman underscores what *Kuhnle* insisted – that total disability be a practical assessment regarding the effect of the injury or disease on the individual worker's wage earning capacity. While vocational testimony is relevant and admissible, the Court clarified that it is not always required – especially where common sense and evidence demonstrate a worker has limited employment skills coupled with physical limitations that would prevent him or her from finding or retaining employment with success and continuity.[19]

When vocational experts are used at the administrative or litigation levels, their opinions cannot stand alone but must be based on medical evidence of the worker's loss of function and impairment.[20] This makes practical sense in that vocational experts are not medical experts. Their expertise is with respect to the labor market, assessment and transferability of a worker's skills and abilities into other occupations and the worker's ability to obtain a job. Vocational experts are not competent to determine a worker's limitations or impairments on their own – however, this often occurs in practice and should be identified and challenged both at the administrative and litigation levels. Closely related to this issue is when vocational experts decide upon which of competing medical opinions to base their

[19] *Young v. Department of Labor & Industries*, 81 Wn. App. 123, 132, 913 P.2d 402, 408 (1996).
[20] *Buell v. Aetna Cas. & Sur. Co.*, 14 Wn. App. 742, 746, 544 P.2d 759, 761-62 (1976).

vocational opinion. While a vocational expert may be asked to rely on a particular set of physical restrictions from one physician over another, it is tantamount to a vocational expert rendering a medical opinion if he or she determines which of competing medical opinions are more appropriate physical limitations for a worker's injuries.

5 When a Worker's Ability to Obtain Employment is Relevant – Always

If there was any question after *Kuhnle* whether a worker's inability to obtain employment is determinative of total disability, any such question was definitively resolved by the Court in *Leeper v. Department of Labor and Industries*, 123 Wn.2d 803, 872 P.2d 507 (1994). *Leeper* is a consolidation of three cases that, in trial, used jury instructions that defined permanent total disability to include a worker's ability to obtain work as suggested by the 1989 Washington Pattern Jury Instructions.[21] The previous edition of the Washington Pattern Instruction defined total disability as a medical condition that only made a worker "unable to perform a gainful occupation" without the inclusion of the phrase "or obtain".[22]

[21] 6 Wash. Prac. *WPI*, 155.07 (3d ed. 1989).
[22] 6 Wash. Prac. *WPI,* 155.07 (2d ed. 1980).

The Department challenged the use of the new jury instruction and argued a worker's ability to obtain work was only relevant in odd lot cases. The Court disagreed and found the Department's argument confused the burden of proof with the admissibility of evidence. While the odd lot doctrine shifts the burden of persuasion to the Department once the worker has made a *prima facie* case of total disability, the doctrine does not limit the evidence a worker may use to prove total disability in the first instance. The inability to obtain work because of a workplace injury is relevant evidence at all stages of a disability hearing.

The Department also argued that unemployment benefits instead of workers' compensation benefits protect workers who cannot obtain employment. The Court disagreed and held this argument failed to account for those workers who cannot obtain employment because of a workplace injury. Such individuals are not eligible for unemployment compensation because they are not able to work. Moreover, while a worker is not permanently totally disabled merely because of general fluctuations in the labor market, the requirement that the injury, rather than market fluctuations, cause the inability to obtain work ensures a worker's inability to obtain work is relevant to proving total disability.[23] [24]

[23] *Leeper v. Department of Labor & Industries*, 123 Wn.2d 803, 817 P.2d 507 (1994).

As a result of *Leeper*, the definition of total disability as used in the Washington Pattern Jury Instructions is a correct statement of the law. It currently reads as follows:

> Total disability is an impairment of mind or body that renders a worker unable to perform or obtain gainful employment with a reasonable degree of success and continuity. It is the loss of all reasonable wage-earning capacity.
>
> A worker is totally disabled if unable to perform or obtain regular gainful employment within the range of the worker's capabilities, training, education, and experience. A worker is not totally disabled solely because of inability to return to the worker's former occupation. However, total disability does not mean that the worker must have become physically or mentally helpless.

When a worker is seeking permanent total disability benefits rather than temporary total disability, the following additional phrase should be added to the instruction:

> Total disability is permanent when it is reasonably probable to continue for the foreseeable future.[25]

Where the evidence establishes a worker is not capable of performing or obtaining generally available regular work but limited to

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[24] *Leeper, id,* is also illustrative of individualized information that is appropriately considered in an assessment of a worker's ability to perform and obtain gainful employment. Mr. Taasevigen had criminal convictions which he argued made it difficult for him to obtain many jobs; the Court held that his convictions were properly considered by the jury because such convictions are part of Mr. Taasevigen's strengths and weaknesses, training, and experience which define his ability to obtain and perform a job. *Id*, at 818-19, 817 P.2d at 516.

[25] 6 Wash. Prac. *WPI,* 155.07 (5th ed. 2005).

odd jobs or special work, the fact finder must consider the odd-lot doctrine which is currently defined in the Washington Pattern Jury Instructions as follows:

> If, as a result of an industrial injury or occupational disease, a worker is able to perform only odd jobs or special work not generally available, then the worker is totally disabled unless the Department or employer proves by a preponderance of the evidence that odd jobs or special work that he or she can perform is available to the worker on a reasonably continuous basis.[26]

6 Vocational Services

Vocational services are fully addressed in Chapter 12. Therefore, this Chapter will address vocational services only to the extent they impact permanent total disability. To this end, it is important to point out that the stated purpose of workers' compensation and "the principle that animates it is to insure against the loss of wage earning capacity."[27] As such, the legislature provided that before a claim is closed, the Department or self-insured employer shall use the services of vocational experts to assist in determining whether vocational rehabilitation services are both necessary and likely to enable a worker to become employable at gainful employment.[28] This provision provides the Department an opportunity

[26] 6 Wash. Prac. *WPI,* 155.07.01 (5th ed. 2005).
[27] RCW 51.32.095(1); *Leeper*, 123 Wn.2d at 814, 817 P.2d at 515.
[28] RCW 51.32.095.

to mitigate against a worker's permanent total disability by providing retraining or other services that will enable the worker to perform and obtain gainful employment. If a worker can be retrained to become gainfully employable, the worker is not permanently totally disabled but remains entitled to temporary total disability benefits while actively and successfully undergoing retraining.[29]

In determining whether a worker is capable of performing and obtaining gainful employment or requires vocational services to become employable, the vocational expert must consider the following priorities:

- Return to the previous job with the same employer;
- Modification of the previous job with the same employer including transitional return to work;
- A new job with the same employer in keeping with any limitations or restrictions;
- Modification of a new job with the same employer including transitional return to work;
- Modification of the previous job with a new employer;

[29] RCW 51.32.095(3)(a). The statute characterizes ongoing time loss benefits during retraining as a cost provided for vocational services. Therefore, while the Department routinely terminates a worker's time loss compensation immediately upon completion of retraining (even when a worker has not obtained employment or been provided job placement assistance) a worker may nevertheless qualify for ongoing total disability benefits if, at the completion of retraining, the labor market declined or the worker's industrially related conditions worsened such that the worker is incapable of performing or obtaining gainful employment pursuant to RCW 51.08.160.

- A new job with a new employer or self-employment based on transferable skills;
- Modification of a new job with a new employer;
- A new job with a new employer or self-employment involving on the job training;
- Short-term retraining and job placement.[30]

While the Department and self-insured employers must use the services of vocational specialists to assist in evaluating an injured worker's ability to work as defined by law, the ultimate decision whether vocational services are necessary and likely to enable an injured worker to become employable at gainful employment is a decision in the sole discretion of the Department. As a discretionary decision, it can only be reversed on appeal by proving the Department abused its discretion. This requires proof that the discretionary decision is manifestly unreasonable or exercised on untenable grounds for untenable reasons.[31] Given this onerous burden of proof, the Department's decision regarding whether or not to provide vocational retraining is essentially non-reviewable and thus binding.[32] Significantly, it is binding on both parties.

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[30] RCW 51.32.095(2).

[31] *In re: Mary Spencer*, BIIA Dec., 90 0264 (1991), quoting, *Ritter v. Board of Commissioners*, 96 Wn.2d 503, 515, 637 P.2d 940 (1981).

[32] *In re: Gary Manley*, BIIA Dec., 66 115 (1986).

If the Department refuses retraining to a worker who is a strong candidate for permanent total disability benefits, it does so with significant risk in litigation because the Department cannot take a position in litigation inconsistent with its vocational determination while the claim was open.[33] Therefore, in litigation, the Department or self-insured employer cannot defend against a worker's qualification for permanent total disability benefits on the basis the worker would be employable if vocationally retrained because the Department previously determined the worker did not require vocational services.

If, however, the Department determines a worker requires vocational retraining and the retraining fails to enable the worker to perform and obtain employment, the Department should similarly be precluded from defending against permanent total disability on any other basis other than that the retraining provided to the worker enabled him or her to perform and obtain a gainful occupation. This is because disqualification of preceding vocational priorities should have issue preclusive effect such that the Department or self-insured employer should not be allowed to submit evidence contrary to its previous vocational determination – this is assuming, of course, that the worker's condition is essentially the same at claim closure as it was

[33] *In re: Ronald Thomas*, BIIA Dec., 89 3503 (1991).

at the time of the vocational determination.[34] Unfortunately, this does not always occur at the Board where the Department and self-insurers are permitted to defend against permanent total disability based on all priorities preceding retraining. This can and should be challenged on appeal.

7 The Three P's – Preexisting Conditions, Proximate Cause and Pain

While the foregoing cases, jury instructions and discussion provide a correct definition of total disability, this Chapter cannot end here because total disability is not a stand-alone concept. There are several significant additional issues involved in most total disability cases which are often disregarded or misunderstood. These include consideration of a worker's preexisting conditions, the amount of proximate cause required between the industrially related conditions and the worker's inability to perform gainful employment as well as consideration of a worker's pain.

A. Pre-existing conditions, limitations and infirmities

In practice, it is common to encounter cases where the Department, self-insurers, or vocational experts request the attending physician and/or defense medical examiners to provide an opinion

[34] *See*, *Brakus v. Department of Labor and Industries*, 48 Wn.2d 218, 292 P.2d 865 (1956).

whether the injured worker is capable of performing a gainful occupation when considering the industrially related condition(s). This is often construed by physicians as requiring them only to consider limitations imposed by the industrially related, accepted conditions when determining whether an injured worker is capable of performing and obtaining gainful employment. This is contrary to common sense and well-established Washington law; the whole injured worker must be able to return to work, not just the worker's injured body part. As such, the worker must be considered as a whole person with all preexisting conditions and bodily infirmities when determining whether he or she is capable of performing and obtaining gainful employment.[35]

It was long ago established that the Industrial Insurance Act is not limited in its application to persons who are completely free from disease or physical or mental abnormalities. Indeed, if the injury complained of is a proximate cause of the disability for which compensation is sought the previous physical condition of the worker is not deemed the cause of the injury, but merely a condition upon which the real cause operated.[36] Subsequent to *Miller*, our courts have

[35] W*endt v. Department of Labor and Industries*, 18 Wn. App. 682-83, 571 P.2d 229, 235 (1977).
[36] *Miller v. Department of Labor and Industries*, 200 Wash. 674, 682-683, 94 P.2d 764 (1939).

continued to reiterate this principle.[37] Therefore, if a worker's preexisting conditions, infirmities or limitations are not fully considered in determining whether a worker is totally disabled, such determination is irrelevant and otherwise flawed as a matter of law. As such, care must be taken to identify all conditions limiting a worker's ability to perform and obtain work including any preexisting physical or mental limitations, learning disabilities, language barriers, criminal convictions, etc. As long as the industrially related condition is at least a proximate cause of total disability, then the injured worker is totally disabled even though there are other unrelated conditions and limitations also contributing to the worker's inability to perform and obtain gainful employment.

B. Proximate Cause

For a worker to qualify for total disability benefits, the inability to perform gainful employment must be proximately related to the industrial injury or disease. Significantly, proximate cause as defined in the context of the Industrial Insurance Act requires only that the industrial injury or occupational disease be **a** proximate cause of the resulting disability. The industrial injury or disease need not be the sole cause, the primary cause or even a substantial cause of a

[37] *Groff v. Department of Labor and Industries,* 65 Wn.2d 35, 44, 395 P.2d 633 (1964); *Kallos v. Department of Labor and Industries*, 46 Wn.2d 26, 30, 278 P.2d 393 (1955); *Jacobsen v. Department of Labor and Industries*, 37 Wn.2d 444, 448, 224 P.2d 338 (1950).

worker's inability to perform gainful employment. As long as the evidence proves that total disability would not have resulted "but for" the industrially related injury or disease, then the worker is totally disabled as a proximate result of the injury or disease.[38] This is a crucial concept to understand when there are multiple contributing causes of a worker's total disability.

Unfortunately, proximate cause is frequently misunderstood – especially when juxtaposed to the burden of proof required to establish a worker's entitlement to benefits, which burden is by a preponderance of evidence. Because a worker must prove by a preponderance of evidence, in other words, on a more probable than not basis, that the industrially related condition is a proximate cause of his/her inability to perform or obtain a generally available gainful occupation, physicians, claims managers and others working in this field not infrequently mistake the quantum of proof standard as also applying to the quantum of causation necessary to establish proximate cause. However, this is not legally correct. Indeed, as long as a physician can testify to an opinion on a more probable than not basis that the injury or disease was at least a cause, no matter how significant, of the resulting disability such that, but for the injury or

[38] *Wendt v. Department of Labor and Industries*, 18 Wn. App. 674, 571 P.2d 229 (1977).

disease, the worker would not be totally disabled, such is legally sufficient causation to establish the worker is totally disabled.

Based on longstanding law that a total disability determination must include consideration of a worker's preexisting conditions and infirmities and proximate cause only requires that total disability would not have occurred but for the injury or disease, a defense against total permanent disability that underscores a worker's preexisting unrelated conditions as primarily causing the worker's inability to work clearly seeks to obfuscate, prejudice and/or confuse the fact finder – whether that is a claims manager, vocational counselor, physician, judge or jury. Stated otherwise, if an injured worker has significant preexisting medical conditions which combine with relatively insignificant injury related limitations, the underlying message of the defense is that it is not fair for a worker to collect lifetime pension benefits when total disability is primarily caused by preexisting unrelated conditions. Unfortunately, industrial appeals judges sometimes buy into this argument and find against a worker's appeal for pension benefits.[39]

[39] In *In re Shauna Guyman*, BIIA Dec. 05 13662 (2006), the IAJ required the worker to establish that the industrial injury be a significant cause of the disability sought instead of a mere but for cause of the disability sought. The Board reviewed the decision of the IAJ and held as follows: "In the Proposed Decision and Order, the industrial appeals judge determined that the industrial injury was not a 'significant proximate cause' of a claimant's need for low back surgery. The term 'significant proximate cause' is not the correct standard to apply in an industrial injury case. We reiterate that the industrial injury need only be **a** proximate cause of the condition for which compensation is sought. We have long since abandoned the language that the injury must be a significant cause of the condition for which surgery was necessary." *See also*, *Brashear v. Puget Power and Light*, 100 Wn.2d 204, 667 P.2d 78 (1983).

However, this argument is not appropriate in the context of Industrial Insurance.[40]

Larson's points out that "proximate cause or legal cause [as developed by tort law] is out of place in compensation law because . . . it is a concept that is itself thoroughly suffused with the idea of fault; it is a theory of causation designed to bring about a just result when starting from an act containing some element of fault." And, the primary test of legal cause in tort is foreseeability, which is irrelevant to workers' compensation coverage where improbabilities and unforeseeabilities can indeed satisfy the required causation in workers' compensation owing to merely being connected with the work or injury.[41] In other words, in workers' compensation, so long as the injury or disability would not have occurred but for the workplace injury or disease, there is adequate proximate cause even though the injury or disease is completely unforeseeable, there are other more significant conditions contributing to the disability and nobody is at fault. Therefore, the factual, but for, causation is the singular

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[40] In civil tort, proximate cause has both a factual or "but for" question as well as a legal question whether, as a matter of law, liability should attach given the existence of cause in fact. Legal causation is grounded in policy determinations as to how far the consequences of a defendant's act should extend. *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 951 P.2d 749 (1998). The focus of legal cause is "whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. *Schooley*, 134 Wn.2d at 478-79, 951 P.2d 749. Legal causation is, among other things a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. *Schooley*, 134 Wn.2d at 479-80, 951 P.2d 749.

[41] 2 A. Larson, *Workers' Compensation Law*, Desk Edition, § 3.06 (2004).

proximate cause determination that should be made in workers' compensation cases. Any indication that a claim manager, physician or vocational expert is confusing the requisite amount of proximate cause with the more probable than not basis of medical opinions must be immediately corrected as such confusion could result in the loss of a worker's pension.

C. Pain

Pain is another significant factor often disregarded by the Department, self-insurers and physicians in determining whether a worker is permanently totally disabled. While a worker's physical disability must be supported by medical testimony based at least in part on one or more objective medical findings,[42] [43] such does not mean that pain should be disregarded or marginalized. In fact, owing to the potential debilitating effects of pain, it can be one of the most significant factors to consider in determining whether a worker is totally disabled. Too often, however, the Department and self-insured employers limit the medical evidence to be considered in determining permanent total disability to only that which can be objectively demonstrated and refuse to inquire or otherwise consider how a worker's pain and/or use of pain medication(s) may impose additional

[42] *Wilbur v. Department of Labor and Industries*, 61 Wn.2d 439, 378 P.2d 684 (1963); *Parks v. Department of Labor and Industries*, 46 Wn.2d 895, 286 P.2d 103 (1955); *Lewis v. ITT Continental Baking Co.*, 93 Wn.2d 1, 603 P.2d 1262 (1979)(Objective findings are those that can be seen, felt or measured).

[43] Objective medical findings are not required, however, with respect to psychiatric conditions. *Price v. Department of Labor and Industries,* 61 Wn.2d 439, 378 P.2d 307 (1984).

limitations including fatigue, impaired concentration, compromised coping skills, inappropriate behavior, difficulty sustaining activity, etc.

At this point in the Chapter it should be obvious that failure or refusal to consider how a worker's pain impacts his/her ability to perform or obtain gainful employment is inconsistent with our Court's interpretation of permanent total disability since 1942. Confusion often arises, however, because with respect to permanent partial disability, pain is marginalized and not considered an independent category of impairment. However, it is important to underscore here that permanent total disability and permanent partial disability assessments are completely different concepts and should not be confused.

Permanent partial disability presents a pure medical determination based on objective medical findings without much, if any, consideration of the impact of pain. While the categories for evaluating permanent partial impairment as set forth in the Washington Administrative Code as well as the *AMA Guides to the Evaluation of Permanent Impairment* purport to account for some associated pain in their disability assessment formulas, the purpose of these rating systems is to provide a more standardized impairment assessment process, distinctly different from the individualized assessment required for a determination of permanent total

disability.[44] While the *Guides* acknowledge that subjective complaints impact function and encourage physicians to discuss these factors in the partial impairment evaluation, there is not yet "an accepted method within the scientific literature" to uniformly determine impairment related to pain. As such, "subjective concerns, including fatigue, difficulty in concentrating, and pain, when not accompanied by demonstrable clinical signs or other independent, measurable abnormalities, are generally not given separate impairment ratings." [45]

While the law concerning total disability clearly requires consideration of a worker's ability to sustain work activity with a reasonable degree of success and continuity,[46] the Court has also expressly acknowledged pain as an appropriate consideration with respect to total disability. In *Adams v. Department of Labor and Industries,* 128 Wn.2d 224, 905 P.2d 1220 (1995), the Court wrote that "wage earning capacity means sustainable wage-earning capacity and working in great pain is not sustainable . . . "[47] [48]

Therefore, the longstanding debate regarding if and how pain should be considered in the context of permanent partial disability

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[44] *See,* RCW 51.32.080(3)(a).
[45] *AMA Guides to the Evaluation of Permanent Impairment* (5th ed. 2000) at p. 10.
[46] *Kuhnle, Id* at 197, 120 P.2d at 1007.
[47] *Adams v. Department of Labor and Industries*, 128 Wn.2d at 233, 905 P.2d at 1220.
[48] *Adams, Id*., is also significant for establishing that when an injured worker is working, such does not necessarily preclude a finding of permanent total disability. In *Adams*, the worker took a job, despite his doctor's advice, because he needed money to feed his family. However, the work caused severe pain and swelling which the fact finder could consider in determining whether his wage earning capacity was not sustainable. Essentially, an injured worker should not have to perform work that causes serious discomfort or pain or endangers his/her life or health.

evaluations does not exist in the context of permanent total disability. As such, if a worker has limitations owing to pain, such limitations must be considered in determining if the worker is capable of performing and obtaining gainful employment; otherwise, the total disability determination is flawed and therefore challengeable.

8 Putting It All Together

Proving a worker is permanently totally disabled is not as onerous as the phrase suggests because the law does not require a worker to actually be totally and completely disabled for all purposes nor does it require the worker to establish such disability is forever permanent. The law requires only that the industrially related condition(s) be a proximate cause of the worker's inability to perform or obtain generally available gainful employment as of the time of claim closure and the foreseeable future thereafter. Unlike permanent partial disability assessments, a permanent total disability determination requires a comprehensive individualized assessment of how the industrially related condition and *sequelae*, including chronic pain, if any, impacts a worker's wage earning capacity when considered in conjunction with the worker as a whole person, with all preexisting conditions and infirmities, as well as the worker's age, education, training, experience, physical and mental limitations, and

any other factors that could reasonably impact a worker's ability to perform and obtain work with a reasonable degree of success and continuity.

To ensure an injured worker is not unfairly denied total disability benefits, it is important that physicians and all decision-makers in a claim have a complete understanding of the worker as a whole person with all preexisting conditions, limitations, infirmities and weaknesses and a complete and detailed understanding of all conditions and limitations caused by the industrial injury or disease. Moreover, owing to potential confusion regarding the phrase total disability and its related legal concept of proximate cause, as well as potential uncertainty regarding how pain and preexisting conditions figure into total disability, it is imperative that all participants in the total disability determination clearly understand the applicable law. If not, an adverse decision regarding total disability might easily be challenged and reversed based on a correct application of the law.