BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: THOMAS VEON	**DOCKET NO. 10 13856**
CLAIM NO. SA-07489	**PROPOSED DECISION AND ORDER**

INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

APPEARANCES:

Claimant, Thomas Veon, by
Williams, Wyckoff & Ostrander, PLLC, per
Wayne L. Williams

Self-Insured Employer, Chevron Corporation, by
Wallace, Klor & Mann, P.C., per
Bradley Garber and Lawrence E. Mann

In Docket No. 10 13856, the claimant, Thomas Veon, filed an appeal with the Board of Industrial Insurance Appeals on April 20, 2010, from an order of the Department of Labor and Industries dated April 8, 2010. In this order, the Department closed the claim with time-loss compensation benefits paid through January 12, 2010, and with payment of a permanent partial disability award equal to 13 percent of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder. The Department order is **REVERSED AND REMANDED.**

PRELIMINARY MATTERS

On May 26, 2010, the parties agreed to include the Jurisdictional History in the Board's record. That history establishes the Board's jurisdiction in this appeal.

The deposition of Brian D. Tallerico, O.D., taken on October 12, 2010, was published on filing. All objections are overruled. All motions are denied.

The deposition of Stephen W. Snow, M.D., taken on October 27, 2010, was published on receipt. All objections are overruled. All motions are denied. Deposition Exhibit No. 1 was marked, but not offered and remains with the deposition.

The deposition of Thomas Williamson-Kirkland, M.D., taken on November 5, 2010, was published on filing. All objections are overruled. All motions are denied.

ISSUES

1. As of April 8, 2010, was claimant's left shoulder conditions, proximately caused by the industrial injury of April 27, 2005, fixed or in need of further medical treatment?

2. If the claimant's conditions were fixed, what level of impairment best describes the permanent partial disability proximately caused by the industrial injury?

3. Was the claimant a totally and temporarily disabled worker from January 13, 2010, to April 7, 2010?

4. Was the claimant a permanently totally disabled worker as of April 8, 2010?

EVIDENCE

In support of his appeal, the claimant, Thomas Veon, testified and presented the vocational testimony of Karin L. Larson and the medical testimony of Dr. Brian D. Tallerico. In response, the self-insured employer, Chevron Corporation, presented the testimony of Theodore J. Becker, the vocational testimony of Robert K. Moore, and the medical testimony of Drs. Stephen W. Snow and Thomas Williamson-Kirkland.

DECISION

Thomas Veon was born on September 20, 1945. Mr. Veon testified he is 5 feet 8 inches tall, weighs 165 pounds, and is right handed. Mr. Veon had a ninth grade education and did not possess a general equivalency high school degree. Mr. Veon worked from 1967 through 1995 in federal civil service, mainly in a commissary warehouse. From 1995 to 1997, Mr. Veon was employed as a security guard. He then worked as a delivery driver. From January 1998 to August 1999, Mr. Veon worked at Tower Lanes, a bowling alley, as a cocktail server/waiter. Prior to the industrial injury, Mr. Veon worked at a Chevron Mini Mart for five years. He had been convicted of a gross misdemeanor for selling alcohol to a minor.

Mr. Veon was injured on April 27, 2005, when he twisted and felt a twinge in his left shoulder. He completed his graveyard shift as a convenience store worker and went to bed. On awakening, Mr. Veon noticed he could not move his left shoulder. Initially, tendonitis of the left shoulder was diagnosed.

Mr. Veon underwent orthopedic treatment from Dr. Stephen W. Snow in July 2005. Dr. Snow, an orthopedic surgeon, diagnosed adhesive capsulitis, also known as a frozen shoulder. Dr. Snow explained that, "My treatment for that has come to be mostly observation, to try to get him comfortable with Cortisone shots, to wait until they are in what's called a thawing phase, and then start physical therapy." Snow Dep. at 6.

Dr. Snow testified Mr. Veon did not improve after conservative measures, including injections and physical therapy. Dr. Snow testified that initially, his treatment approach was to let the shoulder condition run its course in the hopes that it would go away on its own.

Dr. Brian Tallerico, an osteopath, conducted the first independent medical examination on June 19, 2006. At that time, Dr. Tallerico learned of the claimant's complaints of deep burning pain along the back of the left shoulder and at the trapezius muscle of the left arm. Initially, Dr. Tallerico diagnosed a left shoulder strain/sprain related to the industrial injury and resulting in adhesive capsulitis. Dr. Tallerico recommended Mr. Veon return to Dr. Snow's care. Dr. Snow did not see the claimant in July 2006, but reviewed Dr. Tallerico's report and concurred. Tallerico Dep. at 8.

On August 16, 2006, Dr. Snow attempted to manipulate the left shoulder while Mr. Veon was under anesthesia, to break up the adhesions, but they would not budge. On August 28, 2006, Dr. Snow attempted to arthroscopically release the left shoulder and was unsuccessful. Dr. Snow performed surgery to strip the scar tissue from the left shoulder.

Despite extensive physical therapy through December 2006, Dr. Snow testified that the left shoulder seemed to freeze back up "pretty much to where it was." Snow Dep. at 7. At that time, Dr. Snow concluded the claimant's frozen shoulder required ongoing therapy for six more months. Tallerico Dep. at 9.

Mr. Veon continued to receive treatment from Dr. Snow through 2007. Dr. Snow released Mr. Veon to return to work in the summer of 2007. In September 2007, Dr. Snow injected the shoulder and prescribed further physical therapy. By November 13, 2007, Dr. Snow offered no further treatment. Tallerico Dep. at 9.

Theodore J. Becker, a capacity evaluation provider, administered a performance-based test to the claimant in January 2008. Mr. Veon could perform within the light to medium levels of exertion. He could extend his left arm fully to 90 degrees, but could not lift his left arm above shoulder level. The left arm's range of motion improved since 2005. It was measured to 129 degrees on flexion, 43 degrees on extension, 59 degrees of external rotation, and 80 degrees of internal rotation.

Dr. Tallerico examined the claimant a second time on April 12, 2008. Dr. Tallerico testified the examination was limited because the claimant's left shoulder was tender and hypertonic, especially in the back of the left trapezius muscle. The claimant demonstrated flexion to 95 degrees, extension and external rotation to 45 degrees, and internal rotation to 40 degrees. Tallerico Dep. at 11.

Dr. Tallerico diagnosed a left shoulder strain, adhesive capsulitis, and limited range of motion related to the industrial injury. Dr. Tallerico restricted the claimant from lifting, pushing,

pulling, or carrying greater than 10 pounds with his left upper extremity or performing any above the waist or overhead activities with the left upper extremity. All repetitive activities were prohibited.

Dr. Tallerico first precluded activities that required reaching and lifting above the waist. On July 1, 2008, Dr. Tallerico wrote an addendum report and concluded Mr. Veon could reach to shoulder level, but only for a maximum of two hours per day. Tallerico Dep. at 14.

On cross-examination, Dr. Tallerico agreed Mr. Veon could use his left arm above waist level. Dr. Tallerico reported that Mr. Veon's range of motion had improved by 2008. By that time, Mr. Veon demonstrated the capacity to move his left arm above shoulder level. Dr. Tallerico passively measured flexion to 95 degrees, 5 degrees above shoulder level. Dr. Tallerico explained he moved Mr. Veon's left arm above shoulder level without Mr. Veon expressing pain. Tallerico Dep. at 16-17.

Dr. Snow continued to follow Mr. Veon's left shoulder condition through 2008. He last examined Mr. Veon on December 10, 2009, and measured the left arm's range of motion to 70 degrees forward and 20 degrees of external rotation.

Dr. Tallerico was asked to assume the claimant's condition remained essentially the same from the time of Dr. Tallerico's last examination in 2008 through January 12, 2010. On the basis of that assumption, Dr. Tallerico testified the claimant's limitations remained the same through that period of time. Tallerico Dep. at 14-15. Dr. Tallerico was unsure if Mr. Veon's left arm's range of motion actually improved since 2008. Tallerico Dep. at 18-19.

Dr. Tallerico reviewed the job analyses of a parking lot attendant. Dr. Tallerico approved the job analyses provided the claimant was not required to lift, push, or pull more than 10 pounds. Tallerico Dep. at 13 and 17. Dr. Tallerico did not review the full job analysis at the time of his testimony and was not informed of how often a parking lot attendant was required to lift more than 10 pounds or move his left arm at or above shoulder height. Tallerico Dep. at 18.

Dr. Thomas Williamson-Kirkland examined the claimant on July 23, 2009, and issued his report on July 23, 2009. Dr. Snow concurred with the report that indicated no lifting over shoulder height and lifting should be with the elbow bent and no more than 10 pounds to shoulder height. 10/13/10 Tr. at 83. Mr. Veon's attempts to return to work centered on working as a parking lot attendant. He contacted Republic Parking, owner of two lots, but was unsuccessful in obtaining employment.

Karin L. Larson, a vocational rehabilitation counselor, understood that Dr. Tallerico restricted the claimant from the use of his left arm. Ms. Larson testified the claimant could lift his arm bent at

the elbow, but could not lift more than 10 pounds up to the level of his shoulder with his left arm. The claimant could reach out in front with his left arm. The claimant can reach outward up to his waist in front. The claimant can lift up to 10 pounds with his arm bent and to shoulder level. The claimant cannot push or pull with his left arm or carry more than 10 pounds. The claimant's right arm could perform without restriction.

Ms. Larson contacted parking lots and learned that the position demanded lifting 30 to 35 pounds to shoulder level, as well as sweeping the parking lot and taking out the garbage. Central Parking restricted the lifting because the tickets could be separated and were not required to be lifted in bulk. The need to sweep the parking lot and take out the garbage could not be reduced. Ms. Larson considered these demands precluded Ms. Veon from obtaining employment as a parking lot attendant.

ANALYSIS

To prevail in his claim for time-loss compensation benefits from January 13, 2010, to April 7, 2010, and the status of a totally and permanently disabled worker as of April 8, 2010, Mr. Veon must establish that limitations were imposed on his ability to work by the industrial injury, as shown by medical testimony. Vocational testimony may establish that he is unable to maintain gainful employment in the labor market with a reasonable degree of continuity considering his age, education, work history, transferable skills, and experience. If those conditions are met, the medical expert need not make the conclusion that the injured workman is totally and permanently disabled. The vocational testimony alluded to in *Fochtman v. Department of Labor & Indus.*, 7 Wn. App. 286 (1972) must be based, in part, on medical evidence of the workman's loss of function and extent of physical impairment. *Allen v. Department of Labor and Indus.*, 30 Wn. App. 693, 699 (1981).

The medical testimony established that Mr. Veon could lift his left arm to the height of his shoulder, but could not lift more than 10 pounds and could reach to shoulder level for no more than two hours per day. The vocational testimony was that Mr. Veon had transferable cashiering skills, but the barrier to his employment as a parking lot attendant was the alleged requirement to lift a box of tickets weighing 30 to 35 pounds to machines located at shoulder height. To research the existence of this requirement in the claimant's relevant labor market, both vocational counselors reviewed labor market surveys. Mr. Moore testified he relied on the limitations defined as no lifting above 10 pounds and no work at or above shoulder level. 10/13/10 Tr. at 50.

Mr. Moore reviewed the labor market contacts regarding parking lot attendant. AAMCO indicated that rare lifting and carrying rolls of tickets weighing up to 15 pounds was required. This information was provided on January 24, 2006. 10/13/10 Tr. at 58-59.

Mr. Moore reviewed labor market surveys of Republic Parking that were performed on December 15, 2005, and January 24, 2006. The survey indicated a parking lot attendant must lift and carry rolls of tickets weighing up to 15 pounds.

Mr. Moore surveyed AAMCO again in August 2007, and learned parking lot attendants must only rarely lift rolls of tickets weighing up to 10 pounds. 10/13/10 Tr. at 62. Mr. Moore also reviewed a second survey by Republic Parking that indicated lifting a ticket box weighing 10 pounds was required twice per day. The box of tickets must be carried about 100 feet at the beginning of the day, but parking lot attendants were rarely required to work at shoulder height. 10/13/10 Tr. at 64-65.

A further survey of AAMCO indicated a parking lot attendant must move boxes of tickets weighing 25 to 35 pounds, but is not required to lift the whole box because it holds individual boxes weighing less than 10 pounds. 10/13/10 Tr. at 68.

Mr. Moore reviewed the contact with the Rhodes Building parking lot. He learned most of the current parking lot attendants have a high school diploma or a GED, which is desired, but the parking lot attendant must be able to read and perform cashiering functions. 10/13/10 Tr. at 71.

The controversy as to whether the claimant could lift to shoulder level, and with what frequency, was thoroughly presented in the record. However, even if Mr. Veon could lift his left arm to shoulder level, he could not lift more than 10 pounds. The labor market surveys were inconsistent and the evidence was unpersuasive that the parking attendant position only demanded lifting no more than 10 pounds to the level of the shoulder.

Dr. Snow's opinion was persuasive because he was best informed of the claimant's left upper extremity restriction. Dr. Snow attended to the left shoulder over the claimant's course of treatment. Dr. Snow specifically did not concur with allowing the claimant to reach to shoulder level for up to two hours per day. 10/13/10 Tr. at 62-63.

Further, the employment positions also demanded ancillary duties of sweeping the lot and emptying garbage that were beyond Mr. Veon's capacities. The positions of bowling alley attendant required mechanical duties beyond the claimant's capacities. Mr. Moore did not conclude Mr. Veon could work as a bowling alley attendant because most bowling alleys were too small to hire

attendants to only perform duties within Mr. Veon's limitations. 10/13/10 Tr. at 73. Neither vocational consultant found Mr. Veon employable in that position, ultimately. 10/13/10 Tr. at 57.

The positions of cashier and security guard were not fully reviewed in the context of a labor market survey. In the final analysis, Mr. Moore did not offer a vocational opinion as to the claimant's capacity to obtain employment as a cashier or security guard. 10/13/10 Tr. at 54-56. Mr. Veon was incapable of gainful employment on a reasonably continuous basis from January 13 to April 7, 2010, and was a permanently and totally disabled worker as of April 8, 2010.

The Department order dated April 8, 2010, is incorrect and should be reversed. The matter should be remanded to the Department to pay time-loss compensation benefits from January 13, 2010, to April 7, 2010, and award the claimant the status of a totally and permanently disabled worker as of April 8, 2010.

FINDINGS OF FACT

1. On May 2, 2005, the claimant, Thomas Veon, filed an Application for Benefits with the Department of Labor and Industries in which he alleged an industrial injury on April 27, 2005, while in the course of his employment with the Chevron Corporation. On June 2, 2005, the Department issued an order in which it allowed the claim as an industrial injury. On April 8, 2010, the Department issued an order in which it closed the claim with time-loss compensation benefits paid through January 12, 2010, and with payment of a permanent partial disability award equal to 13 percent of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder. On April 20, 2010, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the April 8, 2010 order. On April 28, 2010, the Board agreed to hear the appeal under Docket No. 10 13856.

2. On April 27, 2005, the claimant suffered an industrial injury to his left upper extremity, resulting in the inability to lift his left arm above shoulder level or lift more than 10 pounds to that level.

3. As of April 8, 2010, the claimant's conditions, proximately caused by the industrial injury, had reached maximum medical improvement and were not in need of further proper and necessary medical treatment.

4. Claimant was born on September 20, 1945, completed nine grades of education, worked for 30 years in federal service, and had transferable skills as a cashier and delivery driver.

5. During the period from January 13, 2010, through April 7, 2010, inclusive, the residual effects of the industrial injury precluded the claimant from obtaining or performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with the claimant's age, education, work history, and pre-existing disabilities.

6. As of April 8, 2010, the residual effects of the industrial injury precluded the claimant from obtaining or performing reasonably continuous, gainful employment in the competitive labor market, when considered in conjunction with the claimant's age, education, work history, and pre-existing disabilities.

CONCLUSIONS OF LAW

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

2. The claimant's conditions, proximately caused by the industrial injury, reached maximum medical improvement as of April 8, 2010, as contemplated by RCW 51.36.010.

3. During the period from January 13, 2010, to April 7, 2010, the claimant was a temporarily and totally disabled worker, due to the residual effects, proximately caused by the industrial injury, as contemplated by RCW 51.32.090.

4. As of April 8, 2010, the claimant was a totally and permanently disabled worker within the meaning of RCW 51.08.160.

5. The Department order dated April 8, 2010, is incorrect and is reversed. The matter is remanded to the Department to pay time-loss compensation benefits from January 13, 2010, to April 7, 2010, and award the claimant the status of a totally and permanently disabled worker as of April 8, 2010.

DATED: DEC 17 2010.

for Stephen Allen

Tom M. Kalenius
Industrial Appeals Judge
Board of Industrial Insurance Appeals