Golden Gate University Law Review

Volume 21
Issue 1 *Ninth Circuit Survey*

Article 13

January 1991

Worker's Compensation - Stevens v. Director, Office of Workers' Compensation Programs: Workers' Compensation - When Does a Total Disability Become Partial?

Carol A. Farmer

WORKERS' COMPENSATION

SUMMARY

STEVENS v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS: WORKER'S COMPENSATION—WHEN DOES A TOTAL DISABILITY BECOME PARTIAL?

I. INTRODUCTION

In *Stevens v. Director, Office of Workers' Compensation Programs*,[1] the Ninth Circuit held that an employee's disability that was total does not become partial for purposes of compensation until suitable alternative employment is available to the employee.[2] Interpreting the Longshore and Harbor Workers' Compensation Act (LHWCA),[3] the court answered an issue not previously decided: when does a total disability become partial?[4]

1. Stevens v. Director, Office of Workers' Compensation Programs, 909 F.2d 1256 (9th Cir. 1990) (per Farris, J.; the other panel members were Ferguson, J., and Pregerson, J. concurring), *cert. denied*, 59 U.S.L.W. 3502 (U.S. Jan. 22, 1991) (No. 90-515).

2. *Stevens*, 909 F.2d at 1257 (reversing and remanding a decision of the Benefits Review Board).

3. 33 U.S.C. §§ 901-50 (1990).

4. *Stevens*, 909 F.2d at 1259. The court's interpretation of the Act rejected the Benefit Review Board's retroactive application of an employee's change of disability status (total to partial) to the date of maximum medical improvement. *Id.* at 1257. Maximum medical improvement is reached when the injury has healed to the fullest extent possible. *Id.*

II. BACKGROUND

A. FACTS

In May of 1981, petitioner Wilborn Stevens, a Lockheed employee, injured his right arm in a work related accident.[5] He received medical treatment, including two surgeries, and attained maximum medical improvement on November 29, 1982.[6] The Administrative Law Judge (ALJ) held that Stevens had lost 20 percent of the use in his right arm.[7] Lockheed paid Stevens temporary total disability from the date of injury until February 6, 1983.[8] After this date, Lockheed began to pay permanent *partial* disability compensation for a 20 percent loss of use of a right arm.[9]

At a December 1985 hearing on Stevens' claim for compensation before the ALJ, it was concluded that Stevens had a residual earning capacity.[10] A vocational specialist established that Stevens could perform a job in a convenience food store or a self-service gas station as of September 30, 1985.[11] Lockheed did not contend that it had proven these jobs were available to Stevens at any earlier date.[12]

The ALJ awarded Stevens the following compensation: a) temporary total disability, from May 1981 to November 29, 1982; b) permanent total disability, from November 30, 1982 to September 29, 1985 (after which date jobs were found to be available); and c) permanent partial disability, from September 30, 1985 until benefits ended by schedule.[13] Lockheed appealed to the Benefits Review Board the ALJ's award of permanent to-

---

5. *Stevens*, 909 F.2d at 1257.
6. *Id.*
7. *Id.* at 1257-58.
8. *Id.* at 1258.
9. *Stevens*, 909 F.2d at 1258 (emphasis in original).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Stevens*, 909 F.2d at 1258. Permanent total disability pays 66 ⅔% of the worker's average weekly wage for the duration of the disability. 33 U.S.C. § 908(a) (1990). Temporary total disability pays 66 ⅔% of the average weekly wages during the duration of the disability. 33 U.S.C. § 908(b). Permanent *partial* disability pays 66 ⅔% of the average weekly wage for a length of time determined by schedule. 33 U.S.C. § 908(c) (emphasis added).

tal disability from November 30, 1982 to September 29, 1985.[14]

On appeal, the Benefits Review Board vacated and reversed the ALJ's award of permanent total disability between November 1982 and September 1985.[15] The Board found Stevens was only entitled to permanent *partial* disability benefits for that period.[16] In so doing, the Board retroactively applied the showing of alternative available jobs to the date of maximum medical improvement.[17]

B. The Longshore And Harbor Worker's Compensation Act

The LHWCA establishes disability coverage for four different categories: permanent total, temporary total, permanent partial and temporary partial disability.[18] The Act defines "disability" as incapacity due to injury to earn the wages which the employee was earning at the time of injury in the same or any other job.[19]

III. THE COURT'S ANALYSIS

The Ninth Circuit noted that an injured worker has the burden of showing the injury was work related and that it prevents performance of his prior job.[20] Upon such a showing, the employer has the burden of proving that suitable alternative work is available in the community.[21] If the employer fails to meet this burden, the ALJ will hold that the disability is total and, probably, permanent.[22] The employer must identify specific

---

14. *Stevens*, 909 F.2d at 1258.

15. *Id.*

16. *Id.* (emphasis in original).

17. *Id.*

18. *Stevens*, 909 F.2d at 1259. *See* 33 U.S.C. § 908 (a)-(c), (e) (1990) and *supra* note 13.

19. *See* 33 U.S.C. § 902(10) (1990) which provides: " 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment. . . ."

20. *Stevens*, 909 F.2d at 1258. *See* Hairston v. Todd Shipyards Corp., 849 F.2d 1194 (9th Cir. 1988) (upheld ALJ's finding that employer failed to meet its burden of demonstrating alternative work was available to claimant, who was employed as a rigger before injury).

21. *Stevens*, 909 F.2d at 1258. *See Hairston*, 849 F.2d at 1196.

22. *Stevens*, 909 F.2d at 1258.

jobs that the claimant is capable of performing.[23]

In determining when a total disability becomes partial, the Ninth Circuit looked to the statutory language and policy concerns encompassed by the LHWCA.[24] The court observed that the statute indicates two independent variables of disability: *nature* (or duration) of disability and *degree* of disability.[25] The statute's four disability categories use the words "temporary" and "permanent" to denote the duration (nature) of the disability; "total" and "partial" go to the severity (degree) of disability.[26] The court concluded that maximum medical improvement is indicative of permanent/temporary disability and availability of alternative work is indicative of partial/total disability.[27] As a result, the court reasoned that the statute's structuring of the term "disability" supports a change from total disability status to partial disability at the date of available suitable alternative employment.[28]

The Ninth Circuit noted that the statutory definition of "disability" contains a wage-earning component.[29] The degree of physical disability is measured by its impact on the employee's earning capacity.[30] The court thus reasoned that a claimant is only able to work when there is a suitable job available that he is capable of performing.[31] In assessing an employee's capability to perform possible work, the Benefits Review Board must consider the claimant's skills along with the likelihood given the claimant's education, age and background, that he would be hired if he diligently pursued the potential job.[32]

---

23. *Id. See* Bumble Bee Seafoods v. Director, Office of Workers' Compensation Programs, 629 F.2d 1327, 1330 (9th Cir. 1985) (affirmed Benefit Review Board's granting of benefits for total disability to claimant where employer did not show specific jobs available that injured claimant could perform).

24. *Stevens*, 909 F.2d at 1259.

25. *Id.*

26. *Id. See supra* note 18 and accompanying text.

27. *Stevens*, 909 F.2d at 1259.

28. *Id.*

29. *Id.* at 1259. *See* 33 U.S.C. § 902(10) (1990) and *supra* note 19 for statutory language.

30. *Stevens*, 909 F.2d at 1259. *See Bumble Bee*, 629 F.2d at 1328.

31. *Stevens*, 909 F.2d at 1259.

32. *Id.* at 1258. *See* Hairston v. Todd Shipyards Corp., 849 F.2d 1194, 1196 (9th Cir. 1988).

The Benefits Review Board maintained that an employee's capability to perform a given task neither increases nor decreases between the time he reached maximum medical improvement and a later showing of an available job.[33] The Ninth Circuit observed, however, that in holding that a disability changes from total to partial at the same time it changes from temporary to permanent, the Board ignored the economic aspect — the degree of disability.[34] The court also noted that the Board assumed that the job market at the time of maximum medical improvement was the same as when the job showing was made.[35] Since this point was not proven, the court reasoned that an alternative job within the claimant's abilities may not have appeared until sometime after maximum medical improvement was attained, or the claimant may have required training and education after maximum medical improvement to obtain a suitable job.[36] Since courts have no way of knowing the actual circumstances, the fact on which a change in disability status will turn must be proof of an actual job which the claimant is able to perform and can realistically obtain if diligently sought.[37]

Lastly, the Ninth Circuit noted that its interpretation of the LHWCA best serves the statute's policy interest in encouraging injured workers back into the work force by providing employers with an incentive to inform workers promptly of available jobs.[38] Creating that incentive enables claimants to discover potential employment that they might otherwise not know of, even though the employer is not obligated to find a claimant a job.[39]

IV. CONCLUSION

In *Stevens v. Director, Office of Workers' Compensation Programs*,[40] the Ninth Circuit interpreted the Longshore and Harbor Workers' Compensation Act[41] to support that an em-

33. *Stevens*, 909 F.2d at 1259.
34. *Id.* at 1259-60.
35. *Id.* at 1260.
36. *Id.*
37. *Stevens*, 909 F.2d at 1260.
38. *Id.*
39. *Id.*
40. 909 F.2d 1256 (9th Cir. 1990).
41. *See supra* note 3.

ployee's disability status changes from total to partial only upon the date of available alternative employment.[42]

The court noted that the statute's definition of "disability" equated physical impairment with incapacity to earn pre-injury wages.[43] Hence, an employee is only able to work once a suitable job becomes available which he is then capable of performing.[44] The Ninth Circuit concluded that this interpretation best serves the statute's policy interests of rehabilitating injured workers to re-enter the work force by giving employers an incentive to show promptly the availability of jobs to employees.[45]

In holding that a claimant's total disability status changes to partial once suitable alternative work is available, the Ninth Circuit reversed the Benefit Review Board's holding that the change from total to partial disability status is retroactive to the date of maximum medical improvement.[46] The court asserted that the Board's retroactive application of disability status change to the time of maximum medical improvement focuses on the medical aspect, but ignores the economic component of disability.[47] Because a new job within the injured worker's abilities may not have been available until after maximum medical improvement, total disability does not become partial until the employer meets its burden of showing available alternative employment that the claimant can perform and probably obtain if diligently sought.[48]

*Carol A. Farmer**

42. *Stevens*, 909 F.2d at 1259.
43. *Id.*
44. *Id.*
45. *Id.* at 1260.
46. *Id.* at 1257.
47. *Stevens*, 909 F.2d at 1259-60.
48. *Id.* at 1260.

* Golden Gate University School of Law, Class of 1992.