Comparison wages after reopening


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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JACK D. HAMILTON DOCKET NO. 03 14743
CLAIM NO. S-667968 DECISION AND ORDER

APPEARANCES:

Claimant, Jack D. Hamilton, by
Law Offices of Robyn L Pugsley P.S., per
Robyn L. Pugsley

Self-Insured Employer, Hecla Mining Company, by
Evans, Craven & Lackie, P.S., per
Gregory M. Kane

The claimant, Jack D. Hamilton, filed an appeal with the Board of Industrial Insurance Appeals on May 9, 2003, from an order of the Department of Labor and Industries dated April 30, 2003. In this order, the Department declared that the claim had been reopened for treatment effective December 12, 1996. The Department determined that treatment was no longer necessary and closed the claim with no additional permanent partial disability. The Department order is REVERSED AND REMANDED.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued on February 9, 2004, in which the industrial appeals judge reversed and remanded the order of the Department dated April 30, 2003.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We grant review to clarify our position on whether an award for permanent impairment compensates the worker for any future loss of earning capacity. In this particular case, the parties provided a stipulation of all the facts material to the issues raised by the appeal.

The claimant, Jack D. Hamilton, injured his back during the course of his employment as a miner with Hecla Mining Company on March 18, 1985. At the time of his injury, Mr. Hamilton was earning $2,339.59 per month. He worked eight hours per day, five days per week, twelve months per year, at a rate of $11.90 per hour. This monthly wage included health insurance benefits. The parties did not specify how much of the monthly wage of $2,339.59 represented the cost of health insurance benefits provided by the employer. However, based on RCW 51.08.178, the monthly
wage predicated on the days and hours worked would be $2,094.40 ($11.90 per hour x 8 hours = $95.20 daily wage; $95.20 x 22 = $2,094.40 monthly wage). The cost of the health insurance benefits was, therefore, $245.19 per month.

As a result of his injury, Mr. Hamilton was required to undergo an L4-S1 Steffee plate fusion on January 8, 1993. He received time loss compensation benefits while recovering from his surgery. As a result of his injury, Mr. Hamilton was permanently restricted from performing heavy work as a miner, but was capable of performing light duty work on a full-time, reasonably continuous basis. He was retrained to work as a teacher's aide, receiving an associate's degree from Spokane Community College on August 15, 1995. On December 7, 1995, his claim was closed with time loss compensation paid through August 15, 1995, and an award for permanent partial disability consistent with Category 5 of the categories of permanent low back impairments. As of December 7, 1995, Mr. Hamilton was capable of working as a teacher's aide with an earning capacity of $7.66 per hour, six hours per day, five days per week, ten months per year. We assume that teacher's aide positions were only generally available six hours per day, ten months per year.

A little over one year later, on December 27, 1996, Mr. Hamilton applied to reopen his claim for aggravation of his condition. On January 30, 1997, the Department reopened the claim and reinstated time loss compensation effective December 12, 1996. Mr. Hamilton underwent two further surgeries. First, the Steffee plates were removed. When his condition failed to improve, Mr. Hamilton underwent a laminectomy and foraminotomy on the left at L5, with a left posterior iliac crest autograft and fusion at L4-5 and L5-S1 and an anterior lumbar interbody cage reconstruction at L4-S1 on August 3, 1999.

After Mr. Hamilton recovered from his surgeries, his physicians released him to work as a teacher's aide. When the vocational counselor, Ruth Johnson, agreed that the claimant was able to work in this capacity, time loss compensation was terminated as paid through September 28, 2000. Mr. Hamilton's claim was closed on April 30, 2003, with no additional award for permanent partial disability over that which had previously been paid.

The parties agree that for the period September 29, 2000 through April 30, 2003, Mr. Hamilton was still incapable of returning to work as a miner, but he was capable of obtaining and performing work as a teacher's aide. During that time period, however, teacher's aides were earning $8.72 per hour (an increase of $1.06 per hour over their December 1995 hourly wage).
The work pattern for teacher's aides continued to be six hours per day, five days per week, ten months per year. We continue to assume that Mr. Hamilton would have been physically able to work as a full-time teacher's aide, but that such teacher's aide jobs were not generally available in the claimant's labor market. We also assume that there was no other full-time, year-round light work Mr. Hamilton was qualified to obtain and perform, during the period of September 29, 2000 through April 30, 2003. The claimant alleged at hearing that teacher's aides do not receive health insurance benefits as part of their compensation package. The employer did not deny this. During the period of September 29, 2000 through April 30, 2003, Mr. Hamilton did not actually perform any work in any capacity.

The parties also stipulated that miners working for employers other than Hecla Mining Company during the applicable time period of September 29, 2000 through April 30, 2003, earned $27.65 an hour in 2000; $28.76 an hour from 2001-2002, and earned $29.90 an hour in 2003, in addition to receiving employer-sponsored health care benefits. We gather that this stipulated fact was offered in support of an adjustment as favorably acknowledged by the Supreme Court in Hunter v. Department of Labor & Indus., 43 Wn.2d 696 (1953). In Hunter, a worker prevented by his injury from returning to the job he had held at the time of his injury, had taken a lighter-duty but lesser-paying job with the same employer. Eventually, due to a general wage increase, his earnings at this lesser-paying job equaled what his earnings had been at the job at the time of his injury. It therefore appeared, and the Department had determined, that he no longer had a loss of earning capacity. However, the pay for the job held at the time of injury had also increased due to the same general wage increase. The Board had held, and the Court upheld the Board's determination, that the worker's general wage increase therefore did not reflect a decrease in disability or a restoration of earning power. Comparing the new differential between his current earning capacity and what the job at injury currently paid, the worker continued to have the same loss of earning capacity.

Here the parties' stipulation is specifically phrased to suggest that the specified increased wages for miners do not apply to miners employed by Hecla. In both Hunter and the Board's post-Hunter Significant Decision of In re Chester Brown, BIIA Dec., 88 1326 (1989), the Hunter adjustment is allowed where the earnings paid for the employment held at the time of injury have increased. We do not believe we can infer from this stipulation that Hecla miners continued to make only $11.90 per hour in 2000-2003. The Department would have to determine if a Hunter adjustment would be appropriate if loss of earning power benefits are paid.
Perhaps Hecla no longer had miners in 2000-2003 and the wage increases listed were intended by the parties to reflect what Hecla miners would have made if there were still mining jobs at Hecla. The Board has held that in determining loss of earning power benefits of a worker who was a prevailing wage union carpenter at the time of injury, it is appropriate to look to evidence of what prevailing wage union carpenters are currently making. *In re Michael W. Haney*, Dckt. No. 89 3517 (February 8, 1991). Of course, in *Haney*, the increased prevailing wage would have applied to all prevailing wage carpenter jobs, including the job the worker held at the time of injury.

The parties' Stipulation of Facts is also silent with respect to the wage being earned by Hecla miners or miners employed by other employers as of December 7, 1995. Thus, it is not known whether Mr. Hamilton's job at the time of his 1985 injury was then still paying $11.90 per hour or something more.

The stipulation does state that miners with employers other than Hecla continue to receive employer-sponsored health care benefits, although the cost of such benefits in the years 2000-2003 is not stated. Thus, it is not known whether the cost of such benefits would be equal to, less than, or greater than the $245.19 amount being provided for Mr. Hamilton by Hecla at the time of his injury.

In his memorandum in support of summary judgment, the claimant contends that he should receive loss of earning power benefits calculated by taking into account the above increase in wages paid to miners. Since the employer argues that the claimant should not receive loss of earning power benefits, Hecla does not address a *Hunter* adjustment. Hecla contends that Mr. Hamilton is not entitled to loss of earning power benefits for the period 2000-2003, because his earning capacity (as a teacher's aide) has actually increased by $1.06 per hour as compared to his earning capacity at the time his claim was closed with a permanent partial disability award in 1995.

Both Mr. Hamilton and Hecla agree that there is no dispute as to any fact material to the issues raised by this appeal and that the appeal can and should be decided as a matter of law under CR 56. As to the issue of whether Mr. Hamilton is entitled to *any* loss of earning power benefits for the period at issue, we agree that there is no dispute of any material fact, and we conclude that Mr. Hamilton is entitled to summary judgment. Specifically, we order that Mr. Hamilton receive loss of earning power benefits for the period September 29, 2000 to April 30, 2003, based on a comparison of his earning capacity at that time, to his earning capacity *at the time of injury*, and not at the time his claim had been closed in December 1995.
However, based on the Stipulation of Facts submitted, we are unable to calculate the actual loss of earning power sustained by Mr. Hamilton, and the amount of loss of earning power benefits to which he is entitled. The claim is remanded to the Department with direction to calculate and direct Hecla to pay loss of earning power and/or time loss compensation benefits to the claimant for the period of September 29, 2000 to April 30, 2003, but to otherwise close the claim, effective April 30, 2003.

The dispute regarding Mr. Hamilton's entitlement to loss of earning power benefits arises because of a conflict in the interpretation of RCW 51.32.090(3) between two different divisions of the Court of Appeals. RCW 51.32.090(3) provides:

(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old;

Division One of the Court of Appeals has held that, in an aggravation case under RCW 51.32.160, a worker whose claim had been closed with a permanent partial disability award is thereafter entitled to loss of earning power benefits only if it is shown that the current earning capacity during the aggravation period is less than that which the worker had at the time the claim had been closed. *Davis v. Bendix Corp.*, 82 Wn. App. 267, *rev. denied*, 130 Wn.2d 1004 (1996). In a later case, Division Three of the Court of Appeals disagreed with *Davis*, holding that the worker's loss of earning power should be based on a comparison of the worker's earning power at the time of initial injury and at the time of aggravation. *Hubbard v. Department of Labor & Indus*, 92 Wn. App. 941 (1998), *rev'd on other grounds*, 140 Wn.2d 35 (2000).

On review of the Hubbard decision, the Supreme Court held that before loss of earning power benefits can even be considered, a worker who has filed a claim for aggravation must first make a threshold showing that, as a result of the aggravation, he was rendered temporarily and totally disabled or has suffered a decrease in earning power proximately resulting from the injury's aggravation. As to cases in which a worker had met that threshold, the Supreme Court left unresolved the conflict between Division One and Division Three as to whether loss of earning power benefits should be calculated based on earning capacity at the time of injury as opposed to earning capacity at the time the claim had been closed. Specifically, the Supreme Court stated:
Because Hubbard has failed to make the necessary threshold showing, this Court is not required to determine the correct formula for calculating LEP benefits in an aggravation case where such benefits are proper. Thus, we do not presently resolve the existing conflict in the Court of Appeals as to whether "old" in RCW 51.32.090(3) refers to the claimant's earning power when the original injury occurred or when the claim was initially closed. Instead, we encourage the Legislature to clarify its intent in RCW 51.32.090(3)(a) when a claimant seeks LEP benefits based upon the aggravation of an injury for which he or she has already received a PPD award.

*Hubbard* at 45.

The Legislature has not acted to "clarify its intent" as suggested by the Supreme Court. Thus, we are left with the two conflicting decisions from the Courts of Appeal. We find the reasoning of the Court of Appeals in the *Hubbard* decision to be a better statement of the law. The Court states that it is error to consider loss of earning power in fixing an award for permanent partial disability. The opinion further states that permanent partial disability compensates the worker for loss of bodily function, which is distinguished from loss of earning power in each worker. *Hubbard*, at 747. We agree with the Court that the rationale set forth in *Davis* is "an aberration in Washington workers' compensation law." *Hubbard* at 949.

*Davis* was predicated on the theory that when a worker's claim is closed with a permanent partial disability award, such award serves to compensate the worker for future lost earning capacity. Under the *Davis* Court's reasoning, if the worker's claim was closed with a Category 5 rating for low back impairment, and at the time he had a 25 percent loss of earning power, he cannot receive further loss of earning power benefits after his claim is reopened unless he shows that his earning capacity is less than what it was at the time his claim was closed, even though it may still be less than what it was at the time of injury. Again, the Court in *Hubbard* correctly noted that permanent partial disability awards are not taking these future earnings into account. *See, also, Page v. Department of Labor & Indus.*, 52 Wn.2d 706 (1958).

The logic underlying this holding remains sound. A worker can have a permanent partial disability that in no way limits his earning capacity. Yet another worker with the same loss of function might find that the resulting loss of function severely reduces his earning capacity. For example, the earning capacity of the concert pianist who loses a finger would likely be greatly impacted by the impairment. But a lawyer who lost the same finger might have no loss of income whatsoever as a result of such impairment. Yet, both workers will receive the same permanent partial disability award.
Of course, if the worker has an impairment that renders him unable to obtain and perform gainful employment on a reasonably continuous basis, he will instead receive a permanent total disability pension. RCW 51.08.160. If his permanent impairment severely affects his earning capacity, but still allows him to obtain and perform gainful employment on a reasonably continuous basis, his wage compensation is terminated once the claim is closed. That is because while the Industrial Insurance Act provides for temporary total disability benefits and temporary loss of earning power benefits while a claim is open, and permanent total disability benefits when a worker's condition becomes fixed and stable, our state workers' compensation system simply does not have a benefit designed to compensate a worker for "permanent loss of earning capacity." Responding to the absence of such a benefit by characterizing a permanent partial disability award as an award for lost future earning capacity is simply not logical.

In the present case, Mr. Hamilton has met the threshold test required by the Supreme Court in Hubbard. Specifically, after his claim was reopened for treatment, he was temporarily and totally disabled, as a result of the aggravation of his injury, from December 12, 1996 through September 29, 2000, and received temporary total disability benefits. If his earning capacity was not thereafter restored to that existing at the time of his injury, then he was entitled to loss of earning power benefits under RCW 51.32.090(3) until his earning capacity was fully restored, or his permanently partial disability was determined and his claim again closed, whichever came first, and provided that the loss of earning power exceeded 5 percent. The proportion to which Mr. Hamilton's earning power during the relevant part of the aggravation period, bore to his earning capacity at the time of injury exceeded a loss of at least 5 percent. Therefore, Mr. Hamilton was entitled to benefits under RCW 51.32.090 during the period September 29, 2000 to April 30, 2003.

FINDINGS OF FACT

1. On October 19, 1987, the claimant, Jack D. Hamilton, filed an application for benefits with the self-insured employer, Hecla Mining Company, alleging he had sustained an industrial injury on March 18, 1985, while in the course of his employment. The claim was allowed and closed by an order issued by the self-insured employer on January 30, 1987, without any award for permanent partial disability. On September 8, 1987, the claimant filed an application to reopen the claim for aggravation of condition. By an order dated October 23, 1987, the Department denied the application to reopen the claim for the
reason that the claimant's condition was the result of a new traumatic incident occurring August 10, 1987. On November 30, 1987, the claimant's medical provider filed a Protest and Request for Reconsideration of that order with the Department. By an order dated February 9, 1988, the Department set aside the order dated October 23, 1987, held it for naught, and reopened the claim effective August 20, 1987. On August 29, 1988, the Department issued a further order in which it allowed and closed the claim for medical treatment only. On October 13, 1988, the claimant's medical provider filed a Protest and Request for Reconsideration of that order with the Department. By an order dated October 27, 1988, the Department set side the order of August 29, 1988, held it for naught, and directed that the claim remain open. On April 3, 1990, the Department closed the claim and directed the self-insured employer to pay an award for permanent partial disability consistent with Category 3 of the categories of permanent low back impairments, to be paid at 75 percent of the monetary value of such an award.

On April 23, 1990, the Board of Industrial Insurance Appeals received a Notice of Appeal, filed on behalf of the claimant, from the Department order of April 3, 1990. The appeal was assigned Board Docket No. 90 2173, and on May 3, 1990, the Board granted the appeal, directing that proceedings be held with respect to the issue raised by the Notice of Appeal. On May 2, 1991, a Proposed Decision and Order was entered reversing the Department order of April 3, 1990, and remanding the claim to the Department to direct the self-insured employer to provide the claimant with medical treatment. A timely Petition for Review was filed by the self-insured employer, and on July 5, 1991, the Board issued an Order Denying Petition for Review, thereby adopting the Proposed Decision and Order as the final order of the Board.

On July 16, 1991, the Department directed the self-insured employer to provide the claimant with medical treatment. On December 7, 1995, the Department issued a further order closing the claim, directing the self-insured employer to pay an award for permanent partial disability consistent with Category 5 of the categories of permanent low back impairments, less prior permanent partial disability awards and advances.

On December 27, 1996, the claimant filed an application to reopen his claim for aggravation of condition. The claim was reopened. Further action was taken on the claim and further appeals were taken to the Board and to Superior Court, none of which have jurisdictional relevance to the issue presented in this appeal. Ultimately, on April 30, 2003, the Department entered an order declaring the claim had been reopened for
treatment, effective December 12, 1996, determining that treatment was
no longer necessary and that there was no additional permanent partial
disability, and closed the claim.

On May 9, 2003, the Board received a Notice of Appeal, filed on behalf
of the claimant, from the Department order of April 30, 2003. On
May 16, 2003, the Board issued an order granting the appeal, assigning
Board Docket No. 03 14743, and directing that proceedings be held with
respect to the issues raised by the Notice of Appeal.

2. The claimant, Jack D. Hamilton, sustained an industrial injury on
March 18, 1985, during the course of his employment as a miner for his
self-insured employer, Hecla Mining Company. The injury involved his
back, and required him to undergo a Steffee plate fusion at the L4-S1
levels of his spine. Mr. Hamilton’s monthly wage at the time of his injury
was $2,339.59, based on an hourly wage of $11.90, and work
performed eight hours per day, five days per week, twelve months per
year, and included employer-provided health insurance benefits valued
at $245.19 per month.

3. On December 7, 1995, Mr. Hamilton’s back condition, proximately
cau sed by his injury of March 18, 1985, was medically fixed and stable;
he required no further medically proper and necessary treatment; and
his permanent impairment due to the injury was best described by
Category 5 of the categories of permanent dorso-lumbar and
lumbosacral impairments. As of December 7, 1995, Mr. Hamilton was
no longer able to return to work as a miner, but was physically capable
of performing full-time and reasonably continuous light work. As of
December 7, 1995, Mr. Hamilton was only capable of obtaining and
performing light work as a teacher’s aide. Teacher’s aide jobs at that
time paid $7.66 per hour and were only available six hours per day, five
days per week, ten months per year, and did not include
employer-provided health insurance benefits.

4. On December 12, 1996, Mr. Hamilton’s back condition became
aggravated, requiring the reopening of his claim for further treatment.
He underwent two further surgeries, including removal of the Steffee
plates, and a laminectomy and foraminotomy on the left at L5, with a left
posterior iliac crest autograft and fusion at L4-5 and L5-S1, and an
anterior lumbar interbody cage reconstruction at L4-S1. As of April 30,
2003, Mr. Hamilton’s back condition, proximately caused by his injury of
March 18, 1985, was again fixed and stable, and required no further
proper and necessary medical care. As of April 30, 2003, his permanent
impairment due to the injury was best described by Category 5 of the
categories of permanent dorso-lumbar and lumbosacral impairments. As
of April 30, 2003, Mr. Hamilton was capable of performing and obtaining
reasonably continuous gainful employment as a teacher’s aide.
5. During the period December 12, 1996 through September 28, 2000, Mr. Hamilton was unable to obtain and perform reasonably continuous gainful employment as a result of the condition proximately caused by his injury of March 18, 1985, and he was entitled to and did receive temporary total disability (time loss compensation) for such period.

6. During the period September 29, 2000 through April 30, 2003, Mr. Hamilton was capable of performing light work, but only as a teacher's aide, a job which was only available six hours per day, five days per week, ten months per year. During this period, such jobs paid $8.72 per hour and did not include employer-provided health insurance benefits.

7. During the period September 29, 2000 through April 30, 2003, miners working for employers other than Hecla Mining Company earned: $27.65 per hour during the period September 29, 2000 through December 31, 2000; $28.76 per hour during the period January 1, 2001 through December 31, 2002; and $29.90 per hour during the period January 1, 2003 through April 30, 2003. In addition, during the period September 29, 2000 through April 30, 2003, miners working for employers other than Hecla Mining Company received employer-sponsored health care benefits.

8. There are no genuine issues as to any fact material to the issues raised by this appeal.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal, which raises no material issue of fact and can be decided as a matter of law.

2. As of April 30, 2003, the condition of the claimant, Jack D. Hamilton, proximately caused by his injury of March 18, 1985, was medically fixed and stable and he was no longer in need of proper and necessary medical services within the meaning of RCW 51.36.010.

3. As of April 30, 2003, the condition of the claimant, Jack D. Hamilton, proximately caused by his injury of March 18, 1985, had not become permanently aggravated, and his permanent partial disability under RCW 51.32.080, proximately caused by the injury of March 18, 1985, remained best described by Category 5 of the categories of permanent dorso-lumbar and lumbosacral impairments, a disability for which he had received an award when his claim was originally closed on December 7, 1995. As of April 30, 2003, Mr. Hamilton was capable of obtaining and performing reasonably continuous and gainful employment as a teacher's aide.
4. During the period September 29, 2000 to April 30, 2003, Mr. Hamilton’s condition, proximately caused by his injury of March 18, 1985, was not fixed and stable, his earning capacity during such period was only partially restored to the earning capacity he had at the time of his injury. The reduced earning capacity was proximately caused by his injury of March 18, 1985, and the reduced earning capacity was at least 5 percent less than his earning capacity at the time of the injury. RCW 51.32.090.

5. The order of the Department dated April 30, 2003, is incorrect and is reversed. This claim is remanded to the Department to direct the self-insured employer to pay Mr. Hamilton loss of earning power benefits and/or temporary total disability benefits for the period September 29, 2000 to April 20, 2003, calculated by comparing the then-existing residual earning power to that which the claimant had at the time of injury, consistent with the Stipulation of Facts entered into between the claimant and the employer in this appeal, and consistent with Hunter v. Department of Labor & Indus., 43 Wn.2d 696 (1953), and In re Chester Brown, BIIA Dec., 88 1326 (1989), but to otherwise close the claim, effective April 30, 2003, with time loss compensation, loss of earning power benefits, medical benefits and permanent partial disability awards, as paid.

It is so ORDERED.

Dated this 22nd day of September, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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THOMAS E. EGAN     Chairperson

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FRANK E. FENNERTY, JR.    Member

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CALHOUN DICKINSON    Member