Parker, John

LOSS OF EARNING POWER (RCW 51.32.090(3))

Entitlement after reopening

In order to be entitled to loss of earning power benefits after a claim has been reopened, it is necessary to establish that the aggravation caused a temporary total loss of wages or an actual loss of earning power. **….*In re John Parker*, BIIA Dec., 03 23407 (2005)**
[*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 05-2-00443-9.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JOHN L. PARKER	**)**	**DOCKET NO. 03 23407**
	)	
CLAIM NO. W-232831	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, John L. Parker, by
Stiles & Stiles, Inc., P.S., per
Brock D. Stiles

Self-Insured Employer, Asplundh Tree Expert Co., by
Vandeberg Johnson & Gandara, per
Charles R. Bush

Department of Labor and Industries, by
The Office of the Attorney General, per
Diana Sheythe Cartwright, Assistant

The self-insured employer, Asplundh Tree Expert Co. (Asplundh), placed an appeal in the U.S. Postal Service on December 5, 2003, which was received by the Board of Industrial Insurance Appeals on December 8, 2003, from an order of the Department of Labor and Industries dated October 6, 2003. In this order, the Department affirmed a March 24, 2003 Department order, in which the Department directed Asplundh to pay the claimant, John L. Parker, time loss compensation starting July 18, 2001, and continuing through the date of the order. The Department order is **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

The industrial appeals judge, in a Proposed Decision and Order issued September 21, 2004, reversed and remanded the appealed Department order. The industrial appeals judge denied Mr. Parker the time loss compensation for the period that the Department had directed, July 18, 2001 through October 6, 2003, but the industrial appeals judge determined Mr. Parker was entitled to loss of earning power benefits for that same period and directed the Department to calculate the specific amount due for loss of earning power during the period. Upon request, the Board extended the period applicable to all parties for filing Petitions for Review to November 8, 2004. Asplundh filed its Petition for Review on September 30, 2004. Mr. Parker filed by mail on November 8, 2004, a Claimant's Reply to Employer's Petition for Review, as well as a separate Petition for Review. This matter is therefore before the Board for review and decision, pursuant to RCW 51.52.104 and RCW 51.52.106.

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 were required in any event to grant review because the statutory time for this Board to grant or deny review on Asplundh's Petition for Review, twenty days from receipt of a Petition for Review, would have run before the November 9, 2004 extension that we had provided to all parties for filing Petitions for Review. See RCW 51.52.104 and RCW 51.52.106.

DECISION

John L. Parker slipped and fell, injuring his low back on May 14, 1998, during the course of his employment as a groundsman with Asplundh, a self-insured employer. The Department allowed the claim and Asplundh provided for treatment and time loss benefits. The Department closed Mr. Parker's claim on January 28, 1999, upon directing Asplundh to provide an award for permanent partial disability consistent with Category 2 of WAC 296-20-280, the categories of permanent dorso-lumbar and/or lumbosacral impairments. On October 19, 2000, Mr. Parker applied to reopen the claim for aggravation of condition. Litigation at this Board resulted in a direction that the Department reopen Mr. Parker's claim effective October 11, 2000. Asplundh has now appealed from a Department order wherein, in effect, the Department directed Asplundh to provide time loss compensation and vocational benefits for temporary total disability from employment during the period July 18, 2001 through October 6, 2003. The industrial appeals judge denied the time loss compensation, but determined entitlement to loss of earning power compensation and remanded to the Department to calculate the actual entitlement amount.

In addition to the reason of statutory time constraints earlier stated, we have granted review as well to consider, for this appeal, the significance of a holding of our State Supreme Court in *Hubbard v. Department of Labor & Indus.,* 140 Wn.2d 35 (2000). In the matter before us, Mr. Parker's claim, as indicated, had been closed and then reopened on the basis of aggravation of the condition caused by the industrial injury. The court in *Hubbard* held that in such circumstances an injured worker is not entitled to compensation for lost earning power unless the aggravation proximately caused a temporary total loss of wages or an actual loss of earning power.

The industrial appeals judge premised the determination of entitlement to compensation upon a comparison of Mr. Parker's earning power during the contested period with Mr. Parker's earnings **at the time of the industrial injury that gave rise to this claim**. The industrial appeals judge did not take into account the *Hubbard* ruling, requiring a threshold showing that aggravation of the industrial injury had caused temporary total disability and/or the loss of earning power.

We agree with Asplundh's assertion and with the industrial appeals judge that Mr. Parker was not temporarily totally disabled during the period July 18, 2001 through October 6, 2003, and that he, therefore, is not entitled to full time loss compensation during that period. The industrial appeals judge identified the relevant evidence and ably articulated the reasons for this determination in the Proposed Decision and Order. In sum, Asplundh showed that it made the job of flagger available to Mr. Parker with any accommodations that would have been necessary to his performance of the flagger job during the period. Mr. Parker's evidence to the contrary, essentially contending that the accommodations would not have been adequate, is not convincing.

We also find that Mr. Parker's earning power during the period July 18, 2001 through October 6, 2003, was not adversely affected by **aggravation** of the industrial injury since the last claim closure before the aggravation period in question. As noted by the industrial appeals judge, Mr. Parker had returned to work with Asplundh as a flagger prior to claim closure and continued to work in that capacity through claim closure. The wages he was capable of earning at the accommodated flagger position during the period now in question, July 18, 2001 through October 6, 2003, were the same as he was earning at the time of claim closure. Therefore, Mr. Parker's situation does not satisfy one of the alternative thresholds for loss of earning power compensation upon claim reopening that the court identified in *Hubbard*—that the **aggravation** proximately caused actual loss of earning power.

In his Claimant's Reply to Employer's Petition for Review, Mr. Parker contends that his situation nevertheless satisfies the other alternative threshold in *Hubbard*—that the **aggravation** proximately caused a temporary total loss of wages. Mr. Parker contends that he was temporarily totally disabled from employment during the period October 11, 2000 through July 17, 2001, which is the period immediately preceding the period of loss of earning power for which the industrial appeals judge directed the Department to calculate actual entitlement. At hearing, although none of the physicians were asked questions directly related to this period, Mr. Parker did explain why he felt he could not work during the period. And, according to Mr. Parker's testimony, which Asplundh did not refute, Asplundh paid Mr. Parker time loss compensation payments for this period, October 11, 2000 through July 17, 2001.

The contended loss of earning power, for the period July 18, 2001 through October 6, 2003, is squarely before the Board for review in this appeal. In the particular circumstances of this appeal, and for **purposes limited solely to the appeal before us**, we find that Asplundh has acquiesced in Mr. Parker's contention that he was temporarily totally disabled from employment

during the preceding period October 11, 2000 through July 17, 2001, due to aggravation of his injury. Mr. Parker thereby, for purposes in this appeal of considering entitlement to loss of earning power compensation for a subsequent period, meets the alternative threshold in *Hubbard*—that the **aggravation** proximately caused a temporary total loss of wages in a period prior to the period of contended entitlement to loss of earning power compensation. As indicated, at hearing Asplundh did not challenge Mr. Parker's contention related to the period October 11, 2000 through July 17, 2001. Mr. Parker again, in his Petition for Review, made the assertion that he was temporarily totally disabled during this period. Asplundh has not denied this assertion in its pleadings, even though Asplundh discussed *Hubbard* in its Petition for Review. And, as indicated, it is established that Asplundh paid time loss compensation for the period October 11, 2000 through July 17, 2001.

However, due to the Board's limited scope of review, we must stop short of making a final determination of whether Mr. Parker is ultimately entitled to the time loss already paid by Asplundh for the period October 11, 2000 through July 17, 2001. We have not been made aware of any **final Department of Labor and Industries order** that determines whether Mr. Parker was temporarily totally disabled during any part of that period. The Jurisdictional History stipulated by Mr. Parker and Asplundh does indicate that the Department issued an order on February 3, 2003, in which the Department directed Asplundh to provide an award for permanent partial disability for increased permanent impairment and closed the claim with time loss compensation as paid through July 17, 2001. The Department, though, by an order dated March 10, 2003, cancelled the February 3, 2003 order and held the claim open for further treatment. The Department has not, to our knowledge, revisited by way of a determinative order the matter of whether Mr. Parker was temporarily totally disabled during any of the period of October 11, 2000 through July 17, 2001.

Balancing the goal of the Board fully deciding a matter, including closely related and arguably subsumed issues, against limitations of our review authority is not a novel task. And there is no absolute, simple rule that can foresee all possible circumstances and foretell the proper determination in all circumstances. We recently visited the issue of how far our scope of review may extend to issues not **explicitly** determined by the Department, in *In re Robert L. Harvey,* Dckt. Nos. 03 12923 & 03 12924 (September 22, 2004). We characterized the considerations in the following manner.

> This Board has review authority necessary to fulfill our obligation to make findings and conclusions upon each contested issue of fact and law in a matter properly before us, as directed in RCW 51.52.104 and RCW 51.52.106. In determining our scope of review, we must be mindful of (a) our obligations, under RCW 51.52.104 and

RCW 51.52.106, to fully decide cases properly before us, while also adhering to (b) the principle that our jurisdiction is appellate-only:

> It is not disputed that the board's and the superior court's jurisdiction is appellate only, and for the board and the trial court to consider matters not first determined by the department would usurp the prerogatives of the department, the agency vested by statute with original jurisdiction. Both parties agree that if a question is not passed upon by the department, it cannot be reviewed either by the board or the superior court.

Lenk v. Department of Labor & Indus., 3 Wn. App. 977, 982 (1970).

> To ascertain whether the board acted within its proper scope of review . . . we look to the provisions of the order appealed to the board. The questions the board may consider and decide are fixed by the order from which the appeal was taken. . . as limited by the issues raised by the notice of appeal. *Brakus v. Department of Labor & Indus.,* 48 Wn.2d 218 . . . (1956).

Lenk, at 982.

> A scope of review analysis raises the question: Is it proper to consider particular evidence, and make detailed findings of fact and conclusions of law in light of the appellant's contentions that a specific Department order is incorrect?

Harvey, at 2-3.

In the appeal before us, having determined that Mr. Parker is not entitled to full time loss compensation for a period squarely before us, we must also determine whether he is entitled to partial time loss compensation, that is, loss of earning power compensation, for the same period. In order to do so, *Hubbard* requires that we consider whether Mr. Parker's aggravation proximately caused a temporary total loss of wages during any of the preceding period October 11, 2000 through July 17, 2001. Two major considerations related to the Board's limited scope of review, in the absence of a final **Department** order regarding this prior period, leads us to fall short of a final, legally binding determination that Mr. Parker is ultimately entitled to time loss compensation for the period October 11, 2000 through July 17, 2001. The first reason, of course, is that the Department has not issued a written order determining that issue.

Second, Asplundh's present appeal is differentiated from those instances where we have determined such subsumed issues, for instance, whether a particular medical condition exists and was caused by the industrial injury in order to determine a broader issue before the Board such as worsening, even though the Department had not yet made a determination on the subsumed issue

considered. See *In re Donna Jones (Simmons)*, BIIA Dec., 99 23362 (2001). Indeed, in an appeal of a denial of reopening, we declined to reach issues concerning **particular benefits** such as treatment or award for permanent partial disability, after determining that the matter of existence of a condition and causation and worsening of that condition were necessarily within the scope of our review, even though the Department had not decided those subsumed issues. We determined the subsumed issues regarding the condition, but remanded the matter to the Department to determine benefits due, if any, upon reopening the claim. See *In re Ronald Holstrom,* BIIA Dec., 70,033 (1986). We, if possible, avoid encroaching upon the Department's original jurisdiction to determine actual workers' compensation benefits, even though determination of an arguably subsumed issue in an appeal before us is very closely connected to a benefit issue not yet determined by the Department.

We determine that Mr. Parker is not entitled to time loss compensation during the period July 18, 2001 through October 6, 2003. However, for the above-stated reasons we find that, in this appeal and for these purposes only, Asplundh has acquiesced in Mr. Parker's contention that aggravation of the industrial injury caused a temporary total loss of wages, meeting an alternate *Hubbard* threshold for subsequent loss of earning power compensation during the period July 18, 2001 through October 6, 2003. Having found that one of the *Hubbard* threshold requirements has been met, we otherwise agree with the industrial appeals judge that Mr. Parker's actual loss of earning power compensation is to be based on a comparison of wages at the time of injury, with the wage earning capacity during the period of contended loss of earning power at issue, the period July 18, 2001 through October 6, 2003. See *In re Jack D. Hamilton*, Dckt. No. 03 14743 (September 22, 2004). We do not have before us a sufficient record to make such a calculation. We remand the matter to the Department for that purpose.

We have considered the Proposed Decision and Order, Asplundh's Petition for Review, Mr. Parker's Reply and Mr. Parker's Petition for Review. Based on a thorough review of the record before us, we make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The claimant, John L. Parker, injured his low back during the course of employment with Asplundh Tree Expert Co. (Asplundh) on May 14, 1998. He filed an application for benefits with the Department of Labor and Industries on June 1, 1998. On June 12, 1998, the Department issued an order in which it allowed the claim. On January 28, 1999, the Department issued an order in which it closed the claim with a permanent partial disability award equal to Category 2 of permanent dorso-lumbar and/or lumbosacral impairments.

On October 19, 2000, Mr. Parker filed an application to reopen his claim. On January 4, 2001, the Department issued an order in which it denied the application. On February 16, 2001, Mr. Parker filed a Protest and Request for Reconsideration. On July 9, 2001, the Department issued an order in which it affirmed the order of January 4, 2001. On July 23, 2001, Mr. Parker filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On August 23, 2001, the Board granted the appeal, assigned it Docket No. 01 18644, and directed that proceedings be held. On May 20, 2002, the Board, in Docket No. 01 18644, issued a Proposed Decision and Order in which the industrial appeals judge reversed the Department order of July 9, 2001, and remanded the claim to the Department with directions to reopen Mr. Parker's claim and to direct the self-insured employer to provide Mr. Parker with such benefits as he is entitled to under the facts and the law. On July 19, 2002, the Board, in Docket No. 01 18644, issued an Order Adopting Proposed Decision and Order.

On August 5, 2002, the Department issued an order in which it reopened the claim effective October 11, 2000. On March 24, 2003, the Department issued an order in which it awarded Mr. Parker time loss compensation beginning July 18, 2001, to the date of the order, and continuing. On April 7, 2003, the self-insured employer filed a Protest and Request for Reconsideration. On October 6, 2003, the Department issued an order in which it affirmed its order of March 24, 2003. On December 5, 2003, the self-insured employer mailed a Notice of Appeal to the Board of Industrial Insurance Appeals, which was properly addressed and with the proper postage affixed from the Department order dated October 6, 2003. On December 8, 2003, the Board received the Notice of Appeal. On December 18, 2003, the Board granted the appeal, assigned it Docket No. 03 23407, and directed that proceedings be held.

2. Mr. Parker injured his low back during the course of his employment with Asplundh on May 14, 1998, when he slipped and fell, landing on his back.

3. Mr. Parker's low back condition, proximately caused by his industrial injury of May 14, 1998, can best be described as mechanical low back pain.

4. Mr. Parker was born on October 4, 1945. He graduated from high school in 1964, after which he worked various jobs, all requiring manual labor and/or driving a forklift.

5. Mr. Parker was working as a groundsman for Asplundh on May 14, 1998, when he was injured. The duties of a groundsman require heavy manual labor.

6. Aggravation or worsening of his industrial injury has not caused Mr. Parker loss of earning power during the period July 18, 2001 and ending October 6, 2003. The appealing self-insured employer, Asplundh, paid Mr. Parker time loss compensation for the period beginning October 11, 2000 and ending July 17, 2001, but the Department of Labor and Industries has not issued a final order concerning that period. For purposes of this appeal only, Asplundh has acquiesced in Mr. Parker's assertion that aggravation of his industrial injury caused him to be temporarily totally disabled from employment during some of, or all of, the period October 11, 2000 through July 17, 2001.

7. For the period beginning July 18, 2001 through October 6, 2003, Mr. Parker was no longer able to perform the duties of a groundsman, nor any other job that required heavy manual labor, due to the residuals of his May 14, 1998 industrial injury.

8. Mr. Parker, given his age, education, and work experience, was not precluded by the residuals of the industrial injury of May 14, 1998, from engaging in gainful employment on a reasonably continuous basis for the period beginning July 18, 2001 and ending October 6, 2003. In particular, he could perform the duties of a flagger, for which he had training and experience, and for which there was a labor market within a reasonable commute from his home. Mr. Parker was able to perform the position of flagger at the time of first claim closure on January 28, 1999. The earnings of a flagger represent Mr. Parker's earning capacity during the period July 18, 2001 through October 6, 2003, and such earning capacity was at least five percent less than his earning capacity at the time of his industrial injury.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal, which was timely filed.

2. Mr. Parker, for the period beginning July 18, 2001 and ending October 6, 2003, was not a temporarily totally disabled worker within the meaning of RCW 51.32.090.

3. Mr. Parker, for the period beginning July 18, 2001 and ending October 6, 2003, meets one of the alternate threshold requirements for loss of earning power compensation under *Hubbard v. Department of Labor & Indus.,* 140 Wn.2d 35 (2000), to wit, that the aggravation of his industrial injury proximately caused a temporary total loss of wages during a preceding period. He does not meet the other alternate threshold, that the aggravation caused a loss of earning power during that period.

4. The Department order of October 6, 2003, is incorrect and is reversed. This matter is remanded to the Department with directions to deny Mr. Parker time loss compensation for the period July 18, 2001 through October 6, 2003; determine Mr. Parker's loss of earning power entitlement for the period based on a comparison of wages of a flagger with his wages at the time of injury; direct the self-insured employer to provide the loss of earning power compensation to Mr. Parker; and take such further action as indicated by the facts and the law.

It is so **ORDERED**.

Dated this 9th day of February, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member