

## **Weston, Douglas**

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### **[LOSS OF EARNING POWER \(RCW 51.32.090\(3\)\)](#)**

#### **Entitlement beyond date condition becomes fixed**

A worker's condition is not legally fixed until the Department first issues an order which classifies the worker's condition as fixed and permanent. Loss of earning power payments may be made through that date, provided the worker is otherwise entitled to such benefits. However, a protest of the initial closing order does not automatically extend the period of loss of earning power, absent medical evidence establishing that the worker's condition was not fixed on the date of that closing order. ...*In re Douglas Weston*, BIIA Dec., 86 1645 (1987)

Scroll down for order.



1 Under WAC 263-12-145(3) the Board has the authority to remand this matter to the hearing  
2 process to schedule further hearings for the purpose of presenting additional evidence. We do not  
3 feel that a remand is necessary. We have the authority to reopen the case on our own motion.  
4 Hence, the one-page document entitled "Eligibility Statement Form" attached to Mr. Weston's Petition  
5 for Review will be marked as Board Exhibit No. 5 and is hereby admitted.  
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9 The issues presented by this appeal are whether Mr. Weston is entitled to loss of earning  
10 power compensation between June 3, 1985 and March 11, 1986 and whether he is entitled to a  
11 permanent partial disability award greater than the 5% awarded by the Department of Labor and  
12 Industries. In the Proposed Decision and Order the Industrial Appeals Judge interpreted Franks v.  
13 Department of Labor and Industries, 35 Wn.2d 763, 215 P.2d 416 (1950) and In re Leslie Whaley,  
14 Dckt. No. 48,492 (November 21, 1978) to preclude the Department from paying loss of earning power  
15 compensation or time-loss compensation after the worker's industrial condition becomes medically  
16 fixed. We disagree with this conclusion.  
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20 Franks, as well as Hunter v. Department of Labor and Industries, 43 Wn.2d 696, 263 P.2d 586  
21 (1953) stand for the proposition that, once the Department has acted to change the classification of a  
22 worker's disability from temporary to permanent, the worker is, thereafter, no longer eligible for  
23 temporary disability compensation. Both of these decisions implied a distinction between factual and  
24 legal fixity of a condition. We made that distinction explicit in In re Charles Deering, BIIA Dec., 25,904  
25 (1968). Relying on Hunter, we held that a worker who has sustained a loss of earning power as the  
26 result of an industrial injury is entitled to loss of earning power compensation until the date on which  
27 the Department issues an order fixing the extent of his permanent partial disability. Thus, before  
28 temporary total or temporary partial disability compensation can be legally terminated on the basis that  
29 the worker's condition is fixed, the Department must first formally change the classification of the  
30 worker's disability from temporary to permanent. This action occurred on January 8, 1986 when the  
31 first order was issued establishing Mr. Weston's permanent partial disability rating.  
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Claimant's protest from that order did not automatically extend the period of loss of earning  
power entitlement to March 11, 1986, when the Department adhered to the provisions of the January  
8, 1986 order. . For once the Department acted to classify Mr. Weston's condition as fixed and  
permanent as of January 8, 1986, it became incumbent upon Mr. Weston to present medical evidence  
to the contrary. Rather than presenting countervailing evidence that his industrial condition was not  
fixed and was in need of further treatment beyond January 8, 1986, Mr. Weston presented the

1 testimony of Dr. Mary Jane Person, affirmatively establishing that his condition was medically fixed as  
2 of April 26, 1985. Thus, the Department order of January 8, 1986 was correct insofar as it determined  
3 that Mr. Weston's condition was fixed as of that date and loss of earning power compensation cannot  
4 be paid beyond that date.  
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7 The question therefore becomes whether Mr. Weston was entitled to loss of earning power  
8 compensation for the period of June 3, 1985 through January 8, 1986. Quite apart from the distinction  
9 between the medical question and the legal question of when a worker's condition becomes fixed, a  
10 worker cannot receive time-loss compensation or loss of earning power compensation unless the  
11 factual evidence otherwise supports the payment of such benefits. Mary Jane Person, D.O., an  
12 osteopathic surgeon, was Mr. Weston's attending physician from 1983 through July, 1985. While she  
13 considered Mr. Weston's industrially related condition to be medically fixed as of April 26, 1985, she  
14 also concluded that Mr. Weston could not return to his former job but could only do light duty work on  
15 a full time basis. In fact, Mr. Weston returned to work on June 3, 1985 and worked until sometime in  
16 November, 1985. He then ceased work due to insufficient work. During that time, he was paid \$3.35  
17 per hour and worked 40 hours per week. His total earnings in that position were \$2,945.00. During  
18 the same time he worked part-time at a light duty position. Between June 3, 1985 and March 11, 1986  
19 he earned \$1,653.25. At the time of Mr. Weston's industrial injury on November 11, 1984, he was  
20 earning \$7.35 per hour, working full-time.  
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28 RCW 51.32.090(3) provides that a worker who suffers a temporary partial disability with a  
29 consequent loss of earning power as a result of an injury, is entitled to loss of earning power  
30 compensation until his earning power is completely restored (or the loss is less than 5%) or his  
31 condition becomes fixed and the extent of his permanent partial disability, if any, is established. Based  
32 on the facts presented in this case, we are unable to determine the precise percentage of Mr.  
33 Weston's loss of earning power between June 3, 1985 and January 8, 1986. The facts indicate his  
34 loss in earning capacity exceeds 5%. Therefore, with respect to this issue, we remand to the  
35 Department to determine Mr. Weston's earning capacity and the amount of his entitlement to loss of  
36 earning power compensation during this period.  
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41 With respect to the issue of the extent of Mr. Weston's permanent partial disability, we are  
42 persuaded that as of March 11, 1986 Mr. Weston's low back condition, causally related to his  
43 November 11, 1984 industrial injury, was fixed and best described by Category 2 of WAC 296-20-280,  
44 the categories of permanent dorso-lumbar and lumbosacral impairments.  
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## FINDINGS OF FACT

1. On November 19, 1984, the Department of Labor and Industries received a report of accident wherein the claimant, Douglas G. Weston, alleged the occurrence of an industrial injury on November 11, 1984 while in the course of his employment with Sunrise Fiberglass Engineering, Inc. This claim was assigned Claim No. J-506937.

On December 6, 1984 the Department issued an order stating that medical evidence disclosed that the injury was an aggravation of a pre-existing condition described as "lumbar strain"; the Department denied responsibility for this pre-existing condition. The claim was allowed for the sole reason of temporary aggravation occurring on November 11, 1984, and was to be adjudicated on that basis.

On January 8, 1986 the Department issued an order closing the claim with time-loss compensation as paid, and a permanent partial disability award of 5% of unspecified disabilities, payable at 75% of monetary value.

On February 25, 1986, the Department received a protest and request for reconsideration, filed on behalf of the claimant.

On March 11, 1986, the Department issued an order adhering to the provisions of the January 8, 1986 order closing the claim.

On April 21, 1986 the Department of Labor and Industries received a notice of appeal, filed on behalf of the claimant, from the March 11, 1986 Department order; the Board of Industrial Insurance Appeals received the notice of appeal on April 22, 1986.

On May 13, 1986 the Board issued its order granting the appeal, assigning it Docket No. 86 1645, and directing that proceedings be held on the issues raised in the notice of appeal.
2. On November 11, 1984, while in the course of his employment with Sunrise Fiberglass Engineering, Inc., the claimant, Douglas G. Weston, sustained an injury to his low back when he slipped and twisted his back as he was pushing a 55 gallon drum of resin, weighing approximately 550 pounds. Shortly thereafter, he twisted his left leg in a wire, causing him to fall. As a result of these incidents, the claimant sustained a lumbosacral sprain with possible mild right sciatic nerve injury.
3. As of April 26, 1985, the claimant's condition causally related to the November 11, 1984 industrial injury was medically fixed and stable, and in need of no further treatment, but the Department did not change the classification of Mr. Weston's disability from temporary to permanent until January 8, 1986, when it issued an order closing the claim.
4. Between June 3, 1985 and January 8, 1986 the claimant was able to perform only light duty work on a full-time basis as a result of the industrial injury of November 11, 1984.

5. At the time of the claimant's industrial injury on November 11, 1984, the claimant was earning \$7.30 per hour on a full-time basis working in fiberglass construction, a field in which he had worked for the preceding fifteen years. As a result of the industrial injury, he could not return to that occupation between June 3, 1985 and January 8, 1986.
6. Between June 3, 1985 and November of 1985, the claimant worked as a service manager for a motor scooter repair business, earning \$3.35 per hour, 40 hours per week; his earnings totalled \$2,945.00. Between June 3, 1985 and March 11, 1986 the claimant also worked part-time as a wharfinger, assessing and collecting moorage fees; he earned \$1,653.25 during this time.
7. As of January 8, 1986, and through March 11, 1986 the claimant's conditions causally related to the November 11, 1984 industrial injury were fixed and stable, and his permanent disability attributable thereto was most consistent with that established by Category 2 of WAC 296-20-280, permanent dorso- lumbar and lumbosacral impairments. Such disability was manifested by mild to moderate intermittent objective findings.

**CONCLUSIONS OF LAW**

1. This Board has jurisdiction over the subject matter and the parties to this appeal.
2. Between June 3, 1985 and January 8, 1986, Douglas G. Weston, was temporarily partially disabled and entitled to loss of earning power compensation as set forth in RCW 51.32.090(3).
3. The Department order of March 11, 1986 which adhered to the provisions of an order dated January 8, 1986 closing the claim with time-loss compensation as paid and a permanent partial disability award of 5% of total bodily impairment payable at 75% of the monetary value, is incorrect and is reversed and the claim is remanded to the Department with directions to reopen the claim to determine the extent to which Mr. Weston's earning power was reduced between June 3, 1985 and January 8, 1986, and pay loss of earning power benefits accordingly, and to thereupon close the claim with a permanent partial disability award equal to 5% as compared to total bodily impairment, paid at 75% of the monetary value.

It is so ORDERED.

Dated this 30th day of December, 1987.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/

SARA T. HARMON Chairperson

/s/

FRANK E. FENNERTY, JR. Member

/s/

PHILLIP T. BORK Member