Estrada, Manuel

INTEREST (RCW 51.52.135)

Loss of earning power benefits

Interest is not payable when a worker is awarded loss of earning power benefits since such benefits are not payments for temporary total disability and RCW 51.52.135(2) permits payment of interest when a worker prevails in an appeal regarding a claim for temporary total disability.In re Manuel Estrada, BIIA Dec., 89 3707 (1991)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

IN RE: MANUEL ESTRADA)	DOCKET NO. 89 3707
)	
CLAIM NO. J-295781)	ORDER DENYING THE FIXING OF INTEREST

An appeal was filed by the claimant from an order of the Department of Labor and Industries dated August 9, 1989. That order closed the claim with time-loss compensation as paid and with a deduction for an overpayment of time-loss compensation in the amount of \$487.71 from a final award of permanent partial disability for low back impairment equal to 10% as compared to total bodily impairment, paid at 75% of monetary value.

On January 3, 1991 the Board issued an Order Denying Petition for Review, thereby adopting as the final order of the Board a Proposed Decision and Order dated October 29, 1990. The Proposed Decision and Order reversed the Department's order of August 9, 1989 and remanded the claim to the Department to:

Pay time-loss compensation and/or loss of earning power benefits as required by law between December 15, 1987 and August 9, 1989, and to place the claimant on the pension rolls as a permanently and totally disabled worker effective August 9, 1989.

The claimant has requested that we fix interest in this appeal.

RCW 51.52.135(2) provides:

When a worker or beneficiary prevails in an appeal by the worker or beneficiary to the board or the court <u>regarding a claim for temporary total</u> <u>disability</u>, the worker or beneficiary shall be entitled to interest at the rate of twelve percent per annum on the unpaid amount of the award after deducting the amount of attorney fees.

We identified this appeal as one potentially subject to an order fixing interest by virtue of the direction in the Proposed Decision and Order that the Department "pay time-loss compensation and/or loss of earning power benefits" between December 15, 1987 and August 9, 1989. It now appears that no "temporary total disability" benefits have or will be paid as a result of this appeal. The claimant's request that we fix interest in this appeal is therefore denied.

Subsequent to the entry of our Order Denying Petition for Review, the Department entered an order on February 13, 1991 which awarded loss of earning power benefits in the amount of \$5,072.00 for the period December 16, 1987 through August 8, 1989. Such benefits amounted to 39% of the compensation rate for that period and were reduced by the amount of the permanent partial disability

award (\$4,500.00) originally made by the order of August 9, 1989 but now converted to loss of earning power benefits. The net award for loss of earning power benefits was therefore \$572.00.

The claimant subsequently protested the order of February 13, 1991. He questioned the Department's conversion of the permanent partial disability award to loss of earning power benefits. He also questioned the calculation of loss of earning power benefits. It is not clear whether the Department has entered a further order in response to the claimant's protest of the Department order of February 13, 1991. Apparently an order was entered on March 4, 1991 which terminated "time loss benefits" as paid through "August 8, 1987."

It seems that there may be a continuing dispute between the claimant and the Department over the <u>amount</u> of loss of earning power benefits. However, regardless of who is correct this Board will, in any event, not be fixing interest in this appeal. Interest is simply not payable on loss of earning power benefits--only "temporary total disability" benefits.

In a letter to the claimant's attorney dated April 1, 1991 our Executive Secretary explained that interest could not be fixed on loss of earning power benefits or pension benefits paid as a result of the appeal. He stated that interest could only be fixed on temporary total disability benefits. He pointed out that the Department had only paid loss of earning power benefits for the period December 16, 1987 through August 9, 1989. He invited the claimant's attorney to verify whether that was correct.

In a letter dated April 4, 1991 the claimant's attorney responded to our Executive Secretary. He seems to take issue with our view that loss of earning power benefits do not constitute "temporary total disability" benefits. He also seems to contend that the claimant should also receive interest on permanent total disability benefits. Although the response is somewhat ambiguous it does state:

The injured worker concludes that he was awarded \$5,072.00 time loss benefits as a result of his appeal to the board and that he is entitled to interest on that amount. That is what he wants.

Loss of earning power payments are not payments for temporary total disability, but for partial loss of earning power. RCW 51.32.090(3). as such, they do not qualify for an award of interest under RCW 51.52.135(2). Only when a worker is temporarily totally incapacitated from performing any work at any gainful occupation does he have a claim for temporary total disability benefits. See RCW 51.32.909(1); RCW 51.08.160. Eligibility for loss of earning power (LEP) payments obviously contemplates that the worker is capable of engaging in some type of gainful occupation. Receipt of LEP benefits is, then, inconsistent with being classified as temporarily and totally disabled. The

payments made to the claimant by the Department for the period December 16, 1987 through August 8, 1989 were for loss of earning power and not temporary total disability.

Even if we were to conclude (which we do not) that the Department was not authorized to convert the prior disability award to loss of earning power benefits, there would still be no interest payable in this appeal. The request by the claimant that we fix interest on any loss of earning power benefits payable for the period December 16, 1987 through August 8, 1989 is therefore denied.

Dated this 19th day of July, 1991.

BOARD OF INDUSTRIAL IN	ISURANCE APPEALS
<u>/s/</u> S. FREDERICK FELLER	CHAIRPERSON
/s/	
PHILLIP T. BORK	MEMBER