# LOSS OF EARNING POWER (RCW 51.32.090(3))

#### **Unemployment compensation**

Entitlement to loss of earning power benefits does not depend on whether the worker is employed, but rather on whether the worker's capacity to earn the wage at injury is restored. Accordingly, a worker is not precluded from receiving loss of earning power benefits because of the simultaneous receipt of unemployment compensation. ... *In re Daniel Estes*, **BIIA Dec.**, **96 0722 (1997)** [*Editor's Note:* The Board's decision was appealed to superior court under Clallam County Cause No. 97-2-01050-3.]

Scroll down for order.

## BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS **STATE OF WASHINGTON**

)

1 IN RE: **DANIEL L. ESTES**  DOCKET NO. 96 0722

#### CLAIM NO. N-370126

**DECISION AND ORDER** 

**APPEARANCES:** 

2

3

4 5

6 7

8

9

10 11

12

13 14

15

16

17 18

19 20

21 22

23 24

25 26

27 28

29

31 32

33 34

35 36

37

39 40

41 42

43 44

45 46

47

Claimant, Daniel L. Estes, by Casey & Casey, P.S., per Gerald L. Casey and Carol Casey

- Employer, Donald B. Murphy Construction, Inc., None
  - Department of Labor and Industries, by The Office of the Attorney General, per Michael J. Thomas, Assistant

The claimant, Daniel L. Estes, filed an appeal with the Board of Industrial Insurance Appeals on February 9, 1996, from an order of the Department of Labor and Industries dated January 29, 1996. The order awarded the claimant a permanent partial disability award equal to Category 2 for permanent dorso-lumbar and/or lumbosacral impairments, less deductions, and closed the claim.

## **REVERSED AND REMANDED.**

#### DECISION

30 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 claimant, Daniel L. Estes, to a Proposed Decision and Order issued on June 17, 1997, in which the order of the Department dated January 29, 1996, was reversed and remanded to the Department with directions to issue a new 38 order that indicates that Mr. Estes' low back condition as proximately caused by the industrial injury of November 7, 1991, would best be described by Category 3 of WAC 296-20-280; that Mr. Estes suffered a loss of earning power from July 1995 through January 29, 1996, as a proximate result of the industrial injury of November 7, 1991, equal to 84.3 percent compared to the \$16.20 per hour he was earning on a full-time basis at the time of injury; and that the claim shall be closed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed, and the rulings are affirmed.

We agree with the industrial appeals judge's determination that Daniel L. Estes' permanent impairment causally related to the industrial injury of November 7, 1991, is best described by Category 3 of WAC 296-20-280. We have granted review to correct a legal error in the Proposed Decision and Order with respect to the claimant's entitlement to loss of earning power benefits hereinafter (LEP) for that period of time during which he received unemployment compensation while his claim was still open.

The evidence in the record is well summarized in the Proposed Decision and Order and we discuss only those facts necessary to illustrate our basis for granting review. Mr. Estes, a construction worker, was injured on November 7, 1991, when he fell 25 feet from a bridge in Grays Harbor. He injured his back and ribs. The residuals of the injury preclude his returning to heavy labor. The Department provided vocational services in the form of a year of college classes, that enabled Mr. Estes to finish his bachelor of arts degree in sociology. The exchange for this unusual vocational service was that Mr. Estes signed an agreement to consider the entire state of Washington as a potential labor market after he got the degree. In fact, Mr. Estes limited his job search to a 50-mile radius of Port Angeles, Washington. Between December 8, 1994 and July 1995, he applied for numerous jobs, including jobs that did not require a bachelor of arts degree and jobs that probably exceeded his physical capacities. He received unemployment compensation during that time. In July 1995, he finally obtained part-time employment with the Port Angeles Park District by developing a proposal to generate tourism dollars through marketing the Port Angeles area as a sports tournament locale. As a construction worker, Mr. Estes earned \$16.20 per hour and worked 40 to 60 hours per week, with occasional layoffs of one or two weeks at a time between union hiring hall referrals. The record does not indicate the amount that he

received in unemployment compensation. His park district job paid \$10.10 per hour for 20-25 hours per week.

The industrial appeals judge determined that Mr. Estes could not receive LEP while he received unemployment compensation. The Proposed Decision and Order provided, "For one earning unemployment benefits, it is commonly known that the potential worker declares that he is fit and able to perform full-time gainful employment." Proposed Decision and Order, at 11. RCW 51.32.090(3) provides that as long as an injured worker's earning power is only partially restored, the worker shall receive temporary partial disability payments. There is no exclusion for periods when the worker is receiving unemployment compensation. LEP benefits do not depend on whether or not one is employed or employable full-time, but rather on whether one's capacity to earn the wage rate at injury has been restored. Mr. Estes' availability for employment is not at issue insofar as his entitlement to temporary partial disability or LEP is concerned. In fact, he must be capable of employment in order to qualify for LEP. There may be a question as to whether LEP benefits are payable only for the time "gap" between unemployment benefits and former wage earning capacity, but that is an administrative question for Department personnel. The necessary inquiry is whether his earning capacity was reduced by more than five percent.

Vocational witnesses, Martha Foley and Jeffrey Phillipps, testified for the claimant and the Department, respectively, that if Mr. Estes had been able to find employment commensurate with the bachelor of arts degree he attained at the end of his vocational program on December 8, 1994, he could expect a starting salary of \$1,500 per month/\$18,000 per year. Mr. Phillipps considered a job at \$10 per hour to generate about \$21,000 per year. In his opinion, this was an increase in earning capacity because the average construction worker works only 7.13 months per year. This is a specious argument unless Mr. Estes was determined to be a seasonal worker. There is

nothing in the record to show that the Department treated Mr. Estes as a seasonal worker for time
loss compensation purposes, so it has no basis for making that determination with respect to LEP.
The most appropriate conclusion from the record is that Mr. Estes' earning capacity fell from

\$16.20 per hour to \$10.10 per hour. He is entitled to LEP from the date he graduated from college

on December 8, 1994, until his claim was closed on January 29, 1996.

## FINDINGS OF FACT

1. On November 14, 1991, the claimant, Daniel L. Estes, filed an application for benefits with the Department of Labor and Industries alleging that he suffered an injury during the course of his employment with Donald B. Murphy Construction, Inc., on November 7, 1991. On November 22, 1991, the Department issued an order allowing the claim.

On December 9, 1994, the Department issued an order terminating time loss benefits with payment for the period from December 6, 1994 through December 8, 1994, and holding the claim open for further action. On December 14, 1994, the claimant filed a protest and request for reconsideration of the Department order dated December 9, 1994.

On January 29, 1996, the Department issued an order closing the claim with an award for permanent partial disability equal to Category 2 of permanent dorso-lumbar and/or lumbosacral impairments, less any permanent partial disability deductions. On February 9, 1996, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order dated January 29, 1996. On March 11, 1996, the Board issued an order granting the claimant's appeal, assigning it Docket No. 96 0722, and ordering that further proceedings be held.

- 2. On November 7, 1991, Mr. Estes suffered injuries to his back, hip, ribs, and right shoulder, as a result of a fall of approximately 20 feet from scaffolding onto a rocky beach area. At the time of the injury, Mr. Estes was working for Donald B. Murphy Construction, Inc., as a construction worker earning \$16.20 per hour, approximately 40 to 60 hours per week.
- 3. As of January 29, 1996, Mr. Estes' conditions proximately caused by his industrial injury of November 7, 1991, were fixed and stable and not in need of further necessary and proper medical treatment.
- 4. As of January 29, 1996, the level of permanent impairment to Mr. Estes' low back proximately caused by the industrial injury of November 7, 1991, was best described by Category 3 of WAC 296-20-280.

- 5. As a condition of receiving vocational services, Daniel L. Estes agreed to consider the entire state of Washington as his relevant labor market upon completion of those services.
- 6. Daniel L. Estes completed his vocational program on December 8, 1994, but limited his job search to a 50-mile radius of the Port Angeles area. In addition to jobs that were suited to his vocational training, he applied for jobs that did not require that training as well as for jobs that probably exceeded his physical capacities.
- 7. Daniel L. Estes would more probably than not have been able to obtain employment within the state of Washington which made use of his vocational training had he sought employment outside a 50-mile radius from Port Angeles, Washington.
- 8. Mr. Estes applied for and obtained employment security benefits from December 1994 to July 1995, due to inability to find employment in the Port Angeles area during that time period.
- 9. Between December 8, 1994 and the date he began working for the Port Angeles Park District in July 1995, and considering the permanent residuals of the industrial injury of November 7, 1991, along with the skills and training acquired as a result of the vocational services provided by the Department of Labor and Industries, Daniel L. Estes' expected earning capacity was \$1,500 per month based on full-time employment of 40 hours per week.
- 10. From July 1995 through January 29, 1996, Daniel L. Estes was employed by the Port Angeles Park District at the wage rate of \$10.10 per hour in a position that required him to work 20-25 hours per week.

## **CONCLUSIONS OF LAW**

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter of this appeal.
- 2. From December 8, 1994 through January 29, 1996, the claimant, Daniel L. Estes, suffered a loss of earning power in excess of five percent as a proximate result of the industrial injury of November 7, 1991, and is entitled to loss of earning power benefits as defined in RCW 51.32.090 for that period.
- 3. The order of the Department of Labor and Industries dated January 29, 1996, that awarded the claimant a Category 2 for permanent dorso-lumbar and/or lumbosacral impairments, less deductions, and closed the claim, is reversed. This claim is remanded to the Department with directions to pay Daniel L. Estes a permanent partial

disability award equal to Category 3 of WAC 296-20-280, less amounts previously paid; along with loss of earning power benefits from December 8, 1994 through January 29, 1996; and to thereupon close the claim.

It is so ORDERED.

Dated this 23rd day of October, 1997.

#### BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/	
S. FREDERICK FELLER	Chairperson
/s/	
FRANK E. FENNERTY, JR.	Member
/s/	
JUDITH E. SCHURKE	Member