Dyer, Howard

LOSS OF EARNING POWER (RCW 51.32.090(3))

Rebuttable presumption of entitlement

Where the medical evidence establishes that as a result of the injury the worker cannot return to his regular job and is required to change jobs, the fact that his post-injury earnings are less than his pre-injury earnings creates a rebuttable presumption that he has sustained a loss of earning power. **….*In re Howard Dyer*, BIIA Dec., 15,763 (1962)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: HOWARD L. DYER	)	**DOCKET NO. 15,763**
	)	
CLAIM NO. C-584255	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Howard L. Dyer, Pro se

Employer, Weyerhaeuser Company, by
Huntington and Huntington, per
Lester Huntington

Department of Labor and Industries, by
The Attorney General, per
Walter F. Robinson, Jr., Assistant

Appeal filed by the employer, Weyerhaeuser Company, on May 31, 1961, from an order of the supervisor of industrial insurance dated April 4, 1961, paying the claimant loss of earning power compensation at the rate of 13.5% for the period from March 1, 1960, to June 1, 1960, and at the rate of 11.8% for the period from June 1, 1960, to April 1, 1961, and from a further order of the supervisor dated May 5, 1961, paying the claimant loss of earning power compensation at the rate of 11.8% for the period of April 1, 1961, to May 1, 1961. **SUSTAINED**.

DECISION

This matter was before the board in a prior appeal by the employer from an order of the supervisor of industrial insurance dated March 10, 1960, allowing this claim for an occupational dermatitis and paying the claimant loss of earning power compensation at the rate of 13.5% for the period from August 31, 1959, to March 1, 1960. The board's decision and order on that appeal dated December 29, 1960, contained the following finding of fact:

> "2. As a result of exposure to glue dust on or about March 16, 1959, and July 10, 1959, in the course of his employment with Weyerhaeuser Company, the claimant developed an occupational disease described as eczematous dermatitis on both upper and lower eye lids of both eyes, and, as a result thereof, suffered a loss of wages from $2.41 per hour to $2.085 per hour for the period August 31, 1959, to March 1, 1960."

No appeal was taken by the employer from the above-mentioned order of this board and, thereafter, the supervisor issued the orders from which this appeal was taken by the employer, continuing the claimant's loss of earning power compensation at the rate of 13.5% or the period

from March 1, 1960, to June 1, 1960, and at the rate of 11.8% for the period from June 1, 1960, to May 1, 1961.

It is, of course, res judicata by virtue of this board's order of December 29, 1960, that the claimant suffered an occupational dermatitis and that as a result thereof he suffered a 13.5% loss of earning power during the period from August 31, 1959, to March 1, 1960, and the only issue before the board on this appeal is whether the claimant was entitled to the additional loss of earning power compensation by reason of his dermatitis condition during the periods covered by the supervisor's orders of April 4, 1961, and May 5, 1961.

The applicable statute is R.C.W. 51.32.090(3) which provides that:

> "As soon as recovery is so complete that the present earning power of the workman, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments [time-loss compensation] shall cease. If and so long as the present earning power is only partially restored, the payments shall continue in the proportion which the new earning power shall bear to the old. No compensation shall be payable out of the accident fund unless the loss of earning power shall exceed five percent."

The record before the board establishes that at the time the claimant developed the dermatitis condition of the eyelids of both eyes as a result of exposure to glue dust in July, 1959, he was working as a "set up" man earning $2.415 per hour ($2.335 per hour plus 6¢ per hour nite shift differential); that on his doctor's orders he transferred to a different job to reduce his exposure to glue dust on August 31, 1959, with a consequent reduction in pay to $2.085 per hour, and that he subsequently received a raise in pay to $2.135 per hour effective June 1, 1961. However, on the latter day the rate of pay on his former job as a "set up" man was also increased to $2.415 per hour plus a 6¢ differential for nite shift.

The only medical testimony in the record also establishes that the claimant's dermatitis condition had not reached a fixed state during the entire period here in question and that, although his dermatitis condition had considerably improve, it had not improved "enough to warrant going back to try the same thing again," that is, to permit the claimant to return to his job as a "set-up" man.

The employer's contentions essentially are that the claimant was not entitled to loss of earning power compensation because (1) he had never lost any time from work and had never been totally temporarily disabled as a result of his dermatitis condition, (2) that in order "to come

within the act, the claimant must show that he has been temporarily totally disabled and then returned to employment which requires less physical effort," and (3) that the claimant's "physical ability to work now is just as good and to the same extent as it was previously."

At the outset we may observe that the employer probably, as a matter of law, may not now question the eligibility of the claimant under the act on the theory that he had never been totally temporarily disabled, in view of its failure to appeal from the board's decision and order dated December 29, 1960, sustaining the department's order allowing such compensation for the period from August 31, 1959 to March 1, 1960. (See Abraham v. Department of Labor and Industries, 178 Wash. 160). However, disregarding this question, we do not agree that the above quoted statute should be construed as now contended by the employer.

We recognize that an argument may well be made that the phrase "partially restored" in the statute in question implies that there must previously have been a total loss of earning power. Such an interpretation of the statute, however, would mean that simply because a type of work is immediately available to a workman, which he can perform with the condition due to his injury at a substantial wage loss, he receives no compensation whatsoever for the economic loss he suffers until his condition becomes fixed, while the same workman would be compensated for such loss if he is required to remain away from work for a few days and finds work at a lesser paying job which he can perform. Such a construction of the statute clearly would result in gross injustice and, as a practical matter, would discourage workmen from attempting to find some type of work they could do during periods of temporary disability. This certainly could not have been the legislative intent, considering the general object and purpose of the act.

It is noted that the claimant in the case of Hunter v. Depart- ment of Labor and Industries, 43 Wn. (2d) 696, was required as a result of his injury to change jobs from an outside service lineman to that of a meter journeyman with the same employer and he was paid loss of earning power compensation for several years until he was paid a permanent partial disability award. Although the specific question decided by the court in that case was that he was not entitled to a continuation of such compensation after his condition became fixed, the case indicates the long standing departmental practice and interpretation of the statute in cases of this type, which has never been challenged.

It is a well established principle of statutory construction that "the general purpose or spirit of a legislative act must always be held in view, and absurd consequences avoided as far as

possible," and that "a thing which is within the object, spirit, and meaning of a legislative act is as much within the act as if it was within the letter." State Ex Rel. Thorp v. Devin, 26 Wn. (2d) 333. Considering this principle together with the equally well established principle that the construction placed upon a statute by the officer or department charged with its administration, although not binding on the courts, if nevertheless entitled to considerable weight in determining the legislative intent, we are of the opinion that, under the statute in question, a workman who suffers a temporary partial disability with a consequent loss of earning power as a result of an injury, is entitled to loss of earning power compensation until his earning power is completely restored (or the loss is less than 5%), or his condition becomes fixed and the extent of his permanent partial disability, if any, is established.

The employer's next contention that the claimant's "physical ability to work" during the period in question "is just as good and to the same extent as it was previously," is true in the sense that he could engage in just as strenuous physical activity as he could at the time he developed his occupational dermatitis, but it does not follow that he did not suffer a less of earning power, which is the only question before us. He could not, however, engage in work "to the same extent" as he did before as his employment opportunities were limited because of his occupational disease.

It may be inferred from the record that the employer also takes the position that the burden was on the claimant to show that he was unable, because of his dermatitis, to obtain some other type of work at the same wage he was earning prior to the development of that condition, which he failed to do.

It is undoubtedly true that the fact that post-injury earnings are less than pre-injury earnings is not conclusive evidence of loss of earning power, but this fact is sufficient to create a presumption of loss of earning power, which may be rebutted by evidence explaining away the post-injury earnings as an unreliable basis for estimating capacity. Larson's Workmen's Compensation Law, Vol.II Sec. 57.21.

In the instant case, the evidence establishes that the claimant had to change jobs because of his occupational disease and that he was offered and accepted a lesser paying job. The claimant, therefore, has established a prima facie case of loss of earning power and the employer presented no evidence to show that there was other work available which the claimant could have performed without loss of wages.

No question was raised by the employer as to the accuracy of the department's computation of loss of earning power compensation based on his earnings in June, 1959, as compared to his earnings subsequent to August 3, 1959, and while the department's right to reduce the percentage of the claimant's loss of earning power compensation effective June 1, 1960, as was done, appears questionable (See Hunter v. Department of Labor and Industries, supra, and annotations in 2 A.L.R and 92 A.L.R.), the amount of loss of earning power compensation determined by the department to be owing to the claimant cannot be increased by the board, in view of the fact that no appeal was taken by the claimant. Brakus v. Department of Labor and Industries, 48 Wn. (2d) 218.

We conclude, therefore, that the supervisor's orders of April 4, 1961, and May 5, 1961, should be sustained.

FINDINGS OF FACT

After a careful review of the record, the board finds:

1. The claimant, Howard L. Dyer, filed two "report of accident" forms with the department of labor and industries on April 8, 1959, and August 11, 1959, alleging that he had sustained an occupational disease as the result of his exposure to glue dust in the course of his employment with the Weyerhaeuser Company on or about March 16, 1959, and July 30, 1959, respectively. By order of the supervisor of industrial insurance dated September 16, 1959, both claims were consolidated for action. On March 10, 1960, the supervisor of industrial insurance entered an order allowing the claim and paying the claimant compensation for temporary loss of earning power at the rate of 13.5% of the statutory allowance for time-loss compensation from August 31, 1959, to March 1, 1960. On April 1, 1960, the employer, Weyerhaeuser Company, appealed to this board from that order and thereafter on December 29, 1960, this board entered an order sustaining the supervisor's order of March 10, 1960.

2. On April 4, 1961, the supervisor entered an order paying the claimant compensation for temporary loss of earning power at the rate of 13.5% of the statutory allowance for time-loss compensation from March 1, 1960, to June 1, 1960, and for temporary loss of earning power at the rate of 11.8% of the statutory allowance for time-loss compensation from June 1, 1960, to April 1, 1961. On May 5, 1961, the supervisor entered an order paying the claimant compensation for temporary loss of earning power at the rate of 11.8% of the statutory allowance for time-loss compensation from April 1, 1961, to May 1, 1961. From those orders the employer, Weyerhaeuser Company, appealed to this board on May 31, 1961, which appeal was granted by the board's order dated July 7, 1961.

3. As a result of his exposure to glue dust on or about March 16, 1959, and July 10, 1959, in the course of his employment with Weyerhaeuser Company, the claimant developed an occupational disease described as an "eczematous dermatitis" on the upper and lower eyelids of both eyes and as a result thereof, he was required, on his doctor's orders, to transfer to a lesser paying job on August 31, 1959, to reduce his exposure to glue dust.

4. Although the claimant's dermatitis condition subsequently improved, it had not improved to the extent of permitting him to return to the job he was performing in July, 1959, by May 1, 1961, and his condition had not yet become fixed by the latter date.

5. As a result of his occupational disease, the claimant suffered a loss of earning power in percentages, which, at least, were not less than that determined by the department's orders of April 4, 1961, and May 5, 1961.

CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the board concludes:

1. The orders of the supervisor of industrial insurance dated April 4, 1961, and May 5, 1961, are correct and should be sustained.

ORDER

Now, therefore, it is hereby ORDERED that the orders of the supervisor of industrial insurance dated April 4, 1961, and May5, 1961, be, and the same are hereby, sustained.

Dated this 27th day of December, 1962.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
J. HARRIS LYNCH Chairman

/s/_____
R. H. POWELL Member

/s/_____
HAROLD J. PETRIE Member