Arnold, Marietta

LOSS OF EARNING POWER (RCW 51.32.090(3))

Department obligated to make eligibility determination

Where the worker's condition is not fixed and the worker can return to light duty employment but not to her former job, the Department is required to determine whether the worker is eligible for loss of earning power compensation. ***….In re Marietta Arnold,* BIIA Dec., 56,329 (1981)** [concurrence]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARIETTA L. ARNOLD	**)**	**DOCKET NO. 56,329**
	)	
CLAIM NO. H481526	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Marietta L. Arnold, by
Cullen, Holm, Hoglund and Foster, per
Avelin P. Tacon III

Employer, Shelton Cedar Products,
None

Department of Labor and Industries, by
The Attorney General, per
Meredith Wright Morton, Assistant

This is an appeal filed by the claimant on March 1, 1980, from an order of the Department of Labor and Industries dated February 27, 1980, which adhered to a prior order paying claimant time-loss compensation for the period from September 1, 1979 through September 4, 1979, and terminating time-loss compensation payments on the latter date. **REVERSED AND REMANDED**.

DECISION

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 to a Proposed Decision and Order issued by a hearings examiner for this Board on December 2, 1980, in which the order of the Department dated February 27, 1980 was sustained.

The Board has reviewed the evidentiary rulings of the hearings examiner and finds that no prejudicial error was committed and said rulings are hereby affirmed.

The legal question presented before us concerns whether the claimant was entitled to further compensation as an industrially injured worker after September 4, 1979, at which date the Department effectively terminated her temporary total disability payments. It is the contention of the claimant that she is entitled to continued time-loss benefits after September 4th, up to and including at least February 27, 1980, the date upon which the Department last acted in adjudication of her claim.

Mrs. Arnold was injured on February 15, 1979, when an industrial accident caused a comminuted fracture which was, in the words of Dr. Jerome Zechmann, "fairly significantly displaced". The Department of Labor and Industries terminated the claimant's time-loss compensation ostensibly because it was its administrative determination that Dr. Zechmann felt she was able to return to full-

time gainful employment. The claimant's position in this appeal is that she was unable to return to her former job and unable to find other types of work for which she would be physically capable and vocationally qualified. Therefore, she maintains she should be entitled to continued disability benefits.

It is important to note that this case is not one falling under the application of subsection (4) of RCW 51.32.090 relating to an employer's request of a physician to certify that an injured worker is able to perform available work other than that worker's usual work. It is clear in the record before us that the employer does not have work other than the claimant's usual work available to her, nor was such work available during the time at issue in this appeal.

Consequently, the determination of the claimant's rights to benefits falls within that portion of the statute which reads as follows:

> "(1) When the total disability is only temporary, the schedule of payments contained in subdivisions (1) through (13) of RCW 51.32.060 as amended shall apply, so long as the total disability continues.
>
> **...**
>
> (2) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments 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 unless the loss of earning power shall exceed five percent."

In the case of Bonko v. Department of Labor and Industries, 2 Wn. App. 22 (1970), it was established that temporary total disability, i.e., time-loss compensation, and permanent total disability differ only in their duration and not in their character. The definition of total disability is not changed by the section above quoted. Temporary total disability is a condition which temporarily incapacitates a worker from performing any work at any gainful occupation. The court of appeals went on to hold that if a worker is able to work, such worker cannot be temporarily totally disabled. In that case, the court held that since Bonko was able to work and his condition was fixed or static then time-loss payments should cease, no payments for loss of earning power should be awarded, and a permanent partial disability award, if appropriate, should be made to the worker.

Although not critical to the issue before the court in Bonko, the court recognized that:

> "...the workman, while being treated for a temporary total disability, may be physically able to return to some kind of work during his recovery and before his condition becomes fixed or static. During that period, the

> workman shall be paid time-loss compensation in proportion that the new earning power shall bear to the old."

That form of "time-loss compensation" that the court refers to is more commonly understood to mean temporary loss of earning power compensation or temporary partial disability. In the case before us, we read the testimony of Dr. Zechmann to establish that it was his opinion the claimant was capable of performing light duty employment. In the case before us, it is significant to note that the claimant did make an effort to secure employment following her release from Dr. Zechmann. Although unsuccessful, it is not established that such was because of the claimant's limited experience or any aptitude deficiency.

Although reasonable minds may differ in interpreting the testimony presented, we do not feel Dr. Zechmann's testimony combined with that of the claimant is sufficient to warrant a finding that the claimant was merely an odd lot on the labor market when released. See Kuhnle v. Department of Labor and Industries, 12 Wn.2d 191 (1942). To the contrary, Dr. Zechmann's comments more convincingly show that the claimant would have reasonable vocational alternatives in areas of light work that are generally available in the competitive labor market, assuming she had sufficient intellectual capacity and transferrable market skills.

Under the rule pronounced in Bonko, supra, if the claimant's condition were found to be medically fixed and stable when released, the Department's order terminating all compensation would certainly be correct. However, it is also apparent from Dr. Zechmann's explanation of the claimant's protracted recovery that her condition was not stable and could not reasonably be found to be fixed until about a year after her February 1979 injury. Consequently, we believe it was incumbent upon the Department to determine whether the claimant's ability to perform light work had restored her earning power "to that existing at the time of the injury", RCW 51.32.090(3). We are unable to determine in the record before us what her earning power capacity was in September 1979. We believe the statute requires that as long as the claimant's condition is not fixed and earning power is not completely restored, that the Department must determine to what extent earning power is restored and, at least, continue temporary partial compensation payments (loss of earning power compensation) in the proportion which that new earning power would bear to the old.

Therefore, we will reverse the Department's order and remand the claim for further action with direction to determine if the claimant's earning power was fully restored as of September 5, 1979, or

only partially restored, and if the latter, to pay the claimant consistent with the direction of RCW 51.32.090(3).

FINDINGS OF FACT

After a careful review of the entire record of this appeal, the following findings are entered:

1. On March 23, 1979, the claimant, Marietta L. Arnold, filed a report of accident with the Department of Labor and Industries alleging the occur of a industrial injury on February 15, 1979, during the course of her employment with Shelton Cedar Products. The claim was accepted, medical treatment provided and time-loss compensations were initiated and paid through September 4, 1979. On October 4, 1979, such compensation was terminated by order of the Department. Following a timely protest from the claimant, the Department entered an order on February 27, 1980, adhering to the provisions of its October 4, 1979 order terminating time-loss compensation but the claim continued open for authorized treatment. On March 4, 1980, the claimant filed a notice of appeal with the Board of Industrial Insurance Appeals. On April 2, 1980, the Board issued an order granting the appeal and directed that proceedings be held on the issues raised by the appeal.

2. As of September 5, 1979, the claimant was physically capable of performing some form of gainful employment on a reasonably continuous basis but was incapable of returning to her former position as a shake packer.

3. As of September 5, 1979, the claimant's condition causally related to her February 15, 1979 industrial injury was not fixed but continued to require further medical management.

4. As of September 5, 1979, it was undetermined whether the claimant's then existing earning power was restored to that existing at the time of the occurrence of her injury, Although she was physically capable of performing some types of light duty employment generally available in the competitive labor market.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction of the parties and subject matter of this appeal.

2. As of September 5, 1979, the claimant may have been no longer temporarily totally disabled, but as of that date the Department of Labor and Industries bore the burden of determining whether her earning power had been completely or only partially restored.

3. In determining whether the claimant's earning power is completely or only partially restored, the Department must consider socio-economic factors including the nature of the claimant's injury, her age, extent of education and prior work history and other marketable skills.

4. The order of the Department of Labor and Industries dated February 27, 1980, effectively terminating the claimant's temporary compensation benefits as paid to September 4, 1979, was incorrect, and should be reversed, and the claim remanded to the Department with direction to determine whether the claimant's earning power was completely or only partially restored as of September 5, 1979, and if only partially restored, to pay the claimant temporary partial disability compensation in the proportion which the new earning power would bear to her earning power at the time of injury until such time as her condition becomes fixed and stable.

It is so ORDERED.

Dated this 2nd day of April, 1981.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
AUGUST P. MARDESICH Member

/s/_____
FRANK E. FENNERTY, JR. Member

CONCURRING OPINION

I am in basic agreement with the conclusion reached that the Department was incorrect in terminating compensation benefits as paid through September 4, 1979. However, I believe the Department should consider restoration of full time-loss benefits by virtue of its own medical aid rules. In WAC 296-20-010(7), it states, in effect, that a worker's attending physician should inform the worker and the Department as to the specific date when the worker is "capable of returning to his regular work...[c] compensation will be terminated on this date." It seems only reasonable that since the claimant here probably could not have returned to a job as a shake packer until at least a year after her injury, that temporary total disability benefits should continue until that date certain.

The other question raised in my mind concerning this appeal is the burden on the employer to assist the claimant in securing "light" employment until the claimant is able to return to her former position. There surely is a moral, if not a legal, obligation upon the employer to assist employees injured while working to return to gainful employment even when they are temporarily unable to resume regular duties. In the event the claimant secured "light" work and such work was

compensated less than her former work, then the Department should pay the claimant loss of earning power compensation in the proportion which the new earning power would bear to her earning power at the time of injury until she is able to return to her former position.

Since the claimant's employer here did not work with her attending physician to evaluate a light work position consistent with RCW 51.32.090(4) and WAC 296-20-010(6), it looks like a slap in the claimant's face to just chop off benefits entirely merely because the claimant was released on her physician's impetus to some non-descript "light duty" employment. I agree with the majority that at a minimum the claimant is entitled to some level of continued benefits until some work equal in remuneration to her former job is actually made available to her.

Dated this 2nd day of April, 1981.

/s/
FRANK E. FENNERTY, JR. Member