

Hamilton, Jack

LOSS OF EARNING POWER (RCW 51.32.090(3))

Comparison wages after reopening

After a reopening of the claim, a worker's loss of earning power benefit shall be based on a comparison of the worker's earning power at the time of the initial injury with his current earning power, following the rationale of *Hubbard v. Department of Labor and Indus.*, 92 Wn. App. 941 (1998), *rev'd. on other grounds*, 140 Wn.2d 35 (2000), rather than that of *Davis v. Bendix Corp.*, 82 Wn. App. 267 (1996), *rev. denied*, 130 Wn.2d 1004 (1996). ...***In re Jack Hamilton*, BIIA Dec., 03 14743 (2004)**

Scroll down for order.

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

1 **IN RE: JACK D. HAMILTON**) **DOCKET NO. 03 14743**
2)
3 **CLAIM NO. S-667968**) **DECISION AND ORDER**
4

5 **APPEARANCES:**

6
7 Claimant, Jack D. Hamilton, by
8 Law Offices of Robyn L Pugsley P.S., per
9 Robyn L. Pugsley

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11 Self-Insured Employer, Hecla Mining Company, by
12 Evans, Craven & Lackie, P.S., per
13 Gregory M. Kane
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15 The claimant, Jack D. Hamilton, filed an appeal with the Board of Industrial Insurance
16 Appeals on May 9, 2003, from an order of the Department of Labor and Industries dated April 30,
17 2003. In this order, the Department declared that the claim had been reopened for treatment
18 effective December 12, 1996. The Department determined that treatment was no longer necessary
19 and closed the claim with no additional permanent partial disability. The Department order is
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21 **REVERSED AND REMANDED.**
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23 **DECISION**

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed
26 Decision and Order issued on February 9, 2004, in which the industrial appeals judge reversed and
27 remanded the order of the Department dated April 30, 2003.
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29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
30 no prejudicial error was committed. The rulings are affirmed. We grant review to clarify our
31 position on whether an award for permanent impairment compensates the worker for any future
32 loss of earning capacity. In this particular case, the parties provided a stipulation of all the facts
33 material to the issues raised by the appeal.
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35 The claimant, Jack D. Hamilton, injured his back during the course of his employment as a
36 miner with Hecla Mining Company on March 18, 1985. At the time of his injury, Mr. Hamilton was
37 earning \$2,339.59 per month. He worked eight hours per day, five days per week, twelve months
38 per year, at a rate of \$11.90 per hour. This monthly wage included health insurance benefits. The
39 parties did not specify how much of the monthly wage of \$2,339.59 represented the cost of health
40 insurance benefits provided by the employer. However, based on RCW 51.08.178, the monthly
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1 wage predicated on the days and hours worked would be \$2,094.40 (\$11.90 per hour x 8 hours =
2 \$95.20 daily wage; \$95.20 x 22 = \$2,094.40 monthly wage). The cost of the health insurance
3 benefits was, therefore, \$245.19 per month.
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5 As a result of his injury, Mr. Hamilton was required to undergo an L4-S1 Steffee plate fusion
6 on January 8, 1993. He received time loss compensation benefits while recovering from his
7 surgery. As a result of his injury, Mr. Hamilton was permanently restricted from performing heavy
8 work as a miner, but was capable of performing light duty work on a full-time, reasonably
9 continuous basis. He was retrained to work as a teacher's aide, receiving an associate's degree
10 from Spokane Community College on August 15, 1995. On December 7, 1995, his claim was
11 closed with time loss compensation paid through August 15, 1995, and an award for permanent
12 partial disability consistent with Category 5 of the categories of permanent low back impairments.
13 As of December 7, 1995, Mr. Hamilton was capable of working as a teacher's aide with an earning
14 capacity of \$7.66 per hour, six hours per day, five days per week, ten months per year. We
15 assume that teacher's aide positions were only generally available six hours per day, ten months
16 per year.
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18 A little over one year later, on December 27, 1996, Mr. Hamilton applied to reopen his claim
19 for aggravation of his condition. On January 30, 1997, the Department reopened the claim and
20 reinstated time loss compensation effective December 12, 1996. Mr. Hamilton underwent two
21 further surgeries. First, the Steffee plates were removed. When his condition failed to improve,
22 Mr. Hamilton underwent a laminectomy and foraminotomy on the left at L5, with a left posterior iliac
23 crest autograft and fusion at L4-5 and L5-S1 and an anterior lumbar interbody cage reconstruction
24 at L4-S1 on August 3, 1999.
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26 After Mr. Hamilton recovered from his surgeries, his physicians released him to work as a
27 teacher's aide. When the vocational counselor, Ruth Johnson, agreed that the claimant was able to
28 work in this capacity, time loss compensation was terminated as paid through September 28, 2000.
29 Mr. Hamilton's claim was closed on April 30, 2003, with no additional award for permanent partial
30 disability over that which had previously been paid.
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32 The parties agree that for the period September 29, 2000 through April 30, 2003,
33 Mr. Hamilton was still incapable of returning to work as a miner, but he was capable of obtaining
34 and performing work as a teacher's aide. During that time period, however, teacher's aides were
35 earning \$8.72 per hour (an increase of \$1.06 per hour over their December 1995 hourly wage).
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1 The work pattern for teacher's aides continued to be six hours per day, five days per week, ten
2 months per year. We continue to assume that Mr. Hamilton would have been physically able to
3 work as a full-time teacher's aide, but that such teacher's aide jobs were not generally available in
4 the claimant's labor market. We also assume that there was no other full-time, year-round light
5 work Mr. Hamilton was qualified to obtain and perform, during the period of September 29, 2000
6 through April 30, 2003. The claimant alleged at hearing that teacher's aides do not receive health
7 insurance benefits as part of their compensation package. The employer did not deny this. During
8 the period of September 29, 2000 through April 30, 2003, Mr. Hamilton did not actually perform any
9 work in any capacity.

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14 The parties also stipulated that miners working for employers other than Hecla Mining
15 Company during the applicable time period of September 29, 2000 through April 30, 2003, earned
16 \$27.65 an hour in 2000; \$28.76 an hour from 2001-2002, and earned \$29.90 an hour in 2003, in
17 addition to receiving employer-sponsored health care benefits. We gather that this stipulated fact
18 was offered in support of an adjustment as favorably acknowledged by the Supreme Court in
19 *Hunter v. Department of Labor & Indus.*, 43 Wn.2d 696 (1953). In *Hunter*, a worker prevented by
20 his injury from returning to the job he had held at the time of his injury, had taken a lighter-duty but
21 lesser-paying job with the same employer. Eventually, due to a general wage increase, his
22 earnings at this lesser-paying job equaled what his earnings had been at the job at the time of his
23 injury. It therefore appeared, and the Department had determined, that he no longer had a loss of
24 earning capacity. However, the pay for the job held at the time of injury had also increased due to
25 the same general wage increase. The Board had held, and the Court upheld the Board's
26 determination, that the worker's general wage increase therefore did not reflect a decrease in
27 disability or a restoration of earning power. Comparing the new differential between his current
28 earning capacity and what the job at injury currently paid, the worker continued to have the same
29 loss of earning capacity.

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34 Here the parties' stipulation is specifically phrased to suggest that the specified increased
35 wages for miners **do not** apply to miners employed by Hecla. In both *Hunter* and the Board's post-
36 *Hunter* Significant Decision of *In re Chester Brown*, BIIA Dec., 88 1326 (1989), the *Hunter*
37 adjustment is allowed where the earnings paid **for the employment held at the time of injury**
38 have increased. We do not believe we can infer from this stipulation that Hecla miners continued to
39 make only \$11.90 per hour in 2000-2003. The Department would have to determine if a *Hunter*
40 adjustment would be appropriate if loss of earning power benefits are paid.

1 Perhaps Hecla no longer had miners in 2000-2003 and the wage increases listed were
2 intended by the parties to reflect what Hecla miners would have made if there were still mining jobs
3 at Hecla. The Board has held that in determining loss of earning power benefits of a worker who
4 was a prevailing wage union carpenter at the time of injury, it is appropriate to look to evidence of
5 what prevailing wage union carpenters are currently making. *In re Michael W. Haney*, Dckt.
6 No. 89 3517 (February 8, 1991). Of course, in *Haney*, the increased prevailing wage would have
7 applied to all prevailing wage carpenter jobs, including the job the worker held at the time of injury.
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11 The parties' Stipulation of Facts is also silent with respect to the wage being earned by Hecla
12 miners or miners employed by other employers as of December 7, 1995. Thus, it is not known
13 whether Mr. Hamilton's job at the time of his 1985 injury was then still paying \$11.90 per hour or
14 something more.
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17 The stipulation does state that miners with employers other than Hecla continue to receive
18 employer-sponsored health care benefits, although the cost of such benefits in the years 2000-2003
19 is not stated. Thus, it is not known whether the cost of such benefits would be equal to, less than,
20 or greater than the \$245.19 amount being provided for Mr. Hamilton by Hecla at the time of his
21 injury.
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24 In his memorandum in support of summary judgment, the claimant contends that he should
25 receive loss of earning power benefits calculated by taking into account the above increase in
26 wages paid to miners. Since the employer argues that the claimant should not receive loss of
27 earning power benefits, Hecla does not address a *Hunter* adjustment. Hecla contends that
28 Mr. Hamilton is not entitled to loss of earning power benefits for the period 2000-2003, because his
29 earning capacity (as a teacher's aide) has actually increased by \$1.06 per hour as compared to his
30 earning capacity at the time his claim was closed with a permanent partial disability award in 1995.
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33 Both Mr. Hamilton and Hecla agree that there is no dispute as to any fact material to the
34 issues raised by this appeal and that the appeal can and should be decided as a matter of law
35 under CR 56. As to the issue of whether Mr. Hamilton is entitled to **any** loss of earning power
36 benefits for the period at issue, we agree that there is no dispute of any material fact, and we
37 conclude that Mr. Hamilton is entitled to summary judgment. Specifically, we order that
38 Mr. Hamilton receive loss of earning power benefits for the period September 29, 2000 to April 30,
39 2003, based on a comparison of his earning capacity at that time, to his earning capacity **at the**
40 **time of injury**, and not at the time his claim had been closed in December 1995.
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1 However, based on the Stipulation of Facts submitted, we are unable to calculate the actual
2 loss of earning power sustained by Mr. Hamilton, and the amount of loss of earning power benefits
3 to which he is entitled. The claim is remanded to the Department with direction to calculate and
4 direct Hecla to pay loss of earning power and/or time loss compensation benefits to the claimant for
5 the period of September 29, 2000 to April 30, 2003, but to otherwise close the claim, effective
6 April 30, 2003.
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10 The dispute regarding Mr. Hamilton's entitlement to loss of earning power benefits arises
11 because of a conflict in the interpretation of RCW 51.32.090(3) between two different divisions of
12 the Court of Appeals. RCW 51.32.090(3) provides:
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14 (a) As soon as recovery is so complete that the present earning power
15 of the worker, at any kind of work, is restored to that existing at the time
16 of the occurrence of the injury, the payments shall cease. If and so long
17 as the present earning power is only partially restored, the payments
18 shall:
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20 (i) For claims for injuries that occurred before May 7, 1993, continue in
21 the proportion which the new earning power shall bear to the old;
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23 Division One of the Court of Appeals has held that, in an aggravation case under
24 RCW 51.32.160, a worker whose claim had been closed with a permanent partial disability award is
25 thereafter entitled to loss of earning power benefits only if it is shown that the current earning
26 capacity during the aggravation period is less than that which the worker had at the time the claim
27 had been closed. *Davis v. Bendix Corp.*, 82 Wn. App. 267, *rev. denied*, 130 Wn.2d 1004 (1996). In
28 a later case, Division Three of the Court of Appeals disagreed with *Davis*, holding that the worker's
29 loss of earning power should be based on a comparison of the worker's earning power at the time
30 of initial injury and at the time of aggravation. *Hubbard v. Department of Labor & Indus.*,
31 92 Wn. App. 941 (1998), *rev'd on other grounds*, 140 Wn.2d 35 (2000).
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34 On review of the Hubbard decision, the Supreme Court held that before loss of earning
35 power benefits can even be considered, a worker who has filed a claim for aggravation must first
36 make a threshold showing that, as a result of the aggravation, he was rendered temporarily and
37 totally disabled or has suffered a decrease in earning power proximately resulting from the injury's
38 aggravation. As to cases in which a worker had met that threshold, the Supreme Court left
39 unresolved the conflict between Division One and Division Three as to whether loss of earning
40 power benefits should be calculated based on earning capacity at the time of injury as opposed to
41 earning capacity at the time the claim had been closed. Specifically, the Supreme Court stated:
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1 Because Hubbard has failed to make the necessary threshold showing,
2 this Court is not required to determine the correct formula for calculating
3 LEP benefits in an aggravation case where such benefits are proper.
4 Thus, we do not presently resolve the existing conflict in the Court of
5 Appeals as to whether "old" in RCW 51.32.090(3) refers to the
6 claimant's earning power when the original injury occurred or when the
7 claim was initially closed. Instead, we encourage the Legislature to
8 clarify its intent in RCW 51.32.090(3)(a) when a claimant seeks LEP
9 benefits based upon the aggravation of an injury for which he or she has
10 already received a PPD award.

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12 *Hubbard* at 45.

13 The Legislature has not acted to "clarify its intent" as suggested by the Supreme Court.
14 Thus, we are left with the two conflicting decisions from the Courts of Appeal. We find the
15 reasoning of the Court of Appeals in the *Hubbard* decision to be a better statement of the law. The
16 Court states that it is error to consider loss of earning power in fixing an award for permanent partial
17 disability. The opinion further states that permanent partial disability compensates the worker for
18 loss of bodily function, which is distinguished from loss of earning power in each worker. *Hubbard*,
19 at 747. We agree with the Court that the rationale set forth in *Davis* is "an aberration in Washington
20 workers' compensation law." *Hubbard* at 949.

21 *Davis* was predicated on the theory that when a worker's claim is closed with a permanent
22 partial disability award, such award serves to compensate the worker for future lost earning
23 capacity. Under the *Davis* Court's reasoning, if the worker's claim was closed with a Category 5
24 rating for low back impairment, and at the time he had a 25 percent loss of earning power, he
25 cannot receive further loss of earning power benefits after his claim is reopened unless he shows
26 that his earning capacity is less than what it was at the time his claim was closed, even though it
27 may still be less than what it was at the time of injury. Again, the Court in *Hubbard* correctly noted
28 that permanent partial disability awards are not taking these future earnings into account. See,
29 also, *Page v. Department of Labor & Indus.*, 52 Wn.2d 706 (1958).

30 The logic underlying this holding remains sound. A worker can have a permanent partial
31 disability that in no way limits his earning capacity. Yet another worker with the same loss of
32 function might find that the resulting loss of function severely reduces his earning capacity. For
33 example, the earning capacity of the concert pianist who loses a finger would likely be greatly
34 impacted by the impairment. But a lawyer who lost the same finger might have no loss of income
35 whatsoever as a result of such impairment. Yet, both workers will receive the same permanent
36 partial disability award.
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1 Of course, if the worker has an impairment that renders him unable to obtain and perform
2 gainful employment on a reasonably continuous basis, he will instead receive a permanent total
3 disability pension. RCW 51.08.160. If his permanent impairment severely affects his earning
4 capacity, but still allows him to obtain and perform gainful employment on a reasonably continuous
5 basis, his wage compensation is terminated once the claim is closed. That is because while the
6 Industrial Insurance Act provides for temporary total disability benefits and temporary loss of
7 earning power benefits while a claim is open, and permanent total disability benefits when a
8 worker's condition becomes fixed and stable, our state workers' compensation system simply does
9 not have a benefit designed to compensate a worker for "permanent loss of earning capacity."
10 Responding to the absence of such a benefit by characterizing a permanent partial disability award
11 as an award for lost future earning capacity is simply not logical.

12 In the present case, Mr. Hamilton has met the threshold test required by the Supreme Court
13 in *Hubbard*. Specifically, after his claim was reopened for treatment, he was temporarily and totally
14 disabled, as a result of the aggravation of his injury, from December 12, 1996 through
15 September 29, 2000, and received temporary total disability benefits. If his earning capacity was
16 not thereafter restored to that existing at the time of his injury, then he was entitled to loss of
17 earning power benefits under RCW 51.32.090(3) until his earning capacity was fully restored, or his
18 permanently partial disability was determined and his claim again closed, whichever came first, and
19 provided that the loss of earning power exceeded 5 percent. The proportion to which
20 Mr. Hamilton's earning power during the relevant part of the aggravation period, bore to his earning
21 capacity at the time of injury exceeded a loss of at least 5 percent. Therefore, Mr. Hamilton was
22 entitled to benefits under RCW 51.32.090 during the period September 29, 2000 to April 30, 2003.

23 **FINDINGS OF FACT**

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- 25 1. On October 19, 1987, the claimant, Jack D. Hamilton, filed an
26 application for benefits with the self-insured employer, Hecla Mining
27 Company, alleging he had sustained an industrial injury on March 18,
28 1985, while in the course of his employment. The claim was allowed
29 and closed by an order issued by the self-insured employer on
30 January 30, 1987, without any award for permanent partial disability.
31 On September 8, 1987, the claimant filed an application to reopen the
32 claim for aggravation of condition. By an order dated October 23, 1987,
33 the Department denied the application to reopen the claim for the
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1 reason that the claimant's condition was the result of a new traumatic
2 incident occurring August 10, 1987. On November 30, 1987, the
3 claimant's medical provider filed a Protest and Request for
4 Reconsideration of that order with the Department. By an order dated
5 February 9, 1988, the Department set aside the order dated October 23,
6 1987, held it for naught, and reopened the claim effective August 20,
7 1987. On August 29, 1988, the Department issued a further order in
8 which it allowed and closed the claim for medical treatment only. On
9 October 13, 1988, the claimant's medical provider filed a Protest and
10 Request for Reconsideration of that order with the Department. By an
11 order dated October 27, 1988, the Department set side the order of
12 August 29, 1988, held it for naught, and directed that the claim remain
13 open. On April 3, 1990, the Department closed the claim and directed
14 the self-insured employer to pay an award for permanent partial
15 disability consistent with Category 3 of the categories of permanent low
16 back impairments, to be paid at 75 percent of the monetary value of
17 such an award.

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19 On April 23, 1990, the Board of Industrial Insurance Appeals received a
20 Notice of Appeal, filed on behalf of the claimant, from the Department
21 order of April 3, 1990. The appeal was assigned Board Docket
22 No. 90 2173, and on May 3, 1990, the Board granted the appeal,
23 directing that proceedings be held with respect to the issue raised by the
24 Notice of Appeal. On May 2, 1991, a Proposed Decision and Order was
25 entered reversing the Department order of April 3, 1990, and remanding
26 the claim to the Department to direct the self-insured employer to
27 provide the claimant with medical treatment. A timely Petition for
28 Review was filed by the self-insured employer, and on July 5, 1991, the
29 Board issued an Order Denying Petition for Review, thereby adopting
30 the Proposed Decision and Order as the final order of the Board.

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32 On July 16, 1991, the Department directed the self-insured employer to
33 provide the claimant with medical treatment. On December 7, 1995, the
34 Department issued a further order closing the claim, directing the
35 self-insured employer to pay an award for permanent partial disability
36 consistent with Category 5 of the categories of permanent low back
37 impairments, less prior permanent partial disability awards and
38 advances.

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40 On December 27, 1996, the claimant filed an application to reopen his
41 claim for aggravation of condition. The claim was reopened. Further
42 action was taken on the claim and further appeals were taken to the
43 Board and to Superior Court, none of which have jurisdictional relevance
44 to the issue presented in this appeal. Ultimately, on April 30, 2003, the
45 Department entered an order declaring the claim had been reopened for
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1 treatment, effective December 12, 1996, determining that treatment was
2 no longer necessary and that there was no additional permanent partial
3 disability, and closed the claim.
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5 On May 9, 2003, the Board received a Notice of Appeal, filed on behalf
6 of the claimant, from the Department order of April 30, 2003. On
7 May 16, 2003, the Board issued an order granting the appeal, assigning
8 Board Docket No. 03 14743, and directing that proceedings be held with
9 respect to the issues raised by the Notice of Appeal.
10

11 2. The claimant, Jack D. Hamilton, sustained an industrial injury on
12 March 18, 1985, during the course of his employment as a miner for his
13 self-insured employer, Hecla Mining Company. The injury involved his
14 back, and required him to undergo a Steffee plate fusion at the L4-S1
15 levels of his spine. Mr. Hamilton's monthly wage at the time of his injury
16 was \$2,339.59, based on an hourly wage of \$11.90, and work
17 performed eight hours per day, five days per week, twelve months per
18 year, and included employer-provided health insurance benefits valued
19 at \$245.19 per month.
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21 3. On December 7, 1995, Mr. Hamilton's back condition, proximately
22 caused by his injury of March 18, 1985, was medically fixed and stable;
23 he required no further medically proper and necessary treatment; and
24 his permanent impairment due to the injury was best described by
25 Category 5 of the categories of permanent dorso-lumbar and
26 lumbosacral impairments. As of December 7, 1995, Mr. Hamilton was
27 no longer able to return to work as a miner, but was physically capable
28 of performing full-time and reasonably continuous light work. As of
29 December 7, 1995, Mr. Hamilton was only capable of obtaining and
30 performing light work as a teacher's aide. Teacher's aide jobs at that
31 time paid \$7.66 per hour and were only available six hours per day, five
32 days per week, ten months per year, and did not include
33 employer-provided health insurance benefits.
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35 4. On December 12, 1996, Mr. Hamilton's back condition became
36 aggravated, requiring the reopening of his claim for further treatment.
37 He underwent two further surgeries, including removal of the Steffee
38 plates, and a laminectomy and foraminotomy on the left at L5, with a left
39 posterior iliac crest autograft and fusion at L4-5 and L5-S1, and an
40 anterior lumbar interbody cage reconstruction at L4-S1. As of April 30,
41 2003, Mr. Hamilton's back condition, proximately caused by his injury of
42 March 18, 1985, was again fixed and stable, and required no further
43 proper and necessary medical care. As of April 30, 2003, his permanent
44 impairment due to the injury was best described by Category 5 of the
45 categories of permanent dorso-lumbar and lumbosacral impairments. As
46 of April 30, 2003, Mr. Hamilton was capable of performing and obtaining
47 reasonably continuous gainful employment as a teacher's aide.

- 1 5. During the period December 12, 1996 through September 28, 2000,
2 Mr. Hamilton was unable to obtain and perform reasonably continuous
3 gainful employment as a result of the condition proximately caused by
4 his injury of March 18, 1985, and he was entitled to and did receive
5 temporary total disability (time loss compensation) for such period.
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- 7 6. During the period September 29, 2000 through April 30, 2003,
8 Mr. Hamilton was capable of performing light work, but only as a
9 teacher's aide, a job which was only available six hours per day, five
10 days per week, ten months per year. During this period, such jobs paid
11 \$8.72 per hour and did not include employer-provided health insurance
12 benefits.
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- 14 7. During the period September 29, 2000 through April 30, 2003, miners
15 working for employers other than Hecla Mining Company earned:
16 \$27.65 per hour during the period September 29, 2000 through
17 December 31, 2000; \$28.76 per hour during the period January 1, 2001
18 through December 31, 2002; and \$29.90 per hour during the period
19 January 1, 2003 through April 30, 2003. In addition, during the period
20 September 29, 2000 through April 30, 2003, miners working for
21 employers other than Hecla Mining Company received
22 employer-sponsored health care benefits.
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- 24 8. There are no genuine issues as to any fact material to the issues raised
25 by this appeal.
26

CONCLUSIONS OF LAW

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- 29 1. The Board of Industrial Insurance Appeals has jurisdiction over the
30 parties to and the subject matter of this appeal, which raises no material
31 issue of fact and can be decided as a matter of law.
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- 33 2. As of April 30, 2003, the condition of the claimant, Jack D. Hamilton,
34 proximately caused by his injury of March 18, 1985, was medically fixed
35 and stable and he was no longer in need of proper and necessary
36 medical services within the meaning of RCW 51.36.010.
37
- 38 3. As of April 30, 2003, the condition of the claimant, Jack D. Hamilton,
39 proximately caused by his injury of March 18, 1985, had not become
40 permanently aggravated, and his permanent partial disability under
41 RCW 51.32.080, proximately caused by the injury of March 18, 1985,
42 remained best described by Category 5 of the categories of permanent
43 dorso-lumbar and lumbosacral impairments, a disability for which he had
44 received an award when his claim was originally closed on December 7,
45 1995. As of April 30, 2003, Mr. Hamilton was capable of obtaining and
46 performing reasonably continuous and gainful employment as a
47 teacher's aide.

1 4. During the period September 29, 2000 to April 30, 2003, Mr. Hamilton's
2 condition, proximately caused by his injury of March 18, 1985, was not
3 fixed and stable, his earning capacity during such period was only
4 partially restored to the earning capacity he had at the time of his injury.
5 The reduced earning capacity was proximately caused by his injury of
6 March 18, 1985, and the reduced earning capacity was at least
7 5 percent less than his earning capacity at the time of the injury.
8 RCW 51.32.090.

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10 5. The order of the Department dated April 30, 2003, is incorrect and is
11 reversed. This claim is remanded to the Department to direct the
12 self-insured employer to pay Mr. Hamilton loss of earning power benefits
13 and/or temporary total disability benefits for the period September 29,
14 2000 to April 20, 2003, calculated by comparing the then-existing
15 residual earning power to that which the claimant had at the time of
16 injury, consistent with the Stipulation of Facts entered into between the
17 claimant and the employer in this appeal, and consistent with *Hunter v.*
18 *Department of Labor & Indus.*, 43 Wn.2d 696 (1953), and *In re Chester*
19 *Brown*, BIIA Dec., 88 1326 (1989), but to otherwise close the claim,
20 effective April 30, 2003, with time loss compensation, loss of earning
21 power benefits, medical benefits and permanent partial disability
22 awards, as paid.

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24 It is so **ORDERED**.

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26 Dated this 22nd day of September, 2004.

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28 BOARD OF INDUSTRIAL INSURANCE APPEALS

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33 _____
34 THOMAS E. EGAN Chairperson

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39 FRANK E. FENNERTY, JR. Member

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44 CALHOUN DICKINSON Member