

Parker, John

LOSS OF EARNING POWER (RCW 51.32.090(3))

Entitlement after reopening

In order to be entitled to loss of earning power benefits after a claim has been reopened, it is necessary to establish that the aggravation caused a temporary total loss of wages or an actual loss of earning power.*In re John Parker*, BIIA Dec., 03 23407 (2005)

[*Editor's Note*: The Board's decision was appealed to superior court under Skagit County Cause No. 05-2-00443-9.]

Scroll down for order.

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

1 **IN RE: JOHN L. PARKER**) **DOCKET NO. 03 23407**
2)
3 **CLAIM NO. W-232831**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, John L. Parker, by
8 Stiles & Stiles, Inc., P.S., per
9 Brock D. Stiles

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11 Self-Insured Employer, Asplundh Tree Expert Co., by
12 Vandenberg Johnson & Gandara, per
13 Charles R. Bush

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15 Department of Labor and Industries, by
16 The Office of the Attorney General, per
17 Diana Sheythe Cartwright, Assistant
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19 The self-insured employer, Asplundh Tree Expert Co. (Asplundh), placed an appeal in the
20 U.S. Postal Service on December 5, 2003, which was received by the Board of Industrial Insurance
21 Appeals on December 8, 2003, from an order of the Department of Labor and Industries dated
22 October 6, 2003. In this order, the Department affirmed a March 24, 2003 Department order, in
23 which the Department directed Asplundh to pay the claimant, John L. Parker, time loss
24 compensation starting July 18, 2001, and continuing through the date of the order. The Department
25 order is **REVERSED AND REMANDED**.
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29 **PROCEDURAL AND EVIDENTIARY MATTERS**

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31 The industrial appeals judge, in a Proposed Decision and Order issued September 21,
32 2004, reversed and remanded the appealed Department order. The industrial appeals judge
33 denied Mr. Parker the time loss compensation for the period that the Department had directed,
34 July 18, 2001 through October 6, 2003, but the industrial appeals judge determined Mr. Parker was
35 entitled to loss of earning power benefits for that same period and directed the Department to
36 calculate the specific amount due for loss of earning power during the period. Upon request, the
37 Board extended the period applicable to all parties for filing Petitions for Review to November 8,
38 2004. Asplundh filed its Petition for Review on September 30, 2004. Mr. Parker filed by mail on
39 November 8, 2004, a Claimant's Reply to Employer's Petition for Review, as well as a separate
40 Petition for Review. This matter is therefore before the Board for review and decision, pursuant to
41 RCW 51.52.104 and RCW 51.52.106.
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1 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
2 no prejudicial error was committed. The rulings are affirmed.
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4 We were required in any event to grant review because the statutory time for this Board to
5 grant or deny review on Asplundh's Petition for Review, twenty days from receipt of a Petition for
6 Review, would have run before the November 9, 2004 extension that we had provided to all parties
7 for filing Petitions for Review. See RCW 51.52.104 and RCW 51.52.106.
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10 DECISION

11 John L. Parker slipped and fell, injuring his low back on May 14, 1998, during the course of
12 his employment as a groundsman with Asplundh, a self-insured employer. The Department
13 allowed the claim and Asplundh provided for treatment and time loss benefits. The Department
14 closed Mr. Parker's claim on January 28, 1999, upon directing Asplundh to provide an award for
15 permanent partial disability consistent with Category 2 of WAC 296-20-280, the categories of
16 permanent dorso-lumbar and/or lumbosacral impairments. On October 19, 2000, Mr. Parker
17 applied to reopen the claim for aggravation of condition. Litigation at this Board resulted in a
18 direction that the Department reopen Mr. Parker's claim effective October 11, 2000. Asplundh has
19 now appealed from a Department order wherein, in effect, the Department directed Asplundh to
20 provide time loss compensation and vocational benefits for temporary total disability from
21 employment during the period July 18, 2001 through October 6, 2003. The industrial appeals judge
22 denied the time loss compensation, but determined entitlement to loss of earning power
23 compensation and remanded to the Department to calculate the actual entitlement amount.
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31 In addition to the reason of statutory time constraints earlier stated, we have granted review
32 as well to consider, for this appeal, the significance of a holding of our State Supreme Court in
33 *Hubbard v. Department of Labor & Indus.*, 140 Wn.2d 35 (2000). In the matter before us,
34 Mr. Parker's claim, as indicated, had been closed and then reopened on the basis of aggravation of
35 the condition caused by the industrial injury. The court in *Hubbard* held that in such circumstances
36 an injured worker is not entitled to compensation for lost earning power unless the aggravation
37 proximately caused a temporary total loss of wages or an actual loss of earning power.
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40 The industrial appeals judge premised the determination of entitlement to compensation
41 upon a comparison of Mr. Parker's earning power during the contested period with Mr. Parker's
42 earnings **at the time of the industrial injury that gave rise to this claim**. The industrial appeals
43 judge did not take into account the *Hubbard* ruling, requiring a threshold showing that aggravation
44 of the industrial injury had caused temporary total disability and/or the loss of earning power.
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1 We agree with Asplundh's assertion and with the industrial appeals judge that Mr. Parker
2 was not temporarily totally disabled during the period July 18, 2001 through October 6, 2003, and
3 that he, therefore, is not entitled to full time loss compensation during that period. The industrial
4 appeals judge identified the relevant evidence and ably articulated the reasons for this
5 determination in the Proposed Decision and Order. In sum, Asplundh showed that it made the job
6 of flagger available to Mr. Parker with any accommodations that would have been necessary to his
7 performance of the flagger job during the period. Mr. Parker's evidence to the contrary, essentially
8 contending that the accommodations would not have been adequate, is not convincing.

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10 We also find that Mr. Parker's earning power during the period July 18, 2001 through
11 October 6, 2003, was not adversely affected by **aggravation** of the industrial injury since the last
12 claim closure before the aggravation period in question. As noted by the industrial appeals judge,
13 Mr. Parker had returned to work with Asplundh as a flagger prior to claim closure and continued to
14 work in that capacity through claim closure. The wages he was capable of earning at the
15 accommodated flagger position during the period now in question, July 18, 2001 through October 6,
16 2003, were the same as he was earning at the time of claim closure. Therefore, Mr. Parker's
17 situation does not satisfy one of the alternative thresholds for loss of earning power compensation
18 upon claim reopening that the court identified in *Hubbard*—that the **aggravation** proximately
19 caused actual loss of earning power.

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21 In his Claimant's Reply to Employer's Petition for Review, Mr. Parker contends that his
22 situation nevertheless satisfies the other alternative threshold in *Hubbard*—that the **aggravation**
23 proximately caused a temporary total loss of wages. Mr. Parker contends that he was temporarily
24 totally disabled from employment during the period October 11, 2000 through July 17, 2001, which
25 is the period immediately preceding the period of loss of earning power for which the industrial
26 appeals judge directed the Department to calculate actual entitlement. At hearing, although none of
27 the physicians were asked questions directly related to this period, Mr. Parker did explain why he
28 felt he could not work during the period. And, according to Mr. Parker's testimony, which Asplundh
29 did not refute, Asplundh paid Mr. Parker time loss compensation payments for this period,
30 October 11, 2000 through July 17, 2001.

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32 The contended loss of earning power, for the period July 18, 2001 through October 6, 2003,
33 is squarely before the Board for review in this appeal. In the particular circumstances of this
34 appeal, and for **purposes limited solely to the appeal before us**, we find that Asplundh has
35 acquiesced in Mr. Parker's contention that he was temporarily totally disabled from employment

1 during the preceding period October 11, 2000 through July 17, 2001, due to aggravation of his
2 injury. Mr. Parker thereby, for purposes in this appeal of considering entitlement to loss of earning
3 power compensation for a subsequent period, meets the alternative threshold in *Hubbard*—that the
4 **aggravation** proximately caused a temporary total loss of wages in a period prior to the period of
5 contended entitlement to loss of earning power compensation. As indicated, at hearing Asplundh
6 did not challenge Mr. Parker's contention related to the period October 11, 2000 through July 17,
7 2001. Mr. Parker again, in his Petition for Review, made the assertion that he was temporarily
8 totally disabled during this period. Asplundh has not denied this assertion in its pleadings, even
9 though Asplundh discussed *Hubbard* in its Petition for Review. And, as indicated, it is established
10 that Asplundh paid time loss compensation for the period October 11, 2000 through July 17, 2001.

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16 However, due to the Board's limited scope of review, we must stop short of making a final
17 determination of whether Mr. Parker is ultimately entitled to the time loss already paid by Asplundh
18 for the period October 11, 2000 through July 17, 2001. We have not been made aware of any **final**
19 **Department of Labor and Industries order** that determines whether Mr. Parker was temporarily
20 totally disabled during any part of that period. The Jurisdictional History stipulated by Mr. Parker
21 and Asplundh does indicate that the Department issued an order on February 3, 2003, in which the
22 Department directed Asplundh to provide an award for permanent partial disability for increased
23 permanent impairment and closed the claim with time loss compensation as paid through July 17,
24 2001. The Department, though, by an order dated March 10, 2003, cancelled the February 3, 2003
25 order and held the claim open for further treatment. The Department has not, to our knowledge,
26 revisited by way of a determinative order the matter of whether Mr. Parker was temporarily totally
27 disabled during any of the period of October 11, 2000 through July 17, 2001.

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34 Balancing the goal of the Board fully deciding a matter, including closely related and
35 arguably subsumed issues, against limitations of our review authority is not a novel task. And there
36 is no absolute, simple rule that can foresee all possible circumstances and foretell the proper
37 determination in all circumstances. We recently visited the issue of how far our scope of review
38 may extend to issues not **explicitly** determined by the Department, in *In re Robert L. Harvey*, Dckt.
39 Nos. 03 12923 & 03 12924 (September 22, 2004). We characterized the considerations in the
40 following manner.

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44 This Board has review authority necessary to fulfill our obligation to make
45 findings and conclusions upon each contested issue of fact and law in a matter properly
46 before us, as directed in RCW 51.52.104 and RCW 51.52.106. In determining our
47 scope of review, we must be mindful of (a) our obligations, under RCW 51.52.104 and

1 RCW 51.52.106, to fully decide cases properly before us, while also adhering to (b) the
2 principle that our jurisdiction is appellate-only:
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4 It is not disputed that the board's and the superior court's
5 jurisdiction is appellate only, and for the board and the trial court to
6 consider matters not first determined by the department would usurp the
7 prerogatives of the department, the agency vested by statute with
8 original jurisdiction. Both parties agree that if a question is not passed
9 upon by the department, it cannot be reviewed either by the board or the
10 superior court.

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12 *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977, 982 (1970).

13 To ascertain whether the board acted within its proper scope of review
14 . . . we look to the provisions of the order appealed to the board. The
15 questions the board may consider and decide are fixed by the order
16 from which the appeal was taken. . . as limited by the issues raised by
17 the notice of appeal. *Brakus v. Department of Labor & Indus.*, 48 Wn.2d
18 218 . . . (1956).
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20 *Lenk*, at 982.

21 A scope of review analysis raises the question: Is it proper to
22 consider particular evidence, and make detailed findings of fact and
23 conclusions of law in light of the appellant's contentions that a specific
24 Department order is incorrect?
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27 *Harvey*, at 2-3.

28 In the appeal before us, having determined that Mr. Parker is not entitled to full time loss
29 compensation for a period squarely before us, we must also determine whether he is entitled to
30 partial time loss compensation, that is, loss of earning power compensation, for the same period. In
31 order to do so, *Hubbard* requires that we consider whether Mr. Parker's aggravation proximately
32 caused a temporary total loss of wages during any of the preceding period October 11, 2000
33 through July 17, 2001. Two major considerations related to the Board's limited scope of review, in
34 the absence of a final **Department** order regarding this prior period, leads us to fall short of a final,
35 legally binding determination that Mr. Parker is ultimately entitled to time loss compensation for the
36 period October 11, 2000 through July 17, 2001. The first reason, of course, is that the Department
37 has not issued a written order determining that issue.
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39 Second, Asplundh's present appeal is differentiated from those instances where we have
40 determined such subsumed issues, for instance, whether a particular medical condition exists and
41 was caused by the industrial injury in order to determine a broader issue before the Board such as
42 worsening, even though the Department had not yet made a determination on the subsumed issue
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1 considered. See *In re Donna Jones (Simmons)*, BIIA Dec., 99 23362 (2001). Indeed, in an appeal
2 of a denial of reopening, we declined to reach issues concerning **particular benefits** such as
3 treatment or award for permanent partial disability, after determining that the matter of existence of
4 a condition and causation and worsening of that condition were necessarily within the scope of our
5 review, even though the Department had not decided those subsumed issues. We determined the
6 subsumed issues regarding the condition, but remanded the matter to the Department to determine
7 benefits due, if any, upon reopening the claim. See *In re Ronald Holstrom*, BIIA Dec., 70,033
8 (1986). We, if possible, avoid encroaching upon the Department's original jurisdiction to determine
9 actual workers' compensation benefits, even though determination of an arguably subsumed issue
10 in an appeal before us is very closely connected to a benefit issue not yet determined by the
11 Department.
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14 We determine that Mr. Parker is not entitled to time loss compensation during the period
15 July 18, 2001 through October 6, 2003. However, for the above-stated reasons we find that, in this
16 appeal and for these purposes only, Asplundh has acquiesced in Mr. Parker's contention that
17 aggravation of the industrial injury caused a temporary total loss of wages, meeting an alternate
18 *Hubbard* threshold for subsequent loss of earning power compensation during the period July 18,
19 2001 through October 6, 2003. Having found that one of the *Hubbard* threshold requirements has
20 been met, we otherwise agree with the industrial appeals judge that Mr. Parker's actual loss of
21 earning power compensation is to be based on a comparison of wages at the time of injury, with the
22 wage earning capacity during the period of contended loss of earning power at issue, the period
23 July 18, 2001 through October 6, 2003. See *In re Jack D. Hamilton*, Dckt. No. 03 14743
24 (September 22, 2004). We do not have before us a sufficient record to make such a calculation.
25 We remand the matter to the Department for that purpose.
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28 We have considered the Proposed Decision and Order, Asplundh's Petition for Review,
29 Mr. Parker's Reply and Mr. Parker's Petition for Review. Based on a thorough review of the record
30 before us, we make the following Findings of Fact and Conclusions of Law.
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32 **FINDINGS OF FACT**

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1. The claimant, John L. Parker, injured his low back during the course of employment with Asplundh Tree Expert Co. (Asplundh) on May 14, 1998. He filed an application for benefits with the Department of Labor and Industries on June 1, 1998. On June 12, 1998, the Department issued an order in which it allowed the claim. On January 28, 1999, the Department issued an order in which it closed the claim with a permanent partial disability award equal to Category 2 of permanent dorso-lumbar and/or lumbosacral impairments.

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2 On October 19, 2000, Mr. Parker filed an application to reopen his claim.
3 On January 4, 2001, the Department issued an order in which it denied
4 the application. On February 16, 2001, Mr. Parker filed a Protest and
5 Request for Reconsideration. On July 9, 2001, the Department issued
6 an order in which it affirmed the order of January 4, 2001. On July 23,
7 2001, Mr. Parker filed a Notice of Appeal with the Board of Industrial
8 Insurance Appeals. On August 23, 2001, the Board granted the appeal,
9 assigned it Docket No. 01 18644, and directed that proceedings be held.
10 On May 20, 2002, the Board, in Docket No. 01 18644, issued a
11 Proposed Decision and Order in which the industrial appeals judge
12 reversed the Department order of July 9, 2001, and remanded the claim
13 to the Department with directions to reopen Mr. Parker's claim and to
14 direct the self-insured employer to provide Mr. Parker with such benefits
15 as he is entitled to under the facts and the law. On July 19, 2002, the
16 Board, in Docket No. 01 18644, issued an Order Adopting Proposed
17 Decision and Order.

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19 On August 5, 2002, the Department issued an order in which it
20 reopened the claim effective October 11, 2000. On March 24, 2003, the
21 Department issued an order in which it awarded Mr. Parker time loss
22 compensation beginning July 18, 2001, to the date of the order, and
23 continuing. On April 7, 2003, the self-insured employer filed a Protest
24 and Request for Reconsideration. On October 6, 2003, the Department
25 issued an order in which it affirmed its order of March 24, 2003. On
26 December 5, 2003, the self-insured employer mailed a Notice of Appeal
27 to the Board of Industrial Insurance Appeals, which was properly
28 addressed and with the proper postage affixed from the Department
29 order dated October 6, 2003. On December 8, 2003, the Board
30 received the Notice of Appeal. On December 18, 2003, the Board
31 granted the appeal, assigned it Docket No. 03 23407, and directed that
32 proceedings be held.

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34 2. Mr. Parker injured his low back during the course of his employment
35 with Asplundh on May 14, 1998, when he slipped and fell, landing on his
36 back.
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38 3. Mr. Parker's low back condition, proximately caused by his industrial
39 injury of May 14, 1998, can best be described as mechanical low back
40 pain.
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42 4. Mr. Parker was born on October 4, 1945. He graduated from high
43 school in 1964, after which he worked various jobs, all requiring manual
44 labor and/or driving a forklift.
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46 5. Mr. Parker was working as a groundsman for Asplundh on May 14,
47 1998, when he was injured. The duties of a groundsman require heavy
manual labor.

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6. Aggravation or worsening of his industrial injury has not caused Mr. Parker loss of earning power during the period July 18, 2001 and ending October 6, 2003. The appealing self-insured employer, Asplundh, paid Mr. Parker time loss compensation for the period beginning October 11, 2000 and ending July 17, 2001, but the Department of Labor and Industries has not issued a final order concerning that period. For purposes of this appeal only, Asplundh has acquiesced in Mr. Parker's assertion that aggravation of his industrial injury caused him to be temporarily totally disabled from employment during some of, or all of, the period October 11, 2000 through July 17, 2001.
 7. For the period beginning July 18, 2001 through October 6, 2003, Mr. Parker was no longer able to perform the duties of a groundsman, nor any other job that required heavy manual labor, due to the residuals of his May 14, 1998 industrial injury.
 8. Mr. Parker, given his age, education, and work experience, was not precluded by the residuals of the industrial injury of May 14, 1998, from engaging in gainful employment on a reasonably continuous basis for the period beginning July 18, 2001 and ending October 6, 2003. In particular, he could perform the duties of a flagger, for which he had training and experience, and for which there was a labor market within a reasonable commute from his home. Mr. Parker was able to perform the position of flagger at the time of first claim closure on January 28, 1999. The earnings of a flagger represent Mr. Parker's earning capacity during the period July 18, 2001 through October 6, 2003, and such earning capacity was at least five percent less than his earning capacity at the time of his industrial injury.

CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal, which was timely filed.
 2. Mr. Parker, for the period beginning July 18, 2001 and ending October 6, 2003, was not a temporarily totally disabled worker within the meaning of RCW 51.32.090.
 3. Mr. Parker, for the period beginning July 18, 2001 and ending October 6, 2003, meets one of the alternate threshold requirements for loss of earning power compensation under *Hubbard v. Department of Labor & Indus.*, 140 Wn.2d 35 (2000), to wit, that the aggravation of his industrial injury proximately caused a temporary total loss of wages during a preceding period. He does not meet the other alternate threshold, that the aggravation caused a loss of earning power during that period.

