

## **Bean, Karl**

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

#### **Effect of not working**

When a worker is not working, but demonstrates a requisite loss of earning power, the worker may be entitled to loss of earning power benefits. Benefits may not be denied merely because the worker was not working for periods of time in which he seeks the benefit. ...*In re Karl Bean*, BIIA Dec., 04 19814 (2006)

Scroll down for order.

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

**IN RE: KARL D. BEAN** ) **DOCKET NOS. 04 19814 & 05 15615**  
 )  
**CLAIM NO. Y-534856** ) **DECISION AND ORDER**

**APPEARANCES:**

Claimant, Karl D. Bean, by  
Robinson & Kole, P.S., Inc., per  
Dennis A. Kole

Employer, Canfor USA Corp., by  
TOC Management Services, per  
Joanne Collier

Department of Labor and Industries, by  
The Office of the Attorney General, per  
Kerena A. Higgins, Assistant

**Docket No. 04 19814:** Karl D. Bean, the claimant, filed a protest with the Department of Labor and Industries on January 27, 2004, from an order of the Department of Labor and Industries dated December 2, 2003. In this order, the Department affirmed its November 6, 2003 order wherein the Department held Mr. Bean's claim open and paid benefits for loss of earning power for the period September 29, 2003 through October 1, 2003, but ended time loss compensation benefits and loss of earning power benefits effective October 1, 2003, for the stated reason that Mr. Bean's employment was terminated. The Department forwarded Mr. Bean's protest to the Board of Industrial Insurance Appeals on October 11, 2004. The Department order is **REVERSED AND REMANDED.**

**Docket No. 05 15615:** Mr. Bean filed an appeal with the Board on May 24, 2005, from an order of the Department dated May 18, 2005. In this order, the Department denied time loss compensation benefits for the period December 3, 2003 through March 28, 2005, for the stated reason that Mr. Bean was able to work. The Department order is **REVERSED AND REMANDED.**

**PROCEDURAL AND EVIDENTIARY MATTERS**

In a Proposed Decision and Order issued on October 6, 2005, the industrial appeals judge reversed and remanded the Department orders dated December 2, 2003 and May 18, 2005. The industrial appeals judge directed the Department to: deny time loss and loss of earning power compensation for the period October 2, 2003 through October 8, 2003; pay time loss compensation for the period October 9, 2003 through December 29, 2003; and deny time loss and loss of earning

1 power compensation for the period December 30, 2003 through March 28, 2005. Mr. Bean filed a  
2 timely Petition for Review to the Proposed Decision and Order. This matter is therefore before the  
3 Board for review and decision pursuant to RCW 51.52.104 and RCW 51.52.106.

4 The Board has reviewed the evidentiary rulings in the Board record. We find no prejudicial  
5 error in these rulings. The evidentiary rulings are affirmed.

### 6 **DECISION**

7 Although directing benefits for other periods, the industrial appeals judge denied Karl D.  
8 Bean loss of earning power benefits for October 2, 2003 through October 8, 2003, and for  
9 December 30, 2003 through March 28, 2005, for the sole reason that Mr. Bean was not working  
10 because he had been terminated from employment for insubordination. There appears no  
11 significant dispute over the facts. Mr. Bean asks only that we review the industrial appeals judge's  
12 legal conclusion denying loss of earning power compensation for the reason that Mr. Bean was not  
13 working. We agree with Mr. Bean that lack of employment, whether due to termination for cause or  
14 otherwise, does not preclude entitlement to loss of earning power compensation for periods during  
15 which sufficient lost earning capacity is otherwise shown.

16 Mr. Bean sustained this industrial injury to his low back on January 16, 2003, during the  
17 course of his employment with Canfor USA Corp., pulling green chain in a lumber mill. Gary  
18 McCallum, M.C., board certified in family medicine, provided treatment including medications,  
19 physical therapy, and epidural steroid injections. Before the injury, Mr. Bean had worked eight  
20 hours a day, five days a week. His wage was \$8.50 or \$9 an hour. Mr. Bean returned to work in a  
21 light duty position as a bar coder for \$8 an hour. He continued to experience back pain while doing  
22 this job, and he was provided with a chair and anti-fatigue mats. The chair helped, but the mats did  
23 not. Sometimes Mr. Bean did not put the mats down because they were dirty and he did not want  
24 to touch them. Mr. Bean continued to work two to three hours a day until October 1, 2003. On that  
25 day a supervisor told Mr. Bean to put the mats down. Mr. Bean refused and he was fired for  
26 insubordination. After being fired, Mr. Bean entered vocational retraining.

27 Dr. McCallum and Phillip Ballard, M.D., a certified neurologist who examined Mr. Bean on  
28 December 30, 2003, agreed that during the period October 2, 2003 through October 8, 2003,  
29 Mr. Bean would have been limited to a few hours per day of light duty work. The industrial appeals  
30 judge therefore determined that Mr. Bean would have continued to be employable in his light duty  
31 position for Canfor and would therefore not been entitled to full time loss compensation benefits, but  
32 would have been entitled to loss of earning power benefits had Mr. Bean not engaged in an act of

1 insubordination on October 1, 2003, and been fired. The industrial appeals judge reasoned that  
2 Mr. Bean's termination on October 1, 2003, was the superseding cause for his inability to work  
3 between October 2, 2003 and October 8, 2003, and that Mr. Bean is not entitled to recover time  
4 loss or loss of earning power benefits for a period during which he was able to work, but through his  
5 own actions rendered himself unemployed.

6 The industrial appeals judge did find that Mr. Bean proved that he was entitled to time loss  
7 compensation for the period October 9, 2003 through December 29, 2003. Dr. McCallum testified  
8 that as of October 9, 2003, Mr. Bean had increased symptoms, including spasm, and that he was  
9 no longer physically able to work in his light duty position with Canfor. As of October 9, 2003,  
10 Mr. Bean would not have been employable at Canfor even if he had not been fired, and even if the  
11 position as a bar coder was still available to him. On October 9, 2003, the industrial injury became  
12 the proximate cause of Mr. Bean's inability to work.

13 Finally, the industrial appeals judge determined that Mr. Bean did not prove that he was  
14 unable to work between December 30, 2003 and March 28, 2005. On December 30, 2003,  
15 Dr. Ballard examined Mr. Bean. Mr. Bean's symptoms had decreased. For example, he had no  
16 muscle spasm. The industrial appeals judge reasoned that because Dr. McCallum's opinion that  
17 Mr. Bean was unable to engage in work as a bar coder was premised upon his exhibiting spasm  
18 and increased symptoms, the resolution of this temporary exacerbation by December 30, 2003,  
19 would have resulted in Mr. Bean again being employable in a light duty position for two or three  
20 hours a day. Dr. McCallum did not testify that he examined Mr. Bean after October 9, 2003, or that  
21 Mr. Bean had any exacerbations in his condition after December 30, 2003. Again, the industrial  
22 appeals judge determined that the reason Mr. Bean was not working as of December 30, 2003, was  
23 Mr. Bean's insubordination at work and consequent discharge from employment. The industrial  
24 appeals judge determined that as of December 30, 2003, Mr. Bean was employable as a bar coder,  
25 but he had voluntarily disqualified himself for continued employment by his refusal to comply with  
26 his employer's reasonable instructions.

27 We have previously found, in RCW 51.32.090, that there is no requirement that an injured  
28 worker must be actually working in order to receive loss of earning power compensation to which  
29 the worker would otherwise be entitled. *In re Ralph Faulder, Jr.*, BIIA Dec., 94 2765 (1996).  
30 RCW 51.32.090(1) and (2) provide full rate time loss compensation when "disability" from  
31 employment is temporary but total. Where earning power at any kind of work has been restored to  
32 earning power at the time of injury, time loss compensation ceases. We agree, as does Mr. Bean

1 explicitly in his Petition for Review, that he is not entitled to full time loss compensation for periods  
2 other than those already directed by the industrial appeals judge. The issue for decision here  
3 concerns only loss of earning power compensation. Where earning power is partially restored,  
4 RCW 51.32.090(3)(a)(ii) provides that for claims for injuries occurring on or after May 7, 1993, if a  
5 worker is indeed working during the period of contended loss of earning power, the actually-earned  
6 wages may serve as the basis for computing the loss of earning power compensation without going  
7 further to consider whether those wages indeed reflect maximum earning capacity at the time. The  
8 worker may receive eighty percent (80%) of the difference between these wages and earning  
9 power at the time of injury. However, the total of the compensation payments and wages earned  
10 during the period may not exceed one hundred fifty percent (150%) of the full time loss  
11 compensation rate. The statute further provides: "the payments may not be less than the worker  
12 would have received if (a)(i) of this subsection had been applicable to the worker's claim." The  
13 referenced portion, (a)(i) of the subsection, provides that for claims arising for injuries that occurred  
14 before May 7, 1993, the loss of earning power compensation is time loss compensation "in the  
15 proportion which the new earning power shall bear to the old." A further condition is stated in  
16 (3)(b), that in either instance, no loss of earning power compensation is payable unless "the loss of  
17 earning power shall exceed five percent."

18         Given the plain language of the statute, not reducing compensation to less than  
19 entitlement under (a)(i), we have no hesitation in holding that, where a worker is not working, but  
20 shows loss of earning power caused by the covered injury greater than five percent, the worker is to  
21 receive the percentage of time loss compensation that otherwise reflects the lost earning capacity.  
22 See also *In re Patricia Heitt*, BIIA Dec., 87 1100 (1989). We therefore find that the Department's  
23 orders are incorrect insofar as they deny Mr. Bean loss of earning power compensation solely  
24 because he was not working during periods of contended entitlement.

25         On the other hand, we recognize that a worker may terminate, or be properly terminated  
26 from, employment **following** upon a period in which the worker's earning power compensation had  
27 been previously calculated under RCW 51.32.090(3)(a)(ii) – using the eighty percent of difference  
28 between earning capacity at injury and present wage method. This is the circumstance in  
29 Mr. Bean's case. In such circumstances, we perceive no basis in the law for continuing to calculate  
30 loss of earning power compensation under the eighty percent method – *i.e.*, based upon what the  
31 worker's actual earnings would have been had he or she maintained the particular lesser paying  
32 employment. In clear statutory terms, that particular method is premised upon the "actual

1 difference between the worker's **present** wages and earning power at the time of injury."  
2 RCW 51.32.090(3)(a)(ii) (Emphasis added.) Without **present** wages, the method is inapplicable.  
3 Not only is this apparent from a plain reading of the statute, this is also consistent with what we  
4 believe to be policy presumptions underlying in the legislation: (a) that, if a worker is indeed  
5 working, the worker is likely to be attempting to work at or near maximum earning capacity within  
6 the limits imposed by his or her injury; and (b) such efforts should be recognized by allowing for  
7 potentially greater compensation when the worker does return to, and while he or she remains in,  
8 the labor force – this being a primary goal of our workers' compensation system. In any event, we  
9 believe the statutory scheme is clear – where there is five percent or greater loss of earning  
10 capacity, but the injured worker is not in fact working, then (3)(a)(i) must apply – compensation is  
11 the time loss rate "in proportion which the new earning power shall bear to the old." *Heitt*.

12 We remand this matter to the Department to provide the time loss compensation directed by  
13 the industrial appeals judge. We also remand the matter to the Department to consider Mr. Bean's  
14 entitlement to loss of earning power compensation even though he was not actually employed  
15 during the period October 2, 2003 through October 8, 2003, and during the period December 30,  
16 2003 through March 28, 2005. It may be practical or otherwise reasonable for the Department to  
17 determine Mr. Bean's earning capacity during these periods by way of inference from his hours and  
18 hourly earnings in lighter duty employment as a bar coder. However, since Mr. Bean was not  
19 employed actually during these periods, it is not statutorily required that the Department limit its  
20 determination of Mr. Bean's earning capacity during these periods to his earnings in the bar coder  
21 position.

22 We have considered the Proposed Decision and Order and Mr. Bean's Petition for Review.  
23 Based on a thorough review of the record before us, we make the following Findings of Fact and  
24 Conclusions of Law.

### 25 **FINDINGS OF FACT**

26 1. On January 30, 2003, the claimant, Karl D. Bean, filed an application for  
27 benefits with the Department of Labor and Industries, wherein he  
28 alleged that he sustained an industrial injury on January 16, 2003, while  
29 in the course of employment with Canfor USA Corp. On February 6,  
30 2003, the Department allowed the claim. On November 6, 2003, the  
31 Department issued an order in which it provided loss of earning power  
32 benefits for the period September 29, 2003 through October 1, 2003,  
and ended time loss compensation and loss of earning power benefits  
October 1, 2003, for the stated reason that Mr. Bean's employment was  
terminated. Mr. Bean protested that order within sixty days of its  
issuance. On December 2, 2003, the Department issued an order in

1 which it affirmed the order dated November 6, 2003. On January 27,  
2 2004, Mr. Bean protested the order dated December 2, 2003. On  
3 October 11, 2004, the Department forwarded the protest to the Board of  
4 Industrial Insurance Appeals as a direct appeal. On October 13, 2004,  
5 the Board issued an Order Granting Appeal and assigned it Docket  
6 No. 04 19814.

- 7 2. On May 18, 2005, the Department issued an order in which it denied  
8 Mr. Bean time loss benefits for the period December 3, 2003 through  
9 March 28, 2005. On May 24, 2005, Mr. Bean appealed the order to the  
10 Board of Industrial Insurance Appeals. On June 8, 2005, the Board  
11 issued an Order Granting Appeal and assigned it Docket No. 05 15615.
- 12 3. Karl D. Bean is 48 years old. He has an eleventh grade education. On  
13 January 16, 2003, Mr. Bean sustained an injury to his low back while  
14 working for Canfor USA Corp., pulling green chain. At the time of his  
15 injury, Mr. Bean worked eight hours a day, five days a week and earned  
16 \$8.50 an hour.
- 17 4. The industrial injury caused Mr. Bean to have a low back sprain/strain.
- 18 5. During the period October 2, 2003 through October 8, 2003, Mr. Bean  
19 was limited by the residuals of his industrial injury, which caused him to  
20 be unable to perform the work he was performing at the time of his  
21 industrial injury. He was able to work at least two hours a day, five days  
22 a week at the light duty job of bar coder for Canfor USA Corp. He would  
23 have been paid \$8 an hour for this work.
- 24 6. On October 1, 2003, Mr. Bean committed an act of insubordination at  
25 work. He refused to place down anti-fatigue mats that had been  
26 recommended by an occupational therapist and provided by his  
27 employer. The employer responded by terminating Mr. Bean's  
28 employment.
- 29 7. Had Mr. Bean not committed an act of insubordination at work on  
30 October 1, 2003, he would have continued to be employed as a bar  
31 coder from October 2, 2003 through October 8, 2003.
- 32 8. Throughout the period October 9, 2003 through December 29, 2003,  
Mr. Bean experienced an exacerbation of his industrial injury that was  
manifested by spasm in his low back. During this time Mr. Bean was  
precluded by the residuals of his industrial injury from engaging in any  
reasonably continuous, gainful employment, including light duty work as  
a bar coder.
9. As of December 30, 2003, Mr. Bean no longer manifested spasm in his  
low back, and had returned to the physical condition he had been in as  
of October 8, 2003.

- 1 10. Throughout the period December 30, 2003 through March 28, 2005, due  
2 to the effects of his industrial injury, Mr. Bean was incapable of  
3 performing the work in which he was employed at the time of the  
4 industrial injury. He was during this period capable of working at least  
5 two hours a day, five days a week as a bar coder for Canfor. During this  
6 period of time Mr. Bean would have continued to be employed in his  
7 position as a bar coder had he not committed an act of insubordination  
8 on October 1, 2003.

### 7 CONCLUSIONS OF LAW

- 8 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
9 parties to and the subject matter of these appeals.
- 10 2. Mr. Bean was not entitled to full time loss compensation benefits  
11 pursuant to RCW 51.32.090 for the period October 2, 2003 through  
12 October 8, 2003.
- 13 3. The fact that Mr. Bean was not employed during the period October 2,  
14 2003 through October 8, 2003, does not legally preclude Mr. Bean from  
15 entitlement to loss of earning power benefits pursuant to  
16 RCW 51.32.090(3). Mr. Bean's loss of earning power benefits, if any,  
17 during this period should be calculated by multiplying his time loss rate  
18 by the percentage of lost earning capacity when comparing his earnings  
19 at the time of injury to his earning capacity during the period October 2,  
20 2003 through October 8, 2003, if such loss is five percent or greater.
- 21 4. Mr. Bean was entitled to full time loss compensation for the period  
22 October 9, 2003 through December 29, 2003, pursuant to  
23 RCW 51.32.090.
- 24 5. Mr. Bean was not entitled to full time loss compensation for the period  
25 December 30, 2003 and March 28, 2005, pursuant to RCW 51.32.090.
- 26 6. The fact that Mr. Bean was not employed during the period  
27 December 30, 2003 through March 28, 2005, does not legally preclude  
28 Mr. Bean from entitlement to loss of earning power benefits pursuant to  
29 RCW 51.32.090(3). Mr. Bean's loss of earning power benefits, if any,  
30 during this period should be calculated by multiplying his time loss rate  
31 by the percentage of lost earning capacity when comparing his earning  
32 at the time of injury to his earning capacity during the period  
December 30, 2003 through March 28, 2005.
7. The Department orders dated December 2, 2003 and May 18, 2005, are  
incorrect and are reversed. These matters are remanded to the  
Department with directions to: affirm payment of loss of earning power  
benefits to Mr. Bean for the period September 29, 2003 through  
October 1, 2003; provide Mr. Bean full time loss compensation for the  
period October 9, 2003 through December 3, 2003; and deny full time  
loss compensation, but consider loss of earning power compensation  
entitlement regardless of whether Mr. Bean was actually employed, for



1 the periods October 2, 2003 through October 8, 2003, and  
2 December 30, 2003 through March 28, 2005.

3 It is so **ORDERED**.

4 Dated this 12th day of January, 2006.

5 BOARD OF INDUSTRIAL INSURANCE APPEALS

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7  
8 /s/ \_\_\_\_\_  
THOMAS E. EGAN Chairperson

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11 /s/ \_\_\_\_\_  
FRANK E. FENNERTY, JR. Member

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