

Deering, Charles

LOSS OF EARNING POWER (RCW 51.32.090(3))

Entitlement beyond date condition becomes fixed

A worker receiving loss of earning power compensation, whose condition becomes fixed but whose earning power is not fully restored, is entitled to continuation of loss of earning power compensation until an order is entered fixing the extent of permanent partial disability. *Citing Hunter* (43 Wn.2d 696). ...***In re Charles Deering, BIA Dec., 25,904 (1968)***

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: CHARLES DEERING) DOCKET NO. 25,904
2)
3 CLAIM NO. C-766118) DECISION AND ORDER
4

5 APPEARANCES:
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7 Claimant, Charles Deering, by
8 James J. Solan
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10 Employer, W. G. Clark Construction Company,
11 None
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13 Department of Labor and Industries, by
14 The Attorney General, per
15 Joe Gordon, Jr., Thomas O'Malley, and Gosta E. Dagg, Assistants
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17 Appeal filed by the claimant, Charles Deering, on January 18, 1966, from an order issued by
18 the Department of Labor and Industries on December 2, 1965, closing this claim with a loss of
19 earning power award for the period from September 23, 1964 to October 22, 1964, but with no
20 award for permanent partial disability in addition to the award of 15 per cent of the maximum
21 allowable for unspecified disabilities previously paid. **SUSTAINED** as to permanent partial disability
22 award and **REVERSED AND REMANDED** as to termination of loss of earning power
23 compensation.
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28 **DECISION**

29 This matter is before the Board for review on the basis of the Statement of Exceptions filed
30 by the Department of Labor and Industries to a Proposed Decision and Order issued by a hearing
31 examiner for this Board on March 24, 1967, reversing the order appealed from and remanding the
32 claim to the Department with direction to pay the claimant an additional loss of earning power
33 award for the period from October 22, 1964 to December 2, 1965, and to pay him an additional
34 permanent partial disability award of 20 per cent of the maximum allowable for unspecified
35 disabilities.
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39 The Board has given careful consideration to the hearing examiner's Proposed Decision and
40 Order, to the Department's Statement of Exceptions thereto, and to the evidence presented by the
41 parties to this appeal. From our review of the record, we have concluded that the Department's
42 exceptions on the extent of claimant's permanent partial disability are well taken and that the
43 claimant has failed to sustain the burden of proving that he is entitled to an additional award for
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1 permanent partial disability. However, we believe the Proposed Decision and Order properly
2 considered and determined the loss of earning power issue and we adopt that part of the Proposed
3 Decision and Order, which is as follows:
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6 "It is noted that the claimant in the case of Hunter v. Department of
7 Labor and Industries, 43 Wn. 2d 696, was required as a result of his
8 injury to change jobs from an outside service linesman to that of a meter
9 journey-man with the same employer, and he was paid a loss of earning
10 power compensation for several years until he was paid a permanent
11 partial disability award. Although the specific question decided by the
12 Court in that case was that he was not entitled to a continuation of such
13 compensation after his condition became fixed, the case indicates that
14 the claimant was entitled to compensation for loss of earning power until
15 such time as a final order was issued by the Department.

16 The Hunter case, supra, seems very much to the point in this case, and
17 it would seem that the ruling in that case indicates that under the statute
18 in question, a workman who suffers a temporary partial disability, with a
19 consequent loss of earning power as a result of an injury, is entitled to a
20 loss of earning power compensation until his earning power is
21 completely restored (or the loss is less than 5%), or his condition
22 became fixed, and the extent of his permanent partial disability, if any, is
23 established.

24 It seems apparent that in this case the claimant's condition could not be
25 considered fixed, or his permanent partial disability, if any, established,
26 until the December 2, 1965, order of the Supervisor was entered.
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28 After the department had held the December 14, 1964, order in
29 abeyance, they were at liberty to find the permanent partial disability the
30 same, increase it, remand the claim for further treatment, or allow
31 compensation for loss of earning power, which they did, in part.

32 The claimant was in no position to take any action until after the
33 Supervisor's order of October 13, 1965, which appeared to allow loss of
34 earning power for an additional year, but by reading the order, it is
35 obvious the dates were not what the Department intended, and it had
36 the right to issue the order correcting the dates. Nevertheless, it was
37 the order of December 2, 1965, that established the permanent disability
38 and allowed one month loss of earning power.
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40 In view of the above discussion, this examiner is persuaded that the
41 claimant was entitled to an award for loss of earning power from
42 September 23, 1964, to December 2, 1965. On just what basis the
43 Department found the loss of earning power to equal 41.7% is not found
44 in the record, nor is the record complete enough to determine this rate
45 during the period involved, but once the right to the award for loss of
46 earning power is established, it is within the Department's authority to
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1 further investigate this matter, and take such other action as is set forth
2 in this order." (Emphasis supplied by examiner)
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4 The Department's medical witness, Dr. Stevens Dimant, a specialist in neurology and
5 neurosurgery, who had been the claimant's attending physician for a period of time following his
6 injury and had last seen him on October 23, 1964, testified that his condition had then reached a
7 fixed stage leaving him with a permanent partial disability of 15 per cent of the maximum allowable
8 for unspecified disabilities. He further expressed the opinion that his condition and resulting
9 disability had remained unchanged thereafter during the period now in issue. As stated in the
10 examiner's Proposed Decision and Order, the claimant is entitled to loss of earning power
11 compensation until an order fixing the extent of his permanent partial disability award was issued on
12 December 2, 1965. Hunter v. Department of Labor and 43 Wn. 2d 696.
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18 The claimant's medical witness, Dr. Peter Fisher, a specialist in internal medicine, who had
19 examined him on one occasion only, on January 13, 1966, testified that his condition was then fixed
20 and that his permanent disability resulting therefrom was equal to 50 per cent of the maximum
21 allowable for unspecified disabilities.
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24 With respect to the claimant's contention that he is entitled to an additional award for
25 permanent disability, it may be noted, as the Department has pointed out in its Statement of
26 Exceptions, that in order to sustain the burden of proof on this issue, it was incumbent upon the
27 claimant to establish by medical testimony, some of it based upon objective findings, that his
28 disability was greater on the date his claim was closed than the Department had found it to be.
29 Hyde v. Department of Labor and Industries, 46 Wn. 2d 31. As the Department has further noted,
30 Dr. Fisher testified that his diagnosis of the claimant's condition and his evaluation of his permanent
31 disability residual thereto was based not upon abnormal physical or neurological findings but upon
32 his evaluation of the history he had been given of the claimant's subjective symptomatology.
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37 In view of the foregoing considerations, we have concluded that the order issued by the
38 Department of labor and Industries on December 2, 1965, should be sustained as to the extent of
39 the permanent partial disability, but reversed and remanded with direction to determine and pay
40 loss of earning power compensation for the period October 23, 1964 to December 2, 1965.
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1 In the course of our review of this record, we have considered the hearing examiner's
2 evidentiary rulings and, finding no prejudicial error therein, hereby affirm said rulings.
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6 **FINDINGS OF FACT**

7 Based upon the record, the Board finds:

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9 1. On March 2, 1961, the claimant, Charles Deering, sustained an injury to
10 his head and neck while in the course of his employment with W. G.
11 Clark Construction Company. On March 8, 1961, a report of accident
12 was filed with the Department of Labor and Industries. The claim based
13 thereon was allowed and thereafter, on June 13, 1961, the Department
14 issued an order closing the claim with no time-loss compensation or
15 permanent partial disability award.
- 16 2. On February 13, 1962, the claimant filed an application to reopen his
17 claim for aggravation of condition. On May 8, 1962, the Department
18 issued an order denying the application.
- 19 3. On May 22, 1963, the claimant again filed an application to reopen his
20 claim for aggravation of condition. On October 16, 1963, the claim was
21 reopened effective as of May 6, 1963. On January 9, 1964, the
22 Department entered an order paying time-loss compensation from which
23 order the employer, on February 13, 1964, filed a notice of appeal. The
24 employer's appeal was granted by an order of this Board dated February
25 28, 1964. Thereafter, on May 18, 1964, the Board entered an order
26 sustaining the Department's order of January 9, 1964. On December
27 14, 1964, the Department entered an order closing the claim with a
28 permanent partial disability award of 15% of the maximum allowable for
29 unspecified disabilities, from which order the claimant, on February 9,
30 1965, filed a notice of appeal with this Board. On February 24, 1965,
31 the Department entered an order holding its prior order of December 14,
32 1964 in abeyance, pending further investigation. Since the Department
33 had reassumed jurisdiction of the case, the Board entered an order on
34 February 26, 1965, denying the appeal.
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36 4. On October 13, 1965, the Department entered an order closing the claim
37 with no additional award for permanent partial disability but with a one-
38 month payment for loss of earning power in the sum of \$77.15, or a
39 41.7% loss of earning power. The period covered by this order was
40 shown on the order to be from September 23, 1964 to October 22, 1965,
41 but on December 2, 1965, the Department entered an order correcting
42 the date to October 22, 1964. On January 18, 1966, the claimant filed a
43 notice of appeal from this order, and on January 28, 1966, this Board
44 granted the appeal.
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5. On March 24, 1967, a hearing examiner for this Board entered a Proposed Decision and Order in connection with this appeal. Thereafter, within the period of time provided by law, exceptions were filed and the case referred to the Board for review as provided by RCW 51.52.106.
 6. As a result of his injury of March 2, 1961, the claimant has had to have various types of treatment because of head and neck involvement, which caused severe headaches, dizziness, unsteadiness, lack of concentration and loss of memory, which eventually prevented him from continuing on as a carpenter, as he was unable to climb ladders and engage in work that involved scaffolds, heights above the ground, looking up, and doing such work as involved handling materials with others. He was able to obtain employment as a janitor where the hazards were not so great and the pressure was much less, but the rate of pay was less than what he received as a carpenter.
 7. The claimant is able to engage in a gainful occupation on a reasonably continuous basis, but physically unable to engage in the same type of carpentry work he performed before the injury.
 8. As a result of his head and neck injury, the claimant suffered a substantial loss of earning power from September 23, 1964 to December 2, 1965, and has only been compensated for one month of this, i.e., from September 23, 1964 to October 22, 1964, at the rate of 41.7% loss, and is entitled to the balance, the amount of which should be determined by the Department after an investigation of the salary he would have earned as a carpenter and the salary he was making as a janitor.
 9. The claimant's condition attributable to his industrial injury of March 2, 1961, consisting of the residuals of head and neck injury, medically became fixed on or about October 22, 1964, and thereafter remained fixed throughout the period at issue in this appeal and was judicially fixed on December 2, 1965, when his claim was closed. On or about December 2, 1965, claimant's permanent disability resulting from his condition attributable to his industrial injury of March 2, 1961, was equal to 15% of the maximum allowable for unspecified disabilities.

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CONCLUSIONS OF LAW

39 Based upon the foregoing findings of fact, the Board concludes:

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1. This Board has jurisdiction of the parties and subject matter of this appeal.
 2. The order issued by the Department of Labor and Industries on December 2, 1965, is correct and should be sustained as to the extent of the permanent partial disability award, but it is incorrect on the payment of compensation for loss of earning power and must be reversed and remanded to the Department with direction to determine

1 and pay the claimant loss of earning power compensation for the period
2 October 23, 1964 to December 2, 1965, and thereupon close the claim.

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4 It is so ORDERED.

5 Dated this 20th day of March, 1968.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS
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8 /s/
9 ROBERT C. WETHERHOLT Chairman

10 /s/
11 R.H. POWELL Member

12 /s/
13 R.M. GILMORE Member
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