

## **Deering, Charles**

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### **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.



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**  
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8 Based upon the record, the Board finds:  
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- 10 1. On March 2, 1961, the claimant, Charles Deering, sustained an injury to  
11 his head and neck while in the course of his employment with W. G.  
12 Clark Construction Company. On March 8, 1961, a report of accident  
13 was filed with the Department of Labor and Industries. The claim based  
14 thereon was allowed and thereafter, on June 13, 1961, the Department  
15 issued an order closing the claim with no time-loss compensation or  
16 permanent partial disability award.  
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- 18 2. On February 13, 1962, the claimant filed an application to reopen his  
19 claim for aggravation of condition. On May 8, 1962, the Department  
20 issued an order denying the application.  
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- 22 3. On May 22, 1963, the claimant again filed an application to reopen his  
23 claim for aggravation of condition. On October 16, 1963, the claim was  
24 reopened effective as of May 6, 1963. On January 9, 1964, the  
25 Department entered an order paying time-loss compensation from which  
26 order the employer, on February 13, 1964, filed a notice of appeal. The  
27 employer's appeal was granted by an order of this Board dated February  
28 28, 1964. Thereafter, on May 18, 1964, the Board entered an order  
29 sustaining the Department's order of January 9, 1964. On December  
30 14, 1964, the Department entered an order closing the claim with a  
31 permanent partial disability award of 15% of the maximum allowable for  
32 unspecified disabilities, from which order the claimant, on February 9,  
33 1965, filed a notice of appeal with this Board. On February 24, 1965,  
34 the Department entered an order holding its prior order of December 14,  
35 1964 in abeyance, pending further investigation. Since the Department  
36 had reassumed jurisdiction of the case, the Board entered an order on  
37 February 26, 1965, denying the appeal.  
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- 39 4. On October 13, 1965, the Department entered an order closing the claim  
40 with no additional award for permanent partial disability but with a one-  
41 month payment for loss of earning power in the sum of \$77.15, or a  
42 41.7% loss of earning power. The period covered by this order was  
43 shown on the order to be from September 23, 1964 to October 22, 1965,  
44 but on December 2, 1965, the Department entered an order correcting  
45 the date to October 22, 1964. On January 18, 1966, the claimant filed a  
46 notice of appeal from this order, and on January 28, 1966, this Board  
47 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

7  
8 /s/  
9 ROBERT C. WETHERHOLT Chairman

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11 /s/  
12 R.H. POWELL Member

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14 /s/  
15 R.M. GILMORE Member

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