

Larson, Lloyd

LOSS OF EARNING POWER (RCW 51.32.090(3))

Simultaneous loss of earning power and time-loss compensation

TIME-LOSS COMPENSATION (RCW 51.32.090)

Simultaneous loss of earning power and time-loss compensation

A worker who suffers an industrial injury causing a loss of earning power and subsequently suffers another industrial injury causing temporary total disability is not precluded from simultaneously receiving loss of earning power compensation and time-loss compensation.*In re Lloyd Larson*, BIIA Dec., 86 0479 (1988)

Scroll down for order.

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

1 **IN RE: LLOYD J. LARSON**) **DOCKET NOS. 86 0479, 86 0481, 86 0483, 86**
2) **2901 & 86 3547**
3)
4 **CLAIM NOS. J-296830 & H-648217**) **DECISION AND ORDER**

6 **APPEARANCES:**

8 Claimant, Lloyd J. Larson, by
9 Chapman, Forbes & Pack, per
10 James D. Pack

12 Employer, (Claim No. J-296830),
13 Karr Brothers Mobile Homes, Inc.
14 None

16 Employer, (Claim No. H-648217),
17 Soundview Utilities, Inc.,
18 None

20 Department of Labor and Industries, by
21 The Attorney General, per
22 Loretta J. Lopez, Beverly Norwood Goetz, and Deborah Hilsman, Assistants

24 Docket No. 86 0479 is an appeal filed by the claimant, Lloyd J. Larson, on February 7, 1986
25 from an order of the Department of Labor and Industries in Claim No. J-296830 dated January 31,
26 1986. The order stated that time-loss compensation will be paid under this claim as long as claimant
27 is unable to work due to this injury. The Department order is **AFFIRMED**.

30 Docket No. 86 0483 is an appeal filed by the claimant, Lloyd J. Larson, on February 7, 1986
31 from an order of the Department of Labor and Industries in Claim No. J-296830 dated January 24,
32 1986. The order denied time-loss compensation for the period of July 24, 1983 through November 16,
33 1983. The Department order is **AFFIRMED**.

36 Docket No. 86 0481 is an appeal filed by the claimant, Lloyd J. Larson, on February 7, 1986
37 from an order of the Department of Labor and Industries in Claim No. H-648217 dated January 31,
38 1986. The order stated that time-loss compensation was not payable under this claim but was instead
39 payable under Claim No. J-296830. The Department order is **REVERSED AND REMANDED**.

1 Docket No. 86 2901 is an appeal filed by the claimant, Lloyd J. Larson, on August 13, 1986
2 from an order of the Department of Labor and Industries in Claim No. H-648217 dated June 13, 1986.
3 The order terminated claimant's time-loss compensation effective January 25, 1982 with loss of
4 earning power benefits not payable for the period of January 26, 1982 through February 26, 1983.
5 The Department order is **REVERSED AND REMANDED**.
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8 Docket No. 86 3547 is an appeal filed by the claimant, Lloyd J. Larson, on October 6, 1986
9 from an order of the Department of Labor and Industries in Claim No. H-648217 dated September 25,
10 1986 which denied time-loss compensation for the period of December 10, 1981 through July 25,
11 1982, inclusive, and loss of earning power benefits for the periods of July 26, 1982 through February
12 25, 1983 and April 1, 1983 through July 23, 1983. The Department order is **REVERSED AND**
13 **REMANDED**.
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18 DECISION

19 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
20 and decision on timely Petitions for Review filed by the Department of Labor and Industries and the
21 claimant to a proposed Decision and Order issued on December 21, 1987 in which the orders of the
22 Department in Claim No. J-296830 dated January 24, 1986 and January 31, 1986 were sustained; the
23 January 31, 1986 Department order in Claim No. H-648217 was sustained; and the Department
24 orders in Claim No. H-648217 dated June 13, 1986 and September 25, 1986 were reversed and
25 remanded to the Department to pay the claimant time-loss compensation from December 10, 1981
26 through January 22, 1982 and January 26, 1982 through July 25, 1982 and loss of earning power
27 benefits from July 26, 1982 through February 25, 1983 and March 31, 1983 through July 23, 1983,
28 with the loss of earning power benefits to be calculated based upon claimant's actual earnings at
29 Soundview Utilities, Inc., as of January 23, 1980 and at Karr Brothers Mobile Homes, Inc., during
30 periods for which the loss of earning power shall be paid, and for other action as indicated.
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37 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
38 prejudicial error was committed and said rulings are hereby affirmed.
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40 The issues presented by this appeal and the evidence presented by the parties are adequately
41 set forth in the proposed Decision and Order. We have granted review, not to disturb the Findings of
42 Fact as they appear in the proposed Decision and Order, but instead to apply our interpretation of the
43 law to those facts and in that manner reach a decision in the appeal under Docket No. 86 0481 which
44 differs from that reached in the Proposed Decision and Order. That order states:
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1 "Whereas the attorney for the claimant has requested time loss be paid
2 under this claim rather than under Claim No. J-296830, and

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4 Whereas a review of the file indicates that the claimant should be paid
5 time loss under Claim No. J-296830,

6 Therefore, time loss is not payable under this claim."
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8 The Proposed Decision and Order concluded that time-loss compensation for the periods of time from
9 February 26, 1983 through March 30, 1983, November 17, 1983 through March 31, 1984 and from
10 July 1, 1984 through January 31, 1986 was correctly paid under the J-296830 claim, a claim arising
11 from a second injury to claimant's back. We also hold that time-loss compensation was correctly paid
12 under this J-296830 claim. However, this does not prevent the Department from simultaneously
13 paying loss of earning power compensation under Claim No. H-648217, a claim arising from the first
14 injury to claimant's back.
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16 Under Claim No. H-648217, claimant should receive loss of earning power payments during
17 these periods of time for the same reasons that he should receive those payments for the periods
18 between July 26, 1982 and July 23, 1983. The evidence clearly establishes that after claimant's first
19 industrial injury of January 23, 1980 he was no longer able to return to the same type of employment.
20 From July 26, 1982 through February 25, 1983 then from March 31, 1983 through July 23, 1983 he
21 returned to work at a lesser paying job and established, as decided in the proposed Decision and
22 Order, his entitlement to loss of earning power compensation. However, for the periods of time from
23 February 26, 1983 through March 30, 1983 and July 24, 1983 through November 16, 1983, from
24 November 17, 1983 through March 31, 1984 and from July 1, 1984 through January 31, 1986, the
25 claimant was not paid loss of earning power compensation and the Proposed Decision and Order
26 considered that either the Board lacked jurisdiction because the Department had not passed on the
27 issue for the period of July 24, 1983 through November 16, 1983 and that loss of earning power
28 compensation could not be paid during those periods of time during which time-loss compensation
29 was paid under the J-296830 claim for claimant's second injury. This ruling was incorrect.
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32 Clearly, claimant must allow the Department to adjudicate his loss of earning power entitlement
33 under Claim No. H-648217 before the Board may issue a decision on that issue. Lenk v. Department
34 of Labor and Industries, 3 Wn. App. 977 (1970). However, the order appealed from in Docket No. 86
35 0481 recited above, clearly indicates that the Department had considered the issue of compensation
36 for the periods of time in question and had indicated that time-loss compensation would only be paid
37 under the J-296830 claim. We are convinced both by the language of that order and by the activity the
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1 Department took under the J-296830 claim, that the Department has indeed passed on the question of
2 loss of earning power for all the periods mentioned above. The Board therefore has the jurisdiction to
3 decide the issue of claimant's entitlement to loss of earning power payments under Claim No.
4 H-648217.
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7 Not precluded from determining the issue of loss of earning power compensation based on a
8 lack of jurisdiction over the issue, we must now turn to the problem of whether loss of earning power
9 compensation can be paid simultaneously under the earlier claim with time-loss compensation under
10 the second claim. Citing Erickson v. Department of Labor and Industries, 48 Wn.2d 458 (1956), the
11 Proposed Decision and Order reasoned that, in a case of successive injuries, the prior injury is not to
12 be considered the cause of total disability, but instead is merely the condition with which the
13 subsequent injury combined to cause the total disability. Under this reasoning, the Industrial Appeals
14 Judge concluded that the Department was correct in paying time-loss compensation under Claim No.
15 J-296830 and not under Claim No. H-648217. However, we are not concerned with an attempt to
16 treat the first injury as a cause of the total disability as was the case in Erickson. Claimant's entitlement
17 to loss of earning power benefits under the first claim does not extinguish merely because he suffers a
18 second industrial injury for which he is entitled to time-loss compensation under the second claim.
19 The time-loss compensation for that second injury, calculated on claimant's lower rate or pay at the
20 time of his second injury, does not compensate him for the ongoing loss of earning power which he
21 continued to endure due to his first injury.
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30 Furthermore, RCW 51.32.090(3) provides in pertinent part as follows:

31 As soon as recovery is so complete that the present earning power of the
32 worker, at any kind of work, is restored to that existing at the time of the
33 occurrence of the injury, the payments shall cease. If and so long as the
34 present earning power is only partially restored, the payments shall
35 continue in the proportion which the new earning power shall bear to the
36 old. No compensation shall be payable unless the loss of earning power
37 shall exceed five percent.
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39 Under the plain language of this provision, loss of earning power compensation must continue so long
40 as the worker's earning power is only partially restored. Put another way, loss of earning power
41 benefits are not terminated until the worker's condition is fixed and his earning power has been
42 restored within 5% of that existing at the time of injury. Neither of these events has occurred with
43 respect to the first industrial injury of January 23, 1980. Obviously the second industrial injury of
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1 February 25, 1983 did not somehow restore claimant's earning power to that existing at the time of the
2 first injury.
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4 Furthermore, simultaneous payment of loss of earning power compensation under Claim No.
5 H-648217 and time-loss compensation under Claim No. J-296830 will most closely resemble the
6 reality of the situation. The first employer will bear the cost experience of claimant's ongoing loss of
7 earning power, while the second employer will bear the cost experience of claimant's temporary total
8 disability as calculated based on his lower rate of pay while working for that employer. Finally,
9 claimant will receive a level of benefits that most closely represents his entitlement based on his actual
10 earning capacity before he became injured the first time.
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12 Findings of Fact Nos. 1 through 14 are adopted. Finding of Fact No. 15 is deleted and in its
13 stead the following Finding of Fact is entered:
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15 **FINDINGS OF FACT**

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- 17 15. For the periods of time from February 26, 1983 through March 30, 1983,
18 July 24, 1983 through November 16, 1983, November 17, 1983 through
19 March 31, 1984 and July 1, 1984 through January 31, 1986, claimant
20 continued to have a loss of earning power due to conditions causally
21 related to the January 23, 1980 industrial injury.
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25 Conclusions of Law Nos. 2-5, 7-8 and 10-11 are adopted. Conclusions of Law Nos. 1, 6 and 9
26 are deleted and the following entered in their stead.
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28 **CONCLUSIONS OF LAW**

- 29 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
30 and subject matter of these appeals.
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- 32 6. Claimant's entitlement to loss of earning power benefits for periods from
33 February 26, 1983 through March 30, 1983, July 24, 1983 through
34 November 16, 1983, November 17, 1983 through March 31, 1984 and
35 July 1, 1984 through January 31, 1986 were due to the industrial injury of
36 January 23, 1980 under Claim No. H-648217.
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- 38 9. In appeal Docket No. 86 0481, the January 31, 1986 Department order in
39 Claim No. H-648217, which ordered that time-loss compensation was not
40 payable under this claim but was instead payable under Claim No.
41 J-296830, is incorrect in part and must be reversed and this claim
42 remanded to the Department with direction to pay loss of earning power
43 benefits for the periods of time from February 26, 1983 through March 30,
44 1983, July 24, 1983 through November 16, 1983, November 17, 1983
45 through March 31, 1984, and July 1, 1984 through January 31, 1986.
46 Such compensation is to be calculated based upon claimant's actual
47 earnings at Soundview Utilities, Inc., as of January 23, 1980 and at Karr

1 Brothers Mobile Homes, Inc., during periods for which the loss of earning
2 power shall be paid.
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5 It is so ORDERED.

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7 Dated this 15th day of August, 1988.
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9 BOARD OF INDUSTRIAL INSURANCE APPEALS

10
11 /s/ _____
12 SARA T. HARMON Chairperson

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15 /s/ _____
16 FRANK E. FENNERTY, JR. Member
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