Heitt, Patricia

LOSS OF EARNING POWER (RCW 51.32.090(3))

Proof required

To prove entitlement to loss of earning power benefits the worker must present (1) lay or expert testimony establishing pre-injury earning capacity; (2) expert testimony establishing post-injury earning capacity; and (3) expert testimony establishing that a reduction, if any, in post-injury earning capacity is causally related to the residuals of the industrial injury. Evidence that a worker's post-injury income was less than pre-injury income is insufficient to establish a loss of earning power absent proof that the worker's reduced income is due to physical restrictions imposed by the industrial injury.
….*In re Patricia Heitt*, BIIA Dec., 87 1100 (1989)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PATRICIA C. HEITT	**)**	**DOCKET NO. 87 1100**
	)	
CLAIM NO. J-319462	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Patricia C. Heitt, by
Goodwin, Grutz & Scott, per
Jay C. Kinney

Employer, Waldo Hospital Association, by
Davis, Wright & Jones, per
Michael J. Killeen

Department of Labor and Industries, by
The Attorney General, per
Stephen A. Eggerman, Sidney S. Swan, Zimmie Caner, and Wilhelm Dingler, Assistants

This is an appeal filed by the claimant on April 7, 1987 from an order of the Department of Labor and Industries dated February 10, 1987. The order adhered to the provisions of an order dated November 12, 1986 which closed the claim with no award for permanent partial disability, and demanded reimbursement of time-loss compensation paid for the period of time from September 1, 1984 through December 31, 1985 in the sum of $16,504.41, found that claimant was not eligible for loss of earning power for the same period, and denied responsibility for: (1) pre-existing cervical degenerative disease and posterior fusions of C3-4 and C4-6; (2) pre-existing L5 spondylolysis; (3) polio residuals of the left lower extremity; and (4) minimal proximal weakness of both lower extremities, possible steroid myopathy. **AFFIRMED**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on September 12, 1988 in which the order of the Department dated February 10, 1987 was reversed and the claim remanded to the Department to recompute loss of earning power compensation for the period of March 12, 1984 through September 15, 1986 and thereupon close the claim without an award for permanent partial disability and with denial of responsibility for: (1) pre-existing cervical degenerative disease, status post posterior fusions of C3-4 and posterior fusions of C4 through C6, unrelated to the industrial injury; (2) pre-existing L5 spondylolysis, not industrially

related; (3) residual of old polio of left lower extremity, not industrially related; and (4) minimal proximal weakness of both lower extremities, possible mild steroid myopathy, not industrially related.

The issues in this matter were narrowed at a hearing held on March 15, 1988. Any claim to permanent partial disability and any contention that the Department was responsible for any of the conditions segregated by the February 10, 1987 order were abandoned. The remaining issues concern Mrs. Heitt's entitlement to loss of earning power compensation for the period of March 12, 1984 through September 15, 1986 and the effect any entitlement would have on the Department's demand for reimbursement of loss of earning power benefits paid for the period of time from September 1, 1984 through December 31, 1985.

In its Petition for Review the Department contends that Mrs. Heitt has not proven her entitlement to loss of earning power benefits for the period of March 12, 1984 through September 15, 1986. From our review of the record we are compelled to agree with the Department and therefore it was error for the Proposed Decision and Order to remand to the Department with direction to compute loss of earning power benefits.

Loss of earning power is governed by the provisions of RCW 51.32.090(3). To prove entitlement to loss of earning power benefits Mrs. Heitt must present the following: (1) lay or expert testimony establishing pre-injury earning capacity; (2) expert testimony establishing post-injury earning capacity; (3) expert testimony establishing that a reduction, if any, in post-injury earning capacity is causally related to residuals of the industrial injury.

The relevant evidence presented in this appeal establishes that claimant was working as a physical therapist at the time of her industrial injury of July 16, 1983. Mrs. Heitt testified that after her industrial injury she worked in a day care center as a telephone solicitor and as an activity director at a convalescent center. She testified that income from these jobs was substantially less than the $12.00 an hour she was capable of making as a physical therapist and presented pay stubs supporting this assertion. She admitted, however, that she was unlicensed to work as a physical therapist in the State of Washington. Nancy Leonard, who works as a physical therapist and was a supervisor at Waldo Hospital, where claimant was employed when she suffered her industrial injury, testified that physical therapists in the State of Washington must be licensed.

William Backlund, M.D., an orthopedic surgeon, testified that Mrs. Heitt's industrial injury of July 16, 1983 resulted in a cervical strain superimposed on pre-existing neck problems, posterior fusions of C3 to C6 and marked degenerative changes at C6 through C7. He had examined or treated claimant

on September 14, 1983, September 28, 1983, October 17, 1983, November 7, 1983, December 14, 1983, January 25, 1984, June 4, 1985, and May 21, 1986. He considered Mrs. Heitt's industrially related condition medically fixed as of the June 4, 1985 visit. In his opinion claimant could no longer return to work as a physical therapist "as he understood it", though he admitted he didn't understand the specifics of the physical therapy job that Mrs. Heitt had held with Waldo Hospital.

The claimant called Peggy McGuire, a vocational counselor, to testify. Her testimony was extremely limited, focusing on the level of compensation for physical therapists and assistant physical therapists in the State of Washington from 1984 on, relying primarily on the Washington State Physical Therapy Association salary survey. She indicated that she didn't ascertain claimant's pre- and post-injury restrictions or physical limitations and gave no testimony as to claimant's pre- or post-injury earning capacity.

Thus, claimant has not proven her entitlement to loss of earning power compensation. Mrs. Heitt has merely proven the amount of income she was receiving at the time of her injury as a result of her part- time physical therapist's job and the income she received from work performed post-industrial injury. Although her showing of reduced income may be evidence of reduced earning power, she has not proven that the reduced income is due to physical restrictions imposed by the industrial injury. The testimony of Dr. Backlund that she could not return to her former position as a therapist is insufficient to establish that she suffered a loss of earning power due to the industrial injury. There must be a causal relationship established between the reduced income and her industrial injury. This is accomplished through expert testimony which demonstrates reduced earning power due to disability causally related to the industrial injury. This critical link was never established in this appeal. Merely establishing that Mrs. Heitt could not go back to her position as a physical therapist is insufficient, especially in this case where it has been indicated that it would be impossible for her to return to that job because she is not licensed to work as a physical therapist in the State of Washington. In light of that evidence it cannot be said that "but for" her industrial injury and the residuals therefrom she is unable to return to her former employment as a physical therapist. For all these reasons we are unconvinced that Mrs. Heitt, suffering from a cervical strain now resolved, resulting in no permanent partial disability and presenting no evidence of ongoing treatment for the strain during the relevant period of March 12, 1984 through September 15, 1986, has established the reduced earning power necessary to prove her entitlement to loss of earning power compensation.

Finally, the Department also contends that the Proposed Decision and Order was incorrect in finding June 4, 1985 as the date that Mrs. Heitt was medically fixed. The Department contends that it was also an error to establish November 12, 1986 as the date Mrs. Heitt's cervical condition was legally fixed, pursuant to the authority of Hunter v. Department of Labor and Industries, 43 Wn.2d 696 (1953) and In re Valerie Sampson, Dckt. No. 86 1212 (October 16, 1987). The Department contends that the distinctions between medical and legal fixity are not applicable in this case because it would have been impossible for legal fixity to occur until September 30, 1987, and therefore the date of legal fixity must be the date that medical fixity is established.

In a prior appeal in Docket No. 69,430 the Board issued a Decision and Order allowing this claim on April 24, 1986. The employer appealed to superior court. At the hearing held in the instant appeal on March 15, 1988, the parties noted that the prior appeal had been settled but gave no date. The Petition for Review asserts that September 30, 1987 is the date that the superior court appeal was finally disposed of. The record before us contains no actual indication that this was indeed the date the superior court agreement was entered. Regardless, the superior court appeal is not a bar to establishing a date of legal fixity as being other than the date of medical fixity.

We note that legal fixity occurred on November 12, 1986 when the Department first issued an order closing the claim. Even though acceptance of the claim had not been finally adjudicated by the superior court, once the Board had issued its Decision and Order on April 24, 1986, allowing the claim, the Department had jurisdiction to administer all other aspects of the claim, which would include issuing an order finding claimant's condition fixed and closing the claim. Therefore for the reasons set forth in Hunter and In re Douglas Weston, BIIA Dec., 86 1645 (1987), claimant's condition was legally fixed on November 12, 1986, the date the Department first issued an order classifying Mrs. Heitt's condition as fixed and permanent. The appeal to superior court did not act as a stay and did not prevent the Department from issuing an order establishing legal fixity. RCW 51.52.110. The Department contends that legal fixity also could not have occurred because the Department orders were protested by the claimant. However, this Board has ruled that a protest of an order does not automatically extend the period during which a claimant would be entitled to loss of earning power benefits. In re Douglas Weston. Therefore Mrs. Heitt's protest of the November 12, 1986 order does not alter the effect of that order on the determination of legal fixity.

From our review of the record the Department order appealed from is correct and must be affirmed.

FINDINGS OF FACT

1. On September 22, 1983 the Department of Labor and Industries received a report of accident indicating that the claimant, Patricia C. Heitt, had sustained an injury on July 16, 1983 while in the employ of Waldo General Hospital. On March 26, 1984 the Department issued an order rejecting the claim on the basis that claimant's condition was not the result of the injury alleged and that the condition pre-existed the alleged injury and was not related thereto. On May 21, 1984 the Department received a protest and request for reconsideration filed on behalf of the claimant. On June 6, 1984 the Department issued an order holding the order dated March 26, 1984 in abeyance. On October 26, 1984 the Department issued an appealable only order adhering to the provisions of the prior order dated March 26, 1984. On December 21, 1984 claimant filed a notice of appeal to the Board of Industrial Insurance Appeals from the order dated October 26, 1984. On January 9, 1985 the Board issued an order granting the appeal, assigning it Docket No. 69,430, and ordering that proceedings be held in the matter.

   On October 29, 1985 a Proposed Decision and Order was issued which affirmed the Department order rejecting the claim. A timely Petition for Review was filed by the claimant and on December 23, 1985, the Board issued an order granting the petition. On April 24, 1986 the Board issued a Decision and Order finding that the claimant had sustained an industrial injury within the meaning of RCW 51.08.100 on July 16, 1983, that the Department order dated October 26, 1984 was incorrect and should be reversed and the claim remanded to the Department of Labor and Industries with direction to allow the claim and take such further action as was indicated by the law and the facts. On May 29, 1986 a notice of appeal was filed in superior court by the employer from the Decision and Order of the Board. The appeal was subsequently settled by agreement of the parties.

   On June 18, 1986 the Department issued an order pursuant to the Decision and Order of the Board that the order of October 26, 1984 be reversed, and that the claim for injury sustained on July 16, 1983 be allowed as an industrial injury, and claimant be entitled to medical aid and compensation as may be indicated in accordance with the industrial insurance laws.

   On July 29, 1986, the Department issued three orders paying loss of earning power compensation for the period of September 1, 1984 through December 31, 1985. On September 5, 1986 the Department received a protest and request for reconsideration filed on behalf of the claimant requesting loss of earning power compensation for the period March 1984 through September 1, 1984 and from January 1, 1986 through the date of the protest. On August 25, 1986 the Department received a protest and request for reconsideration filed on behalf of the employer, Waldo General Hospital from the three Department orders of July 29, 1986.

On September 15, 1986 the Department issued an order correcting and superseding the Department orders dated July 29, 1986, stating that subsequent information disclosed the claimant was not eligible for loss of earning power compensation, therefore constituting an overpayment from September 1, 1984 through December 31, 1985 in the amount of $16,504.41; ordering that claimant refund the overpayment in that amount; and that the claim remain open for authorized treatment and such further action as may be indicated. The Department order dated September 15, 1986 was not communicated to nor received by the claimant or her attorney.

On November 12, 1986, the Department issued an order stating that whereas claimant had received compensation from September 1, 1984 through December 31,1985 in the sum of $16,504.41 by orders dated July 29, 1986, subsequent information disclosed that claimant was not eligible for loss of earning power compensation constituting an overpayment during the period in the sum of $16,504.41, and whereas medical opinion disclosed further treatment was not indicated and that the claimant's condition was fixed and stable and that there was no permanent partial disability attributable to the injury, it was ordered that the claim be closed as paid to December 31, 1985 without further allowance for time-loss compensation or permanent partial disability and formal demand was made to the claimant for reimbursement to the Department of the sum of $16,504.41; the Department denied responsibility for: (1) pre-existing cervical degenerative disease, status post posterior fusions of C3-4 (1970) and posterior fusions of C4 through C6 (1973), unrelated to the 1983 industrial injury; (2) pre-existing L5 spondylolysis, not industrially related; (3) residuals of old polio of left lower extremity, not industrially related; and (4) minimal proximal weakness of both lower extremities, possible mild steroid myopathy, not industrially related.

On November 18, 1986 the Department received a protest and request for reconsideration filed on behalf of the claimant from the Department order of November 12, 1986. On December 10, 1986 the Department issued an appealable only order affirming the order dated September 15, 1986. On January 6, 1987 the Department received a protest and request for reconsideration filed on behalf of the claimant of the orders dated September 15, 1986, November 12, 1986 and December 10, 1986. On February 6, 1987 the Department issued an order holding in abeyance the order dated November 12, 1986. On February 9, 1987 the Department issued an order holding in abeyance the order dated December 10, 1986. On February 10, 1987 the Department issued an appealable only order adhering to the provisions of the prior order dated November 12, 1986. On April 7, 1987, claimant filed a notice of appeal with the Board from the order dated February 10, 1987. On April 23, 1987 the Board issued an order granting the appeal, assigning Docket No. 87 1100, and ordering that proceedings be held.

2. On July 16, 1983 the claimant sustained an industrial injury during the course of her employment with Waldo General Hospital when attempting to help ambulate a 200 pound patient with multiple sclerosis. As the claimant attempted to lift the patient to his feet she experienced a sharp pain in her left abdomen, left lower back, her left calf, and her neck.

3. As of February 10, 1987 the claimant sustained a cervical strain superimposed upon pre-existing cervical fusions and pre-existing degenerative changes above and below the fusions and the strain was a proximate result of the industrial injury of July 16, 1983.

4. As of June 4, 1985 claimant's condition causally related to the industrial injury was medically fixed and stable, with no further treatment indicated.

5. As of February 10, 1987 claimant suffered no permanent disability causally related to her industrial injury of July 16, 1983.

6. Claimant suffers from conditions described as follows: (1) pre-existing cervical degenerative disease, and post-operative posterior fusions of C3-C6; (2) pre-existing L5 spondylolysis; (3) residuals of polio of the left lower extremity; and (4) minimal proximal weakness of both extremities with possible mild steroid myopathy. These conditions are not causally related to claimant's industrial injury of July 16, 1983.

7. Between March 12, 1984 and September 15, 1986 the claimant's earning power was not impaired due to any residuals causally related to her industrial injury of July 16, 1983.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. From November 12, 1986 through and as of February 10, 1987 claimant's condition causally related to her industrial injury of July 16, 1983 was legally fixed and permanent and in need of no further treatment.

3. Between March 12, 1984 and September 15, 1986 claimant was not entitled to loss of earning power compensation as provided for in RCW 51.32.090(3).

4. The order of the Department of Labor and Industries dated February 10, 1987 which adhered to the provisions of an order dated November 12, 1986 which found an overpayment for time-loss compensation from September 1, 1984 through December 31, 1985 and found that claimant was not eligible for loss of earning power compensation constituting an overpayment in the amount of $16,504.41 and demanding reimbursement, and denying responsibility for: (1) pre-existing cervical degenerative disease, status post posterior fusions at C3-4 and posterior fusions of C4 through C6, unrelated to the 1983 industrial injury; (2) pre- existing L5 spondylolysis, not industrially related; (3) residuals of old polio of the left lower extremity, not industrially related; and (4) minimal proximal

weakness of both lower extremities, possible mild steroid myopathy, not industrially related, is correct in all respects and must be affirmed.

It is so ORDERED.

Dated this 23rd day of March, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
SARA T. HARMON Chairperson

/s/
PHILLIP T. BORK Member