

Brown, Chester

LOSS OF EARNING POWER (RCW 51.32.090(3))

Effect of wage increase in pre- and post-injury employments

A worker's time-loss compensation and loss of earning power payments are based on the worker's actual wages at the time of the injury rather than the worker's "potential" ability to earn money. However, in computing loss of earning power benefits it is proper to consider the extent of increase, if any, which has occurred in the earnings paid for the employment held at the time of the injury in order to arrive at the earnings which the worker would have received had he or she not experienced the injury. (*Hunter v. Department of Labor & Indus.*, 43 Wn.2d 696 (1953)). Similarly, it is proper for the Department to take into account any increases in wages from post-injury employment, since, as the worker's wages increase, he regains that portion of his lost earning power. ...*In re Chester Brown*, BIIA Dec., 88 1326 (1989)

Scroll down for order.

1 aggravated the shoulder and subsequently had surgery in 1982. He never returned to his profession
2 as a logger. At the time of his injury he earned \$ 12.87 per hour.
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4 Mr. Brown was retrained by the Department of Labor and Industries and on October 1, 1986
5 was hired by Grays Harbor County to work on a road crew as a flagger and general worker. The
6 parties stipulated on the record that Mr. Brown earned \$ 7.00 per hour from July 1, 1986 until October
7 1, 1986 while he was being trained. After he was officially hired, on October 1, 1986, he earned \$
8 1,524 per month until April 1, 1987 when his salary was raised to \$ 1,584 per month. He continued to
9 earn this salary until January 1, 1988 when he received another raise to \$ 1,688 per month which he
10 earned until April 1, 1988.
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12 The issues presented by Mr. Brown's appeal concerned the degree of permanent disability of
13 his left shoulder on the closing date of the claim, and whether he was entitled to loss of earning power
14 benefits after he was hired by Grays Harbor County until the date his condition was found to be fixed
15 and permanent by the Department. See, In re Douglas G. Weston, BIIA Dec., 86 1645 (1987).
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17 We have reviewed the record and agree with the findings and conclusion of the Industrial
18 Appeals Judge that the degree of permanent disability of Mr. Brown's left shoulder, causally related to
19 his industrial injury, is equal to 25% of the amputation value of the left arm at or above the deltoid
20 insertion or by disarticulation at the shoulder.
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22 Mr. Brown's Petition for Review does not argue with this conclusion, but only deals with the
23 issue of loss of earning power benefits. Mr. Brown presents two points which he believes were either
24 not considered or were incorrectly considered by the Industrial Appeals Judge in calculating loss of
25 earning power benefits.
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27 Mr. Brown alleges that if he can prove he had the ability to earn more money than he was
28 actually earning at the time of his injury, then that earning capacity, rather than his actual wage at the
29 time of injury, should be considered the basis for the calculation of loss of earning power benefits. Mr.
30 Brown does not offer any Board or Court decisions in support of this theory of law. This Board has, in
31 the past, always considered the claimant's actual wages at the time of injury rather than a "potential"
32 ability to earn money, as the basis for computing loss of earning power benefits.
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34 In In re Howard L. Dyer, BIIA Dec., 15,763 (1962), in discussing loss of earning power, we
35 specifically spoke of post-injury and pre- injury earnings, not "potential" earnings capability. In In re
36 Douglas G. Weston, BIIA Dec., 86 1645 at 4-5 (1987) the wage earned at the time of injury, not what
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1 the claimant allegedly could have earned, was the basis used in calculating loss of earning power.
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3 (See Finding of Fact No. 5, in Weston).

4 RCW 51.32.090(3) permits a claimant to recover the proportional difference in time-loss
5 payments when he has a reduced earning capacity. Time-loss payments are based solely on certain
6 percentages of the actual wages earned at the time of injury. Thus, Mr. Brown's actual wage at the
7 time of his injury, and not what he was potentially able to earn, is the correct figure to use when
8 calculating his loss of earning power compensation.
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11 Mr. Brown's other contention is that the Industrial Appeals Judge incorrectly considered the
12 claimant's pay raises while he was employed by Grays Harbor County. Mr. Brown cites Hunter v.
13 Department of Labor and Industries, 43 Wn.2d 696, 263 P.2d 586 (1953) in support of this contention.
14 We do not agree that Hunter precludes consideration of Mr. Brown's subsequent raises. In Hunter,
15 the claimant was employed as a lineman for Puget Sound Power & Light Company when he was
16 injured. After the injury, Mr. Hunter was no longer able to be employed as a lineman and was
17 employed by the same employer as a meter journeyman, which paid less than his former employment.
18 Due to this circumstance, the Department awarded him loss of earnings power benefits.
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23 Subsequently, there was a general wage raise for Puget Sound employees and Mr. Hunter
24 earned as much as he had at the time of his injury. The Department terminated his payments. On
25 appeal the Board recognized the fact that linemen had also received raises and still earned more than
26 meter journeymen. For that reason the Board and the Court reinstated Mr. Hunter's loss of earning
27 power benefits. The facts in this case are not analogous to the facts in Hunter. The only evidence as
28 to what Mr. Brown made as a logger was the \$12.87 per hour rate he earned at the time of his injury.
29 No evidence was presented as to subsequent raises received by loggers. Therefore, the \$12.87
30 figure must be used as the basic wage rate in determining the proportionate time loss compensation
31 he is to receive.
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37 It is proper to consider what a worker's earnings were at the time of his industrial injury and to
38 establish the extent of increase, if any, which has occurred in earnings paid for such employment
39 since the industrial injury in order to arrive at the earnings which a worker would have received had he
40 or she not experienced the industrial injury. This was what occurred in Hunter and was the basis for
41 Mr. Hunter being able to continue to receive loss of earning power benefits, even after he received a
42 raise while working as a meter journeyman after his industrial injury.
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1 In the present appeal, Mr. Brown failed to produce any evidence to establish the basic wage
2 rate he would have received had he remained employed as a logger after his industrial injury. Had he
3 done so, we would have taken that into consideration in arriving at the base earning rate from which
4 loss of earning power compensation could be computed. However, we are unable to use any wage
5 rate other than that contained in the record as the basic wage rate from which to compute Mr. Brown's
6 loss of earning power capacity.
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10 As a practical matter, the Department has already determined Mr. Brown's wage at the time of
11 injury in order to pay him time loss compensation. In the absence of any evidence indicating that
12 loggers' wages have increased since Mr. Brown's industrial injury, the Department should use the
13 same calculation to compute Mr. Brown's loss of earning power rate as was used to compute his time
14 loss compensation rate.
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18 It is also proper to use the wage increases Mr. Brown received while employed by Grays
19 Harbor County in determining the proper proportionate payments since, as Mr. Brown's wage
20 increased, he regained that portion of his lost earning power based on the established basic wage
21 rate. There is nothing in Hunter which would lead us to any other conclusion. RCW 51.32.090
22 specifically states that ". . . so long as the present earning power is only partially restored, the
23 payments shall continue in the proportion which the new earning power shall bear to the old." For
24 payments to Mr. Brown to be made in this statutorily mandated fashion, his raises must be included.
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28 The record supports the Industrial Appeals Judge's decision that Mr. Brown should be awarded
29 loss of earning power benefits. Dr. Ray Broman and Dr. John Huddleston testified that, due to the
30 condition of Mr. Brown's left shoulder, he should not return to logging. Steve Duschesne, a vocational
31 rehabilitation counselor, did not know of a job Mr. Brown was capable of performing on a reasonably
32 continuous basis that would pay him more than he earned while employed by Grays Harbor County.
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36 The evidence presented as to Mr. Brown's earnings as a logger and his subsequent earnings
37 from Grays Harbor County also support the Industrial Appeals Judge's decision in that Mr. Brown's
38 earning power was diminished more than 5% from July 1, 1986 through December 17, 1987.
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42 Based on these facts it is clear that Mr. Brown did suffer a loss of earning power pursuant to
43 RCW 51.32.090(3), from July 1, 1986 through December 17, 1987. However, Findings of Fact Nos.
44 10 through 15 and Conclusions of Law Nos. 4 and 5, in the Proposed Decision and Order do not
45 conform to the record or the law and must be corrected.
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1 The parties stipulated, on the record, to Mr. Brown's rate of pay while at Grays Harbor, from his
2 date of hire until the closing date of this claim. Tr. 9/6/88 at 11. For some reason the Industrial
3 Appeals Judge did not use these rates in reaching his decision. This was incorrect and new Findings
4 of Fact incorporating the correct dates and wages will be entered herein.
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7 The Industrial Appeals Judge also ordered that the loss of earning power payments should
8 extend to April 1, 1988, the final closing date of the claim (proposed Finding of Fact No. 15 and
9 proposed Conclusion of Law No. 4). This is also incorrect in that loss of earning power payment can
10 only be made up to the time Mr. Brown's condition was found to be fixed and permanent by the
11 Department, which was December 18, 1987 when the Department issued an order awarding Mr.
12 Brown a permanent partial disability award equal to 15% of the amputation value of the left arm at or
13 above the deltoid insertion or by disarticulation at the shoulder. In re Douglas G. Weston, BIIA Dec.,
14 86 1645 (1987). Mr. Brown did not present evidence that his condition was not fixed and stable on
15 December 18, 1987 and, therefore, no further loss of earning power benefits can be paid beyond that
16 date.
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22 Conclusion of Law No. 5 is also incorrect in that the Industrial Appeals Judge ordered the
23 Department to pay the claimant the difference between his pre and post injury earnings. Loss of
24 earning power benefits can only be awarded in the percentage of temporary total disability
25 compensation which is proportionate to the percentage of lost earning power. RCW 51.32.090(3).
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28 Thus, after a review of the entire record, we conclude that the Department order dated April 1,
29 1988 is incorrect and should be reversed and the claim should be remanded to the Department to
30 award the claimant a permanent partial disability award equal to 25% of the amputation value of the
31 left arm at or above the deltoid insertion or by disarticulation at the shoulder. Further, the claimant
32 should be awarded loss of earning power benefits in such proportion as the Department determines,
33 based on the below-stated Findings of Fact.
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37 **FINDINGS OF FACT**

- 38 1. On April 16, 1980 an accident report was filed with the Department of
39 Labor and Industries alleging that the claimant, Chester Brown, had
40 suffered an industrial injury to his left shoulder on March 31, 1980 while in
41 the employ of Schaben Logging Company, Inc. On July 22, 1980 the
42 Department issued an order allowing the claim and closing it for medical
43 treatment only. On February 25, 1982 an application to reopen the claim
44 on grounds of aggravation of condition was filed. On March 9, 1982, the
45 Department issued an order reopening the claim effective December 21,
46 1981 for authorized treatment and action as indicated. On February 17,
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1 1983 the Department issued an order directing that the claimant should be
2 paid an advance of \$4,000.00 on an award for permanent partial disability.
3 On August 1, 1985 the Department issued an order terminating time-loss
4 compensation effective July 31, 1985, based on a recent vocational
5 evaluation and on medical information in the claim file which the
6 Department determined to show that Mr. Brown was capable of
7 reasonably continuous gainful employment. The order also held the claim
8 open for authorized medical treatment and further action as indicated. On
9 August 9, 1985 the claimant protested and requested reconsideration of
10 the August 1, 1985 Department order.

11 On August 23, 1985 the Department issued an order granting two
12 semi-monthly time-loss compensation payments for the month of August,
13 1985. On December 18, 1987, the Department issued an order granting
14 the claimant an award for permanent partial disability equal to 15% of the
15 amputation value of his left arm at or above the deltoid insertion or by
16 disarticulation at the shoulder, and closed the claim with time loss
17 compensation as paid.

18 On January 19, 1988 the claimant protested and requested
19 reconsideration of the December 18, 1987 Department order. On March
20 18, 1988 the Department issued an order holding its December 18, 1987
21 order in abeyance. On April 1, 1988 the Department issued an order
22 holding that the claim should remain closed pursuant to the December 18,
23 1987 Department order. On April 6, 1988 the claimant filed his Notice of
24 Appeal with the Board of Industrial Insurance Appeals. On April 20, 1988
25 the Board issued an order granting the appeal, assigning it Docket No. 88
26 1326 and directing that further proceedings be held in the matter.

- 27 2. On March 31, 1980, the claimant, Chester Brown, injured his left shoulder
28 during the course of his employment as a logger with Schaben Logging
29 Company.
- 30 3. At the time of his injury, Mr. Brown earned \$12.87 per hour as a logger.
- 31 4. The claimant, Chester Brown, is a forty-four year old, left-handed man with
32 a seventh grade education and work experience in various areas of the
33 logging industry, which required heavy bending, heavy lifting, stooping,
34 heavy pulling, and working on rough and steep terrain. Mr. Brown is
35 unable to read or write. He can neither read nor understand technical
36 manuals. He functions at an intellectual level below that of any grade in
37 elementary school. As a result of the industrial injury of March 31, 1980
38 claimant is unable to return to his prior employment as a logger.
- 39 5. From July 1, 1986 through September 30, 1986 claimant received
40 on-the-job training as a member of a road crew for Grays Harbor County.
41 His job on the road crew involved flagging, some shoveling, and some
42 pre-leveling. Co-workers and his supervisor on the road crew aided Mr.
43 Brown whenever his work at that job became physically too demanding.
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- 1 6. From July 1, 1986 through December 17, 1987, as the result of his March
2 31, 1980 industrial injury, and taking into account his age, education,
3 intellectual level, work experience, and physical restrictions, the claimant,
4 Chester Brown, was precluded from full-time work as a hook tender or as
5 a worker in any aspect of the logging industry. Between those dates, Mr.
6 Brown was precluded from any job generally available in the State of
7 Washington for which he had any qualifications by way of education,
8 experience, or intellect, which would have paid him more than his job as a
9 worker on a road crew for Grays Harbor County, Washington.
- 10 7. From July 1, 1986 through September 30, 1986 the claimant, Chester
11 Brown, earned \$7.00 per hour as a trainee on a road crew for Grays
12 Harbor County.
- 13 8. From October 1, 1986 through March 31, 1987 the claimant, Chester
14 Brown, earned \$ 1,524.00 per month as a worker, on a road crew, for
15 Grays Harbor County. Mr. Brown's earning capacity during this time was
16 \$ 1,524.00 per month.
- 17 9. From April 1, 1987 through December 17, 1987 the claimant, Chester
18 Brown, earned \$ 1,584.00 per month as a worker, on a road crew, for
19 Grays Harbor County. Mr. Brown's earning capacity during this time was
20 \$ 1,584.00 per month.
- 21 10. From July 1, 1986 through December 17, 1987, the claimant, Chester
22 Brown, suffered a loss of earning power greater than 5% of his earning
23 capacity at the time of his industrial injury, based on the wages he earned
24 while employed by Schaben Logging Company at the time of his injury.
- 25 11. As of April 1, 1988, Chester Brown had a left shoulder condition causally
26 related to his March 31, 1980 industrial injury diagnosed as a contusion
27 injury to the left shoulder with status post- operative degenerative arthritis,
28 primarily in the acromioclavicular joint. By December 18, 1987 and
29 continuing until April 1, 1988 this condition was fixed and stable and not in
30 need of further curative treatment.
- 31 12. As of April 1, 1988, Chester Brown had a permanent physical impairment
32 causally related to his industrial injury equal to 25% of the amputation
33 value of the left arm at or above the deltoid insertion or by disarticulation at
34 the shoulder.

CONCLUSIONS OF LAW

- 35 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
36 and the subject matter of this appeal.
- 37 2. From July 1, 1986 through December 17, 1987, the claimant, Chester
38 Brown, was entitled to benefits for loss of earning power as a result of his
39 left shoulder condition causally related to his March 31, 1980 industrial
40 injury, pursuant to RCW 51.32.090(3).

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3. On December 18, 1987, and continuing until April 1, 1988, the claimant had suffered a permanent partial disability within the meaning of RCW 51.08.150 and was entitled to compensation therefor equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder pursuant to RCW 51.32.080.
 4. The order of the Department of Labor and Industries dated April 1, 1988, which adhered to the provisions of a Department order dated December 18, 1987 which paid a permanent partial disability award equal to 15% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder, and closed the claim with time loss compensation as paid, is incorrect and is reversed and the claim is remanded to the Department with directions to award the claimant loss of earning power benefits in such proportion as the Department determines based on the above-stated Findings of Fact and Conclusions of Law and close the claim with a permanent partial disability award equal to 25% of the amputation value of the left arm at or above the deltoid insertion or by disarticulation at the shoulder, less the prior award.

19 It is so ORDERED.

20 Dated this 29th day of June, 1989.

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22 BOARD OF INDUSTRIAL INSURANCE APPEALS

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25 /s/
26 SARA T. HARMON Chairperson

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29 /s/
30 FRANK E. FENNERTY, JR. Member

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33 /s/
34 PHILLIP T. BORK Member