Thomas, Ronald

LOSS OF EARNING POWER (RCW 51.32.090(3))

Effect of completing vocational rehabilitation

A worker who, upon successfully completing a vocational rehabilitation program approved by the Department, becomes employed at a job with wages 5 percent or more less than that at the time of the injury, is entitled to LEP benefits. The entitlement is not impacted by the Department's later position that the plan was unnecessary. **….*In re Ronald Thomas*, BIIA Dec., 89 3503 (1991)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD J. THOMAS	**)**	**DOCKET NO. 89 3503**
	)	
CLAIM NO. J-592617	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronald J. Thomas, by
Harpold, Fornabai and Fiori, per
David L. Harpold

Employer, Coeur D Alenes Co., by
Russell Steiner, Employee Safety Officer

Department of Labor and Industries, by
The Attorney General, per
Whitney Petersen, Paralegal, and Douglas D. Walsh, Assistant

This is an appeal filed by the claimant, Ronald J. Thomas, on September 12, 1989 from an order of the Department of Labor and Industries dated September 5, 1989 which adhered to the provisions of an order dated January 6, 1989 which closed the claim without award for permanent partial disability and with time loss compensation as paid to April 14, 1988. **REVERSED AND REMANDED**.

PROCEDURAL AND EVIDENTIARY MATTERS

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 claimant, Ronald J. Thomas, to a Proposed Decision and Order issued on August 14, 1990 in which the order of the Department dated September 5, 1989 was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed and said rulings are hereby affirmed.

DECISION

The issues in this appeal are: (1) whether Mr. Thomas is entitled to an award for permanent partial disability; and (2) whether he is entitled to loss of earning power compensation for any period from April 15, 1988 through January 5, 1989. We find in favor of Mr. Thomas on both of these issues.

Mr. Thomas was born January 24, 1951 and has a good educational and work history. He graduated high school, had two years of junior college in mathematics and electronics design, and completed a two-year meat cutter's apprenticeship, which included a year of school and the first year of a total six years employment in meat cutting. He worked almost nine years at Mill Steel (Coeur D

Alenes Co.) in a variety of laboring jobs and also gained experience as a crane operator at Mill Steel. He suffered an injury to his low back in December 1983 and received medical treatment for that injury, but did not lose any time from work.

The present appeal arises from Mr. Thomas's claim for an injury at Mill Steel on June 11, 1985. Mr. Thomas injured his low back when "pulling a piece of crop (phonetic) off the rollette table". 5/1/90 Tr. at 10. He reported the injury to his supervisor, filed his claim, and returned to work, but was reinjured approximately two weeks later. He was subsequently unable to return to any kind of work at Mill Steel.

Mr. Thomas has received chiropractic treatment, and has been examined by three physicians whose testimony we have before us: Dr. Frederick J. Davis, a board certified orthopedic surgeon, in March 1986; Dr. William Furrer, Jr., a board certified orthopedic surgeon, on November 18, 1988; and Dr. Melvin D. Levine, a board certified orthopedic surgeon, on July 11, 1989. Dr. Davis rated Mr. Thomas's permanent impairment due to this injury as within Category 2 of WAC 296-20-280, the categories of permanent dorso-lumbar and lumbosacral impairments. Both Dr. Furrer and Dr. Levine rated Mr. Thomas's permanent impairment as within Category 1.[1] Dr. Davis' rating was based upon disc space narrowing, suspected disc herniation at L5-S1, atrophy of Mr. Thomas's left calf, pain radiating into his leg, and numbness and tingling in his toes. Dr. Furrer and Dr. Levine confirmed that Mr. Thomas has a central disc herniation, but at L4-5, and diagnosed a low back strain by history related to the industrial injury. Each justified the Category 1 rating by noting an absence of objective clinical findings upon examination. Neither believed that the disc herniation was related to Mr. Thomas's June 11, 1985 industrial injury.

We are persuaded that Mr. Thomas's permanent impairment related to this injury is best described by Category 2. Subjectively, Mr. Thomas has not noticed any basic improvement in his

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[1]

> WAC 296-20-280 Categories of Permanent Dorso- Lumbar and Lumbosacral Impairments. (1) No objective clinical findings. Subjective complaints and/or sensory losses may be present or absent.
>
> (2) Mild low back impairment, with mild intermittent objective clinical findings of such impairment but no significant x-ray findings and no significant objective motor loss. Subjective complaints and/or sensory losses may be present.

condition since his injury and re-injury in June 1985. Dr. Davis did not elaborate on background history. However, Dr. Levine reported the history in June 1985 as including that Mr. Thomas "experienced immediate back pain and noticed a pop in this (sic) back." 6/21/90 Tr. at 5. Dr. Furrer related with regard to one of the incidents, "he reached across a table to pull of (sic) a crop and experienced sudden severe low back pain, with radiation into the right thigh." 6/21/90 Tr. at 43.

Dr. Furrer was originally of the opinion that Mr. Thomas's herniated disc at L4-5 was related to this industrial injury, but later changed his opinion . Dr. Furrer's only stated reason for this change in opinion was that, "[n]one of the physical findings support that diagnosis but save the x-rays, the CT of the lumbar spine. So, clinically, there were no symptoms compatible with that diagnosis." 6/21/90 Tr. at 49-50. Immediately following this testimony, Dr. Furrer was asked his opinion "as to whether or not there was a relationship between the pre-existing injury of 1983 and the industrial injury of June 11, 1985" and responded "this 1985 incident aggravated a pre-existing problem which was noted in 1983." 6/21/90 Tr. at 50. Dr. Furrer did not change his opinion that a disc herniation is in fact present. He did not explain how normal findings on examination have any bearing upon when and why the disc herniation occurred. The context of his opinion regarding aggravation, requires us to infer that, if the June 1985 industrial injury did not directly cause the herniated disc, it at least aggravated Mr. Thomas's pre-existing condition which included the herniated disc.

Dr. Furrer further stated that "a herniated disc can manifest themselves (sic) and an individuals (sic) can be symptomatic and other times they can be relatively asymptomatic." 6/21/90 Tr. at 57. Dr. Furrer had previously indicated that Mr. Thomas's reports of numbness in his second, third, and fourth right toes may be a characteristic symptom of problems with his L5 nerve root distribution: "There are some patients who might have a distribution of sensory impairment at that area, yes." 6/21/90 Tr. at 55. The point was not explored with regard to other symptoms. Dr. Levine stated that Mr. Thomas may have a herniated disc without any symptoms. Such testimony is entirely consistent with Dr. Furrer's view that Mr. Thomas's herniated disc may be only intermittently symptomatic.

In the final analysis, Dr. Furrer and Dr. Levine stated only that objective clinical findings were not present on the particular dates of the examinations which they conducted. On the other hand, their testimony supports the conclusion that the herniated disc was either directly caused or at least aggravated by the industrial injury in June 1985 and that symptoms and findings from this injury or aggravation may appear intermittently. Given that it was precisely Mr. Thomas's clinical findings which led Dr. Davis to suspect a herniated disc, and given Mr. Thomas's continued and present reports of

similar pain plus sensory loss, we believe the preponderance of the evidence is that he has mild intermittent objective clinical findings of his low back impairment. This is in accord with the impairment described in Category 2, as pointed out by Dr. Davis.

We next turn to the matter of whether Mr. Thomas was entitled to loss of earning power compensation which had not been paid upon claim closure. Our Industrial Appeals Judge described the period in question as extending from April 15, 1988 to September 5, 1989. September 5, 1989 is the date of the order on appeal. Like our Industrial Appeals Judge, we frequently use this date as the date through which we may consider entitlement to time loss or loss of earning power compensation, because our jurisdiction extends through the date of the final order on appeal. See In re Tom G. Camp, BIIA Dec., 38,035 (1973). However, in the circumstances of this particular case, we should only consider Mr. Thomas's entitlement up to January 6, 1989. By an order issued on that date, the Department closed the claim and established that Mr. Thomas's condition was legally fixed. Mr. Thomas does not contend that he was in need of further treatment as of that date. Under these circumstances, time loss or loss of earning power compensation is appropriately considered up to, but not beyond, January 6, 1989. In re Douglas G. Weston, BIIA Dec., 86 1645 (1987).

It is clear from the record that the Department terminated Mr. Thomas's time loss compensation effective April 14, 1988, because he had been successfully prepared to reenter the work force through vocational training and counseling which the Department had both approved and provided. Evelyn Tekei is a certified vocational rehabilitation counselor who is registered with the Department. Mr. Thomas was referred to her on January 7, 1987. She explained that a vocational assessment had already been prepared as early as December 18, 1985 and that her specific task was to develop a vocational plan. Towards this end, Ms. Tekei and Mr. Thomas discussed his aptitudes and Ms. Tekei had him further evaluated. She surveyed the labor market, conducted a job analysis and spoke with numerous training facilities. She "finally arrived at a . . . decision for him to enter formalized training in order for him to obtain the skills to work." 5/1/90 Tr. at 4.

The vocational plan called for training as a recreational vehicle technician at Clover Park Vocational-Technical Institute. Based upon the labor market survey, including the wage information gathered from prospective employers, Ms. Tekei had anticipated Mr. Thomas would be able to obtain an entry-level wage of approximately $6.00 to $7.00 per hour upon course completion. Indeed, this proved to be an accurate assessment, since the first job which Mr. Thomas obtained, three to four

weeks after completing training on or about April 4, 1988, paid a starting wage of $6.10 per hour and, after four weeks, $6.35 per hour.

The entry wage level ($6.00 to $7.00 per hour) of a recreational vehicle technician contrasts rather markedly with the higher wage of $10.95 per hour which Mr. Thomas was earning at the time of his industrial injury. Nevertheless, having developed an approved vocational plan and having trained Mr. Thomas for the lower paying job, the Department denied loss of earning power benefits once vocational training was completed and Mr. Thomas was placed in the lower paying job. What rule or policy the Department relied upon in justification of this we do not know.

In proceedings before this Board, the Department presented the testimony of Carl Gann, a vocational expert whose only involvement with this case was by way of a records review in May 1990 in preparation for his testimony in this litigation. He reviewed Ms. Tekei's materials and the medical records, including those of Dr. Davis, Dr. Furrer, and Dr. Levine, and expressed his opinion regarding various jobs which he felt Mr. Thomas could perform which paid wages equal to or exceeding the wages earned at the time of the industrial injury. The jobs he suggested draw only upon Mr. Thomas's previous skills, training and experience, and not at all upon his training as a recreational vehicle technician. Ms. Tekei, on the other hand, maintained an opinion consistent with the vocational plan, that is, that Mr. Thomas's earning capacity after completion of the training was $6.00 to $7.00 per hour.

We do not hold that a worker who has completed an approved vocational plan preparing the worker for a lower paying job will always be entitled to loss of earning power compensation until legal fixity of condition is determined. Conceivably, extraordinary circumstances might exist where this would not be warranted. For instance, the labor market might significantly improve. Or, the worker's physical abilities might significantly improve to an unexpected degree. Or, the worker might, at his or her own independent initiative, undertake to gain added education and skills beyond those targeted in the vocational plan. However, absent such circumstances, we will not give much weight to later forensic vocational testimony concerning loss of earning power which is directly inconsistent with the prior vocational assessments and training plan to which the Department committed both the worker and itself. In the present case there has been no suggestion of any unusual or compelling circumstances. The Department simply appears to be attempting to repudiate, long after the fact, the necessity of the very vocational plan it approved and paid for while the worker's claim was open for treatment, compensation, and vocational services.

Ms. Tekei testified that the vocational plan which the Department approved and provided for Mr. Thomas was developed after she conducted a labor market survey which included the wage rate and job availability information later shown to be accurate. Mr. Thomas relied upon the Department's approval of this plan and cooperated in the vocational process. The Department's present position is wholly inconsistent with the approved vocational plan. Allowing the Department to now contradict or repudiate the plan by contending the plan was unnecessary in the first place would deprive Mr. Thomas of loss of earning power compensation to which he otherwise would be entitled. We can find no reason why the Department should now be able to assert that Mr. Thomas, without the plan, was capable of earning wages equal to or exceeding his wages at the time of injury. The question this immediately brings up is: Why was the plan provided in the first place?

An examination of the statutes and regulations governing vocational rehabilitation services further supports our holding regarding the loss of earning power issue. The Department is authorized to provide vocational rehabilitation services when "in the sole opinion of the supervisor [of Industrial Insurance] or supervisor's designee, whether or not medical treatment has been concluded, vocational rehabilitation is both necessary and likely to enable the injured worker to become employable at gainful employment. . . ." (Emphasis supplied) RCW 51.32.095. Consistent with this provision, the Director of the Department of Labor and Industries has the "sole discretion" to resolve disputes arising out of such determinations. RCW 51.32.095(6); WAC 296- 18A-470(3). Our review of the Director's decisions is limited to determining whether or not the exercise of such discretionary authority has been abused. In re Armando Flores, BIIA Dec., 87 3913 (1989).

We note also that the Department has chosen to define "gainful employment" as meaning any occupation which allows a worker to be compensated "with wages or other earnings considering RCW 51.12.010." (Emphasis supplied) WAC 296-18A-420(2). RCW 51.12.010 clearly states that our workers' compensation laws are to be liberally construed to reduce "to a minimum the suffering and economic loss arising from injuries. . . ." (Emphasis supplied) RCW 51.12.010.[2] Finally, the worker's

[2]We believe the priority of minimizing wage loss is so obvious as a matter of public policy that our legislature did not consider it ecessary to explicitly state it as such in setting forth the prescribed order of priorities of vocational rehabilitation goals in RCW 51.32.095(2):

> (a) Return to the previous job with the same employer;
>
> (b) Modification of the previous job with the same employer including transitional return to work;

cooperation in reasonable efforts at rehabilitation is mandatory. The Department is authorized to suspend further action and compensation on the claim during any period of noncooperation. RCW 51.32.110 and WAC 296-18A-480(4).

At least two basic principles can be derived from the statutes and regulations which we have just described. First, absent compelling circumstances otherwise shown, we can assume that a vocational rehabilitation plan approved by the Department reflects an informed judgment by the Department that the plan is necessary to make the worker employable. We can also assume that the plan is reasonably calculated, i.e., likely, to enable the worker to become employable at an earning capacity which will reduce the worker's economic loss to a minimum. RCW51.12.010. That is, we can assume that the Department has fulfilled its statutory mandate under RCW 51.12.010 and has determined that after successful completion of the vocational plan the worker will return to work with the least reduction in earning power possible. Thus, we conclude that the Department would not have approved the vocational plan in this case unless it had determined that it was the best plan for Mr. Thomas and unless it was calculated to reduce his economic loss to a minimum.

Secondly, given that the Department has sole discretion to determine the necessity and likelihood of success of vocational rehabilitation services, its subsequent decisions with regard to compensation for loss of earning power must be consistent with the initial discretion exercised in the vocational rehabilitation planning. In other words, in cases like the one before us, where the vocational plan is expected to lead to a lower subsequent level of earning power, and that expectation is then

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> (c) A new job with the same employer in keeping with any limitations or restrictions;
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> (d) Modification of a new job with the same employer including transitional return to work;
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> (e) Modification of the previous job with a new employer;
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> (f) A new job with a new employer or self-employment based upon transferable skills;
>
> (g) Modification of a new job with a new employer;
>
> (h) A new job with a new employer or self-employment involving on-the-job training;
>
> (i) Short-term retraining and job placement.

borne out, there should then be entitlement to appropriate temporary loss of earning power compensation. The statute in effect sets up a system of checks and balances to guide the exercise of the Department's discretion. Since the worker may be entitled to loss of earning power compensation after a vocational plan has been completed, the Department is encouraged to carefully assess each vocational plan and to make sure it minimizes the worker's loss of earning power.

Pursuant to WAC 296-18A-450(1) and (3), Mr. Thomas's vocational plan was communicated to and approved by the Department and communicated to the employer and to Mr. Thomas, who was required to sign the plan and agree that he understood its contents and would faithfully execute his responsibilities. To our knowledge, neither Mr. Thomas nor the employer filed any dispute, protest, or appeal concerning the vocational plan. The Coeur D Alenes Company did not participate in the hearings before this Board except to the extent of some cross-examination of Mr. Thomas. Thus, it is only the Department which is now attempting to challenge its own prior vocational determinations. In the circumstances of the present case, we reject this challenge. To hold otherwise in these circumstances would allow the Department to avoid its prior determination regarding claimant's expected reduced earning capacity following completion of the vocational rehabilitation plan.

We would also note that the approved plan was at the bottom of the order of priorities for vocational rehabilitation efforts set forth in RCW 51.32.095(2), i.e., subsection (i), short-term retraining and job placement. These priorities, subsections (a) through (i), clearly reflect descending levels of success in achieving the goal of minimizing economic loss, with subsection (a), return to the previous job with the same employer, clearly being the highest priority in achieving that goal. The Department, in approving this plan, obviously decided that the higher priority efforts encompassed in (a) through (h) were not appropriate here, and that short-term retraining was necessary to make this particular worker employable. A predictably concomitant result of this determination, of course, was claimant's lower earning capacity following conclusion of the retraining.

The Department's failure to pay Mr. Thomas loss of earning power compensation is inconsistent with the determinations which the Department made in approving and providing the vocational rehabilitation plan. In the particular circumstances of this case, we believe the Department is precluded from basing its defense against Mr. Thomas's claim for loss of earning power on vocational testimony inconsistent with the actual approved vocational plan results. Mr. Thomas is entitled to temporary loss of earning power compensation.

The time period at issue is April 15, 1988 through January 5, 1989. Mr. Thomas successfully completed his vocational plan on April 4, 1988. Three to four weeks later he got a job as a recreational vehicle technician. For the first month he earned $6.10 per hour. Thereafter, he earned $6.35 per hour. He was laid off after about seven months of work, i.e., probably in late December 1988. Therefore, for almost all of the period during which Mr. Thomas is claiming loss of earning power compensation, we have very good actual information about what he was in fact earning. That actual information is entirely consistent with Ms. Tekei's vocational opinion that Mr. Thomas's earning capacity was between $6.00 and $7.00 per hour after plan completion. Therefore, in this case, we conclude that Mr. Thomas's actual wages establish his earning capacity between April 15, 1988 and January 5, 1989. On remand, the Department must compute the rate of loss of earning power compensation based upon employment at eight hours per day, five days per week, at an hourly rate of $6.10 through the first month of employment, and $6.35 per hour thereafter.

We adopt from the Proposed Decision and Order Findings of Fact Nos. 1, 2, 3, and 4 and Conclusion of Law No. 1. In addition, we make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

5. The Department approved a vocational rehabilitation plan which was determined by the Department to be necessary and likely to enable Mr. Thomas to become employable at gainful employment. The claim was communicated to, and accepted by, Mr. Thomas and was communicated to the employer, Coeur D Alenes Company. The vocational rehabilitation plan included training as a recreational vehicle technician at Clover Park Vocational Technical Institute and projected that, upon completion of the plan, Mr. Thomas would be able to obtain full-time employment as a recreational vehicle technician and that his earning capacity would be between $6.00 and $7.00 per hour. As of April 4, 1988, Mr. Thomas had successfully completed the vocational rehabilitation plan and was able to be gainfully employed five days per week, eight hours per day, at between $6.00 and $7.00 per hour. Approximately one month after plan completion, Mr. Thomas obtained employment as a recreational vehicle technician. For the first month of that employment, he was paid $6.10 er hour. Thereafter, he was paid $6.35 per hour. He was laid off some time in late December, 1988.

6. On January 6, 1989, Mr. Thomas's condition causally related to the industrial injury was legally fixed.

7. Mr. Thomas was paid time loss compensation through April 14, 1988.

8. During the period of April 15, 1988 through January 5, 1989, Mr. Thomas suffered a loss of earning power due to his industrial injury of June 11, 1985, exceeding 5%. At the time of the industrial injury, Mr. Thomas was capable of full-time employment at an hourly wage of $10.95. As a result of the industrial injury, his earning capacity was reduced during the period of April 15, 1988 through January 5, 1989 as follows: He was capable of full-time employment at a wage of $6.10 per hour for approximately two months following plan completion on April 4, 1988. Thereafter, through January 5, 1989, he was capable of full-time employment at a wage of $6.35 per hour.

9. As of September 5, 1989, Mr. Thomas's condition causally related to his injury of June 11, 1985 was diagnosed as a low back strain by history. The industrial injury also either caused or aggravated a herniated nucleus pulposus at the L4-5 level of his spine with evidence of disc space narrowing, intermittent radiculopathy and symptoms of back pain and pain radiating into his lower extremity, and numbness. Mr. Thomas's condition causally related to the industrial injury was fixed and stable and best described by Category 2 of WAC 296-20-280, the categories of permanent dorso-lumbar and lumbosacral impairments.

CONCLUSIONS OF LAW

2. Mr. Thomas is entitled to an award for permanent partial disability consistent with the degree of impairment reflected by Category 2 of WAC 296-20-280, the categories of permanent dorso-lumbar and lumbosacral impairments (5% as compared to total bodily impairment) pursuant to WAC 296-20-680(3), paid at 75% of monetary value pursuant to RCW 51.32.080(2) (1979).

3. Mr. Thomas is entitled to loss of earning power compensation for the period April 15, 1988 through January 5, 1989, consistent with an earning power during said period equal to employment five days per week, eight hours per day at wages of $6.10 per hour for the first two months following April 4, 1988 (date of plan completion) and at wages of $6.35 per hour thereafter. RCW 51.32.090(3).

4. The order of the Department of Labor and Industries dated September 5, 1989 which affirmed the order dated January 6, 1989 which closed the claim with time loss compensation as paid through April 14, 1988 and without award for permanent partial disability is incorrect and is reversed. The claim is remanded to the Department of Labor and Industries to pay loss of earning power compensation for the period April 15, 1988 through January 5, 1989 consistent with Mr. Thomas's earning power at full-time employment at wages of $6.10 per hour for the first two months following April 4, 1988 and at wages of $6.35 per hour thereafter. Mr. Thomas's hourly wage at the time of injury was $10.95 per hour. The Department is also directed to pay an award for permanent partial disability consistent with the impairment described by Category 2 of WAC 296-20-280 (5% as

compared to total bodily impairment), paid at 75% of monetary value, and to thereupon close the claim.

It is so ORDERED.

Dated this 14th day of March, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON Chairperson

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

/s/ _____
PHILLIP T. BORK Member