Coolidge, Carl

LOSS OF EARNING POWER (RCW 51.32.090(3))

Entitlement beyond date condition becomes fixed

A worker's right to temporary periodic disability [loss of earning power (LEP)] benefits, when otherwise due, cannot be terminated by an order formally stating that a condition is fixed when the order does not concurrently determine whether permanent disability benefits are payable under the claim. *Citing Weston*, *Deering*. The distinction between factual and legal fixity does not justify the result. The worker is entitled to continued LEP benefits until an order fixes the extent of, and makes an award for, permanent partial disability, if any. ***….In re Carl Coolidge*, BIIA Dec., 89 4308 (1991)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under Klickitat County Cause No. 91-2-00090-1.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CARL H. COOLIDGE	**)**	**DOCKET NOS. 89 4308 & 90 1118**
	)	
CLAIM NO. S-642378	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Carl H. Coolidge, by
Morse & Bratt, per
Ben Shafton

Self-Insured Employer, St. REgis Paper Company, by
Eisenhower, Carlson, Newlands, Reha, Henriot & Quinn, per
Richard A. Jessup

The appeal assigned Docket No. 89 4308 was filed by the claimant, Carl H. Coolidge, on October 26, 1989 from an October 5, 1989 Department order. The order affirmed an order dated August 29, 1989, which determined that Mr. Coolidge had completed training and was employable, that he was medically fixed and stable and that he was not eligible for "loss-of-earning power time loss benefits." The Department order is **REVERSED**.

The appeal assigned Docket No. 90 1118 was filed by Mr. Coolidge on March 9, 1990 from a February 14, 1990 Department order. The order closed Mr. Coolidge's claim with time loss compensation as paid to June 9, 1989 and directed the self-insured employer to pay Mr. Coolidge a permanent partial disability award for respiratory impairment consistent with the degree of disability represented by Category 2 of WAC 296-20-380 for respiratory impairment. The Department order is reversed.

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 timely Petitions for Review filed by the claimant, Carl H. Coolidge, and the employer, St. Regis Paper Company, to a Proposed Decision and Order issued on August 8, 1990 in which the orders of the Department dated October 5, 1989 (Docket No. 89 4308) and February 14, 1990 (Docket No. 90 1118) were reversed. In Docket No. 89 4308, the claim was remanded to the Department with instructions to issue an order setting aside and holding for naught its order dated October 5, 1989 and determining that Mr. Coolidge is entitled to loss of earning power benefits for the period June 10, 1989 through and including August 28, 1989. In Docket No. 90 1118, the claim was remanded to the Department with instructions to issue an order setting aside and holding for naught its order dated

February 14, 1990, closing Mr. Coolidge's claim, and directing the self-insured employer to pay Mr. Coolidge loss of earning power for the period June 10, 1989 through and including August 28, 1989 and to pay Mr. Coolidge a permanent partial disability award consistent with Category 2 of WAC 296-20-380.

The self-insured employer's Petition for Review was mailed on September 24, 1990 and received on September 25, 1990. Inadvertently, no order granting or denying that Petition for Review was issued. Pursuant to RCW 51.52.106 the employer's Petition for Review is therefore deemed granted.

DECISION

The issue presented by this appeal and the stipulated facts presented by the parties are adequately set forth in the Proposed Decision and Order.

Mr. Coolidge argues he is entitled to loss of earning power compensation for the period June 10, 1989 through February 13, 1990. St. Regis Paper argues that Mr. Coolidge is not entitled to loss of earning power for any of the period June 10, 1989 through February 14, 1990. St. Regis Paper contends the Department, by approving termination of periodic benefits effective June 9, 1989 by its February 14, 1990 closing order, determined the industrially related condition was both medically and legally fixed and stable as of June 9, 1989. Our industrial appeals judge considered the condition legally fixed and stable as of the August 29, 1989 order so stating. He thus ordered periodic benefits be paid up to, but not after, that date. He ostensibly relied upon two prior significant decisions of the Board, and court cases cited in those decisions: In re Douglas G. Weston, BIIA Dec., 86 1645 (1987) and In re Charles Deering, BIIA Dec., 25,904 (1968). We agree with the claimant.

It was stipulated that the industrial injury reduced Mr. Coolidge's ability to earn wages. The amount of lost earning power was stipulated for each of several periods from June 10, 1989 through February 13, 1990. However, as noted by the employer, no facts were stipulated to directly suggest a date of medical fixity of condition other than that indicated in the Department orders. The Department issued an order on August 29, 1989 determining that Mr. Coolidge's condition, related to the injury, was medically fixed and stable and he was not eligible for benefits for lost earning power. The Department did not close the claim or pay a permanent partial disability award at that time. On February 14, 1990 the Department did close the claim with an award for permanent partial disability.

In Deering, supra, we held that a worker having a loss of earning power of 5% or greater as a result of his or her industrial injury is entitled to compensation for that loss of earning power until the

Department issues an order fixing the extent, if any, of the worker's permanent partial disability. Nearly twenty years later, in Weston, supra, we held that a worker cannot automatically extend the period of entitlement to loss of earning power compensation by protesting an initial closing order which determined the extent of permanent partial disability. The period of entitlement is not extended absent proof that the worker's condition was not fixed on the date of the closing order.

In the present case, the question before us is whether an order which determines that a worker's condition is medically fixed and stable[1], but which does not determine the extent of permanent disability, may operate to the same extent to cut off loss of earning power benefits as did the initial closing order in Weston. We hold that an order which merely recites that a worker's condition is fixed and stable but which does not determine the extent of permanent disability and make an award for the disability, if any is due, does not justify the termination of loss of earning power benefits otherwise payable.

St. Regis Paper and the Proposed Decision and Order emphasize the date on which a Department order formally states that a worker's medical condition is fixed and stable. The only difference between St. Regis Paper and the Proposed Decision and Order is that St. Regis Paper argues that the critical date is June 9, 1989 (by necessary implication of the February 14, 1990 order), while the Proposed Decision and Order states that August 28, 1989 is the critical date (relying upon the August 29, 1989 order). See Footnote No. 1, supra. Stepping off on either foot in this direction overlooks the real holdings of Weston and Deering and misapprehends the significance our courts have attributed to terms such as "fixed and stable", "fixed state", "fixed an permanent" and the like. Such terms have been employed to distinguish between the types of benefits to which a worker might be entitled. We find nothing in the decisions of our courts or our prior decisions which justifies

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[1]This claim coming on for further consideration;F

> WHEREAS a request has been made for payment of loss-of- earning power benefits for reduced wages from Northwest Auto Parts, and
>
> WHEREAS it has been determined that the claimant completed training and is now employable and is medically fixed and stable, he is therefore not eligible for loss-of-earning power time loss benefits.

Department order dated August 29, 1989, Claim No. S-642378 (Emphasis supplied).

elevating the term "medically fixed and stable" to the status of a magic legal wand which can be waved by Department order over a claim so as to deny or delay benefits otherwise due.

We turn to examine the language of our courts upon which we most directly relied in Weston and Deering:

> Usually, during a period of temporary total disability, the workman is undergoing treatment. In any event, such classification contemplates that eventually there will be either complete recovery or an impaired bodily condition which is static. Until one or the other of these conditions is reached, the statutory classification is temporary total disability. Permanent partial disability, on the other hand, contemplates a situation where the condition of the injured workman has reached a fixed state from which full recovery is not expected. [Miller v. Dep't of Labor & Indus., 200 Wash. 674, 94 P.2d 764.]
>
> It is plain from the foregoing that a claimant cannot at one and the same time be classified as temporarily totally disabled and permanently partially disabled. Accordingly, when it has been determined, as it was here, that the condition of the workman has reached a fixed state and he is entitled to a permanent partial disability award, he is not, thereafter, entitled to any compensation for time loss unless it is subsequently determined that he is in need of further treatment and has been restored to the temporary total disability classification . . . .

Hunter v. Dep't of Labor & Indus., 43 Wn.2d 696, 699-700, 263 P.2d 586

Both Franks and Hunter involved the issue of whether a worker may continue to receive periodic temporary disability benefits beyond the date of entitlement to an award for permanent partial disability. Ms. Franks had disavowed her right to additional time loss compensation before the Board and, at oral argument, conceded that claims for further time loss compensation and a greater award for permanent partial disability were inconsistent. The real dispute in Franks was over the adequacy of the Department's exception to the interrogatory to the superior court jury which allowed the jury to award both an additional amount for permanent partial disability and, at the same time, an amount of additional time loss compensation. Franks, 35 Wn.2d at 766-768.

Mr. Hunter, on the other hand, actually attempted to remove himself from the rule which was stated as so obvious in Franks. He contended that continued receipt of partial loss of earning power compensation under RCW 51.32.090 is not inconsistent with receipt of an award for permanent partial disability. The Hunter court rejected this argument, indicating that the reasoning of Franks is

compelling. Hunter described only two general classifications with regard to a worker's entitlement to awards for disability:

> . . . We are convinced that the act contemplates two separate and distinct classifications: (1) temporary disability status, and (2) permanent disability status. Payment of compensation in connection with one status (percentage time-loss payments respecting temporary disability) would not be authorized and would be inconsistent with any simultaneous classification within the permanent disability status and the payment and acceptance of a permanent disability award.

Hunter, 43 Wn.2d at 700-701.

The result sought by St. Regis Paper and that reached in the Proposed Decision and Order would create nothing short of a third, impermissible classification of claims of disabled workers. That classification would be one in which the claim is suspended for disability benefit purposes even though the disability is acknowledged. Mr. Coolidge's situation well underscores the point. It is acknowledged that up to the time when his condition became medically fixed, it disabled him, causing a partial loss of earning power and, thereafter, a compensable permanent partial disability. The elevation of formally designated medical fixity, or "legal fixity", to a separate claim status beyond those two described in Hunter would entirely disregard the continuity of Mr. Coolidge's disability and unjustly delay his receipt of benefits. This would be the complete opposite of the result intended by the holdings in Weston and Deering, and it would deviate from the course of claims adjudication as historically assumed and sanctioned by our courts.

In Miller (cited in Hunter and Franks, supra) the worker challenged the closing of his claim with an award for permanent partial disability. The court framed the issue with regard to whether or not the claim should have been closed in terms of the familiar rule: "The rule in this state undoubtedly is that, before an allowance can be made for permanent partial disability, the condition of the injured workman must have reached a fixed state." Miller v. Dep't of Labor & Indus., 200 Wash. 674, 680, 94 P.2d 764 (1939). Having found that the evidence supported the conclusion that the worker's condition was fixed as necessary to the closing order, the court stated: "Appellant's condition having become fixed, it was necessary for the department to determine whether the disability was total or partial." (Emphasis supplied) Id. at 681. While this latter statement was not essential to the holding in Miller, it is reflective of a long assumed and unchallenged rule which underlies the decisions of our courts when discussing the significance of fixity of a worker's condition.

> It is clear that where a claimant's condition is deteriorating or further medical treatment is contemplated, the condition is not "fixed" and the claim remains open so that treatment can be provided. However, if a claimant's condition has stabilized to the point where no further medical treatment is required, the condition is "fixed" for purposes of closing the claim and determining the disability award. This interpretation aids the purpose of the act to provide prompt and certain relief for the injured workman. RCW 51.04.010.

Pybus Steel v. Dep't of Labor & Indus., 12 Wn.App. 436, 439, 530 P.2d 350 (1975) (Emphasis supplied).

Thus, the term "fixed" is an interpretive term to aid prompt relief. It is a judicially imposed condition and not found in the statutory definition of permanent partial disability. DuPont v. Dep't of Labor & Indus., 46 Wn.App. 471, 477, 730 P.2d 1345 (1986). Our courts have used the term "fixed" with the understanding that the claim would be closed and an award for permanent partial disability, if any, would be made: "The relevant date in determining whether a condition is fixed is the date on which the closure order was issued." DuPont, 46 Wn. App. at 477; Harper v. Dep't of Labor & Indus., 46 Wn.2d 404, 407, 281 P.2d 859 (1955); and Roberts v. Dep't of Labor & Indus., 46 Wn.2d 424, 425, 282 P.2d 290 (1955).

We adhere, then, to the holdings in Weston and Deering. A worker who is otherwise entitled to receive loss of earning power compensation, and whose condition becomes medically fixed prior to full restoration of earning power, is entitled to continuation of loss of earning power compensation until an order is entered which fixes the extent of, and makes award for, permanent partial disability, if any.[2] Time loss or loss of earning power compensation benefits, when otherwise due, may not be terminated until an order issues determining the extent, if any, of permanent disability. The right to temporary periodic disability benefits, when otherwise due, cannot be terminated by an order formally stating that a condition is fixed when the order does not at the same time determine whether benefits for permanent disability are payable under the claim. The distinction between factual and legal fixity does not justify such a result.

We adopt from the Proposed Decision and Order Finding of Fact No. 1 and Conclusion of Law No. 1, and in addition make the following Findings of Fact and Conclusions of Law:

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[2]The further issue contained in Weston, that is, the effect of a protest of an initial closing order, is not directly relevant to the present case.

FINDINGS OF FACT

2. On April 7, 1983, while in the course of his employment with St. Regis Paper Company/Champion International, Carl H. Coolidge suffered pulmonary difficulty. Mr. Coolidge's condition arose naturally and proximately out of the course of his employment.

3. As of August 29, 1989, Mr. Coolidge's condition causally related to his occupational disease was medically fixed and stable, and did not require further medical treatment.

4. For the time period June 10, 1989 through and including February 14, 1990, as a result of his occupational disease, Carl Coolidge could not perform the requirements of his former job.

5. The wages Mr. Coolidge would have received had he continued to be employed in his former occupation for the period June 10, 1989 through June 30, 1989 were $11.11 per hour on a full time basis. Mr. Coolidge would have received for the period July 1, 1989 through February 14, 1990 $11.44 per hour on a full time basis.

6. During the time period June 10, 1989 through November 13, 1989, Mr. Coolidge's earning power was $6.62 per hour. From November 14, 1989 through January 23, 1990, his earning power was $6.81 per hour. From January 24, 1990 through February 14, 1990, his earning power was $7.21 per hour. During all of these periods Mr. Coolidge was capable of work eight hours per day, five days per week.

7. Mr. Coolidge suffered a loss of earning power of greater than 5% from June 10, 1989 through February 13, 1990 when comparing his earning power as described in Finding of Fact No. 6 with the earning power which he would have enjoyed, as described in Finding of Fact No. 5, but for his occupational disease.

8. As of February 14, 1990, Carl Coolidge's condition causally related to his industrial injury was best described by Category 2 of WAC 296-20-380, the categories of permanent respiratory impairment.

CONCLUSIONS OF LAW

2. Between June 10, 1989 and February 13, 1990, Carl H. Coolidge was temporarily partially disabled and entitled to loss of earning power compensation as set forth in RCW 51.32.090(3).

3. The Department order of October 5, 1989 which affirmed an order dated August 29, 1989 which determined that Mr. Coolidge was employable and that his condition was medically fixed and stable and which denied him loss of earning power time loss benefits is incorrect and is reversed. This matter, Docket No. 89 4308, is remanded to the Department with instructions to issue an order determining Mr. Coolidge's condition was medically fixed and stable as of August 29, 1989, his training was complete and that he was employable but entitled to loss of earning power

benefits for the period June 10, 1989 through and including August 29, 1989.

4. The Department order dated February 14, 1990 which closed Mr. Coolidge's claim with time loss compensation as paid to June 9, 1989 and directed the self-insured employer to pay Mr. Coolidge a permanent partial disability award best described by Category 2 of WAC 296-20-380 for permanent respiratory impairment is incorrect and is reversed. This matter, Docket No. 90 1118, is remanded to the Department with instructions to issue an order directing the self-insured employer to pay Mr. Coolidge loss of earning power compensation benefits for the period August 30, 1989 through and including February 13, 1990 consistent with earning power for the respective periods as described in Finding of Fact Nos. 5, 6 and 7 above, and to pay Mr. Coolidge a permanent partial disability award consistent with the degree of disability represented by Category 2 of WAC 296-20-380, and to thereupon close the claim.

It is so ORDERED.

Dated this fourth day of March, 1991.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
SARA T. HARMON Chairperson

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

DISSENT

The Board majority states that the Proposed Decision and Order's resolution of this case, in ordering payment of loss of earning power compensation to the claimant only for the period from June 10, 1989 through August 28, 1989, "ostensibly relied upon" Weston and Deering, supra. I disagree with that characterization. In my view -- and obviously in our industrial appeals judge's view -- it was not an "ostensible" reliance. This resolution is compatible with Weston and Deering, in light of the stipulated facts presented, and the specific determinative language contained in the Department orders of August 29, 1989 and February 14, 1990.

I concur with the discussion and analysis in the Proposed Decision and Order, and I specifically adopt the ultimate decision-making paragraphs from page 5, line 12, through page 6, line 17.

I would adopt all the proposed findings of fact and conclusions of law, except that I would amend the second sentence of Finding No. 7 to replace the words "As of February 14, 1990," with the words "As of August 29, 1989 and through February 14, 1990,".

Summing up, I believe claimant should receive loss of earning power compensation solely from June 10, 1989 through August 28, 1989.

Dated this fourth day of March, 1991.

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PHILLIP T. BORK Member