

Sellers, Lannie

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Loss of earning power benefits

RCW 51.32.220 permits offset of social security disability payments against temporary total disability benefits and permanent total disability benefits. Loss of earning power benefits are not temporary total disability payments and the Department has no statutory authority to offset these benefits.***In re Lannie Sellers, BIIA Dec., 91 3253 (1993)***
[*Editor's Note:* The Board's decision was appealed to superior court under Snohomish County Cause No. 93-2-03359-0.]

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ISSUES

The issues presented by this appeal are as follows:

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- (1) In calculating loss of earning power benefits, should the Department base its calculations on the claimant's post-injury wages or on the claimant's post-injury earning capacity when evidence shows post-injury earning capacity to be greater than post-injury wages?
 - (2) Should the cap on monthly payments as found in RCW 51.32.090(7) be applied before or after the loss of earning power percentage is calculated against the monthly time loss rate?
 - (3) When an injured worker is receiving both loss of earning power benefits under RCW 51.32.090(3) and social security disability payments, may the loss of earning power payments be offset by the social security disability payments as provided by RCW 51.32.220(1)?

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DECISION

With respect to Issue Nos. 1 and 2 above, the Board adopts as its own the findings and conclusions as outlined by our industrial appeals judge in the Proposed Decision and Order of November 4, 1992. Without restating the entirety of that decision, we pause to recognize that in calculating loss of earning power benefits the Department should follow the discussion as stated in the Proposed Decision and Order so as to base its calculations of benefits on the claimant's post-injury earning capacity when the evidence establishes that capacity to be greater than his or her post-injury wages. Second, we agree with the Proposed Decision and Order that the claimant's monthly loss of earning power benefit must first be calculated as a percentage of the claimant's time loss compensation rate. After this calculation has been made the "ceiling" on benefits as found in RCW 51.32.090(7) can be applied. Third, we have granted review for the limited purpose of considering whether the social security offset provisions of RCW 52.32.220(1) apply to the payment of loss of earning power compensation. We conclude they do not.

By way of clarification we set forth here the calculations used by the Department in arriving at its April 16, 1991 order. Mr. Sellers' loss of earning power for the period July 16, 1987 through November 7, 1988 was computed in the following manner and steps:

- (A) The Department calculated monthly cost of living adjusted incomes using the formula of RCW 51.32.075 and a figure of \$650.00 as the claimant's monthly wages as of the date of the industrial injury, this amount being incorrect given our finding that the claimant's monthly wage was \$1,000.00 at the time of his injury;

- 1 (B) The Department then determined the appropriate time loss compensation
2 rate for each fiscal year during the loss of earning power period by
3 applying the multiplier of RCW 51.32.060(1)(b);
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5 (C) The Department then applied the RCW 51.32.090(7) ceiling on time loss
6 compensation of 75% of the average wage in this state as computed by
7 RCW 51.08.018 and determined that it did not reduce the claimant's time
8 loss compensation rate;
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10 (D) The Department then applied the RCW 51.32.220 social security offset
11 formula computed with data provided by the Social Security Administration
12 to reduce the claimant's monthly time loss compensation rate;
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14 (E) The Department then computed the claimant's loss of earning power
15 percentage of 25% by subtracting the loss of earning power period
16 maximum earning capacity as a medical records technician from his
17 maximum earning power for that same period as a milker (had he been
18 able to perform that job) with the result obtained divided by the claimant's
19 maximum earning power as a milker, with the quotient multiplied by the
20 time loss compensation rate as reduced by the social security offset with
21 the product equal to a monthly loss of earning power entitlement; and
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23 (F) The Department then multiplied the monthly loss of earning power
24 entitlement it had derived by the number of months in each fiscal year and
25 then added the products together to arrive at the total loss of earning
26 power entitlement for the loss of earning power.

27 Lannie Sellers, injured May 31, 1976, claims entitlement to loss of earning power benefits for
28 the period of July 16, 1987 through November 7, 1988 in accordance with the provisions of RCW
29 51.32.090. Based on an Order on Agreement of Parties issued by the Board under Docket No. 89
30 2755 on August 1, 1990, it is established that Mr. Sellers is in fact entitled to benefits for the above
31 period. The dispute presented here relates to how the loss of earning power benefits should be
32 calculated and whether social security offset may be taken.
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34 By the terms of the stipulation offered hereto, the parties have agreed that Mr. Sellers'
35 maximum earning power at the time of his injury was \$1,000.00 per month. They have further agreed
36 that for the period at issue his maximum earning power was \$1,200.00 per month based on his ability
37 to work as a medical records technician. Had he been able to work as a milker, the job he held at the
38 time of his industrial injury, his earning power would have been \$1,600.00 per month. Finally, the
39 parties have agreed that during the relevant period in question Mr. Sellers received social security
40 disability income family benefits under the Federal Old Age, Survivors, and Disability Insurance Act,
41 U.S.C. 42.
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1 The resolution of this case turns in part upon an understanding of the nature of loss of earning
2 power benefits. Loss of earning power payments are not payments "for temporary total disability", but
3 for partial loss of earning power. In re Manual Estrada, Dckt. No. 89 3707 (July 19, 1991). Only when
4 an injured worker is temporarily totally incapacitated from performing any work at any type of gainful
5 occupation does that worker have a claim for temporary total disability benefits or "time loss
6 compensation" in the vernacular of workers' compensation. Eligibility for loss of earning power
7 benefits, on the other hand, contemplates that the worker is capable of engaging in some type of
8 gainful occupation, but is unable to earn the wages he or she commanded before being injured due to
9 a loss of function or impairment causally related to the industrial injury. Logically, receipt of loss of
10 earning power benefits, paid only while a claim is open, is inconsistent with being classified as a
11 temporarily totally disabled worker and must, as a result, contemplate the status of being partially
12 disabled, but only on a temporary basis. It is useful to think of loss of earning power compensation as
13 a "temporary partial disability" benefit.

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21 Temporary total disability benefits are wage replacement benefits. Time loss compensation
22 resulting from a compensable injury is that temporary compensation which a worker is entitled to
23 receive from the fund while totally incapacitated to perform work for his employer, and before his
24 disability condition has become fixed or determined. Lightle v. Dep't of Labor & Indus., 68 Wn.2d 507,
25 510 (1966). Similarly, "loss of earning power", standing unchanged since being enacted by the
26 Legislature and memorialized in Laws of 1911, ch. 74, § 5, is in reality a partial wage replacement
27 benefit. In the same fashion that temporary total disability benefits (time loss compensation benefits)
28 are payable as wage replacement benefits to injured workers who are unable to engage in any kind of
29 work on a reasonably continuous basis, temporary partial disability benefits (loss of earning power) are
30 wage replacement benefits payable to injured workers who have returned to work, but who have
31 experienced a reduction in earning capacity. By referring to the benefit as "loss of earning power",
32 there has arisen confusion as to a conceptual understanding of the classification of this benefit. It is
33 either a temporary total disability benefit, paid to claimants who have returned to work without regard
34 to the definition or meaning of "total disability", or it is an independent and separate benefit paid on a
35 temporary basis to those claimants who are only "partially disabled" and who have returned to work,
36 but who have suffered a diminished earning capacity due to their work related conditions. In other
37 words, where is the emphasis of the benefit? Is it a total disability type payment or only a partial
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1 disability payment? Because the worker has returned to some employment to receive "loss of earning
2 power" benefits, we conclude that it cannot be the equivalent of temporary "total" disability.
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4 In this regard we differ from the analysis found in the Proposed Decision and Order. Loss of
5 earning power is not analogous to either "temporary total" disability or "permanent partial" disability.
6 Permanent partial disability is a benefit which compensates for loss of function without regard to the
7 effect on the ability to work or earn wages. Temporary total disability compensates for total loss of
8 wages. Loss of earning power is a partial restoration of wages no doubt intended to encourage injured
9 workers to return to the workplace as soon as their ability to work is at least somewhat restored. It is
10 clear that this benefit does not incorporate the key distinguishing criteria of the other two statutory
11 benefits in that it is neither permanent nor total in nature.
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13 The legislation creating loss of earning power supports the conclusion that it is in fact
14 "temporary partial disability" compensation and not time loss compensation. RCW 51.32.090 states,
15 in relevant part:
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- 17 (1) When the total disability is only temporary, the schedule of payments
18 contained in RCW 51.32.060(1) and (2) shall apply, so long as the total
19 disability continues.
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- 21 (2) Any compensation payable under this section for children not in the
22 custody of the injured worker as of the date of injury shall be payable only
23 to such person as actually is providing the support for such child or
24 children pursuant to the order of a court of record providing for support of
25 such child or children.
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- 27 (3) As soon as recovery is so complete that the present earning power of the
28 worker, at any kind of work, is restored to that existing at the time of the
29 occurrence of the injury, the payments shall cease. If and so long as the
30 present earning power is only partially restored, the payments shall
31 continue in the proportion which the new earning power shall bear to the
32 old.
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37 (Emphasis added) As the first sentence of subsection (3) indicates, an injured worker who has
38 recovered from an injury such that his or her earning power is fully restored is no longer temporarily
39 totally disabled and time loss compensation ends. The second sentence of subsection (3) addresses
40 a somewhat different situation. It contemplates the situation in which the claimant has partially
41 recovered and is able to return to some kind of work, possibly different from the type of work
42 performed at the time of injury, but is unable to earn the same wage. In that case, the partially disabled
43 worker shall receive a portion of the benefit he or she would have received if totally disabled. Again,
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1 however, this partial disability benefit is paid on a temporary basis until the claimant fully recovers or
2 until a final adjudication of the claim is undertaken by the Department. Loss of earning power
3 compensation is a temporary partial disability benefit separate and distinct from time loss
4 compensation and should not be confused with such.
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7 The above analysis is important inasmuch as the social security offset provision at issue here
8 is specific in authorizing which benefits are subject to offset. RCW 51.32.220 states, in part:
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- 10 (1) For persons under the age of sixty-five receiving compensation for
11 temporary or permanent total disability pursuant to the provisions of
12 chapter 51.32 RCW, such compensation shall be reduced by an amount
13 equal to the benefits payable under the federal old age, survivors and
14 disability insurance act as now or hereafter amended not to exceed the
15 amount of the reduction established pursuant to 42 USC 424a.
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18 (Emphasis added) As is immediately recognizable, there is provision for the offsetting of both
19 temporary total disability benefits and permanent total disability benefits, but for nothing more. There
20 is no mention of temporary partial disability benefits, be it referred to by that term or by the more
21 common phrase of loss of earning power compensation. We read what a statute says, and we do not
22 read into it what is simply not there. Jenkins v. Bellingham Mun. Court, 95 Wn.2d 574, 579 (1981).
23 The Department's authority does not extend beyond the statute. Dep't of Labor & Indus. v. American
24 Industries, 59 Wn. App. 790, 792 (1990). Thus, absent specific authorization, we are unable to
25 conclude that the Legislature intended for the Department to apply social security offset to temporary
26 partial disability benefits. For us to so conclude would require us to take the position of defining a
27 temporary partial disability benefit (loss of earning power) as a temporary total disability benefit. This
28 we cannot do. Simply put, the social security offset provisions of RCW 51.32.220 do not apply to
29 temporary partial disability benefits.
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35 After consideration of the Proposed Decision and Order and the Petitions for Review filed
36 thereto, and a careful review of the entire record before us, we make the following:
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38 **FINDINGS OF FACT**

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40 1. On June 7, 1976 the claimant, Lannie G. Sellers, filed an application for
41 benefits with the Department of Labor and Industries, alleging the
42 occurrence of an industrial injury on May 31, 1976 while in the course of
43 his employment with Don Tillman. On January 27, 1978 the Department
44 issued an order allowing the claim and closing it without award for
45 permanent partial disability.
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1 On July 27, 1982, the claimant filed an application to reopen his claim. On
2 December 6, 1982 the Department issued an order reopening the claim
3 effective July 19, 1982. On November 7, 1988 the Department issued an
4 order closing the claim with time loss compensation as paid and with
5 permanent partial disability awards equal to 10% as compared to total
6 bodily impairment and 10% of the amputation value of the right leg at or
7 above the knee joint with a functional stump. On January 6, 1989, the
8 claimant mailed a protest and request for reconsideration to the
9 Department, which received it on January 9, 1989. On April 28, 1989 the
10 Department issued an order which affirmed its November 7, 1988 order.
11 On June 26, 1989 the claimant mailed a notice of appeal to the Board of
12 Industrial Insurance Appeals, which received it on June 28, 1989. On
13 August 2, 1989 this Board issued an order granting the claimant's appeal
14 subject to proof of timeliness, assigning it Docket No. 89 2755 and
15 directing that further proceedings be held. On August 1, 1990 the Board
16 issued an Order on Agreement of Parties finding that the claimant's appeal
17 was timely filed, reversing the April 28, 1989 Department order and
18 remanding the claim to the Department to calculate and pay loss of
19 earning power benefits to the claimant for the period of July 16, 1987
20 through November 7, 1988, inclusive, and thereupon close the claim
21 pursuant to the terms of the November 7, 1988 order.

22 On April 16, 1991 the Department issued an order setting aside its April
23 28, 1989 order with the claim reopened to pay loss of earning power
24 benefits at the rate of 25% for the period of July 16, 1987 through
25 November 7, 1988, inclusive, in the amount of \$660.94 and with the claim
26 to thereafter remain closed pursuant to the November 7, 1988 Department
27 order. The claimant received the April 16, 1991 Department order on April
28 22, 1991. On June 21, 1991 the claimant filed a notice of appeal with the
29 Board of Industrial Insurance Appeals. On July 31, 1991 this Board issued
30 an order granting the claimant's appeal subject to proof of timeliness,
31 assigning it Docket No. 91 3253 and directing that further proceedings be
32 held.

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- 34 2. At the time of his May 31, 1976 industrial injury, the claimant was married
35 with three children and was earning total monthly wages as defined by
36 RCW 51.08.178 of \$1,000.00 as a milker.
 - 37 3. Between July 16, 1987 and November 7, 1988, inclusive, the claimant was
38 married with only one child as that term is defined by RCW 51.08.030,
39 received social security disability income family benefits under the Federal
40 Old-age, Survivors and Disability Insurance Act, 42 U.S.C. 401 et. seq.,
41 possessed a maximum earning power of \$1,200.00 per month as a
42 medical records technician, and would have possessed an earning power
43 as a milker of \$1,600.00 per month, but for the May 31, 1976 industrial
44 injury.
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