Faulder, Ralph, Jr.

LOSS OF EARNING POWER (RCW 51.32.090(3))

Effect of not seeking full-time employment

It was incorrect to deny the worker loss of earning power benefits for any period of time on the basis he was not seeking full-time employment due to his enrollment in school, whether a worker actually seeks full-time employment is irrelevant to determining entitlement to loss of earning power benefits. **….*In re Ralph Faulder, Jr.*, BIIA Dec., 94 2765 (1996)** [dissent]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RALPH E. FAULDER, JR.	**DOCKET NO. 94 2765**
CLAIM NO. T-320184	**CORRECTED DECISION AND ORDER (CORRECTS ORDER DATED 9/19/95)**

APPEARANCES:

Claimant, Ralph E. Faulder, Jr., by
Aaby, Putnam, Albo & Causey, per
F. Wayne Lieb

Self-Insured Employer, Asplundh Tree Expert Company, by
Preston, Gates & Ellis, per
Charles R. Bush

The self-insured employer, Asplundh Tree Expert Company (Asplundh), filed an appeal with the Board of Industrial Insurance Appeals on May 5, 1994, from an order of the Department of Labor and Industries dated March 9, 1994. The order affirmed a Department order dated May 25, 1993, and directed that the claim was to remain open, the self-insured employer was to pay time-loss compensation for the period May 14, 1992 through June 7, 1992, and was to obtain wage information to calculate loss of earning power compensation for the period September 21, 1992 through March 9, 1994, and continuing until it had been demonstrated that Mr. Faulder was not entitled to vocational services. **REVERSED AND REMANDED.**

DECISION

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 worker and the self-insured employer to a Proposed Decision and Order issued on April 28, 1995, in which the order of the Department dated March 9, 1994, was reversed and remanded to the Department with direction to enter a further order directing the self-insured employer to deny time-loss compensation for the period May 14, 1992 through June 7, 1992, but to calculate and pay appropriate loss of earning power compensation for the period September 21, 1992 through March 9, 1994.

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

On September 28, 1995 we received a Motion for Reconsideration from the claimant requesting that we reconsider our determination that Mr. Faulder was not entitled to loss of earning power benefits for periods of time in which he was not seeking full-time employment. The self-insured employer and the Department did not respond to Mr. Faulder's motion. After careful consideration of the claimant's motion and the record, we conclude that it was incorrect to deny Mr. Faulder loss of earning power benefits for any period of time on the basis that he was not seeking full-time employment. Accordingly, we are issuing this Corrected Decision and Order which corrects the order issued September 19, 1995 and is our final order in this matter. This order restates our determinations on many of the issues previously raised and explains our reconsideration of the loss of earning power benefits issue.

Mr. Faulder asserts that he is entitled to loss of earning power benefits for the period May 14, 1992 to June 7, 1992. He also argues that the order on appeal constitutes a vocational services determination and, as such, is subject to an abuse of discretion standard on review. Asplundh argues that the order on appeal requires the self-insured employer to gather information to calculate loss of earning power benefits, but does not require actual payment of such benefits. Furthermore, if loss of earning power benefits are required to be paid, Asplundh contends that the basis for calculating the loss of earning power should be whatever wage Mr. Faulder was capable of earning at the time his claim was initially closed rather than the wage he was earning at the time of his injury.

We conclude that neither the Department order nor the Proposed Decision and Order in this appeal properly determined the periods during which Mr. Faulder was entitled to loss of earning

power compensation. We are otherwise in agreement with the outcome of the appeal. The Department's March 6, 1994 order was not a vocational determination and the standard of review in this appeal is a whether a preponderance of the evidence presented supports the appealing party's prayer for relief. We discuss in detail below our conclusion that the claimant's wage at the time of injury is the proper basis for the calculation of loss of earning power benefits in this appeal. Finally, it is clear to us that the order on appeal requires actual payment of loss of earning power benefits to Mr. Faulder as opposed to the barren exercise of merely calculating whether or not such benefits were due.

A brief review of the facts will help to illustrate our reasoning. Mr. Faulder injured his low back while working as a tree trimmer on August 29, 1990. His claim was closed with no award for permanent partial disability on April 17, 1991. There is no record of physical restrictions imposed on Mr. Faulder at claim closing as a result of the injury.

While his claim was active, Mr. Faulder enrolled at South Puget Sound Community College (SPSCC). When the claim was closed, he elected to remain in school and did not return to work for the self-insured employer. Between April 1991 and July 1992, when he filed his reopening application, Mr. Faulder went to school full-time and worked part-time jobs as a computer lab technician at SPSCC and as the operator of his own tree-trimming business. He graduated from SPSCC in 1991 and transferred to The Evergreen State College (TESC) to obtain a Bachelor of Arts degree (BA). From June 1992 to September 1992, Mr. Faulder worked full-time as a tree-trimmer. In September 1992, he returned to school full-time. In that same month, the Department granted his reopening application.

Mr. Faulder graduated from college in June 1993 with a Bachelor of Arts degree in Liberal Arts. He took more classes in business management than any other area of concentration, but did not complete the full four year business management curriculum at TESC.

As of September 1992, Mr. Faulder could not return to tree-trimming work due to his recurrent back problems related to the industrial injury. His attending physician, Dr. Stephen C. Albrecht, certified time-loss for three weeks in May and June 1992. However, he testified that certification applied only to tree-trimming work. He agreed that Mr. Faulder was physically capable of light and sedentary employment during that period. In fact, the record demonstrates that at all times following the reopening of the claim, Mr. Faulder was qualified and physically capable to work as a computer operator, which is classified as light to sedentary labor.

Since obtaining his BA, Mr. Faulder has sought employment as a computer programmer and operator. He succeeded only in obtaining part-time, on-call work at the Office of the Administrator of the Courts in Olympia. Even if he were to obtain full-time work in that career field, his earning power would be more than five percent less than his earning power as a tree-trimmer. The Department closed the claim in February 1993. The self-insured employer appealed and, as a result, the Department held the claim open and entered the order on appeal.

The basis for the self-insured employer's appeal was the contention that Mr. Faulder's loss of earning power, if any, should be calculated according to the wages he earned at the time his claim was closed rather than at the time of injury. When the claim was closed, Mr. Faulder was a full-time student, working part-time in a student work-study computer technician position at SPSCC. The self-insured employer relies on language in the claims administration manual used internally at the Department which states that <u>if a claim has been closed with an award for PPD</u>, payment of loss of earning power on reopening should be based on the claimant's earning power

at claim closure taking the permanent partial disability into account. This reasoning is not apposite here. Mr. Faulder's claim was closed without an award for permanent partial disability. He retained the earning power he had as a tree-trimmer and even worked intermittently as a tree-trimmer until September 1992. He chose to return to college while his claim was open and was not making use of his full earning capacity at that time, but that is not the same thing as not having been restored to full earning capacity. As the industrial appeals judge properly concluded, for those periods when payment of loss of earning power benefits to Mr. Faulder was appropriate, the earning power calculation should be based on his earning capacity as a tree-trimmer.

In our original order we noted that during periods when Mr. Faulder was attending school full-time, his relationship to employment was not that of a full-time worker. We stated that he voluntarily removed himself from the full-time work force, He did not choose to attend school because of any disability related to the industrial injury. We noted that Mr. Faulder did not seek full-time employment until after his graduation from school in 1993. We then concluded that his eligibility for loss of earning power benefits during periods when he attended classes full-time should be limited to the hours he made himself available for employment. After consideration of the claimant's motion, however, we conclude that a requirement that the claimant be available for full-time work is an unnecessary and unwarranted expansion on the prerequisites to a finding that the claimant is entitled to loss of earning power benefits.

Because loss of earning power benefits are available to compensate a worker for reduced earning capacity, it should be irrelevant to the inquiry if the worker was actually seeking full-time employment. The relevant statute, RCW 51.32.090(3), refers solely to the "present earning power" of the worker to determine if a worker is entitled to benefits. The benefits are tied to the earning capacity. There is no statutory requirement that the reduced earning capacity be

exercised as a prerequisite to receiving loss of earning power benefits. The inclusion of a requirement that the worker be actually seeking full-time employment is not warranted by the statute or case law and is not consistent with prior Board decisions

We have previously held that in order to establish 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 any post-injury reduction in earning capacity is causally related to the accepted occupational disease or industrial injury. In re Patricia Heitt, BIIA Dec., 87 1100 (1989). Additionally, the reduction in earnings must be at least five percent less than her pre-injury earnings. RCW 51.32.090(3). Once a worker is eligible for loss of earning power benefits, those benefits remain payable until such time as earning capacity is restored or an order is issued awarding permanent partial disability. In re Carl H. Coolidge, BIIA Dec., 89 4308 (1991); In re Charles Deering, BIIA Dec., 25,904 (1968); In re Douglas G. Weston, BIIA Dec., 86 1645 (1987). Mr. Faulder meets these requirements and this is the appropriate extent of the Board's inquiry. The inclusion of a requirement that the claimant also be seeking full-time employment for the periods he is seeking loss of earning power benefits was an unwarranted expansion of the prerequisites we had previously established.

Our previous order in this matter had indicated that Mr. Faulder had voluntarily removed himself from the work force because he did not seek full-time employment until after his graduation from school. RCW 51.32.090(8) states that if the supervisor of industrial insurance determines that the worker "voluntarily retires and is no longer attached to the work force," benefits are not payable. If this statute is the basis for denying Mr. Faulder's benefits, this too would be an expansion on the term "voluntary retirement." No prior Board decision requires labeling as "voluntarily retired" a worker who is attending school without regard to the intention of the worker to return to the

workforce once schooling is completed. Injured workers should not be discouraged from using a period of temporary disability to increase their employability, even in instances when vocational services are not provided by the Department. The record clearly demonstrates Mr. Faulder's intention was to remain attached to the workforce once his schooling was completed. Accordingly, we do not consider Mr. Faulder to be "voluntarily retired" merely because he attended school full-time.

There is no statutory basis or case law which requires the Board to conclude that a worker is entitled to loss of earning power benefits only for periods of time that he is actually seeking or engaged in full time employment. Mr. Faulder is entitled to loss of earning power benefits for the period of time in which his earning capacity was reduced due to his injury. Therefore, between September 1992 and June 1993, Mr. Faulder is entitled to loss of earning power benefits regardless of his availability for full-time employment. With respect to the period for which the Department ordered paid time-loss compensation to be paid in May and June 1992, the same analysis applies. Mr. Faulder is entitled to loss of earning power benefits regardless of whether or not he actually made himself available for full-time work.

The periods of time during which Mr. Faulder is eligible for loss of earning power benefits are generally described in the record. Using the information in the record, the Department should determine the exact dates involved. He testified that he only worked full-time as a tree-trimmer during school breaks. Otherwise, he worked 8 to 16 hours per month as a computer operator while in school.

After June 1993, Mr. Faulder limited his employment search to Thurston County. It would not have been unreasonable for his labor market to include at least Tacoma, which is within the 30-mile radius which vocational expert Mardi Sarjent testified makes up a labor market.

Although Mr. Faulder found no full-time employment in Thurston County, there is the reasonable likelihood that his success was affected by the limits he set on his job search. It is, therefore, reasonable to conclude that he was capable of obtaining and performing full-time employment as a computer operator after June 1993. Loss of earning power benefits from June 1993 forward should be paid on the basis of Mr. Faulder's present earning power if he was to be employed full-time as a computer operator.

FINDINGS OF FACT

1. Ralph E. Faulder, Jr., filed an application for benefits with the Department of Labor and Industries on October 4, 1990, alleging that he had suffered an industrial injury in the course of his employment as a tree-trimmer with Asplundh Tree Expert Company on August 29, 1990. His claim was allowed and was closed by Department order dated April 17, 1991, with time-loss compensation as paid to September 23, 1990, without award for further time-loss compensation or permanent partial disability.

   Ralph E. Faulder, Jr., filed an application to reopen his claim for aggravation of condition on July 13, 1992. The claim was reopened pursuant to Department order dated September 21, 1992, and closed by Department order dated February 19, 1993. Following a timely protest filed on behalf of the claimant, the Department entered an order on May 25, 1993, setting aside and holding for naught its order of February 19, 1993, and holding the claim open for authorized treatment. The self-insured employer filed a timely protest to the order of May 25, 1993. The Department entered an order on March 9, 1994, affirming its order of May 25, 1993, and directing that the claim would remain open, that the self-insured employer was to pay to the claimant time-loss compensation for the period May 14, 1992 through June 7, 1992, and obtain wage information to calculate loss of earning power compensation for the period September 21, 1992 through March 9, 1994, and continuing until it had been demonstrated that claimant was not entitled to vocational services.

   Asplundh Tree Expert Company filed a Notice of Appeal of the March 9, 1994 order with the Board of Industrial Insurance Appeals on May 5, 1994. On May 16, 1994, the Board entered an order granting the appeal, assigning it Docket No. 94 2765, and directing that further proceedings be held.

2. On August 29, 1990, Ralph E. Faulder, Jr., sustained an industrial injury to his low back. As of April 17, 1991, his industrially related back

condition was medically fixed and stable. He sustained no permanent disability and suffered from no specific physical limitations.

3. Between April 17, 1991 and March 9, 1994, Ralph E. Faulder's physical condition causally related to the industrial injury of August 29, 1990, worsened or became aggravated, with objective medical findings of such worsening demonstrable on physical examination.

4. Between April 17, 1991, and the date of his graduation from The Evergreen State College, Ralph E. Faulder chose to be enrolled in school full-time, although he worked full-time during the summer breaks.

5. Between April 17, 1991 and September 21, 1992, with the exception of the period from May 14, 1992 through June 27, 1992, Ralph E. Faulder was physically capable of performing the duties of the job of tree trimmer, taking into account his age, education, experience and training, and the effects of the August 29, 1990 industrial injury.

6. Between April 17, 1991 and September 21, 1992, Ralph E. Faulder worked as a tree-trimmer during school breaks and on weekends. He engaged in that work full-time from June 1992 through approximately September 21, 1992.

7. From May 14, 1992 through June 27, 1992, and as of September 21, 1992, and for all relevant periods thereafter, the residuals of the industrial injury of August 29, 1992, prevented Ralph E. Faulder from engaging in employment as a tree-trimmer or any other employment which required greater exertion than light to sedentary employment.

8. Between May 14, 1992 and June 27, 1992, and from and after September 21, 1992, Ralph E. Faulder was capable of reasonably continuous gainful employment as a computer operator/technician, taking into account his age, education, training, experience, and the residuals of his industrial injury.

9. As of March 9, 1994, Ralph E. Faulder, Jr., had a Bachelor of Arts degree with an emphasis on business management received from The Evergreen State College in June 1993. He also had a 1991 Associate of .Technical Arts degree in computer programming. He had 17 years experience as a tree trimmer, which is classified as heavy labor. While enrolled in college full-time between 1990 and 1991, he worked part-time as a computer lab assistant. Beginning in September 1993, he has been employed part-time as a computer operator technician with the Office of the Administrator of the Courts. His hours were part-time due to the availability of work at that location.

10. There is no evidence in the record that full-time computer operator technician employment is not available within Mr. Faulder's reasonable

labor market, which includes the Olympia and Tacoma metropolitan areas.

11. The wages Ralph E. Faulder earned per hour as a tree-trimmer at the time of injury exceed by more than five percent of the wages he could have earned as a computer technician operator between May 14, 1992 and June 27, 1992, and from September 21, 1992 through March 9, 1994.

CONCLUSIONS OF LAW

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

2. During the period May 14 through June 27, 1992, and the period September 21, 1992 through March 9, 1994, Ralph E. Faulder suffered a loss of earning power in excess of five percent as defined in RCW 51.32.090(3) as a proximate result of his industrial injury of August 29, 1990.

3. The Department's order dated March 9, 1994, does not constitute a determination by the Department that Ralph E. Faulder, Jr., is entitled to vocational services.

4. The order of the Department of Labor and Industries dated March 9, 1994, which affirmed a Department order dated May 25, 1993, and directed the claim was to remain open and the self-insured employer was to pay time- loss compensation for the period May 14, 1992 through June 7, 1992, and obtain wage information to calculate loss of earning power compensation for the period September 21, 1992 through March 9, 1994, and continuing until it had been demonstrated that claimant was not entitled to vocational services is incorrect, and is hereby reversed and remanded to the Department to enter a further order directing the self-insured employer to obtain the necessary information to calculate loss of earning power benefits for the claimant for the period May 14, 1992 through June 27, 1992, and the period September 21, 1992 through March 9, 1994, and to thereupon pay loss of earning power benefits to the claimant for those periods, the self-insured employer should pay loss of earning power benefits on the difference between Mr. Faulder's full-time wages as a tree-trimmer and his wages if he were employed full-time as a computer operator technician; and to thereupon provide such other and further benefits as are required under the Industrial Insurance Act.

It is so ORDERED.

Dated this 29th day of January, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

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

DISSENT

I dissent from the Board majority. Mr. Faulder's Motion for Reconsideration should be denied. The result in the original Decision and Order is correct.

The majority result on reconsideration concerns me because it fails to recognize the significance of Mr. Faulder's decision to become a full time student. Mr. Faulder's decision materially changed his status and materially impacted and compromised his earning power. His status as a "worker" as that term is contemplated in RCW Title 51 had changed to status of

"student."[1] In re Patricia Heitt, BIIA Dec., 87 1100 (1989)[2], this Board said "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 the worker's reduced income is due to physical restrictions imposed by the industrial injury." (Emphasis added.) The evidence in this case clearly establishes that Mr. Faulder's post injury loss of earning power at times while he continued to be temporarily and partially disabled was not caused by his industrial injury.

The court of appeals has affirmed that the legislature in creating RCW Title 51 had as one of its purposes the reduction of the financial burden of injured workers until the injured is able to return to work. In restating this well understood axiom, the court observed "[t]his goal cannot come to fruition when a worker voluntarily removes himself from the active labor force and opts, despite the presence of sufficient physical capacity, to decline further employment activity." Kaiser Aluminum v. Overdorff, 57 Wn. App. 291, 788 P.2d 8 (1990). The facts in the Overdorff case relate to a worker who had voluntarily retired. The rationale in Overdorff is instructive, even though this case had nothing to do with voluntary retirement. Mr. Overdorff had changed his status; he voluntarily removed himself from the active labor force. So did Mr. Faulder when he opted to assume the status of full-time student. I must add, parenthetically, that Mr. Faulder's assumption the original Decision and Order intended to classify him with workers in a status of voluntary retirement, pursuant to RCW 51.32.090(3) is unfounded. The Overdorff rationale is included here because it provides assistance to the analysis of the fact of Mr. Faulder's case. Mr. Faulder's

[1] As noted by the court in State ex rel Royal v. Board of Yakima Commissioners, one of the standard rules of statutory construction is that all of the provisions of an act must be considered in relation to one another and if possible harmonized to insure the proper construction of each. State ex rel Royal v. Board of Yakima Commissioners, 123 Wn.2d 451, 459, 869 P.2d 56 (1994).

[2] See also, In re Charles Deering, BIIA Dec., 25,904 (1968), where the Board found that Mr. Deering had suffered a substantial loss of earning power, part of which had been paid and ordered the balance to be determined after an investigation of the salary he would have earned as a carpenter, the occupation at the time of injury and the salary he

volitional decision to change his status from a temporarily and partially disabled worker to that of a full-time college student added sufficient non-injury related cause to his ability to work to conclude loss of earning power as provided in RCW 51.32.090(3) inappropriate. As the court noted in Kaiser, cited above, Mr. Faulder must face the financial consequences of his decision.

Upon further analysis of the facts in this case and the applicable law, I have reached the following conclusions. First, Mr. Faulder's argument regarding the continuation of temporary benefits to an injured worker while incarcerated is not persuasive because it ignores his freedom to act voluntarily and the prisoner's lack of freedom to seek, let alone obtain, employment.

Second, although I would not change the result reached in the original Decision and Order, in this dissent I have avoided reference to the phrase "actively seeking employment," as used in the original Decision and Order. That phrase is more appropriate to benefit eligibility determination pursuant to RCW Title 50, the unemployment compensation statute, and is only tangentially pertinent to this case. The only value is to emphasize the voluntary nature of Mr. Faulder's decision to change his status from "worker" to "non-worker." Third, our characterization as a useless act the Department's instructions to the employer in the order appealed is incorrect. The instructtional order is appropriate considering determination of "eligibility" for loss of earning power is one step in the process while determining the benefits due is another.

Finally, I note that one interpretation of appellate court and prior Board decisions would equate "earning power" as used in RCW 51.32.090(3) to wages actually earned. A careful reading of RCW 51.32.090(3) lends support to that interpretation. Mr. Faulder's earning power at the time of injury was based on the wage then paid. His monthly wage was calculated pursuant to RCW 51.08.178, the monthly wage computation section of the Act. His benefit level for temporary total

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was making in his post injury job as a janitor. The Board in Deering recognized the plain fact that a "worker" ceases to be a "worker" as contemplated by RCW Title 51 when the individual voluntarily quits the labor force.

disability was determined pursuant to RCW 51.32.060 and paid pursuant to RCW 51.32.090. To then consider, as has the majority, that Mr. Faulder's post injury "earning power" (his temporary partial disability benefit) is to be determined on the basis of wages he could have earned if he were employed is a leap of logic permitted only in the determination of permanent disability benefit, whether partial or total. The benefit determination formula in RCW 51.32.090(3) does not permit such a leap of logic, nor does the case law support it. In sum, during the time period Mr. Faulder's status was that of a student not enrolled in an authorized vocational rehabilitation program pursuant to RCW 51.32.095, and voluntarily holding himself off the labor market for reasons unrelated to his diminished physical capacity, he ceased to be a worker eligible for temporary wage replacement benefits pursuant to RCW 51.32.090(3) while continuing in that status.

I would deny Mr. Faulder's motion, thus reaffirming as correct the result reached in the original Decision and Order.

Dated this 29th day of January, 1996.

/s/_____
ROBERT L. McCALLISTER Member