



Significant Washington Board decisions refresher: **Time loss and loss of earning power**

By Mary Hannon ■ November 19, 2021

Welcome to our Significant Board of Industrial Insurance Appeals Decisions Refresher series, which focuses on Board decisions that form the fundamentals of claims processing in Washington. The following is one of twelve blogs that will break down some of the most impactful Board significant decisions. Each blog will include key takeaways from referenced Board decisions that affect Washington workers' compensation rules and laws, and ultimately affect how you process your claims.

This week's refresher concerns significant Board decisions related to **time loss compensation and loss of earning power**. When reviewing the five Board significant decisions outlined below, please consider the following:

- Time loss compensation calculations are based on wages the injured worker was receiving from all employment at the time of injury or manifestation of occupational disease. Income from a second job must also be included when computing gross monthly wage. In addition, "wages" is defined as the gross cash wages paid by the employer for services performed (included tips reported to the employer for federal income tax purposes), bonuses paid by the employer of record as part of the employment contract in the twelve months immediately preceding the injury or date of disease manifestation and the reasonable value of board, housing, fuel and other consideration of like nature received from the employer at the time of injury or on the date of disease manifestation that are part of the contract of hire.¹
- In order to compute the worker's wage, you must first determine which subsection of RCW 51.08.178 the worker's employment pattern falls under.
- The intent of RCW 51.08.178 is to ensure that wages are computed in a fair and equitable manner.
- When computing the gross monthly wages, you should always keep in mind RCW 51.12.010 which states "...This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment."
- The self-insurer must compensate a worker for loss of earning power when the worker's earning capacity has decreased as a result of the industrial

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The self-insurer must compensate a worker for loss of earning power when the worker's earning capacity has decreased as a result of the industrial injury



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injury or occupational disease.²

- In order to be eligible for loss of earning power benefits for claims with dates of injury or occupational disease on or after May 7, 1993, the following must be provided: (1) the worker must have a loss of earning power exceeding five percent of wages at the time of injury; (2) medical certification must indicate that the worker's loss of earning power is due to the industrial injury or occupational disease; and (3) the worker must be working at any employment for income, salary, wages, or commission. Employment may include light duty, transitional, or modified duty work as well as on-the-job training in an approved vocational plan.

The following five cases provide further insight on specific questions and issues that may arise in the context of a worker's entitlement to time loss or loss of earning power benefits.

Significant Decision #1: *In re Chad Thomas*, BIIA Dec., 00 10091 (2001)

- Legal Issue: Is a claimant entitled to time loss compensation when terminated for disciplinary reasons?
- Key Point: It depends. Disciplinary termination from work does not require reinstatement of full time loss compensation if the evidence establishes the following: (1) the disciplinary termination was administered for reasons wholly unrelated to the industrial injury or receipt of workers' compensation benefits; and (2) the discipline likely would have been administered to any of the employer's workers in similar situations. However, the Washington Court of Appeals has interpreted the relevant statute, RCW 51.32.090(4), as requiring the injured worker to "begin the work with the employer of injury" before time loss benefits are terminated.³

Significant Decision #2: *In re Mark Billings*, BIIA Dec., 70 883 (1986)

- Legal Issue: Does payment of time loss benefits during one time period create a presumption that time loss benefits are also due during a subsequent or previous time period?
- Key Point: No. Determinations that a worker is temporarily totally disabled for periods immediately prior and subsequent to the period for which time-loss compensation is claimed create no presumption that the worker is temporarily totally disabled during the interim period. An award of time loss for a particular period, which becomes final, precludes relitigation of the issue of eligibility for time loss during that particular period. Time loss is temporary by definition. There is no presumption that a temporary disability will continue into the future or that it has existed for a period into

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the past.

Significant Decision #3: *In re Patricia Heitt*, BIIA Dec., 87 1100 (1989)

- Legal Issue: What is needed to establish entitlement to loss of earning power benefits?
- Key Point: To prove entitlement to loss of earning power benefits the worker must present (1) lay or expert testimony establishing preinjury earning capacity; (2) expert testimony establishing post-injury earning capacity; and (3) expert testimony establishing that a reduction, if any, in post-injury earning capacity is causally related to the residuals of the industrial injury. The Board significant decision *In re Ralph Faulder, Jr.*, BIIA Dec., 94 2765 (1996) clarified that pursuant to RCW 51.32.090(3), for entitlement to loss of earning power benefits, the reduction in earnings must be at least five percent less than preinjury earnings.

Significant Decision #4: *In re Daniel Estes*, BIIA Dec., 96 0722 (1997)

- Legal Issue: Does receiving unemployment benefits preclude entitlement to loss of earning power benefits?
- Key Point: Not necessarily. Loss of earning power benefits do not depend on whether one is employed or employable full-time, but rather on whether one's capacity to earn the wage rate at injury has been restored. Accordingly, a worker is not precluded from receiving loss of earning power benefits because of the simultaneous receipt of unemployment compensation. The Board cited RCW 51.32.090(3), which states that as long as an injured worker's earning power is only partially restored, the worker shall receive temporary partial disability payments.

Significant Decision #5: *In re Renee Stephenson*, BIIA Dec., 13 22648 (2014)

- Legal Issue: When determining whether a worker has voluntarily retired from the workforce, and therefore not entitled to temporary total disability benefits, what time period should be the focus of inquiry?
- Key Point: In this context, the focus should be on the period of time beginning when the worker last performed gainful employment and ending on the first date for which benefits are being sought. The Board stated that temporary total disability benefits are not available to a worker who has voluntarily retired and is no longer attached to the workforce. See RCW 51.32.090(10). By regulation, the Washington State Department of Labor and Industries considers a worker to have retired if two conditions are met: (1) the worker is not receiving income, salary or wages from any

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gainful employment; and, (2) the worker has provided no evidence to show a bona fide attempt to return to work after retirement. See WAC 296-14-100. However, a worker is not voluntarily retired when the industrial injury or occupational disease is a proximate cause for the retirement. This must be established by expert testimony.

Reach out to the attorneys at Reinisch Wilson Weier if you have any questions on the above significant decisions, on what constitutes an occupational disease, or on any workers' compensation matter. ■

¹ WAC 296-14-520; WAC 296-14-522.

² RCW 51.32.090.

³ *Glacier Nw., Inc. v. Walker*, 151 Wash. App. 389, 393 (2009).⁴ *Id.*

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