Tucker, Ronald

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

Pension benefit contributions made by an employer are not critical to the workers health and survival. Therefore, those contributions should not be included in the wage calculation because they are not a core, non-fringe benefit, such as food, shelter, fuel and health care critical to protecting the worker's basic health and survival. *Citing In re Cockle v. Department of Labor and Indus.*, 142 Wn.2d 810 (2001). ***….In re Ronald Tucker*, BIIA Dec., 00 11573 (2001)** [*Editor's Note*: The Board's decision was appealed to superior court under Benton County Cause No. 01-2-01239-5.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD L. TUCKER	**)**	**DOCKET NOS. 00 11573 & 00 17279**
	)	
CLAIM NO. P-678740	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Ronald L. Tucker, by
Flynn, Merriman & Palmer, P.S., per
Robert D. Merriman

Employer, South Columbia Basin Irrigation District,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Gigi I. Tsai, Assistant

In the matter assigned Docket No. 00 11573, the claimant, Ronald L. Tucker, filed an appeal with the Board of Industrial Insurance Appeals on March 8, 2000, from an order of the Department of Labor and Industries dated January 13, 2000. The order adjusted the claimant's time loss compensation rate and set a new rate of $629.03 per month effective December 1, 1999. The order also assessed an overpayment in the amount of $2,150. **REVERSED AND REMANDED.**

In the matter assigned Docket No. 00 17279, the claimant, Ronald L. Tucker, filed an appeal with the Board of Industrial Insurance Appeals on July 3, 2000, from an order dated May 5, 2000, which affirmed a prior order dated January 13, 2000. The January 13, 2000 order adjusted the claimant's time loss compensation rate and set a new rate of $629.03 per month effective December 1, 1999. The order also assessed an overpayment in the amount of $2,150. **DISMISSED.**

DECISION

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 Department of Labor and Industries to a

Proposed Decision and Order issued on November 13, 2000, in which the order of the Department dated January 13, 2000, was reversed and remanded and the appeal taken from the Department order dated May 5, 2000, was dismissed.

The appeal was submitted to the Board on stipulated facts. The parties agreed that Mr. Tucker, as an employee of South Columbia Basin Irrigation District, suffered an industrial injury on March 5, 1997. At the time of the injury, Mr. Tucker was a single parent with one dependent child and his base wage was $2,272.16 per month. The parties also agreed that South Columbia Basin Irrigation District paid a monthly health insurance premium on behalf of Mr. Tucker in the amount of $353.08 and a monthly retirement benefit in the amount of $170.52.

The issue in this case is whether the cost of Mr. Tucker's health insurance benefit and retirement benefit should be included in the calculation of his time loss compensation benefit.

The Supreme Court of the state of Washington has recently held that health insurance premiums paid on behalf of a worker during his or her work tenure and not paid during a period of disability must be included in the calculation of time loss benefits. *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). The court did not have before it the issue concerning pension benefits paid during work but not continued during a period of disability. The *Cockle* case was an appeal from the Court of Appeals, Division II.

On June 3, 1999, Division II of the Washington State Court of Appeals issued its decision in the case of *Cockle v. Department of Labor & Indus.*, 96 Wn. App. 69 (1999). The issue before the court was whether the employer-furnished benefit of $162.07 per month for Ms. Cockle's medical insurance and $43.45 per month for her dental insurance were the kind of benefit to be included in the calculation of her time loss compensation.

The court construed the language of RCW 51.08.178 to include the medical and dental benefits in the term "wages."[1] The court determined that those things that the worker must replace during his or her period of disability, out of the time loss compensation benefit, were those things that the Department of Labor and Industries must include in the calculation. The court went on to say that benefits which are paid by the employer, but which need not be replaced by the worker during the period of disability, but may be restored or replenished after he or she returns to work, are not to be included within the calculation of time loss compensation.

In Footnote 10 to the decision, the court cites a number of fringe benefits that might possibly be included in the time loss compensation calculation, but specifically states that the court ruled only on the health insurance benefit. The court specifically rejected its earlier *obiter dictum* that wages included any and all forms of consideration received by the employee from the employer, as was stated in *Rose v. Department of Labor & Indus.*, 57 Wn. App. 751 (1990).

On January 18, 2001, the Washington State Supreme Court issued its decision in *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001).

The court held that the costs of health care benefits which Ms. Cockle's employer paid on a monthly basis should be included in the calculation of her time loss compensation benefit. Rejecting the Court of Appeals' concept of fair market value for the benefit, the Supreme Court instead said the employer's contribution toward the health insurance premium would be the amount to be factored into the calculation of time loss compensation benefits. The court specifically stated:

> [T]his court has recognized that the workers' compensation system should continue 'serving the goal of swift and certain relief for injured workers.' *Tri*, 117 Wn.2d at 138. We therefore construe the statutory phrase 'board, housing, fuel, or other consideration of like nature' in RCW 51.08.178(1) to mean readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and

[1] "The term 'wages' shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire." RCW 51.08.178(1).

> survival. Core, *non*fringe benefits such as food, shelter, fuel, and health care all share that 'like nature.' By contrast, we do not believe injury-caused deprivation of the reasonable value of *fringe* benefits that are *not* critical to protecting workers' basic health and survival qualifies as the kind of 'suffering' that Title 51 RCW was legislatively designed to remedy.

Cockle, at 822.

In this case, there is no question that pursuant to *Cockle*, Mr. Tucker is entitled to have his employer's contribution toward health insurance premiums included in his wages for calculation of time loss compensation benefits. The real issue is whether the Department also must include the employer's contribution of $170.52 per month for Mr. Tucker's monthly retirement benefit.

It is clear to us in this appeal that the retirement benefit is both readily identifiable and is a reasonably calculable in-kind component of Mr. Tucker's earning capacity at the time of injury. Because the employer has discontinued paying the retirement benefit during the period of Mr. Tucker's disability, the loss to Mr. Tucker of this benefit is no less a component of his lost earning capacity due to his injury than the wages he had been earning at the time of injury. In other words, it is reasonable to assume that had the $170.52 not been earmarked for pension benefits, it would have been going directly into Mr. Tucker's paycheck on a monthly basis. Including the value of monthly retirement benefits in the time loss calculation would undoubtedly "most likely reflect a worker's lost earning capacity." *Double D Hop Ranch*, 133 Wn.2d 793, at 798 (1997).

However, the *Cockle* court, recognizing that the legislative intent behind RCW 51.08.178 was to set some limits on what is encompassed by the phrase "other consideration of like nature," has construed the phrase to be limited to "reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury <u>that are critical to protecting workers' basic health and survival</u>." Fringe benefits not critical to protecting workers' basic health and survival do not qualify. *Cockle*, at 822, 823.

Although we do not wish to downplay the importance to workers of their pension benefits, we simply cannot place such benefits in the same category as health care benefits as being critical to protecting workers' basic health and survival during an injured worker's period of disability.

In summary, we find that pension benefits are not of "like nature" with benefits such as food, shelter, fuel, and health care. We reverse the January 13, 2000 Department order and remand this claim to the Department with directions to include Mr. Tucker's monthly health insurance premium paid by the employer, in the calculation of Mr. Tucker's time loss compensation.

We also note that our industrial appeals judge dismissed the appeal from the Department order dated May 5, 2000, which affirmed the January 13, 2000 order. The industrial appeals judge did so because he determined that the Department lacked jurisdiction to issue that order as the January 13, 2000 order was already the subject of a timely appeal pending before the Board. Further, the Department did not act to reassume jurisdiction in the claim, as it transferred the protest by Mr. Tucker to the Board as a direct appeal. As the Department lacked jurisdiction to issue the May 5, 2000 order, the Board lacks jurisdiction over the subject matter of that order and the claimant's appeal from the order must be dismissed.

After consideration of the Proposed Decision, the Petition for Review filed thereto, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On March 17, 1997, the claimant, Ronald L. Tucker, filed an application for benefits with the Department of Labor and Industries, alleging the occurrence of an industrial injury on or about March 5, 1997, during the course of his employment with South Columbia Basin Irrigation District. The claim was allowed and benefits provided.

   On January 7, 2000, the Department issued an order that paid the claimant time loss compensation for the period from December 31, 1999 through December 31, 1999, set the time loss compensation rate at $1,704.03 per month based on the claimant being single with one dependent and wages of $2,272.16 per month at the time of injury, and stating that the wages were based on $12.91 per hour at eight hours per

day and five days per week. On January 13, 2000, the Department issued an order that adjusted the claimant's compensation rate, set a new rate of $629.03 per month effective December 1, 1999, and assessed an overpayment in the amount of $2,150. On January 14, 2000, the claimant filed a protest of the January 7, 2000 order. On January 27, 2000, the claimant's Notice of Appeal from the January 13, 2000 order was received at the Department as a protest. On March 8, 2000, the claimant's Notice of Appeal was received by the Board of Industrial Insurance Appeals as a direct appeal. On March 13, 2000, the Board issued an order granting the appeal, assigning it Docket No. 00 11573, and directing that proceedings be held.

On May 5, 2000, the Department issued an order affirming the prior order of January 13, 2000, which had been appealed by the claimant under Docket No. 00 11573. On July 3, 2000, the claimant filed an appeal with the Board from the May 5, 2000 Department order. On August 1, 2000, the Board issued an order granting the appeal, assigning it Docket No. 00 17279, and directing that proceedings be held.

2. On or about March 5, 1997, Ronald L. Tucker sustained an injury during the course of his employment with South Columbia Basin Irrigation District.

3. At the time of his industrial injury on March 5, 1997, Mr. Tucker was single with one dependent child.

4. At the time of his industrial injury on March 5, 1997, Mr. Tucker was earning a base wage of $2,272.16 per month. In addition to his base wage, at the time of his industrial injury, Mr. Tucker's employer was paying monthly health insurance premiums on behalf of Mr. Tucker in the amount of $353.08 and monthly retirement benefits on behalf of Mr. Tucker in the amount of $170.52.

5. The Department failed to reassume jurisdiction over the January 13, 2000 order within 30 days of receiving the claimant's Notice of Appeal on January 27, 2000.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and subject matter of the appeal in Docket No. 00 11573.

2. The Board of Industrial Insurance Appeals has jurisdiction over the parties to the appeal in Docket No. 00 17279.

3. The Department of Labor and Industries lacked subject matter jurisdiction to issue the May 5, 2000 order which attempted to affirm the prior order dated January 13, 2000.

4. The Board lacks jurisdiction over the subject matter of the appeal in Docket No. 00 17279.

5. The monthly payment by Mr. Tucker's employer for health insurance constitutes a portion of his wages pursuant to RCW 51.08.178 for the purposes of computing his time loss compensation.

6. The amount of money paid by Mr. Tucker's employer for his retirement benefits does not constitute a part of the wages pursuant to RCW 51.08.178 for the purposes of computing his time loss compensation.

7. The order of the Department of Labor and Industries dated January 13, 2000, is incorrect and is reversed. This claim is remanded to the Department to recalculate Mr. Tucker's time loss compensation based on a marital status of single with one dependent and a monthly wage of $2,625.24 ($2,272.16 + $353.08) and to take such further action as is indicated by the facts and the law.

8. The claimant's appeal from the order of May 5, 2000, is dismissed for lack of subject matter jurisdiction.

It is so ORDERED.

Dated this 22nd day of June, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/______________________________
THOMAS E. EGAN Chairperson

/s/______________________________
JUDITH E. SCHURKE Member

DISSENT

I dissent.

I believe that pension benefits are to be included as part of an injured worker's time loss calculation because they are in-kind compensation and part of the bargained for contract of hire

between worker and employer. Such a conclusion is dictated not only by the recent *Cockle* decision, but also is in keeping with the intent of the Legislature when it passed the wage calculation statute in 1971. As noted by the *Cockle* court, this was the same Legislature that passed RCW 51.12.010, codifying the long-recognized principle: "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." *Cockle*, at 811.

The majority's interpretation of *Cockle* is misguided. The Supreme Court has consistently held that an injured worker should be compensated based on his or her actual "lost earning capacity." *Double D Hop Ranch*, 133 Wn.2d 793, at 798 (1997).

In the case before us, there can be no question that pension benefits paid by this employer on behalf of Mr. Tucker represent a very real portion of his earning capacity at the time of his injury. There is no doubt in my mind that pension benefits for Mr. Tucker were hammered out in arms-length negotiations between employer and workers and as such, represent a benefit paid by the employer to Mr. Tucker in lieu of actual take-home wages. In other words, workers such as Mr. Tucker decided to forego a portion of their potential take-home pay in exchange for pension benefits. As noted by Justice Thurgood Marshall in his powerful dissent in *Morrison-Knudsen*, 461 U.S. 624, at 641 (1983):

> For the purposes of determining a worker's earning power, there is no principled distinction between direct cash payments and payments into a plan that provides benefits to the employee. If the employer had agreed to pay some fixed amount of money to its employees who, in turn, paid the amount into benefit funds, that amount would satisfy the majority's definition of wages since the benefit has "a present value that can be readily converted into a cash equivalent on the basis of [its] market valu[e]." In my view, the result should not change simply because the company agrees to eliminate an unnecessary transaction by paying the contributions directly to the trust funds.

In fact, this language was quoted with approval by our Supreme Court. *Cockle*, at 818. Although the majority appears to recognize the inequity of discounting this portion of Mr. Tucker's

lost earning capacity, they fail to go the extra step dictated by the Legislature and the *Cockle* court to construe ambiguity in the law to the benefit of the injured worker. The majority's interpretation of the *Cockle* language at 822, 823 is misguided at best. The majority realizes the importance of retirement benefits, but does not believe retirement benefits "rise" to the same "category as health care benefits as being critical to protecting workers' basic health and survival during an injured worker's period of disability." I strongly disagree. Retirement benefits for most workers are accumulated during employment strictly for survival upon conclusion of their working life. Unfortunately, workers injured on the job also are recipients of workers' compensation pensions that are offset by social security disability benefits; unlike workers who are not injured that receive in full both their social security benefits and retirement benefits. The majority's construction results in a time loss calculation that is not reflective of this worker's actual lost earning capacity and as such, it fails to reduce to a minimum the suffering and economic loss resulting to this injured worker.

Although I agree that *Cockle* requires reversal to the Department with direction to include health benefits as part of Mr. Tucker's time loss calculation, I would find, also, that Mr. Tucker's pension benefit must be included as part of the basis for time loss compensation benefits.

Dated this 22nd day of June, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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