Hyatt, Rosalie

RES JUDICATA

Wages at time of injury

The loss of health care benefits prior to the issuance of a final order setting the wage for time-loss compensation purposes cannot be the basis for a later adjustment due to a change in circumstance under RCW 51.28.040. A judicial change in the interpretation of the law does not affect the finality of the Department's order setting the time-loss compensation rate. **….*In re Rosalie Hyatt*, BIIA Dec., 02 13243 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 03-2-11626-8.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROSALIE A. HYATT	**)**	**DOCKET NO. 02 13243**
	)	
CLAIM NO. M-684044	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Rosalie A. Hyatt, by
Law Offices of David B. Vail & Associates, per
Jennifer M. Cross

Employer, Valley Terrace, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Kay A. Germiat, Assistant

The claimant, Rosalie A. Hyatt, filed an appeal with the Board of Industrial Insurance Appeals on April 5, 2002, from an order of the Department of Labor and Industries dated January 8, 2002. In this order, the Department denied the claimant's application for adjustment in compensation benefits because the Department could not reconsider the final order dated October 23, 1998, and the application did not support a change in circumstance. The Department order is **AFFIRMED**.

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 claimant to a Proposed Decision and Order issued on January 16, 2003, in which the industrial appeals judge affirmed the order of the Department dated January 8, 2002.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted review because we agree with our industrial appeals judge's decision, and we wish to elaborate on it further.

The facts in this matter are simple: Ms. Hyatt sustained an industrial injury on August 28, 1990. Her claim was allowed, and was closed on August 14, 1991. On May 31, 1994, she filed an application to reopen her claim, which was granted on May 23, 1994. On October 23, 1998, the Department issued an order setting forth the claimant's time loss rate, which became final.

On November 8, 2001, the claimant requested the Department recalculate her time loss rate in light of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). On January 8, 2002, the

Department issued an order denying her request for adjustment in compensation because it was not supported by a change in circumstances, and also noted that the October 23, 1998 order had become final. The January 8, 2002 order is the subject of this appeal.

At the time of injury, the claimant was provided with health care benefits, which were terminated on January 31, 1993.

The starting point in the analysis of this matter is the law concerning finality of orders. The October 23, 1998 order setting forth the time loss rate became final. A final order is thus entitled to res judicata effect, which prohibits litigation of the issues encompassed by it, even if the order itself is wrong. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

Res judicata effect, however, will not be accorded to an order if it fails to clearly advise the claimant of the issue. *Kingery v. Department of Labor & Indus*., 132 Wn.2d 162 (1997). In this regard, Ms. Hyatt argues that she was not adequately apprised of the basis for the wage rate determination since the order did not specify that health care benefits were not included in the calculation. The October 23, 1998 order specifically referred to the claimant's hourly rate, the hours she worked per day, the days she worked per week, and the fact that she was married with no dependent children (Exhibit K). While it contained no reference to employer contributions for health care benefits, the order certainly set forth the basis for the wage rate calculation. We do not believe that the order's failure to mention each and every possible source of income constitutes a failure to clearly advise the claimant of the basis for the calculation; the Department cannot be expected to include items that are not a part of its calculation. To so require would be unworkable, as the Department cannot be expected to list every potential source of income.

Moreover, in failing to list employer contributions to health care benefits, the Department effectively excluded them. We believe that the claimant was adequately informed of the basis for the wage rate calculation, and the October 23, 1998 order should be accorded res judicata effect.

Ms. Hyatt also argues that she should not be bound by the October 23, 1998 order because the *Cockle* case was a change in the law. She reasons that given the goals of the Industrial Insurance Act, and the mandate to resolve all doubts as to the meaning of the Act in favor of the injured worker, it is inconsistent to bind a worker by an order that is correct at the time it is issued, but which is later incorrect due to a change in the interpretation of the law.

Certainly, the Industrial Insurance Act is to be liberally construed in favor of the injured worker. We do not believe, however, that this mandate contemplates the complete abrogation of well-settled law concerning the finality of orders. While the Industrial Insurance Act is to be liberally construed in favor of the worker, there is no authority to use different rules in applying well-settled case law from other areas of law. In *Columbia Rentals, Inc. v. State of Washington*, 89 Wn.2d 819 (1978), the plaintiff property owners were successors in interest to plaintiffs who had brought a quiet title action against the State to fix oceanfront boundaries. In the original action, the boundaries were fixed. Subsequent to this, the United States Supreme Court, in *Hughes v. Washington,* 389 U.S. 290, L. Ed. 2d 530, 88 S. Ct. 438 (1967), established a different rule for this determination, one that was far more advantageous for the successors in interest. The successors in interest then brought suit to modify the earlier judgments against their predecessors in interest, in an effort to have the property lines established under the new rule of law.

The Washington State Supreme Court, however, refused to do so. It observed that:

> Res judicata is a doctrine grounded on the idea that the objective of all judicial proceedings is the rendition of a judgment—an authoritative determination of the legal relations of the parties with respect to some particular matter. The finality of the determination serves the interests of society as well as those of the parties by bringing an end to litigation on the claim.

Columbia Rentals, at 821. The court went on to state:

> If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation. This case clearly illustrates that point. If the prior judgments could be changed to conform with *Hughes*, then should *Hughes* be overruled, another suit to again change judgments would be in order. That is precisely what the doctrine of res judicata precludes. We hold respondents' actions are barred by res judicata.

Columbia Rentals, at 823. Clearly, the fact that there was a judicial change in the interpretation of the law does not affect the finality of the order setting the time loss rate.

However, our analysis of this matter is complicated by the fact that Title 51 has a section that allows certain types of issues to be revisited where there has been a change in circumstances. RCW 51.28.040 provides:

> If change of circumstances warrants an increase or rearrangement of compensation, like application shall be made therefor. Where the application has been granted, compensation and other benefits if in

> order shall be allowed for periods of time up to sixty days prior to the receipt of such application.

This section of the statute has been most often used in connection with applications to reopen, and provides the authority to grant benefits to workers for up to 60 days prior to the application, should the application to reopen be granted. *See Wallace Hansen*, BIIA Dec., 90 1429 (1991), and *Fuller v. Department of Labor & Indus.*, 169 Wash. 362 (1932). This section of the statute has also been used to adjust compensation in instances where reopening of the claim is not also an issue.

In *In re Charles Stewart*, BIIA Dec., 96 3019 (1998), the claimant was injured in 1991, and an order setting the rate of time loss compensation was issued on April 23, 1992. That order became final. At the time the order was issued, he was receiving a wage, and, in addition to his wages, he and his wife had free use of an apartment valued at $675 per month. The order specified the wage rate, but did not include the value of the free apartment. After his injury, his employer continued to waive the rent, but on March 1, 1993, the claimant and his wife separated, and he moved to another apartment, one for which he was required to pay rent. The claimant then made application to the Department for a change in circumstances, which was denied, as the Department took the position that RCW 51.28.040 applies only to applications to reopen claims. This Board, however, disagreed, stating that the provision of a rent-free apartment constituted the voluntary continuation of payment of wages by the employer. Once, however, there has been a change in the voluntary payment of wages, whether due to divorce or otherwise, this constitutes a change in circumstances within the meaning of RCW 51.28.040.

The *Stewart* matter is distinguishable from the present case. In the *Stewart* matter, there was a decrease in the claimant's pay by the employer, in that he ceased to receive the benefits of what was, in effect, a voluntary continuation of wages. It represents a change in his personal circumstances, and at the time the time loss order issued he was not aggrieved by it, as it was accurate. It differs from this matter, however, in that at the time the order was issued in this matter, Ms. Hyatt was in fact **not** receiving her health care benefits. She, like the claimant in *Cockle*, could easily have appealed, but did not do so.

This claimant can only prevail if the Board determines that a change in law is a change in circumstances within the meaning of RCW 51.28.040, and we do not believe this is the case. The phrase "change in circumstances" encompasses a change of facts personal to the claimant, not a change in the judicial interpretation of the law. In this matter, the circumstances did not change, the

interpretation of the law did. Ms. Hyatt failed to appeal the time loss order at a time when indeed, she *was* aggrieved by it. Even if the order was wrong, the claimant's failure to appeal the order does not preclude attaching res judicata effect to it. As in the *Marley* matter, society's interest in the finality of judgments and orders requires that res judicata effect attach to orders even if they are wrong, where the aggrieved party fails to appeal the order.

Further, in *In re Margo Schmitz*, BIIA Dec., 97 5627 (1999), the claimant was injured on March 2, 1993. On April 29, 1993, the Department issued an order setting forth the calculation for Ms. Schmitz's time loss rate. This order became final. Prior to this, however, in 1992 the claimant had joined with her fellow workers in filing a grievance against the State relative to their pay. In 1995, the Washington State Personnel Resources Board issued a formal decision in favor of Ms. Schmitz and her colleagues, concluding that she should receive additional pay retroactive to 1990. Ms. Schmitz then requested that the Department adjust her time loss compensation rate accordingly.

This Board determined that the decision by the Personnel Resources Board constituted a change in circumstances within the meaning of RCW 51.28.040, stating:

> The decision by the Personnel Resources Board constitutes a change in circumstances because it was a determination that Ms. Schmitz's wages were incorrectly paid as of the date of injury. This is not a situation where there was a mistake in wage information given to the Department. The Department made no error in calculation. An external, third party ordered an adjustment in wages paid to Ms. Schmitz effective well before her industrial injury.

Schmitz, at 4-5.

Again, at the time the time loss order was issued, the claimant's wages were fixed and the order reflected what she was paid. However, she preserved her rights by filing the grievance, which subsequently provided relief **retroactive** to before the industrial injury. Thus, at the time of the injury she should have been earning more than what she was paid, but this was not apparent until after the time loss order was issued. The fact that the Personnel Resources Board made a determination that was retroactive to prior to the date of injury is key to this analysis. At the time the order specifying time loss rate was issued, she was not aggrieved by it. It was only after the Personnel Resources Board issued their decision that she was on notice that the time loss order was incorrect. *Schmitz* is thus distinguishable from this appeal.

In conclusion, we hold that res judicata effect attached to the order of October 23, 1998, and that it became final. We further hold that a change in the law does not constitute a change in circumstances, within the meaning of RCW 51.28.40, and the Department order of January 8, 2002 is correct, and is affirmed.

FINDINGS OF FACT

1. On September 7, 1990, the claimant, Rosalie A. Hyatt, filed an application for benefits alleging she sustained an industrial injury to her back, arm, and neck on August 28, 1990, during the course of her employment with Valley Terrace, Inc. On October 29, 1990, the Department closed the claim. On November 19, 1990, the employer filed a Protest and Request for Reconsideration. In an order dated December 14, 1990, the Department corrected its order dated October 29, 1990, and noted the time loss compensation rate was calculated on a basis the claimant was married with no dependents, her monthly wage at the time of injury was $784.80 per month, and closed the claim with no permanent partial disability. On January 16, 1991, the claimant filed an aggravation application. In an order dated January 30, 1991, the Department set aside its December 14, 1990 order and the claim remained open. In an order dated August 14, 1991, the Department closed the claim with a permanent partial disability award for 5 percent amputation value of the right arm at or above the deltoid insertion or by disarticulation at the shoulder. On May 31, 1994, the claimant filed an aggravation application. In an order dated September 22, 1994, the Department reopened the claim effective May 31, 1994. On August 19, 1997, the claimant was paid time loss compensation from August 6, 1997 through August 19, 1997. On October 13, 1997, the claimant filed a Protest and Request for Reconsideration of the Department's August 19, 1997 order. In an order dated October 23, 1998, the Department corrected its August 19, 1997 order, noting that the time loss compensation rate was calculated on the basis the claimant was married with no dependents, and her monthly wage at the time of injury was $959.20 per month. The claimant neither protested nor appealed the Department order dated October 23, 1998.

   The order issued on October 23, 1998, that established the basis for the claimant's time loss compensation rate, was issued after the claimant's health insurance benefits were terminated on January 31, 1993.

   On November 8, 2001, the claimant requested the Department recalculate her wage rate in light of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). In an order dated January 8, 2002, the Department denied the claimant's request for adjustment in compensation because it was not supported by a change of circumstances and noted that the Department order dated October 23, 1998, became final.

On February 28, 2002, the claimant filed a Protest and Request for Reconsideration of the Department's January 8, 2002 order. On April 5, 2002, the Department forwarded the claimant's Protest and Request for Reconsideration of the Department's January 8, 2002 order to the Board as a direct appeal. On April 25, 2002, the Board granted the claimant's appeal of the Department order dated January 8, 2002, assigned it Docket No. 02 13243, and ordered that further proceedings be held.

2. On August 28, 1990, the claimant, Rosalie A. Hyatt, sustained an injury during the course of her employment with Valley Terrace, Inc. Ms. Hyatt's health insurance benefits were paid by her employer until these benefits were terminated effective January 31, 1993.

3. On October 23, 1998, the Department issued an order that stated the claimant's time loss compensation rate was calculated on the basis that the claimant was married with no dependents, and her monthly wage at the time of injury was $959.20 per month.

4. The claimant neither protested nor appealed the Department order dated October 23, 1998.

5. On November 8, 2001, the claimant requested the Department recalculate her wage rate in light of *Cockle*.

CONCLUSIONS OF LAW

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

2. The order issued on October 23, 1998, that established the basis for the claimant's time loss compensation rate, became final and was binding with regard to her time loss compensation rate. The rationale in the decision *Cockle v. Department of Labor and Indus.,* 142 Wn.2d 801 (2001) cannot be applied in this claim to recalculate the claimant's benefit rate.

3. RCW 51.28.040 cannot be used as a basis to recalculate the claimant's time loss compensation rate because the change in circumstances involving the termination of claimant's health insurance benefits occurred before the October 23, 1998 order. That order established the basis for the time loss compensation rate and there was no protest or appeal taken from the order.

4. The claimant has not sustained a change of circumstances as contemplated by RCW 51.28.040.

5. The Department of Labor and Industries' order dated January 8, 2002, is correct and is affirmed.

It is so ORDERED.

Dated this 28th day of August, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member

DISSENT

I dissent. I believe that a change in the interpretation of the law constitutes a clear change in circumstances within the meaning of RCW 51.28.040.

In October of 1998, when the wage loss order was issued, it was settled law that employer contributions to health care benefits were not included in a wage rate calculation. At the time the order was issued, Ms. Hyatt was not aggrieved by the order; she thus had no basis to appeal the order. When *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001) was decided, however, the law changed. It was only then that Ms. Hyatt had reason to seek a change in her wage rate.

Certainly, society has an interest in the finality of orders. However, the express goal of the Industrial Insurance Act is to reduce "to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." RCW 51.12.010. To that end, "[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment, . . . " *Dennis v. Department of Labor & Indus.*, 109 Wn.2d. 467, 470 (1987).

In view of this mandate, it is **precisely** for this purpose that the Legislature enacted RCW 51.28.040. Through no fault of the claimant, there was a change in the law. To deny her the benefit of the *Cockle* rationale does not comport with the mandate of the Industrial Insurance Act or

its goals. I believe Ms. Hyatt's wage rate should be recalculated to include the value of her employer's contribution to her health care benefits, and that her time loss calculation should be recalculated to 60 days prior to her request for the recalculation, pursuant to RCW 51.28.040.

Dated this 28th day of August, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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