McLaughlin, Clement

RES JUDICATA

TIME-LOSS COMPENSATION (RCW 51.32.090)

Orders void ab initio

Department orders setting the wage without inclusion of the value of worker's health care benefits are not void *ab initio*. Time-loss compensation orders entered with personal and subject matter jurisdiction are not void. To the extent that prior Board significant decisions, *In re Dennis Roberts*, BIIA Dec., 88 0073 (1989) and *In re Rod Carew*, BIIA Dec., 87 3313 (1989), do not reflect the law post *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994), they are overruled. ***….In re Clement McLaughlin*, BIIA Dec., 02 18933 (2003)** [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 03-2-41325-9SEA.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CLEMENT J. MCLAUGHLIN	)	**DOCKET NOS. 02 18933 & 02 18934**
	)	
CLAIM NO. X-052249	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Clement J. McLaughlin, by
Walthew, Warner, Thompson, Eagan & Keenan, P.S., per
Kathleen M. Keenan Kindred

Employer, Jacks, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Lisa V. Brock, Assistant

The claimant, Clement J. McLaughlin, filed an appeal (Docket No. 02 18933) with the Board of Industrial Insurance Appeals on August 28, 2002, from an order of the Department of Labor and Industries dated July 17, 2002. In this order, the Department affirmed its order of April 17, 2002, which denied the claimant's request for adjustment of time loss compensation, as there was insufficient evidence of a change of circumstances. The Department order is **AFFIRMED.**

The claimant filed a second appeal (Docket No. 02 18934) with the Board on August 28, 2002, from orders of the Department dated June 28, 2002, July 12, 2002, July 26, 2002, August 9, 2002, and August 23, 2002. In these orders, the Department paid time loss compensation to the claimant without the requested adjustment. The Department orders are **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 Department to a Proposed Decision and Order issued on May 9, 2003, in which the industrial appeals judge reversed the orders of the Department dated June 28, 2002, July 12, 2002, July 17, 2002, July 26, 2002, August 9, 2002, and August 23, 2002. The industrial appeals judge remanded the claims to the Department with direction to recalculate the wage and time loss compensation rate to include employer-paid health care benefits in the amount of $207.48 per month commencing May 1, 1999, when the employer terminated them; to issue an order paying the adjusted time loss compensation benefits for the period May 1, 1999 through August 23, 2002, less previous payments; and to thereafter take such further action as is required by the facts and the law.

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 to affirm the Department orders, concluding that the June 8, 1999 order is a final and binding determination of Mr. McLaughlin's time loss compensation rate. Further, he is not entitled to a rate adjustment pursuant to RCW 51.28.040 (change of circumstances).

The following is a summary of the evidence necessary to explain our decision. Clement J. McLaughlin was injured in the course of his employment with Jacks, Inc., on March 3, 1999. The claim was allowed and benefits paid, including treatment and time loss compensation.

On June 8, 1999, the Department issued a determinative order setting the claimant's time loss compensation rate at $2,070.81 per month, based on a status of married with no dependents, wages of $3,185.86 per average month, and an injury date of March 3, 1999. Mr. McLaughlin concedes that he received the order in June 1999 and did not file a protest or appeal. The order includes the requisite statement regarding the finality of orders absent a timely protest or appeal, per RCW 51.52.050.

Mr. McLaughlin now seeks review of an order dated July 17, 2002 (Docket No. 02 18933), affirming an April 17, 2002 order that denied his request for adjustment of the time loss compensation rate, based on a change of circumstances. He also appeals five Department orders (on appeal under Docket No. 02 18934), which paid time loss compensation from June 11, 2002 through August 19, 2002, without adjustment.

The claimant does not dispute the Department's use of $1,500 per month base salary plus commissions, a total that averaged $3,185.86 per month, as a component of his wage at the time of injury. He seeks to include an additional $207.48, the amount his employer was paying for his health insurance at the time of injury. Mr. McLaughlin's health insurance coverage terminated on April 30, 1999, when he was laid off due to the industrial injury.

Two years later, in April 2001, Mr. McLaughlin learned of the decision in *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). *Cockle* holds that the wage used to calculate time loss compensation includes the reasonable value of employer-provided health care. Mr. McLaughlin wrote to the Department requesting that his wage rate include the reasonable value of the employer-provided health care. The Department responded with an April 16, 2001 order, denying adjustment because the June 8, 1999 order setting the rate had become final. The April 16, 2001 order contained statutory notice regarding finality and no protest or appeal was filed. On January 28, 2002, the Department issued an order purporting to declare the April 16, 2001

order null and void for lack of jurisdiction. On April 17, 2002, the Department issued the order finding no change of circumstances supporting an adjustment of the wage rate. The claimant protested, and the April 17, 2002 order was affirmed on July 17, 2002.

The Proposed Decision and Order concluded that "[t]he Department orders setting wage and time-loss compensation benefits and paying time-loss compensation benefits from April 23, 1999 through August 23, 2002 are void ab initio." Conclusion of Law No. 5. We disagree. *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994), unequivocally holds that an order of the Department is not void if entered with personal and subject matter jurisdiction. The Department's power to decide a controversy includes the power to decide wrong; an incorrect decision, entered with jurisdiction, is as binding on all parties as a correct one. *Marley*, at 543. The "void ab initio" Decisions and Orders relied on by our industrial appeals judge, *In re Dennis Roberts*, BIIA Dec., 88 0073 (1989) and *In re Rod Carew*, BIIA Dec., 87 3313 (1989), do not reflect the state of the law post-*Marley.* To the extent that *Roberts* and *Carew* are inconsistent with *Marley*, these cases are hereby overruled.

The June 8, 1999 Department order, entered with jurisdiction, set forth the calculation of the time loss compensation rate in a manner that informed the claimant as to what was taken into account and in what amount. See *In re Louise Scheeler,* BIIA Dec., 89 0609 (1990) (wage calculation order not res judicata unless it contained underlying basis for rate). Mr. McLaughlin had the same opportunity to challenge his wage rate, on grounds that it did not take into account health benefits, as did Diane Cockle. Unlike Ms. Cockle, he did not.

The June 8, 1999 and April 16, 2001[1] orders contained the statutory language regarding finality and were not timely appealed. The first of these two orders set the time loss compensation rate and the second denied Mr. McLaughlin's request to add the value of health insurance to his wage rate, due to the finality of the June 8, 1999 order. Both orders became final and binding on all parties, including the Department.

We note that the orders paying time loss compensation from June 11, 2002 through August 19, 2002, without the requested adjustment, were timely appealed (Docket No. 02 18934). However, the time loss compensation rate cannot be challenged in an appeal to these payment orders. The rate remains res judicata due to the finality of the prior order setting the wage rate.

[1] Although the Department lacked jurisdiction to vacate its final order of April 16, 2001, this does not affect our jurisdiction to address the orders and issues before us.

The Department, on April 17, 2002, issued its order finding no change of circumstances meriting adjustment of the time loss rate. This order was timely protested, and the July 17, 2002 affirmance order was timely appealed (Docket No. 02 18933). We find that the Department correctly denied a wage adjustment because the facts do not demonstrate the requisite change of 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.

In two Significant Decisions, *In re Charles Stewart*, BIIA Dec., 96 3019 (1998) and *In re Margo Schmitz*, BIIA Dec., 97 5627 (1999), we found changes in circumstances that merited wage rate adjustments pursuant to RCW 51.28.040.

Charles Stewart's wage rate was calculated without regard to the employer-provided waiver of rent. Mr. Stewart did not protest or appeal the wage rate order. Nearly a year after the order setting time loss compensation had issued, Mr. Stewart lost the employer-provided waiver of rent. This was considered a "change of circumstances" that entitled Mr. Stewart to an adjustment of his wage rate, despite the final Department order setting the rate. Mr. McLaughlin's case is distinguishable. On June 8, 1999, the Department erroneously determined that Mr. McLaughlin's wage at the time of injury was $3,185.86. At the time the wage was calculated, Mr. McLaughlin already had lost the health care benefit portion of his wage, as the employer-paid coverage had terminated on April 30, 1999. There was no change in Mr. McLaughlin's circumstances subsequent to the Department's June 8, 1999 determination.

In *Schmitz*, the claimant's wage as of the date of injury was **retroactively increased** when she prevailed before the State Personnel Resources Board. Although the increase was based on a legal ruling, that ruling changed Ms. Schmitz's actual wages as of the date of injury. In contrast, no change of circumstances affected a component of Mr. McLaughlin's wages at the time of injury between June 8, 1999 (when the Department erroneously calculated his wage rate, based on wage at the time of injury, without health care benefits) and April 2001, when he first asked the Department to include the value of health insurance in his wage rate calculation.

Further, the publication of the *Cockle* decision is not a change of circumstances, as contemplated by RCW 51.28.040. *In re Rosalie A. Hyatt*, Dckt. No. 02 13243 (August 28, 2003). RCW 51.28.040 does not provide authority for adjusting Mr. McLaughlin's wage rate.

In conclusion, we hold that the wage calculation set forth in the June 8, 1999 Department order is a final and binding determination and that no change in circumstances, within the meaning of RCW 51.28.040, supports wage rate adjustment. The Department orders dated June 28, 2002, July 12, 2002, July 17, 2002, July 26, 2002, August 9, 2002, and August 23, 2002, are correct and are affirmed.

FINDINGS OF FACT

1. On March 12, 1999, the claimant, Clement J. McLaughlin, filed an application for benefits with the Department of Labor and Industries, alleging a March 3, 1999 injury sustained during the course of his employment with Jacks, Inc. On June 8, 1999, the Department issued an order allowing the claim and setting his time loss compensation rate, based on wages of $3,185.86 per month and a status of married with no dependents.

   On April 10, 2001, the claimant sent a written request to the Department asking for an adjustment of his time loss compensation in accordance with the *Cockle* decision. On April 16, 2001, the Department issued an order denying reconsideration of the June 8, 1999 order. On January 28, 2002, the Department issued an order purporting to declare the April 16, 2001 order null and void.

   On April 17, 2002, the Department issued an order denying an adjustment of the claimant's time loss compensation on grounds that no change of circumstances had occurred. On April 25, 2002, the claimant protested the order. On July 17, 2002, the Department affirmed the April 17, 2002 order.

   The Department issued orders paying time loss compensation, without the requested adjustment, on June 28, 2002, July 12, 2002, July 26, 2002, August 9, 2002, and August 23, 2002. The claimant protested the orders on August 28, 2002, and the Department forwarded the protest to the Board of Industrial Insurance Appeals as a direct appeal. On August 28, 2002, the claimant filed a Notice of Appeal with the Board from the July 17, 2002 Department order. Both appeals were granted on October 9, 2002. Docket No. 02 18933 was assigned to the appeal from the July 17, 2002 order. Docket No. 02 18934 was assigned to the appeal from the June 28, 2002, July 12, 2002, July 26, 2002, August 9, 2002, and August 23, 2002 orders.

2. On March 3, 1999, Clement J. McLaughlin sustained an industrial injury during the course of his employment with Jacks, Inc.

3. Mr. McLaughlin's health insurance benefits were paid by his employer until the benefits were terminated on or about April 30, 1999.

4. On June 8, 1999, the Department issued a determinative order setting the claimant's time loss compensation rate at $2,070.81 per month, based on a status of married with no dependents, wages of $3,185.86 per average month, and an injury date of March 3, 1999. The order contained requisite notice regarding finality, absent a timely protest or appeal, as set forth in RCW 51.52.050.

5. The June 8, 1999 order, which established the claimant's time loss compensation rate, was issued after the claimant's health insurance benefits were terminated on or about April 30, 1999.

6. The June 8, 1999 order was communicated to Mr. McLaughlin during June 1999. He did not protest or appeal the June 8, 1999 order within 60 days of communication.

7. The Department orders dated June 28, 2002, July 12, 2002, July 26, 2002, August 9, 2002, and August 23, 2002, paid time loss compensation benefits using the rate established in the June 8, 1999 order.

8. In April 2001, the claimant wrote to the Department and requested an adjustment to his wage rate in light of the *Cockle* decision.

CONCLUSIONS OF LAW

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

2. The Department order issued on June 8, 1999, which established the basis for the claimant's time loss compensation rate, became a final and binding determination of Mr. McLaughlin's time loss compensation payments in this claim.

3. RCW 51.28.040 does not provide a basis for recalculation of the claimant's time loss compensation rate, because the change in circumstances involving the termination of the claimant's health insurance benefits occurred before the June 8, 1999 order was issued. The June 8, 1999 order established the basis for the time loss compensation rate applicable to this claim and no protest or appeal was taken from the order. Further, the publication of *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001), on January 18, 2001, does not constitute a change in circumstances, as contemplated by RCW 51.28.040.

4. The Department orders dated June 28, 2002, July 12, 2002, July 17, 2002, July 26, 2002, August 9, 2002, and August 23, 2002, are correct and are affirmed.

It is so **ORDERED.**

Dated this 5th day of November, 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 change in circumstances within the meaning of RCW 51.28.040.

In June 1999, when the wage rate order was issued, employer contributions to health care benefits were not included in a wage rate calculation, pursuant to settled law. Mr. McLaughlin was not aggrieved by that order and had no grounds for appeal. When *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001) was decided, however, the law changed. For the first time, Mr. Mc Laughlin had reason to seek a change in his 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, "the 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). Consistent with this mandate, the Legislature enacted RCW 51.28.040.

The denial to Mr. McLaughlin of the benefits of *Cockle* is contrary to the goals and principles of the Industrial Insurance Act. The Department should recalculate Mr. McLaughlin's wage rate, including the reasonable value of his employer's payment of health care benefits. The new rate

should apply to his time loss compensation retroactively, starting 60 days prior to his request for the recalculation, as provided in RCW 51.28.040.

Dated this 5th day of November, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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