Crook, Roger

RES JUDICATA

Time-loss compensation

When the rate of time-loss compensation benefits is properly adjusted, the adjustment is retroactively applicable to all time-loss compensation benefits paid subsequent to the last closing order. ***….In re Roger Crook*, BIIA Dec., 04 10691 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 06-2-02329-3 SEA.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROGER D. CROOK	)	**DOCKET NO. 04 10691**
	)	
CLAIM NO. J-149542	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Roger D. Crook, by
Scott, Kinney & Fjelstad, per
Brian D. Scott

Employer, Sam's Tire Service, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Diana S. Cartwright, Assistant

The claimant, Roger D. Crook, filed an appeal with the Board of Industrial Insurance Appeals on January 20, 2004, from an order of the Department of Labor and Industries dated November 13, 2003. In this order, the Department affirmed its order of August 17, 2001, wherein the Department established the worker's time loss compensation rate of $1,920.39 per month, taking into account the wage for job of injury as $1,350 per month; marital status as married with no dependents; and the compensation rate included all cost of living increases since July 24, 1982. The Department order is **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 a timely Petition for Review filed by the Department to a Proposed Decision and Order issued on June 27, 2005, in which the industrial appeals judge reversed and remanded the Department order dated November 13, 2003.

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

The question presented here is whether Mr. Crook is barred from obtaining retroactive adjustment and payment of time loss compensation to include the cost of an employer-provided health care benefit, given that the period(s) in question were followed by final closing orders. A review of the history of the case is essential to understand the legal contentions raised by the appeal.

Roger D. Crook, a 51-year-old Marysville, Washington resident, hurt his right knee on July 24, 1982, while working at Sam's Tire Service in Kirkland, Washington. The record establishes that at the time of the injury Mr. Crook was receiving an employer-paid medical benefit valued at $137 per month. Mr. Crook's industrial insurance claim was ultimately allowed and Mr. Crook received time loss compensation (temporary total disability benefits) for the period of July 31, 1982 through December 8, 1982. Given the law in effect in 1982, the $137 per month cost of Mr. Crook's employer-paid medical benefit was not included in his monthly time loss compensation calculation, although it appears that his employer subsequently terminated payment. On February 15, 1983, Mr. Crook's claim closed with no award for permanent partial disability. Because neither a protest nor an appeal was filed, the closing order became final sixty days after its communication to Mr. Crook, as per the provisions of RCW 51.52.050.

An industrial insurance claim, unlike most other insurance claims, may be reopened from time to time under certain circumstances to provide a worker with further treatment and related benefits. Thus, when Mr. Crook experienced a worsening of his industrially-related conditions in late 1984, he applied to reopen. The Department considered the matter and, on March 7, 1985, issued an order in which it allowed further treatment and benefits. Thereafter, the claim remained open until April 28, 1988, when it was closed by an order wherein the Department paid Mr. Crook permanent partial disability awards of 15 percent for the right lower extremity and 7.5 percent for the left lower extremity. The April 28, 1988 closing order became final.

Nearly a decade passed. On January 15, 1997, following the receipt of information from Mr. Crook, the Department issued an order in which it reopened the claim once again. On this occasion, the claim was open for one and one-half years before closing on June 5, 1998, with no increase in permanent partial disability. The closing order of June 5, 1998, became final.

The Department most recently reopened the claim on December 10, 1999, after receiving yet another aggravation application. Relevant to the present matter, the Department then issued an order on August 17, 2001, wherein the Department established, for the first time in nineteen years, the facts upon which Mr. Crook's time loss compensation was calculated. Mr. Crook thought the Department was mistaken as to the facts and filed an appeal with this Board, arguing that the cost of his employer-paid medical benefit should have been included in his temporary total disability calculation. More to the point, he argued that he should now be paid the additional, higher amount relating back to the date he first qualified for time loss compensation, July 31, 1982, less those amounts already paid.

In part, Mr. Crook is correct. Our Supreme Court has indicated that the cost of a worker's health care benefit should be included in his or her time loss compensation calculation. RCW 51.08.178 is construed 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 survival. *Cockle v. Department of Labor & Indus*., 142 Wn.2d 801 (2001). Currently, the Department includes the value of a health care benefit in a worker's monthly wage/time loss computation and begins paying a worker a higher rate of compensation if and when the employer-paid health benefit expires. However, in older cases in which a claim has been closed and subsequently reopened, the Department limits the increase in compensation to the period beginning sixty days before being advised of a change in circumstances or, in the alternative, sixty days prior to the date a claimant files an aggravation application, so as to comply with the provisions of RCW 51.28.040. The question thus becomes whether a final closing order serves as a bar to the recovery of benefits relating to periods prior to the order.

Resolution of this question begins with an examination of *Somsak v. Criton Techs/Health Tecna,* 113 Wn. App. 84 (2002). *Somsak* is compelling in that it is factually similar to the present matter. As is the case with Mr. Crook, Mary Somsak was injured at work, filed an industrial insurance claim, and received time loss payments. In 1989, her claim closed with a permanent partial disability award. The closing order became final. Nine years later (presumably after the claim had been reopened), the Department issued its order of February 5, 1998, wherein the Department explained for the first time the factual basis upon which Ms. Somsak's time loss compensation was calculated. When Ms. Somsak protested the Department's decision to exclude her regularly-worked overtime hours in her time loss compensation calculation, the employer of injury argued that the doctrine of res judicata barred Ms. Somsak's protest and subsequent appeal. The employer believed that the earlier closing order barred any further adjudication of Ms. Somsak's time loss compensation **rate**. The *Somsak* court disagreed, stating that fundamental fairness precluded the application of res judicata to the earlier closing order given that the order(s) failed to state Ms. Somsak's hours, rate of pay, or health care benefit.

In this Board's unanimous effort to follow *Somsak*, we read the decision somewhat expansively, suggesting that not only should the rate of compensation be recalculated, but also that an injured worker could recover the higher rate of compensation going back to the date of injury. *In re Lila Olson,* Dckt. No. 03 19331 (October 26, 2004); *In re Dano A. Cota,* Dckt. No. 03 14440 (March 22, 2005). On closer examination, however, it is apparent that the *Somsak* court did not

necessarily extend its analysis to issues other than Ms. Somsak's time loss compensation rate. It is also apparent that the court did not authorize payment of benefits back to the date of injury, although perhaps for other reasons. The court wrote that a portion of the superior court order was overly broad and could be read to encompass facts and payments not before the superior court in its appellate capacity. If this were the case, the superior court order might preclude the Department from consideration of statutory provisions to the contrary. *Somsak*, at 97. Accordingly, the Division II court struck that portion of the superior court order where the court directed the Department to pay Ms. Somsak the difference between the time loss previously paid since the date of injury and the court-ordered recalculated amount.

In significant respects, *Somsak* parallels the reasoning of our decision in *In re Louise J. Scheeler,* BIIA Dec., 89 0609 (1990). In *Scheeler* we addressed the question of whether final unappealed Department orders wherein the Department paid time loss compensation precluded Ms. Scheeler from later challenging the time loss compensation **rate**. The Board held that a determinative time loss compensation order that has been neither appealed nor protested is a binding res judicata determination only with respect to the issue resolved by the order, *i.e.*, **entitlement** to time loss compensation. Unless prior orders of the Department have apprised the parties in clear and unmistakable terms that the present controversy has already been finally adjudicated, no res judicata effect will be applied. Restated slightly, a final determinative time loss order may be binding as to a worker's entitlement to compensation for a specific period, but is not necessarily binding as to the rate. Note, however, that the *Scheeler* case differs from the present appeal in one significant respect; when Ms. Scheeler appealed the calculation of her time loss compensation rate, her claim had never been closed. With no closing order to contend with, Ms. Scheeler was not barred by the application of res judicata and could not be held to have abandoned her claim to additional benefits by allowing a closing order to become final. We wish to emphasize that *Scheeler* remains a leading decision that will continue to be followed, although limited by the rule of the present decision.

Our Supreme Court has addressed the matter of final, unappealed Department orders in rather direct terms. The doctrine of claim preclusion applies to final judgment by the Department as it would to an unappealed order of a trial court.

> An order or judgment of the Department resting upon a finding, or findings, of fact become a complete and final adjudication, binding upon

> both the Department and the claimant unless such action . . . is set aside upon appeal or is vacated for fraud or something of like nature.

Marley v. Department of Labor & Indus., 125 Wn.2d 533, 536-537 (1994), citing *LeBire v. Department of Labor & Indus*., 14 Wn.2d 407, 415 (1942). An unappealed final order from the Department precludes the parties from rearguing the same claim. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim. *Marley*, at 538.

An unappealed Department order is res judicata as to the issues encompassed within the terms of the order, absent fraud in the entry of the order. *Kingrey v. Department of Labor & Indus*., 132 Wn.2d 162, 169 (1997). In the same vein, this Board has held that a closing order determines explicitly, or by necessary implication, the totality of the claimant's entitlement to all benefits of whatever form, as of the date of claim closure. The Department is without authority to affirm, modify, or reverse an order once sixty days pass following its communication. *In re Randy Jundul*, BIIA Dec., 98 21118 (1999). We continue to hold that the Department, in a closing order, determines a worker's entitlement to all benefits of whatever form as of the date of the order. A party who fails to protest or appeal a closing order is deemed to have abandoned claim to any and all benefits that may have accrued up to the date of closure.

We hold that the res judicata effect of an unappealed, final closing order precludes the payment of additional benefits, such as time loss compensation, for periods prior to the order.[1] However, after a closed claim has been reopened a worker may challenge the time loss rate, assuming no order addressing the rate has been issued during an earlier period in the claim history. After reopening, a recalculation of the time loss compensation rate to include the cost of an employer-paid health care benefit may be indicated, particularly given the possibility that current or future time loss benefits may be paid under the reopened claim.

We acknowledge that our decisions in *Olson* and *Cota* are inconsistent with this decision and indicate, by way of this order, that the reasoning contained therein will no longer be followed.

FINDINGS OF FACT

1. On September 13, 1982, the claimant, Roger D. Crook, filed an application for benefits, in which he alleged he suffered an injury to his right knee in the course of his employment with Sam's Tire Service, Inc., on July 24, 1982.

[1] The Department practice of recognizing bills received after a closing order for treatment rendered **prior** to closing is not invalidated.

On September 23, 1982, the claim was allowed and time loss compensation benefits were authorized beginning August 9, 1982.

On February 15, 1983, the claim was closed without an award for permanent partial disability.

On October 24, 1984, the claimant filed an application to reopen his claim.

On November 1, 1984, the application to reopen was denied.

On December 3, 1984, the claimant filed an application to reopen the claim.

On March 7, 1985, the claim was reopened effective August 27, 1984, for arthritis treatment and action as indicated.

On May 6, 1987, the claimant was paid a permanent partial disability award of 10 percent of the amputation value of the right leg at or above the knee joint with functional stump, and 5 percent of the amputation value of the left leg at or above the knee joint with functional stump, and the claim was closed.

On July 1, 1987, the claimant filed a Protest and Request for Reconsideration of the May 6, 1987 Department order.

On February 4, 1988, the Department affirmed its May 6, 1987 order.

On February 5, 1988, the Department held its February 4, 1988 order in abeyance.

On April 28, 1988, the claim was reopened to pay an additional permanent partial disability award, and the claim was closed.

On January 25, 1991, the claimant filed an application to reopen the claim.

On May 22, 1991, the application to reopen the claim was denied.

On July 22, 1991, the claimant filed a Protest and Request for Reconsideration of the May 22, 1991 Department order.

On September 17, 1991, the order dated May 22, 1991, was affirmed.

On November 21, 1991, the claimant filed a Protest and Request for Reconsideration of the September 17, 1991 Department order.

On February 11, 1993, the order dated May 22, 1991, was affirmed.

On October 24, 1996, the claimant filed an application to reopen the claim.

On January 15, 1997, the claim was reopened with benefits effective October 17, 1996.

On June 5, 1998, the claim was closed without an award for additional permanent partial disability.

On March 26, 1999, the claimant filed an application to reopen the claim.

On August 5, 1999, the Department denied the claimant's application to reopen the claim. The order was mailed to an incorrect address and the claimant never received it.

On December 10, 1999, the Department reopened the claim for medical benefits only effective March 18, 1999, and held the August 5, 1999 Department order for naught.

On August 17, 2001, the Department established the worker's time loss compensation rate at $1,920.39 per month. The worker's total time loss compensation rate was calculated by taking into account wages for the job of injury based on the monthly salary of $1,350; the worker's total gross wages of $1,350 per month; and the worker's marital status as married with no dependents.

On October 16, 2001, the claimant deposited in the U.S. Postal Service a Protest and Request for Reconsideration of the August 17, 2001 Department order.

On November 13, 2003, the Department affirmed the August 17, 2001 Department order. The November 13, 2003 Department order was communicated to the claimant on November 17, 2003.

On January 16, 2004, the claimant placed a Notice of Appeal of the November 13, 2003 Department order with proper postage affixed in the U.S. Postal Service and mailed it to the Board of Industrial Insurance Appeals.

On February 27, 2004, the Board of Industrial Insurance Appeals granted the claimant's appeal of the November 13, 2003 Department order and assigned it Docket No. 04 10691.

2. On July 24, 1982, Roger D. Crook injured his right knee in the course of his employment with Sam's Tire Service, Inc.

3. At the time of his injury on July 24, 1982, Roger D. Crook's compensation included employer-paid health insurance benefits in the amount of $137 per month.

4. Roger D. Crook was unable to obtain or perform reasonably continuous gainful employment due to the residuals from his July 24, 1982 industrial injury from July 31, 1982, until he returned to work at Sam's Tire Service, Inc., in December 1982.

5. During the period from July 31, 1982 to December 1982, while Mr. Crook was not working, his employer terminated his employer-provided health care benefits.

6. On February 15, 1983, the Department of Labor and Industries first closed this claim. The claim was subsequently reopened and closing orders were issued on November 1, 1984; May 6, 1987; February 4, 1988; April 28, 1988; and June 5, 1998.

7. On August 17, 2001, the Department of Labor Industries first issued a determinative wage loss order wherein the Department set forth the underlying factual basis used in calculating Roger D. Crook's rate of time loss compensation under this claim. In that order, the Department did not include the reasonable value of employer-provided health care benefits.

CONCLUSIONS OF LAW

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

2. By operation of RCW 51.32.160, Roger D. Crook is barred from receiving time loss compensation benefits for any period subsequent to February 15, 1990, unless specifically authorized by the Director of the Department of Labor and Industries.

3. The Department order dated November 13, 2003, is incorrect and is reversed. This claim is remanded to the Department of Labor Industries with directions to recalculate Roger D. Crook's time loss compensation rate based on a wage for the job of injury of $1,350 per month, marital status of married with no dependents; to include the amount of $137 per month as the cost of the employer-provided health care benefit; to include all cost of living increases since July 24, 1982; and to take such

other action, if any, as may be specifically authorized by the Director of the Department of Labor and Industries.

It is so **ORDERED**.

Dated this 14th day of December, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member

DISSENT

I respectfully disagree with the majority opinion in this matter and would decide this appeal in a manner consistent with prior decisions of *In re Lila M. Olson,* Dckt. No. 03 19331 (October 26, 2004) and *In re Dano A. Cota,* Dckt. No. 03 14440 (March 22, 2005). These decisions were based on a sound legal analysis that concluded the doctrine of res judicata would not bar a worker from contesting his rate of time loss compensation when the Department had not issued an order specifying the basis for the worker's time loss compensation rate. A determinative time loss compensation order that has been neither appealed nor protested is a binding res judicata determination only with respect to the issue resolved by that order, *i.e.*, entitlement to time loss compensation.

The majority starts out following this sound reasoning then departs from it by indicating that a closing order precludes adjustment of the payment of time loss compensation benefits for any time periods prior to the order closing the claim. The *Somsak v. Criton Techs./Heath Tecna, Inc.,* 113 Wn. App. 84 (2002) and *In re Louise Scheeler*, BIIA Dec., 89 0609 (1990) decisions clearly support the proposition that in order to be entitled res judicata effect, an order must clearly apprise the parties that the controversy has been finally adjudicated. The majority applies this reasoning to adjust time loss compensation benefits retroactively for a substantial period of time. Nevertheless, the majority departs from this sound reasoning and determines an unappealed closing order, which does not address any aspect of the basis for the claimant's time loss compensation rate, will be

given res judicata effect with regard to the rate of time loss compensation benefits paid prior to the closing order. I strongly disagree with such inconsistent rationale and would remand this matter to the Department with directions to recalculate all time loss compensation benefits that had been paid to Mr. Crook.

Dated this 14th day of December, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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