

Everhart, Stephen

TIME-LOSS COMPENSATION (RCW 51.32.090)

Res judicata

If the Department issues two orders determining the worker's wage in order to calculate time-loss compensation benefits, the last order issued that becomes final is the determinative order setting the worker's wage. ...*In re Stephen Everhart*, BIIA Dec., **09 14820 (2010)**

Scroll down for order.

1 There is no genuine issue as to any material fact. We agree that this appeal is appropriate
2 for summary disposition under CR 56, and have treated the parties' filings as competing motions for
3 summary judgment. We have considered the following documents:

- 4 1. The February 1, 2008 Department order.
- 5 2. The April 17, 2009 Department order.
- 6 3. The claimant's Notice of Appeal.
- 7 4. The Jurisdictional History to which the parties stipulated on July 17,
8 2009.
- 9 5. A document entitled "Why the Order of May 15, 1996 is Void," filed by
10 the claimant on October 8, 2009.
- 11 6. A Responsive Memorandum, with an attached copy of Order Granting
12 Relief on the Record in *In re Roy L. Johns*, Dckt. No. 08 14888 (June 2,
13 2008), filed by the Department on November 2, 2009.
- 14 7. A Responsive Memorandum filed by the claimant on November 5, 2009.
- 15 8. The claimant's Petition for Review, filed on February 3, 2010.

16 We also note that, on November 10, 2009, the industrial appeals judge issued an
17 Interlocutory Order Finding Determination of Claimant's Wages Pursuant to Department Order
18 Dated May 15, 1996 is Final and Binding. On November 23, 2009, the claimant filed a Motion for
19 Reconsideration of the November 10, 2009 order. On November 25, 2009, that motion was denied.
20 On December 23, 2009, the claimant filed a document that was treated as a request for
interlocutory review pursuant to WAC 263-12-115. On December 29, 2009, review was declined.

UNDISPUTED FACTS

21 Mr. Everhart sustained an industrial injury on January 28, 1996, and filed an Application for
22 Benefits on February 5, 1996. The claim was allowed and, on March 14, 1996, the Department
23 issued an order determining that Mr. Everhart's monthly wage at the time of injury was \$2,200, and
24 that his time-loss compensation rate was \$1,320.00. Time-loss compensation benefits were paid
25 based on that rate through May 8, 1996. On May 15, 1996, the Department issued an order stating
26 that Mr. Everhart had received time-loss compensation benefits in the amount of \$2,222 for the
27 period of January 29, 1996, through May 8, 1996; that he was entitled to time-loss compensation
28 benefits of \$444.40 for that period; and that he must repay the Department \$1,777.60. The
29 Department determined that the overpayment resulted because of a change in reported gross
30 wages. On July 12, 1996, Mr. Everhart protested the recoupment order. On May 29, 1997, the
31
32

1 Director of the Department of Labor and Industries waived repayment. On June 3, 1997, the claim
2 was closed.

3 On July 7, 2004, Mr. Everhart filed an application to reopen for aggravation of condition. On
4 September 22, 2004, the Department reopened the claim effective June 29, 2004. On
5 July 26, 2006, the Department determined the claimant's monthly wage at the time of injury was
6 \$440. The claimant protested that order on August 10, 2006. On January 31, 2007, the
7 Department affirmed the July 26, 2006 wage order. On February 8, 2007, the claimant appealed to
8 the Board of Industrial Insurance Appeals. On March 9, 2007, the Department reassumed
9 jurisdiction. On May 2, 2007, the Department affirmed the January 31, 2007 and July 26, 2006
10 orders. The May 2, 2007 order was neither protested nor appealed and became final.

11 The Department closed the claim on May 3, 2007; the claimant protested on June 14, 2007;
12 and the Department affirmed claim closure on June 19, 2007. The claimant appealed to the Board
13 on June 26, 2007; and the Department reassumed on July 19, 2007. On February 1, 2008, the
14 Department issued an order ending time-loss compensation benefits as paid through July 20, 2006;
15 itemizing the payment rates from June 29, 2004, through July 20, 2006; taking deductions for child
16 support enforcement and office of financial recovery liens; and closing the claim without any
17 additional permanent partial disability. On March 17, 2008, the claimant protested the February 1,
18 2008 order. On April 17, 2009, the Department affirmed that order, and the current appeal ensued.

19 **ISSUE**

20 The sole issue raised by the claimant is whether his monthly wage at the time of injury was
21 \$2,200.00, as established by the March 14, 1996 Department order, or \$440, as established by the
22 May 2, 2007 Department order. Mr. Everhart argues that the higher rate applies, with a
23 correspondingly higher time-loss compensation rate.

24 **DISCUSSION**

25 The claimant contends that the March 14, 1996 wage order became final and binding
26 because it was neither protested nor appealed within the time allowed by RCW 51.52.050 and
27 51.52.060. The claimant also argues that the Department did not have jurisdiction to issue its
28 recoupment order of May 15, 1996, under RCW 51.32.240. The Department agrees that the
29 March 14, 1996 wage order became final, but argues it is no longer binding in light of the
30 subsequent July 26, 2006 wage order, which was ultimately affirmed on May 2, 2007. The
31 Department also points out that the May 15, 1996 order was a recoupment order, not a wage order.
32 It acknowledges that no new wage order was issued until July 26, 2006. However, the Department

1 asserts that it had subject matter jurisdiction to issue the July 26, 2006 order, as well as the May 2,
2 2007 affirming order, under the reasoning of *In re Roy L. Johns*, Dckt. No. 08 14888 (June 2, 2008),
3 and *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). According to the Department,
4 because the claimant failed to protest or appeal the May 2, 2007 order, it became a final and
5 binding determination of his monthly wage at the time of injury. The Department also contends that
6 there is no need to reach the claimant's argument regarding whether the Department had
7 jurisdiction to issue its May 15, 1996 recoupment order under RCW 51.32.240.

8 In the Proposed Decision and Order, the industrial appeals judge focused largely on that
9 question, and concluded that the Department had jurisdiction to issue the May 15, 1996 order. We
10 have several concerns about the industrial appeals judge's analysis. First, like the claimant, he
11 cited and quoted from the current version of RCW 51.32.240, rather than the version applicable in
12 1996. Second, whatever the merits of the claimant's argument might have been back in 1996 when
13 he protested the May 15, 1996 order, the time is long past for raising any challenge to that order
14 under RCW 51.32.240. Third, the question of whether recoupment was appropriate is moot
15 because, in response to the claimant's timely protest to the May 15, 1996 order, the Director waived
16 recoupment on May 29, 1997. Fourth, the industrial appeals judge has incorrectly characterized
17 the May 15, 1996 order as a wage order that is similar in its terms to the July 26, 2006 order.

18 The parties have not supplied copies of these orders. However, it is clear from the
19 stipulated jurisdictional history that the May 15, 1996 order does not set forth any calculation of the
20 claimant's wage at the time of injury, and the Department concedes as much. The order simply
21 details what Mr. Everhart was paid in time-loss compensation benefits, what he should have been
22 paid, and assesses an overpayment. The only mention of wages is the statement that the
23 overpayment resulted because of a change in reported gross wages. No new wage rate was
24 established. Thus, we disagree with the industrial appeals judge's determination that "the terms of
25 the May 15, 1996 order establishing claimant's wages became final," because that order did not in
26 fact establish the wage rate. Proposed Decision and Order, at 3.

27 We adopt the analysis set forth in the Department's Responsive Memorandum, filed on
28 November 2, 2009. Despite the existence of the March 14, 1996 wage order, the Department had
29 subject matter jurisdiction to issue the July 26, 2006 wage order, and the subsequent May 2, 2007
30 affirming order, under *Marley*, as explained in *Johns*. Like the current appeal, *Johns* involved the
31 question of which of two wage orders, neither of which had been protested or appealed, was
32

1 binding on the parties. In finding the most recent order determinative, we relied on *Marley*, in which
2 the Supreme Court held:

3 To declare an order void, a reviewing court must find the issuing tribunal lacked
4 either personal jurisdiction over the parties or subject matter jurisdiction over the
5 claim. Subject matter jurisdiction is the authority to adjudicate the type of
6 controversy at issue.

6 *Marley*, 125 Wn.2d at 543-544.

7 There is no question the Department is authorized to adjudicate the monthly wage at the time of
8 injury pursuant to RCW 51.08.178. Thus, the Department had the requisite subject matter
9 jurisdiction to issue the July 26, 2006 wage order, and the subsequent May 2, 2007 affirming order.
10 Those orders are not void.

11 When the Department issued the July 26, 2006 order, the claimant protested that order.
12 However, after several challenges, Mr. Everhart allowed the May 2, 2007 affirmance order to
13 become final. Had the claimant persisted in challenging the Department's issuance of a new wage
14 order, he would have been free to argue that the original March 14, 1996 wage order was final and
15 binding. However, he lost the opportunity to raise that argument once he allowed the new May 2,
16 2007 wage order to become final. Since this is the claimant's sole reason for challenging the
17 Department's closure of his claim, the April 17, 2009 order from which he appealed must be
18 affirmed.

19 **FINDINGS OF FACT**

- 20 1. On February 5, 1996, Stephen R. Everhart filed an Application for
21 Benefits in which he alleged an industrial injury to his left knee on
22 January 28, 1996, while in the course of his employment with Everhart's
Minit Mart. On March 6, 1996, the Department allowed the claim.
- 23 2. On March 14, 1996, the Department issued an order in which it
24 determined that Mr. Everhart's monthly wage at the time of injury was
25 \$2,200.00, and that his time-loss compensation rate was \$1,320.00.
26 Time-loss compensation benefits were paid based on that rate through
27 May 8, 1996.
- 28 3. The March 14, 1996 Department order was neither protested nor
29 appealed.
- 30 4. On May 15, 1996, the Department issued an order in which it stated that
31 Mr. Everhart had received time-loss compensation benefits in the
32 amount of \$2,222 for the period of January 29, 1996, through May 8,
1996; that he was entitled to time-loss compensation benefits of \$444.40
for that period; and that he must repay the Department \$1,777.60. The
Department determined that the overpayment resulted because of a
change in reported gross wages.

- 1 5. The May 15, 1996 Department order contained no language establishing
2 a new wage calculation.
- 3 6. On July 12, 1996, Mr. Everhart protested the May 15, 1996 recoupment
4 order.
- 5 7. On May 29, 1997, the director waived the repayment of the overpayment
6 demanded in the May 15, 1996 order.
- 7 8. On June 3, 1997, the claim was closed.
- 8 9. On July 7, 2004, Mr. Everhart filed an application to reopen the claim for
9 aggravation of condition.
- 10 10. On September 22, 2004, the Department reopened the claim effective
11 June 29, 2004.
- 12 11. On July 26, 2006, the Department determined Mr. Everhart's monthly
13 wage at the time of injury was \$440. The claimant protested that order
14 on August 10, 2006. On January 31, 2007, the Department affirmed the
15 July 26, 2006 wage order. On February 8, 2007, the claimant appealed
16 to the Board of Industrial Insurance Appeals. On March 9, 2007, the
17 Department reassumed jurisdiction. On March 13, 2007, the Board
18 returned the case to the Department. On May 2, 2007, the Department
19 affirmed the January 31, 2007 and July 26, 2006 orders.
- 20 12. The May 2, 2007 order was neither protested nor appealed.
- 21 13. The Department closed the claim on May 3, 2007; the claimant
22 protested on June 14, 2007; and the Department affirmed claim closure
23 on June 19, 2007. The claimant appealed to the Board on June 26,
24 2007, and the Department reassumed jurisdiction on July 19, 2007.
- 25 14. On February 1, 2008, the Department ended time-loss compensation
26 benefits as paid through July 20, 2006; itemized the payment rates from
27 June 29, 2004, through July 20, 2006; indicated deductions were taken
28 for child support enforcement and office of financial recovery liens; and
29 closed the claim without an award for additional permanent partial
30 disability.
- 31 15. On March 17, 2008, the claimant protested the February 1, 2008 order.
32 On April 17, 2009, the Department affirmed that order. On May 14,
2009, the claimant appealed to the Board of Industrial Insurance
Appeals. On May 21, 2009, the Board granted the appeal under
Docket No. 09 14820, and agreed to hear the appeal.
16. There is no genuine issue as to any material fact.

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 Department had the requisite subject matter jurisdiction to issue the wage order of July 26, 2006, and the affirming orders of

1 January 31, 2007, and May 2, 2007, under RCW 51.08.178. Those
2 orders are not void. *Marley v. Department of Labor & Indus.*, 125 Wn.2d
3 533 (1994).

- 4 3. The May 2, 2007 Department order became final and binding within the
5 meaning of RCW 51.52.050 and RCW 51.52.060, and cannot be
6 challenged in this appeal.
- 7 4. The Department is entitled to summary disposition of this appeal as a
8 matter of law under CR 56.
- 9 5. The April 17, 2009 Department order is correct and is affirmed.

DATED: March 3, 2010.

BOARD OF INDUSTRIAL INSURANCE APPEALS

11 /s/ _____
12 THOMAS E. EGAN Chairperson

13 /s/ _____
14 LARRY DITTMAN Member