

Carew, Rod

RES JUDICATA

Orders void ab initio

Time-loss compensation orders based on a legally incorrect computation method are void *ab initio* and a party may challenge the correctness of the amount of time-loss compensation even though the statutory time limitation for filing an appeal or request for reconsideration has passed. ...*In re Rod Carew*, BIIA Dec., 87 3313 (1989); *In re Dennis Roberts*, BIIA Dec., 88 0073 (1989) [Editor's Note: Consider impact of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). Overruled, *In re Clement McLaughlin*, BIIA Dec., 02 18933 (2003).]

TIME-LOSS COMPENSATION (RCW 51.32.090)

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Time-loss compensation orders based on a legally incorrect computation method are void *ab initio* and a party may challenge the correctness of the amount of time-loss compensation even though the statutory time limitation for filing an appeal or request for reconsideration has passed. ...*In re Rod Carew*, BIIA Dec., 87 3313 (1989); *In re Dennis Roberts*, BIIA Dec., 88 0073 (1989) [Editor's Note: Consider impact of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). Overruled, *In re Clement McLaughlin*, BIIA Dec., 02 18933 (2003).]

Wages (RCW 51.08.178) - Compensation

RCW 51.08.178 requires the Department to base the calculation of time-loss compensation on the worker's monthly wage at the time of injury. The pre-1988 statute does not permit the averaging of wages over a several month period in order to determine the "monthly wage." ...*In re Ubaldo Antunez*, BIIA Dec., 88 1852 (1989); *In re Rod Carew*, BIIA Dec., 87 3313 (1989); *In re Dennis Roberts*, BIIA Dec., 88 0073 (1989); *In re Jeanetta Stepp*, BIIA Dec., 87 2734 (1989)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: ROD E. CAREW**) **DOCKET NO. 87 3313**
2)
3 **CLAIM NO. H-994708**) **DECISION AND ORDER**
4

5 APPEARANCES:
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7 Claimant, Rod E. Carew, by
8 Beaudry, Clark and Krueger, per
9 William A. Taylor

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11 Employer, Washington King Clam, Inc.,
12 None

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14 Department of Labor and Industries, by
15 The Attorney General, per
16 Stephen A. Eggerman, Assistant and Laurel Anderson, Paralegal
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18 This is an appeal filed by the claimant, Rod E. Carew, on October 7, 1987 from an order of the
19 Department of Labor and Industries dated September 25, 1987. The order adhered to the provisions
20 of an order dated May 14, 1987 closing the claim with time-loss compensation as paid, and a
21 permanent partial disability award of 5% as compared to total bodily impairment. **REVERSED AND**
22 **REMANDED.**
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25 **DECISION**
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27 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
28 and decision on a timely Petition for Review filed by the claimant, and a response thereto filed by the
29 Department, to a Proposed Decision and Order issued on June 10, 1988. The Proposed Decision and
30 Order dismissed claimant's appeal for the reason that the only relief sought involved issues which had
31 become res judicata.
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34 The issues presented in this appeal are (1) whether the principle of res judicata precludes the
35 claimant from attempting to readjust the rate at which his time-loss compensation had been paid after
36 determinative orders paying time-loss compensation had become final; and (2) if the principle does not
37 bar this action, whether the Department may calculate a worker's "monthly wage" (as used in
38 determining the base rate of time-loss compensation) by averaging either the monthly income earned
39 in a four-month period immediately prior to the industrial injury or by averaging the monthly income
40 earned during the calendar year of injury.
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1 The evidence upon which this case must be decided consists of 40 exhibits which were
2 submitted by stipulation of the parties. While the Proposed Decision and Order adequately
3 summarizes most of the evidence, for clarity, a brief recitation of the material facts is in order.
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6 In December 1981, the claimant began work for Washington King Clam, Inc. as a clam
7 harvester. His remuneration was based upon the number of clams he harvested. Exhibit No. 3
8 reflects monthly remuneration Mr. Carew received from December 1981 through March 1982. It
9 shows that in December 1981 the company paid him \$778.38; in January 1982, \$831.50; in February
10 1982, \$1,203.08; and in March 1982, \$1,627.10. Exhibit No. 6 reveals that for the year of 1982
11 Washington King Clam, Inc. paid Mr. Carew \$18,705.01. Exhibit No. 1 indicates that on March 13,
12 1982, Mr. Carew sustained the industrial injury for which this claim was filed.
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16 Exhibits 7 through 16 are copies of the Department orders providing time-loss compensation at
17 a rate of \$666.01 per month for various periods beginning March 14, 1982 and ending December 21,
18 1983. Though not stated in the orders, the Department arrived at this payment amount using a base
19 calculation which averaged Mr. Carew's gross monthly earnings during the four month period he had
20 worked for the company from December 1981 to the March 13, 1982 injury.
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24 A Department memo dated December 26, 1984 indicates that Mr. Carew advised the
25 Department of his gross earnings during 1982 and requested a review of his time-loss rate. The
26 Department considered this request as an application for change in compensation pursuant to RCW
27 51.28.040 (Exhibit No. 5). The Department adjusted the rate based upon a calculation which
28 averaged the remuneration received during the twelve months of 1982. The Department applied the
29 sixty day time limit contained in RCW 51.28.040 and recalculated the time-loss compensation effective
30 October 26, 1984 (sixty days prior to claimant's request). The adjusted rate equaled \$1,073.32 per
31 month, and was paid, with cost of living increases, until the final time-loss order was entered on
32 November 14, 1986, paying time-loss compensation through February 3, 1987. (Exhibits 24 and 34).
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36 On September 25, 1987, the order under appeal was issued whereby the Department adhered
37 to a prior order closing the claim with "time- loss compensation as paid."
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40 In this appeal, Mr. Carew does not dispute the portions of the order closing his claim and
41 awarding a permanent partial disability. His appeal is solely concerned with the sufficiency of the
42 time-loss paid under his claim. He asserts the time-loss was paid under rates established in direct
43 contravention of RCW 51.08.178. He contends that because the time-loss orders were based upon
44 calculations invalid under the statute, they were void ab initio and without res judicata effect.
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1 The Department responds that each of the underlying time-loss orders was determinative and
2 became final with respect to the rate calculation. Since Mr. Carew admittedly did not appeal these
3 orders within sixty days of their issuance, the Department maintains that RCW 51.52.050 and .060
4 preclude any reconsideration, including scrutiny of the method by which the time-loss base rate was
5 calculated. Substantively, the Department asserts that the initial rate calculation and any subsequent
6 adjustments were either computed in accordance with the law or were based on a factual rather than
7 legal mistake and that the statutory time period for correction has elapsed. It concludes that these
8 orders should therefore be considered res judicata and beyond the Board's jurisdiction to review.
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13 Generally, a Department order is a res judicata determination with respect to all issues
14 specifically addressed by the order, unless an appeal or request for reconsideration is filed within sixty
15 days of the order's communication. RCW 51.52.050 and .060; Perry v. Department of Labor and
16 Industries, 48 Wn. 2d 205 (1956); Kuhnle v. Department of Labor Industries, 15 Wn. 2d 427 (1942);
17 King v. Department of Labor and Industries, 12 Wn. App. 1 (1974). However, when an order is void,
18 no appeal or request for reconsideration is necessary, and the statute of limitation will not apply.
19 Likewise, a void order will not become res judicata in effect. Booth v. Department of Labor and
20 Industries, 189 Wash. 201 (1937).
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25 Our inquiry therefore turns to whether the Department time-loss orders conformed to the
26 statutory method of computation found in RCW 51.08.178. While this statute was amended by Laws
27 of 1988, ch. 161,] 12, p. 698-699, the rights of parties, with limited exceptions, are governed by the
28 law in effect at the time the industrial injury occurred. Department of Labor and Industries v. Moser, 35
29 Wn. App. 204 (1983). Similarly, a newly enacted statute will operate prospectively unless the
30 legislative intent to the contrary is clear and unequivocal. Bodine v. Department of Labor and
31 Industries, 29 Wn.2d 879 (1948). Our inquiry reveals no language which expressly states or
32 necessarily implies a retroactive effect to the 1988 amendment. Another exception applies when a
33 statute relates to practice, procedure or remedies, and does not affect substantive or vested rights.
34 Bodine; Moser. However, the interests affected by the 1988 amendments are substantive, i.e., the
35 worker's right to compensation benefits and the Department's financial obligations. Consequently, no
36 exception to the rule of prospective effect operates to cause a retroactive application of the 1988
37 amendments to RCW 51.08.178.
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44 RCW 51.08.178, as it existed at the time of claimant's injury here, stated in part:
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1 (1) For the purposes of this title, the monthly wages the worker was receiving
2 from all employment at the time of injury shall be the basis upon which
3 compensation is computed, unless otherwise provided specifically in the
4 statute concerned.
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6 The primary consideration of this statute when calculating time-loss compensation is the monthly wage
7 at the time of injury. Under the facts of this case, the "monthly wage" calculation required by the
8 statute is straightforward. Exhibit No. 3 establishes that Mr. Carew's wages were fixed and recorded
9 by the month. Indeed, the Department calculations acknowledged as much since they too began with
10 a monthly wage. Mr. Carew was injured in March 1982. During that month he earned \$1,627.10.
11 Obviously, Mr. Carew's monthly wage at the time of injury was \$1,627.10. Under these plain and
12 simple facts, it is not necessary to resort to the statute's substitute methods for calculating monthly
13 wages according to daily wages and number of days per week normally worked, or usual wages paid
14 other similarly engaged employees. The explicit terms of the statute make these methods available
15 only where the worker's wages are not fixed by the month. Confronted with the verified evidence of
16 Mr. Carew's monthly wage at the time of injury, the Department nevertheless chose, in contravention
17 of the statutory mandate, to average his wages, including months both prior and subsequent to the
18 injury.
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20 Initially, the Department calculated the time-loss compensation by averaging the wages
21 received during the four months prior to injury. Upon receipt of new information showing subsequent
22 earnings, it adjusted the calculation by using a 12 month average of wages which claimant had
23 received during the full calendar year of the injury. In support of its methods, the Department
24 references its Workers' Compensation Claims Manual, which sets forth a six-month average method.
25 However, neither RCW 51.08.178 nor the Department's authority to promulgate rules and regulations
26 permit any deviation from the statutory method of calculating a worker's monthly wage. In re Teresa
27 Johnson, BIIA Dec., 85 3229 (1987). At the time of the orders in question, the averaging of monthly
28 wages by the Department was without support in law, and remained so until the effective date of the
29 1988 statutory amendment to RCW 51.08.178.
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31 Throughout the period in which Mr. Carew was temporarily totally disabled as a result of his
32 industrial injury, the Department entered orders providing time-loss compensation based upon
33 calculations which not only failed to heed the statutory rule of calculation, but were directly contrary to
34 it. There is no room within the plain language of the statute for averaging previous or subsequent
35 monthly wages when establishing the monthly compensation rate. It is not the Department's function
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1 to stray from the legislature's mandate and award an amount which, for one reason or another, it may
2 deem just or "fair" under the particular circumstances. The Department's function was to apply the
3 statutorily prescribed method to the underlying facts; because the time-loss compensation orders
4 entered in this claim did not comport with the statute, they are therefore void ab initio insofar as they
5 apply a calculation method which violates the statutory mandate of RCW 51.08.178. Thus claimant
6 was not required to protest or appeal those time-loss compensation orders in the face of the
7 Department's clear legal error, which rendered the orders void ab initio as to the computation method.
8 The issue of the sufficiency of time-loss compensation paid under this claim is therefore properly
9 before us. Booth. The amount the Department failed to pay in time-loss compensation due to its
10 legally erroneous computation method is still owing to the claimant and must be paid.

11 After consideration of the Proposed Decision and Order, claimant's Petition for Review, and the
12 Department's response thereto, as well as the briefs of the parties and the entire record in this matter,
13 and mindful of our construction of RCW 51.08.178, as already discussed, we conclude that the
14 Department has underpaid Mr. Carew's time-loss compensation by using a legally erroneous
15 calculation method. Accordingly, the Department order of September 25, 1987 must be reversed in
16 order to correct that error. We enter the following Findings of Fact and Conclusions of Law.

17 **FINDINGS OF FACT**

- 18 1. On March 19, 1982, the claimant, Rod E. Carew, filed an accident report
19 with the Department of Labor and Industries, alleging an industrial injury
20 occurring on March 13, 1982 while in the course of employment with
21 Washington King Clam, Inc. On April 12, 1982 an interlocutory
22 Department order was issued whereby time-loss compensation was paid.

23 On July 21, 1982, the Department entered an order allowing the claim for
24 industrial injury.

25 On January 20, 1983 the first of a series of determinative orders was
26 entered whereby time-loss compensation was paid. On December 26,
27 1984 the Department received information indicating the claimant received
28 \$18,705.01 in wages for the year of 1982. The Department issued an
29 order on January 14, 1985, adjusting the time-loss compensation rate
30 effective October 26, 1984. On February 5, 1985 a determinative
31 Department order was issued which corrected and superseded a time-loss
32 compensation order dated November 19, 1984 and paid time-loss
33 compensation for the period of January 6, 1985 through February 5, 1985.
34 On November 14, 1986 the Department entered the last order of a series
35 of determinative orders paying time-loss compensation, paying such
36 compensation through February 3, 1987.
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1 On May 14, 1987 the Department entered an order which closed the claim
2 with time-loss as paid, and with compensation for permanent partial
3 disability equal to 5% as compared to total bodily impairment.
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5 On July 8, 1987 the claimant filed with the Department his protest and
6 request for reconsideration of its May 14, 1987 order. The Department
7 issued an order dated August 18, 1987, holding its order dated May 14,
8 1987 in abeyance. By order dated September 25, 1987, the Department
9 affirmed its order dated May 14, 1987. On October 7, 1987 the Board of
10 Industrial Insurance Appeals received a notice of appeal filed by the
11 claimant from the Department order dated September 25, 1987. The
12 Board issued an order granting claimant's appeal on October 19, 1987,
13 which assigned the appeal Docket No. 87 3313 and directed that
14 proceedings be held on the issues raised in the notice of appeal.

- 15 2. On March 13, 1982, the claimant while in the course of his employment
16 with Washington King Clam, Inc. was injured. As a proximate result of this
17 injury the claimant was temporarily totally disabled from gainful
18 employment for certain periods of time between March 13, 1982 and
19 February 3, 1987.
- 20 3. The claimant's monthly wages for the month of March 1982 were
21 \$1,627.10.

22 **CONCLUSIONS OF LAW**

- 23 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
24 and the subject matter of this appeal.
- 25 2. The amendments to RCW 51.08.178 found at Laws of 1988, ch. 161,] 12,
26 p. 698-699, have prospective effect only and may not be retroactively
27 applied to this claim involving a March 13, 1982 industrial injury.
- 28 3. Pursuant to RCW 51.08.178, the time-loss compensation rate to which the
29 claimant is entitled is fixed by the month and is based upon his monthly
30 wage at the time of injury, which equaled \$1,627.10. The Department
31 orders providing time- loss compensation in this claim were based upon
32 averaging monthly wages, were entered by the Department without
33 statutory authority, and were void ab initio as to the calculation method
34 used.
- 35 4. The Department order dated September 25, 1987 adhering to the
36 provisions of a prior order closing this claim with time-loss compensation
37 as paid and a permanent partial disability award equal to 5% as compared
38 to total bodily impairment, is incorrect. The Department order is reversed
39 and the claim is remanded to the Department with direction to pay
40 time-loss compensation to the claimant based on the monthly wage at the
41 time of injury, \$1,627.10, for the period of March 1982 through February 3,
42 1987, less prior time-loss compensation paid, and thereupon close the
43 claim with the previously paid permanent partial disability award equal to
44 5% as compared to total bodily impairment.
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1 It is so ORDERED

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3 Dated this 3rd day of January, 1989.

4 BOARD OF INDUSTRIAL INSURANCE APPEALS

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7 /s/
8 SARA T. HARMON Chairperson

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11 /s/
12 FRANK E. FENNERTY, JR. Member

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15 /s/
16 PHILLIP T. BORK Member

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