Roberts, Dennis

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)

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).]

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)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DENNIS G. ROBERTS	**)**	**DOCKET NO. 88 0073**
	)	
CLAIM NO. J-636345	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Dennis G. Roberts, by
Springer, Norman & Workman, per
Leonard Workman

Employer, Grant L. McLaughlin,
None

Department of Labor and Industries, by
The Attorney General, per
Kathryn Eims and Art DeBusschere, Assistants and Steve LaVergne, Paralegal

This is an appeal filed by the claimant, Dennis G. Roberts, on January 7, 1988 from an order of the Department of Labor and Industries dated December 14, 1987. The order adhered to the provisions of an order dated September 18, 1987, which made two semi-monthly time-loss compensation payments for a period beginning October 4, 1987; it listed payment dates of October 18, 1987 and November 3, 1987 and an amount to be paid on each date of $174.35. **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 of Labor and Industries to a Proposed Decision and Order issued on October 28, 1988 in which the Department order dated December 14, 1987 was reversed and the matter was remanded to the Department to recompute the rate of time-loss compensation for the period beginning August 1, 1985 and ending December 14, 1987, in accordance with the calculations set forth in Exhibit No. 8.

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

The claimant's notice of appeal challenged the rate of time-loss compensation as reflected "by the order of September 18, 1987, and prior orders" in Claim No. J-636345 for the industrial injury of July 31, 1985. Claimant sought recalculation of the time-loss compensation rate and payment of both past due and future time-loss compensation at the correct rate.

The underlying facts from which this controversy arose were largely undisputed. The claimant, Dennis G. Roberts, sustained a back injury during the course of his employment on May 16, 1983, which gave rise to industrial insurance Claim No. J-263629. Because of that injury, Mr. Roberts was not physically capable of returning to his previous employment and the Department placed him in a vocational rehabilitation program. By May 1, 1985 he had successfully completed the vocational retraining, and began working under the continued guidance of the vocational rehabilitation program with McLaughlin Dairy. A "Progress Report", contained in the Department file and admitted into the record as Exhibit No. 9, memorializes the understanding of employment. It stated that effective May 1, 1985 Mr. Roberts would work as a milker for the dairy 25 to 30 hours per week and receive $4.00 per hour. The number of hours of work could increase. Claimant testified that he understood he was to work four hours per day but that he also worked double shifts at various times. Claimant's testimony and the employer's payroll records, Exhibit No. 4, reveal that he was paid once in May, twice in June, three times in July, and once in August. The number of hours worked fluctuated for each recorded period of employment. Claimant worked from May 1, 1985 to July 31, 1985, when he sustained another industrial injury to his back and discontinued his employment.

As a result of the claim based upon the July 31, 1985 injury (Claim No. J-636345), the Department has paid time-loss compensation since August 1, 1985. Though time-loss compensation began immediately after the July 31, 1985 injury, the Department's first determinative order paying time-loss compensation was dated February 12, 1986. Exhibit No. 5 indicates how the Department established the time-loss compensation rate. The Department took the gross earnings of $1,456.00, as reported by claimant, from April 30, 1985 through July 31, 1985 and divided this amount by the number of months worked (three). The Department averaged the gross monthly wage to be $485.33. This amount was reduced by a multiplier of 69% to reflect that the claimant was married, with two children. The monthly time- loss compensation base rate was established at $334.88, subject to cost of living increases. Apparently further determinative time-loss compensation orders were issued using this base rate, although the next time-loss compensation order referred to in the record was issued on September 18, 1987. See Exhibit No. 1 The record does not reflect any protest or appeal by Mr. Roberts from the February 12, 1986 Department order, nor does the record indicate the contents of that order, other than that it paid time-loss compensation from December 16, 1985 through February 15, 1986.

On September 16, 1987, the Department entered an order stating that "full time-loss compensation for the period from 8-4-87 to 9-18-87 in the amount of $538.65" was paid "by Order and Notice dated 8-14-87 - 9-14-87 (sic) based on conjugal status of married with 2 dependents". The Department order determined that one of the dependents had turned 18 on July 29, 1987, and demanded a refund of an overpayment of $15.62 as a result of a recalculation of the time-loss compensation reflecting a reduction in the number of dependents to one. This order was protested by the claimant in a timely manner on November 9, 1987. On September 18, 1987 the Department entered a time-loss compensation order paying time-loss compensation at the reduced rate, apparently reflecting one, as opposed to two, dependent children. It provided two semi-monthly time-loss compensation payments for a period commencing October 4, 1987, listing payment dates of October 18, 1987 and November 3, 1987, and amounts of $174.35 to be paid on each date. Mr. Roberts filed an appeal from this order on November 16, 1987. In an order dated November 25, 1987, the Department held the September 18, 1987 order in abeyance pending further investigation. The Board thereupon returned the case to the Department.

In an order dated December 4, 1987, the Department set aside and held for naught the September 16, 1987 and September 18, 1987 orders, stating that a further determinative order addressing the issue of entitlement to loss of earning power would be entered after additional information could be obtained. On December 14, 1987 the Department entered an order stating its September 18, 1987 order was affirmed. Claimant filed this appeal from that order.

Both the December 4, 1987 and December 14, 1987 orders present some ambiguity with respect to the scope of the investigation the Department initiated. Claimant protested both the September 16, 1987 and the September 18, 1987 Department orders in a timely fashion. However, while the December 4, 1987 Department order set aside both the September 16, 1987 and September 18, 1987 Department orders, the December 14, 1987 Department order affirmed only the September 18, 1987 Department order. Nonetheless, despite the failure of the December 14, 1987 order to explicitly mention the September 16, 1987 order, the affirmance of that order is implicit in the terms of the December 14, 1987 order, since payment of time-loss compensation was apparently directed at a rate utilizing the reduced dependency multiplier. Therefore, in the present appeal from the December 14, 1987 order, the Board may hear claimant's challenge with respect to the proper dependency multiplier to be applied in the time-loss compensation calculation.

Additionally, during the pendency of this appeal, Mr. Roberts disputed the sufficiency of the time-loss compensation entitlement based upon a claim for loss of earning power compensation, concededly caused by his 1983 industrial injury. That question, unlike that of the dependency multiplier, remains before the Department in its adjudication of a separate claim, J-263629. It may not be decided by the Board under this appeal, which is based exclusively upon the 1985 injury, Claim No. J-636345. Our Industrial Appeals Judge correctly concluded that any loss of earning power which the claimant may have sustained was not based upon the July 31, 1985 industrial injury and correctly indicated that the loss of earning power issue could not be adjudicated under the present claim or in this appeal. We do wish to direct the parties' attention to our prior decision in In re Lloyd J. Larson, BIIA Dec., 86 0479 (1988), for further guidance on the loss of earning power issue.

The subject matter over which we do have jurisdiction is determined by the Department order and the notice of appeal. RCW 51.52.050, .060 and .070; Lenk v. Department of Labor and Industries, 3 Wn. App. 977 (1970). Though Mr. Roberts appealed a single time-loss compensation order dated December 14, 1987, he is disputing the rate calculation upon which it was based and requesting relief which extends over the entire period time-loss compensation had been paid, beginning August 1, 1985. Mr. Roberts does not suggest, however, that he filed protests or appeals from time-loss compensation orders previous to the one subject to this appeal. Generally, Department orders prior to its December 14, 1987 order are res judicata determinations with respect to all issues specifically addressed by the order, unless an appeal or protest and request for reconsideration is filed within sixty days of the order's communication. RCW 51.52.050 and .060; "Perry v. Department of Labor and Industries, 48 Wn.2d 205 (1956); Kuhnle v. Department of Labor and Industries, 15 Wn.2d 427 (1942); King v. Department of Labor and Industries, 12 Wn. App. 1 (1974). Nevertheless, when an order is void, no appeal or request for reconsideration is necessary, and the statute of limitations will not apply. Likewise, a void order will not become res judicata in effect. Booth v. Department of Labor and Industries, 189 Wash. 201 (1937).

In this instance, all Department time-loss orders must conform to the statutory method of computation found in RCW 51.08.178, and each may be reviewed to determine statutory conformity. While our Industrial Appeals Judge observed that the governing statute was amended by Laws of 1988, ch. 161,] 12, p. 698-699, he incorrectly determined those amendments are retroactive and applicable to the facts in this case. The rights of parties, with limited exceptions, are governed by the law in effect at the time the industrial injury occurred. Department of Labor and Industries v. Moser,

35 Wn. App. 204 (1983). Similarly, a newly enacted statute will operate prospectively unless the legislative intent for retroactivity is clear and unequivocal. Bodine v. Department of Labor and Industries, 29 Wn.2d 879 (1948). The 1988 amendments to RCW 51.08.178 do not expressly state, nor do they contain language which necessarily implies, retroactive application. Other exceptions to prospectivity are found when a statutory amendment relates to practice, procedure, or remedies. However, the interests affected by the 1988 amendments are substantive. They involve the worker's right to compensation benefits and the Department's financial obligations to pay those benefits.

A final exception applies if the 1988 amendments are "clarifying" legislation. Overton v. Economic Assistance Authority, 96 Wn.2d 552(1981). However, the statute prior to the amendments was not ambiguous, it was explicit and straightforward. Indeed, the amendments were requested by the Department because the statute was not susceptible to the averaging computation the Department wished to utilize when determining time-loss compensation in cases where a worker's monthly wages were not fixed. It follows, then, that no exception to the rule of prospective effect operates in this case to cause a retroactive application of the 1988 amendments to RCW 51.08.178.

RCW 51.08.178, as it existed at the time of the claimant's 1985 injury, stated in pertinent part:

> . . . (1) For the purposes of this title, the monthly wages the worker was receiving from all employment at the time of injury shall be the basis upon which compensation is computed, unless otherwise provided specifically in the statute concerned. In cases where the worker's wages are not fixed by the month, they shall be determined by multiplying the daily wage the worker was receiving at the time of injury: . . .

The statute then listed seven multipliers, depending on the number of days per week the worker was "normally employed." The daily wage to be used in the computation was defined in the statute as "the hourly wage multiplied by the number of hours the worker is normally employed."

Under this statutory scheme, prior to the 1988 amendments, all methods for computing time-loss compensation were based upon the monthly wage at the time of injury. In cases where the worker's wages were not "fixed" by the month, the statute dealineated alternative means for determining monthly wages based on the worker's "normal" employment at the time of injury.

In Mr. Roberts' case, the hours worked and resulting wages were recorded by the employer sporadically, but more often than monthly, and they fluctuated for every time period recorded. There is no indication in the record that his wages were "fixed" by the month, as the term "fixed" is

contemplated under RCW 51.08.178. Therefore, the preferred statutory method for computing monthly wages at the time of injury is unavailable.

The primary alternative method of calculation appears applicable under the facts of this case. This mathematical formula is based upon determinations of normal monthly employment as existing at the time of injury. Mr. Roberts sustained his injury on July 31, 1985. The best reflection of his normal employment appears to be either his performance during July, the month of injury, or an average of the total hours worked over the three month period, 414 divided by 3 which equals 138. Exhibit No. 8. The payroll record reveals Mr. Roberts worked 136 hours and earned $554.00 in July 1985. Specifically, it appears to indicate that from July 2nd through the 11th (a ten day period) he worked 44 hours and received $176.00; from July 12th through the 18th (a seven day period) he worked 40 hours and received $160.00; from July 19th through the date of injury (a thirteen day period) he worked 52 hours and received $208.00. Claimant testified that he was to work four hours per day and the understanding of employment listed 25-30 hours of work per week. Tr. 9/19/88 at 22 and Exhibit No. 9. However, claimant also testified that he worked double shifts at various times. Under the statutory formula, the number of days worked in each week and hours per day are necessary to the calculation. Unfortunately, given the obvious fluctuations in the hours of work and the failure of the record to clarify the number of hours per day and days per week worked, we are unable to find sufficient indicators of the hours per day or days per week Mr. Roberts was "normally employed" at the time of injury in July 1985. Without this information, it is not possible for us to arrive at Mr. Roberts' normal daily wage or determine which multiplier reflects the normal days per week worked.

Despite the failure of proof, it is abundantly clear from the testimony of the Department's claim specialist, Ronald L. McClelland, in conjunction with Exhibit No. 5, that the Department attempted to arrive at the monthly wage by averaging claimant's wages over the entire three month period of employment, rather than by following the statutorily prescribed method. The averaging of several months of wages to arrive at the monthly wage used to compute time-loss compensation is without support in the law as it existed at the time of injury. In re Teresa M. Johnson, BIIA Dec., 85 3229 (1987). The only "averaging" possibly permitted by RCW 51.08.178 would be that which is necessary to determine how many days per week or hours per day Mr. Roberts was "normally employed." The Department's initial calculation does not make this attempt; the Department's subsequent calculation in November 1987, as reflected in Exhibit No. 8, at least begins by averaging hours of normal employment, but does not complete the process by determining days per week and hours per day.

Throughout the period in which Mr. Roberts was temporarily totally disabled as a result of his industrial injury, the Department apparently entered orders providing time-loss compensation based upon the calculation evidenced by Exhibit No. 5, which does not comport with the statutory rules of computation. Because the time-loss compensation orders entered in this claim did not comport with the statute, they are void ab initio insofar as they apply a computation method which violates the statutory mandate of RCW 51.08.178. Thus, the claimant was not required to protest and request reconsideration or appeal each of those time-loss compensation orders in the face of the Department's clear legal error which rendered the orders void ab initio as to the computation method. In re Rod Carew, Dckt. No. 87 3313 (January 3, 1989).

Mr. Roberts has also contested the reduction in the dependency multiplier used in the computation of his time-loss compensation. He testified that he had three dependent children, not two, at the time of injury. Tr 9/19/88 at 5. The record indicates that the number of dependents originally utilized by the Department in its calculation was two and later was reduced effective July 29, 1987 to one. The claimant's testimony was not factually rebutted by the Department, indicating that the Department has mistaken the number of claimant's dependent children. This, however, was plainly a mistake of fact, which does not render void any of the orders containing the error, as would an error based upon the violation of the statutory rule for computing time-loss compensation. The mistake can only be corrected upon appeal or protest under the terms of the order giving rise to the error.

On November 9, 1987, Mr. Roberts first questioned this determination when he filed the protest and request for reconsideration of a September 16, 1987 Department order. The order specifically addressed the computation of the time-loss dependency percentage. It recalculated time-loss compensation for a period beginning August 4, 1987. The Department indirectly affirmed its determination in the order under appeal, when it continued time-loss compensation utilizing a single dependent reduction. The Department may correct the error only insofar as it is statutorily empowered to do so. It is authorized to correct the factual error for a period beginning August 4, 1987.

After consideration of the Proposed Decision and Order, the Department's Petition for Review, and the entire record before us, we conclude that the Department has paid Mr. Roberts time-loss compensation by using legally and factually erroneous calculations. Accordingly, the Department order of December 14, 1987 must be reversed and the matter remanded to the Department to determine the number of days per week and hours per day during which claimant was "normally

employed" at the time of his industrial injury of July 31, 1985 and to calculate time-loss compensation accordingly, using the proper statutory multiplier. For guidance in this endeavor, we refer the parties to In re Ubaldo Antunez, Dckt. No. 88 1852 (May 3, 1989) and In re Jeanetta Stepp, Dckt. No. 87 2734 (June 12, 1989). The Department must also properly adjust claimant's dependency multiplier as noted above.

FINDINGS OF FACT

1. On September 17, 1985, an accident report was filed alleging an industrial injury occurring to claimant, Dennis G. Roberts, on July 31, 1985 while in the course of his employment with Grant L. McLaughlin.

   On October 18, 1985, the Department issued an interlocutory order providing for payment of time- loss compensation for the period from August 1, 1985 through October 15, 1985. On November 15, 1985, the Department issued an interlocutory order providing for payment of time-loss compensation from October 16, 1985 through November 15, 1985. On December 18, 1985, the Department issued an interlocutory order providing for payment of time- loss compensation from August 1, 1985 through December 15, 1985.

   On February 12, 1986, the Department issued a determinative order providing payment of time-loss compensation from December 16, 1985 through February 15, 1986.

   On February 20, 1986, the Department issued an order allowing this claim for the industrial injury occurring July 31, 1985.

   On September 16, 1987, the Department issued an order determining that claimant's dependency multiplier in his time-loss compensation calculation was one, effective August 4, 1987, and demanding a refund of an overpayment of time-loss compensation in the sum of $15.62; the order further provided that the claim was to remain open for authorized treatment and action as indicated.

   On September 18, 1987, the Department issued an order, communicated to claimant on September 21, 1987, providing two semi-monthly time-loss compensation payments for the period commencing October 4, 1987.

   On November 9, 1987, claimant filed a protest and request for reconsideration of the Department order dated September 16, 1987.

   On November 16, 1987, claimant placed in the U. S. mail a notice of appeal, received by the Board of Industrial Insurance Appeals on November 18, 1987, pertaining to the Department order dated September 18, 1987. The Board docketed the appeal No. 87 3979. On November 25, 1987, the Department issued an order holding in abeyance its order dated September 18, 1987. On November 30, 1987, this Board issued an

order in Docket No. 87 3979, returning this matter to the Department for further action.

On December 4, 1987, the Department issued an order setting aside and holding for naught the Department orders dated September 16, 1987 and September 18, 1987, and providing that a further determinative order addressing the issue of entitlement to loss of earning power would be entered after additional information was obtained.

On December 14, 1987, the Department issued an order affirming the Department order dated September 18, 1987.

On January 7, 1988, claimant filed a notice of appeal with this Board from the Department order dated December 14, 1987. On January 26, 1988, this Board issued an order granting claimant's appeal and assigning it Docket No. 88 0073.

2. On May 16, 1983 Dennis G. Roberts sustained an industrial injury which gave rise to an industrial insurance claim, Claim No. J-263629.

3. Mr. Roberts worked for Grant L. McLaughlin Dairy from May 1, 1985 through July 31, 1985. On July 31, 1985 while in the course of employment with the Grant L. McLaughlin Dairy, the claimant, Dennis G. Roberts, bent over and turned, injuring his back. As a proximate result of this injury the claimant was temporarily totally disabled from any form of gainful employment on a reasonably continuous basis between July 31, 1985 and December 14, 1987. The July 31, 1985 industrial injury did not render claimant temporarily partially disabled.

4. As of December 14, 1987 the claimant's condition proximately caused by his industrial injury of July 31, 1985 was not fixed.

5. The claimant's normal employment at the time of his July 31, 1985 injury is reflected either by his employment during the month of July 1985 or by his employment over the three month period of May 1, 1985 through July 31, 1985. From July 2nd through July 11th, claimant worked 44 hours; from July 12th through July 18th, he worked 40 hours; and from July 13th to the time of injury, he worked 52 hours. He worked a total of 136 hours during July and received $544.00 in actual wages. Over the three month period claimant averaged 138 hours of employment per month, as reflected by Exhibit No. 5. The number of hours per day and days per week he was normally employed are not reflected in the payroll record kept by the employer for the claimant.

6. The claimant's monthly wages at the time of injury fluctuated and were not fixed by the month. The number of hours per day worked and days per week worked varied throughout the period of May 1, 1985 through July 31, 1985.

7. On July 31, 1985 the claimant was married, with three dependent children under the age of 18.

8. Between July 31, 1985 and December 14, 1987 the claimant sustained no loss of earning power as a proximate result of his industrial injury of July 31, 1985.

CONCLUSIONS OF LAW

1. Claimant's appeal was timely filed and the Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. The amendments to RCW 51.08.178 found at Laws of 1988, ch. 161,] 12, p. 698-699, have prospective effect only and may not be retroactively applied to this claim involving a July 31, 1985 industrial injury.

3. Pursuant to RCW 51.08.178, the time-loss compensation rate to which the claimant is entitled must be determined by utilizing one of the statutory multipliers found in RCW 51.08.178(1)(a) through (g). All Department orders providing time- loss compensation in this claim were based upon an averaging of the wages claimant received during the entire three month period of his employment, and were entered by the Department without statutory authority and were void ab initio as to the calculation method used.

4. The time-loss compensation rate to which claimant is entitled is based upon a mistake of fact concerning the number of claimant's dependent children, which should be corrected effective August 4, 1987 to show that on the date of the industrial injury, July 31, 1985, claimant had three, not two, dependent children.

5. The claimant was not entitled to payment of loss of earning power compensation, contemplated by RCW 51.32.090(3), as a proximate result of the industrial injury occurring on July 31, 1985.

6. The order of the Department of Labor and Industries dated December 14, 1987 adhering to the provisions of an order dated September 18, 1987 providing two semi-monthly time-loss compensation payments for the period commencing October 4, 1987, was based upon a legally erroneous method of computation of the rate of time-loss compensation and a mistaken number of dependent children and should be reversed. This matter should be remanded to the Department to recalculate and pay time-loss compensation to the claimant for the period from August 1, 1985 through December 14, 1987 in accordance with the directives of this decision and order, requiring a determination of the normal number of hours per day and days per week worked by the claimant either during the three month period of May 1, 1985 through July 31, 1985 or during July 1985. Once that determination is made, the Department must use the proper multiplier found in RCW 51.08.178(1)(a) through (g). Further, the Department must recompute, effective August 4, 1987, the percentage reduction based upon the accurate redetermination of the number of

claimant's dependents, and take such other action as indicated, authorized or required by law.

It is so ORDERED.

Dated this 12th day of June, 1989.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON Chairperson

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

/s/ _____
PHILLIP T. BORK Member