

## Scheeler, Louise

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### RES JUDICATA

#### Wages at time of injury

Prior unappealed time-loss orders are not res judicata as to the rate of time-loss where none had ever informed the claimant of the underlying basis for the rate of time-loss compensation (*i.e.*, the gross monthly wages being used for the computation). ...***In re Louise Scheeler, BIIA Dec., 89 0609 (1990)***

Scroll down for order.



1 of compensation. Because the orders paying time loss compensation failed to detail or explain how  
2 the rate was calculated, it is our determination that the Department is not precluded from later  
3 recalculating the rate of compensation based on new information as to the gross monthly wage at the  
4 time of injury.  
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7 The facts in this appeal are not in dispute and were entered into the record by stipulation. On  
8 June 24, 1983 Ms. Scheeler suffered an industrial injury while working for Auburn East Mobile Home  
9 Park. This injury left her temporarily totally disabled. Time loss compensation benefits have been paid  
10 for periods beginning on June 25, 1983 and thereafter through November 20, 1987, based on gross  
11 monthly wages of \$938.00. It has been stipulated, however, that at the time of her injury Ms. Scheeler  
12 actually earned gross monthly wages of \$1,071.30 and that she was married with no dependents.  
13 After issuing only interlocutory orders, on August 26, 1983 the Department issued two determinative  
14 time loss orders for the periods June 25, 1983 through June 30, 1983 and July 1, 1983 through August  
15 15, 1983. After a protest by which Ms. Scheeler questioned the rate of time loss compensation, the  
16 Department issued an order on December 12, 1983. Exhibit 4. That order indicated that the time loss  
17 benefits had been paid at an incorrect rate and that the compensation rate was now corrected.  
18 However, while the order retroactively adjusted the rate of time loss compensation, it did not specify  
19 the actual time loss rate or the gross monthly wages on which it was based.  
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27 The order under appeal (which affirms the January 4, 1989 order set forth in Exhibit No. 2)  
28 readjusts time loss compensation retroactively from June 25, 1983 through November 20, 1987, by  
29 increasing the wage base to \$938.00, but refuses to consider gross monthly wages of \$1,071.30 for  
30 that period. The parties did not explain in their stipulation why the Department had agreed to adjust  
31 the time loss compensation rate retroactively for that period, but only to the extent of increasing the  
32 wage base to \$938.00, not \$1,071.30. Claimant's hearing brief contends that the Department  
33 readjusted Ms. Scheeler's time loss rate retroactively by including \$300.00 in monthly income which  
34 was received in kind from the Auburn East Mobile Home Park, but refused to include the correct  
35 amount of wages from Issaquah Village in the readjustment. The January 4, 1989 Department order  
36 supports this interpretation. No rationale has been provided by the Department to explain why the  
37 Department feels that res judicata principles do not preclude one retroactive readjustment (from a  
38 \$638.00 to a \$938.00 wage base) but do preclude the other (to a \$1,071.30 wage base). The January  
39 4, 1989 order indicates that the Department is only considering the new wage information (gross  
40 monthly wage of \$1,071.30) for the period beginning 60 days prior to the day (January 20, 1988) on  
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1 which the new wage information was provided. Apparently, the 60 day time period comes from RCW  
2 51.28.040.  
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4 The parties stipulated that Ms. Scheeler's wages at the time of injury included \$300.00 of  
5 monthly income "in kind" from the Auburn East Mobile Home Park, \$200.00 per month from the mobile  
6 home park, and monthly wages of \$571.38 from Issaquah Valley, another employer. Based on Ms.  
7 Scheeler's letter dated January 15, 1988 and received January 20, 1988, the Department has paid  
8 time loss compensation from November 21, 1987 through the present based on the full gross monthly  
9 wages of \$1,071.30.  
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11 The Department and our industrial appeals judge are incorrect in asserting that prior final  
12 Department orders paying time loss compensation, but failing to explain how the time loss  
13 compensation rate was calculated, are res judicata determinations with respect to the rate of time loss  
14 compensation for the period of June 25, 1983 through November 20, 1987.  
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16 Claimant relies in part on In re Teresa Johnson, BIIA Dec. 85 3229 (1987). In that decision, we  
17 suggested that orders paying time loss compensation which do not detail or explain the underlying  
18 basis of the time loss rate are not res judicata as to that issue. However, as the Department and our  
19 industrial appeals judge correctly point out, Teresa Johnson is of limited value here because it  
20 involved the question of whether the Department could recoup previously paid time loss compensation  
21 under the provisions of RCW 51.32.240. That specific statutory provision overrides res judicata  
22 principles in certain limited circumstances when the Department seeks recoupment of overpayments.  
23 There is no comparable underpayment statute available to claimants. The nearest thing to a statutory  
24 mechanism for correcting underpayments is RCW 51.28.040, which permits a retroactive change in  
25 the rate of compensation for a period of 60 days prior to the receipt of new information. Generally this  
26 provision is considered to apply to aggravation applications. However, the Department purportedly  
27 relied on that statute here to limit its ability to go back more than 60 days from the date that the  
28 claimant's new wage information was received. Yet neither RCW 51.32.240 nor RCW 51.28.040  
29 answers the specific question before us, i.e., do the final unappealed Department orders paying time  
30 loss compensation for the period of June 25, 1983 through November 20, 1987 preclude Ms. Scheeler  
31 from now challenging the time loss rate?  
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33 A number of our prior decisions clearly express our refusal to construe orders of the  
34 Department as having finally decided issues which are not specifically addressed or which are  
35 addressed in an ambiguous way: In re Daniel A. Gilbertson, Dckt. No. 89 2865 (November 7, 1990);  
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1 In re Gary G. Johnson, BIIA Dec., 86 3681 (1987); In re Lyssa Smith, BIIA Dec., 86 1152 (1988); In re  
2 Loss Thompson, BIIA Dec., 13,473 (1962). We explained in Gary G. Johnson that, when the  
3 Department issues an order expressly addressing the issue of claim allowance and that order is  
4 protested by the employer, the Department is obligated to specifically address the allowance issue in a  
5 further order. A subsequent determinative time loss order which the employer failed to timely protest  
6 or appeal did not preclude the employer from later challenging allowance of the claim. The  
7 determinative time loss order could not be construed as allowance of the claim for res judicata  
8 purposes since it failed to clearly apprise the employer that the claim had been allowed. We held that  
9 a determinative time loss compensation order which has been neither appealed nor protested is a  
10 binding res judicata determination only with respect to the issue resolved by that order, i.e., entitlement  
11 to time loss compensation awarded thereby. In reaching that decision, we looked to see whether the  
12 prior unappealed time loss compensation order clearly apprised the employer that the claim had been  
13 allowed, so as to preclude further litigation on that question. Gary G. Johnson, supra, pp. 4-5, citing  
14 King v. Dep't of Labor & Indus., 12 Wn.App. 1, 528 P.2d 271 (1974). We apply the same specific and  
15 clear notice requirements here.

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24 The record of proceedings contains no reference to any Department order which clearly  
25 apprises Ms. Scheeler of the underlying basis of the time loss rate until the order of April 7, 1988  
26 (which was timely protested) which apprises her of the rate to be paid commencing as of November  
27 21, 1987 based on a gross monthly wage of \$1,071.30, and the order under appeal dated February  
28 16, 1989 which affirmed a January 4, 1989 order which indicates that the retroactive time loss  
29 compensation would be paid based on a monthly wage of \$938.00. These were the first instances of  
30 the Department ever informing the claimant as to the underlying basis for the rate of time loss  
31 compensation. Thus, the claimant is not precluded by the principle of res judicata from challenging the  
32 rate of time loss compensation for the period of June 25, 1983 through November 20, 1987.

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37 Our decision in this regard is consistent with our adherence to fundamental fairness when we  
38 are asked to determine whether the principle of res judicata applies. Unless prior orders of the  
39 Department have apprised the parties in clear and unmistakable terms that the present controversy  
40 has already been finally adjudicated, no res judicata effect will be applied. When Ms. Scheeler  
41 protested the first determinative time loss order, the rate of time loss was positively placed into issue.  
42 The order of December 12, 1983 which stated only that the previous rate of compensation was  
43 incorrect without specifically stating the new rate, much less the basis for the new rate, did not apprise  
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1 Ms. Scheeler as to the gross monthly wages which the Department was using as the basis for  
2 calculating her time loss compensation. Such an order, or subsequent like orders, cannot be res  
3 judicata as to that issue.  
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6 Furthermore, despite the Department's current posture in this appeal, it is clear that the  
7 Department itself does not consider its prior unappealed time loss compensation orders res judicata  
8 determinations with respect to the appropriate time loss rate. Otherwise, why would the Department  
9 have adjusted Ms. Scheeler's time loss rate retroactively by increasing the wage base to \$938.00?  
10 We can find no legitimate reason within the record before us for the Department to refuse to correct  
11 the retroactive time loss rate completely, rather than partially as it has done. Accordingly, the  
12 Department must recalculate the rate of time loss compensation for the periods prior to November 21,  
13 1987 based on Ms. Scheeler's stipulated gross monthly wage of \$1,071.30.  
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17 In so holding, we make the following Finding of Facts and Conclusions of Law:  
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20 **FINDINGS OF FACT**

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22 1. On July 19, 1983, the Department of Labor and Industries received an  
23 accident report from claimant, Louise J. Scheeler, alleging that she  
24 sustained an industrial injury on June 24, 1983, while in the course of her  
25 employment with Auburn East Mobile Home Park. Time loss  
26 compensation was paid by interlocutory orders dated August 1 and August  
27 2, 1983, for the period of June 28, 1983 through June 30, 1983. On  
28 August 26, 1983 the Department issued a determinative order, paying  
29 time loss for the period of June 25, 1983 through June 30, 1983, less  
30 deduction.

31 On October 28, 1983, the claimant protested the rate of time loss  
32 compensation. On December 12, 1983, the Department issued an order  
33 which stated that the compensation rate was now corrected and made a  
34 partial payment of time loss compensation for the period of June 25, 1983  
35 through November 30, 1983 to adjust the compensation rate. On January  
36 20, 1988, the claimant protested the rate of time loss compensation. On  
37 February 8, 1988, the Department issued an order correcting and  
38 superseding earlier orders of September 22, 1987, December 16, 1987,  
39 and January 4, 1988, recalculating the time loss compensation rate and  
40 adjusting the rate for the period November 21, 1987 through February 6,  
41 1988.

42 After a February 17, 1988 protest and request for reconsideration, the  
43 Department issued an order on April 7, 1988 recalculating time loss  
44 compensation benefits for the period November 21, 1987 through March  
45 22, 1988 based upon gross monthly wages of \$1,071.30. The April 7,  
46 1988 order stated:  
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1 Monthly compensation is \$801.53 as of 11-21-  
2 87 based on gross monthly wages of  
3 \$1071.30 based on two jobs and an income  
4 in-kind of \$300.00/mo at time of injury.  
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6 After an April 12, 1988 protest and request for reconsideration, the  
7 Department issued an order on June 24, 1988 adhering to the provisions  
8 of its order dated April 7, 1988.

9 After a June 29, 1988 protest and request for reconsideration, the  
10 Department issued an order on September 19, 1988 placing the June 24,  
11 1988 order in abeyance. On January 4, 1989, the Department adjusted  
12 the time loss rate and paid additional retroactive time loss compensation  
13 for the period June 25, 1983 through November 20, 1987 based upon  
14 gross monthly wages of \$938.00 (married with no dependents, including  
15 \$300.00 monthly income in kind). After a February 3, 1989 protest and  
16 request for reconsideration, the Department issued an order on February  
17 16, 1989 affirming the provisions of its January 4, 1989 order.

18 On February 24, 1989, the claimant filed a notice of appeal with the Board  
19 of Industrial Insurance Appeals. On March 10, 1989, the Board issued an  
20 order granting the appeal, assigning it Docket No. 89 0609, and directed  
21 that proceedings be held on the issues raised.  
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- 23 2. On June 24, 1983, Louise J. Scheeler was injured while in the course of  
24 her employment with the Auburn East Mobile Home Park. Her claim was  
25 allowed by the Department and benefits provided.
- 26 3. As of June 24, 1983, Ms. Scheeler was married with no dependents and  
27 earned gross monthly wages of \$1,071.30, including \$300.00 in-kind  
28 income and wages of \$200.00 from Auburn East Mobile Home Park as  
29 well as wages of \$571.30 from Issaquah Villa.
- 30 4. Between June 25, 1983 and February 16, 1989, Ms. Scheeler was not  
31 capable of gainful employment on a reasonably continuous basis as a  
32 result of her industrial injury.
- 33 5. The Department has readjusted the time loss rate retroactively and paid  
34 additional time loss compensation for the period between June 25, 1983  
35 and November 20, 1987 based upon gross monthly wages of \$938.00 at  
36 the time of injury.
- 37 6. The Department has paid time loss compensation for the period between  
38 November 21, 1987 and February 16, 1989 based upon gross monthly  
39 wages of \$1,071.30 at the time of injury.
- 40 7. No order prior to the order of the Department dated April 7, 1988 clearly  
41 apprised Ms. Scheeler, of the underlying factual basis used by the  
42 Department to calculate the rate of time loss compensation.  
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3 **CONCLUSIONS OF LAW**  
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- 5 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
6 and the subject matter of this appeal.  
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8 2. Between June 25, 1983 and February 16, 1989, claimant was a  
9 temporarily totally disabled worker within the meaning of RCW 51.32.090.  
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11 3. Pursuant to RCW 51.08.178, the time loss compensation rate to which the  
12 claimant is entitled is fixed by the month and is based on her monthly  
13 income at the time of injury, which equalled \$1,071.30.  
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15 4. On February 16, 1989 when the Department issued its order adhering to  
16 the order of January 4, 1989, the rate of compensation for time loss  
17 benefits from June 25, 1983 through November 20, 1987 was properly in  
18 issue, and determination of the proper rate for the entire period was not  
19 precluded by the doctrine of res judicata.  
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21 5. The order of the Department of Labor and Industries dated February 16,  
22 1989 which affirmed the provisions of an order dated January 4, 1989  
23 which readjusted the time loss rate and paid additional retroactive time  
24 loss compensation for the period June 25, 1983 to November 20, 1987  
25 based upon gross monthly wages of \$938.00 (married with no dependents  
26 and including \$300.00 monthly income in-kind) is reversed and this matter  
remanded to the Department with directions to pay claimant time loss  
compensation for the period June 25, 1983 through November 20, 1987  
based on a gross monthly wage at the time of injury of \$1,071.30 (married  
with no dependents), less prior awards for said period.

27 It is so ORDERED.

28 Dated this 13<sup>th</sup> day of November, 1990.  
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30 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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32  
33 /s/  
34 SARA T. HARMON Chairperson

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37 /s/  
38 FRANK E. FENNERTY, JR. Member

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41 /s/  
42 PHILLIP T. BORK Member  
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