

Lewis, Eleanor (II)

COLLATERAL ESTOPPEL

Prior Board decision in same claim

Where a prior Board decision involving the same claim required a determination of the exact amount of monetary pension benefits, and the determination of the worker's rate of time-loss compensation was a critical part of that decision, the doctrine of collateral estoppel bars the Department from recalculating the pension benefits on remand when it discovers the time-loss compensation rate was based on the incorrect number of hours worked per day.*In re Eleanor Lewis (II)*, BIIA Dec., 89 2474 (1990) [Editor's Note: Consider impact of *Birrueta v. Dep't of Labor & Indus.*, 186 Wn2d 532 (2016) on continued viability of this holding.]

COMPUTATION OF BENEFITS

Change of circumstances (RCW 51.28.040)

The statutory provision permitting the Department to readjust compensation does not, on its face, give the Department authority to readjust the compensation rate absent an application. Further, it requires a change in circumstances and does not apply where the Department had the correct wage information but simply failed to realize its error in computation.*In re Eleanor Lewis (II)*, BIIA Dec., 89 2474 (1990)

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: ELEANOR LEWIS) DOCKET NO. 89 2474
2)
3 CLAIM NO. H 614547) DECISION AND ORDER
4 _____)

5 APPEARANCES:

6
7 Claimant, Eleanor Lewis, by
8 Patrick R. McMullen
9

10 Employer, Community Homewell, Inc.,
11 None
12

13 Department of Labor and Industries, by
14 The Attorney General, per
15 Stephen A. Eggerman, Assistant
16

17 This is an appeal filed by the claimant, Eleanor Lewis, on June 14, 1989 from an order of the
18 Department of Labor and Industries dated June 9, 1989 which determined that the Department's
19 method of computing the claimant's pension benefits based upon a monthly wage of \$341.00 at the
20 time of injury was correct. **REVERSED AND REMANDED.**
21
22

23 **EVIDENTIARY AND PROCEDURAL MATTERS**

24 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
25 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
26 issued on December 11, 1989 in which the order of the Department dated June 9, 1989 was affirmed.
27
28

29 The parties have been before the Board in two previous appeals - Docket No. 86 0076 and
30 Docket No. 86 4139. In Docket No. 86 0076 the Board entered an Order On Agreement of Parties
31 dated July 18, 1986 which directed that the claimant be classified as permanently and totally disabled
32 effective February 13, 1982. In Docket No. 86 4139, the issue before the Board was whether the
33 Department was correct in charging the sum of \$24,113.49, which had previously been paid Ms. Lewis
34 as a permanent partial disability award, against the pension reserve, pursuant to RCW 51.32.080(2).
35 In that appeal, we concluded as follows:
36
37
38

39 The record establishes that the last monthly permanent partial disability
40 payment to the claimant was on June 6, 1986, and that as of that date she
41 would have received a total of \$22,564.37 in permanent total disability
42 payments had she been awarded a pension back in February, 1982, the
43 date of "first instance", instead of a permanent partial disability award. As
44 previously noted, the permanent partial disability compensation paid to the
45 claimant, including interest, totaled \$24,113.49. Accordingly, applying the
46 plain and unambiguous language of the statute, the "portion" of the
47

1 permanent partial disability compensation which exceeds the amount that
2 would have been paid...if total permanent disability had been paid in the
3 first instance" amounts to \$1,549.12 in this case, and that sum therefore
4 constitutes the charge which is to be properly deducted from the
5 claimant's pension reserve for and on account of the prior permanent
6 partial disability award.
7

8 In re Eleanor Lewis, Dckt. No. 86 4139 (January 28, 1988) at 3-4. The claim was then remanded to
9 the Department with instructions to "recalculate the claimant's pension based upon a charge of
10 \$1,549.12 to her pension reserve, with the remaining \$22,564.37 of the permanent partial disability
11 compensation previously paid to the claimant to be credited and offset against the retroactive pension
12 compensation otherwise due the claimant." In re Eleanor Lewis, Dckt. No. 86 4139(January 28, 1988)
13 at 6.
14

15
16
17 After the remand the Department noticed that the employer's report of accident form, received
18 by the Department on November 27, 1979, showed that claimant only worked five hours per day at
19 \$3.10 per hour. The Department had previously calculated claimant's pension benefits, based upon
20 an eight hour work day. Thus the Department proceeded to recalculate the claimant's pension
21 benefits, based on a monthly wage of \$341.00 at the time of injury, rather than \$540.60. Ms. Lewis
22 protested, the Department responded by adhering to its decision to use the lesser amount, and the
23 instant appeal has resulted.
24
25
26
27

28 **DECISION**

29 Ms. Lewis asserts that, based on the prior decision in Docket No. 86 4139, the Department is
30 required to pay pension benefits based on the eight hour workday calculations. The industrial appeals
31 judge concluded that the Department was not barred by the doctrine of collateral estoppel and could
32 recalculate the claimant's earnings and, consequently, her pension benefits. We disagree.
33
34

35 Collateral estoppel bars the "relitigation of an issue or determinative fact after the party
36 estopped has had a full and fair opportunity to present a case". McDaniels v. Carlson, 108 Wn.2d
37 299,303 (1987). For collateral estoppel to apply, the following questions must be answered
38 affirmatively:
39
40

- 41 (1) Was the issue decided in the prior adjudication identical with the one
42 presented in the action in question?
- 43 (2) Was there a final judgment on the merits?
- 44 (3) Was the party against whom the plea is asserted a party or in privity with
45 the party to the prior adjudication?
46
47

1 (4) Will the application of the doctrine not work an injustice on the party
2 against whom the doctrine is to be applied?
3

4 Rains v. State, 100 Wn.2d 660,665 (1983).
5

6 Resolution of the issue raised in Docket No. 86 4139 required a determination of the exact
7 monetary amount of pension benefits, i.e., \$22,564.37, which the claimant would have received, had
8 the Department initially placed her on a pension in February of 1982 rather than closing the claim with
9 a permanent partial disability award. The figure of \$22,564.37 was arrived at by determining Ms.
10 Lewis' wages, her marital status, and the number of dependent children at the time of her injury.
11 Indeed, in Docket No. 86 4139 the Department presented the testimony of Beverly M. Lewis, a
12 pension benefit supervisor with the Department, who testified that the claimant's rate of time loss
13 compensation "was based on a monthly wage of \$540.60 a month". 5/27/87 Tr. at 5.
14
15
16
17

18 The Department argues that collateral estoppel does not apply because "the issue of the
19 amount of hours the claimant was working was not litigated at the Board level in the original action, but
20 were merely "evidentiary facts and collateral to the issue in the original claim". Department's Reply to
21 Petition for Review, p. 2, lines 5-8 (citing McDaniels, at 305). We do not accept the Department's
22 characterization of the evidence. Without a determination of the claimant's monthly wages at the time
23 of her injury it would have been impossible to calculate the figure of \$22,564.37, i.e., the benefits Ms.
24 Lewis would have received had she initially been placed on the pension rolls in February of 1982.
25 That calculation was critical to our determination in the prior appeal that Ms. Lewis' pension reserve
26 should be reduced by \$1549.12, the difference between \$24,113.49 and \$22,564.37. Thus, the
27 amount of claimant's wages at the time of her injury was not an "evidentiary fact" which was "merely
28 collateral to the original claim" but was, instead, an "ultimate fact", that is, a fact "directly at issue in the
29 first controversy upon which the claim rests". McDaniels, supra, at 305-306. The collateral estoppel
30 doctrine therefore applies.
31
32
33
34
35
36
37

38 In making this determination we are mindful of the difficulty in distinguishing ultimate facts from
39 evidentiary facts. Phillip A. Trautman in his article Claim and Issue Preclusion in Civil Litigation in
40 Washington, 60 Wash.L.Rev. 805 (1985) notes this difficulty and suggests a different approach.
41 Trautman states:
42
43

44 [T]he appropriate question,. . . is not whether ultimate or evidentiary facts
45 are involved, but whether the issue was actually recognized by the parties
46 as important and by the judge as necessary to the first judgment. If so,
47 the determination should be conclusive, with an important qualification

1 being whether the significance of the issue for purposes of subsequent
2 action was sufficiently foreseeable at the time of the first action.
3

4 Trautman, 60 Wash.L.Rev. 805, at 835.
5

6 Applying this approach, we believe that it was not only reasonably foreseeable but obvious that
7 the determination of the claimant's wages at the time of her injury would determine the subsequent
8 calculation of her pension benefits. Although review of the record in the original proceeding does not
9 indicate any dispute as to Ms. Lewis' wages, it is important to note that if the Department had
10 presented the monthly wage figure which it presently contends is correct, the Department would have
11 been entitled to a much larger reduction of the pension reserve pursuant to RCW 51.32.080(2). It was
12 therefore of considerable importance to the Department to present any evidence it may have had that
13 the claimant's wages were not \$540.60 per month as testified to by the Department's own witness.
14
15

16 The Department also apparently contends that it has authority to recalculate Ms. Lewis' pension
17 benefits pursuant to RCW 51.28.040 which states:
18

19 If change of circumstances warrants an increase or rearrangement of
20 compensation, like application shall be made therefor. Where the
21 application has been granted, compensation and other benefits if in order
22 shall be allowed for periods of time up to sixty days prior to the receipt of
23 such application.
24
25
26

27 Initially we note that the statute does not on its face give authority to the Department to adjust
28 compensation, absent an application for such an adjustment. Secondly, we are not aware of any
29 "change" in Ms. Lewis' circumstances which would justify a "rearrangement of compensation".
30 Indeed, as the parties' stipulation indicates, the Department has had the correct wage information in
31 hand since November 27, 1979, but simply failed to realize its apparent error until sometime after our
32 January 28, 1988 decision in Docket No. 86 4139.
33
34
35

36 Finally, the Department argues that pursuant to RCW 51.32.060 the Department is required to
37 pay pension benefits based upon the wages of the worker at the time of the industrial injury. This is of
38 course true. However, as a matter of law, the Department is precluded from arguing that the
39 claimant's wages were not \$540.60 at the time of her injury.
40
41

42 The Department order is incorrect and must be reversed. We adopt Findings of Fact Nos. 1, 2,
43 and 3 and Conclusion of Law No. 1. We make the following additional Findings of Fact and
44 Conclusions of Law:
45
46
47

1
2
3
4
5
6
7
8
9
FINDINGS OF FACT

- 10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
4. In Docket No. 86 4139, a determination of the claimant's wages at the time of her industrial injury was necessary to determine the extent to which the Department was entitled to reduce the claimant's pension reserve.
 5. The only evidence presented in Docket No. 86 4139 was that the claimant's monthly wages at the time of her industrial injury were \$540.60.

CONCLUSIONS OF LAW

2. The Department is collaterally estopped from recalculating the claimant's pension benefits based upon a redetermination of Ms. Lewis' monthly wages at the time of her industrial injury.
4. The Department order dated June 9, 1989, which reaffirmed the Department's method of computing claimant's pension benefits based upon a monthly wage of \$341.00 at the time of injury, is incorrect and is reversed and the claim is remanded to the Department to recalculate the payment of pension benefits based upon a wage at the time of injury of \$540.60 per month.

It is so ORDERED.

Dated this 2nd day of July, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
SARA T. HARMON Chairperson

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

/s/ _____
PHILLIP T. BORK Member