

## Prewitt, Tex

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### RES JUDICATA

#### Wages at time of injury

Because the order establishing all the information necessary for calculation of time-loss compensation, including wages at the time of injury, had become final, the worker cannot challenge the calculation in an appeal of a subsequent order paying time-loss compensation benefits on the basis that the calculation is based on an incorrect wage at the time of injury. *Citing Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994). ...***In re Tex Prewitt*, BIIA Dec., 95 2064 (1996)** [*Editor's Note*: The Board's decision was appealed to superior court under Okanogan County Cause No. 96-2-00516-1.]

Scroll down for order.



1 time loss compensation and permanent partial disability, less prior awards, and, (d) thereupon to  
2  
3 close the claim.

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

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9 This appeal presents two issues. One issue we resolved easily, concluding the same as our  
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11 industrial appeals judge. It is the issue of the amount of permanent partial disability Mr. Prewitt  
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13 suffered due to his industrial injury. Our industrial appeals judge used some language in arriving at  
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15 his decision which is confusing. We believe it is necessary to correct that language.

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17 The parties do not dispute that Mr. Prewitt injured his legs, back, and neck on July 25, 1990,  
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19 while working for Summit Communications, Inc. The Department allowed the claim, paid time loss  
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21 compensation benefits, and provided treatment. The Department then closed the claim on  
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23 March 14, 1995, paying Mr. Prewitt a permanent partial disability equal to Category 3 for low back  
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25 impairment, pursuant to WAC 296-20-280. Mr. Prewitt appealed the closing order on  
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27 April 10, 1995. Mr. Prewitt and the Department agreed that Dr. William Shanks, of Spokane,  
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29 should examine Mr. Prewitt and report his findings and conclusions concerning Mr. Prewitt's low  
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31 back condition. The parties further agreed they would be bound by Dr. Shanks' rating of  
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33 Mr. Prewitt's low back impairment.

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35 Dr. Shanks examined Mr. Prewitt on December 7, 1995, and issued a report that detailed  
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37 Mr. Prewitt's history, the results of the examination, the doctor's diagnosis, and his conclusions. In  
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39 Findings of Fact Nos. 3, 4, and 5 of the Proposed Decision and Order, our industrial appeals judge  
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41 correctly set forth Dr. Shanks' findings, diagnosis, and conclusions. As a result of the industrial  
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43 injury, Mr. Prewitt suffered a permanent partial disability equal to Category 5 of WAC 296-20-280,  
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45 for low back impairment. Prior to the industrial injury, Mr. Prewitt suffered from a congenital  
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47 condition in his low back that impaired him to an extent equal to Category 2 of WAC 296-20-280.

1 Thus, the Department should pay Mr. Prewitt a permanent partial disability equal to Category 5,  
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3 less the preexisting Category 2. However, this payment does not equal a Category 3, as our  
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5 industrial appeals judge indicated in the discussion section of the Proposed Decision and Order.  
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7 While the conclusions of law appear to correctly state the basis of the award, we will clarify it here.  
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9       A permanent partial disability of the low back, most closely described as a Category 5, is  
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11 equivalent to 25 percent of the amount paid for total bodily impairment (t.b.i.). Category 3 is equal  
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13 to 10 percent t.b.i. and Category 2 equals 5 percent t.b.i. Mr. Prewitt is entitled to an award of 25  
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15 percent t.b.i. (Category 5) less a preexisting 20 percent t.b.i. A flat award of a Category 3 would  
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17 result in a payment of 10 percent t.b.i. Although there is a three category difference between  
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19 Category 5 and 2, this is not the same percentage of total bodily impairment as a Category 3.  
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21 Again, the conclusions of law in the Proposed Decision and Order were adequate, however, we felt  
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23 that a clarification was in order due to the statement at page 3, line 2 of that order.  
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25       Mr. Prewitt's second contention is that the Department made a mistake when it determined  
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27 his time loss compensation rate at the time of his injury. Mr. Prewitt argued that his monthly wage  
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29 was considerably higher than that upon which the Department based the time loss compensation  
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31 rate. Mr. Prewitt showed, through stipulated testimony, to the satisfaction of the industrial appeals  
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33 judge, that his monthly wage should have been based on the \$120.00 per day he was paid by his  
34  
35 employer. We believe the evidence is clear and would be a preponderance in favor of Mr. Prewitt's  
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37 contention if we could reach the merits.  
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39       The Department argues in its Petition for Review that the Board lacks jurisdiction to require  
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41 the Department to recalculate the time loss compensation rate because the September 13, 1990  
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43 order, that established the rate, was not protested nor appealed in a timely fashion. The  
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45 Department contends the order became res judicata and the time loss rate established cannot be  
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47 challenged.

1 A party may raise the issue of lack of jurisdiction in the adjudicating body at any time during  
2 the proceedings prior to a judgment becoming final. *Hunter v. Department of Labor & Indus.*,  
3 19 Wn. App., 473 (1978). A party may not waive jurisdictional inadequacies. *First Union*  
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5 *Management v. Slack*, 36 Wn. App. 849 (1984). The rules of civil procedure, under which the  
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7 Board functions in its adjudicatory actions, require us to dismiss an appeal should we determine we  
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9 do not have jurisdiction over the subject matter of the appeal. CR 12(h)(3); RCW 51.52.140.  
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13 In order to determine if we have jurisdiction, we are empowered to go beyond the record  
14 before us. We may conduct a search of the Department file to assist us in the determination.  
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16 *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965).  
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19 We have made that search because the Department order establishing the time loss  
20 compensation rate is not in the record before us. We have reviewed the September 13, 1990  
21 order, that contains the following pertinent language:  
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25 It is hereby ordered that this claim be allowed and the claimant be  
26 entitled to benefits in accordance with the industrial insurance laws.  
27 Rate of time loss compensation is based on married plus one  
28 dependent child and wages at the time of injury or exposure of  
29 \$1,145.17 per month.  
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31 Mr. Prewitt did not claim that he did not receive the order and nothing in the file or record  
32 indicates the order was not communicated to him. He had 60 days from the date he received the  
33 order to protest or appeal it. RCW 51.52.060. The language apprising him of that requirement was  
34 contained in the Department order.  
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39 Mr. Prewitt did not timely protest the order and ask the Department to reconsider it, nor did  
40 he timely appeal the order to the Board. The order became res judicata and cannot now be  
41 attacked, even though it might contain a clear error.  
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1 The Washington State Supreme Court, with all justices concurring, held that an order of the  
2 Department that was not protested or appealed in a timely fashion became final and binding.  
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5 *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).  
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7 In that case, Mrs. Marley, widow of a deceased worker who was killed in the course of his  
8 employment, sought benefits under the Industrial Insurance Act. Although Mr. Marley had sent  
9 child support payments (through a state agency) to Mrs. Marley, the couple had lived separately for  
10 about 12 years. The Department denied her claim for benefits (although it had allowed benefits for  
11 the couple's children) in an order dated October 4, 1984. Mrs. Marley failed to protest or appeal  
12 within 60 days of receiving the order. She requested that the Department reconsider its decision  
13 on November 5, 1990. The Department refused. She argued on appeal to the Board that the  
14 order was void because it contained an error and the order could be attacked at any time. The  
15 Board upheld the Department order, but the superior court reversed the Board and remanded the  
16 case to the Department with directions to decide whether the Marleys were living in a state of  
17 abandonment at the time of Mr. Marley's death. The Court of Appeals reversed the superior court,  
18 holding the order was final. The Supreme Court agreed, and said that:  
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31 An unappealed final order from the Department precludes the parties  
32 from rearguing the same claim.  
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34 If a party to a claim believes the Department erred in its decision,  
35 that party must appeal the adverse ruling. The failure to appeal an  
36 order, even one containing a clear error of law, turns the order into a  
37 final adjudication, precluding any reargument of the same claim.  
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39 *Marley*, at 538.  
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41 The court noted an exception to the rule is the instance of a void Department order. The  
42 court held an order is void only if the Department lacks subject matter or personal jurisdiction.  
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44 *Marley*, at 539. Mrs. Marley could not argue the Department lacked personal jurisdiction. There  
45 can be no question that the Department had personal jurisdiction over Mr. Prewitt. Nor can it be  
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1 said that the Department lacked jurisdiction over the subject matter of Mr. Prewitt's claim. The  
2 Department had such jurisdiction in the *Marley* case. "[T]he Department has 'original and exclusive  
3 jurisdiction, in all cases where claims are presented, to determine the mixed question of law and  
4 fact as to whether a compensable injury has occurred.'" *Marley*, at 540, citing *Abraham v.*  
5 *Department of Labor & Indus.*, 178 Wash. 160 (1934).  
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11 The court held in the *Marley* case that since the Department had subject matter jurisdiction  
12 to adjudicate all claims for workers' compensation, its order was not void. At worst, the Department  
13 made an erroneous decision, but it still had jurisdiction. The court quoted from *Dike v. Dike*,  
14 75 Wn.2d 1, 8 (1968): "Obviously, the power to decide issues includes the power to decide wrong,  
15 and an erroneous decision is as binding as one that is correct until set aside or corrected in a  
16 manner provided by law." *Marley*, at 543.  
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23 Finally, the court stated: "We therefore find that Mrs. Marley's failure to appeal the  
24 Department's order of October 4, 1984, transformed the order into a final adjudication, valid and  
25 binding on Mrs. Marley." *Marley*, at 543.  
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29 We must conclude that the same logic and conclusions apply in this appeal. We do note  
30 this Board has held that Department orders that do not state how the time loss compensation was  
31 calculated, i.e., failed to state the monthly wage or the matrimonial status of the claimant or the  
32 claimant's number of dependents, are not res judicata as to that issue. *In re Louise J. Scheeler*,  
33 BIIA Dec., 89 0609 (1990); *In re Teresa Johnson*, BIIA Dec., 85 3229 (1987). That is not the case  
34 in this appeal.  
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41 The determinative order of September 13, 1990, contained all the information necessary for  
42 the calculation of Mr. Prewitt's time loss compensation pursuant to the statute. RCW 51.32.090.  
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45 Mr. Prewitt first challenged the calculation of time loss compensation on April 12, 1993,  
46 when he protested a time loss compensation order dated March 17, 1993. That order established  
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1 the rate of compensation for the two semi-monthly payments beginning March 1, 1993. Such a  
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3 protest to the Department's calculation was untimely and cannot be used to attack the final and  
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5 binding adjudication of the method of calculation of time loss benefits or the amounts of those  
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7 benefits.

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9 For the reason that we do not reach the merits of the issue of Mr. Prewitt's monthly wage at  
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11 the time of his injury, we will not set forth any findings or conclusions except those which are  
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13 consistent with this opinion.

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15 After consideration of the Proposed Decision and Order and the Petition for Review filed  
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17 thereto, and a careful review of the entire record before us, we make the following:

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19 **FINDINGS OF FACT**

- 20  
21 1. On August 13, 1990, Tex D. Prewitt filed an application for benefits with  
22 the Department of Labor and Industries. On July 25, 1990, while in the  
23 employ of Summit Communications, Inc., Mr. Prewitt injured his legs,  
24 back, and neck. On September 13, 1990, the Department issued an  
25 order allowing the claim and determining that for the purpose of time  
26 loss compensation the rate of compensation would be \$1,145.17 per  
27 month. On March 17, 1993, the Department issued an order paying  
28 time loss compensation for the period March 1, 1993 through  
29 March 31, 1993. On April 12, 1993, Mr. Prewitt protested the incorrect  
30 wage rate. On April 19, 1993, the Department issued an order  
31 terminating time loss compensation as paid through April 7, 1993. On  
32 April 23, 1993, the claimant protested that order. On June 17, 1993, the  
33 claimant protested the rate of time loss compensation since the date of  
34 the initial time loss payment. On June 30, 1993, the Department issued  
35 an order holding its April 19, 1993 order in abeyance.

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37 On February 9, 1994, the Department issued an order affirming its  
38 April 19, 1993 order, determining that the claimant was not a "year  
39 round worker" at the time of his injury, that therefore his monthly wage  
40 at time of injury was determined to be \$1,145.17, and that the wage  
41 calculation also was affirmed. On March 3, 1994, the claimant filed his  
42 Notice of Appeal with the Board of Industrial Insurance Appeals from the  
43 Department's February 9, 1994 order. On April 1, 1994, the Board  
44 issued an order granting the appeal. On June 16, 1994, the Board  
45 issued an order on agreement of parties reversing the Department's  
46 February 9, 1994 order and remanding the claim to the Department for  
47 further action.



1 On March 14, 1995, the Department issued an order granting the  
2 claimant an award for permanent partial disability equal to Category 3 of  
3 WAC 296-20-280 and closed the claim. On April 10, 1995, the claimant  
4 filed his Notice of Appeal with the Board from the Department's March  
5 14, 1995 order. On April 17, 1995, the claimant filed an amended  
6 Notice of Appeal. On May 4, 1995, the Board issued an order granting  
7 the appeal.  
8

- 9 2. On March 14, 1995, Mr. Prewitt had a low back condition proximately  
10 caused by his July 25, 1990 industrial injury. The condition was fixed  
11 and stable. Evidence of that condition included: a slight limp; increased  
12 pain with toe walking; a slight list to the right; flattened lumbar lordosis;  
13 tenderness in the lumbar area, both over the midline and bilaterally;  
14 marked tightness of the paraspinal muscles on the right, up to the L2  
15 level; limited ranges of motion; limited straight-leg raising, with greater  
16 restrictions on the right; and, diminished sensation along the right  
17 medial calf and dorso-medial foot. X-ray evidence of the condition  
18 included: lumbar scoliosis, convex to the right; degenerative changes  
19 throughout the lumbar area, with anterior and lateral spurring and  
20 narrowing of the disc spaces at T12 through L1, some anterior spurring  
21 and narrowing at L2-3, L3-4, L4-5, and especially at L5-S1; and,  
22 sclerosis about the L5-S1 disc space, with fairly large anterior spurring  
23 and a grade 1-through-2 spondylolisthesis, marked loss of disc space at  
24 the L4-5 and L5-S1 levels, and, upon flexion/extension views, slight  
25 motion at the L5-S1 level but no transitional movement.  
26
- 27 3. Mr. Prewitt had a low back condition prior to his July 25, 1990 industrial  
28 injury. It was diagnosed as a spondylolisthesis. Prior to the industrial  
29 injury, this condition resulted in a permanent bodily impairment that best  
30 fit Category 2 of WAC 296-20-280.  
31
- 32 4. On March 14, 1995, Mr. Prewitt had a permanent partial disability of his  
33 low back that best fit Category 5 of WAC 296-20-280. The  
34 July 25, 1990 industrial injury proximately caused the increase in  
35 category of disability from Category 2 to Category 5.  
36
- 37 5. The September 13, 1990 Department order stated that the rate of time  
38 loss compensation to be paid Mr. Prewitt would be based upon his  
39 status as married, with one dependent child, and wages at the time of  
40 his injury equaling \$1,145.17 per month.  
41

#### 42 **CONCLUSIONS OF LAW**

- 43 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
44 parties and the subject matter of this appeal as that jurisdiction pertains  
45 to the issue of permanent partial disability, and it is has jurisdiction over  
46 the parties and the subject matter of this appeal sufficient to determine  
47

1 that it lacks subject matter jurisdiction over the issue of recalculation of  
2 time loss compensation.

- 3
- 4 2. The order of the Department of Labor and Industries dated  
5 September 13, 1990, became res judicata 60 days after its  
6 communication to the parties, when no protest and request for  
7 reconsideration was filed with the Department and no appeal was filed  
8 with the Board.
- 9
- 10 3. The order of the Department of Labor and Industries dated  
11 March 14, 1995, that granted Mr. Prewitt an award for permanent partial  
12 disability equal to Category 3 of WAC 296-20-280, and closed the claim,  
13 is incorrect. This order is reversed and the claim is remanded to the  
14 Department with directions to pay a permanent partial disability equal to  
15 Category 5 of WAC 296-20-280, less a preexisting low back impairment  
16 best described by Category 2 of WAC 296-20-280, to confirm that time  
17 loss compensation paid at the rate established by the Department order  
18 of September 13, 1990, was res judicata, and to close the claim.

19  
20 It is so ORDERED.

21  
22 Dated this 29th day of October, 1996.

23  
24 BOARD OF INDUSTRIAL INSURANCE APPEALS

25  
26  
27 /s/ \_\_\_\_\_  
28 S. FREDERICK FELLER Chairperson

29  
30 /s/ \_\_\_\_\_  
31 JUDITH E. SCHURKE Member