Prewitt, Tex

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.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: TEX D. PREWITT	**DOCKET NO. 95 2064**
CLAIM NO. M-508195	**DECISION AND ORDER**

APPEARANCES:

Claimant, Tex D. Prewitt, by
Calbom & Schwab, P.S.C., per
Jeffrey Schwab

Employer, Summit Communications, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Shara J. DeLorme, David W. Coe, and Lorna W. Lewis, Assistants

The claimant, Tex D. Prewitt, filed an appeal with the Board of Industrial Insurance Appeals on April 10, 1995, and amended on April 17, 1995, from an order of the Department of Labor and Industries dated March 14, 1995. The order granted Mr. Prewitt an award for permanent partial disability equal to Category 3 of WAC 296-20-280 and closed the claim. **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 June 28, 1996, in which the order of the Department dated March 14, 1995, was reversed and the claim remanded to the Department with directions (a) to determine the amount of time loss compensation due Mr. Prewitt based on wages of $120.00 per day as a full-time worker, (b) to find that Mr. Prewitt's low back condition best was described by Category 5 of WAC 296-20-280, with a preexisting low back condition best described by Category 2 of WAC 296-20-280, with the difference between the categories of permanent partial disability to have been caused by the July 25, 1990 industrial injury, (c) to pay Mr. Prewitt the awards due for

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

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

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

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

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

Thus, the Department should pay Mr. Prewitt a permanent partial disability equal to Category 5, less the preexisting Category 2. However, this payment does not equal a Category 3, as our industrial appeals judge indicated in the discussion section of the Proposed Decision and Order. While the conclusions of law appear to correctly state the basis of the award, we will clarify it here.

A permanent partial disability of the low back, most closely described as a Category 5, is equivalent to 25 percent of the amount paid for total bodily impairment (t.b.i.). Category 3 is equal to 10 percent t.b.i. and Category 2 equals 5 percent t.b.i. Mr. Prewitt is entitled to an award of 25 percent t.b.i. (Category 5) less a preexisting 20 percent t.b.i. A flat award of a Category 3 would result in a payment of 10 percent t.b.i. Although there is a three category difference between Category 5 and 2, this is not the same percentage of total bodily impairment as a Category 3. Again, the conclusions of law in the Proposed Decision and Order were adequate, however, we felt that a clarification was in order due to the statement at page 3, line 2 of that order.

Mr. Prewitt's second contention is that the Department made a mistake when it determined his time loss compensation rate at the time of his injury. Mr. Prewitt argued that his monthly wage was considerably higher than that upon which the Department based the time loss compensation rate. Mr. Prewitt showed, through stipulated testimony, to the satisfaction of the industrial appeals judge, that his monthly wage should have been based on the $120.00 per day he was paid by his employer. We believe the evidence is clear and would be a preponderance in favor of Mr. Prewitt's contention if we could reach the merits.

The Department argues in its Petition for Review that the Board lacks jurisdiction to require the Department to recalculate the time loss compensation rate because the September 13, 1990 order, that established the rate, was not protested nor appealed in a timely fashion. The Department contends the order became res judicata and the time loss rate established cannot be challenged.

A party may raise the issue of lack of jurisdiction in the adjudicating body at any time during the proceedings prior to a judgment becoming final. *Hunter v. Department of Labor & Indus*., 19 Wn. App., 473 (1978). A party may not waive jurisdictional inadequacies. *First Union Management v. Slack*, 36 Wn. App. 849 (1984). The rules of civil procedure, under which the Board functions in its adjudicatory actions, require us to dismiss an appeal should we determine we do not have jurisdiction over the subject matter of the appeal. CR 12(h)(3); RCW 51.52.140.

In order to determine if we have jurisdiction, we are empowered to go beyond the record before us. We may conduct a search of the Department file to assist us in the determination. *In re Mildred Holzerland*, BIIA Dec., 15,729 (1965).

We have made that search because the Department order establishing the time loss compensation rate is not in the record before us. We have reviewed the September 13, 1990 order, that contains the following pertinent language:

> It is hereby ordered that this claim be allowed and the claimant be entitled to benefits in accordance with the industrial insurance laws. Rate of time loss compensation is based on married plus one dependent child and wages at the time of injury or exposure of $1,145.17 per month.

Mr. Prewitt did not claim that he did not receive the order and nothing in the file or record indicates the order was not communicated to him. He had 60 days from the date he received the order to protest or appeal it. RCW 51.52.060. The language apprising him of that requirement was contained in the Department order.

Mr. Prewitt did not timely protest the order and ask the Department to reconsider it, nor did he timely appeal the order to the Board. The order became res judicata and cannot now be attacked, even though it might contain a clear error.

The Washington State Supreme Court, with all justices concurring, held that an order of the Department that was not protested or appealed in a timely fashion became final and binding. *Marley v. Department of Labor & Indus*., 125 Wn.2d 533 (1994).

In that case, Mrs. Marley, widow of a deceased worker who was killed in the course of his employment, sought benefits under the Industrial Insurance Act. Although Mr. Marley had sent child support payments (through a state agency) to Mrs. Marley, the couple had lived separately for about 12 years. The Department denied her claim for benefits (although it had allowed benefits for the couple's children) in an order dated October 4, 1984. Mrs. Marley failed to protest or appeal within 60 days of receiving the order. She requested that the Department reconsider its decision on November 5, 1990. The Department refused. She argued on appeal to the Board that the order was void because it contained an error and the order could be attacked at any time. The Board upheld the Department order, but the superior court reversed the Board and remanded the case to the Department with directions to decide whether the Marleys were living in a state of abandonment at the time of Mr. Marley's death. The Court of Appeals reversed the superior court, holding the order was final. The Supreme Court agreed, and said that:

> An unappealed final order from the Department precludes the parties from rearguing the same claim.
>
> If a party to a claim believes the Department erred in its decision, that party must appeal the adverse ruling. The failure to appeal an order, even one containing a clear error of law, turns the order into a final adjudication, precluding any reargument of the same claim.

Marley, at 538.

The court noted an exception to the rule is the instance of a void Department order. The court held an order is void only if the Department lacks subject matter or personal jurisdiction. *Marley*, at 539. Mrs. Marley could not argue the Department lacked personal jurisdiction. There can be no question that the Department had personal jurisdiction over Mr. Prewitt. Nor can it be

said that the Department lacked jurisdiction over the subject matter of Mr. Prewitt's claim. The Department had such jurisdiction in the *Marley* case. "[T]he Department has 'original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred'." *Marley*, at 540, citing *Abraham v. Department of Labor & Indus*., 178 Wash. 160 (1934).

The court held in the *Marley* case that since the Department had subject matter jurisdiction to adjudicate all claims for workers' compensation, its order was not void. At worst, the Department made an erroneous decision, but it still had jurisdiction. The court quoted from *Dike v. Dike*, 75 Wn.2d 1, 8 (1968): "Obviously, the power to decide issues includes the power to decide wrong, and an erroneous decision is as binding as one that is correct until set aside or corrected in a manner provided by law." *Marley*, at 543.

Finally, the court stated: "We therefore find that Mrs. Marley's failure to appeal the Department's order of October 4, 1984, transformed the order into a final adjudication, valid and binding on Mrs. Marley." *Marley*, at 543.

We must conclude that the same logic and conclusions apply in this appeal. We do note this Board has held that Department orders that do not state how the time loss compensation was calculated, i.e., failed to state the monthly wage or the matrimonial status of the claimant or the claimant's number of dependents, are not res judicata as to that issue. *In re Louise J. Scheeler*, BIIA Dec., 89 0609 (1990); *In re Teresa Johnson*, BIIA Dec., 85 3229 (1987). That is not the case in this appeal.

The determinative order of September 13, 1990, contained all the information necessary for the calculation of Mr. Prewitt's time loss compensation pursuant to the statute. RCW 51.32.090.

Mr. Prewitt first challenged the calculation of time loss compensation on April 12, 1993, when he protested a time loss compensation order dated March 17, 1993. That order established

the rate of compensation for the two semi-monthly payments beginning March 1, 1993. Such a protest to the Department's calculation was untimely and cannot be used to attack the final and binding adjudication of the method of calculation of time loss benefits or the amounts of those benefits.

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

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

FINDINGS OF FACT

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

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

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

2. On March 14, 1995, Mr. Prewitt had a low back condition proximately caused by his July 25, 1990 industrial injury. The condition was fixed and stable. Evidence of that condition included: a slight limp; increased pain with toe walking; a slight list to the right; flattened lumbar lordosis; tenderness in the lumbar area, both over the midline and bilaterally; marked tightness of the paraspinal muscles on the right, up to the L2 level; limited ranges of motion; limited straight-leg raising, with greater restrictions on the right; and, diminished sensation along the right medial calf and dorso-medial foot. X-ray evidence of the condition included: lumbar scoliosis, convex to the right; degenerative changes throughout the lumbar area, with anterior and lateral spurring and narrowing of the disc spaces at T12 through L1, some anterior spurring and narrowing at L2-3, L3-4, L4-5, and especially at L5-S1; and, sclerosis about the L5-S1 disc space, with fairly large anterior spurring and a grade 1-through-2 spondylolisthesis, marked loss of disc space at the L4-5 and L5-S1 levels, and, upon flexion/extension views, slight motion at the L5-S1 level but no transitional movement.

3. Mr. Prewitt had a low back condition prior to his July 25, 1990 industrial injury. It was diagnosed as a spondylolisthesis. Prior to the industrial injury, this condition resulted in a permanent bodily impairment that best fit Category 2 of WAC 296-20-280.

4. On March 14, 1995, Mr. Prewitt had a permanent partial disability of his low back that best fit Category 5 of WAC 296-20-280. The July 25, 1990 industrial injury proximately caused the increase in category of disability from Category 2 to Category 5.

5. The September 13, 1990 Department order stated that the rate of time loss compensation to be paid Mr. Prewitt would be based upon his status as married, with one dependent child, and wages at the time of his injury equaling $1,145.17 per month.

CONCLUSIONS OF LAW

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

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

2. The order of the Department of Labor and Industries dated September 13, 1990, became res judicata 60 days after its communication to the parties, when no protest and request for reconsideration was filed with the Department and no appeal was filed with the Board.

3. The order of the Department of Labor and Industries dated March 14, 1995, that granted Mr. Prewitt an award for permanent partial disability equal to Category 3 of WAC 296-20-280, and closed the claim, is incorrect. This order is reversed and the claim is remanded to the Department with directions to pay a permanent partial disability equal to Category 5 of WAC 296-20-280, less a preexisting low back impairment best described by Category 2 of WAC 296-20-280, to confirm that time loss compensation paid at the rate established by the Department order of September 13, 1990, was res judicata, and to close the claim.

It is so ORDERED.

Dated this 29th day of October, 1996.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
JUDITH E. SCHURKE Member