

Stewart, Charles

RES JUDICATA

Wages at time of injury

If there has been a change in circumstances as contemplated by RCW 51.28.040, the rate of time-loss compensation may be adjusted irrespective of any previous determination of the rate. **...*In re Charles Stewart, BIIA Dec., 96 3019 (1998)*** [*Editor's Note: The Board's Decision was appealed to superior court under King County Cause No. 98-2-10175-0SEA.*]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: CHARLES H. STEWART**) **DOCKET NO. 96 3019**
2)
3 **CLAIM NO. N-245107**) **DECISION AND ORDER**
4 _____)

5 **APPEARANCES:**

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7 Claimant, Charles H. Stewart, by
8 Grutz, Scott & Kinney, per
9 Daniel R. Fjelstad

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11 Employer, Richard C. Hedreen,
12 None

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14 Department of Labor and Industries, by
15 The Office of the Attorney General, per
16 Aileen M. Cronin, Assistant
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19 The claimant, Charles H. Stewart, filed an appeal with the Board of Industrial Insurance
20 Appeals on May 24, 1996, from an order of the Department of Labor and Industries dated May 20,
21 1996. The order closed the claim with a permanent partial disability award of 5 percent of the
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23 amputation value of the right leg at or above the knee joint with functional stump. **REVERSED AND**
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25 **REMANDED.**
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29 **DECISION**

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31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
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33 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
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35 Order issued on August 25, 1997, in which the order of the Department dated May 20, 1996, was
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37 reversed and remanded to the Department with direction to issue an order closing the claim with a
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39 permanent partial disability of 5 percent of the amputation value of the right leg at or above the
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41 knee joint with functional stump, less prior awards. The proposed decision also directed the
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1 payment of time loss compensation between February 23, 1995 and May 20, 1996, the
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3 recalculation of time loss compensation for the period of March 1, 1993 to May 20, 1996, including
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5 the value of a rental waiver in the sum of \$675, and the denial of responsibility for the claimant's left
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7 leg condition.
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9 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
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11 no prejudicial error was committed and the rulings are affirmed. As explained in the proposed
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13 decision, the parties initially raised a number of factual issues, most of which were settled while the
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15 appeal was pending at the hearing stage. Their agreement requires a reversal of the order on
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17 appeal. The parties also submitted facts by agreement that serve as the basis for the remaining
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19 issue before the Board concerning the correct time loss compensation rate for the period of
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21 March 1, 1993 through May 20, 1996. See Exhibit No. 5. The parties stipulated that Mr. Stewart
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23 was temporarily totally disabled from February 23, 1995 through May 20, 1996, because of the
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25 industrial injury. They agreed that the claimant received, but did not timely protest, the April 23,
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27 1992 Department order setting the rate of time loss compensation at \$416.66 per month. The
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29 parties also agreed that prior to his injury, Mr. Stewart received a waiver of his rent as part of his
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31 compensation package. This waiver of rent was shared equally with his wife. After his injury, the
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33 employer continued to waive the rent to March 1, 1993, when the claimant separated from his wife
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35 and apparently moved out of the apartment. Other exhibits show that Mr. and Mrs. Stewart were
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37 apartment managers when Mr. Stewart had an industrial injury on April 1, 1991. They each
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39 received \$416.66 per month in wages and each had free use of an apartment valued at \$675. per
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41 month.
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1 The claimant contends that the April 23, 1992 Department order setting the rate of his time
2 loss compensation does not preclude an increase in compensation after he moved out of the
3 apartment on March 1, 1993, and lost his housing. The proposed decision supports Mr. Stewart's
4 contention. The Department's Petition for Review challenges both the claimant's right to have his
5 rate of compensation change as well as the method of calculation. We agree with the proposed
6 decision that the claimant's rate of time loss compensation should be changed due to a change in
7 circumstances, but we rely on RCW 51.28.040. We disagree with the calculation of time loss
8 compensation in the proposed decision, and we conclude that one-half the actual rent for the
9 apartment should be used rather than the full rent.
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11 We have held that workers cannot challenge their rate of time loss compensation when final
12 orders have been issued that establish all the information necessary for the calculation of time loss
13 compensation. *In re Tex Prewitt*, BIIA Dec., 95 2064 (1996) citing *Marley v. Department of Labor &*
14 *Indus.*, 125 Wn.2d 533 (1994). In the proposed decision, the industrial appeals judge reasons that
15 orders that do not set out the basis for the time loss compensation rate cannot be res judicata
16 since they do not put the claimant on notice. This reasoning is supported in prior decisions. See
17 for example *In re Louise Scheeler*, BIIA Dec., 89 0609 (1990). Nonetheless, it is not necessary to
18 address the finality of the April 23, 1992 Department order since there has been a change in the
19 claimant's circumstances that supports an increase in time loss compensation under
20 RCW 51.28.040. That section states:
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22 If change of circumstances warrants an increase or rearrangement of
23 compensation, like application shall be made therefor. Where the
24 application has been granted, compensation and other benefits if in
25 order shall be allowed for periods of time up to sixty days prior to the
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1 The Department argues that this statute applies only to applications to reopen claims and cites
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3 *Fuller v. Department of Labor & Indus.*, 169 Wash. 362 (1932). However, that case actually
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5 extended the application of the statute to applications to reopen claims and did not restrict it to
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7 open claims and applications for increases in compensation already being paid.
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9 In this appeal, Mr. Stewart's attorney wrote to the Department on April 13, 1993, and
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11 advised, in part, that Mr. Stewart was no longer receiving the use of an apartment as of March 1,
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13 1993, and he asked that the claimant's time loss compensation be increased. Exhibit No. 4. Thus,
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15 Mr. Stewart should receive an increase in time loss compensation if the elimination of continued
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17 compensation in the form of a shared apartment is a change in circumstances under RCW
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19 51.28.040.
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21 The Department also argues that if RCW 51.28.040 applies, the change in circumstances
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23 involves marital changes after the industrial injury that cannot be the basis for an increase in
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25 compensation. We disagree. After the 1991 industrial injury, Mr. Stewart's employer continued to
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27 provide compensation to the claimant in the form of the value of a shared apartment until March 1,
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29 1993. The rental value of the apartment was a component of the compensation scheme, although
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31 shared by Mr. Stewart and his wife. The continuation of this benefit to Mr. Stewart constitutes the
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33 voluntary payment of wages while an injured worker is temporarily totally disabled. See
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35 RCW 51.32.090 (6). Once such a disabled worker has reported a change in the voluntary payment
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37 of wages or other compensation by his employer, then under RCW 51.28.040 the Department must
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39 adjust the worker's rate of time loss compensation up to sixty days prior to its receipt of the
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41 claimant's request. The fact that the cessation of the voluntary compensation is an indirect
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43 by-product of a private matter should not affect the calculation of wages and benefits used to
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45 establish time loss compensation under RCW 51.08.178.
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1 The Department also challenges the value of the shared apartment determined in the
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3 proposed decision. We agree with the Department that the proper value is not the complete
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5 apartment rent, but rather the value of the housing to Mr. Stewart at the time of his injury. At the
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7 time of the industrial injury, Mr. Stewart's compensation package included the shared use of an
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9 apartment with one co-worker. The evidence establishes the reasonable value of the apartment at
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11 \$675 per month. Each worker sharing the apartment was essentially being compensated \$337.50
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13 per month in benefits through the shared use of housing. Time loss compensation must be based
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15 upon the actual compensation being received at the time of the industrial injury. Thus,
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17 Mr. Stewart's rate of time loss compensation for the period March 1, 1993 through May 20, 1996,
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19 should be adjusted to include an additional \$337.50 per month in compensation at the time of the
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21 industrial injury. Since there are other factors and changes that might affect the exact rate of
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23 compensation, we will remand the claim to the Department to recalculate the rate of time loss
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25 compensation beginning March 1, 1993.

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27 The order of the Department of Labor and Industries dated May 20, 1996, that closed the
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29 claim with a permanent partial disability award of 5 percent of the amputation value of the right leg
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31 at approximately the knee is reversed. The claim is remanded to the Department to issue an order
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33 paying for allowed vocational services not exceeding \$200, segregating the claimant's left leg
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35 condition, paying time loss compensation for the period of February 23, 1995 through May 20,
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37 1996, recalculating the claimant's rate of time loss compensation for the period of March 1, 1993
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39 through May 20, 1996, to include housing benefits received and valued at \$337.50 per month, and
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41 closing the claim with a permanent partial disability award of 5 percent of the amputation value of
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43 the right leg at or above the knee joint with functional stump, less prior awards.

FINDINGS OF FACT

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3 1. On April 6, 1991, the claimant, Charles H. Stewart, filed an accident
4 report with the Department of Labor and Industries alleging that he had
5 sustained an industrial injury on April 1, 1991, during the course of his
6 employment with Richard C. Hedreen. The claim was accepted and
7 benefits were paid. On May 20, 1996, the Department issued an order
8 closing the claim with a permanent partial disability award equal to 5
9 percent of the amputation value of the right leg at or above the knee
10 joint with a functional stump.
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12 On May 24, 1996, the claimant filed a Notice of Appeal of the May 20,
13 1996 Department order, with the Board of Industrial Insurance Appeals.
14 On June 18, 1996, the Board issued an order granting the appeal,
15 assigning it Docket No. 96 3019, and directing that proceedings be held
16 on the issues raised in the Notice of Appeal.
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- 18 2. At the time of his injury on April 1, 1991, Mr. Stewart worked as an
19 apartment manager for the Jefferson Square Apartments. His wife also
20 worked as an apartment manager for the Jefferson Square Apartments.
21 As compensation, Mr. Stewart and his wife each received a rental
22 waiver for an apartment they shared, and each received \$416.66 in
23 cash payment per month. The rental value of the apartment they
24 shared was \$675 per month.
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- 26 3. On April 1, 1991, while working for the Jefferson Square Apartments,
27 Mr. Stewart fell from a ladder and injured his right knee.
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- 29 4. On April 23, 1992, the Department issued an order allowing the claim
30 and stating, in part, as follows: "It is hereby ordered that this claim be
31 allowed and the claimant be entitled to benefits in accordance with the
32 Industrial Insurance Laws. Rate of time loss compensation is based on
33 single + 0 dependent child(ren) and wages at the time of injury, or
34 exposure, of \$416.66 per month." This order was not protested or
35 appealed, and it became final.
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- 37 5. After Mr. Stewart was injured, he remained with his wife at their
38 Jefferson Square apartment. He was not charged any rent for staying
39 at the apartment. His wife remained an apartment manager.
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- 41 6. On March 1, 1993, Mr. and Ms. Stewart separated, and Mr. Stewart no
42 longer had the use of the apartment. On April 13, 1993, Mr. Stewart's
43 attorney wrote to the Department, advised it of this fact, and asked that
44 Mr. Stewart's time loss rate be adjusted upward to reflect the loss of
45 in-kind remuneration.
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- 47 7. The value of the apartment rental waiver to Mr. Stewart at the time of
the injury was \$337.50 per month.

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8. Between March 1, 1993 through February 22, 1995, Mr. Stewart was paid time loss compensation based on earnings equal to \$416.66 per month. This rate did not include the value of the rental waiver to him.
 9. Between February 23, 1995 and May 20, 1996, Mr. Stewart was totally, temporarily disabled as a proximate cause of the industrial injury of April 1, 1991.
 10. The claimant's left leg condition was not proximately caused by the industrial injury of April 1, 1991.
 11. The Department is responsible for payment of outstanding past approved vocational bills not exceeding \$200.
 12. As of May 20, 1996, Mr. Stewart's condition, proximately caused by the industrial injury of April 1, 1991, was fixed and stable and not in need of further treatment.
 13. As of May 20, 1996, Mr. Stewart's permanent partial disability, proximately caused by the industrial injury of April 1, 1991, was equal to 5 percent of the amputation value of the right leg at or above the knee joint with a functional stump.

CONCLUSIONS OF LAW

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1. This Board has jurisdiction over the subject matter and the parties to this appeal. This appeal was timely filed.
 2. From February 23, 1995 to May 20, 1996, Mr. Stewart was totally, temporarily disabled as a proximate cause by the industrial injury of April 1, 1991, within the meaning of RCW 51.32.090.
 3. On March 1, 1993, when Mr. Stewart lost the free use of a shared apartment that had been provided by his employer, he thereby underwent a change in circumstances within the meaning of RCW 51.28.040.
 4. Between March 1, 1993 and May 20, 1996, the basis for the claimant's time loss compensation should include the full value of the rental waiver to the claimant of \$337.50 per month.
 5. As of May 20, 1996, the claimant's left leg condition was not proximately caused by the industrial injury of April 1, 1991.
 6. The Department order of May 20, 1996, that closed the claim with a permanent partial disability award equal to 5 percent of the amputation value of the right leg at or above the knee joint with a functional stump is

1 incorrect, and is reversed. This matter is remanded to the Department
2 of Labor and Industries with direction to issue an order closing the claim
3 with a permanent partial disability award equal to 5 percent of the
4 amputation value of the right leg at or above the knee joint with a
5 functional stump, less prior awards; pay time loss compensation for the
6 period of March 1, 1993 through May 20, 1996, using a basis rate for
7 the time loss compensation calculation that includes the value of the
8 claimant's rental waiver in the sum of \$337.50, in addition to the wages
9 he made in the sum of \$416.66, less prior awards made for time loss
10 compensation during that time; paying for vocational services not to
11 exceed \$200; and segregate and deny responsibility for the claimant's
12 left leg condition as unrelated to the industrial injury of April 1, 1991.
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14 It is so **ORDERED**.

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16 Dated this 8th day of April, 1998.
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18 BOARD OF INDUSTRIAL INSURANCE APPEALS
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24 S. FREDERICK FELLER Chairperson
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