

## 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, BIA 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:**

6  
7 Claimant, Charles H. Stewart, by  
8 Grutz, Scott & Kinney, per  
9 Daniel R. Fjelstad

10  
11 Employer, Richard C. Hedreen,  
12 None

13  
14 Department of Labor and Industries, by  
15 The Office of the Attorney General, per  
16 Aileen M. Cronin, Assistant  
17

18  
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  
22  
23 amputation value of the right leg at or above the knee joint with functional stump. **REVERSED AND**  
24  
25 **REMANDED.**  
26  
27

28  
29 **DECISION**

30  
31 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
32 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and  
33 Order issued on August 25, 1997, in which the order of the Department dated May 20, 1996, was  
34 reversed and remanded to the Department with direction to issue an order closing the claim with a  
35 permanent partial disability of 5 percent of the amputation value of the right leg at or above the  
36  
37 knee joint with functional stump, less prior awards. The proposed decision also directed the  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1 payment of time loss compensation between February 23, 1995 and May 20, 1996, the  
2  
3 recalculation of time loss compensation for the period of March 1, 1993 to May 20, 1996, including  
4  
5 the value of a rental waiver in the sum of \$675, and the denial of responsibility for the claimant's left  
6  
7 leg condition.  
8

9       The Board has reviewed the evidentiary rulings in the record of proceedings and finds that  
10  
11 no prejudicial error was committed and the rulings are affirmed. As explained in the proposed  
12  
13 decision, the parties initially raised a number of factual issues, most of which were settled while the  
14  
15 appeal was pending at the hearing stage. Their agreement requires a reversal of the order on  
16  
17 appeal. The parties also submitted facts by agreement that serve as the basis for the remaining  
18  
19 issue before the Board concerning the correct time loss compensation rate for the period of  
20  
21 March 1, 1993 through May 20, 1996. See Exhibit No. 5. The parties stipulated that Mr. Stewart  
22  
23 was temporarily totally disabled from February 23, 1995 through May 20, 1996, because of the  
24  
25 industrial injury. They agreed that the claimant received, but did not timely protest, the April 23,  
26  
27 1992 Department order setting the rate of time loss compensation at \$416.66 per month. The  
28  
29 parties also agreed that prior to his injury, Mr. Stewart received a waiver of his rent as part of his  
30  
31 compensation package. This waiver of rent was shared equally with his wife. After his injury, the  
32  
33 employer continued to waive the rent to March 1, 1993, when the claimant separated from his wife  
34  
35 and apparently moved out of the apartment. Other exhibits show that Mr. and Mrs. Stewart were  
36  
37 apartment managers when Mr. Stewart had an industrial injury on April 1, 1991. They each  
38  
39 received \$416.66 per month in wages and each had free use of an apartment valued at \$675. per  
40  
41 month.  
42  
43  
44  
45  
46  
47

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.  
10

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:  
21

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  
26 receipt of such application.  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1 The Department argues that this statute applies only to applications to reopen claims and cites  
2  
3 *Fuller v. Department of Labor & Indus.*, 169 Wash. 362 (1932). However, that case actually  
4  
5 extended the application of the statute to applications to reopen claims and did not restrict it to  
6  
7 open claims and applications for increases in compensation already being paid.  
8

9 In this appeal, Mr. Stewart's attorney wrote to the Department on April 13, 1993, and  
10  
11 advised, in part, that Mr. Stewart was no longer receiving the use of an apartment as of March 1,  
12  
13 1993, and he asked that the claimant's time loss compensation be increased. Exhibit No. 4. Thus,  
14  
15 Mr. Stewart should receive an increase in time loss compensation if the elimination of continued  
16  
17 compensation in the form of a shared apartment is a change in circumstances under RCW  
18  
19 51.28.040.  
20

21 The Department also argues that if RCW 51.28.040 applies, the change in circumstances  
22  
23 involves marital changes after the industrial injury that cannot be the basis for an increase in  
24  
25 compensation. We disagree. After the 1991 industrial injury, Mr. Stewart's employer continued to  
26  
27 provide compensation to the claimant in the form of the value of a shared apartment until March 1,  
28  
29 1993. The rental value of the apartment was a component of the compensation scheme, although  
30  
31 shared by Mr. Stewart and his wife. The continuation of this benefit to Mr. Stewart constitutes the  
32  
33 voluntary payment of wages while an injured worker is temporarily totally disabled. See  
34  
35 RCW 51.32.090 (6). Once such a disabled worker has reported a change in the voluntary payment  
36  
37 of wages or other compensation by his employer, then under RCW 51.28.040 the Department must  
38  
39 adjust the worker's rate of time loss compensation up to sixty days prior to its receipt of the  
40  
41 claimant's request. The fact that the cessation of the voluntary compensation is an indirect  
42  
43 by-product of a private matter should not affect the calculation of wages and benefits used to  
44  
45 establish time loss compensation under RCW 51.08.178.  
46  
47

1           The Department also challenges the value of the shared apartment determined in the  
2  
3 proposed decision. We agree with the Department that the proper value is not the complete  
4  
5 apartment rent, but rather the value of the housing to Mr. Stewart at the time of his injury. At the  
6  
7 time of the industrial injury, Mr. Stewart's compensation package included the shared use of an  
8  
9 apartment with one co-worker. The evidence establishes the reasonable value of the apartment at  
10  
11 \$675 per month. Each worker sharing the apartment was essentially being compensated \$337.50  
12  
13 per month in benefits through the shared use of housing. Time loss compensation must be based  
14  
15 upon the actual compensation being received at the time of the industrial injury. Thus,  
16  
17 Mr. Stewart's rate of time loss compensation for the period March 1, 1993 through May 20, 1996,  
18  
19 should be adjusted to include an additional \$337.50 per month in compensation at the time of the  
20  
21 industrial injury. Since there are other factors and changes that might affect the exact rate of  
22  
23 compensation, we will remand the claim to the Department to recalculate the rate of time loss  
24  
25 compensation beginning March 1, 1993.

26  
27           The order of the Department of Labor and Industries dated May 20, 1996, that closed the  
28  
29 claim with a permanent partial disability award of 5 percent of the amputation value of the right leg  
30  
31 at approximately the knee is reversed. The claim is remanded to the Department to issue an order  
32  
33 paying for allowed vocational services not exceeding \$200, segregating the claimant's left leg  
34  
35 condition, paying time loss compensation for the period of February 23, 1995 through May 20,  
36  
37 1996, recalculating the claimant's rate of time loss compensation for the period of March 1, 1993  
38  
39 through May 20, 1996, to include housing benefits received and valued at \$337.50 per month, and  
40  
41 closing the claim with a permanent partial disability award of 5 percent of the amputation value of  
42  
43 the right leg at or above the knee joint with functional stump, less prior awards.

**FINDINGS OF FACT**

- 1  
2  
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.  
11  
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.  
17
- 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.  
25
- 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.  
28
- 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.  
36
- 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.  
40
- 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.  
46
- 47 7. The value of the apartment rental waiver to Mr. Stewart at the time of  
the injury was \$337.50 per month.

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24
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.

25  
26

### **CONCLUSIONS OF LAW**

- 27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47
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.  
13

14 It is so **ORDERED**.

15 Dated this 8th day of April, 1998.

16 BOARD OF INDUSTRIAL INSURANCE APPEALS  
17

18 \_\_\_\_\_  
19 S. FREDERICK FELLER Chairperson  
20  
21

22 \_\_\_\_\_  
23 FRANK E. FENNERTY, JR. Member  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47