# Schmitz, Margo

## RES JUDICATA

### Wages at time of injury

Once an order expressing the basis for the calculation of time-loss compensation benefits has become final, a change in benefits can occur only if there has been a change in circumstances. A retroactive determination that the worker was entitled to higher wages is such a change in circumstances, and the change in wages may apply to benefits to which the worker was entitled 60 days prior to the application for an increase in benefits. **….*In re Margo Schmitz*, BIIA Dec., 97 5627 (1999)** [dissent] [*Editor's Note:* The decision and order indicates it reverses an order dated April 25, 1997, when, in fact, the decision reversed by the Board order is a letter determination of the same date.]

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

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| **IN RE: MARGO A. SCHMITZ** | **)** | **DOCKET NO. 97 5627** |
| | **)** | |
| **CLAIM NO. N-572908** | **)** | **DECISION AND ORDER** |

APPEARANCES:

Claimant, Margo A. Schmitz, by
Solan, Doran, Milhem & Hertel, P.S., per
Jerry Hertel

Employer, Lakeland Village/Washington State Department of Social and Health Services,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Sheryl L. Gordon, Assistant

The claimant, Margo A. Schmitz, filed an appeal with the Board of Industrial Insurance Appeals on July 18, 1997, from an order of the Department of Labor and Industries dated April 25, 1997. The appeal was initially received at the Department of Labor and Industries on June 11, 1997, and forwarded by the Department to the Board as a direct appeal. The April 25, 1997 order of the Department affirmed an earlier order issued on March 1, 1996, that determined that the Department could not reconsider the order previously issued on April 29, 1993, because no protest or appeal had been filed in response to the order within 60 days of communication to the claimant, Ms. Schmitz. The April 29, 1993 order allowed the claim for benefits, paid time loss compensation benefits to the claimant for a period from April 14, 1993 through April 28, 1993, and established Ms. Schmitz's time loss compensation rate based on her status as a married individual with no dependents and monthly wages of $2,793. **REVERSED AND REMANDED**.

## PROCEDURAL ISSUE

At the outset we note that the parties brought this matter to issue by each side filing a motion for Summary Judgment. In addition to or in support of the motions for Summary Judgment, the parties also entered into a stipulation of fact (Stipulation of Parties dated August 6, 1998) regarding the material events involved in this appeal.

Civil Rule 56 provides a mechanism for the parties to obtain a summary disposition of a dispute. We have long held that motions for summary judgment are appropriate in Board proceedings. *In re David Potts*, BIIA Dec., 88 3822 (1989). If the judge in a case concludes, after reviewing the motions, affidavits, memoranda, and other documentation submitted by the parties, that there is no genuine issue as to any material fact, then the judge may determine whether the moving party is entitled to a judgment as a matter of law. The motion is used when one party wishes to pierce the pleadings and seek relief as a matter of law. Where the parties stipulate to the facts, then the question of whether or not there are any issues of material fact is removed as an issue. The stipulation in this case, by its terms resolves all the disputed issues of fact. Further, the parties at a conference held on March 24, 1998, agreed that their evidentiary presentations were concluded (rested) upon submission of the Stipulation of Parties. Conference, March 24, 1998, p. 4, l. 41, p. 5, l. 15. We, therefore, do not need to determine whether or not there are any genuine issues of material fact.

## 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 Margo A. Schmitz on May 17, 1999, from a Proposed Decision and Order issued on April 1, 1999, in which the order of the Department dated April 25, 1997, was affirmed.

We have granted review in this matter because we agree that Ms. Schmitz's time loss compensation rate should be adjusted to reflect the increase ordered by the Washington Personnel Resources Board on July 13, 1995.

Ms. Schmitz asserts that the Department's order dated April 29, 1993, that set her time loss compensation rate based on wages of $2,793, should be modified to reflect a subsequent change in her wage rate to $3,322. We note that the factual presentation in the Proposed Decision and

Order follows the Stipulation of Parties. At the time of her injury on March 2, 1993, Ms. Schmitz was employed by the Washington State Department of Social and Health Services at a facility known as Lakeland Village. We set forth the chief events below:

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| December 8, 1992 | Ms. Schmitz joined with other clinical psychologists employed by the state of Washington in eastern Washington in filing a grievance against the state. The grievance alleged that psychologists in eastern Washington were paid less than their counterparts in western Washington. |
| March 2, 1993 | Ms. Schmitz sustained an industrial injury while in the course of her employment as a psychologist with the state of Washington. |
| April 29, 1993 | The Department of Labor and Industries issued an order allowing Ms. Schmitz's claim and calculated temporary total disability benefits based upon a monthly wage of $2,793. This was the wage Ms. Schmitz was making at the time she filed her grievance in December of 1992. The parties further stipulated that no protest or appeal of this order was made within 60 days of receipt of the order by any party. |
| June 4, 1993 | Ms. Schmitz filed a formal petition for grievance arbitration with the Washington State Personnel Board. |
| July 13, 1995 | The Washington Personnel Resources Board issued a formal decision in favor of Ms. Schmitz, concluding that her wages should have been $3,322 a month and that they should have been paid retroactive to October 16, 1990. |
| November 17, 1995 | Ms. Schmitz requested that the Department of Labor and Industries adjust her time loss compensation rate to reflect the adjusted wage of $3,322 per month. |

The Department denied the requested adjustment and issued an order indicating that the April 29, 1993 order calculating the basis for temporary total disability benefits was final and binding. Our industrial appeals judge agreed with the Department's position based upon the Supreme Court decision of *Marley v. Department of Labor & Indus*., 125 Wn.2d 533 (1994).

We have held that workers cannot challenge their rate of time loss compensation when final orders have been issued that establish all the information necessary for the calculation of time loss compensation. *In re Tex Prewitt*, BIIA Dec., 95 2064 (1996), citing *Marley v. Department of Labor & Indus*., above. We have also held, however, that under certain circumstances the compensation rate for temporary total disability can be adjusted due to a change in circumstances pursuant to RCW 51.28.040.

In our recent decision of *In re Charles H. Stewart*, BIIA Dec., 96 3019 (1998), we held that termination by an employer of voluntary payment of wages after an injury constituted change in circumstances justifying a rearrangement of compensation. Mr. Stewart and his (then) wife worked at an apartment complex and received a waiver of rent as a part of their compensation package. After his work-related injury he continued to live in the apartment. For the time Mr. Stewart continued to live in the apartment he was receiving a partial continuation of his wages in the form of the rent waiver. Eventually Mr. Stewart and his wife separated and he moved out of the apartment. After he moved he no longer received any part of the compensation he had been receiving when he was injured. Mr. Stewart's initial time loss benefit was based solely on his cash wages.

As in the present case, Mr. Stewart did not appeal or protest the original calculation of his temporary total disability benefits. After he moved from the employer's apartment his attorney advised the Department that Mr. Stewart was no longer receiving wages in the form of the value of the rent waiver and requested an adjustment in the temporary total disability rate. The Department declined to do so. We concluded that there was a change in circumstances within the meaning of RCW 51.28.040 when Mr. Stewart ceased to receive the partial continuation of his wage benefit.

At the time Ms. Schmitz was injured, neither she nor her employer could have known the final result of the grievance based on the wage dispute. The decision by the Personnel Resources Board constitutes a change in circumstances because it was a determination that Ms. Schmitz's

wages were incorrectly paid as of the date of injury. This is not a situation where there was a mistake in wage information given to the Department. The Department made no error in calculation. An external, third party ordered an adjustment in wages paid to Ms. Schmitz effective well before her industrial injury.

At the time the Department made its initial calculation of Ms. Schmitz's temporary total disability benefit she had no basis to protest or appeal. She was, at that time, not aggrieved by the Department order as required by RCW 51.52.050. Her wage dispute with her employer was just a dispute. There was no basis to require a different calculation. Eventually, Ms. Schmitz received back compensation for the wages she should have been paid at the time of injury. During the time she was receiving temporary total disability or time loss benefits she was actually being paid less than she was entitled because it was based on an incorrect wage.

RCW 51.12.010 requires that the Industrial Insurance Act be liberally construed to reduce to a minimum an injured worker's economic loss. The employer was required to pay Ms. Schmitz her correct wages back to October 16, 1990. It would be inconsistent with the purposes of the Act for Ms. Schmitz to receive her corrected back pay except for the periods she was receiving time loss based on her former, incorrect wages. Consistent with RCW 51.12.010 and our decision of *In re Charles Stewart*, we conclude that facts in this appeal constitute a change in circumstances as provided by RCW 51.28.040.

We are limited, however, in the relief we can order. RCW 51.28.040 provides:

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

(Emphasis added.) The rearrangement of compensation, based on the change in circumstances, can only be awarded up to 60 days prior to the date of the application for the increase. Ms. Schmitz

requested a rearrangement of the compensation on November 17, 1995, and we can only direct an adjustment back 60 days from this date.

Based on the foregoing we enter the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. On March 8, 1993, Margo A. Schmitz filed an application for benefits with the Department of Labor and Industries, alleging that she had been injured on March 2, 1993, during the course of her employment with Lakeland Village, a facility operated by the Department of Social and Health Services (hereafter DSHS) of the State of Washington. On April 29, 1993, the Department issued an order that allowed the claim for benefits, paid her time loss compensation for the period from April 14, 1993 through April 28, 1993, and determined that the rate of her time loss compensation was based on her status as a married individual with no dependents and monthly wages of $2,793.

   On November 17, 1995, the claimant requested that the Department recalculate the rate at which time loss compensation benefits were paid to her based on monthly wages of $3,322. On March 1, 1996, the Department issued an order that indicated that the agency could not reconsider the April 29,1993 order because no appeal or protest of the order had been filed within 60 days of communication of the order to the claimant, and the order had become final and binding. Ms. Schmitz filed a Protest and Request for Reconsideration of the March 1, 1996 order on April 10, 1996. By order dated April 25, 1997, the Department affirmed the provisions of the March 1, 1996 order.

   The claimant filed a Notice of Appeal with the Department from the April 25, 1997 order on June 11, 1997. On July 18, 1997, the Department forwarded the appeal to the Board of Industrial Insurance Appeals as a direct appeal. This Board extended the time within which it had to consider the appeal by orders dated August 18, 1997, and August 27, 1997. On September 4, 1997, the Board granted the appeal subject to proof that it was timely filed, assigned the appeal Docket No. 97 5627, and directed that further proceedings be held.

2. On March 2, 1993, the claimant was injured during the course of her employment with Lakeland Village, a facility operated by DSHS of the State of Washington, where she worked as a clinical psychologist.

3. On December 18, 1992, the claimant was a member of a class of employees who belonged to the Washington Federation of State Employees, and who filed a grievance with the Personnel Board of the State of Washington, alleging that DSHS had engaged in an unfair labor practice because clinical psychologists employed by DSHS in western

Washington received higher monthly wages than clinical psychologists in eastern Washington.

4. On April 29, 1993, the Department issued an order that, in part, established the claimant's time loss compensation rate based upon her status as a married individual with no dependents and monthly wages of $2,793.

5. Ms. Schmitz did not file a protest or appeal from the April 29, 1993 Department order within 60 days after the order was communicated to her.

6. On July 13, 1995, the Washington Personnel Resources Board issued its formal decision on the wage grievance filed by Ms. Schmitz and others and directed the Department to pay the claimant all back pay retroactive to October 16, 1990, based on an adjusted monthly wage of $3,322.

7. Based on the order of the Washington Personnel Resources Board, Ms. Schmitz's correct wage at the time of her industrial injury of March 2, 1993, was $3,322 per month and not $2,793 per month.

8. The application for rearrangement of compensation was made by Ms. Schmitz on November 17, 1995.

## CONCLUSIONS OF LAW

1. Ms. Schmitz filed her Notice of Appeal from the April 25, 1997 order of the Department of Labor and Industries within the time limitation set out in RCW 51.52.060.

2. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

3. The change in Ms. Schmitz's compensation by the Washington Personnel Resource Board, retroactive to the date prior to her industrial injury is a change of circumstances within the meaning of RCW 51.28.040.

4. The order of the Department of Labor and Industries dated April 25, 1997, is incorrect and the order is reversed. This matter is remanded to the Department to recalculate Ms. Schmitz's entitlement to temporary total disability benefits or benefits for loss of earning power

based upon a wage at injury of $3,322 and to pay any such benefits as may be due up to 60 days prior to November 17, 1995.

It is so ORDERED.

Dated this 3rd day of November, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

**DISSENT**

I dissent from the majority opinion as both the Proposed Decision and Order and the Department order of April 25, 1997, should be affirmed. At the heart of the majority decision is the attempt to overcome the finality of the Department's April 29, 1993 order setting Ms. Schmitz's time loss compensation rate. The majority acknowledges the Washington State Supreme Court decision of *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994) and our own significant decision of *In re Tex Prewitt*, BIIA Dec., 95 2064 (1996), by stating that workers cannot challenge the rate of time loss compensation after the basis for the compensation has been established by a final Department order. However, they sidestep these decisions by concluding that Ms. Schmitz was not required to appeal the time loss because she was not "aggrieved" by that order.

The majority reasons that Ms. Schmitz was not required to appeal the time loss determination order of April 29, 1993, because RCW 51.52.050 only requires those aggrieved by a Department order to protest or appeal. See also RCW 51.52.060. Their reasoning is that at the time the Department calculated Ms. Schmitz's time loss compensation rate it was based upon the

wages actually paid to her by her employer. Thus, their rationale is that there was no basis for Ms. Schmitz to request a different calculation from the Department. This approach ignores the actual circumstances of Ms. Schmitz's employment situation.

On December 8, 1992, Ms. Schmitz joined with other clinical psychologists employed in state government in filing a grievance regarding their level of compensation. As noted in the parties' factual stipulation, the grievance alleged that psychologists in eastern Washington were being paid less than their counterparts in western Washington and that they should receive the same pay for the same kind of work. Three months after the grievance was filed in March of 1993, Ms. Schmitz was injured in the course of her employment. In April of 1993 the Department began paying Ms. Schmitz time loss compensation based on her wages from the state of Washington at the time of her injury as required by RCW 51.08.178. As of the date of the time loss order, Ms. Schmitz was actively disputing the correctness of her wages with her employer. Less than 60 days after the April 29, 1993 order, Ms. Schmitz filed a formal petition for grievance arbitration with the Washington State Personnel Board. This grievance asserted in very specific terms that Ms. Schmitz felt that she, along with her co-workers, was not being paid a correct wage. Ms. Schmitz failed to protest or appeal the Department's wage loss order that calculated her temporary total disability benefits based on a wage she was already disputing with her employer before the Washington State Personnel Board.

Based on these facts, it is impossible for me to conclude that Ms. Schmitz was not aggrieved by the Department's calculation of her temporary total disability benefits based upon a wage she claimed was unfair and inaccurate. We do not know, nor will I speculate, as to why she did not protest the Department's April 29, 1993 order. It is very clear, however, that she was formally contesting her base wage rate and that she did not bring this to the Department's attention in a timely fashion. Although we cannot know what the Department would have done had a protest

been filed, the fact remains that remedies were available to Ms. Schmitz that she failed to use. Ms. Schmitz was aggrieved by the April 29, 1993 order within the meaning of RCW 51.52.050. Therefore, based on both *Marley* and our own decision in *Prewitt*, I would conclude that the Department was correct in its order of April 25, 1997, that it could not reconsider the basis for Ms. Schmitz's temporary total disability benefits because the order of April 29, 1993, had become final.

As I have concluded that Ms. Schmitz was aggrieved by the time loss calculation order in 1993, I do not deem the later adjustment in her wages a change of circumstances pursuant to RCW 51.28.040. The statute does not provide a definition of what constitutes a change in circumstances warranting an adjustment of compensation. In view of the Supreme Court's decision in *Marley*, I find it difficult to determine what could be construed as a change in circumstances sufficient to overcome the finality of a Department order. I do not view Ms. Schmitz's situation as a change in circumstances as her wage dispute was pending at the time of the Department's time loss calculation. The fact that she and her co-workers were successful in their dispute does not relieve her from the obligation to challenge the Department's order when issued. She had in her possession all the information needed to protest the accuracy of her wage determination when the order was issued.

Obviously there are circumstances where corrections in temporary total disability benefits need to and should be made. RCW 51.32.240 provides a mechanism for the Department and self-insurers to recoup overpayments of benefits due to clerical error and other related reasons. That statute was recently amended to allow injured workers to receive compensation for the underpayment of benefits for similar reasons. The amendment of RCW 51.32.240 does not provide guidance or insight as to what constitutes a change of circumstances under RCW 51.28.040.

Except for somewhat unusual factual situations, since *Marley* I do not see where RCW 51.28.040 has any broad application. It would be helpful if the Legislature would provide some guidance to balance the countervailing priorities of finality to Department orders and flexibility of addressing changing circumstances. In the absence of such further guidance it appears to me that *Marley* mitigates for the finality of Department orders, thus limiting the application of RCW 51.28.040.

Dated this 3rd day of November, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
JUDITH E. SCHURKE Member