Jackson, Douglas

TIME-LOSS COMPENSATION (RCW 51.32.090)

Wages (RCW 51.08.178) - Compensation

Life insurance contributions paid by an employer are not critical to the worker's health and survival. Therefore, those contributions should not be included in the wage calculation because they are not a core, non-fringe benefit, such as food, shelter, fuel and health care critical to protecting the worker's basic health and survival. *Citing In re Cockle v. Department of Labor and Indus.*, 142 Wn.2d 810 (2001). ***….In re Douglas Jackson*, BIIA Dec., 99 21831 (2001)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DOUGLAS A. JACKSON	)	**DOCKET NO. 99 21831**
	)	
CLAIM NO. T-945537	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Douglas A. Jackson, by
Casey & Casey, P.S., per
Carol L. Casey

Self-Insured Employer, South Kitsap School Dist. #402, by
Craig, Jessup & Stratton, per
Bernadette M. Pratt

Department of Labor and Industries, by
The Office of the Attorney General, per
Steve Puz, Assistant

The claimant, Douglas A. Jackson, filed an appeal with the Board of Industrial Insurance Appeals on November 24, 1999, from an order of the Department of Labor and Industries dated October 22, 1999. The order affirmed a Department order dated July 23, 1999, which reduced the claimant's monthly time-loss compensation rate to $625.40 effective August 1, 1999, due to the receipt of social security disability benefits. **AFFIRMED.**

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 claimant to a Proposed Decision and Order issued on January 31, 2001, in which the order of the Department dated October 22, 1999, was affirmed. We have granted review to change some evidentiary rulings and to decide whether the holding in *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001), should be extended to include the "reasonable value" of employer-provided life insurance and disability insurance benefits within the definition of "wages" (RCW 51.08.178(1)) for the purpose of calculating an injured worker's monthly entitlement to time-loss compensation.

EVIDENTIARY AND PROCEDURAL MATTERS

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, except as follows. We overrule all objections to the relevancy of proffered evidence about life and disability insurance benefits Mr. Jackson received as part of his compensation package with the self-insured employer. Specifically, we admit all testimony describing or otherwise related to the employer's monthly

payment or contribution to Mr. Jackson's life and disability insurance premiums that was either stricken or placed in colloquy at pages 24-27 of the transcript of the October 13, 2000 hearing. While *Cockle* does not order the Department to add to its calculation of "wages" any employment benefits other than health insurance benefits, it also does not specifically limit its holding to those benefits. By setting a standard upon which the Department and the Board may determine which of the various types of employment-related benefits should be included within the calculation of "wages," *Cockle* potentially makes relevant evidence about many types of those benefits. Admitting this evidence will not unduly prejudice the parties to this appeal against whom it is offered. The employer, as the payer of these benefits, has always had knowledge of their nature, number, and cost and can easily produce proof of those matters. Additionally, the inclusion of this evidence of these benefits does not change the result in this appeal for reasons that we state below.

Mr. Jackson asked for an extension to file his Petition for Review and was granted until March 20, 2001, to do so. This extension applied to all parties to this appeal. We received the claimant's Petition for Review on March 15, 2001. On March 22, 2001, two days after the extension period ended, the employer's attorneys filed a document that, although entitled "Employer's Response to Claimant's Petition for Review," obviously was intended as a Petition for Review in its own right. Since we had not adopted the Proposed Decision and Order because of the receipt of the timely Petition for Review filed by the claimant, RCW 51.52.104 and WAC 263-12-145 do not prevent us from considering the employer's Petition for Review even though it was not filed within the time limit set by the extension. *Wells v. Olsten Corp.*, 104 Wn. App. 135 (2001); *B & J Roofing, Inc. v. Board of Industrial Ins. Apps.*, 66 Wn. App. 871 (1992). We note that matters objected to by the employer would be within the purview of our review upon our receipt of **any party's** Petition for Review. *In re Richard Sims*, BIIA Dec., 85 1748 (1986).

Calculation of Time-loss Compensation

The Department order under appeal applied an offset to Mr. Jackson's time-loss compensation due to his receipt of social security benefits. In order for the Department's calculation of the social security offset to be correct, its calculation of the claimant's monthly entitlement to time-loss compensation (referred to as the time-loss compensation rate) must also be correct. In this appeal, the contested issues centered on the accuracy and completeness of the Department's calculation of Mr. Jackson's wages as of the date of injury, which is one of the factors used to compute the time-loss compensation rate. Mr. Jackson contends that the Department

should have calculated his monthly wages as of the date of injury as if he was a full-time (40-hours/week) worker and should have included the value of employer-provided benefits, including health insurance, consisting of medical, dental, and vision insurance benefits as well as life and disability insurance.

Mr. Jackson was a full-time worker for the self-insured employer from February 1981 until early in 1995, when he accepted an offer of a 4-hour per day position that included full benefits. The claimant admitted that he was working 4 hours per day, 5 days per week when he sustained his June 30, 1995 industrial injury. He believed that he would have been returned to a full-time position in approximately 1997. Mr. Jackson has supplied no legal authority to support his argument that his rate of time-loss compensation should be calculated as if this anticipated future change in his hours actually had occurred. RCW 51.08.178(1) specifically states that the wages that are used to calculate time-loss compensation are those that the worker was receiving "at the time of injury." Neither *Department of Labor & Indus. v. Avundes*, 140 Wn.2d 282 (2000), nor *Double D Hop v. Sanchez*, 133 Wn.2d 793 (1997), change the fundamental rule that an injured worker's rights to benefits and their amounts are controlled by the law in force when the industrial injury occurred. *See*, *e.g.*, *Aschenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22 (1963); *Ellis v. Department of Labor & Indus.*, 88 Wn.2d 844 (1977); *Seattle School Dist. No. 1 v. Department of Labor & Indus.*, 116 Wn.2d 352 (1991). We note that if anticipated changes of circumstances could be used to support a recalculation of wages to increase time-loss compensation, changes in circumstances such as layoffs, plant closures, etc., could be used to decrease those benefits.

The Proposed Decision and Order included in its calculation of Mr. Jackson's wages, the amounts the employer paid for medical, dental, and vision insurance, with the cost of those benefits being equal to what the employer paid to provide them. These determinations are consistent with our state Supreme Court's holding in *Cockle*. In addition to these health insurance benefits, the employer also paid $6.65 per month as its contribution to the claimant's disability insurance and $8.75 per month for his life insurance policy. The Proposed Decision and Order did not include in the calculation of the claimant's wages, the monthly amounts paid by the employer for disability insurance and life insurance. We affirm the Proposed Decision and Order's determinations for the reasons stated below.

We note first that there have been no reported decisions, either by the courts or by us, that apply *Cockle* to the types of benefits that are before us in this appeal. Prior to the Supreme Court's decision in *Cockle*, we held that the value of employer-provided pension benefits should not be included in a calculation of "wages." *In re John Stringham*, Dckt No. 99 22182 (Dec 27, 2000). After *Cockle* was issued, we revisited our decision involving pension benefits, reaching the same result. *In re Ronald Tucker*, Dckt. Nos. 00 11573 & 00 17279 (June 22, 2001).

In *Cockle*, our Supreme Court was faced with the issue of the correct construction of the provision, within RCW 51.08.178(1), that states:

> The term "wages" shall include the reasonable value of board, housing, fuel, or other consideration of like nature received from the employer as part of the contract of hire, but shall not include overtime pay except in cases under subsection (2) of this section.

The court determined that the phrase "other consideration of like nature" within that provision was ambiguous. It applied the ejusdem generis rule of statutory construction along with another rule of construction, that statutes must not be construed in a manner that renders any portion thereof meaningless or superfluous, to the aforementioned statutory language. The court adopted a moderate course, noting that:

> The Legislature's specific choice of words thus rules out both exceedingly narrow and exceedingly broad readings of the phrase "other consideration of like nature received from the employer as part of the contract of hire."

Cockle, at 810.

The court also noted that ambiguous statutory language should receive a construction that best advances the perceived legislative purpose. It acknowledged the remedial nature of our state's industrial insurance system and the legislative goal of providing swift and certain relief for injured workers. The court, applying these and other rules of construction, stated:

> We therefore construe the statutory phrase "board, housing, fuel, or other consideration of like nature" in RCW 51.08.178(1) to mean readily identifiable and reasonably calculable in-kind components of a worker's lost earning capacity at the time of injury that are critical to protecting workers' basic health and survival. (Footnote omitted.) Core, *non*fringe benefits such as food, shelter, fuel, and health care all share that "like nature." By contrast, we do not believe injury-caused deprivation of the reasonable value of *fringe* benefits that are *not* critical to protecting workers' basic health and survival qualifies as the kind of "suffering" that

> Title 51 RCW was legislatively designed to remedy. *See* RCW 51.12.010.

Cockle, at 822-823.

We first note that both the life insurance and "long-term" disability insurance benefits are readily identifiable and reasonably calculable. The record contains the exact dollar amount of the employer's monthly contribution to the purchase of each of these benefits. These insurance benefits are also "in kind" benefits just as were the health insurance benefits that were in dispute in *Cockle*. The determination in this case depends upon the categorization of these benefits. Are they more properly classified as core or non-fringe benefits critical to protecting the worker's basic health and survival? Or are they merely fringe benefits that are not critical to protecting his basic health and survival?

We believe that the life insurance benefit clearly is the latter kind of benefit; one that is properly characterized as a fringe benefit upon which the worker's basic health and survival does not depend. Generally, life insurance is purchased to provide, upon the death of the insured, a benefit to someone else and/or to provide an instrument to assist in saving money. Obviously, the former purpose for purchasing this insurance has nothing to do with the worker's health and survival, since funds are paid only upon his death. As for the latter purpose, it is analogous to a pension benefit, which we determined in *Tucker* to be a fringe benefit rather than a core or non-fringe benefit. Clearly, the life insurance benefit is not of "like nature" with benefits such as food, shelter, fuel, and medical care. We hold that employer-provided contributions for life insurance are not "wages" within the meaning of RCW 51.08.178.

We cannot, however, make such a categorical determination regarding employer contributions for disability insurance. There are many different types of disability insurance available on the open market today. Some disability policies provide a benefit that is analogous to specified permanent partial disability benefits provided for by RCW 51.32.080, wherein specific cash awards are paid for the loss of a limb or sensory organ. Other policies provide payments of selected debts or bills of the insured if he or she meets the policy definition of disabled. A disability policy that pays the monthly mortgage obligation of a disabled worker arguably is "of like nature" to employer-provided shelter. Some provide a wage replacement benefit. It can be argued that the entitlement of an injured worker to time-loss compensation in and of itself lessens the need of the worker for such a disability benefit.

Because of the differences in disability policies and the benefits they provide, an injured worker who seeks to have that benefit included in his "wages" for purposes of the calculation of his time-loss compensation rate must present evidence of the terms of the disability insurance plan or policy provided or paid for by the employer. Without such proof, it is impossible to show that the employer's payment for such a plan or policy is properly classified as a core, non-fringe benefit critical to protecting the worker's basic health and survival. The mere assertion in this case, by Mr. Jackson, that the disability insurance paid for by his employer is for "long-term disability" is not substantial evidence sufficient to meet his burden of proof in this appeal. *Cyr v. Department of Labor & Indus.*, 47 Wn.2d 92 (1955); *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949). Therefore, we conclude that the Department need not include the employer contributions as "wages" when calculating Mr. Jackson's rate of time-loss compensation.

Although we conclude that the Department incorrectly calculated the claimant's rate of time-loss compensation, we affirm the Department order under appeal inasmuch as even with the time-loss compensation rate increased by the amount of the employer's contribution for medical, dental, and vision insurance benefits, his revised time-loss compensation rate is still below the average current earnings (ACE) figure used to calculate the social security offset.

FINDINGS OF FACT

1. On August 28, 1995, the claimant, Douglas A. Jackson, filed an application for benefits, alleging that he had sustained an industrial injury on June 30, 1995, during the course of his employment with South Kitsap County School District #402. On September 5, 1995, the Department of Labor and Industries issued an order allowing the claim. On October 22, 1999, the Department issued an order that affirmed its order of July 23, 1999, which reduced the claimant's monthly time loss compensation rate to $625.40 effective August 1, 1999, due to the receipt of social security disability benefits of $890 per month. On November 24, 1999, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On January 24, 2000, the Board issued an order granting the appeal, assigning it Docket No. 99 21831, and directing that proceedings be held on the issues raised by the Notice of Appeal.

2. On June 30, 1995, the claimant, while working on a project in the course of his employment with South Kitsap County School District #402, felt a snap in the left knee as he arose from a kneeling position. The claimant's knee condition proximately caused by the industrial injury of June 30, 1995, has been treated surgically on two occasions. As an

incidental result of his treatment for his knee condition, he has also required treatment for his low back, including two surgeries for fusion.

3. As of June 30, 1995, the claimant was working 4 hours a day at $13.83 per hour. His wages were $1,217.04 per month.

4. As of June 30, 1995, the claimant received medical benefit payments of $199.70 per month and dental and vision benefits of $87.92 per month as a part of his contract wages. These benefits were critical to maintaining the claimant's basic health.

5. As of June 30, 1995, the claimant received life insurance benefits in the amount of $8.75 per month and long-term disability insurance in the amount of $6.65 per month. These benefits were not critical to protecting his basic health and survival.

6. As of July 23, 1999, when the Department issued its social security offset order, and also as of October 22, 1999, the claimant's wages at the time of injury adjusted for cost of living would have been $1,938.30 per month.

7. As of June 30, 1995, the claimant was single and had no dependents, accordingly, his time loss rate as of July 23, 1999, should have been $1,162.98 per month.

8. The claimant's average current earnings figure based on 80 percent of his highest year's income is $1,515.40 per month. As of July 23, 1999, the claimant was receiving $890 per month in social security disability benefits.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this timely filed appeal.

2. The claimant's monthly "wages" within the meaning of RCW 51.08.178(1) at the time of injury included his hourly wages and his medical, dental, and vision insurance benefits, which in the aggregate total $1,504.66.

3. The claimant's time-loss compensation rate adjusted for the receipt of social security disability benefits should be $625.40 within the meaning of RCW 51.32.220(1) and 20 CFR Chap. III § 404.408(c).

4. The order of the Department of Labor and Industries dated October 22, 1999, is correct and is affirmed.

Dated this 13th day of August, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member

DISSENT

I dissent.

This is our second chance to interpret what the Supreme Court included in the *Cockle* decision as part of a worker's wages. Similar to the Board's majority decision in *Tucker*, the majority continues the narrow view of expansion of *Cockle* beyond the inclusion of health, dental, and vision insurance benefits.

We have in front of us two additional benefit issues, life insurance paid by the employer and disability insurance paid by the employer. The majority states that the worker's basic health and survival does not depend on life insurance. I thoroughly disagree. While in this specific case this worker does not have dependents, for workers who do, life insurance provides basic health and safety upon a worker's death, in many cases providing the only means of support, at least on a temporary basis, for the family. But in addition, we must take judicial notice of the changing uses of life insurance; that holders of the life insurance policy can take loans out on the policy to protect their health and survival, as well as for other reasons, using life insurance policies as you would your wages.

In respect to disability insurance, the majority realizes there are those type of policies that are arguably "of like nature" to employer-provided shelter. I respectfully point out that disability insurance is directly related to the health of a worker. It is to provide a monetary replacement, as recognized by the majority, for a loss suffered by the worker, a loss that directly impacts the worker's capacity to provide for family or self.

The majority's failure to include these benefits in the wage loss calculation fails to reduce to a minimum the suffering and economic loss resulting to this injured worker, as required by law.

I note that the Department incorrectly calculated the claimant's rate of time loss by failing to include the employer's contribution for medical, dental, and vision benefits, and even though this would not change the amount received by the worker, because of the majority decision in this case it still necessitates reversal of the Department order by law.

In summary, I would reverse the Department order of October 22, 1999, and remand this matter back to the Department to include life insurance, disability insurance, and health, dental, and vision insurance payments by the employer in the time-loss calculation.

Dated this 13th day of August, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

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