

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: TOMMIE H. STINNETT) DOCKET NO. 13 12137
2)
3 CLAIM NO. AD-22387) PROPOSED DECISION AND ORDER

4 INDUSTRIAL APPEALS JUDGE: Tom M. Kalenius

5 APPEARANCES:

6 Claimant, Tommie H. Stinnett, by
7 Williams, Wyckoff & Ostrander, PLLC, per
8 Dane D. Ostrander

9 Employer, Ironman Steel Erectors, Inc.,
10 None

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Scott A. Douglas, Assistant

14 The claimant, Tommie H. Stinnett, filed an appeal with the Board of Industrial Insurance
15 Appeals on February 19, 2013, from an order of the Department of Labor and Industries dated
16 January 4, 2013. In this order, the Department affirmed a prior order dated June 26, 2012, that
17 closed the claim with payment of a permanent partial disability award equal to Category 3,
18 WAC 296-20-240. The Department order is **REVERSED AND REMANDED**.

19 PROCEDURAL AND EVIDENTIARY MATTERS

20 On August 26, 2013, the parties agreed to include the Jurisdictional History in the Board's
21 record. That history establishes the Board's jurisdiction in this appeal.

22 PRELIMINARY MATTERS

23 The claimant filed a Motion for Summary Judgment with a Declaration of Dane Ostrander on
24 July 17, 2013. On July 29, 2013, the Department filed a Reply and a Cross Motion for Summary
25 Judgment along with a Declaration of Cherie Wagaman and 17 exhibits. On August 2, 2013, the
26 Claimant filed a Reply Brief with a second Declaration of Dane Ostrander referring to the
27 Department orders dated March 17, 2008, and November 5, 2008, and a Declaration of
28 Julie Hatcher referencing six orders that were not affirmed beginning on May 14, 2007, and five
29 orders that reordered payment orders but did not affirm the orders beginning on March 14, 2007.

30 At my request, the parties filed final memorandums of law that analyzed *In re Brian D.*
31 *Flewelling*, Dckt. No. 12 16447 (June 5, 2013) and *In re Lloyd Johnson*, Dckt. Nos. 12 15248 and
32 12 18850 (April 11, 2013). On August 29, 2013, the Department filed a supplemental brief. On

1 August 30, 2013, the claimant filed a supplemental brief and the Second Declaration of
2 Julie Hatcher dated August 29, 2013, with exhibits, that included the time-loss payment order from
3 September 19, 2006, through December 11, 2006, for \$9,522.24.

4 **ISSUES**

5 Whether there is a material issue of fact and as a matter of law was the
6 Department order incorrect in failing to pay the claimant the rate of
7 time-loss compensation set in the final Department order dated
8 October 23, 2006, in the subsequent 143 payment orders over nearly six
9 years?

10 **EVIDENCE**

11 The Declaration of Dane Ostrander dated July 10, 2013, alleged, among other things, that
12 Mr. Stinnett was injured on September 1, 2006. The Department agreed that the claim was allowed
13 in an order dated September 25, 2006. The claimant and the Department did not contest that the
14 employer contributed toward Mr. Stinnett's health benefits. Ms. Stinnett was last paid health care
15 coverage on September 20, 2006. On October 23, 2006, the Department issued an order that
16 calculated and set the rate, including health care benefits, of gross monthly wages at \$5,668.20 per
17 month, and health care benefits in the amount of \$1,161 per month, for a gross total monthly
18 income of \$6,829.20.

19 The Department filed a Declaration of Cherie Wagaman dated July 25, 2013, that alleged,
20 among other things, that:

- 21 √ On December 12, 2006, the Department sent payment for time-loss
22 compensation as of September 19, 2006, paid through December 11,
23 2006.
- 24 √ Time-loss compensation payments were paid until June 9, 2012. There
25 was no protest or request for reconsideration of the Department order
26 dated October 23, 2006, or any of the subsequent payment orders.
- 27 √ All of the time-loss payments commencing September 19, 2006, and
28 ending June 9, 2012, excluded the value of the health care benefits
29 which were calculated into the original rate established by the order
30 dated October 23, 2006.

31 From the memorandum and declarations of the parties, it was established that the time-loss
32 payment orders issued after October 23, 2006, stated only the amount of benefits to be paid and
the time period covered. The Department agreed with the statement of facts as laid out in
Claimant's Motion but maintained that the time-loss payment orders included information regarding
the time-loss compensation rate ("The time loss compensation rate for the payment period: 9/19/06

1 thru 12/11/06 is \$3400.92 per month or \$113.36 per day"). *Department's Reply to Claimant's Motion*
2 *for Summary Judgment and Cross-Motion for Summary Judgment.*

3 **DECISION**

4 The Declaration of Cherie Wagaman, a claims consultant, conceded that the claims
5 adjudicator erred when she failed to include the value of the health care benefits in the time-loss
6 payments actually made to Mr. Stinnett. The Department alleged that Mr. Stinnett's remedy to
7 correct the erroneous payments is found in RCW 51.32.240(2). That statute provides a 60-day
8 protest window for adjudicator errors, and a one-year protest window for clerical errors. The
9 Department argued that neither the Board nor the Department had the authority to revise the
10 incorrect time-loss payment orders reaching back to 2006 due to the res judicata effect of the
11 Department order of October 23, 2006. *August 29, 2013 letter of Assistant Attorney General Scott*
12 *Douglas.*

13 It is the Department's contention that a claimant must address adjudicator error in an order
14 through timely protest or appeal made within 60 days of receipt of the order. Mr. Stinnett's failure to
15 protest or appeal any of the 143 payment orders issued over a nearly six-year period renders those
16 orders final and binding, and res judicata bars the Department from now adjudicating those orders.
17 *Department's Reply to Claimant's Motion for Summary Judgment and Cross-Motion for Summary*
18 *Judgment.*

19 The Department also described the receipt of numerous communications from various
20 parties with information regarding termination of Mr. Stinnett's employment as "an error on the part
21 of the claims adjudicator not to correct the payment orders issued to properly reflect the wage order
22 in this claim." *Department's Reply to Claimant's Motion for Summary Judgment and Cross-Motion*
23 *for Summary Judgment, at 3.*

24 The parties agreed that the information in the claimant's file on the date the wage order was
25 issued, October 23, 2006, and the information received subsequently over the ensuing months and
26 years all correctly reflect that Mr. Stinnett's employment had ended and his employer-paid health
27 care benefits had ended prior to the October 23, 2006 wage order. *August 29, 2013 letter of*
28 *Assistant Attorney General Scott Douglas, at 3.*

29 RCW 51.32.240(2)(a) imposes a mandatory requirement to request an adjustment in
30 benefits within one year from the date of the incorrect payment or it will be deemed waived.
31 RCW 51.32.240(2)(b) precluded any adjustment of benefits because of adjudicator error.
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1 Adjustments due to adjudicator error are addressed by the filing of a written request for
2 reconsideration with the Department of Labor and Industries or appeal with the Board of Industrial
3 Insurance Appeals within 60 days from the date the order was communicated.

4 The overarching issue in this appeal is whether RCW 51.32.240 shall apply to permit the
5 Department to exclude health care benefit payments from time-loss compensation after the entry of
6 an un-appealed rate order that is res judicata. The rate order of October 23, 2006 was res judicata
7 that the wages of Mr. Stinnett include the value of a health care benefit. *Cockle v. Department of*
8 *Labor & Indus., 142 Wn.2d 801 (2001).*

9 A time-loss payment order that only states the amount of time-loss compensation and the
10 specific period does not contain clear and unmistakable terms that a wage rate change occurred. *In*
11 *re Roger Crook*, BIIA Dec., 04 10691 (2005), *In re Louise Scheeler*, BIIA Dec., 89 0609 (1990). In
12 *Crook* and *Scheeler*, the Department issued time-loss compensation payment orders but had not
13 set forth in clear and unmistakable terms the wage rate. The res judicata effect of the subsequent
14 rate order on the prior time-loss payments orders was at issue. In *Crook*, the Board held that after
15 reopening, a recalculation of the time-loss compensation rate to include the cost of a health care
16 benefit may be indicated. In *Scheeler*, the prior time-loss payment orders had no res judicata effect
17 as to the rate of time-loss where none had ever informed the claimant of the underlying basis for
18 the rate of time-loss compensation (i.e., the gross monthly wages being used for the computation).

19 Here, no closing order has become final and the claimant did not abandon his right to
20 recover health care benefits relating to the period commencing September 19, 2006, and ending
21 June 9, 2012, prior to the order under appeal.

22 The Board's holding in *Scheeler* applies to limit the res judicata effect of the time-loss
23 payment orders. In *Scheeler*, the Board held that a determinative time-loss compensation order that
24 has been neither appealed nor protested is a binding res judicata determination only with respect to
25 the issue resolved by the order, i.e., **entitlement** to time-loss compensation. *Crook* at 4.

26 The Department failed to provide clear, precise, and unmistakable terms in a time-loss
27 payment order that sufficiently notified Mr. Stinnett that the terms of the October 23, 2006 wage rate
28 order were not being followed. The series of payments orders were sufficiently confusing and of a
29 nature that could not readily be deciphered as to the gross monthly wage being used to pay
30 time-loss compensation. The calculation required at least six variables: the marital status, the
31 number of dependents, the maximum time-loss rate, daily time-loss rate, COLA, and the health
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1 care benefit. The difficulty of calculating the gross monthly wage used by the Department through
2 solving a six-variable equation made the payment orders confusing and not readily decipherable.
3 The only time-loss payment within 60 days of the wage order was a payment in the amount of
4 \$9,622.24 and all subsequent payments were \$3,400.92 so Mr. Stinnett could not compare the
5 amount of the payment to decipher the difference. There was no clear, precise, unmistakable
6 method to readily decipher the wage rate used by the Department.

7 Fundamental fairness precludes the application of res judicata to the time-loss payment
8 orders. *Crook and Scheeler* clearly established that time-loss payment orders are final and binding
9 only as to entitlement, not rate.

10 To adopt the Department's legal argument is to incorrectly assume that the Department's
11 failure to pay the terms of the final wage order triggers the application of the constraints on
12 recoupment defined by RCW 51.32.240(1) and/or (2).

13 RCW 51.32.240 entitles the Department to recoup overpayment of benefits that were paid in
14 final orders. The Department may correct an inaccurate rate of compensation by the overpayment
15 statute. The Department may correct the error in marital status and so provide only those benefits
16 due. The Board has held that the "entire, and only, purpose of RCW 51.32.240(1), and indeed the
17 purpose of the whole of RCW 51.32.240, is to enhance the ability of the Department to recoup
18 incorrect benefit awards that were in excess of the benefits to which the worker was entitled." *In re*
19 *Theresa Johnson*, BIIA Dec., 85 3229 (1987) and *In re John Janssen*, Dckt. No. 97 9155 (July 21,
20 1999), as cited in *Lloyd D. Johnson*, Dckt. Nos. 12 15248 & 12 18850 (April 11, 2013).

21 RCW 51.32.240 does not provide authority to the Department to do indirectly what is
22 precluded directly. Because the Department's wage rate order of October 23, 2006, became final,
23 the Department is without authority to affirm, modify, or reverse the inclusion of the value of health
24 care benefits into wage rate calculations without notice in clear, precise, and unmistakable terms.
25 *In re Randy Jundul*, BIIA Dec. 98 21118 (1999).

26 There is no issue of fact presented by these Motions for Summary Judgment. It was a matter
27 of law that a series of time-loss payment orders failed to apprise Mr. Stinnett in clear and
28 unmistakable terms that a wage rate change occurred. As a matter of law, the Department must
29 recalculate time-loss payments to include the value of healthcare benefits, based on the
30 October 23, 2006 Department order. The Department order dated January 4, 2013, should be
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1 reversed and the matter remanded to the Department with directions to pay time-loss compensation
2 at the rate set forth in the wage order of October 23, 2006.

3 FINDINGS OF FACT

- 4 1. On August 26, 2013, an industrial appeals judge certified that the parties
5 agreed to include the Jurisdictional History in the Board record solely for
6 jurisdictional purposes.
- 7 2. On October 23, 2006, the Department issued an order in this claim in
8 which it determined Mr. Stinnett's total gross wages at the time of the
9 industrial injury covered in this claim were \$6,829.20 a month and
10 included health care benefits of \$1,161 a month in his gross wages. The
11 order detailed and explained how Mr. Stinnett's total gross wages were
12 calculated.
- 13 3. There was no timely protest or appeal of the Department's October 23,
14 2006 wage order and it became final.
- 15 4. The Department's payment orders commencing September 19, 2006,
16 and ending June 9, 2012, paid the claimant time-loss compensation
17 benefits without taking into consideration the value of his employer's
18 contribution to his health care benefits as calculated and stated in the
19 October 23, 2006 wage order.
- 20 5. The pleadings and evidence submitted by the parties demonstrate that
21 there is no genuine issue as to any material fact.
- 22 6. The Department's payment orders commencing September 19, 2006,
23 and ending June 9, 2012, only stated the amount of time-loss
24 compensation and the specific period.
- 25 7. The Department failed to notify Mr. Stinnett in clear and unmistakable
26 terms that the Department was attempting to modify the final wage order
27 of October 23, 2006.

28 CONCLUSIONS OF LAW

- 29 1. The Board of Industrial Insurance Appeals has jurisdiction over the
30 parties and subject matter in this appeal.
- 31 2. Mr. Stinnett is entitled to a decision as a matter of law, as contemplated
32 by CR 56.
3. The Department is not entitled to a decision as a matter of law as
contemplated by CR 56.
4. The October 23, 2006 Department order was final and binding of the
claimant's wages and entitlement to the value of his employer's
contribution to his health care benefits.
5. The doctrine of res judicata precludes the redetermination of the
claimant's wages, including subtracting the value of his employer's
contribution to his health care benefits.

- 1 6. The time-loss payment orders issued for the period commencing
2 September 19, 2006, and ending June 9, 2012, should have been
3 calculated based on the provisions of the October 23, 2006 order and
4 were not res judicata as to the rate of time-loss compensation where no
5 order had ever informed Mr. Stinnett of a change in the underlying basis
6 for the rate of time-loss compensation apart from time period and
7 amount.
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9 7. The time-loss payment orders issued for the period commencing
10 September 19, 2006, and ending June 9, 2012, did not notify
11 Mr. Stinnett in clear, precise, unmistakable terms that enabled him to
12 readily decipher the wage rate used by the Department as different from
13 the provisions of the October 23, 2006 order.
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15 8. The Department order dated January 4, 2013, is incorrect and is
16 reversed. This claim is remanded to the Department of Labor and
17 Industries with directions to recalculate time-loss payment orders
18 commencing September 19, 2006, and ending June 9, 2012, to include
19 the value of Mr. Stinnett's employer's contribution to his health care
20 benefits; and to thereupon close the claim as otherwise set forth in the
21 Department order dated January 4, 2013.

22 DATED: SEP 13 2013

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Tom M. Kalenius
Industrial Appeals Judge
Board of Industrial Insurance Appeals