Keeler, Edward

RES JUDICATA

Wages at time of injury

A party is not required to appeal or protest a time-loss rate-setting order to apply for an adjustment due to a change of circumstance when the change of circumstance occurs after the order is issued but prior to its becoming final. **….*In re Edward Keeler*, BIIA Dec., 02 16376 (2003)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: EDWARD W. KEELER	)	**DOCKET NO. 02 16376**
	)	
CLAIM NO. P-347828	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Edward W. Keeler, by
Sharpe Law Firm, per
Robert J. Heller

Employer, Nelson Trucking Co., Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Mary V. Wilson, Assistant

The claimant, Edward W. Keeler, filed an appeal with the Board of Industrial Insurance Appeals on May 29, 2002, from an order of the Department of Labor and Industries dated May 1, 2002. In this order, the Department denied the claimant's request for an adjustment in the time loss compensation rate on the basis that the Department did not receive information to establish a change in circumstances. The Department order is **REVERSED AND REMANDED**.

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 Department to a Proposed Decision and Order issued on September 25, 2003, in which the industrial appeals judge reversed the May 1, 2002 Department order and directed the Department to recalculate Mr. Keeler's rate of compensation to include his employer-provided health insurance benefits in the amount of $366.50 per month beginning 60 days prior to the Department's receipt of his request for a readjustment in compensation.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The Department urges us to affirm the order of May 1, 2002, arguing that Mr. Keeler failed to establish that there was a change in circumstances within the meaning of RCW 51.28.040. We agree with our industrial appeals judge's resolution of this appeal. We have granted review solely to reopen the record for additional evidence and clarify the issue before us.

The parties requested that the industrial appeals judge issue a decision based upon certain documents, which he marked and admitted as Exhibit Nos. 1-6. These documents show that Mr. Keeler suffered an industrial injury on January 9, 1996, in the course of his employment with Nelson Trucking Co., Inc. On January 30, 1996, the Department issued an order allowing Mr. Keeler's claim and determining that he was entitled to time loss compensation benefits from January 10, 1996 through January 29, 1996. The order also established Mr. Keeler's time loss compensation rate at $1,670.24 per month based on Mr. Keeler being married with no dependents and wages of $2,569.60 per month. The January 30, 1996 order was not protested or appealed.

At the time of the industrial injury, Nelson Trucking Co., Inc., was making a monthly contribution to a union trust fund for Mr. Keeler's health care insurance. The employer stopped making contributions on behalf of Mr. Keeler after the January 30, 1996 order, although the record before the industrial appeals judge did not clearly establish either the date the benefits were terminated or the amount of the employer's monthly contribution. Exhibit No. 5, which is a May 6, 2002 Department "R Log," suggests that the employer terminated its monthly health care contribution of $432.90 on the last day of February 1996. Conversely, in a letter dated October 11, 2001 (identified as Exhibit No. 3), Mr. Keeler's legal representative stated that the employer was actually contributing $366.50 per month for Mr. Keeler's health care, which ended as of May 31, 1996. The industrial appeals judge accepted the representation set forth in Exhibit No. 3.

On November 7, 2003, the Board received a letter from claimant's counsel dated November 6, 2003, stating that the intent of the parties in submitting Exhibit No. 3 was to establish the date on which the claimant first requested recalculation of his time loss benefits. He also acknowledged that the May 6, 2002 "R Log" entry correctly reflected the date the employer terminated its health care contribution on behalf of Mr. Keeler. We are treating the November 6, 2003 letter as a request to reopen the record and we find that this letter should be admitted into evidence to ensure that the record before us is complete and accurate. In deciding to reopen the record, we note that the Department has stipulated in the Petition for Review that the November 6, 2003 letter should be considered by us in resolving this appeal. Accordingly, the November 6, 2003 letter is hereby admitted as Exhibit No. 7. In light of the representations made by Mr. Keeler's counsel in the November 6, 2003 letter, we find that the employer terminated its health care contribution on behalf of Mr. Keeler effective March 1, 1996.

Mr. Keeler's employer-provided health insurance benefits ended during the appeal/protest period from the January 30, 1996 order. According to the Department's Petition for Review, the

Department denied Mr. Keeler's request for an adjustment of compensation "because a change in circumstances did not occur before the January 30, 1996 order became final and binding." The issue raised by this appeal is whether the injured worker is entitled to relief under RCW 51.28.040 where the alleged change in circumstances occurs after the Department has issued the order setting the time loss compensation rate, but before that order becomes final. We find that there was a change in circumstances within the meaning of the statute, which requires a readjustment of Mr. Keeler's time loss rate.

The starting point for our analysis is RCW 51.28.040. The statute requires that there be a change in circumstances to warrant an increase or readjustment of compensation, but it is silent with regard to when this change of circumstances must take place. RCW 51.28.040 provides:

> If change in 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.

The issue before us is the same issue we decided in the recent case of *In re Joanne K. Tolonen*, Dckt. No. 02 18722 (October 20, 2003). In *Tolonen*, as in this case, the employer terminated the claimant's health insurance benefits during the appeal/protest period from the wage rate order. After the order had become final, the injured worker requested that the Department readjust her time loss compensation rate to take into account the value of her employer-provided health care benefits that were lost as a result of the industrial injury, pursuant to *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801 (2001). The Department denied the request for readjustment in compensation, and on appeal, argued that there was no change in circumstances because the wage order was a final and binding determination as to all changes in circumstances that occurred within the 60-day appeal/protest period. We rejected this argument, holding that a party is not required to appeal or protest a time loss rate-setting order in order to apply for a finding of change of circumstances under RCW 51.28.040 where the change of circumstances occurred after the order is issued, but prior to its becoming final. We reach the same conclusion here.

Based on our decision in *Tolonen*, we find that the termination of Mr. Keeler's employer-provided health insurance benefits as of March 1, 1996, constituted a change in circumstances within the meaning of RCW 51.28.040. We also find that Mr. Keeler is entitled to a readjustment of his time loss compensation rate based on the change in circumstances, pursuant to *Cockle*. The Department shall readjust Mr. Keeler's time loss compensation rate based on his lost

employer-provided health insurance benefit in the amount of $366.50 per month, which is the figure set forth in the union contract in effect as of the date of the industrial injury. The Department's recalculation of Mr. Keeler's time loss rate shall be effective 60 days prior to October 12, 2001, the date the Department received Mr. Keeler's request for readjustment.

FINDINGS OF FACT

1. On January 23, 1996, the Department received an application for benefits from the claimant, Edward W. Keeler, alleging that he sustained an industrial injury on January 9, 1996, in the course of his employment with Nelson Trucking Co., Inc. On January 30, 1996, the Department issued an order allowing the claim, determining that Mr. Keeler was entitled to time loss compensation benefits from January 10, 1996 through January 29, 1996, and setting the time loss rate at $1,670.24 per month based on Mr. Keeler being married with zero dependents and wages of $2,569.60 per month. No protest or appeal was filed from the January 30, 1996 order. On October 12, 2001, the Department received a request from the claimant to recalculate his rate of compensation based on a change in circumstances. On May 5, 2002, the Department issued an order denying the claimant's request. On May 29, 2002, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the May 1, 2002 Department order. The Board granted the claimant's appeal by an order dated July 1, 2002, and assigned the appeal Docket No. 02 16376.

2. As of January 9, 1996, the claimant was receiving employer-provided health insurance benefits in the amount of $366.50 per month.

3. The Department order dated January 30, 1996, which established the claimant's rate of compensation, did not take into account the value of the claimant's employer-provided health insurance benefits.

4. Nelson Trucking Co., Inc., terminated its health insurance benefit of $366.50 per month for Mr. Keeler, effective March 1, 1996.

CONCLUSIONS OF LAW

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

2. The Department order dated January 30, 1996, correctly established the claimant's rate of compensation as of that date and contained the necessary elements for a time loss compensation wage rate order within the meaning of RCW 51.08.178. The order became a final and binding order within the meaning of RCW 51.52.060.

3. The employer's termination of the claimant's health insurance benefits as of March 1, 1996, constituted a change in circumstances within the meaning of RCW 51.28.040, from the circumstances existing on January 30, 1996.

4. The request received by the Department on October 12, 2001, was a valid application for a change in circumstances, pursuant to RCW 51.28.040.

5. The Department order dated May 1, 2002, is incorrect and is reversed. This matter is remanded to the Department of Labor and Industries with directions to recalculate the rate of compensation based on the termination of the claimant's employer-provided health care benefits in the amount of $366.50 per month and to make this adjustment effective 60 days prior to October 12, 2001, the receipt date of the claimant's request.

It is so **ORDERED**.

Dated this 29th day of December, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
CALHOUN DICKINSON Member