Hickle, Robert

SCOPE OF REVIEW

Issues limited by notice of appeal

Although the Department order changing the effective date of the worker's marital status was without legal authority, because only the employer appealed the order, the Board could not change the effective date of marriage and place the employer in a worse position than if it had not appealed. The Board affirmed the order citing *Brakus v. Department of Labor and Indus.*, 48 Wn.2d 218 (1956). **….*In re Robert Hickle*, BIIA Dec., 11 23444 (2013)**

TIME-LOSS COMPENSATION (RCW 51.32.090)

Marital status

Marital status on the date of injury is determinative for calculating the compensation rate under RCW 51.32.060(1). Subsequent changes in status are irrelevant. **….*In re Robert Hickle*, BIIA Dec., 11 23444 (2013)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBERT R. HICKLE	)	**DOCKET NO. 11 23444**
	)	
CLAIM NO. W-966483	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Robert R. Hickle, by
The Law Offices of Steven D. Weier, Inc., P.S., per
Corey L. Endres

Self-Insured Employer, CHS, Inc., by
Law Office of Gress & Clark, LLC, per
James L. Gress

Department of Labor and Industries, by
The Office of the Attorney General, per
Dana Tumenova, Assistant

The self-insured employer, CHS, Inc., filed an appeal with the Board of Industrial Insurance Appeals on December 7, 2011, from an order of the Department of Labor and Industries dated October 12, 2011. In this order, the Department affirmed the August 8, 2011 order, in which it stated that the claimant's compensation rate was established based on being married at the time of the industrial injury, and on July 10, 2011, the claimant informed the Department that his marital status under his claim was incorrect. The Department changed the claimant's marital status on which compensation was based to single, effective February 22, 2011, as provided by RCW 51.32.240(1). The Department order is **AFFIRMED.**

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of an October 24, 2012 Proposed Decision and Order, in which the industrial appeals judge reversed the October 12, 2011 Department order and remanded with directions to change Mr. Hickle's marital status from married to single effective November 4, 2008, not February 22, 2011. The self-insured employer filed a Response to the Claimant's Petition for Review on November 26, 2012.

The Board has reviewed the evidentiary and procedural rulings in the record of proceedings. With one exception, we find that no prejudicial error was committed and the rulings are affirmed. The exception has to do with the July 20, 2012 Order Granting Review of Interlocutory Appeal, regarding the scope of review. We agree with the determination that the question of whether

Mr. Hickle willfully misrepresented his marital status is not before us in this appeal. However, we disagree with the narrow characterization of the issue as being "limited to the effective date of the change of marital status" because we must also consider whether there is a basis for making the change of marital status.

In its October 12, 2011 order, the Department affirmed its August 8, 2011 order and stated:

> The Department established this worker's compensation rate based upon being married on the date of injury or disease manifestation. This action was taken due to information supplied by the worker. On 7/10/11 the worker informed the Department that information was incorrect. Effective February 22, 2011, the Department is changing the marital status upon which compensation is established to single. This action is taken in accordance with RCW 51.32.240(1).

The self-insured employer appealed, requesting an earlier effective date for the change in marital status. The question of when the change in marital status should become effective cannot be resolved without first determining whether there is any factual or legal basis for making the change. If not, there would be no basis for changing the effective date from February 22, 2011, to November 4, 2008, as proposed by the industrial appeals judge. Mr. Hickle's marital status is significant because married workers have a higher compensation rate than single workers under RCW 51.32.060(1). Our interpretation of that statutory provision is critical to the resolution of this appeal.

The parties submitted the appeal based on a stipulation of facts. Mr. Hickle was injured on October 3, 2005. He was married at the time. The claim was closed on December 26, 2006. He was still married at that time.

On January 29, 2007, Mr. Hickle's marriage was terminated by judicial decree. On November 13, 2008, he filed an application to reopen his claim. On December 19, 2008, the Department reopened the claim effective November 4, 2008. The self-insured employer paid time-loss compensation benefits from November 4, 2008, through July 15, 2011, based on a status of married. On September 23, 2009, the Department issued an order in which it established the wage at time of injury and determined that Mr. Hickle's marital status was "married." The Department affirmed the September 23, 2009 order on April 25, 2011, and that order has become final.

On July 10, 2011, Mr. Hickle filled out a pension benefits questionnaire and mistakenly checked the wrong box in response to a question regarding whether he was married at the time of

the October 3, 2005 injury. He checked "no," even though it is undisputed that he was married at that point and his marriage was not terminated until January 29, 2007.

The Department then issued the August 8, 2011 order, relying on RCW 51.32.240(1), which permits the recoupment of benefits paid because of innocent misrepresentation. Only the employer protested this order.[1] The Department affirmed the August 8, 2011 order on October 12, 2011. In the meantime, Mr. Hickle was placed on a pension effective February 22, 2011, with the self-insured employer being granted second injury fund relief. Those orders have become final and are not at issue here.

Only the employer appealed the October 12, 2011 order, arguing that the effective date for the marital status change should be the date of injury, October 3, 2005, with an overpayment of benefits established. The industrial appeals judge reversed the Department order, making November 4, 2008, the effective date for the change of marital status and remanding to the Department to take further action. Only Mr. Hickle has petitioned for review.

The central question is whether marital status on the date of injury is determinative for calculating the compensation rate under RCW 51.32.060(1). If it is, then subsequent changes in status are irrelevant, and do not affect the compensation rate, or trigger the recoupment provisions of RCW 51.32.240(1).

The claimant cites *Foster v. Department of Labor & Indus.*, 161 Wash. 54 (1931) for the proposition that marital status at the time of injury is controlling, and whatever happens thereafter cannot be used as the basis for recalculating the compensation rate. In *Foster*, the worker was unmarried at the time of injury. He married thereafter and sought an increase in his compensation rate based on his new status. The supreme court held that if a worker is single at the time of injury, a subsequent marriage is not considered a change of circumstance under § 7686 (the predecessor to RCW 51.28.040), and the compensation rate is not increased under § 7679 (the predecessor to RCW 51.32.060).[2] The supreme court relied on the fact that RCW 51.32.060 "definitely and permanently" fixed compensation based on Mr. Foster's status as a single man "at the time of injury." *Foster*, 161 Wash. at 60.

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[1] That document was not made part of the parties' factual stipulation, but was Attachment 4 to Employer's Motion Regarding the Board's Jurisdiction over Overpayment and Willful Misrepresentation Issue. CHS pointed out that the Department had previously issued a September 23, 2009 wage order in which it established the worker's marital status as married and the self-insured employer had paid benefits based on that representation; so there might be an overpayment that needed to be addressed.

[2] For ease of discussion, we use the current statutory references.

The current version of RCW 51.32.060(1) uses the same critical phrase with reference to marital status—"at the time of injury." Under RCW 51.32.060(1)(g), a single worker's compensation rate is calculated as follows: "If unmarried at the time of the injury, sixty percent of his or her wages." Under RCW 51.32.060(1)(a), a married worker's compensation rate is calculated as follows: "If married at the time of injury, sixty-five percent of his or her wages." Thus, based on the plain language of 51.32.060(1), as interpreted by the supreme court in *Foster*, it is not a change of circumstance when a worker is married at the time of injury and the marriage is later terminated by judicial decree. Under *Foster*, RCW 51.28.040 cannot be used as a mechanism for changing the compensation rate based on a post-injury marriage or dissolution, and we have found no other statutory provision that would change Mr. Hickle's marital status by operation of law, based on the subsequent dissolution of his marriage.

The only reference we have found to the post-injury termination of marriage and how that might affect the compensation rate is RCW 51.32.072, which increases the benefits of workers who were injured before July 1, 1971. For that group, if the worker was unmarried at the time of injury or married at that time but the marriage was subsequently terminated by judicial decree, the compensation rate is 50 percent of the state average monthly wage. If the worker was married at the time of injury and the marriage was not subsequently terminated, the rate is 50 percent of the state average monthly wage, plus an additional 5 percent. However, RCW 51.32.072 is specifically limited to workers injured prior to July 1, 1971. It does not apply to workers like Mr. Hickle, who were injured thereafter.

The only other provision we have found regarding how post-injury changes in family status affect compensation is RCW 51.32.025, which addresses dependent children. RCW 51.32.025 provides that any payments made to or on account of the children of a deceased or temporarily or totally permanently disabled worker "shall terminate" once they reach a certain age, with some exceptions for ongoing education or disability. There is no similar statute with respect to marital status.

RCW 51.32.025 and RCW 51.32.072 demonstrate the Legislature's ability, when it so chooses, to specifically provide for different compensation rates based on post-injury changes in marital status and post-injury changes in the ages of a worker's children. *Foster* was decided in 1931. Since then, the Legislature has not modified the critical language in RCW 51.32.060, referring to marital status "at the time of injury," nor has it enacted a separate provision similar to

RCW 51.32.025 or RCW 51.32.070, to address post-injury changes in marital status for workers injured after July 1, 1971. Based on *Foster* and the plain language of RCW 51.32.060(1), we conclude that Mr. Hickle's marital status at the time of injury is controlling with respect to his compensation rate. The subsequent termination of his marriage is irrelevant with respect to the rate of compensation under RCW 51.32.060(1).

Mr. Hickle also argues that the April 25, 2011 order, which affirmed the September 23, 2009 order setting his wage at time of injury and determining that he was married, has become final and is therefore "res judicata on the issue of the claimant's time loss compensation rate." Petition for Review, at 5. In changing Mr. Hickle's marital status from married to single, the Department relied on RCW 51.32.240(1), which permits the recoupment of benefits if payment has been made based on an innocent misrepresentation. As it turns out, Mr. Hickle did not misrepresent his marital status at the time of injury. Instead, he made a mistake filling out a form, saying he was single when he was actually married. However, had Mr. Hickle misrepresented his marital status, the finality of the April 25, 2011 order would not have precluded the Department from changing his marital status based on the provisions of RCW 51.32.240(1). *In re Alonso Veliz*, Dckt. No. 11 20348 (March 4, 2013).

Mr. Hickle asks that we either affirm the Department order, with the February 22, 2011 effective date, or direct the Department to cancel its order "as there is no basis in law or fact to issue an order changing the effective date of the claimant's change in marital status when he was married at the time of injury." Petition for Review, at 6-7. In its Response, the employer correctly argues that we cannot grant the claimant the affirmative relief of canceling the Department order, because he failed to appeal the October 12, 2011 order. Only the employer appealed and, as the appellant, CHS cannot be placed in a worse position than if it had not challenged the Department order. *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956). Thus, even though the Department should not have changed Mr. Hickle's marital status, the most we can do is to affirm the Department order establishing an effective date of February 22, 2011, which is the alternative relief requested by the claimant.

FINDINGS OF FACT

1. On May 10, 2012, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Robert R. Hickle sustained an industrial injury on October 3, 2005, in the course of his employment with CHS, Inc.

3. Mr. Hickle was married at the time of the industrial injury.

4. On December 26, 2006, the Department closed the claim.

5. On January 29, 2007, Mr. Hickle became single through a decree of dissolution entered in King County Superior Court.

6. On December 19, 2008, the Department reopened the claim effective November 4, 2008.

7. On September 23, 2009, the Department issued an order establishing Mr. Hickle's wage at time of injury and determining that his marital status was married. Mr. Hickle protested this order on November 20, 2009. On April 25, 2011, the Department affirmed the September 23, 2009 order. The April 25, 2011 order contained language notifying the parties that it would become final if it were not appealed within 60 days of receipt. No protest or appeal was filed.

8. The self-insured employer paid Mr. Hickle time-loss compensation benefits from November 4, 2008, through July 15, 2011, based on a status of married.

9. On August 3, 2011, Mr. Hickle faxed a pension benefits questionnaire to the Department indicating that he was currently single and mistakenly indicating that he had been single at the time of injury.

10. On October 4, 2011, the Department placed Mr. Hickle on the pension rolls, effective February 22, 2011.

11. On August 8, 2011, the Department issued an order stating that the claimant's compensation rate was established based on being married at the time of the industrial injury, and on July 10, 2011, Mr. Hickle informed the Department that his marital status under his claim was incorrect. The Department changed Mr. Hickle's marital status on which compensation was based to single, effective February 22, 2011, as provided by RCW 51.32.240(1). The employer protested this order and on October 12, 2011, the Department affirmed the August 8, 2011 order. The employer filed an appeal with the Board of Industrial Insurance Appeals on December 7, 2011. Mr. Hickle did not protest or appeal the October 12, 2011 order.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter in this appeal.

2. Mr. Hickle's marital status on October 3, 2005, the date of his industrial injury, is determinative for purposes of calculating his compensation rate under RCW 51.32.060(1). There is no statutory authority for changing his marital status based on a subsequent dissolution of the marriage.

3. Because Mr. Hickle did not protest or appeal the October 12, 2011 Department order, the order must be affirmed.

4. The October 12, 2011 Department order is affirmed.

DATED: March 26, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

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