

## **Miner, Jennifer**

---

### **TIME-LOSS COMPENSATION (RCW 51.32.090)**

#### **Child born after date of injury**

Although a wage calculation order was final and binding, RCW 51.08.030 and RCW 51.28.040 allow for adding a child conceived before the injury and born after the injury as a change of circumstances. ....*In re Jennifer Miner, BIIA Dec., 13 18958 (2014)* [*Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 15-2-00963-0 SEA.*]

Scroll down for order.

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

1 **IN RE: JENNIFER M. MINER** ) **DOCKET NO. 13 18958**  
2 )  
3 **CLAIM NO. SD-70260** ) **DECISION AND ORDER**  
4

5 **APPEARANCES:**

6  
7 Claimant, Jennifer M. Miner, by  
8 Walthew Law Firm, per  
9 Robert J. Heller

10  
11 Self-Insured Employer, Northwest Hospital & Medical Center, by  
12 Thomas G. Hall & Associates, per  
13 Thomas G. Hall and Ryan S. Miller  
14

15 The claimant, Jennifer M. Miner, filed a protest with the Department of Labor and Industries  
16 on June 10, 2013. The Department forwarded this to the Board of Industrial Insurance Appeals as  
17 an appeal of a Department order dated June 5, 2013. In that order, the Department changed a  
18 May 3, 2013 order and indicated the date of injury wage for the job of injury was based on hours  
19 worked at different rates of pay, (\$17.39 an hour x 138.36 average hours a month = \$2,406.23) plus  
20 (\$16.74 an hour x 31.83 average hours a month = \$532.89) plus (\$1.00 an hour x 37.91 average  
21 hours a month = \$37.91) with additional health care benefits of \$641.71 a month, for a total wage  
22 from all employment at time of injury of \$3,618.74 a month. The Department further determined  
23 that Ms. Miner was single with one dependent child. The order is **REVERSED AND REMANDED**.  
24  
25  
26  
27  
28

29 **PROCEDURAL AND EVIDENTIARY MATTERS**

30 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
31 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and  
32 Order issued on July 21, 2014, in which the industrial appeals judge dismissed her appeal.  
33  
34

35 The industrial appeals judge issued the Proposed Decision and Order on consideration of a  
36 motion for summary judgment filed by the self-insured employer, Northwest Hospital & Medical  
37 Center (Northwest); Ms. Miner's reply to that motion; Northwest's further reply to Ms. Miner's reply;  
38 and oral argument. No evidentiary or procedural rulings were made in the record of proceedings  
39 other than determining that this matter is ready for determination. Northwest contends that a  
40 December 24, 2008 Department order should be considered final and binding regarding all issues  
41 addressed by the June 5, 2013 order. Ms. Miner contends that the December 24, 2008 order was  
42 timely protested and not final and binding.  
43  
44  
45  
46  
47

1 Further proceedings are not necessary in this appeal. Our determination is based on the  
2 materials submitted by Northwest and Ms. Miner and our examination of the Department claim file  
3 to obtain necessary procedural information using our authority described in *In re Mildred*  
4 *Holzerland*.<sup>1</sup> This additional information pertains to the questions of whether a February 11, 2011  
5 order became final and whether Ms. Miner constructively filed an application for change in  
6 circumstances under RCW 51.28.040, notifying Northwest and the Department of Labor and  
7 Industries of the birth of her child that was conceived before the industrial injury but born after the  
8 industrial injury.  
9

### 10 **DECISION**

11 On November 18, 2008, Jennifer Miner sustained an industrial injury in the course of her  
12 employment with Northwest. On her December 8, 2008 Application for Benefits, Ms. Miner  
13 indicated she had one unborn child with an expected delivery date of February 25, 2009. The  
14 Department of Labor and Industries issued an order on December 24, 2008, in which it determined  
15 that Ms. Miner's total gross wage at the time of injury was \$3,292.15 a month based on hourly  
16 wages of \$16.99, 12 hours a day, 13 days a month, for a monthly wage of \$2,650.44, plus health  
17 care benefits of \$641.71. In this order, the Department also determined that Ms. Miner was single  
18 with no children at the time of injury.  
19

20 The determinative issues in this appeal are whether the monthly wage determination stated  
21 in the December 24, 2008 order can be changed and whether the dependent child determination  
22 can be changed. We find that the monthly wage determination in the December 24, 2008 order  
23 cannot be changed. Any time-loss compensation benefits should be calculated using the wage  
24 determination in the December 24, 2008 order. The number of dependent children can be changed  
25 as of the birth of Ms. Miner's one child on February 26, 2009, to account for Ms. Miner's child  
26 conceived before the industrial injury but born after the industrial injury and based on Ms. Miner's  
27 notification to Northwest and the Department of this change in circumstances.  
28

29 The June 5, 2013 order from which Ms. Miner has taken her present appeal is the last of five  
30 Department orders ostensibly reconsidering and determining the issue of Ms. Miner's wages at the  
31 time of injury and issued subsequent to the December 24, 2008 order. The stipulated Jurisdictional  
32 History discloses that the first of these five subsequent wage-basis orders was issued on  
33 February 4, 2011, over two years after the issuance of the first determinative wage order of  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

---

<sup>1</sup> BIIA Dec., 15,729 (1965).

1 December 24, 2008. The stipulated Jurisdictional History does not show a timely protest of the  
2 February 4, 2011 order. However, our review of the Department claim file under the authority  
3 enunciated in *Holzerland* discloses that Northwest filed a timely protest of that order with the  
4 Department on February 16, 2011. The stipulated Jurisdictional History shows that timely protests  
5 of the other four subsequent orders were filed by Ms. Miner or Northwest. None of the five  
6 subsequent wage-basis orders issued by the Department after the original December 24, 2008  
7 wage-basis order became final within the meaning of RCW 51.52.50. As indicated at the outset of  
8 this Decision and Order, the Department forwarded Ms. Miner's timely protest of the last of these  
9 orders, the order of June 5, 2013, to the Board to be treated as an appeal.  
10

11  
12 The December 24, 2008 Department order contained language indicating that the order  
13 would become final unless a protest or appeal was filed within sixty days of communication of the  
14 order. Ms. Miner does not deny that the order was communicated to her in due course after  
15 issuance. Ms. Miner does contend that a December 8, 2008 medical chart note received after the  
16 December 24, 2008 order and referencing her pregnancy, is a protest of the December 24, 2008  
17 order. We note here that our *Holzerland* review disclosed other such notes.  
18

19  
20 We agree with the industrial appeals judge that such notes referencing pregnancy do not  
21 comprise a protest of the December 24, 2008 order. It is undisputed that when the Department  
22 issued the December 24, 2008 order, as was true on the date of her November 18, 2008 industrial  
23 injury, Ms. Miner was pregnant but had not given birth to a child. She did not yet have "child" within  
24 the common understanding of that term. Neither did she have an includable child within the  
25 meaning of the defining, governing statute, RCW 51.08.040. This statute includes within the  
26 definition of child, a "child born after the injury where conception occurred prior to the injury." When  
27 the Department issued the December 24, 2008 order, Ms. Miner did not have such a child because  
28 the child had not been born. Notes referencing Ms. Miner's pregnancy were consistent with the  
29 Department December 24, 2008 order and cannot be considered a protest of the order.  
30

31  
32 **Wages at time of injury.** The Department order dated December 24, 2008 is a final,  
33 binding order and has res judicata effect regarding the determination of Ms. Miner's wages at the  
34 time of injury.<sup>2</sup> The subsequent Department orders ostensibly revisiting the issue of Ms. Miner's  
35 wages at the time of injury, including the now appealed June 5, 2013 Department order, were  
36

37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  

---

<sup>2</sup> RCW 51.52.050; *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

1 ineffective to finally alter the prior binding determination that her monthly wage at time of injury was  
2 \$3,292.15, which included \$641.71 in health care benefits.  
3

4 We distinguish Ms. Miner's case before us from *In re Stephen R. Everhart*<sup>3</sup> where we held  
5 that the second of two final wage orders issued was controlling in a contest over a subsequent  
6 determination of an overpayment of benefits. In *Everhart*, as in the case before us, a first wage  
7 order was not protested or appealed. Unlike the case before us, a Department order affirming a  
8 subsequent wage order was not appealed or protested. In *Everhart*, the Board had to determine  
9 which of the two wage orders would be deemed controlling, the earlier order, or the later order. The  
10 Board determined that the second of the two wage determinations controlled because it was neither  
11 protested nor appealed. In contrast to *Everhart*, no Department order in Ms. Miner's claim  
12 ostensibly readdressing wages at time of injury has ever become final. In the pending appeal of the  
13 order ostensibly re-determining Ms. Minor's wages at time of injury, Northwest has asserted the res  
14 *judicata* effect of the earlier, final December 28, 2008 order with respect to wages at time of injury.  
15 We agree that the December 28, 2008 order has such *res judicata* effect and precludes a  
16 determination that Ms. Minor's wage at time of injury was other than \$3,292.15, which included  
17 \$641.71 in health care benefits.  
18  
19  
20  
21  
22  
23  
24

25 **Dependent child.** The December 28, 2008 order is not controlling regarding whether  
26 Ms. Miner has an includable child that was conceived before the industrial injury and born after the  
27 industrial injury. The December 28, 2008 order only indicated that at the time of injury, Ms. Miner  
28 did not have an includable dependent child. This was true. The order did not make any  
29 determination whether a child conceived before the injury had been born subsequently as  
30 contemplated in RCW 51.08.030. Such change in circumstances is cognizable under  
31 RCW 51.28.040. This statute allows the Department to adjust benefits due to a change in  
32 circumstances effective up to sixty days prior to the Department's receipt of an application notifying  
33 the Department of the changed circumstances.  
34  
35  
36  
37  
38

39 Our review of the claim file maintained by Department discloses a series of medical notes  
40 referencing Ms. Miner's pregnancy that were received by the third party administrator for Northwest  
41 and forwarded to the Department. We previously indicated that Ms. Minor reported her pregnancy  
42 and due date on her Application for Benefits. Then, on March 27, 2009, Northwest received a  
43 medical note dated March 6, 2009, indicating that Ms Miner was one week postpartum. This note  
44  
45  
46

---

47 <sup>3</sup> BIIA Dec., 09 14820 (2010)

1 adequately placed Northwest on notice that the terms of RCW 51.08.030 pertaining to a child  
2 conceived before, and born after, the industrial injury had been met.

3  
4 RCW 51.32.060(1)(g) directs that a worker disabled from employment who was single at  
5 time of injury with no dependent children shall receive time-loss compensation benefits equal to  
6 60 percent of his or her wages at the time of injury. A totally disabled worker who is single with one  
7 dependent child shall receive time-loss compensation benefits equal to 62 percent of his or her  
8 wages at the time of injury.<sup>4</sup> As of ten days prior to March 6, 2009 (February 26, 2009), Ms. Miner  
9 gave birth to a child conceived before her industrial injury. She provided Northwest timely notice of  
10 this change in circumstances and became eligible for time-loss compensation benefits calculated at  
11 62 percent of her wages at the time of injury on the birth of her child that was conceived before the  
12 industrial injury.  
13  
14  
15  
16  
17

18 The facts that we have recounted are not disputed and are as reported by the parties in the  
19 summary judgment proceedings and as apparent on our review of the Department file under  
20 *Holzerland*. We determine that Ms. Miner's wages at time of injury were \$3,292.15, which included  
21 \$641.71 in health care benefits, and that at the time of injury Ms. Miner was single with no  
22 dependent children. As of February 26, 2009, Ms. Miner had one includable dependent child. As  
23 of February 26, 2009, Ms. Miner's time-loss compensation benefits rate should be calculated based  
24 on her status of single with one child.  
25  
26  
27

28 We have considered the Proposed Decision and Order, Ms. Miner's Petition for Review, and  
29 Northwest's Response to Claimant's Petition for Review. Based on a review of the entire record  
30 before us and our review of procedural documents in the claim file maintained by the Department of  
31 Labor and Industries, we make the following Findings of Fact and Conclusions of Law.  
32  
33

#### 34 **FINDINGS OF FACT**

- 35
- 36 1. On December 5, 2013, an industrial appeals judge certified that the  
37 parties agreed to include the Jurisdictional History in the Board record  
38 solely for jurisdictional purposes. In addition to procedural facts stated  
39 on that document, we find that on February 16, 2011, the self-insured  
40 employer, Northwest Hospital & Medical Center, filed a protest and  
41 request for reconsideration of the February 4, 2011 Department order.
  - 42 2. On November 18, 2008, Jennifer Miner sustained an industrial injury  
43 when she was moving patients in the emergency room at Northwest  
44 Hospital & Medical Center where she worked  
45

46  
47 

---

<sup>4</sup> RCW 51.32.060(1)(h).

- 1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27
3. Ms. Miner notified Northwest Hospital & Medical Center through its third party administrator that she was pregnant at the time of her November 18, 2008 industrial injury in the Application for Benefits filed with the third party administrator on December 1, 2008. By way of a medical note by Olympic Physical Therapy dated February 16, 2009, received by the third party administrator on March 6, 2009, Northwest was notified on behalf of Ms. Miner that her expected delivery was ten days from February 16, 2009. In a medical note by Dr. Steven K. Taylor, M.D. dated March 6, 2009, received by the third party administrator on March 27, 2009, Northwest was notified on behalf of Ms. Miner that she was one week post partum, having delivered her child. On February 26, 2009, Ms. Miner had one child that was conceived before her industrial injury and born after the industrial injury.
  4. On December 24, 2008, the Department issued a wage order in which it determined Ms. Miner's monthly gross wage at the time of injury was \$3,292.15, which included \$641.71 in employer-provided health care benefits, and determined she was single with no children.
  5. The December 24, 2008 wage order included a statement informing Ms. Miner that the order would become final within 60 days from the date it was communicated unless a written request for reconsideration was filed with the Department or an appeal was filed with the Board of Industrial Insurance Appeals. No protest or appeal was filed pertaining to the December 24, 2008 Department wage order by any party to the claim within 60 days of communication of the order.

#### **CONCLUSIONS OF LAW**

- 28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47
1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
  2. Neither Jennifer M. Miner nor any other party filed a timely Protest and Request for Reconsideration of the Department order dated December 24, 2008 within the meaning of RCW 51.52.050. As provided by RCW 51.32.050 and the principles of res judicata, Ms. Miner's monthly wage at time of injury was \$3,292.15, which included \$641.71 in employer-provided health care benefits and she was single with no children.
  3. As of February 26, 2009, Jennifer M. Miner was single with one dependent child conceived before and born after her industrial injury within the meaning of RCW 51.08.030. An application due to change in circumstances was constructively and effectively filed on behalf of Ms. Miner on March 27, 2009, within the meaning of RCW 51.28.040. As of February 26, 2009, Ms. Miner's time-loss compensation benefits rate, if otherwise entitled, should be calculated at 62 percent of her wages at the time of injury, as provided by RCW 51.32.060(1)(h).

1 4. The order of the Department of Labor and Industries dated June 5, 2013,  
2 is reversed and remanded to the Department with directions to issue an  
3 order in which it determines that Ms. Miner's monthly wage at the time of  
4 injury was \$3,292.15, which included \$641.71 in employer-provided  
5 health care benefits, and she was single with no children at the time of  
6 injury. The Department shall further determine that as of February 26,  
7 2009, Ms. Miner was single with one qualified child, as provided by  
8 RCW 51.32.060(1)(h). The Department shall take such further action as  
9 indicated under the facts and the law.

10 Dated: December 22, 2014.

11 BOARD OF INDUSTRIAL INSURANCE APPEALS

12  
13  
14  
15  
16  
17 /s/ \_\_\_\_\_  
18 DAVID E. THREEEDY Chairperson

19  
20  
21  
22 /s/ \_\_\_\_\_  
23 JACK S. ENG Member

24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47