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

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

APPEARANCES:

Claimant, Jennifer M. Miner, by
Walthew Law Firm, per
Robert J. Heller

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

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

PROCEDURAL AND EVIDENTIARY MATTERS

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 a Proposed Decision and Order issued on July 21, 2014, in which the industrial appeals judge dismissed her appeal.

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

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

DECISION

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

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

The June 5, 2013 order from which Ms. Miner has taken her present appeal is the last of five Department orders ostensibly reconsidering and determining the issue of Ms. Miner's wages at the time of injury and issued subsequent to the December 24, 2008 order. The stipulated Jurisdictional History discloses that the first of these five subsequent wage-basis orders was issued on February 4, 2011, over two years after the issuance of the first determinative wage order of

[1] BIIA Dec., 15,729 (1965).

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

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

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

Wages at time of injury. The Department order dated December 24, 2008 is a final, binding order and has res judicata effect regarding the determination of Ms. Miner's wages at the time of injury.[2] The subsequent Department orders ostensibly revisiting the issue of Ms. Miner's wages at the time of injury, including the now appealed June 5, 2013 Department order, were

[2] RCW 51.52.050; *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

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

We distinguish Ms. Miner's case before us from *In re Stephen R. Everhart*[3] where we held that the second of two final wage orders issued was controlling in a contest over a subsequent determination of an overpayment of benefits. In *Everhart,* as in the case before us, a first wage order was not protested or appealed. Unlike the case before us, a Department order affirming a subsequent wage order was not appealed or protested. In *Everhart,* the Board had to determine which of the two wage orders would be deemed controlling, the earlier order, or the later order. The Board determined that the second of the two wage determinations controlled because it was neither protested nor appealed. In contrast to *Everhart,* no Department order in Ms. Miner's claim ostensibly readdressing wages at time of injury has ever become final. In the pending appeal of the order ostensibly re-determining Ms. Minor's wages at time of injury, Northwest has asserted the res judicata effect of the earlier, final December 28, 2008 order with respect to wages at time of injury. We agree that the December 28, 2008 order has such res judicata effect and precludes a determination that Ms. Minor's wage at time of injury was other than $3,292.15, which included $641.71 in health care benefits.

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

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

[3] BIIA Dec., 09 14820 (2010)

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

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

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

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

FINDINGS OF FACT

1. On December 5, 2013, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes. In addition to procedural facts stated on that document, we find that on February 16, 2011, the self-insured employer, Northwest Hospital & Medical Center, filed a protest and request for reconsideration of the February 4, 2011 Department order.

2. On November 18, 2008, Jennifer Miner sustained an industrial injury when she was moving patients in the emergency room at Northwest Hospital & Medical Center where she worked

[4] RCW 51.32.060(1)(h).

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

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).

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

Dated: December 22, 2014.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member