Barker, Douglas

SOCIAL SECURITY DISABILITY OFFSET (RCW 51.32.220)

Computation

Contributions to a "cafeteria plan" as provided by 42 U.S.C. § 409(a)(4)(l) are not taxable wages and cannot be included in wage calculation. **….*In re Douglas Barker,* BIIA Dec., 14 19053 (2015)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DOUGLAS A. BARKER	**)**	**DOCKET NOS. 14 19053, 14 19054 & 14 19055**
	)	
CLAIM NO. AN-90329	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Douglas A. Barker, by
Karmy Law Office, PLLC, per
Jill A. Karmy

Employer, Northwest Hardwoods, Inc., by
Vigilant Counsel for Employers,
None

Retrospective Rating Group, Vigilant Retro No. 00068,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Crystal Schlanbusch

In Docket No. 14 19053, the claimant, Douglas A. Barker, filed an appeal with the Board of Industrial Insurance Appeals on June 30, 2014, from an order of the Department of Labor and Industries dated June 16, 2014. In this order, the Department affirmed a prior order dated March 12, 2014, in which it affirmed the Department order dated January 8, 2014. In the order dated January 8, 2014, the Department adjusted Mr. Barker's time-loss compensation benefits rate based on his receipt of social security benefits. The new time-loss compensation benefits rate, effective January 1, 2014, was $1,309.25 per month, based on receipt of $2,067.00 per month in social security benefits and a determination his highest year's earnings were $50,645.30 in 2012. In the January 8, 2014 order, the Department also assessed an overpayment of $1,763.28 based on the time-loss compensation benefits Mr. Barker would receive during January 2014 because the offset could not be implemented until February 1, 2014. The Department order is **REVERSED AND REMANDED**.

In Docket No. 14 19054, Mr. Barker filed an appeal with the Board on June 30, 2014, from a Department order dated June 23, 2014. In this order, the Department affirmed a prior order dated March 20, 2014, in which it adjusted Mr. Barker's time-loss compensation benefits rate to $1,437.60 per month, based on a change in his healthcare benefits in the amount of $727.26 per month. The adjustment also was based on the social security offset calculation in the Department's January 8,

2014 order, the subject of the above appeal. The Department order is **REVERSED AND REMANDED**.

In Docket No. 14 19055, Mr. Barker filed an appeal with the Board on June 30, 2014, from a Department order dated June 24, 2014. In this order, the Department affirmed a prior order dated March 19, 2014, in which it determined Mr. Barker's total gross wages in his job-of-injury were $5,213.85 per month. This calculation was based on an hourly pay of $23.02 per hour, and work hours of 8 hours per day, 5 days per week, with additional wages of $727.26 per month for health care benefits and $435.07 per month in overtime, and a marital status of married with no dependents. In the March 19, 2014 order, the Department also stated this compensation rate would continue to be reduced by the social security offset established in the January 8, 2014 order. The Department order is **REVERSED AND REMANDED**.

SUMMARY

As provided by 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 Mr. Barker to a Proposed Decision and Order dated on June 17, 2015. In Docket No. 14 19055, our industrial appeals judge reversed the June 24, 2014 order because the parties stipulated the March 19, 2014 wage order it affirmed was incorrect. Our judge affirmed the orders involved in the remaining two appeals.

Mr. Barker's total gross wages at the time of his injury were $5,286.45 per month, $72.60 more than the $5,213.85 total wages set forth in the March 19, 2014 order. We agree with our judge's disposition of Docket No. 14 19055.

The issues in Docket No. 14 19053 are whether the Department correctly calculated Mr. Barker's social security offset; his revised time-loss compensation benefits rate based on the offset; and the overpayment for time-loss compensation benefits he received in January 2014, before the offset could be implemented. At issue in Docket No. 14 19054 is whether a revised March 20, 2014 wage order issued one day after the March 19, 2014 wage order involved in Docket No. 14 19055 is correct. The March 20, 2014 order includes the reduction in Mr. Barker's time-loss compensation benefits rate based on his social security offset as calculated in the order involved in Docket No. 14 19053.

Mr. Barker maintains the Department miscalculated his social security offset because its determination of his highest year earnings in 2012 was too low. He argues the Department should include $2,268.24 paid to a cafeteria plan when calculating his earnings for that year. He maintains

the Department should be ordered to recalculate his social security offset; his time-loss compensation benefits rate after the offset is implemented; and the overpayment for the benefits he received in January 2014. However, even if we conclude the sum paid into the cafeteria plan should not be included when totaling his highest year earnings, he still maintains the orders involved in Docket Nos. 14 19053 and 14 19054 should be reversed. He argues the increase in his wage order would alter the calculations that are the basis for the orders involved in those appeals.

We have concluded Mr. Barker's 2014 contributions to his cafeteria plan should not be included in his highest year earnings. Our judge held this sum should not be included because it was not subject to social security or federal income taxes. We agree with this conclusion. However, Mr. Barker maintains the federal statutes mandate the inclusion of this sum in his highest year earnings. We disagree with his analysis of the relevant statutory language. We agree the increase in Mr. Barker's wage order should cause the reversal of his two companion appeals. All of the current and past time-loss compensation benefits paid to Mr. Barker must be recalculated based on his increased wage rate. The calculation of Mr. Barker's social security offset and the resulting overpayment for the time-loss compensation benefits he received during January 2014 should also be made using his corrected time-loss rate. The wage order involved in Docket No. 14 19054 also must be recalculated based on his increased wage rate and on any resulting reduction in the amount of his social security offset. We are reversing all three orders involved in this consolidated appeals.

DECISION

Factual Basis and Statutory Framework

These consolidated appeals were decided based on stipulated facts. The parties have agreed Mr. Barker's wages at the time of his injury were $5,286.45 a month, $72.60 a month higher than the Department's March 19, 2014 wage order. His gross income included the same additional wages for health care benefits ($727.26) and overtime ($435.07) listed in the Department's March 19, 2014 wage order.

The following stipulations relate to the social security offset calculation. Mr. Barker's highest earning year was 2012, when he was paid $53,313.54 in gross wages. However, the Internal Revenue Service (IRS) only counted $50,645.30 of this sum as taxable income for that year. Similarly, that is the same amount that was subject to social security taxes. His gross wages for 2012 included $2,268.24 he contributed to an IRS Section 125 Cafeteria Plan out of his pretax

earnings. The cafeteria plan offered to him by his employer is defined by this statute as an employee benefit plan under which he could "choose among 2 or more benefits consisting of cash and qualified benefits."[1] A qualified benefit is further defined in the federal code as "any benefit . . . not includible in the gross income of the employee."[2] A *Labor and Employment Law* treatise clarifies that:

> Cafeteria plans are formal written arrangements established by an employer to give its employees an opportunity to purchase health, child care, life insurance, and other benefits from a menu of several benefits. Because cash is always the basic benefit offered in a cafeteria plan, employees covered by such plans are able to forego taxable cash in favor of selecting a non-taxable benefit and paying for the benefit with before-tax dollars.
>
> If it were not for the special tax rules applicable to cafeteria plans, merely giving an employee the right to choose cash instead of some other non-taxable benefit available under a cafeteria plan would, under the tax principle of constructive receipt, result in the taxation of the cash to the employee. Of course, if the employee actually chooses the cash, he or she will be subject to taxation on that amount. The cafeteria plan rules carve out an exception to the constructive receipt doctrine, and permit an employee to have the choice of cash or a non-taxable benefit.[3]

Accordingly, even though the parties' stipulation did not specify how the sum Mr. Barker contributed to his cafeteria plan was used, we know he had his taxable earnings in 2012 reduced by $2,268.24. His contributions to his cafeteria plan were ostensibly used for health or child care expenses, life insurance, or other benefits. Mr. Barker chose to forego wages so he could use pretax dollars to purchase an employee benefit, reducing his taxable income. He is now seeking to have his contributions to his cafeteria plan included in his 2012 wages because that would reduce his social security offset and increase the time-loss compensation benefits he can retain. The total monthly social security and time-loss compensation benefits a worker can receive is 80 percent of his or her average current earnings (ACE). Mr. Barker's ACE is one-twelfth of his total wages in his highest earnings year. His highest earnings year was 2012. Mr. Barker wants to include the $2,268.24 in his ACE because that would increase the 80 percent cap on the total benefits he can retain.

[1] 26 USC 125(d)(1)(B).
[2] 26 USC 125(f)(1).
[3] 6-159 *Labor and Employment Law* 159.01 (published by Matthew Bender & Co. 2015).

DISCUSSION

As our industrial appeals judged noted, the Board has held the Department must use the definition of wages found in federal law when determining a worker's ACE.[4] In *David Short*, we cited three federal cases stating that a worker's earnings for the purpose of computing his ACE are those subject to social security taxes. Our holding also follows two prior Board decisions affirming that the Department's calculations of ACE should be based on the same definition of wages used by the Social Security Administration.[5] Since the parties stipulated Mr. Barker's $2,268.24 contributions to his cafeteria plan were not subject to social security taxes, they cannot be included in his ACE.

Mr. Barker, however, maintains the federal statute, 42 USC 409(a)(4)(I), requires that his contributions to a cafeteria plan be included in his ACE. This statute defines wages for the purpose of determining a worker's ACE. The pertinent language states that wages shall **not** include:

> [a]ny payment made to, or on behalf of, an employee . . . under a cafeteria plan (within the meaning of section 125 of the Internal Revenue Code of 1986) if such payment would not be treated as wages without regard to such plan and it is reasonable to believe that …section 125 would not treat any wages as constructively received.[6]

Despite its obtuse language, this statute's meaning can be discerned. This section states a worker's wages cannot include any payment made to a cafeteria plan if that sum would not be treated as wages by the IRS. We know Mr. Barker's 2012 contributions of $2,268.24 to his cafeteria plan were not subject to federal income tax. The prior quotation from the *Labor and Employment Law* treatise explains the constructive receipt doctrine does not apply to the $2,268.24 used to purchase cafeteria plan benefits and the contributions are not taxable. Because his contributions to his cafeteria plan would not have been treated as wages by the IRS, they cannot be included in his wages when calculating his ACE. We accordingly conclude federal law does not require Mr. Barker's contributions to his cafeteria plan to be included in his 2012 wages.

The Department correctly calculated Mr. Barker's ACE. However, because the Department has admitted it did not correctly calculate his wages at the time of his injury, it still must recalculate the offset amount. The increase in Mr. Barker's wages should cause an increase in his time-loss benefits. An offset order must be based on a correct monthly time-loss rate. An increase in

---

[4] *In re David Short,* Dckt. No. 03 19518, at 3 (August 23, 2004).
[5] *In re Laverne McKenna*, BIIA Dec., 49,873 (1978); *In re Joan B. Varnado,* Dckt. No. 09 15790 (September 22, 2010).
[6] 42 USC 409(a)(4)(I).

Mr. Barker's time-loss rate would increase the benefits he should have been paid during January 2014. This should result in a change in the overpayment for the time-loss benefits paid to him during that month. The June 16, 2014 Department order should be reversed so the Department can recalculate his social security offset and the resulting overpayment based on the correct time-loss compensation benefits rate. Similarly, the March 20, 2014 order in which the Department changed Mr. Barker's time-loss compensation benefits rate must be based on the increased wage order, and a correctly calculated offset order.

We therefore are reversing all three orders before us so the Department can recalculate Mr. Barker's time-loss compensation benefits rate and also recalculate his social security offset and the resulting overpayment based on the correct time-loss rate.

FINDINGS OF FACT

1. On August 12, 2014, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History, as amended, in the Board record solely for jurisdictional purposes.

2. The Department's June 16, 2014 social security offset order was based on a determination Mr. Barker's highest year earnings were $50,645.30 in 2012. The Department did not include the $2,268.24 Mr. Barker contributed out of his pretax earnings in 2012 to an Internal Revenue Code Section 125 Cafeteria Plan in its calculation of "average current earnings" to determine the amount of the social security offset against Mr. Barker's time-loss compensation benefits payments.

3. At the time of Mr. Barker's December 7, 2012 industrial injury, he was married with no dependants. His wages were $5,286.45 per month, which includes additional wages of $727.26 per month for employer-contributed health care benefits and $435.07 per month for overtime.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.

2. The "average current earnings" provisions of 42 USC 424a of the federal code govern the calculation of the maximum amount of combined social security and time-loss compensation benefits a worker can retain after he receives social security benefits and is used by the Department to determine the proper social security offset by which his time-loss compensation benefits will be reduced based on his social security income. "Average current earnings" are those earnings subject to social security and federal income taxes under federal law and do not include contributions out of pretax earnings to a Section 125 Cafeteria Plan. 42 USC 409(a)(4)(I).

3. In Docket No. 14 19055, the Department order dated June 24, 2014, is reversed. This matter is remanded to the Department to recalculate Mr. Barker's time-loss compensation benefits rate based on total gross monthly wages at his job of injury of $5,286.45 per month, which includes additional wages of $727.26 per month for health care benefits and $435.07 per month for overtime, and a marital status of married with no dependents.

4. In Docket No. 14 19053, the June 16, 2014 order is reversed. This matter is remanded to the Department to recalculate Mr. Barker's social security offset based on a corrected time-loss compensation benefits rate consistent with our decision in the above appeal. The Department is further ordered to recalculate the overpayment for Mr. Barker's January 2014 time-loss compensation benefits based on the corrected time-loss rate. The Department's determination in its January 8, 2014 order that Mr. Barker's highest year earnings were $50,645.30 in 2012 is correct and is affirmed.

5. In Docket No. 14 19054, the June 23, 2014 order is reversed. This matter is remanded to the Department with directions to recalculate the adjustment to Mr. Barker's time-loss compensation benefits compensation rate based on a change in his healthcare benefits in the amount of $727.26 per month, based on the corrected time-loss rate and social security offset amount consistent with our decisions in the above appeals.

Dated: August 20, 2015.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member