WAGES (RCW 51.08.178)

Kept on salary (RCW 51.32.090(8))

A worker's wages at the time of injury as determined by final Department order determines the adequacy of wages paid under the kept on salary provisions of RCW 51.32.090(8).*In re Miguel Escorcia*, BIIA Dec., 17 12979 (2018) [*Editor's note*: The Board's decision was appealed to superior court under Cowlitz County Cause No. 18-2-00757-8.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS STATE OF WASHINGTON

)

IN RE: MIGUEL A. ESCORCIA

CLAIM NO. AV-74711

DOCKET NO. 17 12979 DECISION AND ORDER

Miguel A. Escorcia sustained an industrial injury while working as a concrete laborer and carpenter for Tapani Underground, Inc. The Department allowed Mr. Escorcia's claim and has provided benefits. The Department denied time-loss compensation benefits on the grounds that Tapani Underground kept Mr. Escorcia on salary for the period in question. Our industrial appeals judge affirmed the Department order. Mr. Escorcia argues that he was not paid his full wages and thus is entitled to time-loss compensation benefits. We **AFFIRM** the Department order because the amount of salary paid by Tapani Underground for the period in question is consistent with the wages Mr. Escorcia was receiving at the time of injury as determined by a final and binding Department order dated September 18, 2014.

DISCUSSION

An injured worker is not entitled to time-loss compensation benefits even though disabled in part or in full from employment "should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury "¹ This is commonly referred to as the "kept on salary" or KOS program. We perceive benefits of the program to include maintaining a potentially beneficial relationship between an injured worker and employer, lessening the adverse effect of the injury on the injured worker by providing more income during a period of disability than would be provided by time-loss compensation benefits, lessening the burden on the State Industrial Insurance Fund, and benefiting the employer by resultant lesser adverse impact of the claim on the employer's industrial insurance premium rates.

In the matter before us Tapani Underground and the Department considered Mr. Escorcia to have been kept on salary by Tapani Underground for several years after his November 18, 2013 industrial injury—November 19, 2013, through February 29, 2016. On September 18, 2014, the Department issued an order that determined Mr. Escorcia's wages at the time of injury to have been \$37.18 an hour, 8 hours a day, five days a week, or \$6,543.68 a month, plus health care benefits of \$67.48 a month, for a total gross wage of \$6,611.16 a month.

The order further stated that Mr. Escorcia was married with three dependents. The order contained the statutorily required notice that the order would become final and binding if not protested

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¹ RCW 51.32.090(8).

or appealed within 60 days of receipt. The stipulated Jurisdictional History does not disclose any protest or appeal of the order and Mr. Escorcia has not contended that the order is other than final and binding. It is undisputed that Tapani Underground provided Mr. Escorcia a salary consistent with the September 18, 2014 order during the period now at issue before us; November 19, 2013, through February 29, 2016.

Despite the finality of the September 18, 2014 Department order and Tapani Underground's salary payments consistent with the order determinations, Mr. Escorcia maintains he is nevertheless entitled to time-loss compensation benefits for November 19, 2013, through February 29, 2016. He bases his contention on the alleged (and undisputed fact) that the September 17, 2014 order, although final, was factually incorrect because he was actually earning more at time of injury than determined by the September 17, 2014 order. Mr. Escorcia argues that because of this he was not kept on salary and is therefore entitled to full time-loss compensation benefits as there is no other remedy available to him.

We must reject Mr. Escorcia's argument. His available remedy was to protest or appeal the September 17, 2014 Department order. Because he did not protest or appeal the September 17, 2014 order, the determinations made in that order became binding whether they were factually correct or incorrect.² We have not been made aware of any legislative intent that the KOS statute should be viewed so as to supersede or negate binding determinations of an injured worker's wages at the time of injury or otherwise allow for redeterminations of such. The KOS statute and the other statutory provisions on which wages at time of injury determinations are founded are together aimed at determining whether a worker is entitled to time-loss compensation benefits and, if so, how much.³ We see no justification for fragmenting the statutory scheme so as to provide relief to Mr. Escorcia where a remedy was available but simply not used. To determine the adequacy of the salary paid to Mr. Escorcia by Tapani Underground, we look to the wages at time of injury as determined by the Department in its final and binding September 17, 2014 order.⁴

DECISION

In Docket No. 17 12979, the claimant, Miguel A. Escorcia, filed an appeal with the Board of Industrial Insurance Appeals on March 17, 2017, from an order of the Department of Labor and

² Marley v. Department of Labor & Indus., 125 Wn.2d 533 (1994).

³ See, RCW 51.08.178 (monthly wages as basis for compensation and computation of monthly wages; RCW 51.32.060 (total disability compensation rates); RCW 51.32.090 (temporary total disability provisions).

⁴ See, for instance, *In re Chris J. Engberg*, Dckt. Nos. 14 17219 (September 25, 2015).

Industries dated January 20, 2017. In this order, the Department denied Mr. Escorcia time-loss compensation benefits from November 19, 2013, through February 29, 2016. This order is correct and is affirmed.

FINDINGS OF FACT

- 1. On May 16. 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
- 2. In a September 17, 2014 order, the Department of Labor and Industries determined Miguel A. Escorcia's wages at the time of his covered November 18, 2013 industrial injury. The order was communicated to Mr. Escorcia in due course and he did not appeal or protest the order within 60 days of communication of the order.
- 3. Mr. Escorcia's employer, Tapani Underground, kept Mr. Escorcia on salary from November 19, 2013, through February 29, 2016, at a rate consistent with the wage determination in the September 17, 2014 Department order.

CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
- 2. The wages at time of injury determination by the Department of Labor and industries in its September 17, 2014 order is a final and binding determination of wages at time of injury within the meaning of, and for purposes of determining wage replacement benefits, under RCW 51.08.178, RCW 51.32.060, and RCW 51.32.090, and within the meaning of RCW 51.52.050.
- 3. From November 19, 2013, through February 29, 2016, the employer, Tapani Underground, paid Miguel A. Escorcia wages consistent with his wages at the time of injury within the meaning of RCW 51.32.090(8) such that Mr. Escorcia is not entitled to time-loss compensation benefits from November 19, 2013, through February 29, 2016.
- 4. The Department of Labor and Industries order dated January 20, 2017, is correct and is affirmed.

Dated: June 4, 2018.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LIAMS, Chairperson S. ENG. Member

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Addendum to Decision and Order In re Miguel A. Escorcia Docket No. 17 12979 Claim No. AV-74711

Appearances

Claimant, Miguel A. Escorcia, by Busick Hamrick Palmer, PLLC, per David C. Johansen

Employer, Tapani Underground, Inc., None

Retrospective Rating Group, Smart - Dream Team Retro #10006, by Approach Management Services, per Chris Ristine

Department of Labor and Industries, by Office of the Attorney General, per Tom W. McGirk

Petition for Review

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 February 27, 2018, in which the industrial appeals judge affirmed the Department order dated January 20, 2017.

Evidentiary Rulings

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