

Escorcía, Miguel

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 Escorcía, 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.

1 or appealed within 60 days of receipt. The stipulated Jurisdictional History does not disclose any
2 protest or appeal of the order and Mr. Escorcía has not contended that the order is other than final
3 and binding. It is undisputed that Tapani Underground provided Mr. Escorcía a salary consistent with
4 the September 18, 2014 order during the period now at issue before us; November 19, 2013, through
5 February 29, 2016.
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9 Despite the finality of the September 18, 2014 Department order and Tapani Underground's
10 salary payments consistent with the order determinations, Mr. Escorcía maintains he is nevertheless
11 entitled to time-loss compensation benefits for November 19, 2013, through February 29, 2016. He
12 bases his contention on the alleged (and undisputed fact) that the September 17, 2014 order,
13 although final, was factually incorrect because he was actually earning more at time of injury than
14 determined by the September 17, 2014 order. Mr. Escorcía argues that because of this he was not
15 kept on salary and is therefore entitled to full time-loss compensation benefits as there is no other
16 remedy available to him.
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20 We must reject Mr. Escorcía's argument. His available remedy was to protest or appeal the
21 September 17, 2014 Department order. Because he did not protest or appeal the September 17,
22 2014 order, the determinations made in that order became binding whether they were factually
23 correct or incorrect.² We have not been made aware of any legislative intent that the KOS statute
24 should be viewed so as to supersede or negate binding determinations of an injured worker's wages
25 at the time of injury or otherwise allow for redeterminations of such. The KOS statute and the other
26 statutory provisions on which wages at time of injury determinations are founded are together aimed
27 at determining whether a worker is entitled to time-loss compensation benefits and, if so, how much.³
28 We see no justification for fragmenting the statutory scheme so as to provide relief to Mr. Escorcía
29 where a remedy was available but simply not used. To determine the adequacy of the salary paid to
30 Mr. Escorcía by Tapani Underground, we look to the wages at time of injury as determined by the
31 Department in its final and binding September 17, 2014 order.⁴
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39 **DECISION**

40 In Docket No. 17 12979, the claimant, Miguel A. Escorcía, filed an appeal with the Board of
41 Industrial Insurance Appeals on March 17, 2017, from an order of the Department of Labor and
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45 ² *Marley v. Department of Labor & Indus.*, 125 Wn.2d 533 (1994).

46 ³ See, RCW 51.08.178 (monthly wages as basis for compensation and computation of monthly wages; RCW 51.32.060
47 (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).

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

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

21 **CONCLUSIONS OF LAW**

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

40 Dated: June 4, 2018.

41 BOARD OF INDUSTRIAL INSURANCE APPEALS

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43 LINDA L. WILLIAMS, Chairperson

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45 JACK 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.