

## **Peterson, Martina**

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### **DEPARTMENT**

#### **Authority to issue subsequent order once the period for appeal has passed**

#### **Authority to recoup overpayment of benefits**

Once the 60-day appeal period expired, a Department order became final and binding on all parties, including the Department. As a result, the Department's effort to "modify from final to interlocutory" an unappealed order was invalid, although it could recoup monies paid due to clerical error. ...*In re Martina Peterson, BIA Dec., 94 0991 (1995)*

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

1			
2	IN RE:	MARTINA PETERSON	) DOCKET NO. 94 0991
3			)
4	CLAIM NO.	K-293529	) DECISION AND ORDER
5			)
6	<hr/>		

APPEARANCES:

7		
8		
9	Claimant, Martina Peterson,	
10	<u>Pro Se</u>	
11		
12	Employer, Lake Vue Gardens, Inc.,	
13	None	
14		
15	Department of Labor and Industries, by	
16	The Attorney General, per	
17	Amanda J. Goss, Assistant	

18 This is an appeal filed by the claimant, Martina Peterson, on  
19 February 15, 1994, from an order of the Department of Labor and  
20 Industries dated January 12, 1994. The order of January 12, 1994, took  
21 three actions. First, the closing order of November 4, 1993, was  
22 modified from a final to an interlocutory order. Second, the  
23 Department acknowledged receipt of a lien from the Office of Support  
24 Enforcement against the claimant's benefits and ordered the claimant to  
25 repay \$510.00. Third, the Department closed the claim with no  
26 additional award for permanent partial disability. **REVERSED AND**  
27 **REMANDED.**

PROCEDURAL MATTERS

28  
29 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before  
30 the Board for review and decision on a timely Petition for Review filed  
31 by the Department of Labor and Industries to a Proposed Decision and  
32 Order issued on December 13, 1994, in which the order of the Department  
33 dated January 12, 1994, was reversed and the matter remanded to the  
34 Department with directions to issue an order declaring that an

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1 overpayment in the amount of \$510.00 had resulted because of an Office  
2 of Support Enforcement lien, to be repaid from any future benefits due  
3 the claimant on any claim with the State Fund or self-insurer, but not  
4 modifying the November 4, 1993 order to an interlocutory order or  
5 closing Ms. Peterson's claim with no additional permanent partial  
6 disability award.

7 **EVIDENTIARY MATTERS**

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

11 **DECISION**

12 On August 5, 1986, Martina Peterson experienced an industrial  
13 injury while employed by Lake Vue Gardens, Inc. Her claim with the  
14 Department of Labor and Industries was allowed and various benefits  
15 provided until the claim was closed on February 29, 1988.

16 In 1991, Ms. Peterson filed an aggravation application and  
17 successfully reopened her claim. She received further treatment and  
18 other benefits until the fall of 1993.

19 On November 4, 1993, the Office of Support Enforcement filed a  
20 lien in the amount of \$225.00 with the Department of Labor and  
21 Industries against Ms. Peterson's industrial insurance benefits. Upon  
22 receiving the lien, the Department issued an order, also dated November  
23 4, 1993, that closed the claim with an award for permanent partial  
24 disability equal to Category 2 of permanent lumbosacral impairments.  
25 Unfortunately, the Department made a mistake. Instead of deducting  
26 \$225.00 from Ms. Peterson's award, it added that amount. Ms. Peterson,

1 who was apparently satisfied with the award, filed neither a protest  
2 nor an appeal of the November 4, 1993 order.

3 Although the record was not fully developed, the closing order of  
4 November 4, 1993, became final and binding 60 days later, on or about  
5 January 4, 1994. Any worker, beneficiary, employer, or other person  
6 aggrieved by an order, decision, or award of the Department must,  
7 before he or she appeals to the courts, file with the Board and the  
8 Director, by mail or personally, within 60 days from the day on which  
9 such copy of such order, decision, or award was communicated to such  
10 person, a Notice of Appeal to the Board. RCW 51.52.060. Absent such  
11 an appeal, the order becomes final. Turning to the case at hand, the  
12 burden would be on the Department of Labor and Industries to establish  
13 that its order of November 4, 1993, did not become final on or about  
14 January 4, 1994. However, no such evidence was presented. Evidence  
15 that a Department order was mailed to a worker at his or her last known  
16 address gives rise to a presumption that the order was received by the  
17 worker in the due course of the mails. In re John Karns, BIIA Dec.,  
18 05,181 (1956). Even if we were to allow three days mailing time for  
19 the November 4, 1993 order to be communicated to the claimant, the  
20 order would have become final on or about January 7, 1994.

21 It appears that shortly after the order became final, the  
22 Department realized its mistake. On January 12, 1994, the Department  
23 issued the order under appeal here wherein it declared that the order  
24 of November 4, 1993, was modified from a final to an interlocutory  
25 order. At the same time, it ordered Ms. Peterson to repay \$510.00,  
26 \$255.00 for the mistaken overpayment and \$255.00 for the Office of

1 Support Enforcement lien.

2 Two points need emphasis. First, the Department was without  
3 jurisdiction to modify the November 4, 1993 order from final to  
4 interlocutory. When the 60-day appeal period expired on or about  
5 January 7, 1994, the order became final and binding on all parties,  
6 including the Department of Labor and Industries. An order or judgment  
7 of the Department resting upon a finding, or findings, of fact becomes  
8 a complete and final adjudication, binding upon both the Department and  
9 the claimant. LeBire v. Department of Labor & Indus., 14 Wn.2d 407,  
10 415, 128 P.2d 308 (1942). An unappealed final order from the  
11 Department precludes the parties from rearguing the same claim. Marley  
12 v. Department of Labor & Indus., 125 Wn.2d 533, 538, \_\_\_ P.2d \_\_\_  
13 (1994). Using the Marley rationale, we conclude that the order of  
14 November 4, 1993, that closed the claim with a Category 2 award for  
15 permanent low back impairment, became final and could not thereafter be  
16 modified to interlocutory status by the Department.

17 Second, even though the November 4, 1993 order became final and  
18 binding, the Department, nonetheless, retained jurisdiction over the  
19 claim to recover the \$510.00 of overpaid benefits.

20 Whenever any payment of benefits under this  
21 title is made because of **clerical error,**  
22 mistake of identity, innocent  
23 misrepresentation by or on behalf of the  
24 recipient thereof mistakenly acted upon, **or**  
25 **any other circumstance of a similar nature,**  
26 all not induced by fraud, **the recipient**  
27 **thereof shall repay it and recoupment may be**  
28 **made from any future payments** due to the  
29 recipient on any claim with the state fund or  
30 self-insurer as the case may be. The  
31 department or self-insurer, as the case may  
32 be, **must make claim for such repayment or**

1            **recoupment within one year of the making of**  
2            **any such payment** or it will be deemed any  
3            claim therefor has been waived. The director,  
4            pursuant to rules adopted in accordance with  
5            the procedures provided in the administrative  
6            procedure act, chapter 34.05 RCW, may exercise  
7            his discretion to waive, in whole or in part,  
8            the amount of any such timely claim where the  
9            recovery would be against equity and good  
10            conscience.

11  
12        RCW 51.32.240(1). (emphasis added.)  
13

14            It is evident from the record that the Department's order of  
15        November 4, 1993, contains an inadvertent clerical error. The  
16        Department should have deducted \$255.00 from Ms. Peterson's award, not  
17        added that amount. By virtue of the January 12, 1994 order, the  
18        Department made demand for repayment within one year of making the  
19        overpayment. We hold that even though a closing order becomes final  
20        and binding, the Department, under RCW 51.32.240(1), retains  
21        jurisdiction to issue a further order to recover amounts paid due to  
22        clerical error, mistake of identity, innocent misrepresentation, or  
23        circumstance of a similar nature where demand for repayment is made  
24        within one year of the making of the overpayment.

25            A final question remains as to whether our industrial appeals  
26        judge was correct in ordering the Department to recover the \$510.00  
27        paid Ms. Peterson from any future benefits due her on any claim with  
28        the State Fund or self-insurer. We conclude that our industrial  
29        appeals judge was incorrect. RCW 51.32.240(1) is reasonably clear. It  
30        states that recoupment **may** be made from any future payments due to the  
31        recipient. It does not state that recovery **shall** be made from future  
32        payments. The word "may" indicates a permissive condition, a grant of

1 power to choose among alternatives. The Legislature intended the words  
2 to have different meanings: "may" being discretionary while "shall"  
3 being mandatory. State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d  
4 196 (1985). We hold that RCW 51.32.240(1) gives the Department the  
5 option to recover amounts paid by clerical error, mistake of identity,  
6 innocent misrepresentation, or circumstance of a similar nature from  
7 future benefits due the recipient on any claim with the State Fund or  
8 self-insurer, but does not mandate such an approach.

9 After consideration of the Proposed Decision and Order, the  
10 Petition for Review filed thereto, and a careful review of the entire  
11 record before us, we make the following:

12 **FINDINGS OF FACT**

- 13 1. On August 29, 1986, the Department of Labor  
14 and Industries received an application for  
15 benefits from the claimant, Martina Peterson,  
16 alleging that she sustained an injury on  
17 August 5, 1986, while in the course of her  
18 employment with Lake Vue Gardens, Inc. The  
19 claim was allowed and various benefits  
20 provided until the claim was closed on  
21 February 29, 1988.

22  
23 On June 7, 1991, Martina Peterson filed an  
24 aggravation application and successfully  
25 reopened her claim. She received further  
26 treatment and other benefits until the fall of  
27 1993. On November 4, 1993, the Department  
28 issued an order closing the claim with a  
29 permanent partial disability award equal to  
30 Category 2 of permanent dorso-lumbar and/or  
31 lumbosacral impairments. No appeal was taken  
32 from that order.

33  
34 On January 12, 1994, the Department issued an  
35 order modifying its order of November 4, 1993,  
36 from a final to an interlocutory order, and  
37 closed the claim without additional award for  
38 permanent partial disability. In addition,  
39 the Department declared that an overpayment of  
40 \$510.00 had resulted because of an Office of

1 Support Enforcement lien.  
2

3 On February 15, 1994, the claimant filed a  
4 Notice of Appeal with the Board of Industrial  
5 Insurance Appeals. On April 6, 1994, the  
6 Board issued an order granting the appeal,  
7 assigned Docket No. 94 0991 to the appeal, and  
8 directed that further proceedings be held on  
9 the issues raised therein.

10  
11 2. On August 5, 1986, Martina Peterson suffered  
12 an injury while in the course of her  
13 employment with Lake Vue Gardens, Inc.

14  
15 3. On November 4, 1993, the Office of Support  
16 Enforcement entered a lien against Ms.  
17 Peterson's industrial insurance benefits in  
18 the amount of \$255.00.

19  
20 4. On November 4, 1993, the Department of Labor  
21 and Industries erroneously added the sum of  
22 \$255.00 to Ms. Peterson's permanent partial  
23 disability award, resulting in her receipt of  
24 the sum of \$3,630.00, rather than the correct  
25 sum of \$3,120.00. Ms. Peterson received  
26 \$510.00 more than she would have received had  
27 the Department of Labor and Industries  
28 properly deducted the Office of Support  
29 Enforcement lien amount.  
30

31 5. No person aggrieved by the Department's order  
32 of November 4, 1993, filed an appeal with the  
33 Board and/or Director of the Department of  
34 Labor and Industries within the 60-day time  
35 provision of RCW 51.52.060. The Department  
36 did not take action to modify or set aside the  
37 November 4, 1993 order within the 60-day  
38 appeal period.  
39

40 **CONCLUSIONS OF LAW**

41  
42 1. The Board of Industrial Insurance Appeals has  
43 jurisdiction over the parties and the subject  
44 matter to this appeal.  
45

46 2. Under the provisions of RCW 51.32.240, Ms.  
47 Peterson shall reimburse the Department of  
48 Labor and Industries the amount of \$510.00  
49 received because of clerical error made by the  
50 Department of Labor and Industries in paying  
51 Ms. Peterson's permanent partial disability  
52 award.



1  
2 3. The Department order of November 4, 1993,  
3 which closed the claim with an award for a  
4 permanent partial disability equal to Category  
5 2 of permanent dorso-lumbar and/or lumbosacral  
6 impairments, became final and binding on all  
7 parties inasmuch as no timely appeal or  
8 protest was filed to said order. That portion  
9 of the Department order dated January 12,  
10 1994, which attempted to modify the November  
11 4, 1993 order from a final to an interlocutory  
12 order, is void.  
13

14 4. The order of the Department of Labor and  
15 Industries dated January 12, 1994, which  
16 modified its order dated November 4, 1993,  
17 from a final to an interlocutory order, closed  
18 the claim with no additional permanent partial  
19 disability award, and which declared that an  
20 overpayment of \$510.00 had occurred because of  
21 an Office of Support Enforcement lien, is  
22 incorrect, and is reversed, and this matter is  
23 remanded to the Department of Labor and  
24 Industries with directions to issue an order  
25 declaring that Ms. Peterson received an  
26 overpayment of benefits in the amount of  
27 \$510.00, as a result of a lien from the Office  
28 of Support Enforcement; that the Department  
29 shall thereafter take such other and further  
30 action as may be appropriate in recovering the  
31 \$510.00.  
32

33 It is so ORDERED.

34  
35 Dated this 10th day of March, 1995.

36  
37 BOARD OF  
38 INDUSTRIAL INSURANCE APPEALS

39  
40  
41 /s/ \_\_\_\_\_

42 -  
43 S. FREDERICK FELLER Chairperson

44  
45  
46 /s/ \_\_\_\_\_

47 -  
48 FRANK E. FENNERTY, JR. Member

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50  
51 /s/ \_\_\_\_\_  
52 -

ROBERT L. McCALLISTER

Member