Carlson, Brian

TREATMENT

Wage rate

When a previously injured worker files a claim for injuries incurred while working at a light-duty job (at a reduced rate of pay), the wage rate at the time of injury for the second claim will be based on the wages earned while performing the light-duty job. ***….In re Brian Carlson,* BIIA Dec., 16 16567 (2017)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: BRIAN K. CARLSON	)	**DOCKET NO. 16 16567**
	)	
CLAIM NO. AX-47839	)	**DECISION AND ORDER**

In November of 2015, Brian K. Carlson sustained an industrial injury to his left shoulder while working for Tacoma Transload, Inc. The Department of Labor and industries set Mr. Carlson's wages as of the date of his injury at $2,628.84 a month, further concluding that he was married and had four children. Mr. Carlson asserts that his wages should be calculated based on those from an earlier claim with Tacoma Transload, Inc. Our industrial appeals judge reversed the Department's wage-rate determination and directed that Mr. Carlson's wages should be based on his earnings under the prior claim. Both the employer, Tacoma Transload, Inc., and Retrospective Rating Group No. 10989 argue that Mr. Carlson's wages in the present claim should be calculated on what he was paid at the time of the industrial injury in November 2015 as required by RCW 51.08.178(1). We agree. The Department's order of April 1, 2016, is **AFFIRMED.**

DISCUSSION

Our record shows that Mr. Carlson had been employed by Tacoma Transload, Inc., for a period of time prior to August 2014 as a semi-truck driver hauling shipping containers from Ellensburg, Washington to either Seattle or Tacoma. In August 2014 he filed a claim for benefits based on a claim for occupational disease due to medical conditions involving his back. This claim was allowed. In order to accommodate the physical restrictions relating to this claim Tacoma Transload, Inc., provided lighter duty work that essentially amounted to a reduction in Mr. Carlson's hours. The only evidence of his wages relating to this first claim came from Mr. Carlson. He testified that he was making approximately $4,200 a month.

Mr. Carlson testified that he missed about a month of work and then returned to the lighter duty position. He worked at this position from approximately September 2014 through the date of injury in the present appeal, November 5, 2015. His wages in this lighter duty position and from all employments was $2,628.84 a month. The total wages included healthcare benefits, a prorated bonus from Tacoma Transload, Inc., and a miniscule amount from a part-time job.

The November 5, 2015 industrial injury occurred when Mr. Carlson slipped from the top step of the cab of the truck he was driving and fell to the pavement, injuring his left shoulder. Following the industrial injury Tacoma Transload, Inc., provided additional modifications to Mr. Carlson's duties to allow for the additional restrictions relating to the injury to his shoulder. As of February 15, 2016,

Mr. Carlson was no longer on physical restrictions relating to the injury to his left shoulder but was still on physical restrictions relating to his back condition from his prior claim. He continues to have physical restrictions relating to his prior back claim, which apparently is still open.

For ease of reference and to avoid confusion we will refer to the two claims involved in this appeal in their order of filing. The "first claim" refers to Mr. Carlson's back claim and the "second claim" refers to his shoulder claim. Both claims were open simultaneously.

Mr. Carlson appealed the Department's wage calculation order in his second (shoulder) claim arguing that but for his first claim he would have been making a higher wage at the time of his second claim. Our industrial appeals judge agreed and reversed the Department order and directed the Department to recalculate Mr. Carlson's wages in the second claim based on the wages paid under the first claim.

Tacoma Transload, Inc., and its retrospective rating group argue that Mr. Carlson's wages should be calculated based on his wages as of the date of his industrial injury in the second claim, citing RCW 51.08.178(1).

This Board has considered the question of wage calculation in circumstances similar to the present case in the matter of *In re Eva Sadecki,* BIIA Dec., 06 11468 (2007). Ms. Sadecki injured her neck in a "first claim." While the first claim was still open she incurred a second injury to her low back and filed a "second claim." As in Mr. Carlson's case, both claims were open simultaneously. The Board held where wages in second claim were reduced as a result of a first or prior claim, the wage rate for the purposes of time-loss compensation is, nonetheless, the wages that were actually paid at the time of the second injury.

Ms. Sadecki was also receiving loss of earning power benefits from her first claim. At the time of her second claim she was receiving both reduced wages and loss of earning power benefits. She asked that the Board include the amount of her loss of earning power benefits as part of her total compensation for the purpose of calculating wages for her second claim.

In rejecting Ms. Sadecki's argument the Board cited a prior decision of *In re Ronnie L Sanders*.[1] Mr. Sanders' situation also involved a reduction in wages due to a prior or first claim. He argued that loss of earning power benefits should be included as a part of the wage calculation under a second claim in order to mitigate the lost income resulting from the first claim. The Board held that the

[1] *In re Ronnie L Sanders*, Dckt. No. 99 14713 (December 5, 2000).

Legislature had not intended that the wage calculation should include loss of earning power benefits paid to him from a prior claim.

The Board also held in *Sanders* that the injured worker could have received both loss of earning power benefits from the first claim and time-loss compensation under a second claim at the same time.[2] Importantly, as it relates to Mr. Carlson, the Board noted that Mr. Sanders had allowed the first claim to close and that he could not further claim loss of earning power benefits except as part of an application to reopen that claim. We have no information in the record of evidence that Mr. Carlson was receiving, or that he even applied for, loss of earning power benefits under the first claim. It is irrelevant to our decision in the present appeal whether or not Mr. Carlson was receiving loss of earning power benefits under the first claim at the time he was injured under the second claim. He may be entitled to loss of earning power benefits under the first claim but such benefits do not and would not impact the wage calculation under this, the second, claim.

It appears that our industrial appeals judge tried to distinguish *Sadecki*, *Sanders,* and *Larson* by finding that Mr. Carlson was not entitled to loss of earning power benefits under the first claim; this apparent distinction serving as a basis to support a finding that Mr. Carlson's wages for the second claim should be the same as for the first claim. The statutory scheme under RCW 51.08.178(1) makes no such distinction. Further, the record of evidence provides no factual basis for a determination that Mr. Carlson was not entitled to loss of earning power benefits under the first claim. If anything, the record of evidence suggests that he may have been eligible for these benefits.

Loss of earning power benefits are payable to an injured worker, prior to closure of a claim, where the worker has sustained a loss of earning capacity of at least 5 percent from the wages earned at the time the claim was filed.[3] For example, Ms. Sadecki sustained a significant reduction (more than 5 percent) in earning power or capacity as a result of her first claim. While the first and second claims were open she was entitled to receive loss of earning power benefits payable under the first claim. She was also entitled to receive temporary total disability benefits (time-loss compensation) based exclusively on her wages at the time of her injury giving rise to the second claim.

Mr. Carlson's entitlement to loss of earning power benefits under the first claim is not on appeal. Based on the limited record we have it would appear that Mr. Carlson's **reduction** in wage-earning capacity was greater than 5 percent following the first claim. He testified that he was making

[2] *Sanders*, citing *In re Lloyd Larson*, BIIA Dec., 86 0479 (1988).
[3] RCW 51.32.090(3)(a) & (b).

approximately $4,200 a month at the time of the first claim and the Department determined that his wages at the time of the second claim were $2,628.84 a month; the difference is obviously more than 5 percent. This calculation, alone, would not be sufficient to conclude that loss of earning power benefits are payable. For example, in an appeal regarding loss of earning power benefits it would be necessary to show more than a mere differential in wage prior to and following an industrial injury. The Board has held that, on appeal, proof of loss of earning power or capacity requires:

> (1) lay or expert testimony establishing pre-injury earning capacity; (2) expert testimony establishing post-injury earning capacity; (3) expert testimony establishing that a reduction, if any, in post-injury earning capacity is causally related to residuals of the industrial injury.[4]

The Department properly calculated Mr. Carlson's wages in the second (present) claim based on the wages he was receiving as of the date of his industrial injury on November 5, 2015. Mr. Carlson argues that his wages were temporarily reduced as a result of his first claim. In essence, he claims that he is entitled to some compensation for this reduction in his earning potential at the time of his second claim. The statutorily provided remedy for a temporary reduction in earning capacity, while a claim remains in an open status, is loss of earning power benefits. The first claim is not on appeal and we have no jurisdiction to address the administration of that claim.[5]

We distinguish our decision from that of the industrial appeals judge by emphasizing that the entitlement, **or lack of entitlement to loss of earning power benefits**, under the first claim would not alter the calculation of wages as set forth in RCW 51.08.178(1). Mr. Carlson's wages at the time of his industrial injury on November 5, 2015, were correctly calculated based on the wages he was receiving from all employments as of the date of that injury.

The employer and retrospective rating group further argue that the Department incorrectly calculated the bonus paid to Mr. Carlson. Mr. Carlson apparently received an annual bonus of $250. The Department apportioned that bonus at the rate of $54.16 a month. Dividing the annual bonus over a 12-month period would reduce the monthly amount of the bonus to $20.83 a month. However, an injured worker cannot do worse on appeal–in the absence of an employer appeal–than the benefits provided by the order on appeal.[6] We can only affirm the Department order dated April 1, 2016, as neither the employer nor the retrospective rating group appealed that order.

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[4] *In re Patricia Heitt,* BIIA Dec., 87 1100 (1989) at 2.
[5] *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970).
[6] *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956).

DECISION

In Docket No. 16 16567, the claimant, Brian K. Carlson, filed a protest with the Department of Labor and Industries on April 18, 2016, from an order dated April 1, 2016. The Department forwarded the protest to the Board of Industrial Insurance Appeals as an appeal. In this order, the Department affirmed its order dated March 25, 2016, where it determined the wage for the job of injury was based on the monthly salary of $2,372.92 and that Mr. Carlson was married with four children. The worker's total gross wage received from all employments at the time of the November 5, 2015 injury was $2,628.84 a month. This order is correct and is **AFFIRMED**.

FINDINGS OF FACT

1. On September 19, 2016, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Under Claim No. AX-47839, the subject of the appeal in Docket No. 16 16567: Mr. Carlson submitted a claim for an industrial injury in the course of his employment with Tacoma Transload, Inc., on November 5, 2015. Mr. Carlson slipped on the top step of the cab of his tractor rig while exiting the vehicle. He fell to the pavement and sustained an injury to his left shoulder.

3. At the time of the industrial injury, Mr. Carlson had been working in a lighter duty position with Tacoma Transload, Inc., since September 2015. The lighter duty position was an accommodation relating to physical restrictions for a prior industrial insurance claim. The prior claim was open at the time of the industrial injury on November 5, 2015.

4. As of the November 5, 2015 industrial injury, Mr. Carlson's wage rate was $2,372.92 a month. Tacoma Transload, Inc., contributed $195.08 a month for health care benefits and $54.16 a month for bonuses; for a total gross monthly wage from Tacoma Transload, Inc., of $2,622.16.

5. As of November 5, 2015, Mr. Carlson had a second, part-time job as a substitute bus driver and earned $6.68 a month. His total wages at the time of the industrial injury from all employments was $2,628.84.

CONCLUSIONS OF LAW

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

2. Brian Carlson's monthly wages from all employments at the time of injury of November 5, 2015, under Claim No. AX-47939 were correctly calculated within the meaning of RCW 51.08.178(1).

3. The Department order dated April 1, 2016, is correct and is **AFFIRMED.**

Dated: September 13, 2017.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

Addendum to Decision and Order
In re Brian K. Carlson
Docket No. 16 16567
Claim No. AX-47839

Appearances

Claimant, Brian K. Carlson, Pro Se

Employer, Tacoma Transload, Inc., by Compwise, per Scott Dehem

Retrospective Rating Group, Association of WA Business - Transportation & Warehousing #10989, by Compwise, per Scott Dehem

Department of Labor and Industries, by Office of the Attorney General, per James A. Yockey

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 retrospective rating group and the employer filed a timely Petition for Review of a Proposed Decision and Order issued on June 12, 2017, in which the industrial appeals judge reversed and remanded the Department order dated April 1, 2016.