Lacy, Flora

DEPARTMENT

Authority to correct underpayments of benefits

Authority to recoup overpayment of benefits

The Department's failure to include employer-paid health care benefits in a wage calculation is an adjudicator error as referenced in RCW 51.32.240 because the adjudicator must make a decision as to whether the wages should include the employer-paid health insurance benefit in the monthly wage calculation. The failure to look at the appropriate documents is not a clerical error. **….*In re Flora Lacy*, BIIA Dec., 08 21768 (2009)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: FLORA L. LACY	)	**DOCKET NO. 08 21768**
	)	
CLAIM NO. Y-990275	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Flora L. Lacy, Pro Se

Employer, Enterprise for Progress in the Community (EPIC), by
Integrated Claims Management, per
Mark Fowble

Department of Labor and Industries, by
The Office of the Attorney General, per
Kevin M. Hartze, Assistant

The claimant, Flora L. Lacy, filed an appeal with the Board of Industrial Insurance Appeals on December 19, 2008, from an order of the Department of Labor and Industries dated December 10, 2008. In this order, the Department held that it cannot reconsider the order dated February 21, 2008 because the protest was not received within the sixty-day time limit and the order is final and binding. The Department order is **AFFIRMED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on September 1, 2009, in which the industrial appeals judge reversed and remanded the order of the Department dated December 10, 2008. This order addresses the only contested issue of this appeal, whether or not the Department can reconsider the wage-set order of February 21, 2008, in which the Department failed to include employer-paid health care benefits in the order, and whether that failure is a clerical or an adjudicator error.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. We have granted the Department's Petition for Review because we do not agree with our industrial appeals judge that the Department's error of omitting health care benefits in a wage-set order is a clerical error. Rather, we conclude that the Department's determination that there were no health care benefits to include in the monthly wage calculation was adjudicator error.

According to RCW 51.32.240(2), the Department can readjust payments of benefits for up to a year when it has failed to pay benefits because of clerical error. Under these same provisions, however, the recipient of benefits may not seek an adjustment of benefits because of adjudicator error. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment. RCW 51.52.050 explains that the way to seek modification of an order containing adjudicator error is to file an appeal within sixty days of when the order is communicated. Ms. Lacy failed to file an appeal within sixty days of the order of February 21, 2008 being communicated to her. That order became final and binding. Ms. Lacy did not protest or appeal that order until December 5, 2008, after she had contacted her claims manager when she stopped receiving health insurance through her former employer. Ms. Lacy wanted the Department to assist her in paying for the COBRA benefit to be able to continue her health benefits. She testified that it was at this time that her claims manager informed her that he had made a mistake but could not change it, and she would have to appeal to the Board.

Ms. Lacy worked at two jobs at the time of her injury. When she filed for industrial insurance, she included information on her application that she was receiving health care benefits. The Department of Labor and Industries issued an order on February 21, 2008, that set her wages from the job of injury and the second job, setting forth the wage from each job, the number of hours worked per day, and the number of days worked per month for each job. **For each job listed**, the order stated that there were no health care benefits, tips, bonuses, overtime, or housing/board/fuel that the Department was including in either monthly wage. The order found Ms. Lacy's total gross wage to be $2,745.26, ($2,680.80 + $64.46). The order contained the language that the order would become final 60 days from the date it was communicated to her unless she filed a request for reconsideration or an appeal. Ms. Lacy sought no further explanation of the order from the Department until December 5, 2008, long after the order became final and binding.

In the Department's first order dated September 18, 2006, the Department paid Ms. Lacy time-loss compensation benefits, and set her time-loss compensation rate based on Ms. Lacy being single, with no children, and monthly wages of $2,680.80 from all employment on August 26, 2006. Apparently, the Department did not consider wages from Ms. Lacy's second job in this wage-set order. However, as this was an interlocutory order, the Department was able to reconsider the wage-set issue in the February 21, 2008 order, which was a determinative order.

When the Department issued the final wage-set order on February 21, 2008, an adjudicator had to manually enter whether Ms. Lacy was receiving any wages for board, tips, bonuses, or

health care benefits that should be included in the monthly wage calculation. The Department admits that it had the correct information on her application for industrial insurance benefits, and that at the time of injury Ms. Lacy was receiving employer-paid health insurance. For whatever reason, the order omitted the health care benefit amount and instead stated "None." The omission or the inclusion of a dollar amount for any of these items requires adjudicator oversight because the adjudicator must make a decision as to whether the wages should include the employer-paid health insurance benefit, tips, bonuses, overtime, or board in the monthly wage calculation.

The order of February 21, 2008 determined her monthly wage from her two employments to be $2,680.80 per month for the job of injury, and $64.46 per month for the second job, for a total gross wage of $2,745.26. The order also sets forth how the monthly calculation for each job was reached, citing the hourly rate used, the number of hours per day, and the number of days per month worked for each job. Additionally, the Department's calculation for each job shows that the Department did not include an additional amount in the monthly wage for health care benefits. If Ms. Lacy was confused about the significance of the order, she could have made an inquiry with the Department. But it was not until December 5, 2008, almost ten months later, that she notified the Department of Labor and Industries, in writing, that the order of February 21, 2008, did not take into account the health care benefit she was receiving at the time of her injury, a benefit amount that should have been included by the Department in her monthly wage.

Our industrial appeals judge believed that the Department's error could be properly considered a "clerical" error rather than an "adjudicator" error. His reasoning is that because the adjudicator could have just hit the wrong key in entering "None" for health care benefit instead of hitting the keys for the appropriate health care benefit amount contained on her application, this was more clerical than actually making a determination or exercising judgment. We disagree.

We have held that it is clerical error when an order closed a claim with a permanent partial disability for a left-sided impairment rather than a right-sided impairment. The error of omitting the health care benefit amount in a monthly wage calculation is not like making an error when paying a permanent partial disability award for a left-sided disability when the disability was on the right side. The difference between the two types of error is that there is no adjudicator judgment being applied when the adjudicator mistakenly uses "right" rather than "left" in an order. The adjudicator "judgment" applied in such an order is in determining the **amount** of the permanent partial disability, **not** which side the disability is on. Applying judgment when determining a worker's monthly wage at the time of injury includes a judgment about whether the worker was receiving

employer paid health care benefits that should be included in the monthly wage amount. When the adjudicator writes or types in the order that the amount of health care benefits to be included in the monthly wage is "None", that is an adjudication, requiring the adjudicator to decide whether to include any benefit amount, and if so, in what amount. In Ms. Lacy's case, the adjudicator made a mistake in failing to consider the health care benefit amount Ms. Lacy was receiving from one of her employers at the time of injury. That omission, however, was adjudicator error requiring the adjudicator to use judgment in reaching the determination. Failing to look at the appropriate document that had the information that Ms. Lacy was receiving a health care benefit and include that amount in the monthly wage calculation was not a clerical error.

Our industrial appeals judge concluded that it must be a clerical error because to conclude otherwise would mean that any mistake caused by someone at the Department who fails to look at something in the file, would be an adjudicator error "that could not be remedied." That is incorrect. The remedy that an injured worker or an employer has when there is adjudicator error contained in a Department order is to appeal the order within sixty days from the date the order is communicated. Ms. Lacy was apprised by the appeal language in the February 21, 2008 order that the order would become final if she did not protest or appeal in writing within sixty days of when the order was communicated. A written appeal within sixty days was her recourse if she wanted to correct the order of February 21, 2008. Her protest, received on December 5, 2008, was not timely. The Department correctly determined that it had no jurisdiction to correct its error contained in the final order of February 21, 2008.

In sum, we conclude that the record supports the determination that the Department was unable to reconsider the order of February 21, 2008 because the claimant's protest was not received within the sixty-day time limitation. The error contained in that order was adjudicator error, and RCW 51.32.240(2) does not permit the Department to adjust Ms. Lacy's monthly wage amount to include health care benefits after the order has become final.

FINDINGS OF FACT

1. On August 31, 2006, the Department of Labor and Industries received Flora Lacy's Application for Benefits, in which she alleged an injury on August 26, 2006, while in the course of her employment with EPIC. The claim was allowed and benefits were paid. On February 21, 2008, the Department issued an order setting the claimant's monthly wage based on two jobs at the time of injury, showing the hourly rate paid for each job, the number of hours worked per day, and the number of days

worked per month for each job, with no additional amounts added to include health care benefits for either job.

Ms. Lacy received the order of February 21, 2008, within a few days of when the Department issued it. On December 5, 2008, Ms. Lacy requested, in writing, that the Department adjust her wage rate to include the employer provided health care benefit. On December 10, 2008, the Department issued an order stating it could not reconsider the order dated February 21, 2008, because the protest was not received within the sixty-day limitation. On December 19, 2008, the Board of Industrial Insurance Appeals received Ms. Lacy's appeal from the December 10, 2008 order. On January 21, 2009, the Board granted the claimant's appeal under Docket No. 08 21768, and agreed to hear the appeal.

2. On August 26, 2006, Ms. Lacy sustained an industrial injury for which she was entitled to industrial insurance benefits. In her Application for Benefits submitted to the Department of Labor and Industries, Ms. Lacy included information that at the time of her injury she received employer-provided health care benefits. At the time of her injury, Ms. Lacy had two jobs.

3. The Department issued an order on February 21, 2008, that determined Ms. Lacy's gross total monthly wage at the time of injury. The order stated that her wage was set by taking into account the following: The wage for the job of injury based on $11.17 per hour, 12 hours per day, 20 days per month, which equaled $2,680.80 per month, additional wage for the job of injury to include no health care benefit, tips, bonuses, overtime, or housing/board/fuel. The wage for the second job is based on $13.96 per hour, averaging .21 hours per day, 5 days per week, which equaled $64.46 per month, nothing for health care benefits, tips, bonuses, overtime, or housing/board/fuel. The total gross wage is $2,745.26 per month. The worker's marital status on the date of this order was single with no children.

4. Ms. Lacy did not protest or appeal the February 21, 2008 order until December 5, 2008, when the Department received, in writing, her request to adjust her wage rate to include her employer-paid health care benefit.

5. The Department's omission of the health care benefit in the wages of the job of injury, calculated in the provisions of the February 21, 2008 order, was an adjudicator error, not a clerical error, because in setting wages the order required adjudicator judgment to determine whether the

worker received a health care benefit at the two jobs, and if so, in what amount, and then to manually enter it in the computer.

CONCLUSIONS OF LAW

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

2. Ms. Lacy's protest on December 5, 2008, to the provisions of the February 21, 2008 order, was not timely, and pursuant to RCW 51.52.050, the order dated February 21, 2008, setting her wages at the time of her industrial injury and not including the employer-provided health care benefit amount in that wage calculation, is final and binding.

3. The Department's error in the February 21, 2008 order, in concluding that there were no health care benefits to be included in either of the wages from Ms. Lacy's two jobs at the time of injury, was an "adjudicator" error within the meaning of RCW 51.32.240(2).

4. The order of the Department of Labor and Industries dated December 10, 2008 is correct and is affirmed.

Dated: December 8, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
LARRY DITTMAN Member