Rice, Jimmy

BURDEN OF PROOF

Employer appeal

In an employer's appeal, the employer must present a prima facie case which includes the fact that it filed a timely appeal. If the defending party asserts the affirmative defense of res judicata, the defending party has the burden of establishing the facts supporting the defense. **….*In re Jimmy Rice*, BIIA Dec., 12 14962 (2013)**

RES JUDICATA

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JIMMY R. RICE	)	**DOCKET NO. 12 14962**
	)	
CLAIM NO. AG-58632	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING FOR**
	)	**FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Jimmy R. Rice, by
Putnam, Lieb, per
Wayne Lieb

Employer, Falcon Waterfree Technologies, by
AMS Law, P.C., per
Aaron K. Owada

Department of Labor and Industries, by
The Office of the Attorney General, per
Kaylynn What, Assistant

The employer, Falcon Waterfree Technologies, filed an appeal with the Board of Industrial Insurance Appeals on April 20, 2012, from an order of the Department of Labor and Industries dated March 12, 2012. In this order, the Department affirmed an October 11, 2011 order in which it allowed the claim for a March 12, 2009 industrial injury and for occupational asthma due to exposure to ammonia gas on the job. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

OVERVIEW

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. Falcon Waterfree Technologies filed a timely Petition for Review of a March 1, 2013 Proposed Decision and Order in which the industrial appeals judge dismissed the employer's appeal for failure to make a prima facie showing that the October 11, 2011 Department order was timely protested or appealed.

The deadline for filing a Petition for Review was extended to April 15, 2013. On April 25, 2013, the claimant, Jimmy R. Rice, filed a request addressed to the industrial appeals judge seeking adjudication of his outstanding Motion for Fees and Costs. On May 2, 2013, Mr. Rice filed Claimant's Motion to Supplement Record with the discovery deposition of Michael Dwyer, and Claimant's Response to Employer's Petition for Review.

We have granted review because the industrial appeals judge erroneously required the employer to make a prima facie showing that it had timely protested or appealed the October 11, 2011 order in which the Department allowed the claim and then dismissed the appeal when the employer failed to satisfy that burden. Res judicata is an affirmative defense that was raised by the claimant. Mr. Rice therefore had the burden of going forward and proving that the October 11, 2011 allowance order was final and binding. CR 8(c); *In re Daniel A. Gilbertson*, Dckt. No. 89 2865 (November 7, 1990); *Luisi Truck Lines v. Wash. Utils. & Transp. Com*, 72 Wn.2d 887, 894 (1967); *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 865 (2002).

The Proposed Decision and Order is vacated and the appeal is remanded for further proceedings. On remand the industrial appeals judge shall address any pending motions. In addition, we note that there are duplicate Exhibit Nos. 1. At the December 7, 2012 hearing, the industrial appeals judge admitted the discovery deposition of Matthew Korcinsky as Exhibit No. 1. The other Exhibit No. 1 is a January 4, 2012 memo from Tina Bryant to Sean at Falcon Waterfree Urinals, and that exhibit is identical to Exhibit No. 2. Both were offered at the December 10, 2012 hearing. On remand the industrial appeals judge shall sort out the confusion.

There is also the question of whether the industrial appeals judge should have permitted the employer to present the testimony of Shawn Switzer by telephone regarding the employer's receipt of the October 11, 2011 order. The industrial appeals judge denied the employer's request for telephonic testimony and the employer was unable to secure Mr. Switzer's personal attendance, which contributed to the dismissal of its appeal. We believe the industrial appeals judge should have permitted Mr. Switzer to testify by telephone. However, because we are vacating the Proposed Decision and Order for other reasons and remanding for further proceedings, the industrial appeals judge will have the opportunity to address this question again if it arises, based on the most current information provided by the parties.

DECISION

The Jurisdictional History prepared by Board staff and sent to the parties showed:

10-11-11 DO	
	Received 1-4-12 DO 3-10-11 is canceled. Claim for industrial injury that occurred on 3-12-09 while working for Falcon Waterfree Technologies is allowed. Worker entitled to receive treatment and benefits. (DET)
3-5-12 P&RR	Employer (Owada - Atty) DO 10-11-11 rc'vd 1-4-12
3-12-12 DO	DO 10-11-11 is AFFIRMED (Appealable Only)

On its face, the Jurisdictional History did not reveal any problem with the timeliness of the employer's protest of the October 11, 2011 order under RCW 51.52.050, which requires that a protest be filed within 60 days of the date the order was communicated to the party. The sixtieth day after January 4, 2012, fell on March 4, 2012. As provided by ER 201, we take judicial notice of the fact that March 4, 2012 was a Sunday. The employer therefore had until Monday, March 5, 2012, to file the protest. RCW 1.12.040. If, as the Jurisdictional History indicates, the employer received the order on January 4, 2012, and protested it on March 5, 2012, the protest was timely. That would mean the October 11, 2011 order has not become final and the Department had the authority to issue the subsequent March 12, 2012 order in which it affirmed the October 11, 2011 order.

However, the parties did not stipulate to the Jurisdictional History. In addition, this appeal has a rather convoluted procedural history. The current appeal in Docket No. 12 14962 was originally consolidated with nine other appeals regarding this claim. Docket No. 12 14962 is the only appeal still pending. The August 1, 2012 Interlocutory Order Establishing Litigation Schedule in the ten consolidated appeals identified timeliness issues with respect to three other appeals but not Docket No. 12 14962. A hearing was scheduled for October 16, 2012, to address the timeliness issues in the other appeals and that hearing was later rescheduled to November 26, 2012, at the claimant's request.

In the August 1, 2012 order, the industrial appeals judge required any party wishing to present testimony by telephone to file a motion unless the parties agreed to telephonic proceedings. On September 12, 2012, the employer filed a Motion to Allow Telephonic Testimony. The Department joined the employer's motion on September 10, 2012. The claimant filed his opposition on September 25, 2012. On September 28, 2012, and October 1, 2012, the Department and the employer filed replies. The motion was heard on October 4, 2012, at which point the industrial appeals judge made the following oral ruling:

> This is what I'm going to order: At this point in time I'm not going to grant the motion, but I'm going to give the parties an opportunity to -- short opportunity to provide any more detailed information that they choose to. And I wouldn't expect that -- it would be about the particular witnesses at issue and perhaps addressing some of the factors if they choose to. But, again, I wouldn't expect that any summary regarding their need for telephone testimony be more than a paragraph, and perhaps a short paragraph at that.

> And if there's an individualized identification of the information sufficient in my mind to allow their testimony by telephone, I'll be granting that. So that's my ruling.

10/4/12 Tr. at 17.

There was some further discussion on the record, with the claimant's attorney requesting that the industrial appeals judge require declarations going through all of the factors set forth in *In re Peter Kim*, BIIA Dec., 00 21147 (2002). The industrial appeals judge indicated that a paragraph and the representations of the attorneys would suffice but that he would also issue a written order once he had received submissions from the parties.

On October 31, 2012, the industrial appeals judge issued a written order in which he allowed the Department to take the testimony of Randall Bell, M.D., and Donald Schaezler, Ph.D., by telephone. In his written order, he stated:

> The Employer may not call witnesses by telephone unless it provides an individualized description of the basis for each witness's testimony by telephone. Any such description shall be filed by the employer not less than one month prior to the hearing. At the time of filing of such a description, the employer shall request a telephone conference to permit the judge to make a ruling on its request.

After the October 4, 2012 motion hearing, there were still several outstanding discovery issues, and a conference was scheduled for November 9, 2012, to address those questions. At that conference, the Assistant Attorney General indicated she wanted to clarify that the claimant was apparently now raising an issue about whether the employer had "correctly or promptly appealed the October 11, 2011 order" in Docket No. 12 149062. 11/9/12 Tr. at 6. There was some discussion regarding which party had the burden of going forward and the burden of proof on this issue. Ultimately, the employer agreed to present its evidence first even though it continued to believe that because the claimant was raising the issue the claimant had the burden of proving that the employer had not timely challenged the October 11, 2011 allowance order.

On November 19, 2012, the claimant filed a letter seeking to correct the statement of the timeliness issue in the August 1, 2012 Interlocutory Order Establishing Litigation Schedule to include: "Did the employer file a timely appeal to the Department order, allowing Mr. Rice's claim for benefits, dated October 11, 2011?" On November 21, 2011, the employer filed its second amended witness confirmation, substituting Shawn Switzer as a witness. The letter stated:

> As Mr. Switzer is not in the State of Washington we request his testimony be taken by telephone on Monday, November 26, 2012. Mr. Switzer's

> testimony is expected to last lest (sic) than 30 minutes and pertains to his communications with the Department of Labor and Industries and the Department's acceptance of Mr. Rice's claim. We do not believe it is judiciously feasible to bring Mr. Switzer to Washington for such limited testimony.

The November 26, 2012 timeliness hearing ended up being canceled because the employer's attorney was hospitalized. It was re-scheduled for December 10, 2012. On December 7, 2012, two conferences were held to address pre-trial issues, one in the morning and one in the afternoon. A number of matters were discussed. Our focus is on the industrial appeals judge's handling of the employer's request to present Mr. Switzer's testimony by telephone on December 10, 2012.

The industrial appeals judge determined that the employer needed to strictly comply with his order regarding telephone testimony. He noted that the employer's request was filed only five days before the November 26, 2012 hearing and failed to include a request for a telephone conference to discuss the motion, as required by the October 31, 2012 order. The industrial appeals judge therefore denied the employer's request to present Mr. Switzer by phone but permitted the employer to present him in person the following Monday, with the claimant being allowed to take his discovery deposition just prior to hearing. The employer was unable to secure Mr. Switzer's personal attendance in Washington on December 10, 2012. In lieu of testimony, the parties entered into stipulations and submitted exhibits on the issue of whether the October 11, 2011 order was timely protested or appealed. Mr. Rice then moved to dismiss the employer's appeal for failure to make a prima facie case on that issue and the industrial appeals judge granted the motion.

We believe the employer should have been permitted to present Mr. Switzer's testimony by telephone. However, we have granted review for a more fundamental reason, to address the question of who had the burden of going forward and the burden of proof on the res judicata defense. The claimant's attorney raised the burden of proof question on November 9, 2012, when the issue of whether the employer had timely protested or appealed the October 11, 2011 order was raised. He asserted that the employer had the burden of proof on this issue. The Department disagreed, as did the employer.

Initially, the industrial appeals judge was going to require briefing on this question, but then the employer's attorney said he would present his timeliness evidence first, and the industrial appeals judge said he would give the parties flexibility to renew the issue at hearing and present argument to assist him when he wrote his order. Ultimately, the employer was unable to present

any witnesses on timeliness at the December 10, 2012 hearing, so the parties resorted to stipulations and exhibits; the claimant moved to dismiss the employer's appeal; and the industrial appeals judge granted the motion, relying on the proposition that: "In an employer appeal, the employer must first present evidence sufficient to make a prima facie case. *In re Christine Guttromson*, BIIA Dec., 55,804 (1981)." Proposed Decision and Order, at 3.

Guttromson does not apply to an affirmative defense raised by Mr. Rice. For the Board to have jurisdiction over an appeal, there must be a timely appeal from a Department order. Falcon Waterfree Technologies had the burden of proving it filed a timely appeal of the March 12, 2012 Department order. The Board file shows that it did.

Beyond that, a defending party is free to assert the affirmative defense of res judicata. If the issue raised by the appellant has already been decided by a prior final Department order, then the Board does not have subject matter jurisdiction to address the same issue again and the appeal must be dismissed. But it is well established that it is up to the party asserting the affirmative defense of res judicata to prove it. CR 8(c); *In re Daniel A. Gilbertson*, Dckt. No. 89 2865 (November 7, 1990); *Luisi Truck Lines v. Wash. Utils. & Transp. Com*, 72 Wn.2d 887, 894 (1967); *Hisle v. Todd Pac. Shipyards*, 151 Wn.2d 853, 865 (2002). Because he was the party raising the res judicata defense, Mr. Rice had the burden of proving that the October 11, 2011 order was a final and binding determination on the question of claim allowance.

Because the industrial appeals judge placed the burden on the wrong party, the March 1, 2013 Proposed Decision and Order is vacated. This order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. The appeal is remanded to the hearings process, as provided by WAC 263-12-145(4), for further proceedings as indicated by this order. On remand, Mr. Rice shall have the burden of going forward and the burden of proof with respect to his affirmative defense of res judicata. The industrial appeals judge shall also address outstanding motions, and correct the problems we have noted with the exhibits. Unless the appeal is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party

aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104.

Dated: May 29, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
DAVID E. THREEDY Chairperson

/s/_____
JACK S. ENG Member