

## **Guerra, Richard**

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### **SUSPENSION OF BENEFITS (RCW 51.32.110)**

#### **No show fees**

Where the self-insured claims administrator advises the worker that a "no-show fee" will be assessed against the worker if the worker fails to give seven days notice that he will not attend a scheduled appointment, and the worker gives the required seven days notice, the Department is estopped from assessing the cost of the no-show fee to the worker. ....***In re Richard Guerra, BIIA Dec., 14 19746 (2015)***

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

**IN RE: RICHARD S. GUERRA** ) **DOCKET NO. 14 19746**  
 )  
**CLAIM NO. SE-37626** ) **DECISION AND ORDER**

**APPEARANCES:**

Claimant, Richard S. Guerra, by  
Busick Hamrick, PLLC, per  
Steven L. Busick

Self-Insured Employer, Clark County, by  
Law Office of Gress & Clark, LLC, per  
James L. Gress

The claimant, Richard S. Guerra, filed an appeal with the Board of Industrial Insurance Appeals on August 22, 2014, from an order of the Department of Labor and Industries dated August 14, 2014. In this order, the Department affirmed a July 24, 2014 order that directed the SIE to reduce time loss compensation benefits by the no-show examination charge in the amount of \$547.50, because the claimant refused or failed to attend the scheduled examination on October 20, 2012, without good cause. The Department order is **REVERSED AND REMANDED**.

**DECISION**

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 August 5, 2015, in which the industrial appeals judge affirmed the Department order dated August 14, 2014. On October 16, 2015, we received the employer's response to the claimant's Petition for Review.

This order addresses the issues of this appeal, whether Mr. Guerra had good cause for failing to attend the scheduled examination on October 20, 2012, and whether a no-show fee can be assessed due to his non-appearance at the scheduled examination.

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 agree with our industrial appeals judge that Mr. Guerra did not prove he had good cause for his failure to attend the October 20, 2012 examination. Even so, we conclude that the self-insured employer is estopped from collecting a no-show fee from Mr. Guerra's time-loss

1 compensation benefits.<sup>1</sup> The self-insured employer's claim administrator, Katie DeFrang of  
2 Gallagher Bassett, scheduled Mr. Guerra for an October 20, 2012 examination with Dr. Keith  
3 Holley. She sent a letter dated September 27, 2012, to Mr. Guerra in which she informed him that  
4 she scheduled an examination with Dr. Holley on October 20, 2012. In that letter, Ms. DeFrang  
5 also informed Mr. Guerra to call the claims administrator at least seven days in advance if he could  
6 not keep the appointment, and that failure to cancel within seven days would result in a substantial  
7 fee for the no-show. Dr. Holley had examined Mr. Guerra previously for this claim on May 15,  
8 2010. Based on his experience in the previous examination with Dr. Holley, Mr. Guerra did not  
9 believe it was in his best interest to attend. He called his attorney and told him about his concerns.  
10 On October 1, 2012, Mr. Guerra's attorney sent a letter to Ms. DeFrang, informing her that  
11 Mr. Guerra would not attend another examination with Dr. Holley. Although Ms. DeFrang received  
12 the letter from Mr. Guerra's counsel indicating the claimant would not attend the scheduled  
13 examination, she did not cancel the exam.

14 Mr. Guerra acted in reliance on Ms. DeFrang's letter, and his counsel informed the employer  
15 that he would not attend the October 20, 2012 examination with Dr. Holley. Mr. Guerra would suffer  
16 injury if the self-insured employer's claim administrator were allowed to repudiate the  
17 representations made in the September 27, 2012 letter and assess a no-show fee. As in our  
18 *Aldridge* decision, in this case "estoppel is necessary to prevent a manifest injustice, and will not  
19 impair governmental functions."<sup>2</sup> The self-insured employer is estopped from assessing the cost of  
20 a no-show fee to Mr. Guerra for failing to attend the October 20, 2012 examination.

### 21 **FINDINGS OF FACT**

- 22 1. On November 4, 2014, an industrial appeals judge certified that the  
23 parties agreed to include the amended Jurisdictional History in the  
24 Board record solely for jurisdictional purposes.
- 25 2. Mr. Guerra sustained an industrial injury on November 25, 2009, when a  
26 chair he was sitting on rolled out from under him, and he fell to the floor  
27 landing on his buttocks and back. He felt an immediate sharp pain down  
28 his right leg.
- 29 3. On May 15, 2010, Mr. Guerra attended a self-insured scheduled  
30 examination with Dr. Holley.

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47 <sup>1</sup> *In re Colleen McColley Aldridge*, Dckt. No. 13 20204, 13 21703 (July 23, 2015).

<sup>2</sup> *Aldridge* at 10.

- 1 4. Mr. Guerra was not impressed with the examination or what he felt was  
2 Dr. Holley's opinion that his problem was a result of his posture. He also  
3 felt Dr. Holley did not consider the CD of an MRI he provided, and he  
4 objected to Dr. Holley's mischaracterization of his work as being in an  
5 office setting.
- 6 5. The self-insured employer, through its claim administrator, scheduled  
7 another examination with Dr. Holley to take place on October 20, 2012.  
8 In a letter dated September 27, 2012, the self-insured employer directed  
9 Mr. Guerra to attend the October 20, 2012 examination and indicated he  
10 should call the claims administrator at least seven days in advance if he  
11 could not keep the appointment.
- 12 6. Because of how he felt about and the concerns he had regarding the  
13 May 15, 2010 examination with Dr. Holley, and because he felt it would  
14 be a waste because the result would be the same, Mr. Guerra decided  
15 not to attend the October 20, 2012 examination. Mr. Guerra's counsel  
16 sent a letter dated October 1, 2012, to the claims administrator indicating  
17 Mr. Guerra would not attend the October 20, 2012 scheduled medical  
18 examination with Dr. Holley.
- 19 7. On July 24, 2014, the Department issued an order in which it directed  
20 the self-insured employer to reduce time-loss compensation benefits by  
21 the no-show examination charge of \$547.50 because Mr. Guerra failed  
22 to attend the October 20, 2012 scheduled examination without good  
23 cause.  
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#### 25 **CONCLUSIONS OF LAW**

- 26 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
27 parties and subject matter in this appeal.
- 28 2. Under RCW 51.32.110 and RCW 51.36.070, Mr. Guerra was required to  
29 submit to an examination by the physician, Dr. Holley, selected by the  
30 self-insured employer's claim administrator on October 20, 2012.
- 31 3. Mr. Guerra did not have good cause for failing to attend the  
32 October 20, 2012 scheduled examination within the meaning of  
33 RCW 51.32.110.
- 34 4. Mr. Guerra acted in reliance on the self-insured employer's  
35 representation that he needed to provide timely notice that he was not  
36 going to attend the October 20, 2012 examination. The self-insured  
37 employer is estopped from assessing an examination charge for the  
38 missed examination.  
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3 5. The August 14, 2014 Department order is incorrect, and is reversed.  
4 The matter is remanded to the Department to issue an order in which it  
5 determines that any examination charge for the October 20, 2012  
6 examination is not Mr. Guerra's responsibility.

7 Dated: November 19, 2015.

8 BOARD OF INDUSTRIAL INSURANCE APPEALS  
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13 /s/  
14 DAVID E. THREEEDY Chairperson  
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18 /s/  
19 FRANK E. FENNERTY, JR. Member  
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