

Vanzuyt, Ann

DEPOSITIONS

Filing

After taking a perpetuation deposition with the judge's permission, if the party desires to not file the deposition, opposing parties must be given the opportunity to request publication.
...*In re Ann Vanzuyt*, BIIA Dec., 15 18385 (2016)

Scroll down for order.

1 opportunity to present rebuttal testimony on this issue. Dr. Kahn's deposition taken on April 14, 2016,
2 shall be published during the hearing process on receipt.

3 Ms. VanZuyt is a 50-year-old woman who worked as a corrections deputy for Pierce County
4 for 24 years. She was fingerprinting an inmate on June 10, 2007, when the inmate went berserk,
5 grabbed Ms. VanZuyt's head, slammed it down into a table, and beat her up fairly seriously.
6 Ultimately, she had neck, low back, and shoulder surgeries.

7 Prior to the initial closing of her claim, Ms. VanZuyt had low back surgery in May 2009, at
8 which time she had a total disc replacement at L5/S1 by a Dr. Blair. After her claim was reopened in
9 2011, Ms. VanZuyt had a neck fusion (September 2012) and a shoulder surgery for a right rotator
10 cuff tear (January 2012).

11 Ms. VanZuyt testified that she had urinary incontinence issues and sexual dysfunction that she
12 relates to the low back surgery performed as treatment for her industrial injury. Although Ms. VanZuyt
13 did not list sexual dysfunction as an issue in the Notice of Appeal, nor did it appear as an issue in the
14 litigation order, Ms. VanZuyt's expert witnesses testified that she suffered sexual dysfunction as a
15 result of her low back surgery. This evidence was presented in the perpetuation depositions of
16 Richard E. Seroussi, M.D., and Claire Yang, M.D., and was not objected to by counsel for the
17 employer.

18 Counsel for the employer did not object to Ms. VanZuyt's testimony related to sexual
19 dysfunction including sensation issues in her vaginal area and an inability to achieve orgasm.
20 Because this issue was not brought before our industrial appeals judge before Ms. VanZuyt's
21 testimony, the industrial appeals judge was taken by surprise. Presumably, the industrial appeals
22 judge determined that the evidence was prejudicial to the employer despite the fact that no surprise
23 was demonstrated by counsel for the employer. Our judge then ruled that the issue was not before
24 her for determination. Although we agree that it is lamentable that the sexual dysfunction issue was
25 not raised in the Notice of Appeal or noted in the litigation order, it could very well be, as noted by
26 counsel for the claimant, that he did not feel the issue would prejudice the employer since obviously
27 the employer had been aware for a considerable period of time that Ms. VanZuyt was alleging that
28 sexual dysfunction was a condition caused by her surgery.

29 We note that as early as the 2011 IME by Dr. Kahn the employer was aware Ms. VanZuyt was
30 alleging that her sexual dysfunction condition was caused by her disc replacement surgery. In
31 response to the industrial appeals judge's questions about whether she should "make a finding about
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1 sexual dysfunction," counsel for the employer did not allege surprise related to the evidence being
2 presented by the claimant about this issue.

3 Sima D. Kahn, M.D., is an obstetrician/gynecologist who testified at the request of the
4 self-insured employer at a perpetuation deposition taken on April 14, 2016. Dr. Kahn examined
5 Ms. VanZuyt on three occasions—all at the request of the employer between 2011 and 2014. By the
6 time Dr. Kahn testified, our industrial appeals judge had already ruled that sexual dysfunction would
7 not be an issue in the appeal. Thus, when Dr. Kahn testified that Ms. VanZuyt's genital
8 desensitization or orgasmic difficulties were related to her surgery, the employer's attorney moved to
9 strike the testimony based on our judge's ruling. Dr. Kahn's testimony, especially on cross
10 examination, is not entirely favorable to the employer. The employer decided not to file Dr. Kahn's
11 deposition. The industrial appeals judge seems not to have noticed that the perpetuation deposition
12 of Dr. Kahn was never filed and the Proposed Decision and Order was issued without the benefit of
13 Dr. Kahn's testimony. According to the representation of counsel for the claimant, it was not until the
14 transcripts were ordered by her after the Proposed Decision and Order was issued, that counsel
15 became aware that the deposition had not been published or filed. Counsel now asks that we publish
16 the deposition and consider it in making a decision on the issues on appeal.

17 We were unable to find any precedent involving a deliberate failure to file a perpetuation
18 deposition at the Board. Although there are Board cases related to instances in which perpetuation
19 depositions were inadvertently not filed, we have found only one case involving a seemingly
20 deliberate failure to file a deposition. In the *White* appeal the Board stated:]

21 Although technically speaking, the employer's counsel should have moved to reopen
22 his case-in-chief when he learned that Dr. Knopp's deposition would not be published
23 by the claimant, we do not feel his failure to do so should result in the rejection of this
24 evidence. The deposition of Dr. Knopp will remain in the record as evidence offered by
the employer.¹

25 This passage seems to indicate that if a perpetuation deposition is not filed by the party
26 deposing an expert, the opposing party has the right to file the deposition. A perpetuation deposition
27 is simply live testimony taken out of the presence of the judge. Certainly, if a party calls a witness at
28 hearing and is not happy with the witness's testimony, it cannot retroactively cancel the testimony.
29 We hold that where a party elects not to file a perpetuation deposition, the party has a duty to inform
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32 ¹ *In re Peter White*, BIIA Dec., 58,734 (1982), at 2.

1 the Board and opposing counsel in order to give opposing counsel the opportunity to order the
2 deposition and have it published if the opposing party chooses to do so.

3 Because we determine that there has been no prejudice to the employer to include sexual
4 dysfunction as a condition alleged to have been caused by the industrial injury, we remand to the
5 hearing process to consider the evidence of sexual dysfunction, and to consider the deposition of
6 Dr. Kahn. In addition, because during the proceedings the industrial appeals judge ruled that there
7 would be no determination on this issue, the employer must be given the opportunity to rebut the
8 claimant's evidence in this regard and the industrial appeals judge should allow the self-insured
9 employer to present rebuttal evidence on this issue.

10 **ORDER**

11 The August 11, 2016 Proposed Decision and Order is vacated. These appeals are remanded
12 to the hearings process, as provided by WAC 263-12-145(4), for further proceedings as indicated by
13 this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new
14 Proposed Decision and Order. The new order will contain findings and conclusions as to each
15 contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may
16 petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final
17 Decision and Order of the Board within the meaning of RCW 51.52.110.

18 Dated: December 13, 2016.

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20 BOARD OF INDUSTRIAL INSURANCE APPEALS

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