

Richmond, Patricia

DEPOSITIONS

A deposition taken in accordance with WAC 263-12-115(9) may be published without the necessity of establishing the witness' unavailability under CR 32(a)(3). ...*In re Patricia Richmond*, BIIA Dec., 63,064 (1983) [dissent] [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 84-2-00893-8. Rules pertaining to deposition are now found in WAC 263-12-117.]

Scroll down for order.

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

1 **IN RE: PATRICIA RICHMOND**) **DOCKET NO. 63,064**
2)
3 **CLAIM NO. S-374876**) **DECISION AND ORDER**
4 _____

5 **APPEARANCES:**

6 Claimant, Patricia Richmond, by
7 Goodwin, Grutz and Scott, per
8 Tracy B. Madole

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10 Self-insured employer, Western Electric Company, by
11 Schweppe, Doolittle, Krug, Tausend and Beezer, per
12 Kenneth E. Rekow and Robert J. Rohan

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14 This is an appeal filed on October 1, 1982 by Western Electric Company, from an order
15 issued by the Department of Labor and Industries on August 13, 1982, which adhered to the
16 provisions of a prior order holding the claim open for authorized treatment and action as may be
17 indicated. **AFFIRMED.**

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20 **DECISION**

21 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
22 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and
23 Order issued on September 8, 1983 in which the order of the Department dated August 13, 1982
24 was affirmed. On December 15, 1983 the Board received a letter from claimant's counsel urging
25 action on the appeal, which is being treated as a reply to the employer's petition.

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27 In its Petition for Review, the employer maintains that it was error for the industrial appeals
28 judge to have published the deposition of Dr. Philip G. Lindsay, pointing out that the requirements
29 of Superior Court Rule 32(a) (3) were not satisfied by the claimant.

30 CR 32(1)(3) reads as follows:

31 "The deposition of a witness, whether or not a party, may be used by any
32 party for any purpose if the court finds: (i) that the witness is dead; or (ii)
33 that the witness resides out of the county and more than twenty miles
34 from the place of trial, unless it appears that the absence of the witness
35 was procured by the party offering the deposition; or (iii) that the witness
36 is unable to attend or testify because of age, illness, infirmity, or
37 imprisonment; or (iv) that the party offering the deposition has been
38 unable to procure the attendance of the witness by subpoena; or (v)
39 upon application and notice, that such exceptional circumstances exist
40 as to make it desirable, in the interest of justice and with due regard to
41 the importance of presenting the testimony of witnesses orally in open
42 court, to allow the deposition to be used.

1 RCW 51.52.140 specifies that except as otherwise provided in Chapter 51.52 RCW, the practice in
2 civil cases shall apply to appeals before the Board. In RCW 51.52.020, the legislature did, in our
3 view, "otherwise provide" in conferring upon the Board a grant of authority to "make rules and
4 regulations concerning its functions and procedure, which shall have the force and effect of law. . ."

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7 The Board's Rules of Practice and Procedure contained in WAC 263-12 and 263-16 give
8 deference to the rules of civil procedure in WAC 263-12-125 wherein it is stated:

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10 "Insofar as applicable, and not in conflict with these rules, the statutes
11 and rules regarding procedures in civil cases in the superior courts of
12 this state shall be followed. . ."

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14 Within its rules stands WAC 263-12-115 (7) and (8)¹
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17 ¹During the pendency of this matter before the Board on the employer's Petition for Review, the Board
18 amended WAC 263-12-115 by emergency action. The amendment was in no way prompted by the instant appeal and
19 the revised wording in no way affects the material discussion of the Board's rules relating to the presentation of
20 testimony by deposition. The new wording pursuant to the emergency rule reads:

21 "(9) Evidence by deposition. When a hearing is recessed or set over pursuant to WAC
22 263-12-115(7) or (8), or if a party volunteers or desires to take the testimony of any
23 witness in a proceeding by deposition, or if the admission of evidence cannot
24 otherwise be accomplished in a reasonably timely manner, the industrial appeals judge
25 may permit or require the perpetuation of testimony by deposition regardless of the
26 witness' availability to testify at the hearing or at a future recessed hearing. Such
27 ruling may only be given after the industrial appeals judge gives due consideration to:
28 (a) The complexity of the issues raised by the appeal, (b) the desirability of having the
29 witness' testimony presented at a hearing, (c) the costs incurred by the parties in
30 complying with the ruling, and (d) the fairness to the parties in complying with the
31 ruling. The industrial appeals judge may require that depositions be taken and
published within prescribed time limits, with each party bearing its own costs, which
time limits may be extended by the industrial appeals judge for good cause."

32 "(7) Failure to present evidence when due. If any party is due to present certain evidence
33 at a hearing or recessed hearing and, for any reason on its part, fails to present thereat
34 all of such evidence, it shall be discretionary with the industrial appeals judge as to
35 whether to conclude the hearing and issue a proposed decision and order on the
36 record, or to recess or set over the proceedings to further hearing for the receipt of
37 such evidence, or to require its presentation by way of deposition to be taken and
38 published within prescribed time limits, with each party bearing its own costs, which
time limits may be extended by the industrial appeals judge for good cause.

39 (8) Evidence by deposition. If a party volunteers or desires to take the testimony of any
40 witness in a proceeding by deposition, or if the admission of evidence cannot
41 otherwise be accomplished in a reasonably timely manner, the industrial appeals judge
42 may permit or require the perpetuation of testimony by deposition regardless of the
43 witness' availability to testify at the hearing or at a future recessed hearing. Such
44 ruling may only be given after the industrial appeals judge gives due consideration to:
45 (a) The complexity of the issues raised by the appeal, (b) the need for the industrial
46 appeals judge to personally observe the witness and evaluate the witness' demeanor
47 and credibility, (c) the costs incurred by the parties in complying with the ruling, and (d)
the fairness to the parties in complying with the rulings."

1 This rule was promulgated with recognition of the special need to keep this agency's quasi-
2 judicial procedures from becoming overly protracted. In addition, the rule permits a less rigid
3 method of securing and proffering testimony, often from physicians or other professionals whose
4 schedules sometimes are not amenable to a rigid hearing setting. Also, the ability to take
5 depositions of such witnesses had the added benefit in many cases of lowering out-of-pocket
6 expense for litigants who would otherwise shoulder the burdensome portal-to-portal fee of expert
7 witnesses, including time in waiting, which commonly occurs in the usual civil case.
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11 Despite the foregoing discussion, we are mindful that in RCW 51.52.100 there is reference to
12 proceedings before the Board requiring that no testimony at a hearing be received unless the
13 witness has been sworn to tell the truth, "or unless his or her testimony shall have been taken by
14 deposition according to the statutes and rules relating to superior courts of this state". (Emphasis
15 added). We understand the legislature in that paragraph of the statute to have been concerned
16 with the quality and reliability of proffered testimony, making certain that only sworn testimony is
17 admitted in evidence.
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21 The Supreme Court in adopting the civil rules specifically made reference to testimony taken
22 by deposition to be subject to CR 30(c). We do not construe the legislature's use of the phrase
23 "taken... according to the statutes and rules" to necessarily include that portion of the civil rules
24 relating to qualifications of use and publication. In fact CR 27(a)(3) uses a similar phrasing, "[t]he
25 deposition may then be taken in accordance with these rules", to permit a person to perpetuate
26 their own or any other person's testimony after certain showings have been made to the court upon
27 filing a verified petition. That rule makes no judgment on the use or admissibility of depositions
28 properly taken. Admissibility as evidence is governed in CR 27(a)(4) and CR 32. Similarly, we
29 perceived no intent of the legislature in RCW 51.52.100 to hamstring proceedings before this Board
30 by limiting the qualifications and use of depositions to just those circumstances covered by the civil
31 rules. To the contrary, we understand the words "taken...according to" to have been carefully
32 selected so as not to encompass all civil rules governing use and admissibility of testimony by
33 deposition.
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37 We view the deposition of Dr. Philip G. Lindsay as one for the perpetuation of his testimony,
38 and not as a discovery deposition. The employer had named Dr. Lindsay as a witness it intended
39 to present in its case-in-chief. We do not view as being significant the failure of the parties to
40 stipulate at the time the deposition was taken that it was for the perpetuation of his testimony.
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1 Based upon the foregoing, we are in agreement that the deposition of Dr. Philip G. Lindsay
2 was properly ordered published despite the failure of the claimant to meet the requirements of
3 "unavailability" set forth in CR 32(a)(3). Our Rule specifically removes "unavailability" as a
4 necessary prerequisite to use of deposition testimony. The Board has reviewed the remaining
5 evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed
6 and said rulings are hereby affirmed.
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10 The merits of this appeal present essentially two issues. First, as of August 13, 1982, did the
11 claimant have a psychiatric condition which was causally related to her industrial injury of August
12 29, 1980? If so, then was the claimant in need of further treatment as of that date for such
13 condition? The claimant presented no evidence purporting to show a need for further treatment for
14 any organic (or physical) condition causally related to her industrial injury of August 29, 1980.
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18 Much of the evidence presented by the parties has been adequately discussed in the
19 Proposed Decision and Order. However, we wish to expand on the discussion contained therein,
20 especially with respect to the issue of causal relationship.
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22 The testimony in the record fails to show a direct causal nexus between the event of August
23 29, 1980 affecting her low back and the resultant psychiatric reaction which she had.
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25 Certainly, the claimant's history showed her to respond in a similar fashion to other physical
26 traumas, even though they may have been relatively minor. For many years prior to the injury of
27 August 29, 1980, the claimant exhibited paranoid personality traits and periods of depression.
28 These conditions did not appear to have been aggravated, in the usual sense, by the collapse of
29 the claimant's chair at work on August 29, 1980. Instead, this industrial injury, as did two previous
30 ones, appears to have provided a "trigger" and to have become a "focal" point for the claimant to
31 perceive the industrial injury and the treatment she received as the cause of her psychiatric
32 problems. From a careful review of the testimony of the claimant and her husband, it is discerned
33 that the death of the claimant's mother was a more deeply stressful event in the production and
34 duration of her symptoms than the 1980 industrial injury. Nevertheless, to be compensable the
35 industrial injury need only be one of multiple proximate causes to require the compensation insurer
36 to shoulder the responsibility for treatment. Hurwitz v. Department of Labor and Industries, 38 Wn.
37 2d 332 (1951), Wendt v. Department of Labor and Industries, 18 Wn. App. 674 (1977).
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45 On balance, we believe the record does support that Ms. Richmond's August 29, 1980 injury
46 played a proximate role in the production and duration of her psychiatric abnormalities. Further, we
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1 are persuaded that such condition requires further psychotherapy to return Ms. Richmond to her
2 pre-injury state.
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4 We parenthetically note that the treatment to which the claimant is entitled should be limited
5 to correcting only the exacerbation of her pre-injury state. The obligation of the self-insured
6 employer should be to return the claimant to the psychiatric state (or level) as was present
7 immediately prior to the injury of August 29, 1980.
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10 The proposed findings, conclusions and order are hereby stricken and replaced by those that
11 follow:
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13 **FINDINGS OF FACT**

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- 15 1. On September 16, 1980, the Department of Labor and Industries
16 received an accident report alleging that the claimant, Patricia
17 Richmond, had sustained an industrial injury on August 29, 1980 while
18 in the course of her employment with Western Electric Company, a self-
19 insured employer under the Industrial Insurance Act. On October 9,
20 1980, the Department issued its order allowing the claim; medical
21 treatment was provided, and time-loss compensation paid. On July 2,
22 1981, the Department issued its order closing the claim with time-loss
23 compensation payments having been made by the self-insured
24 employer through April 19, 1981, inclusive. On July 7, 1981, the
25 claimant filed with the Department a request for reconsideration. On
26 August 13, 1981 the Department issued an order adhering to the
27 provisions of its previous order dated July 2, 1981, closing the claim.
28 On August 21, 1981, following a timely protest, the Department issued
29 an order holding in abeyance its previous order dated August 13, 1981,
30 pending further consideration. Following interlocutory action, the
31 Department issued an order on May 19, 1982, holding for naught its two
32 previous orders respectively dated July 2, 1981 and August 13, 1981,
33 and held the claim open for authorized treatment and other action as
34 may be indicated. On July 14, 1982, the employer filed with the
35 Department a letter of protest. On August 13, 1982, the Department
36 issued its order adhering to the provisions of its previous order dated
37 May 19, 1982, which had held the claim open for authorized treatment
38 and action as may be indicated. On October 1, 1982, the self-insured
39 employer filed its notice of appeal with the Board of Industrial Insurance
40 Appeals. On October 19, 1982, the Board issued its order granting the
41 appeal, assigning it Docket No. 63,064 and directed that proceedings be
42 held on the issues raised therein.
 - 43 2. On August 29, 1980, a chair collapsed under the claimant, Patricia
44 Richmond, while at work for Western Electric Company, causing her to
45 fall onto her tailbone and to injure her low back. By April 19, 1981, and
46 to and including August 13, 1982, the claimant's organic condition
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1 involving her low back was fixed, and the claimant was not in need of
2 further treatment therefor.

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4 3. On and prior to August 29, 1980, the claimant suffered from psychiatric
5 conditions involving paranoia and depression, both of which had
6 previously been exacerbated by two previous industrial injuries
7 sustained by the claimant while employed by Western Electric
8 Company. During those two exacerbations, the claimant had received
9 treatment for these psychiatric problems and had missed extensive time
10 from work.
- 11 4. The claimant's two-pre-existing psychiatric conditions, paranoia and
12 depression, were exacerbated as a result of her industrial injury of
13 August 29, 1980.
- 14 5. As of August 13, 1982, the claimant was in need of further psychiatric
15 treatment, for the causally related exacerbation of her two pre-existing
16 psychiatric conditions.
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18 **CONCLUSIONS OF LAW**

19 Based upon the foregoing findings of fact, the following conclusions are entered:
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- 21 1. The Board of Industrial Insurance Appeals has jurisdiction over the
22 parties and the subject matter to this appeal.
- 23 2. Under the provisions of RCW 51.36.010, the claimant was entitled to
24 further treatment, for the exacerbation of her two pre-existing psychiatric
25 conditions, paranoia and depression, until those two conditions are
26 returned to the state or level as they existed immediately prior to August
27 29, 1980.
- 28 3. The order of the Department of Labor and Industries dated August 13,
29 1982, adhering to the provisions of a previous order issued May 19,
30 1982, which held the claim open for authorized treatment and action as
31 may be indicated, is correct and should be affirmed.
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33 It is so ORDERED.

34 Dated this 22nd December, 1983.

35 BOARD OF INDUSTRIAL INSURANCE APPEALS

36
37 /s/ _____
38 MICHAEL L. HALL Chairman

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40 /s/ _____
41 FRANK E. FENNERTY, JR. Member

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43 **DISSENTING OPINION**

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45 I disagree with the Board majority's decision, and particularly, the expressed conclusion that,
46 "on balance," the record supports the view that claimant's 1980 injury herein played "a proximate
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1 role in production and duration of her psychiatric abnormalities", and that it is the employer's
2 responsibility in this claim to provide "psychotherapy to return Ms. Richmond to her pre-injury
3 state".
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6 To me, the very clear weight of the evidence tips the "balance" heavily against the majority's
7 conclusion. In light of the entire record, and this claimant's prior mental problems and her reactions
8 to emotional stress in her personal life, I am much more persuaded by the opinions of Dr. Linda
9 McGuire-Raskin and Dr. John E. Hamm. I believe the claimant's pre-existing and unrelated
10 conditions of paranoia and depression were not aggravated or exacerbated in any way by this
11 actually minor industrial injury.
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14 I would reverse the Department's order of August 13, 1982, and direct the closure of this
15 claim.
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18 Dated this 22nd day of December, 1983.

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20 /s/
21 PHILLIP T. BORK Member
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