Osborn, Elena

BOARD

Offer of judgment CR 68

CR 68, which provides for payment of costs if an offer of judgment is declined and the matter ultimately is resolved for the offered amount or less, does not apply to proceedings before the Board. **….*In re Elena Osborn*, Declaratory Ruling (1999)**

Scroll down for order.

IN RE: ELENA OSBORN	)	**DECLARATORY RULING**
	)	
	)	
	)	
	)	

Elena Osborn, the claimant in an appeal pending before the Board under Docket No. 98 13505, filed a Petition for Declaratory Ruling on December 31, 1998. In her petition, Ms. Osborn requested the Board of Industrial Insurance Appeals enter a declaratory ruling on the applicability of CR 68, Offer of Judgment, to actions under Title 51.

On January 27, 1999, we received from Stuart Entertainment d/b/a Trade Products, Inc., through its representative, Comprehensive Risk Management, Employer's Reply to Claimant's Petition for Declaratory Ruling. After consideration of the arguments contained in the claimant's Petition for Declaratory Ruling and the employer's reply, we determine that a Declaratory Ruling is appropriate under WAC 263-12-180 and that CR 68, Offer of Judgment, should not apply to actions under Title 51, before the Board of Industrial Insurance Appeals.

In her petition, Ms. Osborn alleged that her claim, Claim No. T-749539, is before the Board of Industrial Insurance Appeals based on a notice of appeal filed from a Department order that closed the claim with time-loss compensation as paid with no award for permanent partial disability and segregated a psychiatric condition as unrelated to the industrial injury. The matter had been set for hearing with issues identified as entitlement to time-loss compensation, award of permanent partial disability, further necessary and proper treatment for conditions causally related to the industrial injury, and for acceptance of a psychiatric condition as proximately related to the industrial injury. Prior to the hearings held in this matter, Ms. Osborn received from the employer's representative an Offer of Judgment. The Offer of Judgment specifically indicated that in the event she failed to accept the offer and obtained a decision which required benefit payments less than she would receive under the offer, that pursuant to CR 68, the employer would seek an award of costs.

In her petition, Ms. Osborn argues that CR 68 is utilized in a variety of actions involving monetary awards and that these types of settlements do not require a factual or even legal basis. In contrast, industrial insurance actions involve an award of benefits which may include a variety of factors beyond monetary benefits and settlements, whether at the Department level or at the Board of Industrial Insurance Appeals, require a factual and legal basis which must be reflected in the record. Ms. Osborn also argues that an Offer of Judgment results in a waiver of benefits prohibited by RCW 51.04.060.

In its response, the self-insured employer indicated that RCW 51.52.140 provides that, "Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter"; and accordingly, CR 68 as a rule for practice in civil cases, should apply to proceedings before the Board. In addition, the employer does not believe that there is a waiver of benefits; that the prohibition of waiver of benefits prohibits waiver of future benefits but does not preclude agreements between parties as to what conditions are to be determined to be caused or related to the present industrial injury.

In our view, CR 68 should not be applied to Board proceedings because it conflicts with RCW 51.52.095. The relevant portion of the statute provides:

If agreement concerning final disposition of the appeal is reached by the parties present at the conference, or by the employer and worker or beneficiary, the board may enter a final decision and order

in accordance therewith, providing the board finds such agreement is in conformity with the law and the facts.

CR 68 provides that if an Offer of Judgment is accepted, the court shall enter judgment. Despite the fact that our orders are not judgments, the *shall*, as used in the rule, means entry of the judgment is mandatory. In application before the Board, this would require that once an offer of judgment has been accepted we must enter the order without regard to whether it is in conformity with the law and the facts. This conflicts with the provisions in RCW 51.52.095 that indicate the Board will only enter an agreement if it finds that the agreement conforms with the law and the facts. Because application of the rule would conflict with the statute, the rule should not be applied to Board proceedings.

We note that Ms. Osborn argues that the application of CR 68 would be a waiver of worker rights under the act. We are unsure that this is a rationale for not applying CR 68 to Board proceedings. It does not appear that this would be any more of a waiver than any other agreement to settle an appeal. In either situation, the worker may be compromising what he or she believes is his or her full entitlement under the act. Under CR 68, if the offer is accepted, it could be the same as any other agreement. The only differences are that we would be required to enter the order and, if the worker does not accept the offer of judgment and loses the appeal after a hearing on the merits, the worker would be required to pay the employer's costs in defending the order.

It is more reasonable that the provisions of CR 68 should not apply to our tribunal. As previously mentioned, we do not issue judgments, nor are any of the parties defending against claims in the usual sense of the word. The rule is clearly intended to apply when monetary damages are sought as part of civil litigation, not when benefits are sought with regard to worker's compensation. Often the issue in an appeal before us is whether the benefits should or should not be granted. There is often little room for a compromise. A worker is either entitled to relief or not, with little middle ground on which a compromise can be built. The application of the rule to our proceedings is not a good fit.

We point out that there are several other indications of court rules that are either directly in conflict with our procedural rules or, if not directly in conflict, do not apply easily to proceedings before the Board of Industrial Insurance Appeals. For example, CR 23, with regard to class actions, and CR 3-6, dealing with commencement of action, service of process and pleadings, have little application to proceedings before the Board of Industrial Insurance Appeals. There is no right to a jury trial before the Board of Industrial Insurance Appeals, as allowed by CR 38. CR 64, which refers to costs on appeal pursuant to RCW 4.84, has not been applied to proceedings before the Board of Industrial Insurance Appeals. These are just a few of many possible examples where court rules, although not explicitly in contradiction with any rules for procedure set out in RCW 51.52, are nonetheless not applied to proceedings before the Board because they would be unsuitable for appeals before the Board.

Finally, it would seem intrinsically unfair to apply this rule when it only allows a party defending against a claim to serve an offer of judgment on the opposing party. As such, it would therefore only allow the employers or the Department to make offers of judgment. It could be argued that the worker would never be "defending a claim" in any appeal before the Board of Industrial Insurance Appeals, and therefore, in appeals brought by the employers, it would be the Department that would be defending its own order, not the worker. It seems patently unfair to invoke a court rule which would only allow the Department or employers to benefit from the rule and have the ability to make offers of judgment and have their costs paid by the worker. There would be no corresponding benefit for the worker under the Industrial Insurance Act.

This Board has never allowed the assignment of costs to prevailing parties before the Board under either CR 64 or RCW 4.84.110. It does not seem appropriate that in our system for resolving disputes regarding workers' right to benefits under the Industrial Insurance Act, that the Department and self-insured employers should have the ability to require the worker to pay costs merely because the worker is unsuccessful in establishing his or her right to benefits to the degree he or she believed they were

entitled. Such a ruling would not seem in keeping with the spirit of the Industrial Insurance Act, and this Board declines to apply CR 68 to proceedings before it.

It is so **ORDERED**.

DATED this 26th day of May, 1999.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

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

/s/ _____
JUDITH E. SCHURKE Member