BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GAIL A. GOMEZ	**)**	**DOCKET NO. 17 15610**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
CLAIM NO. SJ-40894	**)**	**FOR FURTHER PROCEEDINGS**

Ms. Gomez worked as a nurse case manager for the employer, Virginia Mason Hospital Association (Virginia Mason), at its Federal Way Clinic. After a patient visit she contracted a viral infection. She developed an acute pain in her right ear from a secondary ear infection; her eardrum ruptured; and she suffered permanent hearing loss in her right ear. Ms. Gomez did not apply for benefits until more than one year after her exposure, illness, and hearing loss. The Department allowed her claim as an occupational disease and closed her claim with permanent partial disability benefits for 100 percent loss of hearing in her right ear. Virginia Mason contests the claim allowance arguing that Ms. Gomez's viral infection was an industrial injury, so her claim was time barred. The parties stipulated to the facts and filed cross-motions for summary judgment under CR 56. Following oral argument and the receipt of all evidence in this appeal, the appeal was transferred to another industrial appeals judge to write the Proposed Decision and Order. The claimant filed a motion and affidavit to assign a different industrial appeals judge, which Ms. Gomez has characterized as an Affidavit of Prejudice. The motion was considered a request to deny the transfer of the file and was denied. The industrial appeals judge determined that Ms. Gomez's viral infection was an industrial injury, not an occupational disease, and as such her claim was time-barred. The industrial appeals judge reversed the Department order and remanded with instructions to deny Ms. Gomez's claim. Ms. Gomez maintains that the claimant's affidavit of prejudice deprived the industrial appeals judge of the ability to decide this appeal. Ms. Gomez also argues that the industrially related condition should be considered an occupational disease rather than an industrial injury. The employer maintains that Ms. Gomez suffered an industrial injury, which is time-barred. We find that our chief judge properly denied the claimant's request to transfer the case to a different judge to author the Proposed Decision and Order in accordance with the Board's procedural rules. We further find that summary judgment is inappropriate because an issue of material fact exists in this case. The Proposed Decision and Order of March 19, 2018, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

This appeal was originally assigned to industrial appeals judge Janene Sohng. The parties filed cross-motions for summary judgment. Following oral argument and the receipt of all evidence in this file, the appeal was transferred to industrial appeals judge Robert Krabill to write the Proposed Decision and Order. A letter dated February 28, 2018, was sent to the parties notifying them that the appeal was transferred from industrial appeals judge Sohng to industrial appeals judge Krabill under WAC 263-12-045(4), and that industrial appeals judge Krabill would be writing the Proposed Decision and Order. The letter went on to indicate that the Proposed Decision and Order would be issued after March 7, 2018, and "If you believe there are compelling reasons why this appeal should not be transferred, you must contact me [chief industrial appeals judge Whitney] before that date."

On March 6, 2018, one day before the March 7, 2018 deadline for objection to the transfer to industrial appeals judge Krabill, the claimant filed a motion and affidavit to assign a different industrial appeals judge, which Ms. Gomez has characterized as an Affidavit of Prejudice. In the motion and affidavit, claimant's counsel cited RCW 4.12.050, and WAC 263-12-125, and indicated Ms. Gomez's belief that industrial appeals judge Krabill is prejudiced against the claimant and that "(s)he cannot obtain a fair and impartial hearing before such judge." The claimant requested that the matter be assigned to another industrial appeals judge to issue the decision in the appeal. According to the affidavit, claimant's counsel received notice of the assignment to industrial appeals judge Krabill on March 5, 2018, one day prior to filing the motion.

The claimant's motion was considered a request to deny the transfer of the appeal and was denied in a letter dated March 19, 2018. The denial indicated that, "The information set forth in your letter does not set forth compelling reasons for this case not to be transferred for the purpose of writing the Proposed Decision and Order." The case remained assigned to industrial appeals judge Krabill, who issued the Proposed Decision and Order dated March 19, 2018, the same date as the denial letter.

The Board of Industrial Insurance Appeals has the authority to determine its own procedure under RCW 51.52.020. This statute indicates, in part, "The board may make rules and regulations concerning its functions and procedure, which shall have the force and effect of law until altered, repealed, or set aside by the board."

The Board has properly promulgated rules for procedure, including WAC 263-12-125, which provides that, "Insofar as applicable, and not in conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed."

In the Petition for Review, Ms. Gomez contends that when she filed the affidavit of prejudice under RCW 4.12.050, industrial appeals judge Krabill was deprived of jurisdiction to hear the appeal. RCW 4.12.050 states in part:

> (1) Any party to or any attorney appearing in any action or proceeding in a superior court may disqualify a judge from hearing the matter, subject to these limitations:
>
> (a) Notice of disqualification must be filed and called to the attention of the judge before the judge has made any discretionary ruling in the case.
>
> (b) In counties with only one resident judge, the notice of disqualification must be filed not later than the day on which the case is called to be set for trial.
>
> (c) A judge who has been disqualified under this section may decide such issues as the parties agree in writing or on the record in open court.
>
> (d) No party or attorney is permitted to disqualify more than one judge in any matter under this section and RCW 4.12.040.

WAC 263-12-091 provides, "Affidavits of prejudice **against an industrial appeals judge assigned to conduct hearings in an appeal** are subject to the provisions of RCW 4.12.050, except that such affidavit must be filed within thirty days of receipt of the notice of assignment of the appeal to the industrial appeals judge or prior to the assigned industrial appeals judge holding any proceeding in the appeal, whichever occurs sooner." (Emphasis added). Thus, the Board's affidavit rule limits the parties' affidavit right to affidavit the judge who **conducts** the hearing only, as distinguished from the judge who **drafts a proposed order** for the Board, a review judge who reviews a proposed order, or a mediation judge who meets with parties to facilitate settlement discussions.

Following the transfer of the appeal to industrial appeals judge Krabill to write the decision, Ms. Gomez filed a motion and affidavit to assign a different industrial appeals judge, which Ms. Gomez has characterized as an Affidavit of Prejudice. The motion was considered a request to deny the transfer of the file and our chief industrial appeals judge denied the request. WAC 263-12-045(4) provides that, "At any time the board or a chief industrial appeals judge or designee may substitute one industrial appeals judge for another in any given appeal."

In the present appeal, Ms. Gomez filed an affidavit of prejudice seeking removal of the industrial appeals judge reassigned to write the Proposed Decision and Order after all hearings had concluded and the record was closed. Accordingly, the chief industrial appeals judge properly denied the affidavit of prejudice in accordance with the Board's procedural rules.

Next, since the parties filed cross-motions for summary judgment, the question arises as to whether there exists an issue of material fact.[1] The parties stipulated to the facts in this case, including the discovery depositions of Ms. Gomez and Dr. Palermo, and the Declaration of Tracy Erickson, M.D. In summary judgment, the moving party is required to establish that there was no genuine issue as to any material fact, with all facts and reasonable inferences considered in the light most favorable to the claimant as the nonmoving party.[2] In the present case, a genuine issue as to material fact exists because the physicians disagree on whether Ms. Gomez has an occupational disease or an industrial injury.

Ms. Gomez has worked for Virginia Mason for seven years. On January 6, 2015, Ms. Gomez worked as a registered nurse and plan care manager for Virginia Mason at its Federal Way Clinic. In that position, she typically saw patients with chronic disease. During a patient visit on January 6, 2015, which lasted from thirty minutes to an hour, she contracted a viral upper respiratory infection. She was sick with a cold from the viral infection starting the following day, January 7, 2015.

Late on January 12, 2015, Ms. Gomez developed an acute pain in her right ear from a secondary ear infection. The next morning, January 13, 2015, Ms. Gomez reported to Kari Steadman, her direct supervisor, that she was sick. On that same date, she sought care for sudden right ear pain from her physician and colleague Christine Palermo, M.D. Dr. Palermo happened to work for Virginia Mason at the same Federal Way Clinic. That night, the ear infection ruptured Ms. Gomez's eardrum, and she experienced profound, permanent hearing loss in her right ear. Dr. Palermo referred Ms. Gomez to Dr. Eriksson in the ear, nose, and throat clinic.

Dr. Palermo has known Ms. Gomez since 2012, as they both work at Virginia Mason and she has been Ms. Gomez's primary care physician since 2013. She was providing treatment for arthritis, which included immune-suppressing medication. Dr. Palermo first became aware Ms. Gomez was sick at an appointment on January 13, 2015. She understood Ms. Gomez had upper respiratory

[1] CR 56.
[2] *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982).

symptoms for six days and then developed acute right ear pain at about 11:00 p.m. on January 12, 2015. Dr. Palermo believed Ms. Gomez suffered from a viral illness and a bacterial sinus infection at that January 13th appointment. Dr. Palermo diagnosed an infection of the middle ear that was a complication of the upper respiratory illness. On January 14, or 15, 2015, she saw Ms. Gomez again and confirmed the presence of a ruptured ear drum. In follow-up- conversations, Dr. Palermo did not discuss with Ms. Gomez any specific exposure, but they did talk about the fact that in the preceding time period, Ms. Gomez had seen several patients of Dr. Palermo that were quite ill and caused her exposure to catching something at work.

Because Dr. Palermo treated both Ms. Gomez and CPL, a patient with an upper respiratory viral illness, she identified the date of January 6, 2015, as a specific date when Ms. Gomez had an appointment with CPL. Dr. Palermo believed that Ms. Gomez caught her viral and bacterial illness from proximity to CPL for about an hour on January 6, 2015. She added that CPL had to remove a mask she was wearing during the appointment.

Dr. Eriksson, an otolaryngologist, provided evaluation and treatment to Ms. Gomez for her right ear. She discussed with Ms. Gomez that with acute sensorineural hearing loss, the most likely treatable cause would be a viral infection, such as an upper respiratory infection, which could be contracted anywhere. She believed on a more-probable-than-not basis the Ms. Gomez's right ear hearing loss did not arise naturally and proximately out of her employment with Virginia Mason.

The parties stipulated to the facts in this case, including the discovery depositions of Ms. Gomez and Dr. Palermo, and the Declaration of Tracy Erickson, M.D. But the physicians disagree on whether Ms. Gomez has an occupational disease or an industrial injury. Because a genuine issue of material fact exists, summary judgment is not appropriate.

ORDER

This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter 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. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: June 7, 2018.

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

FRANK E. FENNERTY, JR., Member

Addendum to Order
In re Gail A. Gomez
Docket No. 17 15610
Claim No. SJ-40894

Appearances

Claimant, Gail A. Gomez, by Causey Wright Law Firm, per Brian M. Wright

Self-Insured Employer, Virginia Mason Hospital Association, by Pratt, Day & Stratton PLLC, per Kathryn Kunkler and Marne J. Horstman

Department of Labor and Industries, by Office of the Attorney General, per Marta Lowy

Department Order(s) Under Appeal

In Docket No. 17 15610, the employer, Virginia Mason Hospital Association, filed an appeal with the Board of Industrial Insurance Appeals on May 24, 2017, from an order of the Department of Labor and Industries dated April 4, 2017. In this order, the Department affirmed a Department order dated October 5, 2016 that directed the self-insured employer to accept Ms. Gomez's claim for occupational hearing loss, and closed the claim with a permanent partial disability award for 100 percent hearing loss in the right ear.

Petition for Review

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 Proposed Decision and Order issued on March 19, 2018. The employer filed a response to the Petition for Review.