Garcia, Daniel

SANCTIONS

Frivolous defense

Where a state fund employer appeared in an appeal filed by the worker but declined to agree with the resolution of the appeal proposed by the worker and the Department, the employer's actions do not constitute an affirmative action as contemplated by RCW 4.84.185. RCW 4.84.185 does not apply to a decision by a party to decline a proposed settlement agreement. **….*In re Daniel Garcia*, BIIA Dec., 12 19373 (2013)** [*Editor's Note*: The Board's decision was appealed to Cowlitz County Superior Court, No. 13-2-01554-5.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DANIEL I. GARCIA	)	**DOCKET NOS. 12 19373 & 12 21275**
	)	
CLAIM NO. AG-77739	)	**ORDER DENYING MOTION FOR SANCTIONS**

In Docket No. 12 19373, the claimant, Daniel I. Garcia, filed an appeal with the Board of Industrial Insurance Appeals on August 6, 2012, from an order of the Department of Labor and Industries dated August 1, 2012. In this order, the Department denied the claimant time-loss compensation benefits from March 28, 2012, through July 31, 2012.

In Docket No. 12 21275, Mr. Garcia, filed an appeal with the Board of Industrial Insurance Appeals on September 24, 2012, from an order of the Department dated July 31, 2012. In this order, the Department affirmed an order dated March 28, 2012, in which it denied time-loss compensation benefits from June 16, 2011, through March 27, 2012.

On May 21, 2013, a Proposed Decision and Order was issued in which the industrial appeals judge reversed and remanded the Department orders dated July 31, 2012, and August 1, 2012. Mr. Garcia filed a timely Petition for Review of the Proposed Decision and Order. On July 16, 2013, the Board issued a Decision and Order in which it reversed the Department orders and remanded the matters to the Department to pay time-loss compensation benefits from June 16, 2011, through July 31, 2012.

On August 16, 2013, Mr. Garcia filed a Motion for Sanctions against the state fund employer, Shipp Brothers Landscape, Inc., based on a frivolous defense under RCW 4.84.185. Mr. Garcia argues that there was no evidence of any planned defense, or even a theory of a defense by the employer, or its representative, Washington State Farm Bureau, per Richard Clyne. Mr. Garcia claims that the employer required him to present a prima facie case for the sole purpose of forcing him to litigate while having no plans to defend, and requests an award of attorney fees and costs. Mr. Garcia's attorney, Robert R. Hall, submitted a timesheet detailing the time he spent on this claim and the tasks performed. Mr. Hall requests as sanctions, an attorney fee of $9,132.50, and $2,123.20 in costs.

In the employer's response to the claimant's motion, it notes that neither the Washington State Farm Bureau nor the employer is charged with defending orders issued by the Department of Labor and Industries. It argues that there is no support for the conclusion that an employer's failure to step into the shoes of the Department in defending its own order constituted a frivolous defense.

There is no support for the conclusion that not agreeing to an offer of settlement is a frivolous defense.

The Department's response to the claimant's Motion for Sanctions consists of a letter dated September 4, 2013, from Assistant Attorney General Katy J. Dixon, to Executive Secretary J. Scott Timmons, stating that the Department does not object to the claimant's motion.

We will briefly discuss the events that preceded the filing of the motion for sanctions. A conference was held in these appeals on October 23, 2012, at which time the matter was set for a hearing for February 7, 2013. An Interlocutory Order Establishing Litigation Schedule was issued on October 29, 2012, noting that the claimant indicated that he would present his own testimony, Dr. Fisher, and unidentified medical, lay, and vocational witnesses. The Department indicated that it would present as yet unidentified vocational, medical, and lay witnesses. Mr. Clyne attended the conference representing the employer, but did not identify any witnesses.

According to Mr. Hall, he received a message on October 30, 2012, from Assistant Attorney General Katy J. Dixon, offering to reverse and remand the orders under appeal and to pay Mr. Garcia time-loss compensation benefits from June 16, 2011, through July 31, 2012. Mr. Hall stated it is his understanding that after having been provided the clinical records of the mental health provider for Mr. Garcia, the Department's expert witness changed his position and the Department could not defend its orders.

Mr. Hall drafted a proposed Order on Agreement of Parties, and sent it to Ms. Dixon. A copy of the proposed agreement was eventually forwarded to Mr. Clyne. Mr. Clyne would not agree with the settlement.

On November 27, 2012, Ms. Dixon sent a letter to the industrial appeals judge, stating that as a result of further investigation, the Department would not be defending the orders on appeal. She noted that the Department would not call any witnesses, and requested that the Department's hearing time be cancelled.

On November 29, 2012, the industrial appeals judge sent the parties a letter, noting that the Department no longer intends to defend its orders. He stated that Mr. Garcia must still present a prima facie case for entitlement to the benefits sought. The industrial appeals judge further indicated that the employer, the remaining party with an interest, may elect to defend the Department orders being appealed.

Mr. Hall filed his confirmation of witnesses as required by December 28, 2012. Depositions of Jerry J. Fisher, M.D., and clinical psychologist Michael R. Shrifter, were noted for Vancouver, Washington, for February 4, 2013. That morning, Mr. Hall's office received a telephone call from Mr. Clyne. He indicated that he would not attend the depositions, as he had no questions for Dr. Fisher or Mr. Shrifter, who were both attending providers for Mr. Garcia. Mr. Hall contacted Mr. Clyne by telephone, and confirmed that he would not be attending the depositions, and that the employer would not authorize the resolution of the appeals by payment of the time-loss compensation benefits.

Mr. Clyne acknowledges that he informed Mr. Hall he would not cross-examine the claimant's witnesses. He attended the hearing on February 7, 2013, and asked one question of Mr. Garcia, and six questions of the claimant's vocational witness.

RCW 4.84.285 provides:

> In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.
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> The provisions of this section apply unless otherwise specifically provided by statute.

The Board has applied this statute and imposed terms in certain situations. Sanctions were imposed against the Department of Labor and Industries in the case *In re Shimangus Gaim*, BIIA Dec., 00 14616 (2002). In that case, the Department closed the claim with no evidence that the worker's conditions were fixed and stable, even though the Department's file contained medical reports that indicated the worker needed additional treatment. The Department presented no evidence at hearing. The Department argued that it is justified in taking action without a factual basis and can require the worker to prove his or her entitlement to benefits at the Board. The Board concluded that this argument is not supported by case law or any other decision or statute.

The Board assessed attorney fees and costs against the Department under RCW 4.84.185 for a defense that was frivolous and advanced without reasonable cause.

In *In re Robynhawk Freebyrd-Brown*, BIIA Dec., 02 10758 (2003), the Board imposed sanctions under RCW 4.84.185 against the Department for relying on an untenable legal theory. The Department defended its order rejecting the claim on the basis that the application for benefits was only for an industrial injury, and the Board could not reach the issue of occupational disease. The Board concluded this theory was untenable and noted that under established precedent an application for benefits must be viewed as a claim for compensation for either an industrial injury or an occupational disease, and the Department must adjudicate the claims under both theories.

In both *Gaim* and *Freebyrd-Brown*, the Department failed to properly administer the claim and forced the worker to appeal to the Board. The current appeals differ. Nothing indicates that the Department failed to properly administer the claim, and in any event, Shipp Brothers Landscape, did not make the decisions that Mr. Garcia appealed.

RCW 4.84.185 speaks to a party taking an affirmative action such as commencing an action or interposing a defense. It does not, on its face, purport to apply to a party who simply appears and is mostly silent. Although a state fund employer has no obligation to participate in an appeal, it has the right to do so if it so chooses. Here, the state fund employer appeared in the action but declined to agree with the resolution of the appeals proposed by Mr. Garcia and the Department. Nothing in RCW 4.84.185 appears to apply to the decision of a party to decline a proposed settlement agreement.

The imposition of sanctions under RCW 4.84.185 is within the sound discretion of the Board. Under the specific facts of these appeals, we do not find that sanctions are warranted. The claimant's Motion for Sanctions against the state fund employer is denied.

DATED: December 9, 2013.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/
DAVID E. THREEDY Chairperson

/s/
JACK S. ENG Member