

## **Kaur, Kamaljit**

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### **PENALTIES (RCW 51.48.017)**

#### **Failure to provide claim file**

A worker is not required to identify specific items in the claim file when the worker requests a copy of the claim file. Where the worker requested the claim file and the self-insured employer failed to provide surveillance videos because they were held by the self-insured's attorney, the Department must first determine if the videos were part of the claim file before responding to the worker's request for a penalty. ...*In re Kamaljit Kaur*, BIIA Dec., 13 15477 (2014)

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

1 **IN RE: KAMALJIT KAUR** ) **DOCKET NO. 13 15477**  
2 )  
3 **CLAIM NO. SA-06994** ) **DECISION AND ORDER**  
4 \_\_\_\_\_ )

5 **APPEARANCES:**

6 Claimant, Kamaljit Kaur, by  
7 Davies Pearson, P.C., per  
8 Benjamin R. Sligar

9 Self-Insured Employer, ConocoPhillips Co., by  
10 Law Office of Robert M. Arim, PLLC, per  
11 Robert M. Arim  
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13 The claimant, Kamaljit Kaur, filed an appeal with the Board of Industrial Insurance Appeals  
14 on April 29, 2013, from an order of the Department of Labor and Industries dated April 23, 2013. In  
15 this order, the Department denied the claimant's request for a penalty to be assessed against the  
16 employer for failure to provide a complete copy of the claim file on the basis that claimant's counsel  
17 did not request a copy of the claim file to include the surveillance video, and the Department's  
18 review of the evidence fails to reveal an unreasonable delay on the part of the employer in  
19 providing a copy of the surveillance video. The Department order is **REVERSED AND**  
20 **REMANDED.**  
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25 **PROCEDURAL MATTERS**

26 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for  
27 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and  
28 Order issued on March 14, 2014, in which the industrial appeals judge reversed and remanded the  
29 Department order dated April 23, 2013. While we agree that the Department order dated April 23,  
30 2013, should be reversed, we do so for different reasons than those stated in the Proposed  
31 Decision and Order.  
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35 The case was presented on opposing motions for summary judgment under CR 56. We  
36 agree with our industrial appeals judge that summary relief is appropriate but disagree as to the  
37 prevailing party. The industrial appeals judge found for the self-insured employer, ConocoPhillips  
38 Co., (ConocoPhillips) and directed the denial of a penalty but for different reasons than set forth in  
39 the order of April 23, 2013. We find that the Department denied Ms. Kaur's request for a penalty  
40 against ConocoPhillips on a basis not supported by the Industrial Insurance Act or the  
41 Department's regulations. Ms. Kaur prevails and we will remand the Department's order for further  
42 adjudication of the penalty request.  
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1 On October 29, 2013, the Board received the Employer's Motion for Partial Summary  
2 Judgment, including a Memorandum in Support of the Employer's Motion for Partial Summary  
3 Judgment, and the Declaration of Aushante Humphries. Attached to the Motion, Memorandum,  
4 and Declaration are six exhibits. In resolving this appeal we have considered:  
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- 7 • Exhibit 1 is a copy of a May 12, 2009 letter from the office of the  
8 claimant's attorney to the employer requesting an updated employer  
9 claim file from January 14, 2009, to May 12, 2009. Exhibit 1 is remarked  
10 as Board Exhibit No. 1 and is admitted.
- 11 • Exhibit 2 is a copy of an October 21, 2009 letter from the office of the  
12 claimant's attorney to the employer requesting an updated employer  
13 claim file from May 12, 2009, to October 21, 2009. Exhibit 2 is remarked  
14 as Board Exhibit No. 2 and is admitted.
- 15 • Exhibit 3 is a copy of a February 26, 2010 letter from the office of the  
16 claimant's attorney to the employer requesting, among other things, an  
17 updated copy of the employer's claim file. Exhibit 3 is remarked as  
18 Board Exhibit No. 3 and is admitted.
- 19 • Exhibit 4 is a copy of a July 23, 2010 letter from the office of the  
20 claimant's attorney to the employer requesting, among other things, an  
21 updated copy of the employer's claim file. Exhibit 4 is remarked as  
22 Board Exhibit No. 4 and is admitted.
- 23 • Exhibit 5 is a copy of a November 6, 2012 letter from the office of the  
24 claimant's attorney to the Department requesting a penalty be assessed  
25 against the employer for failure to provide a complete claim file. Exhibit  
26 5 is remarked as Board Exhibit No. 5 and is admitted.
- 27 • Exhibit 6 is a copy of an April 23, 2013 Department Order and Notice  
28 denying the claimant's penalty request. Exhibit 6 is remarked as Board  
29 Exhibit No. 6 and is admitted.

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33 On November 7, 2013, the Board received the Claimant's Response to Employer's Partial  
34 Summary Judgment Motion and Claimant's Cross Motion for Summary Judgment, and Affidavit of  
35 Benjamin R. Sligar in Support of Claimant's Response to Employer's Partial Summary Judgment  
36 Motion and Claimant's Cross Motion for Summary Judgment. Attached to the Response, Cross  
37 Motion, and Affidavit are five exhibits:  
38

- 39 • Exhibit 1 is a copy of Claimant's Request for Admission. Exhibit 1 has  
40 been remarked as Board Exhibit No. 7 and is admitted.
  - 41 • Exhibit 2 is a copy of Employer's Answers to Claimant's Request for  
42 Admission. Exhibit 2 has been remarked as Board Exhibit No. 8 and is  
43 admitted.
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- 1 • Exhibit 3 is a copy of Claimant's Second Request for Admission. Exhibit  
2 3 is remarked as Board Exhibit No. 9 and is admitted.
- 3 • Exhibit 4 is a copy of Employer's Answers to Claimant's Second  
4 Requests for Admission. Exhibit 4 is remarked as Board Exhibit No. 10  
5 and is admitted.
- 6 • Exhibit 5 is a copy of Claimant's Answers to Employer's First Set of  
7 Interrogatories and Request for Production of Documents. Exhibit 5 is  
8 remarked as Board Exhibit No. 11 and is admitted.

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10 On November 25, 2013, the Board received the Employer's Reply to Claimant's Response  
11 and Response to Claimant's Cross Motion for Summary Judgment, and Affidavit of Robert M. Arim.  
12 Attached to the Reply, Response, and Affidavit are three exhibits:  
13

- 14 • Exhibit 1 contains copies of correspondence between counsel for the  
15 employer and counsel for the claimant during the time period from  
16 May 28, 2009 through August 25, 2009. Exhibit No. 1 has been  
17 remarked as Board Exhibit No. 12 and is admitted.
- 18 • Exhibit 2 is a copy of a redacted September 8, 2010 letter from counsel  
19 for the employer to the employer. Exhibit 2 has been remarked as  
20 Board Exhibit No. 13 and is admitted.
- 21 • Exhibit 3 is a copy of Claimant's Answers to Employer's First Set of  
22 Requests for Admission. Exhibit 3 has been remarked as Board Exhibit  
23 No. 14 and is admitted.

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26 Our review of the above-listed documents and evidence establish there is no genuine issue of  
27 material fact in this appeal.  
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### 29 **DECISION**

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31 On May 9, 2008, Ms. Kaur filed a claim for benefits for an injury occurring on April 15, 2008.  
32 The Department allowed the claim on June 12, 2008, and directed ConocoPhillips, as the  
33 self-insured employer, to provide benefits. Both parties were represented by legal counsel early on  
34 in the claims process. Beginning on May 12, 2009, Ms. Kaur's attorney submitted a request for a  
35 copy of the claim file under the authority of RCW 51.28.070 to ConocoPhillips' claims  
36 administrators. Shortly thereafter, ConocoPhillips' attorney requested that all claim inquiries be  
37 directed to him. Following this initial request for a copy of the claim file, Ms. Kaur submitted  
38 additional requests for the claim file on October 21, 2009; February 26, 2010; July 23, 2010;  
39 February 15, 2011; August 1, 2011; April 17, 2012 and August 28, 2012.  
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42 On October 23, 2012, during the deposition of Dr. Mark Remington in an earlier appeal in  
43 this claim (Board Docket No. 12 15571), Ms. Kaur's attorney discovered that ConocoPhillips had  
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1 been conducting surveillance of Ms. Kaur since early 2009. ConocoPhillips acknowledged the  
2 existence of the surveillance materials. The surveillance was undertaken at the request of  
3 ConocoPhillips' claims administrator to the company's attorney. ConocoPhillips' legal counsel  
4 arranged for the surveillance.  
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7 ConocoPhillips' claims administrator provided copies of the claim file as it existed as of the  
8 date of each of Ms. Kaur's requests. However, none of the information provided included the  
9 surveillance materials procured by ConocoPhillips's legal counsel. Ms. Kaur asserts that the  
10 surveillance materials are a part of the claim adjudication process and should have been provided  
11 when she made a proper request for the file in writing.  
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14 On November 6, 2012 the claimant requested that a penalty, or penalties, be assessed  
15 against the employer for failure to provide full copies of the claim file. That request included, what  
16 is referred to as a screen shot of a communication dated March 19, 2009, from the employer  
17 inquiring about the need for further investigation. This screen shot was included in the claim file  
18 provided by ConocoPhillips's claims administrator to Ms. Kaur. It indicates a need for a confidential  
19 investigation of the claim. Board Exhibit No. 5. Ms. Kaur indirectly argues that this screen shot is  
20 an indication that the surveillance materials were part of the claims administration file.  
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23 ConocoPhillips argues that surveillance/investigation conducted by its attorney is not part of  
24 the claim file as contemplated by RCW 51.28.070 and WAC 296-14-970. It asserts that Ms. Kaur  
25 received the complete claim file as compiled by its claims administrator.  
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28 We decline to decide what constitutes the claim file in this appeal because we believe that  
29 the Department erred in its order denying Ms. Kaur's request for a penalty for other reasons. The  
30 Department's order dated April 23, 2013, denied the request for a penalty using the following  
31 language:  
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34 Benjamin Sligar did not request a copy of the claim file to include the  
35 surveillance video.  
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37 The department's review of the evidence fails to reveal an unreasonable  
38 delay on the part of Conocophillips Company, in providing a copy of the  
39 surveillance video.  
40

41 We note that Benjamin Sligar is Ms. Kaur's attorney.  
42

43 The Department's basis for denying the penalty request is fundamentally at odds with the  
44 purposes of the Industrial Insurance Act. The Act is to be: "liberally construed for the purpose of  
45 reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring  
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1 in the course of employment." RCW 51.12.010. An injured worker should not be required to  
2 identify specific elements of the claim file in order to receive those documents. It is an undue  
3 burden to require such specificity for either injured workers or their authorized representatives.  
4 RCW 51.28.070. A request for the claim file means all contents of the claim file without the need to  
5 identify any particular item in the file.  
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8 The Department has carved out exceptions to providing materials in the claim file as  
9 provided in WAC 296-14-970. Under this regulation a self-insured employer may deny access to  
10 the claim file in the following situations:  
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- 12
- 13 (2) Reasons for denying release of a claim file, to a worker shall include, but  
14 not be limited to the following:
    - 15 (a) Presence of psychological, mental health, or physical treatment records,  
16 investigative reports or other records, release of which may not be in the  
17 interest of the worker.
    - 18 (b) Medical opinion or other documented information indicates the worker is a  
19 danger to himself or herself or others.  
20

21 Where a self-insured employer denies the release of a claim file it must follow the procedures  
22 further set forth in WAC 296-14-970:  
23

- 24 (3) If, pursuant to the criteria established under subsection (2) of this section,  
25 the self-insured employer determines that release of the claim file, in  
26 whole or in part, may not be in the worker's interest, the employer must  
27 submit a request for denial with explanations along with a copy of that  
28 portion of the claim file not previously submitted to the self-insurance  
29 section within twenty days after receipt of the request from the worker.  
30

31 When the Department receives a request for a denial of the claim file the Department, in turn, must:

- 32 (4) If the request for the claim file is denied, in whole or in part, a written order  
33 of denial will be issued by the department and mailed to the worker.  
34 The worker may appeal the order to the board of industrial insurance  
35 appeals.  
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37 Thus, even in situations where the self-insured employer has a basis to deny a copy or portions of  
38 the claim file, it must submit the matter to the Department who will conduct a review. Assuming the  
39 Department approves the denial of the claim file information, it must then issue an order explaining  
40 the basis of the denial. This allows the injured worker to be advised that there is information being  
41 withheld and to challenge that decision.  
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44 In the present appeal there is no showing that ConocoPhillips, by means of its claims  
45 administrators, denied portions of the claim file in the worker's interests or because Ms. Kaur was a  
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1 danger to herself or others. The Department did not deny the penalty request based on  
2 WAC 296-14-970. The Department did not cite any other statutory or regulatory provision to deny  
3 Ms. Kaur's request for a penalty.  
4

5 We acknowledge that the parties provided extensive argument on what constitutes the claim  
6 file. The Department denied the penalty request apparently under the assumption that the  
7 surveillance videos were, in fact, part of the claim file. From the wording of the order, it appears the  
8 Department would have awarded a penalty if Ms. Kaur had specifically mentioned the surveillance  
9 videos and not received them. The penalty was denied for the sole reason that Ms. Kaur did not  
10 specifically request the surveillance materials. It is contrary to the purposes of the Industrial  
11 Insurance Act to require injured workers to identify specific items in their claim files when requesting  
12 a copy of those files. Requiring such an itemization or identification is unduly burdensome. It is  
13 appropriate to remand this matter to the Department to further adjudicate Ms. Kaur's request for a  
14 penalty and determine whether the surveillance/investigation was part of the claim file as  
15 contemplated by RCW 51.28.070 and WAC 286-14-970.  
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#### 22 **FINDINGS OF FACT**

- 23 1. On June 25, 2013, an industrial appeals judge certified that the parties  
24 agreed to include the Amended Jurisdictional History in the Board  
25 record solely for jurisdictional purposes.  
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- 27 2. On May 12, 2009; October 21, 2009; February 26, 2010; July 23, 2010;  
28 February 15, 2011; August 1, 2011; April 17, 2012; and August 28,  
29 2012, the claimant requested complete and/or updated copies of the  
30 claim file from the self-insured employer or self-insured representative.  
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- 32 3. In response to the May 12, 2009; October 21, 2009; February 26, 2010;  
33 July 23, 2010; February 15, 2011; August 1, 2011; April 17, 2012; and  
34 August 28, 2012 requests, the self-insured employer or self-insured  
35 employer's representative timely provided copies of the claim file in its  
36 possession to the claimant, but did not provide the  
37 surveillance/investigation material.  
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- 39 4. Between March 29, 2009, and August 18, 2010, the claimant was  
40 intermittently placed under surveillance by a private investigator. The  
41 surveillance was arranged by the self-insured employer's legal counsel  
42 at the request for the employer's claims administrator.  
43
- 44 5. On November 6, 2012, the claimant requested that a penalty be  
45 assessed against the self-insured employer for failure to provide a  
46 complete copy of the claim file on the basis that the  
47 investigation/surveillance materials produced between March 29, 2009,  
and August 18, 2010, were not provided in response to the

1 May 12, 2009; October 21, 2009; February 26, 2010; July 23, 2010;  
2 February 15, 2011; August 1, 2011; April 17, 2012; and August 28, 2012  
3 claim file requests.

- 4 6. On April 23, 2013, the Department issued an order denying the  
5 claimant's request for a penalty as follows:  
6

7 Benjamin Sligar did not request a copy of the claim file to  
8 include the surveillance video.

9 The department's review of the evidence fails to reveal an  
10 unreasonable delay on the part of Conocophillips  
11 Company, in providing a copy of the surveillance video.  
12

- 13 7. The pleadings and evidence submitted by the parties demonstrate that  
14 there is no genuine issue as to any material fact.

15 **CONCLUSIONS OF LAW**

- 16 1. The Board of Industrial Insurance Appeals has jurisdiction over the  
17 parties and subject matter in this appeal.  
18  
19 2. Denying an injured worker's request for a copy of his/her claim file due  
20 to a failure to enumerate or identify a specific portion of the claim file is  
21 not proper within the meaning of RCW 51.28.070 and RCW 51.12.010.  
22  
23 3. The April 23, 2013 Department order is incorrect as a matter of law and  
24 is reversed. This matter is remanded to the Department with direction  
25 further adjudicate the claimant's November 6, 2012 penalty request  
26 against the employer for failure to provide a complete copy of the claim  
27 file; determine whether the surveillance/investigation is part of the claim  
28 file; and to take such additional action and issue such further orders as  
29 required by the law and the facts.

30 Dated: June 6, 2014.

31 BOARD OF INDUSTRIAL INSURANCE APPEALS

32 /s/ \_\_\_\_\_  
33 DAVID E. THREEEDY Chairperson

34 /s/ \_\_\_\_\_  
35 FRANK E. FENNERTY, JR. Member

36 /s/ \_\_\_\_\_  
37 JACK S. ENG Member