

Angulo, Carlos

EVIDENCE

Rebuttal testimony

The Board held that disclosure of late discovered surveillance video only after the appellant's witnesses testified meets the requirement of *new matters* for which rebuttal testimony is appropriate.***In re Carlos Angulo, Order Vacating Proposed Decision and Order, BIA Dec., 20 11887 (2021)***

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

1 **IN RE: CARLOS ANGULO**) **DOCKET NO. 20 11887**
2)
3)
4) **ORDER VACATING PROPOSED DECISION**
5 **CLAIM NO. SD-21229**) **AND ORDER AND REMANDING THE APPEAL**
6) **FOR FURTHER PROCEEDINGS**

7 The claimant, Carlos Angulo, sustained an industrial injury in January 2013. He appealed a
8 December 20, 2020 order issued by the Department of Labor and Industries that closed his claim
9 and directed the self-insured employer, Masco Corporation, to pay him an award for permanent
10 partial disability equal to a Category 2 low back impairment. After Mr. Angulo presented lay testimony
11 and the testimony of his medical and vocational experts, two days before the first of the employer's
12 expert witnesses' testimony, the employer discovered surveillance video of Mr. Angulo taken in
13 relation to another claim and provided it to Mr. Angulo. The surveillance video was not offered as an
14 exhibit, but the employer's witnesses testified that the surveillance video supported their opinions that
15 Mr. Angulo is not entitled to the pension he seeks. Mr. Angulo moved to exclude the employer's
16 experts' testimony about the surveillance, or in the alternative to reopen the record for rebuttal
17 testimony to allow his witnesses address the surveillance video. In his Proposed Decision and Order,
18 our judge denied both forms of relief and affirmed the Department order under appeal. Mr. Angulo
19 petitions for review, challenging all adverse evidentiary rulings, and seeking a determination that he
20 is permanently and totally disabled.

21 Because the claimant was not provided with surveillance video until after he had presented
22 his case-in-chief, and was not provided an opportunity for rebuttal, while the self-insured employer's
23 experts testified that the surveillance footage supported their conclusions, the Proposed Decision
24 and Order of January 20, 2021, is vacated and this appeal is **REMANDED FOR FURTHER**
25 **PROCEEDINGS.**

DISCUSSION

26 At the conclusion of the hearing of October 20, 2020, the claimant rested subject to the
27 publication of the deposition of Alma Garcia, D.O., which had been taken on October 14, 2020.

28 On August 10, 2020, Mr. Angulo served the self-insured employer with interrogatories and
29 requests for production. The employer submitted responses on August 20, 2020, but did not identify
30 any investigation or surveillance of Mr. Angulo. On September 22, 2020, surveillance was conducted
31 on Mr. Angulo and video taken. An investigative report was generated on October 23, 2020. The
32 employer's August 20, 2020 response was not supplemented prior to Mr. Angulo presenting the
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1 testimony of his witnesses and resting his case on October 20, 2020. The surveillance video and
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3 investigative report were disclosed to Mr. Angulo on October 28, 2020, two days before the testimony
4 of the first of the employer's witnesses. The employer did not offer the video as an exhibit or call the
5 investigator as a witness. However, the employer's expert witnesses testified about their
6 observations of the video.
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9 Mr. Angulo filed a motion to strike testimony of the employer's witnesses regarding the
10 surveillance video as unfairly prejudicial under ER 403. In the alternative, he requested an
11 opportunity to present rebuttal testimony. The employer responded that the investigation and
12 surveillance were undertaken in relation to another claim, and it was not until it was seen by the
13 employer's attorney that it was clear it was relevant to this claim. The employer argues that no
14 remedy is necessary, but if so, rather than striking testimony regarding the surveillance video,
15 Mr. Angulo should be allowed to present rebuttal testimony from witnesses who have already
16 testified.
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19 In his Proposed Decision and Order, our judge denied Mr. Angulo's motion and both forms of
20 requested relief, explaining that his decision affirming the Department's closing order was based on
21 the testimony of the employer's witnesses regarding their examinations and examination findings and
22 not their testimony regarding the surveillance video.
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25 We disagree with this reasoning. While allowing rebuttal testimony is largely within the
26 discretion of the industrial appeals judge, more important than whether testimony about the
27 surveillance video may be persuasive to an industrial appeals judge or the Board, is that the record
28 is fully developed without prejudice to either party. Striking testimony in which the employer's expert
29 witnesses said the surveillance video supported their conclusions would be prejudicial to the
30 employer. Not allowing the opportunity to have his witnesses address the surveillance video is
31 prejudicial to Mr. Angulo.
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34 Disclosure of the surveillance video after all of Mr. Angulo's witnesses had testified is certainly
35 "new matters" for which rebuttal testimony is appropriate. However, rebuttal is properly limited to
36 addressing the surveillance video, and not provided as an opportunity to reiterate the claimant's case
37 in chief.¹ Under the circumstances presented here, we conclude it is appropriate to allow Mr. Angulo
38 the opportunity to present rebuttal testimony from witnesses who have already testified regarding
39 surveillance video.
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¹ *In re Maria Chavez*, BIIA Dec., 87 0640 (1988).

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ORDER

The Proposed Decision and Order of January 20, 2021, is vacated. This order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5) to provide Mr. Angulo the opportunity to present rebuttal testimony 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.

Dated: May 24, 2021.

BOARD OF INDUSTRIAL INSURANCE APPEALS


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**Addendum to Decision and Order
In re Carlos Angulo
Docket No. 20 11887
Claim No. SD-21229**

Appearances

Claimant, Carlos Angulo, by Lehmbecker Law, per Thomas J. Moore

Self-Insured Employer, Masco Corporation, by Gress, Clark, Young & Schoepper, per James L. Gress

Department Order Under Appeal

In Docket No. 20 11887, the claimant, Carlos Angulo, filed an appeal with the Board of Industrial Insurance Appeals on February 6, 2020, from an order of the Department of Labor and Industries dated December 20, 2019. In this order, the Department affirmed its October 21, 2019 order that closed the claim with time-loss compensation benefits paid through December 29, 2013, and directed the self-insured employer to pay Mr. Angulo a permanent partial disability award equal to Category 2, WAC 296-20-280, for dorso-lumbar and/or lumbosacral impairments.

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 a Proposed Decision and Order issued on January 20, 2021, in which the industrial appeals judge affirmed the Department order dated December 20, 2019. On March 15, 2021, the self-insured employer filed a response to the Petition for Review.