

## **Pak, Chong**

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### **MOTION TO DISMISS**

#### **Failure to make a prima facie case**

A non-appealing party may move to dismiss an appeal for failure of the appellant to make a prima facie case. If the motion is denied, the non-appealing party may rest on its motion or present evidence. If the non-appealing party doesn't rest on its motion, the industrial appeals judge must review all of the evidence presented, from both parties, to determine if the appellant made a prima facie case. ....*In re Chong Pak*, BIIA Dec., 23 15521 (2025)

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## DISCUSSION

As a result of his December 23, 2013 injury, Mr. Pak broke his left wrist and injured his lip, eyes, and face. With the aid of a Korean interpreter, Mr. Pak presented only his testimony at hearing. At the conclusion of his testimony, the Department moved for dismissal of his appeals for failure to present a prima facie case. Our industrial appeals judge reserved ruling on the motion and told the parties she would give Mr. Pak time to consider the motion and take argument on the motion at the next hearing date. She instructed the Department to be prepared to present its case at the next hearing date. Ultimately, our judge again deferred ruling on the dismissal motion and the Department presented its case. At hearing, the Department asked that the testimony of its witnesses be held in colloquy, which our judge initially denied. In her PDO, our judge reconsidered this request and placed the Department's witnesses' testimony in colloquy. She then granted the Department's prima-facie motion as to both orders on appeal and dismissed both dockets.

We have previously held that when the Department makes a motion to dismiss an appeal for failure to present a prima facie case and the Department does not rest on its motion, we must review all of the evidence, including that presented by the Department, to determine if the claimant has made a prima facie case.<sup>2</sup> In deciding whether to grant the motion, we are required to accept the non-moving party's evidence as true, view all the evidence in the light most favorable to the non-moving party, and determine if there is any evidence or reasonable inference from the evidence establishing a prima facie case.<sup>3</sup> If we find the non-moving party has satisfied their initial burden, we must proceed to the next step of weighing the evidence and determining whether the non-moving party has proved their entitlement to the benefits they seek by a preponderance of the evidence.<sup>4</sup> Accordingly, we remove the testimony of the Department's witnesses from colloquy and consider it in reaching our findings and conclusions.

Because Mr. Pak did not respond to the Department's request for documents in support of his income, the Department's April 28, 2023 order calculated his wages based on his reported income for the 12-month period of November 18, 2012, through November 17, 2013. That period of income amounted to \$2,800, which resulted in a monthly rate of \$233.33. The Department also determined Mr. Pak was receiving Social Security Disability during the period it paid time-loss compensation

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<sup>2</sup> *In re Jerry L. Gibbs*, Dckt. No. 11 14052 (October 8, 2012); *In re Tana R. Gerrish*, Dckt. No. 00 21025 (August 28, 2002).

<sup>3</sup> *Spring v. Dep't of Labor & Indus.*, 96 Wn.2d 914 (1982), *after remand*, 39 Wn. App. 751 (1985).

<sup>4</sup> *Gibbs*, at 4.

1 benefits, so it offset his wages for the period of July 15, 2022, through April 20, 2023, a period of  
2 roughly 10 months. This resulted in an overpayment of \$2,707.60.

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4 Mr. Pak testified his wages should have included the amount he was paid for the job of injury.  
5 The Department did not include that wage because there was no documentation to support it. Based  
6 on the record in his claim allowance hearing, it appears Mr. Pak did not complete that job due to his  
7 injury, prompting the employer to hire others finish the work. And as part of its wage calculation, the  
8 Department included a greater time frame than it normally does when calculating intermittent wages  
9 under RCW 51.08.178(2). Our review of the complete record establishes Mr. Pak failed to establish  
10 a prima facie case that the Department's wage order was incorrect.

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12 However, we reach a different result on the overpayment order. In reaching her decision, our  
13 judge granted the Department's motion to dismiss based solely on Mr. Pak's testimony. This is error.  
14 In doing so, we find that there is evidence in the record to show the Department's overpayment order  
15 is incorrect because it applied the overpayment to a period exceeding six months. The Department  
16 explained it included the roughly 10-month period in its offset order because the overpayment  
17 resulted from a computer or clerical error.

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19 The overpayment statute, RCW 51.32.220 provides:

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21 (1) For persons receiving compensation for temporary or permanent total disability  
22 pursuant to the provisions of this chapter, such compensation shall be reduced by an  
23 amount equal to the benefits payable under [Social Security] . . . .

24  
25 (2) Any reduction under subsection (1) of this section shall be effective the month  
26 following the month in which the department or self-insurer is notified by the federal  
27 social security administration that the person is receiving disability benefits under the  
28 federal old-age, survivors, and disability insurance act: PROVIDED, That in the event  
29 of an overpayment of benefits **the department or self-insurer may not recover more  
30 than the overpayments for the six months immediately preceding the date the  
31 department or self-insurer notifies the worker that an overpayment has occurred:**  
32 PROVIDED FURTHER, That upon determining that there has been an overpayment,  
33 the department or self-insurer shall immediately notify the person who received the  
34 overpayment that he or she shall be required to make repayment pursuant to this  
35 section and RCW 51.32.230.

36  
37 (Emphasis added.)

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39 Washington enacted RCW 51.32.220 to implement a reverse offset by reducing Washington  
40 total disability benefits owed to injured workers who also receive Social Security Disability benefits.<sup>5</sup>  
41 The statute does not contain an exclusion on the six-month limitation on overpayments based on the

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47 <sup>5</sup> *In re Kenneth V. Gilmore, Jr.*, Dckt. No. 18 23039 (November 13, 2019).

1 reason for an overpayment. Accordingly, the record establishes the Department's overpayment order  
2 is incorrect because it assessed the overpayment for a period exceeding the six-month limitation  
3 contained in RCW 51.32.220(2).  
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### 5 **DECISION**

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7 In Docket No. 23 15521, the claimant, Chong D. Pak, filed an appeal with the Board of  
8 Industrial Insurance Appeals on May 1, 2023, from an order of the Department of Labor and Industries  
9 dated April 21, 2023. In this order, the Department offset Mr. Pak's wages based on his Social  
10 Security benefits. The Department order is incorrect and is reversed. This matter is remanded to  
11 the Department to issue a new overpayment order that assesses an overpayment due to a Social  
12 Security offset pursuant to RCW 51.32.220(2).  
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15 In Docket No. 23 17720, the claimant, Chong D. Pak, filed an appeal with the Board of  
16 Industrial Insurance Appeals on May 1, 2023, from an order of the Department of Labor and Industries  
17 dated April 28, 2023. In this order, the Department established Mr. Pak's wages. This order is correct  
18 and is affirmed.  
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### 22 **FINDINGS OF FACT**

- 23 1. On April 30, 2024, an industrial appeals judge certified that the parties  
24 agreed to include the Jurisdictional History in the Board record solely for  
25 jurisdictional purposes.  
26
- 27 2. Chong D. Pak sustained an industrial injury on December 23, 2013, when  
28 he slipped and fell. His claim was allowed.  
29
- 30 3. Based on the entire record, the Department's April 21, 2023 order  
31 incorrectly assessed an overpayment due to an offset for Social Security  
32 benefits Mr. Pak was receiving. The order imposes an offset that exceeds  
33 the six-month period allowed by RCW 51.32.220(2).  
34
- 35 4. Based on the entire record, there is insufficient evidence to show the  
36 Department order dated April 28, 2023, incorrectly calculated Mr. Pak's  
37 wage rate.

### 38 **CONCLUSIONS OF LAW**

- 39 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties  
40 and subject matter in these appeals.  
41
- 42 2. The Department's order dated April 21, 2023, is incorrect and is reversed.  
43 This matter is remanded to the Department to recalculate the  
44 overpayment pursuant to RCW 51.32.220(2) and limit the overpayment  
45 to the six months immediately preceding the date the Department notified  
46 Mr. Pak that an overpayment had occurred.  
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3. Mr. Pak failed to present a prima facie case that the Department's April 28, 2023 order is incorrect.
  4. The Department's CR 41(b)(3) motion to dismiss Mr. Pak's appeal of the Department order dated April 28, 2023, is granted and the appeal is dismissed for failure to present a prima facie case for the relief being sought.

8 Dated: January 2, 2025.

10 BOARD OF INDUSTRIAL INSURANCE APPEALS

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**Addendum to Decision and Order  
In re Chong D. Pak  
Docket Nos. 23 15521 & 23 17720  
Claim No. ZB-07580**

**Appearances**

Claimant, Chong D. Pak, Self-Represented

Employer, Various Employers (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Eric J. Lawless

**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 August 27, 2024, in which the industrial appeals judge dismissed the appeals.

**Evidentiary Rulings**

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that the industrial appeals judge erred in placing the testimony presented by the Department in colloquy and failing to consider the entire record when determining whether Mr. Pak presented a prima facie case. Accordingly, the testimony of the Department's witnesses is removed from colloquy.