

## **Barber, Kenneth**

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### **ETHICS**

**Attorney as witness**

### **EVIDENCE**

**Attorney as witness**

Where the testimony of the worker's attorney was critical to the questions in dispute, the attorney was precluded, under RPC 3.7, from acting as both witness and advocate. The attorney's testimony was stricken and the matter remanded to the hearing process.

**....*In re Kenneth Barber*, Order Setting Aside Proposed Decision and Order and Remanding Appeal to the Hearing Process, BIIA Dec., 87 0334 (1988)**

Scroll down for order.

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

1     **IN RE: KENNETH BARBER**                     )     **DOCKET NOS. 87 0334 & 87 0335**  
2   )  
3   )     **ORDER SETTING ASIDE PROPOSED**  
4   )     **DECISION AND ORDER AND REMANDING**  
5     **CLAIM NOS. H-933901 & H-730751**     )     **APPEAL TO THE HEARING PROCESS**

7 **APPEARANCES:**

9             Claimant, Kenneth Barber, by  
10            Michael E. Nelson, Attorney at Law

12            Employer, Blackstock Masonry, Inc.,  
13            None

15            Department of Labor and Industries, by  
16            The Attorney General, per  
17            Thornton Wilson, Assistant

19            In Docket Nos. 87 0334 and 87 0335, Claim Nos. H-933901 and H-730751, the claimant filed  
20            an appeal on January 28, 1987 from an order of the Department of Labor and Industries dated  
21            January 6, 1987, which adhered to the provisions of a prior Department order dated October 8, 1986,  
22            which distributed a third party settlement as follows:

25                     "WHEREAS, the claimant has recovered \$312,574.00, and RCW  
26                     51.24.060 requires distribution of the settlement proceeds as follows: 1)  
27                     Net share to attorney for fees and costs (\$156,841.00); 2) Net share to  
28                     claimant (\$106,787.76); and 3) Net share to Department (\$48,945.24).

29                     WHEREAS, the Department of Labor and Industries declares a statutory  
30                     lien against the claimant's third party recovery for the sum of \$85,532.04;

32                     NOW THEREFORE, demand is hereby made upon the claimant to  
33                     reimburse the Department in the amount of \$48,945.24.

34                     IT IS FURTHER ORDERED no benefits or compensation will be paid to or  
35                     on behalf of the claimant until such time the excess recovery totaling  
36                     \$31,267.71 has been expended by the claimant for costs incurred as a  
37                     result of the condition(s) covered under this claim."

39 **REMANDED TO THE HEARING PROCESS.**

**DECISION**

42            Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
43            and decision on a timely Petition for Review filed by the Department of Labor and Industries to a  
44            Proposed Decision and Order entered on September 30, 1987. The Proposed Decision and Order  
45            46            47

1 reversed the Department order of October 8, 1986 (sic) and directed that the Department issue a  
2 further order recalculating the Department lien in conformity with the Proposed Decision and Order.  
3

4 The Department's Petition for Review challenges the Proposed Decision and Order's finding  
5 that Mr. Barber in fact made no recovery for any expenses under Claim No. H-933901 in the  
6 settlement of his third party action and the Proposed Decision and Order's conclusion that the  
7 Department was equitably estopped from claiming a lien for benefits paid under Claim No. H-933901.  
8 However, because of a significant evidentiary error, we cannot resolve these substantive issues at this  
9 juncture. For the Department also argues that the Industrial Appeals Judge erred in permitting  
10 claimant's attorney, Mr. Michael Nelson, to testify on claimant's behalf on the critical issues in dispute.  
11 Because we agree that RPC 3.7 precludes Mr. Nelson from acting both as advocate and witness, we  
12 conclude that his testimony must be stricken, the Proposed Decision and Order vacated, and the  
13 matter remanded to a different Industrial Appeals Judge for further proceedings and for the issuance  
14 of a further Proposed Decision and Order.  
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21 RPC 3.7 provides:

22 "A lawyer shall not act as advocate at a trial in which the lawyer or another  
23 lawyer in the same firm is likely to be a necessary witness except where:

24 (a) The testimony relates to an issue that is either uncontested or a  
25 formality;

26 (b) The testimony relates to the nature and value of legal services  
27 rendered in the case; or

28 (c) The lawyer has been called by the opposing party and the court rules  
29 that the lawyer may continue to act as an advocate; or

30 (d) The trial judge finds that disqualification of the lawyer would work a  
31 substantial hardship on the client and that the likelihood of the lawyer  
32 being a necessary witness was not reasonably foreseeable before trial.  
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36 "The Department objected to Mr. Nelson's testimony. More importantly, Mr. Nelson was clearly aware  
37 prior to trial that he was an essential witness and listed himself as such at least as early as the May 7,  
38 1987 conference. Indeed, since Mr. Nelson represented Mr. Barber in his third party suit, his  
39 testimony is critical to the questions in dispute - whether the Department was equitably estopped from  
40 asserting a lien for more than \$14,998.41, and whether claimant had recovered expenses incurred  
41 under Claim No. H-933901 in his settlement of his third party action for the earlier injury sustained  
42 under Claim No. H-730751.  
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1 While Mr. Nelson may be "willing to take the risk should this go to superior court that it would be  
2 found to be improper" for him to have testified on issues going to the very heart of the dispute between  
3 the parties while also representing the claimant, we are not willing to abdicate our responsibility as a  
4 quasi-judicial tribunal to apply the rules of professional conduct.  
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7 It seems likely that on remand Mr. Barber will wish to again present Mr. Nelson's testimony. He  
8 will not be permitted to do so, so long as Mr. Nelson is also representing him as counsel in this appeal.  
9

10 Finally, we note that the Department both on May 7, 1987 and in its Petition for Review has  
11 suggested that claimant might explore the question of whether only a portion of the benefits paid under  
12 Claim No. H-933901 are recoverable by the Department from the third party settlement. It is, of  
13 course, the claimant's decision as to whether he wishes to pursue that avenue. We would simply note  
14 that, because this litigation has already been substantially delayed due to the violation of RPC 3.7, the  
15 parties should take care on remand to present a complete record on all issues in dispute. After a  
16 further proposed decision is issued, all parties will again have the right, pursuant to RCW 51.52.104, to  
17 petition this Board for review.  
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19 It is hereby ORDERED that Mr. Michael Nelson's testimony be stricken, that the Proposed  
20 Decision and Order issued on September 30, 1987 be vacated, and that the matter be remanded for  
21 assignment to a different Industrial Appeals Judge for further proceedings and the issuance of a  
22 further Proposed Decision and Order.  
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24 Dated this 31st day of March, 1988.  
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26 BOARD OF INDUSTRIAL INSURANCE APPEALS  
27

28 /s/  
29 \_\_\_\_\_  
30 SARA T. HARMON Chairperson  
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32 /s/  
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34 PHILLIP T. BORK Member  
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