Gaim, Shimangus

SANCTIONS

Frivolous defense

Sanctions may be appropriate if the Department requires the worker to present evidence merely because the worker has the burden of proof. ***….In re Shimangus Gaim*, BIIA Dec., 00 14616 (2002)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: SHIMANGUS GAIM	)	**DOCKET NO. 00 14616**
	)	
CLAIM NO. P-181113	)	**ORDER GRANTING CLAIMANT'S MOTION**
	)	**FOR SANCTIONS**

The claimant, Shimangus Gaim, filed an appeal with the Board of Industrial Insurance Appeals on May 5, 2000, from an order of the Department of Labor and Industries dated May 1, 2000. The order set aside the terms of a January 5, 2000 order and affirmed the provisions of an order issued on September 8, 1998. The September 8, 1998 order closed the claim with an award for permanent partial disability consistent with the degree of disability represented by Category 2 of WAC 296-20-280. On May 2, 2001, our industrial appeals judge issued a Proposed Decision and Order that reversed the remanded the matter to the Department with directions to pay time-loss compensation for the period May 22, 1998 through May 1, 2000 and directed the claim remain open for further proper necessary medical and/or surgical treatment. On May 31, 2001, having received no Petition for Review, we issued an Order Adopting Proposed Decision and Order as the final decision of the Board. On June 27, 2001, we received from Mr. Gaim, a motion for terms pursuant to RCW 4.84.185. After consideration of the claimant's motion, the response of the Department, the reply to the Department's response, and the record in this appeal, we determine that the motion should be granted.

Mr. Gaim suffered a low back injury on February 19, 1997. The claim was allowed. Conservative treatment did not resolve his problems and he was recommended for surgery in 1997. It was determined that he suffered a herniated disc at L4-5 and, prior to the closure of the claim, had a history of radiculopathy causing pain in the leg. An independent medical evaluation, performed in November 1997, led the examiner's to conclude that surgery should be performed and also concluded that at the time of their examination his condition should not be considered fixed and stable. A neurosurgeon who also examined him at the time, Dr. Yonemura, recommended surgery. Mr. Gaim, however, was hesitant to have the surgery performed. Conservative treatment reduced the symptoms in Mr. Gaim's leg, but not those in his low back. Frustrated with Mr. Gaim's reluctance to have surgery, Dr. Yonemura eventually indicated he no longer wished to treat Mr. Gaim. This appears to be the extent of the medical information available to the Department at the time it closed the claim the first time. On September 8, 1998, the Department issued an order that closed the claim with an award for permanent partial disability equal to Category 2 of the categories for permanent dorso-lumbar and lumbosacral impairments. An appeal of that order resulted in the issuance of an Order on Agreement of Parties that reversed the order and remanded the matter to the Department for further investigation.

The claimant was referred to another neurosurgeon, Dr. Wright. At that time another MRI was performed but claimant no longer had complaints of pain radiating into his leg. Based on this, Dr. Wright no longer though the claimant was a surgical candidate. Dr. Wright referred him to Dr. Blanton, a physiatrist. Dr. Blanton recommended an industrial rehabilitation program, which he described as a combination of physical therapy and occupational therapy designed to get the claimant back to work. It is significant that both doctors, as well as the previous independent medical examiners, felt that at the time of their examinations Mr. Gaim was unemployable. Armed with this information, on May 1, 2000, the Department issued another order that affirmed the original closure under the original terms. The appeal of that order is the appeal currently before us. In the course of the appeal, Mr. Gaim presented the testimony of Dr. Blanton and Dr. Wright. The Department rested without presenting testimony. Our industrial appeals judge issued a Proposed Decision and Order that found for the claimant based on medical evidence overwhelmingly

establishing that the condition caused by the industrial injury was not fixed and stable and required further treatment.

The claimant then filed a motion for sanctions. In its response, the Department indicated that Dr. Yonemura's notes indicate that Mr. Gaim was not amenable to undergoing surgery and that he had already run the gambit of conservative treatment from medication to physical therapy to epidural steroid injections. Consequently, on September 8, 1998, the Department issued its order closing the claim with a permanent partial disability rating. The Department did not argue that it had medical information that conflicted with the medical information described by the claimant in its motion and presented at hearing through the testimony of Dr. Wright and Dr. Blanton. The Department did not pursue the avenues afforded by RCW 51.32.110 if it believed that Mr. Gaim was being uncooperative nor was there any argument or evidence presented that would have tended to indicate that the recommended non-surgical treatment modalities, physical therapy and occupational therapy, were not considered by the Department to be proper and necessary treatment. The overwhelming evidence supports the conclusion that the Department's own independent medical examiners, as well as the doctors who testified on behalf of the claimant, believed that claimant's condition was not fixed and stable.

In response to Mr. Gaim's motion, the Department also argued that the claimant has the burden of establishing his right to benefits at all stages of the claim, citing as authority, *Olympia Brewing Co. v. Department of Labor & Indus.,* 34 Wn.2d 498 (1949). Accordingly, the Department believes it is not frivolous for the defense to stand by their right to hold the claimant to its burden of proof. This interpretation is not warranted by *Olympia Brewing.* That case discusses the burden of proof when a party challenges a determination of the Department in an appeal before the Board. The argument that the Department 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 is not supported by the holding in *Olympia Brewing* or any other decision or statute. We can think of no purpose of the act that would be served by placing such a burden on the worker for claiming benefits under the act.

RCW 4.84.185 provides for a non-prevailing party to pay reasonable expenses, including fees an attorney incurred in opposing an action or defense that was frivolous and advanced without reasonable cause. The standard can be described as whether the party against whom the motion is made has raised a defense about which there was no debatable issues upon which reasonable minds might differ and so devoid of merit that there was no possibility of success. *Biggs v. Vail,* 124 Wn.2d 193 (1994). Our review of this matter it becomes hard to understand, let alone explain, the Department or the assistant attorney general's handling of this claim. It appears that this situation is precisely what the legislature had in mind when in enacted RCW 4.84.185. We believe the Department should pay the claimant's reasonable expenses, including attorney fees.

We note that the Department has argued that this motion is untimely under the statute. The statute requires that the motion must be filed within thirty days of the entry of the final order. We note that the claimant filed this motion under Docket No. 98 18019, which was the docket number assigned to the appeal of the 1998 order that closed the claim. However, it was clear upon the reading of the claimant's motion that the motion for terms was intended to apply to the final order issued in Docket No. 00 14616. This motion, filed on June 27, 2001, was clearly filed within thirty days of our May 31, 2001 Order Adopting Proposed Decision and Order. Our intention to treat the

motion in this manner was stated in a letter from our Executive Secretary dated July 6, 2001 and was not the result of ex parte discussion with claimant's counsel.

We determine that the Department's defense of this action was frivolous and advanced without reasonable cause and attorney fees are appropriate. In his declaration, Mr. Kohles indicated that his hourly fee set in the contract was $200 per hour and that he raised his rates after June 1, 2000, to $275 per hour. We, however, feel that $200 per hour is generous and will calculate sanctions using that hourly wage. It appears from the documentation supplied by Mr. Kohles, that there are 29.4 hours that can be attributed to this appeal.[1] We therefore set the attorney fee at $5,880. Mr. Kohles also documented costs in the amount of $1,651.57. Therefore, the Department is required to pay Mr. Kohles attorney fees and costs equaling $7,531.57.

It is so ORDERED.

DATED: March 25, 2002.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JUDITH E. SCHURKE Member

[1] Of the 39.4 hours outlined in the declaration of Mr. Kohles, we noted that 6 hours were incurred prior to filing the notice of appeal in this matter. We deducted those hours from the total. We also note that there were two entries for the time spent in the preparation and the taking of Dr. Wright's deposition, accordingly we deducted another 4 hours. After these deductions, a total of 29.4 hours remained.