Kim, Peter

BOARD

Telephone hearings

An industrial appeals judge has discretion to determine in what circumstances telephone testimony will be allowed over the objection of a party. Factors impacting that decision include objections related to oath giving and verification of the witness's identity, and assessing credibility. Oath giving and identification are germane only to objections based on concerns that the witness may not be who they purport to be. Objections related to assessing credibility should be tempered by the realities of the appeal process where the Board members or the court or jury are the ultimate assessors of credibility, not the industrial appeals judge. **….*In re Peter Kim*, BIIA Dec., 00 21147 (2002)** [*Editor's note*: See also WAC 263-12-115(10).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: PETER S. KIM	**)**	**DOCKET NO. 00 21147**
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING APPEAL**
CLAIM NO. X-303459	**)**	**TO THE HEARING PROCESS**

APPEARANCES:

Claimant, Peter S. Kim, by
Law Office of M. Lynn Greiner, per
M. Lynn Greiner

Employer, Evergreen Staffing, by
William L. Rogers, President

Department of Labor and Industries, by
The Office of the Attorney General, per
Brian L. Dew, Assistant

The claimant, Peter S. Kim, filed an appeal with the Board of Industrial Insurance Appeals on October 16, 2000. Mr. Kim appeals an August 15, 2000 Department of Labor and Industries order. In the order the Department affirmed a May 23, 2000 order. In the May 23, 2000 order the Department denied time loss compensation for the period from October 23, 1999 through January 16, 2000, on the basis that no medical certification had been provided. **REMANDED TO HEARINGS.**

DECISION

The industrial appeals judge issued a Proposed Decision and Order on May 6, 2002, in which the judge reversed the August 15, 2000 Department order. The industrial appeals judge directed the Department to calculate and provide claimant Peter S. Kim loss of earning power benefits for the period "August 23, 1999, to January 16, 2000, inclusive" based upon ability to work four hours per day, five days per week. The Department filed a timely Petition for Review. This matter is before the Board for review and decision pursuant to RCW 51.52.104 and RCW 51.52.106.

Through this appeal Peter S. Kim contends that he is entitled to loss of earning power benefits for the period October 23, 1999 through January 16, 2000. As further discussed below, we find that Mr. Kim has not met his burden to establish his entitlement to the benefits sought for this

period. We cannot agree with the analysis in the Proposed Decision and Order that would direct the Department to calculate and provide the benefits.

However, upon vacating the Proposed Decision and Order, we remand this matter to our hearing process for the taking of further evidence, including the telephone testimony of Mr. Kim. Mr. Kim lives in Georgia. Through his attorney, Mr. Kim requested that he be allowed to testify by telephone. The industrial appeals judge who ruled upon the motion denied Mr. Kim's request. The ruling of the industrial appeals judge was, in effect, sustained upon interlocutory review by an assistant chief industrial appeals judge. That judge suggested that the parties attempt to arrive at a stipulation concerning Mr. Kim's testimony. However, such a stipulation was not entered. Mr. Kim subsequently did not testify.

First, we note the following error in the Proposed Decision and Order that would require correction even if we were to agree that Mr. Kim is entitled to loss of earning power benefits. The industrial appeals judge referred to the period considered as **August** 23, 1999 through January 16, 2000, in the statement of the issue and in the body of the decision, as well as in Finding of Fact No. 3 and Conclusion of Law No. 3. The Department, in its May 23, 2000 order that was affirmed by the appealed August 15, 2000 order, considered time loss benefits only for the period **October** 23, 1999 through January 16, 2000. The scope of our review authority therefore is limited to considering whether time loss benefits or loss of earning power benefits are due for the period October 23, 1999 through January 16, 2000. *See*, *e.g.*, *Brakus v. Department of Labor & Indus.*, 48 Wn.2d 218 (1956) and *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977, 982 (1970). We may consider only the question of whether Mr. Kim has shown entitlement to any loss of earning power benefits during the period October 23, 1999 through January 16, 2000.

Next we turn to the question of whether Mr. Kim has met his burden, such that we should direct the Department to provide loss of earning power benefits as Mr. Kim requests. In order to prove entitlement to loss of earning power benefits, Mr. Kim must show that his August 9, 1999 industrial injury caused physical restrictions that caused his earning power, compared to that at the time of injury, to be reduced by five percent or more during all or a portion of the period October 23, 1999 through January 16, 2000. See RCW 51.32.090(3)(a) and (b); and, *In re Patricia C. Heitt*, BIIA Dec., 87 1100 (1989). The burden was upon Mr. Kim to prove these propositions by a

preponderance of the evidence.[1] RCW 51.52.050. *See* also, *e.g.*, *Olympia Brewing Co. v. Department of Labor & Indus.*, 32 Wn.2d 498 (1949) and *Stafford v. Department of Labor & Indus.*, 33 Wn. App. 231, review denied 99 Wn.2d 1020 (1982).

At hearings, Mr. Kim has presented only the testimony of Dr. Kaya Hasanoglu, a physician certified in physical medicine and rehabilitation. Dr. Hasanoglu expressed the opinion, that during the relevant period Mr. Kim was "capable of working at least part-time in a light-duty position." Hasanoglu Dep. at 16, lines 8-9. Dr. Hasanoglu also testified, "[a]t that time my records do not indicate specific recommendations" regarding "how much" Mr. Kim should have been working. Hasanoglu Dep. at 16, lines 2-9.

Mr. Kim's attorney then asked "how many hours a day **would you have recommended** that he work," and Dr. Hasanoglu answered, "[f]our hours a day." Hasanoglu Dep. at 16, lines 10-12 (emphasis supplied.) Dr. Hasanoglu then further referenced the particular physical restrictions that had been recommended regarding such functions as sitting, standing, walking, bending, squatting, crawling, and climbing. See Hasanoglu Dep. at pages 16-17.

In summary, Dr. Hasanoglu only testified that: (1) during the relevant period restrictions on certain of Mr. Kim's specific bodily functions were recommended; and (2) in **retrospect** it "would have" been recommended that Mr. Kim work four hours per day.

To satisfy the burden of establishing a prima facie case under RCW 51.52.050, Mr. Kim had to present substantial evidence, evidence of a character, which, if unrebutted or uncontradicted, would convince an unprejudiced thinking mind that the Department order under appeal is incorrect. A mere scintilla of evidence is insufficient to meet this burden. See *Omeitt v. Department of Labor & Indus.*, 21 Wn.2d 684 (1944), *In re Natishia M. Powell*, Dckt. No. 00 16728 (October 1, 2001), and *In re Felimon C. Aguilar*, Dckt. No. 97 7032 (June 29, 1999). The testimony of Dr. Hasanoglu presented by Mr. Kim, without more, does not provide evidence from which such a reasonable fact finder could infer that Mr. Kim sustained a loss of earning power during the period October 23, 1999 through January 16, 2000. A reasonable fact finder cannot infer from this evidence whether, during the relevant period, Mr. Kim worked at all, and if so, how much he worked, or where he worked. A reasonable fact finder cannot otherwise infer from Dr. Hasanoglu's testimony what wages, if any, were earned during that relevant period. Such information is not otherwise provided in the record before us.

[1] "Preponderance of the evidence" means that the fact finder must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true. Washington Pattern Jury Instructions (WPI) 155.03

As a matter of law the evidence in the record before us is insufficient to establish loss of earning power during the period October 23, 1999 through January 16, 2000. Again, Dr. Hasanoglu did not testify that Mr. Kim followed any of the recommendations. There is no evidence in this record that Mr. Kim in fact did restrict his activities during this period. Even if one argued that it is reasonable to infer that Mr. Kim did abide by Dr. Hasanoglu's recommendations, Dr. Hasanoglu made it clear that the recommendations at that time were related to discrete functional activities. It would require speculation to find that this actually resulted in reduction of hours worked or a reduction in earning capacity otherwise. Such speculation does not satisfy Mr. Kim's burden. See *Miller v. Department of Labor & Indus.*, 1 Wn. App. 473, 480 (1969).[2] Even when making all reasonable inferences in favor of Mr. Kim, we must hold that the evidence is insufficient to meet his burden of establishing a prima facie case pursuant to RCW 51.52.050.

We next discuss Mr. Kim's request to testify by telephone. This Board has previously held that our industrial appeals judges have authority to take the testimony of witnesses by telephone. *See In re Paublino Pacheco*, Dckt. No. 93 3321 (May 10, 1994). In *Pacheco*, the Board recognized that in matters of procedure the Board and its judges turn to the Civil Rules that govern procedure before our superior courts. The Civil Rules direct Board procedure unless the Civil Rules conflict with our own specifically adopted rules. *See* RCW 51.52.100, RCW 51.52.140, and WAC 263-12-125.

Civil Rule (CR) 43(a)(1) states that testimony shall be taken "orally in open court, unless otherwise directed by the court." This Civil Rule contemplates that alternative means to take evidence may be considered in lieu of in-person testimony. For instance, CR 30 and CR 32(a)(3)(E) provide for presentation of depositions in lieu of in-person testimony. Such is allowed "upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally in open court . . .." R 32(a)(3)(E). Industrial appeals judges frequently

[2] This Board has held that, in order to prove entitlement to loss of earning power benefits, a worker must present: (1) lay or expert testimony establishing pre-injury earning capacity; (2) expert testimony establishing post-injury earning capacity; and (3) expert testimony establishing that a reduction, if any, in post-injury earning capacity is causally related to the residuals of the industrial injury. *In re Patricia Heitt*, BIIA Dec., 87 1100 (1989). As indicated, Mr. Kim particularly has not presented evidence, either lay or expert testimony, concerning the second item, that is, related to lost **earning** capacity. Dr. Hasanoglu's testimony may be substantial evidence that would assist a fact finder in determining the issue of causation, item (3) in *Heitt.* But Dr. Hasanoglu was not asked, and did not venture an opinion, about actual post-injury earnings or earning capacity during the period for which Mr. Kim seeks benefits. Thus, on particularly item (2), Dr. Hasanoglu's testimony is only a mere scintilla of evidence or no evidence at all, rather than substantial evidence, on the issue of actual post-injury earnings or earning capacity. A mere scintilla of evidence is insufficient to carry Mr. Kim's burden on that issue. *See Sayler v. Department of Labor & Indus.,* 69 Wn.2d 893, 896 (1966); *Austin v. Department of Labor & Indus*., 6 Wn. App. 394, 396 (1971); and *Miller*.

receive the testimony of physicians, chiropractors, vocational experts, and others, for instance, Department claims adjudication staff, by deposition.

The Board, in *Pacheco*, further recognized that parties may stipulate, or the court may direct over objection, that deposition testimony may be taken by telephone or other electronic means. CR 30(b)(7). The Board then, viewing the rules together, reasoned that judges in civil matters, including our industrial appeals judges, have authority to take testimony by telephone.[3] With regard to administration of oaths to all witnesses as required by CR 43, the Board indicated that, if telephone testimony is allowed, the witness must present himself or herself to a person who is recognized as having the authority to administer an oath in the jurisdiction where the witness is located. The Board referenced CR 28.

The Board, in *Pacheco*, ultimately identified a large number of considerations that may affect a determination to allow or deny particular telephone testimony. Identified considerations were: availability of adequate technology; need for translation services; arrangement for administering the oath; sanctions available in the event of perjury; ability to travel; practicality of obtaining testimony by in-person deposition; preference of the witness regarding travel, telephone or deposition; importance or lack of importance of the judge's presence to rule upon objections and motions; anticipated difficulty in handling documents such as proposed exhibits; the requesting party's compliance with discovery requests; the proposed witness's willingness to cooperate with preparation as well as effective examination by all parties; the number of parties participating; the number of witnesses testifying by telephone; and the timeliness of the request and timeliness of objections to the request. The Board indicated that motions for telephone testimony, objections to such testimony, and the industrial appeals judge's ruling, considering relevant factors, should each be in writing or contained in a verbatim report of proceedings.

In the case at hand, Mr. Kim provided his written declaration in support of his request to present his own testimony by telephone. He indicated he lives in Duluth, Georgia, as a single parent with his two children, ages nine and six, over whom he has custody. His ex-wife lives in Denver. He stated that he could not be gone for two or three days because he could not leave his

[3] We also note that, even in a due process hearing regarding driver's license revocation, it has been held that a defendant did not have the right to confront a witness in person as opposed to the witness appearing by telephone. *Weekly v. State of Washington, Department of Licensing*, 108 Wn. App. 218 (2001). We are not aware of any specific appellate case in this state that discusses the circumstances under which telephone testimony should or should not be taken in open court. We do note, however, that Evidence Rule (ER) 611 directs that the court shall exercise reasonable control over the "mode" and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

children alone due to their dependency on him for meals, school transportation, and their need of him in the home. Also, Mr. Kim had started a new job a month prior to the declaration. He stated that when he originally asked his employer for as little as a day off work to accommodate telephone testimony, the employer denied the request. Mr. Kim was concerned that he would lose his job if he took the two or three days necessary to come to this state to testify. Finally, Mr. Kim indicated that he did not have the financial resources to fund a trip that would cost several hundred dollars. He was earning $10 per hour at the time, providing the sole support for his children and his own living expenses. He had no savings, and used all of his money for basic living expenses. Finally, Mr. Kim's attorney represented that she believed Mr. Kim's testimony would take only approximately 15 minutes.

The assistant attorney general for the Department objected to Mr. Kim's testimony by telephone on the following grounds. First, he argued that,

> we believe we're entitled to expect Mr. Kim to come to Washington State since he initiated this process and used the State court or the State Board hearing system, in which they're expected to come and be able to allow us face-to-face cross examination as well as in-person testimony.

9/5/01 Tr. at 5. He also indicated he did not understand Mr. Kim's concerns about taking time off and also having to care for his children. Finally, the assistant attorney general suggested that perhaps Mr. Kim could travel "by bus or by car or by train." Again, the assistant attorney general indicated,

> As far as living in a small town in Georgia, I think that's kind of the basic issue. This is a choice that Mr. Kim has made after he has initiated this process in the State, to voluntarily go off to a small town in Georgia. That shouldn't . . .be significant enough of a factor to prevent us from pursuing what we see to be our normal right of having him examined, questioned in person.

9/5/01 Tr. at 5-6. Finally, when the industrial appeals judge inquired as to the significance of Mr. Kim's testimony, the assistant attorney general first indicated that he thought there were credibility issues regarding whether the employer offered a light duty job. However, the assistant attorney general then indicated,

> I don't think there's going to be any disagreement that an offer of light duty was made. I'm not clear on whether the details of the offer are something that are in agreement.

> Moreover, our understanding of the claimant's rejection of that offer, I do not believe is something that is in agreement.

9/5/01 Tr. at 6.

The employer, through its president William L. Rogers, objected also to Mr. Kim testifying by telephone. First, he stated that Mr. Kim was in Georgia because of his own decision.

> Number two, there's a reason why we have face-to-face testimony. It's so that the judge, or if there is a jury, can look at the individual. And if there is a credibility problem, assess who is telling the truth and who is not.

9/5/01 Tr. at 7. In response, Mr. Kim's attorney asserted that there is no dispute over whether a light duty job was offered. Rather, the issue concerns the offer compared to what Dr. Hasanoglu advised Mr. Kim he could perform. The attorney again indicated the only claim is for loss of earning power compensation. The attorney explained that Mr. Kim has children in school and in daycare when he works. Coming to this state to testify would take at least two days, during which he would miss work and have to pay for the care of his children or not have anyone to transport them to school.

The industrial appeals judge, while indicating sympathy for Mr. Kim as a single parent, held that the *Pacheco* factors weighed against allowing telephone testimony in this case. The judge indicated, due to credibility factors and a detached voice on the phone without other indicia of credibility, it would be difficult for the fact finder to draw any reliable conclusions about the facts. The judge also indicated a belief that *Pacheco* stated that telephone testimony should not be used simply to reduce or avoid the inherent costs in litigating a dispute. *See* 9/5/01 Tr. at 10-11. Also, during hearing on Mr. Kim's motion the industrial appeals judge expressed concern, as did the others present, about arranging for someone to administer an oath to Mr. Kim, as indicated in *Pacheco*.

We cannot agree with the ruling of the industrial appeals judge that denied Mr. Kim the opportunity to arrange for his testimony by telephone. First, the industrial appeals judge, as did the assistant attorney general and Mr. Rogers, assigned too much **relative** importance to the goal of a particular industrial appeals judge being able to assess Mr. Kim's credibility through in-person testimony. While that goal is desirable as a general matter when more important competing considerations are not present, it is not integral to the workers' compensation appeals process in this state. Our State Legislature has determined, and this Board and our courts have emphasized,

that in workers' compensation cases our hearings process may ultimately in any case require the Board itself to determine all factual matters, including credibility of witnesses, without the Board members ever hearing the witnesses testify, let alone meeting or seeing a witness in person. RCW 51.52.104 and RCW 51.52.106. Also, if further appeal is taken, a superior court judge or jury will decide the factual issues based upon the transcribed record of testimony made before the industrial appeals judge, again, without that judge or jury having directly heard, let alone having seen, the witnesses in person. RCW 51.52.115. And, although we consider the value of personal observation of witnesses, we have reserved the right to substitute industrial appeals judges such that the judge who issued the Proposed Decision and Order may not necessarily be the judge who heard the testimony. WAC 263-12-045(3); and *In re Alonso Leal*, Dckt. No. 01 14782 (June 24, 2002). *See* also, *Robles v. Department of Labor & Indus.*, 48 Wn. App. 490, 494 (1987); and, *Rosales v. Department of Labor & Indus.*, 40 Wn. App. 712, 714-716 (1985).

In the present case the assistant attorney general for the Department and Mr. Rogers for Evergreen Staffing have both asserted that credibility issues are present. The credibility concerns in this case are not extraordinary or unusual compared to the majority of other cases coming before this Board and its judges. And the concerns about allowing telephone testimony raised here do not identify any more risk of prejudice to the Department or the employer than to Mr. Kim himself. As indicated previously, it is Mr. Kim who has the burden of persuasion by a preponderance of the evidence. Most all appellants, whether employers or workers or others, testifying before our judges would rather appear in person if it is reasonably possible for them to do so. It is doubtful that Mr. Kim could obtain any advantage by appearing by telephone.

Secondly, the fact that Mr. Kim has couched his request **partially** in financial terms should not be viewed as a disincentive to allowing him to testify by telephone. The financial restraints identified by Mr. Kim are not of the type ordinarily inherent in litigating before this Board. The caution on this point expressed in *Pacheco* is appropriate where it appears that a party is simply trying to cut costs by presenting telephone testimony where others similarly situated would be expected to present the testimony in person. Most appellants and most other witnesses are within this state when the case is heard. The next largest group of appellants and witnesses are from neighboring states. Mr. Kim lives much farther away and travel expenses would be much greater. Also, we note that Mr. Kim identified two other compelling reasons for his request other than the costs associated with travel considerations. These were: (1) his responsibilities as a single parent

of young children with the other parent living a long distance away; and (2) the fact that he was working at a new job from which his employer refused to excuse him for the days necessary to travel.

Finally, arranging for a proper oath should not be viewed as a barrier to Mr. Kim testifying by telephone. We recognize that the Board, in *Pacheco*, identified this as a concern and went so far as to indicate that someone authorized to administer oaths at the witness's physical location must administer the oath. While that may be one way to approach arrangements for an oath, on further consideration we note that there are other means available as well to accomplish this task.

The Legislature has provided that the Board's duly authorized industrial appeals judges, as well as all persons duly authorized by the Board to take depositions,

> Shall have power to administer oaths . . . and to do all things conformable to law which may be necessary to enable them, or any of them, effectively to discharge the duties or his or her office.

RCW 51.52.100. The Civil Rules provide:

> **(d) Oaths of Witnesses**
>
> (1) *Administration.* The oaths of all witnesses in the superior court
> (A) shall be administered by the judge;
> (B) shall be administered to each witness individually; and
> (C) the witness shall stand while the oath is administered.
>
> (2) *Applicability.* This rule shall not apply to civil ex parte proceedings or default divorce cases and in such cases the manner of hearing witnesses shall be as each superior court may prescribe.
>
> (3) *Affirmation in Lieu of Oath.* Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

CR 43. In order to facilitate the taking or depositions out-of-state and in other countries, the Civil Rules provide judges the authority to appoint a person to administer an oath at a particular deposition. CR 28(a) and (b).

Our industrial appeals judges have, under our governing statutes and court rules, broad authority to administer oaths to witnesses. Our jurisdiction is appellate only in nature and is defined by subject matter within certain areas of controversy administered first by the Department of Labor & Industries. *See Brakus* and *Lenk*. The question of allowing telephone testimony and administering an oath to voluntary witnesses does not involve a question of jurisdictional authority.

The purpose of a witness oath is clear:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Evidence Rule (ER) 603. This purpose can be satisfied by telephone.

Our industrial appeals judges are generally very well-experienced in determining and accommodating the needs of parties for presentation of their testimony in different locations, over nonconsecutive days, by deposition, with and without a variety of interpreters, and over the telephone. Again, as before, we are satisfied that our industrial appeals judges have authority to allow voluntary witnesses to testify by telephone. We are also satisfied that our judges have authority to administer an oath over the telephone.

So long as an industrial appeals judge has carefully considered the reasons for a request as well as the objections to the request, and finds good reason to allow telephone testimony, and so long as necessary special arrangements are made, and the witness is identified, we are confident in the capacity of our industrial appeals judges and our own capacity to weigh and consider telephone testimony properly.

In Mr. Kim's case, we find that his request to testify by telephone was made for compelling reasons that outweigh the asserted reasons for objecting to the request. The Proposed Decision and Order dated May 6, 2002, is vacated. This matter is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order, with direction to allow for Mr. Kim's telephone testimony and for such other testimony as is offered, scheduled, and deemed proper, if the appeal is not voluntarily dismissed or resolved by mutual agreement of the parties. The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings and conclusions as to each contested issue of fact and law, based on the entire record, and consistent with this order. Any party aggrieved by

such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 8th day of August, 2002.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member