Freebyrd-Brown, Robynhawk

SANCTIONS

Frivolous defense

Because the Department had no evidence to support its order and chose to rely on an untenable legal theory, sanctions are appropriate. ***….In re Robynhawk Freebyrd-Brown,* BIIA Dec., 02 10758 (2003)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ROBYNHAWK FREEBYRD-BROWN	**)**	**DOCKET NO. 02 10758**
	)	
	)	
	)	**ORDER GRANTING MOTION FOR**
CLAIM NO. Y-395626	**)**	**SANCTIONS**

The claimant, Robynhawk Freebyrd-Brown, filed an appeal on February 25, 2002, from an order of the Department of Labor and Industries dated December 21, 2001. The order affirmed an order dated September 27, 2001, that rejected the claim. On December 9, 2002, our industrial appeals judge issued a Proposed Decision and Order, which reversed the Department order of December 21, 2001, and remanded the matter to the Department with directions to allow the claim as an occupational disease and to take such further action as indicated by the law and the facts. On January 14, 2003, having received no petition for review, we issued an Order Adopting Proposed Decision and Order as the Board's final order in this matter. Thereafter, on February 7, 2003, the claimant filed a motion for sanctions under RCW 4.84.185. The statute is authority for an award of expenses, including attorney fees, to a prevailing party in response to a defense that was frivolous and advanced without reasonable cause. After consider of the claimant's motion, the Department's response, and the claimant's reply, we determine that the request for sanctions should be granted.

Ms. Freebyrd-Brown filed this claim as a result of back pain that commenced in the summer of 2001, while working for Del Monte Foods as a fruit sorter. When the back pain became worse, she sought treatment from Charles Sherwood, physical assistant supervised by Judith Page, D.O. Dr. Page testified at hearing and established the basis for allowing the claim as an occupational disease. She indicated that Ms. Freebyrd-Brown had a pre-existing facet condition as L5-S1 that had been aggravated by work activities, resulting in a sacroiliac strain. At the end of the presentation of claimant's case, the Department rested and moved to dismiss the appeal pursuant to CR 41.

The Department's position was that the issue of occupational disease was not before the Board. The Department argued that the only issue before the Board was whether claimant sustained an industrial injury. Because claimant's evidence did not establish an industrial injury, the Department asserted that the appeal must be dismissed. The Department responded to the motion for sanctions with a similar argument. The Department asserted that sanctions are not proper because it believed that this was a claim for an industrial injury and it was not required to defend an occupational disease theory for allowance of the claim.

In support of its motion for sanctions, the claimant relies on the fallacy of the Department's position that this is a claim for an industrial injury and the claimant is precluded from advancing a claim for occupational disease in this appeal. It is well settled that an application for benefits must be viewed as a claim for compensation for either an industrial injury or an occupational disease, and the Department must adjudicate the claim under both theories. *In re Joe Callender, Sr.*, BIIA Dec., 89 0823 (1990); *In re Judith Burr*, Dec., 52,023 (1979) It follows that the Board's scope of review involves whether the claim should be allowed as an industrial injury or an occupational disease. In light of these longstanding Board decisions, the Department's theory for defending the rejection of the claim is without merit.

Ms. Freebyrd-Brown also argued that the Department rejected the claim without a medical basis. She asserted that the one medical witness identified by the Department, Dr. McLaughlin, had not provided an opinion about her condition until after the Department had denied her claim. The Department did not respond to the assertion that it did not have medical evidence in support of its position. It appears that the Department had no evidence to support the denial of the occupational disease claim.

In addition to the argument that the question of an occupational disease was not before the Board, the Department also responded to the motion by indicating that it was not on notice that the claimant was advancing an occupational disease claim. The record in this matter does not support this assertion. We note that the notice of appeal in this matter was actually filed as a protest with the Department. The Department, in appropriate use of its authority, forwarded the protest to the Board for treatment as an appeal. The letter did not reference either industrial injury or occupational disease theories for the claim. However, our record reflects that the statement of historical facts stipulated to by the parties was amended by our industrial appeals judge to show that the application for benefits alleged an occupational disease or an industrial injury. In addition, the judge's Report of Proceedings dated May 21, 2002 indicates that at a conference held on that date, the major issued preserved by the claimant was whether claimant's occupational disease for a low back condition should be allowed. The Department's assertion that it had no notice that the claimant was advancing an occupational disease claim is disingenuous and is not supported by the record.

Finally, the Department argues that its defense as a whole must be frivolous in order for sanctions to be appropriate. *Biggs v. Vail*, 119 Wn.2d 129 (1992). It asserts that because it was successful in defending against the industrial injury claim, sanctions should not be imposed merely because it was unsuccessful in defense of the rejection of an occupational disease claim. This again is not persuasive in that the Department is defending the rejection of the claim. Based on prior Board decisions, in such a defense a claim can be rejected only if the claimant is unsuccessful in establishing an industrial injury or an occupational disease. For the rejection of the claim to be affirmed, the facts must preclude allowance of the claim based on either theory.

The Department's defense in this matter fits within the criteria for imposing sanctions under RCW 4.84.185. The defense was advanced without reasonable cause. Also, its defense did not include a request to eliminate the Department's obligation to consider a claim under both theories. The Department did not present argument supporting a change in the previous rulings on that issue. The imposition of sanctions is appropriate.

It appears that the Department required the claimant to present evidence in this matter based on a belief that the claimant was limited to presenting evidence on an industrial injury theory for allowance of the claim. This incorrect belief was relied on again to respond to the claimant's motion for sanctions. Because the Department had no evidence to support denial of the claim, has chosen to rely on an untenable legal theory for its motion to dismiss, and its response to the motion for sanctions, the motion for sanctions is granted.

In support of its motion, the claimant's attorney established that he spent 15 hours in furtherance of this appeal and that the fair value of his time is $150 per hour. The claimant was also required to expend $479.68 in costs related to her appeal. The total award for fees and costs,

therefore, will be in the amount of $2,729.68. It is ORDERED that the Department should pay this amount pursuant to RCW 4.84.185.

DATED: June 5, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/ _____
THOMAS E. EGAN Chairperson

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