

Benavides, José

BOARD

Hearing

A hearing on a motion to dismiss satisfies the requirement for a hearing under *Watt v. Weyerhaeuser Co.*, 18 Wn. App. 731 (1977) when the hearing is held pursuant to proper notice and the parties understand the hearing may result in a final disposition of the appeal. ...*In re José Benavides*, BIA Dec., 05 10661 (2007)

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

1 **IN RE: JOSÉ R. BENAVIDES**) **DOCKET NO. 05 10661**
2)
3 **CLAIM NO. W-333080**) **DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, José R. Benavides, Pro Se

6 Self-Insured Employer, J R Simplot Co., by
7 Evans, Craven & Lackie, P.S., per
8 Gregory M. Kane

9
10 The claimant, José R. Benavides, filed an appeal with the Board of Industrial Insurance
11 Appeals on January 28, 2005, from an order of the Department of Labor and Industries dated
12 January 13, 2005. In this order, the Department affirmed its order of October 21, 2004, in which it
13 affirmed a prior order dated July 29, 2004, in which the Department denied the claimant's
14 application to reopen. The claimant's appeal is **DISMISSED**.

15 **DECISION**

16 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
17 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
18 issued on January 25, 2007, in which the industrial appeals judge dismissed the claimant's appeal.
19 All contested issues are addressed in this order.

20 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
21 no prejudicial error was committed. The rulings are affirmed. We have granted review to decide if
22 our industrial appeals judge properly dismissed this matter. In this case, the pro se claimant, José
23 Benavides, had a history of missed appearances. Fourteen conferences were held in this matter
24 with poor attendance on the part of Mr. Benavides or his representatives. While he secured both
25 lay and legal representation during the pendency of his appeal, his attention to the Board
26 proceedings remained unsatisfactory. Mr. Benavides also failed to appear for two agreed
27 examinations, which might have lead to the resolution of his appeal. After his hearing was finally
28 scheduled, our industrial appeals judge properly issued a litigation order, in which she addressed
29 pre-trial scheduling, discovery, and post-hearing deadlines.

30 When the claimant's attorney failed to confirm witnesses on the specified deadline, the
31 employer brought a motion to dismiss. Our industrial appeals judge scheduled a telephone hearing
32 to hear oral argument on the motion. At this point, Mr. Benavides was represented by counsel. His

1 attorney sent a letter one month prior to the confirmation deadline, in which he indicated that they
2 were unable to confirm any expert witnesses. Despite that fact, Mr. Benavides was unwilling to
3 dismiss the appeal. During the telephone hearing, our industrial appeals judge granted the motion
4 to dismiss on the record. She indicated that she would memorialize her ruling in a Proposed
5 Decision and Order.

6 In supporting the actions of our industrial appeals judge, we remain mindful of the Court of
7 Appeals' ruling in *Watt v. Weyerhaeuser*, 18 Wn. App. 731 (1977). In the *Watt* opinion,
8 the court ruled that a worker's appeal could be dismissed only at a hearing. A hearing was
9 distinguished from a conference. The court noted that, unlike a conference, a hearing is a trial de
10 novo on sworn testimony in which the Board performs an essentially judicial function and the
11 purpose is to decide the issues on appeal. Mr. Watt's appeal was dismissed following the initial
12 conference. At the first conference, the appeal was dismissed and held in suspension. The
13 claimant was given a certain amount of time to come forward with proof that he was ready to
14 proceed and had medical evidence in support of his appeal. After Mr. Watt's attorney missed a
15 suspension deadline, the case was dismissed without a hearing.

16 Unlike Mr. Watt, Mr. Benavides was represented by counsel in a hearing not a conference.
17 The hearing was held pursuant to due and proper notice, and the purpose was to determine the
18 disposition of the appeal. We believe that this type of proceeding satisfies the requirement of *Watt*
19 that a hearing precede a decision to dismiss the appeal. Although the claimant did not voluntarily
20 dismiss his appeal, his counsel made the representation that he would be unable to present a
21 legally sufficient case. His attorney was obligated to ensure that Mr. Benavides understood that the
22 hearing on the motion could result in the dismissal of his appeal. Based on the pleadings and
23 notices, there is no reason to question notice in this matter.

24 In the *Watt* ruling, the Court pointed out that the purpose of a hearing is to decide the issues
25 on appeal. The dispositive issue in Mr. Benavides case was his inability to present a prima facie
26 case. Mr. Benavides received judgment on his appeal in the form of a dismissal.

27 The fact that this hearing was conducted by phone with parties located throughout the state
28 did not detract from the dignity of the proceeding. Measures which preserve efficiency and
29 accommodate the parties should be encouraged provided that they do not interfere with the efficacy
30 of the process.

31 Historically, this Board has adhered to the principle that the least severe sanction should be
32 imposed provided that the purpose of discovery is not undermined. *In re Waheed*

1 *Al-Maliki*, BIIA Dec., 01 14923 (2003). In a situation where a party fails to confirm expert testimony,
2 the prescribed remedy is to cancel the claimant's hearing time while reserving enough time for the
3 claimant to present his own testimony. While confirmation of witnesses is one of the factors
4 underlying the dismissal, there is more at issue here. The claimant's attorney admitted that he had
5 no witnesses and was not planning on securing any expert testimony for the hearing. The actual
6 admission that the worker cannot present a case, justifies the harsher remedy. This is not an issue
7 of discovery, but an issue of legal sufficiency as contemplated by CR 41(b). We stand behind the
8 actions of our industrial appeals judge. She properly scheduled a hearing with due and proper
9 notice to all parties. Her decision to dismiss the appeal was correct, justified by the circumstances
10 presented here, and consistent with her duties and power pursuant to WAC 263-12-045(k).

11 **FINDINGS OF FACT**

- 12 1. The claimant, José R. Benavides, filed an application for benefits with
13 the Department of Labor and Industries on August 21, 2000, in which he
14 alleged that he sustained an industrial injury in the course of
15 employment with J.R. Simplot Company on July 26, 2000. In an order
16 dated August 25, 2000, the claim was allowed. On July 19, 2001, the
17 Department issued an order in which it closed the claim without further
18 award for time loss compensation or permanent partial disability. On
19 September 10, 2001, the claimant filed a protest of the order of July 19,
20 2001, and on October 24, 2001, the Department issued an order in
21 which it affirmed its order of July 19, 2001. The claimant filed an appeal
of the order of October 24, 2001, on December 10, 2001. The Board
granted the appeal under Docket No. 01 23234 on January 8, 2002, and
on October 22, 2002, the Board entered an order in which it dismissed
the appeal in Docket No. 01 23234.

22 On July 19, 2004, the claimant filed an aggravation application. On
23 July 29, 2004, the Department entered an order in which it denied the
24 aggravation application. On August 19, 2004, the claimant filed a
25 protest of the order of July 29, 2004. On September 23, 2004, the
26 Department issued an order in which it held its order of July 29, 2004, in
27 abeyance. On October 21, 2004, the Department entered an order in
28 which it affirmed the order of July 29, 2004. On November 4, 2004, the
29 claimant filed a Notice of Appeal of the order of October 21, 2004; this
30 appeal was assigned Docket No. 04 24990. On November 12, 2004,
31 the Department issued an order in which it held its order of October 21,
32 2004, in abeyance. On November 29, 2004, the Board issued an order
in which it granted the appeal in Docket No. 04 24990. On January 13,
2005, the Department issued an order in which it affirmed its order of
October 21, 2004. On January 28, 2005, the claimant filed a Notice of
Appeal from the order of January 13, 2005. On February 9, 2005 the
Board entered an order in which it vacated its November 29, 2004 order
in which it granted the appeal in Docket No. 04 24990. On

1 February 10, 2005, the Board entered an order in which it granted the
2 claimant's appeal of the January 13, 2005 order under Docket
3 No. 05 10661.

- 4 2. The claimant failed to confirm any expert testimony nor was he able to
5 obtain any medical expert willing to testify on his behalf.

6 **CONCLUSIONS OF LAW**

- 7 1. The Board of Industrial Insurance Appeals has jurisdiction over the
8 parties to and the subject matter of this appeal.
- 9 2. Pursuant to CR 41(b), the claimant's January 28, 2005 appeal of the
10 Department order of January 13, 2005, is **DISMISSED**.

11 It is so **ORDERED**.

12 Dated this 6th day of June, 2007.

13
14 BOARD OF INDUSTRIAL INSURANCE APPEALS

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16
17 /s/ _____
18 THOMAS E. EGAN Chairperson

19
20 /s/ _____
21 FRANK E. FENNERTY, JR. Member

22
23 /s/ _____
24 CALHOUN DICKINSON Member