Gonzalez, Adela

BOARD

Equitable powers

In order to be entitled to equitable relief for failing to file a timely protest, a worker must satisfy a two-part test to excuse the untimely filing. The worker must first establish that the worker is illiterate in English and unable to ascertain and/or understand the nature and contents of the order; and second, the worker must establish some misconduct in communication of the order on the part of the Department if it knew or should have known that the worker was illiterate in English. **….*In re Adela Gonzalez,* BIIA Dec., 05 23236 (2006)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: ADELA N. GONZALEZ	**DOCKET NO. 05 23236**
CLAIM NO. SA-23653	**ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING THE APPEAL FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Adela N. Gonzalez, by
Springer, Norman & Workman, per
John R. Dick

Self-Insured Employer, Foster Farms, by
Wallace, Klor & Mann, P.C., per
Lawrence E. Mann and Jennifer C. Baker

Department of Labor and Industries, by
The Office of the Attorney General, per
Natalee Fillinger, Assistant

The claimant, Adela N. Gonzalez, filed an appeal with the Board of Industrial Insurance Appeals on December 12, 2005, from an order of the Department of Labor and Industries dated October 13, 2005. In this order, the Department affirmed its order of May 18, 2005, in which it denied the claim because the claimant's condition was not the result of the injury alleged, and the claimant's condition was not the result of the exposure alleged. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on July 13, 2006, in which the industrial appeals judge dismissed the appeal from the Department order dated October 13, 2005.

We have granted review in order to remand this matter to the hearings process to allow Ms. Gonzalez an opportunity to present additional evidence.

The issue in this matter is whether Ms. Gonzalez, who was born and raised in Mexico and came to the United States in 1988, meets the two-prong test set forth in *Rodriguez v. Department of Labor & Indus.,* 85 Wn.2d 949 (1975), for equitable relief for failing to file a timely protest to the Department's order dated May 18, 2005, in which the Department denied her claim.

The record in this matter is quite small. The only evidence presented is the testimony of the claimant, Adela N. Gonzalez, and the testimony of an individual by the name of Loren Stanley Hanna III. Mr. Hanna is a Spanish-English interpreter and translator. Mr. Hanna translated the May 18, 2005 Department order for Ms. Gonzalez on September 15, 2005. Ms. Gonzalez testified that she was unable to read and understand the contents of the May 18, 2005 Department order until it was translated to her by Mr. Hanna on September 15, 2005. Following the translation of the May 18, 2005 Department order, Ms. Gonzalez filed a protest to the order.

The application of equitable principles to excuse the untimely filing of a protest to a Department order is set out in the case of *Rodriguez v. Department of Labor & Indus.*, *supra*, and *Kingery v. Department of Labor & Indus.*, 132 Wn.2d 162 (1997). *Rodriguez* is factually similar to the case currently before us involving Ms. Gonzalez. In *Rodriguez*, the claimant was illiterate in English and Spanish, and was a Mexican-American farm worker. He used an interpreter whenever he dealt with the Department of Labor and Industries. When Mr. Rodriguez received the Department order in question, his interpreter was ill and he did not get the order translated until after the time for filing a protest had expired. In *Rodriguez*, the court found that the claimant's illiteracy made it impossible for him to ascertain or understand the nature and the contents of the order which had been communicated, and that the Department knew, or should have known, that Mr. Rodriguez was illiterate at the time it closed his claim. The second prong of the *Rodriguez* test, which is misconduct on the part of the Department of Labor and Industries, is discussed in a footnote on page 955 of the *Rodriguez* decision. The court notes that the information concerning the Department's knowledge of Mr. Rodriguez's need for an interpreter was contained in two separate medical examination reports that were received by the Department.

The court's two-prong test to be used when equitable principles should excuse an untimely filing of a protest to a Department order is confirmed in *Kingery*. In *Kingery*, the court stated:

> Key to the application of equitable principles in *Ames* and *Rodriguez* are two elements: the claimant's competency to understand the content of the order and the appellate process, including noted time limits, when the Department communicated the order to the claimant, and some misconduct on the part of the Department in communicating its order to the claimant.

Kingery, at 174.

We find that Ms. Gonzalez has made a prime facie case with respect to the first element set forth in *Rodriguez*. That is, she has established that she was not competent to understand the content of the order and the appellate process, including the noted time limits for filing a protest, at

the time she received the Department order. This is because Ms. Gonzalez is illiterate in English. The test, as explained in *Kingery*, focuses on the claimant's comprehension of the contents of the order. Ms. Gonzalez's testimony is that she cannot read English.

The current record, as it is comprised, consists only of an inquiry regarding Ms. Gonzalez's ability to understand the Department order dated May 18, 2005. There is no evidence in the record regarding misconduct on the part of the Department, which is the second prong of the test set forth in *Rodriguez*. While there is no direct inquiry in the record regarding any misconduct on the part of the Department, there is an inquiry, on cross-examination of Mr. Hanna by the self-insured employer's attorney, regarding Ms. Gonzalez's need for interpreters. Mr. Hanna, the interpreter who was assisting Ms. Gonzalez, was asked if he ever accompanied Ms. Gonzalez to her medical appointments. Mr. Hanna answered on page 48 of the transcript of May 16, 2006, that he had accompanied Ms. Gonzalez to her doctors' appointments and translated or interpreted for her probably fifteen times.

In order to properly apply the test set forth in *Rodriguez* it is incumbent on our industrial appeals judges to inquire whether there was any evidence to indicate that the Department knew of Ms. Gonzalez's need for an interpreter or translator. When the only issue before this Board is the application of a specific legal doctrine, such as in this case, our industrial appeals judges should advise the parties of their burden of proof, and ensure that a proper record is prepared for review by this Board.

We find that Ms. Gonzalez has made a prima facie case with respect to the first element of the test set forth in *Rodriguez* and *Kingery*. That is, she has established that she was not competent to understand the content of the order and the appellate process, including the noted time limits, at the time that the Department communicated the order to her. While there is some evidence in this record that the Department or the self-insured employer may have known about Ms. Gonzalez's inability to understand the order based on her use of interpreters at her medical appointments, the record needs to be more fully developed.

The Proposed Decision and Order of July 13, 2006, is vacated. This appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. Our industrial appeals judge is instructed to advise the parties of the two-prong test set forth in *Rodriguez*, and because the record as it currently exists contains evidence that Ms. Gonzalez used interpreters at her medical appointments, both the claimant and the self-insured employer will

be offered the opportunity to present additional evidence regarding the second prong of the *Rodriguez* test.

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

It is so **ORDERED.**

Dated this 16th day of October, 2006.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member