Gruger, David

BOARD

Summary judgment

To raise an issue of credibility on a motion for summary judgment, the non-moving party must present contradictory evidence or otherwise impeach the evidence of the moving party. The non-moving party may not rely on speculation or argumentative assertions to establish an issue of material fact. **….*In re David Gruger*, BIIA Dec., 08 14143 (2009)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID L. GRUGER	)	**DOCKET NO. 08 14143**
	)	
CLAIM NO. SB-39498	)	**DECISION AND ORDER**
	)	

APPEARANCES:

Claimant, David L. Gruger, by
Robinson & Kole, P.S., Inc., per
Nathan T. Dwyer

Self-Insured Employer, Lowe's HIW, Inc., by
Reinisch Mackenzie, P.C., per
Erin Sullivan-Byorick

Department of Labor and Industries, by
The Office of the Attorney General, per
Elijah M. Forde, Assistant

The self-insured employer, Lowe's HIW, Inc., filed an appeal with the Board of Industrial Insurance Appeals on May 1, 2008, from an order of the Department of Labor and Industries dated March 27, 2008. In this order, the Department determined that it was unable to reconsider the order dated October 10, 2007, due to lack of jurisdiction; and that the written request for reconsideration was not received within the time limits required by law. The Department order is **REVERSED AND REMANDED**.

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 February 26, 2009, in which the industrial appeals judge reversed and remanded the order of the Department dated March 27, 2008.

Prior to a hearing on the merits, the industrial appeals judge resolved this matter in a Proposed Decision and Order in which he granted the self-insured employer's motion for summary judgment. We have granted review in order to state our reasons for agreeing that summary judgment was appropriate and to clearly delineate the documents and evidence we considered. CR 56(h) requires that the "order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered." In addressing the parties' motions for summary

judgment, we have considered the stipulated jurisdictional history, as well as a declaration signed by Joseph D. Taylor, an account specialist employed by Specialty Risk Services, the third-party insurance administrator for the self-insured employer. The claimant and the Department opposed the motion with oral argument. They did not file supporting written affidavits, declarations, or other documents.

The parties stipulated into the record the jurisdictional and historical facts that establish the Board's jurisdiction and provide the historical context to the controversy presented by this appeal. On July 5, 2007, the Department received the claimant's application to reopen this claim. On October 3, 2007, the Department issued an order in which it extended the decision period on the application for an additional 60 days, and in which it provided that the decision would be made no later than December 2, 2007. On October 10, 2007, the Department issued an order in which it allowed the application to reopen the claim. On January 14, 2008, the Department received a Protest and Request for Reconsideration filed by the self-insured employer to the order dated October 10, 2007. On March 27, 2008, the Department issued the order under appeal. In the order the Department states, "Labor and Industries is unable to reconsider the Department order dated October 10, 2007 due to lack of jurisdiction. The written request for reconsideration was not received within the time limits required by law."

Mr. Taylor's declaration in support of the motion established that he became employed as an account specialist for the third-party administrator, Specialty Risk Services, on October 5, 2007. His duties included managing worker's compensation claims and responding to Department orders and correspondence. According to Mr. Taylor's declaration, as of the date of his statement, August 5, 2008, his employer had no record of receiving the October 10, 2007 Department order and the order was issued "unbeknownst to me." Declaration of Joseph D. Taylor, at 2. Mr. Taylor described a teleconference that took place on January 9, 2008, between himself and Steve Kazda, a Department Claims Administrator. Mr. Taylor inquired as to when the Department would respond to the claimant's application to reopen. Mr. Kazda advised him that the Department had issued the reopening order on October 10, 2007. He told Mr. Kazda that his employer had not received the order. On January 9, 2008, Mr. Taylor issued a Protest and Request for Reconsideration. Mr. Taylor declared that, under normal business practices, the protest was most likely mailed on the same date.

At the hearing on the motion for summary judgment, the Department and the claimant argued that judgment in favor of the motion would deprive them of the right of cross-examination.

The claimant argues that the resolution of the question of communication of the order is a determination of credibility of the witness(s) and summary judgment is not appropriate when credibility of the declarant is at issue.

Although the claimant's assertion that summary judgment is inappropriate when credibility is at issue is supported by case law, it appears that at a minimum, there must be a showing that credibility is at issue. In *Gingrich v. Unigard Security Insurance Co.*, 57 Wn. App. 424 (1990), the court granted summary judgment. In the relevant portion of the decision, the court noted that nothing in the record contradicted the declarant, there was no reason to question his credibility, and cases that suggested summary judgment is not appropriate when credibility is an issue did not apply in that circumstance. *Gingrich*, at 429. Cases that support denial of summary judgment to allow cross-examination on credibility uniformly require, at a minimum, a showing of inconsistent statements by the declarant. The Supreme Court has stated, "To raise an issue of credibility at a hearing on a motion for summary judgment, the nonmoving party must present contradictory evidence or otherwise impeach the evidence of the moving party." *Dunlap v. Wayne,* 105 Wn.2d 529, 536 (1986).

The limited record contains nothing to contradict the statement that the order was not received by Mr. Taylor or the statement that there is no record of Specialty Risk Services having received the order. We have only argument from the worker and the Department that they want to cross-examine with regard to receipt of the order. It is clear that the worker and the Department have nothing more than speculation that the employer may have received the order. The non-moving party may not rely on speculation or argumentative assertions to establish an issue of material fact. *Heath v. Uraga,* 106 Wn. App. 506 (2001). Without contradictory evidence or evidence that would otherwise impeach the evidence of the self-insured employer, we will not deny the motion for summary judgment in order to allow cross-examination of the declarant.

Mr. Taylor's statements do not raise a genuine issue of material fact. Even giving all reasonable inferences to the nonmoving party, there is no other conclusion to draw except that Mr. Taylor and Specialty Risk Services (as party employer's representative) did not receive the October 10, 2007 Department order until January 9, 2008. The undisputed facts in this case establish that Mr. Taylor sent his protest either on the day he received the January 9, 2008 order, or the following day. Certainly, this is within the 60 days allowed under the statute, and the protest is timely. As such, this matter is remanded to the Department to act on the employer's January 9, 2008 timely protest from the Department order dated October 10, 2007.

FINDINGS OF FACT

1. On July 16, 2006, the claimant, David L. Gruger, filed an Application for Benefits with the Department of Labor and Industries in which he alleged he sustained an injury to his back on July 11, 2006, while working in the course of his employment with Lowe's HIW.

   On February 8, 2007, the self-insured employer issued an order in which it closed the claim effective February 8, 2007, with medical benefits only and without award for time-loss compensation benefits or an award for permanent partial disability.

   On July 5, 2007, the claimant filed an application to reopen his claim with the Department of Labor and Industries.

   On October 3, 2007, the Department issued an order in which it stated that the Department was extending its decision period for an additional 60 days and that the Department would make a decision no later than December 2, 2007.

   On October 10, 2007, the Department issued an order in which it reopened the claim effective June 7, 2007, for authorized treatment and action as indicated.

   On January 14, 2008, the Department of Labor and Industries received a Protest and Request for Reconsideration from the employer from the Department order dated October 10, 2007.

   On March 27, 2008, the Department issued an order in which it stated that the Department was unable to reconsider the Department order dated October 10, 2007, due to lack of jurisdiction; that the written request for reconsideration was not received within the time limits required by law.

   On May 1, 2008, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order dated March 27, 2008.

   On May 6, 2008, the Board granted the employer's appeal under Docket No. 08 14143, and agreed to hear the appeal.

2. The Department order dated October 10, 2007, was communicated to the employer on January 9, 2008.

3. The employer filed a Protest and Request for Reconsideration from the Department order dated October 10, 2007, on January 14, 2008.

4. The stipulated jurisdictional history and the declaration submitted by the self-insured employer demonstrate that there is no genuine issue as to any material fact.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The self-insured employer is entitled to a decision as a matter of law pursuant to CR 56.

3. The Department order dated March 27, 2008, is incorrect and is reversed. This matter is remanded to the Department with directions to find the employer filed a timely Protest and Request for Reconsideration from the Department order dated October 10, 2007, and to take such further action as is indicated by the facts and the law.

Dated: June 19, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
LARRY DITTMAN Member