

## **Gruger, David**

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### **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**

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

4 **APPEARANCES:**

5  
6 Claimant, David L. Gruger, by  
7 Robinson & Kole, P.S., Inc., per  
8 Nathan T. Dwyer

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

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

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

**DECISION**

21 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
22 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order  
23 issued on February 26, 2009, in which the industrial appeals judge reversed and remanded the  
24 order of the Department dated March 27, 2008.

25 Prior to a hearing on the merits, the industrial appeals judge resolved this matter in a  
26 Proposed Decision and Order in which he granted the self-insured employer's motion for summary  
27 judgment. We have granted review in order to state our reasons for agreeing that summary  
28 judgment was appropriate and to clearly delineate the documents and evidence we considered.  
29 CR 56(h) requires that the "order granting or denying the motion for summary judgment shall  
30 designate the documents and other evidence called to the attention of the trial court before the  
31 order on summary judgment was entered." In addressing the parties' motions for summary  
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1 judgment, we have considered the stipulated jurisdictional history, as well as a declaration signed  
2 by Joseph D. Taylor, an account specialist employed by Specialty Risk Services, the third-party  
3 insurance administrator for the self-insured employer. The claimant and the Department opposed  
4 the motion with oral argument. They did not file supporting written affidavits, declarations, or other  
5 documents.

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

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

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

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

4 Although the claimant's assertion that summary judgment is inappropriate when credibility is  
5 at issue is supported by case law, it appears that at a minimum, there must be a showing that  
6 credibility is at issue. In *Gingrich v. Unigard Security Insurance Co.*, 57 Wn. App. 424 (1990), the  
7 court granted summary judgment. In the relevant portion of the decision, the court noted that  
8 nothing in the record contradicted the declarant, there was no reason to question his credibility, and  
9 cases that suggested summary judgment is not appropriate when credibility is an issue did not  
10 apply in that circumstance. *Gingrich*, at 429. Cases that support denial of summary judgment to  
11 allow cross-examination on credibility uniformly require, at a minimum, a showing of inconsistent  
12 statements by the declarant. The Supreme Court has stated, "To raise an issue of credibility at a  
13 hearing on a motion for summary judgment, the nonmoving party must present contradictory  
14 evidence or otherwise impeach the evidence of the moving party." *Dunlap v. Wayne*, 105 Wn.2d  
15 529, 536 (1986).

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

25 Mr. Taylor's statements do not raise a genuine issue of material fact. Even giving all  
26 reasonable inferences to the nonmoving party, there is no other conclusion to draw except that  
27 Mr. Taylor and Specialty Risk Services (as party employer's representative) did not receive the  
28 October 10, 2007 Department order until January 9, 2008. The undisputed facts in this case  
29 establish that Mr. Taylor sent his protest either on the day he received the January 9, 2008 order, or  
30 the following day. Certainly, this is within the 60 days allowed under the statute, and the protest is  
31 timely. As such, this matter is remanded to the Department to act on the employer's January 9,  
32 2008 timely protest from the Department order dated October 10, 2007.

1 **FINDINGS OF FACT**

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

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

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

12 On October 3, 2007, the Department issued an order in which it stated  
13 that the Department was extending its decision period for an additional  
14 60 days and that the Department would make a decision no later than  
15 December 2, 2007.

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

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

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

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

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

32 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.

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- 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