Rosentrater, Nathan

BOARD

Reassignment of Industrial Appeals Judge

When a case is reassigned from one judge to another, the expectation is that the new judge will exercise independent judgment and take whatever further steps he or she deems appropriate. **….*In re Nathan Rosentrater*, BIIA Dec., 08 20200 (2009)**

Summary judgment

A declaration in support of summary judgment is insufficient if opinions are not related to the critical date or contain only conclusory opinions, without the requisite supporting facts showing the basis for those opinions. When a declaration is deficient, the opposing party is not required to file a responsive declaration from a medical expert. **….*In re Nathan Rosentrater*, BIIA Dec., 08 20200 (2009)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: NATHAN A. ROSENTRATER	**DOCKET NO. 08 20200**
CLAIM NO. SC-23427	**ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING THE APPEAL FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Nathan A. Rosentrater, by
Davies Pearson, P.C., per
Knowrasa T. Patrick-Roundtree

Self-Insured Employer, Food Services of America, Inc., by
Law Office of Gress & Clark, LLC, per
James L. Gress

The claimant, Nathan A. Rosentrater, filed an appeal with the Board of Industrial Insurance Appeals on October 28, 2008, from an order of the Department of Labor and Industries dated September 30, 2008. In this order, the Department closed the claim with time-loss compensation benefits as paid to May 28, 2008, and no award for permanent partial disability. The appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

OVERVIEW

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 August 28, 2009. The industrial appeals judge granted the self-insured employer's Motion for Summary Judgment and affirmed the September 30, 2008 Department order.

The sole factual basis for the employer's Motion for Summary Judgment was a one-page declaration signed by David A. Coons, D.O. The employer's attorney also asserted, without a supporting declaration, that Mr. Rosentrater had no medical evidence to support his appeal. As the movant, the employer was required to establish that there was no genuine issue as to any material fact, with all facts and reasonable inferences considered in the light most favorable to the claimant as the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). As the claimant has argued from the outset, Dr. Coons' Declaration is insufficient because his opinions are not related to the critical date of September 30, 2008, when the Department issued its closing order. In addition, the declaration contains conclusory opinions, without the requisite supporting specific facts

showing the basis for those opinions, contrary to *Hash v. Children's Orthopedic Hospital*, 49 Wn. App. 130, 133-135 (1987), affirmed, 110 Wn.2d 912, 915-916 (1988). Because Dr. Coons' declaration was deficient, the claimant was not required to file a responsive declaration from a medical expert. *Hash*, 49 Wn. App. at 132. Thus, the Motion for Summary Judgment should have been denied based solely on the inadequacy of the employer's filings.

Furthermore, the employer's attorney appears to have filed the Motion for Summary Judgment without first engaging in discovery, that is, making "an inquiry reasonable under the circumstances" to determine if his assertion that Mr. Rosentrater had no medical evidence to support his appeal was "well grounded in fact," as required by CR 11. On April 7, 2009, the claimant filed a request for sanctions under CR 11 on that basis. The motion was not addressed in the Proposed Decision and Order, nor has the claimant raised the issue in his Petition for Review. Because we are remanding for further proceedings, we will allow the industrial appeals judge to consider the question of whether CR 11 sanctions are warranted, if the claimant renews his motion.

In its Response to Claimant's Petition for Review, the employer also requests CR 11 sanctions against the claimant and his attorney "for their continued frivolous pursuit of this appeal." Response, at 2. Because we find merit in the claimant's contention that the employer's Motion for Summary Judgment should be denied, the employer's motion for sanctions is likewise denied.

The Proposed Decision and Order is vacated. The employer's Motion for Summary Judgment is denied. The appeal is remanded for further proceedings on the merits of the claimant's appeal. On remand, the claimant may renew his motion for sanctions under CR 11 if he chooses.

DECISION

This case has a convoluted procedural history, which is well described in the Proposed Decision and Order. At the outset, we note that there is no merit to the claimant's assertion that the employer was precluded from filing its Motion for Summary Judgment until after the deadline for completing discovery had passed. As correctly pointed out in the Proposed Decision and Order, the employer was free to file its motion prior to the discovery deadline. *In re Kelly Stouffer*, Dckt. No. 08 17256 (January 26, 2009). However, that does not mean the employer's attorney was relieved of the obligation to comply with CR 11, and make a reasonable inquiry to determine if Mr. Rosentrater had medical evidence to support his appeal before asserting otherwise.

We also note that, as explained in *Stouffer*, the proper procedure for obtaining a continuance of the hearing on the Motion for Summary Judgment was to file a motion with a supporting affidavit

or declaration, explaining the good cause basis. It would have been a simple matter for the claimant's attorney to file such a motion, with a declaration indicating she was in the process of obtaining the requisite medical evidence and requesting further time to do so. The claimant's attorney failed to do that. Nonetheless, having been apprised that the claimant had medical evidence which he intended to present at hearing, the industrial appeals judge could have continued the matter sua sponte, even in the absence of a motion in compliance with CR 56(f). Ultimately, however, this is a non-issue. No continuance was necessary because the declaration submitted by the employer in support of its Motion for Summary Judgment was insufficient, and the motion should have been denied on that basis.

In reaching this determination, we have considered the following documents and other evidence:

1. The September 30, 2008 order under appeal;
2. The Notice of Appeal filed on October 28, 2008;
3. The stipulated Jurisdictional History;
4. The February 19, 2009 Interlocutory Order Establishing Litigation Schedule;
5. The employer's Motion for Summary Judgment, and supporting memorandum, filed on March 13, 2009;
6. The January 29, 2009 Declaration of David A. Coons, D.O., attached to the employer's Motion for Summary Judgment;
7. Claimant's Response to Employer's Motion for Summary Judgment and Motion for Sanctions, filed on April 7, 2009;
8. The April 6, 2009 Declaration of Knowrasa T. Patrick-Roundtree, attached to the claimant's Response;
9. The record of the April 14, 2009 hearing;
10. Claimant's Request for Interlocutory Review, filed on April 16, 2009;
11. Claimant's notice to take the deposition of Arthur H. Ginsberg, M.D., filed on April 20, 2009;
12. Employer's Response to Claimant's Request for Interlocutory Review, filed on April 27, 2009;
13. Claimant's Reply to Employer's Response to Claimant's Request for Interlocutory Review, filed on April 28, 2009;
14. The April 30, 2009 Order Declining Review of Interlocutory Appeal issued by Assistant Chief Industrial Appeals Judge Lynn D. W. Hendrickson;
15. The June 22, 2009 letter from Senior Assistant Chief Industrial Appeals Judge Charles M. McCullough, reassigning the case to Industrial Appeals

Judge Frank G. Rekasis, and the accompanying Notice of Change of Industrial Appeals Judge Assigned for Hearing;

16. The July 1, 2009 Interlocutory Order Denying Self-Insured Employer's Motion for Summary Judgment and Denying Claimant's Motion for Sanctions issued by Judge Rekasis;

17. The employer's request for interlocutory review filed on July 6, 2009;

18. The August 13, 2009 letter from Chief Industrial Appeals Judge Janet R. Whitney reassigning the case to Industrial Appeals Judge David K. Crossland, and the accompanying Notice of Change of Industrial Appeals Judge Assigned for Hearing;

19. The August 28, 2009 Proposed Decision and Order issued by Judge Crossland;

20. The August 26, 2009 letter of James L. Gress to Judge Crossland, received at the Board on August 28, 2009;

21. The claimant's Petition for Review filed on October 12, 2009;

22. The October 12, 2009 Declaration of Knowrasa T. Patrick-Roundtree, attached to the claimant's Petition for Review;

23. Employer's Response to Claimant's Petition for Review filed on October 16, 2009.

Our review of the listed documents and evidence reveals that a scheduling conference was held on February 17, 2009. At that time, the parties were given until May 29, 2009, to complete discovery, and the claimant was given until April 17, 2009, to confirm witnesses. On March 13, 2009, Food Services of America, Inc., filed a Motion for Summary Judgment, a supporting memorandum, and a Declaration of David A. Coons, D.O., stating, in its entirety:

1. I am a physician who specializes in the field of orthopedic surgery in the State of Washington.

2. As relates to the present industrial insurance claim, I have treated claimant for his industrially related left shoulder condition and performed surgery on January 31, 2008.

3. It is my professional medical opinion that Mr. Rosentrater's industrially related condition is medically fixed and stable without injury related impairment. I am offering this opinion on a more-probable-than-not basis.

4. It is my professional medical opinion that Mr. Rosentrater does not require further medical treatment under this claim. I am offering this opinion on a more-probable-than-not basis.

5. It is my professional medical opinion that Mr. Rosentrater is capable of work without restrictions. I am offering this opinion on a more-probable-than-not basis.

In the memorandum signed on March 11, 2009, by Kelly Niemeyer on behalf of James L. Gress, the employer's attorney asserted: "The medical evidence clearly supports the Department's decision. Claimant's attending surgeon has submitted the attached Declaration confirming that he does not support an entitlement to further treatment or impairment. Claimant cannot offer any credible or persuasive evidence that refutes this doctor's opinion. There is no factual dispute here or competing medical opinions." Memorandum, at 3. Mr. Gress also asserted that "[c]laimant can offer no medical evidence in support of his contention that he is entitled to treatment, or, alternatively, permanent partial disability related to his left shoulder condition under this claim." Memorandum, at 1.

On March 19, 2009, the Board mailed notices to the parties, scheduling the motion hearing for April 14, 2009, before Industrial Appeals Judge Judit E. Gebhardt. Under CR 56, the claimant had until Friday, April 3, 2009, 11 days prior to the hearing date, to file any responsive pleadings. On April 7, 2009, the claimant filed Claimant's Response to Employer's Motion for Summary Judgment and Motion for Sanctions, along with a Declaration of Knowrasa T. Patrick-Roundtree, his attorney. Ms. Patrick-Roundtree stated that Mr. Rosentrater sustained an industrial injury on July 13, 2007 (the Department order lists the date of injury as July 9, 2007, as does the stipulated Jurisdictional History); underwent left shoulder surgery with Dr. Coons on January 13, 2008 (Dr. Coons gave the date as January 31, 2008); was last seen by Dr. Coons on May 28, 2008; and that was the last treatment note in either the Department or employer file.

Ms. Patrick-Roundtree also stated that the claim was closed with no award for permanent partial disability on September 20, 2008 (the correct date is September 30, 2008); that the claimant appealed on October 28, 2008; that a scheduling conference was held on February 17, 2009, at which the claimant listed two unidentified medical witnesses; and that the claimant was given until April 17, 2009, to confirm his witnesses. In addition, according to Ms. Patrick-Roundtree:

> 6. The Employer filed this Motion for Summary Judgment on March 11, 2009 and has not requested any discovery in this matter.
>
> 7. I spent approximately 1.5 hours reviewing the case file and responding to this motion, and my hourly rate is $225.00.

In his Response, the claimant argued that sanctions were warranted under CR 11, which provides:

> The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the

> circumstances: (1) it is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The claimant noted that the "Employer has not requested discovery in this case" (Response at 2); the claimant had until April 17, 2009, to identify expert witnesses to support his appeal; and Mr. Rosentrater had "undergone an independent medical examination with a duly qualified neurologist, Arthur Ginsberg, M.D. Although a copy of the report has not been forwarded to the Employer, the Employer has not requested discovery to reasonably inquire as to the evidence held by the claimant to support his appeal." Response, at 2.

At the telephonic hearing on April 14, 2009, the claimant's attorney advised the industrial appeals judge that she had provided Mr. Gress with Dr. Ginsberg's report as well as an addendum. 4/14/09 Tr. at 6-7. She argued that Dr. Coons' declaration was inadequate because it did not address Mr. Rosentrater's condition as of the date of the order under appeal, September 30, 2008. The industrial appeals judge orally granted the motion for summary judgment, because the claimant had presented no declaration from a medical expert to counter Dr. Coons.

On April 16, 2009, the claimant's counsel sought interlocutory review under WAC 263-12-115(6), again arguing that the employer had not requested discovery and noting that she had sent a copy of Dr. Ginsberg's report to the employer on April 6, 2009, and a copy of an addendum on April 13, 2009. She pointed out that the employer's attorney had had those reports in his possession at the time of the hearing. Claimant's counsel asserted that she had requested a continuance to obtain Dr. Ginsberg's declaration. On April 20, 2009, the claimant filed a notice to take the deposition of Arthur H. Ginsberg, M.D.

The case then devolved into divergent views of whether Ms. Patrick-Roundtree had or had not asked for a continuance. The employer filed a Response to Claimant's Request for Interlocutory Review, asserting that "[d]uring the proceeding, claimant at no point in time argued for a continuance in order to obtain a declaration. It is speculative at this point in time whether claimant could in fact obtain a declaration from a physician within the field of specialty required for this particular condition that would constitute or raise a genuine issue of material fact." Response, at 1. Mr. Gress also noted that Ms. Patrick-Roundtree had "failed to point out the timing of those

reports and whether or not those reports were actually authored after the motion for summary judgment was filed in this case by the employer." Response, at 1-2.

The claimant filed a reply, in which claimant's counsel stated: "Employer argues that the Claimant did not request a continuance during oral arguments. However, this is untrue. Claimant indicated to Judge Gebhardt before going on the record, and while on the record, that Claimant would seek a declaration from the IME doctor if necessary." Reply, at 1. Ms. Patrick-Roundtree also pointed out that:

> Further, the Employer argues that claimant could not obtain an opinion within the field of specialty necessary for the condition at issue. The claimant underwent an IME with a duly licensed physician, with a specialty in neurology. The Employer had a copy of the IME report during the time of oral arguments and is very well aware of the doctor's opinions and the date of the examination. . . [I]f there is a question of specialty, that goes to the weight not admission.

Reply, at 1-2.

On April 30, 2009, Assistant Chief Industrial Appeals Judge Lynn D. W. Hendrickson issued an Order Declining Review of Interlocutory Appeal in which she stated: "Judge Gebhardt's ruling granting summary judgment is dispositive of this appeal. A Proposed Decision and Order will be issued upon receipt of the April 14, 2009 transcript consistent with her ruling."

Due to Judge Gebhardt's retirement, the case was transferred to Industrial Appeals Judge Frank G. Rekasis on June 22, 2009. On July 1, 2009, he issued an Interlocutory Order Denying Self-Insured Employer's Motion for Summary Judgment and Denying Claimant's Motion for Sanctions. He concluded that the employer's motion was not frivolous or filed in bad faith, but that it was premature, since it had been filed prior to the completion of discovery. He indicated that the appeal would be assigned to a different hearings judge, for further proceedings. On July 6, 2009, the employer filed a request for interlocutory review. There does not appear to have been any order issued in response to that request. On August 13, 2009, the parties were advised by Chief Industrial Appeals Judge Janet R. Whitney that the case was being reassigned to Industrial Appeals Judge David K. Crossland and that he would "be writing the Proposed Decision and Order in this case."

The Proposed Decision and Order was issued on August 28, 2009. At the end of his analysis, Judge Crossland concluded:

> Therefore, the self-insured employer's motion for summary judgment should be granted. This decision is consistent with Judge Gebhardt's previous oral ruling and consistent with Judge Hendrickson's denial of interlocutory review. I find that a reassigned industrial appeals judge under the circumstances of this appeal was to

> stand in the shoes of Judge Gebhardt and write a Proposed Decision and Order that was consistent with Judge Gebhardt's oral ruling. The Department order dated September 30, 2008, is correct and should be affirmed.

Proposed Decision and Order, at 5-6.

The claimant has petitioned for review, renewing his contention that he requested a continuance, both on and off the record on April 14, 2009. Ms. Patrick-Roundtree contends that the court reporter was having difficulty hearing during the telephonic proceeding, as evidenced by dashes throughout the transcript. Petition for Review, at 4. As an example, the claimant points to the dash on page 6, at line 24 of the transcript. Ms. Patrick-Roundtree asserts:

> Prior to going on the record for oral argument on the Employer's motion, claimant stated that a declaration could be obtained from his IME doctor. The Employer's attorney admitted to having a copy of the IME report. The judge asked the Employer's attorney whether he was willing to allow more time for the claimant to obtain a declaration from his IME doctor, of course he stated "no". However, the judge could have allowed claimant additional time without the Employer's consent.

Petition for Review, at 3-4.

In a Declaration attached to the Petition for Review, Ms. Patrick-Roundtree also avers that the claimant sent a copy of an independent medical examination report supporting his appeal to the employer on April 6, 2009, and an addendum on April 13, 2009. She states that, "on and off the record, I indicated that if a declaration was needed from our medical expert, it could be obtained if given more time. During the oral argument, the court reporter indicated that she was having a difficult time hearing me, and she had to adjust her seating." Petition for Review, at 8.

DISCUSSION: As we have already said, regardless of what happened on April 14, 2009, the claimant failed to file a written request for a continuance with accompanying affidavit establishing good cause, as required by CR 56(f). Nonetheless, once apprised that the claimant had medical evidence to support his appeal, the industrial appeals judge could have continued the matter on her own motion. In that respect, this case is different from *Stouffer*, where the non-movant employer failed to file a motion for continuance, and never asserted that it had or was seeking medical evidence in support of its appeal.

In his Petition for Review, the claimant also argues that he should not be put to the expense of obtaining an affidavit from his medical witness. However, if he was required to file such an affidavit, the fact that it would cost additional money to do is no excuse for failing to comply with CR 56.

With respect to the accuracy of the April 14, 2009 record, the presence of dashes in the transcript does not necessarily indicate that material is missing. A dash may denote a pause in

speaking. If Ms. Patrick-Roundtree believed the transcript was inaccurate, the proper procedure was to file a motion to correct it. *In re Cascade Utilities, Inc.*, BIIA Dec. 04 W1392 (2006), at 7.

Finally, the claimant renews his argument that Dr. Coons' declaration is deficient, because the doctor does not "tell us Mr. Rosentrater's status as of the closing date." Petition for Review, at 5. That argument has merit.

Is an attorney permitted to file his or her own affidavit or declaration in opposition to a motion for summary judgment? However, before addressing that question, we must address a new issue raised in the Employer's Response to Claimant's Petition for Review, filed on October 16, 2009. Mr. Gress now argues that, under RPC 3.7 and *In re Kenneth Barber*, BIIA Dec. 87 0334 (1988), the claimant's attorney should not have placed herself in the position of being a witness by filing her own declaration in support of the claimant's opposition to the Motion for Summary Judgment. Response, at 6, 9. This is the first time this issue has been raised, and the employer has never moved to strike the declaration. Furthermore, Mr. Gress's statement of the law is incorrect.

Barber did not involve a motion for summary judgment. It involved the claimant's attorney testifying at hearing about critical disputed issues regarding a third-party settlement. The Department objected to the presentation of that testimony, and the Board struck it under RPC 3.7. In the current case, the claimant's attorney submitted her own declaration in opposition to summary judgment. In that context, the Supreme Court has noted that "an attorney's affidavit is entitled to the same consideration as any other affidavit based upon personal knowledge if the affidavit is based upon the attorney's own knowledge of the facts set forth therein." *Wilson v. Steinbach*, 98 Wn.2d 434, 438 (1982), relying on *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 880 (1967).

Meadows involved a wrongful death action against Tyler Williamson and Arnold's Auto Wrecking and Repairing, which was managed by Arnold Timm. The plaintiff alleged that the company was vicariously liable for Mr. Williamson's actions. The defendants moved for summary judgment. In response, the plaintiff filed two affidavits executed by her attorney, detailing statements the attorney asserted had been made by Mr. Williamson and Mr. Timm. The defendants argued that "the affidavits of plaintiff's attorney are composed of reiterations of unsworn and/or uncertified hearsay statements concerning which he could not, either with propriety or in conformity with rules of evidence, testify to at the time of trial." *Meadows*, 71 Wn.2d at 879. The Court disagreed, explaining:

> We have held, as do many courts, that an attorney's verification of pleadings . . . when based upon hearsay or upon information and belief is insufficient to render such pleadings available for consideration under RPPP 56(e) [current CR 56]. [Citations omitted] The same approach is, and should be, applied to an attorney's affidavit based upon information short of testimonial knowledge. [Citations omitted] This is not to say, however, that an attorney is disqualified from making an affidavit based upon his personal knowledge of the facts set forth. Unwise or impractical though it otherwise might be for an attorney of record in a case to make an affidavit in support of his client's cause in a summary judgment proceeding, such an affidavit is entitled to the same consideration as that of any other affidavit based upon testimonial knowledge. [Citation omitted]
>
> In the instant case, plaintiff's counsel averred he was present and heard the statements he asserts were made by Tyler Williamson and Arnold Timm during their respective interviews. Under appropriate circumstances plaintiff's counsel could so testify. What the circumstances might be which would give rise to the necessity or the admissibility of such testimony would depend, in a large measure, upon the course of the trial and the foundation thereby erected. In any event, the requisite testimonial knowledge was evidenced by the pertinent affidavits, and the admissible content thereof was entitled to consideration in the summary judgment proceeding. [Citation omitted]

Meadows, 71 Wn.2d at 880.

The court went on to find that the attorney's affidavits successfully countered the defendants' showing and reversed the trial court's grant of summary judgment.

Based on *Meadows*, Ms. Patrick-Roundtree was not precluded from filing her own declaration in opposition to the employer's Motion for Summary Judgment. The relevant question is whether each of her statements was based on personal knowledge of the facts set forth therein, or based on the less stringent standard of information and belief. Her declarations regarding particular facts are admissible, so long as she has testimonial knowledge with respect to those facts. As the claimant's attorney, Ms. Patrick-Roundtree has such knowledge with respect to the procedural matters addressed in paragraphs 1, 4, 5, 6, and 7 of her Declaration. On the other hand, most of paragraphs 2 and 3, regarding the industrial injury and treatment received, are based on information and belief, not testimonial knowledge.

Sufficiency of Dr. Coons' Declaration: Ultimately, however, the contents of the claimant's attorney's declarations, both the one attached to the Petition for Review and the one attached to the Claimant's Response to Employer's Motion for Summary Judgment and Motion for Sanctions, are not of much consequence, except for the question of whether sanctions should be imposed on the employer's attorney. In addressing the employer's Motion for Summary Judgment, the initial focus

must be on the movant employer, not the non-movant claimant. Any failures of the latter become important only if the employer has first satisfied the requirements of CR 56.

The sole evidentiary facts presented by the employer in support of its Motion for Summary Judgment are contained in Dr. Coons' declaration. The threshold question is whether that declaration, viewed in the light most favorable to the non-movant claimant, establishes that there is no genuine issue as to any material fact. *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982). One way to test whether the employer has satisfied that standard is to add the phrase "a fact about which there is no dispute" after each of the proposed findings of fact. It is immediately apparent that the employer has failed to show there is no dispute about the claimant's status as of the September 30, 2008 closing date, just as the claimant says. See, proposed Findings of Fact Nos. 3 and 4. The employer failed to present any evidence regarding that critical date. Furthermore, Dr. Coons' declaration is wholly inadequate under *Hash*, because it contains conclusory opinions, without the requisite supporting facts to show the basis for those opinions. The claimant was therefore not required to file any opposing declaration from a medical expert. The employer's Motion for Summary Judgment should be denied.

Sanctions: The claimant requested sanctions under CR 11 at the outset, because the employer alleged that Mr. Rosentrater had no medical evidence to support his appeal, without first asking the claimant what evidence he had, under the rules of discovery. The employer has now requested sanctions under CR 11 in its Response to the Petition for Review, asserting that all of the claimant's contentions are frivolous. As evidenced by the foregoing discussion, we disagree. Therefore, no sanctions are warranted against the claimant or his attorney on that basis.

On the other hand, the employer's attorney has not denied the claimant's contention that he filed the Motion for Summary Judgment without first engaging in discovery to determine whether the claimant had any medical evidence in support of his appeal. The employer's attorney asserted: "Claimant cannot offer any credible or persuasive evidence that refutes [Dr. Coons'] opinion." Memorandum in Support of Motion for Summary Judgment, at 3. According to the employer's attorney: "Claimant can offer no medical evidence in support of his contention that he is entitled to treatment, or, alternatively, permanent partial disability related to his left shoulder condition under this claim." Memorandum in Support of Motion for Summary Judgment, at 1. The record does not reveal the basis for these assertions. Thus, CR 11 sanctions may be warranted against the employer's attorney for failure to make "an inquiry reasonable under the circumstances" to determine if his assertion that Mr. Rosentrater had no medical evidence to support his appeal was

"well grounded in fact." However, in light of the posture of the appeal and the fact we are remanding for further proceedings, we will allow the industrial appeals judge to make the initial determination. We note that, under CR 43, the motion may be heard "on affidavits presented by the respective parties."

There is one final matter. We are concerned with the statement in the Proposed Decision and Order to the effect that the drafter had no choice but to write a decision consistent with the oral ruling made by another judge on April 14, 2009. Perhaps the form letter reassigning the case or the language in the Order Declining Review of Interlocutory Appeal gave that impression. We therefore wish to emphasize that, when a case is reassigned from one judge to another, our expectation is that the new judge will exercise independent judgment and take whatever further steps he or she deems appropriate.

The August 28, 2009 Proposed Decision and Order is vacated. The employer's Motion for Summary Judgment is denied. The appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings on the merits of the claimant's appeal.

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 upon the entire record, and consistent with this order. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, pursuant to RCW 51.52.104.

DATED: November 10, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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