Gomez, Gail

BOARD

Reassignment of Industrial Appeals Judge

***Affidavit of prejudice**

Parties to an appeal may file an affidavit of prejudice to disqualify an industrial appeals judge assigned to conduct hearings, but after the hearings have been completed by one judge, the parties may not disqualify a judge who was reassigned solely for the purpose of issuing a Proposed Decision and Order. ***….In re Gail Gomez,* BIIA Dec., 17 15610 (2018)** [*Editor's note*: The Board's decision was appealed to superior court under King County Cause No. 19-2-00765-6 KNT.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: GAIL A. GOMEZ	**)**	**DOCKET NO. 17 15610**
	)	
CLAIM NO. SJ-40894	**)**	**DECISION AND ORDER**

Gail Gomez worked as a registered nurse and plan care manager for Virginia Mason at its Federal Way Clinic, where she contracted a viral upper respiratory infection. She developed an acute pain in her right ear from a secondary ear infection. The ear infection ruptured Ms. Gomez's eardrum, and she experienced profound, permanent hearing loss in her right ear. Ms. Gomez applied for benefits more than one year after her exposure, illness, and hearing loss. The Department allowed Ms. Gomez's claim and closed the claim with a permanent partial disability award for 100 percent hearing loss in the right ear. Virginia Mason appealed the allowance of the claim and maintains that Ms. Gomez's claim was time-barred because her viral infection was an industrial injury. Our industrial appeals judge found that there was no genuine issue as to any material fact, concluded that Virginia Mason is entitled to a decision as matter of law, and that Ms. Gomez sustained an industrial injury. The industrial appeals judge reversed the Department order and remanded the claim to the Department to reject the claim because the application for benefits was not filed within the one year statute of limitations for industrial injuries. We agree with the industrial appeals judge. Ms. Gomez did not suffer an occupational disease. She sustained an industrial injury, and the claim for industrial injury is time-barred for failure to file the claim within one year. We **REVERSE AND REMAND** the Department order with direction to reject the claim because the Application for Benefits was not filed within the one-year limitation as required by RCW 51.28.050.

DISCUSSION

In her Petition for Review, Ms. Gomez first argues that the claimant's affidavit of prejudice deprived Industrial Appeals Judge Robert Krabill of the ability to hear this appeal. This appeal was originally assigned to Industrial Appeals Judge Janene Sohng. The parties filed cross-motions for summary judgment. Following oral argument and the receipt of all evidence in this file, the appeal was transferred to Industrial Appeals Judge Robert Krabill to write the Proposed Decision and Order. A letter dated February 28, 2018, was sent to the parties notifying them that the appeal was transferred from Industrial Appeals Judge Sohng to Industrial Appeals Judge Krabill under WAC 263-12-045(4), and that Industrial Appeals Judge Krabill would be writing the Proposed Decision and Order. The letter went on to indicate that the Proposed Decision and Order would be

issued after March 7, 2018, and "[i]f you believe there are compelling reasons why this appeal should not be transferred, you must contact me [Chief Industrial Appeals Judge Whitney] before that date."

On March 6, 2018, one day before the March 7, 2018 deadline for objection to the transfer to Industrial appeals Judge Krabill, the claimant filed a motion and affidavit to assign a different industrial appeals judge, which Ms. Gomez has characterized as an Affidavit of Prejudice. In the motion and affidavit, claimant's counsel cited RCW 4.12.050, and WAC 263-12-125, and indicated Ms. Gomez's belief that Industrial Appeals Judge Krabill is prejudiced against the claimant and that "[s]he cannot obtain a fair and impartial hearing before such judge." The claimant requested that the matter be assigned to another industrial appeals judge to issue the decision in the appeal. According to the affidavit, claimant's counsel received notice of the assignment to Industrial Appeals Judge Krabill on March 5, 2018, one day prior to filing the motion.

The claimant's motion was considered a request to deny the transfer of the appeal and was denied in a letter dated March 19, 2018. The denial indicated that, "[t]he information set forth in your letter does not set forth compelling reasons for this case not to be transferred for the purpose of writing the Proposed Decision and Order." The case remained assigned to Industrial Appeals Judge Krabill, who issued the Proposed Decision and Order dated March 19, 2018, the same date as the denial letter.

The Board of Industrial Insurance Appeals has the authority to determine its own procedure under RCW 51.52.020. This statute indicates, in part, "[t]he board may make rules and regulations concerning its functions and procedure, which shall have the force and effect of law until altered, repealed, or set aside by the board."[1] The Board has properly promulgated rules for procedure, including WAC 263-12-125, which provides that, "[i]nsofar as applicable, and not in conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed."[2] In the Petition for Review, Ms. Gomez contends that when she filed the affidavit of prejudice under RCW 4.12.050, Industrial Appeals Judge Krabill was deprived of jurisdiction to hear the appeal. RCW 4.12.050 states in part:

> (1) Any party to or any attorney appearing in any action or proceeding in a superior court may disqualify a judge from hearing the matter, subject to these limitations:
> (a) Notice of disqualification must be filed and called to the attention of the judge before the judge has made any discretionary ruling in the case.

[1] RCW 51.52.020.
[2] WAC 263-12-125.

> (b) In counties with only one resident judge, the notice of disqualification must be filed not later than the day on which the case is called to be set for trial.
> (c) A judge who has been disqualified under this section may decide such issues as the parties agree in writing or on the record in open court.
> (d) No party or attorney is permitted to disqualify more than one judge in any matter under this section and RCW 4.12.040.[3]

WAC 263-12-091 provides:

> "Affidavits of prejudice **against an industrial appeals judge assigned to conduct hearings in an appeal** are subject to the provisions of RCW 4.12.050, except that such affidavit must be filed within thirty days of receipt of the notice of assignment of the appeal to the industrial appeals judge or prior to the assigned industrial appeals judge holding any proceeding in the appeal, whichever occurs sooner."[4]

Thus, the Board's affidavit rule limits the parties' affidavit right to affidavit the judge who **conducts** the hearing only, as distinguished from the judge who **drafts a proposed order** for the Board, a review judge who reviews a proposed order, or a mediation judge who meets with parties to facilitate settlement discussions. Following the transfer of the appeal to Industrial Appeals Judge Krabill to write the decision, Ms. Gomez filed a motion and affidavit to assign a different industrial appeals judge, which Ms. Gomez has characterized as an Affidavit of Prejudice. The motion was considered a request to deny the transfer of the file and our chief industrial appeals judge denied the request. WAC 263-12-045(4) provides that, "[a]t any time the board or a chief industrial appeals judge or designee may substitute one industrial appeals judge for another in any given appeal."

In the present appeal, Ms. Gomez filed an affidavit of prejudice seeking removal of the industrial appeals judge reassigned to write the Proposed Decision and Order after all hearings had concluded and the record was closed. Accordingly, the chief industrial appeals judge properly denied the affidavit of prejudice in accordance with the Board's procedural rules.

Ms. Gomez next argues in the Petition for Review that the industrially related condition should be considered an occupational disease rather than an industrial injury. Ms. Gomez has worked for the employer, Virginia Mason Hospital Association (Virginia Mason), for seven years. On January 6, 2015, Ms. Gomez worked as a registered nurse and plan care manager for Virginia Mason at its Federal Way Clinic. In that position she typically saw patients with chronic disease. During a patient visit on January 6, 2015, which lasted from thirty minutes to an hour, she contracted a viral

[3] RCW 4.12.050.
[4] WAC 263-12-091 (Emphasis added.)

upper respiratory infection. She was sick with a cold from the viral infection starting the following day, January 7, 2015.

Late on January 12, 2015, Ms. Gomez developed an acute pain in her right ear from a secondary ear infection. The next morning, January 13, 2015, Ms. Gomez reported to Kari Steadman, her direct supervisor, that she was sick. On that same date, she sought care for sudden right ear pain from her physician and colleague Christine Palermo, M.D. Dr. Palermo happened to work for Virginia Mason at the same Federal Way Clinic. That night, the ear infection ruptured Ms. Gomez's eardrum, and she experienced profound, permanent hearing loss in her right ear. Dr. Palermo referred Ms. Gomez to Tracy Eriksson, M.D., in the ear, nose, and throat clinic.

Dr. Palermo has known Ms. Gomez since 2012, as they both work at Virginia Mason, and she has been Ms. Gomez's primary care physician since 2013. She was providing treatment for arthritis, which included immune-suppressing medication. Dr. Palermo first became aware Ms. Gomez was sick at an appointment on January 13, 2015. She understood Ms. Gomez had upper respiratory symptoms for six days and then developed acute right ear pain at about 11 p.m. on January 12, 2015. Dr. Palermo believed Ms. Gomez suffered from a viral illness and a bacterial sinus infection at that January 13 appointment. Dr. Palermo diagnosed an infection of the middle ear that was a complication of the upper respiratory illness. On January 14, or 15, 2015, she saw Ms. Gomez again and confirmed the presence of a ruptured ear drum. In follow-up conversations, Dr. Palermo did not discuss with Ms. Gomez any specific exposure, but they did talk about the fact that in the preceding time period, Ms. Gomez had seen several patients of Dr. Palermo that were quite ill and caused her exposure to catching something at work.

Since Dr. Palermo treated both Ms. Gomez and CPL, a patient with an upper respiratory viral illness, she identified the date of January 6, 2015 as a specific date when Ms. Gomez had an appointment with Ms. CPL. Dr. Palermo believed that Ms. Gomez caught her viral and bacterial illness from proximity to Ms. CPL for about an hour on January 6, 2015. She added that Ms. CPL had to remove a mask she was wearing during the appointment.

Dr. Eriksson, an otolaryngologist, declared that she provided evaluation and treatment to Ms. Gomez for her right ear. She discussed with Ms. Gomez that with acute sensorineural hearing loss, the most likely treatable cause would be a viral infection, such as an upper respiratory infection, which could be contracted anywhere. She believed on a more-probable-than-not basis that

Ms. Gomez's right-ear hearing loss did not arise naturally and proximately out of her employment with Virginia Mason.

Since the parties filed cross-motions for summary judgment, the first question in this appeal is whether there exists an issue of material fact.[5] The parties stipulated to the facts in this case, including the discovery depositions of Ms. Gomez and Dr. Palermo, and the Declaration of Tracy Erickson, M.D. In summary judgment, the moving party is 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.[6] In the present case, no genuine issue as to material fact exists.

Ms. Gomez also argues that the industrially related condition should be considered an occupational disease rather than an industrial injury. In its motion for summary judgment, the employer argued that Ms. Gomez suffered an industrial injury rather than an occupational disease. The parties have stipulated that if the right ear condition is characterized as an occupational disease, the April 4, 2017 Department order closing the claim with provision for hearing aids and an award for permanent partial disability should be affirmed. The parties also stipulated that if the right ear condition is considered an industrial injury, the Department order should be reversed and remanded since the claim was not filed within one year and is time-barred.

Under RCW 51.08.100, "'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom." Under RCW 51.08.140, "'Occupational disease' means such disease or infection as arises naturally and proximately out of employment under the mandatory or elective adoption provisions of this title."

Ms. Gomez cites cases to support her contention that her circumstance should be considered an occupational disease. She cites *Flynn V. Department of Labor and Industries*[7] for the proposition that all elements of RCW 51.08.100 must be met for a claim to be considered an injury, and that without a traumatic happening, inhalation events cannot be an injury. Such reliance on *Flynn* is too expansive. As any other occurrence, inhalation events must be viewed in light of the circumstances.

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[5] CR 56.
[6] *Wilson v. Steinbach*, 98 Wn.2d 434, 437 (1982).
[7] 188 Wash. 346, 349 (1936).

Ms. Gomez also indicates that Dr. Palermo did not immediately inform her that she believed the infected patient was the source of Ms. Gomez's infection. The claimant also points out that initially Ms. Gomez had only a simple viral infection and did not sustain hearing loss for several weeks. Also, Ms. Gomez's physician did not inform her the condition was related to her job until months after the exposure and Dr. Palermo did not discuss filing a claim until more than a year had passed since the exposure. Thus, Ms. Gomez maintains that her condition was an occupational disease.

Ms. Gomez also argues that her condition was not the result of a sudden, tangible happening. She contends that the facts do not support a traumatic occurrence. Ms. Gomez points out, in *Walston v. Boeing Co.*[8] the court refused to accept the argument that inhalation of asbestos was an injury causing immediate cellular level damage. The *Walston* case is distinguishable from Ms. Gomez's situation. Unlike the *Walston* case involving asbestos, the present case did not take years for symptoms to develop. To the contrary, Ms. Gomez's symptoms started the day after the exposure. Ms. Gomez is correct that the exposure need not be repeated for it to ultimately be considered an occupational disease. She also acknowledges that *In re Sharon Baxter*[9] (a needle-stick case) indicates that when a traumatic event occurs with a prompt onset of symptoms, the claim can be considered an industrial injury. In *Baxter*, the Board pointed out that a single incident may serve as the basis for both an industrial injury and for an occupational disease and the claim was characterized as an occupational disease because during the period when Ms. Baxter could have filed an injury claim, the disease was not yet diagnosable based on the time it took to progress. In that case the attending specialist noted it was unlikely that the particular needle stick, which started the disease process, could be identified. Ms. Baxter did not develop a disabling condition or require treatment until years after the needle sticks. By contrast, Ms. Gomez quickly became symptomatic. She was exposed to the virus on January 6, 2015. She was sick the day after the exposure. Five days later, Ms. Gomez had acute pain in her right ear from a secondary ear infection. On January 13, 2015, Ms. Gomez sought treatment from her doctor, Christine Palermo, who also worked at the same clinic with the claimant. That night, the ear infection ruptured Ms. Gomez's eardrum, and she had permanent hearing loss in her right ear.

In *In re James Jacobs* the Board found an industrial injury, even when the tangible happening was not instantaneous, and determined that a mile hike producing hyperventilation syndrome and an

[8] 181 Wn.2d 391 (2014).
[9] BIIA Dec., 92 5897 (1994).

anxiety reaction with collapse and severe chest pain is a sudden and tangible happening, which did not have to be confined to a certain number of seconds or minutes.[10] Mr. Jacobs was hiking to do surveying work and then collapsed. The hike was considered enough of a sudden, tangible event, even though it was superimposed on fatigue from prior days of work. The Board considered this an industrial injury, even though the Department's counsel argued that there was no sudden, tangible happening of a traumatic nature producing a prompt result.

Ms. Gomez suffered a viral infection that occurred as a specific identifiable event, which was the exposure to an infected patient during a single appointment. The exposure is capable of being fixed in time and place while in the employment of Virginia Mason Hospital and is susceptible of investigation. Since the event need not be instantaneous nor confined to a specific measurable period, the facts agreed on by the parties establish all of the elements of an industrial injury within the meaning of RCW 51.08.100. Thus, Ms. Gomez's claim for benefits is time-barred for failure to file the claim within one year of the industrial injury.

Summary judgment is warranted under CR 56 and the employer's motion for summary judgment is granted. The claimant's motion for summary judgment is denied. The Department allowed the claim as an occupational disease. Consistent with the stipulation of the parties, the Department order dated April 4, 2017, should be reversed and remanded to indicate that Ms. Gomez did not suffer an occupational disease; that she sustained an industrial injury; and to deny the claim for industrial injury as time-barred for failure to file the claim within one year from January 13, 2015.

DECISION

In Docket No. 17 15610, the employer, Virginia Mason Hospital Association, filed an appeal with the Board of Industrial Insurance Appeals on May 24, 2017, from an order of the Department of Labor and Industries dated April 4, 2017. In this order, the Department allowed Ms. Gomez's claim and closed the claim effective April 4, 2017, with a permanent partial disability award for 100 percent hearing loss in the right ear. This order is incorrect and is reversed and remanded to the Department with direction to reject the claim because the Application for Benefits was not filed within the one-year limitation as required by RCW 51.28.050.

[10] *In re James Jacobs*, BIIA Dec., 48,634 (1977).

FINDINGS OF FACT

1. On November 8, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. Gail Gomez sustained an industrial injury on January 6, 2015, when she contracted a viral upper respiratory infection from a patient at work. That viral infection proximately caused a secondary ear infection in her right ear. Ms. Gomez first sought treatment for her viral infection and ear infection on January 13, 2015, and her ear infection proximately caused profound hearing loss in her right ear on January 13, 2015.

3. Ms. Gomez's condition diagnosed as a viral infection did not arise naturally and proximately out of the distinctive conditions of her employment.

4. Ms. Gomez did not file a claim for benefits until April 15, 2016.

5. The pleadings and evidence submitted by the parties 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 and subject matter in this appeal.

2. The employer is entitled to a decision as a matter of law as contemplated by CR 56. For that reason, the claimant is not entitled to a decision as a matter of law under CR 56.

3. Ms. Gomez sustained an industrial injury within the meaning of RCW 51.08.100, on January 6, 2015.

4. Ms. Gomez's viral upper respiratory infection, secondary ear infection, and profound right-sided hearing loss are not an occupational disease within the meaning of RCW 51.08.140.

5. As a claim for industrial injury, Ms. Gomez's claim is not valid or enforceable because it was not filed within the one-year limitation period following the day on which the injury occurred, as prescribed by RCW 51.28.050.

6. The Department order dated April 4, 2017, is incorrect and is reversed. The claim is remanded to the Department with direction to reject the claim because the Application for Benefits was not filed within the one-year limitation prescribed by RCW 51.28.050.

Dated: December 17, 2018

BOARD OF INDUSTRIAL INSURANCE APPEALS

LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

Addendum to Decision and Order
In re Gail A. Gomez
Docket No. 17 15610
Claim No. SJ-40894

Appearances

Claimant, Gail A. Gomez, by Causey Wright Law Firm, per Brian M. Wright

Self-Insured Employer, Virginia Mason Hospital Association, by Pratt, Day & Stratton PLLC, per Marne J. Horstman

Department of Labor and Industries, by Office of the Attorney General, per Heather Leibowitz

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on March 19, 2018, in which the industrial appeals judge reversed and remanded the Department order dated April 4, 2017. On April 19, 2018, the employer filed a response to the Petition for Review.

Evidentiary Rulings

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

Other Procedural Rulings

On June 7, 2018, the Board issued an Order Vacating the Proposed Decision and Order and Remanding the Appeal for Further Proceedings. We noted that Drs. Palermo and Eriksson disagree on whether Ms. Gomez has an occupational disease or an industrial injury. We determined a genuine issue of material fact exists and that summary judgment was not appropriate. The appeal was remanded to the hearings process as provided by WAC 263-12-145(5), for further proceedings.

Ms. Gomez and Virginia Mason filed Motions for Reconsideration of the Order Vacating Proposed Decision and Order and Remanding the Appeal for Further Proceedings. Both parties contended that there are no genuine issue of material fact requiring further proceedings. They requested that the Board apply the law to the undisputed facts and issue a Decision and Order. We reconsidered the matter and determined that there are no genuine issues of material fact, granted the parties' motions for reconsideration and on August 2, 2018, issued an Order Granting Motions for Reconsideration that vacated The Order Vacating Proposed Decision and Order and Remanding the Appeal for Further Proceedings dated June 7, 2018.