

Giblett, Leslie

BOARD

Failure to confirm witnesses

Before excluding a witness's testimony due to a party's failure to confirm, the judge should consider the factors relevant to allowing a continuance: the diligence of the party in pursuing the appeal, the harm caused by not allowing the witness to testify balanced against the prejudice to the opposing party if the witness is allowed to testify, and consideration that the sanction of excluding a witness is an extreme sanction and is not preferred when a less severe sanction may be available.*In re Leslie Giblett*, BIIA Dec., 19 19420 (2020)

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: LESLIE E. GIBLETT**) **DOCKET NO. 19 19420**
2)
3 **CLAIM NO. ZB-27941**) **DECISION AND ORDER**
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5 Leslie Giblett, a self-represented claimant, alleged an injury to her eye while working at her
6 computer. The Department rejected the claim that Ms. Giblett appeals. At hearing, she attempted
7 to present the testimony of her optometrist, even though she hadn't provided a copy of the witness
8 confirmation to the opposing party. Our industrial appeals judge held that Ms. Giblett did not have
9 good cause for failing to provide a witness confirmation to the Department. The judge excluded the
10 optometrist's testimony, but allowed it in colloquy. While we agree with our industrial appeals judge's
11 decision to reject the claim, we grant review to take the testimony of an optometrist out of colloquy
12 and consider it as relevant evidence. We nevertheless **AFFIRM** the Department order rejecting the
13 claim.
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DISCUSSION

Facts

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20 **Leslie Giblett** is a 67-year-old woman who was employed full-time by Murphy & Associates,
21 a recruiting firm that had placed her in the IT department of Costco. Ms. Giblett used three different
22 computer monitors to translate and incorporate data from an old system to a new one. Unlike
23 previous IT positions she has held, she was unable to enlarge small font sizes to make them easier
24 to read. On January 22, 2019, Ms. Giblett was looking at one of the monitors and saw a "big flash of
25 light," and her computer screen seemed to be blinking.¹ Ms. Giblett looked around the room to see
26 if there had been an explosion, but there had not been. Moments later, she realized she was seeing
27 double and was eventually driven home. She never returned to her job at Costco.
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34 Ms. Giblett filed an industrial injury claim for the January 22, 2019 incident. The Department
35 rejected the claim and ordered the repayment of \$2,328.48 in provisional time-loss compensation
36 benefits. Ms. Giblett appealed the Department orders, which is the subject of the current appeals. A
37 hearing was set for May 5, 2020. On January 8, 2020, and June 3, 2020, our industrial appeals judge
38 sent litigation orders to the parties. Both litigation orders contained the following boilerplate language
39 on the third page under "Ground Rules":
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46 ¹ 5/5/20 Tr. at 41.
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1 **Witness Confirmation:** Begin identifying and scheduling your witnesses
2 immediately. By your Witness Confirmation Deadline, you must:

- 3 • Arrange for each witness to testify.
4 • File a letter and **send a copy to the other parties stating:**
5 ▪ The names of all of your witnesses.
6 ▪ The date, time, and location where each witness will testify.
7 ▪ Whether the witness will testify at hearing or by deposition.
8 ▪ Whether you will not use any of your scheduled hearing time.²
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10 On March 25, 2020, Ms. Giblett filed a witness confirmation notice indicating that her
11 optometrist, Dr. Chung, would testify. She submitted the form to the Board but not to opposing
12 parties, using our standard witness confirmation form found on our website. At the hearing on May 5,
13 2020, Ms. Giblett attempted to present Dr. Chung's testimony. The Department objected to her
14 testimony because Ms. Giblett had not provided a witness confirmation notice to the Department.
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16 When asked to explain, Ms. Giblett responded:
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18 When I received this communication for this hearing in the mail, it had a list of
19 instructions, and one of them was witness confirmation and the process to create that
20 and to notify witnesses. So I went online. I was given the link in the letter. I followed
21 the link. And the link specifically said the best process to follow is to do this online. You
22 fill out a [PDF]. The [PDF] you do not personally mail or fax. It's automatically taken
23 into the system. And my erroneous . . . idea was that because it was required by the
24 court system, that would take care of any notifications of any type of witnesses or
25 delivery or whatever was needed. So . . . I submitted it online and felt that was correct.
26 . . . So, yes, I made a mistake, but it was in good faith; . . . I thought I had done
27 everything necessary to make sure the witness could be included and recognized.³
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29 Our industrial appeals judge excluded Dr. Chung's testimony, but allowed it in colloquy, reasoning as
30 follows:
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32 Considering that the litigation order specifically informs parties that they must provide a
33 copy of their witness confirmations to opposing parties, Ms. Giblett's explanation does
34 not provide good cause for admitting Dr. Chung's testimony. Her testimony, therefore,
35 is not admitted.⁴
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37 **Teresa Chung, O.D.**, testified in colloquy. She is an optometrist who began treating
38 Ms. Giblett in November 2015. Optometrists examine patients for glasses or contact lenses, but may
39 also diagnose and treat certain eye infections and diseases, such as glaucoma and macular
40 degeneration. Prior to the alleged injury, Dr. Chung saw Ms. Giblett in April 2016, April 2018, and
41 early January 2019. When she saw Ms. Giblett on January 25, 2019, (shortly after the workplace
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46 ² Emphasis added.

47 ³ 5/5/20 Tr. at 51-52.

⁴ PDO at 5.

1 incident), she observed intermittent esotropia, an eye turn that was not visible up close. Dr. Chung
2 suspected that Ms. Giblett had decompensating phoria, a condition in which the eyes are unable to
3 look straight-ahead. Fatigue, age, and stress weaken a person's ability to realign their eyes in a
4 straight forward position, which causes their vision to double. Dr. Chung was not aware of any
5 condition, other than a detached retina (which Ms. Giblett did not have), that would cause someone
6 to see a flash of light.
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10 Dr. Chung recommended that Ms. Giblett see a neuro-ophthalmologist to determine if a nerve
11 problem was causing the condition. After ruling out a nerve problem, Dr. Chung placed prisms in
12 Ms. Giblett's eyeglasses, which alleviated the double vision problem. She explained that
13 decompensating phoria is a condition that develops gradually, but the double vision aspect of it often
14 presents suddenly. Dr. Chung stated the opinion that Ms. Giblett's decompensating phoria was
15 proximately caused by her work because when she had seen the patient just two weeks prior to the
16 alleged industrial injury Ms. Giblett did not suffer from any double vision, and there was no history of
17 double vision in her medical history. However, Dr. Chung conceded that it may have been a
18 coincidence that the onset of Ms. Giblett's double vision happened to occur at work.
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23 **Courtney Francis, M.D.**, is a neuro-ophthalmologist who specializes in neurologic diseases
24 that manifest in the eyes. Dr. Francis saw Ms. Giblett on May 10, 2019, and August 12, 2019, to
25 evaluate her eye condition. Ms. Giblett's MRIs of the brain and orbits were normal, which confirmed
26 that she had not suffered a stroke or other inter-cranial process that would cause double vision.
27 Dr. Francis determined that Ms. Giblett's eyes were in a turned-in position, which often happens with
28 age. Dr. Francis diagnosed acute onset of comitant esotropia with an idiopathic etiology, which
29 means the cause is unknown.⁵ She was unaware of any medical condition in which a flash of light
30 would cause double vision or esotropia. Dr. Francis said that surgery would be a reasonable option
31 to correct the problem. With respect to causation, Dr. Francis stated the opinion that that Ms. Giblett's
32 condition was not caused by eye strain associated with computer use required by her job. "I don't
33 believe that the distance at a computer would cause a constant turning in of the eyes."⁶
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43 Analysis

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46 ⁵ 8/5/20 Tr. at 12-13.

47 ⁶ 8/5/20 Tr. at 15.

1 In *In re Judith Overby*,⁷ we held that striking a witness's testimony is an extreme remedy that
2 is not preferred when there are less severe sanctions available. And in *In re Kristin Ferrans dba KBJ*
3 *Roofing*,⁸ we discussed the legal standard that applies when a party seeks the testimony of an
4 unconfirmed witness:
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7 When a party seeks to add an unconfirmed witness's testimony, **the situation is best**
8 **analyzed under the standard for a continuance.** This is because any surprise
9 caused by adding the witness can be cured by postponing the testimony to a later date
10 after the objecting party has an opportunity to conduct discovery and prepare. Nothing
11 in the record shows the judge determined whether there was good cause for a
12 continuance based on the factors we outlined in *Tony's Transport*.
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14 (Emphasis added.)

15 In *In re Tony's Transport*,⁹ we enumerated the criteria to determine good cause for a continuance:

16 [H]ow many times hearings have already been continued, the length of the continuance
17 being requested, the diligence with which [the claimant] has in the past or is now
18 pursuing this appeal, the harm caused to the [moving party] if the request for a
19 continuance is not granted, and the prejudice to the [non-moving party] if a continuance
20 is granted.
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22 In *In re Stanley D. Lanier*,¹⁰ we examined whether a self-represented claimant should be given
23 another opportunity to present a medical witness. The worker failed to confirm any witnesses and
24 his hearing time was reduced to one hour. The hearings judge had sent him two warning letters that
25 he had to present medical testimony. The claimant appeared at the hearing with medical records
26 instead of a medical witness. He expressed confusion as to this requirement, despite the fact that
27 the judge had sent him a letter stating, "In most cases, your doctor will be required to appear in person
28 or by phone to testify on your behalf."¹¹ The claimant asked for a continuance to arrange for the
29 necessary medical testimony. The hearings judge denied the continuance and dismissed the appeal
30 for failure to present evidence when due. We noted that the judge didn't explore the factors set forth
31 in *Tony's Transport*, and stated "We accept Mr. Lanier's statement that he was confused about the
32 necessity to present a medical witness as opposed to records, particularly because records are
33 sometimes enough."¹² We vacated the Proposed Decision and Order, and granted the worker's
34 request for a continuance to give him another chance to present his doctor's testimony. .
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43 ⁷ BIIA Dec., 09 19369 (2011).

44 ⁸ *In re Kristin Ferrans dba KBJ Roofing*, Dckt. No. 19 W0108 (May 11, 2020).

45 ⁹ Dckt. No. No. 07 23408 (January 31, 2009).

46 ¹⁰.Dckt. No. 14 17056 (March 17, 2015).

47 ¹¹ Dckt. No. 14 17056.

¹² *Lanier* at 3.

1 Unlike the worker in *Lanier*, Ms. Giblett did not actually fail to confirm witnesses. She only
2 failed to send a copy of the witness confirmation to the opposing party. Although the litigation order
3 states that copies must be served on opposing parties, it is somewhat "buried" in the boilerplate
4 language. There is little evidence that Ms. Giblett's diligence in pursuing this appeal was lacking.
5 She appeared for all proceedings and promptly filed a witness confirmation form after the judge sent
6 her a warning letter. She also filed an amended witness confirmation form shortly thereafter, notifying
7 the judge of Dr. Chung's new phone number. The Department had three months to prepare and
8 present its case, culminating in the testimony of its own medical witness, Dr. Francis, who testified
9 very persuasively. The prejudice to the worker in excluding Dr. Chung's testimony would be her
10 failure to make a prima facie case, resulting in affirmance of the Department order.

11 In any event, our hearings judge allowed Dr. Chung's testimony in colloquy. We take this
12 testimony out of colloquy to be considered on its merits. Having reviewed all medical testimony in
13 this case, we find Dr. Francis' opinion more persuasive and probative as to the issue of causation.
14 The only basis for Dr. Chung's opinion that Ms. Giblett's eye condition was related to her employment
15 is that Ms. Giblett did not suffer from the eye condition a few weeks prior to the alleged date of injury.
16 Dr. Chung also conceded the fact that the alleged injury occurred while working may have been a
17 mere coincidence. Dr. Francis, on the other hand, stated the opinion that Ms. Giblett's eye condition
18 (or any other eye condition) could not be caused by a flash of light. We agree with Dr. Francis that
19 Ms. Giblett's comitant esotropia is not causally related to her employment with Murphy & Associates.

20 **DECISION**

21 In Docket No. 19 19420, the claimant, Leslie E. Giblett, filed an appeal with the Board of
22 Industrial Insurance Appeals on August 28, 2019, from an order of the Department of Labor and
23 Industries dated August 7, 2019. In this order, the Department affirmed its prior order dated May 28,
24 2019, rejecting the worker's claim and ordering the repayment of \$2,328.48 in provisional time-loss
25 compensation benefits previously paid. This order is correct and is affirmed.

26 **FINDINGS OF FACT**

- 27 1. On March 17, 2020, an industrial appeals judge certified that the parties
28 agreed to include the Jurisdictional History in the Board record solely for
29 jurisdictional purposes.
- 30 2. Beginning on or around November 2018, Leslie Giblett was employed by
31 recruiting firm Murphy & Associates, who had placed her in the
32 information technology department of Costco Corporation. She was
33 responsible for the implementation of a new vendor management system.

1 Ms. Giblett translated data and created formulas and calculations to
2 implement the new system. She used three computer monitors to perform
3 her job. Electricity, heat, and air conditioning in the building did not
4 function well.

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- 6 3. On January 22, 2019, Ms. Giblett suddenly observed a big flash of light
7 and her computer screen appeared to be blinking. Moments later
8 Ms. Giblett was seeing double, and she was taken home.
- 9 4. Ms. Giblett did not sustain an injury in the course of her employment with
10 Murphy & Associates. The flash of light was not a proximate cause of her
11 comitant esotropia or any other medical condition.
- 12 5. Ms. Giblett's working conditions while employed by Murphy & Associates
13 do not constitute distinctive conditions of employment.
- 14 6. Ms. Giblett's condition diagnosed as comitant esotropia did not arise
15 naturally and proximately out of the distinctive conditions of her
16 employment with Murphy & Associates.

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18 **CONCLUSIONS OF LAW**

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- 20 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
21 and subject matter in this appeal.
- 22 2. Ms. Giblett did not sustain an industrial injury within the meaning of
23 RCW 51.08.100 on January 22, 2019.
- 24 3. Ms. Giblett's comitant esotropia is not an occupational disease within the
25 meaning of RCW 51.08.140.
- 26 4. The Department order dated August 7, 2019, is correct and is affirmed.

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29 Dated: December 23, 2020.

30 BOARD OF INDUSTRIAL INSURANCE APPEALS

31 
32 LINDA L. WILLIAMS, Chairperson

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34 JACK S. ENG, Member

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**Addendum to Decision and Order
In re Leslie E. Giblett
Docket No. 19 19420
Claim No. ZB-27941**

Appearances

Claimant, Leslie E. Giblett, Self-Represented
Employer, Murphy & Associates, Inc. (did not appear)
Department of Labor and Industries, by Office of the Attorney General, per Kendra E. Lacour

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 October 19, 2020, in which the industrial appeals judge affirmed the Department order dated August 7, 2019

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.