

Benoit, Joseph

BOARD

Remand for additional evidence

Where the employer has received notices of proceedings but failed to appear, it has waived its right to present evidence and the Board will not remand the appeal for further hearings to permit the employer to do so. ...*In re Joseph Benoit*, BIA Dec., 35,483 (1971)

Scroll down for order.

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

1 **IN RE: JOSEPH BENOIT**) **DOCKET NO. 35,483**
2)
3 **CLAIM NO. F-834345**) **DECISION AND ORDER**
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5 **APPEARANCES:**

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7 Claimant, Joseph Benoit, by
8 Fredrickson, Maxey, Bell & Allison, per
9 Leo H. Fredrickson and Otto M. Allison, Jr.

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11 Employer, Garland Harper Company, by
12 Robert D. McGoldrick
13 (In attendance: Leonard Reilly, Secretary-Treasurer)

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15 Department of labor and Industries, by
16 The Attorney General, per
17 Michael Donohue and William L. Halpin, Assistants

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19 This is an appeal filed by the claimant on April 6, 1970, from an order of the Department of
20 Labor and Industries dated March 23, 1970, which rejected the claim for the reason that the
21 myocardial infarction occurring on June 30, 1969, was not due to an industrial injury or to an
22 occupational disease. **REVERSED AND REMANDED.**

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DECISION

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26 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
27 and decision on a timely Statement of Exceptions filed by the employer to a Proposed Decision and
28 Order issued by a hearing examiner for this Board on November 16, 1970, in which the order of the
29 Department dated March 23, 1970, was reversed and the claim was remanded to the Department
30 with direction to allow the claim.

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32 The Board has reviewed the evidentiary rulings of the hearing examiner and finds that no
33 prejudicial error was committed and said rulings are hereby affirmed.

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35 The issue presented by this appeal and the evidence presented by the parties are
36 adequately set forth in our hearing examiner's Proposed Decision and Order dated November 16,
37 1970.

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39 The employer contends in the exceptions, by way of an affidavit signed by Leonard Riley,
40 Secretary-treasurer of the employer corporation, that the claimant was an independent contractor,
41 not an employee of that corporation, and that it was not brought to his attention that the claimant
42 was alleging that he was an employee of the Garland Harper Company until the company received

1 a copy of the Proposed Decision and Order. He then alleged that he was not familiar with the
2 appellate proceedings before the Board.
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4 The record discloses that on May 4, 1970, the employer was sent a copy of the Board's
5 Order Granting Appeal and Directing Presentation of Evidence dated May 1, 1970, and a copy of
6 the claimant's notice of appeal pursuant to RCW 51.52.060, and that on May 12, 1970, the
7 employer was sent Notice of Conference at its place of business in Spokane, Washington, in
8 connection with a conference to be held on May 26, 1970. Notices of a hearing to be held on June
9 22, 1970, and a further continued hearing to be held on August 19, 1970, were also sent to the
10 employer. Neither the employer nor anyone on its behalf appeared at the aforementioned
11 conference and hearing in spite of the admonition in the Notice of Hearing stating:
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16 "You are advised that Section 51.52.102, Revised Code of Washington,
17 provides that in the event of failure of any party to present all his
18 evidence with respect to the issues raised in the notice of appeal at the
19 above time and place, the Board may determine the issues upon such
20 evidence as may be presented to it at said hearing,....
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22 "The parties to the above-numbered appeal are as follows:

23 Joseph Benoit, workman;
24 Garland Harper Company, employer;
25 The Department of Labor and Industries."
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27 In response to the employer's exceptions filed on December 14, 1970, the Board on February 25,
28 1971, issued its order setting the matter for a special hearing on March 18, 1971, in Spokane,
29 Washington, to receive evidence as to when the employer herein first learned that the claimant was
30 alleging that he suffered an industrial injury on June 30, 1969, while in the course of his
31 employment with Garland Harper Company, and whether or not the employer had proper notice of
32 the conference and hearing proceedings in this case.
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36 At the special hearing on March 18, 1971, the employer appeared with an attorney, and the
37 testimony of Mr. Leonard Riley, the company's secretary-treasurer, was taken.
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39 After a careful examination of the testimony presented by the employer at the special hearing
40 on March 18, 1971, it is the opinion of the Board that the employer did receive the earlier
41 communications sent by the Board in May, June, and August, 1970, and it therefore was aware that
42 the claimant was contesting the Department's order rejecting his claim. This awareness occurred
43 prior to the June 22, 1970 hearing before the Board, and the employer had adequate time to
44 prepare its case and present evidence to the Board if it so desired during the hearing process. By
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1 failing to appear at the conference and hearings scheduled in this case, the employer waived its
2 right to present the evidence it now wants considered on the question of independent contractor
3 status of the claimant.
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5 Although we will not reopen the record to receive evidence on the claimant's employment
6 status, we think it proper to remind employer's counsel that coverage of the Workmen's
7 Compensation Act extends to independent contractors whose personal labors are required. RCW
8 51.08.180; Norman v. Department of Labor and Industries, 10 Wn. 2d 180 (1941).
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10 After consideration of the Proposed Decision and Order and the Statement of Exceptions
11 filed thereto, and a careful review of the entire record before us, we are persuaded that the
12 employer cannot now raise the question of employment status and the Proposed Decision and
13 Order is supported by the preponderance of the evidence and is correct at a matter of law.
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15 The hearing examiner's proposed findings, conclusions and order are hereby adopted as this
16 Board's findings, conclusions and order and are incorporated herein by this reference, and the
17 Board makes an additional finding as follows:
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- 19 6. That the Garland Harper Company received a copy of the claimant's
20 notice of appeal and this Board's Order Granting Appeal and directing
21 Presentation of Evidence in May, 1970, and proper statutory notice of
22 the May 26, 1970 conference and the June 22, 1970 and August 19,
23 1970 hearing held before Hearing Examiner Thomas P. Graham in this
24 appeal, and said company was aware that the claimant by his notice of
25 appeal was contesting the rejection of his claim and was alleging that he
26 had suffered an injury while in the course of his employment with said
27 company. That said company did not appear or participate in any
28 manner at the May 26, 1970 conference or the June 22, 1970 and
29 August 19, 1970 hearing held before this Board, although the notice of
30 hearing included the following admonition:
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32 "You are advised that Section 51.52.102, Revised Code of Washington,
33 provides that in the event of failure of any party to present all his
34 evidence with respect to the issues raised in the notice of appeal at the
35 above time and place, the Board may determine the issues upon such
36 evidence as may be presented to it at said hearing,....
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38 "The parties to the above-numbered appeal are as follows:
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40 Joseph Benoit, workman;
41 Garland Harper Company, employer;
42 The Department of Labor and Industries."
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44 and an additional conclusion as follows:
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1 4. By ignoring the communications sent to it by the Board in May, June,
2 and August, 1970, the Garland Harper Company waived its right to
3 present evidence challenging the employee status of Joseph Benoit.
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5 It is so ORDERED.

6 Dated this 3rd day of June, 1971.
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8 BOARD OF INDUSTRIAL INSURANCE APPEALS
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10
11 /s/
12 ROBERT C. WETHERHOLT Chairman
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15 /s/
16 R.H. POWELL Member
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19 /s/
20 R.M. GILMORE Member
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