

## **Gish, Jesse, Jr.**

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### **DISCOVERY**

#### **Applicability of civil rules -- medical experts**

Attorney for self-insured employer engaged in *ex parte* contact with a forensic medical witness identified by the claimant. The witness had no contact with the claimant during the course of claim administration. The Board held that such *ex parte* contact violates CR 26(b)(4) and is objectionable. ...*In re Jesse Gish, Jr.*, BIA Dec., 89 0914 (1990)  
[Editor's Note: See also, legislative restriction on contact with medical providers, RCW 51.52.063.]

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

1     **IN RE: JESSE B. GISH, JR.**                     )     **DOCKET NO. 89 0914**  
2   )   )  
3     **CLAIM NO. T-043639**                             )     **DECISION AND ORDER**  
4

5 APPEARANCES:

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7         Claimant, Jesse B. Gish, Jr., by  
8         Law Offices of David B. Vail & Associates, per  
9         David B. Vail

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11         Self-Insured Employer, Weyerhaeuser Company, by  
12         Kathryn D. Fewell, Corporate Counsel

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14         This is an appeal filed by the claimant, Jesse B. Gish, Jr., with the Department of Labor and  
15 Industries on March 3, 1989 and with the Board of Industrial Insurance Appeals on March 23, 1989  
16 from an order of the Department of Labor and Industries dated January 4, 1989 which adhered to the  
17 provisions of an order dated November 2, 1988. The order of November 2, 1988 closed the claim with  
18 time loss compensation as paid to June 27, 1988 and with a permanent partial disability award equal  
19 to 10% of the amputation value of the right leg at the ankle. **REVERSED AND REMANDED.**

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22                                     **PROCEDURAL AND EVIDENTIARY MATTERS**

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24         Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
25 and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision  
26 and Order issued on April 24, 1990 in which the order of the Department dated January 4, 1989 was  
27 reversed and the claim remanded to the Department with directions to place the claimant on the  
28 pension rolls.

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31         During the course of the hearings in connection with this appeal, David Vail, the claimant's  
32 attorney, objected to certain testimony following ex parte contact between the self-insured employer's  
33 attorney and Drs. Carl Bichard and John R. Mullins. At a conference held on May 5, 1989, the  
34 claimant requested hearing time to present the testimony of Dr. Bichard and two other unnamed  
35 physicians. On July 18, 1989, without notice to the claimant or his attorney, Kathryn Fewell, the  
36 attorney for Weyerhaeuser Company, discussed the case with Dr. Bichard, a long-time attending  
37 orthopedic surgeon. When the July 18, 1989 meeting between Ms. Fewell and Dr. Bichard was  
38 revealed during the course of cross- examination at the hearing on October 23, 1989, Mr. Vail  
39 immediately raised objection on behalf of the claimant to any testimony relating to that meeting.  
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1 In a letter to the Industrial Appeals Judge dated June 19, 1989, Mr. Vail identified Dr. John R.  
2 Mullins as a medical expert who would testify on behalf of the claimant. Dr. Mullins, who is a specialist  
3 in neurology and internal medicine, had no contact with Mr. Gish until he performed an examination on  
4 August 11, 1989. The nature of the examination and the time at which it was performed clearly  
5 establishes Dr. Mullins as a forensic medical expert. He provided no treatment to Mr. Gish and had no  
6 contact with him during the period that the claim was being administered by the self-insured employer  
7 or the Department of Labor and Industries.  
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11 During a recess following Dr. Mullins' direct testimony on behalf of the claimant on November  
12 28, 1989, Ms. Fewell asked Dr. Mullins his opinion regarding physical limitations imposed by Dr.  
13 Bichard and whether he would concur with those limitations. At the time these questions were asked,  
14 both the Industrial Appeals Judge and the claimant's attorney were absent from the hearing room.  
15 Immediately after the hearing was reconvened, Mr. Vail raised objections to Ms. Fewell's ex parte  
16 contact with Dr. Mullins and moved that she be denied the right of cross- examination.  
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20 Subsequent to the Washington Supreme Court's decision in Loudon v. Mhyre, 110 Wn.2d 675  
21 (1988), we issued a Decision and Order, In re Adelbert v. Farr, BIIA Dec., 88 0699 (1989), which dealt  
22 at length with the scope of appropriate ex parte contact between physicians who were to testify as  
23 expert medical witnesses and attorneys representing the parties to an appeal. In that decision we  
24 determined that no physician- patient privilege exists in workers' compensation matters in light of the  
25 provisions of RCW 51.04.050. Thus the principal basis for the Supreme Court's decision in Loudon v.  
26 Mhyre, supra, does not apply in the workers' compensation arena.  
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30 While Ms. Fewell would have been forced to resort to discovery under the civil rules if Dr.  
31 Bichard had refused to engage in ex parte contact, she was not precluded from having voluntary  
32 contact. Because of the absence of the physician-patient privilege, parties to industrial insurance  
33 appeals may engage in ex parte contact with physicians who have provided treatment or rendered  
34 opinions in connection with administration of the claim. However, if the physician declines to engage  
35 in ex parte contact, discovery procedures under the civil rules must be used.  
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39 As Ms. Fewell's contact with Dr. Bichard was voluntary and with an attending physician named  
40 as a witness, it was permissible and did not violate the rules applicable to proceedings before the  
41 Board. Accordingly, the testimony of Dr. Bichard appearing in the transcript of the hearing held on  
42 October 23, 1989 at page 136, line 16 through page 171, line 1 is removed from colloquy and the  
43 objections to that testimony and the motion to strike that testimony are hereby overruled and denied.  
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1 Our decision in Farr dealt principally with the question of ex parte communication with medical  
2 experts who had contact with the claimant during the period the claim was being administered by the  
3 Department or the self-insured employer. In Farr we specifically stated: "This decision does not  
4 address discovery issues with respect to forensic experts under CR 26(b)(4) or CR 35. Additional  
5 discovery limitations apply in those situations, pursuant to the court rules." Farr, at 21.  
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9 Clearly, Dr. John R. Mullins, who examined the claimant at his attorney's request after the order  
10 closing the claim had been appealed to the Board, was a forensic expert. CR 26(b)(4) specifically  
11 limits "[d]iscovery of facts known and opinions held by experts .. acquired or developed in anticipation  
12 of litigation or for trial ...." The clear and unambiguous intent of this provision is to limit the contact  
13 between opposing counsel and a party's forensic experts to discovery under the methods set forth in  
14 CR 26(a) and CR 26(b)(4)(A)(i) and within the scope set forth in CR 26(b)(1). As Dr. Mullins was a  
15 forensic expert and had no contact with Mr. Gish during the course of claim administration, the only  
16 appropriate contact between Ms. Fewell and Dr. Mullins other than on the record during the course of  
17 proceedings would have been pursuant to the provisions of the civil rules relating to discovery or by  
18 agreement with opposing counsel. Thus, the contact that occurred between Ms. Fewell and Dr.  
19 Mullins during the recess between direct and cross-examination was inappropriate and clearly  
20 objectionable.  
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23 While we agree with our Industrial Appeals Judge's interlocutory decision to limit  
24 cross-examination of Dr. Mullins regarding Dr. Bichard's physical capacities evaluation, this material is  
25 now contained in the record as a result of publication of the deposition of Dr. Mullins taken at Ms.  
26 Fewell's request on January 24, 1990. This deposition, which was taken pursuant to an interlocutory  
27 order entered by our Chief Industrial Appeals Judge, does not contain material which is sufficiently  
28 consequential or prejudicial to the claimant's appeal to justify reversing the Industrial Appeals Judge's  
29 publication of this deposition in his Proposed Decision and Order.  
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32 The employer raised a number of other evidentiary objections in its Petition for Review. We  
33 sustain the self-insured employer's hearsay objections with respect to the testimony appearing in the  
34 transcript of October 23, 1989 at page 32, lines 5 through 14 and page 39, lines 10 through 14 and in  
35 the transcript dated January 22, 1990 at page 26, line 15 through page 27, line 8. That testimony is  
36 stricken. The testimony appearing at page 76, line 3 through page 77, line 5 of the transcript dated  
37 October 23, 1989 and at page 204, line 12 through page 205, line 9 is admitted into the record and  
38 removed from colloquy. As both Exhibits 13 and 36 constitute hearsay, they are rejected. The  
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1 material appearing at page 144, line 25 through page 147, line 1 of the November 28, 1989 transcript  
2 is removed from colloquy, as it constitutes material which would establish the extent of the claimant's  
3 motivation to return to employment. The Board has reviewed all other evidentiary rulings contained in  
4 the record of proceedings and the Proposed Decision and Order and finds that no further prejudicial  
5 error was committed and those rulings are hereby affirmed.  
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### 8 **DECISION**

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10 The issue of the extent of Mr. Gish's disability as of January 4, 1989 is thoroughly set forth and  
11 discussed in the Proposed Decision and Order. We agree with our Industrial Appeals Judge's  
12 decision that in light of Mr. Gish's age, training, education, and work experience, he has been  
13 rendered totally and permanently disabled as a result of the combined effects of the impairment  
14 caused by the industrial injury of April 10, 1986 and his preexisting disabilities. Even with the two  
15 recent quarters of education at Centralia Community College, it does not appear that this 62 year old  
16 logger is able to perform any form of continuous gainful employment.  
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19 During the course of working as a logger for some 33 years, Mr. Gish suffered a number of  
20 injuries prior to the industrial injury which resulted in this claim. Included among the conditions which  
21 resulted from prior injuries were problems which affected his ability to use both hands and also  
22 affected his right knee. Mr. Gish is clearly incapable of performing any of the types of jobs that he  
23 previously held in the logging industry. Certain lighter types of employment have been put forward on  
24 behalf of the self-insured employer, but are not realistic even though they may fall within Mr. Gish's  
25 limited physical abilities. Mr. Gish's diction and grammar, attuned to work in the woods, would be a  
26 severe handicap in securing or performing a position as a receptionist at a hotel or motel. His obvious  
27 lack of hand dexterity would prevent any type of employment in the competitive labor market which  
28 required typing, data entry, or use of a ten-key adding machine. This injured worker, who tried hard to  
29 attain sufficient education to resume employment, must be classified as a totally and permanently  
30 disabled worker.  
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33 After consideration of the Proposed Decision and Order and the Petition for Review filed  
34 thereto, and a careful review of the entire record before us, we have determined that the Department  
35 order dated January 4, 1989 is incorrect and must be reversed. The claim will be remanded to the  
36 Department with directions to place the claimant, Jesse B. Gish, Jr., on the pension rolls as a  
37 permanently totally disabled worker.  
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1 Proposed Findings of Fact Nos. 2, 5, 6, 7, 8, 9, and 10 and proposed Conclusions of Law  
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3 Nos. 1, 2, and 3 are hereby adopted as this Board's final findings and conclusions. In addition, the  
4 Board enters the following findings and conclusions:  
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6 **FINDINGS OF FACT**

7 1. On May 1, 1986, the Department of Labor and Industries received an  
8 accident report alleging that the claimant, Jesse B. Gish, Jr., had suffered  
9 an industrial injury to his right ankle and leg on April 10, 1986, while in the  
10 employ of Weyerhaeuser Company. On May 28, 1986 the Department of  
11 Labor and Industries issued an order holding that the worker had  
12 sustained an injury. On November 2, 1988, the Department issued an  
13 order closing the claim with time loss compensation as paid to June 27,  
14 1988, with an award for permanent partial disability equal to 10% of the  
15 amputation value of the right leg at the ankle, and closed the claim.

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17 On December 28, 1988, the claimant protested and requested  
18 reconsideration of the November 2, 1988 Department order. On January  
19 4, 1989, the Department issued an order adhering to the provisions of its  
20 November 2, 1988 order. On March 3, 1989 the Department received a  
21 protest and request for reconsideration of its January 4, 1989 order.

22 The Department forwarded the protest to the Board of Industrial Insurance  
23 Appeals as a direct appeal. The Board received the forwarded protest on  
24 March 21, 1989. On March 23, 1989, the Board issued an order granting  
25 the appeal subject to proof of timeliness, assigning it Docket No. 89 0914,  
26 and directing that further proceedings be held in the matter.

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28 3. The claimant, Jesse B. Gish, Jr., was born on November 6, 1927, stands  
29 5' 1/2" tall, and weighs 160 pounds. He is right handed. He has a high  
30 school diploma, 33 years experience in various aspects of logging, and  
31 two recent quarters of education at Centralia College in entry level  
32 accounting, word processing, and ten-key. His last prior experience as a  
33 clerk typist was as a sergeant in the United States Marines in the late  
34 1940's.

35 4. The claimant's notice of appeal filed on March 3, 1989 with the  
36 Department of Labor and Industries was filed within sixty days of the date  
37 on which the Department order dated January 4, 1989 was communicated  
38 to him.

39 **CONCLUSIONS OF LAW**

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41 4. The order of the Department of Labor and Industries dated January 4,  
42 1989 which adhered to the provisions of an order dated November 2, 1988  
43 and closed the claim with time loss compensation as paid to June 27,  
44 1988 and with a permanent partial disability award equal to 10% of the  
45 amputation value of the right leg at the ankle, is incorrect and is reversed  
46 and the claim is remanded to the Department with directions to place the  
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claimant, Jesse B. Gish, Jr., on the pension rolls as a totally permanently disabled worker.

It is so ORDERED.

Dated this 7<sup>th</sup> day of December, 1990.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/  
SARA T. HARMON Chairperson

/s/  
FRANK E. FENNERTY, JR. Member

/s/  
PHILLIP T. BORK Member

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