

Eerkes, Don

SANCTIONS

Frivolous defense

RCW 4.84.185, which provides for imposition of sanctions in instances where a defense was frivolous and advanced without reasonable cause, applies in appeals before the Board. A party may not seek sanctions under RCW 4.84.185 until such time as the Board's order is final. ...*In re Don Eerkes*, BIA Dec., 90 2532 (1992)

Scroll down for order.

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

1 **IN RE: DON R. EERKES**)
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3 **CLAIM NO. J-294746**)
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DOCKET NO. 90 2532
DECISION AND ORDER

APPEARANCES:

Claimant, Don R. Eerkes, by
Stiles, Stiles & Stiles, Inc., P.S., per
Brian L. Stiles and Terry Carroll

Employer, Western Lime Co.,
None

Department of Labor and Industries, by
The Attorney General, per
Anne M. Skalley, Assistant, and Whitney Cochran, Paralegal

This is an appeal filed by the claimant on May 14, 1990 from an order of the Department of Labor and Industries dated April 27, 1990 which affirmed a Department order dated January 3, 1990. The January 3, 1990 order corrected and superseded a Department order dated December 26, 1989 and closed the claim with time-loss compensation as paid and with an award for permanent partial disability equal to 10% as compared to total bodily impairment for Category 3 lumbar impairment, payable at 75% of monetary value. **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

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 Department of Labor and Industries to a Proposed Decision and Order issued on December 20, 1991 in which the order of the Department dated April 27, 1990 was reversed and the claim remanded to the Department with directions to pay time-loss compensation for the period January 3, 1990 to April 27, 1990 and to thereupon place the claimant on the pension rolls as a permanently and totally disabled worker. The Proposed Decision and Order further assessed the sum of \$2,943.74 in costs and attorneys fees against the Department as sanctions for pursuing a frivolous defense within the meaning of RCW 4.84.185

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

DECISION

The Department's Petition for Review challenges the findings of fact and conclusions of law which form the basis for the Proposed Decision and Order's awards of further time-loss compensation

1 and of a pension to the claimant. The entire body of the petition, however, is devoted to the issue of
2 whether the industrial appeals judge or the Board is authorized to award sanctions pursuant to RCW
3 4.84.185. We conclude that the pension and time-loss compensation were properly awarded. We
4 conclude also that the industrial appeals judge did not have jurisdiction to award sanctions under RCW
5 4.84.185 because a Proposed Decision and Order is not a final order as contemplated by that statute.
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9 The Proposed Decision and Order very adequately summarizes the facts. We report here
10 those factors which persuade us that the additional time-loss compensation and pension awards are
11 correct. Mr. Eerkes was 40 years old at the time his claim was closed. He has a functional IQ of 69
12 (mildly retarded). He has always had problems dealing with people on a long term basis. He worked
13 various heavy labor jobs in construction, holding long term employment only where his employer was
14 a relative, i.e., his father or his uncle. He has marginal manual dexterity. He reads at the rate of two
15 pages of a novel per day. He spent the last year trying to learn how to address an envelope. He has
16 memory difficulties. As a result of his industrial injury, he had a lumbar laminectomy which developed
17 internal scarring. His attending physician rates his degree of lumbar impairment at category 4 of WAC
18 296-20-280. The Department's medical expert rates the degree of impairment as Category 3.
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23 Two performance-based physical capacity evaluations and a non-performance-based evaluation
24 prepared by the attending physician limit Mr. Eerkes to sedentary employment. Two of these
25 evaluations limit him to less than 8 hours per day of work type activity. Only the Department's panel
26 doctor, Dr. William Schayes, who did not personally review the worker's past medical records, testified
27 that Mr. Eerkes had the capacity to lift more than 10 pounds at a time. He testified that Mr. Eerkes
28 was employable full time, but had not been advised of the range of Mr. Eerkes mental and educational
29 limitations. The record reflects that the Department's vocational witness and the specialists at the
30 Buckner Rehabilitation Center concluded that Mr. Eerkes' complex of mental and physical problems
31 made him a poor candidate for a pain clinic or for retraining to a sedentary job.
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37 The Department's petition recites a litany of individual facts which might have undermined the
38 pension case and time loss claim if one viewed them myopically, out of the context of the complete
39 data available. Taken as a whole, however, the evidence of Mr. Eerkes' permanent total disability is
40 very convincing.
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43 We turn now to the question of the sanctions requested by the claimant. RCW 51.52.140
44 provides that "[except] as otherwise provided in this chapter, the practice in civil cases shall apply to
45 appeals prescribed in this chapter." WAC 263-12-125 provides that "[insofar] as applicable, and not in
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1 conflict with these rules, the statutes and rules regarding procedures in civil cases in the superior
2 courts shall be followed" Therefore, this Board can, within the context of appeals from
3 Department orders, apply rules and statutes governing civil cases unless there is a specific restriction
4 or conflict with RCW 51.52 or the applicable Washington Administrative Code provisions.
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7 RCW 51.52 does contain one specific restriction on the Board's powers to sanction parties
8 under the general civil practice. RCW 52.52.100 provides that the Board must refer questions of
9 contempt to the Superior Court for resolution. Contrary to the assertions in the Department's petition
10 for review, the Washington Administrative Code contains no restrictions on the Board's authority to
11 apply sanctions short of contempt. In fact, WAC 263-12-045, which delineates the responsibilities of
12 members of this Board and our industrial appeals judges, specifically grants the authority
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16 (g) To take appropriate disciplinary action with respect to representatives
17 of parties appearing before the board; [and]

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19 (j) To take any other action necessary and authorized by these rules and
20 the laws.

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22 The Board relied on the provisions of RCW 51.52.140 and WAC 263-12-125 to award CR 11
23 sanctions for pursuing a matter in bad faith in the case of In re: Donald Anderson, BIIA Dec., 87 3724
24 (1989). That same statutory and regulatory grant of authority may arguably extend to the application
25 of RCW 4.84.185 when the facts and circumstances so warrant.
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28 RCW 4.84.185 provides, in pertinent part, in any civil action, the court
29 having jurisdiction may, upon written findings by the judge that the action .
30 . . . or defense was frivolous and advanced without reasonable cause
31 require the non-prevailing party to pay the prevailing party the reasonable
32 expenses, including fees of attorneys, incurred in opposing such action . . .
33 or defense. This determination shall be made upon motion by the
34 prevailing party . . . after final judgment or any other final order terminating
35 the action as to the prevailing party. . . . In no event may such motion be
36 filed more than 30 days after entry of the order.

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38 A Proposed Decision and Order is not a final order of the Board, nor is it a final order
39 terminating action herein. Parties have twenty days following the issuance of a Proposed Decision
40 and Order to file a petition for review with the Board. Absent such a petition, the Proposed Decision
41 and Order is adopted as the Board's final order on the twenty-first day after issuance. RCW
42 51.52.104. If a petition for review is filed, the order denying review or the Decision and Order issued
43 after review is granted becomes the final order of the Board only after the 30 day period for appealing
44 to the Superior Court has expired. RCW 51.52.110. In other words, only this Board can issue final
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1 decisions in appeals before the Board. The thirty day period for filing an RCW 4.84.185 motion does
2 not begin until the Board order becomes final.
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4 Our industrial appeals judge entertained the motion for RCW 4.84.185 sanctions before the
5 Proposed Decision and Order was even written, much less communicated to the parties. Although the
6 arguments in favor of judicial economy and public policy advanced in the Proposed Decision and order
7 may be attractive, they fly in the face of the plain language of the statute purportedly relied upon. The
8 motion was clearly premature. The award of sanctions in the Proposed Decision and Order must be
9 reversed.
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11 Without commenting further on the motion for sanctions, we note that if this Decision and
12 Order is not appealed to Superior Court within the statutory period, the claimant possibly may choose
13 to file a new motion for sanctions within 30 days after this order becomes final. We could then
14 consider the questions of applicability and merits of such motion.
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16 Proposed Findings of Fact Nos. 1, 2, 3, 4, 5, 6 and 7 and Proposed Conclusions of Law Nos.
17 1, 2, and 3 are hereby adopted as the final findings and conclusions of this Board. In addition, the
18 Board makes the following conclusion:
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20 **CONCLUSIONS OF LAW**
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- 22 4. The order of the Department of Labor and Industries dated April 27, 1990
23 which affirmed a Department order dated January 3, 1990 which corrected
24 and superseded a Department order dated December 26, 1989 and
25 closed the claim with an award for permanent partial disability equal to
26 10% as compared to total bodily impairment paid at 75% of monetary
27 value and with time-loss compensation as paid, is incorrect and is
28 reversed and the claim remanded to the Department with direction to pay
29 time-loss compensation to the claimant for the period January 3, 1990 to
30 April 27, 1990 and to thereupon place him on the pension rolls as a
31 permanently and totally disabled worker effective April 27, 1990.
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33 It is so **ORDERED**.
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35 Dated this 23rd day of July, 1992
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37 BOARD OF INDUSTRIAL INSURANCE APPEALS
38

39 s/ _____
40 S. FREDERICK FELLER Chairperson
41

42 /s/ _____
43 FRANK E. FENNERTY, JR. Member
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45 /s/ _____
46 PHILLIP T. BORK Member
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