

Madrigal, Ramiro

DEPARTMENT

Administrative convenience

The Department must fairly determine the extent of benefits owed injured workers in Washington State as well as outside the state and its obligation is not met when administrative convenience prevails over claimant's life situation. The Department cannot refuse to schedule an examination in Mexico for administrative purposes since a Mexican doctor would not be easily available to testify at a hearing in a circumstance where the worker resided in Mexico and was unable to obtain visa for legal entry. ...***In re Ramiro Madrigal, BIIA Dec., 91 2559 (1993)*** [Editor's Note: RCW 51.32.110 (6) was changed by Laws 1997 Ch 325 §2.]

SUSPENSION OF BENEFITS (RCW 51.32.110)

Refusal to attend medical examination

The Department inappropriately suspended benefits due to a worker's failure to attend an examination scheduled in Washington when the worker resided in Mexico and was unable to obtain visa for legal entry. ...***In re Ramiro Madrigal, BIIA Dec., 91 2559 (1993)***

Scroll down for order.

1 limitation of range of motion in the claimant's back on the basis that the
2 doctor did not specify the dates of examinations. The industrial appeals
3 judge sustained the objection. The lack of specificity goes to the weight
4 accorded to the testimony. The Department could have pursued further
5 detail on cross-examination. The objection is overruled.

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7 3. At page 58, line 21 the Department objected to Dr. Gallardo reading into
8 the record from a radiological report which he relied on in arriving at his
9 diagnosis. Under ER 703 it is proper to inquire into all data relied upon by
10 an expert in arriving at the opinion offered into evidence. The industrial
11 appeals judge erroneously sustained the objection and it is hereby
12 overruled.

13 4. At page 60, line 21, the industrial appeals judge sustained the
14 Department's objection to the relevance of a question relating to the
15 availability of medical doctors to examine the claimant in Mexico. The
16 question was relevant because the Department alleged that the claimant's
17 physical condition could not be evaluated in Mexico due to the
18 unavailability of physicians. This objection is also overruled.

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20 Exhibits submitted at hearing:

21 The exhibits offered by the Department in the transcript of April 24, 1992
22 at page 89, lines 89, 90 and 91 and at page 108, line 110 and numbered
23 as "Department's" Exhibit Nos. 1, 2, 3 and 4 are renumbered as Exhibit
24 Nos. 4, 5, 6 and 7 respectively, but remain rejected.

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26 Exhibits submitted after hearing:

27 In the transcript of proceedings of April 24, 1992 at page 67, line 3, the
28 parties stipulated to the admission of a letter to be submitted by Dr.
29 Gallardo confirming that he was the witness who testified by telephone on
30 April 24, 1992, his identity and of a copy of Dr. Gallardo's medical license.
31 On May 26, 1992, the Board received several documents from Charles
32 Barr, the claimant's attorney, including an original notarized statement
33 from Dr. Gallardo in Spanish and a copy of his license to practice
34 medicine, also in Spanish. In addition, the claimant's attorney took it upon
35 himself to provide English language translations of the documents. The
36 Department objects to the use of translations provided by the claimant's
37 representative.

38 At the time of the hearing, the doctor testified in Spanish with the
39 assistance of a translator. The parties should have anticipated that any
40 written materials he submitted would also be in Spanish and require
41 translation. It was reasonable that, as the party submitting the
42 documentation, the claimant be responsible for providing English
43 translations of the materials. The Department first raised an objection to
44 the use of translations provided by the claimant in a Response to Petition
45 for Review received at the Board on November 9, 1992, well after the
46 deadline established for response in WAC 263-12-145(4). The objection
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1 is general in nature and does not allege any inaccuracy in the translations.
2 The Department's objection is neither timely nor well taken and is
3 overruled.

4 Pursuant to the stipulation of the parties on April 24, 1992, the April 28,
5 1992 affidavit of Dr. Julio Pena Gallardo is numbered as Exhibit No. 8 and
6 is admitted for the limited purpose of confirming his participation in the
7 April 24, 1992 telephone hearing. The May 21, 1992 English language
8 translation of Dr. Gallardo's affidavit is numbered as Exhibit No. 9 and
9 admitted with the same restriction. The Spanish language copy of Dr.
10 Gallardo's medical license is numbered as Exhibit No. 10 and is admitted.
11 The May 21, 1992 English language translation of Dr. Gallardo's medical
12 license is numbered as Exhibit No. 11 and is admitted.

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

16 **DECISION**

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18 Claimant Ramiro Madrigal petitions for review of a Proposed Decision and Order upholding a
19 Department order which suspended his benefits for failure to submit to a medical examination
20 scheduled in Seattle, Washington. The issue on appeal is whether the claimant had good cause for
21 failure to appear.¹ We find that he did.

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24 Ramiro Madrigal was a 64 year old illegal alien agricultural worker when he fell from a ladder
25 and injured his back in 1982. He received benefits while residing in the Tri-Cities area until 1988. In
26 the spring of that year, Mr. Madrigal returned to Mexico. After 1988, the Department made repeated
27 attempts to schedule a closing medical examination for Mr. Madrigal in Washington state. Mr.
28 Madrigal repeatedly failed to appear at the examinations, citing his residence in Mexico, his lack of a
29 visa to permit entry into the United States, lack of funds, and physical infirmity.

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32 When Mr. Madrigal failed to appear for an examination on April 27, 1990, the Department
33 issued an order suspending his benefits. When Mr. Madrigal protested, the suspension order was
34 held in abeyance pending documentation of the claimed impediments to travel. The Department did
35 not receive what it considered adequate documentation and ultimately scheduled another medical
36 examination in Seattle for April 27, 1991. Upon Mr. Madrigal's failure to appear for that examination,
37 the Department issued an order affirming the earlier suspension of benefits.

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¹The claimant's Petition for Review also raises constitutional challenges to the suspension of benefits, but constitutional questions are beyond the jurisdiction of this Board.

1 On appeal to the Board from an order suspending benefits, the claimant has the burden of
2 showing, by a preponderance of the evidence, that the Department order is incorrect. RCW 51.32.110
3 provides, in pertinent part:
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6 Any worker entitled to receive any benefits or claiming any such under this
7 title shall, if requested by the department or self-insurer, submit himself or
8 herself for medical examination, at a time and from time to time, at a place
9 reasonably convenient for the worker and as may be provided by the rules
10 of the department. If the worker refuses to submit to medical examination,
11 or obstructs the same, . . . the department, with notice to the worker may
12 suspend any further action on any claim of such worker so long as such
13 refusal, obstruction [or] non-cooperation . . . continues and reduce,
14 suspend or deny any compensation for such period: Provided, however,
15 that the department . . . shall not suspend any further action on any claim
16 of a worker or reduce, suspend or deny any compensation if a worker has
17 good cause for refusing to submit to or to obstruct any examination . . .
18 requested by the department or required under this section. (Emphasis
19 added.)
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21 As this Board observed in In re: Bob C. Edwards, Docket No. 90 6072 (June 4, 1992), the
22 existence of good cause in a given case depends on a variety of factors unique to that case. Among
23 the considerations are the claimant's physical condition, capacities, sophistication, circumstances of
24 employment, family responsibilities, medical treatment, proven ability or inability to travel, and, as in
25 this instance, any legal impediments to travel. All of these factors must be balanced against the
26 Department's responsibility to insure an even-handed resolution of disputed issues in light of
27 conflicting medical information, the location of willing and qualified physicians, and the length of time
28 before a physician is available to perform an examination and the reasonable expense thereof.
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31 Our industrial appeals judge considered and rejected the four factors raised by the claimant in
32 support of his defense of good cause for failure to appear: physical infirmity, lack of funds, the fact of
33 his residence in Mexico, and his lack of a visa permitting entry into the United States.
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36 We agree with the hearing judge's conclusion that Mr. Madrigal did not establish by a
37 preponderance of the evidence that his physical condition prevented him from traveling to Seattle.
38 The record establishes that Mr. Madrigal is in his seventies. He has an accepted back injury, but the
39 record does not tell us the nature of the injury. Dr. Gallardo testified without reference to the claimant's
40 medical records. His sole reference to Mr. Madrigal's condition as of April 1990 was that the claimant
41 had "a pain in his waist which was very strong and it is difficult for him to travel any distances."
42 4/24/92 Tr. at 52. Dr. Gallardo had no information about Mr. Madrigal's condition in 1991. Based on
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1 an x-ray taken in April 1992, Dr. Gallardo diagnosed degenerative disc disease, a compression
2 fracture of L-2 and loss of intervertebral space at L1-2. He did not relate this diagnosis to the industrial
3 injury. He did not testify that the diagnosed conditions were present at the time of the order here
4 under appeal.
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7 We further conclude that there was no financial good cause for the claimant not to appear in
8 Seattle. The Department of Labor and Industries made air travel arrangements and advanced funds
9 sufficient to cover legitimate expenses associated with a trip to Seattle for the examination.
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11 Mr. Madrigal raises the issue of his residence in Mexico to challenge whether the location of
12 the scheduled examination was "convenient" as mandated by RCW 51.32.110. The department
13 approached the issue of convenience solely from the standpoint of the Department's ease in obtaining
14 physicians to perform the examination. As established in the testimony of claims consultant Laura
15 Farley, the Department gave no consideration to any legal impediment to Mr. Madrigal's access to
16 those physicians. Ms. Farley testified that the claimant's attorney advised her "previously several
17 years ago" that Mr. Madrigal did not have a visa. 4/24/92 Tr. at 95. He provided her with the names
18 and addresses of various medical specialists in the Mexican state in which Mr. Madrigal resides. She
19 rejected all of the physicians out of hand because no psychiatrist was included in the list of referrals.
20 She made no independent effort to locate such a specialist on behalf of the Department or to obtain
21 examinations from the orthopedic and neurological specialists whose names were provided.
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28 In March 1988, the claimant's attorney provided Ms. Farley with a copy of a U.S. State
29 Department Bulletin addressing the lack of availability of visas to Mexican residents. Ms. Farley stated
30 on the record that she considered scheduling the medical examination in a border state, such as
31 Texas or California, but settled on Washington because of the claimant's assertions that he did not
32 have a visa to enter the country. Under those circumstances, she felt Seattle was "easier . . . for
33 testifying purposes." 4/24/92 Tr. at 95. In other words, based on the understanding that Mr. Madrigal
34 could not enter the United States in any event, the Department proceeded on the basis of anticipated
35 litigation rather than attempting to obtain current medical information in any other fashion!
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40 Like the Department, the hearing judge questioned the credibility of Mr. Madrigal's assertion
41 that he lacked the necessary visa to gain entry to the United States. The industrial appeals judge
42 found him unpersuasive because he admitted to an established pattern of past entry into the United
43 States. What Mr. Madrigal admitted to was a history of illegal entries by various means such as
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1 swimming rivers, hiding in trucks, and bribing people. This is not an atypical history, but it does not
2 establish that the claimant has unlimited or unrestricted access to the United States.
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4 To begin, we take judicial notice of the fact that U.S. immigration laws require that a foreign
5 national who wishes to enter the United States must apply for and receive a visa from an American
6 consulate, 8 USC § 1200, et seq.. Mere application for a visa does not guarantee its issuance.
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8 There is nothing in the record to indicate that Mr. Madrigal is not being forthright about his lack
9 of a visa. Mr. Madrigal testified that he left the United States for the last time when he returned to
10 Mexico to bury his wife in 1988. He was at that time 70 years old and suffering from the effects of his
11 industrial injury. He testified that he applied for a visa at the U.S. consulate in Guadalajara on March
12 11, 1991. His application was denied and he did not receive a visa.
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16 The Department made no effort to rebut Mr. Madrigal's testimony that he lacked the necessary
17 documentation to enter the United States legally. The Department's case on this point consisted
18 entirely of its assertion that it had received no written proof of Mr. Madrigal's immigration status. There
19 is no indication in the record of how the Department expected Mr. Madrigal, an unsophisticated 70
20 year old agricultural worker, living a thousand miles distant from his legal counsel, to wrest proof of
21 lack of a visa from the U.S. Consulate in Guadalajara. The Department's presumption that the
22 claimant has free access to the United States is contrary to all information available in this record.
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27 Our industrial appeals judge applied an overly harsh standard in concluding that Mr. Madrigal
28 had presented no "compelling evidence" that he was legally barred from entering the United States.
29 The appropriate standard was whether Mr. Madrigal had proven, by a preponderance of the evidence
30 presented, that such a bar existed. We find that he did.
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33 Viewed in its totality, the preponderance of the evidence in this case establishes that Mr.
34 Madrigal lacked the necessary legal documentation to the enter the United States at the time of the
35 April 27, 1990 medical examination. While he did not apply for a visa at that time, there is nothing to
36 indicate that he would have been any more successful then than he was in 1991. Inability to legally
37 enter the country where the examination is scheduled is good cause for failure to appear at the
38 examination. The Department improperly suspended Mr. Madrigal's benefits for failure to appear at
39 the examination scheduled on April 27, 1990.
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43 We recognize that the determination of further benefits, if any, to which Mr. Madrigal may be
44 entitled under our Industrial Insurance Act, may well require further medical documentation of his
45 industrially related condition. We are frankly at a loss as to how to address the Department's concerns
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1 that competent medical examiners in Mexico may not adapt themselves to the legal and procedural
2 requirements of our Industrial Insurance Act in evaluating and reporting on the claimant's physical
3 condition. However, the Act does impose an obligation on the Department to fairly and competently
4 determine the extent of benefits due to workers injured in the course of their employment while in this
5 state. That obligation is not lifted, so far as we are aware, when the worker relocates to another state
6 or even to another country. That obligation is not met when the Department ignores the realities of the
7 claimant's situation in life in favor of its own administrative "convenience."
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10 We will remand this matter to the Department with directions to rescind and set aside the
11 suspension orders of April 27, 1990 and May 1, 1991; to reschedule any required medical examination
12 at a location convenient to the claimant, taking into account that the claimant may not be legally able to
13 return to the United States for the examination; to reinstate such benefits to which the claimant may be
14 found to be entitled; and to take such further appropriate action as indicated.
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17 Proposed Findings of Fact Nos. 1 and 2 and Proposed Conclusion of Law No. 1 are correct
18 and are hereby adopted as this Board's final findings and conclusions. In addition, we enter the
19 following Findings of Fact and Conclusions of Law:
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22 **FINDINGS OF FACT**

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- 24 3. At all times relevant to this appeal Ramiro Madrigal has been a resident of
25 the nation of Mexico who requires a visa to legally enter the United States
26 of America.
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 - 28 4. At no time relevant to this appeal has Ramiro Madrigal possessed a visa
29 permitting him entry into the United States of America.
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 - 31 5. In March 1988, the claimant informed the Department of Labor and
32 Industries that he lacked the necessary visa to obtain entry into the United
33 States.
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 - 35 6. At the time the Department scheduled the examination of April 27, 1990,
36 the Department was aware of facts which would prevent the claimant from
37 attending an examination at the scheduled location of Seattle,
38 Washington.
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 - 40 7. Ramiro Madrigal was unable to appear for the medical examination
41 scheduled on April 27, 1990 in Seattle, Washington because he resided in
42 Mexico and did not possess a visa permitting him to enter the United
43 States of America.

44 **CONCLUSIONS OF LAW**

- 45 2. Ramiro Madrigal's failure to appear at a regularly scheduled medical
46 examination on April 27, 1990 was based on good cause within the
47 meaning of RCW 51.32.110.

1 3.3 The Department order of May 1, 1991 which adhered to the provisions of
2 a Department order issued on April 27, 1990 which suspended the
3 claimant's benefits for failure to appear at a medical examination as
4 scheduled by the Department on April 27, 1990 in Seattle, Washington, is
5 incorrect and is reversed and the claim remanded to the Department with
6 direction to rescind and set aside the orders of April 27, 1990 and May 1,
7 1991; to reschedule any required medical examination at a location
8 convenient to the claimant, taking into account that the claimant may not
9 be legally able to return to the United States for the examination; to
10 reinstate such benefits to which the claimant may be found to be entitled;
11 and to take such further action in the claim as may be indicated by the
12 facts and authorized by law.

13 It is so ORDERED.

14 Dated this 29th day of January, 1993.

15 BOARD OF INDUSTRIAL INSURANCE APPEALS

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20 /s/
21 S. FREDERICK FELLER Chairperson

22
23
24 /s/
25 FRANK E. FENNERTY, JR. Member

26
27
28 /s/
29 PHILLIP T. BORK Member