McClure, Jason

DISCOVERY

Motion to compel

A motion to dismiss or compel discovery should not be considered unless there is compliance with the notice requirements of CR 37(a). In light of the discovery deadline, even if proper notice had been provided, the discovery request served the day before discovery was to be completed should not result in sanctions. In addition, the employer must be allowed the opportunity to be heard on the issue of the attorney fees. **….*In re Jason McClure*, BIIA Dec., 94 0569 (1995)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JASON A. MCCLURE	**)**	**DOCKET NOS. 94 0569 & 94 1677**
	)	
CLAIM NO. N-835019	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Jason A. McClure, by
Kristina L. Selset, and by
Adeline J. Crinks, Claims Consultant

Employer, Armco Realty, Inc., by
Mosler, Schermer, Wallstrom, Irons & Scruggs, per
Michael P. Scruggs

Department of Labor and Industries, by
The Office of the Attorney General, per
Karen L. Forner, Assistant

These are two appeals filed on behalf of the employer, Armco Realty, Inc., each from two orders of the Department of Labor and Industries. The appeal assigned Docket No. 94 0569 was received by this Board on June 8, 1994, from orders of the Department dated May 16, 1994, and May 31, 1994. The order of May 16, 1994, paid time loss compensation for the period April 26, 1994 through May 10, 1994, and the order dated May 31, 1994, paid time loss compensation for the period May 16, 1994 through May 31, 1994. **AFFIRMED.**

The appeal assigned Docket No. 94 1677 was filed on behalf of the employer, Armco Realty, Inc., on August 10, 1994, from orders of the Department dated June 20, 1994, and July 1, 1994. The order of June 20, 1994, paid time loss compensation for the period June 1, 1994 through June 14, 1994, and the order of July 1, 1994, paid time loss compensation for the period June 15, 1994 through June 28, 1994, terminated time loss compensation effective June 29, 1994, because the worker was able to work, and directed that the claim remain open for further action. **AFFIRMED.**

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 on behalf of the employer in response to a Proposed Decision and Order issued on July 31, 1995, in which the orders of the Department dated May 16, 1994; May 31, 1994; June 20, 1994; and July 1, 1994, were affirmed.

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

INTRODUCTION

In its Petition for Review, the employer does not question the correctness of the Department orders on appeal. Rather, the employer challenges only proposed Finding of Fact No. 4, which provides, as follows:

> The employer failed to comply with discovery; and attorney fees are ordered to be paid to the Office of the Attorney General in the amount of $300 for costs associated with the failure to comply with discovery.

The employer argues that because the Department's discovery was served on the employer the day before the date on which all discovery was ordered to have been completed, the motion to compel discovery should have been denied. The employer further argues that the Department's motion to compel discovery should not have been heard because the employer was not provided adequate notice of the motion or of the hearing on the motion. We agree with these arguments. A brief recitation of the relevant facts is necessary to explain our decision that the employer did not fail to comply with discovery and that, therefore, sanctions against the employer are inappropriate in this case.

FACTS

At a conference held on September 15, 1994, our industrial appeals judge ordered that all discovery be completed no later than December 16, 1994, and that any extension of time would be for good cause only. 9/15/94 Tr. at 5. On December 15, 1994, one day before all discovery was ordered to have been completed, the Department first served Interrogatories and Requests for Production on the employer. A Declaration in Support of Motion to Dismiss or Compel Discovery was filed dated January 31, 1995.

The employer, as the appealing party, was to begin presenting its evidence at a hearing scheduled for 1:30 p.m. on January 31, 1995. However, on that date, the Department filed a Motion to Dismiss or Compel Discovery. According to counsel for the Department, the employer's counsel was first advised that the Department would move to compel discovery during a telephone conversation at approximately 11:35 a.m. on January 31, 1995, and was first provided written notice of the motion as the scheduled hearing began, at 1:30 p.m. on January 31, 1995. 1/31/95 Tr. at 6. The Department's motion requested that the employer's appeal be dismissed, or in the alternative that discovery be compelled and terms granted. The Declaration in Support of the Motion requested the Department be awarded attorney fees in the amount of $150.

Counsel for the employer strenuously objected to the motion being heard due to a lack of notice, and objected to the motion on several grounds, including the fact that the Department's discovery requests had been served only one day before the discovery completion date. 1/31/95 Tr. at 4-8.

The Motion to Dismiss was denied. 1/31/95 Tr. at 4. However, our industrial appeals judge overruled all of the employer's objections and granted the Department's Motion to Compel. 1/31/95 Tr. at 8. Concerning the Motion for Terms, our industrial appeals judge directed counsel for the

Department to file, prior to the next proceeding, an affidavit indicating the time spent and the appropriate hourly rate. 1/31/95 Tr. at 19.

On February 6, 1995, the Board received the Department's Motion for Costs and Affidavit of Karen L. Forner, which were dated February 2, 1995, and in which the Department requested attorney fees in the amount of $300. Although no hearing was scheduled on this motion, the employer was ordered to pay to The Office of the Attorney General, $300 for attorney fees for failure to comply with discovery.

DECISION

In general, proceedings before this Board are governed by the Superior Court Civil Rules (CR). WAC 263-12-125. Therefore, our industrial appeals judges unquestionably have the authority to hear and consider motions to compel discovery, to order a party to comply with discovery, and to order a party to pay to the moving party the reasonable expenses incurred in obtaining an order compelling discovery. CR 37. We do not lightly reverse such decisions made by our industrial appeals judges.

However, in this case, the industrial appeals judge should not have heard the Department's Motion to Compel Discovery without proper notice of the motion and of the hearing on the motion to the employer. CR 37(a) provides that a party may apply for an order compelling discovery, "upon reasonable notice to other interested parties and all persons affected thereby. . .. " CR 6(d) requires that, in general, a written motion and notice of the hearing thereof be served not later than five days before the time specified for the hearing, unless a different period is fixed by the Civil Rules or by order of the court.

We believe that taken together these rules require that, absent unusual circumstances, a motion for an order compelling discovery and notice of the hearing on that motion must be served at least five days before the scheduled hearing. Reasonable notice that a party's interests may be

adversely affected is a fundamental component of the principle of due process, and requires that a party be permitted an adequate period of time within which to consider and respond to the pending action. A party who has not received reasonable notice has been denied due process. Further, our ability to decide appeals fairly and equitably is diminished if reasonable notice is not afforded to every party. In this case, verbal notice two hours prior to a hearing with no opportunity to review the written motion and supporting declaration prior to the hearing does not constitute reasonable notice.

Because we have decided that the Motion to Compel Discovery should not have been heard, we need not consider whether the motion should have been granted, or the correctness of the order awarding attorney fees. However, we address these issues because they may arise in future cases.

In this case, even if proper notice had been provided, the Department's Motion to Compel Discovery should have been denied. As pointed out by counsel for the employer, the Department served its discovery one day before all discovery was ordered to have been completed. Counsel for the employer has cited King County Local Rule 37(g), which provides, as follows:

> **Completion of discovery.** Unless otherwise ordered by the court for good cause and subject to such terms and conditions as are just, all discovery allowed under CR 26 through 37, including responses and supplementations thereto, must be completed no later than 49 calendar days before the assigned trial date. **Discovery requests must be served early enough that responses will be due and depositions will have been taken by the cut off date.** Discovery requests that do not comply with this rule will not be enforced, absent a written agreement of all parties, and the parties shall not enter into such an agreement if it is likely to affect the trial date.

(Emphasis added.)

Proceedings before this Board are not governed by local court rules, but we find this rule to be persuasive and descriptive of the factors we would consider in ruling on the motion. A discovery completion date is just that--the date by which discovery must be completed, not served. We

therefore hold that, absent an order for good cause and subject to such terms and conditions as are just, discovery must be served sufficiently early that responses will be due before the discovery completion date, or it will not be enforced.

Finally, it was an error to award the attorney fees requested in this case without affording the employer an opportunity to be heard on that issue. In general, a judge can consider a motion to compel discovery and a motion for an award of the costs incurred in obtaining the order to compel at the same time, if the other party has had an opportunity to be heard. But in this case, our judge did not consider the motion for costs at the time the order to compel was issued. Rather, counsel for the Department was directed to submit an affidavit demonstrating the amount of the expenses incurred in obtaining the order. At the time of the original motion and request for attorney fees, the Department requested fees in the amount of $150. However, in the later motion with supporting affidavit, $300 was requested.

The employer was never given an opportunity to be heard before those costs were awarded. This was an error. Fundamental fairness and CR 37(a)(4) both require at least an opportunity to be heard before costs can be awarded.

After consideration of the Proposed Decision and Order, the Petition for Review filed thereto, the Department's Response to Employer's Petition for Review, and the Employer's Reply to Department's Response to Petition for Review, and a careful review of the entire record before us, we hereby adopt the proposed Findings of Fact and Conclusions of Law concerning the merits of these appeals, and reverse the order granting the Motion to Compel Discovery and awarding costs.

FINDINGS OF FACT

1. On November 30, 1993, the Department of Labor and Industries received an application for benefits filed on behalf of the claimant, Jason A. McClure, alleging an injury on or about November 23, 1993, during the course of his employment with Armco Realty, Inc. On May 16, 1994, the Department issued an order paying time loss compensation for the period of April 26, 1994 through May 10, 1994, inclusive. On May 31, 1994, the Department issued an order paying time loss compensation for the period of May 16, 1994 through May 31, 1994, inclusive. On June 8, 1994, the Board of Industrial Insurance Appeals received a Notice of Appeal filed on behalf of the employer from the Department orders dated May 16, 1994, and May 31, 1994 (Docket No. 94 0569).

   On June 20, 1994, the Department issued an order paying time loss compensation for the period of June 1, 1994 through June 14, 1994, inclusive. On July 1, 1994, the Department issued an order terminating time loss compensation with payment for the period of June 15, 1994 through June 28, 1994, and holding the claim to remain open for treatment. On August 10, 1994, the Board received a Notice of Appeal filed on behalf of the employer from the Department orders dated June 20, 1994 and July 1, 1994 (Docket No. 94 1677).

2. Jason A. McClure was employed as a groundskeeper for Armco Realty, Inc., requiring him to frequently use and overuse his hands and arms, causing him to sustain a condition diagnosed as right and left wrist strain.

3. For the periods of April 26, 1994 through May 10, 1994, inclusive; May 16, 1994 through May 31, 1994, inclusive; June 1, 1994 through June 14, 1994, inclusive; and June 15, 1994 through June 28, 1994, inclusive, Jason A. McClure was not capable of gainful employment on a reasonably continuous basis when considering his physical limitations proximately related to his condition, transferable skills, and labor market.

4. All discovery in this case was ordered to have been completed by December 16, 1994. The Department first served Interrogatories and Requests for Production on the employer on December 15, 1994. That discovery was, therefore, not served sufficiently early that responses were due before the discovery completion date.

5. The employer was first provided verbal notice of the Motion to Compel Discovery two hours prior to the hearing on that motion, and was not provided written notice of the motion until the time of the actual hearing.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to these appeals.

2. The employer did not receive reasonable notice of the Motion to Compel Discovery or of the hearing on that motion. No hearing on a Motion to Compel Discovery can be held unless the parties have been given reasonable notice of the motion and the hearing on the motion, or have waived such notice.

3. Because the Department's requests for discovery were not served early enough to be completed by the date established for the completion of discovery, they will not be enforced, and the Department's Motion to Compel Discovery is denied, and the order granting the motion and awarding costs is reversed.

4. The orders of the Department of Labor and Industries dated May 16, 1994, which paid time loss compensation for the period of April 26, 1994 through May 10, 1994, inclusive; and May 31, 1994, which paid time loss compensation for the period of May 16, 1994 through May 31, 1994, inclusive; (Docket No. 94 0569); and June 20, 1994, which paid time loss compensation for the period of June 1, 1994 through June 14, 1994, inclusive; and July 1, 1994, which terminated time loss compensation with payment for the period of June 15, 1994 through June 28, 1994, inclusive, and held that the claim was to remain open for treatment (Docket No. 94 1677), are correct and are affirmed.

It is so **ORDERED.**

Dated this 28th day of November, 1995.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
ROBERT L. McCALLISTER Member