Gonzalez, Maria

ATTENDING PHYSICIAN

Transfer (WAC 296-20-065)

WAC 296-20-065 requires that the Department or self-insured employer approve of a transfer of attending physician. The worker will not be allowed to transfer until the attending physician has had sufficient time to complete a treatment regimen, complete diagnostic studies, and evaluate the efficacy of the therapeutic program. The mere fact that the worker is unhappy with the physician does not warrant a transfer**. ….*In re Maria Gonzalez,* BIIA Dec., 97 0261 (1998)**

INTERPRETERS

Requirement to provide at deposition

The self-insured employer is not required to pay for interpretive services at a deposition; the cost of providing an interpreter is to be borne by the non-English speaking person unless that person is shown to be indigent. **….*In re Maria Gonzalez,* BIIA Dec., 97 0261 (1998)**

Requirement to provide at medical examination

The Department cannot enforce a policy of requiring the self-insured employer to pay for an interpreter for the workers' benefit during medical consultation unless there is a rule to that effect. Because no such rule exists, the Department was incorrect in requiring the self-insured employer to pay for the services of an interpreter. **….*In re Maria Gonzalez,* BIIA Dec., 97 0261 (1998)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARIA GONZALEZ	)	**DOCKET NOS. 97 0261, 97 0262, 97 0263 & 97 0264**
	)	
	)	
	)	
CLAIM NO. T-896813	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Maria Gonzalez, by
Law Office of Charles H. Barr, per
Charles H. Barr

Self-Insured Employer, D & K Frozen Foods, Inc., by
Wallace & Klor, P.C., per
Schuyler T. Wallace, Jr.

Department of Labor and Industries, by
The Office of the Attorney General, per
Kevin M. Hartze, Assistant

These are four appeals filed by the self-insured employer, D & K Frozen Foods, Inc., with the Board of Industrial Insurance Appeals on February 6, 1997, from orders of the Department of Labor and Industries dated January 22, 1997, January 23, 1997, January 24, 1997, and January 27, 1997, respectively.

In Docket No. 97 0261, the Department issued an order on January 22, 1997, that required the self-insured employer to accept responsibility for a condition described as cervical subluxation and for the treatment and disability, if any, arising therefrom, as being related to the industrial injury of October 10, 1995. **REVERSED AND REMANDED.**

In Docket No. 97 0262, the Department issued an order on January 23, 1997, that required the self-insured employer to authorize the transfer of Ms. Gonzalez's care to Edward Lane, M.D., effective April 11, 1996, and further stated that all bills for treatment related to the accepted conditions covered by the claim were payable in accordance with the current medical aid rules and fee schedules of the Department. Further, the order directed the self-insured employer to pay for

the consultation by Dr. Dasso, a chiropractor, performed in June 1996. **REVERSED AND REMANDED.**

In Docket No. 97 0263, the Department issued an order on January 24, 1997, that required the self-insured employer to authorize accompaniment by a qualified interpreter for any professional medical services where the provider deemed it necessary to facilitate communication with this injured worker; the authorization included was not limited to office calls with the attending physician, consultations, physical therapy, and independent medical examinations. **REVERSED AND REMANDED.**

In Docket No. 97 0264, the Department issued an order on January 27, 1997, that required the self-insured employer to reinstate time loss compensation effective the last date paid and to continue to pay time loss compensation until such time as the claimant returned to work or was determined employable as a result of all of the related industrial conditions covered by this claim. **REVERSED AND REMANDED.**

On September 15, 1997, the industrial appeals judge assigned to this case heard the claimant's Motion to Quash Notice of Perpetuation Deposition of Roy Kokenge, M.D., and the self-insured employer's Cross-Motion for Sanctions. Neither Ms. Gonzalez nor her counsel appeared for the hearing and the industrial appeals judge orally denied the motion to quash and granted the motion for sanctions. The claimant submitted a motion for interlocutory review that was denied by the assistant chief industrial appeals judge. **Ruling reserved.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on timely Petitions for Review filed by the claimant and the self-insured employer to a Proposed Decision and Order issued on December 1, 1997. In that Proposed Decision and Order, the industrial appeals judge determined the Department order dated January 22, 1997, was

incorrect and reversed it. The industrial appeals judge remanded the claim to the Department with direction to issue an order that stated the condition diagnosed as cervical subluxation was not to be accepted under the claim. The Proposed Decision and Order also found that the Department order dated January 23, 1997, insofar as it required the self-insured employer to pay for the consultation by Jack Dasso, D.C., was incorrect and he reversed it. However, insofar as it directed the self-insured employer to authorize the transfer of Ms. Gonzalez's care to Edward Lane, M.D., effective April 11, 1996, the industrial appeals judge determined the order was correct and he affirmed it. The Proposed Decision and Order further stated that the order of the Department dated January 24, 1997, was correct and was affirmed. Finally, the Proposed Decision and Order stated that the Department order of January 27, 1997, was incorrect and was reversed and the claim was remanded to the Department with directions to issue an order terminating time loss compensation as paid to April 9, 1996.

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.

Because of the extensive nature of the Petitions for Review and the interrelationships of the issues involved, and because we differ in our conclusions from those of our industrial appeals judge, we shall set forth the facts upon which we base our decision.

Ms. Gonzalez is a 40-year-old Hispanic woman who speaks little English and who, as a result of her employment, suffered bilateral carpal tunnel syndrome. She packed ears of corn in a box, that she would then pick up and push down the conveyor line. She had pain in her hands for two years prior to October 10, 1995, and underwent treatment with Dr. Edward Lane for that pain. Because her pain was worse on October 10, she decided to report it. Ms. Gonzalez testified that she had been experiencing pain in her neck, shoulders, and back, as well as her hands.

Ms. Gonzalez further testified that in October 1995 she told Dr. Lane about all of those places that she experienced pain.

Dr. Lane, a board certified family practitioner, saw Ms. Gonzalez the day after she filed the report with her employer. She complained at that time of bilateral wrist and hand pain and numbness and tingling, that she had been experiencing for two years. As a result of testing, Dr. Lane diagnosed probable bilateral carpal tunnel syndrome. A month later, after further testing, the doctor diagnosed possible de Quervain's tenosynovitis. Dr. Lane said Ms. Gonzalez never told him about a cervical problem. She complained only about her hands. He said that he did not have any trouble communicating with Ms. Gonzalez, without any language interpretation assistance. He also said that he would defer to the attending physician on any issue of temporary inability to work (and resulting time loss compensation). He referred Ms. Gonzalez to Dr. Roy Kokenge, a neurologist, for electrodiagnostic testing.

Dr. Kokenge saw Ms. Gonzalez on November 13, 1995. He is a board certified neurologist. Ms. Gonzalez told him that she had a one-year history of pain and numbness in both hands. Dr. Kokenge testified Ms. Gonzalez told him she had no other health problems and there was no history of any cervical complaints. Ms. Gonzalez said she told Dr. Kokenge about her neck pain. Upon examination, Ms. Gonzalez's neck had a full range of motion and she had no complaint of neck or back pain, though the nerve conduction studies evidenced a carpal tunnel syndrome. Dr. Kokenge said there was no spinal condition present at the time of his examination. He also said that he was able to conduct his examination without the need for language interpretation assistance, as he speaks and understands some Spanish. He found no cervical radiculopathy and would have performed further studies, even in the absence of authorization from the Department, if there had been any such symptoms.

Ms. Gonzalez was then referred to Dr. Hugh Shiels, a board certified orthopedic surgeon, who saw her on December 1, 1995. He also diagnosed the bilateral carpal tunnel syndrome. He testified his notes contained no complaint of cervical problems. His chart notes did reflect complaints about flu symptoms, a urinary tract infection, and numbness in the dorsum of Ms. Gonzalez's index finger. Dr. Shiels requested that the self-insured employer be required to pay for interpretive services. That was provided on a one-time basis. Dr. Shiels felt he was not able to properly communicate, though he said it did not hamper his treatment. After performing the bilateral carpal tunnel releases, Dr. Shiels last saw Ms. Gonzalez April 9, 1996. He released her to return to work as of April 10, 1996, without restrictions.

Because Ms. Gonzalez disagreed with Dr. Shiels about returning to work, she requested a transfer of care to another physician.

In letters to the self-insured employer, Dr. Shiels stated that he agreed with the findings and conclusions of the panel examiners and that as of June 28, 1996, Ms. Gonzalez was medically fixed and stable. He did not anticipate any permanent partial disability. He said she could perform the corn packing job, her former employment.

Dr. Jack Dasso, a chiropractor, saw Ms. Gonzalez on April 12, 1996, for a one-time examination. He had no medical records except some of Dr. Lane's chart notes. Those notes did not contain any neck or shoulder complaints. Ms. Gonzalez reported the cervical spine pain to Dr. Dasso, and upon examination, he noted a decreased cervical range of motion compatible with a cervical injury. He reviewed x-rays and diagnosed a cervical subluxation at C5. At first, he said the cervical subluxation "could" be related to Ms. Gonzalez's work activities and then, when further questioned, answered that it was. Dr. Dasso stated Ms. Gonzalez needed treatment as of January 22, 1997.

Dr. Lewis Almaraz, a board certified neurologist, examined Ms. Gonzalez on July 23, 1996, during a panel examination. The history Ms. Gonzalez gave to Dr. Almaraz on that occasion differed from the history given to other medical practitioners. Dr. Almaraz could find no objective medical findings supporting her complaints of decreased sensation throughout both of her arms. He diagnosed post-bilateral carpal tunnel release procedures and diffuse upper extremity pain complaints and neck pain complaints. He said the upper extremity complaints were not related to the industrial activities and he gave no opinion regarding the causation of the carpal tunnel problems. He said the mechanism of injury and the onset of complaints did not correlate with a neck injury. He found no cervical radiculopathy. He said Ms. Gonzalez's medical condition was fixed and stable and she was capable of reasonably continuous gainful employment.

Alice Nuñez, a claims consultant for the self-insured section of the Department, issued the order directing the acceptance of the cervical subluxation. She testified her decision was based on a letter from Ms. Gonzalez's attorney, the one-page report from Dr. Dasso, and the panel examination report, that contained some comments about back pain. She agreed there was no diagnosis from the panel examination. She agreed that Dr. Shiels never related the symptoms to the industrial activity and she agreed that Dr. Dasso improperly related symptoms.

Ms. Nuñez ordered the transfer of Ms. Gonzalez's care because it was requested during the post-operative period, even though Dr. Shiels never said he would not discontinue treating Ms. Gonzalez. While Ms. Nuñez agreed the action was not supported by any rule, she decided that the standard rule or lack thereof should not apply in the case.

Ms. Nuñez required the self-insured employer to pay for an interpreter. She said that she had previously not issued such an order. She also said there was no rule requiring the self-insured employer to provide interpretation services. Because Dr. Shiels had made the request, she entered the order.

Ms. Nuñez agreed that she had no opinion from a doctor that Ms. Gonzalez was unable to work. After Dr. Shiels had released Ms. Gonzalez on April 10, 1996, Ms. Nuñez issued the order for further time loss compensation because she felt that none of the doctors had considered the cervical condition.

As did our industrial appeals judge, we find that the testimony of the doctors who did not attribute a cervical problem to the industrial activities was more persuasive than that of Dr. Dasso. Ms. Gonzalez failed to report any symptoms in her neck to Dr. Lane, her family practitioner. She reported nothing concerning a cervical problem to Dr. Kokenge, nor did she report anything of that nature to Dr. Shiels. Drs. Dasso and Almaraz received the reports from Ms. Gonzalez a year or more after the report of the carpal tunnel problems. We find Ms. Gonzalez does not have a cervical subluxation proximately caused by the industrial injury of October 10, 1995. Nor was the information available to Ms. Nuñez sufficient to issue an order requiring the self-insured employer to accept the condition diagnosed as cervical subluxation.

We believe our industrial appeals judge was incorrect when he determined that the Department properly authorized the transfer of Ms. Gonzalez's care from Dr. Shiels to Dr. Lane. WAC 296-20-065 requires that the Department or the self-insured employer must approve all transfers of claimants to new physicians. It further states that normally transfers will be allowed only after the attending physician has had sufficient time to complete diagnostic studies, establish a treatment regimen, and evaluate the efficacy of the therapeutic program. It states that no transfer to a consultant or a special examiner will occur without the approval of the attending physician. Finally, it states that transfer will be allowed if the self-insured employer or the Department, in its discretion, determines the transfer is in the best interest of returning the injured worker to a productive role in society. The mere fact that Ms. Gonzalez was unhappy with Dr. Shiels, who had performed the surgery and said that she was ready to go back to work, is not sufficient for a

transfer of her care to another physician. As Ms. Nuñez agreed, there was no rule that allowed such a transfer. She simply decided the standard rule should not apply. That action is not supportable in the law.

Our industrial appeals judge affirmed Ms. Nuñez's order requiring the self-insured employer to provide the services of an interpreter during any medical visitations. The Department has an internal policy that allows for the payment for an interpreter with the attending physician in cases where no self-insured employer is involved. Ms. Nuñez acknowledged there was no rule requiring a self-insured employer to pay for such interpretive services.

An internal policy does not have the force and effect of law. It cannot operate outside the agency that issues and makes use of such a policy. In order for the Department to impose general applicability of a rule, the violation of which subjects a person to an administrative sanction, it must properly promulgate that rule. RCW 34.05.010; RCW 34.05.310, et. seq. Failure to adopt the rule properly will invalidate the administrative action. *State v. Kerry*, 34 Wn. App. 674 (1983). Administrative rules are invalid unless adopted in compliance with the Administrative Procedures Act. *Hillis v. Department of Ecology*, 131 Wn.2d 373 (1997). For that reason, Ms. Nuñez and the Department were incorrect in requiring the self-insured employer to provide interpretive services.

We must agree with our industrial appeals judge when he determined the time loss compensation should terminate when Ms. Gonzalez was released to work as of April 10, 1996. This was the date the doctors determined that the accepted bilateral carpal tunnel condition was medically fixed and stable and no other industrially related condition needed treatment. No time loss compensation should be paid after April 10, 1996. *Franks v. Department of Labor & Indus.*, 35 Wn.2d 763 (1950); *Bonko v. Department of Labor & Indus.*, 2 Wn. App. 22 (1970).

Ms. Gonzalez moved the Board to quash the testimony of Dr. Kokenge because no interpreter was supplied by either the self-insured employer or the Board at the doctor's deposition

taken by the self-insured employer. The self-insured employer filed a motion for sanctions under Civil Rule 11 for a frivolous motion. The industrial appeals judge scheduled a telephone conference for September 15, 1997, as the deposition had been scheduled for September 17, at 2:30 p.m. The matter was not scheduled as a hearing as it had originally been scheduled as a conference for the discussion of various issues. On the date appointed, Mr. Barr was not available, and the industrial appeals judge, after accepting argument from the self-insured employer, denied Ms. Gonzalez's motion and imposed sanctions for a violation of CR 11. Thereafter, Ms. Gonzalez moved for an interlocutory appeal, that was subsequently denied. The industrial appeals judge and the chief industrial appeals judge did not draft findings of fact concerning the sanctions issue.

Most of Ms. Gonzalez's Petition for Review was devoted to whether the services of a language interpreter were required during medical services, as well as during the deposition of Dr. Kokenge. It also was directed at the sanctions imposed.

Interpretive services at a deposition in this case are not required. Unless it is a legal proceeding initiated by a government agency, such as a criminal proceeding or a coroner's inquest, the cost of providing an interpreter is to be borne by the non-English speaking person. The exception is when that person is shown to be indigent. There is no showing of indigency in this case. Mr. Barr cited only that portion of the statute that might have been favorably construed to support his side of the argument. The other portion provides the applicable rule, stated above. RCW 2.43.040.

With respect to the issue of sanctions, we cite three authorities on point. RCW 4.84.185 requires written findings. *In re Don Eerkes*, BIIA Dec., 90 2532 (1992) holds that sanctions are not available until after a final Board order. *Doe v. Spokane and Inland Empire Blood Bank*, 55 Wn. App. 106 (1989) holds that with regard to motions involving CR 11 sanctions the written findings should include: that the action was not well-grounded in fact; that it was not warranted by existing

law; and that the attorney prior to signing the document had made no reasonable inquiry into the facts or the legal basis. The case also stands for the proposition that if a violation has occurred, sanctions are mandatory.

We believe the issue concerning the imposition of sanctions must await a further motion to the Board after the Decision and Order. We will reserve any ruling until after this Decision and Order has been issued and communicated, and a party presents the Board with a motion.

After consideration of the Proposed Decision and Order, the Petitions for Review filed thereto, the Self-Insured Employer's Response to Claimant's Petition for Review, and a careful review of the entire record before us, we make the following:

FINDINGS OF FACT

1. On December 1, 1995, the Department of Labor and Industries received an application for benefits alleging that the claimant, Maria Gonzalez, sustained an industrial injury to her wrists on October 10, 1995, during the course of her employment with D & K Frozen Foods, Inc. The claim was allowed and benefits were provided.

   On June 27, 1996, the Department issued a letter stating that the cervical condition was not accepted under this claim; that treatment with Dr. Dasso was not authorized and would have to be provided for on a private patient basis; that no transfer of Ms. Gonzalez's physician care to another was authorized, and that Dr. Shiels was still the attending physician of record. On July 8, 1996, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On July 25, 1996, the Department issued an order that held the Department letter dated June 27, 1996 in abeyance. On July 25, 1996, the Board issued an order returning the case to the Department for further action.

   On January 22, 1997, the Department issued an order that canceled the Department letter dated June 27, 1996, and directed the self-insured employer to accept responsibility for the condition described as "cervical subluxation," and treatment and disability arising therefrom, as related to the injury of October 10, 1995.

   On January 23, 1997, the Department issued an order that directed the self-insured employer to authorize the transfer of Ms. Gonzalez's care to Edward Lane, M.D., effective April 11, 1996; stated that all bills for treatment related to the accepted conditions covered by this claim were payable in accordance with the current medical aid rules and fee

schedule of the Department; and directed the self-insured employer to pay for the consultation by Dr. Dasso performed in June 1996.

On January 24, 1997, the Department issued an order that directed the self-insured employer to authorize the accompaniment by a qualified interpreter for any professional medical services where the provider deemed it necessary to facilitate communication with the injured worker, including but not limited to office calls with the attending physician, consultations, physical therapy and independent medical examinations.

On January 27, 1997, the Department issued an order that directed the self-insured employer to reinstate time loss compensation effective the last date paid and to continue to pay until such time as the claimant has returned to work or is determined employable as a result of the related industrial conditions covered by this claim.

On February 6, 1997, the self-insured employer filed Notices of Appeal of the Department orders dated January 22, 1997, January 23, 1997, January 24, 1997, and January 27, 1997. On February 13, 1997, the Board issued an order granting the appeal of the Department order dated January 22, 1997, assigning it Docket No. 97 0261; an order granting the appeal of the Department order dated January 23, 1997, assigning it Docket No. 97 0262; an order granting the appeal of the Department order dated January 24, 1997, assigning it Docket No. 97 0263; and an order granting the appeal of the Department order dated January 27, 1997, assigning it Docket No. 97 0264; and directing that proceedings be held on the issues raised in each of the appeals.

2. On October 10, 1995, the claimant, Maria Gonzalez, suffered an industrial injury to her wrists while in the course of employment with D & K Frozen Foods, Inc., diagnosed as carpal tunnel syndrome.

3. The industrial injury did not proximately cause a condition diagnosed as cervical subluxation, nor did it proximately cause any other cervical condition.

4. The request by Ms. Gonzalez to authorize the transfer of her care from Hugh Shiels, M.D., to Edward Lane, M.D., effective April 11, 1996, was not reasonable, and authorization of the transfer by the Department was inappropriate.

5. The claimant's consultation with Jack Dasso, D.C., was for a condition unrelated to the industrial injury of October 10, 1995, and therefore the self-insured employer should not have been directed to pay for the consultation.

6. Dr. Hugh Shiels requested of the Department on February 29, 1996, an authorization of the accompaniment of a qualified interpreter to facilitate

communication with Ms. Gonzalez. There was, at that time, no rule promulgated by the Department of Labor and Industries having general applicability that required self-insured employers to provide interpretive services where the provider deemed it necessary to facilitate communication with the injured worker, including, but not limited to, office calls, consultations, physical therapy, and independent medical examinations.

7. As of April 10, 1996, the claimant was not precluded by the residuals of her industrial injury, given her age, education, and work experience, from engaging in gainful employment on a reasonably continuous basis.

CONCLUSIONS OF LAW

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

2. The industrial injury of October 10, 1995, did not proximately cause a condition diagnosed as cervical subluxation.

3. The Department's direction to the self-insured employer to authorize the transfer of care of Ms. Gonzalez to Dr. Edward Lane, effective April 11, 1996, was inappropriate and incorrect and not authorized pursuant to the law.

4. The direction to the self-insured employer to pay for the consultation by Jack Dasso, D.C., was inappropriate and incorrect.

5. The Department's direction to the self-insured employer to authorize accompaniment by a qualified interpreter for any medical services where the provider deems it necessary to facilitate communication with the injured worker was inappropriate and incorrect.

6. During the period April 10, 1996 to January 27, 1997, the claimant was not a temporarily totally disabled worker within the meaning of RCW 51.32.090.

7. Under Docket No. 97 0261, the order of the Department of Labor and Industries dated January 22, 1997, that canceled a Department letter dated June 27, 1996, and directed the self-insured employer to accept responsibility for the condition described as "cervical subluxation," and for treatment and disability arising therefrom, as related to the industrial injury of October 10, 1995, is incorrect and is reversed. This matter is remanded to the Department with direction to issue an order that states that the condition diagnosed as cervical subluxation is not accepted under this claim.

8. Under Docket No. 97 0262, the order of the Department of Labor and Industries dated January 23, 1997, that directed the self-insured employer to pay for the consultation by Jack Dasso, D.C., and required the self-insured employer to authorize the transfer of care of Ms. Gonzalez to Edward Lane, M.D., effective April 11, 1996, is incorrect and is reversed.

9. Under Docket No. 97 0263, the order of the Department of Labor and Industries dated January 24, 1997, that directed the self-insured employer to authorize accompaniment by a qualified interpreter for any medical services where the provider deems it necessary to facilitate communication with the injured worker, including but not limited to office calls with the attending physician, consultations, physical therapy and independent medical examinations, is incorrect and is reversed.

10. Under Docket No. 97 0264, the order of the Department of Labor and Industries dated January 27, 1997, that directed the self-insured employer to reinstate time loss compensation effective the last date paid and to continue to pay until such time as the claimant has returned to work or is determined employable as a result of all of the related conditions covered by this claim, is incorrect and is reversed. This matter is remanded to the Department with direction to issue an order that ends time loss compensation as paid to April 9, 1996.

It is so ORDERED.

Dated this 7th day of April, 1998.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
S. FREDERICK FELLER Chairperson

/s/_____
JUDITH E. SCHURKE Member