Harper, Duane

BOARD

Discovery

Before applying sanctions for failure to answer requests for admission, consideration should be given to: 1) whether permitting an extension of time to respond promotes the presentation of the merits of the claim, and 2) whether the extension will prejudice the other party. *Citing Santos v. Dean*, 96 Wn. App. 849 (1999). Extension is not required when the admissions establish only a prima facie case and do not support a summary judgment. **….*In re Duane Harper*, BIIA Dec., 99 11127 (2000)**

Summary judgment - time limits

Summary judgment is not appropriate when the motion was filed later than permitted under CR 56 and the worker failed to establish that there were no issues of material fact. CR 56 does not provide for discretion with respect to filing timelines, the only discretion permitted is with respect to the requirement that the motion be heard more than 14 days before the hearing. **….*In re Duane Harper*, BIIA Dec., 99 11127 (2000)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DUANE E. HARPER	)	**DOCKET NO. 99 11127**
	)	
CLAIM NO. N-559562	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
	)	**FOR FURTHER PROCEEDINGS**
	)	

APPEARANCES:

Claimant, Duane E. Harper, by
Beemer & Mumma, P.S., per
Stephen K. Meyer

Employers, Various,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Cynthia A. Sypolt, Assistant

The claimant, Duane E. Harper, filed an appeal with the Board of Industrial Insurance Appeals on February 1, 1999, from an order of the Department of Labor and Industries dated January 22, 1999. The order affirmed the Department's order dated September 11, 1998. That order rejected the claim, determined there was no proof of a specific injury at a definite time or place while in the course of employment, determined that the claimant's injury was not the result of an industrial injury, and determined that the claimant's condition was not an occupational disease. **REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

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 to a Proposed Decision and Order issued on November 30, 1999, in which the order of the Department dated January 22, 1999, was reversed and remanded to the Department with direction to accept the claim and to provide such other and further benefits as are authorized by the law.

This matter came on for hearing upon a motion for summary judgment by the claimant. The industrial appeals judge granted the motion and issued the Proposed Decision and Order directing claim allowance. As a subsidiary issue, the industrial appeals judge ruled that the Department was deemed to have admitted all facts in the claimant's Requests for Admissions by failing to answer them within the time permitted by CR 36. We grant review because of procedural irregularities in the presentation and hearing of the motion. Furthermore, the Requests for Admissions relied upon by the claimant do not resolve all relevant questions of fact necessary to decide the appeal on its merits.

This is a hearing loss case in which the Department rejected the worker's claim because his hearing loss pre-dated any alleged injurious industrial exposure in Washington State. The chronology of the case before the Board is important to determining whether the sanctions in CR 36 apply:

Date	**Event**
7-19-99	Scheduling conference in which discovery deadline of 10-15-99 is established.
9-14-99	Claimant submits Request for Admissions to Department.
10-14-99	Due date for completed Request for Admissions per CR 36.
10-15-99	Deadline for completion of discovery.
10-21-99	Claimant files Summary Judgment Motion *(10 days* later *than allowed by CR 56).*
10-22-99	IAJ sets hearing on SJ motion for 10-28-99 *(allowing Department 6 days to respond instead of 17 as required by CR 56)*.
10-22-99	Written Notice of Hearing on Motion mailed from Olympia (7 days in advance of hearing, instead of the 15 required by WAC 263-12-100).
10-25-99	Department serves completed Request for Admissions on claimant.
10-28-99	Hearing on Motion for Summary Judgment. Department files brief with objection to shortened time for hearing of motion.
11-8-99	First scheduled hearing.

Summary Judgment Motion:

CR 56 requires that summary judgment motions be "filed and served not later than 28 calendar days before the hearing." The rule requires responses to be filed "not later than 11 calendar days before the hearing." CR 56 does not provide for any discretion with respect to filing time-lines. The only discretion permitted is with respect to the requirement that the motion be heard more than 14 days before the hearing "unless leave of court is granted to allow otherwise." In other words, after a timely motion is filed the judge may allow the parties *additional* preparation time before the hearing on the motion. He may not truncate the required time for notice of the motion or filing of responsive pleadings. This interpretation is supported by the language of CR 56(f).

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Case law also supports the necessity of giving the opposing party fair notice and time to prepare for summary judgment. *See, e.g., Mayflower Air-Conditioners, Inc. v. West Coast Heating Supply, Inc*., 54 Wn.2d 211 (1959). In this instance, six days notice of hearing (of which the first two days were weekend days) did not allow the Department even the minimum time afforded by rule to obtain affidavits.

The claimant asserted at hearing that the Board may shorten time for hearing under the Civil Rules. CR 6 allows for ex parte motions for orders shortening time for notice of hearings on motions, however, the Civil Rules govern Board procedures only to the extent that there is no contradictory Board Rule of Procedure. WAC 263-12-100 requires that hearings before the Board may not be held less than 15 days after the mailing of the notice *except* "upon agreement of all parties that have theretofore made an appearance in the appeal." Therefore, absent agreement of all parties, there is no such thing as an order shortening time for a hearing before the Board. The

Department did not agree to the shortened time. It objected to the shortened time in its hearing brief and again in the Petition for Review. Under the circumstances, it was an error to entertain the Motion for Summary Judgment.

CR 36 Request for Admissions:

CR 36 provides, in relevant part:

> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . .

The language of CR 36 is quite straightforward about the effects of failure to answer within the 30-day time period. The industrial appeals judge strictly applied the time limit and enforced the sanctions. This action appears reasonable, especially in light of the very tight time frame between the discovery deadline and the date set for hearing in this appeal. The Department not only filed its responses after the 30 days allowed in the rule, it also missed the discovery deadline in the litigation order by 10 days. However, Washington appellate courts direct that judges apply a balancing test, even if the original 30-day response period has expired. *See Santos v. Dean*, 96 Wn. App. 849 (1999); *Brust v. Newton*, 70 Wn. App. 286, (1993), *review denied*, 123 Wn.2d 1010 (1994); and *Coleman v. Altman,* 7 Wn. App. 80 (1972). Although the ultimate decision is left to the discretion of the judge, the two-prong test cited in *Santos* requires an analysis of (a) whether permitting the extension promotes the presentation of the merits of the case, and (b) whether the extension will prejudice the opposing party.

Looking at whether the extension promotes the presentation of the merits of the case, we conclude that the extension would not be necessary because the matters on which admission is requested only establish a prima facie case for the claimant. Contrary to the assertion in the claimant's response to the Department's Petition for Review, the admissions do not lead irrefutably

to the conclusion that the claimant actually sustained occupational hearing loss as a result of his noise exposure on the job. The Department's position is that the claimant's hearing loss pre-dated his noise exposure. The admissions, as phrased, indicate that the claimant was exposed to injurious noise levels as distinctive conditions of his various employments. They indicate that Dr. Benage made certain statements about the relationship between the exposure and Mr. Harper's hearing loss. The admissions, as phrased, however, do not require the Department to acknowledge that Dr. Benage's statements are true or accurate. Therefore, the admissions do not prevent the Department from presenting its own witnesses, and they do not prevent the Department from cross-examining Dr. Benage. Nor do the admissions, when viewed in the light most favorable to the Department, rise to the level necessary to support summary judgment in favor of the claimant.

On the other hand, the claimant would not have been prejudiced had the extension been granted. Prejudice to the party requesting the admission has to go beyond the mere time and expense of presenting the case. The party must demonstrate prejudice on the order of a sudden and unexpected need to obtain evidence. In this appeal, the claimant, with full knowledge that the hearing was scheduled only four months after the scheduling conference waited nearly two full months before submitting the Request for Admissions. The claimant filed his Motion for Summary Judgment more than a month after he confirmed the attendance of his witnesses at hearing. There is no showing of prejudice demonstrated in the claimant's response to the Department's Petition for Review.

In conclusion, this appeal should not have been decided on summary judgment, both due to lack of compliance with minimum time frames and because the claimant failed to establish that there were no issues of material fact in dispute. We remand this appeal for hearing with the observation that, given the extremely short period of time permitted for discovery, the Department

did not even attempt to demonstrate that there was a reason it did not respond in time under CR 36 or observe the deadlines in the litigation order. Therefore, the matters identified in the claimant's Request for Admissions should be deemed admitted. These admissions relieve the claimant of the burden of establishing his prima facie case. As the claimant must establish his entitlement to benefits by a preponderance of the evidence, he should be permitted to present such non-cumulative additional evidence as may be necessary to satisfy that requirement. The Department should be permitted to cross-examine Dr. Benage and any other witnesses presented by the claimant and to present its witnesses.

The parties are advised that this order is not a final Decision and Order of the Board within the meaning of RCW 51.52.110. At the conclusion of further proceedings, the industrial appeals judge shall, unless the matter is dismissed or resolved by an Order on Agreement of Parties, enter a Proposed Decision and Order containing findings of fact and conclusions of law as to each contested issue, based on the entire record, and consistent with this order. Any party aggrieved by the Proposed Decision and Order may petition the Board for review of the Proposed Decision and Order under RCW 51.52.104.

It is so ORDERED.

Dated this 24th day of March, 2000.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member