Baker, Ronald

BOARD

Subpoena

Where a physician has developed an opinion as an expert and has expressed that opinion, a subpoena should not be refused solely on the ground that the physician has refused to speak with the litigant or the litigant is unable to pay other than the statutory witness fee. **…*In re Ronald Baker*, BIIA Dec., 99 21232 (2001)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: RONALD D. BAKER	**DOCKET NOS. 99 21232, 99 22722, 99 22723 & 00 15504**
CLAIM NOS. N-730154 & P-276006	**ORDER VACATING PROPOSED DECISION AND ORDER AND REMANDING APPEALS FOR FURTHER PROCEEDINGS**

APPEARANCES:

Claimant, Ronald D. Baker, Pro Se

Employer, Jakes Bargain Barn,
None

Employer, Roofpro, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
Dale T. Wagner, Assistant

The claimant, Ronald D. Baker, filed appeals with the Board of Industrial Insurance Appeals:

Docket No. 99 21232, Claim No. N-730154, from a Department order dated September 3, 1999, which set the time loss compensation rate at $239.99 per month, based upon single with no dependants and wages at the time of injury of $150 per month, and that provided time loss compensation for the period September 15, 1994 through November 15, 1994;

Docket No. 99 22722, Claim No. P-276006, from a Department order dated October 18, 1999, which denied time loss compensation for the period January 16, 1998 through April 2, 1999;

Docket No. 99 22723, Claim No. N-730154, from a Department order dated October 18, 1999, which indicated the claim was reopened for benefits, denied time loss compensation after November 15, 1994, indicating the claimant was employable at the job of injury, and closed the claim without an award for permanent partial disability effective October 18, 1999; and,

Docket No. 00 15504, Claim No. P-276006, from a Department order dated March 31, 2000, which indicated time loss compensation was ended as paid to January 15, 1998, and that closed the claim effective March 31, 2000, without further time loss compensation or award for permanent partial disability. **REMANDED FOR FURTHER PROCEEDINGS.**

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, these matters are before the Board for review and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order issued on December 7, 2000, in which the above-referenced orders of the Department were affirmed. On February 7, 2001, we issued an Order Adopting Proposed Decision and Order. On February 21, 2001, we issued an Order Vacating Order Adopting Proposed Decision and Order and Acknowledging Receipt of Petition for Review. This was because we determined that, indeed, Mr. Baker had filed a timely Petition for Review. On March 28, 2001, we issued an Order Granting Petition for Review.

These appeals concern Mr. Baker's industrial insurance claims for injuries that he sustained December 7, 1993 (Claim No. N-730154), and September 21, 1995 (Claim No. P-276006). In Claim No. N-730154, Mr. Baker contends that the Department incorrectly set his time loss compensation rate because it did not include accurate wage information from all employment at the time of injury. Mr. Baker contends that either or both claims were prematurely closed and that he is entitled to further medical treatment under either or both claims. For this latter reason only, he believes that denial of any award for permanent partial disability was premature.

Only Mr. Baker testified at hearings. The industrial appeals judge affirmed each of the appealed Department orders, essentially determining that Mr. Baker did not present a prima facie case for any relief. Due to multiple procedural irregularities and error in interpreting the evidence, we must vacate the Proposed Decision and Order and remand these appeals to the hearings process for further proceedings.

PROCEDURAL IRREGULARITIES

Jurisdiction Not Established

We granted these appeals "subject to proof of timeliness" because there was at least some question in each regarding whether Mr. Baker filed his appeal within 60 days of communication of the respective Department orders. RCW 51.52.050 and RCW 51.52.060. We have not found in the record before us a stipulation to facts establishing jurisdiction in any of these four appeals; nor do we find any presentation of evidence to establish jurisdiction. It is not apparent to us that the industrial appeals judge inquired as to whether the parties could reach a stipulation or whether Mr. Baker was informed of the necessity of establishing jurisdiction and how this could be accomplished. Upon remand, a stipulation should be entered by the parties or evidence taken that would address jurisdiction. Since Mr. Baker is the appealing party, he must bear the burden of

establishing jurisdiction. If jurisdiction is not established in an appeal, then no order other than an order dismissing that appeal will be issued.

In addition to the question of jurisdiction over each of the particular appeals, we note several other matters to which the industrial appeals judge and the parties should have given special attention. In the proposed jurisdictional facts for Docket No. 99 21232, Claim No. N-730154, there is no indication that the March 3, 1995 Department order did not become final. In Docket Nos. 99 22722 and 00 15504, Claim No. P-276006, there is no indication that the claim was timely filed.

Exhibits Not in the Record/Transcript Errors/Motion Not Ruled Upon

We find there are serious file-keeping matters that need to be addressed upon remand. Exhibit Nos. 1 and 2 are referenced in the Proposed Decision and Order, but are not contained in the record. Exhibit No. 1 is referenced as admitted and Exhibit No. 2 was rejected. The industrial appeals judge must account for all exhibits and ensure that they are included in the record.

Two of the transcripts are identified with incorrect docket numbers. Upon remand, the industrial appeal judge should examine all transcripts and account for any errors that are so substantial as to be confusing to a reviewing court.

The Department filed a motion upon which there was no ruling by the industrial appeals judge. This was Department Notice of Intent to Admit Documents. Upon remand, if the motion is not withdrawn, a ruling must be made upon the motion.

Inadequate Consideration of Mr. Baker's Requests for Witness Subpoenas

The industrial appeals judge denied Mr. Baker subpoenas for his medical witnesses. Without such medical testimony, Mr. Baker did not make a prima facie case for further time loss compensation, further medical treatment, or for an award for permanent partial disability.

At pre-hearing conferences, Mr. Baker repeatedly made references to the idea that "he" would subpoena medical witnesses. The industrial appeals judge properly indicated that this was not proper procedure. At 4/25/00 Tr. at 7, Mr. Baker identified as potential witnesses: Dr. Lawrence; Dr. Seidner; Dr. Troutman; Dr. Waltner; Dr. Ludke; Dr. Johnson; Dr. Baker; Dr. Luby; Dr. Franklin; and Dr. Barnett. The industrial appeals judge set hearing dates for Mr. Baker as October 19 and 20, 2000, with a deadline of June 27, 2000, by which to confirm witnesses. The industrial appeals judge indicated that Mr. Baker must "personally contact any medical witnesses that you want to present" and that she would consider which witnesses would be permitted after he "confirm that they are agreeable to come in and testify, and that they do, indeed, support your

position on appeal." 4/25/00 Tr. at 8. The industrial appeals judge stated that she was "not going to issue a subpoena if a doctor does not make that representation [to testify 'favorably or in support of your position']." 4/25/00 Tr. at 9.

Mr. Baker timely confirmed his witnesses. However, when asked, he informed the industrial appeals judge that he had not spoken with his medical witnesses because they wanted $500 before they would speak with him. 9/21/00 Tr. at 7. The industrial appeals judge then asked if he was otherwise "representing to me here today that they will support your position on appeal?" Mr. Baker responded, "Sure . . . I just have faith in them." 9/21/00 Tr. at 7. When the industrial appeal judge explained that such is not enough for issuance of a subpoena, Mr. Baker indicated, "I have the letter right here from Dr. Weltner, and he'll support my position. Why would he sign this, if he wouldn't?" 9/21/00 Tr. at 8. Asked if Dr. Weltner had agreed to come to the hearing, Mr. Baker indicated he did not see why not, that he was sure Dr. Weltner would and that Dr. Weltner indicated Mr. Baker has "got a permanent partial disability, and I'm entitled to all time-loss." 9/21/00 Tr. at 8. The industrial appeal judge again indicated, "that's fine, but do you have a commitment from him that he will come in personally and testify on your behalf?" 9/21/00 Tr. at 9. This was followed by a lengthy interaction, the essence of which is that Mr. Baker asserted he could not speak to any of the medical witnesses because they demanded $500, which he could not afford. The industrial appeals judge indicated that she would not subpoena the medical witnesses without Mr. Baker first speaking to them.

We recognize that our industrial appeals judges must be given significant discretion regarding when there is, and when there is not, sufficient justification for issuing a subpoena requiring witness attendance. The judge must at a minimum be satisfied that the witness would have relevant, admissible testimony and would be provided a **proper** fee to which the witness is entitled. However, a litigant who is not represented by an attorney should not be denied a subpoena that an attorney would have the right to issue.

We are concerned that a requirement that the litigant first talk to a witness may be too rigid or restrictive. Mr. Baker referred to documents that he believed indicated at least one or more physicians would support some aspect of relief that he sought. Neither the Department nor the industrial appeals judge asserted that Mr. Baker was mistaken in that representation. In light of this, denial of a subpoena solely for the reason that Mr. Baker did not speak with a medical witness appears arbitrary.

We have also considered the possibility that, although not articulated, the industrial appeals judge may have been under the impression that a physician is always entitled a negotiated fee. Perhaps the industrial appeal judge believed that one or more physicians were demanding a $500 fee that was refused by Mr. Baker. The industrial appeals judge did not articulate such refusal to pay a $500 fee as the reason for denying any subpoena. In any event, we are not aware of any requirement that every expert be allowed to negotiate his or her own fee for testimony beyond the statutory fee due to any witness.

A health care professional who acquires or develops facts and opinions in treating a patient, not in anticipation of litigation, has the status of a factual or occurrence witness, and is not entitled to expert witness fees under Civil Rule (CR) 26(b)(5). *Paiya V. Durham Constr. Co.*, 69 Wn. App. 578, 579-580 (1993); *Baird v. Larson,* 59 Wn. App. 715 (1990). In short, a physician who does not have, or who has not expressed an expert opinion on a matter, need not form or express an opinion without first negotiating a fee. We see no reasons why such negotiation in anticipation of litigation could not include a special fee for presentation of that opinion at trial as an expert witness. However, in instances where the physician has already developed an opinion as an expert and has expressed such opinion, we do not believe that a subpoena may be refused solely on the grounds that the physician is refusing to speak with the litigant or on grounds that the litigant is refusing to pay other than the statutory witness fee due other witnesses. In the present case, Mr. Baker represented that certain experts already had expressed opinions, which he desired they express at trial. The industrial appeals judge did not indicate whether or not this representation was accepted. The only reason given for denying subpoenas was that Mr. Baker had not spoken with the proposed witnesses.

Upon remand, if Mr. Baker requests a subpoena for a witness, the industrial appeals judge should state on the record or in writing the requirements, with legal and factual justification for such requirements that the industrial appeals judge sets preliminary to Mr. Baker obtaining such subpoena. The industrial appeals judge should subsequently determine whether and to what extent Mr. Baker has met these requirements with regard to each requested subpoena. The industrial appeals judge should indicate on the record all of the reasons for refusing to provide any requested subpoena.

Prima Facie Case Established on Time Loss Compensation Rate

At 10/19/00 Tr. at 10-12, Mr. Baker testified that at the time of injury of December 7, 1993, he was earning $12 per hour at each of two jobs, one 20 hours per week and the other 10 to 30 hours per week. The industrial appeals judge carefully inquired as to whether the initial testimony was relative to the actual injury date. Mr. Baker represented that he was referring to employment at the time of injury. If we were to accept Mr. Baker's testimony, it is readily clear that his wages at the time of injury would be far more than the $150 per month wage figure used by the Department in setting the apparent minimum time loss compensation rate in Claim No. N-730154. In the record before us, there is **no** contrary admissible evidence that speaks to the wage basis issue.

The industrial appeals judge noted the Mr. Baker did not present documentary evidence of wages at the time of injury. However, there is no requirement that wages must be proven by documentary evidence. Mr. Baker made a prima facie case that the Department improperly set his time loss compensation rate in Claim No. N-730154. The Department requested a continuance to present contrary evidence and the industrial appeals judge initially granted the continuance. However, on the following day, the industrial appeals judge indicated that she would consider the case ready for a Proposed Decision and Order without opportunity being provided to the Department to present its evidence. The Department had not rested its case.

Because Mr. Baker presented a prima facie case that the Department incorrectly calculated his time loss compensation rate, it was error to deny the Department opportunity to rebut the case presented. Accordingly, it was error to affirm the September 3, 1999 Department order in Claim No. N-730154. We remand to provide the Department opportunity to present its evidence and with directions that the industrial appeals judge consider all of the evidence in making the decision as to the appropriate wage basis.

The Proposed Decision and Order dated December 7, 2000, is vacated. This appeal is remanded to the hearings process, pursuant to WAC 263-12-145(4), for further proceedings as indicated by this order. 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 the 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 and conclusions as to each contested issue of fact and law, based upon the entire record, and consistent with this

order. Any party aggrieved by such Proposed Decision and Order may petition the Board for review of such further Proposed Decision and Order, pursuant to RCW 51.52.104.

It is so ORDERED.

Dated this 12th day of June, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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

/s/_____
JUDITH E. SCHURKE Member