America 1st Roofing & Builders, Inc.

EVIDENCE

ER 904

Where the ER 904 process is invoked, the Board must follow the rule as it has been interpreted by our state appellate courts. Following *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899 (2007), the Board holds that it is impermissible to allow an expert's report with a prima facie opinion into the record via an ER 904 submission where an objection was made at trial. **….*In re America 1st Roofing & Builders, Inc*., BIIA Dec. 22 W0050 (2023)**

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: AMERICA 1ST ROOFING & BUILDERS, INC.	)	**DOCKET NO. 22 W0050**
	)	
	)	
	)	**ORDER VACATING PROPOSED DECISION**
	)	**AND ORDER AND REMANDING THE APPEAL**
CITATION & NOTICE NO. 317963914	)	**FOR FURTHER PROCEEDINGS**

America 1st Roofing & Builders, Inc., (America 1st) appeals Citation and Notice No. 317963914 issued by the Department of Labor and Industries on August 5, 2021. The Citation and Notice cited two sets of grouped violations for failure to comply with safety rules pertaining to scaffolding and fall protection, with a penalty of $3,600. Two violations were for the alleged failure to comply with rules pertaining to eye and face protection and the use of hard hats. In her Proposed Decision and Order, the industrial appeals judge vacated some violations, reasoning that America 1st did not have constructive knowledge of the violative conditions due to the short duration of exposure to those conditions. After careful consideration of the record and the law, we disagree. Our industrial appeals judge committed reversible error by admitting all of the Department's Evidence Rule (ER) 904 submissions as substantive evidence. The Department's enforcement case file was not admissible under ER 904(a)(6). The error caused the parties to try the case in a way they otherwise wouldn't have. The Department did not present a prima facie case. The record is incomplete. The Proposed Decision and Order of April 14, 2023, is vacated and this appeal is **REMANDED FOR FURTHER PROCEEDINGS**.

DISCUSSION

In its Petition for Review, America 1st contends that the industrial appeals judge erred by admitting Exhibits 1 through 12. Unlike hearings held under the Administrative Procedure Act, the rules of evidence are not relaxed in administrative hearings before this Board and our industrial appeals judges. In hearings before the Board, the civil rules of practice apply.[1] Where the ER 904 process is invoked, we must follow the rule as it has been interpreted by our state appellate courts. Here, the Department timely filed and served an intent to offer documents under ER 904. The Department served an ER 904 notice and documents. America 1st didn't file a response. Yet, at the June 24, 2022 hearing, for the first time, America 1st's counsel lodged a hearsay objection to the admissibility of the documents in the Department's ER 904 submission. The judge noted that

[1] RCW 51.52.140.

America 1st failed to specifically object to any of the documents within 14 days of receipt of the notice, and she admitted Exhibits 1 through 12 under the catchall provision of ER 904(a)(6).

Previously, the Washington Supreme Court in *Miller v. Arctic Alaska Fisheries Corp*.,[2] held that it was error when the court failed to admit two letters from the plaintiff's doctors concerning his medical condition. The Court held that there was no timely objection pursuant to ER 904. The Court ruled that the letters should have been admitted due to the absence of a timely objection. These letters were from medical providers and contained opinions regarding the plaintiff's medical condition. The error was harmless, though, because the letters simply reiterated evidence that had already been gleaned through the plaintiff's testimony.

In *Lutz Tile v. Krech*,[3] the plaintiff sought to admit an opinion regarding the quality of the tile installed for the defendant. The court held that it was impermissible to allow an expert's report with a prima facie opinion into the record via ER 904(a)(6). ER 904(a)(6) provides for the admission of a document relating to a material fact. A material fact should only be admitted, however, as long as it is trustworthy and the admission serves the interest of justice. In order for documents to come in under Rule 904(a)(6), they must be factually based. ER 904 is not intended to admit documents that contain opinions about which reasonable minds would differ. The *Lutz Tile* court determined that expert reports should not routinely be admitted as trustworthy.

In reconciling *Lutz Tile* with *Miller*, the pivotal fact is the nature of the evidence to be admitted. In *Miller*, the plaintiff was seeking to admit two letters that contained material facts, but appeared to be records prepared as part of the plaintiff's treatment. ER 904(a)(1) specifically allows for the submission of reports made for the purpose of treatment. In *Lutz Tile,* though, the plaintiff sought to use ER 904(a)(6) to admit their expert's opinion. The report contained a forensic opinion from a hired expert, which the court found impermissible. This is akin to the Department using ER 904(a)(6) to admit all of the records needed to establish the violations. As Washington evidence expert Karl Tegland[4] has noted, *Lutz Tile* stands for the proposition that expert reports containing subjective opinions are not admissible via ER 904.

[2] 133 Wn.2d 250 (1997).
[3] 136 Wn. App. 899 (2007).
[4] Courtroom Handbook on Washington Evidence Volume 5 D, Karl Tegland, Section 904:2.

It is also important to note that the *Lutz Tile* court concluded that they were dealing with a case of first impression. The court determined that the ruling in *Lutz Tile* was materially different than the holding in *Miller.* We believe that the *Lutz Tile* court was specifically ruling on the catchall phrase in ER 904(a)(6) while the *Miller* Court was focused on the scope of ER 904 in general.

Without the admission of Exhibit 3 and Exhibits 5 through 12, the Department has not made a prima facie case. In light of the more recent ruling in *Lutz Tile*, we believe the practice of submitting inspector reports, rather than establishing a violation through witness testimony, is inconsistent with the rules of evidence. Moreover, this Board has long held that the contents of an inspection report is hearsay under ER 801 in that the contents are (a) oral or written assertions, (b) made by a declarant, and (c) made other than when the declarant was testifying at trial. Hearsay is generally inadmissible.[5] Our industrial appeals judge improperly admitted Exhibits 3, 5, 6, 7, 8, 9, 10, 11, and 12, the enforcement case file information and penalty calculations.

We then turn to the proper remedy. The evidentiary error necessitates reversal if it results in prejudice. Prejudice refers to whether the outcome would be affected in the absence of the error. In this case, the Department reasonably relied on utilizing ER 904 in order to have the bulk of its case admitted. With the admission of the identified exhibits and documents, the Department didn't exercise the option to put on other evidence. And America 1st rested, relying on the judge's ruling. Since the inability to put on a prima facie case certainly affected the outcome of this appeal, these procedural circumstances meet the definition of prejudicial.

Further, WAC 263-12-120 permits the Board to procure evidence deemed necessary to decide the appeal. Regardless of how the evidence is presented, the Board is responsible for ensuring that the record allows the matter to be tried equitably and fairly.[6] Because Exhibit 3 and Exhibits 5 through 12 submitted by the Department are inadmissible, this Board requires more evidence to decide this matter.

On remand, the proper standard to apply regarding constructive notice is articulated in *Pro-Active Home Builders v. Washington State Department of Labor & Industries.*[7] Our judge vacated several items in the citation based on the short duration of the exposure. In *Pro-Active*, the court held that the employer can be deemed to have constructive knowledge of the violations if the

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[5] ER 802.
[6] *In re W. Tom Edwards*, BIIA Dec. 26,382 (1967).
[7] 7 Wn. App. 2d 10 (2018).

items were readily observable or in a conspicuous location regardless of duration. It is the obviousness of the hazards rather than the length of exposure that determines whether there is constructive notice.

ORDER

This appeal is remanded to the hearings process, as provided by WAC 263-12-145(5), for further proceedings as indicated by this order. Unless the matter is settled or dismissed, the industrial appeals judge will issue a new Proposed Decision and Order. The new order will contain findings and conclusions as to each contested issue of fact and law. Any party aggrieved by the new Proposed Decision and Order may petition the Board for review, as provided by RCW 51.52.104. This order vacating is not a final Decision and Order of the Board within the meaning of RCW 51.52.110.

Dated: October 19, 2023.

BOARD OF INDUSTRIAL INSURANCE APPEALS

HOLLY A. KESSLER, Chairperson

ISABEL A. M. COLE, Member

Addendum to Order
In re America 1st Roofing & Builders, Inc.
Docket No. 22 W0050
Citation & Notice No. 317963914

Appearances

Employer, America 1st Roofing & Builders, Inc., by Beckett Law Firm, per Kristian S. Beckett

Employees of America 1st Roofing & Builders, Inc. (did not appear)

Department of Labor and Industries, by Office of the Attorney General, per Brian L. Dew

Department Order(s) Under Appeal

The employer, America 1st Roofing & Builders, Inc., filed an appeal with the Department of Labor and Industries' Safety Division on December 10, 2021. The Department transmitted the appeal to the Board of Industrial Insurance Appeals on January 5, 2022. The employer appeals Citation and Notice No. 317963914 issued by the Department on August 5, 2021. In this notice, the Department alleged America 1st failed to comply with safety rules pertaining to scaffolding and fall protection and with rules pertaining to eye and face protection and the use of hard hats.

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department and employer filed timely petitions for review of Proposed Decision and Order issued on April 14, 2023. The employer filed a response to the Department's Petition for Review.