Stevenson, Kathleen

BURDEN OF PROOF

Employer appeal

In an employer appeal, when the Department or worker moves to dismiss for failure by the employer to make a prima facie case, the Department or worker may rest on their motion or choose to present evidence. Proceeding in this manner does not relieve the employer of its burden. *Overruling In re Christine Guttromson*, BIIA Dec., 55,804 (1981) to the extent it holds that there does not need to be a determination as to whether the employer presented a prima facie case if the claimant does not rest on its motion. ***….In re Kathleen Stevenson*, BIIA Dec., 11 13592 (2012)** [*Editor's Note*: The Board's decision was appealed to King County Superior Court No. 12-2-29291-4KNT.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: KATHLEEN STEVENSON	**) DOCKET NO. 11 13592**
	)
CLAIM NO. AJ-50191	**) DECISION AND ORDER**

APPEARANCES:

Claimant, Kathleen Stevenson, by
Law Offices of James Rolland, P.S., per
Elijah M. Forde

Employer, Contemporary Home Services, Inc., by
AMS Law, P.C., per
Aaron K. Owada

Department of Labor and Industries, by
The Office of the Attorney General, per
Christine J. Kilduff, Assistant

The employer, Contemporary Home Services, Inc., filed an appeal with the Board of Industrial Insurance Appeals on April 4, 2011, from an order of the Department of Labor and Industries dated March 16, 2011. In this order, the Department affirmed an order dated February 10, 2011, in which it reopened the claim effective December 13, 2010. The appeal is **DISMISSED**.

DECISION

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of a Proposed Decision and Order issued on May 8, 2012, in which the industrial appeals judge dismissed the appeal. The Department filed a Response to the Employer's Petition for Review on July 13, 2012.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. The evidence presented by the parties is adequately set forth in the Proposed Decision and Order and will not be repeated in detail here.

While we have reached the same practical result as the Proposed Decision and Order, review is required to address the inconsistency of the decision and a prior significant decision, *In re Christine Guttromson*, BIIA Dec., 55,804 (1981).

When not in conflict with our rules and the Industrial Insurance Act, the civil rules of superior court shall be followed by the Board. *See,* WAC 263-12-125 and RCW 51.52.140. After an

appealing party has presented its evidence, a non-appealing party may move for dismissal for failure to demonstrate a right to relief, without waiving the right to present evidence if the motion is denied. The court may rule on the motion at the time it is made, or after presentation of all evidence. *See* CR 41(3).

As the appealing party, the employer has the initial burden of presenting evidence which establishes a prima facie case for the relief sought. RCW 51.52.050. Upon presentation of a prima facie case, the burden shifts to the claimant to prove entitlement to benefits. *See*, *Olympia Brewing Co. v. Department of Labor & Indus.*, 34 Wn.2d 498 (1949).

In *Guttromson*, we stated:

> [i]f the claimant had elected to rest on a motion to dismiss for failure to present a prima facie case following completion of the employer's case, the Board would be faced with determining whether or not the employer had met its burden under the statute and rules. However, in this instance, the claimant elected to present testimony and a consequence of this election is that the claimant then has the burden of establishing the correctness of the Department's order by a preponderance of the evidence.

Guttromson at 2.

The employer has construed this statement to mean that if the claimant does not rest on a motion to dismiss, and presents any evidence, we need not determine whether the employer presented a prima facie case. The employer asserts the burden then shifts to the claimant to prove entitlement to benefits based on a preponderance of evidence.

We granted review to clarify the impact of the claimant's presentation of evidence. *Guttromson* is overruled to the extent it holds that there does not need to a be a determination as to whether the employer presented a prima facie case if the claimant does not rest on a motion to dismiss.

As the appealing party, the employer has the burden to present a prima facie case for relief sought. The burden does not shift to the claimant until the employer has met its initial burden. The claimant or Department may move to dismiss the appeal and choose to present its case-in-chief, rather than rest on its motion. Proceeding in this manner does not relieve the employer of its burden.

If the claimant or Department moves to dismiss the appeal for failure to present a prima facie case, but also presents evidence, we must first determine whether the employer presented a prima facie case. If the employer has not presented a prima facie case for relief sought, the appeal

will be dismissed. If the employer has presented a prima facie case for relief sought, the burden shifts to the claimant to prove, by a preponderance of evidence, entitlement to the benefits and correctness of the Department order.

In the present case, the relief sought in the employer's Notice of Appeal was a reversal of the Department's order dated March 16, 2011, in which the Department affirmed an order dated February 10, 2011, that reopened the claim. Therefore, the employer was required to present a prima facie case that Ms. Stevenson's condition proximately caused by the industrial injury did not objectively worsen between December 31, 2008, and March 16, 2011. RCW 51.32.160. The employer rested its case after the presentation of the testimony of Shawna Waubanascum, Kellie Kircher, and Ruth Bishop, M.D.

Dr. Bishop was the only witness to provide necessary medical testimony, however she did not provide an opinion as to whether the Ms. Stevenson's condition objectively worsened between the two terminal dates. Dr. Bishop was never asked whether Ms. Stevenson's condition objectively worsened. Dr. Bishop had one visit with Ms. Stevenson on December 17, 2008. This visit allowed Dr. Bishop to provide an opinion as to Ms. Stevenson's status as of the first terminal date, December 30, 2008. Ms. Stevenson was at maximum medical improvement, and did not have permanent impairment or work restrictions due to her industrial injury, as of December 17, 2008.

The employer argued that if Ms. Stevenson's condition worsened, she had subsequent injuries which were superseding, intervening acts which caused this worsening. Specifically, the employer argued Ms. Stevenson's riding of ATVs and slip and fall with a new employer were new injuries. Dr. Bishop opined these new incidents **could** have caused a knee injury. However, because Dr. Bishop had not performed a subsequent examination of Ms. Stevenson, she was not able to opine on a more probable than not basis whether these alleged incidents caused a new knee condition. Medical opinions must be based upon a greater probability, not a mere possibility. *See, Sayler v. Department of Labor & Indus.*, 69 Wn.2d 893 (1966) and *Sacred Heart Medical Center v. Department of Labor & Indus.*, 92 Wn.2d 631 (1979).

The employer did not present competent medical evidence that Ms. Stevenson's industrial injury did not objectively worsen between the two terminal dates. Therefore, the employer did not present a prima facie case for the relief it sought in its appeal. As a result, the Department's motion is granted and the appeal is dismissed.

FINDINGS OF FACT

1. On June 29, 2011, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.

2. The employer, Contemporary Home Services, Inc., failed to present the necessary evidence to prove that Kathleen Stevenson's condition proximately caused by the November 18, 2008 industrial injury did not objectively worsen, aggravate or exacerbate between the period December 31, 2008, and March 16, 2011.

3. The employer, Contemporary Home Services, Inc., failed to present the necessary evidence to prove that the worsening, aggravation or exacerbation of Ms. Stevenson's condition proximately caused by the November 18, 2008 industrial injury that occurred between December 31, 2008, and March 16, 2011, was due to a subsequent, intervening cause.

CONCLUSIONS OF LAW

1. Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.

2. The employer, Contemporary Home Services, Inc., failed to establish a prima facie case for relief sought in its appeal as required by RCW 51.52.050.

3. The employer, Contemporary Home Services, Inc.'s appeal from the Department order dated March 16, 2011, is dismissed.

Dated: August 3, 2012.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/____
DAVID E. THREEDY Chairperson

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