

Christopher, Melinda

EVIDENCE

Rebuttal—prior inconsistent statements

Claimant's request for rebuttal testimony to show a prior inconsistent statement of a witness is proper rebuttal. The testimony could not have been properly offered during the claimant's case-in-chief, because if a witness has not yet testified, the witness's prior out-of-court statements are inadmissible because there is no testimony to impeach.*In re Melinda Christopher, BIA Dec., 18 18038 (2019)* [Editor's Note: The Board's decision was appealed to superior court under Clark County Cause No. 19-2-02665-06.]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: MELINDA A. CHRISTOPHER**) **DOCKET NOS. 18 18038, 18 18539, 18 21840 &**
2) **18 22633**
3)
4 **CLAIM NOS. SZ-73317 & SZ-73318**) **DECISION AND ORDER**

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6 Melinda Christopher asserts that she was assaulted twice at work during 2017 by coworkers
7 in the course of employment with PeaceHealth. She filed an industrial insurance claim for the injuries
8 she alleges she sustained. The Department of Labor and Industries rejected both claims, and she
9 appealed both denials to the Board. She also appealed orders assessing a time-loss compensation
10 overpayment arising from provisional time-loss compensation benefits she received while the
11 Department evaluated her claim. At hearing, Ms. Christopher offered the lay testimony of her brother
12 in rebuttal to one of the witnesses presented by PeaceHealth. However, our industrial appeals judge
13 rejected the brother's testimony, thereby preventing him from testifying. In his Proposed Decision
14 and Order, our judge affirmed both claim denials and the overpayment orders. Ms. Christopher filed
15 a timely Petition for Review seeking allowance of the claims and payment of time-loss compensation,
16 and PeaceHealth filed a response. After careful consideration of the evidence presented, we hold
17 that the rebuttal testimony of Ms. Christopher's brother should have been allowed as evidence. But
18 because Ms. Christopher failed to show that she had any medical conditions proximately caused by
19 the alleged injuries, the exclusion of the brother's testimony was a harmless error. The four
20 Department orders denying the two claims and assessing overpayments are **AFFIRMED**.

DISCUSSION

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30 Melinda Christopher asserts that she suffered an industrial injury on June 5, 2017, when she
31 was assaulted in her workplace by her supervisor, Crystal Crawford. She filed industrial insurance
32 Claim No. SZ-73317 as a result of that incident. She asserts that on August 7, 2017, she was
33 assaulted again in her workplace by another coworker, Michelle Miltenberger Gonzalez.
34 Ms. Christopher filed industrial insurance Claim No. SZ-73318 as a result of that incident. While
35 these claims were being evaluated, Ms. Christopher received provisional time-loss compensation
36 benefits. Ultimately, the Department denied both claims, and Ms. Christopher appealed the denials
37 and the overpayment orders arising from her receipt of the time-loss payments. The parties stipulated
38 that if the claims were denied, then the overpayment orders should be affirmed.

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44 At hearing, Ms. Christopher testified on her own behalf regarding the alleged assaults on her.
45 The self-insured employer, PeaceHealth, presented the testimony of three of her co-workers who
46 contradicted her claim that she had been assaulted on two occasions during 2017. When
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1 PeaceHealth rested, Ms. Christopher called her brother, Jonathan Christopher, to testify in rebuttal
2 to the testimony of Susan Vosnos, one of PeaceHealth's lay witnesses. Ms. Christopher's attorney
3 made an offer of proof to our judge that Mr. Christopher would testify that he spoke by phone with
4 Ms. Vosnos, and she had told him that she would not testify in Ms. Christopher's favor because she
5 did not want to put her job in jeopardy. Unfortunately, Ms. Christopher's attorney asserted that
6 Mr. Christopher's testimony was being offered as a declaration against the interest of Ms. Vosnos.
7 PeaceHealth objected to the taking of Mr. Christopher's testimony, and our judge sustained that
8 objection, denying Mr. Christopher the opportunity to testify.
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10 We recognize that the proper ground for the introduction of Mr. Christopher's testimony would
11 have been to show the prior inconsistent statement of Ms. Vosnos. Professor Karl Tegland discusses
12 this subject in his treatise, *Courtroom Handbook on Washington Evidence*, at Rule of Evidence 613,
13 "Impeachment by Prior Inconsistent Statement." He writes, "The testimony of the second witness
14 (Jonathan Christopher in this case) is *simply rebuttal* and is subject to all the normal rules regarding
15 the admissibility of substantive evidence." Further, Professor Tegland writes, this testimony would
16 not have been properly offered during the claimant's case-in-chief, as PeaceHealth's counsel argued,
17 and our judge accepted, because "if a witness has not yet testified, or refuses to testify about a
18 particular matter, the witness' prior out-of-court statements are inadmissible because there is no
19 testimony to impeach."¹
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21 If Mr. Christopher had had the opportunity to testify as the offer of proof indicated, PeaceHealth
22 would have then had the right to present surrebutal, or rebuttal to the rebuttal. Then our judge could
23 have made his findings based on all the testimony. With doubt cast on Susan Vosnos' testimony,
24 our judge might have concluded that he believed Ms. Christopher's version of one or both of the
25 workplace injuries at issue.
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27 Although we believe that it was error to reject Mr. Christopher's testimony, we do not believe
28 that this error requires a remand to our judge to take that testimony. An industrial injury is not merely
29 the occurrence of a sudden traumatic event from without. There must also be a medical condition
30 that results from the event.² On this question, we agree with our judge that Ms. Christopher failed to
31 show that either of the workplace incidents were a proximate cause of a medical condition. Therefore,
32 even if we conclude that one or both of the incidents described by Ms. Christopher did in fact occur,
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46 ¹ *State v. Robbins*, 25 Wn. 2d 110 (1946).

47 ² RCW 51.08.100.

1 her claims still fail because there was no medical condition that resulted from either of them. As a
2 result, the Department orders on appeal should be affirmed.
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4 **DECISION**

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6 In Docket No. 18 18038, the claimant, Melinda A. Christopher, filed an appeal with the Board
7 of Industrial Insurance Appeals on July 13, 2018. The claimant appeals a Department order dated
8 June 28, 2018, in which the Department reversed its June 13, 2018 order and denied Claim
9 No. SZ-73317. The June 28, 2018 order is correct and is affirmed.
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12 In Docket No. 18 18539, the claimant, Melinda A. Christopher, filed an appeal with the Board
13 of Industrial Insurance Appeals on July 13, 2018. The claimant appeals a Department order dated
14 June 28, 2018, in which the Department reversed its June 13, 2018 order and denied Claim No.
15 SZ-73318. The June 28, 2018 order is correct and is affirmed.
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18 In Docket No. 18 21840, the claimant, Melinda A. Christopher, filed an appeal with the Board
19 of Industrial Insurance Appeals on October 1, 2018. The claimant appeals a Department order dated
20 August 2, 2018, assessing an overpayment of \$2,134.83 for provisional time-loss compensation
21 benefits paid from February 15, 2018, through April 28, 2018, in Claim No. SZ-73318. This order is
22 correct and is affirmed.
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25 In Docket No. 18 22633, the claimant, Melinda A. Christopher, mailed an appeal to the Board
26 of Industrial Insurance Appeals on September 28, 2018, received by the Board on October 18, 2018.
27 The claimant appeals a Department order dated August 2, 2018, assessing an overpayment of
28 \$9,596.86 for provisional time-loss compensation benefits paid from October 5, 2017, through
29 April 28, 2018, in Claim No. SZ-73317. This order is correct and is affirmed.
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32 **FINDINGS OF FACT**

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- 34 1. On October 15, 2018, and November 26, 2018, an industrial appeals judge
35 certified that the parties agreed to include the Jurisdictional History in the
36 Board record solely for jurisdictional purposes.
 - 37 2. Melinda A. Christopher has no condition proximately caused or aggravated
38 by the alleged incident of June 5, 2017.
 - 39 3. Ms. Christopher has no condition proximately caused or aggravated by the
40 alleged incident of August 7, 2017.
 - 41 4. In Claim No. SZ-73317, Ms. Christopher was paid \$9,596.86 in provisional
42 time-loss compensation benefits while the Department determined whether
43 an industrial injury had occurred on June 5, 2017. Ms. Christopher suffered
44 no industrial injury on that date as described in Claim No. SZ-73317.
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5. In Claim No. SZ-73318, Ms. Christopher was paid \$2,134.83 in provisional time-loss compensation benefits while the Department determined whether an industrial injury had occurred on August 7, 2017. Ms. Christopher suffered no industrial injury on that date as described in Claim SZ-73318.

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CONCLUSIONS OF LAW

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1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in these appeals.
 2. Ms. Christopher did not sustain an industrial injury within the meaning of RCW 51.08.100 on June 5, 2017.
 3. The Department order dated June 28, 2018, in Claim No. SZ-73317 is correct and is affirmed.
 4. Ms. Christopher did not sustain an industrial injury within the meaning of RCW 51.08.100 on August 7, 2017.
 5. The Department order dated June 28, 2018, in Claim No. SZ-73318 is correct and is affirmed.
 6. Ms. Christopher was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from October 5, 2017, through April 28, 2018. The Department properly assessed an overpayment of time-loss compensation benefits in the amount of \$9,596.86 in Claim No. SZ-73317.
 7. The Department order dated August 2, 2018, in Claim No. SZ-73317 is correct and is affirmed.
 8. Ms. Christopher was not a temporarily totally disabled worker within the meaning of RCW 51.32.090 from February 15, 2018, through April 28, 2018. The Department properly assessed an overpayment of time-loss compensation benefits in the amount of \$2,134.83 in Claim No. SZ-73318.
 9. The Department order dated August 2, 2018, in Claim No. SZ-73318 is correct and is affirmed.

33 Dated: August 20, 2019.

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BOARD OF INDUSTRIAL INSURANCE APPEALS


LINDA L. WILLIAMS, Chairperson

JACK S. ENG, Member

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3 **Addendum to Decision and Order**
4 **In re Melinda A. Christopher**
5 **Docket Nos. 18 18038, 18 18539, 18 21840 & 18 22633**
6 **Claim Nos. SZ-73317 & SZ-73318**

7 **Appearances**

8 Claimant, Melinda A. Christopher, by Law Office of Steven L Busick, PLLC, per Steven L.
9 Busick

10 Self-Insured Employer, PeaceHealth, by Reinisch Wilson Weier, P.C., per Steven R. Reinisch

11 **Petition for Review**

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14 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
15 and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued
16 on April 5, 2019, in which the industrial appeals judge affirmed the orders of the Department dated
17 June 28, 2018, June 28, 2018, August 2, 2018, and August 2, 2018. The employer filed a response
18 to the Petition for Review on July 10, 2019.

19 **Evidentiary Rulings**

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21 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no
22 prejudicial error was committed. The rulings are affirmed.
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