Gerlach, David

MOTION TO DISMISS

Failure to make a prima facie case

A party making a motion to dismiss for failure to make a *prima facie* case is not required to rest before the motion can be considered on its merits and does not waive the right to present evidence in the event the motion is denied. **….*In re David Gerlach*, BIIA Dec., 85 2156 (1986)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DAVID GERLACH	**)**	**DOCKET NO. 85 2156**
	)	
CLAIM NO. S-329984	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, David Gerlach, by
Delay, Curran, Thompson and Pontarolo, P.S., per
J. Donald Curran

Employer, Plum Creek Timber Company, Inc., by
Rolland and O'Malley, per
Thomas O'Malley and Wayne L. Williams

Department of Labor and Industries, by
The Attorney General, per
Greg M. Kane, Assistant

This is an appeal filed by the self-insured employer on August 8, 1985 from an order of the Department of Labor and Industries dated June 10, 1985 which adhered to the provisions of the Department order dated January 22, 1985, holding the claim open for authorized treatment and action as indicated. Appeal **DISMISSED**.

ISSUE

Whether the self-insured employer has established a prima facie case that the claimant was not in need of further treatment for his back condition related to his September 14, 1979 injury, as of June 10, 1985.

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 employer to a Proposed Decision and Order issued on May 28, 1986 in which the order of the Department dated June 10, 1985 was 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 correct several evidentiary and procedural errors.

With respect to the deposition of Dr. Mark Charles Olson, we make the following evidentiary rulings in addition to those set forth in the Proposed Decision and Order: The objection appearing

on page 57 at line 25 through page 58 at line 2 is sustained, and the answer appearing on page 58 at lines 3 through 4 is stricken. We note further that, while deposition exhibits 1 and 2 accompanied the deposition, they were not offered by either party and are not admitted to evidence.

The Proposed Decision and Order incorrectly held the appellant to the burden of overcoming a purported statutory presumption that the Department order is prima facie correct on an appeal to this Board. There is no such statutory presumption; to the contrary, "the ruling of the supervisor is before the . . . board, but it is not evidence and there is no presumption that it is correct." Olympia Brewing Company v. Department of Labor and Industries, 34 Wn. 2d 498, 506 (1949); Jussila v. Department of Labor and Industries, 59 Wn. 2d 772, 779-780 (1962). In the absence of any such statutory presumption, the employer's initial burden was limited to "the burden of proceeding with the evidence to establish a prima facie case for the relief sought" in its appeal. RCW 51.52.050.

The relief sought in the employer's Notice of Appeal is closure of the claim on the grounds that the order of June 10, 1985 is incorrect "in that there is no curative treatment available to this claimant for conditions causally related to this industrial injury." Thus, to succeed, the employer was required to present a prima facie case that the claimant was not in need of further curative treatment on or about June 10, 1985, the date of the order appealed from.

It should be noted that, in its Petition for Review, the employer initially contends that the issue on appeal is the claimant's need for treatment as of December 21, 1983, not June 10, 1985. However, the Petition for Review later states:

> In short, there is no medical evidence on a more probable than not basis, that any treatment was necessary or would have benefited the claimant during the period from December 21, 1983 through June 10, 1985."

When discussing the probative value of Dr. Mark Olson testimony, the employer later seems to concede that the Department "last considered" the claim in June of 1985.[1] To allay any possible misconception on this question, we find that it is claimant's condition on or about June 10, 1985, the date of the order appealed from, not as of December 21, 1983, the date of the initial order directing

[1] The procedural backdrop against which the confusion arises is as follows: On December 21, 1983 the Department issued an order stating that the claim would remain open for treatment; on March 6, 1984 the Department issued an order adhering to the provisions of the December21, 1983 order; on January 22, 1985 the Department issued an order adhering to the provisions of the March 6, 1984 order; and on June 10, 1985 the Department issued an order adhering to the provisions of the Department order dated January 22, 1985.

that the claim should remain open for further treatment, which is at issue here. See Turner v. Department of Labor and Industries, 41 Wn. 2d. 739 (1953).

Before reaching the question of whether the employer has established a prima facie case, it is necessary to clarify one further matter, i.e., precisely what evidence is before us. More particularly, is Dr. Olson's testimony regarding other doctors' opinions admissible as substantive evidence to establish the truth of the matters asserted? According to the Proposed Decision and Order, "Dr. Olson's testimony established that the Spokane Panel had concluded that the claimant's pre-existing spinal stenosis was affected by his industrial injury." (Emphasis added) While Dr. Olson's testimony as to other non-testifying doctors' opinions may be admissible under ER 703, these opinions are not admitted as substantive evidence to establish the truth of the matters asserted. They are only admitted to show what Dr. Olson considered in arriving at his own opinions and cannot be considered as independent evidence to rebut Dr. Olson's opinions. Thus, in determining whether the employer has made a prima facie case, we are limited to the claimant's testimony and Dr. Olson's opinions.

Dr. Olson last examined Mr. Gerlach on December 17, 1985 and diagnosed a chronic pain syndrome which, in his words, "has to be" causally related to the industrial injury. He recommended inpatient pain clinic evaluation and treatment for that condition. In its Petition for Review, the employer challenges the probative value of this testimony because it "was offered nearly a year after the Department had last considered Mr. Gerlach's condition and, therefore, had no bearing on the Department's order."

Claimant's counsel prevented Dr. Olson from specifically answering the question of whether claimant needed treatment as of June 10, 1985, but Dr. Olson testified that claimant's condition remained fairly stable from September 23, 1980 through December 17, 1985. He had previously examined the claimant on September 23, 1980 and January 19, 1982. Furthermore, according to Dr. Olson, a chronic pain syndrome exists over a period of several years by its very definition. Therefore, Dr. Olson's opinion regarding claimant's need for pain clinic treatment when he examined him on December 17, 1985 must be seen to apply equally to the date of the order on appeal, June 10, 1985.

In addition, the appellant cannot have it both ways. If Dr. Olson's testimony is not sufficiently related to June 10, 1985, for purposes of establishing that the claimant did need treatment as of that date, then it is also not sufficiently related to June 10, 1985 for purposes of establishing that the

claimant did not need treatment as of that date. Either way, the evidence presented by the employer has failed to make a prima facie case for the relief sought, i.e., closure of the claim as of June 10, 1985.

At the close of the employer's case, the claimant moved for summary judgment or, in the alternative, to dismiss for failure to make a prima facie case. Because we find that the employer has indeed failed to establish a prima facie case, that motion must be granted and the employer's appeal dismissed.

With respect to the claimant's motion at the conclusion of the employer's case, one further matter requires our attention. That motion was denied by the Industrial Appeals Judge for the reason that "once a hearing is commenced, the Industrial Appeals Judge does not have authority to grant a summary judgment." The claimant then moved for interlocutory review, stressing that the motion should be considered in the alternative as a motion to dismiss for failure to make a prima facie case. The Chief Industrial Appeals Judge affirmed the Industrial Appeals Judge's denial of claimant's motion. In so doing, he indicated that the movant was required to rest before a motion for summary judgment or a motion to dismiss would be considered on its merits. As a result, the claimant and the Department did then rest, contending again that the employer had failed to make a prima facie case.

While it does not affect the outcome in this case, we wish to make it clear that a movant is not required to rest before a motion to dismiss will be considered on its merits. CR 41(b)(3), made applicable to the Board by WAC 263-12-125, explicitly states:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law, the plaintiff has shown no right to relief." (emphasis added)

Thus, while CR 41 would of course permit an Industrial Appeals Judge to "decline to render any judgment until the close of all the evidence", a movant need not be required to rest on his motion.

One final matter. On its face, Finding of Fact No. 1 raises a possible jurisdictional problem. According to that finding, the employer's protest from the December 21, 1983 Department order was not filed until February 21, 1984. Pursuant to RCW 51.52.050, the employer had 60 days from communication of that order to file its protest. There is no evidence as to when that order was communicated to the employer or when the protest was mailed to the Department. However, we

take official notice of the fact that the 60th day from December 21,1983 fell on February 19, 1984, a Sunday. Monday, the 20th, was a legal holiday. Pursuant to WAC 296-08-070, the employer had at least until February 21, 1984 to file its Protest and Request for Reconsideration with the Department. Since the protest was received at the Department on that date, it was timely filed.

FINDINGS OF FACT

1. On October 25, 1979, the claimant filed an accident report with the Department of Labor and Industries alleging an industrial injury on September 14, 1979 while in the course of employment with Arden Lumber Company, aka Plum Creek Timber Company. On June 9, 1980, an order was issued allowing the claim. On December 22, 1980, the Department issued an order closing the claim with time-loss compensation aspaid through December 21, 1980 and an award for permanent partial disability equal to 5% as compared to total bodily impairment, paid at 75% of the monetary value thereof. On January 15, 1981, the claimant filed a protest and request for reconsideration. On March 18, 1981, the Department issued an order placing the December 22, 1980 order in abeyance. On December 21, 1983, the Department issued an order modifying the December 22, 1980 order from final to interlocutory and directing that the claim should remain open for authorized treatment.

   On February 21, 1984, the employer filed a protest and request for reconsideration. On March 6, 1984, the Department issued an order adhering to the provisions of the December 21, 1983 order. On May 4, 1984 the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On May 23, 1984 the Department issued an order reassuming jurisdiction and placing the March 6, 1984 order in abeyance. On May 23, 1984 the Board issued an order returning the case to the Department for further administrative action. On January 22, 1985, the Department issued an order adhering to the provisions of the March 6, 1984 order.

   On March 20, 1985, the employer filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On April 8, 1985, the Department issued an order reassuming jurisdiction and placing the January 22, 1985 order in abeyance. On April 10, 1985, the Board issued an order returning the case to the Department for further administrative action. On June 10, 1985, the Department issued an order adhering to the provisions of the January 22, 1985 order. On August 8, 1985, the employer filed a notice of appeal with the Board. On August 23, 1985, the Board issued an order granting the appeal, assigning it Docket No. 85 2156, and directing that further proceedings be held in the matter.

2. On September 14, 1979, while in the course of employment with the Arden Lumber Company, aka Plum Creek Timber Company, the claimant was climbing on a pile of lumber on a conveyor belt in an attempt to release a jam on the belt when he fell off the side onto his back.

3. As of June 10, 1985, the claimant's back condition causally related to his industrial injury of September 14, 1979 was not fixed and required further curative treatment to make him more functional and less disabled.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this appeal.

2. As of June 10, 1985 claimant was entitled to further treatment within the meaning of Chapter 51.36 RCW for his condition causally related to the industrial injury of September 14, 1979.

3. Appellant has failed to make a prima facie case showing that the claimant was not in need of further treatment for his condition causally related to the industrial injury of September 14, 1979, as of June 10, 1985.

4. The appeal filed by the self-insured employer on August 8, 1985 from the Department order dated June 10, 1985, adhering to the provisions of the Department order dated January 22, 1985, which held the claim open for authorized treatment and action as indicated, should be dismissed for failure to establish a prima facie case pursuant to RCW 51.52.050.

It is so ORDERED.

Dated this 29th day of December, 1986.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/S/_____
GARY B. WIGGS Chairperson

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

/S/_____
PHILLIP T. BORK Member