Guttromson, Christine

BURDEN OF PROOF

Employer appeal

In an employer appeal, the employer must first present evidence sufficient to make a prima facie case. The burden then shifts to the worker to establish her entitlement to benefits by a preponderance of the evidence. **….*In re Christine Guttromson*, BIIA Dec., 55,804 (1981)** [*Editor's Note*: The language in the order erroneously refers to the burden shifting to the claimant when the claimant chose to present evidence. To the extent it is inconsistent, *Guttromson* was overruled by *In Re Kathleen Stevenson*, BIIA Dec., 11 13592 (2012).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CHRISTINE GUTTROMSON	)	**DOCKET NO. 55,804**
	)	
CLAIM NO. S-156077	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Christine Guttromson
Richter, Wimberley & Ericson, per
Daniel P. Harbaugh

Employer, Sears, Roebuck & Company
Lee, Smart, Cook, Biehl & Martin, per
Michael A. Patterson

This is an appeal filed by the employer on November 30, 1979, from an order of the Department of Labor and Industries dated October 3, 1979, which set aside and held for naught the Department's order of October 16, 1978, and directed that the claim be reopened effective July 29, 1978 for authorized treatment and action as indicated. **REVERSED AND REMANDED**.

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 by a hearings examiner for this Board on September 25, 1980, in which the order of the Department dated October 3, 1979 was sustained.

The issue before this Board is whether or not the claimant's condition attributable to her industrial injury of December 26, 1974 was aggravated or became worse between March 16, 1978 and October 3, 1979. Critical to the resolution of this issue is the determination of which party is charged with the burden of proving or disproving the correctness of the Department's order of October 3, 1979. Under the provisions of RCW 51.52.050 the appellant is charged with the burden of proceeding with the evidence to establish a prima facie case for the relief sought by the appeal. Pursuant to the statute cited above, the Board has adopted WAC 263-12-115(2)(a) and (c). It is clear in this instance that the employer as the appealing party is initially charged with the burden of proceeding with the evidence and establishing a prima facie case.

In attempting to meet its burden of going forward with the evidence the employer presented the testimony of its personnel manager, Velma Jeanes, and two medical witnesses, Drs. Richard D. Howland and Patrick S. Lynch. If 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. Olympia Brewing Co v. Department of Labor and Industries, 34 Wn. 2d 498 (1949).

By reason of the claimant's election to present testimony in this matter, the question to be answered by the Board then becomes the same as that presented by any other appeal involving aggravation of condition: Has the claimant established by a comparison of objective findings made close to the terminal dates that her condition related to the industrial injury of December 26, 1974 became worse or was aggravated between March 16, 1978 and October 3, 1979. Under Olympia Brewing the claimant has the burden of establishing this by a preponderance of the evidence. The only testimony presented of a medical nature which would establish that the claimant's condition became worse or became aggravated during the relevant period was that of Dr. Patrick Lynch, an eminently qualified neurosurgeon. Although Dr. Lynch is unequivocal in his opinion that the claimant's condition did become worse and necessitated further treatment, this opinion is not based upon a comparison of objective medical findings made close to the respective terminal dates. The claimant has failed to meet the burden imposed upon her in establishing aggravation of condition by Dinnis v. Department of Labor and Industries, 67 Wn. 2d 654 (1965) and Cline v. Department of Labor and Industries, 14 Wn. App. 340 (1975). She has not produced medical evidence based at least in part on objective findings that her condition attributable to the industrial injury was aggravated between the date on which the claim was closed and the date the Department entered the order appealed from by the employer.

The Board has reviewed the evidentiary rulings of the hearings examiner and with the exception of those relating to the deposition of Dr. Richard C. Howland, finds that no prejudicial error was committed and said rulings are hereby affirmed. The parties to this matter provided by a stipulation in the record that the depositions of Dr. Richard C. Howland and Dr. Patrick S. Lynch could be published without the necessity of a further hearing and said depositions are hereby published by being appended as a part of the record but not as exhibits. The objections of counsel raised in the depositions of Dr. Patrick S. Lynch and Dr. Richard C. Howland are overruled.

FINDINGS OF FACT

After a thorough review of the entire record made at the proceedings in this appeal, the Board finds as follows:

1. On January 23, 1975 an accident report was received by the Department of Labor and Industries alleging that the claimant had suffered an industrial injury on December 26, 1974, while employed by Sears, Roebuck & Company, a self-insured employer under the Industrial Insurance Act. The claim was accepted, medical treatment provided, time-loss compensation paid, and on June 23, 1977, the claim was closed by a Department order with payment of unspecified permanent partial disability award equal to 25% as compared to total bodily impairment. On June 29, 1977 claimant filed a protest and request for reconsideration referring to the Department's order of June 23, 1977, and on March 16, 1978, the Department issued an order adhering to its order of June 23, 1977.

2. On September 29, 1978 the claimant filed with the Department an application requesting that her claim be reopened for aggravation of condition. On October 16, 1978 the Department entered an order denying this application. On October 23, 1978 a protest and request for reconsideration referring to the Department's order of October 16, 1978 was filed and on January 9, 1979 the Department held its prior order in abeyance. On October 3, 1979 the Department issued an order setting aside and holding for naught its order of October 16, 1978, and reopening the claim effective July 29, 1978 for medical treatment and action as indicated. On November 30, 1979 the self-insured employer, Sears, Roebuck & company, filed a notice of appeal from the Department's order of October 3, 1979. On December 19, 1979 the Board issued an order granting the appeal and directing that hearings be held on the issues raised by the notice of appeal.

3. Claimant suffered an industrial injury to her low back on December 26, 1974, during the course of her employment with Sears, Roebuck & Company, as a result of lifting paper sacks.

4. As a result of the industrial injury of December 26, 1974, claimant suffers from low back conditions which are disabling.

5. Claimant's conditions attributable to the industrial injury of December 26, 1974 did not become worse and were not aggravated between March 16, 1978 and October 3, 1979.

CONCLUSIONS OF LAW

Having made the foregoing findings of fact, the Board now concludes as follows:

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

2. The Department's order of October 3, 1979 is incorrect, and this matter will be remanded to the Department of Labor and Industries with directions to enter an order denying the claimant's application to reopen her claim for aggravation of condition.

It is so ORDERED.

Dated this 7th day of April, 1981.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

/s/_____
AUGUST P. MARDESICH Member