

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 31, 2020

CLAIM NO. 201577381

DREMA JONES

PETITIONER

VS.

APPEAL FROM HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE

THE GYMBOREE CORPORATION AND
HON. DOUGLAS W. GOTT,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and VACANT, Members.

ALVEY, Chairman. Drema Jones (“Jones”) appeals from the Order issued October 16, 2019 by Hon. Douglas W. Gott, Chief Administrative Law Judge (“CALJ”). The CALJ denied Jones’ July 10, 2018 Motion to Reopen. No petition for reconsideration was filed from that order.

On appeal, Jones argues the CALJ erred in denying her Motion to Reopen. Jones argues the CALJ improperly determined she failed to make a *prima*

facie showing to reopen her claim. We determine the ALJ did not abuse his discretion in denying the motion to reopen, and affirm.

Jones filed a Form 101 on May 13, 2016, alleging she sustained a low back injury on May 30, 2015 while working for The Gymboree Corp. (“Gymboree”). At the time of the accident, Jones was an assistant manager for Gymboree at its location at Hamburg Place in Lexington, Kentucky. Gymboree accepted Jones’ claim, in part. It acknowledged she sustained a temporary injury, but denied the remainder of the claim in its entirety. The parties introduced evidence, which we will not review. At the Benefit Review Conference held October 12, 2016, the issues preserved for determination included benefits per KRS 342.730, work-relatedness/causation, average weekly wage, unpaid/contested medical bills, temporary total disability benefits, exclusion for prior active disability, and an unreimbursed hotel bill incurred for Jones’ attendance at a medical evaluation scheduled by Gymboree.

At the November 27, 2016 hearing, Jones testified that she had a pre-operative visit on December 5, 2016 for a scheduled lumbar surgery. She testified her personal health insurance was going to pay for the surgery. The surgery was performed on December 12, 2016. Jones testified she wanted to have the surgery before December 31, 2016 when her health insurance expired.

Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ Weatherby”) rendered his decision on January 27, 2017. He awarded Jones benefits based upon an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. In his decision, ALJ Weatherby referenced the fact that Jones was scheduled for surgery on

December 12, 2016. Jones did not file a motion to place the claim in abeyance, or to delay a decision until she underwent surgery. No petition for reconsideration was filed from the ALJ's decision.

On August 12, 2019, Jones filed a motion to reopen her claim alleging her condition had worsened since ALJ Weatherby's decision. She cited to the December 12, 2016 surgery.

The CALJ entered an order on October 16, 2019 denying the motion to reopen. The CALJ specifically stated as follows:

The basis for the increase in impairment is the surgery that occurred on December 12, 2016. Thus, Jones has not had a worsening of impairment since the ALJ's award on January 27, 2017. The motion is overruled.

The CALJ observes from the ALJ's Opinion that the prospect of surgery was part of the evidence, although there was no specific issue preserved or medical dispute pertaining to it. Dr. Hunt had recommended surgery. Dr. Jenkinson had said it was not reasonable or necessary. Hunt[sic] said she wanted the surgery. (p. 2) It was her choice to have the surgery after the Hearing and before the Opinion was issued (regardless of feeling compelled to have it when she did by extenuating circumstances, as her Reply suggests). Neither the intention to have surgery nor its occurrence were brought to the ALJ's attention before the Opinion was issued.

Jones did not file a petition for reconsideration from the CALJ's order.

We initially note the procedure for reopening a workers' compensation claim pursuant to KRS 342.125 is a two-step process. Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 216 (Ky. 2006). The first step is the *prima facie* motion requiring the moving party to provide sufficient information to demonstrate a substantial possibility of success prior to allowing the submission of evidence.

Stambaugh v. Cedar Creek Mining, 488 S.W.2d 681 (Ky. 1972). “*Prima facie* evidence” is evidence which “if unrebutted or unexplained is sufficient to maintain the proposition, and warrant the conclusion [in] support [of] which it has been introduced ... but it does not shift the general burden” Prudential Ins. Co. v. Tuggle’s Adm’r., 254 Ky. 814, 72 S.W.2d 440, 443 (1934).

The burden during the initial step is on the moving party and requires establishment of grounds for which the reopening is sought. Jude v. Cabbage, 251 S.W.2d 584 (Ky. 1952); W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (Ky. 1946). It is only after the moving party prevails in making a *prima facie* showing as to all essential elements of the grounds alleged for reopening that the adverse party is put to the expense of further litigation. Big Elk Creek Coal Co. v. Miller, 47 S.W.3d 330 (Ky. 2001). When an administrative law judge determines the movant failed to present a *prima facie* case for reopening, the decision is reviewed for an abuse of discretion. Harold Turner v. Bluegrass Tire Co., 331 S.W.3d 605, 610 (Ky. 2010). An abuse of discretion occurs when the decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. Id.; Commonwealth v. English, 993 S.W.2d 941, 945 (Ky. 1999).

In this instance, the CALJ determined Jones was precluded from reopening her claim to assert a worsening of her condition pursuant to KRS 342.125(1)(d). The ALJ noted the surgery which allegedly caused the worsening of her condition occurred prior to ALJ Weatherby rendering his decision. We note Jones did not attempt to delay entry of that decision despite the fact surgery was scheduled.

KRS 342.125(1)(d) states as follows:

(1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

(d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since date of the award or order.

We determine the CALJ did not err, nor did he abuse his discretion in finding Jones did not present a *prima facie* case for a worsening of her condition subsequent to ALJ Weatherby's January 27, 2017 decision. The surgery, which allegedly formed the basis for the worsening, occurred prior to the entry of that decision, not afterward. As such, we find no error in the CALJ's denial of the motion to reopen.

Accordingly, the October 16, 2019 order issued by Hon. Douglas W. Gott, Chief Administrative Law Judge, is hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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