Alaska Workers' Compensation Appeals Commission

Mack A. Parker, Appellant, vs. Safeway, Inc. and Safeway Stores, Inc., Appellees.	Final Decision Decision No. 144 December 28, 2010 AWCAC Appeal No. 09-030 AWCB Dec. No. 09-0177 AWCB Case No. 199300212

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 09-0177, issued at Anchorage on November 25, 2009, by southcentral panel members Deirdre D. Ford, Chair, Howard Hansen, Member for Labor, David Kester, Member for Industry.

Appearances: Mack A. Parker, self-represented appellant; Robert L. Griffin, Griffin & Smith, for appellees Safeway, Inc. and Safeway Stores, Inc.

Commission proceedings: Appeal filed December 28, 2009; briefing completed September 16, 2010; oral argument presented on October 21, 2010.

Commissioners: David Richards, Philip Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

The employee, appellant, Mack A. Parker (Parker), appeals a decision of the Alaska Workers' Compensation Board (board) denying him permanent partial impairment (PPI) benefits. The board concluded that Parker's 2005 back surgery that led to his PPI rating was due to Parker's pre-existing degenerative disk disease, rather than to a 1993 work injury. Parker contends the board erred because he had no pre-existing condition, as he had never suffered from back pain prior to the work injury.

The employer, appellees, Safeway, Inc. and Safeway Stores, Inc. (Safeway), asserts that substantial evidence supports the board's decision because all three doctors who considered causation agreed that Parker's 1993 work injury resulted in a temporary

aggravation of his pre-existing degenerative disk disease, which resolved within three to four weeks after the injury.

The parties' contentions require the commission to decide whether Parker properly attached the presumption of compensability to his claim and whether substantial evidence supports the board's decision. We conclude that Parker lacked necessary medical evidence on causation to attach the presumption, and that the opinions of the three doctors constitute relevant evidence a reasonable mind might accept as adequate to support the denial of PPI benefits. Therefore, we affirm the board's decision.

2. Factual background and proceedings.

Parker was injured on January 4, 1993, when a shoplifter attacked him while he was working for Safeway.[1] In addition to injuries to his arms, he was diagnosed with cervical and thoracic muscle strain.[2] Safeway paid temporary total disability (TTD) benefits from January 5, 1993, to February 11, 1993.[3]

Shortly after the work injury, on January 19, 1993, Dr. Barry Matthisen examined Parker for neck and low back pain.[4] A magnetic resonance imaging (MRI) study done on January 23, 1993, showed minimal degenerative change at L5-S1 with a slight circumferential intervertebral disk bulge.[5]

In June and July 1993, Dr. Christopher W. Horton examined Parker for complaints of neck and low back pain.[6] After reviewing Parker's January MRI, he concluded that Parker had pre-existing degenerative disk disease of the cervical and

---

[1] R. 0010. The original Report of Injury could not be located in the board's record.

[2] R. 0297.

[3] R. 0004.

[4] R. 0335.

[5] R. 0335, 0361.

[6] R. 0035-36.

lumbar spine aggravated by a sprain/strain as a result of the January 1993 work injury.[7] Dr. Horton concluded that Parker was medically stable three to four weeks after the January 1993 injury, and his "degenerative disc condition then returned to its pre-injury state."[8] He concluded that medical treatment that occurred later than three to four weeks after the sprain/strain was "required by his preexisting degenerative disc condition rather than the sprain/strain of January 4, 1993."[9]

Dr. Horton believed that Parker "was not accurately describing his current symptoms and physical capacities," but he referred him for electrodiagnostic (EMG) testing to exclude any organic basis for his complaints.[10] On August 10, 1993, Dr. J. Michael James stated that the EMG studies were "normal."[11] He found no evidence of peripheral entrapment of nerves, or radiculopathy in the upper left extremity or in the lower extremities.[12]

The medical records document numerous complaints of low back pain from 1995 to 1997, many noting that Parker suffered from degenerative disk disease.[13] Dr. Robert Fox found no evidence of any significant neurological change in February 1996.[14] No additional MRIs were done during this time period.

Finally, in June 2005, Dr. Abhay Sanan diagnosed Parker as suffering from classic S1 radiculopathy based on a review of a May 9, 2005, MRI that showed a "clear-cut L5-S1 disc herniation that compressed the left S1 nerve root."[15] On August 17, 2005, Dr. Sanan operated on Parker, finding a soft disk herniation compressing the S1 nerve

---

7 R. 0036.

8 R. 0037.

9 R. 0038.

10 R. 0036.

11 R. 0302-03.

12 R. 0303.

13 R. 0366, 0374, 0482, 0876-77, 0889.

14 R. 0305.

15 R. 0312-13.

root while performing a left L5-S1 microdiskectomy.[16] On July 18, 2006, Dr. Sanan rated Parker as having a 10% whole-person PPI.[17] However, after reviewing Parker's medical records from 1992 through 2007, Dr. Sanan concluded the need for the surgery that resulted in the PPI rating was not work-related:

> Mr. Parker's January 4, 1993 on-the-job injury was not a substantial factor in his low back condition which required surgical treatment . . . . I noted in my review of the medical records that in the time period between the 1993 injury and when I evaluated Mr. Parker in 2005, the records document physical altercations, a gunshot wound near the spine, a motor vehicle accident and involvement in high impact sports such as basketball. Any or all of these are likely contributors to his lumbar condition and could have caused the disc herniation I saw at the time I initially evaluated Mr. Parker.[18]

Additionally, Dr. Sanan stated that "the January 4, 1993 on-the-job injury was only a temporary aggravation of Mr. Parker's lumbar degenerative disc disease which resolved within 3-4 weeks post-injury."[19]

Dr. Matthisen, who treated Parker shortly after his work injuries, agreed with Dr. Horton's and Dr. Sanan's opinions.[20] After reviewing Parker's medical records since Dr. Matthisen's treatment in 1993, Dr. Matthisen stated, "Mr. Parker's work injury of January 1993, for which I briefly provided treatment, was not a substantial factor in his need for lumbar surgery on a frank herniation in 2005."[21]

On March 22, 2007, Parker filed a claim seeking PPI benefits as a result of Dr. Sanan's rating and travel reimbursement due to attending medical appointments in January 1993.[22] Safeway answered the claim on April 18, 2007, denying that any PPI or travel reimbursements were due based on Dr. Horton's affidavit and other

---

16 R. 0046, 0313.

17 R. 0043.

18 R. 0314.

19 *Id.*

20 *See* Oct. 7, 2009, Hr'g Tr. 39:6-22, R. 0336.

21 R. 0336.

22 R. 0059-60.

defenses.[23] The board heard the claim on October 7, 2009.[24] Parker argued that he had suffered from back pain ever since the January 1993 injury,[25] and, thus, his subsequent claims for PPI based on the 2005 surgery must be work-related.

The board applied the three-step presumption analysis to Parker's claim for PPI.[26] The board concluded that Parker failed to attach the presumption of compensability because he did not have medical evidence documenting that the PPI rating was related to his work injury.[27] However, the board assumed that even if Parker attached the presumption through his own testimony that he suffered permanent impairment after the 1993 work injury, Safeway nevertheless rebutted the presumption through the affidavits of Drs. Horton, Sanan, and Matthisen.[28]

Moreover, the board concluded that Parker could not prove his claim for PPI by a preponderance of the evidence because "the overwhelming evidence, is that he has no PPI from the work injury. . . . No doctor has indicated Employee has any PPI as a result of the work injury."[29]

Parker appeals.

3. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[30] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

---

[23] R. 0070-72.

[24] *See Mack A. Parker v. Safeway, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0177, 1 (Nov. 25, 2009) *(Parker).*

[25] *See* Oct. 7, 2009, Hr'g Tr. 53:6-9.

[26] *See Parker*, Bd. Dec. No. 09-0177 at 12-13.

[27] *Id*. at 12.

[28] *Id.*

[29] *Id.* at 13. The board also decided that Parker was entitled to be reimbursed for his mileage related to his medical treatment in January 1993. *Id*. at 13-14. This conclusion has not been appealed.

[30] *See* AS 23.30.128(b).

conclusion."[31] The question of whether the quantum of evidence is substantial is a question of law,[32] which the commission independently reviews.[33]

However, the commission "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the Board."[34] Thus, "even when conflicting evidence exists, we uphold the Board's decision if substantial evidence supports it."[35]

Whether Parker provided enough evidence to attach the presumption is also a legal question[36] that the commission independently reviews.[37]

4. Discussion.

a. Parker failed to attach the presumption of compensability to his PPI claim because he lacked medical evidence.

The Alaska Workers' Compensation Act presumes that an employee's claim is compensable.[38] For the presumption to attach, Parker first must establish a preliminary link between his disability and his employment by presenting "some evidence," beyond

---

[31] *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997)).

[32] *See McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

[33] *See* AS 23.30.128(b).

[34] *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (quoting *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003)). *See also* AS 23.30.122 (providing that the "board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions."); AS 23.30.128(b) (providing that the "board's findings regarding the credibility of testimony of a witness before the board are binding on the commission.").

[35] *Lindhag*, 123 P.3d at 952 (quoting *Bradbury v. Chugach Elec. Assoc.*, 71 P.3d 901, 905 (Alaska 2003)).

[36] *See Tinker v. Veco, Inc.*, 913 P.2d 488, 493 (Alaska 1996).

[37] *See* AS 23.30.128(b).

[38] *See* AS 23.30.120(a)(1).

merely filing a claim, that his PPI arose out of his employment.[39] After he demonstrates such a link, Safeway may rebut the presumption with substantial evidence that the disability is not work-related.[40] If Safeway does so, then the presumption drops out and Parker must prove his claim by a preponderance of the evidence.[41]

The board concluded that Parker did not raise the presumption because he had no medical evidence that his PPI was related to his 1993 work injury. We agree that Parker failed to attach the presumption. "[I]n claims based on highly technical medical considerations medical evidence is often necessary" to establish a preliminary link between disability and employment.[42] A claim for PPI based on the aggravation of a pre-existing condition is such a "highly technical claim."[43] In *Tinker v. Veco, Inc.*, the Alaska Supreme Court concluded that because there was no medical evidence indicating a 1990 ankle injury at work aggravated, accelerated, or combined with pre-existing diabetes, that ankle injury did not constitute "a substantial factor" in Tinker's need for a foot amputation in 1991, and that Tinker could not attach the presumption of compensability.[44] Similarly here, Parker presented no medical evidence that his 1993 work-related back injury, combined with his pre-existing degenerative disk disease, was a "substantial factor" in his need for back surgery in 2005. The only evidence Parker

---

[39] *See, e.g., DeYounge v. NANA/Marriott*, 1 P.3d 90, 96 (Alaska 2000); *Tinker*, 913 P.2d at 493.

[40] *See, e.g., Miller v. ITT Arctic Servs.*, 577 P.2d 1044, 1046 (Alaska 1978).

[41] *See, e.g., id.* at 1049.

[42] *Burgess Const. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981) (internal quotations omitted).

[43] *See Tinker*, 913 P.2d at 493.

[44] *Id.* at 493-94. *Carlson v. Doyon Universal-Ogden Services,* 995 P.2d 224, 227-28 (Alaska 2000) (concluding employee satisfied preliminary link despite lack of medical evidence because her testimony supported she suffered an injury at work and rehabilitation expert's testimony supported that her chances of returning to full-time work were very poor. The court noted that permanent total disability is based on more than medical considerations. Rather, it is based on whether "workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.")

presents is his own testimony that he believed the 1993 work injury was related to his 2005 surgery because his back problems started with the work injury.[45] Like the circumstances in *Tinker*, this lay testimony is insufficient to attach the presumption.

Parker argues that the board ignored the medical evidence documenting his work-related back injury in 1993 and his back surgery in 2005.[46] However, the parties do not dispute whether Parker injured his back at work in 1993 or whether his back required surgery in 2005. Rather, they disagree about whether the two events were connected; in other words, whether the 1993 back injury was a substantial factor in the need for the 2005 back surgery that resulted in a PPI rating. Thus, Parker needs medical evidence relevant to the causation dispute to attach the presumption and, ultimately, to prove his case. Because he does not provide medical evidence related to causation, he failed to attach the presumption of compensability.

b. Substantial evidence supports the board's decision that Parker cannot prove his claim for PPI by a preponderance of the evidence.

Even if we assume that Parker's testimony was sufficient to attach the presumption, the commission agrees with the board that Safeway nevertheless rebutted the presumption[47] with the three doctors' opinions that the 1993 work injury was not a substantial factor in the need for back surgery in 2005. Moreover, substantial evidence supports the conclusion that Parker was unable to prove his claim by a preponderance of the evidence.

Parker argues that his back condition was not pre-existing because he had no back problems prior to the 1993 work injury. Thus, he contends the doctors erroneously attributed his back problems to a pre-existing condition, rather than to a work injury. However, this argument confuses sequence with consequence:

---

[45] *See* October 7, 2009, Hr'g Tr. 53:6-9.

[46] Appellant's Br. 2-5.

[47] An employer may overcome the presumption: "through (1) affirmative evidence that the disability was not work-related, or (2) elimination of all reasonable possibilities that the injury was work connected." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) (citation omitted).

> The Supreme Court rejected use of this logical fallacy to support a finding that a causal relationship exists in complex medical cases when the presumption has been overcome. Once the employer overcomes the presumption of compensability, it is the employee's burden to prove his case by a preponderance of the evidence. When the key controversy centers on the medical evidence of causes of the employee's conditions, timing alone is not enough to satisfy this burden and establish causation of the disabling condition.[48]

The January 1993 MRI revealed that Parker was suffering from degenerative disk disease.[49] This condition pre-existed his work injury, although it was apparently not symptomatic and not diagnosed until the work injury. Thus, the record contradicts Parker's arguments about timing and, even if it did not, Parker cannot establish causation in his case based solely on the timing of the onset of his back pain. Finally, even if timing alone could establish causation for Parker's back problems, his argument asks the commission to choose his testimony over medical evidence that unanimously rejected that his 1993 work injury was a substantial factor in his need for back surgery in 2005. We cannot reweigh the evidence or determine witness credibility on review of a board decision.

Instead, the commission's role is to determine whether substantial evidence in the record as a whole[50] supports the board's denial of PPI. Even though Parker's degenerative disk disease was pre-existing, it can still be considered work-related – if the employment aggravates, accelerates, or combines with the condition such that the

---

[48] *Abonce v. Yardarm Knot Fisheries, LLC*, Alaska Workers' Comp. App. Comm'n Dec. No. 111, 13 (June 17, 2009) (citing *Lindhag*, 123 P.3d at 954 (concluding that the board could rely on a physician's opinion that even though the claimant was diagnosed with asthma after her workplace exposure to toxins, that exposure did not cause her asthma)). *See also Church v. Arctic Fire and Safety*, Alaska Workers' Comp. App. Comm'n Dec. No. 126, 23 (December 31, 2009) (rejecting employee's argument that his work injuries were a substantial factor in his need for thoracic surgery because he had no pain before the work injury because "[t]his sequence of events . . . is not enough by itself to prove causation.").

[49] R. 0335, 0361.

[50] *See* AS 23.30.128(b) (providing in part that "[t]he board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record.")

employment was "a substantial factor in bringing about the disability" for which compensation is sought.[51] However, Drs. Matthisen, Horton, and Sanan all concluded that the 1993 work injury temporarily aggravated his pre-existing degenerative disk disease, but was not a substantial factor in his need for back surgery in 2005, which resulted in the PPI rating. We conclude that the three doctors' opinions constitute evidence that a reasonable mind might accept as adequate to support the conclusion that the 2005 back surgery was not related to the 1993 work injury. All three doctors acknowledged basing their opinions on a review of all of Parker's medical records and their treatment of Parker.[52] The board could properly choose to rely on their opinions in deciding that the presumption was overcome and Parker failed to prove that his 2005 back surgery that resulted in a PPI rating was related to his 1993 work injury. Therefore, we affirm the board's decision.[53]

---

[51] *DeYounge*, 1 P.3d at 96. An amendment to AS 23.30.010(a) changed this test to require the employment, in relation to other causes, to be "the substantial cause" of the disability or need for medical treatment. This amendment does not apply to Parker's case because it went into effect on November 7, 2005.

[52] Parker also asserts that Dr. Horton's opinion should be rejected since Dr. Horton was "biased" against him because he had a relative who worked for Safeway. Reply Br. of Appellant 2. (He does not assert "bias" based on a protected status, such as racial or gender discrimination.) The board may have chosen to discredit Dr. Horton's opinion based on this argument, but it did not do so. When there are different but permissible ways of seeing the evidence, the commission cannot reweigh the evidence on appeal.

In a related argument, Parker contends that Safeway impermissibly conspired with the other two doctors so that their opinions would agree with Dr. Horton. Reply Br. of Appellant 2-3. This argument is without merit, as Safeway provided the doctors with all of Parker's medical records, not just the records that would support Safeway's position. Again, Parker's argument is an attempt to get the commission to reweigh the evidence, which we cannot do on appeal.

[53] Parker also argues in his statement of grounds on appeal that he wanted to have an attorney and was unable to find one. The board denied his request for a continuance at the start of the hearing. Oct. 7, 2009, Hr'g Tr. 11:18-22. The board had previously granted a continuance in April 2008 so that Parker could seek legal counsel, and Parker had contacted a number of attorneys without success. R. 0329, 1223. Because Parker does not argue this point in his brief, the issue is waived. *E.g., Wasserman v. Bartholomew*, 38 P.3d 1162, 1171 (Alaska 2002).

5. Conclusion.

Because Parker failed to attach the presumption of compensability and because the board relied on substantial evidence to conclude that Parker's 1993 work injury was not a substantial factor in his need for back surgery in 2005, which resulted in a PPI rating, we AFFIRM the board's denial of Parker's PPI claim.

Date: *28 December 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David Richards, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's denial of Parker's PPI claim. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days after this decision was distributed or mailed. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors, this is a full and correct copy of the Final Decision No. 144 issued in the matter of *Parker v. Safeway, Inc.,* AWCAC Appeal No. 09-030, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 28, 2010.

Date: *January 4, 2011*

Signed

B. Ward, Appeals Commission Clerk