

Alaska Workers' Compensation Appeals Commission

Silvia V. Tobar,
Appellant,

vs.

Remington Holdings, LP and Liberty
Insurance Corporation,
Appellees.

Final Decision

Decision No. 244 February 21, 2018

AWCAC Appeal No. 17-013
AWCB Decision No. 17-0081
AWCB Case No. 201320570

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 17-0081, issued at Anchorage, Alaska, on July 18, 2017, by southcentral panel members Harry Tashjian, Chair, and Rick Traini, Member for Labor.

Appearances: Silvia V. Tobar, self-represented appellant; Rebecca Holdiman Miller, Holmes Weddle & Barcott, PC, for appellees, Remington Holdings, LP and Liberty Insurance Corporation.

Commission proceedings: Appeal filed August 15, 2017; briefing completed January 2, 2018; oral argument held on February 7, 2018.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Silvia V. Tobar (Ms. Tobar) sustained an injury on July 29, 2013, while working for Remington Holdings, LP, insured by Liberty Insurance Corporation (Remington). Ms. Tobar subsequently filed a Workers' Compensation Claim (WCC) with the Alaska Workers' Compensation Board (Board) on February 27, 2015, seeking ongoing time loss and medical benefits. The Board heard her claim on June 6, 2017, and denied all benefits.¹ Ms. Tobar timely appealed this denial and the Alaska Workers' Compensation Appeals Commission (Commission) heard oral argument on February 7, 2018. The

¹ *Tobar v. Remington Holdings, LP and Liberty Insurance Corporation*, Alaska Workers' Comp. Bd. Dec. No. 17-0081 at 12 (July 18, 2017) (*Tobar*).

Commission now affirms the Board's decision and order because the findings of the Board are supported by substantial evidence.

2. *Factual background and proceedings.*²

On July 29, 2013, Ms. Tobar was lifting laundry at work when she suffered an injury to her lumbar spine, causing significant back pain.³ Ms. Tobar was taken by ambulance to Alaska Regional Hospital, where she was examined, given a magnetic resonance imaging (MRI) scan, and discharged with prescriptions for Vicodin and Flexeril and instructions to avoid work for three days. Her MRI showed disc degeneration at L1-2, L2-3, and L4-5, with no definite interspace narrowing, right facet degeneration at L5-S1, and a 2 mm symmetric posterior disc protrusion at L1-L2. The MRI also showed a small left posterolateral L2-L3 disc herniation with nuclear extrusion, small disc protrusions at L1-L2 and L4-L5, and right facet degenerative changes at L5-S1, without neural impingement or canal stenosis.⁴

ANP-C Shawna H. Wilson examined Ms. Tobar on August 8, 2013, and diagnosed low back pain due to a herniated disc with extrusion at L2-3, and protrusion and annular tear at L4-5. ANP-C Wilson prescribed medications for her pain and physical therapy for pain and lumbar stabilization, and restricted Ms. Tobar from all work for one month.⁵

Between August 8, 2013, and February 28, 2014, Ms. Tobar attended physical therapy periodically and received a left 2-3 translaminar epidural steroid injection. Ms. Tobar was not working during this period, due to medical work restrictions and the unavailability of light-duty work with Remington. On October 23, 2013, Ms. Tobar was released to light-duty work but was told no light-duty work was available. On January 29, 2014, Ms. Tobar noted she was taking her medication only intermittently and had not been attending physical therapy, despite reporting increased back pain. Ms. Tobar was

² We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

³ *Tobar* at 2, No. 1.

⁴ *Id.*, No. 2.

⁵ *Id.*, No. 3.

restricted from all work for one month on January 29, 2014, and again on February 28, 2014. By February 28, 2014, Ms. Tobar showed improvement in pain level, though she still had difficulty with functional status. ANP-C Wilson ordered an additional epidural injection due to the benefit of the previous injection.⁶

On March 20, 2014, Ms. Tobar attended an Employer's Medication Examination (EME) with Scot A. Youngblood, M.D., along with a Spanish language interpreter. Dr. Youngblood diagnosed an "extremely low energy lumbar strain, substantially caused by the alleged industrial injury of July 29, 2013, long ago resolved and medically stable," as well as preexisting and age-related lumbar degenerative disc disease, not substantially caused or aggravated by the work injury, and with no evidence of radiculopathy or myelopathy. He opined Ms. Tobar demonstrated pain behaviors and symptom magnification during the examination, and he found no objective cause for her pain levels. Dr. Youngblood stated the work injury likely should have resolved within two weeks and she would have been medically stable two weeks after the strain due to the low-level cause of the injury (lifting some sheets). He added Ms. Tobar was not disabled, could return to work without limitation, and had no permanent partial impairment (PPI) related to the work injury. The estimated date of medical stability was August 12, 2013. He later explained in deposition that since the disc herniation was minor and did not contact the nerve root, the herniation would have caused pain for only an initial inflammation period of a few months, but he could not tell whether the herniation was in fact caused by the work injury.⁷

On March 25, 2014, Remington controverted benefits, based on Dr. Youngblood's report.⁸

On April 3, 2014, ANP-C Wilson released Ms. Tobar to full or part-time work with lifting limitations of 20 pounds occasionally and 10 pounds frequently, and with limitations

⁶ *Tobar* at 3, No. 4.

⁷ *Id.*, No. 5.

⁸ *Id.* at 4, No. 6.

on prolonged standing, walking, bending, or squatting. ANP-C Wilson noted that Ms. Tobar “must attend physical therapy.”⁹

There is a two-year gap in the medical records for the work injury following the controversion, from April 3, 2014, to February 15, 2016. Ms. Tobar underwent another MRI exam, this one with Gerald York, M.D., on February 15, 2016. The MRI showed degenerative disc and joint changes at L1-2, L2-3, and L4-5, and a disc herniation of the extrusion type at L2-3, with an extraforaminal disc herniation at L2-3 on the left.¹⁰

On September 22, 2016, Ms. Tobar aggravated her back pain while walking up some stairs. Ms. Tobar underwent another MRI exam, also interpreted by Dr. York, which showed no significant worsening of disc herniations at L1-2 and L2-3 levels, and no significant increased stenosis of the spinal canal or neural foramina.¹¹

Kimberly Hand, PA-C, saw Ms. Tobar on October 4, 2016, and noted Ms. Tobar’s disc herniation at L2-3, which appeared to contact the traversing left L3 nerve root. However, PA-C Hand stated Ms. Tobar’s symptoms were not consistent with that analysis, and she recommended conservative treatment with further evaluation for nonsurgical management of Ms. Tobar’s pain. She further stated she agreed with Dr. Kathryn Turner and Ms. Tobar’s physical therapist in recommending psychological counseling.¹²

On January 31, 2017, Ms. Tobar again saw PA-C Hand, who interpreted x-rays from the same visit as showing cervical spondylosis, with good disc heights maintained. She recommended an epidural steroid injection, physical therapy, massage therapy, and further consideration of surgical options, depending on the outcome of recommended treatment. PA-C Hand noted that Ms. Tobar had degenerative changes in her neck, but it did not account for all of her back and left proximal lower extremity pain. She also noted multilevel degenerative changes of the lumbar spine, including the L2-3 disc herniation contacting the left L3 nerve root, but stated Ms. Tobar’s symptoms did not

⁹ *Tobar* at 4, No. 7.

¹⁰ *Id.*, No. 9.

¹¹ *Id.*, No. 10.

¹² *Id.*, No. 11.

correlate with that. PA-C Hand, therefore, did not recommend microdiscectomy surgery at the time, although the question might be revisited after the epidural steroid injection results were apparent. Ms. Tobar stated at this examination that her lumbar spine symptoms had not changed in the previous three years.¹³

On April 4, 2017, PA-C Hand, in response to inquiry from Remington, stated that some but not all of Ms. Tobar's symptoms correlated with the MRI findings. She further stated Ms. Tobar's symptoms had remained the same without any improvement for over 45 days, surgery was not recommended, and a functional capacity evaluation could be appropriate if pain management treatment with Jared Kirkham, M.D., failed to provide relief.¹⁴

Dr. Kirkham saw Ms. Tobar on April 17, 2017, and stated the cause of her lumbar spine pain was somewhat unclear, though it "may be myofascial . . . and certainly perpetuated by [her] chronic pain syndrome, central pain hypersensitivity, and kinesiophobia." Dr. Kirkham noted her symptoms had persisted since the work injury despite injections, medication trials, physical therapy, and time off work. He further noted Ms. Tobar's spine was "actually quite good," and did not merit surgery or other interventional procedures. He stated Ms. Tobar should not have limitations at work, but should return to full-time, full-duty as she tolerates it. Dr. Kirkham further opined that treating Ms. Tobar's depression would be very helpful in improving her chronic spine pain.¹⁵

Ms. Tobar has received psychological counseling that appeared to reduce her pain; however, she terminated counseling on March 20, 2017, because she felt she had improved.¹⁶

Ms. Tobar has not worked since the injury.¹⁷

¹³ *Tobar* at 4–5, No. 12.

¹⁴ *Id.* at 5, No. 13.

¹⁵ *Id.*, No. 14.

¹⁶ *Id.*, No. 16.

¹⁷ *Id.*, No. 15.

The Board found Ms. Tobar's statements at hearing and deposition were mainly concerned with her subjective experience in the course of the injury. The Board found her credible with regard to subjective descriptions of her pain and the events and circumstances of her injury.¹⁸

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in the light of the record as a whole.¹⁹ Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.²⁰ "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."²¹ The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.²² The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.²³

On questions of law and procedure, the Commission does not defer to the Board's conclusions but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."²⁴

¹⁸ *Tobar* at 5, No. 18.

¹⁹ AS 23.30.128(b).

²⁰ *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

²¹ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

²² AS 23.30.128(b).

²³ AS 23.30.122.

²⁴ AS 23.30.128(b).

4. Discussion.

The question before the Commission is whether the Board properly denied Ms. Tobar's claim for time loss and medical benefits. In order to prevail before the Board, Ms. Tobar first needed to provide some link between her 2013 work injury and her need for time loss and medical benefits.²⁵ The injured worker must produce a modicum of evidence establishing the link between the work injury and any ongoing disability.²⁶ The Board found that Ms. Tobar established the link by her testimony that, although released to light duty work, Remington did not have such work available for her. She also asserted her pain levels and other symptoms remain the same as they were following the work injury.

While it is generally necessary to have some medical evidence to establish the preliminary link, the Alaska Supreme Court has held the amount of evidence needed is minimal and if the medical issue is not complicated, lay testimony such as Ms. Tobar's testimony may be enough to establish the link.²⁷ The Board found Ms. Tobar credible in her assertions of ongoing back pain since the injury and accepted her testimony as sufficient to attach the presumption of compensability. The Board's finding of credibility is binding on the Commission and supports the Board's conclusion that Ms. Tobar made the necessary link to establish the presumption of compensability.

Once Ms. Tobar established the necessary link between her work injury in 2013 and her request for ongoing medical and time loss benefits, Remington had to rebut the presumption with substantial evidence that her work injury is not the substantial cause of any need Ms. Tobar may have for medical treatment or her inability to work.²⁸ An

²⁵ *Vetter v. Alaska Workmen's Comp. Bd.*, 524 P.2d 264, 266 (Alaska 1974).

²⁶ See, e.g., *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991).

²⁷ See, e.g., *Beauchamp v. Employers Liability Ins. Corp.*, 477 P.2d 993 (Alaska 1970); *Employer's Commercial Union Co. v. Libor*, 536 P.2d 129 (Alaska 1985).

²⁸ AS 23.30.120; AS 23.30.010(a); *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 919 (Alaska 2016).

employer is able to rebut the presumption with an expert's opinion that work is not the substantial cause of the disability.²⁹

Remington rebutted the presumption with the report of Dr. Youngblood who examined Ms. Tobar on March 20, 2014. At the time of his examination, Dr. Youngblood opined that her work injury had resolved and she was medically stable. He further stated her preexisting and age-related lumbar degenerative disc disease was neither caused by nor aggravated by the work injury. Dr. Youngblood also stated he found no objective cause for her pain levels, and added she could return to work without limitation. He also stated she had no PPI. The disc herniation was minor and did not impinge on the nerve root, which meant it would have caused pain for the initial period of inflammation, or for only a few months. His reports are sufficient evidence to rebut the presumption because it is evidence by an expert that the work injury is not the substantial cause of Ms. Tobar's ongoing pain complaints.

Once Remington rebutted the presumption of compensability, Ms. Tobar had the burden to prove her claim by a preponderance of the evidence. She is unable to meet this burden because the medical evidence to date demonstrates that the work injury resolved without the need for ongoing medical treatment. Moreover, the evidence is that she has been medically stable for some time. Medical stability is defined by the Alaska Workers' Compensation Act as "the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional . . . treatment" ³⁰

Furthermore, medical stability is presumed when there is no objectively measurable improvement for a period of 45 days.³¹ This presumption may only be overcome by clear and convincing evidence.³²

²⁹ *Bradbury v. Chugach Elec. Ass'n*, 71 P.3d 901, 906 (Alaska 2003).

³⁰ AS 23.30.395(28).

³¹ AS 23.30.395(28).

³² *Id.*

Ms. Tobar needed clear and convincing evidence to support her claim for ongoing temporary time loss benefits, but she was unable to produce this evidence. After Ms. Tobar saw Dr. Youngblood in March 2014, she returned to see ANP-C Wilson who released her to return to work with a lifting limitation and referred her for physical therapy. Ms. Tobar did not seek medical treatment, including physical therapy for the next two years. This absence of medical treatment supports the presumption that Ms. Tobar is medically stable and, thus, she is not entitled to any temporary time loss benefit. The finding of medical stability is further supported by Ms. Tobar's statements to PA-C Hand in January 2017 that her lumbar spine symptoms had not changed in the last three years. PA-C Hand, in April 2017, expressly stated Ms. Tobar had not improved for over 45 days.

As for ongoing medical treatment, the evidence in the record does not support a claim for further medical treatment. PA-C Hand, in April 2017, expressly stated Ms. Tobar was not a candidate for surgery. Moreover, Dr. Kirkham who saw Ms. Tobar on April 17, 2017, stated her back was "actually quite good" and she was not a candidate for surgery or other interventional procedures. Dr. Kirkham also placed no limitations on Ms. Tobar returning to work. He did recommend treatment for her depression.

Dr. Youngblood also stated she had no PPI as a result of the 2013 injury. No other doctor indicated Ms. Tobar had any PPI from the 2013 injury, so there is no basis for awarding her any PPI benefit.

Further, Ms. Tobar has been unable to provide the Board with any medical testimony showing a need for medical treatment as a result of the 2013 work injury. Ms. Tobar, both at oral argument and in her brief, was unable to point to any particular medical evidence the Board failed to consider or the Board misunderstood. The MRI in July 2013 showed degenerative disc disease without any neural impingement. Subsequent MRIs likewise showed degenerative disc disease. Dr. Youngblood attributed the disc degeneration to age and it was not caused by the lifting incident at work. Dr. Kirkham likewise was unable to relate her back pain to her work, except noting it arose around the time of the work incident and had persisted unchanged regardless of

treatment options and time off work. He did not recommend any additional treatment except for treatment for her depression which is longstanding.

The Board's decision is affirmed because it is supported by substantial evidence in the record as a whole. This finding does not mean that Ms. Tobar is not in pain. It does mean that she has been unable to prove her claim by a preponderance of the evidence at this time. Ms. Tobar believes her current pain, in both her lumbar and cervical spine, is the direct consequence of the work incident in 2013, which occurred after lifting heavy bed linens. However, the medical evidence before the Board at this time does not support her claim. If, in the future, a doctor indicates she needs medical treatment for which the 2013 work injury is the substantial cause, then she is entitled to file a new claim with the Board.

5. Conclusion.

The Commission AFFIRMS the Board's decision that Ms. Tobar is not entitled to the benefits sought in her February 27, 2015, workers' compensation claim.

Date: 21 February 2018

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 244 issued in the matter of *Silvia V. Tobar vs. Remington Holdings, LP and Liberty Insurance Corporation*, AWCAC Appeal No. 17-013, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on February 21, 2018.

Date: February 23, 2018



Signed

K. Morrison, Appeals Commission Clerk