

Case: *Kevin J. DeNino vs. Yukon Flats School District and Alaska Public Entity Insurance*, Alaska Workers' Comp. App. Comm'n Dec. No. 072 (February 27, 2008)

Facts: Kevin DeNino taught for the Yukon Flats School District in Fort Yukon for one school year, 2001-02. He rented a one-room log cabin to live in; the school district paid the rent. The cabin had an oil-fueled monitor for heat, a propane stove and oven and a propane hot water heater. During winter break, he turned off the propane to his appliances and went to California. Upon his return in January, he testified that he collapsed when he entered the cabin, and repeatedly regained consciousness only to collapse again. He was too disoriented to walk and eventually crawled out of the cabin after sleeping about an hour. He testified that over the next four months, he suffered a "flu" he could not shake and pounding headaches and his respiratory problems seemed to worsen, but that he always seemed to recover if he was outside the cabin. He also suffered more episodes of losing consciousness. He was concerned that he was suffering from carbon monoxide poisoning and began to air out his cabin, but still had headaches and flu symptoms. He then discovered he was out of propane and his oven had a heavy soot buildup. He repaired a crack in the propane line and a district worker adjusted the regulator on the oven pilot. DeNino submitted an injury report in April 2002, asserting carbon monoxide poisoning from the oven or stove. The school district controverted, claiming the injury was not timely reported and not related to his employment. DeNino ascribed a number of different symptoms to chronic carbon monoxide poisoning, including attention deficit disorder, inability to multitask, loss of memory, diarrhea, muscle aches and joint pain, headaches, gagging, fatigue, emotional mood swings, and incoherence, dizziness or disorientation.

In June 2002, he had a blood test that showed his COHB was within normal limits, suggesting he was not suffering from an acute poisoning as of that date. His attending physician, Dr. Diller, referred him to Dr. Lloyd who concluded that "while psychological factors are certainly prominent in this case and are likely contributing to Mr. DeNino's current cognitive inefficiency, other factors also appear to be influencing the current pattern of results. . . . [I]t appears that the current results [cognitive functioning issues] could be due, at least in part, to carbon monoxide exposure." DeNino attended employer medical evaluations. These evaluators concluded that any exposure to carbon monoxide, assuming it occurred, was not the cause for any of DeNino's conditions. DeNino then requested Laura Dahmer-White, Ph.D., a clinical neuropsychologist, to provide a report comparing Dr. Lloyd's report and one of the employer's medical reports. After reviewing the reports, Dr. Lloyd's raw testing scores, and the employer medical evaluator's raw data, she concurred with the employer medical evaluator's opinion.

The parties agreed to a second independent medical evaluation (SIME) with Dr. Early, a psychiatrist, and Dr. Martin, a medical toxicologist, conducted in March 2005. Dr. Martin reported that he could "say with confidence that it is more likely than not that Mr. DeNino's symptoms **did not result** from a toxic exposure in his residential cabin in January 2002 or in the intervening months until May 2002." He believed that DeNino's "numerous symptoms . . . are more likely than not due to a behavioral

problem such as malingering or psychiatric problem such as somatoform disorder, depression or anxiety disorder.” Dr. Early agreed that it was more probable than not that DeNino did not experience any form of carbon monoxide or other toxic fume exposure. He believed that it was much more likely that an anxiety related tachycardia caused him to faint.

After applying the presumption of compensability, the board denied DeNino’s claims because he failed to prove that carbon monoxide poisoning caused his condition. DeNino appealed, arguing that (1) the board should have excluded certain doctors’ reports because they were impermissible character evidence; (2) the employer failed to rebut the presumption because the medical reports were conflicting and any doubts should have been resolved in his favor; and (3) the reports were not based on sound evidence.

Applicable law: Alaska Evidence Rule 404 on character.

Presumption analysis, AS 23.30.120(a). First, the employee must establish the preliminary link between his employment and his alleged injury. Once the employee establishes that link, it is the employer’s burden to overcome the presumption of compensability by coming forward with substantial evidence that the injury was not work related. The employer can rebut the presumption with substantial evidence that either (1) provides an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the injury [or need for treatment]; or (2) directly eliminates any reasonable possibility that employment was a factor in causing the injury [or need for treatment]. If the employer meets this burden then the presumption disappears and the employee must prove the claim by a preponderance of the evidence. E.g., *Bradbury v. Chugach Elec. Ass’n*, 71 P.3d 901, 905-906 (Alaska 2003); *Robinson v. Municipality of Anchorage*, 69 P. 3d 489, 494 (Alaska 2003).

The presumption of compensability is overcome if a qualified expert gives an explicit opinion that the work was probably not a substantial factor in bringing about the claimed injury. See *Stephens v. ITT/Felec Servs.*, 915 P.2d 620, 625-26 (Alaska 1996) (citation omitted).

Beauchamp v. Employers’ Liability Assurance Corp., 477 P.2d 993, 997 (Alaska 1970), provides that “if there is any doubt as to the substance of medical testimony, it must be resolved in favor of the claimant[.]” This rule applies when an employer tries to rebut the presumption with a single expert’s testimony that is either uncertain or inconclusive; it does not apply when there are medical opinions that are firmly held, although conflicting. *Brown v. Patriot Maintenance*, 99 P.3d 544, 549-50 (Alaska 2004).

Issues: Did the board err in not excluding the doctors’ reports as impermissible character evidence? Did the board err in concluding that the employer presented sufficient evidence to rebut the presumption?

Holding/analysis: The commission concluded that the doctors’ reports were not character evidence because they were not offered to prove DeNino’s conduct on a particular occasion. Instead the doctors’ reports disputed causation, concluding that

DeNino's account of his conduct was not as a result of carbon monoxide exposure and that carbon monoxide poisoning was probably not the cause of his symptoms. (In addition, the Alaska Supreme Court observed in its MO&J that the technical rules of evidence do not apply to the board proceedings per AS 23.30.135(a). See below note.)

The commission concluded that the *Beauchamp* rule did not apply to DeNino's case because there were multiple expert opinions that unequivocally rejected causation. The employer medical evaluation reports, the SIME reports and the report by Dr. Dahmer-White, were substantial evidence on which the board could rely in concluding that the presumption was rebutted. "Although the board did not explain its choice in any detail, the opinions are unequivocal, coherent and consistent; reflect a complete review of available records; and are based on sound medical principles." Dec. No. 072 at 24 n.164.

Finally the commission concluded that the board's decision was supported by substantial evidence. "We find, on reading those same opinions, that the opinions relied on by the board are substantial evidence on which a reasonable mind might rely to support its conclusions." Dec. No. 072 at 23.

The commission rejected DeNino's arguments that the doctors' opinions were not acceptable as expert medical or scientific opinion.

Mr. DeNino's assertion that a toxicologist must use a reference that *DeNino reports* is used in a poison control center in Washington is not a credible basis on which [to] reject relevant medical opinion evidence, offered by national board-certified physicians with appropriate experience, training and education, on the basis of their observations, examination, testing and medical knowledge, within the area of their competence and expertise. So far from being unsubstantiated opinions, as asserted by DeNino, the reports . . . were substantiated by specific observations of DeNino and the objective tests he took. The physicians need not quote scientific studies or treatises to bolster their opinions in their reports if they have established their credentials to give an opinion; DeNino did not present *evidence* that they did not have such credentials. Dec. No. 072 at 25.

The commission also rejected DeNino's argument that the board should have relied on his testimony and Dr. Diller's report. The commission noted that the board did not need to make a determination on DeNino's credibility because his testimony was not relevant to causation since the doctors assumed that DeNino's account of what happened to him was true, but still concluded that carbon monoxide exposure, if any, was not the cause of his current medical problems.

Note: This case was appealed to the Alaska Supreme Court, which affirmed the commission's decision in an MO&J (memorandum opinion and judgment).