

Case: *Lowe's HIW, Inc. and Specialty Risk Services vs. Pamela G. Anderson*, Alaska Workers' Comp. App. Comm'n Dec. No. 130 (March 17, 2010)

Facts: Pamela Anderson (Anderson), a kitchen designer for Lowe's HIW, Inc. (Lowe's), experienced low back pain while lifting and rotating a cabinet in April 2003 and when reaching for a clipboard in May 2003. The employer covered benefits for a low back injury but Anderson later sought benefits for a cervical condition. The board considered whether the 2003 injuries so aggravated, accelerated, or combined with her pre-existing cervical problems as to be a substantial factor in bringing about her ensuing disability and need for medical treatment. The board decided her neck surgery was compensable. The board concluded she was entitled to temporary total disability (TTD) as she was not medically stable and she should receive permanent partial impairment (PPI) based on a new rating that included her neck condition. At the time of the board's decision, Anderson was pursuing reemployment benefits. Lowe's appealed.

Applicable law: AS 23.30.190(a) provides in part that the "compensation [for permanent partial impairment] is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value consideration."

AS 23.30.041(k) states in relevant part:

Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. . . . A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. . . .

AS 23.30.395(27), states in relevant part that "medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence."

Issues: Is a lump sum of PPI payable concurrently with TTD for the same injury, during the reemployment planning process? Did the board correctly apply the medical stability presumption to Anderson's claim for TTD? Did the board draw permissible inferences from a witness's testimony? Were the board's findings sufficiently detailed to permit review?

Holding/analysis: The commission concluded that a lump sum of PPI could not be paid concurrently with TTD for the same injury during the reemployment planning process. Anderson argued that different body parts were injured, such that PPI for her lumbar injury may be paid while she was receiving TTD because she is not yet medically stable from her cervical surgeries. The commission rejected this argument because compensation is payable for disability, not for the loss of function of a specific body part. In addition, "AS 23.30.190 directs that calculation of permanent impairment

is to be based on the *whole* person – not a schedule of values for arms, fingers, and legs.” Dec. No. 130 at 11. The commission concluded the board should have delayed the payment of PPI until the entire effects of the injury could be rated to avoid the risk of overpayment and to comply with the statute that required payment in “a single lump sum.”

The board incorrectly analyzed medical stability but because substantial evidence supported a finding that Anderson was not medically stable, the board’s errors were harmless. The board assumed the employee was entitled to a presumption that she was not medically stable and the board failed to require the employee to meet the “clear and convincing” evidence standard. The analysis should work this way: The employee attaches the compensability presumption, AS 23.30.120, with evidence that she is disabled, her disability is temporary and total, and she has not reached the date of medical stability. The employer must rebut by presenting substantial evidence that one of these elements is not satisfied. If the employer presents evidence of a lack of medical stability, the counter-presumption of AS 23.30.395(27) comes into play.

The effect of § .395(27) “is to restrict the application of the presumption provided for in AS 23.30.120.” Thus, if the employer produces substantial evidence of no “objectively measurable improvement for a period of 45 days,” the employer has rebutted the presumption in favor of the claim for TTD and established a counter-presumption that the date of medical stability has been reached. . . .

Once the employer has produced substantial evidence to overcome the presumption in favor of the claim for TTD, the claimant must prove all elements of the claim by a preponderance of the evidence – except that, if the employer has raised the counter-presumption of medical stability, the claimant must first produce clear and convincing evidence that she has not reached the date after which “further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time.” Dec. No. 130 at 14-15.

Nevertheless, the commission concluded that Dr. Chandler’s testimony met the clear and convincing standard and thus, the board had substantial evidence to support its award of TTD, notwithstanding the legal errors in its analysis.

The commission concluded that the board’s assessment of Alice Thurman’s credibility reflected an improper inference bearing on credibility and remanded for reconsideration of her testimony. The board stated, “Ms. Thurman provided no explanation why the adjuster notes beyond January 26, 2004 were not produced.”

Thurman was not asked if the notes she made were all the adjuster notes in the employer’s insurer’s files. She was not asked to identify any notes, or why the notes did not extend past January 26, 2004, so she cannot

have “failed” to explain their absence. The board’s comment indicates the board assumed it was due, and failed to receive, an explanation of an event that the board never established occurred. The belief that a witness improperly concealed information from the board and the opposing party is likely to taint the board’s assessment of the witness’s credibility. Dec. No. 130 at 21.

The commission also noted a number of board errors that required remand. First, the board incorrectly stated that all incomplete or inconclusive medical testimony is “resolved in the employee’s favor.” Incomplete or inconclusive medical testimony, coupled with employee testimony, can be sufficient to attach the presumption. If the inconclusive medical testimony is unopposed, then the presumption is not rebutted and, thus, the employee’s claim is compensable. This was not the circumstance in Anderson’s case, however, where there was opposing and conclusive medical evidence.

Second, the board failed to recognize a fundamental disputed issue. The board incorrectly stated, “No one disputes Claimant had a preexisting, asymptomatic degenerative cervical condition.” In reality, “[w]hether Anderson had an asymptomatic degenerative cervical condition was precisely what Lowe’s disputed.” Dec. No. 130 at 24.

Third, the commission was uncertain as to how the board assessed credibility in its decision because it mischaracterized the testimony or reports of two doctors.

The board found Dr. Chandler’s opinion (that Anderson reported pain in July 2003 and her neck pain never resolved) credible because he is a pain management specialist and Anderson’s attending physician. But, Dr. Chandler actually testified that Anderson reported neck pain in July 2003, and that she never reported that her neck pain had resolved – he did not say that she told him her neck pain had never resolved. *Id.* at 25.

In addition, the board stated that Dr. Blackwell failed to “credibly contend [Anderson] would have suffered her cervical symptoms and disability at the same time, in the same way, and to the same degree, regardless of the work injury.” The board rejected Dr. Blackwell’s opinion because he “fails to eliminate the work injury as a substantial factor in causing Claimant’s cervical symptoms at the time and to the degree they occurred.” But the commission found statements in Dr. Blackwell’s report clearly opining that Anderson’s cervical symptoms were not related to her work injury.

“Taken together, this chain of errors persuades the commission that the board failed to give fair consideration to the argument and evidence presented.” Dec. No. 130 at 28. The commission remanded, instructing the board to decide the case based on the existing record as there was sufficient evidence to find either way.

Note: Dec. No. 113 (July 23, 2009) concerned Lowe’s motion for a stay of payments.