

Case: *City of Seward and Alaska Municipal League/Joint Insurance Association vs. Cuno Hansen*, Alaska Workers' Comp. App. Comm'n Dec. No. 146 (January 21, 2011)

Facts: Cuno Hansen (Hansen) twisted his right knee on February 5, 2008, while working as a lineman for the City of Seward (the City). Hansen saw Dr. Kavanaugh on March 3, 2008. Dr. Kavanaugh's chart note indicated: Hansen presents with a history of right knee pain; he attributes it all to an injury that occurred at work on February 5, 2008. Prior to this, he states that he did have about a ten year history of knee pain. Dr. Kavanaugh's impression was: osteoarthritis, right knee, medial compartment, with work-related acceleration of the condition. On March 11, 2008, Dr. Kavanaugh filled in a form provided by the adjuster indicating that the February 5, 2008, work incident was the substantial cause of Hansen's right knee condition and need for treatment in the form of medial unicompartmental knee replacement surgery.

On March 14, 2008, Dr. Ballard performed an employer's medical evaluation (EME). In his report, after noting Dr. Kavanaugh's impression, Dr. Ballard indicated that Hansen denied previous injuries to his right knee. Dr. Ballard's diagnosis was that the February 5, 2008, injury was a right knee strain which combined with his underlying arthritic condition to cause a temporary aggravation of his underlying medial joint arthritis. Later in his report, Dr. Ballard stated that conservative treatment was appropriate and that he disagreed with Dr. Kavanaugh's recommendation for knee replacement surgery. On March 31, 2008, Dr. Kavanaugh performed the surgery. Dr. Ballard performed a post-operative, follow-up EME on May 30, 2008. In his report he concluded that the underlying osteoarthritis, not the work incident, was the substantial cause of Hansen's need for knee surgery.

A second independent medical evaluation was performed by Dr. Gritzka on October 30, 2008. In his deposition on March 18, 2009, Dr. Gritzka testified that Hansen had a pre-existing right knee condition, degenerative arthritis in the medial compartment, that was the substantial cause for his need for knee replacement surgery.

Dr. Kavanaugh provided a signed written statement dated October 6, 2009, which indicated that he had reviewed Hansen's pre-injury records that were previously unavailable to him, Dr. Gritzka's opinion, and Dr. Ballard's opinion. As a result, Dr. Kavanaugh changed his opinion, stating Hansen's February 5, 2008, work injury was not the substantial cause of his need for a right unicompartmental knee replacement, and the resultant disability and associated medical treatment.

The board applied the compensability presumption and concluded that Hansen's surgery claim was compensable. The board concluded that the City had not rebutted the presumption and even if it had, Hansen satisfied the burden of proof. The City appeals.

Applicable law: Following amendment in 2005, AS 23.30.010(a) reads:

Coverage. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the

employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. *When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.* (Italics added.)

Issue: Was the February 5, 2008, work-related injury the substantial cause of Hansen's need for right knee replacement surgery?

Holding/analysis: Under old case law, workers' compensation liability was imposed whenever employment was established as *a* causal factor in the disability. A 'causal factor' is a legal cause if it is *a* substantial factor in bringing about the harm at issue. AS 23.30.010(a) is to be construed by considering its language, its purpose, and its legislative history, in an attempt to give effect to the legislature's intent. The language in AS 23.30.010(a), that employment must be *the substantial cause* of the disability, death, or need for medical treatment, modifies the standard for coverage. AS 23.30.010(a) signals a legislatively-mandated standard for coverage under the Act, namely that employment must be "the substantial cause" of the disability, etc., that differs from the old case law standard that employment must be "a substantial factor" in bringing about the disability, etc.

The commission concluded that the board erred in deciding that the City had not rebutted the presumption. Two doctors stated that the substantial cause of the need for knee surgery was "the narrowing he already had in his knee" or "the underlying arthritis," rather than the work injury. "Considering this evidence in isolation, as we must, we find that these qualified experts' opinions satisfy the standard for rebutting the presumption of compensability[.]" Dec. No. 146 at 16. The commission rejected the board's apparent conclusion that the doctors' testimony was inconclusive or speculative and so could not rebut the presumption. "Their evidence, as expressed in their testimony, is both specific and conclusive. It speaks authoritatively to the very narrow issue we have before us, whether the substantial cause of Hansen's need for knee replacement surgery is the work-related injury." *Id.*

The commission concluded that the board lacked substantial evidence to conclude Hansen had proved his surgery claim. The only doctor who opined the knee surgery was related to the work injury later changed his opinion after a full review of Hansen's

medical history and records. The board discounted this doctor's revised opinion because it was elicited in a statement prepared for the City's counsel, overlooking that the doctor's initial opinion was elicited in a statement prepared for the City's adjuster.

The board's analysis lacks consistency. Moreover, we do not share the board's cynicism that Dr. Kavanaugh's professionalism and integrity can be so easily influenced. Dr. Kavanaugh's later statement explained that he changed his opinion based on a review of Hansen's medical history and records, which he had not done prior to performing the surgery. The commission believes this is a reasonable basis for him to change his opinion. *Id.* at 17-18.