Case: *Tire Distribution Systems, Inc. and Travelers Property Casualty Company of America vs. David M. Chesser*, Alaska Workers' Comp. App. Comm'n Dec. No. 090 (October 10, 2008)

Facts: David Chesser, a tire retread technician, claimed that he injured his cervical spine while attending training for his employer. Chesser testified that, while "barrel-stacking" tires on March 15, 2005, he "felt a snap, and not more or less a pain, like a – just a quick stab in the back of my neck and upper chest." He testified "that night after school and during school, the rest of the day" he felt "a lot of pain on the side of my neck and my arm. My arm started to go numb." He testified it got worse at dinner, and in the morning, when he awoke, his "whole left arm was completely numb." In support of his testimony, he produced testimony from witnesses that he did barrel-stack tires and that he complained of pain afterward. He went to an emergency room the next day and was seen by Dr. Jeffrey Allgood who recommended a magnetic resonance imaging and that he see a specialist. Ultimately, in May 2005, he underwent surgery. The surgeon, Dr. Davis Peterson, was the only one of Chesser's doctors who made a statement about the cervical injury's relationship to his work. On the first page of his May 10, 2005, report on a board-approved form, the question asking "is the condition work-related?" is answered "yes" with the comment added "happened at work." At the end of the report, Dr. Peterson noted that "workers' compensation clearance" will be needed to proceed with surgery.

Dr. John Swanson conducted an employer medical evaluation in August 2005. Based on Chesser's multiple pre-existing conditions and Dr. Allgood's records, his opinion was that Chesser suffered a spontaneous herniation of the cervical disc in the night while he was asleep. Dr. Swanson also testified in his deposition that lifting weight does not cause stress to the neck so that stacking tires or lifting the tires could not have caused the herniation of the cervical disc. The employer controverted benefits based on this report.

In November 2007, the board addressed whether Chesser's cervical condition was compensable. The board found:

> [T]he testimony of the employee and the records and opinions of his treating physicians indicate the employee injured himself lifting tires in his work, suffering injury and disability, resulting in the cervical fusion graft surgery. We find this testimony and these records are sufficient evidence to raise the presumption of compensability.

The board then found that Dr. Swanson's opinion that lifting tires could not have caused Chesser's cervical condition was sufficient to rebut the presumption. Lastly, the board concluded:

> In the instant case, we find the preponderance of the available evidence, specifically the reports of Dr. Polston, Dr. Peterson, and

> PA-C Chapa, the testimony of the employee and his wife, and the testimony of Mr. Creese, indicate the employee suffered a cervical injury lifting tires on March 15, 2005, while at a training course at the employer's direction. We find the preponderance of the evidence indicates this cervical injury necessitated medical treatment, including the fusion surgery, and resulted in disability. We conclude the employee's claim is compensable under the . . . Act.

The employer appeals, arguing (1) Chesser needed medical evidence to attach the presumption; and (2) the board lacked substantial evidence to find Chesser's claim compensable because no doctor directly contradicted Dr. Swanson's opinion that lifting tires could not have caused an injury to the cervical spine.

Applicable law: AS 23.30.120(a) and related case law on the presumption of compensability. "[B]efore the presumption attaches, some preliminary link must be established between the disability and the employment, and that in claims 'based on highly technical medical considerations' medical evidence is often necessary in order to make that connection." *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981) (footnote omitted) (quoting *Commercial Union Cos. v. Smallwood,* 550 P.2d 1261, 1267 (Alaska 1976)). If the case is one in which it is "impossible to form a judgment on the relation of the employment to the disability without medical analysis," medical evidence is required to attach the presumption. *Commercial Union Cos.*, 550 P.2d at 1267.

When the board examines the evidence to determine if it is sufficient to raise the presumption of compensability, only evidence tending to establish the link is considered and competing evidence is disregarded. Credibility is not evaluated when making the preliminary link determination. *Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999).

The Alaska Supreme Court has held that uncontradicted lay testimony, when combined with equivocal medical opinion, is sufficient to support an award of compensation, *Beauchamp v. Employers Liability Assur. Corp*., 477 P.2d 993, 996 (Alaska 1970). However, that does not necessarily hold true when substantial evidence to the contrary of the equivocal medical opinion is presented, *Brown v. Patriot Maintenance, Inc.,* 99 P.3d 544, 549-50 (Alaska 2004).

The board must make findings of fact and conclusions of law regarding all issues that are both material and contested, *Bolieu v. Our Lady of Compassion Care Ctr*., 983 P.2d 1270, 1275 (Alaska 1999). Findings are adequate to permit appellate review if, "at a minimum, they show that the Board considered each issue of significance, demonstrate the basis for the Board's decision, and are sufficiently detailed[,]" *Stephens v. ITT/Felec Services*, 915 P.2d 620, 629 (Alaska 1996) (Matthews, J., dissenting in part).

AS 23.20.122 and AS 23.30.128(b) give the board the "sole power" to make credibility determinations and weigh witness testimony, including medical testimony and reports.

Issues: Was this a claim "with highly technical medical considerations," such that medical evidence was necessary to attach the presumption of compensability? Does substantial evidence support the board's decision, even though no doctor directly contradicted Dr. Swanson's opinion on causation?

Holding / analysis: The commission concluded that, although it was a close question and the board was not required to do so, the board could choose to view Chesser's claim as one not based on highly technical medical considerations. The commission noted that "[a]t the preliminary link stage, Chesser's claim did not seek to explain how his injury occurred, but to show that the injury occurred in the course of employment." Dec. No. 090 at 11. Thus, the commission concluded that Chesser's testimony and corroborating witness testimony provided sufficient evidence to attach the presumption because his testimony established that his symptoms first appeared during the course of his employment. The commission observed that "Chesser's claim is based on the kind of unexplained accidental injury the Alaska presumption was designed to address[.]" *Id.* at 12.

The commission decided that the board had substantial evidence to conclude that Chesser's cervical condition was work-related. The commission observed that the board's findings could have been clearer and its credibility determinations explicit but that the board's findings, quoted above, were adequate to permit review. Although Chesser did not present medical evidence that lifting tires could cause a cervical injury, he relied on treating doctors' reports and his and others' testimony that his symptoms began when he was stacking tires. Only Dr. Peterson made a statement that the board could construe as a statement of work relationship. The commission did not consider Dr. Peterson's report as *strong* evidence because "[t]he note that the injury 'happened at work,' may be a limitation on the opinion that the injury is 'work-related,' meaning it is confined to a temporal or local relationship, instead of a causal relationship." *Id.* at 17 n.47. But the commission concluded that the report was sufficient evidence from which the board might infer that Dr. Peterson did not find Chesser's account of his injury incompatible with a causal relationship between stacking the tires and herniating the cervical disc. Moreover, the commission noted that lifting, which Dr. Swanson said could not cause the cervical injury, is not the only motion required in stacking tires. "The board's reliance on a combination of lay testimony, which it explicitly found to be credible, and medical report evidence, regarding which it made no explicit credibility finding but explicitly accepted, provides adequate explanation of the board's reasoning." *Id.* at 18.

Note: This case was appealed to the Alaska Supreme Court but the appeal was dismissed.