Alaska Workers' Compensation Appeals Commission

State of Alaska, Department of Corrections,
Movant,

vs.

Scott A. Dennis, Earthworks, and Umiliak Insurance Co.,
Respondents.

Memorandum Decision
Decision No. 036 March 27, 2007

AWCAC Appeal No. 07-001
AWCB Decision No. 06-0331
AWCB Case No. 200602608M, 199927013

Motion for Extraordinary Review of Alaska Workers' Compensation Board Interlocutory Decision and Order No. 06-0331, issued December 20, 2006, by the southeastern panel at Juneau, Janel Wright, Chair, Richard Behrends, Member for Management, and James Rhodes, Member for Labor.

Appearances: Talis J. Colberg, Attorney General, and Daniel N. Cadra, Assistant Attorney General, for movant State of Alaska, Department of Corrections. Tom G. Batchelor, Batchelor & Assoc., P.C., for respondent Scott A. Dennis. Colby J. Smith, Griffin & Smith, for respondents Earthworks and Umiliak Insurance Co.

Commissioners: Jim Robison, Philip Ulmer, and Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

The State of Alaska, Department of Corrections, requests extraordinary review of a decision by the board directing the Department of Corrections to pay benefits under AS 23.30.155(d) as the last employer who may be liable for compensation to Scott Dennis. The board correctly determined that imposition of an order to pay temporary compensation against the last employer under § 155(d) requires only the establishment of a causal link between the temporary disability and the employment concerned, if the prior employer, who would otherwise be liable for compensation, asserts as its sole defense that the later employment is the legal cause of the disability and thereby

assumes the risk of reimbursement. The last employer retains the right to controvert liability on the basis of evidence sufficient to overcome the presumption, but it must pay (subject to the right of reimbursement) temporary compensation despite a valid controversion. While we agree that the case presents novel and important questions of law, any errors in the board's interpretation of the last injurious exposure rule and the recent amendment to AS 23.30.010 are not likely to evade review and should be reviewed on appeal from a final board decision.

We conclude, for the reasons set out below, that it is premature to take up the remaining issues urged upon us by the Department of Corrections in this case. In particular, the issue of what is substantial evidence supporting a finding of "the substantial cause" will be better addressed after the facts are developed and the board has made its findings of fact. We anticipate further proceedings in this case, so we provide guidance to the board in this decision.[1]

Factual background and board proceedings.

Dennis injured his back in his employment at Earthworks. Earthworks paid him compensation and provided medical care, including back surgery. Dennis later went to work for the Department of Corrections (the Department) as a correctional officer. Before he had attended the correctional officer academy, he reported he injured his back moving eggs on February 21, 2006. Of this injury, Kenneth U. K. Leung, M.D., reported:

> I operated on this gentleman in 2000 for an L5-S1 disk herniation. He did quite well after that, but about a year ago he started having pain every time he became active. Also, he is signed up to be a correctional officer and is scheduled to go to the Academy in Anchorage, but unfortunately in January and February he started getting worse, especially on February 21. He was [sic] picked up some boxes and immediately had severe pain down his right leg. He has had pain, numbness and

[1] Refusal of extraordinary review should not be read as approval or disapproval of the board's decision. We set out our analysis of the operation of AS 23.30.155(d) to show why we conclude the board's decision is not so erroneous that delay will work injustice.

> weakness ever since. . . . He is not getting any better and is getting worse.[2]

The board reported that Dr. Leung added the employee's condition had "been coming on for awhile, but the incident of lifting in February caused the acute symptoms requiring more intervention."[3] The Department of Corrections paid Dennis temporary disability compensation and medical benefits until it controverted all benefits on April 10, 2006 after an employer medical evaluation by Chester S. McLaughlin, M.D. The report said:

> I believe it is highly unlikely that a low back injury occurred on 2/21/06. It is my impression that his present status is due to gradual worsening of the degenerative changes at the L5-S1 level, this in combination with the epidural fibrosis of the S1 nerve root on the right, which was reported after the claimant had surgery to the low back.
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> . . . his employment did not bring about the employee's present condition.[4]

The Department now contends that its employment was not the substantial cause of Dennis's disability or need for medical treatment.

Dennis filed a claim for workers' compensation against the Department of Corrections and, shortly afterwards, a claim against Earthworks.[5] The Department and Earthworks both denied liability. At a pre-hearing conference, Dennis's two claims were joined. Dennis asked for an order directing the Department to pay compensation and

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[2] *Scott A. Dennis v. State of Alaska, Earthworks,* AWCB Dec. No. 06-0331, 7 (December 20, 2006), *citing* "3/29/06 Chart Note, Dr. Leung."

[3] *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 7, *citing* "3/29/06 Chart Note, Dr. Leung."

[4] Movant's Mot. for Extraordinary Rev., Attachment 2, 16-17.

[5] The board's decision states Dennis's claim against Earthworks was filed "as early as May 25, 2006." *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 42. From Mr. Batchelor's statement in oral argument, we understand that the claim against Earthworks was filed after Dennis received a copy of Dr. McLaughlin's report. The claim against the Department of Corrections was filed April 27, 2006, Mvt's Mot. for Extraordinary Rev. at 4.

benefits under AS 23.30.155(d). The parties agreed that Dennis's request for compensation under AS 23.30.155(d) should be heard by the board.

The board's decision.

The board's decision extensively reviewed the arguments presented by the parties, which we will not summarize here. The board restated the Department's position as suggesting "that the Board must analyze the situation under the three part presumption analysis *before awarding interim benefits to the employee.*"[6] (Emphasis added.) The board rejected this argument. Based on the last injurious exposure rule, and the use of the word "may" in AS 23.30.155(d), the board reasoned that "if the presumption is triggered by the employee's work for the last employer, the last injurious exposure doctrine applies and we need not proceed to the final steps of the presumption analysis until a hearing on the merits of the case."[7]

The board rejected the Department's argument that it would be inequitable and contrary to the intent of AS 23.30.155(d) if it were required to pay interim benefits and be unable to seek remuneration if Earthworks were to prevail on its statute of limitation defense.[8] The board said:

> The Board finds this argument presupposes that the State is also found not to be liable. We find this argument is simply overreaching. The State's argument, if accepted would render AS 23.30.155(d) meaningless where any insurer raised an absolute defense regardless of the merits of that defense.[9]

The board determined it should "examine the controversion by the *more recent* employer or insurer when determining whether to award interim benefits."[10] (Emphasis

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[6] *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 38.

[7] *Id.*, *citing Gallien v. Alcan Electric & Engineer,* AWCB Dec. No. 03-0238 (September 30, 2003).

[8] *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 39.

[9] *Id.*

[10] *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 39, *citing Ketchikan Gateway Bor. v. Saling,* 604 P.2d 590 (Alaska 1979).

added.) Citing *Grady v. Harding Lawson Assoc.,*[11] the board examined whether the Department of Corrections raised "defenses . . . which take the claim outside the scope of the Act" and found that it did not.[12] The board found that Dennis had raised the presumption of compensability against the Department of Corrections. The board went further to state that "the probative value of the evidence to date is somewhat limited," and to advise the parties that "we find it does not suffice as an explanation that eliminates all possibilities that the current condition is connected to the 2006 injury."[13] However, the board concluded, "the matter presently before the board . . . is not to conclusively determine whether the [Department of Corrections] is or is not liable, but only whether there is a possibility of liability."[14]

The board examined whether there was sufficient evidence in the present record to "support a denial of interim benefits" on the basis of a valid defense by Earthworks.[15] The board determined that "there is insufficient evidence in the record, as yet, to find these defenses meritorious."[16] The board then concluded that the Department "is required to provide interim benefits to the employee."[17]

Arguments on the motion for extraordinary review.

The Department of Corrections argues that the commission should allow extraordinary review because the board's errors regarding the impact of the amendment of AS 23.30.010(a) on the employer's obligation to pay temporary benefits under AS 23.30.155(d) otherwise will likely evade review. It argues review of the

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11 AWCB Dec. No. 98-0102 (April 23, 1998).

12 *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 40.

13 *Id.*

14 *Id.*

15 *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 41.

16 *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 42.

17 *Id.*

board's decision involves an important question of law, which, if resolved now, will materially advance termination of the litigation. Finally, the Department argues that postponement will work a hardship because, if the Department is not liable for benefits, and Earthworks statute of limitations defense is upheld, then the Department will be unable to obtain reimbursement of the amounts it paid to Dennis.

The Department of Corrections argues that the board placed "unwonted emphasis" on the testimony of witnesses before the Legislature in concluding that the last injurious exposure rule is intact after amendment of AS 23.30.010, because the testimony offered by witnesses is of little value in determining legislative intent. The Department of Corrections objects to the board's order because, it argues, the last injurious exposure rule "has no application to this case." Second, the Department argues the board erred when it "repeatedly pointed out that the State 'accepted the claim' by payment of benefits prior to controverting" because payment of compensation is not an admission of liability. Since it is not an admission of liability, mere payment of compensation may not supply the "preliminary link" between the employment and the disability. Therefore, the Department reasons, the board erred in finding the presumption raised, for there is no medical evidence that the employment by the Department may be the substantial cause of Dennis's current condition. Third, the Department of Corrections argues that because the Department has rebutted the presumption, "it would seem reasonable to require at least some evidentiary showing that the employer *may be liable* prior to awarding interim benefits." (Emphasis in original.) The Department argues that the amendment to AS 23.30.010, when incorporated into the operation of AS 23.30.155(d), requires a heightened standard of proof of liability. Requiring evidentiary showings at stages prior to trial is not uncommon in other settings and should not be beyond the board. Fourth, the Department argues that the conditions for payment under AS 23.30.155(d) are not met because it is not clear that one of the employers will be liable and its defense is that no employer is liable.

Dennis argues that although significant questions are raised in this case regarding the operation of AS 23.30.010, AS 23.30.155(d) was not improperly

interpreted by the board, and the board's decision to require payment is legally supportable. He argues that it is premature to address AS 23.30.010 before the record and evidence are fully developed. Dennis contends that taking review at this point would only delay the resolution of this case, because the commission would be required to remand for further findings if review was taken on the current record.

Earthworks did not oppose or promote review. Earthworks pointed out, however, that it had not accepted liability for the employee's disability and need for treatment, and that Earthworks had advanced other defenses to Dennis's claim. Earthworks suggested that one advantage of review would be to provide clear interpretive guidance to the board.

Our standard for granting extraordinary review.

When we are asked to accept an appeal on motion for extraordinary review, we must determine if, before the board's final decision on a petition or a claim, the board's interlocutory decision is so erroneous or unjust, so prejudicial to the requirements of due process, so likely to otherwise evade review, or otherwise reveals our guidance is needed to resolve conflict and materially advance the termination of the litigation, that the strong policy favoring appeals from final decisions is outweighed by the compelling circumstances presented by the motion.[18] For the reasons we explain below, we conclude that the Department did not demonstrate that the board's decision was so unjust as to compel extraordinary review. We agree important questions are raised, and we provide guidance to the board in anticipation of further proceedings. We conclude, however, that it would be premature to undertake review of the significant questions urged upon us in this motion, which we prefer to decide in an appeal after the board has issued a final decision based on a complete record.

[18] 8 AAC 57.076(a); *Chena Hot Springs v. Elliott,* AWCAC Dec. No. 026, 3-4 (January 11, 2007); *Berrey v. Arctec Services,* AWCAC Dec. No. 009, 8 (April 28, 2006).

Discussion.

AS 23.30.155(d) is intended to be "self-executing." It provides the employee with temporary benefits[19] while the board decides between one party, an employer who is almost certainly liable, and the second party, a possibly liable, (usually later), employer. AS 23.30.155(d) is intended to spare the employee the wait for benefits when the only colorable defense by an otherwise responsible employer is that another employer's employment is the legal cause of the disability. In such cases, the later employer pays temporary compensation, but is entitled to be fully reimbursed upon the board's determination that another employer is liable.[20]

The availability of reimbursement is crucial to the proper operation of AS 23.30.155(d). It would be a violation of the right to due process to compel any employer, who validly exercises the right to controvert benefits, to pay benefits to an employee prior to a hearing on the merits of the employee's claim, because an employer cannot recover benefits paid to an employee to whom the employer is not liable,[21] absent proof of employee fraud.[22] If the employer who pays compensation under AS 23.30.155(d) is found not liable to the employee, and reimbursement is not available, by compelling prepayment, the state will have deprived an employer of its property without due process of law.[23] This concern is at the heart of the Department's

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[19] The act does not recognize "interim benefits" as a separate class of benefits. AS 23.30.155(d) provides for payment of "temporary compensation," not "interim benefits."

[20] *Conam Constr. Co. v. Bagula*, AWCAC Dec. No. 024, 7 (January 9, 2007).

[21] *Croft v. Pan Alaska Trucking, Inc.,* 820 P.2d 1064 (Alaska 1991).

[22] AS 23.30.250(a) provides for civil and criminal prosecution of fraud; § 250(b) permits the board to issue an order of reimbursement, which may be enforced by the superior court.

[23] The rights of the parties to due process and the rights of the parties to "fair consideration" of their evidence and arguments, AS 23.30.001, requires careful writing of decisions ordering payment under AS 23.30.155(d) so as to avoid undesirable expression of tribunal bias or prejudgment on the issue of liability. For example, to include a disclaimer that "the matter presently before the Board, however, is not to

objection to being required to pay temporary compensation and benefits to Dennis; it had valid grounds for controversion, it exercised the right to controvert and cease payment, and, if compelled to pay with no prospect of recovering its money, should it later prevail the Department will have been deprived of property without due process of law.

To protect the most recent employer[24] against such deprivation, AS 23.30.155(d) requires that payment of compensation by the most recent employer be required only "when payment of temporary disability benefits is controverted *solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits."* (Emphasis added.) The due process rights of the most recent employer are protected because, if it is not liable for all or a portion of the benefits it paid, AS 23.30.155(d) provides it will receive "any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred."

With this in mind, we turn to consideration of the motion before us. The posture of this case when it reached the board is important to why we decide to decline review. This matter came to the board on the employee's petition to enforce AS 23.30.155(d) as between two employers, not the later employer's petition to dismiss the employee's claim. If, after the Department controverted liability, Dennis had not filed a claim against an earlier employer who objects to liability on the grounds that a more recent employer (the Department) is liable, the Department would have been allowed to stand on its controversion of all benefits, cease payment, and not pay until after the board heard and decided Dennis's claim.

Dennis converted a simple claim against a single employer to a claim, in the alternative, against both, by filing a claim against an earlier employer, Earthworks, and joining the claims. The Department of Corrections had not filed a petition to dismiss

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conclusively determine whether the [party] is liable," AWCB Dec. No. 06-0331 at 40, (emphasis added), suggests that the board has *inconclusively* or *preliminarily* decided a party is liable; either event would be improper.

[24] Since only the later employer is required to make payment under AS 23.30.155(d), only the later employer is at risk of a violation of due process.

the claim and an affidavit of readiness to proceed to hearing on the petition to dismiss. Therefore, when the board heard Dennis's petition for an order of payment under AS 23.30.155(d), the board was not required to determine whether Dennis's claim against the Department survived after the Department presented evidence that would overcome the presumption.[25]

The fact that the most recent employer has evidence overcoming the presumption does not require that the board evaluate whether the employee has sufficient evidence to support a prima facie case without the presumption before the later employer is required to pay under AS 23.30.155(d). The language of AS 23.30.155(d) presumes that both employers have evidence overcoming the presumption, because it does not apply unless "payment of temporary disability benefits is controverted." Therefore, the board ought not to weigh the evidence at this stage, but confine itself to a determination of whether there was sufficient evidence to raise the presumption against both (or more) employers.[26]

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[25] The Department's arguments are strongly reminiscent of a motion for summary judgment under Alaska Rule of Civ. Pro. 56. However, because the board was not presented with a petition to dismiss the claim, the board was not required to determine whether the employee had sufficient evidence to make out a prima facie case against the Department once the presumption was overcome.

[26] The board observed that the evidence presented by the state, (Dr. McLaughlin's expert opinion), was insufficient to "eliminate all possibilities that the current condition is connected to the 2006 injury." *Scott A. Dennis*, AWCB Dec. No. 06-0331 at 40. Such comment on the probative value of the evidence was inappropriate as well as incorrect. An "employer has always been able to rebut the presumption with an expert opinion that 'the claimant's work was probably not a substantial cause of the disability.' *Big K Grocery v. Gibson*, 836 P.2d 941, 942 (Alaska 1992)." *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1189 (Alaska 1993). The test for legal causation has changed for post November 7, 2005 cases from "a substantial factor" to "the substantial cause, in relation to other causes." Nonetheless, an expert opinion which the board describes as: "the February 21, 2006 injury did not cause a recurrent disk herniation nor was it 'a substantial factor in causing, accelerating, or aggravating the pre-existent degenerative changes in the employee's low back,'" *Scott A. Dennis*, AWCB Dec. No. 06-0331 at 8, and which contains the following statement: "Aspects of his employment did not bring about the employee's present condition" (Mot. for Extraordinary Rev., Attachment 2, p. 17) is as definite as that described in *Big K Grocery* (the claimant's

AS 23.30.155(d) is not applied only to "last-injurious exposure" cases; it is applied in all those cases in which there is no dispute that the employee was injured in employment – and the only dispute is which employment is liable. The last injurious exposure rule is not a rule for determining the legal cause of disability. It is a rule for assigning responsibility for the disability between employers, thus avoiding apportionment of liability for payment among employers. The last employer (1) whose employment aggravated, accelerated or combined with the prior injury, (i.e., is a cause in fact) and (2) whose employment is a legal cause of the disability is liable for the whole payment of the disability compensation. We are agreed that the last injurious exposure rule, which avoids apportionment, is still the law whenever more than one employment is a legal cause of the disability.[27]

What has changed under AS 23.30.010(a) is the definition of "a legal cause" for a distinct class of injuries. For a disability resulting from injury prior to Nov. 7, 2005, the employment is the legal cause if it is "a substantial factor in bringing about the disability." From November 7, 2005 forward, to be the legal cause of the disability the employment must be the substantial cause of the disability in relation to other causes. The definition of legal cause has changed, but this is not a change in the last injurious

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work was probably not a substantial cause of the disability), and cited in *Childs.* If an employment is not important enough in bringing about the disability to be "a substantial factor," it can not be the substantial cause of it.

[27] In our view it was unnecessary for the board to rely on testimony to legislative committees. AS 23.30.155(d) is not limited to "last injurious exposure" defenses; it applies in any multiple employer case in which the sole defense of each employer is that the other is liable to the employee. The Department's argument is that by adopting a definition of legal causation that is based on a singular responsible party ("the substantial cause" in relation to other causes) there are no longer cases in which two employers could be "the substantial cause." In time, that may be true. However, so long as claims may be based in part on injuries prior to November 7, 2005, it is still possible for two employers to be the legal cause of an injury. Adoption of "the substantial cause, in relation to others, also avoids apportionment, but assigns responsibility for the disability on the basis of degree of responsibility instead of order of employment.

exposure rule itself. The rule still operates to prevent apportionment of liability of injury between employers.[28]

The board appears to have merged the definition of "legal cause" with the last injurious exposure rule itself in its discussion. We note, however, that the definition of legal cause predated the court's formulation of the last injurious exposure rule in *Saling*.[29] Just as adoption of one standard of legal cause did not require adoption of the last injurious exposure rule, the prospectively applied change in the definition of

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[28] The Department is correct that the last employment which is "the substantial cause, in relation to others," is a subset of those cases in which the last employment is "a substantial factor." To be "the substantial cause," in relation to others, necessarily implies that the employment is one of several substantial causal factors – but only one cause, relative to all the others, is "the substantial cause." We do not agree with the Department that the amendment renders AS 23.30.155(d) ineffective. AS 23.30.010(a) requires the board to "evaluate the relative contribution of different causes." In a multiple injurious exposure case in which the most recent employment occurs after November 7, 2005, the relative contributions of at least two employers must be evaluated by the board before a determination of liability.

The language of AS 23.30.155(d) is not limited to "last injurious exposure" cases – it applies in any multiple employer case (such as concurrent or joint employers) where the employers each admit that one of the employments is responsible for the disability, but each claims another employer is liable. It has an important role to play before the board evaluates the relative causal contributions of multiple employments. Previously the board only evaluated the evidence to determine if the employments were "a substantial factor," and then assigned liability to the most recent. This sometimes meant that an employer whose employment was largely responsible for the employee's disability was relieved from responsibility by the occurrence of a lesser, but later, injury. Now, under AS 23.30.010(a), instead of assigning liability based on date of injury, the board must "evaluate the relative contribution of different causes" and assign liability to the employment which is "the substantial cause." In such cases, it is reasonable that the most recent employer pay temporary compensation under AS 23.30.155(d), as the most recent employer is most likely to have a current relationship with the employee.

[29] *Ketchikan Gateway Bor. v. Saling,* 604 P.2d 590 (Alaska 1979). The "a substantial factor" test of legal causation was adopted in *City of Fairbanks v. Nesbett,* 432 P.2d 607, 610 (Alaska 1967), (holding in a tort case "it was proper to find that a defendant's negligent conduct was the 'legal cause' of plaintiff's injury if the negligent act 'was more likely than not a substantial factor in bringing about (plaintiff's) injury.'"), and applied in a workers' compensation death benefits case in *Cook v. Alaska Workmen's Comp. Bd.,* 476 P.2d 29, 35 (Alaska 1970).

legal cause did not require the legislature to abandon use of it where more than one employment in a series can be found to be a legal cause of the disability. There are now two definitions of legal cause in workers' compensation cases: one that applies to injuries prior to November 7, 2005 and one that applies from November 7, 2005 forward. There is still the possibility that more than one employment can be liable. If, as between the two, the post-November 7, 2005 employment is liable, then the last employer is liable, as it must be "the substantial cause" in relation to the earlier, pre-amendment employment, which is only "a substantial factor." The last employment that is a legal cause of the disability is still liable, without apportionment, for the disability. The board's possible error in this regard is not one that will evade review.

Returning to the issue at hand, there is sufficient reasoning in the board's decision to determine that the board found there was some evidence in the record that the last employer may be the legal cause of the disability, i.e., sufficient evidence to raise the presumption of coverage. In doing so, the board need not weigh the evidence. Once the board finds there is sufficient evidence to raise the presumption, the presumption supplies a prima facie case that the last employer is a legal cause of the disability. Because Dennis's injury in the Department's employment falls after November 7, 2005, the presumption, once raised, supplies a prima facie case that the Department of Corrections employment is the substantial cause, in relation to other causes, of the current disability or, insofar as the claim for medical benefits is concerned, the substantial cause, in relation to other causes, of the need for medical care.

The Department challenged the sufficiency of the evidence raising the presumption of a prima facie case against the Department.[30] Because "the substantial

[30] The Department argues correctly that mere payment of compensation without an award cannot be the basis of the board's finding that the presumption was attached. As we discussed at some length in *S&W Radiator Shop v. Flynn*, AWCAC Dec. No. 016, 18-21 (August 4, 2006), the "concept of payment constituting acceptance of liability . . . is not one supported by Alaska law." By making payments required by law, the employer does not assent to liability asserted by the employee, just as an employee does not agree to a compensation rate by cashing a compensation check. Because

cause" is a higher standard of causation than "a substantial factor," the Department argues that the degree of evidence required to attach the presumption must necessarily be higher as well. We disagree. The employee, to raise the presumption against the Department, need only demonstrate a "causal link" between his employment and the disability.[31]

The board noted that the State "does dispute that the employee's work for the State was 'the substantial cause' of the employee's current disability,"[32] but that "neither employer has disputed that the present condition is work-related."[33] While we find this to be a somewhat confusing finding in view of the Department's controversion,[34] we take the board's observation to mean that the Department did not

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payment without an award cannot be deemed an admission or acceptance of liability, it cannot be inferred that the reason for payment is the absence of evidence against liability – or possession of evidence favoring it. Therefore, payment of compensation alone cannot be evidence supporting the "causal link" between the employment and the injury. In this case, however, the board had, and appears to have relied on, other evidence of a "causal link." The board's inclusion of the employer's payment of compensation as evidence supporting the presumption is troubling, but it does not compel extraordinary review.

[31] AS 23.30.010(a).

[32] *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 40 n. 101.

[33] *Scott A. Dennis,* AWCB Dec. No. 06-0331 at 40.

[34] The Department's motion for extraordinary review, at page 4, states its position as "There is no medical evidence that the injury with the State is the substantial cause of any current problem experienced by the employee." Given the amount of time that has passed between the initial controversion in April 2006 and the board's decision December 20, 2006, the employee's condition may well have changed by the time of this motion. However, the board's decision was made on the record presented at the hearing on August 15, 2006, including the opinions of Dr. Leung and Dr. McLaughlin, which were created reasonably close in time. The board cannot predict when a preliminary link between the employment and the disability will fail. However, the later employer's obligation under AS 23.30.155(d) ends when the employee no longer is entitled to temporary compensation; this operates as an incentive to all parties to bring the merits of the claim promptly to the board for hearing and a limitation on the most recent employer's exposure.

dispute that its employment was somehow connected to the employee's initial temporary disability and need for immediate medical treatment, even if the Department's employment, in the Department's view, is not the substantial cause, in relation to other causes, of Dennis's disability and need for medical benefits.

Although the board did not phrase the test as we would, it appears that the board considered whether there was sufficient evidence to attach the presumption that the state was the substantial cause, and that it found that some such evidence did exist. In view of the statement by Dr. Leung quoted by the board, we cannot say that the board's finding is incorrect. At this stage, that is all that is required for one part of the test for applying 155(d).

We turn now to the other arguments the Department raised. In hearing before us, the Department focused on the evidence it presented overcoming the presumption, not the sufficiency of the initial presumption-attaching evidence. The Department argued that once it presented evidence overcoming the presumption, the board could not order payment under AS 23.30.155(d) based on nothing more than the attachment of the presumption. Something more than the evidence initially attaching the presumption is required, the Department argues, some medical evidence that the last employment was the substantial cause, in relation to others, of the employee's disability.

The Department misunderstands the purpose of the presumption – to supply a prima facie case to an employee unable to produce evidence tending to prove all elements of a prima facie case. If we were to accept the Department interpretation, the presumption of coverage, a foundation of workers' compensation law, would be weakened in last injurious exposure cases. When applying the "a substantial factor" test of liability, a thin coat of evidentiary glue is sufficient to attach the presumption of coverage.[35] When AS 23.30.010 was amended, the Alaska State Legislature provided

[35] In *Commercial Union Companies v. Smallwood*, 550 P.2d 1261, (Alaska 1976) (*Smallwood I*), the Alaska Supreme Court reported Smallwood testified he "often carried his own food, consisting of canned goods and sandwiches, in his cab. He attempted to use as little salt as possible, although on occasion he had to eat at mess

that to establish a presumption under AS 23.30.120(a)(1), "the employee must establish a causal link between the employment and the disability." A causal link is sufficient to make a prima facie case because it is sufficient to raise the presumption of coverage. Thus, for injuries after November 7, 2005, the elements of a prima facie case have changed, but the method of establishing it through use of the presumption has not changed.

The Department argues that once an employer produces evidence sufficient to controvert, the board must reassess the strength of the evidence that raised the presumption initially and permitted application of 155(d) against the later employer. We disagree. AS 23.30.155(d) was designed to require an employer, *who otherwise would not be obligated to pay once a controversion was issued*, to continue payments of temporary compensation until a hearing on the merits of the dispute between employers. Allowing an employer to cease payment on producing sufficient evidence to support a controversion would effectively eliminate AS 23.30.155(d). The board correctly stated it need not consider whether the presumption was overcome before ordering payment under AS 23.30.155(d).[36]

We now address the board's application of the other half of AS 23.30.155(d). As we said above, availability of reimbursement to the most recent employer is crucial to the operation of AS 23.30.155(d) in a way that does not violate due process. AS 23.30.155(d) does not require payment in every last injurious exposure or multiple

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halls where 'you pretty well got to eat what you get.'" *Id.* at 1263. In *Burgess Const. Co. v. Smallwood*, 623 P.2d 312 (Alaska, 1981) (*Smallwood II*), this evidence was augmented by physician testimony that, if work conditions on the North Slope Haul Road prevented Smallwood from eating a low salt diet and seeing a doctor regularly, his working conditions played a significant role his renal failure due to malignant high blood pressure. So, "a prima facie case of work relatedness is made, as it clearly was here by Dr. Tenckhoff's testimony." *Smallwood II,* 623 P.2d at 316.

[36] An employer may choose to file an affidavit of readiness for hearing on the employee's claim or file its own petition to dismiss or limit a claim on the grounds that the employer is not liable for any, or further, benefits, and so bring the matter to the board without delay, instead of waiting on the employee's decision to proceed to hearing.

employer case. AS 23.30.155(d) is the board's only authority to order an employer, who files a controversion, to pay temporary compensation without a hearing and decision on whether the employer is liable to the employee. It is limited to "when payment of temporary disability benefits is controverted solely on the grounds that another employer . . . is responsible for all or a portion of the benefits." The most recent employer is not over-reaching to question whether reimbursement will be available if it should be found not liable or to ask the board to determine whether the only colorable defense by the earlier employer is that it, the most recent employer, is the legal cause of the disability.

In order for there to be a colorable defense that the later employer is the legal cause of the disability, there must be *some evidence* in the record that would be sufficient to attach the presumption of compensability against the later employment; i.e., that there is sufficient evidence to make, with the aid of the presumption, a prima facie case that the later employer is the legal cause of the disability. If the earlier employer involved asserts other colorable defenses, AS 23.30.155(d) does not apply because the earlier employer's defense is not solely that the last injurious exposure is the legal cause of the disability, and the later employer is no longer assured of reimbursement if it prevails. If the most recent employer has other colorable defenses, AS 23.30.155(d) does not apply against it, because the most recent employer does not dispute liability "solely on the grounds" that another employer is liable.

On the other hand, there must be something more than the mere assertion of a defense by an employer; it must be supported by sufficient evidence to make out the elements of the defense (a prima facie case, in other words) or legally supportable – i.e., it must be "colorable." This was the essence of the board's holding in *Robert W. Grady v. Harding Lawson Assoc.*[37] The board's application of *Grady* was confusing in

[37] AWCB Dec. No. 98-0102 at 5 (April 23, 1998) ("if the most recent employer has a legally or factually supported basis for controverting the claim, in addition to contending that another employer is liable, . . . we cannot order payment under subsection 155(d)."). In *Grady,* the earlier employers conceded that Grady's carpal tunnel syndrome was work-related; their defense was only that the last employer was liable. *Id.* at 3. The same test applies to earlier employers as well as the most

this case, but we cannot say it was incorrect on the information presented to the commission.

The Department contends that Dr. McLaughlin's report shows that neither employer is responsible because the employee's back condition is due to progression of epidural fibrosis (scar tissue) discovered in the surgical bed after the surgery that resulted from the Earthworks injury. If the scar tissue is a result of the Earthworks surgery, then it does *not* tend to prove that *neither* employment was a legal cause of the injury. Instead, Dr. McLaughlin's report points squarely at the Earthworks injury as the cause of Dennis's current condition, because the surgery was the result of the Earthworks injury. Therefore, we do not find the board's conclusion (that the Department's defense was that another employer was responsible) is so erroneous as to compel extraordinary review.

Conclusion.

For the reasons set out above, we DENY the motion for extraordinary review.

Date: *March 27, 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a not a final commission decision on the merits of an appeal from a board decision and order on the employee's workers' compensation claim. However, **it is a final decision on whether the movant is permitted to appeal the board's interlocutory**

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recent. We note that appeals commissioner Ulmer was a member of the board panel deciding *Grady.*

(non-final) decision and order to this commission. The effect of this decision is to allow the parties to proceed to a board hearing and a final board decision on the merits of the claim. This decision does not prevent the parties from appealing a final board decision to the commission. See AS 23.30.127. This decision becomes effective when filed in the office of the commission unless proceedings to reconsider it or seek Supreme Court review are instituted. The date of filing is found in the commission clerk's Certification below.

Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129. Because this is not a final decision on the merits of a workers' compensation claim, the Supreme Court may not accept an appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. No decision has been made on the merits of the employee's workers' compensation claims, but if you believe grounds for review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f). If you wish to appeal or petition for review or hearing 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 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Memorandum Decision on Motion for Extraordinary Review, AWCAC Dec. No. 036, in the matter of *State of Alaska Department of Corrections vs. Scott A. Dennis, Earthworks, and Umiliak Ins. Co.*; AWCAC Appeal No. 07-001, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *27th* day of March, 2007.

Signed
C.J. Paramore, Appeals Commission Clerk

I certify that a copy of this Memorandum Decision in AWCAC Appeal No.07-001, AWCAC Dec. No. 036, was mailed on *3/27/07* to Cadra, Smith & Batchelor, at their addresses of record and faxed to Director WCD, AWCB Appeals Clerk, Cadra, Batchelor & Smith.

Signed *3/27/07*
L. Beard, Deputy Clerk Date