Alaska Workers' Compensation Appeals Commission

James E. Smith,
Appellant,

vs.

Anchorage School District,
Appellee.

Final Decision
Decision No. 050 July 25, 2007

AWCAC Appeal No. 06-027
AWCB Decision No. 06-0255
AWCB Case No. 199009706

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 06-0255 issued on September 18, 2006, by the southcentral panel at Anchorage, Janel Wright, Designated Chair, Bardie Scarbrough, Member for Industry, Raymond Scott Bridges, Member for Labor.

Appearances: James E. Smith, appellant, pro se. Shelby Nuenke-Davison, Davison & Davison, for appellee, Anchorage School District.

Commissioners: John Giuchici, Stephen T. Hagedorn, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

In this appeal, the commission is asked to reverse the board's denial of a 2004 claim that treatment of the appellant's hip osteoarthritis is a result of a student's kick to the appellant's groin in 1990. The appellant argues that he was entitled a Second Independent Medical Evaluation (SIME) when he asked for one at the hearing because his physician was unable to provide an opinion. He also argues that the board lacked substantial evidence on which to base a decision. We conclude that, applying the 1990 statute, the board was not required to order an SIME on the relationship between the employment and the hip treatment because no dispute between physicians was established. We find that the board had substantial evidence in light of the whole record to support its decision that the 1990 injury was not a substantial factor in

bringing about the appellant's hip osteoarthritis. We therefore affirm the board's decision.

Factual background.[1]

James E. Smith was struck by a drunk driver while posted at Fort Richardson in 1977.[2] His left shoulder was injured, and his right leg was severely injured, requiring hospitalization for 13 months.[3] In 1983 he took a medical retirement from the U.S. Army,[4] and in 1985 he was hired to work as a teacher assistant at the Anchorage School District's Whaley Center.[5] On April 11, 1990, Smith was kicked by a student. In his testimony to the board he said:

> Now when the student came towards me, he came and hit me on my left side of the leg. It was on the leg. It was – the final end of the blow was at my groin. It did not hit any of my vital areas on the knee, it hit right on the left side and when he came in, he lunged real hard and came to the left of my left leg.[6]

He reported the injury to his employer as "deliberately kicked in the groin section."[7] As a result of this injury, he was taken to Humana Hospital Alaska the same day, where a physician reported he had been "kicked in perineum by student."[8] Describing the injury

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1 We provide a factual summary to place the appeal in context. We do not make findings of fact. We provide citation to the record made before the board, as well as the board's decision, to assure the appellant that we have reviewed the record carefully in order to determine whether there is substantial evidence in light of the whole record on which the board may rely to make its findings. AS 23.30.128(b).

2 Smith Depo. 9:23-10:4.

3 Smith Depo. 65:1-10.

4 Smith Depo. 9:2-9:9.

5 Smith Depo. 15:15-24, 16:21-22.

6 Hrg. Tr. 24:9-14.

7 R. 0001.

8 Not numbered, marked "EE Hearing Exhibit 3."

on a physician report, he wrote "student deliberately kick me in the groin."[9] Smith developed a perineal abscess with an anal fistula, which Dr. Chung drained and excised.[10]

The School District paid for treatment of the injury and compensation to Smith.[11] No further records were received by the board after 1990,[12] and the adjuster file was closed.[13] In November 2004, Smith notified the School District that he would need a bilateral hip replacement as a result of the injury.[14] He filed a workers' compensation claim on November 21, 2004.[15]

Board proceedings.

Smith's claim described his injury as "avascular necrosis of both hips, especially my left hip and thigh." He requested temporary total disability compensation, permanent partial impairment compensation and medical treatment. The School District answered[16] and controverted[17] the claim, asserting, among other defenses, the lack of a causal connection between the 1990 injury and Smith's hip condition.

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9 R. 0003.

10 R. 0517-21.

11 R. 0004.

12 The oldest microfiche copy in the board's file is dated June 11, 1990. R. 0004.

13 The adjusting file of the 1990 injury had been destroyed "a long time ago" when Smith came to the adjuster's office November 23, 2004. Hrg. Tr. 219:14 – 220:13.

14 *Id*.

15 R. 0006-7.

16 R. 0009-10.

17 R. 0005.

On January 24, 2005, Smith was evaluated by Charles Brooks, M.D., at the request of the School District. Dr. Brooks's report[18] was sent to Smith's attorney on March 31, 2005.[19] Smith's deposition was taken by the School District on April 12, 2005. Pre-hearing conferences were conducted on January 24, 2005,[20] March 1, 2005,[21] May 9, 2005,[22] June 28, 2005,[23] December 5, 2005,[24] March 10, 2006,[25] and May 15, 2006.[26] Smith filed an Affidavit of Readiness for Hearing on August 18, 2005,[27] and the parties ultimately agreed to a hearing on August 14, 2006.[28] The issue at hearing was refined by the pre-hearing officer to "causation."[29]

The pre-hearing officer recorded discussion of an SIME in pre-hearing held January 24, 2005, March 1, 2005, May 9, 2005, and June 28, 2005. Smith was advised that the employer opposed an SIME, but "[i]f, by July 12, 2005, the employee provides

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[18] The full report is located at R. 0584-612.

[19] R. 0067. Michael McDonough represented Smith from February 16, 2005, R. 0012, to June 2, 2006. R. 0016.

[20] R. 0630.

[21] R. 0633.

[22] R. 0636.

[23] R. 0642.

[24] R. 0646.

[25] R. 0652.

[26] R. 0655.

[27] R. 0014.

[28] R. 0653.

[29] R. 0656.

the employer with new documentary evidence supporting a medical dispute, the employer may reconsider their position on the SIME."[30]

In the pre-hearing conference May 16, 2006, the pre-hearing officer instructed the parties to file evidence by August 4, 2006, and to file their witness lists and briefs by August 14, 2006.[31] The pre-hearing officer noted that "Parties agreed that they are waiting for additional medical evidence from Mr. Smith's treating providers that may make a difference in the outcome and solutions of this matter."[32]

At the hearing, Smith produced a letter "from the attorney general or one of the officers" stating that [Dr. Laufer] "cannot speak on this behalf."[33] He requested "from the Board to an SIME to determine causation my present medical conditions resulting from the injury 4/11/1990" because Dr. Laufer could not "legally give a medical opinion of causation."[34] The School District's attorney responded that SIME's had been discussed in pre-hearing conferences, that Smith had been referred to a physician (Dr. Moore) by his VA physician (Dr. Laufer) for the purpose of generating an opinion on causation, that there was no dispute to warrant an SIME, and, that "it was a little late now to be asking for [an SIME] with the doctor here [to testify]."[35]

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[30] R. 0642.

[31] R. 0656.

[32] R. 0656.

[33] Hrg. Tr. 12:18-19. The letter was not admitted by the board as a hearing exhibit. It is presumably the letter dated July 7, 2006, addressed to William J. Soule, Esq., (a well-known attorney who practices workers' compensation law on behalf of claimants), from Glen E. Woodworth, Staff Attorney, for Michael P. McCarthy, Regional Counsel, Department of Veterans Affairs, included in the appellants excerpt of record. No objection was made to its inclusion in the record. It informs Mr. Soule that "VA employees are prohibited from providing opinion or expert testimony, with or without compensation, in any legal proceedings . . . except on behalf of the United States. . . . your request to obtain an opinion from Dr. Laufer is denied."

[34] Hrg. Tr. 12:13-18.

[35] Hrg. Tr. 13: 8-20.

The board's designated chair, workers' compensation hearing officer Wright, responded to Smith's request as follows:

> Mr. Smith, we do have quite a stack of medical records in your case and when there is not a dispute between your doctor and the employer's physician, typically, a pre-hearing officer won't order a second independent medical evaluation. So here you are at hearing today.
>
> Mr. Smith: Okay.
>
> Hearing Officer Wright: Now, if after the hearing, the Board feels like we need additional information, that we need more questions answered for our benefit in order to make a decision in your case, then perhaps we would order a second independent medical evaluation. However, if, based upon the entire record that we have before us, we can make a decision, then we wouldn't order a second independent medical evaluation. Does that make sense?
>
> Mr. Smith: Yeah.[36]

Smith also objected to Todd Hess's testimony regarding Smith's termination from the School District, after Hess had testified.[37] Smith refused to question Todd Hess saying "I'm not at liberty to talk about this."[38] He asserted that he was prepared only to address causation, and that the circumstances of his termination had nothing to do with causation.[39] He argued that the School District had taken advantage of his lack of attorney, to "shoot all kinds of stuff at [him] and see if [he's] going to rebut to hurt [his] other case when that comes up."[40] He said:

> We wouldn't have been here because – on the 16th I don't think if I'd known that all this was about to come up or was coming to

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[36] Hrg. Tr. 13:24 – 14:13.

[37] Hrg. Tr. 46:6-7.

[38] Hrg. Tr. 45:22.

[39] Hrg. Tr. 46:13-19.

[40] Hrg. Tr. 46:22-24. Smith was pursuing an Equal Employment Opportunity case against the School District for his termination.

> me. I would at least have some time to respond and get a counsel. I – as you noticed, I did seek counsel to find out about the independent doctor, that I just hired him on hourly rates to see if I could get a copy from the federal government which they would not allow that to happen.[41]

The board dismissed Hess with no questions from Smith, but did not rule on the objection to the testimony.

The board's decision.

The board reviewed the medical records and testimony presented at hearing in detail.[42] Then, the board reviewed the application of the presumption of compensability found at AS 23.30.120(a).[43] The board acknowledged that lay witness evidence may be sufficient to attach the presumption in less complex cases.[44] In Smith's case, the board found that, due to the period of time between the April 1990 injury and the reported 2001 symptoms of avascular necrosis and due to the complexity of Smith's condition, medical evidence was necessary to attach the presumption.[45] The board found no medical opinion was present in the record to raise the presumption that the 1990 injury caused the avascular necrosis, so the presumption did not apply to Smith's claim.[46] Without the aid of the presumption, Smith failed to produce evidence to support a prima facie case of causation. Thus, as the board concluded, the claim must be denied.

Even if the presumption had been raised, the board reasoned, the medical evidence of Dr. Moore's opinion and Dr. Brooks's opinion are substantial evidence

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41 Hrg. Tr. 46:10-18.

42 *James E. Smith v. Anchorage School Distr.,* AWCB Dec. No. 06-0255, 3-8 (September 18, 2006).

43 *Id.* at 11-12.

44 *Id.* at 12.

45 *Id.*

46 *Id.*

rebutting the presumption.[47] Without the presumption, Smith would have to prove his claim by a preponderance of the evidence. The board found the "entire medical record in this matter is devoid of medical evidence connecting the employee's avascular necrosis to his April 11, 1990 work injury."[48] The board stated it would find that, based on the opinions of Dr. Brooks and Dr. Moore, Smith's avascular necrosis of the left hip was not "causally linked to any condition arising out of the course and scope of his work with the employer on April 11, 1990."[49] The board concluded that no benefits were due to Smith, and denied his claim.[50] Smith appeals.

Discussion.

1. Our standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[51] Because the commission makes its decision based on the record before the board, the briefs, and oral argument,[52] no new evidence may be presented to the commission. The board's determination of the credibility of a witness appearing before the board is binding on the commission.[53] The commission exercises its independent judgment on questions of law and procedure, where the question has not been addressed by the Supreme Court or the Alaska State Legislature.[54] The question whether the quantum of evidence is

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47 *Id.* at 13.

48 *Id.*

49 *Id.*

50 *Id.*

51 AS 23.30.128(b).

52 AS 23.30.128(a).

53 AS 23.30.128(b).

54 AS 23.30.128(b).

substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[55]

2. Omission of a document from the record transmitted to the commission is corrected by board record certification.

The commission discovered a document had been omitted from the record transmitted by the board to the commission. It appeared that between the date the board's decision was written and the date the record was prepared for appeal, the board's copy of Dr. Moore's December 17, 2004 letter to Dr. Laufer was mislaid or misfiled.[56] This is not a case where there is doubt that Dr. Moore wrote the letter to Dr. Laufer.[57] Both parties referred to his opinion in their appeal brief and argument.[58] The board described the document sufficiently to be able to identify it as the same

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[55] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[56] The board's transmittal of agency record listed five volumes of pages numbered from 0001 to 0692. The commission carefully examined the 692 numbered pages of record transmitted to the commission by the board. No pages were missing in the sequence of numbers from 1 to 692. The one volume of deposition and three hearing exhibits listed in the transmittal of record are also present. However, despite diligent review of the numbered board record, the commission could not locate within the numbered pages of the numbered board record a copy of Dr. Jeffrey Moore's December 17, 2004 letter to Dr. Laufer. After notifying the board appeals clerk and learning the board did not have the document, the chair issued a notice and request to the board to certify whether the letter in the appellee's excerpt was in the board's record at hearing.

[57] The appellant's request to Dr. Laufer for a referral to a consulting orthopedic for an opinion is at R. 0155-56. Dr. Brooks quotes from Dr. Moore's December 17, 2004 letter in his January 24, 2005 report. R. 0080-81.

[58] Both parties referred to Dr. Moore's opinion in their briefs (Appellant's Br. 4; Appellee's Br. 11) and during oral argument to the commission. The appellant even referred to it in his notice of appeal, asserting "Doctor Moore's opinion is insufficient without my X-rays to validate his medical findings for Causation of my injury on 4/11/90." A copy of a December 17, 2004 3-page letter to Dr. Laufer from Dr. Moore was included in the appellee's excerpt at 37-39.

contained in the appellee's excerpt.[59] While the appellant challenged Dr. Moore's opinion as unreliable because Dr. Moore did not have his X-rays, the appellant does not challenge the substance of the board's summary of Dr. Moore's opinion, the board's characterization of the opinion, or the copy in the appellee's excerpt.

The commission's review is limited to the "record made before the board, the transcript or recording of the proceedings before the board, and oral argument and written briefs allowed by the commission."[60] Based on the board's decision, other pleadings before the board,[61] and other record references, it appeared that Dr. Moore's December 17, 2004 letter was in the record made before the board at the time the board heard the claim. Pursuant to the chair's authority under AS 23.30.009(a), the chair requested the board certify whether Dr. Moore's letter was included in the board record at hearing. We elected to conduct our review in this manner rather than remand the case to the board for action because the parties did not challenge the contents (as opposed to the reliability) or presence of Dr. Moore's letter in the board record at the time of hearing.[62] The board panel chair certified to the commission that Dr. Moore's December 17, 2004 letter was present in the board's record at hearing; based on that certification, the commission is satisfied that the letter was part of the record made before the board in this case.

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[59] The board's description of Dr. Moore's letter in AWCB Dec. No. 06-0255 at 5 is consistent with the December 17, 2004 letter at 37-39 of appellee's excerpt. It was also identified as part of the record by the chair in the hearing. Hr. Tr. 90:1-2.

[60] AS 23.30.128(a).

[61] R. 0040.

[62] We remanded *Alaska Airlines v. Nickerson,* AWCAC Dec. 040 (April 30, 2007) based in part on the absence of a signed (or unsigned) stipulation of facts in the record. There, the appellee's statements in oral argument challenged whether the appellee understood the stipulation contents at the time it was presented to the board and whether the claimant had a copy of the stipulation when she agreed to in a brief board hearing. The contents were not read to the board and appellee in the hearing. These challenges might have been resolved by the missing documents. The parties here do not contest the letter text and its presence in the board record.

3. The board was not required to order an SIME because there was no evidence of a medical dispute regarding causation between Dr. Brooks and Smith's physicians.

Smith argues that he was entitled to an SIME because Dr. Brooks's testimony was "inconsistent and inaccurate" and therefore there is a medical dispute entitling him to an SIME. He points to three points in Dr. Brooks's testimony that are inconsistent or inaccurate: (1), he testified it was "possible" that trauma to the femoral artery could cause vascular damage to the hip, but then testified that he could eliminate the possibility that the kick caused avascular necrosis; (2), he testified that Smith's gout caused the avascular necrosis but agreed not everyone who has gout has avascular necrosis; and, (3), Dr. Brooks retracted his opinion about steroid use causing the avascular necrosis if one steroid injection was all Smith received. Smith urges the commission to conclude the board should have given Dr. Moore's letter no weight because Dr. Moore did not have x-rays of his hip. Smith asks for an SIME because the medical reports are thus inconsistent. The School District argues that the board was not required to order an SIME because Smith failed to establish any medical dispute between his attending physician and the School District medical evaluator on a listed issue.

When Smith was injured, AS 23.30.095(k)[63] provided that in the event of a "medical dispute regarding determination of causation . . . between the employee's

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[63] AS 23.30.095(k) provided in 1990:

> In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, a second independent medical evaluation shall be conducted by a physician or physicians selected by the board from a list established and maintained by the board. The cost of the examination and medical report shall be paid by the employer. The report of the independent medical examiner shall be furnished to the board and to the parties within 14 days after

attending physician and the employer's independent medical evaluation, a second independent medical evaluation shall be conducted by a physician or physicians selected by the board." The statute clearly conditions the employee's right to an SIME under the former AS 23.30.095(k) upon the existence of a medical dispute *between the physicians* for the employee and the employer. Inconsistencies within the opinion of the employer's medical evaluator may be a factor in weighing the credibility of the evaluator's testimony or report, but such inconsistencies are insufficient to establish a "medical dispute regarding determinations of causation" between Smith's physicians and Dr. Brooks. Therefore, any inconsistencies within Dr. Brooks's opinion are not sufficient to establish a qualifying medical dispute.

Smith also argued it was impossible for him to obtain an opinion on causation from his attending physician, Dr. Laufer. Therefore, he suggests, he should be excused from the requirement of providing an attending physician opinion that disputes Dr. Brooks's opinion. However, Dr. Laufer referred Smith to a consulting specialist, Dr. Moore, at Smith's request, for the purpose of obtaining an opinion on causation. Dr. Moore's opinion, obtained through a valid specialist referral, supplied what Dr. Laufer was unable to provide under federal law. Smith did not assert that Dr. Laufer's opinion on causation was different from Dr. Moore's opinion. Nothing in Dr. Laufer's many treatment records suggest that Dr. Laufer rejected Dr. Moore's opinion. We conclude that Dr. Moore's responsive letter to Dr. Laufer is an attending physician opinion on causation. We also note that Smith had the opportunity to change his attending physician upon written notice to the employer if he was not satisfied with the treatment and opinions of his physician.[64] Smith chose not to exercise that right.

> the examination is concluded. A person may not seek damages from an independent medical examiner caused by the rendering of an opinion or providing testimony under this subsection, except in the event of fraud or gross incompetence.

[64] AS 23.30.095(a) provides in part:

> [T]he injured employee may designate a licensed physician to provide all medical care and related benefits. The employee

Finally, Smith suggested in oral argument that the board should have granted him a discretionary SIME,[65] so that his claim may be investigated more closely. We note that at the hearing the board panel chair told Smith that:

> Now, if after the hearing, the Board feels like we need additional information, that we need more questions answered for our benefit in order to make a decision in your case, then perhaps we would order a second independent medical evaluation. However, if, based on the entire record that we have before us, we can make a decision, then we wouldn't order a second independent medical evaluation.[66]

In this case, the board clearly examined the medical records carefully.[67] The reports of Smith's attending physician, Dr. Laufer, were provided to the board with approximately 400 pages of Veterans Administration Health Services records.[68] The board record also contained the December 17, 2004, letter of Dr. Moore to Dr. Laufer.[69] The board found "the entire medical record is devoid of medical evidence connecting the employee's avascular necrosis to his April 11, 1990 work injury."[70] Based on our own careful review of the board's record, we conclude that the board had substantial evidence to support its determination of a lack of medical evidence of a causal connection between

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> may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians.

65 See, AS 23.30.110(g).

66 Hrg. Tr. 14:5-11.

67 The board reviewed the medical records reflecting Smith's elevated uric acid levels, indicating the board panel compared the medical records against Smith's testimony (Hrg. Tr. 115:11 – 116:5) and Dr. Brooks's testimony (Hrg. Tr. 71:8-10, 96:1 – 97:22. AWCB Dec. No. 06-0255 at 5.

68 R. 0098-0514.

69 R. 0693-95; AWCB Dec. No. 06-0255 at 5, n. 27.

70 AWCB Dec. No. 06-0255 at 13.

the 1990 injury and the avascular necrosis of the left hip. The medical records and the testimony of Dr. Brooks at the hearing provided sufficient medical evidence to allow the board to reach a decision. The board was able to trace when Smith's complaints arose, to establish when a diagnosis was made, to have a record history of physical and medical condition over time, to have the condition of avascular necrosis explained, and to have expert opinion presented. We conclude the board decision not to order a discretionary SIME under AS 23.30.110(g) was not an abuse of discretion.

4. There is substantial evidence in light of the whole record to support the board's findings of fact.

The board determined that Smith needed medical evidence to attach the presumption of compensability, as the claim involved a "complex medical condition." Whether medical evidence is required depends on the probative value of the lay testimony and the complexity of the medical facts involved.[71] The only lay testimony regarding the injury was the employee's own testimony. While the board did not find the employee lacked credibility, the board noted that there was no medical record corroborating his testimony to events some 15 years earlier. While there are records corroborating the occurrence of the kicking incident and Smith's treatment shortly thereafter, we agree the medical records do not corroborate Smith's theories of how the left hip avascular necrosis could have been caused by a kick to the middle of his thigh or perineum in 1990.[72] In the commission's experience, avascular necrosis is not an injury commonly claimed in workers' compensation cases, and the board panel could not be expected to be familiar with the mechanism of such injuries. There was expert testimony that the causes of avascular necrosis, except in cases of traumatic dislocation

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[71] *Commercial Union Cos. v. Smallwood*, 550 P.2d 1261, 1267 (Alaska 1976); *Veco, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985).

[72] Smith suggested several theories of causation, including that compression of the femoral artery by a kick to the thigh caused sufficient slowing of blood supply to femoral head to bring about necrosis, or that the infection in the initial abscess in 1990 could have been carried to the hip joint.

of the hip or femoral head fracture, may result from a number of factors.[73] Finally, the board's finding of an 11-year delay between the injury and the onset of symptoms of avascular necrosis is supported by the medical records. We conclude the board had sufficient evidence in light of the whole record to support its findings that it required some medical evidence to attach the presumption of compensability.

The board summarily stated "the presumption of compensability does not apply to the employee's claim, and benefits must be denied."[74] It would be more correct to say that without the benefit of the presumption of compensability, the employee failed to present a *prima facie* case that his avascular necrosis was caused by the 1990 employment injury, and thus failed to meet his burden of producing evidence to support a finding that his condition is work-related. Only Smith's personal opinion suggests that the 1990 kicking incident was a substantial factor in bringing about the avascular necrosis.[75] Smith is not a physician or other qualified medical expert; his personal opinion is not evidence on which a reasonable mind would rely to reach a conclusion regarding the possible causes of avascular necrosis. We therefore agree that the board's conclusion that the claim must be denied is supported by substantial evidence in light of the whole record.

The board also found that, even if the presumption of compensability had been raised, it was rebutted by Dr. Moore's and Dr. Brooks's opinions. Although Smith attacks Dr. Brooks's testimony as inconsistent, on review the inconsistencies are minor or non-existent. Dr. Brooks did change his opinion on the role of steroid use, but it was

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[73] Hrg. Tr. 65:24-66:15, 100:18-101:22.

[74] AWCB Dec. No. 06-0255 at 12.

[75] This is not a case in which the employee asserts that uncontradicted lay testimony regarding events combines with uncertain medical testimony supports a conclusion that a worker's injury was work related. *Beauchamp v. Employers Liab. Assurance Corp.,* 477 P.2d 993, 996-97 (Alaska 1970). This is a case in which the employee asserts that his lay testimony regarding events more than 15 years ago (the description of the kick), combined with his lay opinion regarding medical theory, supports a conclusion the injury was work related.

in response to a clarification of the evidence. Dr. Brooks agreed that it was "possible" that the kicking incident caused the avascular necrosis, but he also stated it was "not a reasonable possibility" and the theory described by Smith was "quite implausible."[76] He stated that he believed it was not a reasonable possibility that the April 19, 1990 injury caused the avascular necrosis.[77] This is a statement that is sufficient to rebut the presumption of compensability – it says that the condition was probably not caused by the employment. In addition, Dr. Brooks presented two alternative explanations of the condition: gout and the wear on the joint caused by the 1977 injury to the opposite leg.

Dr. Moore's opinion was that he could not make a causal connection between the 1990 injury and the avascular necrosis, given the long period of time between the trauma of the 1990 injury and the recent onset of changes in the hip.[78] In his opinion, the condition was "idiopathic," meaning that the cause is unknown.[79]

In the absence of any medical evidence in the record linking the injury to the avascular necrosis, combined with the opinion of Dr. Brooks affirmatively rejecting any reasonable possibility of a causal connection, and of Dr. Moore stating he could not make a connection,[80] we conclude the board had sufficient evidence in light of the whole record to support its finding that the presumption of compensability would have been overcome. We also conclude, after careful review of the board record, that the board's finding that the "entire medical record is devoid of medical evidence connecting

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[76] Hrg. Tr. 80:2-6.

[77] Hrg. Tr. 100:13-17.

[78] R. 0694.

[79] R. 0695.

[80] R. 0694. The appellant argues that the board should not rely on Dr. Moore's opinion because he did not have X-rays, which would, according to Dr. Moore, have enabled him to gauge the amount of bone collapse and arthritic changes in the hip joint. *Id.* However, as Dr. Brooks testified, the successive MRI scans available to Dr. Moore are a better test to identify avascular necrosis. Hrg. Tr. 102:13-17. Since Dr. Moore was not asked to measure the amount of bone collapse, the lack of X-rays does not weaken Dr. Moore's opinion on avascular necrosis.

the employee's avascular necrosis to his April 11, 1990 work injury" is supported by substantial evidence in light of the whole record. The board chose to rely on the expert opinions of Dr. Moore and Dr. Brooks over Smith's personal opinion. Therefore, the board's denial of Smith's claim for benefits related to avascular necrosis must be affirmed.

Conclusion.

The board's findings of fact reflect a close review of the record and testimony. They are supported by substantial evidence in light of the whole record. The board did not abuse its discretion to choose whether or not to require an examination under AS 23.30.110(g). The board properly applied the law and made a reasoned decision. We AFFIRM the board's denial of the claim for benefits related to the employee's left hip condition.

Date: __*25 July 2007*__ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
John Giuchici, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final agency decision. The commission has affirmed (upheld) the board's decision denying and dismissing Mr. Smith's workers' compensation claim. It becomes effective when filed in the office of the commission unless proceedings to appeal it are instituted. Look at the Certification below to find the date this decision was filed in the commission. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of this 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.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal 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 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 AWCAC Decision No. 050 in the matter of James E. Smith v. Anchorage School District; AWCAC Appeal No. 06-027; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *25th* day of *July*, 20*07*.

Signed
R. M. Bauman, Appeals Commission Clerk

I certify that on *7/25/07* a copy of the above Final Decision in AWCAC Appeal No. 06-027 was mailed to J. Smith (certified) & Nuenke-Davison and a copy was faxed to Nuenke-Davison, AWCB Appeals Clerk, and Director WCD.

Signed
L. A. Beard, Deputy Clerk