

Case: *Ralph P. Moore vs. Afognak Native Corp. and Zurich American Insurance Co., Alaska Workers' Comp. App. Comm'n Dec. No. 087* (August 25, 2008)

Facts: Ralph Moore sought benefits for knee replacement surgery after working in the logging industry for 35 years. In 1987, he suffered serious injury when a falling tree hit both his legs. Moore fractured his left knee; it was discovered that he had early osteoarthritis. In December 1998 Moore was diagnosed with "approaching" end-stage osteoarthritis in both knees. For the next five years, Moore continued to work as a logger and to aggravate his knees. While working for Afognak in October 2003, Moore slipped getting out of a skiff, falling on his knees and hitting his elbow. The Kodiak clinic notes indicated, "He may experience a slight flare-up in his knees over the next day or two but then should subside. . . . Return to work and increase duties as he tolerates." In December 2003, Moore slipped and fell off a dock, straining his left knee. He did not seek care in Kodiak and continued to work.

Later in December 2003, he saw his treating doctor, Dr. Partlow, who diagnosed end-stage degenerative joint disease (also known as osteoarthritis) in both knees and recommended knee replacement surgery. In May 2006, Dr. Partlow answered "no" when asked whether either or both of the 2003 injuries were "a substantial factor" in the need for total knee replacements. Dr. Partlow stated that Moore's knee pain was due to arthritis, noting that the injuries caused the arthritis to flare up.

Dr. Leadbetter evaluated Moore on behalf of Afognak in July 2004 and May 2005. He opined that the work injuries produced only a strain to the knees, and produced temporary aggravations of Moore's preexisting condition. He agreed with Dr. Partlow that a total knee replacement may be required "at some point in time," but concluded that this was due to osteoarthritis that had been first discovered in 1987, and not due to the 2003 work injuries.

Moore saw two other doctors in 2005. Twice in January 2005, Dr. Kretschmer examined him. Dr. Kretschmer's notes do not address the role, if any, the 2003 work injuries played in Moore's current knee conditions. But Dr. Kretschmer recommended total knee replacement, noting a diagnosis of "degenerative disease of the left knee." In July 2005, Dr. Snow referenced X-rays "going back to 1998" showing osteoarthritis of both knees, and stated, "To me it appears fairly straight-forward that his initial injuries sustained in 1987 have caused a natural progression of osteoarthritis. He is in need of bilateral total knee replacements."

In June 2006, Dr. Tallerico performed an employer medical evaluation on behalf of Moore's previous employer, Silver Bay Logging. Dr. Tallerico opined that the December 2003 incident was a substantial factor in Moore's disability and need for surgery.

Dr. McDermott performed a second independent medical examination (SIME), concluding that the 2003 injuries were not a substantial factor in Moore's current status or his need for future treatment. He considered the two 2003 incidents to be temporary aggravations and that Moore would have needed knee replacements anyway.

After applying the presumption of compensability and concluding that it had been rebutted, the board denied Moore's claims. The board found the overwhelming medical evidence, including the opinions of Drs. Partlow, Kretschmer, Leadbetter and McDermott, supported that Moore's 2003 injuries were temporary aggravations of a preexisting knee condition and not a substantial factor in Moore's current need for treatment. The board gave the "most weight" to the opinion of Dr. Partlow. The board also stated, "We give little weight to the opinion of Dr. Tallerico, a physician hired by a third employer, not associated with the current dispute, therefore the Board finds his opinion may be biased."

Moore appeals. Moore argues that the board's decision lacks substantial evidence because none of the physicians relied on by the board gave an opinion addressing the causation test set out in *DeYonge v. NANA/Marriott*, and the board failed to fully review the evidence and make specific findings regarding each doctor's testimony. In addition, he asserts that the board erred in concluding that Tallerico was "biased" and in deciding that Moore was not credible.

Applicable law: AS 23.30.128(b) provides in part, "The board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record" and that a board determination of the credibility of a witness who testifies before the board is binding on the commission.

AS 23.30.122 provides that the "board has the sole power to determine the credibility of a witness" and to weigh the evidence from a witness's testimony, including medical testimony and reports.

AS 23.30.120(a) provides a presumption that an employee's claim is compensable. To attach the presumption, the employee must establish a preliminary link between the employment and the injury, *e.g., DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000). Next, the employer must rebut the presumption with substantial evidence that the injury was not work-related. The employer can either "(1) [provide] an alternative explanation [for the injury that], if accepted, would exclude work related factors as a substantial cause of the disability; or (2) directly [eliminate] any reasonable possibility that employment was a factor in causing the disability." *E.g., DeYonge*, 1 P.3d at 96.

"[P]resentation of 'a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not a substantial cause of the disability' rebuts the presumption of compensability." *Cowen v. Wal-Mart*, 93 P.3d 420, 424 (Alaska 2004).

In *DeYonge*, a housekeeper sought *temporary* total disability and medical benefits, claiming that her job aggravated her preexisting arthritis in her knees to the point that she could not work. The Alaska Supreme Court rejected the board's conclusion that the work must worsen the employee's underlying condition, rather than merely aggravate her symptoms, to result in compensable temporary disability. The Court held in *DeYonge* that the employer failed to rebut the presumption of compensability by presenting an alternative explanation for the injury because, although the employee's arthritis was preexisting, her doctor agreed that "the type of duties which she performed as a housekeeper . . . would have been a substantial factor in increasing her

symptoms[.]” The Court explained that the board erred in requiring a permanent aggravation of the housekeeper’s knee condition when she was not claiming permanent total disability, but rather temporary total disability.

“When the board makes a mistake in the application of the law, or lacks substantial evidence to support a finding of fact, the commission must determine if the board’s error prejudices the substantial rights of a party before it may reverse the board’s decision. Even if a finding of fact or conclusion of law is erroneous, the mistake is not grounds for reversal if the finding or conclusion is not necessary to the board’s decision.” Dec. No. 087 at 12-13 (citing *Fairbanks No. Star Bor. v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987)).

Issues: Did the board made adequate findings of fact and rely on substantial evidence to support its findings that Moore’s need for knee replacement surgery was not a result of an injury derived from work for Afognak? Did the board properly apply the aggravation rule in *DeYonge*? Did the board err in finding Tallerico biased? Did the board properly find that Moore was not credible?

Holdings/analysis: The commission found that Moore’s reliance on *DeYonge* was misplaced. Afognak paid the *temporary* disability compensation due for the period of time when Moore’s 2003 work injuries aggravated his left knee condition.

Notwithstanding that Moore’s 2003 injuries brought about *temporary* disability and required medical treatment to return him to pre-injury status, the board had substantial evidence in the medical records and physician opinions to find that the 2003 injuries were not a substantial factor in bringing about the need for surgery to *permanently* replace the left knee joint. Dec. No. 087 at 9-10 (emphasis added).

The commission concluded Afognak properly rebutted the presumption with qualified medical opinions that Moore’s 2003 injuries were not “a substantial factor” in his present need for knee replacement. Moreover, the board had substantial evidence to conclude that once the presumption dropped out, Moore did not prove his case by a preponderance of the evidence. The board cited the “overwhelming medical evidence” in the form of the opinions of Drs. Partlow, Kretschmer, Leadbetter, and McDermott, and decided to place the greatest weight on the opinion of Moore’s treating doctor. The board also supported its finding that the 2003 injuries were temporary and transient with the facts that Moore did not miss work and did not seek immediate medical attention in Kodiak after the December 2003 injury. This evidence was adequate to support the board’s decision and the commission does not set aside board decisions just because the commission views the evidence differently.

The commission concluded the board’s comment regarding Dr. Tallerico is harmless error. The commission concluded that a board panel could not infer bias simply from the fact that a doctor was retained by the employer to do an evaluation, but the board could find that a report is less relevant because it is directed to a different question than the one before the board, and therefore, less persuasive. In Moore’s case, however, this inference would not apply because the Afognak attorney was present at

the deposition and questioned Dr. Tallerico extensively, even though another employer retained Dr. Tallerico to address a different dispute. “[A]s there is no evidence on which to base a finding of bias in the sense of being tangential or bias in the sense of being influenced by personal preference, dislike or financial interest in the outcome, the board’s comment that Dr. Tallerico’s ‘opinion may be biased’ is error.” *Id.* at 14. But the commission concluded the error was not prejudicial because at least three other doctors opined that the 2003 injuries were not a substantial factor in needing knee replacement.

The board did not make express credibility findings regarding Moore’s testimony so the commission did not address Moore’s argument that the board made improper findings. Moreover, the commission concluded that the board did not need to make such findings in Moore’s case since it did not view his testimony as material to its decision.

The board clearly regarded the medical evidence as most persuasive and relevant to the issue before it, rather than Moore’s state of mind or his subjective beliefs. . . . Since the question before the board was whether knee replacement surgery was needed to treat the work-related injury, the board’s focus on the physician’s opinions was not unreasonable. *Id.* at 15-16.

Notes: This case was appealed to the Alaska Supreme Court, but the appeal was dismissed when the parties settled. The amended version of AS 23.30.010, which applies to injuries after Nov. 7, 2005, changes the “a substantial factor” test to “the substantial cause.”