

Case: *Karl B. Cameron v. TAB Electric and Liberty Northwest Insurance*, Alaska Workers' Comp. App. Comm'n Dec. No. 089 (September 23, 2008)

Facts: The employer paid temporary total disability (TTD) benefits after Karl Cameron (Cameron) strained his right shoulder in August 2005. After some recovery time, Cameron was released to light-duty work. He sought reemployment benefits but the administrator determined he was not eligible in April 2006 because he could work as an insurance sales agent, a position Cameron had previously held. Cameron did not appeal the administrator's decision. Cameron's shoulder needed another surgery and the employer paid TTD until he was medically stable in August 2006. Cameron filed a claim for continuing TTD benefits in October 2006. The board heard and denied this claim. Cameron appealed.

Separately, Cameron also filed a claim for permanent total disability (PTD) compensation, asserting that his shoulder injury combined with his prior disabilities to make him permanently, totally disabled because he was unable to return to work in an occupation that was readily available in the Alaska job market. He presented his testimony that (1) his hearing loss prevents him from using a telephone because his hearing aids do not work with telephones and available adaptive technology does not work well; (2) he has tried to work but he cannot hold down a job; and, (3) he has other conditions (asthma, manic depressive illness, a ruptured stomach, back surgery, and a left shoulder injury that needs surgery) also limiting his ability to work. He presented a letter from Dr. Tower opining that Cameron did not "have the physical capabilities [to work in insurance sales], but that is not necessarily related completely to his right shoulder but, rather, to a combination of issues regarding his right shoulder and other issues." On this claim, the board decided:

Applying the presumption analysis described above to the evidence in this claim, we find as follows: We must first consider whether the presumption attaches. We find the employee has failed to do so; both the employer's physician, Dr. Jensen, and the employee's treating and surgical physician have opined that the employee can return to work as far as his right shoulder is concerned. Accordingly, we find he is neither permanently nor totally disabled, in regards to his compensable right shoulder condition. As we found earlier, the employee testified he has the adaptive equipment which would allow him to converse on the telephone, he just doesn't utilize them for work purposes. As we found earlier that the employee is not entitled to TTD, we likewise conclude he is not entitled to PTD benefits. The employee's claim for PTD benefits is denied and dismissed.

Cameron appealed. Cameron argues that the board should have allowed his witness to testify even though his witness list was late, and should have admitted his late-filed witness statement and medical records. Cameron

provided medical records and a witness statement to the employer shortly before the hearing started and an incomplete witness list a few days before the hearing. The board refused to admit the late documents and to allow the witness to testify, noting that Cameron had been informed of the time requirements and that the employer had not been able to prepare to respond. Cameron requested a continuance, but the board denied the request, pointing out that less than two weeks earlier he had insisted that the hearing go forth as scheduled when the employer was seeking a continuance. On appeal, Cameron also argues he is entitled to TTD while pursuing reemployment benefits and the board erroneously denied his PTD claim.

Applicable law: 8 AAC 45.112 requires a witness list to be filed and served at least five working days before a scheduled hearing. 8 AAC 45.120(a) requires witnesses to testify under oath or affirmation. Statements of witnesses not available to testify at hearing should be served on the opposing party and be "in the board's possession 20 or more days before hearing," 8 AAC 45.120(f). 8 AAC 45.195 provides:

A procedural requirement . . . may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of the law.

AS 23.30.185 provides:

In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.041(k), which states in part:

If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages . . . until the completion or termination of the process, . . .

AS 23.30.120(a) provides a presumption that an employee's claim is compensable. Once raised, the presumption shifts the burden of producing evidence to the employer, *e.g.*, *Stephens v. ITT/Felec Services*, 915 P.2d 620, 624 (Alaska 1996). The employee, in order to raise the presumption of

compensability, needs to present only some evidence of a causal link between a permanent total disability and the employment, *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006). At the first step of the presumption analysis, the board should not weigh the credibility of the evidence; the board must simply decide if the evidence, including testimony, would be sufficient to attach the presumption if it were believed, *Resler v. Universal Services, Inc.*, 778 P.2d 1146, 1149 (Alaska 1989).

Issues: Did the board abuse its discretion by denying admission of the employee's medical records, witness statement and witness testimony? Did the board correctly decide that the employee could not receive TTD once he reached medical stability? Did the board correctly apply the presumption analysis to the PTD claim?

Holding/analysis: Cameron did not argue that he complied with the regulations by timely submitting the records, statement and witness list but instead insists the board should have made an exception for him. On the witness statement by Christy Rush and testimony by Dennis Stosel, Cameron explained that Rush addressed his ability to work and he did not provide any information about Stosel, other than that he resided outside Alaska. Although the commission "generously interprets the briefs and arguments of self-represented litigants to allow them to make their appeal," litigants must produce some sort of an argument. Dec. No. 089 at 15. Even when questioned at oral argument to assist him in developing his arguments, Cameron did not explain why he was late and how, if the documents and witness had been permitted, they would have altered the result. His cursory argument resulted in waiver of this appeal point.

In addition, the commission concluded that Cameron failed to establish that he was prejudiced by the board's decision not to admit his late medical records for the purpose of proving he had other medical conditions because medical evidence was already in the record demonstrating that he suffered from other health conditions, including the particular illnesses and injuries that he cited in his argument to the board. Additionally, the regulations did not require the board to grant a continuance since the surprised party, the employer, was not requesting one. "[I]n view of the lack of showing of prejudice to Cameron, the cumulative nature of the evidence, the absence of evidence of a good faith attempt to comply with the regulations regarding medical records or due diligence, Cameron's previous insistence that the hearing go forward, and Cameron's concession that he did not request the records until after the time allowed to file and serve them had passed, the commission cannot say that the board's strict application of its regulations resulted in manifest injustice." *Id.* at 19.

On his arguments that he should receive TTD while pursuing reemployment benefits, Cameron concedes that the physicians agree that he is medically stable. AS 23.30.185 and AS 23.30.041(k) clearly end TTD once medical stability is

reached. Cameron did not appeal the administrator's denial of eligibility for reemployment benefits, but even if he had *and* been successful, he would not have been entitled to TTD once he reached medical stability. Any errors the board made in its analysis of medical stability are moot because of Cameron's concession.

On Cameron's PTD claim, the commission concluded the board did not apply the correct legal analysis. The board assessed credibility, instead of sufficiency, of the evidence when considering whether the presumption attached. Only after the presumption attaches and is rebutted, is the evidence weighted and credibility assessed. The commission remanded to the board to decide the PTD claim based on the current record.