Case: *Rodney N. Powell vs. North Country Construction and Alaska National Insurance Company*, Alaska Workers Comp. App. Comm'n Dec. No. 187 (August 23, 2013)

Facts: Rodney Powell (Powell) broke his leg and suffered an anal fissure in a fall while working for North Country Construction in 1998. In December, 1998, Dr. Chung operated on Powell to close the anal fissure, and remove or treat some hemorrhoids. In 1999, Dr. Anderson reported that the anal fissure appeared to be completely healed, and no significant hemorrhoids or skin tags were present. However, in September and October 1999, Dr. George found an anal fissure and scarring from the prior fissurectomy and she surgically repaired the fissure using a skin flap. In April 2000, she noted the fissure was completely healed and the graft was in place. She removed skin tags on April 10, 2000. On May 16, 2000, Dr. George reported that Powell still had "some redundant tissue in the left posterolateral position," but thought it would shrink in three months or so.

The employer paid benefits related to the anal fissure until filing a controversion on March 24, 2000. The controversion was based on Dr. Marble's employer's medical evaluation (EME) that although the anal fissure could have been an indirect result of the 1998 work injury, Powell's hemorrhoids were not work-related, and no further medical treatment was necessary for the anal fissure. The employer admitted that Powell may not have received the controversion notice because it was mailed to an incorrect zip code, but its adjuster told Powell about the controversion over the phone on March 22, 2000.

Powell had no further medical care for anal conditions from May 2000 until 2011. On November 16, 2011, Powell saw Dr. Kimmins, reporting that he had been left with tissue protrusion after Dr. George's 1999 anal fissure surgery. Dr. Kimmins found "large fibrotic skin tags and hypertrophic papilla." A few weeks later, Dr. Kimmins removed the skin tags and papillae and excised "some redundant internal hemorrhoidal tissue" located in the left anterior quadrant.

Powell filed a claim for benefits on March 5, 2012. On September 19, 2012, Dr. Marble reviewed Powell's medical records for treatment subsequent to his EME. In his opinion, the skin tags were not related to the work injury or to the anal fissure. Dr. Marble stated that skin tags are small benign growths in over 50 percent of the population and are seen frequently in middle age. He also pointed out that the skin tags present in 2000 were removed by Dr. George, and it was more probable than not that new skin tags had developed. Meanwhile, Dr. Kimmins noted in March 2012 that he was not able to comment on events that occurred before he first saw Powell in November 2011, including whether a work-related accident caused Powell's anorectal problems.

The issues for hearing were identified as: (1) whether Powell's work injury was a substantial factor in his need for surgery and related care in November 2011 to remove skin tags and a hypertrophic papilla; and (2) whether the employer's controversion was unfair and frivolous based on a lack of proper service. The board decided that Powell did not attach the presumption of compensability. Or, if he did, he failed to prove his

claim by a preponderance of the evidence. The board also concluded that the controversion notice was not frivolous or unfair. Powell appeals.

Applicable law: AS 23.30.095(a) provides: "The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . ." The '[p]rocess of recovery' language allows the board to authorize continuing care beyond two years from the date of injury. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665-66 (Alaska 1991).

Claims for medical benefits are presumed to be compensable, pursuant to AS 23.30.120(a)(1). To be compensable, Powell's employment needed to be "a substantial factor" in bringing about the need for medical care. A work injury is a substantial factor if the need would not have arisen at the same time, in the same way, or to the same degree but for the work injury. *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 532-33 (Alaska 1987).

AS 23.30.155(d) provides in relevant part, "If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due."

The first step to determining whether a controversion is frivolous or unfair is to decide whether it was filed in good faith. One must examine the controversion and the evidence on which it was based in isolation, without assessing credibility, and draw all reasonable inferences in its favor. *State of Alaska v. Ford*, Alaska Workers' Comp. App. Comm'n Dec. No. 133, 21 (April 9, 2010).

Issues: Did the board have substantial evidence to conclude that Powell did not prove his claim by a preponderance of the evidence? Was the employer's controversion deficient? Was the employer's controversion frivolous or unfair?

Holding/analysis: "In the commission's view, whether substantial evidence supports the board's conclusion that Powell is not entitled to medical benefits for the 2011 procedures performed by Dr. Kimmins is not a close issue. Powell has not come forward with any evidence, medical or otherwise, to support the compensability for that treatment. Other than the fact that Powell had rectal conditions requiring treatment in 1998-99 and 2011, there is no nexus between the 1998 work injury and the 2011 treatment." Dec. No. 187 at 9. The commission noted that the tissue Dr. Kimmins removed in 2011 was in a different location than that of the skin graft surgery in 1999.

The commission concluded that Powell received actual notice of the controversion. "If Powell did not receive the written notice, it constituted a technical deficiency in providing notice to him. In the commission's view, that deficiency was cured through the verbal communication from the adjuster, who provided actual notice to Powell." *Id.* at 10. Moreover, the controversion was not frivolous or unfair because it was filed in good faith; and no penalties were owed because no benefits were due.