Alaska Workers' Compensation Appeals Commission

Tire Distribution Systems, Inc., and Travelers Property Casualty Company of America,
Appellants,

vs.

David M. Chesser,
Appellee.

Final Decision
Decision No. 090 October 10, 2008

AWCAC Appeal No. 07-045
AWCB Decision No. 07-0345
AWCB Case No. 200505635

Appeal from Alaska Workers' Compensation Board Decision No. 07-0345, issued on November 16, 2007, by northern panel members Damian J. Thomas, Member for Labor, and William Walters, Chair.

Appearances: Randall J. Weddle, Holmes, Weddle & Barcott, for the appellants Tire Distribution Systems, Inc., and Travelers Property Casualty Company of America. Robert M. Beconovich, LLC, for appellee, David M. Chesser.

Commission proceedings: Appeal filed November 30, 2007. Appellants' motion for partial stay pending appeal heard December 12, 2007; Order granting appellants' motion for a partial stay and setting the amount of a supersedeas bond issued December 17, 2007. Appellee's motion for extension of time to file brief granted by the chair April 1, 2008. Appellee's second motion for extension of time to file brief granted by the commission panel May 2, 2008. Oral argument on appeal presented July 15, 2008; additional supplemental briefing completed July 22, 2008.

Commissioners: David W. Richards,[1] Philip Ulmer, Kristin Knudsen.

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

[1] David W. Richards was appointed as an Appeals Commissioner representing employees March 1, 2008, following expiration of the term of John Giuchici, who was originally assigned to hear this appeal. The chair's notice of reassignment was issued March 6, 2008, before oral argument of this appeal.

By: Kristin Knudsen, Chair.

This appeal arises from a board decision awarding compensation for an injury to the worker's cervical spine while he was stacking tires at a training facility in Iowa. The appellants contend that the board's decision lacks substantial evidence to support it because the medical evidence against causation was not contradicted by the evidence relied on by the board. The appellants also argue that the board's decision reflects factual errors in its assessment of the evidence. Finally, the appellants contend that the presumption of compensability never attached, because the appellee presented no medical evidence of a causal link between the training center incident and the injury. The appellee opposes and contends that the commission is bound to accept the credibility assessment of the board as to the weight of the medical evidence.

This appeal requires the commission to decide if there is substantial evidence in light of the whole record to support the board's decision. The commission must also decide if medical opinion evidence on causation must be opposed by contrary medical opinion evidence to allow the board to find that the preponderance of the evidence favors causation.

The appellants' argument rests on the assumption that the board failed to analyze this claim as one requiring medical evidence to raise the presumption of compensability, that is, that "before the presumption attaches, some preliminary link must be established between the disability and the employment, and that in claims 'based on highly technical medical considerations' medical evidence is often necessary in order to make that connection."[2] The question whether a claim is based on "highly technical medical considerations" is a mixed question of fact and law. The commission determines that, although the issue is close in this case, the board did not find that the claim was based on highly technical medical considerations; therefore, medical evidence was not required to attach the presumption of compensability. The commission

[2] *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, (Alaska 1981) *quoting Commercial Union Cos. v. Smallwood,* 550 P.2d 1261, 1267 (Alaska 1976).

concludes there was sufficient evidence to support the board's findings of fact and affirms the board's decision.

1. Factual background.

David Chesser worked as a tire retread technician for Tire Distribution Systems. He was sent to Muscatine, Iowa for training at the Bandag Tire Corporate Training Center. He reported that on March 15, 2005, he was stacking tires to a height of eight tires. He testified he felt a "pop" in his neck. The next morning, he awoke with much worse pain. He went to a local emergency room where he was seen by Jeffrey Allgood, M.D. and advised to undergo an MRI and to see a specialist. He returned to Fairbanks where he saw physician assistant Tom Wilson on March 19, 2005. A March 22, 2005, MRI revealed multi-level spondylosis, degenerative disc disease and a left disc herniation at C-6-7. He was referred to Gregory Polston, M.D., of Advanced Pain Centers of Alaska. On April 7, 2005, Chesser gave written notice of an injury to his left arm.

Dr. Polston referred Chesser to Davis Peterson, M.D., who diagnosed C-7 radiculopathy and a C-5-6 herniation. He recommended a fusion with bone allograft from the fifth through seventh cervical vertebrae. On May 25, 2005, Dr. Peterson performed this surgery.

John Swanson, M.D., evaluated Chesser on August 9, 2005, for an employer medical evaluation. Dr. Swanson discussed Chesser's multiple pre-existing conditions, and noted Dr. Allgood's report of neck numbness appearing the morning of March 17, 2005. Dr. Swanson's opinion was that Chesser suffered a spontaneous herniation of the cervical disc in the night while he was asleep. Dr. Swanson reviewed Dr. Allgood's records and supplemented his report on October 12, 2005, indicating he was confirmed in his belief that Chesser suffered a spontaneous cervical herniation in his sleep. Dr. Swanson also testified in his deposition that lifting weight does not cause stress to the neck so that stacking tires or lifting the tires could not have caused the herniation of the cervical disc.

On November 17, 2005, Dr. Peterson, after receiving warning that the source of Chesser's bone graft provided tainted graft material, reported that Chesser was

diagnosed with hepatitis C. At his request John Petrini, M.D., examined Chesser and reviewed his records. Dr. Petrini opined that Chesser's hepatitis C infection resulted from a bone graft from an infected bone donor.

2. Proceedings before the board.

Chesser filed a report of injury to his arm on April 7, 2005. Tire Distribution Systems initially paid compensation and medical benefit. It filed a Controversion Notice on April 3, 2006, based on Dr. Swanson's evaluation. Chesser filed a Workers' Compensation Claim on March 9, 2007, for injury to his neck and arm and for hepatitis C contracted through surgery for the neck injury. The employer controverted and answered the claim April 17, 2007, asserting the injury did not arise out of and in the course of the employment.

The board heard the claim on September 26, 2007. The only issue for the board to decide was whether the injury arose out of and in the course of the employment. Cindy Peterson and Mary Bollinger testified Chesser denied he was injured during the training in Iowa. Frank Ortiz and Roy Schnedler testified that they were instructors at the Bandag Tire Instruction Center and did not remember Chesser stacking tires or telling them that he hurt himself while he was stacking tires. Schnedler testified he took Chesser to the emergency room but that Chesser did not tell him he had been injured at the Center. Schnedler testified another student told him that Chesser said he hurt himself throwing tires. Four other students testified they had no memory of Chesser stacking tires or saying he had injured himself. William Creese testified he was a student with Chesser and that he remembered Chesser stacking the tires. After stacking the tires, Creese testified, Chesser told him that he (Chesser) should not have done that. He testified Chesser tried to play darts later in the evening, but it was too painful.

In the hearing, Ronald Kramer testified he has worked for Tire Distribution Systems for many years. He testified that before the trip to Iowa, Chesser was strong and physically fit. After the injury, he had a difficult time doing the work. Tammy Chesser, Chesser's wife, testified Chesser called her from Iowa to say he had hurt

himself loading tires. She testified that, when she picked him up at the airport on his return, she had to carry his luggage for him.

Chesser testified at hearing that he barrel-stacked tires eight to ten tires high at Tire Distribution Systems. He testified that large operations have machines to stack tires. He testified one of the instructors at the Center asked him to show how manual stacking is done. He testified he felt a "pop" in his neck while he was stacking the tires. He testified he had trouble playing darts that evening. He testified that he had much worse pain in the morning and asked to go to the emergency room. He testified his neck problems persisted after the surgery. He testified Dr. Petersen warned him that a criminal enterprise had sold the hospital bone grafts from cadavers infected with hepatitis C and other infectious diseases. He tested positive for hepatitis C, but he has shown no signs of other infections.

3. The board's decision.

The board's decision was issued November 16, 2007.[3] The board identified the main issue for decision as: "Is the employee entitled to benefits under the Alaska Workers' Compensation Act for his cervical condition?"[4] The board's decision reviewed the principal evidence presented by document and deposition, and the testimony presented at hearing.[5] The board then briefly reviewed the application of the presumption of compensability, noting the rule in *Burgess Constr. Co. v. Smallwood*[6] that in claims based on highly technical medical considerations, medical evidence is often necessary to make a connection between the employment and the injury sufficient to raise the presumption of compensability.[7] Without expressly finding if the employee's claim was one "based on highly technical medical considerations," the board found

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[3] *David M. Chesser v. Tire Distribution Systems, Inc.,* Alaska Workers' Comp. Bd. Dec. No. 07-0345 (Nov. 16, 2007) (W. Walters, Chair).

[4] *Id.* at 2.

[5] *Id.* at 2-8.

[6] 623 P.2d 312 (Alaska 1981).

[7] *David M. Chesser,* Bd. Dec. No. 07-0345 at 9.

> [T]he testimony of the employee and the records and opinions of his treating physicians indicate the employee injured himself lifting tires in his work, suffering injury and disability, resulting in the cervical fusion graft surgery. We find this testimony and these records are sufficient evidence to raise the presumption of compensability.[8]

The board then found that Dr. Swanson's opinion that "any injury suffered by the employee lifting tires could not have caused his cervical condition" was sufficient to rebut the presumption of compensability.[9] The heart of the board's decision is contained in the following paragraph:

> In the instant case, we find the preponderance of the available evidence, specifically the reports of Dr. Polston, Dr. Peterson, and PA-C Chapa, the testimony of the employee and his wife, and the testimony of Mr. Creese, indicate the employee suffered a cervical injury lifting tires on March 15, 2005, while at a training course at the employer's direction. We find the preponderance of the evidence indicates this cervical injury necessitated medical treatment, including the fusion surgery, and resulted in disability. We conclude the employee's claim is compensable under the Alaska Workers' Compensation Act.[10]

The board then found that the employer had "resisted" payment of compensation and controverted the claim; it awarded $19,240 in attorney fees, $5,180 in paralegal costs, and $2,198 in other legal costs under AS 23.30.145(b) and, under AS 23.30.145(a), 10% of compensation paid "when, and if, the statutory minimum amount based on the payment of past and future medical, indemnity, and all other benefits related to her melanoma, [sic] exceeds the attorney fee awarded under AS 23.30.145(b)."

This appeal followed.

4. Standard of review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the findings.[11] The commission does not consider

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8 *Id.*

9 *Id.* at 10.

10 *David M. Chesser,* Bd. Dec. No. 07-0345 at 11.

11 AS 23.30.128(b).

evidence that was not in the board record when the board's decision was made.[12] A board determination of credibility of a witness who appears before the board may not be disturbed by the commission.[13]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[14] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[15] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation[16] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[17]

5. Discussion.

The Alaska Workers' Compensation Act establishes a presumption that an employee's claim "comes within the provisions of this chapter;"[18] a presumption that the courts have interpreted as meaning that the claim is compensable.[19] In order to attach the presumption to a claim, the employee must "establish a link between his injury and his employment."[20] The evidence an employee must present to establish a

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12 AS 23.30.128(a).

13 AS 23.30.128(b).

14 AS 23.30.128(b).

15 *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984) (citing *Miller v. ITT Arctic Serv.,* 577 P.2d 1044, 1046 (Alaska 1978)).

16 AS 23.30.007, .008(a). *See also Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

17 *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979).

18 AS 23.30.120(a)(1).

19 *Bradbury v. Chugach Elec. Ass'n,* 71 P.3d 901, 905 (Alaska 2003) (*citing Temple v. Denali Princess Lodge,* 21 P.3d 813, 815-16 (Alaska 2001)).

20 *Smith v. Univ. of Alaska, Fairbanks,* 172 P.3d 782, 788 (Alaska 2007).

link between the injury and the employment varies from case to case.[21] As the Alaska Supreme Court said in *Burgess Constr. Co. v. Smallwood,* discussing the employer's argument that the presumption did not apply to Smallwood's case,

> Burgess contends that this conclusion is mandated by the following language in our prior decision in this case.
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> "The claim in this case is based on highly technical medical considerations pertaining to the cause of the claimant's renal failure. While valid awards can stand in the absence of definite medical diagnosis, this would appear to be the type of case in which it is impossible to form a judgment on the relation of the employment to the disability without medical analysis."
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> *Commercial Union Cos. v. Smallwood*, 550 P.2d 1261, 1267 (Alaska 1976). We did not mean by this language to imply, as Burgess suggests, that the statutory presumption of compensability in the absence of substantial evidence to the contrary is not applicable in cases such as this. Rather, the quoted language simply acknowledges that before the presumption attaches, some preliminary link must be established between the disability and the employment, and that in claims "based on highly technical medical considerations" medical evidence is often necessary in order to make that connection. As we stated in *Thornton*, "(t)he question in a particular case of whether the employment did so contribute to (aggravate or accelerate) the final result is one of fact which is usually determined from medical testimony." 411 P.2d at 210. But once a prima facie case of work relatedness is made, as it clearly was here by Dr. Tenckhoff's testimony, the Board may not ignore the presumption and allocate the burden of proof to the claimant. Should the company meet its burden of producing substantial evidence that the injury was not work related, the presumption would then drop out, shifting the burden of proving all elements of the claim back to the claimant. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).[22]

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[21] *But see Cameron v. TAB Elec.,* Alaska Workers' Comp. App. Comm'n Dec. No. 089, 22-23 n.100 (Sept. 23, 2008) (noting cases suggesting that sufficient evidence to make a prima facie case is required to attach the presumption).

[22] *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981) (footnotes omitted).

The Supreme Court also noted[23] a passage from Prof. Larson's treatise on workers' compensation law:

> *See* 1 A. Larson, *Workmen's Compensation Law* § 10.33 at 120-21 (1978). The link is often provided by a mere showing that the injury occurred at work. Larson notes:
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> "It is not yet entirely clear what initial demonstration of employment-connection will give the presumption a foothold. Apparently, the idea is to rule out cases in which claimant can show neither that the injury occurred in the course of employment nor that it arose out of it, as where he contracted a disease but has no evidence to show where he got it." (footnote omitted). *Id*. at 121.

Since then, Larson's treatise has been updated to include a fuller discussion of the effect of the statutory presumption:

> In a few jurisdictions, notably New York, Massachusetts and Alaska, a statutory presumption in favor of coverage has figured in unexplained-accident cases. . . . [T]he New York act and the Alaska statute create the presumption in all cases, not merely those involving an employee's death or inability to testify.
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> The sweeping inclusiveness of this language might seem at first glance to mean that the mere making of a claim is also the making of a prima facie case, so long as the death or injury is shown to have occurred. The New York courts have not so interpreted the statutes, however. It is necessary to establish some kind of preliminary link with the employment before the presumption can attach. Otherwise the surviving spouse or dependent would have merely to say, "The deceased was one of your employees and I therefore claim death benefits," whereupon the affirmative burden would devolve upon the employer to prove that there was no connection between the death and the employment.[24]

After discussing the amendment of the Massachusetts statute to clarify that the presumption applied to death cases only if the claimant was found dead at his place of

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[23] *Id.* at 316 n.4.

[24] 1 A. Larson & L. K. Larson, *Larson's Workers' Compensation Law,* § 7.04[3] at 7-50, 51 (2008) (footnotes omitted).

employment, the treatise restates the passage quoted by the Alaska Supreme Court 27 years ago:

> Generally, however, it is not entirely clear what initial demonstration of employment-connection will give the presumption a foothold.
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> Apparently, the idea is to rule out cases in which claimant can show neither that the injury occurred in the course of employment nor that it arose out of it, as where the claimant contracted a disease but has no evidence to show where he or she got it. If there is evidence that the injury occurred in the course of employment, the presumption will usually supply the "arising-out-of-employment" factor. But if the statute did not accomplish more than this, it would add nothing to what most states would hold even in the absence of a statutory presumption, under the cases just discussed.[25]

After 30 years, it still may not be entirely clear what "initial demonstration of employment connection" will attach the presumption in all cases, but, in Alaska, if the case is one in which it is "impossible to form a judgment on the relation of the employment to the disability without medical analysis," medical evidence is required to attach the presumption.

a. The sufficiency of the evidence to attach the presumption of compensability.

The appellants argue that this is a case that requires medical evidence to attach the presumption and that none of the evidence presented by the appellee constitutes such medical evidence. They base their argument on Dr. Swanson's testimony that lifting does not cause intervertebral disc herniations in the *cervical* spine, because, in lifting weight, the stress is borne by the shoulder girdle and thoracic spine and below, but not in the cervical spine.[26] There is no valid scientific evidence, according to

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[25] *Id.* at 7-52 (footnotes omitted). The Alaska Supreme Court has consistently held that the presumption shifts only the burden of producing evidence; it does not shift the burden of proof. Thus, once the employer produces substantial evidence rebutting the presumption, the presumption fails, and the claimant must prove all elements of the claim. *See Wien Air Alaska v. Kramer*, 807 P.2d 471, n.4 (Alaska 1991) (*citing Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

[26] Swanson Dep. 11:19 – 12:1, July 19, 2007.

Dr. Swanson, that a herniated disc in the cervical spine can be obtained by lifting.[27] Appellants contend that, because Dr. Swanson's testimony is not contradicted, it must be accepted by the board as a statement of scientific fact. Therefore, appellants argue, Chesser's claim is based on a theory of causation that contradicts accepted medical understanding, so it is one in which it is "impossible to form a judgment on the relation of the employment to the disability without medical analysis."

The board did not find that this case was one which was based on "highly technical medical considerations" so that medical evidence was necessary to make a connection between the employment and the injury. After examining Chesser's claim, the commission concludes that, although the question is close and the board could have chosen to regard his claim as one requiring medical evidence to attach the presumption, it was not error to conclude Chesser presented sufficient evidence to attach the presumption without medical analysis of causation.

At the preliminary link stage, Chesser's claim did not seek to explain how his injury occurred, but to show that the injury occurred in the course of employment. The claim rests primarily on Chesser's testimony that while he was "barrel-stacking" tires at the training center, he "felt a snap, and not more or less a pain, like a – just a quick

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[27] Swanson Dep. 10:25 – 11:4. Dr. Swanson further testified on cross-examination,

> [T]here is no study that I can find that is consistent with this [theory that lifting causes cervical disc herniation], and I have checked with some of the world's experts on cervical spine injuries including Bowman in Pennsylvania and none of these experts know of any study, nor are they of the opinion that lifting can cause stress on the neck; so it's just not out there. It's a comfortable thought to say that all injuries and all things that happen to people are due to trauma or something that occurs, but it just doesn't work. You have to believe in science.

Swanson Dep. 37:5-17. Dr. Swanson agreed that, assuming facts based on Chesser's testimony, it was possible that the disc herniation occurred spontaneously at the tire center, Swanson Dep. 32:10 – 33:21, or, assuming facts based on initial medical reports that Chesser denied any specific injury, that it occurred spontaneously while Chesser was asleep, Swanson Dep. 8:21 – 9:1.

stab in the back of my neck and upper chest."[28] He testified "that night after school and during school, the rest of the day" he felt "a lot of pain on the side of my neck and my arm. My arm started to go numb."[29] He testified it got worse at dinner,[30] and in the morning, when he awoke, his "whole left arm was completely numb."[31] In support of his testimony, he produced testimony from witnesses that he did barrel-stack tires and that he complained of pain afterwards.

Thus, Chesser's claim is based on the kind of unexplained accidental injury the Alaska presumption was designed to address:

> Apparently, the idea [of requiring evidence of a preliminary link between the employment and the disability] is to rule out cases in which claimant can show *neither* that the injury occurred in the course of employment *nor* that it arose out of it, as where the claimant contracted a disease but has no evidence to show where he or she got it. *If there is evidence that the injury occurred in the course of employment, the presumption will usually supply the "arising-out-of-employment" factor.*[32]

When the board examines the employee's evidence to determine if it is sufficient to raise the presumption of compensability, only evidence tending to establish the preliminary link is considered and competing evidence is disregarded.[33] There is no evaluation of the credibility of the evidence when making the preliminary link determination,[34] thus there is no assessing it in light of contradictory testimony. For that reason, Dr. Swanson's testimony regarding causation is not considered in the first step of the presumption analysis.

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[28] Chesser Dep. 30:8-10, Jan. 31, 2006.

[29] Chesser Dep. 30:17-19, 30:14-15.

[30] Chesser Dep. 30:25 – 31:1.

[31] Chesser Dep. 33:12-13.

[32] 1 A. Larson & L. K. Larson, *Larson's Workers' Compensation Law,* § 7.04[3] at 7-52 (2008).

[33] *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999).

[34] *Id., citing Resler v. Universal Servs., Inc.*, 778 P.2d 1146, 1148-9 (Alaska 1989).

Chesser's testimony is sufficient to establish that the first appearance of symptoms of the injury occurred during the course of employment. While the board could have chosen to regard Chesser's injury as one that required medical evidence to establish the presumption because it was unexplained by Chesser's testimony or his witnesses, it was not *required* to do so. There was sufficient evidence that, explained or not, the injury occurred while Chesser was in the course of his employment and engaged in a work activity at the direction of his employer. There was evidence corroborating the occurrence of an injury in Creese's affidavit and testimony. While Chesser's evidence is not strong, in light of the Supreme Court's decision in *Resler v. Universal Services, Inc.*, the commission concludes that Chesser's testimony, corroborated by the testimony of other witnesses, tended to show an unexplained injury occurred in the course of employment, and is sufficient to attach the presumption.[35]

b. The sufficiency of the evidence to support the board's findings that Chesser's injury was caused by his employment.

The board found that Dr. Swanson's testimony rebutted the presumption of compensability. Since Dr. Swanson's testimony, (that the activity Chesser engaged in at the time he felt the "snap" or "pop" could not have put sufficient stress on the cervical spine to cause a traumatic herniation of the disc), eliminates the reasonable possibility that Chesser's herniated cervical disc was caused by the work, even if it occurred at work; it is sufficient to overcome the presumption. Thus, Chesser was

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[35] *Resler v. Universal Servs., Inc.*, 778 P.2d 1146, 1149 (Alaska 1989) (Resler's testimony that she experienced pain on the job and complained to the medic, a roommate's testimony that she complained of heavy work on the job, a medic's report that she complained of pain, and a physician's report, based primarily on what the patient told him, that she had suffered an injury, and a corroborating witness's testimony that Resler told him that she had gone to the medic for backaches was "not as strong" as in *Cheeks v. Wismer & Becker/G.S. Atkinson*, 742 P.2d 239, (Alaska 1987), but sufficient to attach the presumption.); *Cheeks v. Wismer & Becker/G.S. Atkinson*, 742 P.2d 239, 243-45 (Alaska 1987) (Cheeks' own testimony, corroborated in part by his roommate, his partner, and his doctor, was sufficient evidence to establish the preliminary link.).

required to prove, by a preponderance of the evidence, that the employment was a substantial factor in bringing about the injury he suffered at the training center.

The appellants concede that Chesser was found to be a credible witness by the board. The appellants contend that Chesser's argument on appeal (that a pre-existing condition does not rule out the possibility of compensable injury) is non-responsive, because appellants do not contend that Chesser's pre-existing condition was the basis for their defense. Rather, appellants argue Chesser offered no medical evidence [opposing Dr. Swanson's testimony] to support his position, and thus, he could not prove his case by a preponderance of the evidence.

The Supreme Court has held that uncontradicted lay testimony, when combined with equivocal medical opinion, is sufficient to support an award of compensation.[36] However, that does not necessarily hold true when substantial evidence to the contrary of the equivocal medical opinion is presented.[37] The appellants contend the board (1) relied on lay testimony, implicitly determined to be credible, and medical testimony they argue is inconclusive, and (2) rejected uncontradicted medical testimony that the injury could not have happened *because of* the activity, even if it happened *during* the activity. Underlying their argument is the assumption that the board must have been persuaded by appellee's argument regarding Dr. Swanson's opinion.

At hearing before the board, the appellee argued that Dr. Swanson's testimony was a "notable exception" and contrary to common sense.[38] Appellee's counsel characterized Dr. Swanson's testimony as "incredible nonsense."[39] Appellee argued Dr. Swanson's opinion was

> not a medical opinion, this is an opinion that asks you to suspend your logical sort of beliefs and appreciation and assume that, well, these things don't happen when people are lifting, these things don't happen when people are twisting, and I would

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[36] *Beauchamp v. Employers Liability Assur. Corp.*, 477 P.2d 993, 996 (Alaska 1970).

[37] *Brown v. Patriot Maintenance, Inc.,* 99 P.3d 544, 549-50 (Alaska 2004).

[38] Hrg Tr. 80:21-25.

[39] Hrg Tr. 13:19.

> suggest all the other hearings that this board has ever heard are common occurrences where this caused a cervical consequence.[40]

Appellee did not present medical opinion testimony that directly contradicted Dr. Swanson's testimony at hearing; i.e., testimony that lifting (as opposed to weight on top of the head or a head blow) *does* place a load on the cervical discs that could result in a disc herniation. Rather, appellee relied on medical reports by physicians who had treated the employee and Chesser's testimony that he was well until he went to Iowa, that his pain began when he was stacking tires, and that he was found to have a herniated disc afterwards.[41]

The board must make findings of fact and conclusions of law regarding all issues that are both material and contested.[42] If the board's findings or conclusions are insufficient to permit intelligent appellate review, the commission will remand the case to the board for further deliberation.[43] Findings are adequate to permit appellate

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[40] Hrg Tr. 14:1-8. Appellee's counsel overstates Dr. Swanson's testimony; Dr. Swanson did not deny that lifting may cause disc herniation or other spinal injury in *other* parts of the spine. He stated that the stress of lifting was carried through the shoulders and shoulder blades to the thoracic and lumbar spine. He also noted that there were studies suggesting that head blows and heavy loading of the head may cause cervical herniation. Appellee's counsel did not point to any specific case in which the board found that lifting, with or without twisting, had caused a *cervical* disc herniation, as opposed to other cervical consequences.

[41] Essentially, Chesser's argument was based on classic *post hoc ergo propter hoc* reasoning. The appellants' argument pointed to the logical fallacy underlying such reasoning: just because the injury came after the activity does not mean that the activity caused the injury. *Lindhag v. State, Dep't of Nat. Resources*, 123 P.3d 948, 954 (Alaska 2005). Appellants sought to establish that there was no scientific basis for a causal relationship between the activity and the injury, thus breaking the chain of causation.

[42] *Bolieu v. Our Lady of Compassion Care Ctr.*, 983 P.2d 1270, 1275 (Alaska 1999).

[43] *See McGahuey v. Whitestone Logging, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 054, 10 (Aug. 28, 2007); *Omar v. Unisea, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 053, 6-7 (Aug. 23, 2007); *Geister v. Kids Corps, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 045, 9-10 (June 6, 2007); *Jones v. Frontier Flying Serv.,* Alaska Workers' Comp. App. Comm'n Dec. No. 018, 17 n.95

review if, "at a minimum, they show that the Board considered each issue of significance, demonstrate the basis for the Board's decision, and are sufficiently detailed."[44]

Although it summarized Dr. Swanson's testimony in the discussion of the evidence presented, in its decision the board did not say why it disregarded Dr. Swanson's testimony. Instead, it listed the evidence it relied upon:

> [T]he preponderance of the available evidence, specifically the reports of Dr. Polston, Dr. Peterson, and PA-C Chapa, the testimony of the employee and his wife, and the testimony of Mr. Creese, indicate the employee suffered a cervical injury lifting tires on March 15, 2005, while at a training course at the employer's direction.

This finding establishes that Chesser suffered a "cervical injury lifting tires." The board does not explicitly say "a cervical injury *caused by* lifting tires," or "a cervical injury *from* lifting tires," instead of "a cervical injury *while* lifting tires" or "a cervical injury *after* lifting tires."[45] The next sentence states that the board found a causal connection between the "cervical injury" and the need for treatment, including surgery.[46] The board concludes that the board found the claim compensable.

The commission encourages the board to make explicit credibility determinations and clear findings of fact, so that it is not required to read in missing words. In this case, the commission must assume, because the board found the claim to be compensable, that the board's phrase, "the employee suffered a cervical injury lifting

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(Sept. 7, 2006) ("[W]here a gap in the board's findings will not permit application of the law or intelligent review of the board's decision, we must remand the case to the board, because it is the board's responsibility to determine the facts.").

[44] *Stephens v. ITT/Felec Servs.*, 915 P.2d 620, 629 (Alaska 1996) (Matthews, J., dissenting in part).

[45] The remainder of the sentence, with its focus on date and location, supports an inference that "while" is the missing word between "injury" and "lifting." The difference between "injured while lifting" and "injured from lifting" is significant: it points to the critical distinction between mere succession and actual causation.

[46] There was no dispute that the herniated cervical disc required treatment, or that the surgery was an appropriate treatment.

tires on March 15, 2005," was intended to mean "the employee suffered a cervical injury *from* lifting tires on March 15, 2005."

Chesser's testimony is sufficient to permit the trier of fact to find that he suffered onset of the pain of injury while stacking tires at the training facility. His wife's testimony is sufficient to establish that he had serious pain when he returned. PA-C Chapa's reports simply detail that Chesser had neck pain and radiculopathy in his arm, that he had a prior diagnosis of a bulging disc, and that Chesser had been seen at an emergency room in Iowa. Dr. Polston's report establishes Chesser's history of the onset of pain and the existence of the herniated disc, as do the MRI reports. Dr. Polston does not make an independent assessment of causation, either by saying that Chesser's history is compatible with a causal relationship to his injury or by saying that the tire stacking is temporally, but not causally, related to the injury.

Only Dr. Peterson makes a statement that the board could construe as a statement of work relationship. On the first page of his May 10, 2005, report, made on a board-approved form, the question asking "is the condition work-related?" is answered "yes" with the comment added "happened at work." At the end of the report, Dr. Peterson notes that "workers' compensation clearance" will be needed to proceed with surgery. While the commission cannot consider Dr. Peterson's report as *strong* evidence,[47] it is sufficient that the board might infer that Dr. Peterson did not, as Dr. Swanson emphatically did, find Chesser's account of his injury incompatible with a causal relationship between stacking the tires and herniating the cervical disc.

The board's form is prescribed for injuries that are covered by the workers' compensation act.[48] The question "is the condition work-related?" is somewhat ambiguous, as a relationship to work may not be a causal relation. Standing alone, it may mean that the condition manifested itself at work, or that it happened after work,

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[47] The note that the injury "happened at work," may be a limitation on the opinion that the injury is "work-related," meaning it is confined to a temporal or local relationship, instead of a causal relationship. On the other hand, it may be an explanation of the basis for an opinion that a causal relationship exists.

[48] AS 23.30.095(c).

or that it was communicated to coworkers. However, in the context of the board-prescribed form filed if the physician asserts the treatment is required for an injury covered by workers' compensation, the affirmative response is sufficient, in the absence of contrary evidence regarding the physician's opinion,[49] to support an inference that the physician filling in the form believes that the injury is causally related to the work.

Dr. Swanson's uncontradicted evidence established that *lifting* the tires did not cause the herniated cervical disc. However, lifting was not the only action involved in barrel-stacking tires. The board, on reviewing Dr. Swanson's testimony, may have believed he did not understand the full scope of the activity involved and with which the board members may be familiar. If the board had explained its reasoning more fully, the commission's task would be easier; but the commission cannot say that the board's decision on this record is inadequate to permit appellate review. The board's reliance on a combination of lay testimony, which it explicitly found to be credible, and medical report evidence, regarding which it made no explicit credibility finding but explicitly accepted, provides adequate explanation of the board's reasoning.[50]

The commission need not agree with the board's assessment of the weight of evidence to conclude that the evidence the board relied on is substantial evidence on which a reasonable mind might rely to support a conclusion. The commission is not given the authority to reweigh the evidence, or to set aside the board's findings if the commission would find the greater weight of the evidence is to the contrary. The Alaska Workers' Compensation Act grants the board, not the commission, the power to determine the credibility of the evidence, including competing medical opinions. The board's discussion of the evidence presented indicates that the board considered Dr. Swanson's testimony, but, because the board made no explicit credibility findings, it

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[49] For example, there was no evidence the affirmative answer was entered by anyone other than the physician.

[50] A legal determination that there is sufficient evidence in the record to allow the board to make a decision, as the commission makes here, is "distinct from assigning weight to a particular piece of evidence." *Smith v. Univ. of Alaska, Fairbanks,* 172 P.2d 782, 793 (Alaska 2007).

must be assumed that the credibility of his opinion was not a factor in the board's decision.[51] Therefore, the commission concludes that the board did not reject an uncontradicted opinion because it lacked credibility, but that the board regarded other evidence as more probative of the proposition that the work was a substantial factor in bringing about Chesser's cervical disc herniation.

6. Conclusion.

The commission concludes that the evidence relied on by the board, in light of the whole record, is sufficient to support a conclusion in a reasonable mind that barrel-stacking tires was a substantial factor in causing Chesser's herniated cervical disc and resultant surgery. The commission AFFIRMS the board's decision.

Date: *Oct. 10, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
David W. Richards, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The effect of this decision is to end all administrative proceedings in this appeal of the board's final decision on the workers' compensation claim. The commission AFFIRMED (approved) the board's decision.

Effective November 7, 2005, proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the distribution 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. Check the clerk's certificate of distribution in the box below for the date of distribution.

[51] *Smith*, 172 P.2d at 791 ("[T]here is a distinction between devaluing testimony because it has no probative value, even if true, and deciding the testimony is not credible."); *Hoth v. Valley Constr.,* 671 P.2d 871, 874 n.3 (Alaska 1983).

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision was distributed.

If a request for reconsideration of this final 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 to the Alaska Supreme Court, or petition for review or hearing, 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 Alaska Workers' Compensation Appeals Commission Final Decision No. 090, issued in *Tire Distribution Systems, Inc., and Travelers Property Casualty Company of America v. David M. Chesser*, AWCAC Appeal No. 07-045, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *10th* day of *October*, 2008.

Signed
J. Ramsey, Deputy Appeals Commission Clerk

Certificate of Distribution

I certify that on *10/10/08* a copy of this Final Decision No. 090 in AWCAC Appeal No. 07-045 was mailed to Beconovich and Weddle at their addresses of record, and faxed to AWCB Appeals Clerk, WCD Director, Beconovich and Weddle.

Signed *10/10/08*
J. Ramsey, Deputy Clerk Date