

Case: *James A. Sullivan, Inc. and American Interstate Insurance Co. vs. Timothy K. Hogan*, Alaska Workers' Comp. App. Comm'n Dec. No. 055 (August 30, 2007)

Facts: The employer appeals the board's decision affirming the decision to grant Hogan an eligibility evaluation for reemployment benefits. The employer claims the board erred when it used a deferential standard of review because the board considered new evidence not before the administrator in deciding appellant's petition to the board. The employer argues that the board should have instead reviewed the matter *de novo*. The employer also contends that the administrator erred when she referred Hogan for an evaluation because the administrator and the board had no medical evidence upon which to base a finding that Hogan's compensable work injury alone led to an inability to work in his employment. Dec. No. 055 at 1-2.

Hogan injured his left knee on March 1, 2005, at work. Dr. Charles Kase diagnosed a tear of the left medial meniscus and performed surgery that same month. Shortly thereafter, Dr. Kase recommended that Hogan undergo additional surgery to repair the anterior cruciate ligament (ACL). During the earlier meniscus surgery, Dr. Kase had observed the old ACL injury as well as grade 3 chondromalacia in the knee. (The recommended surgery was not performed.) In August 2005, Dr. John Thompson performed an employer's independent medical evaluation (EME) and in January 2006, Dr. Charles Brooks conducted a second independent medical evaluation (SIME). Dr. Brooks concurred with Dr. Thompson (and with Dr. Kase) that the ACL tear was an old injury that pre-existed Hogan's work-related meniscus injury in March 2005. Both Dr. Thompson and Dr. Brooks advised work restrictions that were necessary as a result of the ACL injury and of articular degenerative changes to the knee existing before the work accident.

Applicable law: AS 23.30.041(c) (version in effect at time of employee's injury and request for reemployment benefits). The commission summarized AS 23.30.041(c) as follows:

To be eligible to obtain an evaluation for eligibility for reemployment benefits all that an employee need demonstrate is that a work-related injury may prevent the employee from returning to work in his or her occupation at the time of injury. The law does not require proof that such a prediction materialize before ordering the evaluation. The point when administrator is determining whether to refer the employee for evaluation, as opposed to whether the employee is actually eligible, was designed to occur early in the process of recovery. The administrator may approve the request for an evaluation if the employee's injury *may* permanently preclude the employee's return to the employee's occupation at the time of the injury. Further, the predicted inability to return to the prior employment must be the *result of* the work injury. Dec. No. 055 at 5-6 (footnotes omitted).

Presumption of compensability, AS 23.30.120(a), applies to reemployment benefits, *Kirby v. Alaska Treatment Ctr.*, 821 P.2d 127, 129 (Alaska 1991).

An injury that combines with a pre-existing condition so as to be a substantial factor in bringing about the disability is compensable, per AS 23.30.010 before its 2005 amendment and case law interpreting that provision.

If the board considers evidence that was not before the administrator when it reviews the administrator's decision, deference to the administrator's decision under the abuse of discretion standard is inappropriate. The board should review *de novo*. *Irvine v. Glacier General Constr.*, 984 P.2d 1103, 1107 n.13 (Alaska 1999).

Issues: Did the board apply the wrong standard of review? Did the board have substantial evidence to decide that the employee is entitled to a reemployment eligibility evaluation?

Holding/analysis: The commission concluded that board should have reviewed administrator's decision *de novo* because it considered new evidence not before the administrator, Dr. Brooks' August 2006 letter.

[H]owever, the error is harmless because the board's decision could have been reached through *de novo* review and the board's decision reflects that deference to the administrator played no role in its decision. The board did not indicate that it would have chosen to assign more weight to different evidence than the administrator used, but decided to uphold the administrator because the evidence the administrator relied on was sufficient. Also, Dr. Brooks' August letter is not logically incompatible with his earlier opinion and the letter was not specifically relied on by the board. Dec. No. 055 at 4 n.18.

The commission concluded that the board had substantial evidence to decide employee was entitled to an eligibility evaluation. "When reviewing *de novo*, the board is entitled to weigh *all* of the evidence presented to it and then to choose which evidence to give greater weight." *Id.* at 6. The employer argued that because all doctors agreed the work-related tear alone would not have rendered Hogan unable to return to work, Hogan is not entitled to an eligibility evaluation. But the question is whether the work-related tear was a substantial factor in Hogan's inability to return to his employment. The commission summarized the substantial evidence supporting entitlement to an eligibility evaluation:

Dr. Thompson stated that the removal of the bucket handle tear of Hogan's left medial meniscus "undoubtedly changed" the mechanics of the left knee and could have aggravated Hogan's pre-existing articular degenerative changes. Both Dr. Kase and Dr. Brooks found that Hogan should not return to work unless Hogan had ACL surgery to reduce the instability in his left knee. . . . Dr. Brooks found that the worsening of Hogan's knee after the meniscectomy and the pre-existing laxity of Hogan's left ACL combined to lead him to conclude that Hogan should not return to work as an insulator. Dr. Brooks's opinion is that the condition of Hogan's knee due to the meniscus tear alone would not have prevented Hogan from returning to his prior employment, provided the ACL condition

did not exist. Instead, the injuries combined and led to a worsening of the condition of Hogan's knee[.] Dec. No. 055 at 6-7 (footnotes omitted).

Note: This case was appealed to the Alaska Supreme Court but dismissed when the parties settled.