

**Case:** *Jeffrey L. Gibson vs. ARCO Alaska, Inc. and Pacific Employers Insurance Company/ACE-USA*, Alaska Workers' Comp. App. Comm'n Dec. No. 134 (April 9, 2010)

**Facts:** Jeffrey Gibson (Gibson) sought medical and disability benefits for injuries to his feet and left shoulder, and for depression. He stopped working for ARCO Alaska, Inc. (ARCO) as a flow measurement technician in 1994 and reported his injuries and requested reemployment benefits in 1997. Gibson attended Washington State University from 1995 to 2000, earning a bachelor's degree and becoming an electrical engineer. After graduation, Gibson pursued reemployment benefits to receive a determination of entitlement and retroactive stipend for the months he attended university. The board addressed the merits of his claims in 2007. The board found his feet and depression claims were compensable but denied his left shoulder claim as not work-related. The board awarded permanent partial impairment (PPI) but stated that it lacked sufficient evidence to determine whether Gibson was entitled to time-loss benefits (temporary total disability (TTD) or total permanent disability (TPD)), leaving that to the parties to either resolve or seek another hearing. The board remanded the reemployment benefits issue to the reemployment benefits administrator (RBA) for a determination of Gibson's eligibility.

In 2008, another hearing was held to address TTD benefits, whether Gibson had been actively pursuing reemployment benefits since 1997, and a social security disability offset. The board relied on medical testimony to establish when Gibson was entitled to TTD, rejecting Gibson's arguments that he was disabled after a 1994 surgery until 2000 and that his depression rendered him temporarily totally disabled from 1995-1997. The board concluded that because he successfully pursued an education during his treatment for depression that he failed to establish an inability to work. The board denied reemployment benefits because he was not actively pursuing them. The board denied the social security offset since those benefits were paid for the depression that the board had concluded was not disabling. Gibson and ARCO appealed.

**Applicable law:** AS 23.30.185 requires TTD to be paid "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 23.30.395(16) defines disability as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." The Alaska Supreme Court (supreme court) has held that "returning to work 'is sufficient evidence to rebut the presumption of continuing compensability for temporary total disability.'" *Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166, 177 (Alaska 2002). Once the presumption is rebutted, the claimant must prove every element of his claim for TTD by a preponderance of the evidence.

Under the doctrine of issue preclusion, "an issue of fact which is actually litigated in a former action may, under certain circumstances, be regarded as conclusive in a subsequent case." *Morris v. Horn*, 219 P.3d 198, 208 (Alaska 2009).

AS 23.30.041(k), reemployment benefits. Entitlement to stipend benefits under AS 23.30.041(k), after exhaustion of temporary compensation and PPI compensation,

"is contingent upon the active pursuit of reemployment benefits – not the active pursuit of stipend." *Griffiths v. Andy's Body & Frame, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 119, 26 (October 27, 2009). "Stipend, however important, is secondary to the primary reemployment benefit, which is monitored assistance in developing a plan for reemployment with aid from qualified specialists, and monitored performance of the plan itself." *Id.* at 25.

AS 23.30.225(b) provides that periodic disability compensation benefits "shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401-433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury."

In *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 744 (Alaska 2005), the supreme court applied this test: whether the social security disability benefits award resulted from injuries (or disease) that are not compensable by the employer without considering the aggravating effect of the work injury. Thus, if the "aggravating effects" of the work injury were considered in awarding social security disability, then the employer is entitled to an offset.

**Issues:** Is the board's 2008 decision concluding that the depression was not disabling inconsistent with its 2007 decision that the depression was compensable under the Act? Does substantial evidence support the board's decision awarding TTD? Did the board correctly apply the law and have substantial evidence to support its denial of reemployment benefits? Did the board apply the correct test to determine whether the employer is entitled to a social security offset?

**Holding/analysis:** The decisions are not inconsistent. Issue preclusion does not apply because entitlement to TTD was not actually litigated and decided in the 2007 decision. Instead, the board left the issue unresolved. In addition, the board decided in 2007 that Gibson's depression was work-related, not whether it was disabling under the Act.

The commission concluded that the board had sufficient evidence in the medical reports and testimony to find that the need for treatment of neuromas and of arthritis did not result in a single period of disability and medical instability, but specific periods of disability and medical instability associated with each procedure. After each procedure, Gibson was returned to medical stability. In addition, the board had substantial evidence to conclude that Gibson was not totally incapable of employment from 1994 through 2000 because of depression. There was medical testimony supporting that he could work despite his depression, his progress through an undergraduate degree, and a couple of periods of employment while attending university that were substantial evidence to support he was not totally disabled for the entire period.

The board applied the correct legal analysis in denying reemployment benefits. Gibson was entitled to benefits only if he was actively pursuing reemployment benefits. "Gibson's conduct after filing a request for reemployment eligibility evaluation, and his testimony to the board, does not indicate that he desired, and actively pursued, the

primary benefit of reemployment services under AS 23.30.041.” Dec. No. 134 at 22. Gibson began litigating a stipend claim and costs for his education in December 2004. But he did not respond at all to a 1997 RBA’s letter for more than a year, he was never found eligible and, although he put in a request in 1997, he omitted any claim for reemployment benefits until December 2004. Additionally, none of the testimony supported that he wanted reemployment services, not simply a stipend and costs paid for his university degree.

The commission concluded the board made legal and factual errors in considering the social security offset. First, the test the board should have applied is above. Second, the Social Security Administration judge’s decision rested on evidence of a number of conditions, not all of them work-related. Thus, the board erred in concluding the social security disability benefits were only as a result of Gibson’s depression. On remand, the board should analyze whether “aggravating effects of the work injury were considered by the Social Security Administration in awarding benefits.” *Id.* at 24. The commission also directed the board to take additional evidence on (1) the social security payments as the evidence was unclear as to whether the payment included funds for Gibson’s children, and (2) any appeals of the judge’s decision that might change or clarify the basis for the disability finding.