

Case: *Assets, Inc., Commerce & Industry Insurance Company, Chartis, and Northern Adjusters, Inc. vs. Derrick F. Taylor*, Alaska Workers' Comp. App. Comm'n Dec. No. 195 (April 12, 2014)

Facts: Derrick F. Taylor (Taylor) suffered two injuries to his back while working for Assets, Inc. on March 15, 2005, and August 19, 2005. At issue on appeal is whether Taylor was medically stable from about November 2007 to January 2013.

In 2005, Dr. Voke, an orthopedic surgeon who was treating Taylor at that time, thought that Taylor would *not* need low-back surgery unless his quality of life deteriorated. Dr. Eule, also an orthopedic surgeon, took over Taylor's care from Dr. Voke in October 2005. On December 13, 2005, Dr. Eule stated that Taylor was not medically stable and was disabled in terms of his low back. However, as of July 6, 2007, he declared Taylor to be medically stable with respect to his low back. That date was consistent with the opinions of second independent medical evaluation doctors Blackwell and Ling. Later in 2007, both Dr. Eule and Dr. Bernard, who had by then performed a syrinx surgery on Taylor, were of the opinion that Taylor did not need low-back surgery. In January 2008, on referral from Dr. Eule, Dr. Levine took over Taylor's primary care. After ordering a number of diagnostic tests, on August 21, 2008, Dr. Levine, who is not an orthopedic surgeon, concluded that Taylor needed disc replacement surgery, an indication that he was not medically stable. On September 3, 2008, Dr. Swanson evaluated Taylor and added his opinion to those of Drs. Bernard and Eule that Taylor was not a surgical candidate. After performing some diagnostic testing, in October 2008, Dr. Levine concluded (1) that Taylor should have had lumbar spine surgery back in 2005 and (2) that his low back was not medically stable from at least January 16, 2008, when Dr. Levine first saw Taylor, through April 3, 2013, when Dr. Levine was deposed.

The board found that the greater weight of the medical evidence was that no medical care or treatment was reasonably expected to make an objective improvement in Taylor's lumbar spine from November 29, 2007, to August 21, 2008. With respect to the period after that to January 17, 2013, the board made the following credibility and weight findings:

[Taylor] relies on Dr. Levine's opinion his low back injury was not medically stable from 2005 forward and should have been surgically repaired years ago. Dr. Levine's medical stability opinion is given considerable weight because it comports with Dr. Swanson's initial opinion [Taylor's] low back was not medically stable effective August 26, 2005, Dr. Eule's view it was not stable as of December 13, 2005, and MRI evidence [Taylor] had a herniated L5-S1 disk. No other physician offered a medical stability opinion for the low back injury until September 8, 2008, when EME Dr. Swanson said [Taylor] was medically stable for his March 15, 2005[,] and August 19, 2005[,] injuries by August 19, 2005[,] and April 19, 2006, respectively. Dr. Swanson's conflicting medical stability opinions are unexplained, confusing and given little weight. Dr. Ling, and later Dr. Eule, offered a July 6, 2007[,] stability date for the

low back. Their opinions are somewhat conclusory and are given less weight.

The board concluded that Taylor was not medically stable in this period and awarded him temporary total disability (TTD) benefits.

Assets appealed the award of TTD for the period of August 21, 2008, to January 17, 2013. Taylor cross-appealed the denial of TTD for the period of November 29, 2007, to August 21, 2008.

Applicable law: AS 23.30.185 provides in relevant part, "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."

AS 23.30.395(27) defines "medical stability" as:

the date after which further objectively measurable improvements from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence[.]

Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary. If the employer produces substantial evidence, the presumption drops out and the claimant must prove the claim by a preponderance of the evidence. *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 458 (Alaska 1997); *Bailey v. Litwin Corp.*, 713 P.2d 249, 254 (Alaska 1986).

"We find this case involves highly technical medical considerations, and that a determination of causation requires the production of a greater weight of medical evidence." *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 789 (Alaska 2007).

Issues: Did the board have substantial evidence to deny TTD from November 29, 2007, to August 21, 2008? Did the board have substantial evidence to award TTD from August 21, 2008, to January 2013? Did the board apply the correct burden of proof by requiring Taylor to prove he was not medically stable by a preponderance of the evidence?

Holding/analysis: The commission did not decide whether the board had substantial evidence to conclude that Taylor was medically stable from November 29, 2007, to August 21, 2008, – deciding to remand the issue "in the interest of completeness."

Dec. No. 195 at 41. In terms of the period from August 21, 2008, to January 17, 2013, the commission stated,

[I]t remains to be seen whether the board's finding that Taylor was TTD in this timeframe is supported by substantial evidence. Prior to August 21, 2008, none of the physicians who had treated or evaluated Taylor said he needed surgery, and the medical consensus was that his low back was medically stable as of July 6, 2007. In contrast to this evidence, on August 21, 2008, Dr. Levine provided his opinion that Taylor needed back surgery. On remand, the board would be in position to shed more light on its evaluation of this and any other evidence it admits. *Id.* at 45.

The commission seemed to be troubled that Taylor had had back surgery a few days after the hearing and instructed the board to consider all evidence, including "evidence relative to Taylor's low-back surgery in April 2013 and recovery therefrom, should the board conclude that this evidence ought to be admitted." *Id.* at 46-47.

In addition, the commission questioned whether the board applied the correct burden of proof. The commission noted that on remand if "the evidence demonstrates that Taylor was medically stable for 45 days for his low back at any time between May 19, 2005, and January 17, 2013, Taylor would have to prove by clear and convincing evidence that he was not medically stable[.]" *Id.* at 45.

Finally, the commission instructed the board to revisit the attorney fees award based on its disposition of the matter on remand.