

Case: *Michael Peratrovich vs. Quality Asphalt Paving and Liberty Mutual Insurance Co./Liberty Northwest Insurance Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 067 (January 24, 2008)

Facts: Michael Peratrovich appealed a board decision denying his 2006 claim for left shoulder surgery for his 2001 work injury.

1. Peratrovich argued that the board should have allowed Peratrovich's testimony regarding a statement made by Dr. Radecki to prove that Dr. Radecki was unqualified to testify as an expert witness and therefore his report should not be considered an expert medical opinion. Peratrovich wanted to testify that Dr. Radecki said something like, "I don't know why you're here" because "this isn't my specialty." The hearing officer excluded the statement as irrelevant and speculative hearsay.

2. Peratrovich argued the board did not engage in "reasoned decision making" because the board did not provide an adequate explanation for not accepting the 2004 opinion of the second independent medical examiner, Dr. Thomas Gritzka. The board described the medical evidence at length and then explained the weight that it gave to the evidence in one paragraph:

We give the most weight to the opinions and testimony of Dr. Radecki, as supported by the objective, radiographic evidence. Dr. Radecki, bases his opinion on objective radiographic evidence that shows a change in the employee's shoulder condition between 2004 and 2005. This new injury or development is further supported by the employee's then treating physician, Dr. Anderson, who in 2002 found that the employee's shoulder condition had fully resolved. Dr. Mayhall also found in 2002 that the employee's shoulder bursitis had fully resolved. All the radiographic evidence prior to 2005 revealed a normal shoulder. In light of the radiographic evidence, we give less weight to the opinions of Drs. Polston and Moore. Dec. No. 067 at 18.

Peratrovich also argued that the board failed to follow the proper legal analysis because the board determined that the need for treatment was not work-related, rather than determining if the treatment was reasonable and necessary.

3. Finally, Peratrovich argued that the board's decision lacked substantial evidence because the board based its decision on the opinion of one physician. Peratrovich relied on *Black v. Universal Services, Inc.*, 627 P.2d 1073 (Alaska 1981).

Applicable law: 8 AAC 45.120(e) provides in part:

Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient

in itself to support a finding of fact unless it would be admissible over objection in civil actions.

Alaska Rule of Evidence 801(d)(1) and Alaska Rule of Evidence 613(b) dealing with hearsay.

Three-step presumption analysis, AS 23.30.120(a) and case law. That presumption attached was undisputed. Once the presumption attaches, the employer may rebut the presumption by presenting substantial evidence that (1) provides an alternative explanation which would exclude work-related factors as a substantial cause of the claimed disability (or medical treatment), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability. *E.g., Bradbury v. Chugach Elec. Ass'n*, 71 P.3d 901, 906 (Alaska 2003). An employer has always been able to rebut the presumption by presenting the opinion of a qualified expert who testifies that in his or her opinion, the claimant's work was probably not a substantial cause of the claimed disability or need for treatment. *Id.*

Per AS 23.30.122, a board finding as to the weight to be assigned medical testimony and reports is conclusive, even if the evidence is susceptible to contrary conclusions.

Black v. Universal Services, Inc., 627 P.2d 1073 (Alaska 1981), distinguished by other cases, including *Rhines v. State*, 30 P.3d 621 (Alaska 2001). In *Black*, the Alaska Supreme Court found that one doctor's testimony that employee was malingering was not substantial evidence by itself on which to deny employee's claim because of "slender evidentiary basis underlying many of the doctor's conclusions" and inconsistency with other medical reports. In *Rhines*, the Court stated that the board may rely on a reviewing physician's opinion to deny a claim if it is "consistent with other evidence." Just because more doctors support one viewpoint does not mean that the board must accord those doctors' opinions greater weight.

Issues: 1) Did the hearing officer abuse his discretion in ruling Peratrovich's testimony about Radecki's statements inadmissible? 2) Did the board adequately explain its views of Dr. Gritzka's report in weighing the medical evidence? 3) Did the board apply proper presumption analysis to Peratrovich's claim? 4) Was Dr. Radecki's report and radiographic evidence substantial enough to support the denial of Peratrovich's claim for shoulder surgery?

Holding/analysis: 1. The commission concluded it was not error to exclude the statement as hearsay. The statement was hearsay because it was offered to prove the truth of the matter asserted. However, the statement was possibly irrelevant because it was unclear what was not Radecki's specialty (pain management, cervical injuries, shoulder injuries, etc.). Also, "I don't know why you're here," could mean a lot of different things, such as trying to elicit a response from the claimant about why he was there or suggesting that the claimant's injury was so obviously work-related that Radecki's exam was unnecessary. Because there was no other direct evidence that Radecki was unqualified, the statement could not be admitted to "supplement" or "explain" his lack of qualifications per 8 AAC 45.120(e). None of the hearsay exceptions were satisfied; claimant admitted no foundation was laid because Radecki was not

given an opportunity to explain or deny the statement. In addition, even if the hearing officer erred, no prejudice was demonstrated. Employee could not show that if his testimony had been permitted that it would have changed the outcome because the statement could be interpreted in different ways and was insufficient by itself to establish the fact that Radecki was unqualified.

2. The commission agreed that the board's decision should have provided a clear statement of its views regarding Dr. Gritzka's report; however, it concluded that the board explained the basis for its decision adequately enough to allow the commission to review the decision. The commission noted that credibility is not weighed when considering whether presumption is rebutted. Also, the 2004 magnetic resonance arthrogram (MRA) ruled out a rotator cuff tear, a labral tear and other possibilities that would suggest "internal derangement" of the shoulder. Therefore, the board properly concluded that Dr. Radecki's report and radiographic evidence was sufficient to rebut the presumption of compensability. In terms of the board's weighing of the evidence, it focused on two radiographic studies and a 2004 MRA study that showed bone spurs, a tear and frayed labrum were not present in 2004 (two years after the work injury). Because Dr. Gritzka did not opine on these studies, his opinion was not relevant to the board's discussion and so the board's reasoning for its decision was clear even without explicitly discussing or rejecting Dr. Gritzka's opinion.

The commission concluded the board properly applied the presumption analysis to whether the employee's current need for medical treatment was related to his 2001 work injury, rejecting the employee's argument that work-relatedness was not at issue. The commission noted that whether "the surgery proposed in 2006 was *required* to treat the 2001 injury is a different question than whether the appellant was injured in his employment in 2001." Dec. No. 067 at 19 n.73.

3. The commission affirmed the board's decision because the board's assessment of the weight to be assigned expert medical opinion is conclusive, and there is substantial evidence in light of the whole record to support the board's findings of fact. The board did not rely just on Dr. Radecki's opinion but also on the radiographic evidence in accordance with *Rhines*.

In this case, Dr. Radecki relied on his two examinations of the employee, the reports of his treatment, and the two radiographic studies. He understood the surgery proposed by Dr. Moore, and he did not suggest that Peratrovich should not have it done. Unlike Dr. Pennell's report in *Black*, Dr. Radecki's opinions were subjected to vigorous cross-examination in a deposition. He explained why he disagreed with Dr. Polston's opinion, pointing out that it was based on a false reading of Dr. Anderson's reports. Finally, his opinion that the bursitis and resulting impingement had resolved by 2003 was consistent with Dr. Anderson's opinion.

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. . . We cannot say that the medical opinion and evidence together on the board's scale were so deficient in this case as to be inadequate evidence to support a finding in a reasonable mind that . . . [the objective of the proposed surgical treatment] were not causally related to the 2001 injury. Dec. No. 067 at 24-25.