

**Case:** *Doyon Drilling, Inc. and Alaska National Insurance Co. vs. Randy A. Whitaker*, Alaska Workers' Comp. App. Comm'n Dec. No. 006 (March 2, 2006)

**Facts:** In connection with Whitaker's right knee injury in April 2002, the Board concluded that Whitaker had provided clear and convincing evidence that he was not medically stable and so ordered the employer to pay "continuing TTD or TPD benefits from February 28, 2004, forward through the period of his recovery." The employer appealed this decision, issued December 21, 2004, to the superior court. While the appeal was pending before the superior court, the employer again controverted TTD on July 22, 2005, on the basis that Whitaker was now medically stable (or in the words of its previous order "the period of recovery" was over). No party sought a remand from the superior court. Whitaker filed a claim seeking ongoing TTD. The board decided on December 14, 2005, that because it lacked jurisdiction to modify its 2004 order since that order was on appeal to the superior court, Whitaker had proved he was entitled to ongoing TTD.

**Statutes/regulations:** AS 23.30.185 providing 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(27) providing that

"medical stability" means the date after which further objectively measurable improvement 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[.]

**Issue:** Did board have jurisdiction to decide medical stability?

**Holding/analysis:** Board could not award ongoing TTD because board did not follow statutory directive and make findings that employee rebutted with clear and convincing evidence the statutory presumption of medical stability raised by the employer. Moreover the board lacked jurisdiction to decide the issue because its decision awarding TTD from Feb. 28, 2004, forward through the period of recovery was on appeal. Board should have resolved this dilemma by seeking a remand from superior court or ordering the parties to seek a remand. Or, in the future, the board could carefully word its orders to retain jurisdiction to settle disputes over when TTD ends.

**Notes:** Comm'n Dec. No. 001 deals with a motion for a stay and Dec. No. 008 deals with awarding attorney fees to the successful party on this appeal.