

Case: *Israel Abonce vs. Yardarm Knot Fisheries, LLC and Commerce and Industry Insurance Company*, Alaska Workers' Comp. App. Comm'n Dec. No. 111 (June 17, 2009)

Facts: Israel Abonce (Abonce) was injured twice in three days in July 2004, when a forklift struck him in the back and when a forklift struck a pallet that then bumped the pallet that he was standing on, causing him to fall. As a result of these two incidents, Abonce reported injuring his right side, including his arm, leg, and buttocks, and his back. He was unable to work because of back pain.

Abonce appeals the board's denial of his claims for ongoing temporary total disability (TTD) and related medical benefits. The board concluded that Abonce was medically stable as of June 21, 2006, thus ending his eligibility for TDD. In addition the board decided that any further medical treatment needed for his right leg, right elbow, and low back was not due to his work injuries. Abonce asserted that: (1) the board unfairly relied on the employer's doctors and the board-appointed second independent medical examiner who conducted a "superficial" examination, rather than Abonce's own doctors; (2) the board mistakenly found a gap of 17 months when he was not treated for low back pain and this mistaken finding was essential to its conclusion that his current low back pain was unrelated to his work injuries; and (3) because he was healthy before the work accidents, those accidents must have caused his disability.

Applicable law: AS 23.30.122 provides in relevant part, "[t]he board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions."

AS 23.30.128(b) states in relevant part that, "[t]he board's findings of fact shall be upheld by the commission if supported by substantial evidence in light of the whole record." Substantial evidence is such evidence that a reasonable mind could accept as adequate to support a conclusion. *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

AS 23.30.185, compensation for TTD ends with medical stability.

Issues: Does substantial evidence support the board's decision to deny ongoing TTD and medical benefits? May the board properly rely on the opinions of the employer's doctors and the second independent medical examiner? Is there substantial evidence to support the board's decision that Abonce's low back pain was not work related, even if Abonce establishes that the treatment gap was less than 17 months? Should the board have given weight to Abonce's argument that because he was healthy before the accidents, the accidents must have caused his disability?

Holding/analysis: The commission rejected Abonce's arguments about the doctors' reports, noting first that the board is tasked with evaluating credibility and deciding the weight to accord physicians' reports and testimony, and could properly rely on the employer's medical evaluation and second independent medical evaluation. And second, the commission observed that the Alaska Supreme Court has refused to adopt

any rule that an attending physician's opinion is presumptively entitled to greater weight than the opinion of an employer's expert. *E.g., Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 793 (Alaska 2007).

On the treatment gap, the commission concluded that even if Abonce saw a physician in Mexico, this evidence would shrink, but does not eliminate, the gap between his work injuries and the documentation of back pain. Additionally, although the board gave weight to the gap in the medical record of Abonce's symptoms, it relied on other evidence to support its decision. Dr. Roth, Dr. Swanson, and Dr. Reimer agreed that the July 2004 work injuries at most caused a low back strain that had long since resolved and that evidence constitutes substantial evidence to support the board's finding that Abonce's current back pain was not work related.

The commission concluded that Abonce's argument that the accidents caused his disability because he was healthy before the accidents confuses sequence with consequence. Once the employer overcomes the presumption of compensability, the employee must prove his case by a preponderance of the evidence. "When the key controversy centers on the *medical evidence* of causes of the employee's conditions, timing alone is not enough to satisfy this burden and establish causation of the disabling condition." Dec. No. 111 at 13 (citing *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 954 (Alaska 2005) (rejecting claimant's *post hoc, ergo propter hoc* argument and concluding that the board could rely on a physician's opinion that even though the claimant was diagnosed with asthma after her workplace exposure to toxins, that exposure did not cause her asthma).

In addition, the commission noted that it could not reweigh the evidence but merely determine whether the board relied on substantial evidence. The board was free to reject Abonce's arguments discrediting a doctor based on a "superficial" exam. Substantial evidence, namely, at least three doctors' opinions, supported the board's conclusion that Abonce's low back, right leg, and right elbow conditions were not related to the July 2004 work injuries. Substantial evidence in the form of four doctors' opinions supported that he was medically stable at the latest by June 21, 2006. The commission noted that the board ensured that the doctors' opinions were based on a complete review of Abonce's medical history by providing the doctors with records that appeared to be missing from a list of reviewed records in their initial reports and leaving the record open so they could revise their opinions.