

Case: *Martin Church v. Arctic Fire and Safety and Alaska National Insurance Company*, Alaska Workers' Comp. App. Comm'n Dec. No. 126 (December 31, 2009)

Facts: Martin Church (Church) injured his right shoulder lifting a fire extinguisher while working for Arctic Fire and Safety. He filed a claim indicating he was injured on December 10, 2002, but testified that the initial injury occurred on August 15, 2002, and that the shoulder slipped out again at work on December 10, 2002. Church sought a variety of benefits that were all related to surgery to remove a bone spur (osteophyte) from his thoracic spine. Church contended that his work injuries caused the thoracic spur either to develop or to become symptomatic, necessitating the surgery.

The board concluded that Church attached the presumption of compensability to his claim but that the employer rebutted it with Dr. Swanson's employer's medical evaluation (EME) report. In the report, Dr. Swanson opined:

The claimant in all probability had spontaneous increase in symptoms in August of 2002 and December of 2002 from the underlying preexisting spondylosis of the thoracic spine. He was performing his normal daily activities, lifting up a fire extinguisher on those dates. These fire extinguishers, which weighed up to 50 pounds, were normal for him to be lifting and therefore this was not a supraphysiologic stress for this claimant. . . . These symptoms are typical of the waxing and waning of symptoms due to the underlying preexisting spondylosis

. . . .

The claimant's work at Arctic Fire and Safety was not a substantial factor in bringing about the diagnosed condition. He fails both the "but for" and "reasonable physician" tests for substantial factor. His spondylosis is present due to genetic inheritance. The claimant's symptoms at that time, as noted by his chiropractor, were no worse than they had been before [the December 2002] events at work. A reasonable physician would not ascribe his spondylosis to non-supraphysiologic activities at work in August 2002 and December 2002. But for his pre-existing spondylosis, he would not have had symptoms. Dec. No. 126 at 16.

The board concluded that Church failed to prove his case that his need for thoracic surgery was work-related. Church and a co-worker testified about how Church was injured at work. Church also presented the testimony of Dr. Cross, who opined that Church's twisting to lift the fire extinguisher on August 15, 2002, caused the pre-existing osteophyte to become symptomatic. On the other hand, the opinions of several doctors, including Dr. Swanson, supported the employer's position. Dr. Ballard stated that Church's "work simply caused a temporary aggravation of [the] underlying chronic condition with lasted for a three-to-four-month period." Dr. Blackwell concluded Church suffered "a musculoligamentous strain and sprain type injury" at work and "not one that induced a spur, that preexisted, to become symptomatic." Dr. Kralick attributed Church's arm and shoulder pain to his work injury in August 2002, but not to

the degenerative changes in his thoracic spine. Similarly, Dr. Papadopoulos cautioned Church that the surgery to remove the bone spur might not relieve his right shoulder pain. Dec No. 126 at 22. Church appealed, raising the issues summarized below.

Applicable law: AS 23.30.120(a) presumes that an employee's claim is compensable. To attach the presumption of compensability, the employee must first establish a "preliminary link" between his injury and his employment. *E.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Next, the employer must overcome the presumption by coming forward with substantial evidence that the injury was not work-related. "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *E.g., Tolbert*, 973 P.2d at 611. "The employer's substantial evidence must either (1) provide an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the disability; or (2) directly eliminate any reasonable possibility that the employment was a factor in causing the disability." *Cowen v. Wal-Mart*, 93 P.3d 420, 424 (Alaska 2004). If the employer meets this burden, the presumption disappears and the employee must prove all elements of his case by a preponderance of the evidence. *See, e.g., Tolbert*, 973 P.2d at 611.

When the work aggravates, accelerates or combines with a pre-existing condition, the disability is compensable so long as the work is "a substantial factor" in bringing about the harm. *See United Asphalt Paving v. Smith*, 660 P.2d 445, 447 (Alaska 1983).

AS 23.30.128(b) requires the commission to uphold the board's findings of fact when they are supported by substantial evidence in light of the whole record. The commission examines "the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board's conclusion." *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citation omitted). But the commission "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the board." *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (citation omitted); *see also* AS 23.30.122.

Evidence that is deemed sufficient to rebut the presumption is also sufficient to support a determination that an employee failed to prove that the work was "a substantial factor" in the need for treatment. *Cowen*, 93 P.3d at 426.

An abuse of discretion occurs when a decision "is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive," *Sheehan v. Univ. of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985), or when a decision leaves the reviewing body with "a definite and firm conviction based on the record as a whole that a mistake has been made." *Black v. Municipality of Anchorage, Bd. of Equalization*, 187 P.3d 1096, 1099 (Alaska 2008).

Issues: (1) Did the board apply the proper standard of causation? (2) Did the board have substantial evidence to conclude that the employer rebutted the presumption of compensability? (3) Did the board have substantial evidence to conclude that Church

did not prove his claim? (4) Did the board abuse its discretion by limiting the second independent medical evaluation (SIME) to a records review?

Holding/analysis: (1) The commission concluded that the board properly applied the “a substantial factor” test, rather than the AS 23.30.010(a) causal standard that was not in effect at the time of Church’s injury and that requires the employment to be “*the* substantial cause” of the need for medical treatment, a more demanding standard than requiring the work to be *a* substantial factor or cause. Church referenced two board statements that referred to “the legal cause.” The board stated, “Unless the aggravation is *a* substantial factor in bringing about the benefits sought by the claimant, the aggravation is not *the* legal cause of the problem,” and “[o]n further reflection we cannot discount the value of those medical opinions offered in this case which state the employee’s work for the employer was not the legal cause of the employee’s need for treatment.” *Martin W. Church v. Arctic Fire and Safety*, Alaska Workers’ Comp. Bd. Dec. No. 09-0051 at 8-9. On page 19, the commission stated:

the board’s use of the phrase “the legal cause” does not demonstrate a misunderstanding or misapplication of the “a substantial factor” test in Church’s case. The board correctly noted that it was looking for whether his employment was “a substantial factor,” not *the* substantial factor, in Church’s need for treatment for his thoracic condition. We conclude that the board’s use of “the legal cause” was intended to demonstrate the legal conclusion or consequence that the board was drawing in Church’s case from its application of the “a substantial factor” test. In other words, when a particular employment is *a* legal cause of a disability, then *the* legal consequence of liability may be imposed on that employer.

(2) The board had substantial evidence that the employer rebutted the presumption. Church first argued that Dr. Swanson’s EME report was improperly based on “but for” causation. The commission observed that “but for” causation is a part of the “a substantial factor” test. “An aggravation or acceleration to a pre-existing condition ‘is a substantial factor in the disability if it is shown that (1) “but for” the employment the disability would not have occurred, and (2) reasonable persons would regard the employment as a cause and attach responsibility to it.’” *Williams v. State of Alaska, Dep’t of Revenue*, 938 P.2d 1065, 1072 (Alaska 1997). The commission distinguished Church’s case from *Tolbert*, which did not apply the but-for test when “two or more forces operate to bring about an injury and each of them, operating alone, would be sufficient to cause the harm.” 973 P.2d at 611-12. Church’s theory was not “two or more forces” but rather that the aggravation of a pre-existing condition caused a need for medical treatment. The Alaska Supreme Court has held the but-for test applies when the theory of liability is aggravation of a pre-existing condition. *Fairbanks North Star Borough v. Rogers and Babler*, 747 P.2d 528, 532 (Alaska 1987) (citations omitted).

Church argued that Dr. Swanson impermissibly distinguished between a worsening of symptoms and a worsening of the underlying condition when, under *DeYonge v. NANA/Marriott*, 1 P.3d at 96, either type of worsening is compensable if work is a

substantial factor in bringing about the aggravation of symptoms or worsening of the condition. The commission concluded that Dr. Swanson specifically addressed whether Church's increased symptoms were related to his work.

Finally, the commission noted that "at the presumption rebuttal stage, Dr. Swanson's statements are not weighed against other testimony nor evaluated for credibility. Instead, the relevant inquiry is whether the employer presented evidence that, if true, a reasonable person might accept as adequate to support a contested conclusion." Dec. No. 126 at 16-17 (citations omitted).

(3) Substantial evidence supports the board's decision that Church's thoracic surgery was not work-related because his work was not a substantial factor in either causing the osteophyte to develop or aggravating, accelerating, or combining with his underlying condition of spondylosis such that he required the surgery. The commission rejected a number of arguments because the board had the sole power to weigh evidence and draw inferences from it. Church argued he had a bone chip, not a bone spur, but failed to explain why this difference mattered to the board's analysis. The commission also rejected Church's reliance on his and a co-worker's testimony about how the injury occurred. The commission stated, "The board acknowledged that Church and Stowe were credible witnesses, but Church's and Stowe's lay testimony lacked probative value as to the cause of the osteophyte because they are not orthopedic surgeons. Moreover, no medical evidence in the record supported that a traumatic injury can cause an osteophyte to grow." *Id.* at 21.

Substantial evidence supported the board's conclusion, specifically Drs. Ballard, Swanson, and Blackwell all opined that Church's 2002 work injuries were not "a substantial factor" in his need for thoracic surgery to remove the osteophyte in 2004; and two other doctors, Dr. Papadopoulos and Dr. Kralick, distinguished between Church's work-related right shoulder pain and the problems with his thoracic spine. The commission also noted "it was reasonable for the board to discredit Cross's testimony because, unlike Drs. Ballard, Swanson, and Blackwell, she did not review all of Church's medical history." *Id.* at 23.

Church argued that because he had no pain before the August work injury, the work injury must have caused his spur. The commission stated that "[t]his sequence of events, however, is not enough by itself to prove causation. Sequence is not the same as consequence; the medical evidence that the board chose to believe rejected that Church's work injuries were 'a substantial factor' in his need for thoracic surgery." *Id.* (citations omitted).

Church also asserted that the board did not find that his original date of injury was in August 2002. The commission concluded (1) the board properly used the date on his report of injury, December 10, 2002; (2) Church was not seeking a non-reporting penalty under AS 23.30.070(f) that would make the exact date of injury relevant; (3) the board implicitly accepted he was injured in August because it found him and Stowe credible; and, most importantly, (4) Church did not demonstrate that the evidence supporting the board's decision depends on the December date of injury. Two

of the doctors acknowledged he was injured in August and because Church described the injuries as being the same, "referencing an incorrect original date of injury in [the other doctors'] reports would not detract from the doctors' opinions on whether that type of injury could be 'a substantial factor' in aggravating a thoracic bone spur to the extent that surgery was needed." *Id.* at 24.

Finally, Church misunderstood *DeYonge*, which he characterized as holding "an aggravation of a pre-existing condition, whatever the source, as long as it's asymptomatic, is a compensable workers compensation situation." *DeYonge* does not impose liability for all aggravations of pre-existing conditions, rather the aggravation must be "a substantial factor" in bringing about the disability for which compensation or medical benefits are sought. *Id.* at 24-25.

(4) The board did not abuse its discretion in limiting the SIME to a records review. The commission concluded the board was in the "best position" to determine what the SIME needed to include since the SIME's purpose was to assist the board. The board's decision was well-reasoned, noting "an extensive record" already existed on how Church's thoracic spine condition developed; a physical examination was unlikely to help determine causation since Church had already had surgery; not requiring a physical examination made the SIME more cost-effective; and the board would permit an exam if the SIME doctor requested one. *Id.* at 25-26.