Alaska Workers' Compensation Appeals Commission

Robert Strong,
Appellant,

vs.

Chugach Electric Association, Inc. and
ACE Fire Underwriters Insurance Co.,
Appellees.

Memorandum Decision
Decision No. 128 February 12, 2010

AWCAC Appeal No. 09-016
AWCB Decision No. 09-0075
AWCB Case No. 200120146

Appeal from Alaska Workers' Compensation Board Decision No. 09-0075 issued April 24, 2009, by the southcentral panel, Judith DeMarsh, Chair, Pat Vollendorf, Member for Labor, and Janet Waldron, Member for Industry.

Appearances: Michael J. Jensen, Law Offices of Michael J. Jensen, for appellant Robert Strong. Dennis Cook, Cook Schuman & Groseclose, Inc., for appellees Chugach Electric Association., Inc. and ACE Fire Underwriters Insurance Co.

Commission proceedings: Appeal filed May 13, 2009. Oral argument presented December 4, 2009.

Commissioners: David W. Richards, Philip Ulmer, Kristin Knudsen.

By: Kristin Knudsen, Chair.

Robert Strong, a lineman for Chugach Electric Association, reported an injury to his left shoulder in 2001, when he shoved aside a large crate as it fell toward him. He had pre-existing moderate to significant degeneration in the shoulder joint when he was injured, but after the injury his arthritis progressed and the joint became more unstable. He continued to work, and from November 2004 to July 2007, he did not seek medical treatment. He retired in March 2007. As a retiree, he is paid a $2,165 monthly social security benefit and an $8,000 monthly union pension.

Strong filed a claim for temporary total disability compensation (TTD) from the date of his retirement and medical benefits on October 4, 2007. Chugach Electric accepted liability for medical treatment, including shoulder surgery in 2008, but denied liability for TTD after March 2007. The board denied Strong's claim for TTD, finding

that Strong had retired voluntarily for reasons unrelated to his injury and that he was not in the workforce or making reasonable efforts to obtain employment. Strong appealed.

The appellant contends that the board erred by requiring a union worker to seek work outside the union hall to establish that he did not voluntarily retire. The appellant asserts that the board misapplied *Vetter v. Alaska Workmen's Compensation Board,*[1] and thus erred by denying Strong's claim notwithstanding the board's finding that he, and his witnesses, testified credibly that he did not retire for purely personal reasons. The appellees contend that an employee who voluntarily retires from the labor market is not entitled to TTD, the board found that Strong's actions were more persuasive than his testimony, and the board was not obligated to accept Strong's belief that looking for work was futile.

The arguments of the parties require the commission to explain the Supreme Court's holding in *Vetter v. Alaska Workmen's Compensation Board.* However, because the board's decision is unclear as to what the board meant to convey regarding the credibility of the evidence and witness testimony, and its decision reflects significant inconsistency, the commission remands the decision to the board for clarification.

1. Factual background and board proceedings.

Robert Strong was born in 1947. He worked as a lineman since 1970. He worked for Chugach Electric since 1983. In September 2001, he reported that a large crate toppled and fell toward him in the storage yard, and, in the process of pushing himself clear of it, he injured his left shoulder. He went to see Dr. Gieringer in December 2001, complaining the shoulder was so painful he could not sleep on his left side. X-rays showed moderate left glenohumeral joint arthritis with an osteophyte over the medial inferior edge of the acromion, inferior anterior edge of the glenoid, multidirectional instability, and acromioclavicular joint and subacromial impingement.[2] Dr. Gieringer's assistant reassured him and gave him instructions on strengthening

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1 524 P.2d 264 (Alaska 1974).

2 R. 0221.

exercises and medication. Dr. Gieringer suspected he had "some sort of strain with a residual instability. . . . not enough to cause him to have a symptomatic silent subluxation . . . ."[3] In June 2002, almost a year after the injury, Dr. Gieringer reported that he advised Strong he should have surgery to correct the "posterior subluxation and inferior subluxation"[4] that were painful and not getting better. When Strong reported he wanted to wait until fall, Dr. Gieringer reported, "a few more months shouldn't make any difference."[5] It was another year before Strong went to see Dr. Gieringer. In September 2003, Dr. Gieringer reported that he "didn't feel [the] instability was as much as when I had examined [Strong] last time."[6] Dr. Gieringer "left it to [Strong] as to whether he would have anything done. . . . although there was no hurry, a capsulorrhaphy of his left shoulder would likely be of some long term benefit."[7] A year later, in November 2004, Dr. Gieringer reported that Strong complained that his shoulder seemed to get worse almost overnight, "so painful that he could hardly stand it."[8] Nonetheless, his range of motion was still good and the instability was "pretty much unchanged."[9] In this visit, Strong told Dr. Gieringer he planned to retire "next year" and wanted to wait for surgery, which Dr. Gieringer told him was "perfectly fine."[10]

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3 R. 0225.

4 R. 0229.

5 *Id*.

6 R. 0231.

7 *Id.*

8 R. 0232.

9 *Id.*

10 *Id*.

Strong retired at the end of March 2007, when he was 60 years old. Although he had sent a letter to Chugach Electric's adjuster asking about having surgery after retirement in 2005, he did not give notice of retirement until February 2, 2007. In the months prior to his retirement, he worked full-time, including overtime. The employer does not have a policy barring retirees from returning to work.

Strong saw Dr. Gieringer June 20, 2007, but Dr. Gieringer advised against surgery because he had less instability and his range of motion was functional. He suggested treatment with an injection if his shoulder became painful, and in July 2007, this was done. He told him that a "resurfacing" of the shoulder joint might be appropriate. In January 2008, Dr. Gieringer's assistant reported he told Strong that he probably should not be climbing poles now and he absolutely would not be able to return to pole climbing after surgery, but that the surgery could reduce pain and increase function.[11]

Strong's surgery was done in December 2008. Strong's humeral head had grown so large that it could not be resurfaced, so a prosthesis was fitted to it and a "hemiarthroplasty" or partial joint replacement was done. A CT scan before surgery had revealed a glenoid bone cyst, so this was removed in the surgery as well. At the time of the hearing before the board, Strong testified he was making good progress in physical therapy and taking only light pain medication.

Strong filed a claim for TTD and medical benefits after Chugach Electric controverted his request for additional medical treatment and compensation based on an employer medical evaluation in August 2007.[12] The claim was denied,[13] and a request for a second independent medical evaluation resulted in an examination by Thomas Gritzka in July 2009.[14] Dr. Gritzka's report agreed with Dr. Gieringer's opinion

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11 R. 0214.

12 R. 0004, 0005-06.

13 R. 0023.

14 R. 0357-82.

that the work injury accelerated the progress of arthritis in the left shoulder and surgery was required to treat it.[15] Chugach formally conceded that the shoulder surgery was treatment required by the injury,[16] but continued to contest liability for TTD because Strong had voluntarily retired.[17]

The board heard the claim on February 3, 2009. It briefly reopened the record on March 25, 2009, and issued a decision on April 24, 2009.[18] In its decision, the board reviewed the testimony presented by witnesses at hearing and by deposition as well as the documentary evidence and set out the arguments of the parties in a concise, well-organized fashion. After stating the presumption analysis it would apply to the claims presented, the board found that the need for surgery was work related.[19]

The board then turned to the claim for TTD. First, the board addressed the question of medical stability. The board noted that, although the claimant testified his left shoulder continued to worsen until he was forced to retire, there was no medical evidence of the condition of his shoulder between November 2004 and July 25, 2007. It found, based on the lack of medical treatment and lack of medical evidence concerning medical stability for the period from November 2004 to July 2007, that the claimant was medically stable.[20] Based on the medical opinions of Dr. Gritzka and Dr. Gieringer, it found the employee was not medically stable from July 25, 2007, until he is found medically stable after surgery.

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[15] R. 0381.

[16] R. 0409, 0164.

[17] R. 0164-69.

[18] *Robert N. Strong v. Chugach Electric Ass'n*, Alaska Workers' Comp. Bd. Dec. No. 09-0075 (Apr. 24, 2009).

[19] *Id.* at 23. The board added that it found the controversion "null and void." *Id*. Presumably, the board meant it had been fully rescinded, because the board did not award a penalty for a controversion that was void *ab initio*. The board noted the parties stipulated to the on-going compensability of the claimant's left shoulder injury, but, without saying it rejected the stipulation, made its "own findings concerning compensability of the claimant's left shoulder condition." *Id*. at 22.

[20] *Id*. at 25-26.

Having established a period when TTD may be payable, the board decided if the employer was liable. Announcing its decision, the board said, "At the third stage of the presumption analysis, we find *the claimant has proven by a preponderance of the evidence he is entitled to TTD* for a portion of the period for which he is requesting those benefits, as discussed below."[21] The board engaged in several pages of analysis of the case law, and concluded:

> Thus, based on the relevant case law in Alaska and informed by the case law in other jurisdictions, we find an employee is not entitled to TTD if he voluntarily retires from the workforce. We also find an employee will not be deemed to have retired from the workforce if he is engaged in regular gainful employment, or although not working, he is willing to work and making reasonable efforts to find work. In addition, we find an employee will not be deemed to have left the workforce if he is willing to work, although not employed at the time, and not making reasonable efforts to find work because of a work related injury where such efforts would be futile.[22]

Because there was no dispute that Strong retired from his employment with Chugach Electric, the board first decided if he retired because of a work-related injury. The board found "the claimant's actions related to his retirement are in conflict with his testimony and that of his lay witnesses."[23] The board went on to say,

> However, we also find the claimant and certain of his lay witnesses testified he wanted to continue working and only retired at the time he did due to his left shoulder condition. *Although we find the claimant credible*, we find it problematic that he, by his own admission, went to great lengths to conceal his left shoulder disability before retirement, then requested TTD benefits from the date of his retirement and ongoing. In addition, we find that *other than his own testimony*, and the testimony of his lay witnesses, *there is no evidence*, such as medical evidence, *that he was in fact disabled due to his left shoulder condition when he retired*. We find the preponderance

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[21] *Id*. at 27 (emphasis added).

[22] *Id*. at 31. Although the board uses the word "find," these are conclusions of law – statements of the law that it will apply to the facts of the case.

[23] *Id*.

> of the evidence shows the claimant voluntarily retired from his job with employer for reasons unrelated to his work injury.[24]

The board next decided if "the claimant remained in the workforce after his retirement from his job."[25] The board found Strong was not "working regularly," so the board turned to the question if Strong was "willing to work and making reasonable efforts to obtain employment."[26] The board found

> the testimony of the claimant proves he was willing to work from the time of his retirement on March 30, 2007 onward. However, we find the only evidence in the record of the claimant's reasonable attempts to remain in the workforce after his retirement is his registration with the union from June 9, 2008 to August 8, 2008, along with the work release to light duty from Dr. Gieringer from June 9, 2008 to July 9, 2008. We find the evidence in the record shows the claimant did make active efforts to obtain employment from June 9, 2008 to August 8, 2008, when he registered with the union. However, we also find he stopped looking for work after August 8, 2008 when he decided he would not be able to find work he could do through the union. However, the claimant did not present any evidence that he made reasonable efforts to find light duty work other than through the union. Had the claimant found other light duty work, although he might not have received union wages, he could have requested temporary partial disability (TPD) benefits, which provide for compensation at the rate of 80% of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury. We find although the claimant was willing to work, he did not make reasonable efforts to obtain employment. Therefore, we find the claimant was not in the work force after he retired on March 30, 2007, and thus not entitled to TTD during that time.[27]

Then the board addressed this question: if Strong was not making reasonable efforts to find work, was it because such efforts would be futile due to his work-related injury?

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[24] *Id*. at 32. (emphasis added) (footnotes omitted).

[25] *Id*.

[26] *Id*. at 33.

[27] *Id*. at 33 (footnotes omitted).

The board concluded that Strong decided it would be futile for him to continue to look for work after August 8, 2008, but, it added, "because we find the claimant did not provide any evidence that he looked for work other than through his union, we do not find it would have been futile for him to continue to look for work."[28] Based on "failure to remain in the workforce by making reasonable efforts to obtain employment, and . . . failure to provide evidence of trying to find work outside the union," the board found Strong did not remain in the workforce after his retirement.[29] The board concluded Strong was *not* entitled to *TTD* benefits.[30]

Strong appeals the board's denial of TTD.

2. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[31] The commission examines "the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board's conclusion."[32] However, the commission "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the Board."[33] Because the commission makes its decision based on the record before the board, the briefs, and

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28 *Id*.

29 *Id.* at 33-34.

30 *Id*. at 34.

31 AS 23.30.128(b).

32 *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citation omitted).

33 *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (quoting *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003)). *See also* AS 23.30.122 (providing "[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) (providing the "board's findings regarding the credibility of testimony of a witness before the board are binding on the commission.").

oral argument, no new evidence may be presented.[34]

The question whether the quantum of evidence is substantial enough to support a conclusion in a reasonable mind is a question of law.[35] The commission independently examines questions of law and procedure.[36]

3. Discussion.

a. The board's decision reveals inconsistency that cannot be reconciled on review.

The board is required to make findings of fact that are "sufficient in quality and quantity to facilitate intelligent review on appeal."[37] If the board's findings are inadequate to permit intelligent review, as where the commission cannot discern the board's reasoning from the findings made, the commission will remand the case to the board for further findings.[38] When the board makes findings that are wholly inconsistent with its stated conclusion, the commission cannot discern the board's reasoning and must remand to the board.

Here, the board's decision states:

> At the third stage of the presumption analysis, we find the claimant has proven by a preponderance of the evidence *he is entitled to TTD for a portion of the period for which he is requesting those benefits*, as discussed below.[39]

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[34] AS 23.30.128(a).

[35] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[36] AS 23.30.128(b).

[37] *Roberts v. Brooks*, 649 P.2d 710, 711 (Alaska 1982); *see also Whaley v. Alaska Workmen's Comp. Bd.*, 648 P.2d 955, 958 (Alaska 1982).

[38] *Lewis-Walunga v. Municipality of Anchorage*, Alaska Workers' Comp. App. Comm'n Dec. No. 123, 12, 2009 WL 5216048 *6 (Dec. 28, 2009); *Tire Distribution Systems, Inc. v. Chesser*, Alaska Workers' Comp. App. Comm'n Dec. No. 090, 15 n.43, 2008 WL 4603564 *10 n.43 (Oct. 10, 2008); *Jones v. Frontier Flying Serv., Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 018, 17 n.95, 2006 WL 3325409 *10 n.95 (Sept. 7, 2006); *S & W Radiator Shop v. Flynn*, Alaska Workers' Comp. App. Comm'n Dec. No. 016, 11, 2006 WL 3325408 *5 (Aug. 4, 2006).

[39] *Robert N. Strong,* Bd. Dec. No. 09-0075 at 27 (emphasis added).

While it is a conclusion of law that an employee is *entitled* to benefits, the board's statement is a finding that the employee proved a proposition of fact by a preponderance of the evidence. Apparently the board found that Strong proved by a preponderance of the evidence that Strong was temporarily, totally disabled for a period of time and that his December 2001 shoulder injury in his employment was a substantial factor in causing that disability. Then the board concluded, for reasons it announced it would discuss later in its decision, that Strong was entitled to TTD benefits for at least part of the period after March 30, 2007.

However, having announced a conclusion that Strong was entitled to TTD for a period of time, the board then determined that Strong was not entitled to TTD benefits in its "discuss[ion] below." After a review of cases, the board said:

> [W]e find that an employee is not entitled to TTD if he voluntarily retires from the workforce. We also find an employee will not be deemed to have retired from the workforce if he is engaged in regular gainful employment, or although not working, he is willing to work and making reasonable efforts to find work. In addition, we find an employee will not be deemed to have left the workforce if he is willing to work, although not employed at the time, and not making reasonable efforts to find work because of a work related injury where such efforts would be futile.[40]

These statements are not findings of fact, they are statements of the law that the board intends to apply to the facts of the case before it.[41] "Find" in this context means "decide," because the board is deciding what law applies to this case.

The board then made a series of findings of fact: "We find the claimant retired from his job with the employer, . . ."[42] "We find the preponderance of the evidence

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[40] *Id*. at 31.

[41] The commission's statutory obligation is to apply its independent judgment to the board's formulation of the applicable law. AS 23.30.128(b). Use of the verb "find" in this context does not make the board's statement of the legal principles or standards applicable to the case a "finding of fact" which is subject to more deferential review.

[42] *Robert N. Strong*, Bd. Dec. No. 09-0075 at 31.

shows the claimant voluntarily retired from his job with the employer for reasons unrelated to his injury."[43] "We find the claimant was not working . . . when Dr. Gieringer's office first placed restrictions on his ability to pole climb."[44] "[W]e find the claimant was not working regularly, . . ."[45] "We find although the claimant was willing to work, he did not make reasonable efforts to obtain employment. Therefore, we find the claimant was not in the work force after he retired on March 30, 2007, and thus not entitled to TTD during that time."[46] "We find . . . he decided it would be futile for him to continue to look for work after August 8, 2008. However, because we find the claimant did not provide any evidence that he looked for work other than through his union, we do not find it would have been futile for him to continue to look for work."[47] The board concluded, "[W]e find the claimant is not entitled to TTD benefits after March 30, 2007."[48]

The only period Strong claimed TTD benefits was after March 30, 2007,[49] so the board's conclusion that Strong "*is entitled to TTD* for a portion of the period requested" is inconsistent with its conclusion that Strong "*is not entitled to TTD* benefits after March 30, 2007." The commission cannot reconcile this inconsistency in the board's decision.

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43 *Id*. at 32.

44 *Id.* at 32-33.

45 *Id.* at 33.

46 *Id*.

47 *Id*.

48 *Id*. at 34.

49 Strong's first claim was for TTD following surgery, (R. 0006), but a subsequent claim filed Feb. 28, 2008, amended the claim for TTD "[f]rom 3/30/07 Through Continuing." R. 0011.

b. The board's findings of credibility are so unclear that the board's decision cannot be reviewed.

The appeals commission is required to accept the board's findings "regarding the credibility of testimony of a witness before the board."[50] Only the board may "determine the credibility of a witness."[51] "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."[52]

The board in this case identified a conflict in the evidence: "We find the claimant's actions . . . are in conflict with his testimony and that of his lay witnesses."[53] What precisely the board meant by this statement is not clear. Nothing in the board's decision identifies testimony that Strong did an act that other evidence proves he did not do, or that Strong denied performing an act the evidence established he did. Because the board made explicit findings that it found Strong's testimony credible, failed to sufficiently identify the inferences it drew from Strong's actions, and failed to state that it found evidence other than Strong's testimony more persuasive than his testimony, the commission is unable to determine what the board meant by stating Strong's *actions* are in conflict with his testimony.

Credibility as to a witness's testimony may mean that the board finds the person testified in a way that makes the testimony worthy of belief. A credible witness is one whose testimony is believable.[54] This may be what the board meant when it said it found Strong was a credible witness because it described his demeanor as "frank, forthright, and honest."[55] Credible evidence is evidence that is "worthy of belief, trustworthy evidence."[56] The appellant argues it is impossible to reconcile the finding

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50 AS 23.30.128(b).

51 AS 23.30.122.

52 *Id.*

53 *Robert N. Strong*, Bd. Dec. No. 09-0075 at 31.

54 Black's Law Dictionary 1633 (8th ed. 2004).

55 *Robert N. Strong*, Bd. Dec. No. 09-0075 at 32 n.128.

56 Black's Law Dictionary 596 (8th ed. 2004).

that Strong and his witnesses testified credibly with a finding that "there is *no evidence . . .* he was in fact disabled . . . when he retired"[57] and that "the claimant voluntarily retired from his job . . . for reasons unrelated to his work injury."[58]

It is possible that the board meant that although Strong's testimony as to his beliefs regarding his ability to continue working in 2007 was given honestly, his testimony regarding his ability to earn wages was not as persuasive as more trustworthy evidence of his actions at the time and the contemporaneous medical records.[59] If this is what the board meant, however, the board failed to explain the inferences that the board drew from Strong's actions that contradict his credible testimony, so that the reviewer may determine if the evidence supports the inference. It also requires the board to state in its decision that it found some evidence *more* credible or persuasive than the witnesses' testimony. The board may have meant something different, however, and the evidence before the board may be interpreted in more than one way.

Because the board's decision lacked a clear explanation of the conflict it found in the evidence and how it resolved that conflict to reach the conclusion it reached, the commission cannot discern the board's reasoning. Choosing between conflicting evidence or testimony, or from the varied inferences that may be drawn from evidence, is the board's role. Therefore, the commission must remand to the board for further findings clarifying its decision.

c. The board did not err in holding that disability following voluntary withdrawal from the labor market is not compensable.

Strong asserts on appeal that the board erred in holding that, as a matter of law, an employee is not entitled to TTD following voluntary withdrawal from the labor

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57 *Robert N. Strong*, Bd. Dec. No. 09-0075 at 32.

58 *Id.*

59 *See Wasserman v. Bartholomew*, 38 P.3d 1162, (Alaska 2002) (holding the trial court's finding that a witness was credible does not conflict with its finding that two events did not occur as the witness testified; the court was not required to adopt a credible witness's testimony on every point).

market. He asserts that the board misapplied *Vetter v. Alaska Workmen's Compensation Board,*[60] and thus erred by denying Strong's claim notwithstanding the board's finding that he, and his witnesses, testified credibly that he did not retire for purely personal reasons. However, the Supreme Court's opinion in *Vetter* does not require that the employer prove the claimant withdraw from the labor market for "purely personal" reasons, as appellant contends.

Grace Vetter was a waitress at the "Polaris Lunch" in Fairbanks who was injured when she was assaulted by a customer in 1970. Her employer did not have workers' compensation insurance, and when Grace filed a workers' compensation claim for medical benefits and disability compensation, her employer, Sue Wagner, denied the claim. Although it ordered payment of her medical bills, the board dismissed Grace's claim for disability compensation. The board found that Grace did not want to work, based on her husband's attitude toward her work *and* her sporadic work history.

The Supreme Court held that "[i]f a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability."[61] The Court cited a case in which an injured worker terminated her employment due to her pregnancy and afterwards had surgery for the injury. She was denied TTD because "the compensable injury was not the reason she was no longer working."[62] Thus, if there was substantial evidence to support the board's finding that "Grace Vetter was no longer employed, *not because of any injury* but because of her own personal desires, and found no actual impairment of her earning capacity," then the board correctly denied compensation.[63] The converse of this rule is that if Vetter's unemployment was *because of* her work injury, and her earning capacity was impaired, then she was entitled to compensation. *Vetter* does not

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60 524 P.2d 264 (Alaska 1974).

61 524 P.2d at 266.

62 *Id*. at 267.

63 *Id.* (emphasis added).

require that the withdrawal from the labor market (or retirement) be "purely personal" to be voluntary, but neither does it bar compensation when the employee's work injury is a substantial factor in bringing about a disability – *incapacity because of injury to earn the wages . . . receiv[ed] at the time of injury*[64] – that results in retirement instead of unemployment.

d. On remand, the board may consider if the employee made reasonable efforts to return to work when deciding if unemployment, or loss of earnings, after retirement is due to disability.

In *Vetter,* the Supreme Court held that the evidence the board relied on to find that Grace Vetter's unemployment after the injury was voluntary was not substantial evidence. First, the Court noted that although her husband's desires were relevant to the question if Grace was unwilling to work,[65] there was no direct evidence of her husband's opposition to Grace working.[66] Grace testified her husband "didn't particularly care for [her] to go to work," because he thought her income would put them in a higher tax bracket, so she was paid in cash.[67] Grace testified that she was unable to return to work due to headaches and kidney problems resulting from the injury, that she limited her time in public, and that she wanted "no more fights or arguments with anyone."[68] She testified she turned down a job offer because she could not do the work.[69] Her physician testified it was his opinion she was unable to work due to her injury and that she was not malingering.[70] Even given its most favorable

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64 AS 23.30.395(16).

65 524 P.2d at 267.

66 *Id*. at 267 n.12.

67 *Id*. at 268.

68 *Id.*

69 *Id.* The Court noted that the employer testified that Grace came in frequently to ask if she could return to work after the injury, and that Grace was a good worker who would be rehired at any time.

70 *Id*.

inference, the Court said, the testimony did not support the board's finding that Grace was unwilling to return to work.[71] Thus, the Court held there was insufficient evidence to find that Grace Vetter's loss of capacity to earn wages was due to voluntary unemployment.

The Supreme Court's opinion in *Vetter I* does not support the appellant's argument that he need only demonstrate that he is willing to work to defeat his employer's defense to liability for disability compensation based on his voluntary retirement. The decision in *Vetter I* was that there was insufficient evidence that Grace Vetter's unemployment after her injury was voluntary unemployment instead of unemployment because of disability due to her work injury.[72] This decision was further refined in *Vetter v. Wagner*,[73] in which the Supreme Court held that there *was* sufficient evidence presented regarding "Mrs. Vetter's voluntary removal from the labor market subsequent to [the first Board hearing] . . . to substantiate the Board's finding."[74] The Supreme Court held that Vetter's lack of regular employment between 1964 and the start of her employment by Mrs. Wagner, two extended visits to Australia after her injury, testimony by a physician that there were no physical factors to sustain her complaints, and "of prime significance, the fact that she apparently has made no effort to seek *any type of employment* since the May 1972 hearing, although [the physicians] indicated that Vetter could perform light work."[75]

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71 *Id*.

72 Justices Connor and Fitzgerald, dissenting, pointed out that the board *first* found that Vetter was not disabled from work as a result of the injury, *id*. at 268-269, and there was evidence to support that finding in the record. *Id*. at 269. Then the board determined she was not serious about returning to work. *Id.* As Justice Connor wrote, "If the Board was tending to doubt the seriousness of Mrs. Vetter's injuries, the refusal of the waitress job offer . . . would tend to support the inference that she was not seriously interested in obtaining a job. This, of course, is buttressed by her sporadic working history and her indefinite attitude towards work." *Id.* at 270.

73 576 P.2d 979 (Alaska 1978).

74 *Id*. at 982.

75 *Id*. (emphasis added).

In *Robles v. Providence Hospital*, the Supreme Court described Judge Andrew's decision reversing a board decision that Robles was not entitled to permanent total disability compensation as a decision that the employer failed to present evidence overcoming the presumption that Robles was permanently totally disabled.[76] By the time Robles's case came to hearing, Robles had retired and was unemployed. However, Robles retired only after her employer offered her early retirement as one of three options because it could no longer accommodate Robles's work-related disability in temporary office assignments or by locating a position into which she could transfer.[77] Robles's physician's statement that she could do sedentary work and her ability to work in the employer's office for six months before retiring was not enough to overcome the presumption that her claim for permanent total disability was compensable because the employer failed to demonstrate that work suited to Robles's capabilities was available in the community.

The appellant, although he does not cite *Robles*, sought to present a case more like *Robles* than *Vetter*. By claiming he was totally disabled from the date of his retirement, he contends that he, like Robles, was forced to retire by his work-related injury and afterwards he lacked the capacity to continue to earn wages in his employment at the time of injury. Unlike Vetter, he does not argue that continued unemployment directly after an injury was due to the effects of the work-related injury instead of voluntary withdrawal from the labor market. However, Robles's employer presented early retirement to her as an alternative *because* the employer believed a work-related injury prevented her from performing her regular position. Having offered retirement because of her injury, Robles's employer had to produce evidence that there was *other* work available to Robles to overcome the presumption of total disability raised by her employer's action.

The appellant's injury occurred years before he retired and he presented no evidence of a loss of earning capacity between the injury and the retirement. To

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[76] 988 P.2d 592, 595 (Alaska 1999).

[77] *Id*. at 594.

determine if the appellant's retirement was forced upon him by his employer as an alternative to losing his job, the board could consider whether the appellant informed his employer of his inability to perform his work due to the injury, as well as other evidence bearing on whether he was incapable, due to the injury, to earn wages in his employment when he retired. The board decided the employer overcame the presumption of compensability by demonstrating that the appellant's retirement (or loss of earnings) after March 30, 2007, was voluntary and not because of injury.[78] Once the presumption was overcome, and appellant does not deny that it was overcome, the appellant was required to prove that his loss of earnings was due to a work-related injury and resultant disability, not to a voluntary retirement.

The board held that "an employee will not be deemed to have retired . . . if he is engaged in regular gainful employment, or although not working, he is willing to work and making reasonable efforts to find work."[79] This means that an employee who has taken formal retirement from one occupation may need to demonstrate through evidence of reasonable efforts to find work that he has reentered the labor market. The board also held that an employee has not left the labor market (voluntarily) "if he is willing to work . . . and not making reasonable efforts to find work because of a work related injury where such efforts would be futile."[80] Thus, an appellant whose efforts to find work would be futile due to the work-related injury may not need to show he remained in the labor market, but he must present a preponderance of the evidence that a job search would be futile.

The appellant does not argue the board applied an improper standard of law; he argues that the board's finding that he did not make "reasonable efforts to find work"

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78 There is no evidence that Strong did not cease work with Chugach intentionally and that he did not intend his retirement from Chugach to be permanent, which was not the case in *Cortay v. Silver Bay Logging,* 787 P.2d 103 (Alaska 1990), where the Court noted that the evidence "Cortay did not intend to terminate his employment . . . was uncontroverted." *Id*. at 107 n.2.

79 *Robert N. Strong*, Bd. Dec. No. 09-0075 at 31.

80 *Id.*

was not supported by evidence. He argues that he presented unrebutted testimony that he was willing to work, and that he made reasonable efforts to find work by going on his union dispatch list for 2 months in the summer of 2008. The appellant testified that he tried to get one "safety watch" call out through his union.[81] He did not describe other efforts to obtain employment between March 30, 2007, and the time of the hearing. The board found that his registration with the union was evidence of active efforts to find work, but it was not enough to demonstrate reasonable efforts to obtain employment because he presented no evidence of efforts to find light duty work "other than [the safety watch position] through the union."[82]

The appellant does not contend that two months of availability for a very specialized, uncommon position would constitute a reasonable effort to find work by any employee if it had been conducted through an employment search agency. The board's decision reflects a determination that making himself available for call out for a very uncommon position for two months was not proof by a preponderance of the evidence that Strong had reentered (or continued in) the labor market after retiring from Chugach Electric. The board weighed the evidence of Strong's knowledge, occupational skills, and physical limitations against his evidence of a job search. The board's description of Strong's two months of work availability does not mean that the board required Strong to look for work outside the union. It means the board required Strong to present a preponderance of the evidence of a *reasonable* job search and that it found the two months of availability for a safety watch position was not sufficient to demonstrate reasonable efforts to reenter the labor market in view of Strong's many years of experience and qualifications as an electrician.

Therefore, the commission rejects the appellant's argument that the board lacked evidence to support a finding that the appellant's evidence (two months of registration to take a safety watch call out) was insufficient to demonstrate reasonable efforts to find work in the labor market after March 2007. While the commission must

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81 Tr. 61:7-23.

82 *Robert N. Strong*, Bd. Dec. No. 09-0075 at 33.

remand this case for further findings for reasons stated above, on remand the board may apply the same legal standard (unemployed but willing to work and making reasonable efforts to return to work) when deciding if Strong's loss of earnings is due to a compensable disability instead of a voluntary retirement.

The appellant also contended that the board erred as a matter of law by requiring him to look for work other than through his union in order to establish that he did not voluntarily retire. In short, he argued that he is excused as a matter of law from the reasonable work search other unemployed workers would be required to demonstrate because he is a union member. The only discussion he presented in his brief on this point is a statement that the board's decision "that there was work available simply on the basis that Strong did not look for employment outside his union is not supported by substantial evidence."[83] No legal authorities were presented for the proposition that a union member is not required to look for work for which he might otherwise be qualified to demonstrate reasonable efforts to find work. While an appellant need not "prove" his interpretation of the law is correct, when an argument is given only cursory treatment in the appellant's opening brief, it will be considered waived on appeal.[84] Therefore, the commission does not address this argument.

4. Conclusion.

The board's decision is not clear as to the credibility of the evidence and witness testimony. The decision contains inconsistent conclusions as to the appellant's entitlement to TTD. The commission REMANDS the case to the board for clarification of its Decision No. 09-0075 on the current record. The commission retains jurisdiction to

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[83] Appellant's Opening Br. 24. Strong had the burden of establishing that he was in the labor force and making reasonable efforts to find work. Strong did not claim he made other efforts, he argued that the efforts he made were reasonable as a matter of law. The board did not find that other work was available to Strong; it found that Strong failed to prove he made reasonable efforts to find work, but none was available to him. The board's reference to not looking for work "other than through the union" acknowledges the one exception to the employee's failure to produce evidence of a search for employment.

[84] *Adamson v. Univ. of Alaska,* 819 P.2d 886, 889 n.3 (Alaska 1991); *Estate of Milos v. Quality Asphalt Paving, Inc.*, 145 P.3d 533, 536 (Alaska 2006).

review the board's decision and order following remand. The commission clerk is ordered to return the record to the board within 45 days of this order so that the board may act upon the commission's instructions.

Date: *12 Feb 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

signed
Philip Ulmer, Appeals Commissioner

signed
David W. Richards, Appeals Commissioner

signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is not a final decision and order on Mr. Strong's appeal of the board's decision. The effect of this decision is that the commission decided it could not complete a review the board's decision because the decision contained significant contradictions and the commission could not determine what the board meant. The commission remanded (sent back) the case to the board to clarify its decision and retained jurisdiction to consider the board's decision on remand in this appeal. That means that Mr. Strong need not file a new appeal after the board clarifies its decision; but if he wishes to continue his appeal, he must give notice of resuming this appeal within 30 days of the board's decision, and, if necessary, supplement the grounds of his appeal. This decision becomes final on the 30th day after the commission mails or otherwise distributes this decision, unless proceedings to reconsider it or seek Supreme Court review are instituted.

Because this is not a final commission decision on the merits of the appeal from a final board decision, the Supreme Court might not accept an appeal. Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review under Appellate Rules. If you believe grounds for review exist, you should file your petition for review within 10 days after the date this decision was distributed. See the clerk's box below for the date of distribution.

You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an

order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

If you wish to appeal or petition for review to the Alaska Supreme Court, you should contact the Alaska Appellate Courts **immediately**:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 128 issued in the matter of *Robert Strong v. Chugach Electric Association, Inc.,* AWCAC Appeal No. 09-016, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on February 12, 2010.

Date: *2/23/2010*

signed

B. Ward, Appeals Commission Clerk