

Alaska Workers' Compensation Appeals Commission

Gabriele I. Walsh,
Appellant,

vs.

Robert D. Mauer, DDS, and Liberty
Northwest Insurance Co.,
Appellees.

Final Decision

Decision No. 044 June 5, 2007

AWCAC Appeal No. 06-021

AWCB Decision No. 06-0218

AWCB Case No. 200403288

Final Decision on appeal from Alaska Workers' Compensation Board Decision No. 06-0218 issued August 7, 2006, by the southcentral panel at Anchorage, Krista Schwarting, Chair, Patricia Vollendorf, Member for Labor, Linda Hutchings, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, for appellant Gabriele I. Walsh. Jeffrey Holloway, Holmes, Weddle & Barcott, P.C., for appellees Robert D. Mauer, DDS, and Liberty Northwest Ins. Co.

Commissioners: Jim Robison, Stephen T. Hagedorn, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Stephen T. Hagedorn, Appeals Commissioner.

Gabriele Walsh appeals the decision of the board denying her claim for medical benefits, permanent partial impairment benefits and temporary total disability benefits. Because we find there was substantial evidence in the record to support the board's decision, we affirm the board's denial of Walsh's claim.

Facts and proceedings.

Gabriele Walsh worked as a dental assistant for Dr. Robert Mauer. On March 10, 2004, she tripped over some boxes in a hallway at Dr. Mauer's office and fell against the wall, injuring her back. Before this accident, Walsh had a long history of back problems, dating back at least to 1983 when she underwent a discectomy.

On March 12, 2004, Walsh sought treatment at the emergency room at Providence Alaska Medical Center, complaining of low back pain radiating into her left thigh. An x-ray revealed anterior spondylolisthesis at the L3-4 level. In April, Walsh began treatment with Dr. Robert Valentz.

On April 17, 2004, Walsh was involved in a non-work-related car accident and was taken to the Providence emergency room, complaining of low back pain radiating into her left buttock. She was released later that day but returned to the emergency room on April 19, 2004, complaining of neck pain, chest pain, low back pain and left leg pain and numbness. She blamed the car accident for these symptoms. Ms. Walsh consulted Dr. Ruth German on April 27 and May 4, 2004, regarding symptoms associated with the car accident. Similarly, she attributed her worsened symptoms to the car accident when completing an intake form at Dr. Valentz's office on May 10.

Walsh was examined by Dr. Thomas Rosenbaum on July 26, 2004, on behalf of the employer. Dr. Rosenbaum reported that she had not experienced a new injury as a result of the work accident, but had experienced a lumbar strain. He diagnosed her with multi-level degenerative disease. Moreover, he did not predict any permanent impairment as a result of the work injury nor did he believe that further medical treatment was required. On the basis of Dr. Rosenbaum's report, Dr. Mauer controverted benefits. Dr. Valentz reviewed Dr. Rosenbaum's report on August 30, 2004, and disagreed with its conclusions because he believed that Walsh's symptoms of L3 radiculopathy did not predate her March 10 work injury.

Walsh began a course of physical therapy in September 2004, telling her physical therapist that her back pain had increased after the work incident and again after the car accident. When State Farm Insurance Company investigated the impact of the car accident, Dr. Valentz reported that it had aggravated Walsh's back, neck and leg pain. He also wrote to the attorneys representing Walsh in a lawsuit stemming from the car accident, stating that although she had had significant pre-existing back problems, the car accident had aggravated her condition and made it difficult to control her pain symptoms. He recommended spinal cord stimulation and asked that the insurance company covering her claim pay for this treatment.

In November 2004, Walsh consulted Dr. Darius Davis regarding her leg pain, attributing her symptoms to the April 2004 car accident. In December 2004, at a deposition conducted by the employer, Walsh acknowledged a significant history of back pain and surgeries before both the work incident and the car accident and did not explicitly attribute her current symptoms to the work incident.

In March 2005, Walsh underwent a Second Independent Medical Examination, conducted by Dr. Guy Corkill. Dr. Corkill diagnosed Walsh with multi-level instability of the lumbar spine, L4 and L5 radiculopathy and L2-3 disc disease. He stated that the March 2004 work injury aggravated her pre-existing condition and was “a substantial factor in her current low back condition and symptoms.” He did not attribute her condition to the car accident. He recommended future treatment, including pain management. However, he found that she had reached medical stability on November 1, 2004, and that she could not return to the work she had performed at the time of the work injury. He rated Walsh’s permanent partial impairment at 49% of the whole person.

On October 12, 2004, Walsh filed a workers’ compensation claim for temporary total disability benefits from and after July 27, 2004; permanent partial impairment benefits and medical costs. The board heard the claim on November 17, 2005.

At the hearing, the central dispute was whether Walsh’s longstanding back problems had been permanently aggravated by the work injury, as she argued, or whether her worsened condition was primarily a result of the April 2004 car accident. Although Walsh conceded that she was “an eggshell claimant” with a long history of back problems, she nevertheless maintained, based in large part on Dr. Corkill’s report, that the work injury had significantly and permanently aggravated her back problems, leaving her unable to work.

The board’s decision.

Two issues were before the board. Did the employer rebut the presumption of compensability? And, did the employee prove her claim by a preponderance of the evidence? The board began by explaining the three-step analysis involved in applying the statutory presumption of compensability—first the claimant must produce some

evidence to attach the presumption, which assists the claimant to make a prima facie showing that the injury or disability is work-related;¹ second, to rebut the presumption, the employer must either produce substantial evidence to support an alternative explanation or directly eliminate any reasonable possibility that the claimant's work was a factor in the disability.² At this stage, the board does not weigh the evidence; it simply determines whether the employer has produced sufficient evidence to rebut the presumption.³ If the employer succeeds in overcoming the presumption, then the employee must prove her case by a preponderance of the evidence.⁴

Applying this analysis, the board first determined that Dr. Corkill's report was sufficient to meet the employee's initial burden of establishing a preliminary link between the disability and her employment.⁵ The board also found that the employer had presented substantial evidence of an alternative explanation for the employee's disability — that the employee's back problems had been disabling before the work injury and that that injury had not permanently aggravated her condition.⁶ Moving on to the third step of the analysis, the board discussed the credibility of witnesses and the relative weight it gave to the evidence. Specifically, the board noted that in the six months after the work accident, Walsh consistently attributed her increased back pain to the April car accident rather than the fall at work; and that only in September 2004, did she begin to attribute her symptoms to both the work injury and the car accident. Based on this inconsistency, the board found that Walsh was not a credible witness.⁷

¹ See, *Osborne Constr. Co. v. Jordan*, 904 P.2d 386, 389 (Alaska 1995).

² See, *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

³ See, *Veco Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

⁴ See, *id.* at 870.

⁵ *Walsh v. Maurer*, AWCB Dec. No. 06-0218 (August 7, 2006), at 10.

⁶ *Id.*

⁷ *Id.*

The board then considered the medical evidence, noting that most of the physicians involved in the case attributed Walsh's condition to a combination of the work injury and the car accident or found that the work incident was not a significant factor in aggravating her condition. Only Dr. Corkill's report attributed her condition solely to the fall at work.⁸ But the board was not impressed by Dr. Corkill's report, because he failed to summarize Walsh's medical records, leaving the board uncertain that he had adequately reviewed and considered them.⁹ The board was particularly concerned that the report did not appear to take into account Walsh's prior back problems in assigning a PPI rating.¹⁰ Finally, and most importantly, the board found that the report provided insufficient explanation of the causal relationship between the work accident and Walsh's current disability to justify its conclusion that the accident was a significant factor in the disability.¹¹

The board relied most heavily on Dr. Valentz's reports and opinions, noting that "within the first six months after the work incident, [he] consistently attributed the employee's current condition to the motor vehicle accident, not the work accident."¹² The board found overall that Walsh had failed to prove by a preponderance of the evidence that her disability was work-related and, thus, compensable. It therefore denied her claim for further benefits.¹³

⁸ *Id.* at 11.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 11-12.

¹² *Id.* at 12.

¹³ *Id.*

Standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.¹⁴ Because the commission makes its decision based on the record before the board, the briefs, and oral argument,¹⁵ no new evidence may be presented to the commission. The board's determination of the credibility of a witness appearing before the board is binding on the commission.¹⁶ The commission exercises its independent judgment on questions of law and procedure.¹⁷ The question, whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind, is a question of law.¹⁸ However, the evidence should not be read in the light most favorable to the board's decision;¹⁹ instead, we look objectively, without favor, at the board's reasoning and the evidence.

Discussion

We note as an initial matter that the board correctly applied the three-step burden shifting analysis for the presumption of compensability. We agree that Dr. Corkill's report was sufficient evidence that Walsh's disability was work-related to shift the burden to the employer. We also agree that there is sufficient evidence in the record that her back condition was disabling prior to the work accident to rebut the presumption. Although the board did not explicitly identify the evidence it relied upon, we find that Dr. Rosenbaum's report, finding that the injury was a simple strain,

¹⁴ AS 23.30.128(b).

¹⁵ AS 23.30.128(a).

¹⁶ AS 23.30.128(b).

¹⁷ *Id.*

¹⁸ *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

¹⁹ We here correct the error we made in *Anchorage School Dist. v. Delkettie*, AWCAC Dec. No. 022 (October 19, 2006) at 5, n. 9.

predicting no permanent partial impairment and attributing her symptoms to her pre-existing back problems, was sufficient evidence to rebut the presumption. The board then properly applied the preponderance of the evidence standard to the case before it.

The employee's claim is that her back condition was permanently aggravated by her work injury and that the work injury combined with the car accident so that she never recovered from the combined effects of both accidents. The board rejected this claim based on its assessment of the employee's credibility and the relative reliability of the various medical opinions presented to it.

The board reasoned that the employee's medical evidence for disability after July 24, 2004, rested on the unreliable subjective complaints of the employee. At the heart of the board's decision was a determination that the employee lacked credibility. In particular, the board was concerned by the inconsistency of the employee's explanation for her symptoms.²⁰ The board noted that, in the six months following the work incident, Walsh reported to her doctors that her increased back pain was due to the April car accident rather than the trip and fall at work; and these contemporaneous reports contradicted her testimony at the hearing. As a result, the board questioned Walsh's credibility. When the board decides that a witness who appeared before it is not credible, that determination is binding upon the commission, and we may not reverse it.²¹

Walsh also complains that it was error for the board to discount the opinion of Dr. Corkill. But the board may give less weight to a medical opinion if it determines that it was based on poor history given by the patient.²² Rather than relying on Dr. Corkill's opinion, the board gave greater weight to Dr. Valentz's records. Although

²⁰ *Walsh*, AWCB Dec. No. 06-0218 at 10.

²¹ AS 23.30.128(b).

²² *Gillispie v. B & B Foodland*, 881 P.2d 1106, 1111 (Alaska 1994) ("The court also noted that Gillispie herself was not a reliable witness...[T]he court discounted the testimony of Drs. Reinbold and Cooper to the extent they relied on Gillispie's statements in reaching their conclusions.")

Valentz was himself equivocal – he wrote a report contesting Dr. Rosenbaum’s finding of L3 radiculopathy predating the March 10, 2004 accident²³ – the board paid particular attention to his contemporaneous file notes, indicating that Walsh’s symptoms increased as a result of the car accident. Dr. Valentz’s records and Dr. Rosenbaum’s report provide substantial support for the board’s determination that Walsh failed to meet her burden of proof in establishing compensability. We cannot reweigh the evidence, but rather must defer to the board’s determination on matters of credibility.

We note, however, that the board did not explicitly address Walsh’s theory regarding the combination of injuries. Walsh’s theory is that any disability due to the car accident should be considered work-related because the work injury made her “more susceptible” to serious injury because she had recently suffered a work-related injury; thus, she argues, the work-related injury “combined” with her pre-existing condition and the car accident to bring about the disability. We conclude that this omission was a harmless error. In *Bolieu v. Our Lady of Compassion Care Center*, the Alaska Supreme Court reversed a board decision that failed to consider alternative theories of causation.²⁴ The *Bolieu* board denied compensability for skin rashes suffered by the employees because it found that the employees had not contracted “Staph A” infections at work, even though the employees had complained of skin rashes, which might have had causes other than “Staph A.”²⁵ Here the board properly

²³ There is substantial evidence in the record to support the board’s characterization of Walsh’s pre-existing lumbar spine condition as “significant,” AWCB Dec. No. 06-0218 at 2. The board described reports of surgeries, back and leg pain, various degenerative conditions, physical therapy and other accidents before the March 2004 injury. *Id.* at 2-3. We find nothing in the record to contradict the board’s account that Dr. Valentz did not treat Walsh until *after* she was injured in March 2004. *Id.* at 4. The board refrained from speculating as to why Dr. Valentz believed Walsh did not have pain in her left leg before he first saw her in April 2004.

²⁴ 983 P.2d 1270 (Alaska 1999).

²⁵ *Id.* at 1274-75.

focused on the employee's complaint of back pain and disability and did not fail to consider any possible work-related cause of that pain and disability.²⁶

The only evidence in support of Walsh's combination theory was a single paragraph at the close of the deposition of Dr. Rosenbaum, who also said that Walsh has no continuing work-related disability.²⁷ All that Dr. Rosenbaum conceded, under cross-examination, was that the work injury would have made Walsh more susceptible to further injury in the car accident than someone who had back injuries in the remote past.²⁸ He did not testify that any such work-related susceptibility operated in Walsh's case so as to result in further injury than her pre-existing condition would have done, *and* that such susceptibility-induced additional injury was a substantial factor in her continuing disability. Dr. Rosenbaum's statement is not inconsistent with the conclusion of his report that her ongoing symptoms are actually the result of a progression of her pre-existing condition rather than of her work accident. A report that does not attribute the employee's problems to either the work injury or the car accident constitutes substantial evidence to support a rejection of the employee's "combination" theory.

The board conducted the appropriate burden shifting inquiry and determined that the employer had overcome the presumption of compensability. Thus, Walsh had the burden of proof. Without her testimony, which the board expressly declared not to be credible,²⁹ the objective medical evidence is not so strongly in Walsh's favor that we can say that the board erred in finding she did not present sufficient evidence to

²⁶ AWCB Dec. No. 06-0218 at 8 ("the employment must be a substantial factor in bringing about the disability"). Whether the work injury combined with the pre-existing injury and illness, or whether it combined with the pre-existing condition *and* the subsequent injury, the question is the same: did the claimant prove that her work injury was a substantial factor in bringing about her disability after July 27, 2004?

²⁷ Rosenbaum Depo. 25.

²⁸ Rosenbaum Depo. 47.

²⁹ *See, Robinson v. Municipality*, 69 P.3d 489, 496 (Alaska 2003). In *Robinson*, the board found an employee who attributed aggravation of injury first to car accident and then to workers' compensation injury lacked credibility.

persuade them that her disability after July 27, 2004, was the result of the trip and fall at work.

Conclusion

Because we find that the board's decision is supported by substantial evidence in light of the whole record, we AFFIRM the denial of Walsh's claim.

Date: June 5, 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Jim Robison, Appeals Commissioner

Signed

Stephen T. Hagedorn, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final administrative agency decision. The appeals commission affirmed (upheld) the workers' compensation board decision denying Gabriele I. Walsh's workers' compensation claim against her employer. This decision becomes effective when it is filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of filing, look at the Certification by the commission clerk on the last page.

Effective November 7, 2005, proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the filing of this decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal 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 was mailed to the parties, whichever is earlier. See AS 23.30.128(f).

If you wish to appeal 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

You 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. The commission will accept fax filing of a motion for reconsideration.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Final Decision in the matter of *Gabriele I. Walsh v. Robert D. Mauer, DDS, and Liberty Northwest Ins. Co.*; Appeal No. 06-021; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 5th day of June, 2007.

Signed

R. M. Bauman, Appeals Commission Clerk

I certify that on 6/5/07 a copy of the above Final Decision in AWCAC Appeal No. 06-021 was mailed to J. Kalamarides and J. Holloway and a copy was faxed to AWCB Appeals Clerk and Director WCD.

Signed

L. A. Beard, Deputy Appeals Commission Clerk