

Alaska Workers' Compensation Appeals Commission

James A. Sullivan, Inc., and American
Interstate Insurance Co.,
Appellants,

vs.

Timothy K. Hogan,
Appellee.

Final Decision and Order

Decision No. 055 August 30, 2007

AWCAC Appeal No. 06-035

AWCB Decision No. 06-0289

AWCB Case No. 200502910

Appeal from Alaska Workers' Compensation Board Decision No. 06-0289 issued October 27, 2006, by the southcentral panel at Anchorage, Darryl Jacquot, Designated Chair, and Steve Hagedorn, Member for Industry.

Appearances: Robin Jagar Gabbert, Russell, Wagg, Gabbert & Budzinski, for appellants James A. Sullivan, Inc. and American Interstate Insurance Co. Timothy K. Hogan, *pro se*, appellee.

Commissioners: Kristin Knudsen, Jim Robison and Philip Ulmer.

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

By: Kristin Knudsen, Chair.¹

James A. Sullivan, Inc., appeals the board's decision affirming the decision to grant Timothy K. Hogan an eligibility evaluation for reemployment benefits under the provisions of AS 23.30.041(c). Sullivan presents two allegations of board error. Sullivan claims the board erred when it used a deferential standard of review because the board considered new evidence not before the reemployment benefits administrator's designee² in deciding appellant's petition to the board. Sullivan argues

¹ The chair acknowledges the substantial assistance of appeals commissioner Philip Ulmer in writing this decision.

² For ease of reference, we refer to the reemployment benefits administrator's designee more simply as "the administrator."

that the board should have instead reviewed the matter *de novo*. Sullivan also contends that the reemployment benefits administrator erred when she referred Hogan for an eligibility evaluation. It argues that the administrator and the board had no medical evidence upon which to base a finding that Hogan's compensable work injury alone led to an inability to work in his employment.

Our review of the record convinces this panel that the board had sufficient evidence in the record to support a determination that Hogan is entitled to a reemployment eligibility evaluation. We therefore affirm the board's decision.

*Factual background and board proceedings.*³

Hogan injured his left knee on March 1, 2005 while loading an insulation blowing machine onto a truck at a work site.⁴ Hogan's treating physician, Dr. Charles Kase, diagnosed Hogan with a large bucket handle tear of the left medial meniscus. Dr. Kase performed meniscus repair surgery on March 18, 2005.⁵ Hogan received post-surgery physical therapy. Shortly thereafter, on or about June 6, 2005, Dr. Kase recommended that Hogan undergo additional surgery to repair the anterior cruciate ligament (ACL) due to continued left knee complaints by Hogan.⁶ This recommendation arose out of observations of Hogan's knee made by Dr. Kase during the meniscus surgery.⁷ During that surgery, Dr. Kase observed an old ACL injury as well as grade 3 chondromalacia in the knee. Dr. Kase recommended reconstructive surgery, but it was not performed.⁸

On August 9, 2005 Dr. John Thompson performed an employer's independent medical examination of Hogan. On the date of the examination, Dr. Thompson reported that Hogan was medically stable. Dr. Thompson opined that Hogan had a one

³ When summarizing the facts, the appeals commission does not make factual findings. It provides a factual summary to put the issues presented in context.

⁴ R. 0001.

⁵ Dr. Kase performed a partial medial meniscectomy and chondroplasty of the medial femoral condyle and patella. R. 0203.

⁶ R. 0175; R. 0200.

⁷ R. 0204.

⁸ R. 0006-0009.

percent permanent partial impairment rating. That impairment rating, according to Dr. Thompson, was due to the pre-existing injury to Hogan's left ACL.⁹ In January 2006, a second independent medical evaluation was conducted by Dr. Charles Brooks. Dr. Brooks concurred with Dr. Thompson (and with Dr. Kase) that the ACL tear was an old injury that pre-existed Hogan's injury of his left medial meniscus on March 1, 2005.¹⁰ Both Dr. Thompson and Dr. Brooks advised work restrictions.¹¹ Both physicians determined that recommended work limitations were the result of the ACL injury and of articular degenerative changes to the knee existing before the work accident.¹²

On September 6, 2005, Hogan requested reemployment benefits.¹³ He made this request after the 90-day time limit of AS 23.30.041(c). Hogan claimed that the reason he made the request after the time limit was that he did not know that he would not be able to return to work until he had completed his rehabilitation and physical therapy.¹⁴ On March 9, 2006, the administrator referred Hogan for an eligibility determination, excusing the late request due to unusual and extenuating circumstances.¹⁵ The administrator rejected Sullivan, Inc.'s request for reconsideration of her decision.¹⁶ Sullivan, Inc. petitioned the board for review of the administrator's decision rejecting the request for reconsideration.¹⁷

The board's decision.

The board framed the issue before it as whether the administrator abused her

⁹ R. 0139-0145.

¹⁰ R. 0251-0263, 0264-0266 (Dr. Brooks's report); *compare with* R. 0141 (Dr. Thompson's report).

¹¹ R. 0261; R. 0143.

¹² R. 0261; R. 0143.

¹³ R. 0010-0011.

¹⁴ R. 0310.

¹⁵ R. 0312-0313.

¹⁶ R. 0316-0318.

¹⁷ R. 0020-0021.

discretion by referring the employee for an eligibility evaluation under AS 23.30.041(c).¹⁸ The board issued its decision on October 27, 2006.¹⁹

The board found that Hogan had a compensable injury and that there was a prediction by a physician that Hogan *could be* permanently precluded from his work.²⁰ The board noted that two physicians indicated that Hogan should not return to work in the insulation field. The board also found that there was sufficient evidence to support a finding that Hogan may not be able to return to his pre-injury work.²¹ In arriving at its conclusion, the board noted that the statutory language of AS 23.30.041(c) indicates that one need not know with certainty whether or not Hogan could return to his prior work. Under AS 23.30.041(c), it is sufficient for an employee to show that there is a *prediction* that Hogan could not return to his prior work. Accordingly, the board found that the administrator did not abuse her discretion by referring Hogan for an eligibility evaluation under AS 23.30.041(c).

¹⁸ R. 0319. The board and the reemployment benefits administrator considered the second independent medical evaluation report by Dr. Charles Brooks regarding Hogan's injuries dated January 24, 2006. R. 0251-0263. The reemployment benefits administrator decision on March 9, 2006, and refusal of the request for reconsideration in April, 2006, refer to it. R. 0312-0313, R. 0316-0318. However, on review the board also considered the Dr. Brooks' August 2006 letter, R. 0287-89, which was not before the administrator. The Supreme Court instructs us that if the board considers evidence that was not before the administrator when it reviews the administrator's decision, deference to the administrator's decision under the abuse of discretion standard is inappropriate. *Irvine v. Glacier Gen'l Constr.*, 984 P.2d 1103, 1107 n. 13 (Alaska 1999). The board erred by limiting its review; however, the error is harmless because the board's decision could have been reached through *de novo* review and the board's decision reflects that deference to the administrator played no role in its decision. The board did not indicate that it would have chosen to assign more weight to different evidence than the administrator used, but decided to uphold the administrator because the evidence the administrator relied on was sufficient. Also, Dr. Brooks' August letter is not logically incompatible with his earlier opinion and the letter was not specifically relied on by the board.

¹⁹ R. 0319-0327.

²⁰ R. 0325-0326.

²¹ R. 0326.

Discussion.

1. *Our standard of review.*

Our review of the board's decision to uphold the administrator's referral of an employee for an eligibility evaluation is guided by AS 23.30.128(b). We must uphold the board's decision if there is substantial evidence in light of the whole record to support the board's findings of fact. On questions of law or procedure, the commission is required to apply its independent judgment. The board found that the damage to Hogan's knee on March 1, 2005, *may lead* to a result that Hogan may not be able to return to his regular work.²² This is a finding of fact. The commission finds there is sufficient evidence in the record on which a reasonable mind might rely to support the board's conclusion; therefore, the board did not err in upholding the administrator's decision.

2. *There was sufficient evidence to support a finding that the combination of the work injury and pre-existing condition may preclude Hogan from returning to his work at the time of injury.*

Sullivan, Inc. urges the commission to find that the board erred by deciding that the administrator did not abuse her discretion when she found that Hogan was entitled to an evaluation for reemployment benefits. Sullivan claims that the medical opinion evidence was undisputed that Hogan's work injury was not the cause of Hogan's inability to return to work because the physicians agree a meniscus tear alone would not have prevented him from returning to work. In our view, the board and administrator were not required to end the analysis of work-relationship at that point.

To be eligible to obtain an evaluation for eligibility for reemployment benefits all that an employee need demonstrate is that a work-related injury may prevent the employee from returning to work in his or her occupation at the time of injury.²³ The law does not require proof that such a prediction materialize before ordering the

²² There was no dispute that this injury was work related.

²³ AS 23.30.041(c). We base our decision in this case on the law in effect at the time Hogan was injured and when he requested reemployment benefits.

evaluation.²⁴ The point when administrator is determining whether to refer the employee for evaluation, as opposed to whether the employee is actually eligible, was designed to occur early in the process of recovery.²⁵ The administrator may approve the request for an evaluation if the employee's injury *may* permanently preclude the employee's return to the employee's occupation at the time of the injury. Further, the predicted inability to return to the prior employment must be the *result of* the work injury.²⁶ With respect to this inquiry, the employee enjoys the benefit of a presumption of compensability for reemployment benefits, although this presumption is rebuttable.²⁷

Here, Dr. Brooks's report is sufficient to overcome the presumption of compensability; but, this does not lead inexorably to the conclusion that the board erred in its decision to uphold the administrator's decision to refer Hogan for an evaluation. When reviewing *de novo*, the board is entitled to weigh *all* of the evidence presented to it and then to choose which evidence to give greater weight. The board did so and evidently gave greater weight to other evidence than the opinion cited by Sullivan in Dr. Brooks's report.²⁸

Dr. Thompson stated that the removal of the bucket handle tear of Hogan's left medial meniscus "undoubtedly changed" the mechanics of the left knee and could have aggravated Hogan's pre-existing articular degenerative changes.²⁹ Both Dr. Kase and

²⁴ At this preliminary stage of the process of obtaining an evaluation to determine if the employee is eligible for reemployment benefits, the law does not strictly require the administrator to rely upon specific medical opinion or testimony to make a referral for evaluation of eligibility. Providing medical evidence through a physician's testimony or report is, however, a valuable method in which to demonstrate that an injury may result in an employee's inability to return to their prior work, and, of course, a physician's prediction is *required* to be eligible for benefits.

²⁵ Compare AS 23.30.041(c) with 23.30.041(e).

²⁶ AS 23.30.041(c).

²⁷ *Kirby v. Alaska Treatment Ctr.*, 821 P.2d 127, 129 (Alaska 1991) (holding presumption of compensability extends to claims for vocational rehabilitation).

²⁸ In that light, Sullivan's argument is one of disagreeing with the factual determinations of the board and the reemployment benefit administrator.

²⁹ R. 0142.

Dr. Brooks found that Hogan should not return to work unless Hogan had ACL surgery to reduce the instability in his left knee. Dr. Kase opined that until such time, Hogan could do only sedentary or light activity.³⁰ Dr. Brooks found that the worsening of Hogan's knee after the meniscectomy and the pre-existing laxity of Hogan's left ACL combined to lead him to conclude that Hogan should not return to work as an insulator.³¹ Dr. Brooks's opinion is that the condition of Hogan's knee due to the meniscus tear alone would not have prevented Hogan from returning to his prior employment, provided the ACL condition did not exist. Instead, the injuries combined and led to a worsening of the condition of Hogan's knee:

Mr. Hogan's left knee is probably worse now than it was before the subject occupational injury, by virtue of having lost a portion of medial meniscus. This implies the claimant is somewhat more likely to have another reinjury of left knee should he return to work in a physically demanding job.³²

Dr. Brooks's findings are internally consistent and consistent with the opinions of other physicians. They reflect his opinion that Hogan should not have been performing his prior job functions due to the pre-existing condition of his left knee. The fact that the injury occurred demonstrated Hogan's increased risk of injury in his occupation due to the previously unidentified condition.³³ Hogan now is "somewhat more likely to have another reinjury" than he was before he tore the left medial meniscus.

It was not unreasonable for the board to consider the fact that Hogan had worked in the insulation industry on his knee before the March 1, 2005 injury. Employers take employees as they find them. If a work-related injury combines with a

³⁰ R. 0175.

³¹ R. 0164-65.

³² R. 0164.

³³ The commission notes with disappointment the administrator's comment in her April 5, 2006 letter that Dr. Brooks's report *is* "oxymoronic." The comment was an unfair summation of Dr. Brooks's reflections about his findings with respect to the cause of Hogan's predicted inability to return to his prior work. Dr. Brooks acknowledged that his conclusion may *appear* oxymoronic, (juxtaposing contradictory or incongruent terms to describe something, as "pointedly dull" or "living dead") but he then explained why his conclusions were not incongruent.

pre-existing injury to disable an employee, the employee is not barred from eligibility for benefits simply because there is a future surgery available to the employee to correct the non-work-related condition.³⁴ There is substantial medical opinion before the board through Dr. Thompson's and Dr. Brooks's reports that the disability could be mitigated, if not eliminated, by treating the ACL injury. This does not negate the opinion that the earlier ACL injury and the more recent work-related meniscus injury combined to result in the predicted inability of Hogan to return to his prior employment; it simply reinforces that part of Dr. Brooks's opinion that the meniscus tear alone would not have disabled Hogan.³⁵

Based upon the evidence before it, the board might conclude that a work injury and a non-work injury combined to create the result that Hogan could not return to work. The fact that the medical opinions might change after further medical treatment to the non-work injury does not require the board to find otherwise.

Conclusion.

We AFFIRM the decision of the board that upheld the reemployment benefits administrator decision to refer Hogan to a reemployment eligibility evaluation. As the

³⁴ Sullivan did not argue that an employee must obtain surgery for a prior non-work related injury before being considered if he or she is eligible for reemployment benefits. It was not asserted, and we do not decide, that, before an eligibility evaluation is ordered, the administrator and the board must evaluate separate non-work-related injuries in detail, and to determine the relative risks of the corrective surgery, where the employee has productively worked at his or her employment prior to the combining work-related injury. In our view, this would be contrary to the principle that an injury that combines with a pre-existing condition so as to be a substantial factor in bringing about the disability is compensable. The *possibility* that the combined conditions might be "disconnected" through future surgery does not eliminate the present combination in Hogan's case. No evidence was presented to the board or administrator that Hogan unreasonably failed to mitigate his disability by refusing curative treatment offered by the employer.

³⁵ Similarly, the fact that Dr. Brooks would have advised Hogan to change work before the injury if he had the opportunity to do so, does not mean that the injury played no role in his current prediction that Hogan may not return to his former employment.

board pointed out below, whether Hogan will be eligible for reemployment benefits is not an issue under review at this time.

Date: Aug 30, 2007

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

Philip Ulmer, Appeals Commissioner

Signed

Jim Robison, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. There are no further administrative proceedings on the reemployment benefits administrator's decision ordering an eligibility evaluation under AS 23.30.041(c). This decision becomes effective when filed in the office of the appeals commission unless proceedings to reconsider it or seek Alaska Supreme Court review are instituted. To see the date of filing, look at the clerk's certification below. Effective November 7, 2005, proceedings to appeal must be instituted in the Alaska Supreme Court within 30 days of the filing of a final 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. AS 23.30.129.

If a request for reconsideration of this final 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 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

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

