

Case: *Denise O'Hara vs. Carr-Gottstein Foods Safeway, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 093 (December 4, 2008)

Facts: Denise O'Hara (O'Hara) suffered a disc herniation in her back and sought benefits for two surgeries and the resultant disability benefits during periods that she was recovering from the surgeries. O'Hara asserted that the herniation occurred when she lifted a five-gallon bucket of water and flowers at work on December 5, 2006. However, medical reports indicated she had been complaining of increasing back and leg pain in the months leading up to the incident. Moreover, she had told one doctor that the increasing pain was as a result of installing a water feature in her garden in her yard, although she testified to the board that she had not personally worked on the water feature.

Dr. Marble opined that the December 2006 incident was probably not the substantial factor in her need for surgery, but that the herniated disc occurred earlier, when she developed symptoms of left-sided radiculopathy, and that she probably herniated the disc working in her yard at home.

The board found that O'Hara had attached the presumption of compensability and the employer rebutted it with Dr. Marble's testimony. The board decided that O'Hara was not credible, in part because she admitted filling out diagrams showing pain extending from her lower back into left leg in October, contradicting her testimony that the pain began with the December lifting incident. The board concluded that, based on the medical evidence, her work was not the substantial cause of the disc herniation and the need for the surgeries. Under *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000), the employee argued that the pain she suffered on December 5, 2006, constituted a new injury. The board concluded that:

we do not believe the employee's work caused any more than a temporary aggravation of her pre-existing condition. Indeed, we find she could not prove her work was even a substantial cause of her current back condition, as defined in pre-November 7, 2005 injury cases. Finally, we note the employee continued to work until February 2007, so the employee cannot seriously rely on *DeYonge* . . . to contend that pain, alone, can be considered the substantial cause of her disability. Dec. No. 093 at 8.

O'Hara appeals.

Applicable law: AS 23.30.010(a), as amended applying to injuries after November 5, 2005:

To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out

of and in the course of the employment. When determining whether or not the . . . disability or the need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or the need for medical treatment.

AS 23.30.120(a)(1) establishes the presumption of compensability.

To overcome the presumption, the employer's substantial evidence must either (1) provide an alternative explanation for the injury that, if accepted, would exclude work-related factors as [the] substantial cause of the disability; or (2) directly eliminate any reasonable possibility that employment was [the substantial] factor in causing the disability. *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 690-91 (Alaska 2000) (as modified by Dec. No. 093 at 11 to reflect the amendment of AS 23.30.010(a)).

The opinion of "a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not [the] substantial cause of the disability" rebuts the presumption of compensability." *Cowen v. Wal-Mart*, 93 P.3d 420, 424-25 (Alaska 2004) (citations omitted) (quote modified to reflect amendment of AS 23.30.010(a)).

AS 23.30.128(b) and AS 23.30.122 on board's sole authority to determine credibility of witnesses testifying before it.

DeYonge rejected that, to overcome a presumption that a claim for temporary disability is compensable, the medical evidence must show that the work worsened the employee's underlying condition, rather than merely aggravated the employee's symptoms so as to result in disability. Instead, a work-related aggravation of symptoms that results in disability is compensable. *DeYonge* requires that "the nature of the benefit claimed dictates the showing that must be made[.]" Dec. No. 093 at 16. In other words, if an employee is seeking temporary total disability, the employee need not show a permanent aggravation of symptoms.

Issues: Was employer's evidence sufficient to rebut the presumption? Did the board have substantial evidence to conclude that O'Hara's work was not the substantial cause of her need for back surgery and resulting disability? Did the board properly apply *DeYonge*?

Holding/analysis: The commission rejected O'Hara's arguments about the employer's failure to rebut the presumption because her arguments addressed the weight, rather than the sufficiency, of the evidence. At the rebuttal stage, evidence is weighed in isolation. The question is whether, if true, the evidence would rebut the presumption. The commission noted that the difference between a waterfall and a water feature or water fountain was not material to Dr. Marble's opinion, so the perpetuation of this error is not enough to render his opinion so unreliable that a reasonable mind could not rely upon it.

Moreover, Dr. Marble's opinion was sufficient to rebut the presumption. His opinion concluded that the work incident was not the substantial cause of the need for surgery because her symptoms in October were consistent with the disc herniation found on the December magnetic resonance imaging, and, thus, he concluded that the disc herniation occurred before December 5, 2006. Although Dr. Marble pointed to a different possible cause for the herniated disc, "the core of his opinion is that the disc herniation which required the surgical treatment did not occur on December 5, 2006, as claimed." Dec. No. 093 at 13.

The commission rejected O'Hara's arguments that the board failed to properly apply *DeYonge*. *DeYonge* was not applicable because O'Hara contended that she did not have symptoms of disc herniation prior to December 5, 2006, rather than arguing that although the herniation may have occurred earlier, the December 5, 2006, incident aggravated it to the extent that she required surgery. Moreover, no medical evidence supported that "the need for surgery was the result of increased symptoms, instead of the physical injury of a herniated disc impinging on the nerve outlet." Dec. No. 093 at 15.

The commission interpreted AS 23.30.010(a):

The use of the disjunctive "or" means that the board must evaluate the claimed benefits separately. A work-related injury may result in temporary disability, and treatment to restore the employee to pre-injury condition, without necessarily being the substantial factor in bringing about the need for all future medical treatment of the underlying condition. Conversely, a work injury may be the substantial factor in bringing about disability and need for treatment, but not a subsequent temporary increase in symptoms if another activity was the substantial factor in the increased symptoms. Dec. No. 093 at 16.

Thus, in O'Hara's case, even if lifting the bucket did aggravate the disc herniation, resulting in temporary disability, the work incident was not necessarily the substantial factor in her need for surgery for a herniated disc. The commission discussed *Moore v. Afognak Native Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 087, 9 (Aug. 25, 2008) which concluded the board properly rejected a temporary aggravation of a knee condition as a substantial factor in the need for joint replacement surgery; and *Tire Distrib. Sys., Inc., v. Chesser*, Alaska Workers' Comp. App. Comm'n Dec. No. 090 (Oct. 10, 2008), which affirmed a board decision concluding that a disc herniation was work-related based largely in part on finding the employee's testimony credible concerning the onset of his symptoms (in contrast to O'Hara). The commission concluded it had no power to disturb the board's credibility finding and weighing of the evidence, and that the board decision was based on substantial evidence.