Alaska Workers' Compensation Appeals Commission

Marsh Creek, LLC, and Zurich American Ins. Co., and NovaPro Risk Solutions,
Appellants,

vs.

Brian Benston,
Appellee.

Final Decision
Decision No. 101 March 13, 2009

AWCAC Appeal No. 08-001
AWCB Decision No. 07-0382
AWCB Case No. 200602031

Appeal from Alaska Workers' Compensation Board Decision No. 07-0382, issued December 31, 2007, by southcentral panel members Robert Briggs, Chair, and Mark Crutchfield, Member for Labor.

Appearances: Robert Bredesen, Russell, Wagg, Gabbert & Budzinski, P.C., for appellants Marsh Creek, LLC, Zurich American Insurance Co. and NovaPro Risk Solutions. Robert Rehbock, Rehbock & Rehbock, for appellee Brian Benston.

Commission proceedings: Appeal filed January 8, 2008. Motion for stay pending appeal heard by the commission January 17, 2008, and granted upon conditions by order January 24, 2008. Cross-appeal filed January 29, 2008, and voluntarily withdrawn before briefing on March 26, 2008. Oral argument presented August 19, 2008. Notification of delay in commission decision given November 16, 2008.[1]

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

[1] This appeal presented an unusual level of complexity and an extensive record to review. In addition, the commission panel's deliberation and circulation of drafts was slowed by the absence of commission panelists from the state. When it became clear that the commission would be unable to issue its decision within 90 days, the chair notified the parties' representatives of the delay. The commission regrets the delay in its decision.

Brian Benston's arm was severely lacerated by glass from a kitchen door window during a dispute with a fellow guest at the lodge where he was staying in Nelson Lagoon, while he was working on a Marsh Creek project at the local dock. As a result of the injury, his arm was surgically amputated. The appellants appeal the board's decision that Benston's injury arose out of and in the course of his employment as an electrician by Marsh Creek, LLC.[2]

The appellants listed 20 points on appeal, which may be organized into five main arguments. The appellants contend the board improperly applied the remote site doctrine. The appellants contend the board failed to identify Benston's actions at the time of injury or to determine if those actions were work-related, in light of evidence he was in the course of an assault on another. The appellants contend the board's failure to squarely determine if Benston's conduct was willful resulted in improper analysis of their affirmative defense that Bentson's injury was proximately caused by attempting to injure another. The appellants contend that an intoxication defense raised at the outset of the litigation cannot be overcome by the employee's testimony that he has no meaningful recollection of the evening. Finally, the appellants argue that appellee's medical expert witness testimony, permitted over objection after the appellants' medical evidence was presented, was not substantial evidence on which the board might rely because the expert assumed facts not supported by the evidence and formed an opinion with an incorrect understanding of the law.

The appellee opposes and asserts that the board made credibility findings that may not be disturbed by the commission. The appellee asserts that the board made a determination that the appellee did not engage in an assault because it refused to apply the "intent to injure another" defense. The appellee asserts that the board's reliance on

---

[2] *Brian L. Bentson v. Marsh Creek LLC.,* Alaska Workers' Comp. Bd. Dec. No. 07-0382 (Dec. 31, 2007) (R. Briggs, Chair, M. Crutchfield, Memb. for Labor). The board's decision, which includes numerous explicit findings of fact, exceeds 115 pages. The commission commends the board panel for the extraordinary number of explicit credibility findings as to the witness testimony.

the appellee's medical expert was not error. Finally, the appellee asserts that the board correctly applied the remote site doctrine in deciding the case.

The parties' arguments require the commission to first define the case. For reasons set out below, the commission views this appeal as presenting essentially a workplace fight case; the commission's decision first addresses whether the board followed the appropriate analysis in such cases. The commission notes that the board did not acknowledge that the date of injury required it to apply the causal standard in AS 23.30.010, as amended in 2005. However, because the findings made by the board are so extensive, the commission is able to regard this as a harmless error.

First, the commission determines that the board erred in applying the remote site doctrine. This is a traveling employee case, but it is not necessary to resort to the traveling employee rule if the board finds that the fight arose out of the employment. The commission determines that the board had sufficient evidence in the record as a whole to make a finding that the fight arose out of the employment.

Second, the commission concludes that the so-called "aggressor defense" is embodied in the presumption against a "wilful intention . . . to injure . . . self or another" at AS 23.30.120(a)(4) and the claim bar in AS 23.30.235. The presumption is a negative presumption, unlike the positive presumption in AS 23.30.120(a)(1); therefore, the presumption in AS 23.30.120(a)(4) is overcome by presenting substantial evidence that the employee (1) had a willful intent to injure or kill, demonstrated by (a) premeditation and malice or (b) an impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to it; and (2) did an act that reasonably could be expected to cause injury to himself or another.

The board required the employer to eliminate the possibility that the injury was *not* the result of the employee's willful intent to injure another. Therefore, the board failed to apply the correct legal standard. The commission determines the board's findings, so far as they have been made, are supported by substantial evidence, but the board failed to complete the required analysis. The commission therefore remands this case to the board to complete its decision.

Third, the board failed to address the theory raised by the employee that the work, owing to its location, was the substantial factor in bringing about the amputation of the employee's arm, even if the initial laceration injury was not work-related. The commission provides guidance to the board, if the board's decision on remand requires the board to address this theory.

Fourth, the commission concludes that the board properly admitted expert testimony regarding glass shatter, but that the testimony regarding blood spatter did not have sufficient foundation to be expert testimony.

Fifth, the commission concludes that the board's errors in its reasoning in application of the bar to compensation in AS 23.30.235(1) were harmless and its findings regarding the employee's condition were therefore supported by substantial evidence in light of the record as a whole.

1. Factual background.

The facts of the injury were the subject of much dispute at the board hearing. The commission summarizes here only such facts from the board's extensive decision as are needed to give context to the commission's review of the board's decision. The commission's summary necessarily omits numerous facts established by testimony and records that, while pertinent to the board's findings, are not required for the commission's decision.

Brian Benston was an electrician employed by Marsh Creek. He and his co-worker, Robert (also known as Danny) Wilson were sent to Nelson Lagoon[3] to install a crane and electrical equipment at the local dock. Butch Gunderson was Marsh Creek's local contact. Gunderson owns the Tides Inn, a lodge comprised of two ATCO trailers,

[3] Nelson Lagoon is on the north coast of the Alaska Peninsula, separated from the Bering Sea by a long sand spit. It is about 75 air miles northeast of Cold Bay, accessible only by air or sea. It has a community dock, warehouse, harbormaster's office, school, clinic, electrical cooperative, landfill, water treatment system and a 4,000-foot gravel runway. It is the home of the Native Village of Nelson Lagoon, a federally recognized tribe. The Peter Pan Seafoods dock and plant are located 30 miles away at Port Moller.

a kitchen-diner and a sleeper, where Benston and Robert Wilson stayed. Benston and Robert Wilson arrived at Nelson Lagoon on July 30, 2006.

Nels Wilson, a "bush pilot," was also an occasional guest at the Tides Inn. He was no relation to Robert Wilson. Nels Wilson did not appreciate the mess the two electricians made in the common areas, complained about them, and, according to Benston, used terms like "dumb white kids" to describe them. In a conversation with his supervisor, Benston reported Nels Wilson's comments. The supervisor corroborated Benston's testimony regarding this conversation.

On the evening of August 8, 2006, an altercation between the Marsh Creek employees and Nels Wilson occurred in the diner. Nels Wilson retreated to the kitchen. Benston followed, and, according to some witnesses, punched out the glass in the kitchen door, or the door was shut on his outstretched arm or, according to expert testimony, the door's window was shattered on being slammed shut and Benston injured by flying glass. However the injury occurred, the result was a laceration of the radial artery in Benston's arm.

The community health aide, Senta Lockett, responded. She observed a belt tourniquet wrapped around Benston's arm, that he was "shocky," and that his pulse was weak and racing. She removed the tourniquet, applied pressure dressings, and transported Benston to the clinic. Once there, an intravenous solution was started and Lockett called Providence Anchorage Medical Center. She requested a medical evacuation. She obtained direction from Dr. Leinicke and a prescription for morphine. She recalled hearing a plane circling overhead in the night; she supposed this was the LifeGuard flight unable to land.[4]

Lockett's son, E.J. Lockett, contacted Rosemary Gruffus, R.N., a certified nurse practitioner, who oversees the borough community health aides. After talking with Lockett, she tried to arrange a flight directly to Nelson Lagoon, but due to fog and limited visibility, she was unable to reach the village until 7:10 a.m. on the PenAir flight.

---

[4] A LifeGuard flight from Cold Bay left in the night, but was unable to land due to poor visibility.

When she arrived, she contacted Providence, and removed and rewrapped the dressings. The PenAir flight waited and transported Gruffus, Benston, and Robert Wilson to Cold Bay. In Cold Bay, Benston was transferred to Anchorage by a LifeGuard flight, arriving at Providence Anchorage Medical Center at 11:50 a.m. August 9, 2008.

In Anchorage, Benston was found to have multiple deep lacerations of the right forearm and significant arterial bleeding. The emergency room physician immediately called in a hand surgeon. By 6:00 p.m., Benston was undergoing exploratory surgery and repair of the radial artery. The hand surgeon, based on the healthy appearance of muscle tissue, elected not to release (cut through) other compartments. Unfortunately, undiscovered compartmental syndrome had already developed and tissue death had begun. As a result of this process, Benston's forearm was amputated. According to the hand surgeon, the cause of the compartment syndrome was the lack of proximity to an emergency medical facility where his tourniquet and dressing would have been "decompressed" regularly, and the delay in transport was the most significant cause of the amputation of the right forearm.

2. Board proceedings and decision.

Marsh Creek filed a report of injury, not signed by Benston, that "EE was injured in an afterhours altercation and has a severed artery." The injury report was dated August 15, 2006. A notice of controversion of all benefits was filed, listing as the reasons for controversion that the injury was caused by Benston's willful intent to injure another and that the altercation was with someone not employed by Marsh Creek.

Benston filed a claim for workers' compensation September 22, 2006, seeking a 20 percent penalty for the employer's failure to timely report the injury, a penalty for a "frivolous and unsupported" controversion, temporary total disability compensation, permanent partial disability compensation, reemployment benefits, and medical benefits. The claim was answered, denied, and controverted, listing as grounds that the employee's injury was proximately caused by intoxication, by the willful intent to injure another, and that the injury did not arise out of and in the course of employment. Benston filed an affidavit of readiness for hearing on November 2, 2006; it was opposed on November 14, 2006. At a prehearing conference on November 29,

2006, over the objection of Marsh Creek's counsel, the officer set a hearing date of April 17, 2007.[5]

In the interval before the hearing, depositions were taken of witnesses, as shown in the following table:

Witness name	Deposition date	Witness name	Deposition date
Brian Benston	Oct. 13, 2006	Paul Gunderson	Jan. 15, 2007
Michelle McCall, M.D.	Feb. 7, 2007	Robert Wilson	Feb. 12, 2007
Nels Wilson	Feb. 23, 2007	Marc Kornmesser, M.D.	Feb. 28, 2007
Dan Roberts	Mar. 12, 2007	Michael Nemeth	Mar. 23, 2007
Tanya Leinicke, M.D.	Mar. 27, 2007	Priscilla Rysewyk	Mar. 29, 2007
Lila Johnson	Mar. 29, 2007	Senta Lockett	Apr. 4, 2007
John Haase	Apr. 4, 2007	Todd Johnson	Apr. 5, 2007
John Stumpff, R.N.	Apr. 5, 2007		

Benston filed an amended claim for an "ischemic injury" on March 8, 2007, together with a notice of occupational injury occurring August 9, 2006, due to delay in obtaining treatment for the laceration on August 8, 2006, and a petition to consolidate the two claims. Marsh Creek answered the amended claim, controverted the notice of an August 9, 2006, "ischemic injury" and consented to hearing the claims at one hearing in the response to the petition to consolidate.

Marsh Creek filed a witness list on April 9, 2007, listing Dr. Stephen Fuller as an expert witness. Benston filed a witness list on April 10, 2007, one week before the first day of hearing, listing Engineer Joseph Champagne as an expert witness.[6] Benston also filed a petition to bifurcate the hearing on the claim based on the August 9, 2006, "ischemic injury." Marsh Creek petitioned to strike Engineer Champagne's testimony,

---

[5] Bentson also filed a lawsuit against Gunderson, owner of the Tides Inn, and Nels Wilson for his injuries.

[6] The board heard testimony on April 17, April 18, May 30, and May 31. In addition, the board issued a number of interlocutory orders, including one in the interim between the April and May hearing days, *Brian L. Benston v. MarshCreek LLC,* Alaska Workers' Comp. Bd. Dec. No. 07-0116 (May 8, 2007), and one afterwards, *Brian L. Benston v. MarshCreek, LLC.,* Alaska Workers' Comp. Bd. Dec. 07-0183 (Jul. 29, 2007) (reopening record to re-take testimony of two witnesses whose testimony was not recorded and setting post-hearing briefing schedule).

and Benston to bar Dr. Fuller's testimony, or to leave the record open to allow further cross-examination. The board permitted Engineer Champagne and Dr. Fuller to testify and denied the petition to bifurcate the hearing. The board's rulings were memorialized in an interlocutory order issued after the opening of the hearing testimony.[7]

The facts of the evening of the injury were disputed at hearing, but it was not disputed by the parties that Benston was an employee of Marsh Creek and that he was staying at the lodge in Nelson Lagoon at the direction of his employer. The board was required to establish who was present at the altercation in order to determine whose testimony was relevant and credible. The board's decision contains a thorough summary of the witnesses' testimony and laudably explicit credibility findings.[8] The board found the testimony of Todd Johnson regarding events prior to the laceration was not credible.[9] The board found the testimony of Robert Wilson and Benston most credible "as to who was physically present" at the time of the injury.[10]

The board found that Nelson Lagoon was a "`remote site' for purposes of [its] analysis under the remote site doctrine."[11] However, even if it were not a remote site, and assuming Benston was injured while off duty and drinking alcohol, the board found "sufficient evidence for the presumption of compensability to be raised."[12] It found that the presumption was overcome by the evidence that the injury was due to intoxication,[13] but not by the evidence that it was due to an "assault unrelated to the

---

[7] *Brian L. Benston v. MarshCreek LLC,* Alaska Workers' Comp. Bd. Dec. No. 07-0116 (May 8, 2007).

[8] *Brian L. Benston v. MarshCreek, LLC.,* Alaska Workers' Comp. Bd. Dec. 07-0382, (Dec. 31, 2007). The summary of the evidence presented extends over 81 pages of the decision's text.

[9] *Id.* at 100.

[10] *Id.* at 101.

[11] *Id.* at 96.

[12] *Id.*

[13] *Id.* at 97.

workplace."[14] However, the board chose to "proceed to the third step in the compensability analysis on the employer's argument of assault, even though [the board] conclude[s] that the employer has not adduced substantial evidence as a matter of law, to rebut the employee's proof that the conflict with Nels Wilson occurred as an incident of employment."[15]

The board found Nels Wilson's testimony "not credible" and gave it little weight "on the circumstances of the laceration event, including the employee's sobriety."[16] The board found Benston's testimony as to his level of sobriety "the most credible of those witnesses who testified."[17] Specifically, the board found a "paucity of direct, percipient evidence establishing how much alcohol the employee consumed . . . before the laceration . . . . and based on that paucity [the board found] credible the employee's testimony that he consumed at most three to four ounces of alcohol hours before the laceration occurred."[18] Based on Benston's testimony and Dr. Schoenfield's opinion, the board found that the preponderance of the evidence was that Benston was not intoxicated at the time of the injury.[19]

---

[14] *Id.* at 98.

[15] *Id.*

[16] *Id.* at 13.

[17] *Id.* at 102.

[18] *Id.* at 106.

[19] *Id.* at 108. The board did not explicitly conclude that Benston's injury could not have been proximately caused by Benston's intoxication, but the conclusion is implicit in the board's finding that Benston was not intoxicated when the injury occurred.

After finding Marsh Creek overcame the presumption in AS 23.30.120(a)(4),[20] the board stated:

> And so, the burden of persuasion shifts to the employee to prove by the preponderance of the evidence that the employee's injury did not occur due to the employee's intent to harm another. The Board again finds the employee's testimony on this point most credible, and so by a preponderance of the evidence, that the employee has established that the injury did not occur due to any intent to harm another. The Board also finds that the employer has not ruled out all possible reasons for Brian Benston's arm penetrating the glass of the door.[21]

The board concluded its analysis by holding that

> Because of these two alternative possible reasons for how the employee's arm came to be lacerated, (i.e., a punch in frustration and anger rather than intent to harm, or a slamming by Nels Wilson) which do not involve intent to harm another, and because of the Board's finding that the employee's testimony as to his intent is credible, the Board finds that by a preponderance of the evidence the employee has refuted the employer's claim that intent to harm another was a substantial factor in the employee's injury.[22]

The board concluded that Benston's claim was compensable. The board awarded Benston temporary total disability from August 8, 2006, until "medical stability is achieved," permanent partial impairment benefits, a civil penalty for untimely reporting under AS 23.30.070(f), and $108,044.40 in attorney fees and $24,909.58 in costs.[23]

---

[20] *Id.* at 109. AS 23.30.120(a)(4) provides that

> In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that . . . (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

[21] Id. at 109.

[22] Id. at 111.

[23] Id. at 116.

3. Discussion.

a. The traveling employee rule applies to this case.

The commission was first required to consider how this case should be approached. Not surprisingly, the parties themselves disputed the nature of the case. The appellee contended that Nelson Lagoon was a "remote site" and the employee's injury should be considered in the light of *Excursion Inlet Packing Co. v. Ungale*.[24] The appellant contended that Nelson Lagoon was not an employer-operated camp in a remote area, in which the employer controlled virtually all activities, and that Nelson Lagoon was not a "remote site."

The nature of the employment, not only the specific location of the injured employee, determines if the "remote site" doctrine should be considered by the board. In Alaska, there is a tendency to describe industrial sites or facilities as a "community," even before an independent community has grown up because the workers associated with the industry settle there.[25]

In *Excursion Inlet Packing Co. v. Ungale*, the court responded to the argument that Excursion Inlet was not "remote" as follows:

> Only in Alaska could it be argued that [Excursion Inlet Packing]'s facility was not a remote site. In most states, Hoonah--twenty-five miles away--would be remote enough. Outside of Ward's Cove, which owns [Excursion Inlet Packing], there are a few

---

[24] 92 P.3d 413 (Alaska 2004).

[25] For example, the State Department of Commerce, Community and Economic Development classifies the Whitestone Logging Camp as an isolated village, notwithstanding that it has no "residents" and is a working lumber camp. *See* State, Dep't of Commerce, Community and Economic Development, Division of Community and Regional Affairs, *Alaska Community Database Community Information Summary*, *available online at* http://www.commerce.state.ak.us/dca/commdb/CIS.cfm (last accessed January 9, 2009). Anchorage, the state's largest community, began as a tent city of men anxious to find work building the Alaska Railroad. Other communities began as fish salteries, packers or canneries, (e.g., Point Baker, Sand Point, Port Graham, Meyers Chuck), logging camps and lumber mills, (e.g., Hobart Bay, Ward Cove, Thorne Bay), military or government facilities, (e.g., Port Clarence, Shemya Station, Whittier, Woman's Bay) or mines or drilling sites (e.g., Kennicott, Ruby, Prudhoe Bay, Red Devil, Red Dog Mine, Sunrise). Some work camps, notably Prudhoe Bay, have facilities not present in many small independent communities.

> people who own land there, a dozen of whom might stay through the winter, a mail plane on Wednesdays, a store open on Thursdays, a runway that doubles as Main Street, no hotel, no restaurant, no government, virtually no public facilities. There certainly is no question that under a line of decisions in this area, this tiny community would be one in which the remote site doctrine applied:
>
> > Although it is often possible for a resident employee in a civilized community to leave his work and residential premises to pursue an entirely personal whim and thereby remove himself from work-connected coverage, the worker at a remote area may not so easily leave his job site behind.[26]

Ungale lived in group housing at the employer's plant. He had worked there for two summers, but he quit after three weeks in his third summer. When he quit his job, his employer's personnel manager made the necessary travel arrangements, arranging an early morning departure the following day, connecting to flights to California; from there Ungale intended to return to the Philippines where his family resided. The fact that a few private landholders were located near the Excursion Inlet packing plant did not change Ungale's relationship to the employment from "resident worker in a work camp" to "community resident employed at a plant." The packing plant, including the group housing provided by the employer, was sufficiently remote that the "remote site" doctrine could apply. In other words, it is not enough that the injury occur in an area remote from "a civilized community." The employee's regular, on-going residence in the employer's facilities, together with the lack of facilities and population not under the employer's control and the employee's inability to freely access such facilities and population, distinguish the remote work site from a small, remote community where the employee resides.

In this case, Benston and Robert Wilson traveled to Nelson Lagoon for the limited purpose of installing equipment at the local dock. They were experts in their

---

[26] *Excursion Inlet Packing Co. v. Ungale*, 92 P.3d 413, 418-19 (Alaska 2004) (quoting *Anderson v. Employers Liability Assurance Corp.,* 498 P.2d 288, 290 (Alaska 1972) (government contractor's employee injured climbing telephone pole following bet made in employer's bar in Amchitka)).

fields temporarily in a village to do a specific job; just as a lawyer may be sent to Kotzebue to try a case, an environmental quality specialist to inspect a water treatment plant in Kongiganak, or a telecom technician to repair a transmitter in Fort Yukon. They were not cannery workers living in a cannery-operated group housing until the season ended, roughnecks living on a drilling platform, bull-cooks at Prudhoe Bay or grader operators at Red Dog Mine, living in employer group housing on a regular shift schedule as long as the employment lasts, or timber fallers living in a lumber camp in a National Forest until the camp closes. Unlike remote site work camps, Nelson Lagoon, however remote it is from larger communities, does not exist to serve the industrial purposes of Benston's employer.

The board believed the remote site doctrine applied to extend the "course of employment" to Benston's personal activities.[27] However, the commission concludes that another rule applies with similar effect: the traveling employee rule. As summarized in Prof. Larson's treatise on Workers' Compensation Law,

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable.[28]

The traveling employee is not a remote site employee because he does live at an employer's work camp on an on-going, regular basis. The traveling employee travels from the employer's premises to a point not on the employer's premises for the employer's business and returns to the employer's premises where regular employment duties are resumed. It does not matter, for purposes of application of the traveling employee rule, that the employee travels to Barrow instead of Boston or New Stuyahok instead of New York; the course of employment travels with the employee during the

---

[27] *Brian L. Bentson,* Bd. Dec. No. 07-0382 at 96. The object of the remote site doctrine is to extend the "course of employment" to cover other activities than the work duties while in the work camp.

[28] 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law*, § 25.01 (2008) (footnote omitted).

trip, and injuries that arise out of the necessity of sleeping in a hotel – or the floor of the local school gym – are usually held compensable if the employee's activity is reasonably incident to the travel.[29]

The board's error in applying the "remote site doctrine" to extend the course of employment is harmless because the board also analyzed the injury as if Nelson Lagoon were not a remote site. The board said:

> Even if Nelson Lagoon were not a "remote site" as a matter of fact or law, and assuming the employer's argument that the employee was injured while off duty from work and while consuming alcohol, the Board finds sufficient evidence for the presumption of compensability to be raised. There was evidence that the drinking of alcohol was sanctioned by the employer, was not prohibited during "off duty" hours, that socialization with others at Nelson Lagoon (including Nels Wilson) was encouraged to further the work, and Nels Wilson was known by the employer to be an abrasive, unfriendly individual that the employees were attempting to "win over." These interactions took place at a facility provided by the employer. The Board finds these facts sufficient to raise the presumption of compensability because the employee was engaged in an employer sanctioned activity at an employer-provied [sic] facility, and therefore the presumption of compensability attacheds.[sic][30]

The employee's presence at a lodging provided by the employer, the presence of the employee in the common area of the lodging at the time of injury, employer encouragement of interaction with other guests, and the employer's tolerance of drinking alcohol in "off duty" hours were sufficient facts to permit the presumption to be

---

[29] *See, e.g., McBroom v. Chamber of Commerce*, 77 Or. App. 700, 713 P.2d 1095 (1986) (notwithstanding evidence of 0.4 blood alcohol level, employee's death in hotel hot tub covered as alcohol was made available by employer at conference held at hotel); *Fallon v. Nat'l Gypsum Co.*, 384 N.Y.S.2d 232 (1976) (presumption not overcome in case of death resulting from unexplained fall at hotel); *compare, SAIF Corp. v. Barajas*, 810 P.2d 1316 (Ore. 1991) (case remanded to board to determine how employee became involved in fight at hotel that resulted in his stabbing by co-worker for purposes of aggressor defense); *Goranson v. Dep't of Indus., Labor & Human Relations*, 289 N.W.2d 270 (Wisc. 1980) (injuries incurred jumping from hotel room not compensable as situation not created by risk of staying at the hotel).

[30] *Brian L. Bentson,* Bd. Dec. 07-0382 at 97 (footnotes omitted).

applied to a traveling employee. However, because this is first a workplace fight case, the board was not required to look to the traveling employee rule to determine if this claim was compensable.

b. The board had sufficient evidence to find the altercation arose out of the employment, so that the incident may be a workplace fight.

The board found that Benston's employer had

> knowledge of the pre-existing conflict with Nels Wilson, at employer-supplied lodging, at common use facilities. The evidence was unrebutted that the employee reported negative interactions with Nels Wilson to his supervisor Dan Roberts days before the incident that caused injury occurred. We find that the interaction between the employee and Nels Wilson was not purely private and personal, but was an incident of, engendered and facilitated by the employment.[31]

The board's finding rests on the unrebutted existence of friction between Nels Wilson and Benston that was reported to the employer. The board found the "negative interaction" between them was an incident of the employment. To the extent that the evidence is that they were guests at the same lodge, common area contact would be "incident to" staying in the lodge. The board did not identify the *subject matter or origin* of the altercation as arising out of the employment; rather, its findings suggest that any expression of the tension between the two men was sufficiently work-related merely because Benston was placed in contact with Nels Wilson as a result of his travel to Nelson Lagoon. This analysis suggests that the board regarded Nels Wilson's presence at the lodge as a hazard of the journey or an environmental hazard of the workplace.

If the injury to Benston was the result of an unprovoked assault by a fellow guest, this analysis might have been sufficient.[32] However, the evidence of "negative

---

[31] *Id.* at 98.

[32] At the time of Benston's injury, AS 23.30.395(24) provided that "`injury' means accidental injury or death arising out of and in the course of employment, and . . . further includes an injury caused by the wilful act of a third person directed against an employee because of the employment." There was no evidence that Benston was

interactions" is not enough to find the injury occurred in the course of a "workplace fight." Injuries sustained in a fight may be compensable when the workplace environment increased the risk of attack on the injured employee or the fight was motivated by something related to the employment.[33] Nothing in the evidence of "negative interactions" suggests that Bentson was at a greater risk of attack by Nels Wilson because of his employment.

Thus, the board was required to determine if the fight was motivated by the employment. Although the board failed to identify the subject matter of the altercation, (that it found was "not purely private and personal"), the commission's review of the evidence establishes that there was sufficient evidence that the board could find the quarrel arose from Robert Wilson's anger at being denied access to the common area of the lodging by another guest.[34] Benston was with his co-worker, Robert Wilson, when Robert Wilson's anger was expressed.[35] A dispute between guests over the access to common lodging facilities could be considered incident to the necessity of staying in the lodging, just as a dispute between two different contractor's employees on a job site over access to a lunch truck or a parking area would be related to the employment. Thus, the board could have found that "the origin of the assault was [not] purely private and personal" because the denial of access to lodging facilities to Benston and his co-worker engendered the quarrel.

The commission concludes that, because the board had sufficient evidence in the record to support a finding that the subject matter of the altercation arose out of the

---

injured by Nels Wilson *because of* Benston's employment in Nelson Lagoon. For example, evidence that a householder slammed a door in the face of a process server, intending to bar the process server from serving papers and injuring the process server, would tend to prove that the employee process server was injured by a third party because of the employment.

[33] *See* 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law*, § 8.01[1][b], 8-7 (2008).

[34] Robert Wilson Depo. 61:17-65:3 (Feb. 12, 2007).

[35] *Id.* at 64:12-17.

employment, the board's error in failing to identify the specific origin or subject matter of the quarrel is harmless error.

c. The board's findings are supported by substantial evidence, but the board failed to complete the analysis required by assertion of a defense under AS 23.30.120(a)(4).

In *Elliott v. Brown*,[36] the Supreme Court rejected Elliott's complaint for damages against his employer, Paxon Lodge, on the grounds of vicarious liability for his supervisor Brown's assault on him, saying,

> [T]he beneficial effect of the rule that workmen's compensation is the exclusive remedy in workplace fight cases would be largely destroyed if every case required an inquiry into the relative rank of the assailant and victim, an inquiry which is not relevant to the question whether the quarrel was work-related. See generally 2A A. Larson, *The Law of Workmen's Compensation* § 68.21 (1976).
>
> Principally for these reasons, most courts which have considered this question have held that workmen's compensation is the exclusive remedy in these circumstances. *E. g., Burkhart v. Wells Electronics Corp.*, 139 Ind.App. 658, 215 N.E.2d 879 (1966); *McGrew v. Consolidated Freightways, Inc.*, 141 Mont. 324, 377 P.2d 350 (1963).

The court did, however, permit Elliott to maintain an action against Brown individually for the assault, saying,

> We have concluded that the compensation remedy should not be exclusive when an employee commits an intentional tort on a fellow worker. The socially beneficial purpose of the workmen's compensation law would not be furthered by allowing a person who commits an intentional tort to use the compensation law as a shield against liability. See *Bryan v. Utah International*, 533 P.2d 892, 894 (Utah 1975). Workmen's compensation benefits are paid from employers' premiums, as a means of spreading the cost of hazards of the workplace. We do not believe it would be wise public policy to allow an intentional tortfeasor to shift his liability for his acts to such a fund. Assaults by fellow workers differ not in degree but in kind from the type of harm the statute was enacted to deal with.

---

[36] 569 P.2d 1323 (Alaska 1977).

> Courts in other jurisdictions have held that such assaults, though accidental from the standpoint of the employee, are not accidental from the standpoint of the tortfeasor. See 2A A. Larson, *Workmen's Compensation*, Sec. 68.11. Therefore, such assaults can be considered as falling outside the purview of the "accidental" injuries covered by the act.

The so-called aggressor defense[37] is also based on the concept that "such assaults, though accidental from the standpoint of the employee, are not accidental from the standpoint of the tortfeasor." In other words, the employee who intends to injure or kill another, and is injured in acting on that intent, has not suffered an "accidental injury" covered by workers' compensation.

The Alaska Workers' Compensation Act incorporates a limited form of the aggressor defense in AS 23.30.120(a)(4), which provides:

> (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
>
> (2) sufficient notice of the claim has been given;
>
> (3) the injury was not proximately caused by the intoxication. . .;
>
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

The presumption in AS 23.30.120(a)(4) exists because AS 23.30.235(1) bars compensation for an injury "proximately caused by the employee's wilful intent to injure or kill any person." An injury brought about by acting on a willful intent to injure or kill

---

[37] The common law "aggressor defense" denies compensation to the person who "strikes the first blow." It was sharply criticized by Prof. Larson because (1) it is a fault-based concept inappropriate to workers' compensation law, (2) when the subject of an unpremeditated quarrel is the employment, there is no break in the chain of causation, and (3) disapproval of the employee's conduct is no reason to frustrate the purposes of workers' compensation, and, (4) as a practical matter, it is almost impossible to sort out who started most fights months after the event. 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law*, § 8.01[5][c] (2008).

is not compensable as an accidental injury.[38] Thus, when examining workplace fight cases, the board, if sufficient evidence is raised to overcome the presumption, must determine if the injured employee acted on a willful intent to injure another. To do so, the board must determine if the injured employee (1) had a willful intent to injure or kill, demonstrated by (a) premeditation and malice or (b) an impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to it; and, (2) did an act that reasonably could be expected to cause injury to himself or another.

The board found, in a short paragraph, that the appellees "had not established this defense."[39] But, the board also found that "the employer adduced evidence by witnesses which, viewed in isolation, supports the employer's position that the laceration injury occurred due to the employee's intent to harm Nels Wilson."[40] The board then said it would consider the "third step of the presumption analysis" "even though we conclude the employer has not adduced substantial evidence, as a matter of law, to rebut the employee's proof that the conflict with Nels Wilson occurred as an incident of employment."[41]

The board errs in reasoning that the limited aggressor defense recognized in the act cannot apply if the fight arose out of the employment. A simple example illustrates the board's error. If an employee willfully intends to kill his supervisor because he has been demoted, and is injured in the act of killing his supervisor by the supervisor's attempts to defend himself or police responding to the scene, the fact that the origin of the dispute is the employment does not overcome the bar to payment of workers' compensation to the injured employee-murderer. The analysis remains the same if the employee is a waitress who responds to a sarcastic customer's demands for a

---

[38] AS 23.30.395(24) defines "injury" within the meaning of the workers' compensation statutes as "*accidental* injury or death arising out of and in the course of employment." An intentional self-injury, or injury proximately caused by willful injury of another, is not "accidental."

[39] *Brian L. Bentson,* Bd. Dec. No. 07-0382 at 112.

[40] *Id.* at 98. *See also id.* at 109.

[41] *Id.*

replacement order by willfully dropping a heavy tray of dishes on the customer's head. If the waitress is injured by the flying crockery, compensation will be barred.

The presumption in AS 23.30.120(a)(1) is a positive presumption; once raised, it is overcome by evidence that the employment was *not* a substantial factor in bringing about the disability either by evidence eliminating the reasonable possibility that it is, or evidence of another cause inconsistent with the reasonable possibility that the employment is the substantial factor in the disability. Thus, the fact that the injury occurred in the course of a workplace fight does not alone overcome the presumption in AS 23.30.120(a)(1) because it is not inconsistent with the reasonable possibility that the fight arose from the employment and because there is no evidence that it was "purely private and personal." However, if AS 23.30.235(1) bars compensation, failure to overcome the presumption in AS 23.30.120(a)(1) will not save the claim.

The presumption in AS 23.30.120(a)(4) is a *negative* presumption; it presumes the absence of intent to injure or kill another; that is, absence of evidence that might bar compensation of an otherwise covered claim. Therefore, once the employer produces substantial evidence of the existence of such intent, as the board found was the case here, the negative presumption (of the *lack* of intent) has no further role. The board must engage in the inquiry designed to determine if an otherwise covered injury is barred from compensation. The board must weigh the evidence and decide if the employer proved, by a preponderance of the evidence, that the injured employee (1) had a willful intent to injure or kill, demonstrated by (a) premeditation and malice *or* (b) impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to it; (2) the injured employee did an act that reasonably could be expected to cause injury to himself or another;[42] and, (3) the employee's injury was a proximate result of that act.

---

[42] AS 23.30.235(1) does not explicitly require an act by the employee, but a causal relationship between the employee's intent and the employee's injury implicitly requires some employee action. The commission is unwilling to extend AS 23.30.235(1) to situations when the injured employee's *intent* without action causes mental injury to

The board's findings were not organized around this analysis, but taken together, reach almost every step in it. The board found that the employee's testimony as to his intent *before* the injury was credible, that is, that he followed Nels Wilson to the kitchen because "the conversation was not over." The board rejected the evidence of "malice" presented by the employer.[43] The board found that Nels Wilson "slammed the door on the employee's arm and that a single slam fractured both windows."[44] But, the board did not decide part (1)(b) of the above inquiry, or part (2) of the inquiry, and the board improperly required the employer to "[rule] out all possible reasons for Brian Benston's arm penetrating the glass of the door."[45]

The board found that there was substantial evidence "to support an alternate theory for how the employee's arm was lacerated by glass" – that Nels Wilson slammed the door on Benston's arm as it was raised in a defensive gesture or that Benston punched the glass in anger or frustration rather than intent to injure Wilson,[46] and therefore Benston had "refuted the employer's claim that intent to harm was a substantial factor" in his injury.[47] However, punching a glass window in frustration or anger rather than specific intent to harm is not incompatible with impulsive conduct "so serious and so likely to result in injury that willfulness must be imputed to it" and "an act that reasonably could be expected to cause injury to himself or another."

The presentation of evidence that "method B and C might have caused the harm" does not tend to prove "method A did not cause the harm" unless B or C is incompatible with the occurrence of A. Only if B or C is incompatible with the occurrence of A, must the board must decide which it believes occurred: A or B, or A or C, or A, B, or C. This logic underlies the rejection of evidence of alternate causes that

---

the employee himself, as AS 23.30.010(b) addresses mental injury due to an employee's mental stress.

43 *Id.* at 110.

44 *Id.*

45 *Id.* at 109.

46 *Id.* at 111.

47 *Id.*

are not incompatible with a work-related injury as insufficient to overcome the presumption of coverage in AS 23.30.120(a)(1).[48] The same logic applies to the employee's rebuttal of the evidence offered by the employer to prove the elements of the bar in AS 23.30.235(1). The employer produced evidence tending to prove "version A" — that Benston's injury resulted from Benston punching out the door window in his pursuit of a retreating Nels Wilson. Once the employer produces sufficient evidence to overcome the presumption in AS 23.30.120(a)(4) and establish the elements of the AS 23.30.235(1) claim bar, the employee must present evidence that would disprove the elements of the employer's case. If the employee presents evidence supporting a version of events that is incompatible with "version A," or if the employee presents evidence that directly eliminates a necessary element of "version A," the board must decide which evidence it finds credible and which version of events it accepts.

The board found that Benston did not act out of intent to harm Nels Wilson because it did not accept evidence of premeditation and malice. The board's statement that Nels Wilson "slammed the door on the employee's arm" suggests that the board found Benston did not punch out the door window. However, its findings are not clear because the board continued to find, based on evidence it found was credible, that the injury may have had alternate causes, including that Benston may have punched out the windows in anger or frustration, that are not necessarily incompatible with application of AS 23.30.235(1). The board relied on the possibility of alternate causes to conclude the employee rebutted the employer's evidence. The board did not follow the analysis required to determine if the AS 23.30.235(1) defense raised by the employer bars Bentson's claim of injury in a workplace fight. Therefore, the

[48] *Cowan v. Wal-Mart,* 93 P.3d 420, 425 (Alaska 2004); *Steffey v. Municipality of Anchorage,* 1 P.3d 685, 690 (Alaska 2000); *Williams v. State, Dep't of Revenue*, 938 P.2d 1065, 1072 (Alaska 1997) (quoting *Gillispie v. B & B Foodland*, 881 P.2d 1106, 1109 (Alaska 1994) (internal quotations omitted)).

commission remands this matter to the board to complete its findings and make a decision on the current record.[49]

> *d. Employment may be the substantial factor in bringing about disability when the initial injury was not work-related if employment conditions aggravate, accelerate or combine with personal injury or illness so much as to be the substantial factor in bringing about the disability.*

The board did not make findings of fact or conclusions of law regarding the claim for an ischemic injury due to delay in reaching treatment owing to the location of the employment because it found the laceration injury was work-related based on a preponderance of the evidence. Of the amended claim itself, it said,

> the Board adheres to its original legal conclusion, based on the present record, that any claimed injury that occurred subsequent to the initial laceration is a sequella of the initial injury. The Board continues to find that, even if there are separate "injuries" characterized as the "laceration" injury and the "ischemic" injury, the two separately-stated injuries are closely related factually, and the employee's remedy on the separately stated injuries will be speedier by consolidation of hearing on them, since there is commonality of facts and commonality of the employer's defenses. 8 AAC 45.050(b)(5)(A) and (B).[50]

The board's decision to hear both claims together is not an issue in this appeal, and the commission does not review it. The board cited the factual intertwining of the events and the delay that may result from piecemeal litigation as reasons for its action. Because the commission's decision on appeal may require the board to decide if the employee's injury presented in his March 8, 2007, amended claim is compensable, the commission provides guidance to the board.

---

[49] The commission may not make findings of fact on the appealed claim. Where, as here, the facts were disputed, the credibility of witnesses challenged, and there is evidence in the record that supports different versions of the events, the commission remands the case to the board for further fact findings. However, the board need not reconvene the hearing because the elements of the AS 23.30.235(1) claim bar were fully litigated by the parties below.

[50] *Brian L. Bentson,* Bd. Dec. No. 07-0382 at 90.

In its interlocutory decision on the employee's petition to bifurcate the hearing on the claims, the board said that ordinarily "harm suffered during medical treatment of a compensable injury is considered a consequence of the original injury, as opposed to a new, separate injury."[51] The board noted that the "employee appeared to be arguing the converse," and that the employee "cites no legal authority with similar circumstances to support his position."[52] In its final decision, the board's statement that "any claimed injury that occurred subsequent to the initial laceration is a *sequella* of the initial injury," suggests the board regarded the claim of injury owing to delay in medical treatment caused by the employment as not viable unless the initial injury was work-related.

When the appellee was injured, AS 23.30.010(a) provided:

> Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120 (a)(1) that the disability or death or the 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 death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or 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 death or disability or 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 death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

---

[51] *Brian L. Bentson v. MarshCreek, LLC,* Alaska Workers' Comp. Bd. Dec. No. 07-0116 at 11 (May 8, 2007) (R. Briggs, Chair) (quoting *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590, 593 n.4 (Alaska 1996); other citations omitted).

[52] *Brian L. Bentson,* Bd. Dec. No. 07-0116 at 11.

Compensation is payable for disability, not injury.[53] The Supreme Court has held that when employment aggravates, accelerates or combines with a pre-existing injury so that the employment is a "legal cause" of the disability, the disability is compensable.[54] Prior to the 2005 amendment of AS 23.30.010, an employment aggravation of a prior injury was a legal cause of disability if it was "a substantial factor" in bringing about the disability. For injuries after the effective date of the amendment, under AS 23.30.010(a), "the board must evaluate the relative contribution of different causes of the disability . . . and need for medical treatment." Then, if the board finds that, "in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment," compensation is payable for the disability. While the definition of legal cause has changed, [from "*a* substantial factor" to "*the* substantial factor" (emphasis added)] the statutory method of analyzing claims by evaluating the "relative contribution of different causes to the disability" does not bar claims based on employment aggravation of prior personal injuries or disease conditions.

Thus, if the employee suffers a personal injury, which is then so aggravated or accelerated by the employment that the employment is the substantial factor in causing disability, the disability may be compensable even if the original injury was not work-related. The board's assumption that the employee's ultimate disability necessarily shares the character (work-related or not work-related) of the initial injury is error because it omits the analysis required by AS 23.30.010(a). Although poorly phrased,

---

[53] This represents one of the distinctions between the common law and workers' compensation. Injury without disability may be entitled to some compensation for "pain and suffering" in the common law of torts, provided the tortfeasor is found to be at fault. In workers' compensation, an injury that results in no disability results in no compensation, although medical care may be provided, regardless of fault.

[54] *See United Asphalt Paving v. Smith*, 660 P.2d 445, 447 (Alaska 1983) ("[T]here are two distinct determinations which must be made: (1) whether employment with the subsequent employer 'aggravated, accelerated, or combined with' a pre-existing condition; and, if so, (2) whether the aggravation, acceleration or combination was a 'legal cause' of the disability, i.e., 'a substantial factor in bringing about the harm.'") (citing *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 597-98 (Alaska 1979) and *Fluor Alaska, Inc. v. Peter Kiewit Sons' Co.*, 614 P.2d 310, 312-13 (Alaska 1980)).

Benston's claim of disability due to "ischemic injury" caused by delay is a claim for disability compensation based on employment aggravation of a prior personal injury. If the board determines the initial injury is not work-related on remand, the board must determine if Benston's claim, based on employment conditions aggravating a personal injury, is compensable using the analysis set out in AS 23.30.010(a).

> *e. Witness testimony regarding blood spatter did not have sufficient foundation to be expert testimony, but could be considered expert testimony on glass breakage.*

The board relied on Engineer Joseph Champagne's testimony that the physical evidence, shattered glass and blood spatters, was suggestive of a slammed door.[55] The board described Champagne's qualifications as follows:

> Engineer Champagne testified that he holds a bachelor of science degree in aerospace engineering from the University of Oklahoma with post-graduate training related to forensics engineering. He testified he is employed as a consulting engineer with Case Forensics Corporation in Washington state, and "certified to do slip and fall type cases," has worked on "a number on injury-related cases and anatomy cases," including testimony in criminal, civil, and arbitration proceedings as an expert witness." ... He testified that has been engaged in the area of traffic accident reconstruction since 1991, which involves the application of laws of physics to physical evidence such as glass shatter patterns.[56]

The appellants argue that Engineer Champagne was unqualified to testify about blood spatter patterns and that the board's reliance on his testimony to determine that the door slammed on Benston's upraised arm was error. The appellants argue principally that Champagne was never "qualified" as an expert witness.[57] The commission must

---

[55] *Brian L. Benston,* Bd. Dec. No. 07-0382 at 110.

[56] *Id*. at 81 n.681 (citations omitted).

[57] The appellants also argue that Engineer Champagne's testimony was not substantial evidence because he did not have material facts and that he failed to account for the shattering of the second pane in his account of how the window was broken. These arguments go to the weight that the trier of fact might accord his testimony. The commission does not reweigh the evidence.

decide if Champagne's testimony was admissible as expert testimony and if the *Daubert*[58]*/Coon*[59] test applies to expert testimony before the board.[60] Based on the Supreme Court's decisions, and the board's regulation at 8 AAC 45.120(e),[61] the commission concludes that the board is not required to subject all proposed expert testimony to the *Daubert/Coon* test.

In *State v. Coon,* the Alaska Supreme Court first applied *Daubert* to expert testimony based on voice spectrographic analysis, in which the expert expressed the opinion that the defendant's voice was on a recorded phone message.[62] In contrast, in *Marron v. Stromstad*, the Court held that the superior court did not need to apply *Daubert* and properly admitted (1) the testimony of a neurologist who testified as to the basis for the plaintiff's pain and whether the plaintiff was a proper candidate for surgery; and (2) the testimony of an accident reconstruction expert who relied on his experience of having looked at thousands of accidents, rather than any testing done for the particular case, in testifying about the amount of damage that occurs in accidents at

---

58 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

59 *State v. Coon*, 974 P.2d 386 (Alaska 1999).

60 *Daubert* requires the trier of fact to ensure that scientific evidence offered as expert testimony is both relevant and reliable. *Coon,* 974 P.2d at 395.

61 8 AAC 45.120(e) provides:

> Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

62 *Coon*, 974 P.2d at 388.

different speeds.[63] In *Marsingill v. O'Malley*, the Court held the *Daubert* test did not apply to admissibility of the expert testimony of doctors that was based on their experiences of what patients wanted to know in late-night phone calls.[64]

The Alaska Supreme Court held that *Daubert* applies to "expert testimony based on scientific theory"[65] but does not apply when "the expert testimony is plainly derived from experience - not from the scientific method - and is not dependent on sophisticated scientific theory."[66] "In short, scientific testimony is based on theory, and may be subjected to objective testing."[67] Thus, the Alaska Supreme Court has not extended *Daubert* to admission of all expert testimony.

Engineer Champagne's testimony as to what may be derived from the photos of glass shards is based on his experience; it was plainly offered as "expert" testimony. Based on photographs and his experiences, he attempted to reconstruct how the door window shattered. It is similar to the expert testimony offer in *Marron*. The commission concludes the board did not err in admitting Engineer Champagne's testimony as "expert" as to how the glass in the door shattered.

However, Engineer Champagne relied on his understanding of a scientific process, the laws of physics, and his assumptions regarding arterial blood flow, of which he presented no evidence of particular training or experience, to reach an opinion on the blood spatter patterns and what they might reveal as to how Benston's arm was positioned and how it was lacerated. The commission concludes that, because Champagne did not rely on extensive experience examining blood spatter patterns to reach a conclusion and had no particular forensic training in reading blood spatter patterns, notwithstanding his expertise in traffic accident reconstruction, the board's

---

63 *Marron v. Stromstad*, 123 P.3d 992, 1005-07 (Alaska 2005).

64 128 P.3d 151, 160 (Alaska 2006).

65 *Marron*, 123 P.3d at 1004.

66 *Id*. at 1007.

67 *Id*. at 1006.

admission of his testimony on this subject was error under *Coon*.[68]

Coon requires that:

> [The] trial judge ... "determine at the outset, ... whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." This two-step inquiry requires a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." The [U.S. Supreme] Court also provided a non-exhaustive list of factors courts may use in making this inquiry. These included (1) whether the proffered scientific theory or technique can be (and has been) empirically tested (i.e., whether the scientific method is falsifiable and refutable); (2) whether the theory or technique has been subject to peer review and publication (although publication "is not a *sine qua non* of admissibility"); (3) whether the known or potential error rate of the theory or technique is acceptable, and whether the existence and maintenance of standards controls the technique's operation; and, . . . (4) whether the theory or technique has attained general acceptance.[69]

The Board did not use this analysis in deciding whether to admit Engineer Champagne's testimony on blood spatter. It recited only that it found his testimony would aid the board in reaching a decision, citing *Norris v. Gatts*,[70] and, by rejecting the motion

---

[68] *See also John's Heating Serv. v. Lamb*, 46 P.3d 1024 (Alaska 2002) (applying *Coon* test and concluding, in action brought by homeowners against furnace repair company, test had been satisfied, allowing witness to extrapolate from fact that short-term, high-level carbon monoxide exposures are harmful to testify on his theory that long-term, low-level carbon monoxide exposures were also harmful; and to testify on differential diagnosis methodology by which several experts came to conclusion that homeowners were harmed by chronic exposure).

[69] *Coon*, 974 P.2d at 390 (citations omitted).

[70] 738 P.2d 344 (Alaska 1987). An engineer testified about unwanted acceleration in a case in which an Audi rear-ended a motorcycle. The court held the trial court had not abused its discretion by qualifying him as an expert:

> He [the engineer] explained that the Audi 5000 vehicle operates using what amounts to two small micro-computers. He further stated that he had experience with vehicle operating systems similar to the Audi braking system. Both NHSTA and Center for

objecting to his testimony, qualified him to testify as an expert as to the blood spatter patterns. On reviewing the record, the commission concludes the board erred, as Engineer Champagne had neither experience in the field, nor particular expertise, and, failing experience and expertise, his application of general scientific theory was not subjected to the *Coon* inquiry.

The importance of the testifying expert's reliance on his experience to the board's decision (to make the *Coon* inquiry) and the limitations that may be placed on experience-based testimony is illustrated by the Supreme Court's recent decision in *Hagen Ins., Inc. v. Roller.*[71] An injured employee sued the insurer, alleging that the insurer negligently failed to secure workers' compensation insurance for the employer's business, leaving the employee without coverage for an on-the-job injury. The court held that an experienced workers' compensation attorney was qualified to give the opinion that the employee would suffer a permanent impairment if he underwent surgery, although he was not a physician:

> [The attorney] . . . has extensive experience concerning the subject of his contested opinion. He is not a physician and of course cannot issue impairment ratings himself, but there was evidence he has nearly forty years of experience working with clients seeking workers' compensation benefits and he testified that he is very familiar with the guidelines doctors use when issuing ratings. We conclude that this knowledge and experience sufficiently qualified [the attorney] to predict whether [the employee] would suffer a permanent impairment if he underwent the surgery. *Moreover, the superior court allowed [the attorney] to express the contested opinion on the condition that it was consistent with [the doctor's] testimony*.[72]

The Supreme Court also cited to two cases decided before *Coon* in which experience,

---

> Auto Safety have recognized him as an expert in the somewhat constrained field of unwanted acceleration. [The engineer]'s qualifications recommended him to assist the trier of fact to understand the evidence.

Id. at 350.

[71] 139 P.3d 1216 (Alaska 2006).

[72] *Hagen Ins., Inc.*, 139 P.3d at 1224 (emphasis added).

rather than formal training, was enough to permit a witness to be qualified as an expert witness.[73] And, in *Lynden Inc. v. Walker*,[74] the Supreme Court upheld admission of expert testimony by an industrial engineer on the basis of experience coupled with expertise. In that case, an employee, injured while unloading equipment from a builder's trailer, brought a personal injury action against the warehouse operator that had loaded the equipment. The defendant argued that the industrial engineer, who testified that the equipment was not safely packed, did not have adequate expertise because he was unfamiliar with North Slope conditions and did not perform any experiments specific to the case. The Court held:

> All of Lynden's arguments against the applicability of Burleson's experience are relevant, but only as to the weight of his testimony, not to its admissibility. . . . Burleson testified on the topics of industrial safety and human factors, areas in which he has considerable expertise. Burleson has a degree in industrial engineering. He is a member of several professional organizations relevant to industrial safety and human factors. He has expertise in the field of industrial safety. Burleson has researched and investigated industrial accidents, including accidents involving forklifts.[75]

Thus, to the extent that the testifying witness relies on his experience as well as his expertise, the board need not subject the witness's proposed testimony to the *Daubert/Coons* test before admission, provided that the testimony otherwise satisfies standards for admission of expert testimony.

In this case, Engineer Champagne's testimony reflects that he theorized based on application of scientific principles of momentum, and his background did not include

---

[73] *Little Susitna Constr. Co. v. Soil Processing, Inc.*, 944 P.2d 20, 27-28 (Alaska 1997) (holding no abuse of discretion in qualifying witness with thirty years of construction experience in Alaska as an expert on the impact of cold weather on construction equipment because Alaska Evidence Rule 702 allows a witness to be qualified as an expert on the basis of experience alone); *Osborne v. Hurst*, 947 P.2d 1356-1361-62 (Alaska 1997) (holding it not an abuse of discretion for a real estate broker to testify about value of a specific property because of her familiarity with evaluating property, even though she had no training as a real estate appraiser).

[74] 30 P.3d 609 (Alaska 2001).

[75] *Lynden Inc. v. Walker*, 30 P.3d at 618-19 (citation omitted).

particular experience or expertise in the area of blood spatter interpretation.[76] A single experience of a blood stain on a highway was not enough to qualify this witness to testify on interpretation of blood spatter evidence based on some photographs. Therefore, the board's decision to admit his testimony as expert opinion on what could be understood from the pattern of blood spatter in the photographs was error.

f. Board error in consideration of the bar to compensation in AS 23.30.235(2) is harmless.

The board found the employer had produced sufficient evidence to overcome the presumption against causation by employee intoxication in AS 23.30.120(a)(3).[77] This conclusion is unchallenged on appeal. Once the presumption against causation by employee intoxication is overcome, the employer may raise the affirmative defense that the injury, even one otherwise work-related, was proximately caused by the employee's

---

[76] In response to a question asking how many times he has testified in interpreting blood spatter evidence, Engineer Champagne responded, "I think one of – one of the – on of the three cases I was involved in involved a – a blood stain on a roadway that was used to – as part of the reconstruction." Hrg. Tr. vol. 1, 32:17-19 (Apr. 17, 2007). Engineer Champagne also claimed to have had some "anatomy . . . courses," but he did not explain where these courses were taken, or how many hours of instruction they provided. *Id.* at 29:19-20. The commission notes that Dr. Fuller, an experienced orthopedic surgeon with experience in "one of the major trauma hospitals in Denver" and who, at the University of Maryland, had experience of "one of the original trauma units in the United States," (Hrg. Tr. vol. 2, 236:20-25 – 237:1 (Apr. 18, 2007), and who had lengthy experience of "uncontrolled arterial bleeding" and "blood everywhere," (*Id.* at 263:12-16, 18), disclaimed any special expertise in interpreting blood spatter evidence, noting that "there are disagreements, as you probably know, - - among blood spatter experts quite extensively." (*Id*. at 264:6-8, 22-23).

[77] *Brian L. Benston*, Bd. Dec. No. 07-0382 at 97. AS 23.30.120(a) provides in part:

> Presumptions. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> * * *
>
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

intoxication by alcohol, or being under the influence of drugs not prescribed by a physician. Here, Marsh Creek asserted before the board that a compensation award to Benston was barred under AS 23.30.235(2), because Bentson's judgment was impaired by alcohol intoxication and that his actions leading to his injury were proximately caused by his intoxication.

AS 23.30.235 provides:

> **Cases in which no compensation is payable.** Compensation under this chapter may not be allowed for an injury
>
> (1) proximately caused by the employee's wilful intent to injure or kill any person;
>
> (2) proximately caused by intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician.

In *Parris-Eastlake v. State, Dep't of Law*,[78] the Supreme Court said:

> The Alaska Workers' Compensation Act has long included a provision barring any injury caused by a worker's "intoxication." The board has interpreted "intoxication" according to its "common and approved usage," that being "[a] condition of being drunk, having the faculties impaired by alcohol." The board has applied the clause to the claim of an intoxicated employee injured while driving, the claim of an intoxicated construction worker who fell off a roof, and the claim of an intoxicated steelworker who fell off a ladder.[79]

When the presumption against causation by intoxication in AS 23.30.120(a)(3)[80] is overcome, and the bar to compensation under AS 23.30.235(2) is asserted, the question the board must first answer is "the question . . . whether the worker was 'impaired' as a result of alcohol or drugs."[81] Impairment may be impairment of

---

78 26 P.3d 1099 (Alaska 2001).

79 *Id.* at 1103.

80 *See* n.77 above.

81 *Parris-Eastlake,* 26 P.3d at 1103.

judgment or coordination. Then, the board must decide if "the employee's impaired condition proximately cause[d] the injury."[82]

On appeal, the appellants argue that the board relied on evidence that was inadmissible and insubstantial to find Benston was not intoxicated. The appellants argue that Benston's testimony was so universally opposed that it could not be considered substantial evidence. The appellants also argue that Dr. Schoenfield's testimony was inadmissible, and that even if it was not, Dr. Schoenfield defined "intoxication" as a specific blood alcohol level instead of functional impairment required by *Parris-Eastlake*.

The commission has repeatedly said that it does not reweigh credibility determinations by the board.[83] But, the commission will review a decision to determine if the board made a necessary credibility determination.[84] The board found that Benston's testimony as to his level of sobriety "the most credible of those witnesses who testified."[85] The board made extensive credibility findings regarding each witness who testified regarding the amount of alcohol Benston consumed. After reviewing the witness testimony, the board found a "paucity of direct, percipient evidence establishing how much alcohol the employee consumed . . . before the laceration . . . . and *based on that paucity* [the board found] credible the employee's testimony that he consumed at most three to four ounces of alcohol hours before the laceration occurred."[86]

---

82 *Id.* at 1104.

83 *See, e.g., Schouten v. Alaska Indus. Hardware*, Alaska Workers' Comp. App. Comm'n Dec. No. 094, 8 (Dec. 5, 2008) ("A board determination of credibility of a witness who testifies before the board is binding on the commission. 'The board has the sole power to determine the credibility of a witness' and to weigh the evidence from a witness's testimony, including medical testimony and reports.").

84 *Tire Distribution Sys. v. Cheeser*, Alaska Workers' Comp. App. Comm'n Dec. No. 090, 16, 18 (Oct. 10, 2008).

85 *Brian L. Benston,* Bd. Dec. No. 07-0382 at 102.

86 *Id*. at 106.

Although the board had earlier found that the presumption against intoxication had been overcome,[87] the board's statement that it found Bentson's testimony credible based on *a lack of evidence* suggests that the board presumed that Bentson's testimony regarding his alcohol consumption was credible in the absence of evidence otherwise – that is, that it relied on the presumption against intoxication in AS 23.30.120(a)(3) instead of weighing the evidence regarding impairment or that it imported a "presumption of credibility" not found in the Workers' Compensation Act. If the board had done either in reaching a conclusion, it would be reversible error. However, the board's lengthy catalog of each witness's testimony on the point of Bentson's alcohol consumption, the explicit findings on each witness's credibility, and the characterization of Benston's testimony as "candid, unevasive, and credible . . . the *most* credible of those witnesses who testified,"[88] demonstrates the board weighed the testimonial evidence about the amount of alcohol Benston drank before the injury. The commission concludes the board's statement (suggesting it relied on the lack of contradictory evidence to find Benston's testimony was credible) was unfortunately misleading, but ultimately a harmless error.

The appellants argue that the board erroneously relied on Dr. Schoenfeld's opinion that, as the board stated, "the employee's blood alcohol right after consuming the drinks would have been approximately 0.03 gm percent and not likely impaired at the time of the laceration event."[89] The appellants argue that admission of his testimony as a rebuttal witness was error because Dr. Schoenfeld was not listed on a timely witness list despite the appellee's prior knowledge of the intoxication defense. However, the appellants fail to demonstrate that the addition of this rebuttal witness over their objection was prejudicial to their ability to present evidence in support of their case. First, notice was given of calling Dr. Schoenfeld as a rebuttal witness on May 10, 2007, but Dr. Schoenfeld did not actually appear to testify until the fourth day

---

87 *Id.* at 97.

88 *Id.* at 102 (emphasis added).

89 *Id.* at 108.

of hearing on May 31, 2007. Second, the board ruled that it would leave the record open to allow a supplemental deposition of Dr. Schoenfeld, in addition to cross-examination, at the employee's expense.[90] Thus, any surprise occasioned by the failure to list Dr. Schoenfeld prior to the opening of the hearing in April or to provide a detailed summary of his testimony[91] was cured by the board's order. The commission concludes that any error, if there was error, in permitting Dr. Schoenfeld to testify on rebuttal is harmless.

Finally, the appellants argue that the board mistook Dr. Schoenfeld's testimony, on which it relied. The board said, "Dr. Schoenfeld testified the employee's blood alcohol right after consuming the drinks would have been approximately 0.03 gm percent, *and not likely impaired at the time of the laceration event*."[92] A careful reading of the hearing transcript shows Dr. Schoenfeld testified that Benston's blood alcohol level would have been about 0.03 gm percent shortly after drinking four ounces of vodka,[93] and he was then asked, "Would that be a sufficient amount to be considered legally intoxicated?" To that question he answered, "No, it would not."[94] He later clarified that Benston "would not have achieved a blood alcohol level, you know, as high as .08 which would be the level of intoxication in most all the United States."[95]

After a spirited debate on the application of the *Parris-Eastlake* definition,[96] the hearing officer, reminding him of the standard of "a condition of being drunk, having

---

90 Hrg. Tr. vol. 3, 492:25-493:5 (May 30, 2007).

91 In an interlocutory order issued between the April and May hearings, the board criticized the employer's summary of Dr. Fuller's testimony as "essentially non-descriptive and meaningless." *Brian L. Benston v. MarshCreek LLC,* Alaska Workers' Comp. Bd. Dec. No. 07-0116, 17 (May 8, 2007). The description of Dr. Schoenfeld's testimony provided by the employee's counsel is no better; only the attached curriculum vitae provided clues as to the focus of his testimony.

92 Bd. Dec. No. 07-0183 at 108.

93 Hrg. Tr. vol. 4, 524:2-15 (May 31, 2007).

94 *Id.* at 525:2-4.

95 *Id.* at 545:3-5.

96 *Id.* at 571:18 – 575:5.

faculties impaired," asked Dr. Schoenfield to list the factors the board should "be looking for to decide whether Mr. Benston acted with intoxication or not," but the hearing officer did not ask him "in your opinion, was Mr. Benston's judgment or other faculties impaired?"[97] However, on recross examination by Marsh Creek's counsel, the following exchange took place:

> Q: Doctor, I believe you testified that Mr. Benston's – first of all, do you have an opinion as to whether or not Mr. Benston was impaired through alcohol on the night of the incident?
>
> R: No.
>
> Q: You have no opinion, or no, he wasn't impaired?
>
> R: Yeah, I didn't see evidence of impairment.
>
> Q: Okay. So you're saying no, he was not impaired or no, you don't have an opinion?
>
> R: I said I – there was no – I didn't see evidence of impairment.
>
> Q: Okay. So you believe he was not impaired?
>
> R: Yes.
>
> Q: Okay. And is that the basis then for your opinion that alcohol impairment was not the proximate cause for how he became – how he ended up readiat – lacerating his radial artery?
>
> R: I – I didn't see indication of intoxication, you know, that would cause that – that behavior.[98]

It is fair to infer from the above exchange that Dr. Schoenfield believed the employee was, as the board wrote, "not likely impaired" when the injury occurred. The commission concludes that the board's reliance on Dr. Schoenfield's opinion was not based on a misunderstanding of his testimony.

4. Conclusion.

The commission concludes that the board improperly applied the remote work site doctrine, but that this error is harmless in light of the extensive findings of fact made by the board and its alternate analysis that supports application of the appropriate traveling employee rule. The commission concludes the board failed to

---

[97] *Id.* at 575:6 – 576:9.

[98] *Id.* at 601:24 – 602:17.

complete the appropriate findings and analysis required by the employer's presentation of sufficient evidence to support application of the claim bar in AS 23.30.235(1), so the commission REMANDS this part of the case to the board to complete its findings of fact on the present record. The commission AFFIRMS the board's admission of Engineer Champagne's testimony on glass shatter, but REVERSES the board's decision to allow him to testify as an expert on interpretation of blood spatter from photographs. The commission concludes that any errors the board made in its consideration of evidence presented on the claim bar in AS 23.30.235(2) are harmless, and therefore AFFIRMS the board's denial of the defense based on the claim bar in AS 23.30.235(2).

The appellee's cross-appeal was voluntarily withdrawn before briefing by stipulating to its dismissal.

Date: ___*Mar. 13, 2009*__ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final commission decision on the merits of this appeal from the board's decision finding Mr. Benston's claim is covered by the Alaska Workers' Compensation Act. The effect of this decision is to affirm part of the board's decision, reverse an evidentiary ruling, and to remand the case to the board for further findings on one question, the claim bar in AS 23.30.235(1), which the commission decided the board did not complete. The commission did not retain jurisdiction and no further hearings are required by this decision. This decision becomes effective when the commission distributes it unless proceedings to reconsider it or seek Supreme Court review are instituted. The date of distribution is found in the box below.

Effective November 7, 2005, proceedings to appeal must be instituted (started) in the Alaska Supreme Court within 30 days of the distribution 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. Because this is not a final decision on the merits of the workers' compensation claim, which may or may not be barred by the board's decision on remand, 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 or a petition for hearing under Appellate Rules. If you believe grounds for review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing 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 or hearing 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 reconsideration must be filed with the commission within 30 days after mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of this Decision No. 101, the final decision in *Marsh Creek, LLC, Zurich American Ins. Co., and NovaPro Risk Solutions vs. Brian Benston*, AWCAC Appeal No. 08-001, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *13th* day of *March*, 20*09*.

Signed
L. Beard, Appeals Commission Clerk

Certificate of Distribution
I certify that a copy of this Decision No. 101 in AWCAC Appeal No. 08-001 was mailed on *3/13/09* to Bredesen & Rehbock at their addresses of record, and faxed to Rehbock, Bredesen, Director WCD, AWCB Appeals Clerk & AWCB-Anchorage.

Signed
L. Beard, Appeals Commission Clerk