Alaska Workers' Compensation Appeals Commission

Rodney N. Powell, Appellant, vs. North Country Construction and Alaska National Insurance Company, Appellees.	Final Decision Decision No. 187 August 23, 2013 AWCAC Appeal No. 12-029 AWCB Decision No. 12-0198 AWCB Case No. 199826176

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 12-0198, issued at Anchorage on November 14, 2012, by southcentral panel members Ronald P. Ringel, Chair, Stacy Allen, Member for Labor, and Linda Hutchings, Member for Industry.

Appearances: Rodney N. Powell, self-represented appellant; David D. Floerchinger, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, North Country Construction and Alaska National Insurance Company.

Commission proceedings: Appeal filed December 18, 2012; briefing completed June 13, 2013; oral argument held August 13, 2013.

Commissioners: David W. Richards, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes.

1. Factual background and proceedings.

On October 31, 1998, Rodney N. Powell (Powell), the appellant, was working as a carpenter for appellee, North Country Construction (North Country).[1] He fell approximately 16 to 18 feet, landed on some lumber, and broke his left femur.[2] That

[1] At the time, North Country had workers' compensation coverage through Alaska National Insurance Company (Alaska National), the other appellee.

[2] Exc. 003; R. 218-19.

same day, Adrian B. Ryan, M.D., performed open reduction and internal fixation surgery in which hardware was implanted to repair Powell's femur.[3]

Powell saw Dr. Ryan on December 10, 1998. He told Dr. Ryan of an episode of blood in his stool. Dr. Ryan referred Powell to Won Pal Chung, M.D.[4] Dr. Chung saw Powell on December 16, 1998. He diagnosed an anal fissure[5] and the following day, informed Alaska National that it was work-related.[6] On December 22, 1998, Dr. Chung operated on Powell. He found a central anal fissure, two external hemorrhoids, a small skin tag,[7] and additional internal hemorrhoids. He closed the fissure, removed the external hemorrhoids, and treated all the internal hemorrhoids.[8] Dr. Chung examined Powell again on April 9, 1999, finding two internal hemorrhoids.[9] The larger hemorrhoid was ligated[10] by rubber band.[11]

On July 20, 1999, Powell was seen by David D. Anderson, M.D. Dr. Anderson reported that the anal fissure appeared to be completely healed and no significant hemorrhoids or tags were present.[12] On September 14, 1999, Dr. Anderson again saw Powell and found that the fissure site had healed and no rectal masses were present,

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[3] Exc. 001-02.

[4] Exc. 004.

[5] Exc. 006. Taber's Cyclopedic Medical Dictionary describes an anal fissure as "[a] painful linear ulcer on the margin of the anus. It is . . . fairly common in constipated adults."

[6] Exc. 007.

[7] A tag is "[a] small polyp or growth." Taber's Cyclopedic Medical Dictionary.

[8] Exc. 008.

[9] Exc. 009.

[10] To ligate is "[t]o apply a ligature." A ligature is the "[p]rocess of binding or tying." Taber's Cyclopedic Medical Dictionary.

[11] Exc. 009.

[12] Exc. 010.

however there was a "somewhat raw area" that suggested "a very slight superficial fissure."[13]

In September and October 1999, Powell saw June M. George, M.D. Dr. George found a posterior anal fissure and scarring from the prior fissurectomy. She surgically repaired the fissure using an island skin flap.[14] Postoperatively, Dr. George noted that the "skin graft appears to have separated at least in one area from the internal sphincter. Otherwise, things are healing quite well."[15] After seeing Powell again on November 12, 1999, Dr. George noted that the "island graft has taken well. There is a hemorrhoidal complex initially adjacent on the left. . . . He is reassured as to the hemorrhoid, and if it is not bothering him nothing should be done about it."[16]

On January 8, 2000, Powell was seen by Stephen Marble, M.D., for an employer's medical evaluation (EME).[17] Dr. Marble did not perform an internal rectal examination, but his external inspection noted no inflammation and a pair of skin tags.[18] He concurred with Dr. Chung's opinion that the anal fissure could have been an indirect result of the October 31, 1998, work injury, however, he did not think the hemorrhoids were work-related, and no further medical treatment was necessary for the anal fissure.[19]

On March 22, 2000, North Country filed a controversion based on Dr. Marble's EME report. Treatment of Powell's hemorrhoids was controverted on the grounds they were not caused by the October 31, 1998, work injury. Further treatment of the anal fissure was also controverted.[20] In its hearing brief, North Country conceded that

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13 Exc. 011.

14 Exc. 012-15.

15 R. 135.

16 Exc. 016.

17 Exc. 017-26.

18 Exc. 024.

19 Exc. 024-25.

20 Exc. 031.

Powell might not have received the controversion because it had an incorrect zip code.[21] However, Alaska National's adjuster spoke with Powell by telephone about the controversion on March 22, 2000.[22]

In April 2000, Powell saw Dr. George, who noted the fissure was completely healed and the island skin graft was in place. Dr. George discussed removal of some skin tags, and on April 10, 2000, removed them. Powell saw Dr. George again later that month and was informed that the area was healing appropriately and the tag was gone.[23] On May 16, 2000, Dr. George reported that Powell still had "some redundant tissue in the left posterolateral position," but thought it would shrink in three months or so.[24] Powell had no further medical care for anal conditions until 2011.[25]

On November 16, 2011, Powell saw Mark H. Kimmins, M.D., reporting that he had been left with tissue protrusion after the 1999 anal fissure surgery by Dr. George.[26] On examination, Dr. Kimmins found "large fibrotic skin tags and hypertrophic papilla"[27] and scheduled removal at the same time as a colonoscopy. He did not note any protrusion.[28] On November 23, 2011, Dr. Kimmins performed the colonoscopy, then removed the skin tags and papillae. Dr. Kimmins also excised "some redundant internal hemorrhoidal tissue" located in the left anterior quadrant.[29] On December 12, 2011, Dr. Kimmins stated Powell was doing extremely well and was almost totally symptom free.[30]

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21 R. 048.

22 R. 037; Hr'g Tr. 21:7–22:8, Nov. 1, 2012.

23 Exc. 033-35.

24 R. 107.

25 Exc. 037-40.

26 Exc. 037-40.

27 Exc. 039. A papilla is "[a] small, nipple-like protuberance or elevation." Taber's Cyclopedic Medical Dictionary.

28 Exc. 037-40.

29 Exc. 041-42.

30 R. 088-90.

On March 5, 2012, Powell filed a workers' compensation claim.[31] On March 20, 2012, he asked Dr. Kimmins to comment on whether his anorectal problems were caused by a work-related accident. Dr. Kimmins responded that he was not able to comment on events that occurred before he first saw Powell in November 2011.[32]

On September 19, 2012, Dr. Marble reviewed Powell's medical records for treatment subsequent to the January 2000 EME. In his opinion, the colonoscopy and skin tags were not related to the October 31, 1998, work injury or to the anal fissure. Dr. Marble stated that skin tags are small benign growths in over 50 percent of the population and are seen frequently in middle age. He also pointed out that the skin tags present in 2000 were removed by Dr. George, and it was more probable than not that new skin tags had developed.[33]

At the October 11, 2012, prehearing conference, a hearing was set and the issues were identified as: 1) whether Powell's work injury was a substantial factor in his need for the November 2011 surgery and related care (excluding the colonoscopy); and 2) whether North Country's March 22, 2000, controversion was unfair and frivolous based on a lack of proper service.[34] The Alaska Workers' Compensation Board (board) held a hearing on Powell's claim on November 1, 2012. In due course, the board issued its decision, denying the claim.[35]

2. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record. Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.[36]

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[31] Exc. 043-44.

[32] R. 230-32.

[33] Exc. 069-71.

[34] Exc. 072-73.

[35] *See Rodney N. Powell v. North Country Constr.*, Alaska Workers' Comp. Bd. Dec. No. 12-0198 (Nov. 14, 2012).

[36] *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[37] We exercise our independent judgment when reviewing questions of law and procedure.[38]

3. Discussion.

a. Applicable law.

Powell's original injury date was October 31, 1998. Even though Powell filed a claim for more medical benefits on March 5, 2012, the claim relates back to his original injury date of October 31, 1998. Therefore, the 2005 amendments to the Alaska Workers' Compensation Act (Act) do not apply to his claim.

In pertinent part, AS 23.30.095(a) provided then, and still provides as follows: "The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . ." As the board pointed out in its decision, the "'[p]rocess of recovery' language allows the board to authorize continuing care beyond two years from the date of injury."[39] Claims for medical benefits like Powell's are presumed to be compensable, pursuant to AS 23.30.120(a)(1).[40]

Application of the presumption involves a three-step analysis.

> As developed before the 2005 amendments to the Alaska Workers' Compensation Act, the three-step presumption analysis first required an injured worker to produce some evidence that the injury and disability were work related. If the worker did so, the employer was then required to produce substantial evidence that either (1) provided an alternative

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[37] *See Wasser & Winters Co., Inc. v. Linke*, Alaska Workers' Comp. App. Comm'n Dec. No. 138, 5 (Sept. 7, 2010).

[38] *See* AS 23.30.128(b).

[39] *Powell*, Bd. Dec. No. 12-0198 at 6 (quoting AS 23.30.095(a) and citing *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665-66 (Alaska 1991)).

[40] **AS 23.30.120. 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

(1) the claim comes within the provisions of this chapter[.]

> explanation which would exclude work-related factors as a substantial cause of the disability, or (2) directly eliminated any reasonable possibility that employment was a factor in causing the disability. If the employer met this requirement, the burden shifted back to the employee to prove all elements of the employee's claim by a preponderance of the evidence.[41]

For work injuries occurring before the 2005 amendments to the Act to be compensable, employment needed to be "a substantial factor" in bringing about the disability or need for medical care.[42] A work injury is a substantial factor in bringing about the need for medical care if the need would not have arisen at the same time, in the same way, or to the same degree but for the work injury.[43]

b. Powell was unable to satisfy his burden of proving that the 2011 medical treatment was work related.

Due at least in part to the passage of eleven years between the original work injury and the treatment provided by Dr. Kimmins, the board concluded that Powell's claim involved a complex medical question requiring medical evidence to make the preliminary link between the original injury and the subsequent treatment.[44] We concur.[45]

In deciding whether Powell proved his claim, the board bifurcated its analysis. First, it considered whether Powell had satisfied the first step in the presumption analysis by establishing a preliminary link between his original injury and the medical treatment provided by Dr. Kimmins in November 2011. In its review of the medical evidence, the board noted that in the 1999-2000 timeframe, Dr. George reported that

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[41] *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139, 144 n.5 (Alaska 2013) (citing *Bradbury v. Chugach Elec. Ass'n*, 71 P.3d 901, 905-06 (Alaska 2003)).

[42] *See Ketchikan Gateway Borough v. Saling*, 604 P.2d 590, 597-98 (Alaska 1979).

[43] *See Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 532-33 (Alaska 1987).

[44] *See Powell*, Bd. Dec. No. 12-0198 at 11.

[45] *See, e.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999).

the graft had taken well and eventually, the fissure was completely healed.[46] In 2011, Dr. Kimmins did not report a failed graft, instead, he noted that some redundant internal hemorrhoidal tissue was found and removed.[47] The location of this redundant tissue was different than that of the redundant tissue reported by Dr. George.[48] Based on this evidence, the board found that Powell had not shown a preliminary link between the original injury and the treatment provided by Dr. Kimmins relative to the skin graft.[49] Furthermore, the board found that Powell had not provided any medical evidence that would create a preliminary link between the skin tags that were removed in 2011 and the original injury. According to the board, there was never any medical evidence presented to the effect that the skin tags were related to Powell's original injury.[50] It concluded that Powell had not satisfied the first step in the presumption of compensability analysis in these respects.

Second, in the alternative, the board assumed that Powell had presented adequate evidence of a preliminary link between his original work injury and the treatment he received from Dr. Kimmins in 2011, thus satisfying the first step in the presumption of compensability analysis. It then proceeded to consider whether North Country had rebutted the presumption by producing substantial evidence that provided an alternative explanation which would exclude work-related factors as a substantial factor in bringing about the need for that treatment. Under Alaska law, an employer can rebut the presumption through expert medical opinion that employment was not a substantial factor in bringing about the need for medical treatment.[51] As far as the board was concerned, North Country met its burden through the evidence of two

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46 *See Powell*, Bd. Dec. No. 12-0198 at 11.

47 Exc. 041-42.

48 R. 107.

49 *See Powell*, Bd. Dec. No. 12-0198 at 11.

50 *See id*. at 11-12.

51 *See id*. at 12. *See, e.g., Big K Grocery v. Gibson*, 836 P.2d 941, 942 (Alaska 1992).

medical experts, Drs. Kimmins and Marble.[52] Dr. Kimmins' report that stated the redundant tissue was removed from a different location satisfied the board in terms of evidence that would suffice to rebut the presumption that the skin graft was work related; Dr. Marble's evidence that the skin tags were unrelated to the work injury or the anal fissure was sufficient for purposes of rebutting the presumption as to the skin tags.[53] We agree with the board that this evidence effectively rebutted the presumption, assuming the presumption attached in the first place.

Moving to the third step in the presumption of compensability analysis, we reiterate that, if the board's findings of fact are supported by substantial evidence, the commission is to uphold them.[54] In terms of the third step, the board's analysis was similar to its analysis whether Powell had established a preliminary link between employment and his need for treatment by Dr. Kimmins eleven years later. However, it took into account the employer's evidence, as it must in deciding whether Powell had proven his claim by a preponderance of the evidence. The board found that: 1) in Dr. George's opinion, the graft had taken well and the fissure was completely healed; 2) the tissue Dr. Kimmins removed in 2011 was in a different location than that of the skin graft surgery in 1999; 3) no medical evidence was presented that the skin tags were related to Powell's employment; and 4) the skin tags were removed by Dr. George, who informed Powell he could expect new ones to develop.[55]

In the commission's view, whether substantial evidence supports the board's conclusion that Powell is not entitled to medical benefits for the 2011 procedures performed by Dr. Kimmins is not a close issue. Powell has not come forward with any evidence, medical or otherwise, to support the compensability for that treatment. Other than the fact that Powell had rectal conditions requiring treatment in 1998-99 and 2011, there is no nexus between the 1998 work injury and the 2011 treatment.

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52 *See Powell*, Bd. Dec. No. 12-0198 at 12.

53 *See id*.

54 *See* n.36, *supra*.

55 *See Powell*, Bd. Dec. No. 12-0198 at 12-13.

c. The controversion was not deficient.

Under AS 23.30.155(d),[56] an employer wanting to deny benefits to a claimant must file a controversion notice with the board and serve a copy of the notice on the claimant.[57] Following the EME by Dr. Marble in January 2000, Alaska National filed a controversion notice dated March 24, 2000.

Powell claimed he did not receive the notice, as it had an incorrect zip code, and Alaska National conceded that the notice might not have been correctly addressed. However, the board found that Alaska National's adjuster spoke with Powell about its intention to controvert his claim on March 22, 2000, two days before the controversion was filed. If Powell did not receive the written notice, it constituted a technical deficiency in providing notice to him. In the commission's view, that deficiency was cured through the verbal communication from the adjuster, who provided actual notice to Powell.

d. The controversion was not unfair or frivolous.

A related, but distinct issue is whether the controversion notice was unfair or frivolous. In the notice, Alaska National controverted 1) treatment of Powell's hemorrhoids on the grounds they were not caused by the October 1998 work injury, and 2) further treatment of the anal fissure, based on Dr. Marble's EME findings.[58] The board proceeded to analyze whether this notice was unfair or frivolous, in accordance

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[56] Subsection .155(d) reads in relevant part:

> If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due.

[57] By regulation, the notice must be properly addressed. *See* 8 AAC 45.060(b).

[58] Exc. 031.

with commission precedent.[59] We concur in the board's reasoning and adopt its analysis.

> Under *Ford*, the first step in determining whether a controversion was unfair or frivolous is to determine whether the controversion was filed in good faith. That requires an examination of the controversion and the evidence on which it was based in isolation, without assessing credibility, and drawing all reasonable inferences in favor of the controversion. Here, [North Country/Alaska National] controverted all benefits based [on] Dr. Marble's EME report, which stated the hemorrhoid complaints were not work related and no further medical treatment was needed in relation to [Powell's] rectal condition. Viewed in isolation, and without assessing credibility, [North Country/Alaska National's] March 2000 controversion was filed in good faith. Under *Ford*, a finding the controversion was filed in good faith ends the analysis. A controversion filed in good faith is not unfair or frivolous, and is not subject to a penalty.[60]

Because the controversion was filed in good faith, it was not unfair or frivolous.[61] Moreover, as the board pointed out, under section .155, penalties are owed when benefits are not timely paid. Here, no benefits were owed, thus, there was no basis for a penalty.[62]

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[59] *See Powell*, Bd. Dec. No. 12-0198 at 10 and 13, (quoting and citing *State of Alaska v. Ford*, Alaska Workers' Comp. App. Comm'n Dec. No. 133, 21 (April 9, 2010)).

[60] *Powell*, Bd. Dec. No. 12-0198 at 13-14.

[61] *See Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1259 (Alaska 2007) (citing *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992)).

[62] *See Powell*, Bd. Dec. No. 12-0198 at 14.

4. Conclusion.

We AFFIRM the board's decision.

Date: ___*23 August 2013*____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
Philip E. Ulmer, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board's decision. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[63] For the date of distribution, see the box below.

Effective, November 7, 2005, proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed[64] and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission is not a party.

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[63] A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

> **Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

[64] *See id*.

You may wish to consider consulting with legal counsel before filing an appeal. If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

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

More information is available on the Alaska Court System's website:
http://www.courts.alaska.gov/

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). A party may ask the commission to reconsider this final decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that this is a full and correct copy of the Final Decision No. 187 issued in the matter of *Rodney N. Powell vs. North Country Construction and Alaska National Insurance Company,* AWCAC Appeal No. 12-029, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 23, 2013.

Date: *August 26, 2013*

Signed

K. Morrison, Deputy Commission Clerk