Case: *Voorhees Concrete Cutting and Alaska National Insurance Co. vs. Kenneth Monzulla*, Alaska Workers' Comp. App. Comm'n Dec. No. 068 (February 4, 2008)

Facts: The employer appealed a board decision awarding Kenneth Monzulla mileage to use a hot tub as medical therapy, interest for the late payment for a log splitter viewed as a medical device, transportation costs to attend a 2005 board hearing and a 2006 hearing, and denying the employer's request for a change of venue to Anchorage.

1. On the hot tub, the board determined that Monzulla attached the presumption that it was reasonable and necessary treatment under AS 23.30.095(a) with evidence that he discussed the relief from his back pain that he obtained using his neighbor's hot tub with Dr. Davidhizar and the doctor wrote a prescription for daily use. The board examined Dr. Bald's and Dr. Lazar's opinions and found no evidence in the record rebutting the presumption as to the use of the hot tub, so the board awarded mileage for Monzulla to travel to his neighbor's house to use the hot tub.

2. On the log splitter, the employer argued no evidence supported a finding that payment was delayed because no evidence established the date that the employer received the bill for the log splitter and a completed report on form 07-6102. The board calculated interest on the log splitter based on the date of the doctor appointment during which the log splitter was prescribed.

3. The board awarded transportation costs under AS 23.30.145(b) providing for awards of fees and costs to attorneys when the claimant prevails. Monzulla was self-represented and his claim for disc replacement surgery was denied in the 2005 hearing (although the employer later agreed to pay for it). On the 2006 transportation costs, the board decided the costs were reasonable because it believed Monzulla's testimony that he felt it was more cost effective for him to drive to Fairbanks, rather than fly.

4. The employer sought a venue change to Anchorage and Monzulla opposed it because the Fairbanks staff was familiar with his case and he felt that they got it done quicker. The board denied the venue change.

Applicable law: Presumption analysis, AS 23.30.120(a), *Bradbury v. Chugach Elec. Ass'n,* 71 P.3d 901, 905-906 (Alaska 2003); *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 494 (Alaska 2003). First, the employee produces some evidence to establish a preliminary link between the injury and the employment. Second, the board decides whether the employer rebutted this presumption with substantial evidence that either (1) provides an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the injury [or need for treatment]; or (2) directly eliminates any reasonable possibility that employment was a factor in causing the injury [or need for treatment]. Third, once the employer has rebutted the presumption, the presumption drops out, and the employee must prove the claim by a preponderance of the evidence in order to prevail.

Per AS 23.30.122, a board finding as to the weight to be assigned medical testimony and reports is conclusive, even if the evidence is susceptible to contrary conclusions.

AS 23.30.095(a) provides in part that employers are responsible only for providing medical care and those services "which the nature of the injury or the process of recovery requires," which the Alaska Supreme Court has interpreted to mean the care should be "reasonable and necessary." *Philip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). In addition, if the medical care is beyond two years following the date of injury, the board "is not limited to reviewing the reasonableness and necessity of the particular treatment sought, but has some latitude to choose among reasonable alternatives." *Hibdon* at 731.

Pre-judgment interest accrues from the date the medical bill should have been paid. 8 AAC 45.082(d) requires payment of bills within 30 days after the employer receives it and a "completed report on form 07-6102." Form 07-6102 is a physician's report form. Per AS 23.30.095(c), doctors must provide medical reports within 14 days of medical treatment to the employer and board.

AS 23.30.145(b) permits awards "to reimburse the claimant for the costs in the proceedings" when "the claimant has employed an attorney in the successful prosecution of claim" that was not timely controverted or not timely paid or otherwise resisted by the employer.

8 AAC 45.180(f) provides in part that the board "will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim" and listed as a cost that may be awarded in the board's discretion: "(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary[.]"

8 AAC 45.072 provides that hearings will be held in the city nearest the place where the injury occurred and in which a division office is located. The hearing location may be changed to a different city in which a division office is located if

> (1) the parties stipulate to the change;
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> (2) after receiving a party's request in accordance with 8 AAC 45.070(b)(1)(D) and based on the documents filed with the board and the parties' written arguments, the board orders the hearing location changed for the convenience of the parties and the witnesses; the board's panel in the city nearest the place where the injury occurred will decide the request filed under 8 AAC 45.070(b)(1)(D) to change the hearing's location; or
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> (3) the board or designee, in its discretion and without a party's request, changes the hearing's location for the board's convenience or to assure a speedy remedy.

Issues: 1. Does substantial evidence support that the hot tub use was reasonable and necessary? 2. Did the board properly calculate pre-judgment interest for the log splitter? 3. Did the board properly award travel costs for the 2005 and 2006 hearings? 4. Did the board abuse its discretion in denying the change of venue?

Holding/analysis: 1. The commission affirmed the hot tub decision because there was substantial evidence to support the board's decision approving use of a hot tub. The employer argued that the board wrongly interpreted Dr. Lazar's report because he stated that the ***purchase*** of a hot tub was not reasonable or necessary and that a hot tub had no therapeutic benefit "to cure or relieve the effects of injury." He viewed it as a "modality usually of more value than simple heat application such as a heating pad." However, the board apparently inferred that because he viewed a hot tub as of more value for pain relief than a heating pad, that use (as distinguished from purchase) of a hot tub was reasonable for pain relief. The board awarded mileage for use of a hot tub. Because the commission cannot choose between competing inferences and the board's conclusion was one a reasonable mind could make, the commission affirmed the board. (Note: Because the treatment was provided more than two years after the injury, the board's inquiry should not have been limited to whether the treatment sought is reasonable and necessary, but should have been expanded, as it had the discretion to choose among reasonably effective medical treatment alternatives. But the commission observed that it did not discuss this apparent error because the employer did not argue it on appeal.)

2. The commission found that the board did not make adequate findings to support the award of interest on the log splitter, and remanded for further findings. The commission concluded that the board erroneously calculated the date payment was due as the date of Monzulla's appointment with Dr. Davidhizar. The board should have calculated the date as 30 days after it received the doctor's report (which was written 9 days after the appointment) and the log splitter invoice. The commission remanded so the board could determine this date and recalculate the interest.

3. On the transportation costs, the commission concluded that AS 23.30.145(b) did not apply because Monzulla was self-represented. But the commission concluded that

> [w]hen the board makes sufficient findings to support an award to a self-represented claimant under 8 AAC 45.180(f) and the credibility of the claimant was at issue, the board has authority to order payment of legal costs to the prevailing self-represented claimant under 8 AAC 45.180(f) in order to ensure that the claimant's due process rights are not unfairly burdened. Dec. No. 068 at 17-18.

This is because a party should have the opportunity to face the people who will decide his case if the question of his credibility is before the board. The commission concluded that the employee was not entitled to transportation costs to the 2005 hearing because he did not prevail so the commission reversed the board's award. Even though the employer later agreed to pay for the surgery at issue after more evidence was developed, the board's dismissal of his earlier surgery claim was never reversed. On the transportation costs for the 2006 hearing, the commission remanded so that the board could objectively determine the reasonableness of the cost of travel claimed by Monzulla and determine necessity for Monzulla's appearance. The board failed to analyze whether costs of driving (compared to flying) were objectively reasonable,

accepting Monzulla's testimony that he believed driving was reasonable, and it failed to analyze whether it was necessary for Monzulla to appear because his credibility was at issue.

4. The commission concluded that the board's denial of the motion for change of venue was within its discretion. The commission noted that

> [t]he convenience of the parties may be measured in more than cost; in this case the board considered the probability of delay (both in terms of calendar and in terms of familiarizing another hearing officer with the case) as an inconvenience outweighing the cost to the parties of retaining venue in Fairbanks. *Id.* at 22.

But the commission cautioned the board that the regulation for change of venue at a party's request did not allow the board to consider its own interest; the board could move cases to avoid a crowded docket under a different subsection when there was no party request. The commission also cautioned "the board that it may not disproportionately burden one party's access to the board by refusing a change of venue that would benefit both parties' convenience to serve the board's convenience." *Id.*

Note: Dec. No. 114 (August 6, 2009) deals with another appeal between the same parties when the board again denied a venue change. Dec. No. 114 was appealed to the Alaska Supreme Court, *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341 (Alaska June 24, 2011).