

Case: *Robert Strong vs. Chugach Electric Association, Inc. and ACE Fire Underwriters Insurance Company*, Alaska Workers Comp. App. Comm'n Dec. No. 128 (February 12, 2010)

Facts: Robert Strong (Strong) reported that a large crate toppled and fell toward him in the storage yard, and, in the process of pushing himself clear of it, he injured his left shoulder in September 2001. Strong had surgery in December 2008 and sought temporary total disability (TTD) and medical benefits.

Chugach Electric Association, Inc. conceded that the shoulder surgery was compensable but contested liability for TTD. Strong continued to work full time from the time he injured his shoulder in 2001 until his March 2007 retirement. Strong and a lay witness testified that he retired because of his work-related injury. He registered to work with his union for two months in 2008 but did not receive any work. He testified that he decided it would be futile for him to look for work after that time.

The board concluded Strong was not entitled to TTD. Strong appealed.

Applicable law: The board is required to make findings of fact that are "sufficient in quality and quantity to facilitate intelligent review on appeal." *Roberts v. Brooks*, 649 P.2d 710, 711 (Alaska 1982); see also *Whaley v. Alaska Workmen's Comp. Bd.*, 648 P.2d 955, 958 (Alaska 1982).

The Alaska Supreme Court held that "[i]f a claimant, through voluntary conduct unconnected with his injury, takes himself out of the labor market, there is no compensable disability." *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974).

An employee will not be deemed to have retired from the workforce if he or she is willing to work and making reasonable efforts to find work. Dec. No. 128 at 18.

AS 23.30.395(16) defines disability as "incapacity because of injury to earn the wages . . . receiv[ed] at the time of injury[.]"

Issues: Were the board's findings sufficiently clear to facilitate review? Did the board properly apply *Vetter v. Alaska Workmen's Compensation Board*?

Holding/analysis: The commission remanded the decision to the board for clarification. The board's decision was unclear as to the "credibility" of the evidence and witness testimony, and it stated contradictory conclusions. The board stated, "At the third stage of the presumption analysis, we find the claimant has proven by a preponderance of the evidence *he is entitled to TTD for a portion of the period for which he is requesting those benefits*, as discussed below." But the board then determined that Strong was not entitled to TTD benefits. "The only period Strong claimed TTD benefits was after March 30, 2007, so the board's conclusion that Strong '*is entitled to TTD for a portion of the period requested*' is inconsistent with its conclusion that Strong '*is not entitled to TTD benefits after March 30, 2007.*'" Dec. No. 128 at 11.

The commission also did not understand what the board meant in stating that Strong's testimony conflicted with his actions, and despite finding Strong credible, his actions were more persuasive.

It is possible that the board meant that although Strong's testimony as to his beliefs regarding his ability to continue working in 2007 was given honestly, his testimony regarding his ability to earn wages was not as persuasive as more trustworthy evidence of his actions at the time and the contemporaneous medical records. If this is what the board meant, however, the board failed to explain the inferences that the board drew from Strong's actions that contradict his credible testimony, so that the reviewer may determine if the evidence supports the inference. *Id.* at 13.

Lastly, the commission concluded the board applied the correct legal standard. Strong argued that the board erred in holding that, as a matter of law, an employee is not entitled to TTD following voluntary withdrawal from the labor market. He asserts that the *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264 (Alaska 1974), requires that the employer prove the claimant withdrew from the labor market for "purely personal" reasons. The commission held:

Vetter does not require that the withdrawal from the labor market (or retirement) be "purely personal" to be voluntary, but neither does it bar compensation when the employee's work injury is a substantial factor in bringing about a disability – *incapacity because of injury to earn the wages . . . receiv[ed] at the time of injury* – that results in retirement instead of unemployment. *Id.* at 14-15.

Moreover, the commission concluded that Strong must demonstrate more than a willingness to work; he must show that he made reasonable efforts to return to work to prove that his unemployment after retirement is due to disability. The commission described the evidence in *Vetter v. Wagner*, 576 P.2d 979 (Alaska 1978), and *Robles v. Providence Hospital*, 988 P.2d 592, 595 (Alaska 1999). The commission concluded that the board had substantial evidence to conclude his job search was not reasonable because the only evidence that Strong presented was that he registered for work for two months with his union for a very specialized, uncommon position. The commission decided that Strong waived his argument that the board erred by requiring a union worker to seek work outside the union hall to establish a reasonable job search. His argument was cursory and he stated no legal authority.