

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

MICHAEL J. REED,)	
Employee,)	
Claimant,)	FINAL DECISION AND ORDER
)	
v.)	AWCB Case No. 201202404
)	
24/7 PLUMBING & HEATING, INC.,)	AWCB Decision No. 14-0046
Employer,)	
)	Filed with AWCB Anchorage, Alaska
and)	on April 1, 2014
)	
ALASKA WORKERS' COMPENSATION)	
BENEFITS GUARANTY FUND)	
Defendants.)	
)	

Michael J. Reed's November 8, 2012 claim was heard on March 4, 2014 in Anchorage, Alaska by a two-member panel, a quorum under AS 23.30.005(f). This hearing date was selected on January 21, 2014. Mr. Reed (Employee) appeared, represented himself, and testified. Linton Daniels appeared, represented 24/7 Plumbing & Heating, Inc. (Employer), and testified. Velma Thomas, administrator of the Alaska Workers' Compensation Benefits Guaranty Fund (Fund) appeared and testified. Joanne Pride appeared and testified. The record was left open to allow Employee to file additional wage information and closed on March 14, 2014.

ISSUES

The January 21, 2014 prehearing conference summary listed the issues for hearing as temporary total disability (TTD) from January 3, 2012 to January 12, 2012, temporary partial disability (TPD) from January 13, 2012 to February 8, 2012, permanent partial impairment (PPI), medical costs, and compensation rate adjustment. At the inception of the March 4, 2014 hearing, Mr.

Daniels stated that Employer did not dispute the reasonableness or necessity of Employee's medical costs, his TTD or TPD claims, or his PPI rating. Employer did not take a position on Employee's claim for a compensation rate adjustment. Employee contends he is entitled to a compensation rate adjustment and to TPD that was not paid.

1. *Is Employee entitled to TPD benefits from January 13, 2012 through February 8, 2012?*
2. *Is Employee entitled to a compensation rate adjustment?*

FINDINGS OF FACT

The following findings of fact and factual conclusions are established by a preponderance of the evidence:

1. On January 3, 2012, while working for Employer as a plumber's apprentice, Employee cut his right wrist and forearm when a knife slipped. (Report of Injury or Illness, February 28, 2012)
2. After the injury on January 3, 2012, Employee went to the emergency room at Central Peninsula Hospital. He was diagnosed with a right forearm laceration and lacerated tendons were visible. Employee was scheduled for surgery. (Central Peninsula Hospital, Emergency Department Note, January 3, 2012).
3. On January 3, 2012, Peter Ross, M.D., operated on Employee's arm, repairing three lacerated tendons. (Central Peninsula Hospital, Operative Note, January 3, 2012).
4. On January 11, 2012 Employee was seen by Dr. Ross for follow-up. Dr. Ross noted the wound had healed. He stated Employee's activities were "restricted," but did not provide details on the nature of the restrictions. (Dr. Ross, Chart Note, January 11, 2012).
5. On January 13, 2012, Employee returned to work, where he was placed on light duty. He worked regularly for Employer until October 2012 when he resigned. His rate of pay remained the same as before the injury. (Employee).
6. Employee produced some payroll stubs for periods after his injury. Only two of the stubs were for weeks between January 13, 2012 and February 8, 2012. During the week January 16 through January 22, 2012, Employee earned \$369.00. During the week of February 6 through February 12, Employee earned \$362.85. (Attachments to November 8, 2012 Claim).
7. On February 8, 2012, Dr. Ross released Employee to work at his regular work without restrictions. (Dr. Ross, Chart Note, January 11, 2012).

8. At some point, Employee learned Employer did not have worker's compensation insurance at the time of his injury. (Employee).
9. On November 9, 2012, Employee filed a claim seeking TTD, TPD, medical costs, and a compensation rate adjustment. (Claim, November 8, 2012).
10. The minimum weekly compensation rate under AS 23.30.175(a) for 2012 was \$239.00. (Bulletin 11-06).
11. On December 11, 2012, Shawn Johnston, M.D., evaluated employee and determined he has incurred a four percent PPI as a result of the work injury. (Dr. Johnston, PPI rating, December 11, 2012).
12. Because the Fund found no defenses that Employer could assert, it began voluntarily paying benefits without a board order. (Thomas). The Fund paid \$13,403.94 in medical costs and \$7,080.00 for the 4 percent PPI. The Fund also paid TTD at the minimum rate of \$239.00 per week from January 6, through January 13, 2012 because it had no wage information from which it could calculate a higher rate. (Pride, payment itemization).
13. At the conclusion of the hearing, the record was left open until March 14, 2014 so Employee could file information on his earnings in 2010 and 2011. No documents were filed.

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

...

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or

peculiar facts of the case, and inferences drawn from all of the above.” *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

AS 23.30.010. Coverage. (a) 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.

AS 23.30.095. Medical examinations. (a) 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 23.30.097. Fees for medical treatment and services.

. . . .

(d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.

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;

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). The presumption of

compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *See, e.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). However, an employee "need not present substantial evidence that his or her employment was a substantial cause of his disability." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then "if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the [need for medical treatment], etc., the presumption is rebutted." *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 7. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544 P.2d 1013, 1015 (Alaska 1976). The determination of whether evidence rises to the level of substantial is a legal question. *Id.* Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

If the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

AS 23.30.155. Payment of compensation

(a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director

AS 23.30.185. Compensation for temporary total disability.

In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.200. Temporary partial disability.

(a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

Both TPD and TTD are payable only during the “continuance of the disability.” The Alaska Workers’ Compensation Act defines disability as “an incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” TPD is owed when the employee suffers a “decrease of earning capacity” due to the work injury; TTD is owed when the employee temporarily cannot earn wages due to the work injury. *Corey v. Nana Regional Corp. Inc.*, AWCAC Decision No. 192 (March 18, 2014) (citations omitted).

AS 23.30.220. Determination of spendable weekly wage.

(a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:

. . . .

(4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;

ANALYSIS

1. Is Employee entitled to TPD benefits from January 13, 2012 through February 8, 2012?

Employee seeks TPD benefits from the time he returned to work on January 13, 2012 through February 8, 2012, when he was released to full-duty work. This is a factual question to which the presumption of compensability applies. At the first stage of the presumption, Employee must present some, minimal relevant evidence that as a result of the January 3, 2012 work injury, he suffered a decrease of earning capacity during that period. He did not do so. Under AS 23.30.200, TPD is calculated as 80 percent of the difference between Employee's spendable weekly wage before the injury and his earning capacity after the injury. While Employee produced pay stubs covering part of the period, he did not produce any evidence of wages before the injury. As Employee did not produce any evidence from which a decrease in earning capacity could be determined, he failed to raise the presumption. To prevail without the presumption, an employee must prove his claim by a preponderance of the evidence. However, Employee has not produced any evidence, let alone a preponderance to support his claim for TPD from January 13 through February 8, 2012, and it must be denied.

2. Is Employee entitled to a compensation rate adjustment?

This is also a factual question to which the presumption of compensability applies. Evidence offered to raise the presumption is considered irrespective of credibility and is not weighed against other evidence. Employee claimed a compensation rate adjustment, but failed to provide any evidence, even minimal, threshold evidence, to attach the presumption to his claim. Because Employee was paid by the hour, his compensation rate would be determined by his earning in the two calendar years preceding the injury. AS 23.30.220(a)(4). Even though the record was left open to allow Employee to do so, he did not produce any evidence of his earning during 2010 or 2011. Without such evidence, Employee failed to raise the presumption. Similarly, with no evidence to support his claim for a compensation rate adjustment, it must be denied.

CONCLUSIONS OF LAW

1. Employee is not entitled to TPD benefits from January 13, 2012 through February 8, 2012.
2. Employee is not entitled to a compensation rate adjustment.

ORDER

1. Employee's November 8, 2012 claim for TPD benefits and compensation rate adjustment is denied.

MICHAEL J. REED v. 24/7 PLUMBING & HEATING, INC.

Dated in Anchorage, Alaska on April 1, 2014.

ALASKA WORKERS' COMPENSATION BOARD

Ronald P. Ringel, Designated Chair

David Kester, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MICHAEL J. REED, employee / claimant; v. 24/7 PLUMBING & HEATING, INC., employer; and ALASKA WORKERS' COMPENSATION BENEFITS GUARANTY FUND / defendants; Case No. 201202404; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 1, 2014.

Mariaanna Subeldia, Office Assistant