ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 Juneau, Alaska 99811-5512

JOSEPH F. MAJOK, Employee, Claimant, v. TRIDENT SEAFOODS CORPORATION, Employer, and AMERICAN ZURICH INSURANCE COMPANY, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201904275 AWCB Decision No. 20-0096 Filed with AWCB Anchorage, Alaska on October 20, 2020

Joseph Majok's (Employee) April 18, 2019 claim was heard on October 20, 2020, in Anchorage, Alaska, a date selected on September 9, 2020. A June 5, 2020 hearing request gave rise to this hearing. Employee appeared by telephone, testified and represented himself with assistance from "Tamara" a Sudanese interpreter. Attorney Jeffrey Holloway appeared by telephone and represented Trident Seafoods Corporation and its insurer (collectively, Employer). At hearing, it became apparent Employee's written claim for an eye injury did not match events he described, which included an injury to his neck, which he contends lead to a stroke and a need for possible neck surgery. Further, Employee's native language is Nuer and the Sudanese interpreter could understand only 40 percent of his testimony because his Sudanese is "broken." Consequently, the panel on its own motion issued an oral order continuing the hearing. This decision examines the

order to continue the hearing and provides Employee some guidance on how to clarify and prosecute his claim. The record closed at the hearing's conclusion on October 20, 2020.

ISSUE

Employee's written claim contends he developed eye symptoms, diabetes and had a stroke after being splashed in his eye with dirty water on a fish processing line. He contends he remains disabled and is entitled to temporary total disability (TTD) benefits. At hearing, Employee said he was hit in the neck with an object at work, which lead to a stroke and the need for neck surgery.

Employer contends it paid TTD benefits for an eye injury for four days after the three-day waiting period. It contends Employee's attending eye physician opined his work-related eye symptoms resolved and any residual eye problems result from a stroke he had eight days following his last day on the job. Employer contends there is no evidence the work injury caused diabetes. It was surprised at hearing to hear about Employee's alleged neck injury, subsequent stroke and need for neck surgery.

Was the oral order to continue the hearing correct?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) Employer admits that on February28, 2019, his last day on the job, Employee got water splashed in his eye on a processing line while working for Employer in Kodiak, Alaska. Employer contends it knows nothing about any other work injury. (Employer Report of Occupational Injury or Illness, February 28, 2019; Hearing Brief of Trident Seafoods Corporation, October 6, 2020; record).

2) On March 29, 2019, Employee visited Northwest Eye Surgeons in Renton, Washington, stating he got "lake water" in his right eye on March 3, 2019, while at work. He reported washing it out at an eyewash station but the eye began itching and was irritated for about four days. Artificial tears provided no relief. Employee complained of vertical diplopia in the right eye, which he said made him dizzy so he covered it with an eye patch. He had blurry vision and difficulty seeing upon arising in the morning, along with daily headaches and constant double vision. Moving his right eye was more difficult than his left. He also reported having had a stroke on March 8, 2019,

with weakness and numbness on the right side. Employee had no past eye problems or surgeries and no family history of eye issues and took no ocular medication. Alana Curatola, OD, diagnosed right eye diplopia and opined Employee's "eyes show no permanent damage or loss of function from getting lake water in his eyes earlier this month." Dr. Curatola's charted that double vision, headache, restricted eye movements and non-reactive pupil are neurological issues "likely related to recent stroke." She recommended Employee have an immediate evaluation for an aneurysm. (Curatola report, March 29, 2019).

3) On April 16, 2019, Dr. Curatola responded to a questionnaire from the claims examiner. She repeated her diagnoses from the March 29, 2019 visit and opined the February 28, 2019 work injury was not the substantial cause "of his current condition and need for treatment." She stated:

> Patient had a stroke 3/8/2019 and was hospitalized 3/8/2019 to 3/14 2019. Patient's current complaints of double vision, blurred vision, difficulty moving the eye, and headache related to underlying neurological cause. No permanent ocular damage from 2/2019 incident.

Dr. Curatola said Employee needed no further medical treatment for his February 28, 2019 work injury, which in her view and resolved. (Letter, April 15, 2019).

4) On April 18, 2019, Employee claimed unspecified TTD benefits arising from a "02-25-19" work injury while processing for Employer. He explained:

> It happened while on processing line that when the dirty water got to my eye the right size [sic], after I started having double vision followed by stroke and diabetes.

As a reason for filing his claim, Employee stated:

> I'm on treatment currently so I want compensation some income. I currently have no income and my situation is not getting any better. (Claim for Workers' Compensation Benefits, April 18, 2019).

5) On April 30, 2019, Employer denied Employee's claim for all benefits after March 8, 2019, based on Dr. Curatola's April 16, 2019 opinion. (Controversion Notice, April 29, 2019).

6) Employee contends the work injury happened on February 25, 2019, not February 28, 2019. While he did get water splashed in his eye, he contends a "dish" also fell and hit him on the neck, which caused pain for about three days and ultimately caused a stroke. Employee contends he has not worked since, has children to feed and his doctor recommends neck surgery. He contends

Employer is taking advantage of him because he does not speak English well; Employee states he reported his injuries to the "timekeeper" but that person probably did not understand him. Though he did not request a continuance, Employee is frustrated by the delay but understands the reason for the continuance and did not object to it. (Employee).

7) Employer also noted misunderstanding over Employee's claim and lack of discovery and did not oppose continuing the hearing under the circumstances. (Record).

8) Employee's agency file contains no medical records mentioning a neck injury; the few medical records in the file report an eye injury and mention Employee said he had a stroke, without further information concerning it. (Agency file).

9) A contention or claim that a stroke can be caused by being struck in the neck by a falling object is a highly technical issue requiring at least some medical evidence supporting it. Similarly, the cause for neck surgery and diabetes are often multifaceted and can be complex, also requiring medical evidence supporting a contention that work caused the need to treat these. Some seemingly unrelated medical conditions may be compensable under the Workers' Compensation Act if they happened at a remote site. (Experience, judgment, observations).

10) The designated chair contacted a professional interpreting company to find a translator who spoke Nuer, Employee's native tongue. Unable to find one, the interpreting company provided a Sudanese interpreter, Tamara. Sudanese is Employee's second language and Tamara could understand only 40 percent of his testimony because his Sudanese was, in her opinion, "broken." Tamara was reluctant to continue interpreting because she wanted to be accurate; nevertheless, she continued until it became clear there were issues between Employee's written claim for benefits and his hearing testimony, which told a completely different account of his alleged work-related injuries. (Observations; record).

PRINCIPLES OF LAW

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) . . . compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the . . . 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 the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

In construing AS 23.30.010(a), *Morrison v. Alaska Interstate Construction, Inc.*, 440 P.3d 224, 237 (Alaska 2019), said the board must consider different causes of the "benefits sought" and the extent to which each cause contributed to the need for the specific benefit at issue. The board must then identify one cause as "the substantial cause." *Morrison* held the statute does not require the substantial cause to be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The board need only find which of all causes, "in its judgment is the most important or material cause related to that benefit." (*Id.*). *Morrison* further held that preexisting conditions, which a work injury aggravates, accelerates or combines with to cause disability or the need for medical treatment, can still constitute a compensable injury. (*Id.* at 234, 238-39).

> **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
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> (1) the claim comes within the provisions of this chapter. . . .

The presumption applies to any claim for compensation and is a three-step process. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). In the first step, the claimant need only adduce "minimal" relevant evidence establishing a "preliminary link" between the injury and employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). In claims based on highly technical medical considerations, medical evidence is often necessary to make a connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312 (Alaska 1981).

In the second step, if the claimant's evidence raises the presumption, it attaches to the claim and the production burden shifts to the employer, which has the burden to overcome the presumption

with substantial evidence to the contrary. "Substantial evidence" is such "relevant evidence" as a "reasonable mind might accept as adequate to support a conclusion." *Cheeks*, 742 P.2d at 244.

In the third step, if the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. In other words, the employee must "induce a belief" in the fact-finders' minds that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. . . .

The board's credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 (August 25, 2008).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided in this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **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.

Lowe's v. Anderson, AWCAC Decision No. 130 (March 17, 2010), explained to obtain TTD benefits an injured worker must establish: (1) he is disabled as defined by the Act; (2) his disability is total; (3) his disability is temporary; and (4) he has not reached the date of medical stability as defined in the Act. (*Id.* at 13-14). A disability award must be supported by a finding the employee suffered a compensable disability. An employer may rebut the continuing disability presumption and gain a "counter-presumption" by producing substantial evidence proving medical stability. (*Id.*). If the employer raises the counter-presumption, "the claimant must first produce clear and convincing evidence" he has not reached medical stability. (*Id.* at 9). The 45 day provision signals

when "proof is necessary." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992). The injured worker must have a decrease in earning capacity due to a work-connected injury, not because of non-work-related situations or conditions. *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264 (Alaska 1974).

> **8 AAC 45.074. Continuances and cancellations. . . .**
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> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection, (1) good cause exists only when
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> (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

ANALYSIS

Was the oral order to continue the hearing correct?

This hearing was fraught with difficulties from its onset. Employee's native language is Nuer. The designated chair called a professional translating service to obtain a Nuer interpreter. The company was unable to locate one and instead provided Tamara, who spoke Sudanese. *Rogers & Babler.* Unfortunately, Sudanese is Employee's second language and Tamara could understand only about 40 percent of Employee's testimony. His written claim requested TTD benefits for an eye injury. AS 23.30.185. Once Employee began testifying, assuming the translation was accurate, he said the basis for his TTD benefit claim was a neck injury that he contended occurred at work when an object fell and hit him in the neck. He further contended this resulted in a stroke and a possible need for neck surgery. This came as a surprise to Employer and to the panel; neither had any medical documentation or other evidence addressing or supporting a neck injury or stroke claim. While Employee's written claim mentioned having a stroke and developing diabetes, it was unclear if Employee was actually contending that getting water splashed in his eye somehow led

to these conditions. His hearing testimony implied that he may have had more than one incident on the same day. *Rogers & Babler.*

Employer has not attempted any discovery related to a neck injury, stroke or diabetes. Its defense relied on its understanding that Employee was claiming he had an ocular injury caused by water splashing in his eye. At hearing, it became apparent that Employee's written claim did not accurately state all his work-related-injuries and claims. Therefore, given this "surprise" testimony, additional evidence and argument are necessary to not only complete the hearing but to clarify the benefits Employee is seeking and to understand his claim. 8 AAC 45.074(b)(1)(L). Employer also has a right to perform discovery once it determines exactly what happened to Employee and what benefits he seeks; a continuance will help to best ascertain all parties' rights. AS 23.30.135. Therefore, the oral order continuing the hearing was correct. *Rogers & Babler.*

Employee was understandably frustrated with his hearing being postponed. However, if both parties are to have a fair hearing, Employee will need to amend his claim and give Employer an opportunity to defend against it. He is encouraged to obtain an attorney list from the division and to try to obtain a lawyer to represent him; lawyers do not charge attorney fees to injured workers in these cases and if they are paid at all, Employer must pay any attorney fees in addition to any benefits that may be awarded to Employee. At the very least, Employee will need someone who speaks his native language and English and can assist him in completing forms and participating with him at prehearing conferences, depositions and future hearings.

Employee's credibility will be weighed if he testifies in a deposition or at hearing. He should be prepared to explain why his medical records currently in his agency file do not mention him getting hit in the neck or any neck pain or injury. AS 23.30.122; *Smith.* As an initial matter, Employee should identify to whom he reported getting hit in the neck at work by a falling object. He should obtain copies of all medical records and itemized billing statements for treatment that he contends are work-related; this includes all medical records related to his stroke, neck injury and diabetes, if in fact he is claiming benefits for disability or the need for medical treatment for these various conditions. Because stroke, neck injuries and diabetes causation are highly technical issues, Employee will need opinions from medical doctors stating that his work with Employer, or a

specific work-related injury with it, is the substantial cause of his disability or need for medical treatment due to stroke, neck injury and diabetes. AS 23.30.010(a); AS 23.30.120(a); *Morrison.*

It is likely Employee will also have to prove that an object hit him in the neck at work; this may require affidavits and possibly testimony from eyewitnesses supporting his account. *Meek*; *Cheeks*; *Smallwood*; *Saxton.* He should be prepared to prove at a hearing that he has been temporarily totally disabled because of a work injury, and not because of another reason or condition. *Lowe's*; *Leigh*; *Moore*; *Vetter.* Employee should promptly and regularly obtain all relevant evidence, file it with the division and serve a copy on Holloway, with proof of service. A hearing panel will not rely on any evidence filed with the division that was not also served on Holloway. He is encouraged to contact a Workers 'Compensation Technician at 269-4980 for further information and assistance in obtaining and filing medical records and other evidence.

Employee is also encouraged to cooperate fully with discovery; Holloway will likely send him medical and other informational releases for him to sign and return so Employer can obtain discovery and defend against his claims. Employer may also want to take Employee's deposition to further understand his alleged injury and claims. If Employee has any objection to Employer's discovery, he should immediately contact a Workers' Compensation Technician and discuss his objections; the technician will assist him in filing petitions for protective orders if that is his intent.

The workers' compensation system is very complicated; this decision provides Employee with only minimal procedural requirements. Employee's claim is not ready for hearing. He has much evidence to obtain and serve and Employer has much discovery to perform before Employee's claim can be decided. *Rogers & Babler.* Any party may request a prehearing conference.

CONCLUSION OF LAW

The oral order to continue the hearing was correct.

ORDER

Parties will proceed in accordance with this decision.

Dated in Anchorage, Alaska on October 20, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Pam Cline, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of Joseph F. Majok, employee / claimant v. Trident Seafoods Corporation, employer; American Zurich Insurance Company, insurer / defendants; Case No. 201904275; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on October 20, 2020.

/a/
Kimberly Weaver, Office Assistant