

Case: *Ashwater-Burns, Inc., Commerce & Industry Insurance Company, Chartis, and Northern Adjusters vs. Joseph D. Huit*, Alaska Workers' Comp. App. Comm'n Dec. No. 191 (March 18, 2014)

Facts: On November 5, 2010, Joseph Huit (Huit) scratched his abdomen on a drywall screw while working as a carpenter for Ashwater-Burns, Inc. (Ashwater-Burns). On December 3, he went to the emergency room (ER) and was diagnosed with a viral infection. When he did not improve, he returned to the ER a few days later and was diagnosed with endocarditis. Huit notified his employer about the scratch, his infection, and endocarditis on December 21. A few days later, on December 24, Huit was diagnosed with congestive heart failure. In January 2011, Huit filed a workers' compensation claim, seeking temporary total disability (TTD), medical benefits, interest, penalties, attorney's fees, and costs. He was discharged from the hospital on January 13, 2011.

The board held a hearing limited to one issue, whether Huit's claim was compensable, in June 2013. The board concluded that it was because Huit attached the presumption of compensability and Ashwater-Burns failed to rebut it.

In the alternative, the board concluded that if Ashwater-Burns rebutted the presumption, Huit had proved compensability by a preponderance of the evidence. The board decided to give Dr. Bundtzen's opinions the most weight, because he is an infectious disease specialist and was the initial treating physician. Once he knew about the scratch, Dr. Bundtzen opined that it was a possible point of entry. The board assigned less weight to the opinions of Drs. Breall, Riedo, and Leggett. According to the board, these doctors did not have the benefit of "the credible lay testimony presented at hearing regarding the scratch's existence." Of particular significance to the board were the opinions of Drs. Semler and Leggett, who, without any knowledge of the timing of the scratch and Huit's subsequent hospitalizations, both concluded that it would take between four to six weeks for the infection to develop. The board found that the scratch happened on November 5, 2010; Huit's initial hospitalization and diagnosis of an infection took place on December 3, 2010, four weeks later; and his endocarditis was diagnosed six days later, on December 9, 2010. Ashwater-Burns appeals.

Applicable law: AS 23.30.100(a) provides: "Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer." The 30-day deadline begins to run when the first compensable event occurs. *See Cogger v. Anchor House*, 936 P.2d 157, 160 (Alaska 1997).

AS 23.30.120 provides in relevant part: "(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[.]" Case law describes the three-step presumption analysis. The employee attaches the presumption by producing evidence of a causal link between his injury and his work. The employer rebuts the presumption by presenting substantial evidence that

the injury was not work-related. If the employer does so, then the presumption drops out and the employee must prove his case by a preponderance of the evidence.

AS 23.30.128(d) states in relevant part: "The commission may remand matters it determines were improperly, incompletely, or otherwise insufficiently developed."

Issues: Was the notice of injury timely? Did Huit attach the presumption of compensability? Did the board err in concluding the presumption was not rebutted? Does substantial evidence support the board's decision that Huit's claim was compensable?

Holding/analysis: The commission concluded that Huit's claim was timely filed because he was seeking benefits not for the initial scratch on November 5, but for the subsequent infection from the scratch and endocarditis, which were first diagnosed on December 9. That diagnosis was the "first compensable event," triggering the start of the 30-day period to report the injury. Huit's report of injury was filed December 21, 2010, within the 30-day deadline.

The commission concluded that the board properly found that Huit attached the presumption of compensability. Huit had to produce evidence that he suffered a work-related scratch and that the scratch was causally linked to the endocarditis. Huit's and his co-worker's testimony about the scratch and four doctors' opinions that indicated that the scratch was a possible or potential portal of entry for the infection that led to Huit's endocarditis was sufficient evidence of a preliminary link.

The commission concluded that the board erred in deciding that the presumption was not rebutted. The board interpreted the commission's language in *Runstrom v. Alaska Native Med. Ctr.*, Alaska Workers' Comp. App. Comm'n Dec. No. 150 (March 25, 2011), too narrowly, concluding that the only way to rebut the presumption was to present evidence that a cause other than employment was the substantial cause of Huit's infection and endocarditis. "Ashwater-Burns can rebut the presumption with *an* expert opinion that employment was probably not the substantial cause of Huit's disability." Dec. No. 191 at 15. Viewing the employer's evidence in isolation and without evaluating credibility, the commission concluded that Dr. Rideo's opinion that the lack of a skin lesion three to four weeks after the scratch made it not probable that the scratch caused his illness, and Dr. Breall's opinion that it was possible but not probable that the scratch was the entry portal for the Staph bacteria.

The commission remanded to the board to consider whether Huit proved his claim. The commission found the board's findings inadequate because "in our review of the whole record, we were unable to identify an opinion from any of the medical experts who treated or evaluated Huit that the scratch was, to a reasonable degree of medical probability, the substantial cause of his infection and endocarditis." Dec. No. 191 at 17. "Specifically, the board needs to identify with more precision the medical evidence it was relying on in deciding the compensability issue." *Id.* at 18.

Note: This decision cites the explanation of how the presumption operates after the 2005 amendment to AS 23.30.010 from *Runstrom*, Dec. No. 150. However, *Runstrom*

was appealed to the Alaska Supreme Court, 280 P.3d 567 (Alaska 2012). The court indicated that it was not reaching the issue of how the 2005 amendment to AS 23.30.010 changed the presumption analysis. Footnote 16 encouraged the commission to take up the issue again in another case when it was fully briefed by the parties.