Alaska Workers' Compensation Appeals Commission

Denise O'Hara,
Appellant,

vs.

Carr-Gottstein Foods Safeway Inc.
Appellee.

Final Decision
Decision No. 093 December 4, 2008

AWCAC Appeal No. 07-048
AWCB Decision No. 07-0348
AWCB Case No. 200622259

Appeal from Alaska Workers' Compensation Board Decision No. 07-0348, issued November 16, 2007, by northern panel members Fred G. Brown, Chair, and Jeff Pruss, Member for Labor.

Appearances: Robert M. Beconovich, Law Offices of Robert M. Beconovich, LLC, for appellant Denise O'Hara; Robert L. Griffin, Griffin and Smith, for appellee Carr-Gottstein Foods Safeway, Inc.

Proceedings: Appeal filed Monday, December 17, 2007. Appellant's request for extension of time to file brief granted February 27, 2008. Appellant's second request for extension of time to file brief granted April 3, 2008. Appellee's request for extension of time granted May 13, 2008. Oral argument presented September 3, 2008. Notice of record deficiency and order reopening record for supplementation issued November 28, 2008. Supplemental transmittal of record received December 2, 2008.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.

Denise O'Hara appeals the board's denial of her claim for workers' compensation and medical benefits for a back injury she claims occurred December 5, 2006, when she lifted some water buckets at a Carrs Safeway store in Fairbanks. She argues the presumption of compensability was not overcome by evidence that she had symptoms consistent with a left-sided herniation of an intervertebral disc before December 5,

2006, because the herniation was not documented by an MRI scan until after the injury. She contends that the reports of expert physicians are not substantial evidence on which the board could rely to find the work injury did not occur. Finally, she contends that the board failed to apply the Supreme Court's holding in *DeYonge v. NANA/Marriott,* 1 P.3d 90 (Alaska 2000).

This appeal requires the commission to determine whether there was sufficient evidence to overcome the presumption that an employee's claim comes within the provisions of the Alaska Workers' Compensation Act. In doing so, we examine whether the board had evidence that, if believed, could support a conclusion that (1) eliminated the reasonable possibility that the work on December 5, 2006, was the substantial factor in the disability and need for medical treatment; or (2) affirmatively established some other cause that, if believed, would eliminate the reasonable possibility that work was the substantial cause of the disability and need for medical treatment.

The commission determines that the board correctly applied the three-part presumption analysis. The commission concludes that the board had sufficient evidence to rebut the presumption in a physician's testimony that the employment injury on December 5, 2006, was probably not the substantial factor in bringing about the need for treatment and the disability, but that the herniated disc occurred earlier, when she developed symptoms of left-sided radiculopathy. After reaching the third step of the presumption analysis, the board rejected the appellant's testimony and accepted the evidence the appellant's symptoms of left-sided radiculopathy appeared before December 5, 2006. The board's findings regarding the credibility of witnesses who appear before the board are binding on the commission. The commission concludes there was substantial evidence in light of the whole record on which a reasonable mind might rely to conclude that lifting the bucket on December 5, 2006, was not the substantial factor in the need for surgical treatment of the injury and the resultant disability. The board's decision is affirmed.

1. Background facts and board proceedings.

Denise O'Hara worked as a florist manager at a Carrs Safeway store in Fairbanks. She suffered a low back injury in 2001 while working for the same employer.[1] She testified she did not recall what kind of treatment she had for this injury, how long she received treatment, or exactly where her back hurt.[2] She did recall having pain in the right leg after the 2001 injury.[3]

In the summer of 2006, the appellant was off work while recuperating from surgery unrelated to her employment.[4] During this time, a deck and river rock rimmed water feature was installed in her home garden. The appellant, her former boyfriend, and her parents all testified that she did not work on the installation of this feature.

On September 15, 2006, the appellant saw Dr. Stinson complaining of pain in her low back and radiculopathy down her left leg.[5] Dr. Stinson reported that the appellant said increased physical activity in her backyard building a "rock waterfall" led to the recurrence of lumbar pain and pain going down her left leg.[6] He gave the appellant a

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[1] R. 0206.

[2] O'Hara Dep. 51:8-19 (May 15, 2007). Dr. Stinson reported he had been treating O'Hara since June 2004. R. 0247.

[3] O'Hara Dep. 54:1-7.

[4] O'Hara Dep. 58:2 – 59:12. The appellant testified she did not have more leave after a three-week extension (of a grant of six weeks of leave) requested July 21, 2006. It appears she returned to work sometime in the second half of August 2006.

[5] R. 0238.

[6] R. 0238. Although the medical reports, including Dr. Stinson's report, contain references to earlier treatment, the medical reports or records of the earlier treatment were not included in the record transmitted by the board. The board was notified of deficiencies in the record, and the record reopened to allow the board to supplement the record with documents that may have been omitted from the record transmitted to the commission. No medical reports were included in the supplemental transmission. The parties did not raise issues regarding the contents of the earlier records, or the board's summary of the records in its decision, therefore, the commission does not address their absence. Presumably they are misfiled in the file of O'Hara's 2001 injury occupational injury.

steroid injection. The appellant returned to Dr. Stinson on October 12, 2006.[7] She completed a pain diagram showing pain in the lower back and going down the left leg.[8] Dr. Stinson recorded that she reported pain in her left foot and toes.[9]

On December 5, 2006, the appellant went to the emergency room with complaints of back pain.[10] The hospital records contain no report of work-related onset of the pain. An MRI showed a left-sided disc herniation at the L4-5 vertebral interval "severely narrowing the neural foramen and canal at that level" as well as a "[m]ild right-sided focal protrusion at L2/3."[11] The next day, the appellant saw David Witham, M.D., an orthopedic surgeon. Dr. Witham reported the appellant said she had developed severe left leg pain approximately a month ago; there is no report of a work-related injury.[12] The appellant saw Dr. Stinson on December 8, 2006; he again gave her a steroid injection.[13] His notes do not record an account of a work-related injury. On December 11, 2008, the appellant saw Keith Gianni, M.D.[14] Dr. Gianni's record for the visit contain no mention of a relationship between work and the low back pain. On December 28, 2008, Dr. Gianni recorded that the appellant was having a difficult time at work because of the holidays and a co-worker who was not helping her.[15]

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[7] R. 0241.

[8] Def.'s Hrg Ex. 5. A second, similar diagram is dated Oct. 13, 2006. Def.'s Hrg Ex. 6.

[9] R. 0241.

[10] R. 0243.

[11] R. 0311.

[12] R. 0312.

[13] R. 0245. Dr. Stinson reported, "Ms. O'Hara has a long history of symptomatic lumbar degenerative disease relating to a previous work injury. She has been able to maintain herself symptomatically utilizing a variety of conservative measures until recently." *Id.*

[14] R. 0313. Dr. Gianni reported the appellant believed that "over the last four years she has had '18 to 20' epidural injections." *Id.*

[15] R. 0317-18.

The workers' compensation report of injury was completed by Carrs Safeway on January 18, 2007.[16] Carrs Safeway controverted all benefits on January 19, 2007.[17] O'Hara had lumbar discectomy surgery in Seattle on February 23, 2007. She had a second surgery in Fairbanks.[18]

O'Hara filed a workers' compensation claim on February 16, 2007, seeking temporary disability compensation from February 19, 2007 and on-going, medical benefits, a permanent partial impairment compensation, penalties, interest and attorney fees.[19] A timely answer was filed,[20] and an amended controversion filed.[21] O'Hara filed an affidavit of readiness on April 23, 2007.[22] One prehearing conference was held, that set the date of hearing for October 11, 2007.[23]

2. The board's decision.

The board identified the issues before it as (1) whether O'Hara's claim was entitled to a presumption of compensability; (2) whether the claim was barred for failure to file a notice of injury within 30 days;[24] and (3) "whether the substantial cause

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[16] R. 0001. The appellee maintained before the board that it did not have notice of the injury until January 9, 2007. R. 0392.

[17] R. 0002

[18] O'Hara Dep. 73:7:14. O'Hara testified that Dr. Witham, who did the second surgery, did not tell her why a second surgery needed to be done. *Id.* at 73:10-11.

[19] R. 0388-89.

[20] R. 0391-94. The board did not serve the workers' compensation claim until March 6, 2007, R. 0388; so the answer filed March 21, 2007 was timely. 8 AAC 45.050(c)(1).

[21] R.0003. The amended controversion is dated March 29, 2007, but refers to another controversion of March 19, 2007, that could not be found in the board's record.

[22] R. 0390.

[23] R. 0356-57.

[24] The board decided that Carrs Safeway "had actual notice of the injury" and, in the absence of evidence of prejudice to the employer, excused O'Hara's failure to give written notice under AS 23.30.100(d)(1). *Denise L. O'Hara v. Safeway, Inc.,*

of [O'Hara's] need for treatment and disability arose at work or at home."[25] The board's decision reviewed the evidence and testimony presented at the hearing on October 11, 2007.[26] It then reviewed the three-step presumption analysis,[27] citing the Alaska Supreme Court's holding in *Tolbert v. Alascom, Inc.,* that the presumption of compensability is not overcome by medical testimony "if it simply points to other possible causes of an employee's injury or disability, without ruling out work related causes."[28]

The board's application of the three-step analysis to the facts was brief. First, it found that the appellant had raised the presumption:

Alaska Workers' Comp. Bd. Dec. No. 07-0348, 8 (Nov. 16, 2007) (F. Brown, Chair). The appellee did not cross-appeal the board's decision on this point.

[25] *Denise L. O'Hara,* Bd. Dec. No. 07-0348 at 1. The board noted that a petition for reimbursement under AS 23.30.250(b) had been withdrawn at "the beginning of hearing . . . as the issue was added after the most recent prehearing conference, and could not be considered, over the employee's objection." *Id.* at 1, n.1. The hearing transcript contains no statement by counsel for Carrs Safeway withdrawing the petition; the only mention of the petition is O'Hara's counsel's argument that it should not be considered by the board. Hrg Tr. 3:22- 4:7, 170:20-24. Although the board's reference to "the most recent prehearing conference" suggests more than one such conference, the record contains only one pre-hearing conference summary, for a conference on July 23, 2007. R. 0356. At that time, the petition for reimbursement, R. 0016-17, had not been filed. 8 AAC 45.070(g) provides that "[e]xcept when the board . . . determines that unusual or extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and course of the hearing." The commission assumes the board meant that the petition could not be decided over O'Hara's objection because there were no "unusual or extenuating circumstances."

[26] The record on appeal transmitted to the commission did not contain medical reports of the surgery described by the board, Bd. Dec. No. 07-0348 at 4, or the treatment prior to September 15, 2006, also described by the board, *id.* at 2. The parties did not raise issues regarding the board's understanding of these facts, so the commission deliberated on the appeal as presented. The commission notified the Chief of Adjudications of the deficiency after it was confirmed by repeated, diligent searches.

[27] *Denise L. O'Hara,* Bd. Dec. No. 07-0348 at 8-10.

[28] 973 P.2d 603, 611 (Alaska 1999). However, medical testimony that the alternative cause is the injury or disability's probable cause or otherwise rules out work relationship is sufficient to overcome the presumption. *Id.*

> The employee, her friends, family and a co-worker testified that she injured herself at work and indicated they believe this is the substantial cause of her current condition. Based on this testimony, we find the employee has established a presumption of compensability, and the employer must submit substantial evidence to overcome the presumption.[29]

The board then found that Carrs Safeway had provided substantial evidence that would overcome the presumption, and briefly summarized that evidence:

> At hearing, the employer submitted the testimony and medical opinion of Dr. Marble that the employee's symptoms are consistent with a herniation occurring in the fall of 2006, prior to her alleged date of injury. Further, Dr. Marble testified he believes the employee over-extended herself and herniated the disc working in her yard at home, after being de-conditioned due to her period of recovery from the hysterectomy. We find this testimony and evidence sufficient to overcome the presumption, and the employee must prove her claim by a preponderance of the evidence.[30]

The board then weighed the evidence in favor of the employee and against the employee, and found the evidence against her more persuasive.

> At hearing, the employee adamantly testified that she experienced no symptoms extending into her left leg until after the December 5, 2006 work incident. On cross examination, she was presented with and reviewed copies of two distinct pain diagrams. One appears to be dated October 12, 2006. The second is dated October 13, 2006. The employee agreed they are marked and signed separately, and she recognized they contain her signature. Both reflect low-back pain extending down her left leg, to her toes.
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> Based on the employee's testimony that the pain diagrams were signed by her, on or about October 12-13, 2006, and on the testimony of Dr. Marble that these symptoms are consistent with a herniation occurring in the fall of 2006, we find by a preponderance of evidence the employee did not experience a compensable injury work. [*sic*] Instead, we are persuaded by Dr. Marble's testimony, that the employee over-extended herself and herniated the disc working in her yard at home, after being

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29 *Denise L. O'Hara,* Bd. Dec. No. 07-0348 at 10.

30 *Id.*

> de-conditioned due to her period of recovery from the hysterectomy.
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> In sum, we find the employee cannot prove by a preponderance of the evidence that work was the substantial cause of her disability and need for medical treatment subsequent to September 15, 2006. Accordingly, we conclude the employee's claim for continuing workers' compensation benefits, with associated interest, penalties and attorney fees and costs, must be denied.[31]

The board noted that, "based on her acknowledgement that the October pain diagrams were signed by the employee, we find her testimony that she did not experience the diagramed symptoms until December 5, 2006 is not credible."[32] The board also noted its rejection of O'Hara's theory that the pain she experienced on December 5, 2006, represented a new injury under *DeYonge:*

> Moreover, based on the employee's testimony concerning the pain diagrams, and the testimony of Dr. Marble, we do not believe the employee's work caused any more than a temporary aggravation of her pre-existing condition. Indeed, we find she could not prove her work was even a substantial cause of her current back condition, as defined in pre-November 7, 2005 injury cases. Finally, we note the employee continued to work until February 2007, so the employee cannot seriously rely on *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000) to contend that pain, alone, can be considered the substantial cause of her disability.[33]

The board denied the claim, and this appeal followed.

3. Standard of review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the findings.[34] The commission does not consider

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[31] *Denise L. O'Hara,* Bd. Dec. No. 07-0348 at 10-11 (footnotes omitted).

[32] *Id.* at 11, n.3 (citation omitted).

[33] *Id.* at 11, n.4 (emphasis in original).

[34] AS 23.30.128(b).

evidence that was not in the board record when the board's decision was made.[35] A board determination of the credibility of testimony of a witness who appears before the board is binding upon the commission.[36]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.[37] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[38] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation[39] to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[40]

4. Discussion.

a. The presumption of compensability may be overcome by medical testimony that the work injury was probably not the substantial cause of the claimed need for treatment and disability.

O'Hara argues that Dr. Marble's testimony and report and Dr. Borman's testimony cannot overcome the presumption of compensability because they rest on a "fictional" construct and incorrect information. The appellant also contends that Dr. Marble's testimony and report merely point to a pre-existing condition, and do not eliminate the reasonable possibility that the employment aggravated, accelerated or

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35 AS 23.30.128(a).

36 AS 23.30.128(b).

37 AS 23.30.128(b).

38 *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

39 AS 23.30.007, .008(a). *See also Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002), *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987).

40 *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

combined with the pre-existing condition so as to bring about the disability and need for treatment.

The appellant's first argument overlooks the principle that the evidence is not weighed when determining if it is sufficient to attach, or overcome, the presumption. The appellant attacked Dr. Marble's testimony and report because it was based on an incorrect reference to a waterfall (instead of water feature or water fountain) in Dr. Stinson's report. This is an attack on the weight of the evidence, not the sufficiency of the evidence. "A legal determination that the evidence is sufficient to support a proposition is distinct from assigning weight to a particular piece of evidence."[41] Until the presumption is overcome, the board does not weigh the evidence produced, it examines it alone.[42] The difference between a waterfall and a water feature or water fountain was not material to Dr. Marble's opinion, so the perpetuation of this error is not enough to render his opinion so unreliable that a reasonable mind could not rely upon it.

The appellant also contends that Dr. Marble and Dr. Borman do not eliminate the possibility that lifting a bucket of water in the cooler on December 5, 2006, was the substantial factor in bringing about the need for treatment of a herniated disc and subsequent surgery. The appellant relied on her own testimony that she did not have left leg pain (radiculopathy) until December 5, 2006,[43] she had immediate onset of pain when she lifted the bucket of water in the cooler,[44] her witnesses' corroborating

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[41] *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 793 (Alaska 2007) (citing *Fireman's Fund Am. Ins. Cos. v. Gomes*, 544 P.2d 1013, 1015 n.6 (Alaska 1976)).

[42] *Carlson v. Doyon Universal-Ogden Servs.*, 995 P.2d 224, 228-29 (Alaska 2000) ("We look to the employer's evidence standing alone without reweighing it. The evidence must, however, be comprehensive and reliable, and account for relevant factors . . .").

[43] O'Hara Dep. 62:10-23; Hrg Tr. 117:1-4 (May 15, 2007). She later testified, "I had a little bit of numbness down in the inner part of my leg, but nothing like on December 5th." Hrg Tr. 118:16-17.

[44] O'Hara Dep. 63:5-17.

testimony that she left work in distress on December 5, 2006, to go to the emergency room, and the MRI scan evidence of a herniated disc.

To overcome the presumption in AS 23.30.120(a)(1), the employer's substantial evidence must either (1) provide an alternative explanation for the injury that, if accepted, would exclude work-related factors as [the] substantial cause of the disability; or (2) directly eliminate any reasonable possibility that employment was [the substantial] factor in causing the disability.[45] The opinion of "a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not [the] substantial cause of the disability" rebuts the presumption of compensability.[46]

Dr. Marble testified that the left sided herniation of the L4-5 disc, seen on the MRI, was consistent with the pain described by the appellant to Dr. Stinson.[47] He testified that the new symptoms in September 2006 were left-sided radiculopathy, consistent with the MRI findings.[48] Therefore, he said, "whatever caused this, it most likely happened in . . . summer of 2006."[49] He concluded that the December 5, 2006, incident was not the substantial cause of the herniated disc, need for surgery and subsequent disability.[50]

"[T]he fact that a doctor did not state his opinion in absolute terms did not mean that his testimony was inconclusive or that he failed to exclude a cause of the

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[45] *Steffey v. Municipality of Anchorage*, 1 P.3d 685, 690-91 (Alaska 2000) (modified to reflect the amendment of AS 23.30.010(a)).

[46] *Cowen v. Wal-Mart,* 93 P.3d 420, 424-25 (Alaska 2004) (*citing Bradbury v. Chugach Elec. Ass'n*, 71 P.3d 901, 906 (Alaska 2003) *quoting Big K Grocery v. Gibson*, 836 P.2d 941, 942 (Alaska 1992)) (quote modified to reflect the amendment of AS 23.30.010(a)).

[47] Hrg Tr. 136:14-137:2.

[48] Hrg Tr. 138:17-20.

[49] Hrg Tr. 138:22-23.

[50] Hrg Tr. 139:1-5.

claimant's condition."[51] In this case, Dr. Marble did not express his opinion in inconclusive terms.

The appellant argues that Dr. Marble's evidence is not substantial evidence because he relied on the absence of evidence, referring to the following passage of hearing testimony:

> I tried to explain the scenario that makes sense from a medical standpoint as to how the symptoms had evolved. They're clearly documented at least as of September and October. And these are signs and symptoms that correlated with the subsequent MRI.
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> In addition to that, we don't have records in close proximity to this claim of a work injury that would suggest that something else happened like a work injury. So you – on the one hand, there is a -- at least a plausible explanation of how this patient developed more extensive problems with her back and when. And we don't have anything that really links it – at least from a medical standpoint that links it with a work injury.[52]

Dr. Marble was explaining some of the reasoning underlying his opinion that work on December 5, 2006, was not the substantial factor in bringing about the injury that required surgical treatment – a herniated disc. First, he believed the disc had herniated by September 2006 and, second, he believed that nothing "from a medical standpoint" links it with a work injury. Dr. Marble relied on the medical records that established the *presence* of symptoms consistent with the herniated disc shown on the MRI. These symptoms were severe enough that they were described as producing pain "on an 8 or 9 out of 10" when she saw Dr. Stinson, and only relieved to a "4 out of 10" by an epidural injection in September 2006.[53] In addition, the medical records from the

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[51] *Smith*, 172 P.3d at 791 (citing *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1189 (Alaska 1993).

[52] Hrg Tr. 139:16 – 140:6.

[53] R. 0241. By October 12, 2006, her pain had "increased back up to 6 out of 10." R. 0241. The significance of the reported pain scales is that they contradict the appellant's testimony that she did not have serious pain consistent with a left-sided herniated disc until December 5, 2006, and counter her *"post hoc, ergo propter hoc"*

emergency room, from Dr. Witham, Dr. Gianni, and Dr. Stinson in the first half of December 2006 do not contain a history of suffering onset of pain while lifting a bucket at work. Instead, Dr. Witham reported on December 8, 2006 that she "developed left leg pain of a severe nature approximately one month ago. This has continued to worsen. Right leg has joined in as of a couple of days ago."[54] This is not the absence of evidence; it is evidence of a history that is inconsistent with the appellant's version of events, but consistent with another version that, if believed, would eliminate the possibility that the appellant's version, and thus her causal theory, is correct. Although Dr. Marble also pointed to another possible cause for the herniated disc, the core of his opinion is that the disc herniation which required the surgical treatment did not occur on December 5, 2006, as claimed.[55] A reasonable mind could conclude that Dr. Marble's testimony and the supporting records[56] were adequate to rebut the presumption.

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causation argument. *See Tire Distribution Systems, Inc., v. Chesser*, Alaska Workers' Comp. App. Comm'n Dec. No. 090, 15 n.41 (Oct. 10, 2008).

[54] R. 0312.

[55] There is a distinction between eliminating the possibility that lifting a bucket of water aggravated the employee's pain so as to be the substantial factor in bringing about disability for a week and a trip to the emergency room, and eliminating the possibility that lifting the bucket was the substantial factor in bringing about the need for surgical treatment. Dr. Marble recognized this distinction in his testimony. Hrg Tr. 160:16-21. The focus of the board's decision was the surgical treatment and resultant disability, not the immediate treatment and disability, because the claim was only for benefits from February 19, 2007.

[56] The appellant argues the supporting records cannot be considered adequate evidence because the MRI scan is much weightier than pain diagrams. Appellant's Br. 18. However, the MRI scan on Dec. 5, 2006, does not *disprove* the existence of a herniated disc *before* Dec. 5, 2006. The board has had experience in many cases of lower back injuries and recognizes that physicians have been diagnosing (and treating) herniated lumbar discs before the existence of MRI scans. As Dr. Borman testified, "we focus so much on the imaging studies, and we're fascinated with the technology of magnetic resonance imaging, that it can show so much, but if you don't keep it in context and correlate the findings with history and physical, it's so difficult to really tell what the MRI finding is reflecting." Timothy R. Borman, D.O., Dep.

b. DeYonge v. NANA/Marriott does not require the board to impose liability for surgical treatment and resultant disability.

In *DeYonge v. NANA/Marriott*, the Supreme Court rejected the board's conclusion that, to overcome a presumption that a claim for temporary disability is compensable, the medical evidence must show that the work worsened the employee's underlying condition, rather than merely aggravated her symptoms so as to result in disability.[57] The Supreme Court rejected a distinction between aggravation of symptoms and the aggravation of the underlying condition in the context of an aggravation claim for disability under workers' compensation law.[58]

However, the appellant's claim was not limited to an aggravation of symptoms of a pre-existing condition, without worsening of the underlying condition, as was the case in *DeYonge.* The appellant's claim is that there was a specific injury – a herniated disc in her lower back – that required surgical treatment and that lifting a bucket of water in the cooler was the substantial factor in bringing about the herniated disc.[59] The

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29:12-18 (Oct. 3, 2007). Dr. Borman agreed that it was more probable than not that the appellant's disc herniation had occurred by Oct. 13, 2006. Borman Dep. 26:13-23.

[57] 1 P.3d at 96-97.

[58] *Id.* at 96.

[59] O'Hara's workers' compensation claim states, "Employee injured her back while lifting a 5 gallon bucket with water and flowers" and "Employee has sustained a disc herniation and spinal problems associated with the above described lifting injury or has otherwise exacerbated a preexisting injury by the work related event." R. 0388. While the phrase "otherwise exacerbated a preexisting injury" might include a claim that she aggravated or accelerated a pre-existing disc herniation, the sentence structure suggests the phrase "otherwise exacerbated" more likely refers to an injury that is not a disc herniation, especially as the claim was written before the surgery took place and the precise nature of the injury might not be fully known. Assuming, however, a claim that she aggravated a pre-existing disc herniation, the existence of a worsening of the underlying condition and the causal link between the worsening and the need for surgery ultimately rested on the claimant's testimony. She did not rely on medical evidence that she would not have needed the surgery but for an aggravation of a pre-existing disc herniation on December 5, 2006, and that the aggravation was so important that reasonable minds would regard it as the substantial factor in bringing about need for the surgery to treat the disc herniation. There was no medical evidence

appellant did not argue to the board that: (1) she had a pre-existing herniated disc at the L4-5 vertebral level, (2) she was able to live with the condition, (3) she would not have required surgery and (4) she would have been able to continue working, but for (5) lifting the bucket on December 5, 2006. Instead, the appellant argued to the board that the employer's theory, (that she had herniated the disc before December 5, 2006), "is inaccurate, it's impossible. It didn't happen, it couldn't happen."[60] In closing argument to the board, the appellant conceded she had "long-term back problems" but she argued that she was "holding down the fort" until December 5, 2006. Therefore, the appellant argued, the "night and day" difference in functionality was evidence that the December 5, 2006, injury was the substantial factor in the need for surgery and resulting disability. The appellant did not concede that she had a herniated disc at the L4-5 vertebral level before December 5, 2006, or symptoms consistent with that diagnosis.[61]

The Supreme Court's rejection of the distinction between injury and symptoms of injury in aggravation claims is not dispositive in this case. The board was not asked to decide if the employment was the substantial factor in bringing about an increase in symptoms that resulted in temporary disability notwithstanding lack of change in the underlying condition. There was no medical evidence that the need for surgery was the result of increased symptoms, instead of the physical injury of a herniated disc impinging on the nerve outlet. The appellant denied she had symptoms of a pre-existing left-sided herniated L4-5 disc. The question before the board was whether lifting a bucket on December 5, 2006, was the substantial factor in bringing about the need for the February 2007 surgery, the second surgery, and the disability resulting

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that the need for the surgery and disability after February 19, 2007, was due to an increase in pain without physical change.

[60] Hrg Tr. 11:7-9.

[61] *See Robinson v. Municipality of Anchorage,* 69 P.3d 489, 498-99 (Alaska 2003) (Board not required to decide aggravation claim if not properly raised and argued; employee must articulate alternate cumulative aggravation theory, raised in claims based on specific injuries, in another claim).

from the surgeries. Therefore, the board properly focused on whether lifting the bucket on December 5, 2006, was the substantial factor in bringing about the herniated disc.

AS 23.30.010(a) provides that "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."[62] The use of the disjunctive "or" means that the board must evaluate the claimed benefits separately. A work-related injury may result in temporary disability, and treatment to restore the employee to pre-injury condition, without necessarily being the substantial factor in bringing about the need for all future medical treatment of the underlying condition. Conversely, a work injury may be the substantial factor in bringing about disability and need for treatment, but not a subsequent temporary increase in symptoms if another activity was the substantial factor in the increased symptoms.

In *Moore v. Afognak Native Corp.*, the commission discussed the Court's holding in *DeYonge* "that the board erred in requiring a permanent aggravation of the housekeeper's knee condition when she was not claiming permanent total disability, but rather temporary total disability and medical benefits."[63] Moore already had end-stage arthritis in his knee when he was injured in 2003 and received medical treatment and temporary disability compensation for a temporary exacerbation. He later sought a permanent joint replacement, an artificial knee, arguing that his increased pain after the injury caused him to make the decision to have the knee replaced. Guided by the court's holding in *DeYonge* that the nature of the benefit claimed dictates the showing that must be made, the commission determined that the board did not err in finding that the presumption was rebutted by medical evidence that the need for the permanent joint replacement surgery in 2007 was not the result of a temporary

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[62] AS 23.30.010(a) (emphasis added).

[63] Alaska Workers' Comp. App. Comm'n Dec. No. 087, 9 (Aug. 25, 2008) (citing *DeYonge*, 1 P.3d at 97).

exacerbation of the pre-existing condition resulting from the 2003 injury, despite Moore's argument that increased symptoms after the 2003 injury caused him to make the decision to have the knee replaced.[64]

On the other hand, in *Tire Distribution Systems, Inc., v. Chesser*,[65] the commission held that the board did not err in finding there was substantial evidence to support the decision that a herniated cervical disc was compensable, notwithstanding uncontradicted medical evidence that lifting weight could not result in a cervical disc herniation because lifting did not stress the cervical spine discs. Like the case before the commission here, Chesser relied on *"post hoc ergo propter hoc"* reasoning to make his initial case to the board.[66] Chesser's claim did not seek to explain *how* his injury occurred, but to show that the injury occurred in the course of employment (while barrel stacking tires), leaving it to the presumption to supply the remaining elements of his claim. Once the presumption was overcome, however, Chesser's claim was supported by credible testimony that he had no symptoms consistent with disc herniation before "barrel stacking" the tires, the symptoms began during barrel stacking, and that barrel stacking involved more than lifting, *and* a physician opinion, albeit somewhat ambiguous, that the herniated disc was work-related. The commission held that this was sufficient to support the board's finding that the injury arose out of and in the course of the employment.

However, in *Chesser* the board made an explicit finding that it found Chesser's testimony regarding the lack of pre-existing symptoms of disc herniation and the onset of the injury while barrel stacking tires was credible. In this case, the board explicitly found the appellant's testimony regarding the lack of pre-existing symptoms of disc herniation was *not* credible.[67] The board's finding that a witness who testifies before

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64 Alaska Workers' Comp. App. Comm'n Dec. No. 087 at 9-10.

65 Alaska Workers' Comp. App. Comm'n Dec. No. 090 (Oct. 10, 2008).

66 *Id.* at 15.

67 *Denise L. O'Hara,* Bd. Dec. No. 07-0348 at 11, n.3.

the board is, or is not, credible is binding on the commission.[68] The board, not the commission, has the ability to assess the demeanor of the witnesses before it. The board is also in the best position to determine if a witness before it is evasive, unwilling to recall information, or otherwise lacking in candor.

The board chose to accept the medical record evidence that revealed the appellant had symptoms of a left-sided disc herniation in September 2006. It accepted as persuasive this evidence and the medical opinions that the herniated disc occurred *before* December 5, 2006. Comparing the relative contribution of the work injury, the board decided that lifting the bucket was not the substantial factor in bringing about either the need for the surgeries to treat the herniated disc or the disability resulting from the surgeries.[69]

The commission may not reweigh the evidence and make new findings of fact. If there is substantial evidence in light of the whole record to support the board's findings of fact, the commission must uphold the board's findings of fact.[70] In this case, the commission determines that, notwithstanding the evidence of a work-related exacerbation of a pre-existing condition, the board had substantial evidence to find that, in relation to other possible causes, lifting a bucket of water on December 5, 2006, was not the substantial factor in bringing about the need for the surgical treatment of a herniated L4-5 disc and the disability resulting from the surgeries.

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[68] AS 23.30.128(b); *see also* AS 23.30.122 ("The board has the sole power to determine the credibility of a witness.").

[69] The board also noted that O'Hara returned to work and continued to work until mid-February, an observation that indicates the board recognized a consistent pattern since September 2006 of needing epidural injections and pain medication to continue to function at work. Thus, although the appellant had more information available after December 5, 2006, and different treatment recommendations from different physicians, the board chose not to accept her testimony that lifting the bucket caused so much of a lasting change in her condition, from the pain reported to Dr. Stinson, that lifting the bucket was the substantial factor in the need for surgery.

[70] AS 23.30.128(b).

5. Conclusion.

The board's decision is AFFIRMED.

Date: *Dec. 4, 2008* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision in this appeal from Alaska Workers' Compensation Board Decision No. 07-0348 denying Denise O'Hara's workers' compensation claim. The appeals commission affirmed (approved) the board's decision. The effect of this decision is to let the board's decision stand. This is the final administrative decision on this claim.

Proceedings to appeal a final commission decision must be instituted (started) in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission. To see the date of distribution, look in the "Certificate of Distribution" box below.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision is distributed. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after distribution or mailing of this decision.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Final Decision in Alaska Workers' Compensation Appeal Commission Appeal No. 07-048, *Denise O'Hara v. Carr-Gottstein Foods Safeway Inc.,* filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this _*4th*_ day of __*December*__, 2008.

Signed
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION

I certify that on _*12/4/08*_ a copy of this Final Decision No. 094 in AWCAC Appeal No. 07-048 was mailed to Beconovich and Griffin at their addresses of record, and faxed to AWCB Appeals Clerk, WCD Director, AWCB-Fbx, Beconovich & Griffin.

Signed *12/4/08*
J. Ramsey, Deputy Appeals Commission Clerk Date