

Case: *Marilyn A. Coppe vs. Michael A. Bleicher, M.D., Laurie Bleicher, M.D., and Liberty Northwest Insurance Company*, Alaska Workers' Comp. App. Comm'n Dec. No. 164 (August 1, 2012)

Facts: Marilyn Coppe (Coppe) worked as a secretary for Michael Bleicher, M.D. and Laurie Bleicher, M.D. (Drs. Bleicher). She filed a report of injury on August 26, 2005, claiming that the building where she worked made her ill. She asserted her symptoms related to sick building syndrome and became severe in April 2003. She experienced vertigo, nausea, chest pain, and headaches.

In May 2003, Coppe sent a survey to other building occupants asking if they experienced similar symptoms. The three who responded indicated that, while they had some symptoms similar to Coppe's, they did not attribute them to the building. In June 2003, Nortech investigated and did not identify any potential sources of air contaminants in the building.

Two doctors supported Coppe's claim of sick building syndrome. In April 2007, neurotoxicologist, Dr. Heuser, noted that Coppe reported symptoms of impaired memory and cognitive functions, chronic pain and fatigue, shortness of breath, depression, and insomnia. He diagnosed fibromyalgia, found evidence of toxic exposure, and made a tentative finding of sick building syndrome. He evaluated Coppe again on February 9, 2009, concluding that she suffered from sick building syndrome. On September 20, 2007, Dr. Pizzadili wrote that he was treating Coppe for toxic exposure and that multiple diagnostic testing indicated she was suffering from the effects of sick building syndrome and toxic encephalopathy.

In contrast, doctors who reviewed her records for an employer medical evaluation (EME) and a second independent medical evaluation (SIME), disagreed. In July 2007, Dr. Burton reviewed her medical records, concluding that there was no evidence of toxic exposure at work, and Coppe's symptoms were psychologically based, not work-related. Dr. Burton diagnosed a somatoform disorder. At the hearing before the board in December 2010, Dr. Burton testified that Coppe suffered no toxic exposure in connection with her employment for the Drs. Bleicher and that fibromyalgia is not caused by toxic exposure. Similarly, in July 2007, Dr. Bardana, an allergy and immunology specialist, reported her symptoms were subjective, and found no evidence of allergy or toxic reactions associated with her work for the Drs. Bleicher. The board found both doctors to be credible witnesses.

In April 2010, the SIME doctor, Dr. Martin, a toxicologist, concluded that Coppe did not suffer any injury from any workplace chemical or biological toxin exposure, nor was any pre-existing condition aggravated or accelerated by her work for the Drs. Bleicher. Dr. Martin attributed Coppe's complaints to an underlying somatization disorder. Dr. Burton concurred with Dr. Martin's opinions. The board found Dr. Martin to be a credible witness.

The board denied Coppe's claim. Coppe appeals.

Applicable law: Presumption of compensability and related case law.

AS 23.30.100 requires notice within 30 days of a work-related injury but excuses a failure to give notice, for reasons, including "(1) if the employer . . . had knowledge of the injury . . . and the board determines that the employer . . . has not been prejudiced by failure to give notice."

Issues: Did the board have substantial evidence to conclude that Coppe's condition was not work-related? Did the board overlook evidence? Did the board properly conclude that failing to provide a job reference does not constitute permanent and total disability?

Holding/analysis: Due to inadequacy of her briefing, the commission deemed the orthopedic and cigarette smoke inhalation issues waived or abandoned. The commission noted that "forty-six pages of Coppe's fifty-two page opening brief are consumed by her discussion of the facts, whereas, approximately four pages are devoted to her legal arguments and string citations to general legal principles of questionable relevance." Dec. No. 164 at 9.

The commission concluded the board did not ignore or overlook evidence. The board's decision reflected that it considered all the medical evidence; it was not required to discuss Coppe's subjective statements made to certain medical providers.

The commission considered the issue of whether the presumption of compensability was waived due to Coppe's late notice of injury moot because the board proceeded with its analysis as if the presumption applied.

The commission agreed the board had evidence to find the presumption attached and was rebutted. Lastly, the commission found the board had substantial evidence to conclude that Coppe failed to prove her claim by a preponderance of the evidence:

In the board's view, the credible evidence presented was that: 1) Nortech found no air contaminants in the building in 2003; 2) other employees were not affected by the air in the building, contrary to Coppe's assertion that they were; and 3) the opinions provided by the EME doctors and the SIME doctor were more persuasive. The toxicologists, Drs. Burton and Martin, after reviewing the available evidence, both concluded that the building did not expose Coppe to any toxic substances. In contrast, the board attached less weight to the opinions of Dr. Pizzadili and Dr. Heuser because they relied to a significant extent on Coppe's inaccurate representations that the building also made some of her co-workers ill. Together with Dr. Pizzadili's lack of expertise in toxicology and the unreliable test results provided to Dr. Heuser, it was reasonable for the board to question the reliability of their evidence. Dec. No. 164 at 12-13.

Lastly, the board rejected Coppe's argument that the lack of a reference from the Drs. Bleicher constituted permanent and total disability as a result of a work injury. On the contrary, as the board pointed out, permanent and total disability is "the inability because of injuries to perform services." "The lack of a job reference does not equate to being physically unable to work." The commission agreed with the board.

Note: The Alaska Supreme Court affirmed this decision on appeal in February 2014. But the court concluded the presumption applied; the alternative analysis applying the presumption meant the failure to apply it was “harmless error,” rather than moot. *See RLR v. State*, 487 P.2d 27, 45 (Alaska 1971). Also, the court concluded the commission had erroneously (although it was also harmless) excluded the report of injury from the record on appeal.