

Case: *James Jones vs. Frontier Flying Service, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 018 (September 7, 2006)

Facts: Jones, a Frontier Flying pilot, injured his lower back helping to load an outboard motor into an airplane in August 2000. He was paid temporary total disability (TTD) until it was controverted in March 2004. He appeals the board's denial of his claim for further TTD compensation, permanent partial impairment (PPI) compensation, and back surgery. The board concluded that Jones was no longer entitled to TTD because he was medically stable and he was not entitled to PPI because no rating had been performed. The board denied the claim for back surgery but approved an in-patient pain clinic program.

Applicable law: AS 23.30.120(a) and related case law on the presumption of compensability, applied to issue of whether Jones' condition continued to be work-related. Former AS 23.30.010 was interpreted to impose workers' compensation liability whenever employment is established as a causal factor in the disability. "A 'causal factor' is a legal cause if 'it is a substantial factor in bringing about the harm' at issue." *Doyon Universal Servs. v. Allen*, 999 P.2d 764, 770 (Alaska 2000).

TTD is owed to employees who have not reached medical stability after an injury, AS 23.30.185. Medical stability is reached when "further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence[.]" AS 23.30.395(27), formerly AS 23.30.395(21) *renumbered 2005*.

AS 23.30.095(a) as interpreted by *Phillip Weidner & Assocs., Inc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). During the two-year period following the date of injury, the board's discretion to order medical treatment is limited to reviewing the reasonableness and necessity of the particular treatment sought by the employee and the employee's physician; after two years, the board has greater discretion to authorize "indicated" medical treatment "as the process of recovery may require" and may choose among reasonable, competing, medically acceptable alternatives.

AS 23.30.190 provides for awards of PPI based on an impairment rating made in accordance with the American Medical Association's Guides. For PPI, an employee must present evidence of a rating greater than zero percent. Even though the presumption of compensability applies to permanent impairments, employee has burden of introducing evidence "as to the extent of the injury" or percentage of impairment he suffered. *See Tolbert v. Alascom, Inc.*, 973 P.2d 603, 607-08 (Alaska 1999).

Issues: Does the commission need to remand to the board to clarify findings? Does substantial evidence support the board's decision denying TTD after March 5, 2004, on the basis of medical stability? Does substantial evidence support the board's decision directing payment of a comprehensive in-patient pain clinic program for Jones (and

denying the disc replacement surgery)? Does substantial evidence support the board's denial of PPI?

Holding / analysis: The commission did not have to remand because “the board’s decision contains sufficient findings to permit intelligent review, and the record as a whole amply supports the board’s written findings. Despite the lack of orderly discussion and omission of an explicit finding, we were able to determine what legal standards the board applied and to parse out the board’s reasoning.” Dec. No. 018 at 28.

On the TTD issue, Frontier admitted Jones would be entitled to TTD if he began pain clinic treatment but otherwise he did not rebut the presumption of medical stability. Jones argued he was not medically stable because if he had the surgery, he would improve as well as disputing that two doctors’ opinions were enough to raise the presumption of medical stability.

On whether Jones’ continuing condition was work-related: The board failed to make an explicit written finding that Jones proved that his continuing pain condition was work-related, but the commission was able to infer such a finding and did not have to remand for further findings, especially in light of the fact that the employer conceded, rather than appealed, the work-relatedness of Jones’ continuing condition. The commission’s inference was based on the board explaining the evidence attaching the presumption of compensability, explaining the evidence rebutting the presumption, and then engaging in a weighing of doctors’ opinions that ultimately resulted in the board finding the pain clinic program compensable. The commission listed substantial evidence supporting that injury continues to be a substantial factor in Jones’ chronic pain.

On the finding of medical stability, the board failed to clearly articulate and apply the presumptions of compensability and medical stability. The commission explains how presumptions should work:

The relationship between the presumption that a claim comes within the workers’ compensation act in AS 23.30.120(a) and the presumption of medical stability was not well expressed by the board in this case. Because the employee may attach a presumption of compensability of a claim for temporary total disability, an employer in turn may produce substantial evidence, (i.e., such evidence that a reasonable mind could accept as adequate to support a conclusion), that the employee’s condition has had no objectively measurable improvement for a period of 45 days. In effect, such evidence rebuts the “temporary” element of the employee’s claim for temporary total disability. By producing such evidence, the employer raises in turn a presumption of medical stability, which the employee may rebut by producing “clear and convincing” evidence. Alternatively, an employer may produce substantial evidence that the employee is not totally disabled; such evidence will overcome a presumption that the claim for temporary

total disability is compensable, but it will not raise a presumption of medical stability. Dec. No. 018 at 19 n.106.

Nevertheless the commission affirmed the board, finding substantial evidence supported the board's finding that Jones was medically stable. The board was not clear on whether Jones failed to rebut the presumption of medical stability with "clear and convincing evidence" or whether after the presumption dropped out, Jones failed to prove by a preponderance of the evidence that he was not medically stable. But there was substantial evidence to support either conclusion, both of which would mean Jones was medically stable. In addition to doctors' statements that he was medically stable, Jones' own testimony supported he had not improved and his evidence did not explain how the surgery he wanted would help his ongoing pain; one doctor even opined that any surgery might worsen his pain syndrome.

The commission affirmed the board's decision to deny surgery and approve treatment at an in-patient pain clinic. Surgery that Jones sought was more than two years after the injury and required implantation of an artificial disc that had not yet been FDA approved. The commission concluded the board could choose among competing medical alternatives, rather than simply deciding whether Jones' preferred treatment was reasonable and necessary. Substantial evidence in the form of one doctor's opinion and Jones' age of 38 supported the board's finding that any type of back surgery was premature. Jones' pain syndrome needed treatment before surgery or surgery might worsen it, and Jones was young enough that rehab might help before trying an irrevocable treatment like back surgery. Moreover, substantial evidence supported the board's selection of an in-patient pain treatment program. Five doctors had diagnosed Jones with chronic pain syndrome, two of whom recommended such a program. The board did confuse a doctor's name in its analysis, but the commission could figure out which doctor's testimony it was referencing in its decision.

The commission affirmed the board's PPI denial because it was supported by substantial evidence. Three doctors stated Jones had no rating, and no other doctor gave Jones a PPI rating.