

Case: *Uresco Construction Materials, Inc. and Liberty Mutual Insurance Company, formerly Employers Insurance Company of Wausau vs. Franz Porteleki*, Alaska Workers' Comp. App. Comm'n Dec. No. 152 (May 11, 2011)

Facts: The issue before the board was whether Franz Porteleki's (Porteleki) work injury was the substantial cause of his need for knee surgery. Porteleki injured his left knee while working for Uresco Construction Materials, Inc. (Uresco) in December 2007. A 2008 magnetic resonance imaging (MRI) found an almost complete tear of his anterior cruciate ligament (ACL) as well as degenerative changes to his knee. Porteleki's treating doctors were Drs. Raymond and Keller. Prior to the 2007 injury, Porteleki had a history of left knee problems, including degenerative changes. Based on an August 2003 MRI, Dr. Joosse opined that Porteleki tore his ACL not in 2007, but rather in 2003, and the 2003 tear was the substantial cause in the need for surgery. Dr. Diamond, however, concluded that the ACL tear occurred with the 2007 injury. The board concluded that Porteleki attached the presumption, Uresco rebutted it, and Porteleki proved his claim by a preponderance of the evidence. Uresco appeals.

Applicable law: AS 23.30.010(a) provides in part:

. . . compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or 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 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.

"The Board is required to make findings about issues that are both contested and material." Findings must "at a minimum . . . show that the Board considered each issue of significance, demonstrate the basis for the board's decision, and [be] sufficiently detailed." *Pietro v. Unocal Corp.*, 233 P.3d 604, 612 (Alaska 2010).

AS 23.30.145, on attorney fees. *Circle De Lumber Co. v. Humphrey*, 130 P.3d 941, 952 n.76 (Alaska 2006) states "in a controverted case, the claimant is entitled to a percentage fee under subsection (a) but may seek reasonable fees under subsection (b)."

Issues: Were the board's findings adequate to review its decision? Did the board apply the correct presumption analysis? Could the board properly award attorney fees under the higher of AS 23.30.145(a) or (b)? Did the board abuse its discretion in not deducting for the time spent on the unsuccessful unfrivolous controversion issue?

Holding/analysis: The commission noted that the board did not properly apply the new causation standard. Because the board's decision was reached prior to the commission decision in *Runstrom*, it did not apply the modified compensability analysis. But the parties did not dispute that the presumption attached and was rebutted. (Also, see the below note.)

The commission concluded that the board did not make findings about all the contested and material issues necessary to conclude that Porteleki's work injury was the substantial cause of his need for surgery:

It appears to us that the board did not evaluate the relative contribution of the different possible causes of Porteleki's need for surgery. These causes may include Porteleki's pre-existing degenerative changes in his left knee; Porteleki's 2007 work injury; and a possible 2003 ACL tear, the occurrence of which the parties dispute. Dec. No. 152 at 12.

(1) The board failed to decide whether Porteleki tore his ACL in 2003. This was a material, disputed issue because if the tear occurred, then that tear, rather than the work injury, may have been the substantial cause of his need for surgery.

(2) The board relied on the opinions of Drs. Raymond, Keller, Diamond, and the radiologist that performed a 2008 MRI to support its conclusion that the work injury was the substantial cause in the need for surgery. The commission's "review of the record did not uncover any statements by these three doctors that compare causes and pinpoint Porteleki's work-related knee injury, rather than other causes, as 'the substantial cause' of his present need for surgery." *Id.* at 13.

(3) The board did not discuss Dr. Joosse's report or testimony, which the employer relied on in rebutting the presumption. The board's failure to discuss this key report led to further uncertainty in understanding the basis for its decision.

On the attorney fee dispute, the commission concluded that the board did not err in awarding fees under the higher of AS 23.30.145 (a) or (b). Because Uresco controverted Porteleki's claim, either subsection of the fee statute could apply. The board "acted within its discretion in evaluating the fee award and adequately explained its reasoning for deciding the time spent on the unsuccessful controversion claim was *de minimis*, and substantial evidence supports the *de minimis* finding." *Id.* at 16.

Note: This case was decided before the Alaska Supreme Court's decision in *Runstrom v. Alaska Native Med. Ctr.*, 280 P.3d 567 n.16 (Alaska 2012). In *Runstrom*, the court did not decide whether the new causation standard in AS 23.30.010(a) modifies the second step of the presumption analysis and encouraged the commission to reconsider the issue in another case in which the issue was fully briefed by the parties. Thus, how

the changes to AS 23.30.010(a) affected the presumption analysis remains more of an open question than this case indicates.