

Case: *Carol S. Corey vs. NANA Regional Corporation, Inc. and ACE Indemnity Insurance Company*, Alaska Workers' Comp. App. Comm'n Dec. No. 192 (March 18, 2014)

Facts: Carol Corey (Corey) injured her left knee and hit her head on a garbage can when she slipped and fell on a wet floor while working in a school cafeteria for NANA Regional Corporation, Inc. (NANA Regional) on April 29, 2009. After the accident, Corey continued to complain of knee pain to different medical providers. The doctors could not ascertain the source of Corey's continuing knee pain. But when she finally had surgery in May 2012, her doctor diagnosed a chondral fracture that he related to the 2009 slip-and-fall. At least one other doctor disagreed with his findings. The board found her claim for surgery compensable, and awarded medical benefits for her left knee through November 4, 2012. The board denied medical benefits for her thoracic and cervical spine after July 10, 2009.

In terms of the disability payments, NANA Regional ceased paying either temporary total disability (TTD) or temporary partial disability (TPD) benefits as of September 19, 2010, when it controverted Corey's claim based on Drs. Yodlowski and Reimer's opinion that Corey's work-related injuries would have resolved within three months after the fall. The board awarded TTD benefits from November 30, 2009, to January 2010, but credited NANA Regional for TPD payments made during this same period toward its liability for TTD benefits. Corey returned to work for NANA Regional from January 2010 to May 2011, when she was laid off. The board declined to award TPD for the period from January 2010 to May 2011, concluding that Corey "worked the same number of hours, and at the same wage, as she did prior to her work injury." The board did not address whether Corey was entitled to any form of disability payments after May 2011. Neither the parties' arguments at hearing, nor the parties' hearing briefs, specified the timeframes for which Corey was seeking TTD and/or TPD benefits.

Corey appeals, asserting that the board should have decided the compensability of her lumbar spine and her entitlement to permanent partial impairment (PPI) benefits. She also argues that the board erred in not awarding her disability benefits after September 19, 2010, because she did not have knee surgery until May 4, 2012, and she was without work for two years without compensation.

Applicable law: The board's authority to hear and determine questions with respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties." *Simon v. Alaska Wood Prods.*, 633 P.2d 252, 256 (Alaska 1981).

8 AAC 45.065(c) provides in relevant part that the prehearing conference summary "will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and course of the hearing." 8 AAC 45.070(g) provides: "Except when the board or its designee determines that unusual and extenuating circumstances exist, the summary . . . governs the issues and the course of the hearing."

AS 23.30.200 (TPD) and AS 23.30.185 (TTD) provide that TPD and TTD are payable only during “the continuance of the disability.” TPD is owed when the employee suffers a “decrease of earning capacity” due to the work injury; TTD is owed when the employee temporarily cannot earn any wages due to the work injury. Both types of benefits end when a claimant reaches medical stability.

AS 23.30.395(16) defines disability as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”

The AS 23.30.120(a) presumption of compensability applies and, if the facts of the particular case require it, the presumption of medical stability may also apply to claims for TTD and TPD. AS 23.30.395(27) defines medical stability and explains the presumption. The Alaska Supreme Court has held that returning to work, without any consideration of medical stability, is sufficient to rebut the presumption of compensability for TTD benefits. *Bailey v. Litwin Corp.*, 713 P.2d 249, 253-54 (Alaska 1986).

Issues: Did the board err in not considering the compensability of her lumbar spine and her entitlement to PPI benefits? Did the board have substantial evidence in the record to conclude that Corey returned to work for the same wage and the same number of hours in January 2010? Did the board properly explain its rationale for ending disability payments in May 2011?

Holding/analysis: The commission concluded that the issues of the lumbar spine and PPI benefits were not before the board. Those issues were not identified in the pre-hearing conference summaries, which govern the issues at hearing, and the parties, both of whom were represented by attorneys, agreed at hearing that the issues before the board were the compensability of Corey’s left knee, her thoracic and cervical spine, TTD, TPD, a Social Security offset, and attorney fees and costs.

The commission remanded to the board to consider Corey’s eligibility for TTD or TPD benefits because the board decision lacked sufficient support in the record. “Nothing in the record substantiates that Corey was earning the same wage when she returned to work for NANA Regional in January 2010.” Dec. No. 192 at 17. In addition, the commission could not ascertain the board’s rationale for cutting off benefits as of the date of Corey’s layoff. A layoff does not necessarily end entitlement to temporary disability benefits. *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227 (Alaska 2003).