Alaska Workers' Compensation Appeals Commission

Evelyn Q. Rivera,
Appellant,

vs.

Wal-Mart Stores, Inc., American Home Assurance Co., and The Frank Gates Co.,
Appellees.

Final Decision
Decision No. 122 December 15, 2009

AWCAC Appeal No. 09-005
AWCB Decision No. 08-0260
AWCB Case Nos. 200514544 & 200609056

Appeal from Alaska Workers' Compensation Board Decision No. 08-0260 issued December 31, 2008, by southcentral panel members Darryl Jacquot, Chair, Howard (Tony) Hanson, Member for Labor, David Kester, Member for Industry.

Appearances: Phillip J. Eide, Eide, Gingras & Pate, P.C., for appellant Evelyn Q. Rivera. Michelle M. Meshke, Russell, Wagg, Cooper & Gabbert, for appellees Wal-Mart Stores, Inc., American Home Assurance Co., and The Frank Gates Co.

Commission proceedings: Appeal filed January 30, 2009. Late-filed reply brief accepted by order July 20, 2009. Oral argument presented August 13, 2009.

Commissioners: Jim Robison, Philip Ulmer, Kristin Knudsen.

By: Kristin Knudsen, Chair.

Evelyn Rivera worked at Wal-Mart Stores, Inc. (Wal-Mart) from September 2002 until January 2007. In September 2005, she reported that she injured her low back bending to pass a soda to a child. She returned to work after a short absence. She reported another injury to her low back in May 2006. Again, she returned to work, with restrictions, until her employment was terminated in January 2007. Rivera filed a workers' compensation claim for temporary total disability compensation after January 2007 and additional future medical care. Wal-Mart, which had paid brief periods of compensation after each injury, contested the claim on grounds that Rivera was not disabled and that her injuries were not a substantial factor or the substantial cause of a disability or need for medical care. After a hearing at which Rivera, a former co-worker,

Rivera's spouse, and her physician Dr. Grobner testified, the board denied her claim.[1] Rivera appeals.

Rivera argues that the board failed to consider her testimony, and other witness testimony, on the issue of causation. She argues that the Supreme Court's decision in *Smith v. University of Alaska, Fairbanks*[2] compels reversal and a remand for consideration of the lay testimony because the lay testimony tends to contradict the facts or assumptions underlying the expert witnesses' opinions against causation. She also argues that the board lacked substantial evidence to support its findings because it failed to give adequate weight to Dr. Grobner's testimony and ignored conflicts in the testimony of Dr. Klimow and Yodlowski.

The appellees contend that the board's findings are supported by substantial evidence in light of the whole record; thus the commission must uphold the board's conclusions. The commission, the appellees argue, may not set aside a board assessment of credibility of the medical evidence. The appellees contend that causation of the initial injury was not an issue the board was required to decide. Instead, they argue, the board acknowledged the testimony of the lay witnesses, but gave the most weight to medical opinion evidence on the issue of the continuing need for medical care and disability.

The contentions of the parties require the commission to decide if the board had sufficient evidence to support the board's conclusion that Rivera's employment injuries were not the legal cause of her need for continuing medical treatment. The commission must also decide if the board failed to engage in the necessary analysis of the lay testimony or if the board's characterization of Dr. Grobner's testimony was so faulty as to be reversible error.

The commission concludes the board's failure to make explicit findings regarding the lay testimony is not reversible error because the lay testimony did not establish

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[1] *Evelyn Q. Rivera v. Wal Mart Stores, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0260, 11 (Dec. 31, 2008) (D. Jacquot, Chair).

[2] 172 P.3d 782 (Alaska 2007).

material facts not assumed by the medical evidence. The commission concludes the board fairly considered the medical evidence. The board's reference to possibilities in Dr. Grobner's testimony[3] is a fair characterization, given Dr. Grobner's discussion of many factors involved in Rivera's condition, without identifying one as the substantial factor in her continuing pain and need for medical care. The board's characterization illustrates the contrast between Dr. Grobner's testimony and the opinions of Dr. Klimow and Dr. Yodlowski when it weighed the evidence. The commission affirms the board's decision.

1. Factual background.

Evelyn Rivera had been treated for back pain at the Elmendorf Air Force Base clinic in 2001, but she testified she had no problems with her back again until September 2005. At that time, she was working part-time at Wal-Mart. She stated that she set up a baby shower at Wal-Mart, and, when it was almost over, she experienced severe back pain bending to give a child a drink of soda. Rivera was treated with physical therapy and pain medication at Elmendorf's clinic. She missed less than a week of work. She returned to work on light duty, then at regular duty as a "processor" in the ladies department.

According to Rivera, one day in May 2006 she was told to go to work in the lawn and garden department. She and a co-worker unloaded plants and together moved them in a cart on a ramp in the lawn and garden area. She said pushing the cart of plants hurt her back. Then, she was pulling down a boxed dog kennel for a customer, and this hurt her back. Finally, she was working at the cashier station, and moving a bag of rocks across the scanner caused severe back pain. The next day she worked she had back pain pushing racks of plants (or putting plants on racks) and she reported her injury to her supervisor.

Rivera began treatment again at Elmendorf's clinic, but she was referred to Susan Klimow, M.D. She continued to work, missing less than two weeks of work in October 2006. After this, she was given a light duty assignment assisting in the fitting

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[3] *Evelyn Q. Rivera*, Bd. Dec. No. 08-0260 at 10.

rooms. According to Rivera, her employment was terminated in January 2007 because she was taking more than 15 minutes on her breaks; Rivera claimed she did so because her back hurt when she got up from sitting down. A Wal-Mart personnel manager confirmed that Rivera's employment was terminated after she and co-workers were observed (and videotaped) taking breaks that were too long. Rivera continued to receive treatment through the Elmendorf clinic and Dr. Klimow. Dr. Klimow asked for a neurosurgeon's opinion, so Rivera was examined by Estrada Bernard, Jr., M.D. Dr. Bernard reported April 2, 2007, that Rivera's back pain was "most consistent with muscle strain."[4] She had, he said, no indication of radiculopathy or spine instability and he recommended conservative therapy.

At Wal-Mart's request, Rivera was examined by Marilyn Yodlowski, M.D., in April 2007. Dr. Yodlowski gave the opinion that Rivera had temporarily exacerbated a pre-existing condition, but that these exacerbations had resolved within three months. She also gave an opinion that no further medical treatment was needed, and that Rivera was medically stable.

The day prior to the hearing on her claim, she was seen by Dr. Grobner.[5] Rivera did not want to return to the physician to whom she was formerly referred by the Elmendorf clinic, Dr. Klimow, because she was not friendly and Dr. Klimow's prescription for anti-depressant medication offended her.

2. Proceedings before the board.

Rivera filed a claim on April 3, 2007, for temporary total disability (TTD) compensation from May 29, 2006, and medical benefits. The employer filed a controversion notice, and answered the claim, admitting liability for TTD compensation for May 25, 2006, TTD compensation from October 17, 2006, through October 28,

[4] R. 0188.

[5] Dr. Grobner is now in private practice and did not require a referral from the Elmendorf clinic to see Rivera.

2006, and, medical and related benefits through April 18, 2007. Rivera's claim was amended to include additional benefits in a February 27, 2008, prehearing conference.[6]

The board heard Rivera's claim on June 25, 2008. The board identified that the only issues before it were the claim for TTD compensation from January 2007 forward and the need for medical treatment. The board heard testimony from Rivera, Carole Grobner, M.D., Brigitta Castillo (a friend and former co-worker), Roy Johnson (Rivera's spouse), and Tracy Wagoner (a Wal-Mart personnel manager). The board also had deposition testimony from Susan Klimow, M.D., who treated Rivera on referral from the Elmendorf Clinic, and Marilyn Yodlowski, M.D., the employer's medical examiner.

The board found that the presumption of compensability was raised by Dr. Grobner's testimony.[7] The board found that testimony of Drs. Yodlowski and Klimow rebutted the presumption.[8] The board then "review[ed] the record as [a] whole to determine whether the employee has proved his [sic] claim, by a preponderance of the evidence, that the 2005 and 2006 work injuries were a cause of her alleged current disability and need [for] treatment."[9]

The core of the board's decision is set out in these two paragraphs:

> We give the most weight to the opinion of the employee's treating physician, Dr. Klimow that the employee's pre-existing degenerative disc disease is the true underlying cause of the employee's current need for treatment. This opinion is soundly joined by the opinion of Dr. Yodlowski, the employer's physician. We give less weight to the opinions and testimony of Dr. Grobner, who we found to be inconclusive, and based on "possibilities" that the employee's low back condition is related to her work strains. We recognize that in *DeYoung v. NANA/Marriott*, 1 P3d 90 (Alaska 2000), our Supreme Court held that an aggravation of symptoms can be a compensable injury. However in the present case, we find that any aggravation of

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6 R. 0638. The commission notes that the appellant requested an eligibility evaluation and a report was produced by the evaluator that found the appellant not eligible for benefits. R. 0658-95.

7 *Evelyn Q. Rivera*, Bd. Dec. No. 08-0260 at 9.

8 *Id.* at 9-10.

9 *Id.* at 10.

> the employee's symptoms was temporary and transient. The employee initially missed little time from work associated with her injuries.
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> Based on a preponderance of the medical evidence, in particular the substantiated objective record, we conclude that the employee suffered temporary aggravations of a long pre-existing condition in 2005 and 2006. Accordingly, we conclude that any aggravation to her low back knee condition would have resolved shortly after each minor sprain/strain. We conclude the employer is no longer liable for the any medical care or time loss benefits associated with the employee's low back condition. As the employee has not prevailed on her claim, her associated claim for attorney's fees and costs are also denied.[10]

Rivera appeals.

3. Standard of review.

The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record.[11] The commission "do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of the weight to be accorded evidence is the task assigned to the board, . . . The commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive."[12] A board determination of the credibility of a witness who testifies before the board is binding on the commission.[13]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Alaska Workers' Compensation Act (Act).[14] The question whether the quantum of evidence is substantial enough to

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[10] *Evelyn Q. Rivera*, Bd. Dec. No. 08-0260 at 10.

[11] AS 23.30.128(b).

[12] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing AS 23.30.122).

[13] AS 23.30.128(b).

[14] *Id.*

support a conclusion in the contemplation of a reasonable mind is a question of law.[15] 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 to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[16]

4. Discussion.

a. Was the claimant's testimony material evidence that the board was required to assess for credibility?

The appellant argues that the board failed to consider her testimony and that of her husband and friend. She argues that this is reversible error under *Smith v. University of Alaska, Fairbanks*.[17] She argues her case is closely analogous to *Smith* because the lay testimony she presented would undermine the medical opinions that she had a temporary exacerbation of symptoms as a result of work duties and that the work injuries were not a cause of her current disability and need for treatment.[18]

Smith v. University of Alaska, Fairbanks concerned a claim based on an allegation that the claimant suffered a herniated disc at work. Smith, who had two prior back surgeries, was able to return to work for three years. In early July 1999, he twisted his back running down stairs at work and reported this injury. He worked two more weeks before starting annual leave. On August 2, 1999, he went out to help a friend take a boat to a lake. At the lake, he developed excruciating back pain climbing into his truck. His friend drove him to the surgeon who had done his prior surgeries. The pain escalated and within three days he was admitted to the hospital, where scarring from prior surgeries and a herniated disc were discovered and surgery performed. The

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

[16] *Cameron v. TAB Elec.,* Alaska Workers' Comp. App. Comm'n Dec. No. 089, 11 (Sept. 23, 2008) (quoting *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

[17] 172 P.3d 782 (Alaska 2007).

[18] Appellant's Br. 13.

crucial issue for the board to decide was whether the July injury was a legal cause of the surgery a month later.

Smith's surgeon, Dr. Vrablik, and the employer's medical examiner, Dr. Ballard, gave opinion evidence. Neither doctor saw Smith in July. Dr. Vrablik was unable to ascertain whether running down stairs or getting into the truck caused the herniated disc, and he could not say it was probable that the work injury caused the herniated disc. But, he believed it was possible the work injury was significant, based on the history Smith gave him. Dr. Ballard believed the work injury was a small contributing factor, but that the primary cause was the scarring from the prior surgeries. He did not believe Smith herniated his disc running down stairs; at most he suffered a muscle strain.

The Supreme Court noted that the lay testimony as to Smith's activities between the July work injury, his leave shortly afterward, and the August surgery could "undermine Dr. Ballard's assumptions"[19] regarding the course of Smith's illness or support Dr. Vrablik's reliance on Smith's history. Because neither Dr. Ballard nor Dr. Vrablik saw Smith between the July injury and the August visit to Dr. Vrablik, the lay testimony was material to the medical history of Smith's pain and activities. It was also material because the medical opinions on causation were based on factual assumptions regarding those topics.

In Smith's case, the Supreme Court was "unable to determine from the board's decision whether it applied an incorrect legal rule – that lay testimony should be disregarded in complex medical cases – or considered the lay testimony and determined that in Smith's case it had little probative value."[20] The Court remanded the case to the board (the third remand on appeal) with direction to "indicate whether it evaluated the lay testimony and what weight, if any, the lay testimony should have."[21]

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19 *Smith,* 172 P.3d at 790.

20 *Id.*

21 *Id*.

The lesson from *Smith* is that when the lay testimony is material to the crucial issue before the board, the board must indicate in its decision whether it evaluated the lay testimony and what weight, if any, it gave the lay testimony. Thus, to demonstrate reversible error, Rivera first must show her testimony, her husband's testimony, or her friend's testimony was material to a question the board had to answer in order to decide her claim.

Testimony is "material" when it has some logical connection with the consequential facts (i.e., facts that have a legal consequence to them).[22] For example, witness testimony that the witness saw an orange truck stopped at an intersection is material if the trier of fact must decide if an orange truck ran the intersection light. Even if testimony relates to the event, it may not be material if it does not establish consequential facts. For example, the presence of an orange truck at the intersection may not be material because the disputants admit a truck was stopped at the light and the question is whether a blue car ran the intersection. Although the witness's testimony about the truck may be relevant, it may need not be evaluated for credibility if there is no legal consequence to the fact established by the testimony because the parties admit the presence of the truck.

In this case, Wal-Mart conceded that Rivera had two work-related injuries.[23] Rivera did not dispute that she had a pre-existing degenerative condition in her spine.[24] Causation of the initial need for treatment was not an issue the board had to decide. Physicians treated Rivera before and after January 2007. Wal-Mart did not dispute that Rivera had back pain after her May 2006 injury and all the physicians who testified

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[22] Relevance and materiality are closely related concepts; materiality applies to the fact that relevant evidence seeks to establish: "Relevant evidence means evidence having any tendency to make the existence of *any fact that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence." Alaska Rule of Evidence 401 (emphasis added).

[23] Amended Answer to Employee's Workers' Comp. Claim, R. 0018.

[24] Although Rivera testified she did not remember getting treatment for back pain, she did not contest that the medical records demonstrating prior treatment and diagnosis were her records, or the medical evidence that she had progressive degenerative disease in her spine.

assumed that she had back pain. The diagnosis of Rivera's injury was not an issue, because all the physicians agreed that she suffered muscle strains or lumbago (low back pain) as a result of her work injuries. In addition, she suffered facet arthropathy[25] and degenerative disc disease,[26] but no physician said that either of these degenerative conditions was caused by the work she did.[27] Thus, the question the board had to answer was whether the muscle strains Rivera suffered at work required medical treatment after May 25, 2007, a year after the injury. It answered this question in the negative, based on the medical opinion evidence.

The lay testimony that Rivera offered was that she continued to suffer back pain after May 25, 2007, that the physical therapy prescribed by Dr. Hadley did not help her, but that the aquatic program, home exercise program, and the TENS unit prescribed by the Elmendorf Clinic did help her pain. But, none of the physicians who testified doubted Rivera experienced back pain, even after May 2007. However, Rivera's testimony did not distinguish between low back pain caused by a muscle strain or sprain, which all physicians agreed she suffered at work, and low back pain all

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[25] Dr. Grobner described facet arthropathy (or hypertrophy) as "similar to an arthritis but the joints are thickened . . . the closest way – term I can think of is similar to an arthritis." Hrg. Tr. 64:4-7. Dr. Klimow described facet arthropathy as "a degenerative joint type of disease that is often present." Klimow Dep. 12:5-6 (Jun. 2, 2008). Dr. Klimow testified that these degenerative changes can cause lower back pain. *Id*. at 12:22-24. Hypertrophy is the same as arthropathy. *Id*. at 14:2. Dr. Grobner also testified it was possible the facet hypertrophy (arthritis like condition) was causing Rivera's back pain. Hrg. Tr. 65:21-23.

[26] Dr. Grobner described this as "multi-level – level annular tears which are small tears in the disk." Hrg. Tr. 63:2-3. She also found a disc protrusion or bulge between the fourth and fifth lumbar vertebrae, without actual impingement or compression of a nerve. Hrg. Tr. 63:3-9. Dr. Grobner did think it likely that this caused Rivera's back pain because annular tears are not usually symptomatic and the bulge was to the left side instead of the right. Hrg. Tr. 65:23—66:2. Also, she testified that the annular tears were unlikely to have been caused by the work injuries. Hrg. Tr. 72:5-6.

[27] Rivera also sought to prove that her facet arthropathy or degenerative disc disease were aggravated by her work injuries.

physicians agreed could be caused by the degenerative conditions in her back.[28] Absent some medical evidence to support the premise, the fact that Rivera's back pain did not cease after May 2007, improved with a home exercise program, pool therapy, or use of a TENS unit, and still requires treatment, does not tend prove that her back pain was the result of the May 2006 or 2005 work-related injury. This is not a case in which there was a significant medical dispute as to diagnosis, in which the account of the patient's history and course of illness is material. The board could have decided that Rivera's testimony was not material to the diagnosis of the source of her back pain after May 25, 2007, and therefore not material to the disputed need for treatment of the work-related injury.

The second question the board answered was whether the injuries were a legal cause of a total disability – i.e., incapacity to earn the part-time wages Rivera was earning before her second injury. The board's description of the lay testimony Rivera presented is not challenged. Rather, she argues the board's silence on her testimony, and that of her husband and friend, means the board failed to consider lay testimony that was material to the second question decided by the board.

Rivera did not dispute that she was released to return to work at Wal-Mart with lifting and activity limitations after her injury and that she did return to work. Instead, Rivera sought to prove that, despite her physician's release to modified work and her transfer to the fitting room attendant job, she lacked the capacity to earn wages. She does not dispute that, after a brief absence, she worked without loss of earnings until she was dismissed because she was taking excessively long breaks with her co-workers. She claimed she was taking longer breaks *because* of her work injuries. Thus, Rivera argued that her termination is evidence that she lacked the capacity to earn wages in her part-time employment.

Rivera did not deny that the co-workers videotaped with her were also disciplined or that taking longer breaks is a terminable offense. Her testimony was that

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[28] See note 25 above. Dr. Yodlowski also testified that Rivera "clearly has well-documented underlying degenerative changes, which would account for her chronic pain." Yodlowski Dep. 43:17-18 (Jun. 4, 2008).

in January she worked in the fitting room, "phone-operated and I help the customer with the clothes when they'd have to try the clothes on."[29] She said that when her co-worker went to lunch or break, "I'm by myself and I has to do everything, open the – the – the fitting room for the customer and they leave a mess, clothes on the floor. I have to bend and pick them up, arrange everything for the next customer."[30]

Asked about the breaks, she said, "I'm taking too long breaks and I explained to them why was the reason but they – they say no."[31] She said she was taking extra time at break because when she got up, her back hurt.[32]

> [W]hen I sit down in my break like I'm going to sit down for 15 minutes, it was like – it was too long for me sit down and then I – when I tried to get up, I can't because my leg, my leg is getting numb and hurt and I cannot move it.[33]

Rivera testified she did not think she could do the work she was doing at Wal-Mart. She said she has low back pain after vacuuming or bending to take clothes from the dryer, putting a cake in the stove, or cleaning the bathtub.[34] She testified, "I would like to have a desk job that I don't has [sic] to be moving or pulling heavy stuff."[35]

Castillo only saw Rivera on breaks and coming or going to work. Castillo testified that Rivera sometimes showed by facial grimaces she had pain, Rivera sometimes said she was in pain, and Rivera sometimes needed help to stand up because of back pain.

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[29] Hrg. Tr. 32:10-12.

[30] Hrg. Tr. 32:15-19. In her deposition testimony, Rivera stated she could not do her fitting room job "because I'd have to be bending over, picking things up off the floor." Rivera Dep. 44:22-23 (Jul. 12, 2007).

[31] Hrg. Tr. 33:4-5.

[32] Hrg. Tr. 33:7.

[33] Hrg. Tr. 33:9-13. In July 2007, Rivera testified regarding her home activities, "I sit, I read, I watch television, I cook, I play with my children, seated, like Nintendo . . . ." (Rivera Dep. 42:25 – 43:1), and her response to the question, "How long can you sit?" "I could watch a movie. . . . But it always bothers me. I'm uncomfortable." *Id.* at 44:8-11. Rivera's appeal focuses on her hearing testimony, not her deposition testimony.

[34] Hrg. Tr. 36:15-19.

[35] Hrg. Tr. 37:12-13.

Castillo testified Rivera took longer breaks because "when she had bad back pain, she could not stand up."[36] Castillo did not explain why she [Castillo] took breaks that exceeded 15 minutes. Johnson, Rivera's spouse of three years, testified to Rivera's complaints of pain and what he did to assist her at home. He testified that Rivera was in "a lot of pain" after she was terminated, but that "she can do a hell of a lot more now than what she was doing before, just for the last four or five months."[37]

Wal-Mart did not deny that Rivera was not able to return to her former position. Instead, it placed her in the fitting room attendant job where she could work within her limitations. Therefore, Rivera had to establish that she was unable to work in the fitting room in January 2007 or that employment as a fitting room attendant was not evidence of earning capacity.[38] As proof that she lacked capacity to work in the fitting room, Rivera offered testimony that if she sat 15 minutes at her breaks, she would have to sit even longer because if she tried to stand up at the end of 15 minutes, her back would hurt and her leg would be getting numb. Rivera also testified she thought she had permission from "Tracy" to sit longer during her break:

> [E]very time I go to the break room and then I sit down, I'd get – I cannot get up and I stay a little bit, five minutes or more as I needed because my doctor's notes say that I can take 15 minutes as needed and then I asked the doctor what the – how you call it – human resource that I need – they explain me very well about I don't want to get in trouble, I don't want to get

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[36] Hrg. Tr. 95:4-5.

[37] Hrg. Tr. 111:3, 14-15.

[38] Rivera did not argue to the board or on appeal that her employment in the position of fitting room attendant was not evidence of wage-earning capacity. Instead, Rivera argued to the board that her dismissal was evidence she "still cannot attend and perform the duties of her job to her employer's satisfaction and – because of her back problem." Hrg. Tr. 7:6-8. She conceded that if she had been given a 30-minute break, "that may have solved the problem, but," she argued, "they didn't give her that opportunity." Hrg. Tr. 160:21-24. Because Rivera did not make the argument that the assignment to the fitting room was not evidence of earning capacity, the commission does not address the question.

> fired, and she always tell me oh no, it's not a problem, everything you – every time you need it, more than 15 minutes, I'm to take it.[39]

Rivera testified her "doctor's notes say that I can take 15 minutes as needed," but Rivera's physician stated she was to "alternate standing/walking/sitting, she should up to 5 minutes every 30 minutes as needed."[40] She was to avoid extended bending, squatting, or stooping, not lift more than 10 pounds occasionally or 5 pounds frequently.[41]

The board made no findings regarding the credibility of Rivera's testimony. When the board fails to make specific findings that it disbelieves a witness's testimony, the appeals commission must assume that lack of credibility is a not a relevant factor in the board's decision.[42] However, the rule that requires the commission to assume that failure to testify credibly was not a relevant factor in the board's decision does not mean the commission must assume the board believed the witness or that credibility of the testimony was a relevant factor in the decision. Put simply, board silence regarding witness testimony cannot be interpreted as *any* judgment on witness credibility.

Therefore, the commission examines the materiality of Rivera's testimony to the question before the board to determine if the board must consider it to decide the question. Rivera testified she had back pain and stiffness, and Castillo testified Rivera expressed back pain through grimaces and words at work. These were not facts that

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[39] Hrg. Tr. 31:18 – 32:5. Rivera's testimony as to what her doctor's notes say is hearsay. The board's rules permit the admission of hearsay "for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions." 8 AAC 45.120(e).

[40] R. 0291.

[41] *Id.*

[42] *Hoth v. Valley Constr.,* 671 P.2d 871, 874 n.3 (Alaska 1983).

the employer disputed. Rivera's husband testified Rivera "couldn't stand up . . . a few times I had to drive her [to work]."[43] Rivera and Castillo testified that she needed help to stand after sitting 15 minutes or that she needed to sit longer. However, Rivera did not testify that her back pain was so severe or continuous that she could not do the part-time fitting room work despite her physician's release to work. She did not testify that she would have quit her job due to her back pain or because her employer did not honor her limitations.[44] She did not testify that she sought greater restrictions from her physician. Instead, her evidence (that her injury prevented her from standing, unaided and without pain, after sitting down for 15 minutes) would tend to prove that her ability to stand after sitting for 15 minutes was limited by her injury. Without evidence that law, employer policy, employment contract, or medical advice required her to take her break by sitting down for 15 minutes continuously, or that other job duties required her to sit down 15 minutes and then stand, the board could find that testimony regarding this limitation was not material to whether Rivera was capable of continuing to earn wages as a part-time fitting room attendant, as she had been doing.

The board made no finding that this was a case involving complex medical issues. Data from the Alaska Department of Labor and Workforce Development reveal that low back pain and low back strains represent a high enough percentage of

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[43] Hrg. Tr. 109:17-18. He did not work at Wal-Mart, so his testimony regarding Rivera's department manager or what managers told Rivera is hearsay.

[44] Rivera's husband's testimony is that Rivera understood her employer was following her doctor's restrictions:

> She said because if I don't go, apparently, someone inform her in there that she was able to work, you know, because of her doctor limitations saying that you could do this, you could do this but you can't do that, you can't do that so she felt like that didn't have no choice but to go to work. Hrg. Tr. 109:20-25.

workplace injuries to be a not unusual source of workers' compensation claims.[45] This commission's past experience with the board informs the commissioners that the board has experience and familiarity with claims based on low back strains. The board was able to focus on the core question: did Rivera produce a preponderance of evidence that she was totally disabled after January 11, 2007, and, if so, was her May 2006 work-related injury a legal cause of that disability? The parties' lively dispute about Rivera's termination from her employment for taking excessively long breaks was, on close examination, not required to be decided before answering the question presented to the board.[46] The commission concludes the board's failure to include an assessment of the lay testimony on the extent of Rivera's disability was not reversible error.

b. Did the board improperly weigh Dr. Grobner's testimony?

The appellant argues that the board applied an improper test to weighing medical testimony by requiring Dr. Grobner's testimony to be based on "probabilities" instead of "possibilities." The appellant relies on *Smith v. University of Alaska, Fairbanks* for the rule that "a statement by a physician using a probability formula is not required to establish employer liability . . . ."[47]

In *Smith,* the Supreme Court noted that the board did not explicitly reject the employee's physician's testimony.[48] The board had noted that the employee's physician agreed that it was possible, but he could not say it was probable, that the work injury contributed to the need for surgery.[49] However, the board failed to discuss his opinion

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[45] *See* Alaska Dep't of Labor and Workforce Development, Case and Demographics Tables 2008, Table 6 (found at http://labor.alaska.gov/research/cfoi/osh-tables/case/table06cd.pdf), showing back injuries represent between 20 and 21 percent of reported private sector injuries.

[46] Had Rivera argued her case differently, the evidence may have been material. However, when an employee is represented by experienced counsel, as Rivera was, the board may assume that there were sound strategic reasons for Rivera's choice of argument.

[47] Appellant's Br. 14 (quoting *Smith*, 172 P.3d 791).

[48] 172 P.3d at 791.

[49] *Id.*

that, based on Smith's testimony, the work injury was a significant or substantial factor in causing the need for surgery. The board had stated: "No physician has stated, on a more probable than not basis, the employee's work caused his need for surgery . . . ."[50] The Supreme Court held that the board erred by requiring the employee to produce "a statement by a physician using a probability formula" to establish employer liability.[51] Thus, the board's error in *Smith* was in not recognizing that the employee's physician's testimony could be sufficient to support a finding of causation, if combined with a finding that the employee's testimony regarding the course of his symptoms was credible. The board did not commit the same error in this case.

First, the board explicitly rejected Dr. Grobner's testimony in favor of contrary medical opinions. The board stated:

> We give the most weight to the opinion of the employee's treating physician, Dr. Klimow that the employee's pre-existing degenerative disc disease is the true underlying cause of the employee's current need for treatment. This opinion is soundly joined by the opinion of Dr. Yodlowski, the employer's physician. We give less weight to the opinions and testimony of Dr. Grobner, who we found to be inconclusive, and based on "possibilities" that the employee's low back condition is related to her work strains. We recognize that in *DeYoung v. NANA/Marriott*, 1 P3d 90 (Alaska 2000), our Supreme Court held that an aggravation of symptoms can be a compensable injury. However in the present case, we find that any aggravation of the employee's symptoms was temporary and transient. The employee initially missed little time from work associated with her injuries.
>
> Based on a preponderance of the medical evidence, in particular the substantiated objective record, we conclude that the employee suffered temporary aggravations of a long pre-existing condition in 2005 and 2006.[52]

This is a clear statement rejecting Dr. Grobner's opinion, and adopting the opinions of Dr. Klimow and Dr. Yodlowski.

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50 *Id.*

51 *Id.* at 791-92.

52 *Evelyn Q. Rivera*, Bd. Dec. No. 08-0260 at 10.

Second, the board did not require Rivera to produce an opinion in a particular probability formula to have sufficient evidence to support an award. Instead, the board weighed conflicting medical opinions and gave less weight to the opinion it described as inconclusive in comparison to opinions of Drs. Klimow and Yodlowski. In *Smith*, the board did not weigh competing evidence – it found there was *no* medical opinion that the injury was work-related to put on the scales.

Dr. Grobner agreed that "lifting, bending, and twisting" can aggravate annular tears, protruding discs, and facet arthropathy,[53] but she also testified that the injury that Rivera suffered in September 2005 and May 2006 was a muscle strain.[54] She did not testify that Rivera's facet arthropathy was aggravated by the work injuries or made symptomatic by the work injury. Dr. Grobner did not believe that Rivera's annular tears and disc protrusions were the source of Rivera's back pain, but, she testified, it was possible that the facet arthropathy was causing the pain. She added "it is very difficult to determine specifically because there's more than one cause and usually it is a combination of causes that can cause this."[55] Dr. Grobner's testimony could be described as based on possibilities or inconclusive in some respects.[56] Dr. Grobner testified that it was possible that Rivera's back pain would need treatment for up to two

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[53] Hrg. Tr. 64:20-22.

[54] Hrg. Tr. 81:1-10.

[55] Hrg. Tr. 65:18-23. The day before the hearing Dr. Grobner diagnosed "somatic dysfunction" which she described as spasm of the smaller muscles between the vertebrae and a lack of proper movement or alignment in the spine. Hrg. Tr. 68:9-24. Although she agreed Rivera still had pain, she did not testify that the somatic dysfunction found in June 2008 was caused by, or aggravated by, Rivera's employment injuries in 2005 or 2006.

[56] Dr. Grobner's description of her current diagnosis and treatment plan was not uncertain. However, Dr. Grobner left the Air Force in May 2007. Her last examination of Rivera at the Elmendorf Clinic was Aug. 15, 2006, R. 0320, and she did not see Rivera again until the day before the hearing in June 2008. Hrg. Tr. 79:1-9. She had not reviewed Dr. Klimow's reports or Dr. Yodlowski's report, and did not know Rivera had seen Dr. Bernard. Hrg. Tr.79:16-80:6, 81:19. The 22-month examination gap and absent reports may account for Dr. Grobner's inconclusiveness regarding Rivera's back pain. She explicitly refused to offer opinion about prior back pain episodes because she did not know the specifics of the episodes. Hrg. Tr. 77:7-9.

years, but the board was not persuaded that Dr. Grobner's testimony preponderated over the testimony and opinions of the other two physicians. It did not, as the board in *Smith,* fail to acknowledge that the employee produced sufficient evidence to allow a finding in her favor – it simply did not find Dr. Grobner's testimony persuasive.

Although the appellant argued that opinions from Dr. Klimow and Dr. Yodlowski "are contradictory,"[57] the appellant failed to identify a material point of disagreement between them on the point cited by the board: that Rivera's degenerative disc disease is the cause of her need for treatment. The board acknowledged that an increase in symptoms of an unrelated condition caused by the employment may be compensable, but, by stating it found "that any aggravation of the employee's symptoms was temporary and transient,"[58] the board stated it was not persuaded that Rivera's pain or need for treatment after April 2007 was the result of an aggravation incurred in the May 2006 or September 2005 incidents. This is not a finding that Rivera does not need treatment or that she does not have limitations; it is a finding that after a certain time the employer was no longer liable for Rivera's need for treatment.

The board's decision to give greater weight to some medical evidence over competing evidence is conclusive. Here the commission does not find that the board applied an incorrect standard of law to the evidence before it, or that the board denied the parties a fair opportunity to present their evidence. The commission concludes the appellant failed to demonstrate that the board erred as a matter of law.

5. Conclusion.

The commission concludes the board's failure to make explicit findings regarding the lay testimony is not reversible error. Due to the admissions of the parties and the framework of the case presented, the board could have determined that the lay testimony did not establish material facts not assumed by the medical evidence or

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[57] Appellant's Br. 17. The appellant did not argue that Dr. Klimow's opinion and Dr. Yodlowski's opinion failed to overcome the presumption of compensability, thus conceding they are substantial evidence on which the board could rely to deny the appellant's claim.

[58] *Evelyn Q. Rivera*, Bd. Dec. No. 08-0260 at 10.

conceded by the parties. The commission concludes the board's analysis of the medical evidence did not contain reversible legal error. Therefore, the board's decision is AFFIRMED.

Date: *15 Dec 2009* 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 commission decision on the merits of this appeal from the board's decision and order. This decision affirms (approves) the board's decision denying the workers' compensation claim. This decision ends all administrative proceedings in M. Rivera's workers' compensation claim against Wal-Mart Stores, Inc. This decision becomes effective when distributed (mailed) to the parties unless proceedings to reconsider it or seek Supreme Court review are instituted. Find the date of distribution in the box below.

You have a right to appeal this decision to the Alaska Supreme Court. If you want to appeal this decision, proceedings to appeal must be instituted (started) in the Alaska Supreme Court within 30 days of the date of distribution of this final decision and be brought by a party in interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal 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).

If you wish to appeal 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

You can find more information online at the Alaska Appellate Courts' website:

http://courts.alaska.gov/appcts.htm

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 of this decision.

I certify that, with the exception of changes made in formatting for publication, correction of typographical errors, and insertion of omitted footnotes, this is a full and correct copy of the Final Decision No. 122 issued in the matter of *Rivera v. Wal-Mart Stores, Inc.,* AWCAC Appeal No. 09-005, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on December 15, 2009.

Date: *12/29/09*

signed

B. Ward, Appeals Commission Clerk