Case: *Marsh Creek, LLC, Zurich American Insurance Company, and NovaPro Risk Solutions vs. Brian Benston*, Alaska Workers' Comp. App. Comm'n Dec. No. 101 (March 13, 2009)

Facts: Brian Benston's (Benston) forearm had to be amputated after it was cut on glass from a broken window during a dispute with a fellow guest at a remote lodge where he was staying while working on a project for Marsh Creek, LLC (Marsh Creek). On August 8, 2006, an altercation occurred between Marsh Creek employees Benston and Robert Wilson and a bush pilot who was also staying at the lodge, Nels Wilson. Benston followed Nels Wilson into the kitchen and, according to some witnesses, punched out the glass in the kitchen door, or the door was shut on his outstretched arm or, according to expert testimony, the door's window was shattered on being slammed shut and Benston injured by flying glass. However the injury occurred, the result was a laceration of the radial artery in Benston's arm. Benston needed medical evacuation but the flight was unable to land that night due to poor visibility. He finally arrived at Providence Hospital in Anchorage late on August 9, 2006. A hand surgeon in Anchorage concluded that the delay in transport was the most significant cause in the need to amputate the forearm due to tissue death.

The employer controverted workers' compensation benefits on the grounds that the employee's injury was proximately caused by intoxication and by the willful intent to injure another, and that the injury did not arise out of and in the course of employment. Benston later amended his claim to assert that his employment led to a delay in medical treatment, resulting in the amputation of his forearm, and his claims were consolidated. The board made a number of credibility findings. The board concluded that Benston's claim was compensable because his injury was work-related, and the employer had not proved either that his injury was proximately caused by a willful intent to harm another or proximately caused by intoxication. The employer appealed.

Applicable law: AS 23.30.010 (as amended in 2005) provides in part:

> To establish a presumption under AS 23.30.120(a)(1) that the disability . . . arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability. . . . A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability . . . did not arise out of and in the course of the employment. When determining whether or not the . . . disability . . . arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . . Compensation or benefits under this chapter are payable for the disability . . . if, in relation to other causes, the employment is the substantial cause of the disability . . . .

AS 23.30.120(a) provides in part:

> In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
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> . . . .
>
> (3) the injury was not proximately caused by the intoxication of the injured employee . . . ;
>
> (4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

If the employer presents substantial evidence of willful intention, then the board must "weigh the evidence and decide if the employer proved, by a preponderance of the evidence, that the injured employee (1) had a willful intent to injure or kill, demonstrated by (a) premeditation and malice *or* (b) impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to it; (2) the injured employee did an act that reasonably could be expected to cause injury to himself or another; and, (3) the employee's injury was a proximate result of that act." Dec. No. 101 at 20.

AS 23.30.235 bars compensation for an injury "(1) proximately caused by the employee's wilful intent to injure or kill any person; (2) proximately caused by intoxication of the injured employee . . . ."

"When the presumption against causation by intoxication in AS 23.30.120(a)(3) is overcome, and the bar to compensation under AS 23.30.235(2) is asserted, the question the board must first answer is 'the question . . . whether the worker was "impaired" as a result of alcohol or drugs.' Impairment may be impairment of judgment or coordination. Then, the board must decide if 'the employee's impaired condition proximately cause[d] the injury.'" Dec. No. 101 at 33-34.

On the remote site doctrine: "[I]t is not enough that the injury occur in an area remote from 'a civilized community.' The employee's regular, on-going residence in the employer's facilities, together with the lack of facilities and population not under the employer's control and the employee's inability to freely access such facilities and population, distinguish the remote work site from a small, remote community where the employee resides." *Id.* at 12.

The traveling employee rule provides:

> Employees whose work entails travel away from the employer's premises are held in the majority of jurisdictions to be within the course of their employment continuously during the trip, except when a distinct departure on a personal errand is shown. Thus, injuries arising out of the necessity of sleeping in hotels or eating in restaurants away from home are usually held compensable. 2 A. Larson & L. Larson, *Larson's Workers' Compensation Law*, § 25.01 (2008).

Injuries sustained in a fight may be compensable when the workplace environment increased the risk of attack on the injured employee or the fight was motivated by something related to the employment. *See* 1 A. Larson & L. Larson, *Larson's Workers' Compensation Law*, § 8.01[1][b], 8-7 (2008).

Issues: (1) Did the board improperly apply the remote site doctrine? (2) Did the board fail to decide whether the dispute that resulted in the injury was work-related? (3) Did the board fail to identify whether Benston's actions were willful, a necessary finding to determine whether the injury was proximately caused by Benston trying to harm another person? (4) Did the board err in assuming that the employee's ultimate disability (amputated forearm) necessarily shares the character (work-related or not work-related) of the initial injury (severed artery)? (5) Did the board properly admit expert testimony on glass shatter and blood spatter? (6) Did the board err in deciding the employer had failed to prove the intoxication defense?

Holding/analysis: (1) The board erred in applying the remote site doctrine but the error was harmless because of the board's alternate analysis that supports application of the traveling employee rule. The remote site doctrine does not apply because Benston and Robert Wilson were "experts in their fields temporarily in a village to do a specific job" and "[u]nlike remote site work camps, Nelson Lagoon, however remote it is from larger communities, does not exist to serve the industrial purposes of Benston's employer." Dec. No. 101 at 12-13. The commission concluded that the traveling employee rule would apply and result in the compensability presumption attaching to Benston's claim:

> The employee's presence at a lodging provided by the employer, the presence of the employee in the common area of the lodging at the time of injury, employer encouragement of interaction with other guests, and the employer's tolerance of drinking alcohol in "off duty" hours were sufficient facts to permit the presumption to be applied to a traveling employee. *Id.* at 14-15.

(2) The board had sufficient evidence to conclude that the fight arose out of employment because the fight was motivated by something related to the employment. Benston and Robert Wilson were staying at the lodge at the employer's direction and their supervisor knew of negative interactions between them and Nels Wilson. Moreover, "the denial of access to lodging facilities to Benston and his co-worker engendered the quarrel" and a "dispute between guests over the access to common lodging facilities could be considered incident to the necessity of staying in the lodging[.]" "The commission concludes that, because the board had sufficient evidence in the record to support a finding that the subject matter of the altercation arose out of the employment, the board's error in failing to identify the specific origin or subject matter of the quarrel is harmless . . . ." *Id.* at 16-17.

(3) The board required the employer to eliminate the possibility that the injury was *not* the result of the employee's willful intent to injure another. This is not the correct legal analysis (see above applicable law). The board decided that the employee's credible

testimony that he followed Nels Wilson because "the conversation was not over" demonstrated he was not acting with willful intent to harm. But the board failed to complete the required analysis, specifically it failed to consider whether Benston's actions amounted to "impulsive conduct that is so serious and so likely to result in injury that willfulness must be imputed to" as well as whether "the injured employee did an act that reasonably could be expected to cause injury to himself or another." The board found that Nels Wilson slammed the door on Benston's arm. But it also concluded that substantial evidence supported that Benston punched the glass in anger or frustration. The commission observed that punching glass could amount to serious impulsive conduct likely to result in injury. The commission remanded to the board to complete its analysis of the willful intent defense.

(4) The board erred in assuming that Benston's ultimate disability, amputation of his forearm, was only work-related if the initial injury was. On remand if the board decided the initial injury was not work-related, the commission concluded that it must determine whether Benston's claim is compensable using the analysis set out in AS 23.30.010(a) (as amended in 2005). Employment may be the substantial cause in bringing about a disability when the initial injury was not work-related if employment conditions aggravate, accelerate, or combine with personal injury or illness so much as to be the substantial cause in bringing about the disability. In Benston's case, his theory was that the work, owing to its location, was the substantial cause in bringing about the amputation of his forearm, even if the initial laceration injury was not work-related.

(5) The commission concluded that the board properly admitted expert testimony regarding glass shatter, but that the testimony regarding blood spatter did not have sufficient foundation to be expert testimony. The commission concluded the engineer had experience and expertise in analyzing how glass shatters. However, he lacked sufficient experience (he worked on only one case of a blood stain on a highway) and had no forensic training in reading blood spatter patterns, so allowing him to testify from the photographs about what the blood spatter shows about how the arm was injured was in error. The commission concluded that when a witness relies on his experiences and expertise, the board need not apply the *Daubert/Coons* test before admission. Dec. No. 101 at 31-32.

(6) The commission concluded that any errors the board made in its consideration of evidence presented on the intoxication claim bar in AS 23.30.235(2) are harmless:

> [T]he board's lengthy catalog of each witness's testimony on the point of Benston's alcohol consumption, the explicit findings on each witness's credibility, and the characterization of Benston's testimony as "candid, unevasive, and credible . . . the *most* credible of those witnesses who testified," demonstrates the board weighed the testimonial evidence about the amount of alcohol Benston drank before the injury. The commission concludes the board's statement (suggesting it relied on the lack of contradictory evidence to find Benston's testimony was credible) was unfortunately misleading, but ultimately a harmless error. *Id.* at 35.

In addition, the commission concluded that "any surprise occasioned by the failure to list Dr. Schoenfeld prior to the opening of the hearing in April or to provide a detailed summary of his testimony was cured by the board's order" leaving the record open for cross-examination or a supplemental deposition of Dr. Schoenfeld. *Id.* at 36. In addition, the board's reliance on Dr. Schoenfield's opinion that he believed Benston was "not likely impaired" when his injury occurred was not based on a misunderstanding of his testimony.