BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL FROM THE DEPARTMENT OF ADMINISTRATION

In the Matter of C. C.	)	
	)	OAH No. 06-0679-PER
	)	

DECISION

I. Introduction

This case is the appeal of a decision by the Alaska Division of Retirements and Benefits (Division) to deny C. C. Public Employees' Retirement System (PERS) occupational disability benefits. The Division was represented in this appeal by Assistant Attorney General Toby N. Steinberger. Mr. C. represented himself.

After the evidentiary hearing in this appeal, the record was re-opened to allow updated medical evidence after Mr. C.'s back surgery. Based on this new evidence, the Division conceded that as a result of an on-the-job injury on March XX, 2006, Mr. C. eventually became permanently disabled.

The Division, however, maintained its position that Mr. C. did not terminate his employment because of this disability and is not, therefore, eligible for PERS occupational retirement benefits. On May 29, 2009, final briefs were due. The parties filed additional briefing after this deadline regarding the admission of the other material in these final submissions. None of the requests to exclude evidence is granted.

The Administrative Law Judge concludes that Mr. C. is eligible for occupational disability based on a close finding of fact that by a preponderance of the evidence, Mr. C. showed that his disability was the proximate cause of his decision to terminate his employment.

II. Facts

In 1981, Mr. C. began working as a firefighter for the No Name Fire Department.[1] Mr. C. has a history of back pain that preceded his treatment for an on-the-job injury in March of 1999. On May 18, 2002, Mr. C. suffered another on-the-job injury to his back while pulling a fire-hose. On October 31, 2003, Mr. C. suffered another on-the-job injury to his back as a result of riding over a bump in a fire truck. None of these injuries resulted in significant time off work, but he was diagnosed with degenerative disc disease. [2]

[1] Ex. I, page 34.
[2] Ex. I.

On December 24, 2003, however, Mr. C. was incapacitated with back pain due to a diffuse disc bulge. Mr. C. underwent several months of physical therapy before returning to work after taking the physical capacities evaluation and being cleared to return to work by his orthopedic surgeon, Dr. D. P., on July 26, 2004.[3] Dr. P. later opined that the disc injury that put Mr. C. out of work for the first half of 2004 had resolved and was no longer significantly limiting Mr. C.'s activities. [4] On November 26, 2004, Mr. C. again experienced back pain resulting from a slip on the job, but this did not result in significant absence from work.[5]

During 2005, Mr. C. continued to experience intermittent back pain but he continued to work as a firefighter. Mr. C. retired under the old No Name Police and Fire Retirement system in May of 2005, but he was re-hired in a PERS covered position by the No Name Fire Department on June 2, 2005.[6]

On March 16, 2006, Mr. C.'s estranged wife called the No Name Fire Department and reported that there was No Name Fire Department equipment stored at her home, which she had shared with Mr. C. before their separation.[7]

On March 20, 2006, the No Name Fire Department notified the No Name Police Department of this report. On March 20, 2006 the detective and a battalion chief interviewed Ms C. and looked at the equipment at her home.[8]

On March 26, 2006, Mr. C. fell on the ice in the parking lot of the fire station. He was given first aid for abrasions by a fellow employee and he filed a report of his injury. Mr. C. stayed at work trying to see if his back would start feeling better, but the pain got worse, so he went home. [9]

Mr. C.'s testimony was that he realized that he was feeling worse over the next few days and would not be able to return to work right away. At that point, Mr. C. hoped that he would be able to get better if he lay on his back for a few days. Mr. C. explained he hoped that his injury would be "a temporary thing," that his symptoms would diminish, and he would be able to go back to work. Mr. C. checked with another battalion chief to see if he needed to get a return to

[3] Ex. I.
[4] Ex. N.
[5] Ex. I, page 5.
[6] Recording of Hearing-Testimony of Deputy Fire Chief S.
[7] Recording of Hearing-Testimony of Deputy Fire Chief S.
[8] Ex. D & Recording of Hearing-Testimony of Deputy Fire Chief S.
[9] Recording of Hearing -0:30-Testimony of Mr. C..

work release and was told that he should get one if he was going to be absent from work as the result of an on the-job-injury.

Mr. C. explained he called around and could not get an appointment right away, so he went into the emergency room, on March 28, 2006.[10] The purpose of the emergency visit was primarily to get a return to work slip. Mr. C. got a return to work slip from the emergency room. Mr. C. explained that he knew that he could not get an appointment with Dr. P. right away, because in the past he had waited over a month to get in to see Dr. P. He therefore made an appointment with Dr. M., a chiropractor, for March 31, 2006.[11]

On March 30, 2006, the No Name Fire Department informed Mr. C. that he was under investigation in a disciplinary proceeding, that he was on administrative leave pending the outcome of the investigation, and that he was not allowed on No Name Fire Department property without permission of the Chief. [12]

On March 31, 2006, the No Name Police Department served a search warrant on Mr. C. and interviewed him.[13]

On March 31, 2006, Mr. C. also went to his first appointment with Dr. M. Mr. C.'s recollection of that visit at the hearing was that Dr. M. told him that based on Mr. C.'s history and what Dr. M. was seeing right then, Dr. M. did not want to wait to order an MRI, so he ordered an MRI to be scheduled as soon as possible. Dr. M. continued to see Mr. C. until the MRI on April 5, 2006.[14]

On April 6, 2006, the day after the MRI, Mr. C. met with Dr. M., who had received Mr. C.'s MRI results. Mr. C. testified that at that meeting, Dr. M. told him, in so many words "you're done," meaning that Mr. C. was not going to be able to work as a firefighter any more. Mr. C. explained that this news did not come as a great surprise to him, and that he was half expecting it. Mr. C. explained that when he had been recovering from his first disc injury in 2003-2004, he had been told by his care providers that some people recovered from these types of injury and some did not. Mr. C.'s impression was that when his MRI came out for his first disc injury in 2004, all the health care providers who looked at it were of the opinion that he

[10] Recording of Hearing at 3:29-3:45-Testimony of Mr. C.
[11] Recording of Hearing at 3:29-3:45-Testimony of Mr. C.
[12] Ex. B.
[13] Ex. D.
[14] Ex. D.
[14] Agency Record Page 47, Ex. I, page 264 & Recording of Hearing at 0:48-Testimony of Dr. M.

might not recover and that his chiropractor at that time told him that he would not be able to return to firefighting. [15]

After his first disc injury in 2003-2004, Mr. C.'s impression was that even if he did recover he was at increased risk of re-injury and that if he re-injured himself that he was at risk of being disabled not only from future work as a firefighter, but for permanent disabilities that would seriously limit his ability to do day to day activities, and things that he wanted to do and enjoyed doing in his life. Mr. C. explained working as a firefighter was one of those things that he really enjoyed doing, so after his first disc injury, he had worked really hard at his physical therapy so that he would be able to return to work. Mr. C. explained that as a result of these warnings he had heard from his health care providers after his first disc injury, he was not surprised when Dr. M. told him on April 6, 2006 that he had a huge herniation in his disc and would not by able to work as a firefighter again. [16]

Dr. M. testified that he had seen some of Mr. C.'s medical records and the MRI prior to meeting with Mr. C. on April 6, 2006. [17] Dr. M.'s office generated a form which indicated that Mr. C. was not able to return to work. The anticipated return to work date indicated on the form was June 16, 2006, but in his testimony, Dr. M. explained that the form and the report he made on April 4, 2006, were generated through a new computer system that he was trying to use at the time but subsequently abandoned. Dr. M. explained under cross examination that part of the reason he later abandoned this program was the programs lack of flexibility in allowing him to indicate what he wanted to on the reports and forms it generated.[18] Dr. M. explained he used the anticipated return to work date on the form more to indicate when he needed to do a follow-up evaluation, and that in this case it was not used as an indicator of when Dr. M. anticipated that Mr. C. would actually be able to return to work. [19]

At the hearing, Dr. M. testified that he has been practicing as a chiropractor since 1990. At a meeting with Mr. C. in early April 2006, Dr. M. told Mr. C. that he should not work as a firefighter anymore and he should consider a medical retirement.[20] Dr. M. based his opinion in part on indications that there was another injury in addition to the old disc injury in a different part of the spine, the facet joint. Dr. M. concluded that the multiple points of damage on that

[15] Recording of Hearing at 3:29-3:45-Testimony of Mr. C.
[16] Recording of Hearing at 3:29-3:45-Testimony of Mr. C.
[17] Recording of Hearing at 0:48-Testimony of Dr. M.
[18] Recording of Hearing at 0:45-60-Testimony of Dr. M.
[19] Recording of Hearing at 0:40-50-Testimony of Dr. M.

part of the spine made the joint unstable and made the risk to Mr. C. and his co-workers too high to recommend that he return to work as a firefighter.[21]

The Division argues that Dr. M. could not have given Mr. C. the advice on April 6, 2006, that he would no longer be able to work as a firefighter and should consider medical retirement.

This advice turned out to be correct. The Division is no longer contesting that Mr. C. was in fact disabled as the result of his March 26, 2006 on-the-job injury.

The Division's argument is that Dr. M. and Mr. C. must be incorrect that Dr. M. told Mr. C. that he would not be able to return to work on April 6, 2006 because on that date Dr. M.'s office issued a return-to-work-slip, which indicated that Mr. C. would be expected to return to work on June 16, 2006. The Division also argues that other evidence indicates that Dr. M. did not have sufficient information to give Mr. C. this advice as of April 6, 2006. The Division points out that at the hearing, Dr. M. based part of his opinion of Mr. C.'s disability on the EMG report from Dr. B., which Dr. M. concluded indicated that there was more than one site of injury to the joint, which made the joint unstable and increased the likelihood of re-injury. Dr. M. testified that he knew the results of the test before he received the EMG report from Dr. B. because Dr. B. works in his office and he spoke with him before he received the letter.[22] But the Division argues that because Dr. M.'s case notes do not reference scheduling the EMG until May 20, 2006, Dr. M.'s testimony at the hearing that the EMG results indicating that the both the disc and the facet where damaged where part of the basis for his conclusion that Mr. C. was disabled on April 6, 2006, must be incorrect.

While the Division is correct that at the hearing Dr. M. appeared to have been confused about the dates of the tests and when he knew what, Dr. M.'s testimony that he advised Mr. C. to retire from firefighting in early April of 2006 was not seriously undermined by this confusion. Dr. M.'s focus at the hearing appears to have been on explaining his reasons for his opinion that Mr. C. should not continue firefighting rather than on the dates when different events in his treatment of Mr. C. took place.

Whether Mr. C. was permanently disabled was still very much at issue during the hearing. Dr. M. appeared to be somewhat frustrated with the Division's attacks on some of his

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[20] Recording of Hearing at 0:40-50-Testimony of Dr. M.
[21] Recording of Hearing at 0:40-50-Testimony of Dr. M.
[22] Recording of Hearing at 1:03-Testimony of Dr. M.

assumptions.[23] Dr. M. was very credible in his testimony that Mr. C. resigned based on his advice. Dr. M. stated at the hearing that by the April 6, 2006 meeting he had only reviewed some past medical records and the MRI.[24] At the hearing, Dr. M. testified that he in part based his opinion that Mr. C. should not return to work on Mr. C.'s history of re-injuring this part of his spine. Dr. M. testified that every time such an injury takes place, the condition of the spine gets worse and the likelihood of re-injury increases. Dr. M. testified that if he had 20/20 hindsight with what he knew now about the 2006 injury, he would have advised Mr. C. not to go back to work after the 2003 injury.[25] Dr. M.'s opinion was that Mr. C.'s first disc rupture must have improved after the 2003 injury because he was able to return to work, but that the 2006 injury made the disc as bad as it had been in 2003 and that additionally problems in the facet joint became involved in producing Mr. C.'s symptoms.[26]

Although the Division is correct that the information in the EMG report indicating that the facet joint was also injured was probably not available to Dr. M. until after April 6, 2006, the MRI report dated April 5, 2006, does note that "the facet joints demonstrate moderate bilateral neural stenosis." The MRI report dated April 5, 2006, also notes that both "facet joint degenerative hypertrophy" and the disc herniation both contribute to the nerve impingement.[27] These findings show that the MRI report Dr. M. reviewed before the April 6, 2006 meeting with Mr. C. indicate that facet joint abnormalities were also contributing to Mr. C.'s symptoms. This is consistent with Dr. M.'s testimony that part of his opinion that Mr. C. should not return to work, which he shared with Mr. C. in early April, was based on his conclusion that the involvement of the facet joint made Mr. C. more susceptible to re-injury.

While Dr. M.'s opinion was that the EMG report also indicated facet joint damage, the fact that the EMG report was not available to Dr. M. by April 6, 2006, does not make it unlikely that Dr. M. advised Mr. C. to retire on April 6, 2006. Dr. M.'s confusion at the hearing about the date that he was aware of the information in EMG report is only indicative of his understandable

[23] For example, the Division questioned Dr. M. regarding his April 4, 2008 report, at Agency Record P663, about how he knew that Mr. C.'s job required "constant" (Dr. M. actually characterized it in the report as "heavy") lifting, since he was a senior fire captain, implying that Mr. C.'s duties required a lower level of physical fitness than a regular firefighter's. This line of inquiry appeared to frustrate Dr. M., and was subsequently debunked by the testimony of the Division's own witness, Deputy Fire Chief S., who admitted that Mr. C.'s job required that he be able to meet all the physical requirements for firefighting. Recording of Hearing at 0:55-Testimony of Dr. M.
[24] Recording of Hearing at 0:48-Testimony of Dr. M.
[25] Recording of Hearing at 1:29-Testimony of Dr. M.
[26] Recording of Hearing -Testimony of Dr. M.
[27] Agency Record at P46.

confusion about when he learned the information in the EMG report that confirmed the information in the MRI report about the injury to Mr. C.'s facet joint. This does not show that Dr. M. did not know that the facet joint was involved prior to April 6, 2006. It also does not show that Dr. M. was confused about whether or not he advised Mr. C. to retire in early April of 2006.

On April 6, 2006, Mr. C. resigned from his PERS covered position, claiming that disability from his March 26, 2006 injury was the reason for his termination.

Despite the preponderance of the evidence showing that Mr. C. resigned "because of" his disability, the evidence of other possible motivations for his resignation make this a close finding of fact. Mr. C. was aware that he was facing the possibility of serious disciplinary actions and criminal charges when he resigned. Mr. C. already received non-PERS retirement benefits and was therefore not entirely dependent on his continued employment or the successful outcome of work related disability claims. There is also evidence that Mr. C. may never have recovered as fully from his first disc injury as he led his employer to believe, and may have been in pain even before he re-injured himself in 2006. Mr. C. was also having problems with his marriage immediately prior to his resignation.

While it is certainly possible that Mr. C. resigned due to other motivations, it is more likely than not that he would not have resigned but for his disability.

III. Discussion

PERS Occupational Disability Benefits Eligibility

The provisions of AS 39.35.410(a) determine whether a PERS member is eligible for occupational disability benefits. The statute provides:

> An employee is eligible for an occupational disability benefit if employment is terminated because of a total and apparently permanent occupational disability, as defined in AS 39.35.680, before the employee's normal retirement date.

The term "occupational disability" is defined in AS 39.35.680(27), which states:

> (27) "occupational disability" means a physical or mental condition that, in the judgment of the administrator, presumably permanently prevents an employee from satisfactorily performing the employee's usual duties for an employer or the duties of another comparable position or job that an employer makes

> available and for which the employee is qualified by training or education; however, the proximate cause of the condition must be a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties and not the proximate result of the willful negligence of the employee[.]

A public employee seeking PERS disability benefits has the burden of proving he has met the required elements of the statute.[28] A public employee is eligible for occupational disability benefits if the employee's physical condition prevents the employee from performing his usual duties and "the proximate cause of the condition [is] a bodily injury sustained, or a hazard undergone, while in the performance and within the scope of the employee's duties."[29] A bodily injury or hazard in the course of employment is the "proximate cause" of a condition if it aggravates, accelerates, or combines with a pre-existing condition[30] and is a substantial factor in the disability, regardless of whether a non-occupational injury could independently have caused the disability.[31] An injury or hazard may be a substantial factor in a disability if it aggravates the symptoms of a pre-existing condition (*e.g.*, pain), even if it does not aggravate the underlying condition.[32]

In this case, the Division denied occupational disability benefits to Mr. C. because it determined that he does not suffer from a presumably permanent disabling condition caused by a work injury and because it determined that he had terminated his employment because he believed he would be fired not because of a disability. The Division has now determined that it no longer contests Mr. C.'s claim that he suffers from a presumably permanent disabling condition caused by a work injury, but continues to contest his assertion that he terminated his employment because of his disability. Mr. C. has the burden of proving by a preponderance of the evidence that all the elements of the statute have been met.[33]

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[28] *Rhines v. State*, 30. P.3d 621, 628 (Alaska 2001); *Cacioppo v. State*, 813 P.2d 679 (Alaska 1991); *Stalnaker v. Williams,* 960 P.2d 590, 593 (Alaska 1998); *see also,* A.S. 39.35.400 ("A disabled employee . . . shall provide the administrator . . . proof of continuing eligibility . . ."); *Bowen v. Yuckert,* 482 U.S. 137, 146 n. 5, 107 S.Ct. 2287, 2294 (1987) ("It is not unreasonable to require the claimant, who is in a better position to provide information about his own medical condition, to do so.").

[29] AS 39.35.680(27).

[30] *Hester v. Public Employees' Retirement Board*, 817 P.2d 472, 475 (Alaska 1991) (adopting test identical to that applied in workers' compensation cases).

[31] *State, Public Employees' Retirement Board v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991).

[32] *Hester v. Public Employees' Retirement Board*, *supra*, 817 P.2d at 476, note 7. *See* Lopez v. *Administrator, Public Employees' Retirement System*, 20 P.3d 568, 573-574 (Alaska 2001);

[33] *Rhines v. State*, 30 P.3d 621, 628 (Alaska 2001), *citing Stalnaker v. Williams*, 960 P.2d 590, 594 (Alaska 1998); *see also* AS 44.62.460(e)(2).

Mr. C.'s Date of Termination

As noted above, the sole remaining issue in this case is the causal relationship between Mr. C.'s disability and the termination of his employment. The two steps in determining whether this relationship should result in eligibility are first to determine when the employment relationship terminated and second to determine why it was terminated.[34] Termination of employment occurs upon complete severance of the employer-employee relationship.[35] Mr. C. being placed on administrative leave, pending the investigation into his alleged misconduct was not a termination of employment for the purpose of determining his eligibility of PERS disability benefits.[36] In this case the date of termination is April 6, 2006, when Mr. C. resigned. The inquiry in this case therefore depends on Mr. C.'s medical status on that date and the factors that caused his resignation on that date.

Mr. C.'s Disability was an Actual Cause of his Termination

Mr. C. first must show that he was terminated from his position "because of" his occupational disability. In the case of *Stalnaker v. M.L.D.*[37], the Alaska Supreme Court held that the tort law theory of "legal causation" should be used to determine whether the "because of" requirement in the statute has been satisfied in PERS occupational disability cases. It is a two-part test.[38] The first inquiry is a "but for" prong that looks at whether the claimant's disability is an actual cause of the termination.[39] The second part considers the "proximate cause" or, legal policy prong. If the disability is found to be an actual cause of the termination, the legal policy inquiry is to determine the significance and importance of the disability's role in the termination and then determine whether to assign legal responsibility.[40]

The Division argues that Mr. C. was terminated from his position at the municipality because he was aware that he was being investigated for the theft of his employer's property, and he expected that he would soon be dismissed, and not because of his medical condition.

As discussed above, the Division provided evidence supporting its position that Mr. C. may not have believed that he was disabled when he filed his resignation and resigned for other reasons. The Division provided evidence of the personnel action and possibility of potential

[34] *Rhines*, 30 P.3d at 625.
[35] *Rhines*, 30 P.3d at 625.
[36] *Rhines*, 30 P.3d at 626.
[37] 939 P.2d 407 (Alaska 1997).
[38] *Rhines*, 30 P.2d at 625; *Stalnaker*, 939 P.2d at 412.
[39] *Stalnaker v. M.L.D.* 939 P.2d 407, 412 (Alaska 1997).

criminal charges as an alternative motivation for Mr. C.'s decision to resign. The Division also provided the evidence previously discussed about the timing of medical tests and advice, which it argued showed that Mr. C. could not have known that he was disabled before he decided to resign.

The Division's evidence, however, is outweighed by the evidence that Mr. C. terminated because of his disability. The medical evidence shows that Mr. C. suffered a new, permanently disabling injury prior to his termination. This evidence is supported by Mr. C.'s testimony and the testimony of his co-worker, who treated him after his alleged fall on the ice about ten days prior to his termination.

While it is certainly possible that this injury was staged, or that Mr. C. did not realize how serious his medical condition was, and used his injury as a pretext for his resignation, it is more likely than not that, that but for this disabling injury, Mr. C. would not have resigned, and would have attempted to return to work by fighting any personnel action as he fought the criminal charges brought against him and the Division's determinations in this case. Mr. C. does not appear to be afraid to take on a fight to keep his job, as demonstrated by his participation in the several months of difficult physical rehabilitation that he had to successfully complete after his first injury in order to get cleared to return to work.

The injury that caused Mr. C.'s physical limitations, or disabilities, were an actual cause of his termination. The Division admits that Mr. C. could not still be working for the Fire Department even if there had been no disciplinary issue. Although this is a close case, the preponderance in the record shows that Mr. C. would not have resigned, and would have attempted to remain employed, *but for* his disabling injury.

Mr. C.'s Disability is the Proximate Cause of his Termination

Proximate cause is relevant only if actual cause has been found.[41] Since Mr. C.'s disability was an actual cause of his termination, it is necessary to address the issue whether legal responsibility, or proximate cause, exists. Under the legal policy prong, in the tort context, the inquiry focuses on whether the conduct of the defendant in the personal injury claim "has been so significant and important a cause that the defendant should be legally responsible."

[40] *Stalnaker*, 939 P.2d at 412.
[41] *Rhines* at 628.

In the context of a PERS disability case, the inquiry is whether the disability was a substantial factor in the PERS member's termination.[42] This inquiry requires an evaluation of the significance and importance of the disability's causal role in the termination. Normally, in order to satisfy the substantial factor test it must be shown that the result, in this case Mr. C.'s termination, would not have happened "but for" the relevant cause. In this case, the relevant cause is Mr. C.'s disability. In order to satisfy the substantial factor test, it must be also be shown that the relevant cause was so important in bringing about the result that reasonable people would regard it as a cause and attach responsibility to that cause.[43]

If two causes concur to bring about one event, and either one of them, operating alone, would have been sufficient to cause the identical result, both are proximate causes.[44]

Even if Mr. C. would have been terminated for his alleged misconduct, his alleged misconduct could not be a cause of his termination unless it caused Mr. C. to terminate his employment, because he resigned. Mr. C. was not terminated for misconduct. Mr. C. terminated his employment himself. Therefore, the personnel action that began before his termination could not have been an actual cause for his termination unless Mr. C. would not have resigned "but for" the personnel action that was initiated due to his alleged misconduct. In other words, if the personnel action, including the investigation into Mr. C.'s alleged misconduct, was not a necessary prerequisite of his decision to terminate, the personnel action was not an actual cause of his termination, even if it would have eventually resulted in his termination.[45]

As noted above, the evidence in the record indicates that the personnel action and possibility of potential criminal charges may have been a factor in Mr. C.'s decision to resign. However, because Mr. C. would not have resigned but for the disability, the personnel action and possibility of potential criminal charges were not an actual cause of his resignation. This finding was a very close question of fact, but a bare preponderance of the evidence in the record shows that Mr. C. would have resigned even if there was no investigation, no personnel action, and no potential criminal charges.

The personnel action and possibility of potential criminal charges, as well as the issues surrounding his break-up with his wife, which are unrelated to Mr. C.'s medical condition, may

[42] *Stalnaker*, 939 P.2d at 412.
[43] *Vincent ex rel. Staton v. Fairbanks Memorial Hospital*, 862 P.2d 847, 851-852 (Alaska 1993).
[44] *Vincent ex rel. Staton v. Fairbanks Memorial Hospital*, 862 P.2d 847, 852 (Alaska 1993)

well have made Mr. C.'s decision to resign somewhat easier, but the outcome and timing of his decision was probably not dependent on them.

Another factor, or circumstance, that was unrelated to Mr. C.'s disability, which Mr. C.'s decision to resign was more likely to have been dependent on than the circumstances related to his alleged misconduct, was the fact that Mr. C. was already retired under his former retirement coverage and would continue to receive benefits from that plan. Mr. C.'s future income was not solely dependent on his continued employment as a firefighter or the outcome of any future PERS disability retirement or workers' compensation claims. Without this source of income, Mr. C. might have delayed his decision to resign until his eligibility for PERS or workers' compensation benefits or his inability to ever return to work was more firmly established.

The evidence in the record shows that Mr. C.'s decision to terminate was primarily dependent on the diagnosis of disability and the advice he received from Dr. M. about his medical condition; the knowledge and experience that Mr. C. had gained through his extended treatment and recovery from his prior disc injury; and probably to a certain degree, the pain and discomfort that he was experienced between the time of his second disc injury and his resignation.[46] All these factors are the result of Mr. C.'s disabling medical condition. The evidence in the record shows not only that Mr. C. would not have resigned "but for" the disabling medical condition that was the result of his on-the-job injury, but that it was also the only actual cause of his resignation. Mr. C.'s disabling medical condition was an actual cause of the termination of his employment that reasonable people would attach responsibility to, in the sense of concluding that it should result in eligibility for disability retirement benefits.

IV. Conclusion

Mr. C. has shown that his employment with the No Name Fire Department was terminated because of permanently disabling medical condition that he suffered in the performance of his duties. Mr. C.'s disability was both an actual and proximate cause of his

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[45] *See for example, Rhines v. State*, 30 P.3d 621, 625 (Alaska Sep 21, 2001), where a PERS member's disability was held not to be a cause of her termination, because she was terminated due to a reorganization, which was unrelated to her disability.

[46] The Division argues Mr. C.'s medical condition could not have been the real reason for his resignation because the few days between the March 20th injury and the April 6th resignation were insufficient for Mr. C. to make a rational decision to resign based on an injury that was similar to one he had recovered from in the past. This argument overlooks the probable persuasive force of Dr. M.'s prognosis and advice to someone with Mr. C.'s prior experience with his disc injury, as well as the potential effect several days of constant pain and discomfort on Mr. C.'s decision-making.

employment termination under the laws applicable to PERS disability benefits. The PERS administrator's denial of Mr. C.'s disability application for PERS disability benefits, therefore, is overturned.

DATED this 20th day of November, 2009.

By: *Signed*
Mark T. Handley
Administrative Law Judge

Adoption

This Decision is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 15th day of December, 2009.

By: *Signed*
Mark T. Handley
Administrative Law Judge

[This document has been modified to conform to technical standards for publication.]