

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS**

IN THE MATTER OF: )  
 )  
 D F ) OAH No. 07-0613-PER  
 ) Div. R & B No. 2007-027

**DECISION AND ORDER**

**I. Introduction**

D F, a Public Employees’ Retirement System (PERS) member, suffers from disabling degenerative disc disease and is no longer able to work as a certified recreational therapist. She applied to receive occupational disability benefits from PERS. Her application was assessed under occupational as well as non-occupational standards. The PERS Administrator concluded Ms. F was eligible for non-occupational benefits but that she had not established that work was a substantial factor in her disability; and therefore, the PERS Administrator denied her claim for occupational disability benefits.<sup>1</sup> Ms. F appeals the denial of her claim for occupational disability benefits.

Ms. F fell at work while recovering from a surgical procedure necessitated by two non-work-related injuries. Ms. F contends that the work-related fall was a substantial factor aggravating her degenerative disc disease to the point that she is now disabled. PERS contends that the proximate cause of Ms. F’s inability to work as a recreational therapist is the natural and normal progression of her pre-existing degenerative disc disease.

To prevail in this appeal Ms. F has the burden of proving by a preponderance of the evidence that her inability to work as a recreational therapist was proximately caused by her employment.<sup>2</sup> This means that Ms. F must place evidence in the record or point to

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<sup>1</sup> Agency Record (AR) at 6. The administrator found Ms. F has demonstrated that she was “unable to perform the duties of her position due to her disability, and that [she is] totally and presumably permanently disabled to the extent that [she] can no longer perform the duties of [her] position or another position offered by [her] employer.”

<sup>2</sup> The member “bears the burden of establishing by a preponderance of the evidence that the disability was proximately caused by an injury which occurred in the course of employment.” *State, Public Employees’ Retirement Board v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991); 2 AAC 64.290(e) (“Unless otherwise provided ... the burden of proof and of going forward with evidence is on the party who requested the hearing ..., and the standard of proof is preponderance of the evidence....”). To prove a fact by a preponderance of the evidence, Ms. F must show that the fact, more likely than not, is true.

evidence already in the record showing that her employment was a substantial factor in her disability.

A hearing was held on March 24, 2008, before Administrative Law Judge Rebecca L. Pauli. Ms. F was assisted by her friend and treating chiropractor, Christopher Hogan, D.C.<sup>3</sup> Assistant Attorney General Kathleen Strasbaugh represented PERS. The record developed at the hearing consisted of testimony from four witnesses,<sup>4</sup> in addition to the PERS agency record (AR) and exhibits L and M, admitted in bulk at the hearing without objection.

Ms. F has established by a preponderance of the evidence that she suffered a work-related injury to her back on May 25, 2003; this injury resulted in a temporary aggravation of her pre-existing degenerative disc disease; and her work was a contributing factor to her disability but it was not a substantial factor in bringing about her disability.<sup>5</sup> Therefore, Ms. F has not met her burden and the PERS administrator's decision to deny her application for occupational disability is affirmed.

## **II. Facts**

Ms. F is presently 50 years old. She began working at No Name Business as a recreational therapist in December 1996. As a recreational therapist, Ms. F worked with youth with substance abuse and general behavioral problems. She was instrumental in developing the challenge course at No Name Business.<sup>6</sup> The challenge course incorporated recreational activities such as climbing to help troubled youth build interrelationship skills and self esteem.<sup>7</sup>

The job of a recreational therapist is physically demanding and Ms. F loved her work.<sup>8</sup> The essential functions of her position included walking, standing, bending

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<sup>3</sup> "The administrative law judge may allow a self-represented party to be assisted by a person who is not an attorney and may impose reasonable limits on participation by the assistant." 2 AAC 64.160(a).

<sup>4</sup> Ms. F offered her own testimony in addition to the testimony of Dr. Hogan and R W, a former co-worker. An offer of proof was made that Ms. F could present more witnesses whose testimony would be similar to Mr. W. PERS offered the expert medical testimony of Judy Silverman, M.D.

<sup>5</sup> Ms. F has filed a workers' compensation claim for her May 25, 2003, injury. The burdens of proof and policy considerations in workers' compensation claims are so dissimilar to a PERS claim that it could be possible for Ms. F to be denied occupational disability benefits under PERS and still receive in her workers' compensation benefits. *Cacioppo, supra* at 682-683 (Alaska 1991).

<sup>6</sup> F Testimony; W Testimony.

<sup>7</sup> F Testimony.

<sup>8</sup> *Id.*

twisting, squatting, climbing, lifting/carrying more than 50 pounds, as well as the ability to restrain aggressive individuals in excess of 200 pounds.<sup>9</sup>

She was administratively separated from her employment effective February 28, 2007.<sup>10</sup> The administrative separation was prompted when Ms. F's treating physician, physiatrist Larry A. Levine, M.D., concluded that because of her degenerative back condition Ms. F no longer had the physical ability to continue to perform the essential functions of her job.<sup>11</sup>

Ms. F's relevant medical history can be divided into three distinct periods: 1) prior to her non-work-related falls of December 24, 2002, and January 1, 2003; 2) from her non-work-related falls to her May 25, 2003 work-related fall; and 3) after her May 25, 2003 work-related fall.

*1. Prior to Ms. F's Non-Work-Related Falls*

Prior to December 24, 2002, Ms. F was an athlete. She skied, ran, climbed, kayaked, swam, and biked. As is often the case with active individuals, she suffered several notable injuries.

In the early 1990's, Ms. F injured her neck while recreating at Hatcher Pass.<sup>12</sup> The damage was severe enough that it resulted in a C5-C6 fusion.<sup>13</sup> In 1998 or 1999, she broke her ankle, which left her with limited range of motion and "unable to run in a normal fashion."<sup>14</sup> In 1999, she hurt her low back and received treatment from Dr. Hogan.<sup>15</sup> On December 24, 2001, Ms. F was involved in a rollover motor vehicle accident which resulted in some right upper extremity tingling and pain;<sup>16</sup> she denies that this accident resulted in any discomfort in or injury to her lumbar region.<sup>17</sup>

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<sup>9</sup> AR at 21 – 30 (State of Alaska Position Description, Recreational Therapist II).

<sup>10</sup> AR at 17 (January 3, 2007 Henjum Letter). At the time she was advised of her separation, Ms. F was off work receiving workers' compensation benefits for an unrelated right elbow condition and the separation was effective upon her release to work for her elbow. *Id.*

<sup>11</sup> AR at 18 – 19 (October 18, 2006 Levine Letter).

<sup>12</sup> AR at 298 - 302 (February 21, 2003 Shawn P. Johnston, M.D., Consultation Report).

<sup>13</sup> *Id.*

<sup>14</sup> AR at 303 (April 15, 1999 George F. Gates, M.D., Chart Note). No date of injury is given; however, Dr. Gates does note that there has been a considerable passage of time since the original injury.

<sup>15</sup> Hogan Testimony.

<sup>16</sup> AR at 298 (February 21, 2003, Shawn P. Johnston, M.D., Consultation Report).

<sup>17</sup> F Testimony.

2. *Ms. F's Two Non-Work-Related Falls And Their Aftermath*

On December 24, 2002, Ms. F's life changed when she slipped and fell landing on her tailbone. She slipped and fell a second time, on January 1, 2003, again landing on her tailbone.

While neither of these falls was work-related, they were significant and disabling. Ms. F was treated for chronic discongeic low back pain by Dr. Levine and by his physician assistants, Carolyn L. Craig, PA-C, and James Glenn, PA-C. A colleague of Dr. Levine's also examined Ms. F shortly after her falls for concerns related to her pre-existing cervical condition.<sup>18</sup> Dr. Levine performed several diagnostic tests and concluded that Ms. F suffered from a large tear in the annulus centrally and to the left of the midline at L5-S1 and disc degeneration at L3-4 and L4-5.<sup>19</sup>

When asked at hearing whether she took much time off after these falls, Ms. F could not recall. However, personnel records reveal that Ms. F was absent from work a total of 446.37 hours the first quarter of 2003, of which 347.6 hours were leave without pay.<sup>20</sup>

Ms. F's condition did not improve and on March 21, 2003, Dr. Levine performed an intradiscal electrothermal (IDET) procedure.<sup>21</sup> An IDET is a procedure whose efficacy is questionable and sometimes compared to that of a placebo.<sup>22</sup> Regardless, she responded positively to the IDET.<sup>23</sup>

Ms. F was released to work with restrictions in early May, 2003.<sup>24</sup> She did not remain accident free. Although the exact date is unknown other than it was after the IDET and prior to her May 25, 2003 work-related fall, Ms. F fell going down some stairs and injured her left leg.<sup>25</sup> Ms. F reported that the fall "did not particularly seem to

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<sup>18</sup> AR at 298 (February 21, 2003, Johnston Consultation Report).

<sup>19</sup> AR at 194 (March 14, 2003 Radiographic Interpretation); AR at 141 - 142 (March 3, 2003 Chart Note).

<sup>20</sup> Exh. L (Payroll Earnings Records).

<sup>21</sup> AR at 127 - 129 (March 31, 2003 Operative Report).

<sup>22</sup> AR at 55 (July 17, 2007 Judy Silverman, M.D., Second Independent Medical Evaluation Report)

Prepared for the workers' compensation proceeding.

<sup>23</sup> See e.g., AR at 125 (May 22, 2003 Chart Note); AR at 126 (April 14, 2003 Chart Note); AR at 179 (March 28, 2003 Chart Note).

<sup>24</sup> Ms. F was restricted to lifting less than 20 pounds and was to avoid stooping and prolonged sitting. AR at 126 (April 14, 2003 Chart Note).

<sup>25</sup> AR at 125 (May 22, 2003 Chart Note).

aggravate her spine issues” even though the fall caused noticeable bruising.<sup>26</sup> During this same period Ms. F’s right foot was burned by hot chocolate.<sup>27</sup>

3. *Ms. F’s May 25, 2003 Work-Related Fall And Thereafter*

On May 25, 2003, while wearing her back brace, Ms. F fell at work. She tripped over a cord and fell forward, falling on her knees and extending her arms to catch herself and protect her back.<sup>28</sup> After her fall she was taken to the emergency room complaining of pain in both knees, her lower back and scapula.<sup>29</sup> X-rays were taken of her lumbar, right scapula and her knees. The lumbar X-ray revealed mild diffuse disc degeneration.<sup>30</sup>

Three days after the work-related fall Ms. F felt much better, with the exception of some low back pain, and wanted to return to work.<sup>31</sup> Dr. Levine believed the May 2003 fall caused a temporary aggravation of her condition resulting in “about a month’s setback” in her recovery, which he characterized as “significant.”<sup>32</sup> Ms. F was concerned she may have re-injured her back and another MRI was ordered.<sup>33</sup> The May 30, 2003 post-fall MRI was compared to a February 3, 2003 pre-IDET MRI, with the radiologist determining that overall there was no “significant change in the MRI...”<sup>34</sup>

Ms. F’s condition continued to improve. By July 17, 2003, she returned to her IDET recovery protocol.<sup>35</sup> Within three months of her work-related fall, Ms. F had completed the first two levels of the IDET recovery protocol and was working on the third.<sup>36</sup> She had experienced significant improvement in her low back pain.<sup>37</sup> Ms. F requested and received workers’ compensation benefits for her May 25, 2003 work-related fall.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> F Testimony.

<sup>29</sup> AR at 291 – 293 (May 25, 2003 Emergency Room Note).

<sup>30</sup> AR at 296 (May 25, 2003 Radiology Report).

<sup>31</sup> AR at 124 (May 28, 2003 Chart Note).

<sup>32</sup> AR at 121 (July 17, 2003 Chart Note).

<sup>33</sup> AR at 124 (May 28, 2003 Chart Note).

<sup>34</sup> AR at 193 (Addendum to May 30, 2003 MRI Report).

<sup>35</sup> AR at 121 – 122 (July 17, 2003 Chart Note).

<sup>36</sup> AR at 177 (August 20, 2003 Chart Note).

<sup>37</sup> *Id.*

Feeling better, Ms. F was anxious to return to work, and on August 20, 2003, Dr. Levine released Ms. F to work with restrictions.<sup>38</sup> However, her employer felt the restrictions were not conducive to Ms. F returning to the workplace and would not accept the release.<sup>39</sup> She returned to Dr. Levine and persuaded him to remove some of the restrictions. Ms. F was concerned that she would lose her job if the restrictions were not removed. She returned to work under the revised work release.<sup>40</sup>

By mid-September of 2003, Ms. F had progressed through the next level of the IDET recovery protocol. Her low back pain increased when pursuing the ordinary activities of daily life such as shopping at Costco or prolonged sitting.<sup>41</sup> A month later, even with her reported increase in pain, chart notes reveal that her health care providers expected Ms. F would continue to show “slow steady improvement over the next months.”<sup>42</sup>

By November 24, 2003, Ms. F’s condition had stabilized and Dr. Levine provided a permanent partial impairment rating (PPI). Dr. Levine reported that Ms. F complained of “some ongoing spinal issues, it is not normal, but has certainly improved over prior to the IDET issues.”<sup>43</sup> The IDET provided “excellent resolution of portions of [Ms. F’s] symptoms with ongoing slight residual.”<sup>44</sup> Overall Ms. F was “doing reasonably well.”<sup>45</sup>

After her PPI rating, Ms. F continued to improve although she was rarely completely pain free.<sup>46</sup> Another MRI was ordered and compared to the post-work-related fall May 30, 2003 MRI. Again, no significant change was noted.<sup>47</sup>

To address Ms. F’s complaints Dr. Levine prescribed physical therapy, chiropractic treatment with Dr. Hogan, and performed a nucleoplasty which provided

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<sup>38</sup> AR at 121 - 122 (July 17, 2003 Chart Note); AR at 177 (August 20, 2003 Chart Note).

<sup>39</sup> F Testimony.

<sup>40</sup> *Id.*

<sup>41</sup> AR at 176 (September 16, 2003 Chart Note).

<sup>42</sup> AR at 175 (October 14, 2003 Chart Note).

<sup>43</sup> AR at 82 (November 24, 2003 PPI Rating p. 1).

<sup>44</sup> AR at 83 (November 24, 2003 PPI Rating p. 2).

<sup>45</sup> *Id.*; *See also* AR at 118 (January 29, 2004 Chart Note referring to “flares” associated with slip and falls).

<sup>46</sup> AR 118 -119 (January 29, 2004 Chart Note); AR at 174 (February 13, 2004 Chart Note) (“The drive to Anchorage [from Girdwood] being over an hour each way exacerbates her symptoms significantly.”)

<sup>47</sup> AR at 189 (February 19, 2004 Radiographic Interpretation).

some initial relief.<sup>48</sup> Dr. Levine also performed a caudal epidural injection that exacerbated, rather than alleviated, Ms. F's pain.<sup>49</sup>

Ms. F attempted, unsuccessfully, to return to her active lifestyle. In 2004 she was involved in a snow machine crash and has not attempted to snow machine since. She denies she injured her back in the crash.<sup>50</sup>

In addition to her low back pain, Ms. F started to experience hip pain.<sup>51</sup> Drs. Hogan and Levine were unsure if the hip pain was a referral issue from her low back condition, or if it was a new issue caused by Ms. F's sacroiliac (SI) joint.<sup>52</sup>

Ms. F was unable to return to work without aggravating her back. She would work a few days, aggravate her low back pain, take time off and then return to her "base line."<sup>53</sup> Dr. Levine described the physical demands of Ms. F's job as "a continual exacerbating factor to inadequate resolution of her lumbar difficulties."<sup>54</sup> Regardless, on March 15, 2005, Dr. Levine released her to work full time with no restrictions.<sup>55</sup>

On January 11, 2005, as part of the workers' compensation proceeding, Ms. F's employer had Ms. F undergo an employer's medical evaluation (EME). The EME was performed by orthopedist Holm Neumann, M.D., Ph.D.

Dr. Neumann took Ms. F's history, conducted a physical evaluation and reviewed available medical records.<sup>56</sup> He attributed the primary cause of Ms. F's complaints to degenerative disc disease with a superimposed sprain/strain as a result of the May 25, 2003 work-related fall. Dr. Neumann believed the May 25, 2003 fall resulted in a temporary aggravation, which was not yet resolved because of the underlying degenerative process. Dr. Neumann recommended additional physical and chiropractic treatment after which a re-evaluation would be appropriate.

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<sup>48</sup> AR at 167 (July 13, 2004 Chart Note), AR at 110 (Chiropractic Referral Prescription); AR at 163 November 21, 2005 (Physical Therapy Prescription); AR at 168 (June 1, 2004 Chart Note); AR 170 - 171 (April 30, 2004 Chart Note).

<sup>49</sup> AR at 165 (November 30, 2004 Chart Note).

<sup>50</sup> F Testimony.

<sup>51</sup> AR at 109 (March 7, 2005 Chart Note).

<sup>52</sup> *Id.* The sacroiliac joint is the joint in the back where the sacrum and the ilium meet.

<sup>53</sup> F Testimony; AR at 106 (March 15, 2005 Chart Note); *See also* AR at 172 (March 2, 2004, Chart Note).

<sup>54</sup> AR at 166 (November 30, 2004 Chart Note).

<sup>55</sup> AR at 106 (March 15, 2005 Chart Note); AR at 108 (Work Status Report).

<sup>56</sup> Some of the medical records summarized in Dr. Neumann's EME reports may not be contained in the record.

Ms. F continued to miss significant periods of work due to her back pain, which had changed in character. Chart notes no longer described her pain as discogenic low back pain but rather as centralized pain over the sacral spine.<sup>57</sup> As her hip pain increased, she had positive responses to the SI shear tests and it was recommended that she have a steroid injection at her right SI joint. On March 6, 2006, Ms. F was taken off work for three months. Ms. F's ability to return to work as a recreational therapist was questionable.<sup>58</sup>

On March 13, 2006, Dr. Neumann conducted a follow-up EME.<sup>59</sup> After re-evaluating Ms. F and reviewing recent medical records, he concluded that Ms. F's present complaints were the result of the natural progression of her degenerative disc disease, not the May 25, 2003 fall.<sup>60</sup> He concurred with Ms. F's treating physicians that her current complaints could be related to an issue with her SI joint and recommended that a diagnostic injection to the area would be appropriate. Dr Neumann advised against Ms. F returning to her job as a recreational therapist.

On March 17, 2006, Ms. F received steroid injections to her right and left SI joints. She obtained some pain relief for a few days, which was an indicator that the SI joints could be the source of her pain.<sup>61</sup> The injections were repeated on April 11, 2006, and again she reported improvement immediately following the injections.<sup>62</sup> By May 3, 2006, Ms. F was reporting a dramatic decrease in her pain level and her need for pain medication. PA-C Glenn was hesitant to return Ms. F to work because he was "sure she will have a flare-up of her overall conditions when she goes back to doing recreational activities at work, which include repeated balleting and other recreational activities that will most likely flare-up her condition."<sup>63</sup> Notwithstanding PA-C Glenn's concerns, Ms. F was released to return to work with restrictions May 18, 2006.<sup>64</sup>

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<sup>57</sup> See e.g., AR at 150 - 152 (March 2, 2006 Chart Note); AR at 159 (January 24, 2006 Chart Note).

<sup>58</sup> AR at 151 (March 2, 2006 Chart Note p. 2).

<sup>59</sup> AR at 73 - 83 (March 13, 2006 Neumann Report).

<sup>60</sup> AR at 78 - 80 (March 13, 2006 Neumann Report pp. 6 - 8).

<sup>61</sup> AR at 145 - 146 ( March 21, 2006 Chart Note).

<sup>62</sup> AR at 148 - 149 (May 3, 2006 Chart Note).

<sup>63</sup> AR at 149 (May 3, 2006 Chart Note p. 2).

<sup>64</sup> Ms. F was restricted to lifting no more than 20 pounds occasionally and 10 pounds frequently. She was also to avoid repetitious use of her upper extremity. AR at 147 (Work Status Report).



On October 18, 2006, in response to an inquiry by the employer in the workers' compensation proceeding, Dr. Levine wrote a letter opining that the May 25, 2003 fall was a substantial factor in aggravating her original injury and had the fall "not have occurred shortly after her IDET procedure, she may have not been experiencing such significant ongoing symptoms. It can be assumed that she would have made a full recovery at that point had it not been for the [fall] that happened so shortly after her IDET procedure."<sup>65</sup> He believed that the physical restrictions placed on Ms. F were the result of the work-related fall and that it was in her best interest to stop working as a recreational therapist.<sup>66</sup> This letter is the basis for Ms. F's administrative separation which occurred on February 28, 2007.<sup>67</sup>

On July 17, 2007, as part of her workers' compensation proceeding, Ms. F underwent a second independent medical evaluation (SIME).<sup>68</sup> Judy Silverman, M.D. performed the SIME for the workers' compensation board. She spent 2 hours and 20 minutes reviewing Ms. F's medical records prior to actually meeting with Ms. F.<sup>69</sup> Dr. Silverman spent two hours and 30 minutes taking Ms. F's history and conducting a physical examination. Based her evaluation, Dr. Silverman believed that the May 25, 2003 fall caused a temporary aggravation of Ms. F's underlying degenerative disc disease and the aggravation was resolved by March 2006.

Dr. Silverman explained that Ms. F had an underlying degenerative disc disease that had been symptomatic in 1999 and became symptomatic again when she fell in December 2002 and again in January 2003.<sup>70</sup> She reasoned that the May 2003 fall was not a substantial factor because the falls leading to the IDET were the significant factors. Dr. Silverman based her opinion on Dr. Levine's observation that by July 2003, Ms. F had returned to her pre-May fall condition and that overall, Ms. F's condition was better than it had been pre-IDET. Additionally, following her return to pre-work fall status, Ms. F felt good enough to snow machine and return to work.

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<sup>65</sup> AR at 18 (October 18, 2006 Levine Letter p. 1).

<sup>66</sup> AR at 18 - 19 (October 18, 2006 Levine Letter).

<sup>67</sup> AR at 17 (January 3, 2007 Henjum Letter).

<sup>68</sup> AR at 32 - 59 (July 17, 2007 Silverman report).

<sup>69</sup> Some of the medical records reviewed by Dr. Silverman may not be contained in the record.

<sup>70</sup> Silverman Testimony.

When asked whether Ms. F's work or May 25, 2003 fall accelerated Ms. F's underlying degenerative condition, Dr. Silverman responded that it was unlikely because Ms. F was in an active treatment program at the time of the injury and because her ultimate outcome was better than where she was prior to the IDET procedure. Moreover, the post-May 25, 2003 MRIs shows no change from the pre-May 25, 2003 MRIs. Therefore, no objective evidence existed to show that the May 25, 2003 fall caused any change to Ms. F's pre-existing condition.<sup>71</sup> It was the two falls that did not respond to conservative treatment and resulted in the IDET that Dr. Silverman considered significant in terms of causing Ms. F's disability. Dr. Silverman explained that Ms. F's physical restrictions that prevent her from returning to work as a recreational therapist were placed on her because of what she can tolerate to manage the underlying disc problem.<sup>72</sup>

Ms. F's workers' compensation hearing and her PERS hearing occurred a few days apart. To assist Ms. F in her hearings, Dr. Levine provided two opinion letters and Dr. Hogan provided one. Dr. Levine's first letter is dated January 8, 2008.<sup>73</sup> In this letter he characterizes Ms. F's relevant medical history as including some pre-existing work injuries and documented degenerative changes. The second letter, dated February 29, 2008, states that Ms. F "initially injured her back on May 25, 2003, while tripping over electrical cord."<sup>74</sup> He described Ms. F as "running, climbing and doing other activities" prior to her May 25, 2003 fall and that prior to this fall she "would have occasional periods where she had a difficult time with some small flare of her pain, but nothing like she did after that fall on May 25, 2003."<sup>75</sup>

Dr. Levine opined that "[i]n relation to her Workmen's [sic] Compensation claim, it strikes me very much as if [the May 25, 2003 fall] was the straw that broke the camel's back..."<sup>76</sup> He continued:

... [T]he crux of the matter is that something substantially changed on the May 25, 2003, injury. The amount of care she needed escalated at that time and she is continuing to have fairly significant ongoing care and management. The fact of the matter

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<sup>71</sup> Silverman Testimony.

<sup>72</sup> *Id.*

<sup>73</sup> Exh. M at 10 -12 (January 8, 2008 Levine Letter).

<sup>74</sup> Exh. M at 8.

<sup>75</sup> Exh. M at 10.

<sup>76</sup> Exh. M at 12.

is that she was working prior to that event. She tried to go back to work, but continued to re-injure her spine to such a level that it was impossible for her to continue to work. I think that she again had the preexisting issues, but had a definitive injury as of May 25, 2003, that in its totality increased her level of difficulty to the point where she was unable to continue to work as a recreational therapist.”<sup>77</sup>

Dr. Hogan has known Ms. F for 12 years. His wife is a recreational therapist. Dr. Hogan testified consistent with an opinion letter he wrote on February 25, 2008.<sup>78</sup> It is his opinion that it is more likely than not that the May 25, 2003 fall is the proximate cause of Ms. F’s pain and work restrictions because prior to her May 25, 2003 work-related fall, Ms. F was progressing as anticipated and then after this fall, she never fully recovered. Ms. F now uses a cane and handicapped parking.<sup>79</sup>

Dr. Hogan agrees that Ms. F has degenerative disc disease and a history of previous traumas. It is his opinion that those traumas would not have kept Ms. F from returning to work as a recreational therapist. In his view, every time a person injures their back, the back becomes compromised until some incident, major or minor, becomes “the straw that broke the camel’s back.”<sup>80</sup> Here, he believes it was the May 25, 2003 fall.

### **III. Discussion**

Ms. F is eligible for an occupational disability benefit if her employment was terminated because of a total and apparently permanent occupational disability, as defined in AS 39.35.680, before her normal retirement date. The term "occupational disability" is defined as “a physical or mental condition that, ... presumably permanently prevents an employee from satisfactorily performing the employee's usual duties for an employer...; 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 ....”<sup>81</sup>

A PERS member who suffers from a preexisting condition, such as Ms. F’s degenerative disc disease, will receive occupational disability benefits if the member’s

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<sup>77</sup> *Id.*

<sup>78</sup> Exh. M at 6.

<sup>79</sup> Hogan Testimony.

<sup>80</sup> *Id.*

<sup>81</sup> AS 39.35.680(27).

work was a substantial factor in bringing about the disability.<sup>82</sup> 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.<sup>83</sup> It is recognized that “increased pain or other symptoms can be as disabling as deterioration of the underlying disease itself.”<sup>84</sup> If the member is claiming that an aggravation of a pre-existing condition resulted in the disability, it follows that the work-related aggravation must be permanent.

Ms. F focuses on the May 25, 2003 work-related fall as the moment in time where everything changed. However, the record raises a second possible theory of causation: was her day to day work a substantial factor in her disability? Under either theory Ms. F must prove by a preponderance of the evidence that her work was a substantial factor in the disability that presumably permanently prevents her from working.<sup>85</sup>

If work is to be *a substantial factor* in the aggravation of the presumably permanent disability, it must be more than *a factor* in the aggravation. It must contribute something more to the disability than the activities incurred throughout the ordinary course of daily living, but it is not necessary that it be the primary or only factor in bringing about the disability. A substantial factor has been characterized as having been “of particular causal significance” with respect to the disability.<sup>86</sup>

It is understandable that Ms. F believes the May 25, 2003 fall is the proximate cause of her inability to return to work as a recreational therapist. She suffered a debilitating non-work-related aggravation of her pre-existing degenerative condition, could not work, underwent surgery to relieve the aggravation, was on the path to recovery and had returned to work with restrictions when she fell at work. The fall at work caused a setback in her recovery. When she again returned to work, Ms. F found work would eventually aggravate her back pain, she would take time off and then her pain would

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<sup>82</sup> *Hester v. Public Employee’s Retirement Board*, 817 P.2d 472, 475 (Alaska 1991) (Rabinowitz, C.J. dissenting) (adopting test identical to that applied in workers’ compensation cases).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 476, note 7. *See also, Lopez v. Administrator, Public Employees’ Retirement System*, 20 P.3d 568, 573-574 (Alaska 2001).

<sup>85</sup> AS 39.35.410(a); AS 39.35.680(27).

<sup>86</sup> *In The Matter Of S.S.*, OAH No. 05-0707-PER at 14 (April 6, 2007) (“Taken as a whole, the medical records ... indicate that prolonged sitting at work was simply one among many contributing factors, and that it was not of particular causal significance with respect to her chronic pain syndrome.”)

subside permitting her to return to work. When she returned to work, the cycle would repeat itself. Ms. F's testimony and the medical records establish that when she was not working, her back would respond favorably to conservative treatment.

Ms. F has described work causing a temporary aggravation of her pre-existing back condition, but not a presumably permanent aggravation or worsening of the underlying condition. This conclusion is supported by the chart notes. Chart notes contain the treating provider's present sense impression which was that Ms. F had suffered a temporary setback in her recovery; by July 17, 2003 Ms. F had returned to her pre-work-related fall status. On November 24, 2003, Ms. F's back condition was better than it had been prior to her work-related fall and certainly better than it was pre-IDET. Ms. F felt well enough to return to work and attempted to return to some of her prior recreational pursuits. The objective evidence, MRIs taken before and after her May fall; show no appreciable observable change to her physical condition.<sup>87</sup>

Medical observations and diagnosis contained in a chart note are typically given greater weight than an opinion or statement regarding causation. Chart notes are usually prepared contemporaneously with the examination of the patient. Statements regarding causation contained in chart notes, contemporaneous or not, and a treating physician's opinion letter provided for purposes of litigation must be considered in context. Causation for purposes of occupational disability under PERS is a legal term of art. It is unknown whether Dr. Levine's opinion regarding the relationship of the May 25, 2003 work-related fall and Ms. F's inability to return to the workplace were made within the parameters of the legal definition.

Ms. F relies heavily upon the opinion letters of Drs. Levine and Hogan. Many of the statements regarding Ms. F's history contained in Dr. Levine's and Dr. Hogan's letters are not supported by the evidence or Ms. F's testimony. For example, Dr. Levine's opinion letters fail to mention the two falls that were so debilitating that Ms. F was unable to work and resorted to surgery to relieve her pain. The letters also fail to explain the disagreement between Dr. Levine's chart notes that by July 2003, Ms. F had returned to her pre-May 25, 2003 status, had stepped back into her recovery program and

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<sup>87</sup> Whether the MRIs show an objective change is not determinative because deterioration of the underlying condition is not essential to establishing a claim of occupational disability.

referred to the fall as “a setback,”<sup>88</sup> and his opinion rendered for purposes of litigation that this fall was “the straw that broke the camel’s back.” Chart notes confirm that Ms. F continued to improve after her May 25, 2003 work-related fall and that Dr. Levine’s office was happy with her progress. Ms. F’s condition surpassed where it had been prior to her non-work-related falls. The observations contained in Ms. F’s chart notes at the time of injury are corroborated by the opinions of Drs. Neumann and Silverman.

Dr. Hogan attempted to explain this discrepancy when he testified that back injuries build upon each other and that Ms. F’s work-related fall, when added to her prior falls was just too much. He asserted that the work-related fall of May 25, 2003, is the proximate cause of her degenerative disc disease progressing in the manner it did and if Ms. F not fallen at work, she would have made a full recovery. However, this opinion is not supported by her recovery recorded in the chart notes in the months following her work-related fall. Certainly, the work-related fall is a factor but the weight of the evidence does not show it to be a substantial factor.

Moreover, Dr. Hogan failed to explain the differences in Ms. F’s pre-work-related fall course of recovery and post-work-related fall course of recovery. Specifically, prior to this fall Ms. F was unable to return to work without restrictions and did not respond to conservative treatment after this fall, Ms. F’s condition improved such that she eventually was returned to work with no restrictions and that responded positively to conservative treatment.

Neither Dr. Hogan’s nor Dr. Levine’s letters mention the role of the SI joint in Ms. F’s condition. Neither Dr. Hogan nor Dr. Levine address the other intervening incidents such as the snow machine crash, Ms. F’s complaints regarding the increase in pain from her driving, or performing the simple daily tasks. These discrepancies and omissions detract from any persuasive weight the opinion letters may have otherwise had.

When the evidence is weighed, Ms. F has failed to identify or present persuasive evidence that it is more likely than not that either the May 23, 2003 work-related fall or the physical nature of her work alone or combined was a substantial factor in the development of her disability. Because of her recovery after the May 25, 2003 work-related fall and the temporary nature of her work-related aggravations, the more

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<sup>88</sup> AR 176 (September 16, 2003, Carolyn L. Craig, PA-C Chart Note);

persuasive evidence is that the only substantial factors in Ms. F's inability to work are her accidents outside of work and the natural progression of her degenerative disc disease thereafter.

#### **IV. Conclusion**

Occupational disability under PERS requires that the presumably permanent condition be proximately caused by an injury sustained at work. Here, the permanent condition is the underlying degenerative disc disease. The May 25, 2003 work-related fall resulted in a temporary aggravation and a setback in Ms. F's recovery. The physical nature of Ms. F's work resulted in temporary flare-ups of her underlying condition that responded to conservative treatment.<sup>89</sup> Ms. F has not met her burden of establishing that it is more likely than not that either the May 25, 2003 work-related fall or the nature of her work is a substantial factor in her disability.

The PERS decision to deny Ms. F occupational disability benefits is affirmed.

Dated this 18<sup>th</sup> day of July, 2008.

By: *Signed* \_\_\_\_\_  
Rebecca L. Pauli  
Administrative Law Judge

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<sup>89</sup> Cf. *DeYonge v. Nana/Marriott*, 1 P.3d 90 (Alaska 2000).

## Adoption

This Order is issued under the authority of AS 39.35.006. The undersigned, in accordance with AS 44.64.060, adopts this Decision and Order 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 Rule of Appellate Procedure 602(a)(2) within 30 days of the date of this decision.

DATED this 15<sup>th</sup> day of August, 2008.

By: Signed  
Signature  
Rebecca L. Pauli  
Name  
Administrative Law Judge  
Title

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