IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

SHIRLEY SHEA,

Appellant,

vs.

STATE OF ALASKA, DEPARTMENT OF ADMINISTRATION, DIVISION OF RETIREMENT & BENEFITS,

Appellee.

Case No. 3AN–13–06927 CI

AMENDED DECISION AND ORDER

Shirley Shea's case has a long procedural history over the last decade. The facts of Shea's case are amply described by the Alaska Supreme Court in *Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 267 P.3d 624 (Alaska 2011), and are only briefly summarized here.

Shirley Shea underwent a medical procedure in 1984 which resulted in stiffness in her back and lower extremities. Although the pain initially subsided, it returned after she began a position with the state Department of Health and Social Services Division of Public Assistance in 1993. The position required prolonged periods sitting at her desk. Shea began to experience increased achiness in her lower body. As the pain increased, she began seeing various doctors, but to no avail. Eventually, her pain prevented her from sitting up at all.

When Shea ended her state employment in 2001, she was granted non-occupational disability benefits. She was denied occupational disability benefits, the subject of this case. She appealed to the Office of Administrative Hearings, which denied her claim, saying Shea did not prove that her employment was a substantial factor in her disability. The Superior Court affirmed that finding. On appeal to the Supreme Court, the decision was reversed. The Supreme Court held

that Shea did not need to prove that her occupational injury was *the* legal cause of her disability, only that her work was *a* legal cause of her disability.

On remand, Administrative Law Judge Andrew Hemenway again found that Shea's employment was not the proximate cause of her injury. Although ALJ Hemenway applied the correct legal test, his conclusion was not supported by substantial evidence. For this reason the court reverses the judgment below.

I. Standard of Review

Sitting as an intermediate court of appeal in this administrative matter, the Court applies the "substitution of judgment" test for questions of law involving no agency expertise.[1] The substitution of judgment test is similar to the de novo or independent standard of review.[2] This standard is appropriate because the denial of Shea's application was solely based on the legal question of causation, which involves no agency expertise.

For questions of fact, the Court applies the "substantial evidence" test.[3] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support [the agency's] conclusion."[4] Substantial evidence is evaluated "in light of the record as a whole,"[5] and the court "must take into account whatever in the record fairly detracts from its weight" to determine whether the "evidence is substantial."[6] However, the Court does not "reweigh the evidence" or "choose between competing factual inferences;" rather, it assesses "whether the evidence exists."[7]

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[1] *See ConocoPhillips Alaska, Inc. v. State, Dep't of Natural Res.*, 109 P.3d 914, 919 (Alaska 2005).

[2] *See Brandal v. State, Commercial Fisheries Entry Comm'n*, 128 P.3d 732, 735 (Alaska 2006).

[3] *See ConocoPhillips*, 109 P.3d at 919.

[4] *Alaskan Crude Corp. v. State, Alaska Oil & Gas Conservation Comm'n*, 309 P.3d 1249, 1254 (Alaska 2013) (quoting *Lopez v. Adm'r, Pub. Emps.' Ret. Sys.*, 20 P.3d 568, 570 (Alaska 2001) (further quotation and internal quotation marks omitted).

[5] *State, Dep't of Commerce, Cmty. & Econ. Dev., Div. of Corporations, Bus. & Prof'l Licensing v. Wold*, 278 P.3d 266, 270 (Alaska 2012), *reh'g denied* (June 18, 2012) (quoting *Lewis–Walunga v. Municipality of Anchorage*, 249 P.3d 1063, 1069 (Alaska 2011) (internal quotation marks omitted).

[6] *Id.* (quoting *Lopez v. Adm'r, Pub. Emps. Ret. Sys.*, 20 P.3d 568, 570 (Alaska 2001) (internal quotation marks and further quotation omitted)).

[7] *Doyon Universal Services v. Allen*, 999 P.2d 764, 767 (Alaska 2000). In other areas of law, the Alaska Supreme Court has held that where there are two or more conflicting medical opinions—each of which constitutes substantial evidence—the reviewing court will affirm the decision of the agency below. *Id.* (citing *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69, 72 (Alaska 1993)).

II. Applicable Law

Public employees whose employment is terminated because of an occupational disability are eligible for an occupational disability benefit.[8] To obtain this benefit, Shea is required to show by a preponderance of evidence that her occupational injury caused her disability.[9] Causation means that "the occupational injury is a substantial factor in [her] disability regardless of whether a non-occupational injury could independently have caused disability."[10] Shea is not required to show that the occupational injury was *the* legal cause of an injury; "it is only necessary that the actor's conduct be 'a' legal cause."[11]

A "substantial factor" includes both (1) actual cause and (2) proximate cause.[12] Actual cause "requires a showing that the plaintiff's damages would not have been incurred 'but-for' the complained-of conduct."[13] Proximate cause requires proof that the employment was "so important in bringing about the injury that reasonable [persons] would regard it as a cause and attach responsibility to it."[14] Shea bears the burden of proving by a "preponderance of the evidence that the disability was proximately caused by an injury which occurred during the course of employment."[15]

III. Legal Analysis by the ALJ

ALJ Hemenway analyzed both actual and proximate cause. Neither party has challenged ALJ Hemenway's finding that Shea proved actual cause. Therefore, this court considers only the issue of proximate cause.

Under Shea's view, once actual cause has been established, ALJ Hemenway should only have determined whether it is reasonable to assign responsibility.[16]

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[8] AS 39.35.410(a).
[9] *Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 267 P.3d 624, 631 (Alaska 2011).
[10] *Id.* at 631 (Alaska 2011) (quoting *State, Public Emps. Bd. v. Cacioppo*, 813 P.2d 679, 683 (Alaska 1991)). There is no "presumption of compensability" for PERS occupational benefits. *Shea v. State, Dep't of Admin., Div. of Ret. & Benefits*, 267 P.3d 624, 632 (Alaska 2011). Proof of a substantial factor can be shown by increased pain. *Shea*, 267 P.3d at 631 (2011) (citing *Hester v. State, Pub. Emps.' Ret. Bd.*, 817 P.2d 472, 475 (Alaska 1991)).
[11] *Shea*, 267 P.3d at 632 (2011) (citing *Abbott*).
[12] *Id.* at 633.
[13] *Id.*
[14] *Id.*
[15] *Shea*, 267 P.3d at 631 (quoting *Cacioppo*, 813 P.2d at 682–83).
[16] Appellant's Opening Brief at 8 cites to *Cacioppo*'s statement that the employee has the burden of proving proximate cause by a preponderance of the evidence. But then it goes on to say: "The case does not say that the ALJ must find attachment of responsibility by

This is incorrect. As noted above, proximate cause has both a causal component and a responsibility component, and both must be established by Shea by a preponderance of the evidence.

ALJ Hemenway properly identified this standard. ALJ Hemenway concluded that the majority of reasonable persons would not consider Shea's occupational injuries "so significant and important a cause as to attach legal responsibility for it."[17] He also said that "Ms. Shea has not shown that, more likely than not, reasonable persons would view prolonged sitting at work as so significant and important a cause as to attach legal responsibility to her employer for her disability."[18] ALJ Hemenway was analyzing whether there was a preponderance of evidence that Shea's sitting was "a" cause of the injury. ALJ Hemenway used the correct legal standard.

Shea also argues that ALJ Hemenway should have applied a concurrent causation standard. She claims that *Abbott*[19] and *Vincent*[20] "mandate" the concurrent causation test from the workers' compensation arena. Shea incorrectly interprets *Abbott*. The concurrent causation standard is an exception to the substantial factor test. It applies only when "two forces are operating to cause the injury, one because of the defendant's negligence and the other not, and each force by itself is sufficient to cause the injury. . . ."[21] Evidence of "unique physiology" is enough to constitute a "force" under this test.[22]

While Shea has established that her physiology is a "force," there is no evidence of force by her employer that would be sufficient to cause the injury on its own. The only force by her employer was requiring her to sit for long periods of time. This is not enough to cause injury on its own. Therefore, the concurrent causation doctrine is inapplicable here.

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preponderance of the evidence, only the injury causation." This is a confusion of terms. "Attachment of responsibility" is the same thing as "proximate cause." Therefore, since the employee bears the burden of proving "proximate cause" by a preponderance, she also bears the burden of proving "attachment of responsibility" by a preponderance. "Attachment of responsibility" is the only way to prove proximate cause.

[17] Decision on Remand, at 10. Tr. 188.

[18] *Id.*

[19] *State v. Abbott*, 498 P.2d 712 (Alaska 1972).

[20] *Vincent by Staton v. Fairbanks Memorial Hosp.*, 862 P.2d 847 (Alaska 1993).

[21] *Abbott*, 498 P.2d at 727.

[22] *Vincent*, 862 P.2d at 852.

IV. Factual Analysis by the ALJ

Shea argues that there is not substantial evidence to support ALJ Hemenway's finding that a reasonable person would attach responsibility to Shea's employer. Proximate cause is a question of fact, so the Court uses a substantial evidence standard.[23]

ALJ Hemenway based his finding that Shea failed to establish proximate cause on several facts: (1) that the testimony of Dr. Michael Smith (establishing Shea's sitting as a factor) is only "marginally persuasive" when viewed in light of the testimony of Dr. Joella Beard; (2) that Shea failed to report to a physician that her prolonged sitting at work was a causal factor until long after she stopped working; (3) that ordinary daily activities also aggravated her chronic pain; (4) that the aggravation of her chronic pain was only five to ten percent attributable to prolonged sitting; (5) that her underlying physical condition had resolved; and (6) that psychological factors may have contributed to her disability. The Court reviews each of these premises to determine whether they were supported by substantial evidence. Then the Court will ask whether the overall finding of proximate cause was likewise supported by substantial evidence.

1. Dr. Beard's Testimony Did Not Undercut Dr. Smith's

ALJ Hemenway incorrectly found that Dr. Beard's testimony weakened the basis for Dr. Smith's opinion that prolonged sitting at work aggravated Shea's chronic pain.[24] ALJ Hemenway found that Dr. Smith's testimony assumed that Shea still had ilioinguinal neuralgia, but that Dr. Beard's testimony contradicted this assumption.

Dr. Smith stated that Shea's prolonged sitting at work aggravated her condition.[25] He based this conclusion on his understanding that causation is a 51% standard—that the activity was more likely than not a cause of the injury.[26] This was based on Dr. Smith's assumption that Shea had ilioinguinal neuralgia.[27]

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[23] "[P]roximate cause becomes a matter of law only where reasonable minds cannot differ." *Winschel v. Brown*, 171 P.3d 142 (Alaska 2007). Because even ALJ Hemenway recognized that reasonable minds can differ on the question in this case,[23] this court will review the proximate cause issue as a factual matter, under the "substantial evidence" standard described above.

[24] Decision on Remand at 8.

[25] Tr. at 24–25.

[26] Tr. at 35.

[27] Tr. at 22.

Dr. Beard testified that she did not consider Shea's condition to be "chronic pelvic pain." [28] She testified that many patients with pain begin to forget about seeking treatment for the underlying condition. Rather, they seek treatment for the pain itself, because the pain is what disables them.[29] She said:

> I would not have diagnosed her or given her that label of "chronic pelvic pain." . . . But it was my interpretation that her treating physicians felt that she had the ilioinguinal neuralgia. She had just recently been evaluated . . . and diagnosed with that condition at the time of my exam. So her disability was really chronic pain; meaning the . . . pain itself became her diagnostic condition and her disability. . . . Well, there is what we know in pain management is that the original source of the injury or illness eventually stops becoming the condition they seek treatment for, and . . . the pain itself becomes the driving force. [30]

ALJ Hemenway was incorrect to interpret this testimony to mean that Shea's underlying physical condition (ilioinguinal neuralgia) had resolved.[31] This testimony only shows that Shea was likely seeking treatment for chronic pain; the ilioinguinal neuralgia may have remained present as the underlying condition. ALJ Hemenway does not cite to any other evidence supporting his interpretation.

The remainder of Dr. Beard's testimony does not support ALJ Hemenway's finding. She testified that ilioinguinal neuralgia usually "resolve[s] relatively quickly."[32] She said that Shea's duration of injury "would not be typical."[33] This evidence does not necessarily show that Shea's injury had abated; it shows either that (1) Shea's condition was atypical, or (2) something else was causing her pain. Neither is proof that her ilioinguinal neuralgia resolved.

2. Shea Never Reported to a Physician that Prolonged Sitting Aggravated her Condition

ALJ Hemenway found that "Ms. Shea did not report to a physician prolonged sitting at work as contributing to her chronic pain while she was still em-

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[28] Tr.at 185.
[29] Tr. at 185.
[30] Tr. at 185.
[31] *See* Decision on Remand at 8, n. 38.
[32] Tr. at 129.
[33] Tr. at 149.

ployed." ALJ Hemenway amended his decision to include "to a physician." Shea's brief argues that ALJ Hemenway erred because she reported her condition to her supervisor. This claim is moot based on ALJ Hemenway's amendment. There is substantial evidence that Shea did not report her sitting at work as a factor to any physician during her employment.[34]

3. Shea's Daily Activities Contributed to Her Chronic Pain

Shea claims that ALJ Hemenway was incorrect to find that "ordinary daily activities also aggravated her chronic pain."[35] The ALJ based his finding on several facts, including the fact that Shea reported increased pain "when she's been working at a Crisis Center lifting children, or working in the yard" in 1989;[36] "if she takes part in physical activity" in 1998;[37] when "utilizing stairs or sitting or standing too long" in 1999;[38] due to "no particular aggravating factors" in 1999;[39] when sitting, in 2000;[40] and lifting 7.5 pounds in 2001.[41] Each of these is fairly characterized as "ordinary daily [activity]" and there is substantial evidence to support ALJ Hemenway's finding that these aggravated her pain, since they were reported contemporaneously by Shea.

4. Aggravation from Sitting Amounted to Only Five to Ten Percent

ALJ Hemenway's factual finding that Shea's sitting aggravated her symptoms by five to ten percent is supported by substantial evidence.[42]

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[34] Documents 000238, 000240 are unidentified but are medical records from before 1991 which do not mention sitting. Document 000241 is a report by Dr. Baskous from 1998 that does not mention sitting. Documents 000252–000256 are reports from Dr. Fraser in 1998 that do not mention sitting. Document 000257 is by Dr. Nolan in 1998 and does not mention sitting. Document 000258 is a medical report from 1998 which reports that Shea has no aggravating or alleviating factors. Document 000270 is a report from Dr. Duddy which does not mention sitting.

[35] It is unclear to which factual finding Shea refers when she says "the ALJ's finding in number (1) of the decision is factually incorrect." There is a finding on page 5 of the decision, listed as "(1)" which refers to Ms. Shea's reporting that her pain was caused by a wide variety of daily activities, but it is not a finding based on any weighing of evidence; it is a statement that such information appears in the record.

[36] Decision at 3, n. 11.

[37] Tr. 241; Decision on Remand 5, n. 22; Decision at 3.

[38] Decision at 9, n.71

[39] Decision at 9, n.71.

[40] Decision at 9, n.72.

[41] Decision at 9, n.72.

[42] The transcript reads: "Q. And what was the – what level of aggravation would be caused by her sitting? A. You mean what percentage of her symptoms are related to her sitting? Q. Yes. A. I would say small. I would – you know, I – maybe 5 or 10 percent, at the most." Tr. 35:23–36:4.

5. *Whether the Expert Testimony Indicated that Shea's Underlying Condition Had Resolved*

As noted above in Section IV(1), ALJ Hemenway interpreted Dr. Beard's testimony to mean that Shea's underlying condition (ilioinguinal neuralgia) had resolved.[43] This finding was not supported by substantial evidence.[44]

6. *Psychological Factors May Have Contributed to Shea's Disability*

ALJ Hemenway found that there was "expert medical testimony that psychological factors may have contributed to [Shea's] disability."[45] Dr. Beard testified that, in the field of pain management, doctors now know that "the pain itself becomes the[] driving force. And it's a big emotional, psychological, psychosocial dilemma as to what is really driving this pain."[46] She also testified that there was no psychological evaluation of Shea, so it would be difficult for Beard to say whether the pain was caused by a physical or psychological condition.[47]

ALJ Hemenway's finding was a tepid one; he found that psychological factors *may* have contributed to Shea's disability. The evidence in the record supports this minor finding. Dr. Beard testified that it is possible for psychological factors to influence pain, and there was no proof that Shea did not have these psychological factors. Because ALJ Hemenway used the word "may," his finding is supported by substantial evidence.

7. *Whether the Overall Finding of Proximate Cause is Supported by Substantial Evidence*

ALJ Hemenway erred in finding no proximate cause. First, the ALJ's finding that Shea's ilioinguinal neuralgia had resolved was not supported by substantial evidence. Second, there is very little evidence of psychological factors being a cause of Shea's pain.

Third, there was substantial evidence to find that Shea failed to report sitting as a cause of her injury to a physician until after she retired. However, the court must still assess whether that fact is convincing evidence that a reasonable person would not "attach responsibility" to Shea's employer for her injury. As noted by Shea, she reported her injury to Siguardson, her supervisor, who was able to work out a plan to maintain Shea's comfort while sitting.[48] This shows that Shea

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[43] *See supra* Section IV(1).
[44] *See supra* Section IV(1).
[45] Decision on Remand, at 10.
[46] Tr. at 185.
[47] Tr. at 186.
[48] Tr. at 62.

understood that sitting was uncomfortable, and that she knew it was a factor in what caused her pain. Therefore, the fact that she did not report it to a doctor is thus not particularly convincing evidence.

The final remaining reason cited by the ALJ for not attaching responsibility to Shea's employer is that daily activities contributed to Shea's pain. However, the ALJ also found that Shea's daily activities did not change.[49] He found that it was "more likely than not that but for the change in her working conditions (i.e. prolonged sitting) she would not have been disabled in 2001."[50]

ALJ Hemenway made contradictory findings. Shea correctly describes[51] Dr. Smith's testimony. Smith said that it was at least 51% likely that prolonged sitting aggravated Shea's injury. The ALJ used this to conclude that Shea's injury would not have occurred "but for" her employer's conduct.[52] The ALJ cannot find on one hand that Dr. Smith's testimony was substantial evidence establishing actual cause but not substantial evidence supporting the causal component of proximate cause. Dr. Smith's testimony is substantial evidence for both. If Shea's daily activities remained unchanged and sitting was a 51% cause, it cannot be said that the daily activities defeat proximate cause.

In sum, the causal component of proximate cause is supported by substantial evidence. There is substantial evidence supporting the conclusions that Shea's ilioinguinal neuralgia had not resolved, and that prolonged sitting at work aggravated her injury. The question remains whether ALJ Hemenway correctly concluded that Shea did not prove by a preponderance of the evidence that prolonged sitting at work was a substantial factor in her disability. He did not. In light of the record as a whole, the factual findings upon which the ALJ based his conclusion that reasonable persons would not attach responsibility to Shea's employer for her injury were not adequate to support his conclusion.

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[49] Decision on Remand at 6.
[50] Decision on Remand at 7.
[51] Br. of Appellant at 13.
[52] Decision on Remand at 7.

CONCLUSION

For the reasons stated, the decision of the Administrative Law Judge dated February 26, 2013, is REVERSED.

Dated at Anchorage, Alaska, this 18th day of December, 2014.

[redacted]

Philip R. Volland
Superior Court Judge

I certify that on 12/18/14
a copy of the above was mailed to
each of the following at their addresses
of record: AGO Joan Wilkerson
[redacted] Joseph Kalamarides
Secretary/Deputy Clerk