ARTICLES

THE ALASKA WORKERS' COMPENSATION LAW: FACT-FINDING, APPELLATE REVIEW, AND THE PRESUMPTION OF COMPENSABILITY

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I. INTRODUCTION

Workers' compensation systems attempt to achieve a balance between requiring significant proof of each element of a claim and permitting or even mandating the payment of benefits without substantial evidence of causation or disability. Most systems use a combination of statute and case law, but in the final analysis the appellate courts determine which party is burdened and whether each party has met its obligations. Review of the validity and meaning of findings of fact often puts the appellate court in direct conflict with the lower court or administrative body charged with the initial responsibility for making findings of fact and arriving at a decision. Appellate court reversals of fact-finder decisions have a significant impact on the entire compensation system, as well as on the individual cases appealed. When courts "interfere" routinely with factual findings made at the trial or administrative hearing level, there is a danger that the lower tribunal will become little more than a starting place for claims. It is likely that many litigants will appeal their cases, primarily in the hope of being able to reargue the facts successfully. Further, the direction and scope of the compensation system will be influenced by the appellate court's perceptions of matters of proof and fact-finding.

This article examines the statutory presumption of compensability in Alaska's workers' compensation system. First, the judicial

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interpretation of the presumption is discussed. A section regarding the interpretation of the presumption in New York's workers' compensation statute is included because Alaska's statute is derived from New York's statute. The next section outlines the judicial framework for applying Alaska's presumption. Finally, the scope of the fact-finder's authority and the scope of appellate court review are analyzed.

II. INTERPRETING THE GENERAL PRESUMPTION OF COMPENSABILITY

A. Construction under Alaska Law

In Alaska's workers' compensation system, all fact-finding authority is vested in the Workers' Compensation Board (the Board), with review by the superior court and the supreme court only on questions of law and substantial evidence.[1] Unlike most state workers' compensation statutes, however, Alaska's Workers' Compensation Act contains a broad statutory presumption of compensability which provides that in a proceeding for the enforcement of a claim for compensation "it is presumed in the absence of substantial evidence to the contrary" that the claim comes within the provisions of the Alaska Workers' Compensation Act.[2]

The language of this section is not unique. In applying the presumption, the Alaska Supreme Court often looks for guidance to similar language establishing a presumption in the federal Longshoremen's and Harbor Workers' Compensation Act.[3] In addition, there is a wealth of New York case law interpreting New York's Workers' Compensation Law,[4] from which both the federal and Alaska presumptions are derived.[5] Despite the available precedent, the Alaska Supreme Court took many years to arrive at a definitive position concerning the proper application of the presumption.

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1. Miller v. ITT Arctic Servs., 577 P.2d 1044, 1046-49 (1978); Beauchamp v. Employers Liability Assurance Corp., 477 P.2d 993, 997 (Alaska 1970).

2. ALASKA STAT. § 23.30.120 (1984).

Presumptions. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that

(1) the claim comes within the provisions of this chapter;

(2) sufficient notice of the claim has been given;

(3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;

(4) the injury was not occasioned by the wilful intention of the injured employee to injure or kill self or another.

3. 33 U.S.C. § 320 (1982) (enacted in 1927).

4. N.Y. WORK. COMP. LAW § 21 (McKinney 1965) (enacted in 1913).

5. *See* 4 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 89.10 (1984).

The first mention of the statutory presumption in Alaska is found in a 1966 decision. In *Thornton v. Alaska Workmen's Compensation Board,*[6] the court reviewed a denial of benefits based on the Board's finding that the decedent's heart attack did not arise out of his employment.[7] The decision did little to explain the proper application of the presumption. Indeed, the court stated at the outset that the question to be decided was "whether in the light of the whole record [the Board's] finding is supported by substantial evidence, that is, such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[8] The only analysis of the statutory presumption is found in two statements by the court:

> The workmen's compensation statute creates a presumption that in the absence of substantial evidence to the contrary a claim for compensation comes within the provisions of the statute. Accordingly, it is presumed that Thornton's death was work-connected in the absence of substantial evidence that it was not. Such evidence is absent here.
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> . . . The evidence shows that the exertion of climbing the tower was a precipitating factor in Thornton's death, and this bolsters the statutory presumption that the death arose out of and in the course of Thornton's employment.[9]

The court overruled the Board's decision and held, somewhat indirectly, that there was no substantial evidence to rebut the statutory presumption and support a denial of benefits.[10] In fact, all of the medical evidence in the case supported compensability under the rules of causation established by the court. As a result, the court's comments concerning the presumption simply raised questions whether any evidence, beyond the filing of a claim, was necessary to invoke the presumption and what effect "bolstering" evidence had on the presumption's application.

The supreme court's first direct confrontation with the statutory presumption of compensability came in *Anchorage Roofing Co. v. Gonzales.*[11] The issue arose in the context of a possible conflict between the operation of the presumption and the holding in *RCA Service Co. v. Liggett.*[12] The *Liggett* court had held that "[t]he burden of proving that an injury arose out of and in the course of the employment rests upon the claimant."[13] The *Gonzales* court found no inconsistency between *Liggett* and the statutory presumption:

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6. 411 P.2d 209 (Alaska 1966).
7. *Id.* at 210.
8. *Id.*
9. *Id.* at 211 (citations omitted).
10. *Id.*
11. 507 P.2d 501 (Alaska 1973).
12. 394 P.2d 675 (Alaska 1964).
13. *Id.* at 677, *cited in Gonzales,* 507 P.2d at 503-04.

> There is no inconsistency for the presumption . . . places a burden on the employer to go forward with evidence on the issue of whether the injury arises outside or within the scope of employment. Once competent evidence is introduced, the presumption drops out, and the final burden of proof as alluded to in *R.C.A. Service Co. v. Liggett* as to all essential elements is on the claimant.[14]

The court appeared to hold that the mere filing of a claim was sufficient "proof" to support an award, at least on the issue of compensability, unless the presumption was rebutted by substantial evidence of noncompensability.

This interpretation was bolstered, although in a rather confusing manner, by the court's next decision dealing with the statutory presumption, *Employers Commercial Union Co. v. Libor.*[15] The Board in *Libor* ruled for the claimant and the employer appealed. If the presumption of compensability does carry the weight of evidence and is itself sufficient to support an award, the initial question upon review should have been whether the employer had met its burden of presenting substantial rebuttal evidence. On appeal, the employer argued that the Board's decision could not be upheld because it was not supported by substantial evidence and because, since there was substantial evidence "contrary to the presumption, . . . the benefit of the presumption was not available to the claimant."[16] The court held, in the last sentence of its decision, that the Board's decision was supportable on the basis of the presumption alone since it had not been overcome by substantial evidence to the contrary.[17] The court spent considerable time, however, determining whether there was substantial evidence to support the award, a task which should have been totally unnecessary if the presumption were the equivalent of evidence and, as the court finally decided, had not been rebutted.

The evidence supporting the award in *Libor* was not particularly strong. In May of 1969, the claimant suffered an injury at work, resulting in a fractured transverse process of the L2 and L3 vertebra.[18] After a two week absence, the claimant returned to work until February 1971 when he stopped work due to lower back pain.[19] In April he underwent a laminectomy at L5-S1, affecting different vertebra than had been initially injured at work.[20] The operating physicians, who later testified in support of the award, would not testify that there was

14. *Gonzales,* 507 P.2d at 504.
15. 536 P.2d 129 (Alaska 1975).
16. *Id.* at 131.
17. *Id.* at 132.
18. *Id.* at 129.
19. *Id.*
20. *Id.* at 130.

a causal connection between the original accident and the laminectomy, other than to say that a connection could exist.[21] The court held[22] that this evidence, together with the claimant's testimony and the Board's expertise and discretion in such matters, constituted substantial evidence of causal connection.[23]

It was not until 1976, in *Commercial Union Cos. v. Smallwood*[24] (*Smallwood I*) that the court directly addressed the questions whether the claimant must introduce "foothold" evidence before the presumption of compensability takes effect and, if he must, how much evidence is required. *Smallwood I* involved a claim for disability resulting from renal failure. The Board awarded benefits, but the case was remanded for reconsideration because of technical questions concerning the admissibility of certain medical evidence. In its decision, the court apparently retreated from the broad interpretation in *Libor*[25] and *Gonzales*[26] that the presumption itself, without some kind of evidentiary support, was a sufficient "foothold" for the claimant's case:

> The claim in this case is based on highly technical medical considerations pertaining to the cause of the claimant's renal failure. While valid awards can stand in the absence of definite medical diagnosis, this would appear to be the type of case in which it is impossible to form a judgment on the relation of the employment to the disability without medical analysis.[27]

Smallwood returned to the Alaska Supreme Court in *Burgess Construction Co. v. Smallwood*[28] (*Smallwood II*). Although the court once again remanded the case to the Board, this time on the basis of its determination that the Board had applied the wrong causation test in denying benefits,[29] it reexamined its prior comments concerning the need for medical evidence in matters involving technical questions of causation:

> We did not mean by this language to imply . . . that the statutory presumption of compensability in the absence of substantial evidence to the contrary is not applicable in cases such as this. Rather, the quoted language simply acknowledges that before the presumption attaches, some preliminary link must be established between the disability and the employment, and that in claims "based on highly technical medical considerations" medical evidence is often

21. *Id.*
22. The court relied on its prior holding in *Beauchamp v. Employers Liability Assurance Corp.*, 477 P.2d 993 (Alaska 1970), cited in *Libor*, 536 P.2d at 130-31.
23. *Libor*, 536 P.2d at 131-32.
24. 550 P.2d 1261 (Alaska 1976).
25. 536 P.2d at 132, discussed *supra* notes 15-23 and accompanying text.
26. 507 P.2d at 504, discussed *supra* notes 11-14 and accompanying text.
27. 550 P.2d at 1267.
28. 623 P.2d 312 (Alaska 1981).
29. *Id.* at 317.

> necessary in order to make that connection. . . . But once a prima facie case of work relatedness is made, . . . the Board may not ignore the presumption and allocate the burden of proof to the claimant.[30]

This broad language means that the mere filing of a claim does not allow the Board to presume compensability. *Smallwood II* finally established that before the presumption may be invoked there must be foothold evidence that the claimant's disability arose out of, or in the course of, employment. The quantity and quality of the evidence required will depend on the extent to which the question in controversy is a "technical" question.[31]

B. New York Construction of the Presumption Clause Prior to Adoption of the Alaska Statute

The Alaska presumption was taken, as noted at the outset, word-for-word from the New York workers' compensation law,[32] or, in what amounts to the same thing, from the federal Longshoremen's Act, which itself copied the New York law. A standard maxim of statutory construction is that when a state copies verbatim a provision from a sister state's statute, and that statute already has been interpreted by the sister state's court of last resort, the copying state is deemed to have adopted the interpretation.[33] The New York Court of Appeals had provided an explicit and detailed interpretation of the New York statutory presumption before Alaska adopted it. Therefore, it is appropriate to examine New York's interpretation in order to answer two principal questions. First, what demonstration of a "preliminary link" between the disability and employment is necessary to give the presumption of compensability a foothold? Second, if the employer rebuts the presumption with substantial evidence, does the presumption "drop out," or does it continue to function as "evidence," strengthening the claimant's case, and does the employer still retain the burden of persuasion?

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30. *Id.* at 315-16.

31. *Id.* The *Smallwood II* decision was apparently overlooked only seven months later. In Employers Commercial Union Ins. Cos. v. Schoen, 554 P.2d 1146 (Alaska 1976), an award was made for disability resulting from a heart attack, with the only medical testimony stating that causation was "conceivable, but by no means certain." *Id.* at 1147. That testimony, coupled with evidence of a heart attack and symptoms occurring at work, was held to be sufficient to support the award, despite the fact that the claimant had a history of severe heart trouble and even though questions of causation in cardiac cases would appear to be as technical as those involving renal failure. *Id.* at 1147-48.

32. *Supra* text accompanying notes 3, 5.

33. Fuller-Toponce Truck Co. v. Public Service Comm'n, 99 Utah 28, 35, 96 P.2d 722, 725 (1939).

1. *The "foothold" problem.* At first glance, the sweeping language of the statutory presumption seems to mean that merely making a claim, and showing that death or injury occurred, establishes a prima facie case. The New York Court of Appeals rejected this interpretation from the very beginning. Long before the Alaska provision was adopted, the New York Court of Appeals firmly established that some kind of preliminary link between the injury and the employment must be shown before the presumption could be invoked. Indeed, the Alaska Supreme Court in *Smallwood II*[34] clearly accepted this view. A moment's thought reveals that otherwise a claimant would merely have to say: "My husband, who was one of your employees, has died, and I therefore claim death benefits," whereupon the affirmative duty would devolve upon the employer to prove that there was no connection between the death and the employment.

The leading New York case establishing the need for an initial showing of employment connection was *Lorchitsky v. Gotham Folding Box Co.*[35] The claimant had been injured by either an unexplained fall or an assault by a stranger.[36] The Board believed it was unnecessary to determine the precise cause of the claimant's injury because of the statutory presumption that the injury "arose out of and in the course of the employment."[37] The Court of Appeals reversed, stating:

> It is not the law that mere proof of an accident, without other evidence, creates the presumption under section 21 of the Workmen's Compensation Law . . . that the accident arose out of and in the course of the employment. On the contrary, it has been frequently held, directly and indirectly, that there must be some evidence from which the conclusion can be drawn that the injuries did arise out of and in the course of the employment.[38]

The Court of Appeals in *Daus v. Gunderman & Sons, Inc.*,[39] which involved a salesman injured at midnight, reached the same conclusion as the *Lorchitsky* court did. The court reversed the Board's award and observed: "Proof of the accident will give rise to the statutory presumption only where some connection appears between the accident and the employment."[40] In *Dyviniek v. Buffalo Courier Express,*[41] the question whether the statutory presumption applied arose when a photographer was exposed to typhoid. Again, the court stressed that "[t]he lack of any evidence connecting the disease with

34. 623 P.2d 312 (Alaska 1981), discussed *supra* text accompanying notes 28-31.
35. 230 N.Y. 8, 128 N.E. 899 (1920).
36. *Id.* at 12, 128 N.E. at 900.
37. *Id.*
38. *Id.* at 12, 128 N.E. at 901 (citations omitted).
39. 283 N.Y. 459, 28 N.E.2d 914 (1940).
40. *Id.* at 466, 28 N.E.2d at 918.
41. 296 N.Y. 361, 73 N.E.2d 552 (1947).

accidental injury in the course of employment may not be supplied by the statutory presumption."[42] *McCormack v. National City Bank*[43] involved an elevator operator's collapse while at work and his eventual death from a cerebral hemorrhage. The court reversed an award and commented on the use of the statutory presumption:

> [A]s this court has frequently ruled, "[the presumption] cannot be used as a substitute for actual proof." . . . Consequently, where as in the present case, there is no evidence at all of industrial accident or of accidental injury, the lack of such evidence, [sic] may not be supplied by the presumption; in other words section 21 may not be availed of, or the presumption utilized, to establish the incident of accident itself.[44]

Given that the case law establishes a need for some threshold showing of work-relatedness, the question remains: What kind of showing will satisfy the requirement of some work-connection sufficient to give rise to the statutory presumption?

In the most common type of case, the presumption supplies the "arising-out-of-employment" or work-connection factor if there is evidence that the injury occurred while the employee was at work.[45] In most of these cases the injury or death is unexplained, but if the injury or death is in the course of employment, the presumption is routinely applied.[46] The presumption is particularly helpful in cases in which both an idiopathic factor and an occupational factor possibly figure in the causation of the injury. Thus, in *Kurash v. Franklin Stores Corp.*,[47] in which the employee died of a subarachnoid hemorrhage after a violent fall,[48] the court found:

> But where there seems a reasonable basis for a difference in medical opinion on the cause of death, i.e., whether due to the violence of a fall . . . or whether due to internal causes with a resulting violence, there has been a tendency to sustain the presumption invoked by the Board where the medical record would be open to a finding either way.[49]

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42. *Id.* at 364, 73 N.E.2d at 552.

43. 303 N.Y. 5, 99 N.E.2d 887 (1951).

44. *Id.* at 11, 99 N.E.2d at 889 (citations omitted).

45. *See, e.g.,* Humphrey v. Tietjen & Steffin Milk Co., 261 N.Y. 549, 550, 185 N.E. 733, 734 (1933); *see also* 1 A. LARSON, *supra* note 5, § 10.33 n.58 (1984) (summarizing twenty other New York cases).

46. 1 A. LARSON, *supra* note 5, §§ 10.32-.33, including unexplained suicides, § 10.33(c); unexplained falls, § 10.33(b); and unexplained assaults, § 10.33(d).

47. 12 A.D.2d 368, 211 N.Y.S. 838 (1961).

48. *Id.* at 369, 211 N.Y.S.2d at 839.

49. *Id.* at 371, 211 N.Y.S.2d at 840. When the issue is medical causation, the Alaska Supreme Court has made a valuable contribution to the list of potential "footholds" by holding that, in some cases, the foothold must take the form of the introduction of some medical evidence connecting the employment with the injury. *Smallwood II,* 623 P.2d at 316, discussed *supra* text accompanying notes 28-31.

2. *The "drop-out" issue.* New York case law on the question whether the presumption of compensability drops out after the introduction of substantial rebuttal evidence was clear and authoritative prior to the enactment of Alaska's Workers' Compensation Act. In *Wilson v. General Motors Corp.,*[50] the New York court denied compensation and made it clear that the presumption drops out:

> [The presumption] has no bearing here, for it cannot be used as a substitute for actual proof that the injury arose out of and in the course of the employment. . . . In truth, the presumption has no place in any case once the facts are fully developed; of necessity, it fails in the presence of contrary evidence.[51]

This statement is substantially identical to the Alaska Supreme Court's statement in *Gonzales,*[52] that, "[o]nce competent evidence is introduced, the presumption drops out, and the final burden of proof . . . as to all essential elements is on the claimant."[53]

The most extreme contrary position on this point has been developed by Hawaii. In New York and Alaska, the statutory language requires that, absent substantial rebuttal evidence, "(1) the claim comes within the provisions of this chapter." Hawaii, like Alaska, copied the New York formula, although in 1963 it changed the wording of its statute to: "it shall be presumed, in the absence of substantial evidence to the contrary: (1) That the claim is for a covered work injury."[54] This change, according to the editors of the statute, was meant to be "chiefly of a formal character."[55] Hawaii courts have diverged substantially from the New York and Alaska position.

In *Acoustic, Insulation & Drywall, Inc. v. Labor & Industrial Relations Appeal Board,*[56] the Hawaii Supreme Court held that, even after the employer had presented rebuttal evidence, the "employer [has] both the burden of going forward with the evidence and the burden of persuasion."[57] The court reiterated this position in a per curiam opinion denying a petition for a rehearing in *Acoustic*[58] and in *Akamine v. Hawaiian Packing & Crating Co.,*[59] *DeFries v. Association of Owners, 999 Wilder,*[60] and *Lawhead v. United Air Lines.*[61] Although a few federal and other cases are cited in these opinions, none of them supports

50. 298 N.Y. 468, 84 N.E.2d 781 (1949).
51. *Id.* at 472, 84 N.E.2d at 783.
52. 507 P.2d 501 (Alaska 1973), discussed *supra* text accompanying notes 11-14.
53. *Id.* at 504.
54. HAWAII REV. STAT. § 386-85 (1976).
55. Acoustic, Insulation & Drywall, Inc. v. Labor & Industrial Relations Appeal Board, 51 Hawaii 312, 315 n.1, 459 P.2d 541, 543 n.1 (1969) (quoting 1963 Hawaii Senate Journal 793).
56. 51 Hawaii 312, 459 P.2d 541 (1969).
57. *Id.* at 316, 459 P.2d at 544.
58. 51 Hawaii 632, 466 P.2d 439 (1970).
59. 53 Hawaii 406, 495 P.2d 1164 (1972).
60. 57 Hawaii 236, 555 P.2d 855 (1976).

the extreme view that the burden of persuasion always remains on the employer. The Hawaii court could find nothing more substantial than the repeatedly cited statement from *Wheatley v. Adler,*[62] that if an injury arises in the course of employment, doubts should be resolved in the claimant's favor.[63]

The statutory presumption, however, is not needed to effect the policy that doubts should be resolved in the claimant's favor. This policy has been adopted by some courts in states which lack the statutory presumption.[64] Moreover, it is possible to accept this general approach and still follow the normal rule that, once the statutory presumption has been rebutted, the plaintiff has the burden of proof.[65]

At the time *Acoustic* was decided, a New York decision, *Wilson v. General Motors Corp.,*[66] had clearly settled the matter and was available to the Hawaii court. Unlike the cases cited by the Hawaii court, the *Wilson* case should have been more than persuasive authority; it should have been binding if one accepts the rule of construction that a state adopts a sister state's case law interpreting a statutory provision when it enacts a similar provision.[67] *Wilson* had the further advantage of being specifically on point. Nevertheless, *Wilson* had one serious disadvantage for the Hawaii court: it held the opposite of what the court wanted to hold, as evidenced by its repeated and vigorous reaffirmation of its lonely position over the years.

One may question whether the statutory presumption is of much value to the claimant if its sole effect is to shift the burden of producing evidence to the defendant. The answer to this question may help explain what the presumption was really intended to do.

A closer look at the fact situations in the dozens of New York cases in which the presumption was successfully invoked reveals that almost all of them were cases in which a crucial fact of work-connec-

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61. 59 Hawaii 551, 584 P.2d 119 (1978).

62. 407 F.2d 307 (D.D.C. 1968).

63. *Id.* at 312.

64. *See, e.g.,* Garza v. Workmen's Compensation Appeals Bd., 3 Cal. 3d 312, 319, 90 Cal. Rptr. 355, 360, 475 P.2d 451, 456 (1970).

65. The Alaska Supreme Court has described its application of the policy that resolves doubts in favor of claimants as follows:

> In Thornton v. Alaska Workmen's Compensation Bd., 411 P.2d 209, 211 (Alaska 1966), we noted that doubts should be resolved in favor of the claimant "if there were any doubt as to what the substance of the medical testimony was." . . . We believe the *Thornton* approach is correct and the rule is properly applicable only when the substance of a particular witness' testimony is in doubt.

Miller v. ITT Arctic Servs., 577 P.2d 1044, 1049 (Alaska 1978).

66. 298 N.Y. 468, 84 N.E.2d 781, discussed *supra* text accompanying note 50.

67. *Supra* text accompanying note 33.

tion was not only unknown and unexplained, but unknowable and inexplicable. Of course this is true of all cases where the injury is unexplained. Suppose a worker is found dead at his work station with a head wound. There is no way of knowing how he died — whether he fell or was assaulted, and in either case whether it was the result of personal or work-related factors. Without the presumption of compensability, the claimant's task of carrying his burden of proof of work-connection would be hopeless. With the presumption, the burden of proving absence of work-connection passes to the employer. The employer's task of disproving work-connection, however, is equally hopeless. What is unknowable to the claimant is equally unknowable to the employer. Thus, proof that the death occurred during the course of employment provides the "foothold," and the presumption carries the day.

The employer cannot rebut the presumption merely by raising speculative non-work-connected explanations of the injury. The leading case on this issue is *Goddu's Case,*[68] in which the Supreme Judicial Court of Massachusetts interpreted the state's statutory presumption, which is similar to New York's but limited to cases of death or of physical or mental inability to testify.[69] The court held that the presumption supported an award for death from a fall on a level stair landing, despite the fact that there was no explanation of the cause of the fall and there was evidence that the decedent had suffered a coronary attack two years earlier. The court found that the "contrary" evidence was not sufficiently "substantial;" it would be speculative to assume that the present fall was caused by a heart attack on nothing more than evidence of a heart attack two years earlier.[70]

The original draftsmen of the New York statute may have been concerned mainly with the unexplained-death and unwitnessed-accident problems. Judge Conway's dissent in *McCormack*[71] lent support to this view when he wrote:

> The presumption in section 21 has been prescribed by our Legislature by reason of the difficulty in establishing the cause of death in cases, among others, where the person injured dies as a result of an unwitnessed occurrence.[72]

Nonetheless, the drafters of the New York statute failed to limit the presumption to these types of cases, as Massachusetts and some other states have done.

Other basic questions about the applicability of the presumption in Alaska remain unanswered by either the case law or the statute.

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68. 323 Mass. 397, 82 N.E.2d 232 (1948).

69. MASS. ANN. LAWS ch. 152, § 7A (Law. Co-op. 1976).

70. 323 Mass. at 400-02, 82 N.E.2d at 234-35.

71. McCormack v. National City Bank, 303 N.Y. 5, 99 N.E.2d 887 (1951) (Conway, J., dissenting), discussed *supra* text accompanying note 43.

72. *Id.* at 16, 99 N.E.2d at 892 (Conway, J., dissenting).

For example, the significance of the presumption's wording, that "in the absence of substantial evidence to the contrary . . . the claim comes within the provisions of this chapter,"[73] is not clear. The language could be construed to apply only to issues of compensability of initial claims, rather than to questions such as duration and extent of disability. By implication, the Alaska Supreme Court indicated that the statute has a broad application. In *Cook v. Alaska Workmen's Compensation Board,*[74] the court stated that doubt as to what the medical testimony established should be resolved in favor of compensating the employee.[75] The court also made reference to "the presumption in favor of allowing claims."[76] The authority offered by the court for these statements, however, was weak,[77] and these issues have not yet been confronted directly by the court.[78] Because the question is of legislative origin, legislative clarification may be helpful, if not necessary.

III. APPLYING THE PRESUMPTION IN ALASKA'S SYSTEM

In those situations in which the presumption of compensability applies, it is not difficult to fit the presumption within the statutory and court-made scheme for resolving disputes and reviewing the actions of the Workers' Compensation Board. The steps which the Board should take in deciding a claim are outlined below.

1. The supreme court determined in *Smallwood II*[79] that the mere filing of a claim does not automatically result in the application of the presumption. Therefore, the Board must determine whether the claimant has supplied the evidence necessary to establish a "preliminary link" between the injury and employment. If the claimant has not established this foothold, the claim must fail.

2. Once the foothold evidentiary requirements for invoking the presumption have been met, the Board must determine whether the employer has presented substantial

73. ALASKA STAT. § 23.30.120(a)(1).

74. 476 P.2d 29 (Alaska 1970).

75. *Id.* at 32.

76. *Id.* at 35.

77. *Id.* at 32, 35. The court in *Cook* cited, without explanation, Thornton v. Alaska Workmen's Compensation Bd., 411 P.2d 209 (Alaska 1966), as support for the proposition that doubt should be resolved in favor of compensation. *See* discussion *supra* text accompanying notes 6-10.

78. The court has applied the presumption to situations other than determinations of initial injury. A recent example is Veco, Inc. v. Wolfer, No. 2904 (Jan. 25, 1985), where the court applied the presumption to a determination of which insurance carrier was responsible for coverage of a second period of disability.

79. Discussed *supra* text accompanying notes 28-31.

evidence to the contrary. If the employer has not, the claim must be granted.

3. If substantial evidence to the contrary is presented by the employer, the burden of persuasion then rests with the employee. The employee must convince the Board of the merit of the claim without the benefit of the presumption.

On appellate review, the questions to be resolved are similar, but not identical.

1. If the Board decides in favor of the employer, the decision must be affirmed if the court agrees, as a matter of law, that there is substantial evidence to support the decision.[80] The court may not "reweigh the evidence,"[81] because that is the Board's function as fact-finder. Nonetheless, the question whether "substantial evidence" has been presented is a question of law.[82] Thus, the court has the discretion to evaluate the legal sufficiency of the facts. If the court finds, as a matter of law, that the Board's decision was not supported by substantial evidence, it can reverse or remand for further proceedings.

2.(a) If the Board decides in favor of the claimant, the first issue to be determined on appeal is whether the claimant presented sufficient evidence to meet the foothold test of work-connection. If he did not, the claim must be denied.

(b) If the claimant presented foothold evidence, the next issue is whether the employer presented substantial evidence to the contrary. If the employer did not, the decision for the claimant must be affirmed.

(c) If the employer presented substantial evidence to the contrary, the reviewing court must determine whether the claimant presented substantial evidence to support the award, because the claimant's foothold evidence may not be enough to support the award once the presumption drops out. If substantial evidence supports the judgment for the claimant, the decision in favor of the claimant must be affirmed. If not, then the decision must be reversed.

3. If the record reveals that the Board's decision in favor of the claimant was improperly influenced by the presumption, the case must be remanded for reconsideration. In cases in which the employer has presented substantial evidence to rebut the presumption, the presumption drops out.

80. Miller v. ITT Arctic Servs., 577 P.2d 1044, 1049 (Alaska 1978).
81. *Id.*
82. *Id.* at 1046.

> The decision must be based upon the Board's independent evaluation of all the evidence, with no influence from the presumption.

IV. FINDINGS OF FACT AND THE SCOPE OF REVIEW IN ALASKA

It is relatively simple to outline the mechanical aspects of appellate review that establish a framework for evaluating the actions of the Board. The more difficult questions concern the court's role in evaluating the evidence presented to the Board. As suggested in the introduction, if the Board is to be effective at resolving disputed claims, parties to disputes must be confident that the Board's decisions usually will be affirmed on appeal. Tension is most likely to develop between the Board and the appellate court from two types of reversals concerning the evaluation of evidence: 1) when the court reverses a Board determination that the claimant has not presented enough evidence to support the initial claim of work-connection; and 2) when the court reverses a Board determination that the employer has presented substantial evidence to rebut the presumption.

The Alaska Supreme Court has been less than supportive of the Workers' Compensation Board's evaluation of evidence and testimony, at least in those cases in which the Board has ruled against a claimant. Nevertheless, the court's direct pronouncements on this issue appear supportive of the Board. For example, the court's decision in *Beauchamp v. Employers Liability Assurance Corp.*[83] appears to provide substantial support for the Board's authority. The court stated that "Board members were free to rely upon their own experience, observation and judgment in connection with all the evidence before them."[84] This position was reiterated in *Wilson v. Erickson,*[85] in which the court stated that the Board was not limited to the face value of medical testimony but could rely on inferences as well as the peculiar facts of the case.[86] This language was used to reverse a denial of benefits for permanent total disability, even though the disability appeared to be caused in part by lack of rehabilitative effort.[87]

The scope of the Board's authority was also mentioned in *Brown v. Northwest Airlines, Inc.*[88] In *Brown,* the employer contended that the Board was free to disregard medical testimony, disbelieve the claimant, and deny benefits. The court ruled neither on the extent of

83. 477 P.2d 993 (Alaska 1970).

84. *Id.* at 996.

85. 477 P.2d 998 (Alaska 1970).

86. *Id.* at 1001. The court referred to "the court," but undoubtedly meant "the Board."

87. *Id.* at 1001 n.10.

88. 444 P.2d 529 (Alaska 1968).

such authority nor on its potential impact on the operation of the presumption. Instead, the court adopted the rationale from *Ennis v. O'Hearne,*[89] which held that under the proper circumstances, the fact-finder may disregard medical evidence and rely upon its own observations as well as "other evidence"; in the absence of other evidence in the record, however, a decision contrary to the medical evidence could not stand.[90]

These cases give the impression that the Board has a significant degree of latitude in its fact-finding authority. Nonetheless, the court's actions present a different picture. In fact, the Alaska Supreme Court has come very close to crossing, and perhaps has crossed, the line between appellate review of Board decisions and independent re-evaluation of evidence including the credibility of witnesses.

Rogers Electric Co. v. Kouba[91] provides some idea of how little latitude the court intends to give the Board. Kouba was an electrician who suffered a back injury while working at Prudhoe Bay in September 1975. He moved to Texas and received workers' compensation until November 1975. At that time, his doctor decided he could return to work because the problem had subsided. Kouba returned to work on an irregular basis but claimed his ability to work was diminished by the back injury, which was reaggravated by work.[92] Kouba's claim before the Board was for compensation allegedly due since November 1975 because of his reduced work ability. There were two grounds for the Board's denial of benefits. First, the Board found that the claimant's continuing problems were not the result of his admittedly compensable injury.[93] Second, the Board found that the claimant had not missed employment opportunities as a result of his disabilities.[94] The Board's decision rested on its finding that objective signs of disability were absent and its view that it is unusual for disability without objective signs to last for over a year.[95]

The supreme court summarily dismissed the Board's statement that it is unusual for a disability to last a year without objective signs of disability, because no evidence had been set forth in support of the statement. Without mentioning the right of Board members, under *Beauchamp,*[96] to rely upon their own experience, observation, and judgment, the court found a lack of supportive testimony in the record. The employer's expert testified that there were no objective signs

89. 223 F.2d 755 (4th Cir. 1955).
90. *Id.* at 758.
91. 603 P.2d 909 (Alaska 1979).
92. *Id.* at 910-11.
93. *Id.* at 911.
94. *Id.* at 912.
95. *Id.* at 911.
96. 477 P.2d 933, discussed *supra* text accompanying notes 83-87.

of anything that would have prevented the claimant from working as an electrician. On appeal, the court held that this expert's testimony did not contradict the testimony by the claimant's expert that the pain was work-related.[97] Stating that "any doubt as to the substance of the medical testimony should be resolved in favor of the claimant," the court held that "the Board's decision was not supported by the 'substantial evidence' necessary to rebut the statutory presumption of coverage."[98]

A similar attitude toward the Board is demonstrated by *Alaska Pacific Assurance Co. v. Turner.*[99] *Turner* involved a disagreement between the Board and the reviewing court on whether there was sufficient foothold evidence introduced to support the presumption of compensability. The claimant's problems apparently began while he was working, but he continued to work for six months. Although he had applied for reduction-in-force layoff because of his pain, the claimant explained that "for some strange reason" he did not see a doctor until after he suffered sharp pain while lifting the tongue of a boat trailer at home two months after stopping work.[100] The only medical testimony, that of the treating physician, indicated that the claimant was first injured in the course of his employment and that the trailer incident aggravated it, resulting in the need for surgery.[101] The Board found that the injury was entirely due to the trailer lifting, and therefore, the injury was not compensable because it was not work-related.[102] In reaching its decision to require an award of benefits, the supreme court apparently simply disagreed with the Board's evaluation of witnesses and testimony. The court held that the presumption applied and that the injury was compensable.[103] Once again the Board's exercise of its experience, observation, and judgment in evaluating the evidence was reversed by the court.

The court's apparent unwillingness to permit the Board any significant latitude in rejecting testimony that might be supportive of a claim was demonstrated even more emphatically in *Kessick v. Alyeska Pipeline Service Co.*[104] In *Kessick,* the court recognized that the Board could disbelieve a portion of the claimant's testimony and that "[i]t is well-settled that where a claimant testifies falsely in one instance the

97. 603 P.2d at 912.
98. *Id.*
99. 611 P.2d 12 (Alaska 1980).
100. *Id.* at 13.
101. *Id.*
102. *Id.* at 14.
103. *Id.* at 15. The court relied upon *Beauchamp,* 477 P.2d 933, discussed *supra* text accompanying notes 83-87, and *Cook,* 476 P.2d 29, discussed *supra* text accompanying notes 74-77.
104. 617 P.2d 755 (Alaska 1980).

trier of fact may elect to disregard his otherwise uncontradicted testimony."[105] Nevertheless, although there was virtually no objective evidence of continuing disability, and the Board distrusted the medical testimony because most of it was based upon the claimant's history, the supreme court reversed the denial of benefits because no contradictory medical evidence was presented.[106] As the dissent pointed out: "The medical analysis here depended almost entirely on evaluating the history furnished by Kessick and his subjective complaints. This is the type of evidence in which a compensation board has considerable experience."[107]

The supreme court's apparent refusal to allow the Board any discretion if the result is the denial of a claim reached its zenith in *Black v. Universal Services, Inc.*[108] The facts of the claim were extremely complex. There were numerous conflicting opinions about causation, psychological considerations, and the refusal of the initial treating physician to re-examine the claimant because the physician believed the claimant had been malingering. The Board based its decision at least in part on the report of the only psychiatrist who examined the claimant. The psychiatrist stated that the claimant's problems were not due to the accident at work. The court's opinion reveals its view of the Board's authority:

> After reviewing the record, we are unable to accept Dr. Pennell's report as "substantial evidence" in support of the Board's conclusion that Black's then-present disability was unrelated to the February 14, 1976, incident.
>
> Because Dr. Pennell had no opportunity to examine Black in any depth, and because his conclusions are contrary to those of the numerous physicians who treated her, we have concluded that a "reasonable mind" would not accept his diagnosis. While the judiciary may not reweigh the evidence before the Board, . . . neither may it abdicate its reviewing function and affirm a Board decision that has only extremely slight supporting evidence. . . . .
>
> We recognize that Dr. Pennell is a psychiatrist and that Drs. Welke, Butler, Lindig, Klemperer, and Mead are not, and hence that Pennell's conclusion that Black's problems are mental might be given more weight than the other doctors' conclusions to the contrary.
>
> Dr. Pennell's report is neither doubtful nor ambiguous. However, because of the weaknesses in Pennell's report described above, we conclude that a reasonable mind would not accept his psychological conclusions as adequate to support the Board's denial of

105. *Id.* at 757 n.4.
106. *Id.* at 758.
107. *Id.* at 759 (Boochever, J., dissenting).
108. 627 P.2d 1073 (Alaska 1981).

> compensation. Thus, Pennell's report does not provide a substantial basis for the Board's denial of Black's claim.[109]

In reaching this decision, the court decided in effect that it had the authority and the medical expertise to determine the amount of time a doctor must spend with a patient before his opinion becomes "substantial." In addition, the court appears to have concluded that Dr. Pennell and the members of the Board who concurred in the decision, as well as the superior court which affirmed it, had something less than reasonable minds. This point was made in the dissent in *Fireman's Fund American Insurance Companies v. Gomez,* in which Justice Erwin stated that, "while I have never been able to explain a finding by an appellate court stating that reasonable minds cannot differ on a particular question when a reasonable judge dissents as to that view, such is the case herein."[110]

Hoth v. Valley Construction[111] is another case demonstrating the supreme court's restrictive view of the Board's discretion. In *Hoth,* the claimant had fallen from a scaffold in 1971. He had been bruised and shaken, but was not disabled. He did not visit a doctor and returned to work the same day. He apparently experienced increasingly serious wrist pain over the years, but did not see a doctor until 1978.[112] In 1980 when the pain became disabling, his wife reminded him of the 1971 incident, and on the basis of this history the treating physician found a work-connection.[113] Although the Board found a number of reasons for discounting testimony concerning injury to the wrist in the 1971 accident, the supreme court held that compensation should not be denied in the absence of evidence that there had been some intervening accident.[114]

In addition, the *Hoth* court touched upon the Board's right to determine credibility under section 122 of the Workers' Compensation Act, which was added in 1982:

> Credibility of Witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.[115]

The *Hoth* court declined to "assume" that lack of credibility was a

109. *Id.* at 1075-76 (footnotes and citation omitted).
110. 544 P.2d 1013, 1018 (Alaska 1976) (Erwin, J., dissenting).
111. 671 P.2d 871 (Alaska 1983).
112. *Id.* at 872.
113. *Id.*
114. *Id.* at 873-74.
115. ALASKA STAT. § 23.30.122 (1984).

factor in the Board's decision, because the Board had not made specific findings that it disbelieved any of the witnesses.

The supreme court had another chance to consider the credibility issue in *Land & Marine Rental Co. v. Rawls.*[116] The Board denied benefits because it believed, among other things, that the testifying physician's opinion was based on untrustworthy information provided by the claimant.[117] In addition, the Board found that the other doctors' medical reports eliminated all reasonable possibilities that the claimant's condition was related to an earlier work-related injury.[118] The court never mentioned section 122, but again found that there was no substantial evidence to overcome the presumption of compensability.[119]

The supreme court's attitude toward the Board is of considerable importance because of the unique nature of the Board's membership. Alaska utilizes fact-finding tribunals which consist of one "professional," usually a full-time hearing officer representing the Commissioner of Labor, and one representative each from the employee and employer communities.[120] The latter two members are not full-time hearing officers; they are appointed by the Governor to serve on a part-time basis,[121] fulfilling their hearing responsibilities while retaining their usual occupations. For the most part, the employer and employee representatives develop workers' compensation expertise only after appointment, as they begin to deal with cases before the Board. One of the reasons for using lay personnel is probably to bring nontechnical expertise and experience into the hearing process to use what is often referred to as the "common-sense" approach to resolving controversies. While this approach obviously must be constrained by rules of due process and workers' compensation law, the Board must have substantial latitude in exercising its responsibilities in order to fulfill its role and respond to legislative intent. The Board's decisions, however, are subject to a substantial amount of second-guessing during the appellate process, at least when they result in a denial of the benefits sought by a claimant.

The enactment of section 122 seems to be a response to the court's tight control over the Board's findings of fact. The message in section 122 is clear; the court should not ask more of the Board than it does of a jury when it reviews a civil jury verdict.[122] Although the

116. 686 P.2d 1187 (Alaska 1984).
117. *Id.* at 1189-90.
118. *Id.* at 1190.
119. *Id.* at 1191.
120. ALASKA STAT. § 23.30.005(a) (1984).
121. *Id.* § 23.30.005(b).
122. ALASKA STAT. § 23.30.122 (1984), quoted *supra* text accompanying note 115.

court in *Brown*[123] refused to adopt the evidentiary rule pertaining to jury findings in criminal trials established in *Bowker v. State,*[124] the reasoning of the *Bowker* court is instructive of the large measure of discretion to be afforded a civil jury finding of fact:

> We shall not adopt a rule which would treat medical testimony as conclusive merely because it is not disputed by other medical testimony. The jury should be free to make an independent analysis of the facts on which the expert's opinion rests, and thus exercise their historic function of passing on the credibility of the witness. If we were to follow *Douglas* and accede to defendant's argument that the jury was not competent to pass on her mental condition because of Dr. Cheatham's testimony, we would be transferring the jury's function to the psychiatrist and substituting a trial by experts for a trial by jury.[125]

It may be argued that, unlike a jury, the Board is constrained by the statutory language of the presumption, but this is to say no more than that a jury is constrained by the trial judge's instructions.

V. CONCLUSION

Alaska already has ample sound precedent for the two key issues in the application of the general presumption of compensability. The fooothold issue was addressed in *Smallwood II,*[126] and the dropout issue was addressed in *Gonzales.*[127] Although the Alaska Supreme Court did not arrive at these decisions by adopting New York precedent, the end result is the same. Significantly, language in several other Alaska opinions is not entirely consistent with the *Smallwood II* and *Gonzales* approach and might be harmful should the language come to predominate. The principal purpose of the review of New York precedent is to reassure the Alaska Supreme Court that it correctly decided both *Smallwood II* on the foothold issue and *Gonzales* on the drop-out issue. For good measure, the negative example of Hawaii is presented to show how wrong things can go when a court ignores relevant precedent in interpreting an adopted presumption clause.

The Alaska Supreme Court has not yet provided the quality of direction and support found in *Smallwood II* and *Gonzales* on the issue of the Board's fact-finding authority. The court has given some liti-

123. Brown v. Northwest Airlines, Inc., 444 P.2d 529 (Alaska 1968), discussed *supra* text accompanying note 88.

124. 373 P.2d 500 (Alaska 1962).

125. *Id.* at 501-02.

126. Burgess Construction Co. v. Smallwood, 623 P.2d 312 (Alaska 1981), discussed *supra* text accompanying notes 28-31.

127. Anchorage Roofing Co. v. Gonzales, 507 P.2d 501 (Alaska 1973), discussed *supra* text accompanying notes 11-14.

gants reason to believe that the Board is merely the first step in the fact-finding process. Unless the legislature intended the presumption of compensability to create a policy of granting claims whenever possible, both the presumption and the Board's statutory role can be satisfied in the hearing process, as enhanced by section 122, by permitting the Board greater latitude in its decisions. The court should reverse only when the Board fails to apply the proper rule of substantive law or reaches a factual conclusion that is clearly erroneous. For the supreme court, this may be more a question of changing attitude than of changing substance.[128]

In the final analysis, the supreme court has virtually total control over the scope of its review. Despite statutory language, the court determines whether legislative intent has been fulfilled in a given case and whether a litigant has been treated in a constitutional manner by the system. Nevertheless, the supreme court has limited the Board's discretion considerably. If the court will not allow the Board to use its inherent strengths, as a jury is permitted to do, important questions will be raised about the system's ability to distribute benefits appropriately, and the value of a part-time lay board in the hearing process may be lost.

128. A recent Alaska Supreme Court decision, Delaney v. Alaska Airlines, No. 2903 (Jan. 25, 1985), indicates that the court may give more deferrence to Board decisions in the future.