

Alaska Workers' Compensation Appeals Commission

Ge Vue,
Appellant,

vs.

Walmart Associates, Inc. and New
Hampshire Insurance Company,
Appellees.

Final Decision

Decision No. 260 April 17, 2019

AWCAC Appeal No. 18-006
AWCB Decision No. 18-0037
AWCB Case No. 201601904

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0037, issued at Anchorage, Alaska, on April 12, 2018, by southcentral panel members Matthew Slodowy, Chair, Justin Mack, Member for Labor, and Amy Steele, Member for Industry.

Appearances: J. C. Croft, The Croft Law Office, for appellant, Ge Vue; Vicki A. Paddock, Meshke Paddock & Budzinski, PC, for appellees, Walmart Associates, Inc. and New Hampshire Insurance Company.

Commission proceedings: Appeal filed May 2, 2018; briefing completed November 5, 2018; oral argument held January 8, 2019.

Commissioners: James N. Rhodes, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

*1. Introduction.*¹

Ge Vue was injured while working for Walmart Associates, Inc., insured by New Hampshire Insurance Company (Walmart) in 2016 when he was shot in the eye.² The parties initially went to hearing on February 28, 2018, on Walmart's petition asking the

¹ We make no factual findings. We state the facts as found by the Alaska Workers' Compensation Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

² *Vue v. Walmart Associates, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0037 (Apr. 12, 2018) at 3, No. 1 (*Vue II*).

Alaska Workers' Compensation Board (Board) to order mediation.³ The Board declined to do so. The Board heard the merits of Mr. Vue's claim on March 6, 2018, and held that Mr. Vue was not entitled to any additional temporary total disability (TTD) benefits although he was entitled to medical benefits, including the prescription for Lyrica and pulsed neuromodulation therapy. His claim for frivolous or unfair controversion was denied and he was not awarded a penalty on any benefits. He was awarded attorney fees based on the issues upon which he prevailed. Mr. Vue timely appealed the Board's decision, asserting the Board failed to find him disabled as a result of his work-related mental condition, the Board erred in finding Walmart had rebutted the presumption of compensability of the mental condition, the Board erred in finding he had not proven his claim by a preponderance of the evidence, and the Board erred in finding that Walmart's controversions dated April 19, 2017, and May 16, 2017, were filed in good faith and Mr. Vue was not entitled to a penalty.

The Alaska Workers' Compensation Appeals Commission (Commission) heard oral argument on this appeal on January 8, 2019. The Commission now affirms the Board's decision as supported by substantial evidence in the record as a whole.

2. Factual background and proceedings.

On February 3, 2016, Mr. Vue was shot in the eye and face with a BB gun when he attempted to apprehend a shoplifter while working for Walmart as a loss protection manager.⁴ Mr. Vue was seen in the emergency room at Alaska Regional Hospital. An x-ray and CT scan of the head, interpreted by D. Gregg Davenport, M.D., revealed a "metallic foreign body posterior to the globe and inferomedial to the optic nerve within the right orbit."⁵

³ *Vue v. Walmart Associates, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 18-0022 (Mar. 1, 2018) (*Vue I*).

⁴ *Vue II* at 3, No. 1.

⁵ *Id.*

On February 4, 2016, Mr. Vue saw ophthalmologist Carl E. Rosen, M.D.⁶ On February 5, 2016, Dr. Rosen performed orbitotomy surgery with exploration and an attempt to remove the foreign body, which he was unable to do.⁷

Mr. Vue saw Dr. Rosen on February 10, 2016, for follow-up and stated he felt pressure from the back of his eye where the BB was lodged. He also stated he felt more pain and pressure when he tried to look right or left and, therefore, he had to keep his gaze as straight as possible. Mr. Vue reported double vision when both eyes were open. Dr. Rosen noted, although surgical removal was unsuccessful, the foreign body might migrate with time, making removal easier.⁸

On April 7, 2016, Mr. Vue saw Richard Blake, PA-C, at Cottonwood Creek Clinic, for pain and mental distress related to the shooting incident. PA-C Blake assessed post-traumatic stress disorder (PTSD) and chronic pain, and referred Mr. Vue to a mental health counselor.⁹ He did not indicate Mr. Vue was unable to work due to the PTSD.¹⁰

Dr. Rosen, on April 20, 2016, responded to a questionnaire sent by Walmart's nurse case manager, and opined Mr. Vue had the physical capacities to return to work with Walmart as an asset protection manager.¹¹ On April 27, 2016, Mr. Vue told Dr. Rosen he was in constant pain, for which he was taking Tylenol with codeine every five to six hours. Mr. Vue stated sleeping upright helped relieve pain, but this led to neck trouble and poor sleep.¹²

On May 5, 2016, Mr. Vue saw ophthalmologist Shu-Hong Chang, M.D., at the University of Washington, Department of Ophthalmology. Dr. Chang, while recommending surgery be deferred, opined there was a neuropathic component to

⁶ *Vue II* at 3, No. 2.

⁷ *Id.*, No. 3.

⁸ *Id.* at 3-4, No. 4.

⁹ *Id.* at 4, No. 5.

¹⁰ Exc. 0007-9.

¹¹ *Vue II* at 4, No. 6.

¹² *Id.*, No. 7.

Mr. Vue's pain. Dr. Chang stated "medications like Lyrica and Neurontin have been effective to treat other types of chronic ocular neuropathic type pain." If there was evidence of additional or progressive vision loss, Dr. Chang opined it may tip the balance towards surgery.¹³

On May 25, 2016, Mr. Vue saw Darcy Logan, MSCP, LPC, at Alaska Vocational and Counseling Services in Palmer, Alaska, who diagnosed conditions she felt were consistent with PTSD.¹⁴ Mr. Vue saw her again on June 8, 2016, and she noted Mr. Vue was "Not doing well – self report. He feels sad and very hopeless about his future. Suicidal thoughts – with not [sic] intent to follow through. . . . He said he would not harm himself as he could not do that do his son – leave him without a father. He said it was not an option."¹⁵ She did not address whether he was able to work.¹⁶

Mr. Vue saw ophthalmologist William B. Baer, M.D., for an employer's medical evaluation (EME) on August 9, 2016. Dr. Baer opined:

Mr. Vue's disability arises from pain and diminished visual acuity in his right eye, as well as his binocular diplopia. There also appear to be psychological issues, which are beyond the scope of ophthalmologic review.

Mr. Vue has not reached medical stability, as his condition continues to worsen. He is planning to have further surgery on August 24, 2016. Depending on the results of that surgery, he may reach medical stability thereafter. Assessment of mental health is beyond the scope of an ophthalmologic examination.

Were Mr. Vue my patient, I would refer him to another ophthalmologist with subspecialty training in orbital surgery and orbital disease. Dr. Rosen is just such a subspecialist. Dr. Rosen has shown excellent judgment in seeking outside supportive opinion from others similarly qualified to himself. I agree with his treatment thus far and concur in his decision to undertake further surgery.¹⁷

¹³ *Vue II* at 4, No. 8.

¹⁴ *Id.*, No. 9.

¹⁵ *Id.* at 5, No. 10.

¹⁶ Exc. 00018-19.

¹⁷ *Vue II* at 5, No. 12.

On August 10, 2016, Mr. Vue was seen by psychologist Donna C. Wicher, Ph.D., for a psychological EME, and she diagnosed "Adjustment Disorder with Mixed Anxiety and Depressed Mood," as well as chronic pain. Dr. Wicher opined:

Although Mr. Vue has been diagnosed with PTSD, he did not clearly meet the full diagnostic criteria for this condition. While frightening and traumatic, the injury was not life-threatening, which indicates that it would not qualify as a triggering event for PTSD. Even if it did, he did not clearly meet the other diagnostic criteria required for this diagnosis.

. . . .

[I]t is also of concern that his symptoms have reportedly not diminished over time. According to the DSM 5, even in individuals who develop PTSD, approximately 50 percent of them recover within three months of exposure to the trauma and others recover more slowly. The fact that he has not experienced improvement suggests that other factors are playing a greater role than the initial trauma and the fact that his symptoms of depression and anxiety have similarly not improved also suggests the contribution of other factors.

. . . .

[T]he the uncertainty of his vocational and financial future is almost certainly contributing to his continued distress and he appears to have continued distress from having been fired and feeling betrayed by his employer.

. . . .

Mr. Vue's employment has been the substantial cause of his current and ongoing disability and need for treatment since the time of the injury.

. . . .

Mr. Vue is not yet medically stable with regard to his Adjustment Disorder. He will not reach medical stability until his physical conditions have reached a state of medical stability and he knows what his residual effects will be.¹⁸

On August 25, 2016, Mr. Vue was seen by Dr. Chang for surgery. Dr. Chang noted, "The patient was repeatedly cautioned about the 50% chance of blindness and 50% chance of inability to identify/remove foreign body, but cited his intractable orbital pain as the reason he was willing to accept the risks and proceed" The surgical team performed orbital endoscopy, but could not locate the foreign body. The decision was

¹⁸ *Vue II* at 5-6, No. 13.

then made to proceed with a transnasal approach, which was also unsuccessful. The procedure was aborted after various approaches and maneuvers were attempted, when the team determined the foreign body could not be extracted.¹⁹

On October 6, 2016, Dr. Chang responded to a questionnaire sent by Walmart's nurse case manager regarding Mr. Vue's status after the surgery and his ability to return to work. Dr. Chang stated, "He is legally blind in right eye and still healing from surgery. Prognosis for return to work unclear yet."²⁰

Mr. Vue began treating with anesthesiologist and pain management specialist Heath McAnally, M.D., for right eye pain.²¹ On October 12, 2016, Dr. McAnally responded to a letter from Walmart's nurse case manager regarding the use of Lyrica to control pain:

Neuropathic pain in this country is primarily treated by membrane-stabilizing agents in the gabapentin family, and as such we initiated treatment with gabapentin for him. However, he had prohibitively adverse effects including significant amnesia, confusion and also depression. We trialed Lyrica in its place, and I gave him some samples for this. He reported excellent benefit in terms of analgesia and none of the side effects that he had previously been experiencing with gabapentin. We find this quite commonly with the switch from gabapentin to Lyrica, probably due to its increased efficacy/greater oral bioavailability, etc.

The use of membrane-stabilizers to treat neuropathic pain is indeed off-label in this country, and will probably remain so. Please provide this medically necessary treatment for this young man injured in the line of duty.²²

On October 24, 2016, Mr. Vue was seen by Shelly A. Jacobs, LPA, at Providence Behavioral Medicine Group, who diagnosed "post traumatic stress" and "anxiety secondary to trauma."²³

On December 19, 2016, Mr. Vue saw Dr. McAnally, who noted, "Given his endorsement of significant benefit and if anything, reduced depression and suicidality –

¹⁹ *Vue II* at 6, No. 14.

²⁰ *Id.*, No. 15.

²¹ *Id.* at 6-7, No. 16.

²² *Id.*

²³ *Id.* at 7, No. 17.

and also help with opioid cessation – since beginning Lyrica, we will continue cautious therapy with this agent.”²⁴

On January 4, 2017, Mr. Vue saw LPA Jacobs, who noted finances and situational factors were strong stressors negatively impacting Mr. Vue’s mood. Mr. Vue continued to struggle with anxiety secondary to the traumatic experience. Suicidal ideation was noted, but LPA Jacobs opined there was lack of intent.²⁵ Mr. Vue continued to be seen by LPA Jacobs for mental health issues several more times.²⁶ In none of her reports did she address whether Mr. Vue was able to work due to his mental health.²⁷

On January 5, 2017, Mr. Vue saw ophthalmologist Courtney Francis, M.D., at the University of Washington, Department of Ophthalmology, for follow-up on the August 25, 2016, surgery. Dr. Francis stated, “No vision limitations on return to work.” Dr. Francis also checked a box which stated, “May return to work with no restrictions on . . . 1/6/17.”²⁸ Dr. Chang also provided a handwritten note which stated Mr. Vue had reached medical stability from a surgical aspect.²⁹

On February 14, 2017, Mr. Vue was seen by Dr. McAnally, who recommended he continue to use Lyrica for pain, and noted concerns over depression, amnesia, and cognitive defects. Dr. McAnally administered an infraorbital nerve block injection, with Mr. Vue reporting substantial improvement in his pain within minutes.³⁰

Mr. Vue, on February 22, 2017, saw psychiatrist Jane M. Larouche, D.O., who diagnosed “moderate single current episode of major depressive disorder,” anxiety, insomnia, nightmares, and PTSD. Dr. Larouche noted Mr. Vue stayed up at night and slept poorly, in two to three hour increments. His energy and appetite were poor, and

²⁴ *Vue II* at 7, No. 18.

²⁵ *Id.*, No. 19.

²⁶ *Id.*

²⁷ Exc. 00013-00083.

²⁸ *Vue II* at 7, No. 20.

²⁹ *Id.*

³⁰ *Id.*, No. 21.

becoming worse. Mr. Vue had recurring thoughts that “something bad is going to happen to him.” Mr. Vue’s pain was “very severe” and he was becoming increasingly tolerant of his Lyrica dose.³¹ She did not address whether Mr. Vue could return to work.³²

On February 28, 2017, Mr. Vue saw Dr. Baer for an EME, who noted Mr. Vue’s visual field in the right eye was more constricted compared to the August 9, 2016, examination. Dr. Baer opined Mr. Vue was medically stable and released him to return to work based on his physical condition, but he felt it was not appropriate for him to consider the stability of Mr. Vue’s mental condition. Dr. Baer stated:

Were Mr. Vue my patient, I would give him a vacation from efforts to deal with his right eye and concentrate on him getting back to work. If the emotional and cognitive effects of his injuries can be dealt with and relegated to the past, I would be very surprised if his visual acuity and visual fields did not improve. The physical signs supporting his acuity and field limitations are simply not present. I am also not convinced that his diplopia is intractable.

In response to the question whether medications such as Lyrica, Escitalopram, and Prazosin were within the realm of acceptable medical options under the particular facts of this case, Dr. Baer stated:

These medications and their use fall outside the scope of ophthalmologic practice. I do not feel competent to remark on their utility or appropriate use and defer to Dr. Wicher’s opinion as the best informed.

In response to the question whether the February 3, 2016, work injury was the substantial cause of the need for the above prescriptions, Dr. Baer stated:

Again, the use of these medications falls outside the scope of ophthalmologic practice. I defer to Dr. Wicher’s opinion.³³

On March 1, 2017, Mr. Vue saw Dr. Wicher for a psychological EME, who noted Mr. Vue reported sensations of hot, burning, and pins and needles on the right side of his nose, extending to the back of his orbit. He had a sense of biting down on aluminum foil towards the back of his eye. At times, he had pain in his head accompanied by a hot

³¹ *Vue II* at 7-8, No. 22.

³² Exc. 000414-416

³³ *Vue II* at 8, No. 23.

flashing sensation. Headache pain was constant, with migraines and nausea daily. Mr. Vue reported poor appetite and had lost a few pounds. With regards to his mental state, Dr. Wicher noted:

Mr. Vue reported that he feels depressed all the time and finds it difficult to focus on things. He stated that his thoughts rush back and forth. At times, he feels weak and unmotivated. At times, he does not feel safe at home. He worries that the people with whom he had dealt with in the past will hurt him. He believes that these people will hurt him if they see him. He is afraid that they might come find his home and hurt him there. He began having these fears a few months ago. At times, even going to doctors' appointments triggers these fears. He stated that he cannot get the faces of the perpetrators out of his mind. He stated that he worries all of the time. His anxiety has worsened over time. When he goes places, he plans an escape route. When he comes home, he always looks for the quickest way out. He fears that someone will come through the door. He stated that his mind wants to be one step ahead. He feels guilty for being the way he is. He noted that he is unable to take care of his family because he fears that someone will come out of the bushes and harm him. He stated that he thinks about suicide at times. He feels exhausted. He stated that he is tired of thinking all of the time.

. . . .

He stated that he feels quite disconnected from his wife and son. He has told his wife to go to live with her parents in China. He has moved his bed away from the window. When he reads, he closes his right eye. He wears glasses. He stated that his vision is still blurred at some places. He stated that he does not want his wife and son to see him like this anymore and noted that he does not want his wife to be in this "predicament." He stated that she deserves better.

Dr. Wicher diagnosed "Adjustment Disorder with Mixed Anxiety and Depressed Mood," "Somatic Symptom Disorder," and chronic pain. Dr. Wicher opined Mr. Vue was not yet medically stable, but would reach medical stability when his symptoms of depression and anxiety resolved. Further psychological treatment would be reasonable and necessary, and within the realm of acceptable medical options. In response to the question whether medications such as Lyrica, Escitalopram, and Prazosin were reasonable and necessary

medical treatment, Dr. Wicher stated a medical doctor would need to address this question.³⁴ She deferred to Dr. Baer on the question of ability to return to work.³⁵

On March 7, 2017, Mr. Vue saw Dr. McAnally, and reported no thoughts of self-harm, but physical pain was at a level of 7/10. Mr. Vue experienced about three hours of pain relief after the February 14, 2017, nerve block injection, but expressed interest in pulsed neuromodulation of the nerve. Mr. Vue complained he was possibly developing a tolerance to Lyrica, and wished to increase the dosage, instead of resorting to narcotics. Dr. McAnally recommended a Lyrica dosage of 75 mg three times per day, and ordered pulsed neuromodulation be scheduled.³⁶ Mr. Vue continued to see LPA Jacobs for mental health issues.³⁷

On March 21, 2017, Dr. McAnally wrote a letter to Walmart's insurance adjuster which stated, "Given his chronic and severe pain condition, and the associated dysfunction both physically and psychologically that stem from this, I feel it is medically necessary to proceed with neuromodulation."³⁸

On April 3, 2017, Dr. Baer issued an addendum EME, after reviewing recent records of Drs. Chang, Francis, Wicher, and McAnally, and stated:

Mr. Vue uses Lyrica, escitalopram, and prazosin. The last of these is used as a treatment for hypertensive cardiovascular disease. Whether that is reasonable and necessary is beyond my specific area of expertise. Hypertensive cardiovascular disease is, however, not claimed as a condition related to his workplace injury, but is a constitutional condition.

Lyrica is used for control of pain. It is not clear at all how much pain Mr. Vue endures. It would be most unusual for pain from a retained orbital foreign object to persist for more than a year post-injury and in the absence of inflammatory reaction. In my judgement, its use is unnecessary

Dr. McAnally recommended "pulsed neuromodulation" therapy for relief of pain. This treatment involves the placement of an electrode in the form of

³⁴ *Vue II* at 8-9, No. 24.

³⁵ Exc. 00053-54.

³⁶ *Vue II* at 9, No. 25.

³⁷ *Id.*

³⁸ *Id.* at 10, No. 26.

a needle close to the nerve which carries pain impulses to be blocked . . . [Pulsed neuromodulation] is not widely accepted as a treatment modality. This question also could be referred to a physician experienced in pain management. Medical literature suggests that it may be useful in certain cases. It has also been described as a treatment seeking a disease. It is not a standard treatment. Dr. McNally performed a temporary nerve block with reported relief of symptoms. There are available accepted treatment modalities for longer term or permanent block. I do not support the recommended treatment plan

. . . .

As an experimental procedure, it may be an “acceptable” option but is not generally accepted as useful or effective. It is not regarded as a preferred primary treatment.

Dr. Baer opined Mr. Vue may be motivated by secondary gain in his continued claim of symptoms, and questioned the validity of the symptoms and his reporting of them.³⁹

On April 7, 2017, Dr. McNally responded to a letter from Mr. Vue’s attorney requesting his opinion. In response to what additional medical treatment is needed, Dr. McNally recommended pulsed neuromodulation, treatment for PTSD, and “whatever ophthalmology recommends.” Dr. McNally stated the February 3, 2016, work injury was the substantial cause of the current need for treatment. Relying on attached job descriptions of asset protection associate/manager and also security guard, he opined Mr. Vue was unable to return to work in these positions because of eye pain, vision, and physical limitations. Regarding the ability to return to work, Dr. McNally added a handwritten note, “I defer this to ophthalmology, however.”⁴⁰

On April 21, 2017, Walmart denied certain medical benefits, specifically Lyrica medication and pulsed neuromodulation therapy. The basis for the controversion was the April 3, 2017, EME opinion of Dr. Baer who opined Lyrica was unreasonable and unnecessary, and pulsed neuromodulation therapy for relief of pain was not widely accepted as a medical modality and was not regarded as a preferred primary treatment.⁴¹

³⁹ *Vue II* at 10, No. 27.

⁴⁰ *Id.* at 10-11, No. 28.

⁴¹ *Id.* at 11, No. 29.

On April 24, 2017, Dr. McAnally wrote a letter to Walmart's attorney, which stated:

I am writing this letter in rebuttal of the non-ophthalmologic components of Dr. William B. Baer's IME assessment of 3 Apr 2017. While I certainly defer all things ophthalmologic to Dr. Baer, I would also advise him to familiarize himself with the current use of Prazosin in PTSD treatment before rendering an opinion on the matter of its prescription in Mr. Vue's case. It is not being prescribed for hypertension.

I have what I suspect is considerably more experience in treating infraorbital neuralgia and trigeminal neuralgias in general, and if he does not think that a projectile entering the orbit essentially in the immediate vicinity of the infraorbital foramen where the nerve exits can cause severe neuropathic pain, I am beyond perplexed. Temporary resolution of symptoms by diagnostic nerve block has long been held to be the gold standard in diagnosing these peripheral neuralgias, and Mr. Vue's response to infraorbital nerve block (which, by the way I provided free of charge to both the patient and York Risk Services) is sufficient corroboration.

This unfortunate man (who has sustained significant physical, psychological and financial adverse sequelae of his assault while attempting to intervene on a robbery of the store that wound up firing him) deserves far better treatment than he has received. Regarding Dr. Baer's assertion that "there are available accepted treatment modalities for longer term or permanent block" I would welcome his education on the matter, as he evidently possesses interventional pain management expertise in excess of my own

I will provide [Mr. Vue] pulsed neuromodulation of the infraorbital nerve *pro bono*, if York Services believes that the opinion of a board-certified anesthesiologist and interventional pain physician carries less weight in pain management issues than that of an ophthalmologist. Controverting his Lyrica prescription however on the opinion of a non-pain specialist who not only admits that "pain is a subjective symptom not measurable by objective means" but then further goes on essentially to suggest secondary gain motives of Mr. Vue is unconscionable as far as I am concerned, and this is noted in the medical record.⁴²

On May 8, 2017, Mr. Vue filed a claim for TTD from April 2016 "until stable," a permanent partial impairment (PPI) rating and benefit, penalty, interest, and attorney fees and costs.⁴³

⁴² *Vue II* at 11-12, No. 30.

⁴³ *Id.* at 12, No. 31.

On May 16, 2017, Walmart denied specific periods of TTD, specific medical benefits, penalties, interest, and attorney fees and costs. The notice of controversion stated:

[Walmart] and adjuster rely upon Mr. Vue's treating physician, Dr. Chang and Dr. Vincent(sic), and their work status report dated January 5, 2017, opining [Mr. Vue] reached medical stability on that date. [Walmart] and adjuster rely upon the IME physicians, Dr. Baer and his reports dates 2/28/17 and 4/3/17, in which he opined [Mr. Vue] is medically stable and that continued use of Lyrica is unreasonable and unnecessary. Dr. Baer further opines that pulsed neuromodulation therapy for relief of pain is not widely accepted as a medical modality and is not regarded as a preferred primary treatment. Dr. Baer opines the workplace injury is not the substantial cause of need for treatment by this method.

The notice stated Mr. Vue was paid TTD benefits from February 20, 2016, through April 19, 2016, and again from August 25, 2016, through January 26, 2017. Mr. Vue received "full wage continuance" from February 3, 2016, through February 19, 2016. Mileage reimbursement was paid on January 11, 2017, for the period of July 6, 2016, through January 6, 2017, and again on February 27, 2017, for the period of February 27, 2017, through March 2, 2017. The notice stated Mr. Vue had not submitted any additional mileage reimbursement requests.⁴⁴

On May 22, 2017, Dr. Baer issued an addendum EME report after reviewing the August 24, 2016, CT scan imaging, and stated he continued to believe Mr. Vue's symptoms were disproportionate to his injury and he had been less than candid in his responses to examination. Dr. Baer stated:

[H]is claim of extinguished color vision is inconsistent with the absence of evidence of optic atrophy. His measured visual acuity on my examination also is inconsistent with extinguished color vision. Adding to my conviction that Mr. Vue was not cooperating on examination is the information that Dr. Francis found his corrected visual acuity to be 20/20. These inconsistencies strongly suggest to me that Mr. Vue was not fully cooperative . . .

His visual acuity is clearly better than he is willing to respond. His visual field studies are inconsistent with optic nerve appearance and lack of a

⁴⁴ *Vue II* at 12, No. 32.

relative afferent pupillary defect. His diplopia is said to be constant, but he does not close one eye to suppress it . . .

For these reasons, I have come to doubt whether Mr. Vue has ratable permanent partial disability. If he does have disability, it cannot be rated because of his lack of candor⁴⁵

On July 17, 2017, Mr. Vue began working for O'Reilly Auto Parts in Wisconsin as a store manager on a full-time basis.⁴⁶ Mr. Vue has not missed time from work in this job because of mental or physical conditions related to the February 3, 2016, work injury.⁴⁷ The use of Lyrica medication helped control his pain and prevented flare-ups, enabling him to function.⁴⁸ Mr. Vue preferred Lyrica to narcotic medications, because they prevented him from driving, left him feeling dizzy, and gave him headaches and constipation. Lyrica had no such negative side-effects.⁴⁹

At hearing, Mr. Vue testified that on the date of the injury he was working as an asset protection manager when he attempted to apprehend three individuals suspected of theft. As suspects began shooting, Mr. Vue was fearful for his life, and the incident continues to be hard for him to discuss. Since then, he has continued to have nightmares, flashbacks, and sleep disruptions. He has been severely depressed for a long time, and does not feel safe in large crowds. These feelings are especially triggered by cold weather and faces or places familiar to the incident. He did not experience mental symptoms until about a week after the incident. He does not feel he can return to work in loss prevention, due to anxiety and paranoia. He currently works as a manager at an auto parts store, where his employer lets him take breaks during shifts when he experiences episodes of flashbacks, anxiety, or PTSD. These episodes can last from ten minutes to an hour. He currently works full-time, five days a week. The Lyrica medication helped ease the nerve pain in the back of his eye socket, helped him sleep, and enabled him to function. Pulsed

⁴⁵ *Vue II* at 12-13, No. 33.

⁴⁶ *Id.* at 13, No. 34; Ge Vue Dep., Jan. 29, 2018, at 42:7-21.

⁴⁷ Vue Dep. at 45:17-19.

⁴⁸ Vue Dep. at 50:10-25.

⁴⁹ Vue Dep. at 50:24 – 51-11.

neuromodulation therapy helped a lot and prevented his nerves from flaring up for three to four months after the treatment. Partly because of mental distress relating to the shooting incident, he relocated with his family to Wisconsin in June 2017. The only medications he is currently taking for pain are Tylenol and ibuprofen, but he does not recall what exactly the notices of controversion denied. He currently gets between four and six hours of sleep per night. Mr. Vue applied for unemployment benefits in 2016, but was denied “because of his workers’ comp case.” Mr. Vue also believes he was denied unemployment because, to be eligible, he must be “able” to return to work.⁵⁰ Mr. Vue is credible.⁵¹

Dr. McAnally currently practices exclusively in the field of pain management. He has treated many patients with foreign bodies such as bullets and bullet fragments. Mr. Vue has chronic pain related to the initial injury, as well as persistent interorbital neuralgia. Pain cannot be objectively measured; it is entirely subjective. There is more to assessing pain than just biologic issues, such as cultural or personal factors. Lyrica is typically prescribed as an anticonvulsive and antiseizure medication, but it is also FDA-approved for treatment of pain. Lyrica is scheduled as a class V drug on the federal controlled substances list, which means there is some potential for abuse, although Dr. McAnally is unaware of any such instances in his experience. Because of the subjective and individual nature of pain management, probably 90% of what is done in the field is considered “off label” treatment. In discussions with psychiatrists, many have told him Lyrica is superior for anxiolysis, or the reduction or inhibition of anxiety, and is effective as a mood stabilizer. In Mr. Vue’s case, depression and suicide were important issues to be considered. In some cases, untreated pain itself can become a risk factor for suicide. Lyrica also allowed Mr. Vue to get off of narcotics. Continued use of Lyrica in Mr. Vue’s case is both reasonable and necessary. In his time spent treating Mr. Vue, Dr. McAnally did not perceive Mr. Vue amplifying or exaggerating his pain for secondary

⁵⁰ Hr’g Tr. at 13:11 – 15:24; 16:18 – 17:24; 19:4-11; 20:13 – 21:7; 22:2-7; 25:16 – 26:9; 27:14-16; 28:4-7; 29:13-19; 30:1-11; 31:23 – 32:19, Mar. 6, 2018.

⁵¹ *Vue II* at 14, No. 36.

gain, although he would defer this assessment to mental health professionals. It is normal in his practice to rely on a patient's own reporting as to which combination of medications or treatments are effective in a particular case.⁵²

Although it is not his practice specialty, Dr. McNally is familiar with PTSD based on his experience in civilian practice, and his service as a military doctor for three years on active duty in the Air Force, with seven years in reserve.⁵³ Pulsed neuromodulation therapy employs a device that delivers radio frequency pulses to "stun" a nerve. This disrupts a nerve's ability to be painful. Pulsed neuromodulation therapy in Mr. Vue's case was both reasonable and necessary, especially if he continues to experience symptoms. Dr. McNally took issue with Dr. Baer's opinions, as he considered them more "high risk" options.⁵⁴ Dr. McNally is credible.⁵⁵

3. Standard of review.

The findings of fact by the Board are to be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.⁵⁶ Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.⁵⁷ "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."⁵⁸

⁵² Hr'g Tr. at 53:8-12; 55:10-24; 56:14-23; 58:8-14; 60:15 – 61:12; 62:17 – 63:16; 64:20 – 65:5; 75:21 – 76:17; 94:18 – 95:13.

⁵³ Hr'g Tr. at 88:20 – 89:7.

⁵⁴ Hr'g Tr. at 65:12-25; 66:7-24; 67:6-24.

⁵⁵ *Vue II* at 15, No. 41.

⁵⁶ AS 23.30.128(b); *DeYonge v. NANA/Marriott*, 1 P.3d 90, 94 (Alaska 2000).

⁵⁷ *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁵⁸ *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P. 2d 1187, 1188-1189 (Alaska 1984)).

The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.⁵⁹ The Board's findings regarding credibility are binding on the Commission as the Board is, by statute, granted the sole power to determine the credibility of a witness.⁶⁰

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."⁶¹

4. Discussion.

a. Did the Board err in finding Mr. Vue was not entitled to additional TTD?

Mr. Vue contends the Board erroneously found that he was not entitled to additional TTD, as it did not find he was unable to work as a result of the mental consequences of being shot in the eye while working for Walmart. He asserts Walmart did not rebut the presumption of compensability of his mental condition. He further states that the Board erred in finding he did not prove his claim for disability and inability to work resulting from the mental consequences of being shot.

Disability is defined by the Alaska Workers' Compensation Act as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . ."⁶² TTD is payable when the employee's condition is total in character, but temporary in quality.⁶³ To prevail on his claim for disability, Mr. Vue needed to raise first the presumption of compensability in AS 23.30.120. An injured worker may raise the presumption of compensability through his own testimony in cases not involving complicated medical issues or through medical

⁵⁹ AS 23.30.122.

⁶⁰ AS 23.30.122.

⁶¹ AS 23.30.128(b).

⁶² AS 23.30.395(16).

⁶³ AS 23.30.185.

evidence in more complicated cases.⁶⁴ The amount of evidence needed to raise the presumption is not great.⁶⁵

Mr. Vue established through the medical records of the nurse case manager, Beth Musliu, that in February 2016 he was exhibiting “PTSD-type issues and anxiety from being shot.”⁶⁶ Dr. Wicher, in her EME report in August 2016, agreed Mr. Vue had an adjustment disorder with mixed anxiety and depressed mood and that he was not medically stable with regards to the adjustment disorder. She deferred the question of ability to return to work to Dr. Baer, the ophthalmologist EME.⁶⁷ Mr. Vue also treated with Darcy Logan at Alaska Vocational and Counseling Services in Wasilla, Alaska, who noted Mr. Vue’s feelings of hopelessness. She did not discuss his ability to return to work.⁶⁸ Mr. Vue’s pain physician, Dr. McAnally, on April 7, 2017, indicated Mr. Vue was unable to return to work as an asset protection associate/manager or security guard due to pain in the injured eye.⁶⁹ However, Dr. McAnally also deferred to Mr. Vue’s ophthalmologists regarding his ability to do other work.

The Board found Mr. Vue’s own testimony about his fear of returning to work, supported by Dr. McAnally’s testimony, was sufficient to raise the presumption that his disability was due to work injury and he was entitled to TTD. Once this presumption of compensability is raised, the burden is then on the employer to rebut the presumption with substantial evidence. Here, Walmart needed to rebut with evidence that Mr. Vue was medically stable, able to work in some capacity, and not entitled to additional TTD.⁷⁰ Walmart, in order to rebut the presumption of compensability for additional TTD, needed

⁶⁴ *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

⁶⁵ *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Veco, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985).

⁶⁶ Exc. 45.

⁶⁷ Exc. 50-52.

⁶⁸ Exc. 10-13.

⁶⁹ *Vue II* at 10-11, No. 28.

⁷⁰ *Wien Air Alaska v. Kramer*, 807 P.2d 471, 473-474 (Alaska 1991).

to produce medical evidence demonstrating that the work injury was not the substantial cause of his inability to work. A medical report ruling out work as the cause or ascribing the condition to an alternative cause is sufficient to rebut the presumption of compensability.⁷¹ Walmart relied on the EME reports of Drs. Baer and Wicher to rebut the presumption. Dr. Baer stated Mr. Vue was medically stable and able to return to work, opined that Lyrica and pulsed neuromodulation therapy were not reasonable and necessary treatment, and stated pulsed neuromodulation was outside normal medical treatment standards. Dr. Wicher deferred to Dr. Baer on the question of Mr. Vue's ability to return to work even though he was not medically stable mentally. These two reports meet the criteria for rebutting the presumption of compensability.⁷²

The burden of proof then shifted back to Mr. Vue to prove his claim by a preponderance of evidence.⁷³ With regard to his entitlement to TTD due to his mental injury, Mr. Vue's problem is that while his treating doctors and the EME physician Dr. Wicher found that he was not medically stable due to the mental condition, none of them stated he was unable to work due to the mental condition. Dr. Wicher, the psychological EME, agreed in August 2016 Mr. Vue was not medically stable from his mental problems; however, she did not say he could not work. In fact, she deferred the question of his ability to return to work to Dr. Baer. Both Dr. Chang, his treating ophthalmologist, and Dr. Baer, the EME ophthalmologist, released him to return to work from the eye injury. Dr. McAnally, in April 2017, stated Mr. Vue could not return to work as an assets protection associate/manager or security guard, but he deferred to the treating ophthalmologist the question of whether Mr. Vue was able to return to work in some capacity. Mr. Vue treated with Darcy Logan, Shelly A. Jacobs, and Jennifer M. Byers for counseling for his mental issues, but none of them stated (or even considered, apparently) whether he could work.⁷⁴

⁷¹ *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 920 (Alaska 2016).

⁷² *Id.*

⁷³ *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991).

⁷⁴ Exc. 00007-9; 00010-13; 00018-19; 00066-89.

While the idea that Mr. Vue was unable to work due to his mental problems might be inferred from the medical reports, no clear evidence was presented that this was the case. The doctors discussed his concerns, his fears, his sleep problems, and other issues related to his mental health. However, none of the doctors stated he was unable to work or to work only with restrictions, due to his mental condition. As noted above, both the EME psychologist, Dr. Wicher, and Dr. McAnally, his pain doctor, deferred the question of whether Mr. Vue could return to work in some capacity to the ophthalmologists who released him to work. None of his mental health counsellors discussed his ability to return to work.

TTD is paid for disability total in character, but temporary in quality.⁷⁵ Disability is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment."⁷⁶ Drs. Chang and Baer both declared Mr. Vue medically stable and released him to return to work from the physical consequences of being shot in the eye. They did not address the mental issues arising from this tragedy. Dr. Wicher, who did the psychological EME, deferred to Dr. Baer on the question of Mr. Vue's return to work. The implication from her statement is that, while Mr. Vue was not medically stable from the mental health consequences of his eye injury, he was not sufficiently debilitated that he could not return to work. Dr. McAnally also deferred the idea of returning to work in some capacity to the ophthalmologist. Both his treating ophthalmologist, Dr. Chang, and the EME ophthalmologist, Dr. Baer, released Mr. Vue to return to work. In July 2017, Mr. Vue did return to work, albeit after moving to Wisconsin.

Mr. Vue was unable to prove his claim for additional TTD by a preponderance of the evidence, because he was unable to present any medical evidence stating he was unable to work as a result of the work related mental health issues. The Board's decision is supported by substantial evidence in the record as a whole.

⁷⁵ AS 23.30.185.

⁷⁶ AS 23.30.395(16).

b. Did the Board err in finding Walmart did not frivolously or unfairly controvert Mr. Vue's medical treatment?

Walmart, on April 21, 2017, controverted certain medical benefits, specifically the prescription for Lyrica and the treatment of pulsed neuromodulation therapy. The controversion did not controvert any other benefits. Mr. Vue claimed he did not understand what was controverted, but the plain reading of the Controversion Notice does not support his contention. The controversion plainly states on its face that only Lyrica and the pulsed neuromodulation therapy were controverted.⁷⁷ No other benefits were identified on the controversion notice. If Walmart stopped paying any other benefits it was paying at the time of the notice, that would have been bad faith and an unfair and frivolous controversion. Mr. Vue did not so claim and there is no evidence that any other benefits were terminated.

Walmart controverted future TTD in its May 18, 2017, controversion on the basis of Dr. Baer's EME reports that Mr. Vue was medically stable and able to return to work. This controversion also pointed to the medical reports of Drs. Chang and Francis of January 5, 2017, that Mr. Vue was medically stable.

In *Ford*, the Commission discussed at length what makes a controversion unfair and frivolous.⁷⁸ The Commission noted that in *Harp*, the Alaska Supreme Court (Court) held that "[a] controversion notice must be filed in good faith to protect an employer from imposition of a penalty."⁷⁹ Further, for a controversion to be in good faith "the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits."⁸⁰ The Court further repeated its prior holding that "[i]n circumstances where there is reliance by the insurer on responsible

⁷⁷ Exc. 142.

⁷⁸ *State of Alaska, Dep't of Educ. v. Ford*, Alaska Workers' Comp. App. Comm'n Dec, No. 133 (April 9, 2010).

⁷⁹ *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992) (*Harp*).

⁸⁰ *Id.*

medical opinion or conflicting medical testimony, invocation of penalty provisions is improper.”⁸¹

The April 19, 2017, Controversion Notice did not controvert all benefits, but did controvert, in Box 15 Specific Benefits Controverted (Denied), “[m]edical related benefits and costs for Lyrica and pulsed neuromodulation.” In Box 16 Reason Specific Benefits Controverted (Denied), Walmart stated, “Employer and adjuster rely upon IME (sic) physician, Dr. William B. Baer, and his addendum report dated 04/03/17, in which he opines that continued use of Lyrica is unreasonable and unnecessary. Dr. Baer further opines that ‘pulsed neuromodulation’ therapy for relief of pain is not widely accepted as medical modality and is not regarded as a preferred primary treatment. Dr. Baer opines the workplace injury is not the substantial cause of need for treatment by this method.”⁸² This express and precise language did not in any way controvert any other benefits Mr. Vue might have been receiving or might have been entitled to receive.

Mr. Vue testified he was confused and thought all benefits were being controverted. However, the language is clear, only Lyrica and pulsed neuromodulation were controverted. Moreover, the controversion is based on the opinion of the EME ophthalmologist. While these treatments might not have been in his area of expertise, Dr. Baer is a medical doctor and is expected to be sufficiently knowledgeable of medical practices outside his specific area of practice that Walmart might reasonably rely on his opinion. Mr. Vue contended at hearing that this opinion should not be given credence since it was outside Dr. Baer’s area of expertise. However, when weighing the good faith of the controversion, the Board looks to what the employer knew at the time of the controversion. As the Commission noted in *Ford*, the determination of good faith is based on the “content of the notice of controversion rather than the subjective motive of the employer or its insurer when deciding to controvert a claim.”⁸³ The Commission also

⁸¹ *Harp*, citing *Stafford v. Westchester Fire Ins. Co. of New York, Inc.*, 526 P.2d 37 (Alaska 1974).

⁸² Exc. 142.

⁸³ *Ford*, App. Comm’n Dec. No. 133 at 18.

stated that the Court, in *Harp*, focused on the “controversion language and the evidence in possession of the employer or insurer when the controversion is issued. . . .”⁸⁴ This focus by the Court suggests “that good faith is objectively demonstrated by the controversion and evidence offered in its support”⁸⁵

Substantial evidence supports the Board’s conclusion that the April 17, 2017, controversion was in good faith.

The second controversion that Mr. Vue asserts was not in good faith is the Controversion Notice dated May 16, 2017.⁸⁶ This controversion also denied specific benefits, particularly TTD between April 20, 2016, and August 24, 2016, and after January 7, 2017. It also denied medical benefits “which are unnecessary, unreasonable, and/or unrelated to the employee’s injury of 02/03/16.”⁸⁷ The basis for this controversion was the medical report of treating physicians Chang and Vincent (sic) dated January 5, 2017, which stated Mr. Vue’s “vision/globe have stabilized” and he is to return to see Dr. Chang “as needed or as directed by Dr. Francis.”⁸⁸ Dr. Chang also hand wrote in response to posed questions that Mr. Vue was medically stable and deferred to Dr. Francis the question of his ability to return to work.⁸⁹ Dr. Francis, on January 5, 2017, indicated that Mr. Vue could return to work with no restrictions.⁹⁰

These controversions were based, inter alia, on the reports of the treating ophthalmologists that Mr. Vue was medically stable and able to return to work. None of Mr. Vue’s mental health counsellors addressed whether he could return to work. Moreover, the EME, Dr. Wicher, indicated in August 2016 that he was not medically stable mentally, but she, as did Dr. McAnally, the pain physician, deferred to the

⁸⁴ *Ford*, App. Comm’n Dec. No. 133 at 19.

⁸⁵ *Id.*

⁸⁶ Exc. 144.

⁸⁷ *Id.*

⁸⁸ Exc. 396-397.

⁸⁹ Exc. 401.

⁹⁰ Exc. 408.

ophthalmologists the question of his ability to return to work. All the ophthalmologists released Mr. Vue to return to work without restriction.

The Board's finding that the Controversion Notices were filed in good faith is supported by substantial evidence in the record as a whole.

5. Conclusion.

The Board's decision is AFFIRMED.

Date: 17 April 2019

Alaska Workers' Compensation Appeals Commission



Signed

James N. Rhodes, Appeals Commissioner

Signed

S. T. Hagedorn, Appeals Commissioner

Signed

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

If you wish to appeal to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*.

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone: 907-264-0612

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 260, issued in the matter of *Ge Vue vs. Walmart Associates, Inc. and New Hampshire Insurance Company*, AWCAC Appeal No. 18-006, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 17, 2019.

Date: April 19, 2019



Signed

K. Morrison, Appeals Commission Clerk