Alaska Workers' Compensation Appeals Commission

Jeffery L. Gibson,
Appellant, Cross-appellee,

vs.

ARCO Alaska, Inc., and Pacific Employers Insurance Co./ACE-USA,
Appellees, Cross-appellants.

Final Decision
Decision No. 134 April 9, 2010

AWCAC Appeal No. 08-038
AWCB Decision No. 08-0219
AWCB Case Nos. 199430287 & 199430288

Appeal and cross-appeal from Alaska Workers' Compensation Board Decision No. 08-038, issued November 17, 2008, by northern panel members Debra Norum, Member for Industry, Damian Thomas, Member for Labor, and Fred G. Brown, Chair.

Appearances: Robert M. Beconovich, Law Office of Robert M. Beconovich, LLC, for appellant, cross-appellee Jeffery L. Gibson. Robert J. McLaughlin, Mann, Johnson, Wooster & McLaughlin, P.S., for appellees, cross-appellants ARCO Alaska, Inc., and Pacific Employers Insurance Co./ACE-USA.

Commission proceedings: Appeal filed December 31, 2008. Cross-appeal filed January 9, 2009. Briefing completed July 29, 2009. Notice of Supplemental Authority filed August 13, 2009. Oral argument presented November 3, 2009. Notice and order issued November 3, 2009, advising the parties that the record appeared incomplete and directing examination and supplementation of the record. Supplementation of the record by the parties completed November 18, 2009, and supplementary argument completed November 25, 2009. Transcript of June 7, 2007, board hearing filed December 2, 2009. The parties were notified of appointment of a chair *pro tempore* on March 1, 2010.

Appeals Commissioners: David Richards, Stephen T. Hagedorn, Kristin Knudsen.

By: Kristin Knudsen, Chair *pro tempore*.

Jeffery Gibson was laid off from his job as a flow measurement technician when ARCO Alaska, Inc. left the North Slope in 1994. He went back to school, graduating with a B.A. in Electrical Engineering in 2000. He reported an injury to his feet and left

shoulder in April 1997, and he filed a request for reemployment benefits at the same time. After graduation, he amended his claim to include reemployment benefits under AS 23.30.041(k). Gibson also sought surgical treatment for a recurrent neuroma in his right foot, his arthritic big toes in both feet, a tarsal tunnel release, and a psychological diagnosis and medication for depression. Based on the feet injuries and treatment for depression, Gibson claimed he was entitled to temporary total disability compensation (TTD) from July 22, 1994, until he graduated from Washington State University in September 2000, or in the alternative, that he was entitled to stipend while he was attending school and not totally disabled.[1] The board denied Gibson's claims and he appeals. ARCO cross appeals the award of TTD for periods of time following surgeries in 1994 and 1995 because Gibson suffered no loss of earnings and alternatively, the board failed to award a social security offset.

Because the board issued a series of decisions,[2] the commission must decide if the board's 2009 decision, the subject of this appeal, is inconsistent with prior final board decisions on Gibson's claims. The commission must decide if the board had substantial evidence to limit the award of TTD to periods of recovery from each surgery. The commission must decide if the board had substantial evidence upon which to uphold the denial of stipend, and if the reemployment benefits administrator

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[1] ARCO paid Gibson TTD May 2-22, 1997; July 11-31, 1997; Sept. 14 – Oct. 4, 1999; Dec. 30, 2000 – Jan. 19, 2001, and permanent partial disability compensation of $13,500 after the board issued *Jeffery L. Gibson v. ARCO Alaska, Inc*. (*Gibson III*), Alaska Workers' Comp. Bd. Dec. No. 07-0259 (Aug. 27, 2007). R. 1043-44.

[2] *Jeffery L. Gibson v. ARCO Alaska Inc*. (*Gibson I*), Alaska Workers' Comp. Bd. Dec. No. 02-0030 (Feb. 19, 2002) (dismissing claim for failure to give notice of injury under AS 23.30.100), *rev'd, Gibson v. ARCO Alaska*, 4FA 02-1036 (Alaska Super. Ct., Nov. 10, 2003) (Wood, J.) (holding board lacked substantial evidence Gibson knew his foot injuries were related to his employment); *Jeffery L. Gibson v. ARCO Alaska, Inc*. (*Gibson II*), Alaska Workers' Comp. Bd. Dec. No. 06-0156 (June 15, 2006) (dismissing pet. to dismiss claim on statute of limitations grounds under AS 23.30.105); *Gibson III*, Alaska Workers' Comp. Bd. Dec. No. 07-0259 (finding mental illness and feet injuries compensable, ordering the parties to try to resolve dates of entitlement to TTD, and remanding issue of eligibility for reemployment benefits to administrator); *Jeffery L. (Shou) Gibson v. ARCO Alaska Inc*. (*Gibson IV*), Alaska Workers' Comp. Bd. Dec. No. 08-0219 (Nov. 17, 2008).

erred as a matter of law in considering Gibson's present education and experience to deny eligibility. Finally, the commission must decide if the board improperly failed to award a social security offset from TTD.

The commission holds that Gibson had the burden to demonstrate that he was temporarily totally disabled from July 24, 1994, through September 2000. The commission determines that the board had evidence in the record on which a reasonable mind might rely to conclude that Gibson was not disabled by his depression, nor totally disabled by his foot injuries for the entire period claimed. The commission affirms the board's award of TTD with modification. The commission concludes that the board's decision in *Gibson III* made no finding that Gibson was eligible for reemployment benefits. However, because the board had evidence to support its finding that Gibson was not actively pursuing reemployment benefits, the commission affirms the board's decision. Finally, because the board applied the wrong test to its determination, the commission remands this case to the board with instructions to determine if the employer is entitled to take an off-set for social security disability benefits.

1. Factual background.

Jeffery Gibson began working as a flow measurement technician for ARCO in 1980. He was transferred to Alaska in 1985, and worked for ARCO Alaska, Inc. on the North Slope until ARCO left Alaska in 1994. Gibson developed a Morton's neuroma in his right foot in early 1994, and had surgery to remove it in February 1994. He was released to return to work and by May 1994 he was working without restrictions. Gibson was laid off in July 1994 when he voluntarily accepted a "reduction in force" layoff. He received a severance package in September 1994. With this package, he was paid his salary through September 1994 and a lump sum of $60,000.

Gibson moved with his family to eastern Washington in July 1994,[3] applied for admission at Washington State University in Pullman in October 1994, and enrolled in

[3] Unnumbered Bd. Hrg. Ex. (received Aug. 28, 2008), *Uniform Undergraduate Application for Admission to Baccalaureate Colleges and Universities of the State of Washington*, 1, showing date of Washington residence as July 29, 1994.

January 1995.[4] He became a full-time student in August 1995 and he continued to attend the University full-time through July 2000, when he graduated with a B.A. in Electrical Engineering.[5] He attended graduate school at Washington State University in the Fall Semester 2000 and Spring Semester 2001.[6] He enrolled in a combined MBA – JD program at the University of Idaho, but, at the time he testified to entering this program, he had not completed it.[7] The vocational specialist reported that he obtained an M.B.A. from Western Washington University in 2003.[8] He has been employed steadily as an electrical engineer since September 2003.[9]

While living in Washington, Gibson had a number of procedures performed on his feet,[10] culminating in a left tarsal tunnel release December 28, 2000, by Graeme French, M.D. Dr. French allowed "weight bearing as tolerated" and stated Gibson's "disability is partial for two to three months."[11]

Gibson worked part-time while at the University as a teaching assistant I from August 1997 to June 1998,[12] as an engineering intern full-time for USS/POSCO in the summer of 1998,[13] and as a graduate intern project management engineer at the Port

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[4] R. 1094 (showing Gibson audited two classes and took two classes for credit).

[5] *Id.*, showing B.A. Electrical Engineering awarded July 29, 2000.

[6] R. 1093.

[7] Jan. 17, 2002, Hrg. Tr. 6:21 – 7:10.

[8] R. 1321. He testified he received an M.B.A. from Washington State University in 2003. 2007 Hrg. Tr. 66:21-24.

[9] R. 1322-24.

[10] In May 1995 he had a second right foot neuroma surgery by Evan Merrill, D.P.M., R. 0374; in May 1997, an osteotomy of the left big toe by Ronald Alm, D.P.M., R. 0919; and, in July 1997, an osteotomy of the right big toe and excision of stump neuroma by Dr. Alm, R. 0353-54. Dr. French performed a plantar excision of the left foot neuroma in August 1999. R. 0991-92.

[11] R. 0924.

[12] R. 1063, 1088.

[13] R. 1070, 1088.

of Seattle in 2001.[14] Gibson also pursued a social security disability claim.[15] The August 25, 1998, decision of the administrative law judge was that

> . . . based on the application filed on July 17, 1997, (effective filing date), the claimant is entitled to a period of disability commencing July 21, 1994, and to disability insurance benefits under sections 216(i) and 223, respectively of the Social Security Act, as amended; and as of the date of the application for supplemental security income filed on July 17, 1997 (protective filing date) the claimant was "disabled" as defined in section 1614(a)(3)(A) of the Social Security Act.
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> It is the further decision of the Administrative Law Judge that, based on the finding that disability ceased on May 1, 1998, entitled to a period of disability and disability insurance benefits, and eligibility for supplemental security income ended effective July 1998, the end of the second calendar month after the month in which the disability ceased.[16]

Gibson testified he received a $30,000 lump sum payment in settlement of his social security claim.[17]

2. Board proceedings.

In April 1997, Gibson filed a notice of occupational injury asserting injury to both feet and his left shoulder July 21, 1994.[18] At the same time, he filed a request for an eligibility evaluation for reemployment benefits.[19] The reemployment benefits administrator sent Gibson a letter, dated May 13, 1997, asking him to supply more information, including a medical report predicting that his injury would permanently prevent him from returning to his former job and an explanation of the delay in

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[14] R. 1080.

[15] Bd. Hrg. Ex. (received June 7, 2007), Applicant's Ex. # 5, *Notice of Senior Attorney Decision – Fully Favorable* (Aug. 25, 1998).

[16] Bd. Hrg. Ex. (received June 7, 2007), Applicant's Ex. # 5, *Social Security Administration Office of Hearings and Appeals Decision,* 5-6 (Aug. 25, 1998).

[17] Aug. 28, 2008, Hrg. Tr. 36:21 – 37:14.

[18] R. 0001.

[19] R. 0294.

requesting an evaluation.[20] Gibson did not respond.

Gibson filed a claim on March 24, 1998,[21] without requesting reemployment benefits in this claim.[22] He filed a request for hearing on November 2, 1998.[23] In December 1998, ARCO filed a controversion based on failure to give notice within 30 days of the injury or to file a claim within two years of the injury.[24] No hearing was held, and Gibson's second attorney withdrew in July 1999.[25] No action was taken by Gibson to pursue his claim in 2000.

In January 2001, ARCO filed a petition to dismiss the claim for failure to give notice under AS 23.30.100.[26] A third attorney responded to the petition on Gibson's behalf.[27] ARCO filed a request for hearing in April 2001,[28] and Gibson's third attorney withdrew.[29] A fourth attorney entered an appearance on Gibson's behalf in October 2001,[30] and obtained a stipulation to vacate the November 15, 2001, hearing date on ARCO's petition to dismiss.[31]

The board heard ARCO's petition on January 17, 2002.[32] The board dismissed Gibson's claim,[33] and the Superior Court reversed the board's decision on appeal.[34] On

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20 R. 0296.

21 R. 0021-22.

22 R. 0022.

23 R. 0031.

24 R. 0011.

25 R. 0059-60. Gibson's first attorney withdrew before the claim was filed, R. 0018.

26 R. 0066-67.

27 R. 0076-77.

28 R. 0082.

29 R. 0086.

30 R. 0089.

31 R. 0093-94.

32 *Gibson I*, Bd. Dec. No. 02-0030 at 1.

33 *Id.* at 6.

rehearing in 2004, the Superior Court amended its November 10, 2003, decision.[35] Meanwhile, Gibson filed another claim on September 29, 2003, based on a left shoulder injury.[36] At a prehearing conference December 2, 2004, the issues were described as "Periods of TTD, reemployment benefits, PPI, Medicals related to feet and shoulder, Medicals related to psychological problems."[37] No explanation was included in the discussion portion of the summary for inclusion of a reemployment benefits claim.[38]

In January 2006, ARCO filed a second petition to dismiss, this time based on the failure to file a claim within two years of the injury, that is, by July 21, 1996.[39] Gibson obtained representation by a fifth attorney.[40] The board issued a decision denying ARCO's petition to dismiss for failure to file a claim within two years under AS 23.30.105(a).[41] The board held:

> Based on our review of the language of the Superior Court's ruling, we find Superior Court issued a finding of law, which was subject to review only by the Supreme Court, and the Board cannot revisit under the doctrine of *Res Judicata*. Consequently, the Board finds the employee's injury must be considered latent and his claim falls within the scope of the Statute of Limitations. Accordingly, the Board concludes the employer's Petition for dismissal must be denied.[42]

On June 7, 2007, the board heard Gibson's claims on their merits, focusing on the threshold issue of compensability – that is, whether the injuries he claimed were

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[34] R. 01342-53. *Gibson v. ARCO Alaska*, 4FA 02-1036 CI (Nov. 10, 2003) (Wood, J.).

[35] R. 1354 – 57. *Gibson v. ARCO Alaska*, 4FA 02-1036 CI (July 14, 2004) (Wood, J.).

[36] R. 0829-30 (assigned AWCB Case No. 199430288). This claim was joined with the feet claim. R. 1281.

[37] R. 1288.

[38] R. 1288-89.

[39] R. 0846. ARCO also filed a petition to dismiss the feet claim "for failure to prosecute" on Dec. 14, 2005. R. 0841-42.

[40] R. 0839.

[41] *Gibson II,* Bd. Dec. No. 06-0156.

[42] *Id.* at 5.

covered by the Workers' Compensation Act.[43] The questions the board was asked to decide were described by the board as

> . . . the question of compensability of the employee's foot, left shoulder and psychological treatment. The employee is requesting an award of associated time loss benefits, including either TTD or TPD benefits for periods he states he was unable to work as a result of his work injuries. Further, the employee is requesting an increased PPI rating to reflect the 10% whole-person rating of July 20, 2000, by treating physician Dr. French.
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> The employee is also requesting past reemployment benefits for the period of time he was undergoing academic retraining at Washington State University, during 1995 to 2000. The employee had requested such benefits on April 21, 1997, but the employer had controverted all benefits based on defenses raised under AS 23.30.100 and 23.30.105. The employee also requests interest and penalty where applicable, as well as attorney fees and costs.[44]

The board found that although the opinion of Carol Frey, M.D., was sufficient to overcome the presumption as to Gibson's left foot, it was not enough to overcome the presumption as to the right foot because she agreed the first right foot neuroma was work-related.[45] After weighing the evidence, the board found

> by a preponderance of the evidence that the employee's work was a substantial factor in aggravating, accelerating and or combining with his pre-existing arthritic left foot condition, such as to require treatment sooner than would have been otherwise required. In sum, we find the employer is responsible for treatment of both the employee's feet.[46]

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[43] *Gibson III*, Bd. Dec. No. 07-0259 at 6.

[44] *Id.*

[45] *Id.* at 9-10. Gibson's hearing memorandum briefly states the claim for reemployment benefits as follows: "Additionally, Mr. Gibson seeks reemployment benefits as he has rehabilitated himself during the period of 1995-2000, following his ARCO work injury. As such he is entitled to .041(k) benefits and reemployment costs associated with his efforts." R. 0905. ARCO's hearing memorandum indicates ARCO was aware of a request for reemployment benefits. R. 0883-84.

[46] *Gibson III,* Bd. Dec. No. 07-0259 at 11.

Next, the board considered the shoulder injury. The board found that the employer overcame the presumption of compensability,[47] and, relying on "Dr. Jossee's report and testimony [the board concluded] that the employee's shoulder problems are unrelated to his employment with the employer."[48] Finally, the board considered compensability of the need for psychological treatment.

> With respect to the employee's psychological treatment, we find the employee raised the presumption of compensability in his own testimony, as well as in the opinions of Dr. Ragatz, who noted the employee suffered from depression and was distressed, in part, due to pain and the cost of surgeries associated with treatment of his feet. We also note the employer provided no substantial evidence to rebut the employee's testimony or the observations of Dr. Ragatz. The employer merely asserted we should consider the context in which the psychological evaluations were conducted.
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> Concerning the context of the evaluation by Dr. Ragatz, we note the employee was also being treated for depression associated with the death of his father in 1993, the divorce from his wife of 16 years in 1997 and the subsequent move of his children to Pennsylvania, and the need for treatment of his daughter with cerebral palsy. Nevertheless, we find the employer has not overcome the presumption that the employee's need for treatment of his feet was also a substantial factor in his need for [psychological] treatment. Given that we have found the employee's foot conditions compensable, we also find that treatment of his depression is compensable.[49]

Having decided that treatment of Gibson's feet injuries and psychological treatment were compensable as related to the "pain and cost of surgeries associated with treatment of his feet," the board took up the question of Gibson's claims for compensation. Although it awarded Gibson permanent partial impairment compensation (PPI);[50] the board was unable to decide the claim for TTD.[51] The board

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47 *Id*. at 11-12.

48 *Id*. at 12.

49 *Id*. at 12-13.

50 *Id.* at 15.

51 *Id. at* 13.

noted that Gibson

> stated that he has not yet clearly identified the periods when time-loss benefits should be paid, as the focus of the case through the instant hearing has been on establishing compensability. Based on our review of the record, we find insufficient evidence is available to determine whether time-loss benefits are payable.[52]

So, the board asked the parties to "cooperatively attempt to resolve this issue" and, if they were unable to do so in 30 days, to request a prehearing conference to schedule another hearing.[53]

The board characterized Gibson's claim for reemployment benefits as "Whether the employee [is] entitled to a past reemployment benefit for the period of time he was undergoing academic retraining at Washington State University, in 1995 to 2000, pursuant to AS 23.30.041?"[54] In short, the board recognized that Gibson did not want a retraining plan designed by the reemployment benefits administrator, but a determination of entitlement and retroactive stipend for the months he was attending the University pursuing his bachelor of science degree. After describing ARCO's objections, the board said, "[W]e find the reemployment benefits administrator (RBA) has not reviewed the employee's eligibility for reemployment benefits. Accordingly, we will remand this issue to the RBA for a determination of eligibility."[55] In its discussion of attorney fees, the board noted that Gibson "did not prevail in his claim for entitlement to reemployment services, which was the claim with the highest dollar value."[56]

The parties were unable to resolve their differences, and on August 28, 2008, they appeared before the board again. The board stated the issues for decision as

> Whether [Gibson is] entitled to temporary total disability (TTD) benefits associated with his foot surgeries, . . . [and, if he] was actively participating in the reemployment process, . . . for what

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52 *Id.* at 14.

53 *Id.* at 14.

54 *Id.* at 2.

55 *Id.* at 16.

56 *Id.* at 17.

> periods he is due interim stipend benefits . . . [and ARCO] is due a social security offset, pursuant to AS 23.30.225?[57]

After reviewing its prior decision, the board briefly stated its decision. First, as to the claim for TTD, the board said Gibson was entitled to "TTD during the recovery time associated with each of his surgeries, regardless of whether he was also receiving pay from the employer."[58] It rejected Gibson's assertion that he did not really recover from this surgery between July 21, 1994, until sometime after the tarsal tunnel surgery in May 2000;[59] instead, the board relied on medical testimony to establish when he was disabled and medically stable.[60] The board rejected Gibson's claim that he was totally disabled by depression related to his foot surgery:

> [Gibson] also suggested he is due TTD benefits throughout the time period from his first 1995 surgery through his recovery from the 1997 surgery, as he was being treated for depression during this time. Nevertheless, the record reflects that, in addition to depression associated with pain, he was also experiencing a divorce and other problems in his personal life, but was able to successfully focus on obtaining an education. As such, we find the employee has not met the burden of proof required to establish a work-related disability (inability to work), due to his depression, and any associated claim for TTD benefits must be denied.[61]

The board denied the claim for reemployment benefits. Finally, the board denied ARCO's request for an offset for social security disability insurance payments, holding that the social security disability had been awarded for depression, and the board had held that the depression was not disabling; therefore, no off-set was required because no TTD was paid for the same injury.[62]

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57 *Gibson IV,* Bd. Dec. No. 08-0219 at 2.

58 *Id.* at 13.

59 *Id.* at 14.

60 *Id.*

61 *Id.* at 14 n.10.

62 *Id.* at 17.

3. Discussion.

a. Standard of review.

The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record.[63] The commission "do[es] not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is the task assigned to the board, . . . The commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive."[64] A board determination of the credibility of a witness who testifies before the board is binding on the commission.[65]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Alaska Workers' Compensation Act (Act).[66] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[67] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[68]

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[63] AS 23.30.128(b).

[64] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing AS 23.30.122).

[65] AS 23.30.128(b).

[66] *Id.*

[67] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[68] *Cameron v. TAB Elec., Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 089, 11 (Sept. 23, 2008) (quoting *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

b. The board's decision finding an illness covered by the Workers' Compensation Act does not require a finding that the illness is disabling; the board's 2008 decision awarding periods of TTD is not inconsistent with the 2007 decision that the illness is covered by the Act.

AS 23.30.185 requires temporary total disability compensation (TTD) to be paid "during the continuance of the disability." But, § .185 also provides that TTD "may not be paid for any period of disability occurring after the date of medical stability." Disability "means 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."[69] The Supreme Court has held that "returning to work 'is sufficient evidence to rebut the presumption of continuing compensability for temporary total disability.'"[70] Once the presumption is rebutted, the claimant must prove every element of his claim for TTD by a preponderance of the evidence.[71]

In *Gibson III*, the board found that Gibson had demonstrated that his employment was a substantial factor in bringing about the neuromas and accelerating the arthritic condition in his feet, so "as to require treatment sooner than would have been otherwise required."[72] Thus, the employer was liable for treatment of his feet. However, the board also found "insufficient evidence is available to determine *whether* time-loss benefits [TTD or TPD] are payable."[73] The board made no finding that Gibson was entitled to TTD compensation, and at the time the board considered the evidence insufficient to determine if (or that) he was entitled to TTD. Neither Gibson nor ARCO appealed or sought review of this decision.

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[69] AS 23.30.395(16).

[70] *Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166, 177 (Alaska 2002) (quoting *Bailey v. Litwin Corp.*, 713 P.2d 249, 252, 254 (Alaska 1986)).

[71] *See Lowe's HIW, Inc. v. Anderson*, Alaska Workers' Comp. App. Comm'n Dec. No. 130, 13 (Mar. 16, 2010).

[72] *Gibson III* at 11.

[73] *Id.* at 14 (emphasis added).

Under the doctrine of issue preclusion, "an issue of fact which is actually litigated in a former action may, under certain circumstances, be regarded as conclusive in a subsequent case."[74] But, issue preclusion does not apply if the issue of fact was not actually litigated.[75] The board's order directing the parties to attempt settlement makes it clear it did not intend to foreclose later opportunities to litigate the issue of entitlement to TTD. Because the board did not decide that Gibson was entitled to TTD – or that he was not entitled to TTD – the board's decision in *Gibson IV* to award periods of TTD associated with each surgical procedure is not contradicted by *Gibson III.*

Following removal of his right foot neuroma by Dr. Bosenberg, Gibson returned to work for ARCO. He testified he suffered no wage loss as a result of this surgery.[76] He did not leave his employment because of his foot injury, but because he voluntarily chose to take a "reduction in force" layoff, and receive a lump sum payment of $60,000.[77] This, coupled with his prior return to work, was enough to overcome the presumption of compensability regarding his claim for TTD after July 21, 1994. Gibson bore the burden of proving that his loss of earnings was the result of incapacity due to his injury, not to his acceptance of a severance package, change of residence to Washington, and enrollment in the university. The board did not have to accept Gibson's testimony, but could choose to rely on the medical evidence. Gibson produced no evidence of treatment or need for treatment between June 20, 1994, when he last

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[74] *Morris v. Horn*, 219 P.3d 198, 208 (Alaska 2009) (quoting *Plumber v. Univ. of Alaska Anchorage*, 936 P.2d 163, 166 (Alaska 1997) (explaining the doctrine of *res judicata* "provides that a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, [and] (3) in a dispute between the same parties (or their privies) about the same cause of action.")).

[75] *Morris,* 219 P.3d at 209. *See generally* Restatement (Second) of Judgments §§ 28(3), 28(5), 29(2), 29(5) (1982).

[76] July 7, 2007, Hrg. Tr. 117:3-5.

[77] *Id*. at 135:8 – 136:5. The medical treatment he sought was for his daughter, who suffers from cerebral palsy, *id.* at 135:4-6, he and his wife "had seen every neurologist in town and so hadn't had success. We did have success in Spokane, Washington, which is where [the daughter's] doctor is." *Id*. at 32:1-12.

saw Dr. Bosenberg and was returned to work, and March 15, 1995, when he was seen for symptoms of the recurrent neuroma.[78] Dr. Merrill treated the recurrent neuroma with surgery May 15, 1995, and Dr. Merrill placed no restrictions on Gibson except to wear a "post-op shoe" for about four weeks.[79] Dr. Merrill reported that his surgeries did not preclude Gibson from a job that requires walking and standing.[80] Gibson himself testified that he could not recall, but "it was maybe three weeks" that he was using crutches.[81] Gibson testified he did not seek medical treatment for his feet again until at least March 1997.[82] Gibson also admitted that his full-time enrollment at a university prevented him from looking for full-time work.[83]

As to the disability associated with the osteotomies, Gibson admitted to working part-time, and the board's record contains a record of employment as a Teaching Assistant. He was not taken off work until April 22, 1997.[84] He testified he did not recall how long it took to recover from the right toe surgery,[85] but he thought maybe he used crutches for about a month after his toe surgeries.[86] He admitted he sought verification from his physician, Dr. Merrill, that he couldn't work because "that became an issue in my divorce, whether or not I should have been working or not at that

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78 R. 0379.

79 R. 0374. Dr. Merrill reported May 25, 1995, that Gibson had not needed to take pain medications. R. 0373.

80 R. 0314.

81 July 7, 2007, Hrg. Tr. 57:20 – 58:5. This is consistent with Dr. Alm's testimony that after neuroma excision "at three weeks they're in normal shoe gear, although they're still not normal activity, but they're close. By six weeks, they're probably normal activity." Alm Dep. 40:10-13.

82 Jan. 17, 2002, Hrg. Tr. 58:1-6.

83 Aug. 28, 2008, Hrg. Tr. 50:14-17.

84 Frey Dep. Ex. 4 at 419. Dr. Alm predicted a total disability period of four months to accomplish both surgeries. *Id.*

85 2007 Hrg. Tr. at 59:5-6.

86 *Id.* at 62:1-14.

time."[87] In June 1998, Gibson went to work full-time as an engineering intern. Again, the ability to return to work was sufficient to overcome any presumption of continuing total disability following his 1997 treatment of his arthritic big toes. His physician, Dr. Alm, reported he would be disabled for about two months of healing after each big toe surgery.[88] Finally, following his December 2000 surgery, his physician released him from care within three months of the tarsal tunnel surgery.[89]

A physician's prediction of medical stability is not enough to establish that an employee's injury is medically stable if it proves incorrect,[90] but here the predictions were not shown to be incorrect. As Dr. Frey[91] and Dr. Bosenberg[92] testified, neuromas may reoccur, and neither Dr. Frey nor Dr. Alm attributed the need for treatment for the arthritic big toes in 1997 to the existence of the neuromas.[93] Thus, the board could find the 1997 arthritis was not a consequence of the treatment for the neuromas and the board had sufficient evidence to find that the need for treatment of neuromas and of arthritis did not result in a single period of disability and medical instability, but specific periods of disability and medical instability associated with each procedure.[94] After each procedure, Gibson was returned to medical stability. He continued his education full-time, but attending the University was a voluntary choice he made. He demonstrated that he was able to work during the period he claims he was totally

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87 2002 Hrg. Tr. 49:2-3.

88 R. 0299. Dr. Alm also testified that following the big toe surgeries, Gibson should not "be out running or jogging . . . I would prefer to see him in a job where he could sit for most of the day." Alm Dep. 39:5-14.

89 R. 0535.

90 *Thoeni v. Consumer Elec. Serv.,* 151 P.3d 1249, 1256 (Alaska 2007).

91 Frey Dep. 43:22 – 44:1.

92 Bosenberg Dep. 13:1-13. Dr. Merrill also reported that "return of the neuroma . . . can happen as a result of surgery [to remove the neuroma]." R.0316.

93 Frey Dep. 54:7-12; Alm Dep. 45:3 – 46:15.

94 Because the board failed to consider the uncontradicted evidence in the April 22, 1997, report of Dr. Alm, Frey Dep. Ex. 4 at 419, that Gibson was disabled from April 22, 1997, through four months for the big toe surgeries, the board's award of a period of TTD for the big toe surgeries requires modification.

disabled by his foot injuries, when he was not attending the University full-time. The commission concludes the board had sufficient evidence in the medical reports and testimony to award TTD for his foot procedures based on the medical evidence of disability and medical stability rather than Gibson's testimony.

Gibson also claimed that he was entitled to TTD because he was unable to work from July 21, 1994, through July 2000 because he was being treated for depression during this period. However, the board's finding in *Gibson III* was limited: it found the employer failed to rebut a presumption that the work was a substantial factor in the need for psychological treatment because the pain from the feet surgeries was a factor in bringing about the need for psychological treatment. It made no finding that Gibson was disabled by a mental illness, only that psychological treatment was compensable.

Gibson argues now that the board "confounded" the ability to work with the ability to complete a university degree in engineering. However, the board found that Gibson had not met his burden of proof; that is, that Gibson failed to persuade the board that he was totally incapable of employment in the same or other employment from July 21, 1994, through August 2000 because of depression. The board had before it in *Gibson IV* the employee's testimony, Dr. Sedlacek's assessment, and the report of Dr. Klecan. Dr. Klecan stated that "Gibson's recurrent episodes of Major Depression would not have affected his employability during the period between 1994 and 2000."[95] Even clinical psychologist Gordon Sedlacek, Ph.D., ascribed only one marked limitation – on the ability to complete a normal workday without interruption from psychological symptoms,[96] but Gibson's impairment of concentration and persistence he ascribed to "much of the time . . . affected by his unresolved issues with his family and divorce."[97] Finally, Gibson's progress through an undergraduate degree in engineering, his part-time employment while attending the university, and his employment during the summer of 1998, demonstrate that he was not totally disabled by mental illness.

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95 R. 1254.

96 R. 0995.

97 R. 0952.

Gibson testified that he was able to work at Posco, although he testified he experienced difficulty that "would have been better" if he had been able to obtain renewal of his medication.[98] There was substantial evidence in the record before the board that Gibson's depression did not render him incapable of employment in the same, or other employment; therefore, the board's decision must be affirmed.

c. The board's decision in Gibson III made no finding that Gibson was eligible for reemployment benefits and there was no evidence that Gibson actively sought reemployment benefits until he had completed his university degree.

Gibson relies on *Carter v. B & B Construction, Inc.*[99] to argue that he was participating in reemployment planning, and actively involved in the reemployment process from 1995 through 2000. He argues that "to find he was not involved with the process when he has actively proceeded with his legal remedies . . . belies the clear history of this case and is not remotely supported by substantial evidence."[100] He argues that the eligibility evaluation would not have been ordered if the board had not found him eligible for reemployment benefits.

AS 23.30.041(k) provides

> Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the

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98 2008 Hrg. Tr. 51:19 – 52:14.

99 199 P.3d 1150 (Alaska 2008).

100 Gibson Opening Br. 15.

> employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum. An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan.

Benefits payable under AS 23.30.041(k) are limited to those persons who are in the reemployment process under AS 23.30.041. To be entitled to receive "compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process" after exhaustion of TTD and PPI, Gibson must be in the reemployment process under AS 23.30.041.

While an award may be made for past periods of stipend under *Carter* and *Griffiths v. Andy's Body & Frame, Inc.*,[101] the right to such an award is triggered when the employee actively pursues reemployment benefits under the Alaska Workers' Compensation Act before the delay imposed by controversion and litigation. Here, Gibson did not request an eligibility evaluation until April 1997, more than two years *after* the start of the period he claims he was actively involved in the reemployment process under AS 23.30.041. He did not respond to Reemployment Benefits Administrator Saltzman's May 1997 letter. He did not include reemployment benefits on his written workers' compensation claims. There is no evidence he raised

[101] 165 P.3d 619 (Alaska 2007).

reemployment benefits as a disputed issue until December 2, 2004, when "reemployment benefits" appeared without explanation on a prehearing conference summary. That was four years *after* the end of period he claims he was "actively pursuing" reemployment benefits under the Act.

It is correct that ARCO controverted Gibson's claim in December 1998, more than a year and one-half after the administrator wrote to Gibson and received no answer. The controversion does not explain why Gibson did not respond to the administrator's letter before December 1998. While filing a request for a reemployment evaluation may *begin* the active pursuit of benefits under AS 23.30.041, the failure to respond to the administrator's request for more than a year after the request was made when no controversion had been issued may be considered an abandonment of the pursuit of a reemployment plan under AS 23.30.041, especially where prejudice is shown to the employer or neglect makes it apparent to a reasonable person that the employee has no intention of pursuing a reemployment plan under AS 23.30.041.[102]

Gibson did not testify that he desired the services of a reemployment specialist to aid him in returning to work as soon as possible, within the parameters of AS 23.30.041, when he filed the request for eligibility evaluation. There is no evidence in the record that Gibson wanted a specialist's assistance in drafting a plan to return to work as soon as possible in the same or a similar field, and some evidence that he had

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[102] Gibson did not give notice of a claim for reemployment benefits after the controversion until December 2004. He was not actively pursuing reemployment benefits through litigation between 1995 and 2000, the period for which he seeks stipend. Abandonment is a means of waiving a claim, either when it is inconsistent with any other intention but waiver of the claim, or where neglect to insist upon the claim results in prejudice to another party. *See Carr-Gottstein Foods Co. v. Wasilla, LLC*, 182 P.3d 1131, 1136 (Alaska 2008) ("[N]eglect to insist upon a right," . . . may result in an implied waiver, or an estoppel, when "the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question.") (quoting *Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Corp.*, 129 P.3d 905, 917 n.35 (Alaska 2006)); citing *Wausau Ins. Cos. v. Van Biene*, 847 P.2d 584, 589 (Alaska 1993) ("[N]eglect to insist upon a right only results in an estoppel, or implied waiver, when the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question.").

a reason to avoid it. In 1997, whether or not he "should have been working" was an issue in his divorce, and it was to his advantage to establish in the divorce proceedings that he could not work.[103] Active pursuit of reemployment services might have undermined his position that he could not work, and would probably not have supported his attendance at the University for three more years, for reemployment benefits selected must "ensure[s] remunerative employability in the shortest possible time"[104] and plan duration is limited to two years.[105] Gibson argues that he was entitled to stipend because, if his eligibility evaluation had not been stalled by litigation on the timeliness of his claim, he would have been found eligible for benefits. However, this is not a certainty. Gibson also testified he had a two-year degree in electronics and 14 years of experience in the field.[106] By the time he requested the benefits in 1997, he had an additional two years of education. Although he argued that an eligibility evaluation, if conducted in 1997, would have found him eligible for reemployment benefits, he presented no evidence to support this assertion. On the other hand, the employee in *Griffiths* had already been found eligible for reemployment benefits *before* litigation interrupted the plan development process.

Gibson testified he did not expect the insurer to pay for his undergraduate degree,[107] but he could not articulate what he expected from his claim for reemployment benefits: "I would leave that to my attorney. I don't know (indiscernible). I don't know the amounts, I don't know the various (indiscernible) of those. I just know they exist."[108] Thus, while Gibson began litigation of a claim for stipend and costs of his education in December 2004, after he had obtained a university

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[103] 2002 Hrg. Tr. 49-50. He also testified he could not recall why it was important to establish he could not work, *id.* at 49:6-8, but his attorney frankly attributed it to the dispute regarding the amount of child support that Gibson would be ordered to pay as a result of the divorce. *Id.* at 82:25 – 83:5.

[104] AS 23.30.041(i).

[105] AS 23.30.041(k).

[106] 2008 Hrg. Tr. 53:16-19.

[107] 2007 Hrg. Tr. 138:8-10.

[108] *Id.* at 138:14-17.

degree, his failure to respond to the administrator for more than a year and his omission of reemployment benefits from his claims until December 2, 2004, would convey to a reasonable person that Gibson would not pursue a claim for the services of a reemployment specialist.

The pursuit of a period of stipend alone is not the active pursuit of reemployment benefits. As the commission previously said:

> Stipend, however important, is secondary to the primary reemployment benefit, which is monitored assistance in developing a plan for reemployment with aid from qualified specialists, and monitored performance of the plan itself.[109]

Gibson's conduct after filing a request for reemployment eligibility evaluation, and his testimony to the board, does not indicate that he desired, and actively pursued, the primary benefit of reemployment services under AS 23.30.041. Entitlement to stipend benefits under AS 23.30.041(k), after exhaustion of temporary compensation and permanent partial impairment compensation, "is contingent upon the active pursuit of reemployment benefits – not the active pursuit of stipend."[110]

The commission concludes the board did not have substantial evidence in the record to support a finding that Gibson was actively pursuing reemployment benefits under AS 23.30.041 for a period that would exceed the exhaustion of his PPI benefits and temporary total disability compensation. Because the "active pursuit" of reemployment benefits is a condition of award of retroactive stipend, as requested here, the lack of evidence of active pursuit bars an award of stipend. Therefore, the board's denial of reemployment benefits must be affirmed.

d. The board applied the wrong test to determine if the employer is entitled to a social security off-set.

AS 23.30.225(b) provides in relevant part that periodic disability compensation benefits

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[109] *Griffiths v. Andy's Body & Frame, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 119, 25 (Oct. 27, 2009).

[110] *Id.* at 26.

> shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401-433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury.

Gibson testified that he received a settlement of $30,000 from the social security administration. However, the record contains the decision of an administrative law judge for the Social Security Administration that Gibson was entitled to disability benefits from July 21, 1994, through June 30, 1998. The administrative law judge's decision that Gibson was disabled rested on evidence of a number of conditions, not all of them related to his employment:

> The medical evidence establishes that the claimant has severe osteoarthritis in both feet with chronic pain, bilateral shoulder joint instability, left worse than the right, longstanding major depressive disorder (back to 1994), single episode, and dysthymia, but that he does not have an impairment or combination of impairments listed in, or medically equal to one listed in Appendix 1, Subpart P, Regulations No. 4.[111]

The board, however, determined that the basis for the decision to award disability benefits was Gibson's depression, and therefore ARCO was not entitled to a compensation offset.

In *George Easley Co. v. Estate of Lindekugel*,[112] the Supreme Court held that whether the Social Security Administration intended social security disability benefits "to serve as compensation for Lindekugel's condition resulting solely from the accident at Fluor without considering the aggravating effect of the Easley accident" was a question of fact, not a legal question.[113] The board found that Easley could not receive an offset because the disability benefits were compensation for Lindekugel's injury at Fluor, not

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[111] Bd. Hrg. Ex. (received June 7, 2007), Applicant's Ex. # 5, *Social Security Administration Office of Hearings and Appeals Decision,* 4 (Aug. 25, 1998).

[112] 117 P.3d 734 (Alaska 2005).

[113] 117 P.3d at 744.

at Easley.[114] The Court held that

> Although questions remain as to the exact reason why Lindekugel's SSDI payments were reinstated, the fact that they were made retroactive to April 1981, months before Lindekugel's injury at Easley, provided the board with a permissible reason to deny the petition, given that no specific facts contradicting the inference that the board drew from the April 1981 retroactive date were introduced.[115]

Thus, the question of fact for the board was whether Gibson's social security disability benefits were awarded "without considering" the work-related injury.

If the Social Security Administration decision had rested on the mental illness alone, the board's decision would be affirmed. However, the decision states that the evidence on which the decision was based included "that the claimant has severe osteoarthritis in both feet with chronic pain." The board found that the osteoarthritis in Gibson's big toes was work-related; if Gibson has severe arthritis throughout his feet, that is not a fact in the board's record. If the "severe osteoarthritis" referred to in the Social Security Administration decision was the work-related arthritis, the decision text establishes that the aggravating effects of the work injury were considered by the Social Security Administration in awarding benefits.

Citing its earlier decision in *Lindekugel v. George Easley Co.,*[116] the board stated the rule as: "Tangential Social Security disability benefit awards are not subject to a social security offset."[117] However, on appeal of the board decision in *Lindekugel,* the Supreme Court applied a different test: whether the social security disability benefits award resulted from injuries (or disease) that are not compensable by the employer without considering the aggravating effect of the work injury.[118] Thus, if the "aggravating effects" of the work injury were considered in awarding social security disability, then the employer is entitled to an off-set. Because the board did not permit

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114 *Id*.

115 *Id*.

116 Alaska Workers' Comp. Bd. Dec. No. 01-0162 (Aug. 22, 2001).

117 *Gibson IV*, Bd. Dec. No. 08-0219 at 17, n.14.

118 117 P.3d at 744.

the Social Security Administration decision to speak for itself and the board applied the wrong test, the board's denial must be vacated, and this case remanded to consider the Social Security Administration decision and any subsequent appeal decisions. The record contains inconsistent statements regarding the nature of the $30,000 payment and whether it included social security payments to Gibson's children.[119] The board is directed to take additional evidence regarding the social security payments Gibson received and the final administrative adjudication of Gibson's social security claim.

4. Conclusion.

For the reasons set out above, the commission AFFIRMS the board's awards of temporary total disability compensation, MODIFIED to include temporary total disability compensation from April 22, 1997, through four months or the date of medical stability after the May 5, 1997, surgery, whichever is first. The commission AFFIRMS the denial of reemployment benefits, VACATES the board's denial of a social security off-set, and REMANDS this case to the board for further proceedings in accord with this decision. The commission does not retain jurisdiction.

Date: *9 Apr. 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
David W. Richards, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Kristin Knudsen, Chair *pro tempore*

[119] If the Social Security Administration withheld accrued child support pursuant to a court ordered or valid administrative withholding order, it is not a payment by the social security administration to an entitled minor beneficiary. Child support withholdings are not deducted from the base amount of a social security benefit because the social security administration is obeying the court's order enforcing the parent's obligation to the child, not awarding a benefit to the child.

APPEAL PROCEDURES

This is a final decision and order on this appeal and cross appeal of the board's decision awarding compensation to Jeffery L. Gibson, denying his claim for reemployment benefits, and denying ARCO Alaska Inc., a social security offset. The effect of this decision is that the commission affirmed the award of temporary total disability compensation and affirmed the decision denying Mr. Gibson's claim for reemployment benefits. The commission vacated (annulled) the board's denial of ARCO's request for a social security off-set and remanded (sent back) the case to the board to take additional evidence and decide if an off-set is required under AS 23.30.225(b). The commission did not retain jurisdiction. This decision becomes final on the 30th day after the commission mails or otherwise distributes this decision, unless proceedings to reconsider it or seek Supreme Court review are instituted. Look in the box on the last page to see the date of distribution.

Because the commission remanded a part of this case for further action that requires the board to re-decide one issue raised by the cross-appellants, the Supreme Court might not accept an appeal. However, the commission has not retained jurisdiction, so the matter is closed in the commission, and the Court may consider this a final, appealable decision.

Proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. The commission and the board are not parties to the appeal.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review under Appellate Rules. If you believe grounds for review exist, you should file your petition for review within 10 days after the date this decision was distributed. See the clerk's box below for the date of distribution.

You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If you wish to appeal or petition for review 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

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

RECONSIDERATION

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 134 issued in the matter of *Gibson v. ARCO Alaska, Inc.,* AWCAC Appeal No. 09-038, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 9, 2010.

Date: *April 20, 2010*

Signed

B. Ward, Appeals Commission Clerk