

## Alaska Workers' Compensation Appeals Commission

Noelle L. McCullough, by her guardian  
Barbara Williams,  
Appellant,

vs.

Job Ready, Inc. and North American  
Specialty Insurance Co.,  
Appellees.

### Final Decision

Decision No. 151                      April 12, 2011

AWCAC Appeal No. 08-014  
AWCB Decision No. 08-0056  
AWCB Case No. 200206898

Final decision on appeal from Alaska Workers' Compensation Board Decision No. 08-0056, issued at Anchorage on March 24, 2008, by southcentral panel members Darryl Jacquot, Chair, Patricia Vollendorf, Member for Labor, Robert Weel, Member for Industry.

Appearances: Noelle L. McCullough, appellant, by her guardian Barbara Williams; Randall J. Weddle, Holmes Weddle & Barcott, P.C., for appellees, Job Ready, Inc. and North American Specialty Insurance Co.

Commission proceedings: Appeal filed May 6, 2008; briefing completed January 25, 2011; oral argument was not requested.

Commissioners: Jim Robison, S.T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

### *1. Introduction.*

Except in one respect, the circumstances giving rise to the workers' compensation claim of the appellant, Noelle L. McCullough (McCullough), are undisputed. McCullough began working for appellee, Job Ready, Inc. (Job Ready), on October 1, 2001, as an activity therapist.<sup>1</sup> As of April 2002, McCullough's primary client was the nine-year-old non-verbal autistic daughter of Richard Haynes and Amy

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<sup>1</sup> See *Noelle L. McCullough v. Job Ready, Inc. and North American Specialty Ins. Co.*, Alaska Workers' Comp. Bd. Dec. No. 08-0056, 2 (Mar. 24, 2008) (*McCullough*).

Dimmick.<sup>2</sup> According to McCullough's Report of Injury dated April 10, 2002, two days earlier, McCullough injured her back and right shoulder blade while working. She was seated at a table with her back to the entrance of a room. Richard Haynes entered the room and slapped her on the back.<sup>3</sup> In contrast, Mr. Haynes testified that he gave McCullough an "at-a-boy" pat on the shoulder.<sup>4</sup> Thus, only the severity of the slap or pat on McCullough's back was disputed.

The issue presented in this appeal is the compensability of any work-related injury arising out of the aforementioned incident. Following a hearing over four, non-consecutive days, the Alaska Workers' Compensation Board (board) concluded that McCullough's claim was not compensable. We affirm.

*2. Factual background and proceedings.*

Job Ready paid McCullough temporary total disability benefits from April 9, 2002, through October 10, 2002, and paid her permanent partial impairment benefits based on a 5% whole person rating.<sup>5</sup> Her medical bills were paid from 2002 until August 2004.<sup>6</sup>

McCullough was first treated on April 10, 2002, by Physician Assistant (PA) Lori J. Landstrom, who noted a normal right shoulder exam, although McCullough was complaining of discomfort.<sup>7</sup> On April 18, 2002, McCullough reported to PA Landstrom that she might have a debilitating injury. Ms. Landstrom took McCullough off work.<sup>8</sup> Byron McCord, M.D., saw McCullough on April 30, 2002. After observing she had a full range of motion, Dr. McCord's impression was a contusion with sustained reaction.<sup>9</sup>

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<sup>2</sup> See *McCullough*, Bd. Dec. No. 08-0056 at 2.

<sup>3</sup> See *id.*

<sup>4</sup> See *id.* at 10.

<sup>5</sup> See Appellees' Exc. 032.

<sup>6</sup> See *McCullough*, Bd. Dec. No. 08-0056 at 22.

<sup>7</sup> See Appellees' Exc. 001.

<sup>8</sup> See *id.* at 003.

<sup>9</sup> See *id.* at 005.

At the request of Job Ready, McCullough was evaluated on July 26, 2002, by Scot G. Fechtel, D.C., M.D., who specializes in chiropractic orthopedics and neurology. Noting that McCullough's subjective complaints were not supported by objective findings, his diagnosis was, by history, a contusion of the lower thoracic spine that had resolved with chronic pain.<sup>10</sup> On October 10, 2002, McCullough saw J. Michael James, M.D. Dr. James diagnosed chronic pain syndrome and remarked that "we are dealing with a person with pain complaints far in excess of the physical findings. It would appear that her functional capacities are self-limited."<sup>11</sup> After seeing McCullough again in January and March 2003, Dr. James noted that her symptoms would not limit her ability to go to work.<sup>12</sup>

Johanna Kohl, M.D., saw McCullough in October 2003.<sup>13</sup> Job Ready had an employer's medical evaluation performed on May 27, 2004, by Stephen Fuller, M.D., an orthopedic surgeon, Lynne Adams Bell, M.D., a neurologist, and S. David Glass, M.D., a psychiatrist.<sup>14</sup> The report by Drs. Fuller and Bell stated in part:

[McCullough] claims no improvement in subjective pain in the right mid-thoracic paraspinals, resulting from a negligible blow on 04/08/02, which did not even leave a bruise or mark. Her location of discomfort has been migratory and inconsistent, together with inconsistent claims of sensory loss as noted . . . . The bottom line is that there never have been any objective findings of pathology to substantiate or support her subjective claims of pain, which appear to be psychosomatic per suspicions of several physicians in this record.<sup>15</sup>

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<sup>10</sup> See Appellees' Exc. 021.

<sup>11</sup> Appellees' Exc. 031.

<sup>12</sup> See Appellees' Exc. 040.

<sup>13</sup> See *McCullough*, Bd. Dec. No. 08-0056 at 31.

<sup>14</sup> See Appellees' Exc. 052-89.

<sup>15</sup> Appellees' Exc. 066.

. . . [McCullough] has no objective pathology upon which to base a valid diagnosis, attributable to the work incident of 04/08/02. This claim is all subjective allegation and not objective substance.<sup>16</sup>

Dr. Glass reported:

There is no history of a pre-existing psychiatric disorder; however, Ms. McCullough's current report of subjective pain complaints – somatoform disorder (307.80) – is because of pre-existing constitutional and developmental factors and ongoing psychosocial issues.

. . . .

The incident of 04/08/02 did not aggravate, accelerate, or combine with any underlying psychological condition to produce Ms. McCullough's current condition or need for psychiatric/medical care. That said, her current subjective pain complaints having no organic basis would relate to psychosocial circumstances/issues and pre-existing personality factors. Patients with somatoform disorders develop and/or maintain physical symptoms as a way of dealing with personal problems/conflicts only; somatoform disorders (307.80) are not caused by actual tissue pathology or injury.<sup>17</sup>

In a June 2004 response to an inquiry from Job Ready, Dr. Kohl wrote that she agreed with Dr. Glass's opinion, who assessed McCullough as having a somatic disorder, but could not say whether the work-related incident in April 2002 was a cause of her current need for treatment.<sup>18</sup> Dr. Kohl referred McCullough to Joella Beard, M.D., who saw McCullough on September 10, 2004.<sup>19</sup> When Dr. Beard was deposed on March 28, 2005, she stated that she agreed with the opinion that McCullough had a somatoform disorder that was not caused or worsened by the April 8, 2002, incident.<sup>20</sup>

Eileen Ha, M.D., began treating McCullough in November 2004. Having diagnosed McCullough as suffering from a Depressive Disorder Not Otherwise Specified (NOS) and chronic pain disorder, Dr. Ha reiterated those diagnoses in a letter dated

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<sup>16</sup> Appellees' Exc. 067.

<sup>17</sup> *Id.* at 084-85.

<sup>18</sup> *See id.* at 100-01.

<sup>19</sup> *See McCullough*, Bd. Dec. No. 08-0056 at 37.

<sup>20</sup> *See* Mar. 28, 2005, Beard Dep. 12:4. When deposed the following day, Dr. Kohl stated a similar opinion, that McCullough had a pain disorder. *See* Mar. 29, 2005, Kohl Dep. 8:24–9:1.

August 7, 2007.<sup>21</sup> McCullough had a psychiatric evaluation by William G. Campbell, M.D., on June 25, 2007. Dr. Campbell disagreed with Dr. Ha's diagnosis of Depressive Disorder NOS, instead, diagnosing Post-Traumatic Stress Disorder (PTSD). He agreed with her diagnosis of chronic pain disorder.<sup>22</sup>

Ronald N. Turco, M.D., a psychiatrist, performed a second independent medical evaluation (SIME) of McCullough in December 2006<sup>23</sup> and provided a report that same month.<sup>24</sup> In a follow-up letter dated October 16, 2007, Dr. Turco remarked:

I will minimize a recapitulation of materials noted in my December 24, 2006 report. As you know, I made no psychiatric diagnosis, but I did indicate that [McCullough] might have a "pain disorder." I mention this because of the fact that she continued to have pain in the total absence of any objective findings. Several very excellent examiners have evaluated [McCullough] and noted that there is no justification for her subjective complaints of pain. . . . McCullough evidenced substantial somatoform features as well as a hysterical magnification of symptoms. This was noted in the physical examination, the clinical psychiatric examination and the psychological testing administered by both Dr. David Glass as well as myself. This is quite significant and is quite supportive of somatization tendencies and what is essentially the perpetuation of physical complaints without objective findings. . . . [McCullough] fits the criteria presented by Charles V. Ford, who describes individuals such as Ms. McCullough as having developed a lifestyle of disability and "illness as a way of life."<sup>25</sup>

Having reviewed Dr. Campbell's report, Dr. Turco commented:

I note he spent only one hour with Ms. McCullough and did not do any psychological testing. . . . Dr. Campbell has noted that he did not feel that Ms. McCullough was consciously exaggerating symptoms and this may well be the case. Individuals with somatization disorder, "pain disorder," do actually believe that they are experiencing some sort of problem even in the face of repetitive normal examinations. . . . [Dr. Campbell] makes a diagnosis of post-traumatic stress disorder which is not in the realm of believability at least from my perspective. Dr. Eileen Ha has essentially taken surface information from Ms. McCullough and

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<sup>21</sup> See Appellees' Exc. 181.

<sup>22</sup> See *id.* at 175-76.

<sup>23</sup> See *McCullough*, Bd. Dec. No. 08-0056 at 69.

<sup>24</sup> See Appellees' Exc. 154-65.

<sup>25</sup> *Id.* at 201-02.

authored a letter of August 7, 2007. I do not find Dr. Ha's letter convincing.<sup>26</sup>

In summary, Dr. Turco, who has extensive experience treating individuals with PTSD, concluded that the incident of April 8, 2002, would not cause PTSD and that McCullough does not otherwise manifest the symptoms of someone with PTSD.<sup>27</sup> Both Dr. Turco and Dr. Campbell testified at McCullough's board hearing. The opinions expressed in their testimony were consistent with the opinions provided in their reports.<sup>28</sup>

At the hearing before the board, a number of witnesses, including McCullough's husband, sister, mother, father, and several friends, testified to the effect that McCullough was not the "same" person following the April 8, 2002, incident. Prior to that incident, she was active and outgoing, whereas, afterward, McCullough appeared fatigued and in pain.<sup>29</sup>

### 3. *Standard of review.*

Pursuant to the provisions of AS 23.30.128(b), the commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the record as a whole. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>30</sup> "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."<sup>31</sup> The commission exercises its independent judgment in reviewing questions of law or procedure.<sup>32</sup>

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<sup>26</sup> Appellees' Exc. 202.

<sup>27</sup> *See id.*

<sup>28</sup> *See McCullough*, Bd. Dec. No. 08-0056 at 71.

<sup>29</sup> *See id.* at 20-22.

<sup>30</sup> *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted)).

<sup>31</sup> *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984)).

<sup>32</sup> *See* AS 23.30.128(b).

#### 4. Discussion.

##### a. Applicable law.

The presumption of compensability applies to every element of a factual determination relative to a workers' compensation claim.<sup>33</sup> Under AS 23.30.120(a)(1),<sup>34</sup> benefits sought by an injured worker are presumed to be compensable.<sup>35</sup> To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment.<sup>36</sup> If the employee establishes this preliminary link, the presumption may be overcome<sup>37</sup> if the employer presents substantial evidence that the injury was not work-related.<sup>38</sup> Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at this point.<sup>39</sup> If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove his or her case by a preponderance of the evidence.<sup>40</sup> This means that the employee must "induce a belief" in the minds of the board members that the facts being asserted are

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<sup>33</sup> See *Burke v. Houston Nana, L.L.C.*, 222 P.3d 851, 861 (Alaska 2010).

<sup>34</sup> AS 23.30.120(a)(1) provides that "[i]n a proceeding for enforcement of a claim for compensation . . . it is presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of [AS 23.30.]"

<sup>35</sup> See, e.g., *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996).

<sup>36</sup> See, e.g., *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999).

<sup>37</sup> The presumption of compensability analysis is somewhat different for injuries occurring on or after November 7, 2005, the effective date of the 2005 amendments to the Alaska Workers' Compensation Act. See *Runstrom v. Alaska Native Medical Center*, Alaska Workers' Comp. App. Comm'n Dec. No. 150, 6-8 (Mar. 25, 2011).

<sup>38</sup> See *Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either (1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility* that employment was a factor in causing the disability.") (italics in original, footnote omitted); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).

<sup>39</sup> See, e.g., *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

<sup>40</sup> See *Miller*, 577 P.2d at 1046.

probably true.<sup>41</sup> At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers the question of credibility.

*b. Applying the presumption analysis, McCullough did not suffer a compensable injury.*

In ruling as it did, the board appropriately applied the presumption of compensability analysis.<sup>42</sup> In the process of assessing the evidence set forth above, the board found that the presumption had attached, primarily through evidence consisting of McCullough's testimony and the testimony of Dr. Campbell.<sup>43</sup> We concur. Second, the board found that the presumption had been rebutted, based on the reports, opinions, and/or testimony of Drs. Turco, Glass, Fuller, Bell, James, Beard, and Kohl.<sup>44</sup> Their evidence is discussed above.<sup>45</sup> We also agree with the board with respect to this finding. Finally, the board found that McCullough had not proven her claim by a preponderance of the evidence.<sup>46</sup> The facts bearing on this issue are summarized above.<sup>47</sup> Again, we concur with the board.

In terms of rebutting the presumption, Job Ready presented substantial evidence that McCullough had a somatoform disorder that was not work-related. Given their qualifications, the thoroughness of their evaluations, and the specificity of their reports, we find the opinions of Drs. Glass and Turco particularly persuasive. Dr. Glass reported that the work incident on April 8, 2002, "did not aggravate, accelerate, or combine with any underlying psychological condition to produce McCullough's current condition or need for psychiatric/medical care. That said, her current subjective pain complaints having no organic basis, would relate to psychosocial circumstances/issues and pre-

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<sup>41</sup> See *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

<sup>42</sup> See *McCullough*, Bd. Dec. No. 08-0056 at 72-75.

<sup>43</sup> See *id.* at 74.

<sup>44</sup> See *id.*

<sup>45</sup> See pp. 3-6, *supra*.

<sup>46</sup> See *McCullough*, Bd. Dec. No. 08-0056 at 74-75.

<sup>47</sup> See pp. 3-6, *supra*.

existing personality factors.”<sup>48</sup> Dr. Turco stated: “McCullough evidenced substantial somatoform features as well as a hysterical magnification of symptoms. This was noted in the physical examination, the clinical psychiatric examination and the psychological testing administered by both Dr. David Glass as well as myself.”<sup>49</sup>

As for the third step of the presumption of compensability analysis, McCullough did not meet her burden of proof by a preponderance of the evidence that, whatever her psychiatric problems, they were work-related. Dr. Ha diagnosed McCullough as having a Depressive Disorder NOS as a result of the incident on April 8, 2002.<sup>50</sup> She also “did not disagree” that the incident was traumatic.<sup>51</sup> Dr. Campbell, on the other hand, did not agree with Dr. Ha’s diagnosis, preferring a diagnosis of PTSD caused by the April 8, 2002, incident.<sup>52</sup> Thus, there is disagreement between the two medical providers whose opinions might be characterized as most supportive of McCullough’s position that the April 8, 2002, incident was a factor in causing her psychiatric problems. We find that the disagreement between Dr. Campbell and Dr. Ha is significant. The persuasive power of their respective opinions is eroded when they contradict one another. Moreover, Dr. Turco thought that Dr. Ha’s opinion was superficial and, with his considerable experience diagnosing and treating PTSD, was dismissive of Dr. Campbell’s PTSD diagnosis.<sup>53</sup> The board acted reasonably in concluding that McCullough failed to meet her burden of proving her claim by a preponderance of the evidence. The preponderance of the evidence indicates that

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<sup>48</sup> Appellees’ Exc. 084-85.

<sup>49</sup> *Id.* at 201.

<sup>50</sup> *See id.* at 181.

<sup>51</sup> *See id.*

<sup>52</sup> *See id.* at 175.

<sup>53</sup> *See id.* at 202.

McCullough suffers from a somatoform disorder that is not related to her employment with Job Ready.<sup>54</sup>

*5. Conclusion.*

We AFFIRM the board's decision.

Date: 12 April 2011

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



*Signed*

\_\_\_\_\_  
Jim Robison, Appeals Commissioner

*Signed*

\_\_\_\_\_  
S.T. Hagedorn, Appeals Commissioner

*Signed*

\_\_\_\_\_  
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirmed the board's decision denying the employee's claim for benefits. This decision becomes effective when distributed unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).<sup>55</sup> To see the date it is distributed, look at the box below. It becomes final on the 31<sup>st</sup> day after the decision is distributed.

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<sup>54</sup> We do not view as probative the observations of McCullough's friends and family members to the effect that she was not the same person, that is, she was changed, after the work-related incident. Timing or sequence alone does not prove causation. *See Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 954 (Alaska 2005).

<sup>55</sup> A party has 30 days after the service or distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was served by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

**Additional Time After Service or Distribution by Mail.** Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed<sup>56</sup> 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. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. 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

This is a decision issued under AS 23.30.128(e). 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 for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed to the parties. 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<sup>57</sup> 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 this is a full and correct copy of the Final Decision No. 151 issued in the matter of *McCullough, by her guardian Barbara Williams v. Job Ready, Inc. et al.*, AWCAC Appeal No. 08-014, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on April 12, 2011.

Date: April 18, 2011



*Signed*

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B. Ward, Commission Clerk

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<sup>56</sup> *See* n.55, above.

<sup>57</sup> *See* n.55, above.