

Alaska Workers' Compensation Appeals Commission

Margaret E. (Yarbrough) Failla,
Appellant/Cross-Appellee,

vs.

Fairbanks Resource Agency, Inc.,
Alaska Insurance Guaranty Association,
and Northern Adjusters, Inc.,
Appellees/Cross-Appellants.

Final Decision

Decision No. 162 June 8, 2012

AWCAC Appeal No. 10-031
AWCB Decision No. 10-0169
AWCB Case No. 200020715

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 10-0169, issued at Fairbanks on October 8, 2010, by northern panel members William Walters, Chair, Jeff Bizzarro, Member for Labor, Thomas Tibor, Member for Industry.

Appearances: Margaret E. (Yarbrough) Failla, self-represented appellant; Robin Jager Gabbert, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Fairbanks Resource Agency, Inc., Alaska Insurance Guaranty Association, and Northern Adjusters, Inc.

Commission proceedings: Appeal filed November 12, 2010; cross-appeal filed November 22, 2010; briefing completed August 5, 2011; oral argument heard March 13, 2012.

Commissioners: David W. Richards, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant and cross-appellee, Margaret E. Failla (Failla), appeals a decision of the Alaska Workers' Compensation Board (board),¹ in which the board denied her claim for

¹ *Maggie E. (Yarbrough) Failla v. Fairbanks Resource Agency, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 10-0169 (Oct. 8, 2010)(*Failla II*).

various benefits,² to the Workers' Compensation Appeals Commission (commission). Appellees and cross-appellants, Fairbanks Resource Agency, Inc., Alaska Insurance Guaranty Association, and Northern Adjusters, Inc. (collectively Fairbanks Resource or employer), cross-appeal the board's decision in two respects: 1) its retention of jurisdiction, and 2) its setting July 22, 2009, as a cut-off date for medical benefits.³ For the reasons expressed below we affirm the board's denial of benefits and reverse the board's rulings that are the subject of the cross-appeal.

2. Factual background and proceedings.

The board issued two decisions on the merits of Failla's workers' compensation claims, the first in 2004.⁴ As the board did in *Failla II*,⁵ we borrow extensively, although selectively, from its rendition of the factual background of Failla's claim in *Failla I*.

On October 2, 2000, while working for Fairbanks Resource as a nursing assistant, Failla injured her neck, back, and left shoulder, while lifting a disabled patient.⁶ She filed an injury report on October 9, 2000,⁷ and filed a workers' compensation claim on May 23, 2001.⁸ However, of relevance here are certain events and developments predating and following that incident, which have a bearing on both the board's decisions, and the commission's. Failla's history includes physical beatings and mental

² See *Failla II*, Bd. Dec. No. 10-0169 at 25-29.

³ See *id.* at 29.

⁴ *Maggie E. Yarbrough [Failla] v. Fairbanks Resource Agency, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 04-0151 (June 25, 2004)(*Failla I*). The board also issued other decisions which involved discovery disputes between the parties. See *Failla II*, Bd. Dec. No. 10-0169 at 4 (quoting *Failla I*).

⁵ See *Failla II*, Bd. Dec. No. 10-0169 at 2-10.

⁶ See *id.* at 2 (quoting *Failla I*).

⁷ See *id.* at 3.

⁸ See *id.* at 4. Failla's claim, as clarified at a prehearing conference, was for the following benefits: 1) temporary total disability, 2) permanent partial impairment, 3) medical benefits, and 4) frivolous and unfair controversion. See *id.*

abuse by her domestic partners, and incestuous sexual abuse.⁹ Also, she was hospitalized for a nervous breakdown in late September 2000, immediately prior to her October 2, 2000, work injury.¹⁰ Post-incident, there was evidence that Failla was involved in a motor vehicle accident on August 10, 2001, in which there were reported injuries to her neck and back.¹¹

Following the incident on October 2, 2000, Fairbanks Resource initially paid temporary total disability (TTD) benefits and for medical care.¹² Failla treated with Victor Bartling, M.D., who ordered a cervical magnetic resonance imaging (MRI) study, which he found unremarkable. After examining Failla, Carl Unsicker, M.D., ordered a lumbar MRI study, which took place on January 26, 2001. The lumbar MRI study showed a central and right-sided herniated disc at L4-5. Orthopedic surgeon Richard Cobden, M.D., saw Failla on February 14, 2001. Dr. Cobden found she had a limited range of motion in her cervical spine and her neurological examination was otherwise normal. His diagnosis was chronic lumbar and cervical strains. Dr. Cobden referred Failla to neurologist Janice Onorato, M.D. Following neurological testing on March 15, 2001, Dr. Onorato concluded there was no electrophysiological evidence of tibial or sciatic neuropathy and that the origin of Failla's symptoms was unclear.¹³

Fairbanks Resource had orthopedic surgeon John Joosse, M.D., perform an employer's medical evaluation (EME) of Failla on April 4, 2001. Dr. Joosse found her neurological examination to be normal, could not identify any objective findings, and could not correlate any of Failla's reported symptoms with the L4-5 disc herniation. He concluded her complaints were psychosocial and recommended a psychiatric

⁹ See *Failla II*, Bd. Dec. No. 10-0169 at 7, 8, and 10.

¹⁰ See *id.* at 4.

¹¹ See *id.* at 7.

¹² See *id.* at 4.

¹³ See *id.* at 3.

evaluation.¹⁴ Based on Dr. Joosse's evaluation, Fairbanks Resource controverted benefits on April 14, 2001. It had paid TTD and medical benefits through that date.¹⁵

In a medical report dated April 16, 2001, Dr. Cobden indicated Failla's work injury caused a strain syndrome to her neck and back and that she may have herniated the lumbar disc. He also noted she may have psychosocial problems. Dr. Cobden's treatment recommendations were for physical therapy and medication. He reported that Failla was nearing medical stability and would need an impairment rating.¹⁶ On May 3, 2001, Failla saw Randall McGregor, M.D., who found her symptoms consistent with right lumbar radiculopathy and administered an epidural steroid injection.¹⁷

On October 10, 2001, Failla was evaluated at Fairbanks Resource's request by psychiatrist Ronald Turco, M.D. He diagnosed a conversion disorder which caused Failla to translate psychological conflicts into physical symptoms. Dr. Turco did not think that the conversion disorder was caused or aggravated by the work injury.¹⁸

In January 2002, Dr. Cobden reported that Failla's symptoms correlated with lumbosacral strain without definite herniation pressure on the nerve root, that she required only conservative care, and that she was ready for a permanent partial impairment (PPI) rating. Failla saw David Withal, M.D., on February 2, 2002, in Dr. Cobden's absence. He found her complaints did not correlate to her physical examination.¹⁹

The board ordered a second independent medical evaluation (SIME) by orthopedic surgeon John McDermott, M.D., and psychiatrist Ronald Early, M.D., Ph.D. After seeing Failla on April 22, 2002, Dr. McDermott reported that her complaints of pain in her shoulder and back and numbness in her legs were unassociated with

¹⁴ *See Failla II*, Bd. Dec. No. 10-0169 at 3.

¹⁵ *See id.* at 4.

¹⁶ *See id.* at 3-4.

¹⁷ *See id.* at 4.

¹⁸ *See id.* at 5.

¹⁹ *See id.*

objective findings, there were no residuals of trauma from the neck injury, she was medically stable, she had no ratable partial impairment, and that psychiatric difficulties pervaded her complaints. Dr. Early believed that Failla suffered from a histrionic personality disorder and chronic pain syndrome, that the pain syndrome was caused by a combination of her non-work-related histrionic personality disorder and the work injury, and that she was not malingering. He concluded that her pain disorder was not medically stable and that attending a pain clinic might benefit her. At his deposition in October 2002, Dr. Early testified that his diagnosis of pain syndrome was dependent upon Failla having an organic injury.²⁰

In late October 2002, Fairbanks Resource sent Failla to the pain clinic at the University of Washington Medical Center, where she was evaluated by James Robinson, M.D., Ph.D. He found evidence of a diffuse chronic pain syndrome and that her disc herniation might contribute to some of her symptoms, but could not explain the diffuse symptoms she reported. Dr. Robinson concluded that because Failla expressed severe functional limitations and insisted that surgery was necessary to address her pain, she was not a candidate for a structured pain rehabilitation program.²¹ In connection with the pain clinic evaluation, Failla was referred to psychologist Michael Boltwood, Ph.D. He agreed that she was not a good candidate for the pain clinic owing to her fixation on surgery as the only means of relieving her pain. Dr. Boltwood disagreed with Dr. Turco's diagnosis of a conversion disorder, instead preferring a diagnosis of a pain disorder.²²

After undertaking a further review of Failla's medical and psychiatric records, and deposition and hearing transcripts, Dr. Turco reported in January 2003 that he found no organic basis for her physical complaints and adhered to his diagnosis of a conversion disorder and hysterical personality disorder. Furthermore, he disagreed with Dr. Early

²⁰ See *Failla II*, Bd. Dec. No. 10-0169 at 5-6.

²¹ See *id.* at 6.

²² See *id.* at 7.

because contemporary psychiatric science holds that personality disorders cannot be worsened, and disagreed with Dr. Boltwood, primarily on grounds that Dr. Boltwood lacked the requisite information and expertise to formulate his diagnosis of a pain disorder.²³

Before the board held its hearing on Failla's claim, Dr. Cobden rated her with a category 2 impairment, which translates to a 5-to-8 percent PPI rating. Also, Fairbanks Resource had Dr. Josse review Failla's medical records and submit an updated report on May 9, 2004. He reported Failla was neurologically intact, she was not a candidate for surgery, her injuries were not work-related, she was medically stable, she could return to work, and she had no ratable impairment.²⁴

At the hearing on May 20, 2004, Failla and several friends and acquaintances testified regarding her pre- and post-injury activities, physical condition, and capacities. Dr. Turco reiterated in his testimony that Failla had a conversion disorder which caused her to systematically develop complaints with no physical basis. His opinion was that her minor work injury was not a substantial factor in the development or aggravation of her conversion disorder.²⁵ Jeremy Dunning, a private investigator with Northern Investigations, testified that on April 29, 2004, he observed Failla at the Fairbanks workers' compensation office limping and having difficulty negotiating the stairs on entering and exiting the premises. Thereafter, he observed her at other locations moving without difficulty.²⁶

Of relevance to this opinion, the board decided: 1) that Failla was entitled to TTD benefits through June 6, 2002, the date she reached medical stability; 2) that Failla was entitled to medical benefits in the form of reasonable and necessary conservative care related to her lumbar and cervical conditions; and 3) that Failla's claim for PPI benefits should be denied, without prejudice, because Dr. Cobden's impairment rating

²³ See *Failla II*, Bd. Dec. No. 10-0169 at 7-8.

²⁴ See *id.* at 8.

²⁵ See *id.* at 8-9.

²⁶ See *id.* at 9.

did not satisfy board requirements in terms of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 5th Ed.²⁷

The board noted the following facts as relevant background for its decision in *Failla II*. At Fairbanks Resource's request, Failla was evaluated by orthopedist Steven Schilperoort, M.D., on October 18, 2005. He diagnosed personality disorder and symptom magnification, indicated there was no causal connection between the work incident and her condition, recommended no treatment, found her medically stable with no ratable impairment, and believed she could return to work.²⁸ Having been referred again to the pain clinic at the University of Washington, Failla saw Dr. Robinson on January 6, 2006. He concluded that she was not a good candidate for the pain program, she could not work as a nurse's aide, and she could perform light duty work.²⁹

Failla applied for Social Security Disability benefits and Supplemental Security Income. In connection with that application, she was examined by psychologist Frank Nelson, Ph.D., on July 5, 2006. His diagnosis was somatoform disorder. The following day, Failla was evaluated by psychiatrist Wandel Winn, M.D. He diagnosed somatoform disorder and personality disorder and indicated malingering needed to be ruled out. After reviewing additional materials, Dr. Schilperoort, in a supplemental report dated September 17, 2007, reaffirmed his opinion and added malingering to his diagnosis.³⁰

Failla filed another workers' compensation claim on February 4, 2008, requesting TTD from June 6, 2002, PPI, medical benefits, a compensation rate adjustment, penalty, interest, and unfair and frivolous controversy.³¹ Fairbanks Resource denied the claim on February 9, 2008, and filed a controversy on March 4, 2008, on the basis

²⁷ See *Failla II*, Bd. Dec. No. 10-0169 at 14, 12, and 26.

²⁸ See *id.* at 14.

²⁹ See *id.* at 14-15.

³⁰ See *id.* at 15.

³¹ See *id.* She had also filed on February 18, 2005, a workers' compensation claim dated February 14, 2005, seeking, among other things, PPI, permanent total disability, and medical benefits. See Fairbanks Resource's Exc. 189-90.

of Dr. Schilperoort's opinion.³² Eventually, the board ordered another SIME, to be performed by orthopedic surgeon Bruce McCormack, M.D. In his report dated July 22, 2009, Dr. McCormack indicated that Failla's complaints of subjective pain were disproportionate to his objective findings, she was medically stable from her work injury within six months, and that none of her current symptoms were related to her work injury. His opinion was that her pain syndrome was due to psychiatric illness, she might be malingering, and that she could return to work as a nursing assistant or any other job she had held in the ten years preceding her work injury.³³ On February 15, 2010, after reviewing more medical records, Dr. Turco supplemented his EME report, changing his diagnosis to malingering.³⁴ Dr. McCormack reviewed additional medical records and surveillance videos and confirmed his opinions in addendum reports dated March 17 and May 10, 2010.³⁵

Following a prehearing conference on April 29, 2010, Failla's claim was set for hearing on July 15, 2010.³⁶ The prehearing conference summary indicated her amended claim was for PPI, permanent total disability (PTD), temporary partial disability (TPD), and medical benefits, as well as penalty, interest, and unfair and frivolous controversion. Evidence presented at the hearing included surveillance video of Failla; testimony by Dr. Turco that after reviewing all available medical records and the surveillance video, his diagnosis was malingering and secondary gain; and testimony by rehabilitation specialist Carol Jacobsen, R.N., that there were openings in Fairbanks for jobs that Failla had worked at in the past and that she could presently, physically perform. Failla testified that she had been released to work and had been

³² See *Failla II*, Bd. Dec. No. 10-0169 at 15-16.

³³ See *id.* at 16.

³⁴ See *id.*

³⁵ See *id.*

³⁶ There had been an earlier prehearing conference on December 21, 2009, which identified the same issues for hearing. See Fairbanks Resource's Exc. 349.

working, although her condition was worsening.³⁷ When the hearing continued on September 3, 2010, she testified that she was by then working as many as 32 to 40 hours per week at Safeway. Failla maintained that her personality disorder was the result of the stress she felt from pursuing her claim.³⁸

The board denied Failla's claim for TPD because such benefits cease when a claimant reaches medical stability. It had decided in *Failla I*, which was binding since it was not appealed, that Failla reached medical stability on June 6, 2002.³⁹ The board denied PPI benefits because the record lacked a specific percentage rating any PPI.⁴⁰ It found no basis to award PTD because no doctor predicted that Failla suffered a permanent disability and Failla acknowledged that she had returned to work in the open labor market.⁴¹ On the medical treatment claim, the board applied the presumption of compensability, ultimately concluding that Failla could not prove her entitlement to medical benefits after July 22, 2009:

The Board finds the preponderance of the medical evidence, especially the reports and opinions of the SIME physician Dr. McCormack, indicate the employee's work injury fully resolved long before Dr. McCormack's examination of the employee on July 22, 2009. Accordingly, the Board finds the employee was entitled to no additional medical care following that date.⁴²

Because no unpaid medical bills for specific conservative medical treatment before July 22, 2009, could be identified by the board, the board did not award any medical benefits in its decision, but retained jurisdiction to consider any medical bills that might be submitted.⁴³

³⁷ See *Failla II*, Bd. Dec. No. 10-0169 at 17-18.

³⁸ See *id.* at 18.

³⁹ See *id.* at 25 and n.62, *infra*.

⁴⁰ See *id.* at 25-26.

⁴¹ See *id.* at 26.

⁴² *Id.* at 27.

⁴³ *Id.* at 27-28.

Finally, the board denied Failla's claims alleging frivolous and unfair controversion, penalties and interest. The board observed that the employer controverted in good faith, relying on Dr. Schilperoort's opinion.⁴⁴ The board denied late-payment penalties and interest because its decision awarded no benefits.⁴⁵

Failla appeals and Fairbanks Resource cross-appeals.

3. Standard of review.

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."⁴⁶ 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.⁴⁷ "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."⁴⁸ The commission exercises its independent judgment in reviewing questions of law or procedure.⁴⁹ The board's credibility findings are binding on the commission.⁵⁰

4. Discussion.

The commission's reasoning in terms of the issues presented in this appeal and cross-appeal is set forth below.

a. The issues in this appeal are limited.

AS 23.30.127(b)(2) provides that an appeal to the commission "is initiated by filing . . . a statement of the grounds upon which the appeal is taken[.]" Paraphrased,

⁴⁴ See *Failla II*, Bd. Dec. No. 10-0169 at 28.

⁴⁵ See *id.*

⁴⁶ *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)).

⁴⁷ See AS 23.30.128(b).

⁴⁸ *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)).

⁴⁹ See AS 23.30.128(b).

⁵⁰ See *id.*

Failla's points on appeal were: 1) Fairbanks Resource improperly controverted benefits less than 180 days after the board's decision in *Failla I*, and 2) the board erred in denying her claim because the injuries she suffered in the work-related incident on October 2, 2000, were getting progressively worse.⁵¹ However, Fairbanks Resource maintains that Failla failed to include in her grounds for appeal certain issues that she discussed, although cursorily, in her brief, that Fairbanks Resource 1) violated a protective order, and 2) inappropriately interfered with her medical treatment. The employer asks that the commission not consider these two issues in the process of rendering our decision.⁵²

The commission prefers to decide appeals on their merits and not apply procedural rules too narrowly. Moreover, we are mindful that the incident giving rise to Failla's claims occurred eleven years ago. It is time to resolve this matter, insofar as it is within our ability to do so. Ordinarily, parties are deemed to have waived issues on appeal 1) by failing to include them in their points on appeal, 2) by failing to brief issues after including them as points on appeal, or 3) by failing to brief issues adequately.⁵³ Here, among our reasons for affirming the board and denying Failla's assertions of A) improper controversion, B) violation of a protective order, C) interference with her medical treatment, and D) wrongful denial of her claim, are her failures to either 1) include the protective order or interference with treatment issues in her grounds for appeal, or 2) adequately brief any of these four issues (A-D). These rulings notwithstanding, we will proceed to discuss alternative bases for upholding the board's rulings in these respects.

b. The controversion was proper.

One of Failla's points on appeal is that Fairbanks Resource improperly controverted benefits within 180 days of the board's decision in *Failla I*. However, in

⁵¹ See Failla's Statement of Grounds for Appeal.

⁵² See Fairbanks Resource's Br. at 27-35.

⁵³ See *Gunderson v. Univ. of Alaska, Fairbanks*, 902 P.2d 323, 327 n.5 (Alaska 1995).

her brief, Failla makes no argument in this respect. In addressing this issue, the employer points out: 1) that it did not file a controversion within 180 days of *Failla I*; 2) there is no legal prohibition to its doing so, provided that the grounds for the controversion arise subsequent to the decision in question; and 3) the employer's controversion dated January 19, 2005, was based on Failla's failure to return releases,⁵⁴ a legitimate basis for doing so. On this procedural issue, in the exercise of our independent judgment, we agree with Fairbanks Resource that the controversion was proper.

c. The protective order was inoperative.

Failla makes a brief reference to a protective order in the Statement of Issues for Review portion of her brief.⁵⁵ Fairbanks Resource notes that a protective order concerning Failla's mental health records was entered in 2001, upheld in a board decision,⁵⁶ and later effectively rendered inoperative when Failla signed releases for her mental health records.⁵⁷ On review of this procedural question, in our independent judgment, no protective order was in effect at the time of Failla's hearing in July and September 2010, and furthermore, Failla's having signed releases for her mental health records moots the issue.

d. There was no interference with Failla's treatment.

In her Statement of Issues for Review, Failla makes a vague reference to counsel for the employer attempting to persuade physicians not to treat her.⁵⁸ Fairbanks Resource explains that it provided Dr. Jiang, who was treating Failla, with copies of its controversion and Dr. McCormack's SIME report, so that Dr. Jiang would understand its

⁵⁴ See Fairbanks Resource's Br. at 28-29. In support of the second point, the employer cites *M-K Rivers v. Harris*, Alaska Workers' Comp. App. Comm'n Dec. No. 147 (March 4, 2011), and in support of the third point, cites AS 23.30.108.

⁵⁵ See Failla's Br., Part 1.

⁵⁶ See *Yarbrough [Failla] v. Fairbanks Resource Agency, Inc., et al.*, Alaska Workers' Comp. Bd. Dec. No. 01-0229 (Nov. 15, 2001).

⁵⁷ See Fairbanks Resource's Br. at 30-32; see Fairbanks Resource's Exc. 116.

⁵⁸ See Failla's Br., Part 1.

position with respect to Failla's claim.⁵⁹ As the board has previously ruled with respect to another claim, there is no impropriety in the employer doing so.⁶⁰ As a matter of procedure, applying our independent judgment, we agree.⁶¹

e. The board's findings with respect to Failla's claims for TPD, PPI, PTD, and medical benefits are supported by substantial evidence in light of the record as a whole.

The board denied Failla's claims for TPD,⁶² PPI,⁶³ PTD,⁶⁴ and medical benefits.⁶⁵ She was foreclosed from seeking TPD benefits because, in *Failla I*, the board found she

⁵⁹ See Fairbanks Resource's Br. at 33-35.

⁶⁰ See *Hall v. LeBaron Enterprises, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 96-0003 (January 4, 1996).

⁶¹ See 8 AAC 45.092(h) (providing indirect support for the proposition that giving medical reports to a treating doctor is not improperly influencing that doctor's opinion because the regulation requires the parties to provide independent medical examiners with "all the medical records," including depositions and presumably other doctors' opinions). AS 23.30.095(i) provides: "Interference by a person with the selection by an injured employee of an authorized physician to treat the employee, or the improper influencing or attempt by a person to influence a medical opinion of a physician who has treated or examined an injured employee, is a misdemeanor."

⁶² AS 23.30.200(a) reads:

In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

⁶³ AS 23.30.190(a) and (b) read:

(a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as

(footnote continued)

provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.

(b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

64 AS 23.30.180(a) reads in relevant part:

Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be

- (1) area of residence;
- (2) area of last employment;
- (3) the state of residence; and
- (4) the State of Alaska.

(b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

65 AS 23.30.095(a) reads in relevant part:

The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.

was medically stable as of June 6, 2002.⁶⁶ Because *Failla I* was not appealed, ordinarily the law of the case doctrine applies. The law of the case doctrine “maintains that issues previously adjudicated can only be reconsidered where there exist ‘exceptional circumstances’ presenting a ‘clear error constituting a manifest injustice.’”⁶⁷ Entitlement to either TTD benefits,⁶⁸ or TPD benefits,⁶⁹ involves a determination of medical stability.⁷⁰ In *Failla I*, the board concluded, in deciding the TTD claim, that Failla reached medical stability on June 6, 2002.⁷¹ This ruling was not appealed, thereby becoming the law of the case. The board denied Failla’s claim for TPD benefits in *Failla II* on this basis. We agree that the finding of medical stability was binding on the board in *Failla II*, given that Failla did not present any “exceptional circumstances” or

⁶⁶ See *Failla II*, Bd. Dec. No. 10-0169 at 25 and n.39, *supra*.

⁶⁷ *Groom v. State, Dep’t of Transp.*, 169 P.3d 626, 635, n.18 (Alaska 2007) (citing *State, Commercial Fisheries Entry Comm’n v. Carlson*, 65 P.3d 851, 859 (Alaska 2003) (quoting *Patrick v. Sedwick*, 413 P.2d 169, 173-74 (Alaska 1966) and *Alaska Diversified Contractors, Inc. v. Lower Kuskokwim Sch. Dist.*, 778 P.2d 581, 583 (Alaska 1989))). See also *Monzulla v. Voorhees Concrete Cutting*, 254 P.3d 341, 347 n.35 (Alaska 2011).

⁶⁸ See AS 23.30.185.

⁶⁹ See AS 23.30.200(a).

⁷⁰ The claim for TTD from June 6, 2002, onward was modified at the prehearing conference to claims for TPD and PTD. The prehearing conference summary controls the issues at hearing. See *Groom*, 169 P.3d at 636; 8 AAC 45.070(g). Accordingly, TTD was not at issue in *Failla II*.

⁷¹ See *Failla II*, Bd. Dec. No. 10-0169 at 25.

allege that she became temporarily partially disabled *after* reaching medical stability.⁷² The board properly denied TPD.⁷³

Failla's claims for PPI were denied for lack of any evidence of an appropriate PPI rating.⁷⁴ We agree that substantial evidence supports the lack of an appropriate PPI rating. Two doctors opined that Failla had a 0 percent rating and a third doctor's rating was stated as a range of percentages.

As for her claims for PTD under AS 23.30.180 and for continuing medical benefits under AS 23.30.095(a), the board applied the presumption of compensability analysis. Whether the board erred in this analysis is a question of law.⁷⁵

⁷² Because workers' compensation claimants do not need to file a single unified claim for all compensation owed as a personal injury litigant in civil court must do, claimants are free to assert that subsequent events after medical stability rendered them entitled to collect TTD or TPD again. For example, a worker may reach medical stability after a work injury by resting and undergoing physical therapy, but later require surgery and again be eligible for TTD while recovering from that surgery, so long as the need for the surgery is connected to the work-related injury. *See Univ. of Alaska Fairbanks v. Hogenson*, Alaska Workers' Comp. App. Comm'n Dec. No. 074, 14 (Feb. 28, 2008) and *Witbeck v. Superstructures, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 014 (July 13, 2006) (both addressing claim preclusion or *res judicata*, which operate to bar subsequent claims "for the *same* benefit, arising from the *same* injury, against the *same* employer, based on the *same* theory (nature) of injury[,]" in contrast to the law of the case or issue preclusion, which render previously decided and unappealed factual determinations binding).

⁷³ The law of the case doctrine and *res judicata* do not control any other factual issues or bar any claims raised in *Failla II*. In *Failla I*, the board ordered medical benefits under AS 23.30.095 for reasonable and necessary conservative care for Failla's cervical and lumbar conditions. Consequently, Failla could seek medical benefits for conservative care in *Failla II*. In addition, in *Failla I*, the board denied the PPI claim without prejudice, leaving the issue open for future adjudication. Finally, it appears that Failla's claims for penalties, interest, and unfair and frivolous controversion relate to the post-*Failla I* timeframe.

⁷⁴ *See Failla II*, Bd. Dec. No. 10-0169 at 25-26.

⁷⁵ *See McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 118, 11 (October 23, 2009).

In another appeal to the commission,⁷⁶ we set forth the presumption of compensability analysis as it applies to claims predating the 2005 amendments to the Alaska Workers' Compensation Act, AS 23.30.001 — .395.

To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. If the employee establishes the link, the presumption may be overcome when the employer presents substantial evidence that the injury was not work-related. 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. 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. This means that the employee must "induce a belief" in the minds of the board members that the facts being asserted are probably true. At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers the question of credibility.⁷⁷

On the PTD claim, the board concluded that Failla did not attach the presumption because she presented no evidence or argument that she was permanently and totally disabled.⁷⁸ Even if she had attached the presumption, the board concluded that Fairbanks Resource rebutted it and Failla failed to prove her claim. We agree that substantial evidence, including Dr. McCormack's opinion that that she could return to work as a nursing assistant or any other job she had held in the ten years preceding her work injury,⁷⁹ vocational rehabilitation specialist Carol Jacobsen's testimony about the availability of jobs that Failla had previously held in the Fairbanks labor market,⁸⁰

⁷⁶ See *Rockstad v. Chugach Eareckson Support Servs.*, Alaska Workers' Comp. App. Comm'n Dec. No. 140 (November 5, 2010).

⁷⁷ *Rockstad*, App. Comm'n Dec. No. 140 at 28 (footnotes omitted).

⁷⁸ See *Failla II*, Bd. Dec. No. 10-0169 at 26.

⁷⁹ See Fairbanks Resource's Exc. 342.

⁸⁰ See Hr'g Tr. 313-17.

and the employee's testimony about her current employment,⁸¹ supports the board's denial of PTD benefits.

On the medical benefits claim, there is no dispute that Failla had established a preliminary link between employment and her injury, with respect to her need for conservative medical care, attaching the presumption.⁸² Second, the board found that the employer had rebutted the presumption based on Dr. Schilperoort's opinion⁸³ and the presumption dropped out. Ultimately, Failla was unable to prove her case by a preponderance of the evidence. Instead, the board found that the preponderance of the evidence, in particular the medical evidence, was that Failla's work injury had "fully resolved long before"⁸⁴ Dr. McCormack's SIME on July 22, 2009.⁸⁵ The record contains substantial evidence on which the board could rely to conclude that Failla's work injury had resolved before July 22, 2009, including Dr. McCormack's 2009 SIME, Dr. Schilperoort's 2005 examination and 2007 supplemental report, Dr. Robinson's 2006 observations that Failla was not a good candidate for the pain clinic, Drs. Nelson's and Winn's 2006 diagnosis of somatoform disorder, and Dr. Winn's 2006 diagnoses of personality disorder and possible malingering.

Therefore, we can find no mistake in the board's application of the presumption of compensability analysis and affirm its denial of TPD, PPI, PTD, and medical benefits.

⁸¹ See Hr'g Tr. 311:9-11.

⁸² See *Failla II*, Bd. Dec. No. 10-0169 at 27.

⁸³ See *id.* In cases such as *Cowen v. Wal-Mart*, 93 P.3d 420, 424-25 (Alaska 2004), the Alaska Supreme Court has consistently held that presentation of a qualified expert's opinion that the claimant's work was probably not a substantial cause of an injury or disability or need for medical treatment rebuts the presumption.

⁸⁴ *Failla II*, Bd. Dec. No. 10-0169 at 27.

⁸⁵ The board correctly concluded that, because no benefits were awarded, Failla was not entitled to any penalty under AS 23.30.095(e), nor any interest under AS 23.30.155(p), and that no finding of frivolous or unfair controversion could be made under AS 23.30.155(o). See *Failla II*, Bd. Dec. No. 10-0169 at 29.

f. In the exercise of our independent judgment, we reverse the board with respect to the two questions raised by the cross-appeal.

In its cross-appeal, Fairbanks Resource first argues that the board erred when it “retained jurisdiction to consider modification of [its] order under AS 23.30.130 ‘concerning possible medical bills before July 22, 2009, which may remain in dispute.’”⁸⁶ Whether the board erred in this respect is a legal question requiring the commission to exercise its independent judgment.

Pursuant to 8 AAC.45.120(f), certain documents, which would necessarily include medical bills, served on the parties and in the board’s possession “20 or more days before hearing, will, . . . be relied upon by the board in reaching a decision[.]” An exception to this provision is set forth in AS 23.30.130(a),⁸⁷ the statute addressing modification of board orders, and 8 AAC 45.150(d), the board regulation covering the same subject.⁸⁸ The statute and regulation read together allow for a procedure

⁸⁶ Fairbanks Resource’s Br. at 22 (quoting *Failla II*, Bd. Dec. No. 10-0169 at 29).

⁸⁷ AS 23.30.130(a) reads in relevant part:

Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, . . . before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110, the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

⁸⁸ 8 AAC 45.150(d) reads:

A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

- (1) the facts upon which the original award was based;
- (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered

(footnote continued)

whereby board orders may be modified based on a mistake in the board's determination of a fact. Thus, they are, among other things, a means of relieving a party of the requirement in 8 AAC 45.120(f) of having to submit documentary evidence 20 days before the original hearing is held.

However, 8 AAC 45.150(d)(2) provides that if modification is sought owing to newly discovered evidence, an affidavit must be filed explaining the reasons why, with due diligence, the evidence could not have been discovered and produced at the time of the hearing. As the Alaska Supreme Court commented: "The key language in this regulation is the requirement that new evidence could not have been discoverable prior to the hearing through due diligence. . . . This requirement is fair because an allegation of mistake 'should not serve as "a back-door route to retrying a case because one party thinks he can make a better showing on a second attempt.'"⁸⁹

With respect to her medical bills predating July 22, 2009, it is difficult to conceive a set of circumstances under which Failla could potentially satisfy the requirement of AS 23.30.130(a) and 8 AAC 45.150(d) that she demonstrate the evidence consisting of her medical bills could not have been discovered and produced prior to the hearing. The hearing, which resulted in the board's decision in *Failla II*, began on July 15, 2010, nearly a year subsequent to the cut-off date established by the board for Failla's medical bills. The commission believes 338 days (358 days less 20 days⁹⁰), was adequate time for Failla to obtain, file, and serve any medical bills for which she sought compensation. Accordingly, we reverse the board's order retaining jurisdiction to

evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and

(3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

⁸⁹ *Lindhag v. State, Dep't of Natural Resources*, 123 P.3d 948, 956 (Alaska 2005) (quoting *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 961 (Alaska 1998) (quoting *Interior Paint Co. v. Rodgers*, 522 P.2d 164, 169 (Alaska 1974) (internal quotation omitted))).

⁹⁰ See 8 AAC 45.120(f).

consider modification of its order, pursuant to AS 23.30.130(a) and 8 AAC 45.150(d), concerning Failla's medical bills for treatment incurred before July 22, 2009.

The second issue presented in the cross-appeal is whether the board erred in establishing July 22, 2009, as the cut-off date for any medical benefits owed Failla. This is a legal question, as it involves whether the board properly applied the presumption of compensability analysis.⁹¹ In *Failla I*, the board ruled that Failla was entitled to ongoing conservative medical care.⁹² Thus, the presumption of compensability continued to apply with respect to her claim for medical benefits under AS 23.30.095(a).⁹³ Dr. Schilperoort's opinion rebutted the presumption,⁹⁴ according to the board, and was the basis for Fairbanks Resource's controversion dated November 28, 2007. Consequently, at the hearing in July and September 2010, Failla had to prove, by a preponderance of the evidence, that she was entitled to conservative medical care subsequent to November 28, 2007.⁹⁵ No such evidence was presented in connection with the hearing. In the timeframe between the controversion of November 28, 2007, and the issuance of Dr. McCormack's SIME report, July 22, 2009, none of the health care professionals who treated or evaluated Failla offered an opinion that would satisfy her burden of proof of an entitlement to conservative medical care for an injury that continued to be work-related. Thus, the record lacks substantial evidence to support the conclusion in a reasonable mind that Failla was entitled to medical benefits after November 27, 2007, because her need for conservative medical care was connected to her work, rather than, as Dr. McCormack and others opined, a result of conditions that were not work-related.⁹⁶ Yet the board, in effect, awarded Failla those benefits when it set July 22, 2009, as the cut-off date for them. In doing

⁹¹ See n.75, *supra*.

⁹² See *Failla II*, Bd. Dec. No. 10-0169 at 14.

⁹³ See n.65, *supra*.

⁹⁴ See *Failla II*, Bd. Dec. No. 10-0169 at 27.

⁹⁵ See Part 4(e), *supra*.

⁹⁶ Fairbanks Resource's Exc. 340.

so, the board misapplied the third step in the presumption of compensability analysis. Accordingly, we reverse the board insofar as it concluded that Failla's entitlement to conservative medical care for her work-related injury ended on July 22, 2009.

5. Conclusion.

We AFFIRM the board's decision insofar as it denies Failla TPD, PPI, PTD, and ongoing medical benefits, and denies Failla's claims for unfair or frivolous controversies, penalties, and interest. We REVERSE the board's decisions retaining jurisdiction and establishing July 22, 2009, as the cut-off date for medical benefits.

Date: 8 June 2012 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, 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 from the board's Decision No. 10-0169. The commission affirmed the board's decision insofar as it denied benefits and reversed the board's rulings that are the subject of the cross-appeal. The commission's decision becomes effective when distributed unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).⁹⁷ For the date of distributions, see the box below.

⁹⁷ A party has 30 days after the distribution of a final decision of the commission to file an appeal to the supreme court. If the commission's decision was distributed 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

(footnote continued)

Effective, November 7, 2005, 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 distributed⁹⁸ 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 is not a party.

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

More information is available on the Alaska Court System's website:
<http://www.courts.alaska.gov/>

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 distributed⁹⁹ 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 the Final Decision No. 162 issued in the matter of *Margaret E. (Yarbrough) Failla v. Fairbanks Resource Agency, Inc., Alaska Insurance Guaranty Association, and Northern Adjusters, Inc.*, AWCAC Appeal No. 10-031, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on June 8, 2012.

Date: June 12, 2012



Signed

K. Morrison, Deputy Commission Clerk

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.

⁹⁸ *See* n.97, *supra*.

⁹⁹ *Id.*