Alaska Workers' Compensation Appeals Commission

Michael Peratrovich,
Appellant,

vs.

Quality Asphalt Paving and Liberty Mutual Insurance Co./Liberty Northwest Insurance Corp.,
Appellees.

Final Decision
Decision No. 067 January 24, 2008

AWCAC Appeal No. 07-004
AWCB Dec. No. 07-0027
AWCB Case No. 200117418

Appeal from Alaska Workers' Compensation Board Decision No. 07-0027, issued on February 16, 2007, by the southcentral panel at Anchorage, Darryl L. Jacquot, Chair, Robert Weel, Member for Industry, R. Scott Bridges, Member for Labor.

Appearances: Chancy Croft, Croft Law Office, for appellant Michael Peratrovich. Jeffrey D. Holloway, Holmes, Weddle & Barcott, P.C., for appellees Quality Asphalt Paving and Liberty Mutual Ins. Co./Liberty Northwest Ins. Corp.

This decision has been edited to conform to technical standards for publication.

Commissioners: Stephen Hagedorn, John Giuchici, Kristin Knudsen.

By: Kristin Knudsen, Chair.

Michael Peratrovich appeals a workers' compensation board decision denying his claim for further medical benefits (left shoulder surgery) and compensation for his 2001 injury. Peratrovich argues that the board should have allowed Peratrovich's testimony regarding a statement made by Patrick Radecki, M.D., to prove that Dr. Radecki was unqualified to testify as an expert witness and therefore his report should not be considered an expert medical opinion. We conclude the board chair's ruling was not an abuse of discretion. Peratrovich argues the board did not engage in "reasoned decision making" because the board did not provide an adequate explanation for not accepting the 2004 opinion of the Second Independent Medical Examiner, Thomas Gritzka, M.D. We agree with Peratrovich that the board's decision should have provided a clear statement of its views regarding Dr. Gritzka's report; however, we conclude remand is

not required because the board explained the basis for its decision adequately enough to allow the commission to review the decision. Finally, Peratrovich argues that the board's decision lacks substantial evidence to support it because the board based its decision on the opinion of one physician. He also argues that the board failed to follow the proper legal analysis because the board determined that the need for treatment was not work-related, rather than determining if the treatment was reasonable and necessary. Because the board's assessment of the weight to be assigned expert medical opinion is conclusive, there is substantial evidence in light of the whole record to support the board's findings of fact, and the board applied the presumption to the claim for medical treatment, we affirm the board's decision.

1. Factual background.

We summarize the factual background of this case, without engaging in fact finding. Michael Peratrovich worked as a laborer for a division of Quality Asphalt Paving (QAP). On August 21, 2001, he was pulling steel cable out, running forward as the cable reeled off the drum, when the cable caught and stopped suddenly, jerking his left arm and shoulder, and spinning him around. He reported the injury on August 27, 2001. He saw Gary Child, D.O., with complaints of neck, shoulder, and upper arm pain. Dr. Child diagnosed a cervical strain and shoulder strain, and requested a Magnetic Resonance Imaging (MRI) scan in Peratrovich's neck. The scan showed multiple levels of osteophyte formation (bone overgrowth), a disc bulge, some desiccation of the discs, and foraminal narrowing. Dr. Child referred Peratrovich to Susan Anderson, M.D., for more treatment. Peratrovich, a seasonal worker, continued to work for QAP until about October 1, 2001. Since October 2003, Peratrovich has worked year-round for Alaska Sand & Gravel.

Dr. Anderson diagnosed cervical facet arthropathy and left subacromial bursitis.[1] In addition to the treatment directed at the neck, and later thoracic spine, Dr. Anderson

[1] The subacromial bursa rests over the supraspinatus tendon and under the acromial arch of the scapula. The supraspinatus muscle runs along the top of the scapula, under the acromial arch and attaches as the supraspinatus tendon to the top of the humerus, the bone of the upper arm.

made several injections into the subacromial bursa, and prescribed physical therapy. At the request of the employer, Peratrovich was evaluated by William Mayhall, M.D., an orthopedic surgeon, in April 2002 at the request of the employer. His examination of Peratrovich's shoulder showed "tenderness primarily posterior capsular," negative Neer, external rotation, and Hawkins impingement tests, some diffuse tenderness on the posterior aspect of the shoulder, no instability and no crepitus.[2] On the right side, Peratrovich also had no impingement signs, no instability, and no evidence of rotator cuff pathology.[3]

In addition to other diagnoses, Dr. Mayhall diagnosed a left "shoulder sprain with resulting impingement syndrome."[4] He opined that Peratrovich "had a shoulder sprain and a cervical sprain. He had exacerbation of symptomatology and degenerative changes in the cervical spine, as well as a musculoligamentous sprain in the cervical spine and parascapular area."[5] Nevertheless, Peratrovich was medically stationary, and could return to work, so long as he was cautious and used proper lifting techniques.[6] Regarding Peratrovich's shoulder, he reported, "I find no objectifiable impairment per the AMA Guidelines in regard to the shoulder or parascapular region, although he does have some symptomatology. I see no evidence of impairment of the left shoulder. Based on the AMA Guidelines, there is no objectifiable impairment in regard to the parascapular sprain/strain."[7]

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[2] R. 0695.

[3] R. 0695.

[4] R. 0700.

[5] R. 0701.

[6] R. 0703.

[7] R. 0702.

Peratrovich returned to work for a different employer and continued treatment with Dr. Anderson, although there were no more shoulder injections.[8] He continued with physical therapy as well.

Dr. Mayhall and Thomas Dietrich, M.D., a neurosurgeon, examined Peratrovich again in August 2002. Dr. Mayhall reported again that his examination resulted in no impingement signs, no instability and no crepitus.[9] He reported the left shoulder sprain and impingement syndrome were resolved.[10] Dr. Dietrich's examination was limited to the spinal area.

On February 13, 2003, Dr. Anderson reported that Peratrovich's left subacromial bursitis was resolved.[11] However, Peratrovich continued to receive treatment for his cervical and thoracic spine. In September 2003, Peratrovich was scheduled to see Stephen Marble, M.D., for an evaluation at the request of the employer, but he was not examined owing to being late for the appointment. In October 2003, Peratrovich was rescheduled at the same facility with Stephen Radecki, M.D., a physician who specializes in rehabilitation medicine. He also reported that the left shoulder sprain with impingement syndrome was resolved, and that the left subacromial bursitis was resolved.[12]

Peratrovich was examined by Dr. Gritzka[13] in 2004, and a magnetic resonance arthrogram (MRA) was performed at Dr. Gritzka's recommendation. John Fischer, M.D., the radiologist, reported that there was no evidence of a rotator cuff tear, and no

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[8] His treatment with Dr. Anderson focused on his cervical and thoracic injuries.

[9] R. 0654.

[10] R. 0656.

[11] R. 0608.

[12] R. 0550, 552.

[13] This examination was a result of the board's order for a Second Independent Medical Evaluation. Dr. Gritzka's opinion is discussed more fully below.

pathology except mild arthritic changes in the AC joint without impingement.[14] He reported that the bicipital tendon and labrum appeared normal; the undersurface of the rotator cuff was smooth; the ligamentous structures surrounding the shoulder and soft tissues were normal; there was no free fluid in the subacromial bursa; and, there was no evidence of tear of the rotator cuff, either partial thickness or full thickness.[15] There was a slightly down sloping acromion[16] without impingement and mild arthritic changes of the AC joint without impingement. Dr. Fischer did note one "very small punctuate area of bright signal" at the anterior margin of the insertion of the supraspinatus tendon on the greater tuberosity that "could be a very small partial thickness tear."[17]

After Dr. Anderson left the Advanced Pain Centers of Alaska, Peratrovich began seeing Gregory Polston, M.D., an anesthesiologist. Dr. Polston provided a number of injections and treatments for the cervical spine. In October 2005, however, Dr. Polston reported that Peratrovich had complained of pain in the left shoulder. He had pain with movement of his arm overhead, and tenderness around the joint. Dr. Polston diagnosed "left shoulder arthropathy" and referred him to an orthopedist.[18]

Peratrovich saw Jeffrey Moore, M.D., an orthopedic surgeon, in November 2005. Dr. Moore noted Peratrovich had

> tenderness . . . over the greater tuberosity and slight tenderness over the anterior aspect of the shoulder . . . minimal tenderness over AC [acromioclavicular] joint. . . . lack[s] 10 degrees of full forward flexion . . . full passive external rotation and internal

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[14] R. 0864.

[15] R. 0864.

[16] The acromion protrudes from the scapula, forward and to the side, flattening into a large, curving triangular or oblong shape that arches over the joint between the scapula and the humerus, and joins with the clavicle to form the acromioclavicular joint. The shape of the acromion varies from person to person, affecting the amount of space under the acromial arch.

[17] R. 0864. The greater tuberosity is a bump on the top and side of the humerus, the upper arm bone.

[18] R. 0828.

> rotation. . . . Lift-off test is negative. O'Brien's test is equivocal, with tenderness in both pronation and supination. Positive impingement signs are noted, both Neer and Hawkins. There is a negative apprehension sign and negative relocation tests. Slight decrease in strength with abduction and external rotation of the arm is noted, more specifically in testing the supraspinatus as opposed to the infraspinatus. There is no significant atrophy noted in the scapular region. Palpation of the vertebral board of the scapula causes discomfort somewhat diffusely.[19]

Dr. Moore believed Peratrovich had "recurrent impingement, possible small rotator cuff tear, supraspinatus."[20] He ordered an MRI scan of the shoulder. The MRI scan, taken December 3, 2005, was read by Jonathan Coyle, M.D., a radiologist; he wrote the scan showed "moderate acromioclavicular DJD [degenerative joint disease] . . . with mild undersurface osteophyte formation. This causes mild impingement of the rotator cuff."[21] Dr. Coyle diagnosed "mild to moderate acromioclavicular DJD with probable mild partial thickness bursal surface tear of the supraspinatus. No full thickness rotator cuff tear is seen."[22]

Dr. Moore saw Peratrovich again a few days later. At that time, he diagnosed a "partial rotator cuff tear, AC arthritis, and edema noted around the proximal biceps here possibly consistent with a possible proximal biceps tear."[23] He recommended arthroscopy with excision [removal] of the distal clavicle (the shoulder end of the collarbone), acromioplasty (reshaping and smoothing the acromion), repair of the rotator cuff tear and "possible proximal biceps tenodesis" (moving an attachment of the

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19 R. 0826.

20 R. 0826.

21 R. 1132.

22 R. 1132.

23 R. 0824.

biceps tendon from a position at the scapula to the upper arm bone out of the way of the shoulder joint).[24] Dr. Polston concurred in the recommendation.[25]

On January 26, 2006, Dr. Radecki again examined Peratrovich on behalf of the employer. He reported Peratrovich's slight increase in degenerative changes in the left shoulder that, in the absence of new injury reported by Peratrovich, would be due to the progress of age. He noted that the 2005 MRI revealed "some acromioclavicular joint arthritic change and . . . an area of change in the area of the supraspinatus consistent with an element of degenerative change or tear."[26] He characterized the 2005 MRI as "slightly more remarkable and the claimant has more symptoms now than he did in October of 2003."[27] He agreed that arthroscopic examination would be reasonable in view of his chronic shoulder pain. However, he believed that because in October 2003 Peratrovich's symptoms had resolved and he had "excellent and full ranges of motion" that the current condition was not related to the employment in 2001.[28]

2. The claim and board proceedings.

Based on Dr. Radecki's 2003 report, QAP controverted future treatment and compensation on October 23, 2003. Peratrovich filed a claim for "unfair controversion" on December 26, 2003. QAP filed a post-claim controversion dated January 9, 2004, based on Dr. Radecki's report.[29] Peratrovich did not request a hearing of this claim within two years of the January 12, 2004 controversion.[30]

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[24] R. 0824.

[25] R. 0806.

[26] R. 0818.

[27] R. 0821.

[28] R. 0819-20.

[29] R. 0013.

[30] On July 11, 2006, more than two years after the claim was controverted, Mr. Croft filed a request for hearing on the claim. R. 0041. However, QAP's attorney

The board's designee ordered a Second Independent Medical Evaluation on March 3, 2004.[31] The evaluation was performed by Thomas Gritzka, M.D., on June 22, 2004. Dr. Gritzka did not provide a specific diagnosis for the left shoulder, but he commented:

> With regard to the shoulder, without further interim studies, it cannot be stated whether the examinee has any antecedent or predisposing conditions in his left shoulder or whether the injury of August 27, 2001, is the sole and only cause of his left shoulder symptoms.
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> I think the examinee should have a magnetic resonance arthrogram of his left shoulder at this time. On initial examination, he had findings (i.e. crepitus) with passive range of motion of his shoulder that was consistent with internal derangement of the shoulder, either of a superior labral anterior posterior tear or a rotator cuff tear. He has developed post traumatic shoulder stiffness at this time. He needs magnetic resonance arthrogram of the left shoulder to rule an internal derangement of the shoulder in or out. . . . In terms of the specifics of further treatment with regard to his shoulder, the answer depends on the outcome of the proposed magnetic resonance arthrogram. It is a "classic" dilemma in orthopedic surgery and neurosurgery to distinguish shoulder from neck problems because the neck and shoulder are anatomically closely related and symptoms may overlap. . . .[32]

Chancy Croft entered an appearance on behalf of Peratrovich, and filed another workers' compensation claim on May 23, 2006.[33] This claim was for temporary disability from "surgery through medical stability," permanent partial disability compensation "when rated," an evaluation for vocational re-employment benefits, medical benefits, including "treatment as recommended by Dr. Polston," and attorney

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filed a statement that there was no opposition to hearing the claim for an unfair controversion penalty. R. 0043-44.

31 R. 1821.

32 R. 1774.

33 R. 0022-24.

fees.[34] It listed Peratrovich's attending physician as Dr. Polston. The claim was answered[35] and controverted.[36] Among other defenses, QAP asserted that the claim was barred by AS 23.30.110(c) or, as to compensation benefits, by AS 23.30.105. QAP also asserted that Peratrovich's current left shoulder condition "did not arise out of and in the course of the employment."[37]

The board heard Peratrovich's claim on December 13, 2006.[38] Mr. Peratrovich was the main witness.[39] During the hearing, Mr. Croft attempted to introduce testimony by Peratrovich that Dr. Radecki had stated, in Peratrovich's hearing, that "he didn't know why Mr. Peratrovich was there because this was not his specialty."[40] The

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[34] R. 0024.

[35] R. 0035-37.

[36] R. 0017-18.

[37] R. 0036.

[38] The hearing date was set in a July 26, 2006, pre-hearing conference. R. 1812-14.

[39] The only other witness to appear before the board was Joey Merrick, Business Manager for the Laborers Union. He testified that (1) Peratrovich had been a member of the union in good standing for 27 years; (2) Peratrovich has a reputation as a dependable, hard worker, (3) it is impressive and unusual that Peratrovich works year round, and (4) "he's been working through this pain for quite some time." Hrg Tr. 32:20-33:8, 33:17-18.

[40] Hrg Tr. 50:9-11. Mr. Croft initially attempted to make his offer of proof by asking the witness the questions necessary to elicit the testimony. Hrg Tr. 49:17. The workers' compensation hearing officer, D. Jacquot, interrupted him to ask for the offer of proof, without the testimony, stating, "Once he's testified to the hearsay, then you can't [un]ring that bell." Hrg Tr. 49: 22-23. There is more than one way to make an offer of proof. One way is to allow the witness to testify on the record *outside the hearing of the jury*; another is for counsel to dictate into the record the substance of the testimony that would be elicited by the excluded questioning, *outside the hearing of the jury*. 1 McCormick on Evidence, 216 n. 9 (John W. Strong, ed., West Group 1999). As Prof. McCormick notes, the first method ensures there is no later dispute as to what the witness would have said. Hearing Officer Jacquot was clearly concerned that the board members, as triers of fact, should not hear the substance of the testimony offered; on the other hand, we are not certain that a useful purpose was served by

purpose of the offered testimony was to introduce evidence relevant to "Why the evaluation was taking place . . . [and] . . . Dr. Radecki's credentials and credibility."[41] In response to the objection that it was hearsay, and that Dr. Radecki's credentials and credibility could have been probed in his deposition, Mr. Croft responded, "we're not interested in what Dr. Radecki says about his credentials."[42] He stated there "wasn't any need to cover it in the deposition."[43] The hearing officer excluded the testimony as hearsay of a statement of speculation.[44]

3. The board's decision.

The board's decision fairly and concisely reviewed the medical evidence presented and the course of Peratrovich's claim over eight pages.[45] The board first addressed the challenge to the admissibility of Dr. Radecki's reports and deposition testimony. The board found that the employer did not make more than one change in the employer's choice of physician; therefore, the records were not excluded.[46] It determined that Peratrovich's claim was not barred under AS 23.30.110(c).[47] The board then turned to the heart of the claim – whether the need for medical treatment and compensation for the left shoulder is covered by the workers' compensation act.

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requiring an offer by counsel statement, since the statement was heard by the board members. In such circumstances, the offer should be followed by an instruction that the board will disregard the offered testimony in making its decision, unless, after hearing the offer, the hearing officer reconsiders and rules that it was admissible.

[41] Hrg Tr. 48:12:14.

[42] Hrg Tr. 48:18-21.

[43] Hrg Tr. 49:4-5, 51:1-2.

[44] Hrg Tr. 51:10-14. "[T]here's several layers of problems there, Mr. Croft. You're asking him to testify as to hearsay about speculation."

[45] *Michael A. Peratrovich v. Q.A.P.*, Alaska Workers' Comp. Bd. Dec. No. 07-0027, 2-9 (February 16, 2007).

[46] *Id.* at 11.

[47] *Id.* This part of the board's decision was not appealed.

The board reviewed the three-step presumption analysis in some detail. The board found that the employee had raised the presumption that Peratrovich's "current shoulder condition and need for continued medical treatment" is related to his August 2001 injury.[48] The board, without weighing credibility, found that Dr. Radecki's reports and testimony, as supported by the radiographic evidence, rebutted the presumption.[49] Then, reviewing the record as a whole, the board found that Peratrovich failed to persuade the board by a preponderance of the evidence that the "2001 work injury is a cause of his alleged current disability and need [for] treatment."[50] The board said:

> We give the most weight to the opinions and testimony of Dr. Radecki, as supported by the objective, radiographic evidence. Dr. Radecki, bases his opinion on objective radiographic evidence that shows a change in the employee's shoulder condition between 2004 and 2005. This new injury or development is further supported by the employee's then treating physician, Dr. Anderson, who in 2002 found that the employee's shoulder condition had fully resolved. Dr. Mayhall also found in 2002 that the employee's shoulder bursitis had fully resolved. All the radiographic evidence prior to 2005 revealed a normal shoulder. In light of the radiographic evidence, we give less weight to the opinions of Drs. Polston and Moore.[51]

The board found that based on a preponderance of the medical evidence, "in particular the substantiated objective record," the "current shoulder condition and need for medical treatment are no longer related to the August 2001 industrial injury."[52] The board denied Peratrovich's claim as not compensable.[53]

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48 *Id.* at 13.

49 *Id.*

50 *Id.*

51 *Id.* at 13-14.

52 *Id.* at 14.

53 *Id.*

4. Standard of review.

When reviewing appeals from board decisions, the commission may not disturb credibility determinations by the workers' compensation board of witnesses who appear before it.[54] A board finding as to the weight to be assigned medical testimony and reports is conclusive, even if the evidence is susceptible to contrary conclusions.[55] If there is substantial evidence in light of the whole record to support the board's findings, the commission must uphold the board's findings.[56] Because the commission makes its decision based on the record before the board, the briefs filed on appeal, and oral argument to the commission,[57] no new evidence may be presented to the commission. Whether the evidence the board relied on is "substantial evidence," and whether the board applied the proper legal analysis to the facts, are matters of law to which we are required to apply our independent judgment.[58]

5. Discussion.

Peratrovich makes three main arguments on appeal. First, he argues that the board should not have admitted,[59] or relied on, Dr. Radecki's opinion or testimony.

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[54] AS 23.30.128(b). The board made no explicit credibility determination regarding the witnesses who appeared before them in this case.

[55] AS 23.30.122.

[56] AS 23.30.128(b).

[57] AS 23.30.128(a).

[58] AS 23.30.128(b).

[59] Dr. Radecki's opinion is inadmissible, Peratrovich argues, because it was the product of an excessive change of physician by the employer. Our recent decision in *Guys With Tools v. Thurston,* Alaska Workers' Comp. App. Comm'n Dec. No. 062, 27 (Nov. 8, 2007), disposes of this point on appeal. In any event, we agree there is substantial evidence to support the board's calculation of change of physician in this case. Dr. Dietrich was included in a "panel" examination, as his examination occurred within 5 days of the examination by Dr. Mayhall. 8 AAC 45.082(c)(3). Dr. Marble did not examine the employee owing to Peratrovich's late arrival; he merely provided a report summarizing the records. This is insufficient to be an examination of the employee, because the employee is not required to present himself and to personally "submit to an examination" by the physician during such a record review.

Without Dr. Radecki's opinion, the appellant reasons, the presumption would not have been overcome, and the board would have awarded Peratrovich the shoulder surgery he wants.[60] Second, Peratrovich argues that the board failed to consider, and explain why it apparently rejected, the opinion of Dr. Gritzka, the Second Independent Medical Examiner. If it had, he argues, the board would have realized that Dr. Radecki's opinion could not eliminate the possibility, established by Dr. Gritzka, that the 2001 injury resulted in internal derangement of the shoulder. Third, Peratrovich argues that the board lacked substantial evidence on which to base its findings because it relied on one physician's opinion, which, he argues, is not substantial evidence under *Black v. Universal Services, Inc.*[61] As part of his argument regarding the substantiality of the evidence, Peratrovich also argues that the employee was not required to show that the need for shoulder surgery was work related because the employer had not controverted the relationship between the shoulder injury and the employment.

a. Peratrovich's testimony regarding Dr. Radecki's statement was excludable as unexcused hearsay.

We begin our analysis with the question of whether the board's exclusion of Peratrovich's testimony was prejudicial error. Peratrovich offered to testify that he heard Dr. Radecki say he did not know why Peratrovich was there because "this was not his specialty."[62] He offered this testimony for the truth of the statement attributed to Dr. Radecki, and Dr. Radecki was not present to testify. The evidence offered was hearsay; under 8 AAC 45.120(e), the board may not rely on hearsay evidence alone to establish a fact.[63] If Peratrovich had no other direct evidence of the facts he sought to

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AS 23.30.095(e). Dr. Radecki constituted the first change of employer medical examiner.

[60] Br. of Appellant Michael Peratrovich at 24. ("Without Dr. Radecki's reports and opinions the carrier does not have any evidence overcoming the presumption.").

[61] 627 P.2d 1073 (Alaska 1981).

[62] Hrg Tr. 50:9-11.

[63] 8 AAC 45.120(e) provides:

establish by introducing the statement, he must have established that the testimony was admissible "over objection in civil actions;" that is, that it was admissible as an exception to the general rule barring hearsay evidence.

First, we examine the statement for the facts it would tend to prove. Peratrovich would have testified that Dr. Radecki said something like, "I don't know why you're here" because "this isn't my specialty." The inference Peratrovich seeks to draw from these statements is that Dr. Radecki admitted he was unqualified to examine Peratrovich or that he was not an expert qualified to give an opinion.[64] However, what Dr. Radecki was referring to when he said "this" was never identified in the offer of proof. Is he talking about pain management, the form of care Peratrovich had received since he began treatment with Dr. Anderson? Is he talking about shoulder surgery? Is he talking about cervical injuries, Peratrovich's most significant injury? Is he talking about forensic examination? Dr. Radecki's statement that, "I don't know why you're here," could be (1) a statement of conjecture because he hadn't previously read the file or a list of employer questions; (2) a statement suggesting there didn't seem to be an obvious problem with Peratrovich, related to his specialty or otherwise; (3) a statement intended to elicit a response from Peratrovich explaining his injury; or, (4) a statement that Peratrovich's injury is so clearly work-related that his opinion should not be needed. The statement attributed to Dr. Radecki by Peratrovich is capable of enough

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> Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

[64] Br. of Appellant, 20.

variations in meaning or inference, that it alone cannot reliably establish a fact in the absence of other direct evidence.[65]

Second, Peratrovich did not produce other direct evidence tending to prove that Dr. Radecki was, or believed he was, unqualified to examine Peratrovich and provide an expert opinion. If hearsay evidence is not offered to supplement or explain a fact established by direct evidence, it is not admissible unless over objection in civil actions.[66] The only evidence Peratrovich offered on this point was his testimony to the single sentence uttered by Dr. Radecki. Therefore, Peratrovich must establish that his testimony would be admissible over objection in a civil action.

In the hearing Peratrovich claimed, "we're not interested in what Dr. Radecki says about his credentials."[67] If the statement was *not* offered to impeach the credibility of Dr. Radecki's opinion by establishing that he lacked the credentials of education or experience to give an expert opinion, then there was no relevance to the

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[65] Appellant's argument is based on an unproved assumption that if a physician is a specialist in a field he or she is necessarily unqualified to render an opinion on any question arising outside the specialty, but within the scope of the physician's training and experience. Applying appellant's argument to other circumstances demonstrates the underlying assumption: an obstetrician-gynecologist specializes in treatment of ovarian cancer, appellant argues she or he cannot opine whether the patient is pregnant with twins. Without this assumption, the statement "I don't know why you're here because this is not my specialty" loses its force as proof of the fact that the speaker lacks qualification as an expert. The absence of proof of an underlying assumption justifies the hearing officer's comment that "there's several layers of problems there . . . hearsay about speculation." Hrg Tr. 51:12-14.

[66] 8 AAC 45.120(e).

[67] Hrg Tr. 48:20-21. This disclaimer contradicted the preceding statement that "it goes to Dr. Radecki's credentials and credibility." Hrg Tr. 48:13-14. Dr. Radecki describes himself as a physiatrist, that is, a physician specializing in physical medicine and rehabilitation. Radecki Depo. 4:11-5:9. According to the American Academy of Physical Medicine and Rehabilitation, "Physiatrists treat a wide range of problems from sore shoulders to spinal cord injuries. They see patients in all age groups and treat problems that touch upon all the major systems in the body. These specialists focus on restoring function to people." American Academy of Physical Medicine and Rehabilitation, "What is a Physiatrist?" at http://www.aapmr.org/condtreat/what.htm, site updated 12/20/07, last accessed 12/26/07.

offered testimony. It is so vague that it does not tend to prove anything in particular. On those grounds, it could be excluded as irrelevant.

If, on the other hand, it was offered to establish an admission by Dr. Radecki that he was *not sufficiently expert in the anatomy and function of the shoulder and diagnosis of shoulder injuries* to give an opinion, the statement is not admissible as an exception to the hearsay rule, even if Peratrovich's asserted inference is accepted.[68] Our review of Dr. Radecki's deposition establishes that Peratrovich, although he vigorously cross-examined Dr. Radecki, did no foundational questioning regarding the offered statement. Peratrovich's attorney admitted as much when he confessed, "I didn't know it last week."[69] He did not afford Dr. Radecki the opportunity to explain or deny the prior statement. Therefore, to the extent that Peratrovich sought to challenge

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[68] See Radecki Depo. 4:9-6:5 for Dr. Radecki's summary of his education and qualifications. We note that Dr. Radecki acknowledged that he does not perform surgery, although he has surgical training and past experience, because he does not feel qualified to do so. Radecki Depo. 60:5-21.

[69] Hrg Tr. 51:1. The appellant urged the board to accept that a party may challenge the credibility of a witness by introducing testimony by an interested party, regarding an unrecorded statement by the witness uttered out of hearing of the board, without offering the witness the opportunity to explain the statement or rebut the testimony, because "there's no requirement that I have to cover it with [the witness]." Hrg Tr. 51:1-2. The appellant claims on appeal that the offered hearsay statement is admissible because it explains why Dr. Radecki was "confused." Appellant's Reply Br. 4. The rule is that hearsay evidence may be introduced if it "supplements or explains" direct evidence of a fact. If there is no other direct evidence of the fact that is the subject of the offered hearsay then the statement is not admissible. Appellant's description of Dr. Radecki's opinion as "confused" is not a fact established by other direct evidence. For example, a car swerves off a deserted highway into a ditch. A witness testifies that during a cell phone call he overheard the passenger, an unavailable witness, tell the driver, "Slow down, there's a moose in the road," before the car swerved. The witness is testifying to hearsay of a statement of fact (a moose is in the road) offered to explain the fact that the car swerved (established by tire tracks). If the witness testifies he overheard the passenger say, "I don't know why you're going north, because this isn't the usual way," the witness is testifying to the passenger's speculation about the route, not a statement of fact. The statement does not explain how or why the car swerved. If the statement is offered to show the car was not on the passenger's usual path to the destination, the hearsay may be introduced only to supplement other direct evidence of the passenger's usual path.

whether Dr. Radecki believed he had sufficient expertise as a physiatrist to give an opinion through the statement, the hearing officer did not abuse his discretion by excluding the statement, based on 8 AAC 45.120(e) and Alaska Rule of Evidence 801(d)(1) and Alaska Rule of Evidence 613(b).

Third, even if the statement were admissible, the appellant failed to demonstrate that his case was prejudiced by its exclusion. The party challenging the board's ruling on a point of evidence must establish that admission, or exclusion, of the evidence might have affected the outcome of the trier of fact's decision. Peratrovich assumes that the statement, if admitted, must inevitably lead to disregard, if not inadmissibility, of Dr. Radecki's opinion. As we have explained, it is altogether possible that Peratrovich read too much into the statement. The statement is capable of more than one interpretation, not all of them directed at the credibility of the examining physician's report. Without direct evidence of the facts established by the statement, the board could not rely on the statement alone to make a finding of fact that Dr. Radecki was unqualified to provide an expert opinion. We cannot say that the board might have found differently if Peratrovich had been allowed to testify to Dr. Radecki's statement.

We conclude that the board hearing officer did not err by excluding the testimony as irrelevant and speculative hearsay. The hearsay was not offered to supplement direct evidence of a fact and the hearsay was inadmissible over objection. Even if the hearing officer erred, no prejudice was demonstrated by the appellant requiring a remand.

b. The board should have explained more fully why it chose not to rely on Dr. Gritzka's opinion, but the error is harmless as the commission is able to understand the board's reasoning.

The board's decision reviewed the evidence presented at some length,[70] but its decision regarding the weight it assigned the competing medical opinions is contained in a single paragraph:

[70] Alaska Workers' Comp. Bd. Dec. No. 07-0027 at 2-10.

> We give the most weight to the opinions and testimony of Dr. Radecki, as supported by the objective, radiographic evidence. Dr. Radecki, bases his opinion on objective radiographic evidence that shows a change in the employee's shoulder condition between 2004 and 2005. This new injury or development is further supported by the employee's then treating physician, Dr. Anderson, who in 2002 found that the employee's shoulder condition had fully resolved. Dr. Mayhall also found in 2002 that the employee's shoulder bursitis had fully resolved. All the radiographic evidence prior to 2005 revealed a normal shoulder. In light of the radiographic evidence, we give less weight to the opinions of Drs. Polston and Moore.[71]

The appellant argues that it is not enough to explain why the board chose to rely on Dr. Radecki over Drs. Polston and Moore as to the existence of a shoulder injury that required surgical repair. The board, he argues, failed to explain why it did not accept Dr. Gritzka's opinion, or why it chose Dr. Radecki over Dr. Gritzka. Appellant argues Dr. Gritzka's opinion was not answered by Dr. Radecki; therefore, the presumption was not overcome, or, in the alternative, the case must be returned for further fact finding by the board.

The three-step presumption analysis begins with the employee establishing a link between the claimed disability (or in this case, the claimed need for medical treatment) and the employment. The board found such a link, and the appellee does not contest this finding. Once the presumption attaches, the employer may rebut the presumption by presenting substantial evidence that (1) provides an alternative explanation which would exclude work-related factors as a substantial cause of the claimed disability (or medical treatment), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability.[72] An employer has always been able to rebut the presumption by presenting the opinion of a qualified expert who testifies

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[71] Alaska Workers' Comp. Bd. Dec. No. 07-0027 at 13-14.

[72] *Bradbury v. Chugach Elec. Ass'n*, 71 P.3d 901, 906 (Alaska 2003). The presumption of compensability applies to the *claim*, AS 23.30.120(a)(1), and compensation is paid for *disability*, AS 23.30.010.

that in his or her opinion, the claimant's work was probably not a substantial cause of the claimed disability or need for treatment.[73] The board found that the presumption had been overcome by "the reports and testimony of Dr. Radecki, as supported by the radiographic evidence."[74] Although appellant challenges the *credibility* of Dr. Radecki's report, the board properly did not weigh the credibility of the physician's reports and testimony at this stage. The question is, "was the evidence cited by the board sufficient evidence to overcome the presumption?" We conclude that it was.

The appellant argues that Dr. Gritzka's report established that the appellant had post-traumatic stiffness of the shoulder, an internal derangement of the shoulder and "either a superior labral anterior posterior tear or a rotator cuff tear." The appellant then states, "The magnetic resonance arthrogram of the left shoulder Dr. Gritzka suggested established objectively the internal derangement of [the appellant's] left shoulder."[75] The appellant also contends that Dr. Gritzka opined that all these conditions were work-related. None of this evidence, he contends, was rebutted.

The board relied particularly on "the radiographic evidence." The 2004 magnetic resonance arthrogram did not establish that Peratrovich had "internal derangement" of the shoulder. The radiologist, John R. Fischer, M.D., reported

> Bone marrow signal is normal. Bicipital tendon and glenoid labrum appear normal. Mild arthritic change of the AC joint is present without impingement. There is a slightly downsloping

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[73] *Bradbury*, 71 P.3d at 906, *citing Big K Grocery v. Gibson*, 836 P.2d 941, 942 (Alaska 1992). Peratrovich argues that he is not required to prove that the need for surgical treatment is work-related because the 2001 injury itself was not disputed. We disagree. The surgery was to cut out a portion of Peratrovich's acromion and clavicle, inspect and possibly repair a part of the bicipital tendon and supraspinatus tendon. Whether the surgery proposed in 2006 was *required* to treat the 2001 injury is a different question than whether the appellant was injured in his employment in 2001. Peratrovich may have been entitled to a presumption of "continuing disability," but that presumption may be rebutted as well. In any case, the board applied the presumption analysis to Peratrovich's claim.

[74] Alaska Workers' Comp. Bd. Dec. No. 07-0027 at 13.

[75] Br. of Appellant Michael Peratrovich, 28.

> acromion without impingement. There is no free fluid in the subacromial bursa. The undersurface of the rotator cuff is smooth. I see no evidence of tear of the rotator cuff, either partial thickness or full thickness. Ligamentous structures surrounding the shoulder and soft tissues appear normal.[76]

We conclude the board understood Dr. Fischer's report to mean that Peratrovich, in 2004, did not have a rotator cuff tear or a labral tear (a labral tear is a tear of the labrum). Instead of showing "internal derangement," the report concluded that the shoulder and its surrounding structures were normal, with the exception of "mild arthritic change" at the acromioclavicular joint.[77] Thus, the radiographic evidence did not support, let alone "establish objectively," the proposed diagnosis by Dr. Gritzka.[78] Instead, it ruled out the possibility of an impingement syndrome, bursitis, a labral tear, and a rotator cuff tear. We agree with the board that this evidence, with Dr. Radecki's testimony and report that Peratrovich's shoulder injury had fully resolved by October 2003 and his current symptoms were not work related, was sufficient to rebut the presumption that the need for the desired medical treatment [excision of the distal clavicle, acromioplasty, and rotator cuff repair surgery] was work related.

We turn now to the board's weighing of the evidence. The board explained that it gave greater weight to Dr. Radecki's report and the radiographic evidence than the reports of Dr. Polston and Dr. Moore. It did not mention Dr. Gritzka's report, so the appellant argues that the board overlooked or misinterpreted his report. While we agree that a specific comment addressed to Dr. Gritzka's report would have been useful for the reviewer, the board's reasoning and its application of the legal rule was clear. The board explicitly relied on the evidence of Dr. Radecki *and* the radiographic evidence

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[76] R. 0864.

[77] The acromioclavicular joint is where the collarbone meets the acromion, above, forward, and toward the midline of the joint between the upper arm bone and shoulder bone.

[78] Dr. Gritzka's June 2004 report listed no left shoulder diagnosis under the heading "Diagnoses;" instead, he proposed that a MRA study be performed to "rule an internal derangement of the shoulder in or out." R. 1774.

over the opinions of the employee's attending physician, Dr. Polston, and his consultant, Dr. Moore.

Dr. Moore's reports do not contain an opinion that the need for surgery was caused by the 2001 injury; only a statement of the patient's history and a diagnosis based largely on the 2005 MRI scan. Dr. Polston, an anesthesiologist, has not been trained in orthopedics.[79] He relied on Dr. Moore's recommendation to recommend surgery.[80] His opinion was that the 2004 MRA study was consistent with that in the 2005 MRI scan, but also that the 2005 MRI scan was the first one that showed a "partial tear" of the supraspinatus.[81]

On the other hand, Dr. Radecki's testimony explains what the two radiographic studies show and how they support his opinion. He explains what the "tiny amount of high signal intensity" on T-2 weighting means in the 2004 MRA study, why it does not indicate a rotator cuff tear in 2004, and points out that it is unchanged in the 2005 MRI scan. On the other hand, the 2005 MRI scan shows a possible tear in the bursal surface of the supraspinatus, a frayed labrum, moderate arthritic changes in the AC joint and bone spurs on the acromion, not present in the 2004 study. Because Peratrovich denies any new injury, Dr. Radecki opines these new findings must be due to the degeneration of aging. He also testified that the 2004 study was consistent with his examination in October 2003 showing no impingement and Dr. Anderson's opinion that the bursitis and impingement was resolved by February 2003.

It is clear that the board focused on the evidence that the bone spurs, bursal surface supraspinatus tear, and frayed labrum were not present in 2004, more than 2 years after the injurious event. Since Dr. Gritzka did not opine on either of the two radiographic studies and the 2004 MRA study ruled out his proposed diagnosis,[82] his

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[79] Polston Depo. 24:18.

[80] Polston Depo. 18:3-17.

[81] Polston Depo. 13:15, 15:3-13.

[82] We found no record that Peratrovich asked the board to send the radiographic studies to Dr. Gritzka for comment before the hearing, although the

2003 opinion was not relevant to the issue that the board saw as pivotal. The board did not need to comment on a report that was not relevant to its decision. Because the board's explanation of its reasoning was sufficient to allow us to review the decision, the omission of a comment about an opinion that was not directly relevant to the issue as it was framed by the board is not fatal.

c. The board's findings of fact are supported by substantial evidence in light of the whole record.

Peratrovich argues that under *Black v. Universal Services*,[83] the board may not rely on a single physician if that physician's opinion is not consistent with other physicians' testimony. We reject Peratrovich's reading of *Black*. We also find that in this case, the physician's opinion found most persuasive by the board was not entirely inconsistent with other opinions.

Diane Black, a North Slope bull cook, suffered a back injury in 1976 while trying to move a bed. She was told to rest by her physician, but went on a trip to Greece with friends. She returned in a wheelchair. Her Alaska physician refused to see her, claiming she was malingering. She was diagnosed with "myofascial syndrome" by physicians she sought in Seattle and refused orthopedic back surgery in Seattle. The board denied her claim for compensation after June 1977, based on a psychiatric-neurological evaluation by Dr. Pennell, who concluded she had recovered but was manipulating others for secondary gain. The Supreme Court reversed.

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employer agreed November 14, 2006, to Peratrovich's request to send them to Dr. Gritzka for comment, provided Dr. Gritzka agreed to do so in time to avoid a delay in the hearing date. R. 1821. Peratrovich also did not request another Second Independent Medical Evaluation. There may have been sound strategic reasons not to do so. For example, Peratrovich argued that the time for filing an affidavit of readiness for hearing on the employee's claim had been suspended from the date the SIME was ordered through the present under *Aune v. Eastwind,* Alaska Workers' Comp. Bd. Dec. No. 01-0259 (Dec. 19, 2001) (W. Wielechowski), because the SIME report was still "incomplete." Hrg Tr. 25:10-26:17, 27:7-13. However, having not made the request, Peratrovich cannot complain after hearing that the board did not have Dr. Gritzka's comments.

[83] 627 P.2d 1073 (Alaska 1981).

The report, the Court noted, resulted from an "interview [that] lasted only twenty minutes" and the report reflected the brevity of the interview and examination.[84] The court noted it was "frankly troubled by the slender evidentiary basis underlying many of the doctor's conclusions."[85] Finally, the Court noted that although Black's mental problems had been noted by other physicians, Dr. Pennell's opinion was inconsistent with a "plethora" of other reports and "none of these reports indicates that Black's pain is fabricated."[86] Notwithstanding that Dr. Pennell's expertise as a psychiatrist meant that his "conclusion that Black's problems are mental might be given more weight than the other doctor's conclusions," the court held that "because of the weaknesses in Pennell's report described above, we conclude that a reasonable mind would not accept his psychological conclusions as adequate to support the Board's denial of compensation."[87]

In 1982, following *Black*, the legislature adopted AS 23.30.122, which states:

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

Since then, the court's holding in *Black* has been distinguished, notably in *Childs v. Copper Valley Elec. Ass'n,* 860 P.2d 1184 (Alaska 1993), *Safeway v. Mackey,* 965 P.2d 22 (Alaska 1998), and in *Rhines v. State,* 30 P.3d 621 (Alaska 2001). In *Rhines,* the Court stated that the board may rely on a reviewing physician's opinion to deny a claim if it is "consistent with other evidence."[88] Evidence need not be other medical opinion

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84 627 P.2d at 1075 n. 9.

85 *Id.* at 1076 n. 10.

86 627 P.2d at 1076.

87 627 P.2d at 1076.

88 *Rhines v. State,* 30 P.3d 621, 629 (Alaska 2001).

evidence, but, as in this case, radiographic evidence. Workers' compensation hearings are not popularity contests; a greater *number* of physicians on one side, as opposed to the other, does not mean greater *weight* will be assigned to their opinions. In some cases, the board will consider whether an opinion is within the currently accepted realm of medical theory and consistent with well-documented patient history or replicated test results from one physician to another; these considerations may create the appearance of the board looking at the number of physicians favoring one opinion or another. In other cases the reasoning underlying a single opinion, with objective evidence to support it, may be more persuasive than three or four that rely on disproved facts or data that cannot be verified or replicated.

The *Black* court found the lack of evidentiary support for Dr. Pennell's conclusions "frankly troubling." The other five physicians' opinions were, as the Court noted, inconclusive regarding the cause or extent of Black's disability, but none suggested her problems were fabricated. It appears the Court's rejection of Dr. Pennell's report rested as much on the "slender evidentiary support" for it, as the singularity of his opinion that Black's pain was, as the Supreme Court characterized it, "imaginary or faked."[89]

In this case, Dr. Radecki relied on his two examinations of the employee, the reports of his treatment, and the two radiographic studies. He understood the surgery proposed by Dr. Moore, and he did not suggest that Peratrovich should not have it done. Unlike Dr. Pennell's report in *Black*, Dr. Radecki's opinions were subjected to vigorous cross-examination in a deposition. He explained why he disagreed with Dr. Polston's opinion, pointing out that it was based on a false reading of Dr. Anderson's reports. Finally, his opinion that the bursitis and resulting impingement had resolved by 2003 was consistent with Dr. Anderson's opinion.

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[89] 627 P.2d at 1076. Justice Matthews, dissenting, noted that Black's original physician told her she was malingering. *Id.* at 1077. It was not correct, he wrote, "to imply that Dr. Pennell's diagnosis was entirely different from . . . all of the other physicians who treated [Black], for most of the noted that her problem had a strong emotional component." *Id.*

We find there was substantial evidence, in light of the whole record, to support the board's findings of facts. The existence of contradictory evidence, even evidence another panel might find more probative, or competing inferences that may be drawn from the evidence, does not allow us to overrule the board. The legislature has given the board the sole authority to weigh the competing medical opinions. We cannot say that the medical opinion and evidence together on the board's scale were so deficient in this case as to be inadequate evidence to support a finding in a reasonable mind that the possible bursal surface tear in the supraspinatus, the frayed labrum, the possible biceps tendon tear, the bone spurs, and the arthritis in the AC joint [the objective of the proposed surgical treatment] were not causally related to the 2001 injury.

6. Conclusion.

While brief, the board's reasoning was adequate for review. The board did not err in rejecting the offered testimony of a statement heard by Peratrovich. The board had substantial evidence, in light of the whole record, to support its findings. We must therefore AFFIRM the board's decision denying Peratrovich's claim for surgical treatment of his left shoulder and additional related compensation.

Date: *24 January 200_* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Stephen Hagedorn, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final decision on this appeal. The appeals commission affirmed (approved) the board's decision that dismissed the workers' compensation claim. The appeals commission's decision ends all administrative proceedings in Mr. Peratrovich's workers' compensation claim. It becomes effective when served (mailed or otherwise distributed) by the appeals commission unless proceedings to reconsider it or to appeal

to the Alaska Supreme Court are instituted (started). To see the date it is mailed, look at the Certification of Distribution box below.

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 the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure.

A request for commission reconsideration must be filed within 30 days of the date of service (mailing) of the decision. If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal 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).

If you wish to appeal this decision to the Alaska Supreme Court, you should contact the Alaska Appellate Courts immediately:

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

RECONSIDERATION

A party may ask the appeals commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the appeals commission within 30 days after mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true, and correct copy of the Alaska Workers' Compensation Appeals Commission's Final Decision No. 067 in the matter of the appeal of Michael Peratrovich vs. Quality Asphalt Paving and Liberty Mutual Insurance Co./Liberty Northwest Insurance Corp.; AWCAC Appeal No. 07-004; dated and filed in the office of the Alaska Worker's Compensation Appeals Commission in Anchorage, Alaska, this __*24*_ day of __*January*__, 20_*08*.

_*Signed*_____
L. Beard, Appeals Commission Clerk

Certificate of Distribution

I certify that a copy of this Final Decision in AWCAC Appeal No. 07-004 was mailed on _*1/24/08*_ to C. Croft & J. Holloway at their addresses of record and faxed to Croft, Holloway, Director WCD, & AWCB Appeals Clerk.

_*Signed*_____ *1/24/08*
L. Beard, Appeals Commission Clerk Date