Alaska Workers' Compensation Appeals Commission

Lowe's HIW, Inc., and Specialty Risk Services,
Appellants,

vs.

Pamela G. Anderson,
Appellee.

Final Decision
Decision No. 130 March 17, 2010

AWCAC Appeal No. 09-018
AWCB Decision No. 09-0097
AWCB Case No. 200305373

Appeal from Alaska Workers' Compensation Board Decision No. 09-0097 issued May 19, 2009, at Anchorage, Alaska by southcentral panel members Linda Cerro, Chair, Don Gray, Member for Industry, Howard Hansen, Member for Labor.

Appearances: Patricia Zobel, DeLisio Moran Geraghty & Zobel, P.C., for appellants Lowe's HIW, Inc., and Specialty Risk Services. Michael J. Jensen, Law Offices of Michael J. Jensen, for appellee Pamela G. Anderson.

Commission proceedings: Appeal filed June 2, 2009. Appellants' motion for stay pending appeal heard June 23, 2009, and granted in part by commission order issued July 23, 2009. Appellants' motion for an extension of time to file an opening brief granted, and both parties allowed an additional five pages, on August 13, 2009. Parties' stipulation to procedural facts accepted September 21, 2009. Appellee's motion for extension of time granted September 22, 2009. Oral argument on the appeal presented November 13, 2009. Notice of delayed decision given February 11, 2010. Notice of appointment of chair *pro tempore* given March 1, 2010.

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

By: Kristin Knudsen, Chair *pro tempore*.

1. Introduction.

Pamela Anderson had severe degenerative disc disease and a history of prior low back pain. She worked as a kitchen designer for Lowe's HIW, Inc., a large hardware and home building supply store. She had the onset of severe low back pain when

lifting and rotating a 50-pound cabinet on April 4, 2003. She experienced low back pain again on May 22, 2003, when reaching for a clip board. After her 2003 injuries at Lowe's, she was paid various medical benefits and compensation voluntarily, but disputes arose about medical treatment, reemployment benefits, and permanent disability compensation. Ultimately, Lowe's formally conceded liability for the low back injuries, medical treatment, and paid permanent partial impairment compensation to Anderson based on an impairment rating of 22 percent. After her 2003 injuries, Anderson also discovered she had serious pre-existing degenerative disc disease, spinal stenosis, and myelopathy in her cervical spine (neck). She claimed the 2003 injuries aggravated or accelerated these conditions so as to result in disability and need for medical care. Lowe's contested liability for the cervical spine injury, treatment, and disability. Anderson also claimed an increase in her permanent impairment rating of 12 percent based on another rating. In a 100-page decision, the board ruled Anderson's 2003 injuries so aggravated, accelerated, or combined with her pre-existing spinal disease as to be a substantial factor in bringing about a compensable disability and need for medical treatment of her neck.[1] It ordered Lowe's to pay temporary total disability compensation (TTD) from July 1, 2007, "until she attains medical stability."[2] In addition, the board ordered payment of increased permanent partial impairment compensation (PPI) in a lump sum concurrent with the TTD owed for the neck injury.[3] Lowe's appeals.

Lowe's argues that the board ignored the workers' compensation statutes when it ordered the payment of a lump sum of PPI concurrent with the payment of TTD for the same injury, despite Anderson's participation in a reemployment plan under AS 23.30.041.[4] Anderson opposes and argues that the board had substantial evidence

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[1] *Pamela Anderson v. Lowe's Co., Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0097, 91 (May 19, 2009) (L. Cerro, Chair).

[2] *Id*. at 98.

[3] *Id*.

[4] In their opening brief, appellants argued the board lacked substantial evidence to support an increased permanent partial impairment compensation award

to support a finding that she was entitled to a higher impairment rating. Anderson does not oppose the argument that the board cannot direct payment of a lump sum of PPI during reemployment, but she contends that she is entitled to payment of a lump sum of PPI if one part of her body is rated, even if she is still receiving TTD during treatment for another part of her body.

Lowe's argues that the board's determination that Anderson's cervical spine was injured in the course of her employment in 2003 and the award of TTD is the result of a flawed analysis of the evidence. Lowe's argues the board improperly placed the burden of proof on the employer's physicians to disprove the employee's claim. Lowe's also argues that the board erred in directing payment of TTD until Anderson "attains medical stability" because, while TTD may not be paid after medical stability is reached, TTD is based on the temporary total incapacity to earn wages, not the need for medical treatment. Finally, Lowe's asserts the board's comments regarding its witnesses indicate an animus against Lowe's. Anderson argues that the board did not require Lowe's to disprove her case and that the board's recitation of the presumption analysis reveals it understood and applied the law correctly. Anderson concedes that the board made an erroneous procedural finding regarding the witness's testimony, but she argues that the board's statement does not reveal bias or hostility toward the witness or the appellants.

The parties' contentions require the commission to decide if a lump sum of PPI is payable concurrently with TTD for the same injury, during the reemployment planning process. The commission holds that the board's order for payment of a lump sum of PPI in the circumstances presented by this case violated the provisions of AS 23.30.041 and reverses the order of concurrent payment. The commission must decide if there is a "presumption of medical instability," on which the board's analysis rested. Although the commission determines the board's analysis was faulty on this point, the board's

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because the evidence relied upon was inconclusive. As appellee noted, this was not a point stated in their grounds for appeal, Br. of Appellee 31, and that appellants conceded liability for increased PPI in hearing on appellants' motion for stay. *Id.* at 32. Appellants formally withdrew the argument in their reply brief. Appellants' Reply Br. 1.

error does not require reversal. The commission must decide if the board's decision that Anderson suffered a compensable injury to her neck is supported by substantial evidence and is based on a correct understanding of the law. Here, the commission determines that the board's decision is not sufficiently well articulated on certain points for the commission to intelligently review the board's findings and determine if the board fairly considered the parties' medical evidence. The commission determines that the board's consideration of the evidence may have been tainted by improper inferences drawn from a witness's testimony. The commission remands the case for further findings by the board, but, because the evidence in the record is sufficient to support board findings in favor, or against, the claim, the commission does not require the board to rehear the case on remand.

2. Factual background.

Anderson worked as a kitchen specialist for Home Depot when she suffered a back injury in June 1999. She was treated by a chiropractor and was released to return to work before the end of July 1999, but she continued to receive care. She was referred to John Duddy, M.D. A magnetic resonance imaging (MRI) scan in January 2000 showed she had a large protruding disc in her lower back at the L3-4 level, smaller bulges at three other lumbar levels, and bilateral facet arthropathy at L4-5 and L5-S1. Although she had reported pain between her shoulders, and some neck pain, an MRI was not done of her cervical spine. She was discharged from physical therapy in April 2000, and in December that year, she started working as a kitchen designer for Lowe's. She sought no further care for her neck or lower back until April 2003.

On April 4, 2003, she injured her low back lifting a cabinet from counter height and turning to the left. She sought treatment from a chiropractor, Ben Cain, D.C. Dr. Cain reported that his X-rays demonstrated degenerative changes from C-4 through C-7 level in her neck, and at the L-3-4 in the lumbar spine. She continued to work until May 22, 2003, when she experienced severe pain as she stood and reached for a clip board at work. A lumbar MRI scan showed a central disc protrusion at L3-4, and spinal stenosis due to degenerative changes from L-3 through L-5. She was taken off work by Dr. Cain. Since then, she has undergone a series of treatments with varying success,

including surgery to fuse the L2-3 and L4-5 lumbar vertebrae with cages and screws in November 2003, an anterior discectomy at L2-3 and L5-S-1, and implantation of artificial discs at those levels in August 2005, surgery to remove the hardware in February 2006, a total hip replacement in May 2007, and two cervical surgeries in 2008, resulting in discectomy at C-4 through C-7, and fusion at C6-7. She also began treatment for depression and anxiety in 2006, including counseling and medication, which continued through the time of the hearing.

3. Board proceedings.

Anderson filed a workers' compensation claim on June 24, 2003, asking for TTD, medical benefits, transportation, and reemployment benefits, and a penalty for a late report of injury.[5] She filed a second claim in July for transportation costs for travel to medical appointments.[6] Lowe's answered both claims in July, admitting liability for TTD from May 23, 2003, medical benefits for an April 4, 2003, injury, and transportation costs.[7] Lowe's paid Anderson TTD from May 22, 2003, through February 15, 2004; temporary partial disability compensation (TPD) from then through August 28, 2005; and TTD again from August 29, 2005, through July 1, 2007.[8] Meanwhile, Anderson filed a third workers' compensation claim on May 31, 2007, asserting her neck as well as her low back was injured, and seeking medical treatment for her neck, transportation, attorney fees, and permanent partial impairment compensation (PPI).[9]

On July 10, 2007, Lowe's controverted continuing TTD based on an employer medical examiner's opinion that Anderson was medically stable, and denied that the employer was liable for benefits related to the neck injury (or osteoarthritis of the hip), because they were not related to the April 2003 work injury.[10] An amended

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5 R. 0030-31.

6 R. 0033-34.

7 R. 0037-44.

8 R. 0025.

9 R. 0047-48.

10 R. 0016.

controversion filed shortly afterward added that the employer accepted liability for medical care for the low back injury including narcotic medication, disc replacement rechecks, and treatment by Providence Behavioral.[11] The employer began paying PPI pursuant to the employer medical examiner's rating (22 percent of the whole man) on July 2, 2007, biweekly because Anderson was participating in a reemployment plan.

Anderson amended her 2007 claim to include PPI exceeding 22 percent in September 2007, and including PPI for her neck injury.[12] Again Lowe's denied that benefits were due for a neck injury.[13] In July 2008, Anderson added chronic pain and depression to her list of injuries, and added a claim to have PPI payments reclassified as TTD because she was not medically stable.[14] Lowe's answered that there was no evidence that the chronic pain or depression were work-related, and continued its previous denial of benefits related to the neck injury.[15] In December 2008, the parties agreed to a hearing in January.[16] At the hearing, the board took up the following disputes: whether Anderson was due TTD (instead of PPI) from July 2, 2007; whether she suffered a compensable neck injury; whether her PPI was more than 22 percent; and related claims for attorney fees, transportation and medical benefits, interest, and legal costs.[17]

The board's decision was issued May 19, 2009. In its lengthy decision, the board reviewed the evidence presented for about 63 pages.[18] The board recited the three-step presumption analysis[19] and stated it applied it to the following claims: for TTD; for

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11 R. 0018.

12 R. 0107.

13 R. 0109-10.

14 R. 0153-4.

15 R. 0155-57.

16 R. 2335.

17 *Pamela Anderson,* Bd. Dec. No. 09-0097 at 2.

18 *Id.* at 2-65.

19 *Id.* at 67-70.

additional medical costs for treatment of her lower back, chronic pain, depression (or mood disorder); for PPI of 34 percent; and for coverage of her neck injury.[20] The board found in Anderson's favor on all claims[21] and Lowe's appeals.

4. Standard of review.

The commission must uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[22] The commission examines "the evidence objectively so as to determine whether a reasonable mind could rely upon it to support the board's conclusion."[23] However, the commission "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the board."[24] Because the commission makes its decision based on the record before the board, the briefs, and oral argument, no new evidence may be presented.[25]

The question whether the quantum of evidence is substantial enough to support a conclusion in a reasonable mind is a question of law.[26] The commission exercises its independent judgment on questions of law and procedure.[27] If the board's findings and conclusions are based on an erroneous understanding of the law, and the evidence is

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[20] *Id.* at 70.

[21] *Id.* at 98-99.

[22] AS 23.30.128(b).

[23] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007) (citation omitted).

[24] *Lindhag v. State, Dep't of Natural Res.*, 123 P.3d 948, 952 (Alaska 2005) (quoting *Robinson v. Municipality of Anchorage*, 69 P.3d 489, 493 (Alaska 2003)). *See also* AS 23.30.122 (providing "[t]he 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."); AS 23.30.128(b) (providing the "board's findings regarding the credibility of testimony of a witness before the board are binding on the commission.").

[25] AS 23.30.128(a).

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

[27] AS 23.30.128(b).

susceptible to more than one permissible inference, the commission will remand the case to the board with instructions to apply the correct standard of law.

5. Discussion.

a. The order to pay PPI concurrently with TTD.

The board's order directed the appellants to pay TTD from July 1, 2007, until the appellee "attains medical stability from her cervical surgeries, her chronic pain, and her chronic pain-related mood disorder," with interest at the statutory rate on any installments not paid as either PPI or AS 23.30.041(k) benefits, with credit for payments previously made as PPI or § .041(k) benefits.[28] The board also directed payment of "the lump sum of $60,180.00, representing a 34% permanent partial impairment for her lumbar spine condition and subsequent lumbar surgeries, pursuant to AS 23.30.190."[29] Lowe's does not appeal the award of greater PPI, but it appeals the order that it pay the PPI award concurrently with the TTD award retroactive to July 2, 2007. The appellee states she "requested that PPI benefits be paid once all conditions reached medical stability."[30] She asks only that the commission determine if PPI for one body part may be paid while TTD benefits continue for the same injury.[31]

AS 23.30.190(a) provides in part that the "compensation [for permanent partial impairment] 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 consideration." AS 23.30.041(k) states:

> Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. *If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate.* If the employee's permanent impairment benefits are exhausted before the

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28 *Pamela Anderson*, Bd. Dec. No. 09-0097 at 98.

29 *Id*.

30 Br. of Appellee 41.

31 *Id.* at 42.

> completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. If permanent partial disability or permanent partial impairment benefits have been paid in a lump sum before the employee requested or was found eligible for reemployment benefits, payment of benefits under this subsection is suspended until permanent partial disability or permanent partial impairment benefits would have ceased, had those benefits been paid at the employee's temporary total disability rate, notwithstanding the provisions of AS 23.30.155(j). *A permanent impairment benefit remaining unpaid upon the completion or termination of the plan shall be paid to the employee in a single lump sum.* An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. The fees of the rehabilitation specialist or rehabilitation professional shall be paid by the employer and may not be included in determining the cost of the reemployment plan. (emphasis added).

Thus during the reemployment process, the employee may receive TTD. After TTD ceases, the employee may receive PPI, paid in installments equal to the TTD rate if the employee is in the reemployment process. If the employee has PPI left unpaid upon completion of a reemployment plan, then remaining PPI is payable in a lump sum. Otherwise, PPI is to be paid in a *single* lump sum.

The board acknowledged that appellee was involved in the reemployment process from July 1, 2007, because it referred to ".041k benefits erroneously paid"[32] when explaining its credit for prior payments against TTD. The board made no finding that the reemployment process was terminated or completed. Therefore, the board's order directing that Anderson be paid "the lump sum of $60,180.00" concurrently with TTD, while the employee is in the reemployment process is a clear violation of

[32] *Pamela Anderson,* Bd. Dec. No. at 81.

AS 23.30.041(k). The board may award the increased PPI benefit, but payment in a lump sum cannot be ordered concurrently with TTD.

The commission is not persuaded by the appellee's argument that a PPI for her lumbar injury may be paid while the employee is receiving TTD because she is not yet medically stable from her cervical surgeries. AS 23.30.190 provides in part:

> (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 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.
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> (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.
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> (c) The impairment rating determined under (a) of this section shall be reduced by a permanent impairment that existed before the compensable injury. If the combination of a prior impairment rating and a rating under (a) of this section would result in the employee being considered permanently totally disabled, the prior rating does not negate a finding of permanent total disability. (emphasis added).

Compensation is payable for a disability that arises out of the employment,[33] not for the loss of function of a specific body part. Disability, whether total or partial, temporary or permanent, is suffered by the whole employee – although only one part of the employee's body may be permanently impaired by an injury. If the employee's injury results in temporary total disability, then compensation is payable "during the

[33] AS 23.30.010(a).

continuance of the disability. . . . [and] may not be paid for any period of disability occurring after the date of medical stability."[34] When medical stability is reached, temporary compensation is not payable – but permanent compensation may be payable.

AS 23.30.190 directs that calculation of permanent impairment is to be based on the *whole* person – not a schedule of values for arms, fingers, and legs.[35] In this case, the board retained jurisdiction to "consider issues pertaining to PPI for Claimant's cervical spine, chronic pain, and chronic pain-related mood disorder."[36] The board anticipated that there would be further determinations of permanent partial impairment. All impairment ratings must be combined and converted to the percentage of impairment to the whole person in a single rating, which is payable in a single lump sum. Until the appellee has received a true "whole person" rating of her permanent partial impairment, the single lump sum of PPI is not payable.[37]

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[34] AS 23.30.185.

[35] This represents a departure from the scheduled injury method of calculating permanent partial disability formerly found at AS 23.30.190, that established a fixed number of weeks for loss of use of certain limbs and a catchall "unscheduled" category for other injuries based on loss of earning capacity. *See Hewing v. Alaska Workmen's Comp. Bd.,* 512 P.2d 896, 898-99 (Alaska 1973). The original Senate Bill No. 322 introduced in 1988 at section 29 repealed AS 23.30.190 and reenacted it with a provision establishing permanent partial impairment compensation based on a complex adjustment formula between the impairment rating under the American Medical Association Guides to the Evaluation of Permanent Impairment and the maximum compensation amount. In the House CS for CS for Senate Bill No. 322 (Judiciary), the adjustment formula in section 29 was dropped and the maximum reduced, so that the impairment rating was converted to a whole man percentage and multiplied by the maximum amount; this was the version adopted in 34 ch 79 SLA 1988.

[36] *Pamela Anderson,* Bd. Dec. No. 09-0097 at 99.

[37] This does not bar an employer from voluntarily advancing lump sums against the ultimate PPI rating when it is known that the ultimate PPI rating will be larger, or the parties from reaching agreements regarding payments of PPI. But, the question here is whether the board may order an employer to pay PPI concurrent with TTD. Many of the reasons expressed by the Supreme Court in *Smith vs. CSK Auto, Inc.*, 204 P.3d 1001, 1011-12 (Alaska 2009), disfavoring approval of settlements waiving permanent disability compensation before medical stability is reached apply to

There will be occasions, as AS 23.30.180(a) recognizes, when PPI is paid and the employee is subsequently found to be permanently, totally disabled. In such cases, the permanent total disability benefits must be reduced by the amount of the permanent partial disability (or PPI) award, adjusted for inflation.[38] Delaying the payment of PPI until the entire effects of the injury may be rated, instead of ordering the payment of PPI based on piecemeal ratings during a prolonged period of temporary disability, reduces the need for such reductions, and avoids the possibility that an employee, who is finally determined to be permanently, totally disabled faces a reduced benefit to repay lump sums long since spent. It discourages ratings separated by years and disputes that arise as ratings are adjusted from edition to edition of the Guides to the Evaluation of Permanent Impairment.

This is not to say that the board could not determine whether the employee had sustained a larger impairment if the parties submitted the dispute to the board. However, where the board finds, as it did here, that there will be further impairment ratings in the foreseeable future, the calculation of PPI based solely on impairment of one body part is premature, and the resulting PPI for the injury will necessarily not be paid, as it must be, in a *single lump sum*. Thus, the determination of entitlement to a higher PPI amount should not have been accompanied by an order to pay the PPI award concurrent with the order to pay TTD, during participation in the reemployment process, or when additional ratings for the same injury are foreseeable.

b. The application of a presumption of medical instability.

The board reasoned that the employee is entitled to a presumption that she is not medically stable.[39] The board required the employer to produce substantial evidence to rebut this presumption. The board held that medical stability is reached "when there is no longer a *reasonable expectation additional medical care or treatment*

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payments of PPI before the complete impairment is known and the employee's injury is fully medically stable.

[38] AS 23.30.180(a).

[39] *Pamela Anderson,* Bd. Dec. No. 09-0097 at 73.

will result in objectively measurable improvement."[40] Thus, the board required the employer to produce substantial evidence that there is no reasonable expectation that additional medical care will result in objectively measurable improvement, instead of evidence that would demonstrate an absence of objectively measurable improvement for 45 days.

The appellants argue the board erred because it shifted the burden of proof to the employer, contrary to AS 23.30.395(27) and *Municipality of Anchorage v. Leigh*.[41] The appellants argue that because the appellee never overcame the presumption of medical stability, the board's award of TTD should be reversed. The appellee does not respond directly to the appellants' argument regarding a "presumption of medical instability," but argues instead that the board had sufficient evidence to find that she was not medically stable.

The presumption in AS 23.30.120(a)(1) is a presumption that "the claim comes within the provisions of this chapter." Once raised, the presumption in § .120(a)(1) shifts the burden of producing evidence to the employer, but it does not shift the burden of proving facts to the employer.[42] Once the presumption is overcome, the employee must prove all the facts needed to establish the elements of his or her claim by a preponderance of the evidence.

Here the employee made a claim for TTD and PPI. There are shared elements of both claims: that the claimant was an employee of the defendant employer and that she was injured in the course of and arising out of her employment. There are distinct differences between the elements of the claims too. For TTD, she must establish (1) that she is disabled, (that is, she is incapable because of the injury to earn wages she was earning in the same or other employment); (2) that her disability is total; (3) that her disability is temporary; and (4) that she has not reached the date of medical

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[40] *Id.* at 72 (emphasis added).

[41] 823 P.2d 1241 (Alaska 1992).

[42] *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145, 1150 (Alaska 1989); *Meek v. Unocal Corp.*, 914 P2d 1276, 1280 (Alaska 1996); *Temple v. Denali Princess Lodge*, 21 P.3d 813, 816 (Alaska 2001).

stability.[43] For PPI, she must establish that (1) she is not totally disabled; (2) that she has an impairment as a result of the injury; (3) that the impairment is permanent and ratable; and (4) that the impairment rating was made pursuant to statute.

In order to overcome the presumption in AS 23.30.120(a)(1), it is not necessary to produce substantial evidence to rebut every element of a claim. For example, an employer may rebut a claim for TTD by producing evidence that the claimant was not an employee, that the claimed injury did not occur in the course of employment, or that the claimant's disability is not total because she has returned to part time work. Or, because one element of a claim for TTD is that the date of medical stability has not been reached in the period claimed, the employer may produce substantial evidence that the date of medical stability has been reached.

To do this, the employer is aided by a counter-presumption found at AS 23.30.395(27), which states that "medical stability *shall be presumed* in the absence of objectively measurable improvement for a period of 45 days." (emphasis added). The effect of § .395(27) "is to restrict the application of the presumption provided for in AS 23.30.120."[44] Thus, if the employer produces substantial evidence of no "objectively measurable improvement for a period of 45 days," the employer has rebutted the presumption in favor of the claim for TTD and established a counter-presumption that the date of medical stability has been reached. The employer does not need to produce substantial evidence that there is no reasonable expectation that additional medical care will result in objectively measurable improvement if the employer raises the

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[43] AS 23.30.185 bars the payment of compensation for temporary total disability compensation "for any period after the date of medical stability," but medical stability may be reached "notwithstanding the possibility of improvement . . . resulting from the passage of time," AS 23.30.395(27), improvement from the effects of the injury that is not objectively measurable, or an increase in wage earning capacity without improvement from the effects of the injury. In short, "temporary" is not interchangeable with "medically stable" because "medically stable" is a quality applied to the effects of injury, not disability.

[44] *Municipality of Anchorage v. Leigh*, 823 P.2d at 1246.

counter-presumption of medical stability through evidence of an absence of objectively measurable improvement for a period of 45 days.

Once the employer has produced substantial evidence to overcome the presumption in favor of the claim for TTD, the claimant must prove all elements of the claim by a preponderance of the evidence – except that, if the employer has raised the counter-presumption of medical stability, the claimant must first produce clear and convincing evidence that she has not reached the date after which "further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time."[45] As the Supreme Court noted in *Municipality of Anchorage v. Leigh*, this should not be difficult:

> [T]he [employee's] treating physician should have no difficulty offering an opinion on whether or not further objectively measurable improvement is expected. The 45 day provision merely signals when that proof is necessary. The alleged difficulty in proving the nonexistence of medical stability simply fades when viewed in light of the proof actually required.[46]

But, if "a prediction of medical stability that turns out to be incorrect cannot provide substantial evidence to rebut the presumption"[47] favoring a claim of TTD, it is also true that a general hope for improvement that turns out to be incorrect cannot provide clear and convincing evidence that the employee is not medically stable. Thus, when examining past predictions that objectively measurable improvement is reasonably expected with medical treatment, the board must determine if the objectively measurable improvement occurred with the treatment.

By refusing to acknowledge the operation of the counter-presumption, the board failed to apply the correct legal analysis to Anderson's TTD claim. The board's reasoning eliminates the legislature's directive that "medical stability shall be presumed

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45 AS 23.30.395(27).

46 823 P.2d at 1246.

47 *Burke v. Houston NANA, L.L.C.*, 222 P.3d 851, 862 (Alaska 2010).

in the absence of objectively measurable improvement for a period of 45 days" and its requirement of clear and convincing evidence to rebut this presumption.[48] The board's adoption of a presumption of medical instability that ignores the counter-presumption of medical stability and the shifting burden of production is an error of law.

The board also failed to acknowledge that AS 23.30.395(27) provides that medical stability may be reached notwithstanding the need for additional medical care, such as medication, to treat a chronic condition. Thus, the board's rejection of Dr. Bald's opinion as substantial evidence that the employee's condition was medically stable *because* he considered it reasonable to continue narcotic medications for treatment of chronic pain[49] is error because it improperly equates the need for additional medical care, or the possibility of future need for treatment, with an absence of medical stability.

The board's subsequent alternate analysis, based on an assumption that the employer had overcome the presumption of compensability, suffers from similar faults. The board determined that the employee proved by a preponderance of evidence that she was not medically stable in July 2007, but it failed to require the employee to produce clear and convincing evidence of objectively measurable improvement through January 2009 or a reasonable expectation of objectively measurable improvement beyond that date. The commission examines the content, not the weight, of the evidence the board relied on when it found that Anderson was not medically stable.

The commission does not disturb the board's opinion that Dr. Nassar is "well-informed, credible, and convincing"[50] nor does the commission weigh the evidence. Dr. Nassar's deposition and chart notes did not contain a record of objectively measurable improvement over the two years he had been treating her.[51] His statement that he is "hopeful" that her chronic pain and depression could improve with ongoing

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[48] AS 23.30.395(27).

[49] *Pamela Anderson*, Bd. Dec. No. 09-0097 at 74.

[50] *Id.* at 78.

[51] The board's decision states that Dr. Nassar said Anderson was medically stable in April 2008, *id.* at 78.

treatment[52] is a statement of his hope that Anderson's mood disorder could improve, not a statement of reasonable expectation that she will show objectively measurable improvement as a result of his treatment. He agreed that her chronic pain, sleep, and depression would improve with treatment,[53] but he did not describe the treatment or the objective measures of the improvement he expected. Because he referred to treatment of sleep problems, which he did not provide, it is not clear that he was always referring to his treatment when agreeing with Anderson's counsel. He states that counseling is "helpful,"[54] and that "if there is a significant amount of stability in her medical condition, we do offer several group therapy oriented endeavors . . . so that might be something we can explore in the future."[55] But, when speaking of the treatment period from July 2, 2007, through January 2, 2009, he observed, Anderson's condition "has waxed and waned, and there have been some times where she has been able to participate, but then based on exacerbation of her pain problems and her physical condition, there have been times when there have been some setbacks as well."[56]

Taken together, the content of Dr. Nassar's testimony is not clear and convincing evidence that objectively measurable improvement from the effects of the injury is reasonably expected from further medical treatment. He did not testify that Anderson had improved over months of his treatment. While he agrees she will improve with treatment, he did not say that the improvement would be objectively measurable. While a physician need not use specific words, when the statute requires objectively measurable improvement, the physician does not testify to objectively measurable improvement in the past, and he is not asked if the improvement predicted with medical treatment will be objectively measurable, then the lack of a prediction of future

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52 Nassar Dep. 39:6-12.

53 *Id.* at 16:25 – 17:10.

54 *Id.* at 19:4.

55 *Id.* at 19:5-9.

56 *Id.* at 14:1-5.

objectively measurable improvement from the same regimen of treatment is too important to ignore.[57] The commission concludes that Dr. Nassar's testimony does not meet the standard set in *Municipality of Anchorage v. Leigh*[58] or *Thoeni v. Consumer Electronic Services*.[59] Therefore, it could not overcome the counter-presumption of medical stability.

The appellants argue that Dr. Chandler's testimony cannot overcome the counter-presumption of medical stability because it is inherently contradictory. The Supreme Court has held that contradictory testimony does not amount to clear and convincing evidence.[60] Because Dr. Chandler referred Anderson for a rating of her lumbar spine, the appellants argue he considered her medically stable. The appellee argues Dr. Chandler testified that after Anderson's neck surgery, he anticipated that "she will significantly improve."[61]

The appellants are correct that Dr. Chandler's statements regarding the appellee's low back are equivocal. He states, in response to counsel's question if her chronic pain is medically stable, "Not from the standpoint of going back to work, and she is still changing this process because of all the medications she's on. Now, stability

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[57] When medical evidence offered to rebut the presumption [of compensability] is uncertain or inconclusive, the presumption of compensability is not overcome. *Bouse v. Fireman's Fund Ins. Co.,* 932 P.2d 222, 235 (Alaska 1999). Usually, "clear and convincing" is used to describe a burden of proof higher than a preponderance; that is, the proponent of the facts must induce "a belief [in the minds of the triers of fact] that the truth of the asserted facts is highly probable." *De Nuptiis v. Unocal Corp.,* 3 P.3d 272, 275 n.3 (Alaska 2003). The presumption of compensability is overcome by "substantial" evidence, (evidence a reasonable mind might as adequate to reach a conclusion, *Miller v. ITT Arctic Servs.,* 577 P.2d 1044, 1046 (Alaska 1978)). The counter-presumption of medical stability is overcome by a production of "clear and convincing" evidence, that is, evidence that could induce in a reasonable mind the belief that it is highly probable the asserted fact is probably true.

[58] 823 P.2d at 1246.

[59] 151 P.3d 1249, 1256 (Alaska 2007).

[60] *Fred Meyer of Alaska, Inc. v. Bailey*, 100 P.3d 881, 889 (Alaska 2004) (holding it was not error by the Superior Court to find contradictory testimony was not clear and convincing evidence of good faith).

[61] Chandler Dep. 30:7.

by definition of the state is no change up or down for a period of time, and so that by definition is what it is. In my opinion, she's improving significantly right now *because of her neck.*"[62] Asked again about whether he anticipates additional medical improvement of her chronic pain and her lumbar spine with the clinic's treatment, Dr. Chandler responds:

> Again, the answer to that is maybe, because I don't know where we are from the prospective of her lumbar spine because her cervical spine has been so overriding for the last six months to a year that the lumbar spine has taken a second position to this. Now that her surgery is completed . . . and able to participate in physical therapy and back to work program, I think that she will significantly improve, and her back will probably be the limiting factor, not her neck. And at that time we have to make a determination as to what we have to do, if anything, to better the lumbar spine. But right now, I can't tell you where we stand in that because we're still just catching back to zero.[63]

Pressed again by counsel whether he thought Anderson had "not yet reached full recovery as far as her lumbar spine condition is concerned," he responded,

> The judgment on that is still out to lunch, because she may be maximized at this time and be able to function. And if she can, and go back to work, we should not do anything more. But that decision has to come with her ability.
>
> . . .
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> . . . . [W]e're going to deal with the lumbar spine again as the limiting factor. How much that is going to limit her now that her neck works, I don't know. But if she can function and go back to work, we should not do anything more.[64]

Asked to clarify whether he was referring to the chronic pain or the lumbar spine, he said,

> The chronic pain component is the limiting factor and it will be coming from the lumbar spine. Chronic pain . . . will be with her forever. Whether she has the ability to cope with this and

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62 Chandler Dep. 29:10-16.

63 Chandler Dep. 29:24 – 30:13.

64 Chandler Dep. 31:7 – 32:8.

> function without medications or with medications in a working situation is yet to be determined.[65]

Thus, while Dr. Chandler characterized Anderson's current condition as "doing quite well from her [neck] surgery . . . probably the best now we've had in a long time,"[66] he was much less definite about the prospect of objectively measurable improvement of Anderson's lumbar spine and he did not know if she would make improvement in her chronic pain. This is not evidence that could persuade a reasonable mind that it was highly probable that there was a reasonable expectation of objectively measurable improvement with further medical treatment.

On the other hand, Dr. Chandler's discussion of the benefits to be obtained by medical treatment of Anderson's sleep disorder, its relationship to the high doses of narcotics needed to control pain from her lower back injury, and the increased physical function he expected, demonstrated his attention to objective measures of improvement and an affirmative statement that she should be treated for the sleep disorder. Although Dr. Chandler also does not use the words written in the statute, the commission concludes that Dr. Chandler's testimony on this point is sufficiently affirmative and complete to meet the standard of *Municipality of Anchorage v. Leigh* and overcome the counter-presumption of medical stability. Because the board had sufficient evidence in Dr. Chandler's testimony to support a finding that the appellee was not medically stable from this effect of the injury, the commission does not vacate the board's decision and remand, despite the flaws in the board's analysis and its error applying the law.

c. The improper inferences drawn from a witness's testimony.

The appellants assert that the board's failure to afford the employer a fair consideration of its evidence is evident in this comment concerning Alice Thurman's testimony, "Ms. Thurman provided no explanation why the adjuster notes beyond January 26, 2004 were not produced." The appellants argue that this comment reveals

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65 Chandler Dep. 32:9-17.

66 Chandler Dep. 11:20-21.

the board believed that the adjuster improperly withheld information and that therefore the board did not give the testimony that Anderson failed to report neck pain or neck injury to Thurman when interviewed on June 25, 2003, any weight.[67] The appellants argue that this error and other unfair characterizations of their witnesses' testimony in the board's decision reveal the board did not engage in reasoned decision-making, but prejudged the case. The appellee concedes that the employer produced all the adjuster notes in discovery, but argues that the employer failed to produce any evidence of bias or prejudgment.

The commission concludes that the inference the board drew from Thurman's testimony was improper. Thurman was not asked if the notes she made were all the adjuster notes in the employer's insurer's files. She was not asked to identify any notes,[68] or why the notes did not extend past January 26, 2004, so she cannot have "failed" to explain their absence. The board's comment indicates the board assumed it was due, and failed to receive, an explanation of an event that the board never established occurred. The belief that a witness improperly concealed information from the board and the opposing party is likely to taint the board's assessment of the witness's credibility.

However, the board's comments respecting Thurman's testimony do not demonstrate more than the kind of error apt to develop when inadequate time is provided to present witness testimony and exhibits in an orderly manner. The board may limit the time to present witness testimony,[69] but the pressure to reduce the testimony to the barest essentials in order to meet allotted time inevitably results in gaps in the evidence or foundation. The board's hearing began at 9:09 a.m., and the

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[67] *Pamela Anderson*, Bd. Dec. No. 09-0097 at 85, n.448.

[68] Counsel for the employer stated in hearing that she had previously filed the document she handed to the board at the beginning of Ms. Thurman's testimony, but there is no identification of the document in the transcript. Hrg. Tr. 86:17-21.

[69] *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993) ("The Board may place reasonable time limits on testimony in order to manage its own docket.").

first witness was Anderson, whose testimony did not begin until about 9:45 a.m. She was interrupted at 10:00 a.m. for presentation of the claimant's medical expert, which lasted until 10:25 a.m. After a short break, testimony resumed with the claimant's second witness, her daughter, followed by the claimant again. Thurman began her testimony after 11:11 a.m. The board went off record after hearing closing arguments and questions from the board members at 11:39 a.m., so the full allowance of time for presentation of witnesses was less than one hour and forty-five minutes, including breaks, in a case that presented serious and complex evidentiary disputes. The appellants do not argue that the pressure of time denied them the opportunity to present evidence or afford a fair consideration of the evidence, so the commission does not decide the issue in this appeal. However, because the board's assessment of Thurman's credibility reflects an improper inference bearing on credibility, the commission must remand this case to the board for reconsideration of Thurman's testimony.

d. The insufficient articulation of the board's reasoning and errors of analysis regarding the medical evidence of the neck injury.

The appellants argue that the board applied an improper standard to the evaluation of medical evidence regarding Anderson's claim that she injured her neck as a result of the incidents on April 4, 2003, and May 22, 2003. Specifically, the appellants assert the board improperly stated that "A longstanding principle we must include in our analysis is that inconclusive or doubtful medical testimony must be resolved in the employee's favor."[70] The appellants also argue the board impermissibly required the employer to disprove the employee's claim. Finally, the appellants complain that the board unfairly mischaracterized the medical evidence.

The appellee responds that the board did not inappropriately weigh the evidence. First, she argues that the appellants fail to identify a point where the board resolved inconclusive medical evidence in Anderson's favor. Second, she argues that

[70] Br. of Appellants 28 (quoting *Pamela Anderson*, Bd. Dec. No. 09-0097 at 70).

the board gave the testimony of Anderson and Dr. Chandler greater weight, and this is a determination that is for the board alone to make.

In its statement of the second step of the three-part presumption analysis, the board wrote:

> An employer may rebut the presumption of compensability by presenting a qualified expert who testifies the employee's work was probably not a substantial cause of the disability. However, medical evidence does not constitute substantial evidence if it simply points to other possible causes of an employee's need for medical treatment or disability, without ruling out work-related causes. In determining whether the evidence offered is substantial we cannot abdicate our fact-finding role by relying upon inconclusive medical evidence to overcome the presumption. Medical evidence based on speculation is not substantial evidence to rebut the presumption of compensability. A longstanding principle we must include in our analysis is that inconclusive or doubtful medical testimony must be resolved in the employee's favor.[71]

The board, applying the presumption analysis, concluded that:

> Viewing the Employer's evidence in isolation at this stage of the presumption analysis, we find, as above-stated, Employer has rebutted the presumption of continuing compensability for Claimant's cervical spine complaints. We find Dr. Bald's opinion Claimant's early cervical symptoms "resolved relatively quickly and…redeveloped more recently as a direct … and…exclusive [result] of her multilevel degenerative spondylosis," and not the work injury, provides substantial evidence rebutting the presumption.[72]

Thus, because Dr. Bald's report is sufficient to overcome the presumption of compensability, it would, if the board found it was more persuasive, be sufficient to deny the claim. However, at the third stage of the presumption analysis, the board went on to reject the opinions of Dr. Bald and Dr. Blackwell because they failed to eliminate or exclude the employment as a substantial factor in bringing about a

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[71] *Pamela Anderson*, Bd. Dec. 09-097 at 69-70 (footnotes omitted).

[72] *Id.* at 82, citing Dr. Bald's EME Report at 13.

disability due to a neck injury.[73] The board also relied on various inconsistencies it found in Dr. Bald's, Dr. Peterson's, and Dr. Blackwell's reports to find that they were lacking in credibility, despite their sufficiency to overcome the presumption.

The board's analysis of the evidence contains subtle errors. First, the board incompletely stated the principle that, at the second stage of the presumption analysis, inconclusive or doubtful medical testimony must be resolved in the employee's favor. The principal arises from the operation of the presumption, in which inconclusive medical testimony, coupled with employee testimony, is sufficient to raise the presumption. If the inconclusive medical testimony is unopposed, then the absence of more conclusive or complete medical testimony will not defeat the presumption. It is not correct to say, as the board did here, simply that all incomplete or inconclusive medical testimony is "resolved in the employee's favor." Here, the principle had no application because, as the board recognized, the medical opinions offered in support of the claim were opposed by other medical opinions. Therefore, it is incorrect to state that incomplete or inconclusive medical testimony should be resolved in the employee's favor in this case.

Second, the board's statement that "No one disputes Claimant had a preexisting, asymptomatic degenerative cervical condition"[74] reveals a key flaw in its analysis of the medical opinion evidence. Whether Anderson had an asymptomatic degenerative cervical condition was precisely what Lowe's disputed. Lowe's emphasis on the pre-injury reports of neck pain, and the inconsistencies in Anderson's testimony and medical records before and after the injury, was designed to show that Anderson's claims (that her degenerative spondylosis produced no symptoms prior to the injury and that she continually had symptoms afterwards), were not true. The board elsewhere states that it places substantial weight on Anderson's "credible testimony" that her condition was "asymptomatic until the . . . injury, and, following the work injury never resolved."[75]

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73 *Id.* at 87.

74 *Id.* at 86.

75 *Id.* at 83.

This statement suggests that the board understood that the facts were disputed and that the board found that Anderson's testimony was more persuasive. Nonetheless, the statement that "no one disputes" that Anderson had no symptoms before the work injury, and continual unresolved symptoms afterward, coupled with its measurement of the weight of the medical evidence against a standard of acceptance of these facts, signifies the board failed recognize the fundamental disputed issue before it.

The scope of the error is increased by the board's errors in reading Dr. Chandler's testimony. The board found Dr. Chandler's opinion (that Anderson reported pain in July 2003 and her neck pain never resolved) credible because he is a pain management specialist and Anderson's attending physician.[76] But, Dr. Chandler actually testified that Anderson reported neck pain in July 2003, and that she never reported that her neck pain had resolved – he did not say that she told him her neck pain had never resolved.[77] In effect, the board equates the statement "My son never told me he drove my car" with "My son never drove my car." When the question is "Was your son driving your car all last year?" the difference in content is significant. Dr. Chandler's experience in pain management and his status as Anderson's attending physician cannot supply missing content.

Third, the board stated at the third stage of its analysis that Dr. Blackwell failed to "credibly contend [Anderson] would have suffered her cervical symptoms and disability at the same time, in the same way, and to the same degree, regardless of the work injury."[78] The board's second independent medical examiner need not "contend" anything; he is not a party to the action and he is not in a competition to be proved right. Requiring him to contend against other opinions places a burden of proof on the physician that is properly Anderson's burden. The board rejected Dr. Blackwell's opinion because he "fails to eliminate the work injury as a substantial factor in causing

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76 *Id.* at 85.

77 Chandler Dep. 38:21 – 39:1.

78 *Pamela Anderson,* Bd. Dec. No. 09-0097 at 87.

Claimant's cervical symptoms at the time and to the degree they occurred."[79] But, at page 28 of his report, Dr. Blackwell responds "No" to the board's question asking if the work injuries were a substantial factor contributing to her current cervical and/or chronic pain and/or symptoms.[80] The statement quoted by the board is followed by this, "The urgent need for surgery to the cervical spine is the cord compression and that is a function [of] the chronic disease *not the effects of the subject work injury*."[81] This is a plain statement that the need for surgery was not due to the effects of the work injury. Dr. Blackwell then eliminated the mechanism of the work injury as something that could cause symptoms.[82] This is not equivalent to applying a distinction between an injury that causes a "permanent" aggravation of a progressive condition and an injury that causes a temporary aggravation of symptoms, as in *DeYonge v. Nana/Marriott*.[83] Dr. Blackwell's opinion points to the absence of a physical mechanism in Anderson's account of her activity that could have brought about any injury, temporary or permanent.

Therefore, notwithstanding the extensive discussion of the weight it assigned the medical evidence, the commission is uncertain how the board assessed credibility in its decision. As the commission said in *Strong v. Chugach Elec. Ass'n*,[84]

> Credibility as to a witness's testimony may mean that the board finds the person testified in a way that makes the testimony worthy of belief. A credible witness is one whose testimony is believable. . . . Credible evidence is evidence that is "worthy of belief, trustworthy evidence.[85]

Thus, while credibility in the first sense is both absolute (meaning truthful or untruthful) and relative (meaning more or less reliable), credibility in the second sense is usually

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79 *Id.*

80 R. 1976.

81 R. 1977 (emphasis added).

82 *Id.*

83 1 P.3d 90, 96 (Alaska 2000).

84 Alaska Workers' Comp. App. Comm'n Dec. No. 128 (Feb. 12, 2010).

85 *Id.* at 12.

only relative, because the board need not often decide if the expert truthfully related his opinion, it must decide if the opinion is more worthy of reliance than another. When the board makes a finding of credibility of testimony of a witness who testified before the board, it is binding on the commission as a matter of law,[86] the board's finding of the weight given to medical evidence is conclusive and entitled to the same deference given a jury verdict in a civil trial.[87]

The board's review of the medical evidence is confusing because it appears at some points the board focused on the absolute credibility of the rejected medical opinion provider rather than the content and relative reliability of the physician's opinion. The board suggests, for example, that the lack of a full medical record to review is a reason to find one physician lacks credibility, without explaining why the same factor is of no importance in another opinion. The board explained in detail the faults it found in the evidence it did not rely upon but did not explain why it found Dr. Delamater's opinion more credible than other opinions. The board gave greater weight to Dr. Chandler's opinion that Anderson's treatment by Dr. Leach in May and June 2004 was evidence that her cervical symptoms persisted (from April 2003 through at least June 2004), consistent with Anderson's testimony. But, Dr. Chandler also testified that he would have expected Anderson to have pain in her neck prior to the injury, which is not consistent with Anderson's testimony. When assigning relative reliability to medical opinion evidence, the board is not giving fair consideration to the evidence if it rejects one opinion for a particular quality that is equally shared by the adopted evidence or when the board does not give close attention to the content of the opinions before it.

The board's analysis of the evidence was built upon error in identifying the material disputed fact ("No one disputes [Anderson] had a preexisting, asymptomatic degenerative cervical condition"); in stating the law regarding incomplete or inconclusive medical evidence; in suggesting physicians are obliged to argue or prove

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[86] AS 23.30.128(b).

[87] AS 23.30.122.

their opinions, rather than that the employee must prove her claim once the presumption was overcome; and, in failing to reason from the actual content of the opinion evidence, especially on points of material dispute. Taken together, this chain of errors persuades the commission that the board failed to give fair consideration to the argument and evidence presented. When the steps in the board's analysis built on error are removed, the board's reasoning is sufficiently weakened that its conclusion must be vacated.

However, the commission also concludes that there is sufficient evidence in the record that the board could rely on, with fair consideration of the evidence and sound reasoning, to find Anderson's claim for compensation and medical benefits due to a neck injury is compensable, as well as evidence sufficient to deny the claim. The commission will not usurp the board's role as finder of fact. While a remand is necessary for the reasons set forth in this section and the preceding section, it is not necessary for the board to hold another hearing and take additional evidence.

6. Conclusion.

The commission AFFIRMS the award of TTD in Order paragraph 1, MODIFIED as follows: "Employer shall pay Claimant temporary total disability compensation pursuant to AS 23.30.185 from July 1, 2007, until she attains medical stability from the effects of her compensable injury, with credit applied toward this award for payments previously paid as PPI or .041(k) benefits, and interest on unpaid TTD at the statutory rate." The commission REVERSES the board's order insofar as it directs payment of the PPI award contained in Order paragraph 2 concurrently with payment of TTD, without disturbing the board's award of PPI and MODIFIES Order paragraph 2 to read: "Claimant is entitled to permanent partial impairment based on a rating of not less than 34%. When the Claimant is no longer entitled to temporary total disability compensation under paragraph 1, Employer shall pay Claimant $60,180.00, pursuant to AS 23.30.190." The commission VACATES the award of compensation and medical benefits related to neck surgery in the board's Order paragraphs 1 and 3 and associated medical expenses listed in the board's order. The commission REMANDS the claim for compensation and benefits related to neck surgery for rehearing on the present record.

The commission also instructs the board on REMAND to reconsider Thurman's testimony. The commission does not retain jurisdiction.

Date: *17 Mar 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

signed
David W. Richards, Appeals Commissioner

signed
Stephen T. Hagedorn, Appeals Commissioner

signed
Kristin Knudsen, Chair pro tempore

APPEAL PROCEDURES

This is a final decision and order on this appeal of the board's decision awarding compensation and medical benefits to Pamela Anderson. The effect of this decision is that the commission affirmed and modified part of the board's decision awarding TTD compensation, reversed the board's order directing immediate payment of the PPI award, without disturbing the amount of PPI awarded; and remanded (sent back) the case to the board to rehear Ms. Anderson's claim for benefits and compensation for a neck injury and cervical surgery. The board was instructed not to take additional evidence, but decide the claim again using the same evidence. The commission did not retain jurisdiction. This decision becomes final on the 30th day after the commission mails or otherwise distributes this decision, unless proceedings to reconsider it or seek Supreme Court review are instituted. Look in the box on the last page to see the date of distribution.

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

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

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review under Appellate Rules. If you believe grounds for review

exist, you should file your petition for review within 10 days after the date this decision was distributed. See the clerk's box below for the date of distribution.

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

If you wish to appeal or petition for review to the Alaska Supreme Court, you should contact the Alaska Appellate Courts **immediately**:

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

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

RECONSIDERATION

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

I certify that, with the exception of changes made in formatting for publication and correction of typographical errors this is a full and correct copy of the Final Decision No. 130 issued in the matter of *Lowe's HIW, Inc. v. Pamela Anderson,* AWCAC Appeal No. 09-018, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 17, 2010.

Date: *3/23/10*

signed

B. Ward, Appeals Commission Clerk