Alaska Workers' Compensation Appeals Commission

State of Alaska, Appellant, vs. Jennifer D. White and John P. Shannon, D.C., Appellees.	Final Decision Decision No. 291 September 9, 2021 AWCAC Appeal No. 20-022 AWCB Decision No. 20-0108 AWCB Case No. 201817258

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 20-0108, issued December 4, 2020, at Anchorage, Alaska, by southcentral panel members Ronald P. Ringel, Chair; Nancy Shaw, Member for Labor; and Robert C. Weel, Member for Industry.

Appearances: Treg R. Taylor, Attorney General, and Adam R. Franklin, Assistant Attorney General, for appellant, State of Alaska; Jennifer D. White, self-represented appellee, assisted by non-attorney, Barbara Williams; John P. Shannon, D.C., self-represented appellee.

Commission proceedings: Appeal filed December 21, 2020, with motion for stay; motion for stay granted January 22, 2021; briefing completed June 24, 2021; oral argument held August 19, 2021.

Commissioners: James N. Rhodes, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Jennifer D. White was injured while working for the State of Alaska (SOA) and began treatment with John P. Shannon, D.C. (Dr. Shannon). SOA disagreed with some of Dr. Shannon's treatment and refused to pay his bill. Dr. Shannon filed a workers' compensation claim (WCC) and a hearing was held on October 29, 2020, before the Alaska Workers' Compensation Board (Board). SOA argued that the treatment provided by Dr. Shannon was outside the course and scope of chiropractic treatment and, thus,

not compensable. Dr. Shannon contended the treatment was permissible for chiropractors and Ms. White testified the treatment helped her return to work. The Board found the treatment reasonable and necessary medical treatment.[1] SOA timely appealed to the Alaska Workers' Compensation Appeals Commission (Commission) which heard oral argument on August 19, 2021. The Commission now affirms the Board's decision.

2. Factual background and proceedings.[2]

Ms. White worked for SOA at the Alaska Psychiatric Institute as a psychiatric nurse assistant. On December 1, 2018, she was assaulted by a patient.[3] After the injury, Ms. White was taken to the emergency room at Alaska Regional Hospital, where she was examined and discharged with instructions to follow up with her primary care provider.[4] She began treating with Dr. Shannon, whose treatment plan included trigger point injections with a substance identified as Sarapin.[5] SOA objected to the treatment and refused to pay Dr. Shannon's bills for the injections.[6]

Previously, on May 18, 2006, R. Clark Davis, D.C., Secretary of the Alaska Board of Chiropractic Examiners (ABOCE), wrote to Wayne Weaver, a workers' compensation insurance adjuster, regarding a controversion notice Dr. Shannon had received. Dr. Davis stated, "After reviewing the Alaska State Statutes and Regulations regarding chiropractic practice during the April 14, 2006 meeting, the board found that there are no statutes or

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[1] *Jennifer White and John P. Shannon, D.C. v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 20-0108 (Dec. 4, 2020) at 13 (*White II*). *Jennifer White and John Shannon, D.C. v. State of Alaska*, Alaska Workers' Comp. Bd. Dec. No. 20-0063 (July 22, 2020) (*White I*), an interlocutory decision and order, is not part of this appeal.

[2] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[3] R. 908.

[4] R. 759-778.

[5] *White II* at 3, No. 7.

[6] *Id.*, No. 11.

regulations, which would prohibit utilizing injectable nutriceuticals in chiropractic practice."[7]

On January 20, 2017, the ABOCE issued a position statement on injectable nutrients by chiropractors. In setting out the history of the issue, the statement says:

> The issue of chiropractic use of injectable nutrients has been discussed by the Board since 2006 when Dr. John Shannon, Chiropractic Physician licensed in Alaska, first came to the Board for approval of this treatment method. Since that time, there has been at least one Board letter allowing the procedure and an opinion from the State Ombudsman's office stating that the law is vague enough to allow the treatment.[8]

On December 17, 2018, Thomas Bay, an Occupational Licensing Examiner with the Alaska Division of Corporations, Business, and Professional Licensing, replied to an inquiry from a workers' compensation insurance adjuster asking whether the treatments offered by Dr. Shannon were within the scope of chiropractic practice. Mr. Bay had sought the opinion of Brian E. Larson, D.C., Chair of the ABOCE, and included Dr. Larson's response in his reply. Dr. Larson stated:

> Chiropractic has long held the value of vitamins, minerals, herbs, homeopathics and other naturally occurring extracts and substances that do not require a DEA license are within the scope of chiropractic license . . . . The vehicle of delivery is really the only question here. Neither chiropractic statute or regulation discusses the vehicle of administering these substances. It is the opinion of the board, consistent with the statute, that with appropriate training, injection of serapin into a joint is within the scope of chiropractic practice. Additionally, I have reviewed Dr. Shannon's curriculum vitae and find he is exquisitely trained, much of it by medical educators, in all areas pertaining to nutrition and natural substances, and joint injection.[9]

Dr. Shannon treated Ms. White with the injections on December 12, 2018, January 2, 2019, January 16, 2019, and January 30, 2019.[10] The Board found that

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7 R. 79.

8 R. 230-231.

9 R. 75-76.

10 Exc. 105-106, 107-108, 109-110, 111-112.

although Dr. Shannon's chart notes were handwritten and included many medical abbreviations, the notes were legible.[11]

SOA sent Dr. Shannon explanations of benefits (EOB) dated March 7, 2019, and March 8, 2019, for four dates of service stating payment was denied because, "The billed service falls outside the provider's scope of practice or specialty."[12] On March 21, 2019, Dr. Shannon filed a claim for medical costs and a penalty, contending he had not been paid $1,521.09 for treatment rendered to Ms. White.[13] The Board concluded EOBs are not controversions.[14]

On April 3, 2019, SOA filed its answer to Dr. Shannon's claim stating that, "In addition to other services, Dr. Shannon injected [Ms. White] with a substance, Sarapin, on 12/12/18, 1/2/19, 1/16/19 and 1/30/19." SOA contended the charges had been properly denied because Sarapin requires a prescription and injections fall outside the scope of practice for chiropractors in Alaska.[15] The Board found SOA did not file a controversion notice denying payment of Dr. Shannon's bills for Sarapin injections.[16]

On April 16, 2019, SOA filed a controversion notice denying all benefits because Ms. White had not timely signed and filed releases for medical records. A copy of the controversion was served on Dr. Shannon.[17] This controversion did not deny payment of Dr. Shannon's bills for providing Sarapin injections, nor did it deny the treatment because SOA thought the treatment was outside the scope of practice for a chiropractor.

As evidence, SOA filed a letter dated July 2, 2019, from the U.S. Food and Drug Administration (FDA) to High Chemical Company stating that during an inspection from December 17, 2018, to February 8, 2019, it found that High Chemical Company had failed

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11 *White II* at 3, No. 10.

12 Exc. 4-7.

13 Exc. 1.

14 *White II* at 3, No. 12.

15 R. 53-55.

16 *White II* at 4, No. 14.

17 R. 15.

to conduct appropriate laboratory tests to determine that each batch of Sarapin conformed to specifications, and had failed to provide data to support a two-year expiration date. The letter noted High Chemical Company intended to close the company by May 31, 2019.[18]

On October 6, 2020, Karen G. Meister, with the FDA, responded to an email from SOA's attorney asking about Sarapin. Ms. Meister attached labels for Sarapin and another product, both of which contain sarracenia purpurea. In addition, she stated that both products were now delisted, and the marketing end date for Sarapin was June 10, 2016.[19]

SOA filed some minutes of the ABOCE meetings from February 1, 2019, through August 21, 2020. At the February 1, 2019, meeting, the ABOCE continued a discussion on scope of practice, including the injection of nutrients. Harriet Milks, the assistant attorney general advising ABOCE, was in attendance and opined the current statute did not permit injections. Dr. Larson pointed out that under AS 08.20.100, chiropractors were not limited to chiropractic core methodology, but could also employ ancillary methodology. The December 23, 2019, meeting minutes indicate ABOCE had undertaken a regulations project to provide clarity on the issue. ABOCE also adopted a resolution in support of legislation to allow the injection of medications other than controlled substances. At the June 16, 2020, meeting, Dr. Larson reported that most of the public comments on the proposed regulations were positive. At the August 21, 2020, meeting, Dr. Larson reported that the parts of the regulation dealing with the administration of nutritional substances had been withheld at the Department of Law's request.[20]

The Alaska Workers' Compensation Medical Fee Schedules for 2018 and 2019 both included a provision stating:

> Some surgical, radiology, laboratory, and medicine services and procedures can be divided into two components – the professional and the technical. A professional service is one that must be rendered by a physician or other

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[18] Exc. 186-188.

[19] Exc. 206-208.

[20] R. 219-229, 554-560, 610-615, 566-577.

certified on licensed provider as defined by the State of Alaska working within the scope of their licensure.[21]

The Board noted that trigger point injections are a common treatment for some types of muscular pain.[22] Dr. Shannon testified medical doctors also perform trigger point injections, but use different substances.[23] He prefers Sarapin as it is a natural, plant-based medicine that has no side effects and avoids problems due to the use of opioids.[24]

Ms. White testified the injections she received from Dr. Shannon were beneficial in that they relaxed the muscles enough to allow her to work.[25]

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[26] Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[27] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[28] The weight given to witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[29] The Board's conclusions with regard to credibility are binding on the Commission, since the

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[21] 2018 Alaska Workers' Compensation Medical Fee Schedule at 2; 2019 Alaska Workers' Compensation Medical Fee Schedule at 2.

[22] *White II* at 5, No. 20.

[23] Hr'g Tr. at 48:4-9, Oct. 29, 2020.

[24] Hr'g Tr. at 48:8-9.

[25] Hr'g Tr. at 47:1-5.

[26] AS 23.30.128(b).

[27] *See, e.g., Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994) (*Norcon, Inc.*).

[28] *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007) (citing *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-1189 (Alaska 1984).

[29] AS 23.30.122; AS 23.30.128(b).

Board has the sole power to determine credibility of witnesses.[30] The weight given to the witnesses' testimony, including medical testimony and reports, is the Board's decision to make and is, thus, conclusive. This is true even if the evidence is conflicting or susceptible to contrary conclusions.[31]

On questions of law and procedure, the Commission does not defer to the Board's conclusions, but exercises its independent judgment.[32] Review of discovery dispute rulings by the Board, including the imposition of sanctions, is made pursuant to an analysis of whether the Board abused its discretion.[33] Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.[34]

4. Discussion.

The Board, in *White II*, looked primarily at the issue of whether the treatment offered by Dr. Shannon was within the scope of his chiropractic license. The Board decided it did not have authority to review this issue because the ABOCE has the sole jurisdiction to decide an issue of scope of practice within the statute defining chiropractic practice. SOA appealed *White II* to the Commission, and in its Notice of Appeal, stated the Board violated its due process rights when it failed to order Dr. Shannon to provide evidence of the manufacturer, labelling, and identification number of the injections he used. SOA further stated "[t]he Board failed to even consider . . . whether [Dr. Shannon] administered a prescription-only substance," and the Board erroneously held that the ABOCE determines the scope of a chiropractor's license.

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[30] AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P. 3d 139 (Alaska 2013).

[31] AS 23.30.122.

[32] AS 23.30.128(b).

[33] *See, e.g., Dougan v. Aurora Elec., Inc.*, 50 P.3d 789, 793 (Alaska (2002); *McKenzie v. Assets, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 109 (May 14, 2009).

[34] *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985) (*Sheehan*).

SOA, in its briefing to the Board and to the Commission, contends Dr. Shannon acted illegally in using Sarapin on Ms. White. SOA's briefing to the Board in *White II* contended Dr. Shannon dispensed prescription drugs in violation of the statute defining chiropractic practice. SOA further contended that since the Legislature determined the extent of chiropractic practice when it enacted the statute defining chiropractic practice, the Board does have authority to review the medical records submitted to the Board and make a decision whether the treatment falls within the statutory definition. SOA, in its briefing, did not ask the Board to revisit the discovery rulings in *White I* for the hearing in *White II*. SOA did suggest the Board ask Dr. Shannon to produce the vial from the injectable substance to the Board, which he declined to do.

Dr. Shannon asserts the Board's decision should be affirmed, in part, because the Sarapin he uses is not a prescription-only drug, is plant-based, and has been previously approved by the ABOCE as within the scope of chiropractic practice.

a. The discovery issue.

The decision before the Commission on appeal by SOA is *White II*, in which the Board did not revisit *White I* which dealt with SOA's discovery requests. However, SOA, in oral argument to the Commission, contended that without the discovery it sought in *White I* it could not determine if Dr. Shannon properly administered Sarapin within the course and scope of his chiropractic practice. The Commission briefly addresses the discovery issue because it has a tangential relationship to the issue in *White II*, i.e., whether the Board or this Commission has authority or jurisdiction over the scope of chiropractic practice.

SOA further asserts it was not required to present an expert witness testifying that the use of Sarapin, through injection or otherwise, is outside the scope of chiropractic practice and is beyond the scope of a reasonable and useful medical treatment, precisely because SOA was unable to determine if the Sarapin used by Dr. Shannon was a prescription drug. Therefore, according to SOA, the need for an expert under *Hibdon*,

was not reached.[35] SOA did not present any expert testimony about the use of Sarapin, nor any expert testimony that the Sarapin used by Dr. Shannon was a prescription drug.

At oral argument before the Commission, SOA asserted that because Dr. Shannon did not provide a photograph of the vial of Sarapin he used, and the Board did not order him to provide either the vial or a photograph, SOA was unable to determine positively the Sarapin used by Dr. Shannon was a prescription drug. SOA contended the only information about Sarapin, though its internet research, indicated it was a prescription drug and, therefore, outside the scope of chiropractic practice.

On the other hand, Dr. Shannon filed a motion for a protective order because he was concerned that if SOA learned who his supplier is, SOA, as it has in the past, would contact the distributer who, mostly likely anxious to avoid litigation, would cease to supply Dr. Shannon with Sarapin. Dr. Shannon testified at hearing that the Sarapin he uses does not require a prescription and is not a controlled substance.[36] He further testified that the product he uses is "an all natural substance and it's clearly allowed. . . ."[37]

While discovery is liberal under the Alaska Workers' Compensation Act (Act), not all discovery requests need be granted.[38] Here, Dr. Shannon raised serious questions about what SOA would do if it were allowed to identify the name of his supplier of Sarapin. Several suppliers, when contacted by the Assistant Attorney General, declined to continue supplying him. He testified the Sarapin he currently uses is produced by a bona fide drug manufacturer in the United States.

Given his concerns, the Board could have modified SOA's discovery request in order to protect Dr. Shannon's concerns and provide SOA with information about the nature of the Sarapin used by Dr. Shannon. For example, the Board could have required Dr. Shannon to provide a photograph of the vial detailing the contents, but with the name

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35 *Philip Weidner & Assocs., Inc. v. Hibdon*, 989 P.2d 727, 732 (Alaska 1999) (*Hibdon*).

36 Hr'g Tr. at 32:9-10, 23-24.

37 Hr'g Tr. at 43:8-9.

38 *See, e.g., Leigh v. Alaska Children's Servs.*, 467 P.3d 222, 229 (Alaska 2020).

of the distributor redacted, or the Board could have required Dr. Shannon to provide the vial to it in camera. It could then have determined if the vial stated the Sarapin was a prescription drug and provided SOA with that information.

Discovery disputes are reviewed for abuse of discretion. Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.[39] Since the Board determined it did not have authority to decide what practices were within the practice of chiropractic, production of the requested discovery regarding the Sarapin used would not have been helpful or useful to the Board at this time. Therefore, the Board did not abuse its discretion in *White I* when it declined to order Dr. Shannon to produce the vial to SOA.

b. Presumption of compensability.

The Act provides at AS 23.30.120 that it is presumed that claims for compensation are compensable in the absence of substantial evidence to the contrary. The Alaska Supreme Court (Court), in *Municipality of Anchorage v. Carter*, deemed medical costs could be considered to be compensation for purposes of the presumption of compensability.[40]

The presumption of compensability analysis is a three-step analysis.[41] At the first step, the claimant must establish a preliminary link that the claim is compensable.[42] Witness credibility is not considered at this step.[43] Once the claimant has established the preliminary link, the employer must then rebut the evidence with substantial evidence to

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[39] *Sheehan*, 700 P.2d 1295.

[40] *See, e.g., Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991).

[41] *See, e.g., Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991) (*Koons*).

[42] *See, e.g., VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985).

[43] *See, e.g., Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

the contrary.[44] This evidence is viewed in isolation and without consideration of its credibility or weight.[45] If the employer meets this burden, then the Board must consider if the claimant is able to prove the claim by a preponderance of the evidence.[46]

The Board did not apply the presumption analysis to Dr. Shannon's claim because it addressed only the issue of whether it had jurisdiction to decide if his treatment of Ms. White was within the scope of his license. However, had the Board applied the presumption analysis, the outcome would be the same. Dr. Shannon, through his own testimony, the testimony of Ms. White, and the letter from Dr. Larson, all establish the necessary preliminary link between compensability and employment. Ms. White had a work injury and she testified Dr. Shannon's treatment helped her to return to work. Dr. Larson's letter established that the treatment was within the scope of chiropractic practice.

SOA did not rebut the presumption with substantial evidence, which is such evidence that a reasonable person might accept as adequate to support the conclusion.[47] SOA presented some documents from the FDA asserting that at particular times specific companies had been ordered to stop manufacturing Sarapin for failure to conduct specific laboratory tests. This letter stated the company was closing in 2019. Another letter from the FDA stated Sarapin had been delisted and the marketing end date for Sarapin was June 10, 2016. SOA did not present any expert testimony that Sarapin was a prescription drug or that Dr. Shannon's use of it was not within the scope of his chiropractic practice.

However, assuming that SOA did rebut the presumption with the FDA letters, Dr. Shannon proved his claim by a preponderance of the evidence. The Board, whose sole province it is to decide credibility, found the FDA letters inconsistent and, therefore, gave the documents little weight. This finding is binding on the Commission. The Board

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[44] *See, e.g., Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 919 (Alaska 2016) (*Huit*).

[45] *See, e.g., Norcon*, 880 P.2d 1051, 1054.

[46] *See, e.g., Koons*, 816 P.2d 1379, 1381.

[47] *See, e.g., Huit*, 372 P.3d 904, 919.

found the testimony of Ms. White credible when she stated the treatments enabled her to return to work. This finding is binding on the Commission.

The Board also relied on the expert opinion of Dr. Larson that the treatment by Dr. Shannon was within the scope of his chiropractic license. Dr. Shannon also testified that he used Sarapin because it was a natural, plant-based, non-narcotic substance. The Board found the medical treatment provided to be reasonable and necessary. This finding is supported by substantial evidence in the record as a whole.

c. Scope of practice and ABOCE.

The main question before the Board was whether Dr. Shannon was acting within the course and scope of his chiropractic license. The Board determined this was an issue for the ABOCE and was beyond the jurisdiction of the Board. In addressing who has jurisdiction regarding the licensure of medical doctors, the Court has generally determined such decisions are the sole province of the licensing boards.[48]

In *Storrs v. State Medical Board*, the Court looked at the authority of the State Medical Board to revoke the license to practice medicine.[49] The Court stated, "[m]edicine is a complex subject and the State Medical Board is charged with the statutory authority and responsibility of regulating the practice of medicine. The Board is a competent body equipped with the necessary medical knowledge to determine whether a doctor's license to practice should be revoked."[50] Because the State Medical Board had the exclusive authority to regulate the physician's license, the Court reasoned that the proper forum in which to attack the validity of the physician's license was the State Medical Board.[51] The Court, in *Taylor v. Johnston*, again considered the authority of the State Medical Board and stated that the Alaska statutory scheme conferred exclusive authority to it to grant

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[48] *See, Storrs v. State Med. Bd.*, 664 P.2d 547 (Alaska 1983) (*Storrs*); *Taylor v. Johnston*, 985 P.2d 460, 465 (Alaska 1999).

[49] *Storrs*, 664 P.2d 551. The Commission found no Court decisions discussing the jurisdiction of ABOCE.

[50] *Id.* at 554 (opinion of the superior court which the Court accepted in affirming it).

[51] *Id.*

or revoke licenses.[52] Often the decision to revoke a license involves the nature of the medical practice.

The Board, in *Sereyko and Shannon v. Municipality of Anchorage*, determined that whether a chiropractor could inject Sarapin as part of the chiropractic practice was an issue for the ABOCE and the Board did not have jurisdiction to reach that question.[53] The Board did address the issue of whether, under the Act, the injections were medically reasonable and necessary. The Board found the injections reasonable and medically necessary.[54] In *Sereyko*, the employer admitted the injections, if administered by a medical doctor, would have been compensable.

The ABOCE likewise has been granted statutory authority to license chiropractors and to define the limits of chiropractic practice within the statutory description of "practice of chiropractic."[55] To address whether a chiropractor is operating properly within the definition of chiropractic practice, the ABOCE would be looking at the nature of the provider's practice.

SOA contends that Dr. Shannon was using prescription drugs in his treatment of Ms. White, in violation of the statutes on chiropractic practice. SOA points, in support of its contention, to the statute proscribing use of prescription drugs within the practice of chiropractic. The statute provides in pertinent part:

> (1) "ancillary methodology" means employing within the scope of chiropractic practice, with appropriate training and education, those methods, procedures, modalities, devices, and measures commonly used by trained and licensed health care providers. . . .
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> (2) "board" means the Board of Chiropractic Examiners;
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> (3) "chiropractic" is the clinical science of human health and disease that focuses on the detection, correction, and prevention of the subluxation complex and the employment of physiological therapeutic procedures preparatory to and complementary with the correction of the subluxation

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[52] *Taylor v. Johnston*, 985 P.2d 460, 465 (Alaska 1999).

[53] *Sereyko and Shannon v. Municipality of Anchorage*, Alaska Workers' Comp. Bd. Dec. No. 19-0084 at 11 (Aug. 8, 2019).

[54] *Id*. at 12.

[55] AS 08.20 *et. seq*.

> complex for the purpose of enhancing the body's inherent recuperative powers, without the use of surgery or prescription drugs; the primary therapeutic vehicle of chiropractic is chiropractic adjustment;
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> (4) "chiropractic adjustment" means the application of a precisely controlled force applied by hand or by mechanical device to a specific focal point of the anatomy for the express purpose of creating a desired angular movement in skeletal joint structures in order to eliminate or decrease interference with neural transmission and correct or attempt to correct subluxation complex; "chiropractic adjustment" utilizes, as appropriate, short lever force, high velocity force, short amplitude force, or specific line-of-correction force to achieve the desired angular movement, as well as low force neuro-muscular, neuro-vascular, neuro-cranial, or neuro-lymphatic reflex technique procedures;. . . .
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> (6) "chiropractic core methodology" means the treatment and prevention of subluxation complex by chiropractic adjustment as indicated by a chiropractic diagnosis and includes the determination of contra-indications to chiropractic adjustment, the normal regimen and rehabilitation of the patient, and patient education procedures; chiropractic core methodology does not incorporate the use of prescription drugs, surgery, needle acupuncture, obstetrics, or x-rays used for therapeutic purposes; . . . .[56]

The ABOCE, by statute, is responsible for oversight of chiropractors, like the State Medical Board is for medical physicians. The Board, on the other hand, is limited by statute to consideration of the Act only.[57] The Court, in looking at the authority of both the Board and Commission in *Alaska Public Interest Research Group v. State*, stated:

> One factor that courts rely on to determine that an agency exercises only quasi-judicial authority is the limited jurisdiction of the administrative agency. One of the policy justifications for the existence of administrative adjudication is that as a result of their limited jurisdiction, administrative agencies are able to develop expertise in a narrow area. Some courts have decided that a grant of judicial power to an administrative agency is acceptable when the administrative body "resolve[s] factual issues underlying a purely statutory right." . . . Delegation to an administrative agency is upheld as long as the administrative tribunal stays within the bounds of its authority.[58]

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[56] AS 08.20.900 (emphasis added).

[57] *See, Alaska Pub. Interest Research Grp. v. State*, 167 P.3d 27, 36-37 (Alaska 2007) (*AKPIRG*).

[58] *Id.*

The Court added:

> The Appeals Commission's jurisdiction is limited to "hearing and determination of all questions of law and fact" arising under the Alaska Workers' Compensation Act in matters that have been appealed to the Appeals Commission. The scope of its jurisdiction is not that different from the Board's jurisdiction, except that the Appeals Commission performs a quasi-judicial function that is akin to appellate review, while the Board performs a quasi-judicial function that resembles that of a trial court. We recognize that the Appeals Commission, like the Board, may be required to apply equitable or common law principles in a specific case, but both of these quasi-judicial agencies can only adjudicate in the context of a workers' compensation case. Neither the Appeals Commission nor the Board has jurisdiction to hear any action outside of a workers' compensation claim.[59]

The question SOA posed to the Board was whether the injections performed by Dr. Shannon were encompassed by the statutes outlining the scope of chiropractic practice. That is a question to be addressed by the ABOCE. If Dr. Shannon was operating outside the scope of his license, his license would be in jeopardy. The ABOCE is the responsible party for those determinations. The Board, and the Commission, are limited to questions encompassed by the Act. Therefore, the Board correctly declined to address the issue of whether Sarapin injections are covered by the statutes governing chiropractic practice. The Board is affirmed on this issue.

Prudently, the Board did address the one issue within its jurisdiction: were the Sarapin injections reasonable and necessary medical treatment. Both Dr. Shannon, Ms. White's treating physician within the first two years from her date of injury, and Ms. White herself testified the treatments were reasonable and necessary.

SOA contended they were not, but SOA was unable to provide definitive evidence that Dr. Shannon used a prescription drug. SOA asserts that the definitive evidence lay with Dr. Shannon who refused to produce to either SOA or the Board a picture of the vial from which the injections were taken. Dr. Shannon did testify at hearing that he did not use a prescription drug on Ms. White.[60] The Board accepted his testimony.

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[59] *AKPIRG*, 167 P.3d 27, 36-37.

[60] Hr'g Tr. at 48:11-20.

Moreover, when Dr. Shannon injected Ms. White with Sarapin, it was the position of the ABOCE that such injections were within the scope of chiropractic practice. As noted above, the secretary to the ABOCE, in 2006, stated that the ABOCE "during the April 14, 2006 meeting, . . . found that there are no statutes or regulations, which would prohibit utilizing injectable nutriceuticals in chiropractic practice."[61] On January 20, 2017, the ABOCE issued a position statement stating:

> The issue of chiropractic use of injectable nutrients has been discussed by the Board since 2006 when Dr. John Shannon, Chiropractic Physician licensed in Alaska, first came to the Board for approval of this treatment method. Since that time, there has been at least one Board letter allowing the procedure and an opinion from the State Ombudsman's office stating the law is vague enough to allow the treatment.[62]

Then, again, on December 17, 2018, Dr. Larson was quoted in a reply to an inquiry from an adjuster as follows:

> Chiropractic has long held the value of vitamins, minerals, herbs, homeopathics and other naturally occurring extracts and substances that do not require a DEA license are within the scope of chiropractic license . . . . The vehicle of delivery is really the only question here. Neither chiropractic statute or regulation discusses the vehicle of administration of these substances. It is the opinion of the board, consistent with the statute, that with appropriate training, injection of serapin into a joint is within the scope of chiropractic practice. Additionally, I have reviewed Dr. Shannon's curriculum vitae and find he is exquisitely trained, much of it by medical educators, in all areas pertaining to nutrition and natural substances, and joint injection.[63]

Moreover, the ABOCE did not remove its position statement approving the injections from its website until after its February 1, 2019, meeting, which was some time after Ms. White received her last injection. At the time Dr. Shannon performed the injections, the ABOCE had found them to be within the limits of chiropractic practice.

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61 R. 79.

62 R. 230-231.

63 R. 75-76.

Dr. Shannon has asserted his use of Sarapin was reasonable and necessary for Ms. White, and this practice was supported by the expert opinion of Dr. Larson.[64] Ms. White testified to the efficacy of the injections. SOA produced no evidence this practice was outside the reasonable and necessary limits of chiropractic practice.

In *Hibdon*, the Court held that when "the claimant presents credible, competent evidence from his . . . treating physician that the treatment . . . sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable."[65] The Court continued that when an injured worker makes this showing, the employer "must have evidence the treatment was 'neither reasonable and necessary, nor within the realm of acceptable medical opinions under the particular facts' of the case."[66]

Here, Dr. Shannon presented evidence by way of the letter from Dr. Larson, the letter from Dr. Davis, and the ABOCE position statement that his treatment was proper. These documents, along with Ms. White's testimony that the treatments enabled her to return to work, support the finding that the treatments were medically necessary and reasonable.[67] SOA did not provide any expert testimony to contradict the above. Thus, the Board did not err in finding that the treatment was reasonable and necessary. The Board's decision is affirmed.

d. Penalty.

SOA contends the Board erred in assessing a penalty for failure to controvert on a Board-prescribed form the use of Sarapin by Dr. Shannon. SOA's adjuster sent Dr. Shannon EOBs dated March 7, 2019, and March 8, 2019, for four dates of service, stating payment was denied because, "The billed service falls outside the provider's scope

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64 *See, Hibdon*, 989 P.2d 727, 732.

65 *Id*.

66 *Vue v. Walmart Assocs., Inc.*, 475 P.3d 270, 290 (Alaska 2020)(citing *Hibdon*, 989 P.2d at 732).

67 R. 75-76, 79, 230-231; Hr'g Tr. at 47:1-5.

of practice or specialty."[68] On March 21, 2019, Dr. Shannon filed a claim for medical costs and a penalty, contending he had not been paid $1,521.09 for treatment rendered to Ms. White.[69] The Board concluded EOBs are not controversions.[70]

AS 23.30.097(d) provides that, "An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later."[71]

If payment is not timely made or controverted, a twenty-five percent penalty must be added to the payment.[72] Here, as the Board stated, the only controversion SOA filed controverted all benefits due to Ms. White because she failed to provide medical releases. SOA did not controvert payment to Dr. Shannon on grounds that he was using a prescription drug or that such injections were outside the scope of chiropractic practice per statute.[73]

SOA contends the EOB should qualify as a controversion since it was a writing, even though it is not a writing on the Board's prescribed form. SOA contends this writing should protect it from a penalty. First, the Board made a finding of fact that an EOB is not a controversion. To controvert payment or a claim, "the employer must file a notice, in a format prescribed by the director, stating (1) that the right of the employee to compensation is controverted; (2) the name of the employee; (3) the name of the employer; (4) the date of the alleged injury or death; and (5) the type of compensation and all grounds on which the right to compensation is controverted."[74]

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68 Exc. 4-7.

69 Exc. 1.

70 *White II* at 3, No. 12.

71 AS 23.30.097.

72 AS 23.30.155(f).

73 AS 08.20.900(3) and (6).

74 AS 23.30.155(a).

SOA further contends the EOB contained all this required information and the fact that it was not on the prescribed form should be considered inconsequential. The statute requires the Board form to be used to qualify as a controversion for good reasons, including the fact that the controversion form requires service on all parties. It is not clear that the EOB was sent to Ms. White, and even if it had been, whether she would have recognized it as a controversion. The use of the required form for a bona fide controversion puts all parties on notice of the controversion, the reasons for the controversion, and gives notice to the parties to take the requisite action. Such action would include when a hearing request must be filed under AS 23.30.110(c). An EOB provides none of this information.

Moreover, if the EOB were considered to be a controversion in this case, it would have to be considered to be a bad faith controversion since there was no evidence SOA possessed sufficient information/evidence in support of the controversion that if no other evidence were submitted by the claimant in opposition to it, the Board would have to rule in favor of the claimant.[75] SOA did not submit with the EOB any evidence that Dr. Shannon's injections were outside the scope of chiropractic practice. From the record, it appears SOA did not possess a medical opinion that the injections were outside the scope of chiropractic practice, did not possess any information that the injections were prescription drugs, and did not possess any information that the ABOCE had found that such injections were not part of a chiropractic practice per statute.

When SOA did file a controversion on the Board-prescribed form, on April 16, 2019, the controversion denied all benefits only because Ms. White had not timely signed and filed releases for medical records. This controversion did not provide notice to Dr. Shannon that SOA was declining to pay his bills because SOA had decided on its own that the Sarapin injections were prescribed drugs and, thus, outside the scope of chiropractic practice. This controversion was ineffective as to Dr. Shannon because it did not provide him with information as to why his bills would not be paid.

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[75] *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

SOA did file emails from the FDA regarding attempts to stop the production of Sarapin, but no evidence the Sarapin used by Dr. Shannon was a prescription drug, nor any evidence from the ABOCE that the nutrients used by Dr. Shannon were outside the scope of chiropractic practice.[76] The Board found the FDA documents confusing and with unexplained discrepancies. The Board gave little weight to these documents and this finding is binding on the Commission.[77] Moreover, the evidence presented by SOA was not subjected to cross-examination.[78]

The Board did not err in finding SOA owes a penalty to Dr. Shannon.

5. Conclusion.

The Board's decision is AFFIRMED.

Date: *9 September 2021* Alaska Workers' Compensation Appeals Commission

Signed
James N. Rhodes, Appeals Commissioner

Signed
Amy M. Steele, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme

[76] The Commission recognizes SOA's argument that Dr. Shannon did not cooperate with discovery, thus impeding its ability to prove the Sarapin used by Dr. Shannon was a prescription drug and, thus, outside the scope of chiropractic practice. This is discussed elsewhere in this decision.

[77] AS 23.30.122.

[78] At hearing, the Board asked Dr. Shannon if he was willing to waive the "right to cross-examine the author of any of those e-mails or reports that weren't in the evidence that was filed previously?" It does not appear from the transcript that Dr. Shannon ever expressly agreed to this waiver. Moreover, it does not appear that anyone explained to him the importance of requesting to cross-examine those authors. Such an explanation is important for self-represented litigants who might not otherwise understand the value of cross-examination in setting out the facts of a claim.

Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

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

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

RECONSIDERATION

A party may ask the Commission to reconsider this decision by filing a motion for reconsideration in accordance with AS 23.30.128(f) and 8 AAC 57.230. The motion for reconsideration must be filed with the Commission no later than 30 days after the date shown in the Commission's notice of distribution (the box below). If a request for reconsideration of this final decision is filed on time with the Commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in formatting for publication and a correction of a typographical error, this is a full and correct copy of Final Decision No. 291 issued in the matter of *State of Alaska v. Jennifer D. White and John P. Shannon, D.C.*, AWCAC Appeal No. 20-022, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 9, 2021.

Date: *September 13, 2021*

Signed

K. Morrison, Appeals Commission Clerk