

# Alaska Workers' Compensation Appeals Commission

Jay Jespersen,  
Appellant,

vs.

Tri-City Air and Alaska Insurance Guaranty  
Association,  
Appellees.

## Final Decision

Decision No. 295                      August 11, 2022

AWCAC Appeal No. 21-006  
AWCB Decision No. 21-0026  
AWCB Case No. 198528817

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 21-0026, issued at Anchorage, Alaska, on March 19, 2021, by southcentral panel members William Soule, Chair, Nancy Shaw, Member for Labor, and Robert C. Weel, Member for Industry.

Appearances: Richard L. Harren, Law Office of Richard L. Harren, for appellant, Jay Jespersen; Vicki A. Paddock, Meshke Paddock & Budzinski, PC, for appellees, Tri-City Air and Alaska Insurance Guaranty Association.

Commission proceedings: Appeal filed May 17, 2021; briefing completed April 11, 2022; oral argument held June 2, 2022.

Commissioners: Michael J. Notar, S. T. Hagedorn, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

### *1. Introduction.*

There have been several decisions issued by the Alaska Workers' Compensation Board (Board) in this matter.<sup>1</sup> The decision on appeal to the Alaska Workers'

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<sup>1</sup> *Jespersen v. Tri-City Air*, Alaska Workers' Comp. Bd. Dec. No. 19-0050 (Apr. 16, 2019) (*Jespersen I*); *Jespersen v. Tri-City Air*, Alaska Workers' Comp. Bd. Dec. No. 20-0048 (June 17, 2020) (*Jespersen II*). *Jespersen v. Tri-City Air*, Alaska Workers' Comp. Bd. Dec. No. 21-0026 (Mar. 19, 2021) (*Jespersen III*) is the decision currently on appeal. *Jespersen v. Tri-City Air*, Alaska Workers' Comp. Bd. Dec. No. 21-0033 and Errata (Apr. 14, 2021) (*Jespersen IV*) denied reconsideration and/or modification of *Jespersen III* and was not appealed to the Commission.

Compensation Appeals Commission (Commission) is *Jespersen III*. Mr. Jespersen asserts the Board made numerous errors in its findings of fact and determinations of credibility in finding his current disability is not related to his work injury in 1985.

2. *Factual background and proceedings.*<sup>2</sup>

On November 16, 1985, Mr. Jespersen, at age 22, was in a plane crash while flying in white-out conditions near Quinhagak, Alaska. He initially reported cuts, bruises, and head and back injuries.<sup>3</sup> Ultimately, doctors determined Mr. Jespersen suffered multiple rib fractures, a mild fracture at L4, and a compression fracture at L5.<sup>4</sup> He treated with the Falls Chiropractic Clinic (Clinic).

Pre-injury records show that in 1975, the Clinic adjusted Mr. Jespersen's cervical spine at C1, 2, 3, and 5, thoracolumbar spine from T12 to S1, and his left hip. In 1975, Mr. Jespersen hit his head on a barn post and the Clinic diagnosed a cervical strain and adjusted his neck; a recurrent cervical strain resulted in adjustments later in 1975. In April 1981, Mr. Jespersen had lumbosacral pain for two weeks and the Clinic adjusted L2, 3, 4, and 5, and both sacroiliac joints; the diagnosis was lumbosacral subluxation. The Board found that according to a May 23, 1986, entry, on May 22, 1985, Mr. Jespersen strained his low back "pulling a man out of the lake." Michael M. Carney, D.C., interpreted this note to say "1985," but given the context it could be "1986."<sup>5</sup>

Based on these records, the Board found that Mr. Jespersen had a pre-work-injury history of cervical- and lumbar-spine-related pain and treatment beginning around age twelve.<sup>6</sup>

Following the plane crash, on November 17, 1985, Mr. Jespersen received care at a local clinic where the initial physician's report stated x-rays taken that day showed "no

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<sup>2</sup> 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.

<sup>3</sup> R. 3906.

<sup>4</sup> R. 1620-1621.

<sup>5</sup> R. 3733-3739; *Jespersen III* at 5, No. 1.

<sup>6</sup> *Jespersen III* at 5, No. 2.

acute fractures.”<sup>7</sup> The same physician, on November 21, 1985, reported the x-rays taken on November 19, 1985, showed an L5 compression fracture, but there was “no neurologic deficit.” The Board found that these radiology reports were not in the Board’s record.<sup>8</sup>

On March 5, 1986, Charles R. Helleloid, M.D., who was Mr. Jespersen’s friend, family doctor, and former employer, found Mr. Jespersen had right-sided rib fractures, a mild fracture at L4, and a compression fracture at L5. The Board noted that no other physician’s report identified a fracture at L4.<sup>9</sup>

On May 12, 1986, Dr. Carney’s father, C. M. Carney, D.C., at the Clinic, saw Mr. Jespersen for headaches with neck stiffness into both shoulders and back soreness. He found severe right lateral listhesis at C1; minimal malpositioning at C5, 6, and 7 and T3; and chronic suboccipital myofibrositis, and diagnosed a lateral right L5 compression fracture, a pars interarticularis separation at L5, and well-healed fractures at ribs 9, 10, and 11. X-rays showed a completely healed L5 fracture. Dr. C. M. Carney took Mr. Jespersen off work for at least one more month and his prognosis was “somewhat guarded.” At the request of Mr. Jespersen’s attorney, Dr. Carney transcribed the chart notes from the Clinic where Mr. Jespersen treated in 1985-1987. The Board noted that Dr. C. M. Carney’s notes and Dr. Carney’s more recent transcription did not mention any early degenerative changes at L5-S1 on x-rays.<sup>10</sup> By August 1986, Dr. C. M. Carney opined Mr. Jespersen had made “a remarkable recovery” in both the cervical and lumbosacral spine.<sup>11</sup>

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<sup>7</sup> R. 1624, 0932-1001.

<sup>8</sup> R. 1623; *Jespersen III* at 5, Nos. 4 and 5.

<sup>9</sup> Jay Jespersen Dep., Feb. 14, 2019, at 36:7-13, 18:6-7, 18:25 – 19:7; R. 1620-1621; *Jespersen III* at 5-6, No. 6.

<sup>10</sup> R. 1612-1619, 3733-3739, 1607-1608; *Jespersen III* at 6, No. 7.

<sup>11</sup> R. 1604-1605.

On October 31, 1986, Dr. C. M. Carney said Mr. Jespersen was unable to work as a pilot and his prognosis for a complete recovery was poor. He hoped Mr. Jespersen could return to work as a pilot within two to six months.<sup>12</sup>

On February 26, 1987, orthopedic surgeon Duane F. Person, M.D., with East Range Clinics, Ltd., took x-rays and evaluated Mr. Jespersen for an impairment rating. Dr. Person noted Mr. Jespersen's lumbar spine listed to the left and lumbar motion was reduced, but there were no nerve problems in his upper or lower extremities. His cervical x-rays were normal while the lumbosacral x-rays showed a healed L5 compression fracture, and the rib x-rays showed healed fractures on 8 through 12. Dr. Person limited him to lifting up to twenty pounds, with no repetitive lifting, no crouching or working in a cramped position for more than two or three minutes, and no working at height. Dr. Person said Mr. Jespersen was medically stationary, estimated he could probably return to work as a bush pilot in six to eight months, and had a fifteen percent permanent physical impairment of his spine. Dr. Person did not identify any early degenerative disc disease or changes at L5-S1.<sup>13</sup>

On February 26, 1987, radiologist J. E. Magnuson, M.D., found a "slight compression" fracture at L5, did not mention any early degenerative disc disease or changes at L5-S1, and found the lumbar spine "otherwise negative."<sup>14</sup> Dr. C. M. Carney continued to adjust Mr. Jespersen's cervical and lumbar spine thru May 1987.<sup>15</sup> On June 16, 1987, Dr. Carney continued Mr. Jespersen's off-work status and thought he could fly a plane. He identified "early degenerative disc disease of L-5" based on May 15, 1987, x-rays. The Board stated this observation was seventy-eight days after Drs. Person and Magnuson had not reported any degenerative disc disease at L5-S1 and found Mr. Jespersen's lumbar spine negative except for the healed L5 compression fracture.<sup>16</sup>

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<sup>12</sup> R. 1601-1602.

<sup>13</sup> R. 1596-1599.

<sup>14</sup> R. 2086.

<sup>15</sup> R. 3734-3739.

<sup>16</sup> R. 1592-1593; *Jespersen III* at 7, No. 13.

The Board found there was a twenty-year gap in Mr. Jespersen's medical records from June 16, 1987, until August 29, 2007.<sup>17</sup>

On August 29, 2007, Owen Q. Hanley, M.D., saw Mr. Jespersen for pneumonia. His report did not mention the 1985 crash or any orthopedic symptoms.<sup>18</sup> On August 31, 2007, William Lange, M.D., saw Mr. Jespersen for his lungs and diagnosed diabetes and stated, "He apparently had been taking relatively high-dose steroids off and on since approximately January of this year, which were prescribed by an 'arthritis doctor' in Arizona." The report did not mention the 1985 injury or any spine complaints, and the "arthritis doctor" was not identified.<sup>19</sup> The Board found the Board's record contained no medical records diagnosing arthritis or prescribing steroids.<sup>20</sup>

The Board then found another gap of seven years in Mr. Jespersen's medical records from August 31, 2007, until September 7, 2014.<sup>21</sup> In subsequent records, Mr. Jespersen reported a right ankle fusion in 2010 after he fell while standing on a "five-gallon bucket." The Board noted the agency file contained no contemporaneous records describing this event and surgery.<sup>22</sup>

Starting in 2014, Mr. Jespersen began having bilateral leg issues. "I was having problems with my left – well, my legs weren't keeping up with me. I was kind of falling down."<sup>23</sup> On September 7, 2014, he went to the Fairbanks Memorial Hospital (FMH) emergency room for complaints of bilateral leg numbness and weakness, and coughing up blood. Mr. Jespersen's medical history at this visit did not include his 1985 plane

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<sup>17</sup> *Jespersen III* at 7, No. 15.

<sup>18</sup> R. 2304-2306, 2312.

<sup>19</sup> R. 2243-2246.

<sup>20</sup> *Jespersen III* at 52.

<sup>21</sup> *Id.* at 8, No. 18.

<sup>22</sup> *Id.*; R. 2149-2154, 0932-1001

<sup>23</sup> Jay Jespersen Dep. at 21:2-4.

crash. Heart testing suggested a differential diagnosis including a transient ischemic attack [mini-stroke] caused by blood flow issues to the spinal cord.<sup>24</sup>

On September 7, 2014, Mr. Jespersen had a lumbar spine magnetic resonance imaging (MRI) for “transient complete numbness and weakness to bilateral lower extremities.” The report showed a central disc protrusion at L5-S1 that caused mild to moderate bilateral foraminal narrowing without significant central canal narrowing, mild degenerative changes including “disc desiccation” at all levels, and three bulging disks in the lower thoracic and upper lumbar levels. His recorded medical history included diabetes and high blood pressure, but did not mention his 1985 plane crash.<sup>25</sup>

The September 8, 2014, thoracic spine MRI showed “age appropriate” spondylosis in the thoracic spine, along with assessed scoliosis, and “small disc protrusions.”<sup>26</sup> Mr. Jespersen’s September 8, 2014, cervical MRI showed “mild annular bulging” in the C4-5 disc.<sup>27</sup>

On January 8, 2015, Lorie Loreman, D.O., with Arizona Pulmonary Specialists, Ltd., saw Mr. Jespersen for a lung problem, “Valley Fever.” His musculoskeletal system review was described as “normal” and his history did not record the 1985 plane crash or any cervical or lumbar symptoms.<sup>28</sup> He continued to treat with her, but her reports never mentioned cervical or lumbar symptoms or his 1985 work injury, and she recorded no musculoskeletal abnormalities.<sup>29</sup> On January 21, 2016, she recorded for the first time Mr. Jespersen’s right arm difficulties and “significant back discomfort hip discomfort.” The record did not mention his 1985 work injury, and Dr. Loreman charted his musculoskeletal system as “normal.” She recommended a cervical and upper thoracic

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<sup>24</sup> R. 2462-2464.

<sup>25</sup> R. 1590-1591, 1637-1639, 2462.

<sup>26</sup> R. 1589.

<sup>27</sup> R. 1629.

<sup>28</sup> R. 2593-2597.

<sup>29</sup> R. 2211-2217, 2593-2597, 2623-2627.

MRI to rule out a herniation or brachial plexopathy secondary to his previous lung surgery.<sup>30</sup>

On February 8, 2016, Mr. Jespersen had a thoracic MRI to address his lung condition, which showed mild mid- and lower-thoracic disc degeneration with shallow disc protrusions; mild thoracic facet arthrosis with foraminal narrowing mostly at the left side at T2-3, described as “moderate”; and postoperative changes in the right chest wall from lung surgery.<sup>31</sup> On February 11, 2016, Mr. Jespersen had a cervical spine MRI for “neck and upper back pain” for “x2 years.” Radiologist Tyler Gasser, M.D., found mild degenerative changes in the cervical spine.<sup>32</sup>

Mr. Jespersen sought care at NovaSpine Pain Institute (NovaSpine) on February 18, 2016, on referral from Dr. Loreman. On his New Patient Intake Form, he wrote “neck-back pain” as the reason for his visit. He described his pain as constant and ranging from six to nine on a pain scale. He said he had this pain for “32 yrs.” (the Board noted this contention correlated to the work injury/accident date). When Mr. Jespersen was asked if there was “any injury or accident,” he checked the “Yes” box and wrote “Fell.” The Board found that he did not list his 1985 airplane crash. Mr. Jespersen reported his pain had increased “in the last five years.” Lifting made the pain worse, which affected his neck, back, and both hips, with numbness or tingling in both legs. Mr. Jespersen included high blood pressure, diabetes, “stroke,” his right ankle fusion in 2020, and removal of his right upper lung in 2015.<sup>33</sup> The Board found that it was not clear from the medical records if the “fall” to which Mr. Jespersen referred in the initial NovaSpine record was the fall from the five-gallon bucket in 2010, other falls he had in 2014, or the paralysis and fall in the yard in 2014.<sup>34</sup>

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<sup>30</sup> R. 2623-2627.

<sup>31</sup> R. 2628-2629.

<sup>32</sup> R. 2635-2636.

<sup>33</sup> R. 2147-2154; *Jespersen III* at 10, No. 32.

<sup>34</sup> *Jespersen III* at 10, No. 33.

On February 19, 2016, Mr. Jespersen reported neck and back pain, this time citing the airplane accident thirty-two years earlier as when his pain began. He responded that in 1985, he was given medication and told his neck and back were “fine.” In the five years prior to this 2016 visit his pain had been increasing, he was unable to lift things or lay down comfortably, and the joints in his arms ached. He said he had been taking Vicodin with minimal relief, but had not tried therapy or injections. The precipitating injury or event was recorded as when “the patient fell.” Nikesh Seth, M.D., diagnosed cervical disc disorder with radiculopathy, cervical spondylosis, lumbar degenerative disc disease, lumbar intervertebral disc degeneration, bulging thoracic intervertebral disc, and lumbar disc disease with radiculopathy. He opined Mr. Jespersen’s neck and mid-back pain was due to cervical spondylosis and cervical and thoracic degeneration; lumbar degeneration was causing Mr. Jespersen’s lower extremity paresthesias. Dr. Seth recommended another lumbar MRI with a possible injection thereafter.

The Board found that Dr. Seth did not offer a causation opinion connecting his findings to the 1985 work injury.<sup>35</sup> The Board also found that Mr. Jespersen’s February 19, 2016, visit with Dr. Seth was the first time any medical record in the Board file mentioned the 1985 work injury since the Board approved the settlement agreement on June 24, 1988, twenty-eight years earlier.<sup>36</sup> Mr. Jespersen did not list Dr. Seth on his witness list.<sup>37</sup>

On February 29, 2016, a lumbar MRI disclosed approximately fifty percent disc height loss at L5-S1 with a broad-based disc bulge with central disc protrusion, which caused moderately severe bilateral stenosis slightly displacing the S1 nerve roots; moderate bilateral foraminal stenosis; and otherwise mild degenerative changes throughout the lumbar spine without significant canal or foraminal stenosis.<sup>38</sup>

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<sup>35</sup> R. 2150-2154; *Jespersen III* at 10-11, No. 34.

<sup>36</sup> *Jespersen III* at 11, No. 35.

<sup>37</sup> *Id.*, No. 36; R. 1104-1106.

<sup>38</sup> R. 2156.



On March 5, 2016, Mr. Jespersen underwent a cervical epidural steroid injection at C7-T1 to address his cervical radiculopathy.<sup>39</sup> On March 12, 2016, Mr. Jespersen had his second cervical epidural steroid injection at C7-T1.<sup>40</sup> On March 19, 2016, Mr. Jespersen had bilateral L5-S1 epidural steroid injections to address his lumbar radiculopathy.<sup>41</sup> On March 23, 2016, Mr. Jespersen reported his pain was about fifty percent better since his two cervical and one lumbar epidural steroid injections. However, his blood sugar had elevated, causing headaches. Mr. Jespersen said he last worked in October 2015.<sup>42</sup>

On April 2, 2016, Mr. Jespersen had bilateral L2, 3, 4, and 5 lumbar medial branch blocks to address lumbar spondylosis without myelopathy. His “[b]iggest complaint is hips.” Mr. Jespersen again mentioned having had a stroke in 2015.<sup>43</sup> On April 9, 2016, Mr. Jespersen had his second bilateral L2, 3, 4, and 5 lumbar medial branch blocks.<sup>44</sup> On April 16, 2016, Mr. Jespersen underwent bilateral hip injections to address hip osteoarthritis and pain; he also had lumbar radiofrequency ablation on the left side at L2, 3, 4, and 5 to address lumbar spondylosis and pain.<sup>45</sup> The Board noted that Dr. Seth never commented on whether the 1985 work injury played any role in Mr. Jespersen’s symptoms or need for treatment.<sup>46</sup>

On June 16, 2016, in a visit to Paul Jensen, M.D, of Spine Care Specialists of Alaska, Mr. Jespersen reported “back issues” for over thirty-two years after an airplane crash, which involved his neck, thoracic and lumbar spine, Type II diabetes since 2008, and a 2015 stroke after lung surgery. His main problem was worsening left hip pain with left

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<sup>39</sup> R. 1583-1584.

<sup>40</sup> R. 1574-1575.

<sup>41</sup> R. 2088-2089.

<sup>42</sup> R. 2163, 2157-2163.

<sup>43</sup> R. 1558-1560; *Jespersen III* at 12, No. 42.

<sup>44</sup> R. 1553-1554.

<sup>45</sup> R. 1546-1546.

<sup>46</sup> *Jespersen III* at 10-11, No. 34.

calf spasm, which radiated down to his foot. The pain and weakness had recently been bad enough that Mr. Jespersen had to use crutches to get around.<sup>47</sup> The June 16, 2016, lumbar MRI disclosed mild disc bulges from T12 through L4; there was also mild disc height loss and a “moderate disc bulge” “eccentric to the left” with a mild central disc extrusion and inferior migration of disc material with associated mass effect on the S1 nerve roots “left worse than right,” and mild to moderate central canal narrowing all at the L5-S1 level. Dr. Jensen reviewed the June 16, 2016, MRI and found a “large L5-S1 herniated disc” with associated stenosis and severe recess narrowing on the left and stated that the MRI finding “is directly attributable to the patient’s severe left greater than right radicular symptoms.”<sup>48</sup> Dr. Jensen recommended surgery at L5-S1 with discectomy.<sup>49</sup> On July 5, 2016, Dr. Jensen performed an L5-S1 laminectomy on Mr. Jespersen for lumbar spinal canal stenosis secondary to a “large disc herniation.”<sup>50</sup>

On September 27, 2016, Mr. Jespersen reported his lumbar spine was doing about ninety percent better following his surgery in July, although he had intermittent neck pain, spasm, and a “locking up” sensation associated with hand tingling. “Jay has had neck issues for a while.” When working as a pilot and mechanic, Mr. Jespersen was on his hands and knees and often felt like his neck locked up. Dr. Jensen referenced an MRI “taken this winter” in Fairbanks which he said showed low-grade spondylosis with some disc space reabsorption at C6-C7; there was severe central narrowing. He noted mild foraminal changes bilaterally at C4-6 and a small spur on the right at C6-C7. Dr. Jensen assessed diffuse cervical spondylosis with some ligament calcification and recommended Flexeril.<sup>51</sup> The Board found Dr. Jensen had not offered any causation opinions in this report.<sup>52</sup>

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<sup>47</sup> R. 2099-2101.

<sup>48</sup> R. 2102-2105.

<sup>49</sup> R. 2099-2101.

<sup>50</sup> R. 1977-1979.

<sup>51</sup> R. 2117-2118.

<sup>52</sup> *Jespersen III* at 13, No. 51.

On January 13, 2017, Dr. Seth examined Mr. Jespersen for cervical pain. He opined:

This is a patient with an active job who is with severe pain in the neck, mid back and lower back. I feel that the neck and mid back is due to a combo of cervical spondylosis, thoracic and cervical degeneration. I also feel that he is with lumbar degeneration that is causing LE [lower extremity] paresthesia.

The Board found that Dr. Seth did not otherwise offer a causation opinion.<sup>53</sup>

On March 4, 2017, R. David Bauer, M.D., examined Mr. Jespersen for an Employer's Medical Evaluation (EME) and addressed two causation questions. He said the November 16, 1985, injury was not a substantial factor in Mr. Jespersen's need for surgery in 2016 nor in any subsequent care. In his opinion, the disc herniation in 2016 was spontaneous and was not related to Mr. Jespersen's lower back fracture. Dr. Bauer opined the surgery would have occurred when it did and to the extent it did notwithstanding employment conditions. He further found the 1985 injury did not cause a delayed disc herniation. He attributed aging and normal degeneration as the substantial causes for Mr. Jespersen's 2016 surgery and subsequent care.<sup>54</sup> He noted a gap in Mr. Jespersen's medical records from 1987 through 2014, and recorded that Mr. Jespersen said he received no medical care during that interval. He told Dr. Bauer, "I got by okay," but his back would "bug him sometimes." Over the prior ten years "things have gone downhill." He did not recall getting much treatment between 2014 and 2016, but his pain began to increase in 2015 and he saw Dr. Seth, who gave him injections and his neck symptoms improved. Lumbar injections and radiofrequency ablations also helped, but by summer 2016 "things started to change significantly." Dr. Bauer noted that when Mr. Jespersen saw Dr. Alena Anderson on June 16, 2016, he was having sudden pain radiating from his left hip down to his foot in an S1 distribution with calf spasms. This was a "sudden onset" one day when "something moved badly." Thereafter, Mr. Jespersen began having numbness and tingling in his left leg and had to

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<sup>53</sup> *Jespersen III* at 13, No. 52; R. 2172-2174.

<sup>54</sup> R. 1499-1519.

use crutches. Since December 2016, Mr. Jespersen thinks “something has happened again” and his back was as bad as it was before surgery. Dr. Bauer reviewed MRIs from September 7, 2014, February 8, 2016, February 11, 2016, and February 29, 2016. He diagnosed an L5 compression fracture, fractured ribs, and cervical strain, all substantially caused by the work injury. Dr. Bauer opined several other diagnoses were neither caused nor aggravated by the work injury, including: cervical and lumbar degenerative disease, L5-S1 acute disc herniation in 2016, and status-post discectomy.<sup>55</sup>

In addressing the two causation questions, Dr. Bauer noted the “but for” test, and said the November 16, 1985, injury was not “a substantial factor” in Mr. Jespersen’s need for surgery in 2016 or in any subsequent care. Dr. Bauer reasoned Mr. Jespersen’s L5 top endplate compression fracture did not result in any damage to the L5-S1 disc. He agreed endplate fractures “can be strongly associated with disc degeneration” in the disc adjacent to a fracture, but the L5-S1 disc in this case was not affected. Dr. Bauer opined that bone is more brittle than the disc and will break, as it did in this case, before the disc is affected. Dr. Bauer opined the 2016 surgery would have occurred when it did and to the extent it did notwithstanding the 1985 injury. As to alternate causes of the need for medical care in 2016, he found the injury did not cause a delayed disc herniation. Dr. Bauer attributed aging and normal degeneration as the substantial causes for Mr. Jespersen’s 2016 surgery and subsequent care.<sup>56</sup> In his deposition, Dr. Bauer clarified that the 1985 work injury was not a substantial factor in the need for the 2016 back surgery.<sup>57</sup>

Dr. Bauer’s report cited in a footnote four studies including, “A Study of the Mechanics of Spinal Injuries,” and “The Human Spinal Column and Upward Ejection Acceleration: An Appraisal of Biodynamic Implications.” At least three of the four studies

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<sup>55</sup> R. 1499-1519.

<sup>56</sup> R. 1499-1519.

<sup>57</sup> R. David Bauer, M.D., Dep., Feb. 4, 2021, at 34:4 – 38:1.

involved lumbar discs and tended to show vertebral endplate “burst fractures” may cause disc degeneration in the disc adjacent to the fracture.<sup>58</sup>

On March 24, 2017, Dr. Seth reevaluated Mr. Jespersen’s neck and back. Mr. Jespersen said he was in an airplane accident thirty-two years earlier and his pain began then.<sup>59</sup>

On April 3, 2017, a lumbar MRI with and without contrast was compared to Mr. Jespersen’s February 29, 2016, lumbar MRI. Dr. Gasser found postsurgical changes at L5, granulation or scarring, degenerative changes in upper spinal levels, a right disc protrusion at L5-S1 with disc material near the right S1 nerve root, and moderate bilateral foraminal stenosis at L5-S1.<sup>60</sup>

The Board noted that in a report from Dr. Jensen, possibly in July 2017 (the Board found the dates on Dr. Jensen’s office reports were illegible), Mr. Jespersen reported he had done well after his lumbar surgery and had even gone to Minnesota and hunted pheasant. However, Dr. Jensen added that “in December of last year,” Mr. Jespersen “had some episodes” where almost all his symptoms returned. Dr. Jensen recommended either a revision surgery or another lumbar epidural injection.<sup>61</sup>

On or about January 9, 2019, Dr. Jensen responded to the September 26, 2017, letter Mr. Jespersen’s lawyer had written to him. In his check-the-box response, Dr. Jensen opined the injuries Mr. Jespersen sustained in his November 16, 1985, plane crash at work were a substantial factor in causing the need for the surgery he performed on Mr. Jespersen on July 5, 2016. Dr. Jensen also said the plane crash was a substantial factor in causing the need for follow-up medical care since the surgery and additional medical treatment continuing into the foreseeable future.<sup>62</sup> The Board found that Dr. Jensen’s two-word fill-in-the-blank response to Mr. Jespersen’s questionnaire was

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<sup>58</sup> Bauer Dep. at 34:4 – 38:1; R. 1499-1519, 304-338.

<sup>59</sup> R. 2191-2193.

<sup>60</sup> R. 2175-2176.

<sup>61</sup> *Jespersen III* at 15, No. 58; R. 2119-2120.

<sup>62</sup> R. 2092-2093.

strictly for litigation purposes and not a regularly produced medical report.<sup>63</sup> Despite Tri-City's requests for cross-examination, Mr. Jespersen never presented Dr. Jensen for cross-examination.<sup>64</sup>

On May 15, 2019, Brandon P. Hirsch, M.D., at The CORE Institute in Arizona, recorded a history of cervical and lumbar pain arising from a 1985 airplane accident. Mr. Jespersen's symptoms were much as they had been "for several years," but Mr. Jespersen did not relate continuous or chronic and unrelenting pain since 1985. Dr. Hirsch diagnosed, among other things, disc degeneration in the lumbosacral region. He recommended a lumbar spine MRI and physical therapy, but offered no causation opinions.<sup>65</sup>

On March 5, 2020, orthopedic surgeon Sidney H. Levine, M.D., examined Mr. Jespersen for a Second Independent Medical Evaluation (SIME). Mr. Jespersen said after his 1985 work injury "his symptoms never fully subsided and he 'just dealt with it.'" Over time, his neck and back symptoms worsened, were irritated more often, "and his symptoms would last longer." At some point after the 1985 injury, Mr. Jespersen was standing on a five-gallon bucket and fell, twisting his right ankle which required surgery. Dr. Levine diagnosed post-L5-S1 disc herniation with surgery, compression fracture at L5 healed, a right pars interarticularis fracture at L5, Type II diabetes, and peripheral neuropathy. Answering the Board's questions, Dr. Levine ruled out the 1985 work injury as a substantial factor in causing disability or need for treatment beginning in 2014. The 1985 work injury was the substantial cause for treatment for his back injury including a compression fracture at L5 and at the right pars interarticularis, but these injuries healed and treatment and evaluation in 2014 were unrelated to the 1985 work injury. The alternative cause for treatments beginning in 2014 were normal activities of daily living and work. Also, his diabetes was not related to the work injury. Mr. Jespersen's disability from the 1985 work injury ended by June 16, 1987. In Dr. Levine's opinion, Mr. Jespersen

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<sup>63</sup> *Jespersen III* at 16, No. 66.

<sup>64</sup> *Id.* at 67.

<sup>65</sup> R. 2187-2189.

needed no further treatment to address the 1985 work injury or its consequences. The treatment Mr. Jespersen received in 2016, and thereafter, was not related to the compression or pars fracture or the work injury. Dr. Levine agreed with Dr. Bauer that any injury that could occur to a disc associated with an L5 compression fracture on the top endplate would occur at the L4-5 level, but in this case Mr. Jespersen's disc problem was at the L5-S1 level.<sup>66</sup>

On September 3, 2020, endocrinologist Mark A. Silver, M.D., spoke to Mr. Jespersen by telephone and reviewed his medical records for an SIME. Mr. Jespersen said he had been on Prednisone beginning in 2004 for "arthritis." Dr. Silver found no evidence Mr. Jespersen had diabetes prior to 1985, but found "no link" between his 1985 injury and diabetes. Therefore, the work injury "would not be a substantial factor in causing disability or need for treatment" for diabetes. Alternate causes for Mr. Jespersen's diabetes are his "prior chronic steroid use" and his "family history of diabetes" on his father's side. While chronic pain might aggravate blood sugar control and diabetes, chronic pain was not a substantial factor in Mr. Jespersen developing diabetes. Dr. Silver opined the primary cause of Mr. Jespersen's elevated blood sugars and poor diabetic control were improper medical treatment and inadequate diabetic medications.<sup>67</sup>

A December 30, 2020, a lumbar MRI showed multilevel lumbar spondylosis with postoperative changes at L5 and a small posterior L5 disc herniation on the right.<sup>68</sup> On December 30, 2020, Jacelyn P. Davidson, M.D., stated, "Please let patient know his MRI does show impingement of the right S1 nerve. It also shows degenerative disc disease at all the lumbar levels. . . ."<sup>69</sup>

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<sup>66</sup> R. 0932-1001.

<sup>67</sup> R. 2640-2644.

<sup>68</sup> R. 2684-2685.

<sup>69</sup> R. 2653-2655.

On January 26, 2021, Melissa A. Rose, APRN, CNP, on referral from Dr. Davidson, evaluated Mr. Jespersen for low back and left lower extremity pain. Mr. Jespersen gave the following history:

[Employee] is a 57-year-old male who presents to the office for evaluation of low back pain and left lower extremity pain with numbness and weakness. Had a work injury in 1985 resulting in L5 compression fracture and had mild low back pain off and on over the years. Current symptoms first started in spring of 2016. . . .

He also listed a family history of diabetes on his father's side. APRN Rose diagnosed lumbar degenerative disc disease, but did not offer a causation opinion.<sup>70</sup>

*a. Hearing and deposition testimony.*

Mr. Jespersen testified at hearing that when he saw Dr. Bauer for the EME in Seattle, he thought it was not a thorough examination. Mr. Jespersen stated he could no longer drive back and forth between Alaska and the Lower 48 because his low back symptoms were too painful.<sup>71</sup> He was confident the 1985 plane crash necessitated his 2016 injection therapy because he "had pain in the same spots since the day of that accident" and he wanted relief. His neck had been "stiff 30 years."<sup>72</sup>

Mr. Jespersen testified in his deposition that since his accident there were "really hardly any" days that he would call "zero pain, but it was tolerable." The Board found that after some prompting from his lawyer, he could "honestly say" that he had "daily pain" related to his injury.<sup>73</sup> He had not seen Dr. Carney as a patient or otherwise since 1987 or 1988. He "pretty much had health insurance" all the time even though he thought it was not very good. Nevertheless, he "pretty much stayed away from doctors" until he started having back and leg problems in 2014.<sup>74</sup> Mr. Jespersen recalled Dr. Helleloid and

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<sup>70</sup> R. 2707-2712.

<sup>71</sup> *Jespersen I* at 4, No. 14.

<sup>72</sup> Jay Jespersen Dep. at 21:24 – 23:1.

<sup>73</sup> Jay Jespersen Dep. at 12:18 – 13:2.

<sup>74</sup> Jay Jespersen Dep. at 36:3-6, 19:8-21.



a physician at a clinic said he would probably have back problems as he got older.<sup>75</sup> When Mr. Jespersen had leg paralysis and fell in 2014, he recalls the FMH emergency room physician said his L5 vertebra was “crushed” and he fell because “I got pinched nerves that just got pinched on hard enough to lose control of my legs.”<sup>76</sup> Dr. Seth was the only physician Mr. Jespersen saw in Arizona for his back or neck.<sup>77</sup> Mr. Jespersen said the only reason he had injections from Dr. Seth was for his work injury, because he “had pain in the same spots since the day of that accident” and “after 30 years” it was time to do something.<sup>78</sup> Mr. Jespersen said his neck has “been stiff” for thirty years.<sup>79</sup> Between his 1985 work injury and self-employment, he worked for several flying services as a pilot and aircraft mechanic, but said he had no injuries while working for them. In 2010, Mr. Jespersen “slipped off a step stool” at his hanger in Arizona, fractured his ankle, and required ankle fusion surgery.<sup>80</sup> Since his injury, Mr. Jespersen put claims for medical care he attributed to his work injury on his personal health insurance.<sup>81</sup> In his opinion, the 1985 work injury also influenced his blood sugar levels.<sup>82</sup>

Mr. Jespersen did not believe he would be seeking medical benefits for his lumbar spine if he had not had the 1985 airplane crash while working for Tri-City. Since that accident, Mr. Jespersen said he had “never been the same; have never been right.” He dealt with “chronic pain” since the crash and it “finally . . . caught up” with him. Mr. Jespersen had pain “for many years” and it prompted him to see Dr. Seth in 2014. Spinal injections did not work so he turned to Dr. Jensen. The surgery worked for one or two months but then the area “collapsed again.” According to Mr. Jespersen, around

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<sup>75</sup> Jay Jespersen Dep. at 35:7-17.

<sup>76</sup> Jay Jespersen Dep. at 37:9-24.

<sup>77</sup> Jay Jespersen Dep. at 39:19-25, 47:19 – 48:3.

<sup>78</sup> Jay Jespersen Dep. at 22:18 – 23:1.

<sup>79</sup> Jay Jespersen Dep. at 25:18-25.

<sup>80</sup> Jay Jespersen Dep. at 14:2 – 16:7, 55:3 – 59:13, 51:18 – 52:3.

<sup>81</sup> Jay Jespersen Dep. at 59:14 – 60:14.

<sup>82</sup> Jay Jespersen Dep. at 61:15-23.

the time Dr. Jensen performed the low-back surgery he told Mr. Jespersen he was “very positive” the plane crash was a substantial factor in his need for surgery. He does not recall talking about his pain level over the years with Dr. Bauer, but, in Mr. Jespersen’s view, Dr. Bauer’s visit was very short.<sup>83</sup> Mr. Jespersen did not think Dr. Levine was well prepared.<sup>84</sup> He saw Dr. Silver by telephone. He disagreed with Dr. Silver that he had chronic steroid use and that his dad died of diabetes.<sup>85</sup> Mr. Jespersen contended his steroid use arose from his work injury. He did not think his back issues or diabetes came from normal aging because none of his brothers have back or diabetes issues.<sup>86</sup> Mr. Jespersen thought Dr. Jensen has not been paid for his services and that was why Dr. Jensen would not speak to him or his lawyer.<sup>87</sup> He also said that a doctor in the clinic after the 1985 crash told him he would be all right, but someday he would have back problems.<sup>88</sup> Mr. Jespersen, at his own expense, took Cortisol prescribed by an Arizona physician in 2004 through 2008 for back pain. Mr. Jespersen could not recall the clinic physician’s name who he testified once told him he might have back problems later in life.<sup>89</sup> He wants his back “fixed up” so he can go back to work flying. The Board found that no medical records exist in the Board’s record for these visits.<sup>90</sup>

Mr. Jespersen described his pain level between 1985 and 1991: He returned to work in 1987 at his normal job and was “pretty sore.” His pain progressively got worse and “never got better.” Between 1991 and 2000, Mr. Jespersen felt good enough “to get by;” he was flying, loading and unloading planes, and was the first person at work and

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<sup>83</sup> Hr’g Tr. at 250:16 – 251:4, 253:9 – 254:5, 257:25 – 258:5, 258:17-25, Feb. 17, 2021.

<sup>84</sup> Hr’g Tr. at 259:4-19.

<sup>85</sup> Hr’g Tr. at 260:3 – 261:1.

<sup>86</sup> Hr’g Tr. at 262:6-25.

<sup>87</sup> Hr’g Tr. at 264:13-20.

<sup>88</sup> Hr’g Tr. at 264:21 – 265:7.

<sup>89</sup> Hr’g Tr. at 267:15 – 268:5, 268:16-20.

<sup>90</sup> *Jespersen III* at 16, No. 69.

the last person to leave every day. Every other year he bought a new airplane to grow his business. Between 2000 and 2010, he was “good enough to go on” but never “really comfortable.” By 2014, Mr. Jespersen could not do the work required and had to ask clients to help unload planes. During the fifteen years before Dr. Jensen saw him, Mr. Jespersen did not get much medical care except over-the-counter medications and Cortisol treatments. Following his 2016 surgery, his symptoms suddenly got worse and Mr. Jespersen wondered “what happened?” He could point to no specific event that caused his “what happened” moment, but he recalls waking up with a “sizzle” in his back and ended up using crutches again. Eventually, in 2018, Mr. Jespersen went to the emergency room at FMH to find out what was going on with his back and learned the surgery had “collapsed.”<sup>91</sup>

Mr. Jespersen’s wife, Judy Jespersen, testified Mr. Jespersen owed over \$20,000.00 in unpaid work-related medical bills. He struggled to get medical care and his health insurance did not cover his work-related injury. She affirmed sitting and driving in a motor vehicle was difficult for Mr. Jespersen and she wanted “him to see somebody.” She and her husband were worried about his lower extremity numbness, which in her view “is getting worse.”<sup>92</sup> Ms. Jespersen testified in deposition that she knew Mr. Jespersen before and after his 1985 accident.<sup>93</sup> His 2019 problems included mobility, “pain all the time,” restlessness at night, sitting, riding in a car or truck, and standing.<sup>94</sup> She knew his family and was not aware they ever had back problems or surgeries.<sup>95</sup> Once she and Mr. Jespersen purchased their flying service, he piloted planes and did maintenance.<sup>96</sup> Their flying service now must hire help because he could no longer do

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<sup>91</sup> Hr’g Tr. at 273:9 – 275:23, 276:2 – 277:1, 279:10-21, 280:1-11, 281:12 – 282:6, 282:10 – 283:12.

<sup>92</sup> Hr’g Tr. at 70:10 – 71:2, 73:2-11, 290:18 – 291:6, 292:25 – 293:20.

<sup>93</sup> Judy Jespersen Dep. at 5:13-19, 6:20 – 7:4, Feb. 14, 2019.

<sup>94</sup> Judy Jespersen Dep. at 7:8-25.

<sup>95</sup> Judy Jespersen Dep. at 8:4-14.

<sup>96</sup> Judy Jespersen Dep. at 10:24 – 11:13.

all the work.<sup>97</sup> Ms. Jespersen noticed her husband's current symptoms had begun four or five years earlier (2014 or 2015) and gradually increased.<sup>98</sup> They purchased a motorhome in 2015 because he could no longer sit still while driving.<sup>99</sup> Since she and Mr. Jespersen have been together, she has never seen a day when she did not observe some "partial impairment" in his body and said he always had some pain or discomfort.<sup>100</sup> From her perspective, Mr. Jespersen had injection therapy from Dr. Seth because, "He has had the same pain from 30 years ago, so that's what he went for, the low-back pain."<sup>101</sup>

In deposition, Dr. Bauer testified he found no medical record showing Mr. Jespersen continued to complain of back or neck pain after 1987 until sometime in the 2000s, when Mr. Jespersen reported back pain for "a couple of years," but not continuously.<sup>102</sup> Lumbar spine MRIs taken in 2014 did not explain his symptoms. The thoracic and lumbar MRI findings at that time were consistent with degenerative disc disease and there was disc desiccation at multiple levels, degenerative bulging at L4-5 and L5-S1, and facet arthrosis, which is also another word for arthritis.<sup>103</sup> The February 8, 2016, thoracic spine MRI was also consistent with degenerative disc disease, similar to 2014.<sup>104</sup> Dr. Bauer opined disc degeneration is "a systemic process" which occurs at multiple levels, sometimes at varying rates or sometimes at the same time. He noted Mr. Jespersen has degenerative changes in his spine at all spinal levels, which is "very characteristic of a systemic disease rather than a result of trauma."<sup>105</sup>

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<sup>97</sup> Judy Jespersen Dep. at 12:7 – 13:4.

<sup>98</sup> Judy Jespersen Dep. at 15:16-25.

<sup>99</sup> Judy Jespersen Dep. at 18:9-17.

<sup>100</sup> Judy Jespersen Dep. at 19:17 – 20:4.

<sup>101</sup> Judy Jespersen Dep. at 23:22 – 24:16.

<sup>102</sup> Bauer Dep. at 13:22 – 14:4.

<sup>103</sup> Bauer Dep. at 14:5 – 15:25.

<sup>104</sup> Bauer Dep. at 16:16 – 17:6.

<sup>105</sup> Bauer Dep. at 16:16 – 17:6.

Dr. Bauer agreed with Dr. Seth's February 2016 opinion that Mr. Jespersen's neck, thoracic, and lumbar pain was caused by arthritis and degenerative changes. He saw no causal connection between Mr. Jespersen's 1985 L5 compression fracture and Dr. Seth's diagnoses.<sup>106</sup> Dr. Jensen performed the 2016 surgery on the opposite end of the L5 vertebra from where Mr. Jespersen had the L5 compression fracture.<sup>107</sup> Dr. Bauer found no muscle atrophy, leading him to conclude Mr. Jespersen had been using them symmetrically.<sup>108</sup> In his opinion, the seventeen percent fracture Mr. Jespersen had at L5 was a "minor compression fracture."<sup>109</sup> Mr. Jespersen's 2016 acute disc herniation, based on his medical records and the history he gave Dr. Jensen, was in Dr. Bauer's view "something new and different at that time causing very severe pain."<sup>110</sup>

Dr. Bauer, in a footnote in his report, referred to medical journals discussing spine compression physiology and whether it causes injury to discs. A 1967 study showed G-forces ten times the force of gravity applied to the human spine cracked the bone, but not the disc. Dr. Bauer could find no studies refuting this. He reiterated that the 1985 work injury was not a substantial factor in causing Mr. Jespersen's treatment in 2014. Rather, Dr. Bauer opined Mr. Jespersen's fracture healed naturally "and then another disease" started.<sup>111</sup> He explained the distinction between a "burst fracture" and a "compression fracture." A burst fracture is more serious than a compression fracture and typically will damage the adjacent disc. He opined that in Mr. Jespersen's case, a more serious burst fracture at L5 would have affected the L4-5 disc, the one above the level of the fracture, but would not have affected the level below.<sup>112</sup>

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<sup>106</sup> Bauer Dep. at 18:6 – 19:2.

<sup>107</sup> Bauer Dep. at 19:3 – 20:5.

<sup>108</sup> Bauer Dep. at 27:11-19.

<sup>109</sup> Bauer Dep. at 28:24 – 29:8.

<sup>110</sup> Bauer Dep. at 30:4-8.

<sup>111</sup> Bauer Dep. at 30:24 – 35:2.

<sup>112</sup> Bauer Dep. at 36:18 – 37:8.

Dr. Bauer noted Dr. Carney's May 19, 1986, report which said the L5 fracture had completely healed. "Spondylosis" is a synonym for "arthritis."<sup>113</sup> Mr. Jespersen's 1987 records show no L5-S1 disc injury.<sup>114</sup> Dr. Bauer opined the work injury was not "even an iota" responsible for any delayed disc herniation.<sup>115</sup> Dr. Bauer opined that any degenerative disc disease findings in 1987 would be caused by early degenerative disc disease and genetics and did not result from Mr. Jespersen's 1985 work injury.<sup>116</sup> He opined Dr. Seth's injections and Dr. Jensen's surgery, respectively, were not done as a result of Mr. Jespersen's L5 compression fracture, but were because degenerative disc disease collapsed the L5-S1 disc space, which caused radicular pain and the need for surgery.<sup>117</sup> Dr. Bauer opined Mr. Jespersen's continued work as a bush pilot for at least fifteen years caused the symptoms in his cervical and lumbar spine.<sup>118</sup> He assigned responsibility for medical treatment for pain Mr. Jespersen experienced in 2016 to the progression of time, i.e., aging.<sup>119</sup>

At hearing, Dr. Carney testified his father, C. M. Carney, DC, had seen Mr. Jespersen prior to his 1985 work injury. On May 14, 1986, Dr. C. M. Carney diagnosed Mr. Jespersen with a healed lateral right L5 compression fracture. Dr. Carney opined that vertebra would not have its normal "tin can" shape even though it was healed. When compression-fractured, Mr. Jespersen's L5 vertebra became wedge-shaped on the top front right. In his opinion, this injury altered the muscles and ligaments around the compression fracture as they compensated for it. Mr. Jespersen had a well-healed L5 pars interarticularis, which was not an issue.<sup>120</sup>

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<sup>113</sup> Bauer Dep. at 11:4-21.

<sup>114</sup> Bauer Dep. at 13:2-8.

<sup>115</sup> Bauer Dep. at 37:24 – 38:1.

<sup>116</sup> Bauer Dep. at 41:10-25.

<sup>117</sup> Bauer Dep. at 43:15 – 44:7.

<sup>118</sup> Bauer Dep. at 46:8-13.

<sup>119</sup> Bauer Dep. at 47:6-11.

<sup>120</sup> Hr'g Tr. at 216:7-11, 217:20 – 219:24.

Dr. Carney had post-graduate training in orthopedics and “applied spine biomechanics engineering.” He said that in May 1986, Dr. C. M. Carney took lumbar x-rays; Dr. Carney said in reference to those x-rays that he, Dr. Carney, found no degenerative disc disease at L5-S1; however, Dr. Carney said he found early degenerative disc disease at L5-S1 on May 1987 x-rays, but did not see any disc disease at any other spinal level. During the initial time his clinic treated Mr. Jespersen, Dr. Carney did not see any disc “bulges” because Mr. Jespersen only had x-rays, which do not show discs, but only show disc spaces. In his opinion, any bending or twisting motion would bend, twist, and stretch microfibers in the annulus at L5-S1 and cause continuing symptoms. The L5 compression fracture, in his view, would cause Mr. Jespersen to compensate by leaning to the left, which would account for malalignment of certain vertebrae.<sup>121</sup>

Dr. Carney disagreed with Dr. Bauer’s report and deposition, opining it was improper to blame all degenerative changes in Mr. Jespersen’s spine on normal life. He said normal disc desiccation occurs over time when discs become dehydrated. In Mr. Jespersen’s case, in his opinion, the fibers in the L5-S1 disc were torn and nucleus material was getting in between fibrous layers in the annulus. This weakened the annulus which, in his opinion, is what caused Mr. Jespersen’s problem.<sup>122</sup> Assuming Mr. Jespersen “never overcame the pain in his back” and had symptoms on a “practically daily basis” for thirty years post-injury, Dr. Carney opined Mr. Jespersen’s chronic pain was due to altered body mechanics from the compression-fractured L5 vertebra, muscle overuse to maintain posture, and continuous micro tears in the L5-S1 disc.<sup>123</sup>

Dr. Carney also disagreed with Dr. Levine’s opinion that if Mr. Jespersen had a herniated disc as a result of the 1985 plane crash, it would have occurred at the L4-L5 disc, not at L5-S1. In his opinion, the fact that the top end plate of L5 fractured with no damage to the L4-L5 disc shows the disc was stronger than the bone and all the torque

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<sup>121</sup> Hr’g Tr. at 220:9-15, 222:23 – 223:16, 225:1-16, 227:14-18, 228:16 – 229:23.

<sup>122</sup> Hr’g Tr. at 235:13 – 236:10.

<sup>123</sup> Hr’g Tr. at 241:20 – 242:10.

occurred on the L5-S1 disc. Dr. Carney last examined and treated Mr. Jespersen on December 19, 2019, for residuals from his 1985 accident. He was unaware of any acute injury to Mr. Jespersen's spine since 1985.<sup>124</sup> The Board found that Dr. Carney had not examined or treated Mr. Jespersen between 1987 and 2019, a period of about thirty-two years.<sup>125</sup>

At his April 27, 2020, deposition, Dr. Levine said the work injury was not "a substantial factor" in bringing about Mr. Jespersen's current back condition and need for treatment. The alternate cause was normal aging and Mr. Jespersen's continued work over thirty years after the work injury. "That would be any kind of work that would require repetitive bending or pushing or pulling, lifting, those types of activities." Dr. Levine knew of no other substantial factor other than aging that could have brought about Mr. Jespersen's need to incur medical expenses to treat his pain in 2014.<sup>126</sup> Mr. Jespersen's disc herniation was at L5-S1, the "lowest portion in the low back." Dr. Levine explained why a fracture near the top of vertebral body L5 would not result in a disc herniation below the L5 vertebral body in the L5-S1 disc space:

A. . . . [I]f there was going to be a disc herniation that occurred, it would be closer in time to that fracture, but the – the fracture occurs in the bone. The compression occurred in the upper – comes from the upper level. So that would be higher, closer to the L4-5 disc as opposed to the L5-S1, the lower level.

His problem is at that lower level, and that disc was not involved in the compression fracture, and that fracture did not extend into that disc space. So it did not cause – in my opinion, cause injury to that disc.<sup>127</sup>

In Dr. Levine's opinion, vertebral fractures usually heal within six months and any remaining symptoms that may continue would be localized low back pain and would not generally be radicular. Mr. Jespersen had some radicular symptoms, but on the opposite

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<sup>124</sup> Hr'g Tr. 244:6-21, 245:15 – 247:15.

<sup>125</sup> *Jespersen III* at 31, No. 113.

<sup>126</sup> Sidney H. Levine, M.D., Dep. at 11:20 – 12:1, 21:22 – 22:10, 23:25 – 24:6, Apr. 27, 2020.

<sup>127</sup> Levine Dep. at 25:15-23, 26:24 – 27:9.



side from where he had the fractured L5 vertebral body.<sup>128</sup> In his opinion: The injections Dr. Seth provided “were not for the L5 fracture,” but “for the leg pain, the radicular pain.” The surgery he had at L5-S1 was “[m]ost definitely for a disc herniation.”<sup>129</sup> A person does not need to have a specific traumatic event to have disc degeneration and a herniation.<sup>130</sup>

At hearing, Mr. Jespersen’s attorney, Richard L. Harren, took a call from Dr. Jensen’s former office manager stating Dr. Jensen was “not willing to help.” Mr. Harren then stated that Mr. Jespersen would not be calling Dr. Jensen as a witness.<sup>131</sup>

*b. Statement of procedural process.*

The procedural process in this matter has given rise to several disputes, some of which are part of this appeal. On April 16, 2019, *Jespersen I* ordered a panel SIME with an orthopedic surgeon and an endocrinologist, based upon a causation dispute between attending physician Dr. Jensen and EME physician Dr. Bauer. *Jespersen I* found that while Mr. Jespersen had not yet officially claimed benefits related to diabetes, symptoms from that disease could be relevant to his lower extremity issues, which he attributed to his 1985 work injury. *Jespersen I* found a panel SIME would assist the fact-finders in ascertaining the parties’ respective rights under the law.

On September 26, 2017, Mr. Jespersen’s attorney, Mr. Harren, wrote to treating physician Dr. Jensen asking for his opinion about the relationship between Mr. Jespersen’s 1985 work injury and the 2016 surgery performed by Dr. Jensen.<sup>132</sup> Dr. Jensen did not respond until January 2019. On January 11, 2019, Mr. Jespersen filed and served by mail Dr. Jensen’s January 9, 2019, responses to the September 26, 2017, questionnaire.<sup>133</sup> On the same day, Mr. Jespersen requested a hearing on his December 29, 2016, and

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<sup>128</sup> Levine Dep. at 27:22 – 28:21.

<sup>129</sup> Levine Dep. at 29:4-18.

<sup>130</sup> Levine Dep. at 34:23 – 35:2.

<sup>131</sup> *Jespersen III* at 33, No. 118.

<sup>132</sup> R. 2092-2093.

<sup>133</sup> R. 2091.

January 23, 2018, claims and asserted his right to cross-examine Dr. Bauer.<sup>134</sup> On January 16, 2019, Tri-City timely requested an SIME, citing a medical dispute between attending physician Dr. Jensen and EME physician Dr. Bauer.<sup>135</sup> Tri-City, on January 22, 2019, timely asserted its right to cross-examine Dr. Jensen on his answers to Mr. Jespersen's questionnaire.<sup>136</sup> The Board held that Dr. Jensen's "two-word fill-in-the-blank response to [Attorney] Harren's questionnaire was strictly for litigation purposes."<sup>137</sup> This finding meant that Dr. Jensen's answers were not a medical record created in the usual scope of treatment which could be admitted over a request for cross-examination.<sup>138</sup> Dr. Jensen was never presented for cross-examination.<sup>139</sup>

On February 27, 2019, the parties stipulated to file witness lists for an April 4, 2019, procedural hearing and a May 7, 2019, merits hearing in accordance with 8 AAC 45.112.<sup>140</sup> On March 28, 2019, Mr. Jespersen filed a non-conforming witness list for the April 4, 2019, procedural hearing. The list failed to provide a brief description of the subject matter and substance of the witnesses' expected testimony, but identified witnesses as Mr. Jespersen, his wife, Judy Jespersen, and Drs. Bauer and Carney.<sup>141</sup>

At the hearing on April 4, 2019, Mr. Jespersen filed excerpts from several spine studies Dr. Bauer mentioned in his report. Among these were the two dealing specifically with spine biomechanics: (1) *The Human Spinal Column and Upward Ejection Acceleration: An Appraisal of Biodynamic Implications*, 1967; and (2) *A Study of the Mechanics of Spinal Injuries*, 1960. Addressing Tri-City's petition to quash a subpoena for Dr. Bauer's testimony at that hearing, Mr. Jespersen cited to the treatises referenced

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134 R. 0111, 0110.

135 R. 0112.

136 R. 0142.

137 *Jespersen III* at 16, No. 66.

138 8 AAC 45.120(f) and (h).

139 *Jespersen III* at 16, No. 67.

140 R. 4021-4024.

141 R. 0300-0301.

in Dr. Bauer's report's footnotes and stated he wanted to question Dr. Bauer about these biomechanical spine studies. He also conceded that Dr. Bauer's report rebutted the presumption of compensability and shifted the burden of persuasion to him.<sup>142</sup>

On May 13, 2020, the parties agreed to a June 16, 2020, procedural hearing and again stipulated to file witness lists in accordance with 8 AAC 45.112.<sup>143</sup> On June 9, 2020, Mr. Jespersen again filed a non-conforming witness list that failed to provide a brief description of the subject matter and substance of the listed witnesses' expected testimony. This list included Dr. Carney, Mr. Jespersen, and his wife Judy.<sup>144</sup>

At the June 16, 2020, hearing, Tri-City objected to Mr. Jespersen's June 9, 2020, witness list because it failed to provide a brief description of the subject matter and substance of the witnesses' expected testimony under 8 AAC 45.112. Mr. Jespersen withdrew Dr. Carney and requested the Board table Tri-City's request to strike witnesses until such time as he decided to call his wife. He contended the requirement that the witness list include a brief description of the subject matter and substance of Ms. Jespersen's testimony was non-prejudicial to Tri-City and was "irrelevant," because she would "obviously" be testifying about things pertinent to the issue pending. Mr. Jespersen ultimately waived his right to call anyone but himself at this hearing.<sup>145</sup>

Tri-City's June 16, 2020, hearing objection put Mr. Harren on notice that his witness list format was not in conformance with the regulation and would be subject, in the future, to a request to strike all witnesses except his client.<sup>146</sup>

On October 21, 2020, Mr. Jespersen requested a hearing on his amended claims.<sup>147</sup> On October 28, 2020, Tri-City timely reasserted its right to cross-examine Dr. Jensen on

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<sup>142</sup> *Jespersen III* at 17-18, No. 73.

<sup>143</sup> R. 4073-4076.

<sup>144</sup> R. 0732-0733.

<sup>145</sup> *Jespersen III* at 22-23, No. 79.

<sup>146</sup> *Id.* at 23, No. 80.

<sup>147</sup> R. 0763.

his January 9, 2019, report.<sup>148</sup> On November 17, 2020, the parties set a February 17-18, 2021, hearing on Mr. Jespersen's claim, and for the third time stipulated to filing witness lists in accordance with 8 AAC 45.112 and evidence pursuant to 8 AAC 45.120. Documentary evidence upon which the parties wanted to rely at hearing had to be filed and served no later than January 27, 2021.<sup>149</sup>

The Board stated that on January 29, 2021, at 4:59 PM, Mr. Jespersen filed electronically documents upon which he wanted to rely at the February 17, 2021, hearing.<sup>150</sup> The Board further stated that had the Alaska Workers' Compensation Division received Mr. Jespersen's email and all attachments before 5:00 PM on January 29, 2021, Mr. Jespersen's evidentiary filing would still have been untimely.<sup>151</sup> The Board also noted that the Board's computer server received Mr. Jespersen's January 29, 2021, email with all documentary evidence attached at 5:04 PM which, by regulation, made the filing effective the next working day, which was February 1, 2021, and untimely.<sup>152</sup>

The Board held that on February 9, 2021, Mr. Jespersen filed a non-conforming witness list and this list had less required information than his two prior non-conforming witness lists. His witness list included fifteen witnesses. It provided no telephone numbers and no description of the subject matter or substance of any witness's expected testimony. Mr. Harren and his associate attorney, Mr. H. Lee, both signed the witness list.<sup>153</sup>

On February 10, 2021, Tri-City asserted its right to cross-examine the authors of evidence Mr. Jespersen tried to file on January 29, 2021.<sup>154</sup>

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<sup>148</sup> R. 0764.

<sup>149</sup> R. 1271-1274.

<sup>150</sup> *Jespersen III* at 24, No. 89; R. 0770.

<sup>151</sup> *Id.* at 24, No. 90.

<sup>152</sup> *Id.*, No. 91.

<sup>153</sup> R. 1104-1106; *Jespersen III* at 26-27, No. 97.

<sup>154</sup> R. 1293.

*c. Expert witness Mariusz Ziejewski, Ph.D., Mechanical Engineer.*

Mr. Jespersen tried to add a new expert witness to testify at hearing when he filed his February 9, 2021, witness list for the hearing on February 17, 2021. Tri-City objected to the newly disclosed witness list because the witness list did not conform to the Board's regulations by failing to disclose either Mariusz Ziejewski, Ph.D.'s, telephone number or the substance or a description of the nature of his testimony. Mr. Jespersen asserted Dr. Ziejewski was necessary to his case because he had only realized during the deposition of Dr. Bauer that body mechanics might be a crucial element of his defense. Tri-City also objected to the new witness as "trial by ambush" which is disfavored by courts.

The Board, in evaluating the deficient witness list and Tri City's objections, found that in his attorney fees affidavit, the attorney for Mr. Jespersen, Mr. Harren, stated that on September 26, 2017, he spent 1.2 hours reviewing Dr. Bauer's report and drafting a letter to Dr. Jensen.<sup>155</sup> Further, for the hearing on April 4, 2019, Mr. Jespersen filed excerpts from several spine studies Dr. Bauer mentioned in his report.

On the first hearing day, February 17, 2021, Tri-City sought to strike most of the documents Mr. Jespersen had filed as evidence for hearing as hearsay or irrelevant. It objected to Mr. Jespersen's non-conforming witness list because it did not include telephone numbers or descriptions of the subject matter or substance of the witnesses' expected testimony; Mr. Jespersen subsequently pared his list down from fifteen witnesses to four – Mr. Jespersen, his wife, Dr. Carney, and Dr. Ziejewski.<sup>156</sup>

At hearing, the preliminary issue was Tri-City's objection to Dr. Ziejewski. In response to its objection, Mr. Jespersen cited Tri-City's failure to file a petition to strike his witness list and its failure to notify his attorney and point out the errors. His attorney admitted, "I guess I don't know why I lost sight of that" requirement to file a proper witness list. He offered in support that the woman who works the front desk at his office has no legal experience, his associate attorney was relatively new, and the witness list

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<sup>155</sup> R. 1298-1303; *Jespersen III* at 15, No. 59.

<sup>156</sup> *Jespersen III* at 27, No. 100.

was due the same day as the hearing brief, so “it was difficult to do.” Mr. Jespersen’s attorney further stated, “I guess I didn’t see that” witness list requirement, but insisted Tri-City still should have filed a petition before hearing rather than raise it at hearing. He noted his witness list was in the same format he used before (Tri-City had previously objected to deficient witness lists, thus putting Mr. Jespersen on notice) and stated COVID-19 had affected his office and caused “great difficulties.” He likened striking Dr. Ziejewski’s testimony to a benefit “forfeiture,” which “the law abhors.” Mr. Jespersen suggested Tri-City should request a continuance and Mr. Jespersen requested a continuance to allow Tri-City to depose Dr. Ziejewski or hire its own expert. Dr. Ziejewski provided no report, but gave Mr. Jespersen “slides” upon which he intended to rely at hearing, though these were not filed or served prior to the hearing.<sup>157</sup>

In response, Tri-City contended excluding Dr. Ziejewski would not be manifestly unjust to Mr. Jespersen, but to the contrary, its due process rights would be violated if he were allowed to testify. Even if Tri-City cross-examined later, once the panel heard his testimony “the bell’s been rung.” Tri-City contended doing a Google search is inadequate to find out what Dr. Ziejewski knows about this case or to learn his opinions, denying it a reasonable opportunity to cross-examine him. It contended the parties had agreed to a hearing with months to prepare and Tri-City was ready for hearing. For these reasons, it also objected to continuing the hearing.<sup>158</sup>

In reply, Mr. Jespersen contended Dr. Bauer, in his February 4, 2021, deposition, said some “really outrageous things” of which Mr. Jespersen was not previously aware and he needed an expert to rebut those statements. Dr. Ziejewski is a world-renowned biomechanical engineer. Mr. Jespersen contended his right to due process required the panel to allow Dr. Ziejewski’s testimony to uncover “junk science” offered by orthopedic surgeons. Mr. Harren admitted he gave Vicki A. Paddock, Tri-City’s attorney, no notice prior to filing his witness list that he intended to call Dr. Ziejewski to testify about biomechanical issues. He stated Dr. Ziejewski called him the day before witness lists

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<sup>157</sup> *Jespersen III* at 28, No. 102.

<sup>158</sup> *Id.* at 28-29, No. 103.

were due and said he was able to testify at hearing. Mr. Jespersen asked the panel to hear Dr. Ziejewski's testimony as an offer of proof and then decide what to do about it. Mr. Harren said he has thirty-eight years' experience as an attorney and has appeared before the Board for thirty years, including representing Mr. Jespersen in his prior settlement in this case in 1988, and has taken at least one case to the Alaska Supreme Court (Court).<sup>159</sup>

The Board stated its witness list requirement is simple and easy to follow. Either Mr. Harren, his associate attorney, Mr. Lee, or his office person could have provided the required information on the witness list.<sup>160</sup> The Board orally granted Tri-City's objection to Mr. Jespersen's witness list. Since Dr. Ziejewski provided no written report, the required witness information was missing, and based on Tri-City's "trial by ambush" arguments, the Board order excluded his testimony. The Board held that as a party, Mr. Jespersen could testify and his wife could testify since she had already been deposed. Dr. Carney was allowed to testify because he was Mr. Jespersen's former attending physician and the parties had his medical records.<sup>161</sup>

On February 18, 2021, at the start of the second hearing day, Mr. Jespersen requested reconsideration of the witness list ruling from the day prior. Mr. Jespersen filed Dr. Ziejewski's "slides" on which he intended to refer during his testimony. He then explained what Dr. Ziejewski reviewed and what he would say in response to Dr. Bauer's opinions. Mr. Jespersen requested a two-week continuance so Dr. Ziejewski could give testimony and be subject to cross-examination. His attorney further contended if the request for a continuance or the request to add Dr. Ziejewski as a witness were not granted, Mr. Harren might have to contact his errors and omissions insurer for advice on how to proceed. Mr. Harren said he ethically might have to withdraw from the case because he may have erred, thus causing a conflict-of-interest between him and Mr. Jespersen. Mr. Jespersen further contended, despite winnowing his witness list down

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<sup>159</sup> *Jespersen III* at 29, No. 104.

<sup>160</sup> *Id.*, No. 105.

<sup>161</sup> *Id.*, No. 106.

to four witnesses, he wanted to add five more, all of whom he contended were “parties.” Mr. Jespersen asserted he had been trying to get Dr. Jensen’s testimony for two years.<sup>162</sup>

In response, Tri-City stated the Board lacked authority to reconsider an oral decision because reconsideration requires a written decision. It contended Mr. Jespersen was trying to further his “trial by ambush” tactics and the hearing should not be continued so he could cure his failure to prepare properly and file a conforming witness list. Tri-City noted both parties, in November 2020, agreed to a two-day hearing with three months to prepare. Moreover, all parties knew biomechanical issues had existed in this case since at least 2017, when Dr. Bauer issued his report. Tri-City further stated Mr. Jespersen could have deposed Dr. Jensen long ago, but had not done so. It further noted Dr. Carney had testified regarding biomechanical issues and cited to his certification. Moreover, Tri-City contended various witnesses on Mr. Jespersen’s non-conforming list were not “parties” entitled to testify.<sup>163</sup>

When asked when he first knew Dr. Bauer was raising biomechanical issues, Mr. Harren first responded, “in 2017,” when he read Dr. Bauer’s report and saw it “in a footnote.” However, after a recess, he wanted “to correct the record” and said he first became aware of the importance of the body mechanics issue during Dr. Bauer’s February 4, 2021, deposition. Mr. Jespersen also requested “a biomechanical SIME.”<sup>164</sup>

The Board denied Mr. Jespersen’s request for reconsideration because the Administrative Procedures Act (APA) requires a written decision before the power to reconsider can be invoked, and based on Tri-City’s arguments opposing his request.<sup>165</sup> The Board denied Mr. Jespersen’s continuance request because Mr. Jespersen was aware since 2017 that biomechanical issues had been raised, he had years to obtain a biomechanical expert witness and properly notify Tri-City on his witness list about this expert, and, the Board noted, on his attorney fee affidavit, Mr. Harren reported spending

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<sup>162</sup> *Jespersen III* at 33, No. 119.

<sup>163</sup> *Id.* at 33-34, No. 120.

<sup>164</sup> *Id.* at 34, No. 121.

<sup>165</sup> *Id.*, No. 122.



1.2 hours on September 26, 2017, in review of Dr. Bauer's report. The panel did not expressly rule on the SIME request, but "froze" the hearing record as of February 18, 2021.<sup>166</sup>

Eventually, at hearing, the parties agreed the Board could decide if Mr. Jespersen's need for medical treatment was still work-related and the parties could sort out medical issues later if Mr. Jespersen prevailed. Tri-City objected to all evidence Mr. Jespersen filed untimely, except for Blue Cross Blue Shield documents.<sup>167</sup>

Mr. Jespersen clarified the date on which his claim for medical care began was the date he first saw Dr. Seth (February 19, 2016). He clarified the body parts, conditions, or functions for which he sought Tri-City's liability: his low back, including L4 through S1, his neck, and mid-back. Mr. Jespersen was not seeking any medical benefits related to diabetes directly. However, Mr. Jespersen said he needed diabetes treatment before his spine could be addressed and such treatment was included in his claim against Tri-City.<sup>168</sup>

On March 1, 2021, Mr. Jespersen renewed his reconsideration request of the oral order striking his biomechanical engineer expert, contending Drs. Bauer and Levine were biased and should not be relied upon. He also contended only Dr. Carney had evidence of early degenerative disc disease at L5-S1 when he offered his opinions at hearing. Further, he contended Dr. Levine used the wrong legal standard. He relied extensively on *Shea v. State of Alaska, Department of Administration*, especially the Court's statements on the "but for" legal analysis, and renewed his request for an order requiring Tri-City to pay for diabetes treatment sufficient to allow Mr. Jespersen to have surgery for his work-related spine injuries.<sup>169</sup>

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<sup>166</sup> *Jespersen III* at 34, No. 122.

<sup>167</sup> *Id.* No. 123.

<sup>168</sup> *Id.*, No. 124.

<sup>169</sup> *See Shea v. State of Alaska, Dep't of Admin.*, 267 P.3d 624, 636 (Alaska 2011). *Jespersen III* at 34-35, No. 125; R. 1465-1478.

On February 16, 2021, Mr. Jespersen untimely filed an attorney fee affidavit.<sup>170</sup> At hearing on February 17, 2021, Mr. Jespersen asked for his late attorney fee affidavit to be accepted as timely filed. Tri-City non-opposed the request, but asked for a post-hearing review. Mr. Jespersen did not object and an oral order granted Tri-City's request.<sup>171</sup>

At hearing, Mr. Jespersen did not contend he needed a hearing continuance because his attending physician, Dr. Jensen, was "unexpectedly" out-of-state and deposing him was not feasible. Rather, Mr. Harren spoke to Dr. Jensen's office by telephone while on the record examining a witness. Upon ending his call, Mr. Harren advised the Board that Dr. Jensen was not willing to help, and Mr. Jespersen would not be calling him.<sup>172</sup>

On March 19, 2021, *Jespersen III* affirmed the various oral orders made at hearing, including:

1. granted in part and denied in part Tri-City's petition to strike Mr. Jespersen's evidence;
2. denied his request to discover his medical bills directly from the adjuster;
3. denied his request for another SIME;
4. denied his claim for medical treatment and related transportation expenses beginning in 2016 for his cervical, thoracic, and lumbar spine, and for any diabetes treatment necessary for further orthopedic care; and
5. and denied his claims for interest, attorney fees, and costs.<sup>173</sup>

*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.<sup>174</sup>

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<sup>170</sup> R. 1307-1324.

<sup>171</sup> *Jespersen IV* at 2, No. 3.

<sup>172</sup> *Id.* at 2, No. 4.

<sup>173</sup> *Jespersen III* at 62.

<sup>174</sup> AS 23.30.128(b).

Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.<sup>175</sup> “The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.”<sup>176</sup> 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.<sup>177</sup> The Board’s conclusions with regard to credibility are binding on the Commission since the Board has the sole power to determine credibility of witnesses.<sup>178</sup>

On questions of law and procedure, the Commission does not defer to the Board’s conclusions, but exercises its independent judgment.<sup>179</sup> Abuse of discretion occurs when a decision is arbitrary, capricious, manifestly unreasonable, or stems from an improper motive.<sup>180</sup>

#### 4. Discussion.

Jay Jespersen appealed the Board’s decision in *Jespersen III* to the Commission, asserting twenty-one mistakes by the Board. Several of these points on appeal have been arranged together for discussion. Some points involve the Board’s decision declining to allow Mr. Jespersen to put on the testimony of Dr. Ziejewski, an expert in biomechanics. A second group of points by Mr. Jespersen asserts that the Board applied the wrong standard, i.e., the Board applied the “the substantial cause” test when it should have used the “a substantial factor” test in determining if his claim was compensable.

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<sup>175</sup> See, e.g., *Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

<sup>176</sup> *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)).

<sup>177</sup> AS 23.30.122.

<sup>178</sup> AS 23.30.122; AS 23.30.128(b); *Sosa de Rosario v. Chenega Lodging*, 297 P.3d 139 (Alaska 2013) (*Sosa de Rosario*); *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009) (*Smith*).

<sup>179</sup> AS 23.30.128(b).

<sup>180</sup> *Sheehan v. Univ. of Alaska*, 700 P.2d 1295 (Alaska 1985).

Mr. Jespersen also asserts the Board erred in not permitting a continuance of the hearing to allow him additional time to subpoena Dr. Jensen and to permit Tri-City to depose Dr. Ziejewski. Additionally, Mr. Jespersen contends the Board erred in its determination that his current need for medical treatment did not arise out of his 1985 work injury and that he had not suffered ongoing and continuous pain since 1985.

*a. Mr. Jespersen's non-conforming witness list.*

Mr. Jespersen contends the Board erred in finding his witness list was non-conforming to the rules and in disallowing his late-identified expert witness to testify. The Board's regulation at 8 AAC 45.112 details what must be contained in a witness list. It states in full:

A witness list must indicate whether the witness will testify in person, by deposition, or telephonically, the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony. If a witness list is required under 8 AAC 45.065, the witness list must be filed with the board and served upon all parties at least five working days before the hearing. If a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing, except that the board will admit and consider

(1) the testimony of a party, and

(2) deposition testimony completed, though not necessarily transcribed, before the time for filing a witness list.<sup>181</sup>

The rule is straightforward and not complicated nor difficult to follow. Mr. Jespersen's list did not conform to these requirements. The Board held that if one party chooses not to file a proper witness list, it is not the responsibility of the opposing party to advise the other party on how to conduct its litigation.

The Court presumes a regulation is valid. "We accord an administrative regulation a presumption of validity; the party challenging the regulation bears the burden of

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<sup>181</sup> 8AAC 45.112. (Emphasis added.)

demonstrating its invalidity.”<sup>182</sup> The Court stated that in reviewing a regulation, the regulation must be within the agency’s rulemaking authority and it must be “consistent with and reasonably necessary to carry out the purpose of the authorizing statute.”<sup>183</sup> Further a regulation must be “reasonable and not arbitrary.”<sup>184</sup>

Tri-City contends the purpose of this regulation is to provide for the fair and orderly conduct of litigation by requiring all parties to provide necessary information to opposing parties and to the Board. This process of providing for the identity and brief description of the testimony of the witnesses fulfills the Alaska Workers’ Compensation Act’s (Act) requirement that interpretation of the Act be “quick, efficient, fair” and will provide “predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers. . . .”<sup>185</sup>

Mr. Jespersen does not argue that the regulation is invalid. Nonetheless, the Court’s reasoning helps the Commission in looking at whether Mr. Jespersen should have been excused from fully complying with the Board’s requirements.

The regulation requires notice to the opposing party and to the Board of the kind of witnesses to be presented and a brief description of the testimony. This requirement enables both the opposing party and the Board to have an idea as to how the hearing will progress. Mr. Jespersen, on February 9, 2021, filed a witness list that did not conform to the regulatory requirements.<sup>186</sup> His list did not provide “a brief description of the subject matter and substance of the witness’s expected testimony” nor did it include telephone numbers for the witnesses.<sup>187</sup> The witness list was non-conforming.

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<sup>182</sup> See *Anchorage Sch. Dist. v. Hale*, 857 P.2d 1186, 1188 (Alaska 1993) (*Hale*).

<sup>183</sup> *Hale*, 857 P.2d 1186, 1188, citing *Fairbanks N. Star Borough Sch. Dist. v. NEA-Alaska, Inc.*, 817 P.2d 923, 925 (Alaska 1991).

<sup>184</sup> *Id.*, citing *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971).

<sup>185</sup> AS 23.30.001.

<sup>186</sup> *Jespersen III* at 26-27, No. 97.

<sup>187</sup> *Id.*

Mr. Jespersen does not assert that the requirements of the regulation are onerous or burdensome or require an undue amount of expertise in order to comply with the requirements. Moreover, he could not do so. Mr. Jespersen was represented at hearing by counsel who has long practiced before the Board and who is expected to be familiar with the requirements for submitting a proper witness list. Moreover, his attorney was assisted by another licensed attorney in Alaska who is also expected to have read and understood the requirements of the regulation. As noted, the requirements for a conforming witness list are neither onerous nor difficult to implement.

Moreover, Mr. Jespersen had previously filed a non-conforming witness list and was on notice that Tri-City would object to any future non-conforming witness lists. As the Board stated, the requirements are designed to prevent “trial by ambush” and to ensure fairness of the proceedings. Further, the regulation requires exclusion of witnesses on a non-conforming list. However, in spite of a non-conforming witness list, the regulation does permit testimony of a party and testimony from depositions, even if the deposition had not yet been transcribed by the time of the hearing. Under these guidelines, both Mr. and Ms. Jespersen were permitted to testify along with Dr. Carney, whom the Board considered to be a treating physician and whose deposition had been taken.

Mr. Jespersen specifically objects to the exclusion of Dr. Ziejewski, a previously undisclosed expert witness. As the Board stated, the substance of his testimony was not provided on the witness list, nor were his slides or report filed twenty days prior to the hearing as required.<sup>188</sup> Mr. Jespersen’s failure to do this was prejudicial to Tri-City by depriving it of the opportunity to prepare for hearing. Moreover, Mr. Jespersen (or rather his attorney) knew of the need for testimony about body mechanics in 2017 when he received and reviewed Dr. Bauer’s EME report. While Mr. Jespersen’s attorney contended he did not understand the significance or importance of body biomechanics to his case until Dr. Bauer’s deposition, he had read Dr. Bauer’s report in September 2017, had drafted a letter to Dr. Jensen in 2017, and had submitted the medical studies referenced

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<sup>188</sup> See 8 AAC 45.120(f).

in a footnote in Dr. Bauer's report to the Board in 2020. Further, the evidence is that Dr. Ziejewski had agreed to testify at least one day before witness lists were due.<sup>189</sup> Mr. Jespersen knew of the importance of body mechanics to his case, yet he did not timely arrange for a body mechanics expert. This litigation strategy did not work and it is not grounds for ignoring the regulatory requirements for filing evidence and preparing conforming witness lists.

In *Lajiness v. H. C. Price Construction Company*, the Court held that when the employee identified only two witnesses at a prehearing, but tried to introduce previously undisclosed witnesses at hearing, the Board properly rejected the new witnesses.<sup>190</sup> It was not an abuse of discretion for the Board to do so.<sup>191</sup>

Mr. Jespersen had ample opportunity and the necessary expertise to provide a conforming witness list. He did not need to spring an expert on Tri-City at the last possible moment. This tactic is a classic illustration as to why the regulations exist. Mr. Jespersen presented no compelling reason why he should have been excused from complying with the regulations which exist to ensure a fair hearing to all parties. Trial by ambush is not due process.

The regulation is consistent with the statutory requirement that the Act be interpreted fairly, impartially, and efficiently for all parties.<sup>192</sup> The regulation is not difficult to implement. There is no reason for Mr. Jespersen to be excused from complying with it. His attorney's failure to provide Tri-City and the Board with appropriate notice of the witnesses he wished to call at hearing, and his excuses for his failure to file a conforming witness list are not sufficient grounds for waiving the specific requirement that witnesses on a non-conforming list be excluded. The Commission finds the regulation to be within the Board's authority to determine how its hearings should be

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<sup>189</sup> *Jespersen III* at 46.

<sup>190</sup> *Lajiness v. H. C. Price Constr. Co.*, 811 P.2d 1068, 1069 (Alaska 1991) (*Lajiness*).

<sup>191</sup> *Id.*

<sup>192</sup> AS 23.30.001(1).

conducted.<sup>193</sup> The Board did not abuse its discretion in enforcing the exclusion of witnesses on a non-conforming witness list, and the Board properly excluded the testimony of Dr. Ziejewski.

*b. Standard for a pre-2005 work injury and compensability of Mr. Jespersen's claim.*

Mr. Jespersen contends the Board erred in its application of the proper standard to the determination of whether his 1985 work injury precipitated the need for medical treatment in 2016 and ongoing. He does not explicitly point to where the Board made this error. Tri-City asserts the Board's finding that Mr. Jespersen's 1985 work injury was not a substantial factor in the need for ongoing medical treatment is supported by substantial evidence in the record.

Prior to 2005, the standard for determining whether requested medical treatment was compensable was whether the work injury was "a substantial factor" in the need for medical treatment. The standard changed in 2005 with the enactment of AS 23.30.010 which states that "to establish a presumption under AS 23.30.120(a)(1) . . . the employee must establish a causal link between the employment and the . . . need for medical treatment. . . . Compensation or benefits under this chapter are payable for . . . the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment."<sup>194</sup> Since Mr. Jespersen's work injury occurred in 1985, the test for determining if his current need for medical treatment is work related is whether the original injury is a substantial factor in the need for the treatment.

The Court, in *Shea*, stated, "[t]he substantial factor test requires a claimant to demonstrate that: (1) the disability would not have happened 'but for' an injury sustained in the course and scope of employment; and (2) reasonable persons would regard the

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<sup>193</sup> See *Lajiness*, 811 P.2d 1068, 1069, fn. 2 (the Board has "discretion to exercise reasonable control over its proceedings to ensure orderly administration of justice.").

<sup>194</sup> AS 23.30.010(a). (Emphasis added.)



injury as a cause of the disability and attach responsibility to it.”<sup>195</sup> There can be more than one substantial factor under the pre-2005 standard, but the work injury must still be a substantial factor based on medical evidence. It is not a substantial factor simply because the employee believes it to be a factor.

The Board found the plane crash was not a substantial factor, based in part on the fact Mr. Jespersen did not seek medical treatment from any doctor between 1987, when the 1985 injury was declared healed, and his treatment for pneumonia in 2007, twenty years later.<sup>196</sup> The Board thoroughly reviewed the medical records supplied by the parties and submitted to the SIME physicians. The Board found the records did not support a finding of continuous and ongoing pain from 1987 to date arising out of the plane crash. Mr. Jespersen could not, or would not, identify the doctors who told him he would have ongoing problems or the arthritis doctor in Arizona who prescribed steroid injections sometime prior to August 2007.<sup>197</sup>

As Mr. Jespersen asserts, the correct test for an injury occurring prior to 2005 is whether the work injury is a substantial factor in the current need for medical treatment. Mr. Jespersen relies on *Shea* to support his contention that the Board erred in finding that the work injury of 1985 was not a substantial factor in his current need for medical treatment.<sup>198</sup> Specifically, Mr. Jespersen points to the Court’s holding that there may be more than one substantial factor, under the “a substantial factor” test, when evaluating the relationship of a work injury to future medical needs.<sup>199</sup> *Shea*, a non-workers’ compensation case, does state that there may be more than one substantial factor. Neither party disputed this holding.

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<sup>195</sup> *Shea v. State, Dep’t of Admin., Div. of Retirement and Benefits*, 267 P.3d 624, 633-634 (Alaska 2011) (*Shea*).

<sup>196</sup> *Jespersen III* at 6-7, Nos. 10, 11, 13, and 15.

<sup>197</sup> *Id.* at 8, No. 17; *Id.* at 52.

<sup>198</sup> *Shea*, 267 P.3d 624, 636.

<sup>199</sup> *Id.*

Tri-City contends the issue was whether the 1985 work injury was still a substantial factor in Mr. Jespersen's multi-level disc degeneration and the need for medical treatment. It agreed the *Shea* "but for" legal analysis applied to Mr. Jespersen's claim. Tri-City contended that little weight should be given to Dr. Carney given his credentials and because he had not treated Mr. Jespersen for thirty-one years. Tri-City further contended Dr. Jensen's check-the-box letter could not be considered by the Board because the letter was subject to a *Smallwood* objection (request for cross-examination) and provided no helpful information. Mr. Jespersen never presented Dr. Jensen for cross-examination. Thus, the letter could not be considered. Tri-City asserts the Board properly concluded the records and opinions of Drs. Bauer and Levine were entitled to greater weight.<sup>200</sup>

The Board specifically stated, "this is an 'old law' case; the basic legal standard for causation is 'a substantial factor.'"<sup>201</sup> The Board correctly stated the primary issue was whether the 1985 injury "remains a substantial factor in his need for medical treatment. . . ." <sup>202</sup> The fact that there may be more than one substantial factor in a pre-2005 work injury case does not help Mr. Jespersen.

The Board found the opinions of Dr. Bauer and Dr. Levine more persuasive than that of Dr. Carney, and both physicians asserted the only factor in Mr. Jespersen's current need for medical treatment was his degenerative disc disease due to his age and hard work. Both denied the 1985 work injury played any role in the current degenerative disease invading his entire spine. Both asserted the 1985 plane crash was not a substantial factor in the need for medical treatment (back surgery) in 2016 or in Mr. Jespersen's current need for medical care.

The Board noted it is common for a person to experience muscular aches and pains or joint stiffness at the end of the day after strenuous work.<sup>203</sup> The Board found

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<sup>200</sup> R. 1480-1492.

<sup>201</sup> *Jespersen III* at 50.

<sup>202</sup> *Id.* at 51.

<sup>203</sup> *Id.* at 35, No. 127.

no medical record in its file supported Mr. Jespersen's account of what the initial clinic physician and Dr. Helleloid allegedly told him about having back problems later in life, or what the Fairbanks physician allegedly told him about why he fell in 2014.<sup>204</sup>

The Board stated it was unusual for symptoms arising from a work injury to affect other systemic conditions such as diabetes.<sup>205</sup> The Board relied on the opinion of Dr. Silver, the second SIME physician, who is an endocrinologist, that the 1985 work injury was not "a substantial factor in causing disability or need for treatment" for the diabetes.<sup>206</sup> Dr. Silver opined that a substantial factor for the diabetes was chronic steroid use. The Board noted that Mr. Jespersen never produced any medical records regarding the steroid injections, particularly those prior to 2007, until the treatment by Dr. Seth in 2016. Dr. Seth did not provide a reason for the injections and did not relate the need for treatment to the 1985 injury. Moreover, Dr. Seth was not a witness.<sup>207</sup>

The Board found that the opinions of Drs. Bauer and Levine were the more credible regarding the lack of connection between the 1985 injury and any current need for medical treatment. The Board held that the 1985 work injury was not a substantial factor in either the 2016 surgery or in any ongoing need for medical treatment. The Board also discounted the testimony of both Mr. and Mrs. Jespersen.<sup>208</sup>

The Board denied medical treatment for Mr. Jespersen because he was unable to show, by a preponderance of the evidence, that his need for medical treatment from 2016 and ongoing arose out of the 1985 injury. This finding is supported by substantial evidence in the record as a whole. While Mr. Jespersen contends the Board applied the wrong test, he is in error. The Board clearly applied the "a substantial factor" test.

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<sup>204</sup> *Jespersen III* at 16, No. 69.

<sup>205</sup> *Jespersen I* at 5, No. 16.

<sup>206</sup> *Jespersen III* at 23, No. 81.

<sup>207</sup> *Id.* at 12, No. 45.

<sup>208</sup> *Id.* at 55-56, 59-61.

*c. Continuances.*

Mr. Jespersen sought to have the hearing continued to allow him additional time to compel the testimony of Dr. Jensen and, as he asserts, to allow Tri-City time to depose Dr. Ziejewski. Mr. Jespersen asserts the continuance should have been granted to allow additional time to take the deposition of Dr. Jensen and to allow Tri-City the opportunity to depose his proposed expert witness, Dr. Ziejewski. Tri-City objected to a continuance contending Mr. Jespersen had not shown good cause for a continuance. Continuances are not favored and are granted only for good cause.<sup>209</sup>

The Board found that good cause did not exist for a continuance under its regulations. The Board's regulation states, in pertinent part:

(a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

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<sup>209</sup> 8 AAC 45.074(b).

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance. . . .

(2) the board or the board's designee may grant a continuance or cancellation under this section

(A) for good cause under (1)(A) – (J) of this subsection without the parties appearing at a hearing;

(B) for good cause under (1)(K) – (N) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request; or

(C) without the parties appearing at the scheduled hearing, if the parties stipulate to the continuance or cancellation for good cause as set out in (1)(A) – (J) of this subsection. . . .<sup>210</sup>

The Board noted that Mr. Jespersen had had at least two years to arrange for the deposition of Dr. Jensen or to apply to the Board in a timely manner for a subpoena by which to compel his testimony. Mr. Jespersen did neither. Therefore, his request did not fall into one of the above categories constituting good cause. It was his responsibility to arrange for the deposition of Dr. Jensen, since Tri-City had timely requested an opportunity to cross-examine him, and Mr. Jespersen had not arranged either the deposition or to secure timely a subpoena. A party's negligence does not constitute good cause for requesting a continuance.

Further, good cause did not exist for a continuance regarding Dr. Ziejewski. Mr. Jespersen did not seek out the services of Dr. Ziejewski until right before the hearing. He did not get a report from Dr. Ziejewski which should have been filed with the Board twenty days before the hearing. He listed Dr. Ziejewski on his non-conforming witness list and thus, by regulation, his testimony was disallowed. Again, Mr. Jespersen's delay in producing Dr. Ziejewski and his preparation of a non-conforming witness list did not constitute good cause as defined by the regulation. His negligence does not constitute good cause.

The Board properly denied a continuance just so Mr. Jespersen might make a better case at hearing.

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<sup>210</sup> 8 AAC 45.074.

*d. Reconsideration.*

Mr. Jespersen sought reconsideration on the second hearing day of the oral orders issued the preceding day. The Board denied reconsideration at hearing, asserting it had no rules allowing reconsideration of oral orders. This ruling is reviewed under the abuse of discretion standard of review. Mr. Jespersen did not appeal the Board's denial of his petition for reconsideration/modification following the Board's issuance of *Jespersen III*. The Commission reviewed the requirements for reconsideration based on the denial of reconsideration of the oral orders at hearing since Tri-City addressed this issue. Although Tri-City also addressed the petition for reconsideration/modification resulting in *Jespersen IV*, the Commission does not address it, since Mr. Jespersen did not appeal *Jespersen IV* nor list it in his points on appeal.<sup>211</sup>

The APA provides applications of its provisions to a state agency if the agency does not have regulation covering a specific act.

(a) The procedure of the state boards, commissions, and officers listed in this subsection or of their successors by reorganization under the constitution shall be conducted under AS 44.62.330 — 44.62.630. This procedure, including accusations and statements of issues, service, notice and time and place of hearing, subpoenas, depositions, matters concerning evidence and decisions, conduct of hearing, judicial review and scope of judicial review, continuances, reconsideration, reinstatement or reduction of penalty, contempt, mail vote, oaths, impartiality, and similar matters shall be governed by this chapter, notwithstanding similar provisions in the statutes dealing with the state boards, commissions, and officers listed. Where indicated, the procedure that shall be conducted under AS 44.62.330 — 44.62.630 is limited to named functions of the agency.

. . . .

(12) Alaska Workers' Compensation Board, where procedures are not otherwise expressly provided by the Alaska Workers' Compensation Act. . . .<sup>212</sup>

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<sup>211</sup> *Jespersen IV* at 15 denied both the petition for reconsideration and the petition for modification. See Jespersen's Notice of Appeal and Points on Appeal to the Commission.

<sup>212</sup> AS 44.62.330.

If the Act does not cover an action, then the APA applies. Here the issue is a petition/motion for reconsideration of an oral order of the Board. The Act, through its regulations, provides for modification, but has no provision for reconsideration of an oral order.<sup>213</sup> “The Board will in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.3.130.”<sup>214</sup>

Modification under the Act is pursuant to AS 23.30.130, which states:

(a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.<sup>215</sup>

Since the Act does not provide for motions/petitions for reconsideration, the APA applies.

For reconsideration, the APA states:

(a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

(b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence.<sup>216</sup>

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<sup>213</sup> See 8 AAC 45.150.

<sup>214</sup> *Id.*

<sup>215</sup> See 8 AAC 45.150; AS 23.30.130.

<sup>216</sup> AS 44.62.540.

The APA clearly applies to written decisions and does not address oral orders at a hearing. Until the Board reduced its oral orders to a written decision, there was no order from which reconsideration could be taken.

Here, the Board issued oral orders at both hearings which were then ratified in its written decision. Under the APA, Mr. Jespersen then was able to seek reconsideration of those oral orders, but not before. The Board did not abuse its discretion in denying the oral request at hearing for reconsideration of the Board's oral orders.

*e. Credibility.*

Mr. Jespersen contends the Board abandoned common sense and sound judgment in reaching its conclusion as to whom it believed. Therefore, he contends the Board's credibility decisions must be reversed. However, this is not the test the Commission may apply. Both by statute and by Court decisions, only the Board may decide credibility, and it is not the province of the Commission to set the Board's findings of credibility aside, especially on grounds of common sense and sound judgment.

Credibility is the sole province of the Board, as a trier of fact, to decide. Here the Board chose to give more weight to the opinions of Dr. Bauer, Dr. Levine, and Dr. Silver than to the opinion of Dr. Carney or to the testimony of Mr. and Mrs. Jespersen. The Board found Mr. and Ms. Jespersen not credible as to the amount and type of pain Mr. Jespersen suffered over the years.

AS 23.30.122 provides that the Board has the sole right to decide the credibility of witnesses at a hearing. The statute states in full:

The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.<sup>217</sup>

The Act further provides, "The board's findings regarding the credibility of testimony of a witness before the board are binding on the commission."<sup>218</sup>

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<sup>217</sup> AS 23.30.122.

<sup>218</sup> AS 23.30.128(b).



In *Sosa de Rosario v. Chenega Lodging*, the Court specifically stated “we construe AS 22.30.128(b) to mean that the Commission must follow the Board’s credibility determination. . . . [T]he Commission is thus required to accept the Board’s credibility determinations. . . .”<sup>219</sup> The Court has previously noted that a jury’s findings in a civil action can be overturned only if the court finds that, in viewing the evidence in the light most favorable to the non-moving party, no reasonable person could have reached such conclusions.<sup>220</sup> Moreover, when doctors disagree, the Board has the sole right to determine on which doctor’s opinion the Board will rely.<sup>221</sup> “[T]he Board as the fact finder has the authority to interpret an expert’s opinion and decide what weight to give it.”<sup>222</sup>

Mr. Jespersen admitted at oral argument he knew of no Court decision which would provide authority to the Commission to set aside the Board’s credibility findings. However, he asserted the Commission should do so anyway, in the interest of justice. In his briefing, he asserts the Board should have relied on his treating doctors’ opinions that the 1985 injury was a substantial factor in his current need for medical treatment because “the treating physicians’ stake is [Mr. Jespersen’s] health and life.” He contends the EME and SIME physicians’ opinions should be given no weight because their fees are paid by the employer, and by virtue of that payment their opinions are tainted. Mr. Jespersen provided no evidence other than his opinion that payment by Tri-City caused either doctor to render a specific opinion. Mr. Jespersen’s declaration is without foundation or evidence.

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<sup>219</sup> *Sosa de Rosario*, 297 P.3d 139, 146. *See also, Smith*, 204 P.3d 1001, 1008.

<sup>220</sup> *Landry v. Trinion Quality Care Servs., Inc.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 137, at 16 (Aug. 26, 2010), citing *Alaska Children’s Servs., Inc. v. Smart*, 677 P.2d 899, 901 (Alaska 1984).

<sup>221</sup> *See, e.g., Traugott v. ARCTEC Alaska*, 465 P.3d 499, 514 (Alaska 2020) (*Traugott*); *Moore v. Afognak Native Corp.*, Alaska Workers’ Comp. App. Comm’n Dec. No. 087 (Aug. 25, 2008).

<sup>222</sup> *Traugott*, 465 P.3d at 514.

Furthermore, the Act mandates that an employer must pay for an SIME once the Board deems the examination is necessary.<sup>223</sup> The Board's regulation provides a detailed process for the selection and retention of the physicians selected to be available for appointment to perform SIME evaluations. Both employee attorneys and employer attorneys are appointed by the Board each year to select physicians for the Board's list of names for SIMEs.<sup>224</sup> This bipartisan selection process is to ensure that physicians acceptable to both employers and employees are selected. To assert that an opinion by a physician who has been selected by this process is invalid simply because the fee is paid per statutory requirement by an employer, is disconcerting at best. Mr. Jespersen offered no other basis for discounting the opinion of Dr. Levine other than Dr. Carney's disagreement, which the Board chose to discount.

The Board provided a thorough and detailed analysis as to why it found the opinions of Drs. Bauer, Levine, and Silver more persuasive than the opinion of Dr. Carney. It made several credibility findings in reaching its conclusion that Mr. Jespersen's claim was not compensable. First, the Board discussed the testimony of Dr. Carney, who had, with his father, treated Mr. Jespersen following the 1985 plane crash. The Board noted Dr. Carney's post-graduate training in orthopedics and "applied spine biomechanics engineering" and his review of the 1985-1987 x-rays.<sup>225</sup> The Board noted that Dr. Carney "had not examined or treated [Mr. Jespersen] between 1987 and 2019, a period of about 32 years."<sup>226</sup> Dr. Carney did review the reports of Drs. Bauer and Levine and the surgical records of Dr. Jensen, and simply stated he disagreed with Drs. Bauer and Levine.<sup>227</sup>

Mr. Jespersen testified that he had not had a pain-free day for years, but the Board found he had not testified that he had "chronic unrelenting pain" since his work injury in

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<sup>223</sup> See AS 23.30.095(k).

<sup>224</sup> See 8 AAC 45.092.

<sup>225</sup> *Jespersen III* at 30, No. 108.

<sup>226</sup> *Id.* at 31, No. 113.

<sup>227</sup> *Id.* at 30-31, Nos. 110-112.

1985.<sup>228</sup> The Board reviewed the medical records in the record and noted several times that Mr. Jespersen did not mention the 1985 plane crash when he sought medical treatment in 2007 or again in 2016, along with the gap in any medical treatment between 1987 and 2007.

In fact, the Board found that the medical records in the Board's file contradicted Mr. Jespersen's deposition and hearing testimony, and particularly noted the twenty-year gap in treatment records between 1987 and 2007. Further, when Mr. Jespersen sought treatment in 2007 and then again in 2014, he did not mention the plane crash when discussing his prior medical history.

For instance, in 2007, he told Dr. Lange, with whom he treated for pneumonia, that he had been using "relatively high-dose steroids off and on" for arthritis, but he did not identify the doctor. The Board found there was no record of this arthritis treatment in the Board's file.<sup>229</sup> Also, Mr. Jespersen asserted he had been told in 1987 by an unnamed physician that he would have future problems resulting from his work injury and that Dr. Jensen had told him he was positive the work injury was a substantial factor in the need for the surgery in 2016. However, the medical records do not support either statement and the Board found these statements were hearsay and not conclusive evidence.<sup>230</sup>

Again, Mr. Jespersen indicated in subsequent medical histories he had fallen in 2010 and had an ankle fusion, but there are no contemporaneous records documenting this fall or other injuries he may have had. Mr. Jespersen also failed to mention the plane crash when seeing other doctors, including his emergency room visit in 2014 when he fell to the ground and could not move his legs.<sup>231</sup> The Board found it not credible that

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<sup>228</sup> *Jespersen III* at 32-33, No. 116; 52

<sup>229</sup> *Id.* at 52.

<sup>230</sup> *Id.* at 51-52.

<sup>231</sup> *Id.* at 52-53.

Mr. Jespersen would fail to disclose the plane crash in his medical history. The diagnosis for this fall was “mini stroke.”<sup>232</sup>

In 2015, Dr. Loreman recorded that Mr. Jespersen had no musculoskeletal problems. Even though Dr. Loreman primarily treated Mr. Jespersen for a lung condition, he did record Mr. Jespersen’s right arm symptoms and his significant back and hip discomfort. Yet Mr. Jespersen did not mention the 1985 injury to him.<sup>233</sup> Again in 2016, when Mr. Jespersen sought treatment with Dr. Seth, he mentioned a fall, but did not mention the 1985 plane crash. The Board again found it not credible that Mr. Jespersen would attribute his current medical needs to the 1985 injury, but not seek medical treatment for over twenty years and would fail to tell various treating doctors about the plane crash when he did seek medical treatment.

The Board found that the medical records contradicted the testimony of Mr. Jespersen. The Board held he was not a credible witness.<sup>234</sup> Instead, the Board found that the histories provided to Dr. Bauer and Dr. Levine did not support a finding of continuous, chronic, or unrelenting back symptoms since 1985. The lack of any record in the medical histories given to various physicians over the years, up to and including, that given to Dr. Bauer and Dr. Levine undermined Mr. Jespersen’s credibility. The Board stated that the medical records “with his contemporary historical reports are given greater weight than [Mr. Jespersen’s] deposition and hearing testimony. . . .”<sup>235</sup>

The Board also discounted the testimony of Ms. Jespersen because she was unable to discern or relate whether the pain she perceived in Mr. Jespersen arose out of the heavy work he did on a daily basis, or was residual from the plane crash, or his chronic abdominal pain, or his hip arthritis.<sup>236</sup> The Board likewise discounted the testimony of Dr. Carney. The Board found his opinion about the connection between the 1985 plane

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<sup>232</sup> *Jespersen III* at 53.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 54-55.

<sup>235</sup> *Id.* at 55.

<sup>236</sup> *Id.* at 56.

crash and Mr. Jespersen's current need for medical treatment was based on a hypothetical assumption that Mr. Jespersen had continuous and unrelenting pain from 1985 and ongoing, which was not supported in the medical records. The Board held that Dr. Carney's opinion was based on a faulty assumption. The Board gave more weight to the medical records than it did to the testimony of either Mr. or Mrs. Jespersen or Dr. Carney.<sup>237</sup>

The Board, as is its sole province, gave more weight to the "orthopedic surgeon's and radiologist's x-rays and interpretations" than it did to the opinion of Dr. Carney. The Board found that Dr. Carney based his opinion on "presumptions" about what could have happened or might have happened. Dr. Carney did not see Mr. Jespersen between 1987 and 2019 and, thus, had no direct knowledge of Mr. Jespersen's actual condition in the intervening years. The Board noted that Dr. Carney was the only one to observe degenerative disc disease in 1987 and no other medical record or opinion supported him.<sup>238</sup> Moreover, Dr. Carney stated that if Mr. Jespersen's lumbar symptoms were due to generalized degenerative disc disease, he would have expected to see degenerative disc disease throughout Mr. Jespersen's spine. This is exactly what the medical records and spinal imaging show – disc disease at all spinal levels – cervical, thoracic, and lumbar.<sup>239</sup>

The Board relied on the SIME report and deposition testimony of Dr. Levine who opined, as an orthopedic surgeon, that Mr. Jespersen's L5-S1 disc was the result of aging and his work.<sup>240</sup> Both Drs. Levine and Bauer provided detailed explanations why the L5 compression fracture would not, and did not, contribute to the disc herniation at L5-S1. Dr. Chen, in 2014, found mild degeneration and disc desiccation at all levels in Mr. Jespersen's spine. Dr. Burton, in 2014, found age-appropriate spondylosis in the thoracic spine on the MRI. Dr. Dubbs found mild mid-thoracic and lower-thoracic disc

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<sup>237</sup> *Jespersen III* at 57.

<sup>238</sup> *Id.* at 57.

<sup>239</sup> *Id.* at 58.

<sup>240</sup> *Id.*

degeneration on the 2016 MRI. The 2016 MRI of the lumbar spine showed mild disc bulges from T12 through L4 and a moderate disc bulge at L5-S1. Dr. Jensen noted mild foraminal changes bilaterally at C4 through C6. The 2017 lumbar MRI showed degenerative changes in the upper spinal levels.

These reports support the Board's finding that Mr. Jespersen suffered from generalize degenerative disc disease which were the opinions of the EME physician, Dr. Bauer, and the SIME physician, Dr. Levine.<sup>241</sup> The Board gave greater weight to these imaging reports which also supported the opinions of Drs. Bauer and Levine. Both of these doctors stated persuasively that the 1985 plane crash was not a substantial factor in Mr. Jespersen's current need for medical treatment. Reasonable people could accept the EME and SIME doctors' opinions as valid. The substantial evidence in the record supports the Board's findings. More importantly, the findings of credibility are the Board's to make and may not be disturbed by the Commission on appeal.

*f. Determination of compensability.*

The Act states that "it is presumed, in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter. . . ." <sup>242</sup> Tri-City never disputed that Mr. Jespersen was injured in the course and scope of his work in 1985, merely that ongoing medical treatment was not necessitated by that injury. Dr. Carney testified that his current need for medical treatment arose out of that injury. Mr. Jespersen raised the presumption of compensability which Tri-City needed to rebut with substantial evidence.

At hearing, Mr. Jespersen conceded that Dr. Bauer's report rebutted the presumption of compensability in AS 23.30.120.<sup>243</sup> This concession, as he acknowledged, shifted the burden of proof back to him.<sup>244</sup> Thus, the Board did not need to apply the presumption analysis to Mr. Jespersen's claim, although he had to prove his claim by a

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<sup>241</sup> *Jespersen III* at 58-59.

<sup>242</sup> AS 23.30.120(a).

<sup>243</sup> *Jespersen III* at 17, No. 73.

<sup>244</sup> *Id.*

preponderance of the evidence.<sup>245</sup> The Board found that Mr. Jespersen did not prove his claim by a preponderance of the evidence.

The Board stated, properly, that the standard for Mr. Jespersen's claim was whether the 1985 plane crash was "a substantial factor" in his current need for medical treatment.<sup>246</sup> The Board reviewed Mr. Jespersen's claim that the pain from the crash was ever present until 2016 when it became "so unbearable he decided to seek treatment."<sup>247</sup> The Board then looked at his evidence and held that the medical records did not support his claim of continuous pain or that he suffered from "chronic, unrelenting pain" throughout the years.<sup>248</sup> The records show a twenty-year gap in treatment from 1987 to 2007, a period of time in which Mr. Jespersen asserted he had medical insurance. As the Board found, had he been in continuous or chronic non-stop pain, he could have, and should have, sought treatment. Thereafter, in 2007, and again in 2014, when he did seek medical treatment, he did not mention the plane crash when discussing his medical history.<sup>249</sup> In fact, from 2014 onward, he most often mentioned a fall resulting in a right ankle fusion. Also, although Mr. Jespersen claimed to have received high-dose steroids for arthritis from a doctor in Arizona, some time prior to 2007, he was unable to identify the doctor or to produce substantiating medical records.<sup>250</sup> Moreover, in 2021, shortly before the hearing, Mr. Jespersen reported to APRN Rose that he had had "mild low back pain off and on over the years. Current symptoms first started in the spring of 2016."<sup>251</sup>

The Board found that Mr. Jespersen was less credible than the medical records in the Board's file, finding it "inconceivable that if [Mr. Jespersen] had continuous, chronic and unrelenting symptoms from his work injury since 1985, he would not have sought

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<sup>245</sup> *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

<sup>246</sup> *Jespersen III* at 50.

<sup>247</sup> *Id.* at 51.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 52.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 55.

medical treatment . . . and . . . would not even mention the work incident. . . .”<sup>252</sup> His testimony was not supported by his medical records. The Board also discounted the testimony of his wife, noting she was unable to distinguish between residual pain from the plane crash and pain arising out of the heavy lifting and other strenuous work activities. The Board also discounted the testimony of Dr. Carney, who treated Mr. Jespersen in 1987 and then did not treat him again until 2019. The Board found Dr. Carney based his opinion on the “hypothetical assumption that [Mr. Jespersen] ‘never overcame the pain in his back’. . . .”<sup>253</sup> The Board also gave deference to the orthopedic physicians and radiologists regarding the appropriate interpretation of the x-rays and other radiographic studies over the years over the opinion of Dr. Carney.<sup>254</sup> Moreover, Dr. Carney testified that if old-age and/or work was the cause of the herniated disc in 2016, he would expect to see degenerative disc disease throughout Mr. Jespersen’s spine. In fact, this is exactly what the various radiographic studies show.<sup>255</sup> The Board found that Dr. Chen, Dr. Hirsch, Dr. Burton, Dr. Dubbs, Dr. Gasser, Dr. Kincaid, and Dr. Jensen found multiple levels of degeneration.

The Board instead chose to rely on Dr. Bauer and his testimony that medical literature supported his opinion that the compression fracture at the top of the L5 endplate did not cause any damage to the L5-S1 disc. The 2016 disc herniation at L5-S1 was a spontaneous event and the 1985 compression fracture was not a substantial factor in the L5-S1 disc herniation or the need for surgery.<sup>256</sup> He stated the medical literature suggested that vertebral endplate burst fractures may cause disc degeneration in the disc adjacent to the fracture, but in Mr. Jespersen’s case there was no damage to the L5-S1 disc in 1985.<sup>257</sup> He ruled out the 1985 plane crash as a substantial factor and stated the

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<sup>252</sup> *Jespersen III* at 54.

<sup>253</sup> *Id.* at 57.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 58.

<sup>256</sup> *Id.* at 14, No. 54.

<sup>257</sup> *Id.*



only factor for the need for treatment for the herniated disc in 2016 was Mr. Jespersen's age and heavy work activities. Dr. Bauer noted that Mr. Jespersen had no atrophy in any muscles. The compression fracture in 1985 was minor according to Dr. Bauer.<sup>258</sup>

Dr. Bauer's opinion was supported by SIME physician Dr. Levine, who testified that Mr. Jespersen's work duties were "precisely the kind of work that would cause degenerative disc disease in the spine and ultimately lead to a lumbar disc herniation."<sup>259</sup> He also testified that a "compression fracture near the top of the vertebral body L5 would not result in a disc herniation below the L5 vertebral body in the L5-S1 disc space."<sup>260</sup> Dr. Levine defined "a substantial factor" as a "major factor" and "the substantial factor" as "the greatest factor."<sup>261</sup> He attributed Mr. Jespersen's need for medical treatment to normal aging and ongoing work activities over thirty years.<sup>262</sup>

The Board excluded the check-the-box letter of Dr. Jensen because Tri-City had requested the right to cross-examine Dr. Jensen. Mr. Jespersen never made Dr. Jensen available for deposition, even though Dr. Jensen sent his check-the-box letter to Mr. Jespersen's attorney in 2019, giving him two years to set up the deposition or to seek a subpoena compelling his testimony. He failed to do either. Since Dr. Jensen had not been produced for either deposition or testimony at hearing, his opinion could not have been considered by the Board.

The Board chose to rely on the reports of Drs. Bauer and Levine, as is its right. The Board explained in detail why it discounted the testimony of Dr. Carney. The opinion letter of Dr. Jensen was properly excluded. The record as a whole supports with substantial evidence the Board's finding that Mr. Jespersen did not prove his claim by a preponderance of the evidence.

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<sup>258</sup> *Jespersen III* at 59-60.

<sup>259</sup> *Id.* at 60.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 60.

<sup>262</sup> *Id.*

*g. Evidence not presented to Board.*

Mr. Jespersen devotes several pages of his opening brief to an argument that Dr. Bauer did not understand or properly apply the articles he attached to his report. Unfortunately, Mr. Jespersen did not raise this argument to the Board and it was not considered by the Board. On appeal, an argument not properly raised before the Board is not considered.<sup>263</sup> The Commission may not consider evidence or argument that was not presented to the Board. The Act states, “[t]he matter on appeal shall be decided on the record before the board. . . .” and “new or additional evidence may not be received with respect to the appeal.”<sup>264</sup> It is up to the Board to analyze the medical records and the testimony of the doctors and to determine upon which medical opinions to rely. Therefore, the Commission does not address whether Dr. Bauer did or did not understand the articles he attached to his report.

*h. Croft lien in Mitchell.*

Point Number III of Mr. Jespersen’s Points on Appeal is “Croft lien in Mitchell.” At oral argument, Mr. Jespersen stated that attorney Croft withdrew from representing Mr. Mitchell and afterwards filed a lien for his attorney fees, which the Board allowed. He then indicated he was referring to the unpaid medical bills from Dr. Jensen and asserted the unpaid medical bills were part of Mr. Jespersen’s claim for benefits. Mr. Jespersen contends the Board erred in not finding that the medical treatment by Dr. Jensen was necessitated by the 1985 plane crash injuries and should have treated Dr. Jensen’s bills as a lien and awarded payment. However, the Board found that Croft and Mitchell had nothing to do with Mr. Jespersen’s claim.<sup>265</sup> Mr. Jespersen did not brief this issue, only alluding to it when asked at oral argument. Therefore, the Commission considers this issue was waived on appeal.<sup>266</sup>

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<sup>263</sup> See, e.g., *Quality Asphalt Paving, Inc. v. State, Dep’t of Transp. and Pub. Facilities*, 71 P.3d 865, 882 (Alaska 2003).

<sup>264</sup> AS 23.30.128(a).

<sup>265</sup> *Jespersen IV* at 6, No. 13.

<sup>266</sup> See, e.g., *Oels v. Anchorage Police Dep’t Emps. Ass’n*, 279 P.3d 589, 598 (Alaska 2012).

5. Conclusion.

The Decision of the Board in *Jespersen III* is AFFIRMED.

Date: 11 August 2022 Alaska Workers' Compensation Appeals Commission



*Signed*

Michael J. Notar, Appeals Commissioner

*Signed*

S. T. Hagedorn, 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 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, this is a full and correct copy of Final Decision No. 295 issued in the matter of *Jay Jespersen v. Tri-City Air and Alaska Insurance Guaranty Association*, AWCAC Appeal No. 21-006, and distributed by the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 11, 2022.

Date: August 15, 2022



*Signed*

K. Morrison, Appeals Commission Clerk