Alaska Workers' Compensation Appeals Commission

Arsenia V. Morgan,
Appellant/Cross-appellee

vs.

Alaska Regional Hospital and
Broadspire/Arctic Adjusters,
Appellees/Cross-appellants.

Final Decision
Decision No. 035 February 28, 2007

AWCAC Appeal No. 05-005
AWCB Decision No. 05-0256, 05-0304
AWCB Case Nos. 200120068M
200101819, 200010470, 200120077

Final Decision on Appeal of Alaska Workers' Compensation Board Decision No. 05-0256 issued October 5, 2005 by the south-central panel at Anchorage, Rosemary Foster, Chairman, and John A. Abshire, Board Member for Labor; and, on reconsideration, Decision No. 05-0304 issued November 17, 2005 by the south-central panel at Anchorage, Rosemary Foster, Chairman, and John A. Abshire, Board Member for Labor.

Appearances: Arsenia Morgan, appellant and cross-appellee, *pro se*; Tasha M. Porcello, Law Office of Tasha M. Porcello, for appellees and cross-appellants, Alaska Regional Hospital and Broadspire/Arctic Adjusters.

Commissioners: John Giuchici, Chris Johansen, and Kristin Knudsen.

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

By: Kristin Knudsen, Chair.

Arsenia Morgan, a self-represented litigant, appeals from a board decision denying her (1) claim for reemployment benefits because she failed to appeal denial of reemployment benefits on time; (2) three claims for compensation and medical benefits because she failed to request a hearing on time; and, (3) a claim for medical benefits and compensation for a foot injury because the board found the claimed benefits were not related to the reported injury. The cross-appeal challenges the timeliness of the

appeal.[1] Because we find there was substantial evidence in the record to support the board's decision, we affirm the board's denial of Morgan's claims. The procedural challenges to the appeal are therefore moot.

Factual background.

We summarize the facts of this case. In doing so, we may cite to the record, but our citations are not to be considered independent findings of fact. Rather, we wish to assure the appellant, who is self-represented, that we have not gone beyond the board's record in reviewing her appeal.

Arsenia Morgan was hired by Alaska Regional Hospital to work as a certified nurse's aide on July 6, 1999. Her first report of injury was dated June 2, 2000, when she reported injuring "half of upper body, left shoulder, arm, wrist" during a patient transfer when she "bumped wrist on side rail of bed."[2] This injury was assigned case number 200010470. She sought treatment at the Elmendorf AFB hospital on June 3, 2000. Alaska Regional Hospital paid temporary compensation from July 10, 2000 through July 16, 2000.[3]

Morgan's second injury was January 29, 2001. She described the injury as "pre-existing injury/illness of left arm/wrist" when assisting "nurses & CNA lifting patients in & out of bed, toileting, transfer from bed to chair."[4] This injury was assigned case number 200101819. She sought treatment from Peter Ross, M.D., an orthopedist, beginning March 18, 2001. Alaska Regional Hospital paid a day of temporary

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[1] The commission considered and denied the cross-appellee's motion to dismiss the appeal on April 28, 2006.

[2] R. 0001.

[3] R. 0002.

[4] R. 0004.

compensation for this injury in March 2001,[5] and temporary compensation from September 1, 2001 to September 28, 2001.[6] She continued to work part of this time.

Morgan's third injury was September 19, 2001. She described an injury to the "top of [left] foot" when, while standing at the foot of a patient bed, the air bed pump motor fell off the bed and struck the top of her foot.[7] This injury was assigned case number 200120077.

Morgan's fourth injury was September 27, 2001. She reported she injured her right arm and shoulder joint. She stated she "was reaching for the supplies on the top shelf of the activity room and suddenly felt an intense pain in my back (upper) and ache in my shoulder joint. It was aching before but much more now."[8] She was seen at Elemendorf Hospital's emergency room September 27, 2001, and taken off work beginning October 1, 2001. This injury was assigned case number 200120068. Alaska Regional Hospital paid temporary compensation benefits from September 27, 2001 to April 2, 2002.[9]

In October 2001, Morgan quit Alaska Regional Hospital and moved to Fairbanks. While she lived in Fairbanks, she was involved in two motor vehicle accidents. The car she was driving was rear-ended in February 2003. On February 24, 2004, she was struck on the driver's side by another car traveling at a fast rate of speed as she drove into an intersection. A witness described her car as being struck hard enough to lift her car in the air and spin it around.

While in Fairbanks, Morgan worked at Eielson AFB as a clerk, for other employers in quality assurance, as a care coordinator, and as a personal care attendant. Morgan

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5 R. 0011.

6 R. 0016.

7 R. 0013, R. 0137.

8 R. 0014.

9 R. 0029.

has since moved back to the Anchorage area. After holding other jobs as a certified nurse aide, she returned to work at Alaska Regional Hospital.

Board proceedings.

A. The request for reemployment benefits.

On September 27, 2001, Morgan filed a written request for an eligibility evaluation.[10] The reemployment benefits administrator assigned Tom Clark of Corvel Rehabilitation to perform the evaluation.[11] On March 1, 2002, Clark filed an addendum to his January 24, 2002 report[12] to the administrator recommending that the employee not be found eligible for retraining.[13] The administrator, based on Clark's report and addendum, decided that Morgan was not eligible for retraining.[14] On Monday, March

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[10] This is the first step to obtaining vocational reemployment benefits under AS 23.30.041. At the time of Morgan's injuries, AS 23.30.041(c) provided:

> If an employee suffers a compensable injury that may permanently preclude an employee's return to the employee's occupation at the time of injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The employee shall request an eligibility evaluation within 90 days after the employee gives the employer notice of injury unless the administrator determines the employee has an unusual and extenuating circumstance that prevents the employee from making a timely request. The administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation.

Morgan's request was not timely as to her June 2000 or January 2001 injuries, but was within 90 days of her September 27, 2001 injury.

[11] R. 1745.

[12] R. 1772-1796. Clark's report stated there was insufficient information to decide if Morgan was eligible. R. 1779.

[13] R. 1806. The entire addendum is at R. 1805-1806.

[14] R. 0001803. The administrator's letter stated:

18, 2002, the administrator sent her a decision letter containing the following statement:

> If you disagree with my decision that you are not eligible for reemployment benefits, you must complete and return the attached Workers' Compensation Claim (Form #7-6101) within 10 days of receipt of this letter. Please pay particular attention to section 24(g). If you do not request review of my decision within the 10 day period, the decision is final.

Assuming Morgan received the decision letter by Friday, March 22, she would have had until Monday, April 1, 2002 to file an appeal on the attached form. Morgan did not file an appeal of the administrator's decision as directed by the letter. Instead, on May 15, 2002, she filed a second request for reemployment benefits.[15] The administrator's designee responded on June 7, 2002:

> I have received your second request for a reemployment benefits eligibility evaluation. Your first request was made on September 27, 2001. Subsequently, Douglas Saltzman found you not eligible on March 18, 2002. In addition, your insurer controverted all benefits on April 4, 2002.
>
> At this time, we cannot act on your request because you were found not eligible on March 18, 2002. We have not received a claim appealing Douglas Saltzman's March 18, 2002 eligibility determination from you. Until you file the claim, this issue will not be heard by the Alaska Workers' Compensation Board.

> I have determined you are <u>not eligible</u> for reemployment benefits for the following reason(s):
>
> [x] The evaluating specialist's recommendations and addendum report received in this office on March 4, 2002. In this report, Dr. Pierson predicted that you will have the physical capacities to [do] jobs you have held in the 10 years before your injury. Additionally Dr. Pierson and Dr. Jensen decided that you had incurred no permanent impairment rating per the 5th ed. of the AMA Guides for Rating Permanent Impairment. Because you have been released to jobs held in the 10 years before your injury and per the Alaska Supreme Court case in <u>Rydwell.</u>

[15] R. 1800. The form she filed is titled "Request for Eligibility Evaluation."

> No further action will be taken on your request for an eligibility evaluation until you file a claim appealing the eligibility determination by Mr. Saltzman and the AWCB makes a decision on your appeal.[16]

Morgan did not file an appeal until January 31, 2005.[17] She asserted she was entitled to reemployment benefits because the denial was based on Dr. Pierson's incorrect or incomplete prediction of impairment[18] and that if she had not been injured she would have been able to finish her B.S. degree in nursing.[19]

B. The workers' compensation claims.

Morgan filed her first workers' compensation claim on October 15, 2001, for the June 2, 2000 injury, the January 29, 2001 injury, and the September 27, 2001 injury. These injuries are related to her arms and shoulders. In each, she requested compensation, medical benefits, and transportation expenses. Alaska Regional filed answers to the claims on November 16, 2001.[20] A pre-hearing conference was held January 11, 2002 in Anchorage (Morgan attended by telephone) in which the three claims were joined.[21]

Alaska Regional sent Morgan to an employer medical evaluation by Dejan Dordevich, M.D., a rheumatologist, and John Thompson, M.D., an orthopedic surgeon, on February 27, 2002.[22] The evaluators concluded that she had no current

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[16] R. 1801.

[17] R. 0134, 0136, 0138. In section 24(g), "Review of re-employment benefits decision," she checked "(1) eligibility."

[18] R. 0719.

[19] R. 0721.

[20] R. 0047-49. Answers are required under 8 AAC 45.050(c)(1): "An answer to a claim for benefits must be filed within 20 days of service of the claim. . . ." The claim was served by the board on October 24, 2001. Including the three days allowed for mailed service, the answer was filed timely.

[21] R. 1655.

[22] R. 0608-618.

occupationally related condition or disease that was related to the injuries on June 2, 2000, January 29, 2001, or September 27, 2001.[23] The evaluators also found she was medically stable, required no further care, and had no permanent impairment.[24] Based on their report, Alaska Regional filed controversions of each of Morgan's claims on April 5, 2002.[25]

On April 17, 2002, Morgan filed amended claims.[26] She dropped her request for transportation costs.[27] The employer answered the amended claims on May 21, 2002.[28] Following a series of pre-hearing conferences, the board's pre-hearing officer ordered a second independent medical evaluation on April 30, 2003.[29]

On June 3, 2003, Morgan was examined by Larry Levine, M.D., on behalf of the board, in a second independent medical examination.[30] Dr. Levine's report was not favorable to Morgan. He concluded there was no evidence of on-going work injury, and no further treatment of the reported work injuries was required. He stated that Morgan had been medically stable since April 2001, and that she had no permanent impairment from the work injuries. Dr. Levine noted in his report that Morgan was quite upset at hearing his opinion.

Morgan, who had moved back to Anchorage, requested a change of venue to Anchorage. In a pre-hearing conference on November 22, 2004, Alaska Regional objected to the board hearing of a request for change of venue because the board in

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[23] R. 0615.

[24] R. 0616-617.

[25] R. 0026-28.

[26] R. 0055-56.

[27] R. 0056.

[28] R. 0057.

[29] R. 1672-74. The second independent medical evaluation was agreed to by both Morgan and Alaska Regional Hospital.

[30] R. 0647-654.

Fairbanks was familiar with the case. Alaska Regional also argued that Morgan's claims could only be denied by the board, because she had failed to request a hearing within two years of Alaska Regional's controversion. Although the hearing officer decided to hear the change of venue request, Alaska Regional's objections were noted on the pre-hearing summary.[31] On November 24, 2004, the board issued an interlocutory order changing venue to Anchorage.[32]

On January 31, 2005, Morgan filed a claim for compensation and medical benefits for her foot injury of September 19, 2001[33] and amended her prior claims in case number 200010470 and 200101819.[34] Morgan also filed a claim against her 2004 employer, Immediate Care, for injuries from the February 26, 2004 auto accident.[35] Alaska Regional answered[36] and filed a controversion on February 23, 2005.[37] On April 1, 2005, the employer filed an amended controversion of all of Morgan's claims, including the foot claim, incorporating earlier controversions and adding that any need for medical care was related to the 2004 auto accident.[38]

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[31] R. 1678-79.

[32] *Arsenia V. Morgan v. Alaska Reg'l Hosp.,* AWCB Dec. No. 04-0278 (November 24, 2004). R. 0128.

[33] R. 0137.

[34] R. 0133-36. The amendments reasserted claims for transportation costs and added claims for temporary partial disability compensation, permanent partial disability compensation, review of the eligibility evaluation, interest, and a request for a Second Independent Medical Examination. R. 0134, 0136.

[35] R. 0486. That claim is not a part of this appeal.

[36] R. 0144-45.

[37] R. 0030.

[38] R. 0037.

On February 18, 2005 Morgan filed an affidavit of readiness for hearing her October 15, 2001 and April 17, 2002 claims.[39] At a pre-hearing conference on March 31, 2005, the claims for hearing were limited to those filed in case numbers 200010470, 200120068M, 200120077, and 200101819.[40] In a pre-hearing conference on May 20, 2005, shortly before the scheduled hearing, the hearing officer recorded that the issues that would be heard were:

> Whether claim should be dismissed under AS 23.30.110(c).
>
> Is employee entitled to benefits as a result of the alleged injuries of June 2, 2000, January 29, 2001 and September 27, 2001?
>
> Is the employee's request for reemployment benefits barred by the March 18, 2002 RBA determination which found the employee not eligible for reemployment benefits and/or the June 7, 2002 letter to the employee from the RBA informing her that no action could be taken on her request for reemployment benefits until she appealed the March 18, 2002 decision?[41]

The hearing officer also noted that the employer asked that the board "not consider as part of the hearing the employee's 2004 left foot injury."[42] The hearing officer responded "it did not appear this matter would be considered as part of the hearing scheduled for May 24, 2005 as this involves a separate injury and a different employer."[43]

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[39] R. 0139. The affidavit initially included the January 31, 2005 claims, but this date was subsequently obliterated, although it is not indicated who did so.

[40] R. 1682. We note the pre-hearing conference summary states that no claim had been filed in case number 200101819 (the January 29, 2001 injury to the left arm and wrist). That injury was listed on Morgan's October 15, 2001 claim. R.0038.

[41] R. 1694.

[42] R. 1694.

[43] R. 1694. See, R. 0486, Workers' Compensation Claim in case number 200404490, Arsenia Morgan vs. Immediate Care, claiming injury to left lower extremities.

Testimony was taken in the board hearing on May 24, 2005. Morgan was the only witness. After further submission of evidence and oral argument on September 7, 2005,[44] the record was closed.

The board's decisions.

The board's first decision, issued October 5, 2005, reviewed Morgan's four claims and the medical evidence presented on her variously diagnosed injuries.[45] The board found that the three claims filed by Morgan on October 15, 2001 were controverted April 2, 2002 and that the controversions stated that if the employee did not request a hearing within two years of the controversion, "she would lose her right to benefits."[46] The board found that Morgan had until April 3, 2004 to file an affidavit of readiness for hearing.[47] The board found "the record is clear that the employee failed to file an Affidavit of Readiness for Hearing concerning her claims against the employer, or to otherwise request a hearing, within the two-year time limit."[48] The board then stated, "In accord with the court's ruling in *Tipton*, we conclude the statute of limitations at AS 23.30.110(c) bars the employee's claims against the employer."[49]

Morgan's claim for her September 19, 2001 foot injury, filed January 31, 2005, was considered separately. The board recited and applied the conventional three-step

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[44] Morgan was directed by the commission to obtain a copy of the recording of the September 7, 2005 hearing and file it with the commission. *Morgan v. Alaska Regional Hosp.,* AWCAC Dec. No. 013 at 11 (June 15, 2006). She did not do so; therefore, she has waived consideration of whether the board failed to address additional arguments she may have raised in the September 7, 2005 hearing.

[45] *Arsenia V. Morgan v. Alaska Reg'l Hosp.,* AWCB Dec. No. 05-0256, 2-8 (October 5, 2005).

[46] *Arsenia V. Morgan,* AWCB Dec. No. 05-0256 at 10.

[47] *Id.*

[48] *Id.* at 11.

[49] *Id.*

presumption analysis.[50] The board found that the employee's September 21, 2001 accident report and her testimony was sufficient minimal evidence to attach the presumption of compensability. The board then found that the absence of any medical reports of treatment for the left foot until after the 2004 motor vehicle accident, and the employee's statements, recorded by Dr. Stinson, attributing the left foot injury to the motor vehicle accident, were substantial evidence overcoming the presumption.

Weighing the evidence, the board found that the employee's evidence was not persuasive. The board relied on the medical reports of treatment of the foot pain attributing the foot pain to the unrelated auto accident. On the basis of those reports, the board denied the claim for benefits related to the September 19, 2001 injury.

The employee filed a "Petition for Reconsideration" on October 24, 2005.[51] The board met on that same day to consider her petition. On November 17, 2005, the board issued an "Order Denying Reconsideration" that denied reconsideration of its final decision on grounds that the request was late and that the petition "gives no valid reasons for reconsideration of issues already addressed in the Board's decision."[52]

Arguments presented on appeal.

Morgan's points on appeal challenge the board's reliance on the evidence: "documentation about what was said and shown as evidence did not match." She also asserted that the panel "members were or was dozing off and sleeping both times."

Morgan's appeal brief focuses on the merits of her claim for reemployment benefits,[53] the merits of her claim to continuing temporary disability compensation and

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[50] *Arsenia V. Morgan,* AWCB Dec. No. 05-0256 at 12.

[51] R. 0894.

[52] *Arsenia V. Morgan v. Alaska Reg'l Hosp.,* AWCB Dec. No. 05-0304, 3 (November 17, 2005).

[53] She asserts she should have been awarded benefits because (1) her employer at the time of injury "didn't have any position for me," and, (2) her inability to complete her nursing degree affected her marketability adversely.

medical benefits while she was being treated by Drs. Stinson, Chandler, Judkins, and Spencer; her failure to "turn in all this requirements for pre-hearing" due to events within her family; and her sense that Ms. Porcello, the attorney for the employer, "states what I was doing was intentional" and so was "trying to discredit her" at the board hearings, which occurred at times coincident with family events.

Morgan, works in Anchorage, did not appear in person for the oral argument of her appeal. At her request, she participated telephonically. On questioning by the chair, she explained that when one board panel member closed his eyes in the hearing and thus showed disrespect for her. She felt that "no one has really looked for my situation." She argued that the board should have overturned the denial of eligibility for benefits because the injury had prevented her from graduating on time with a B.S. degree in nursing, and thus impaired her future earning capacity. She reargued the merits of her claims, and that various family issues caused her to delay filing a request for hearing. She also argued that she had persisted in trying to settle her claims on the advice of her pastor, who discouraged her from going to hearing.

Alaska Regional Hospital argued that the commission really had no jurisdiction to hear Morgan's untimely appeal. Her petition for reconsideration was late and the board failed to act on the petition within 30 days of the October 5, 2005 decision. Alaska Regional contends the board's decision on reconsideration was void for lack of jurisdiction, so the final order for purposes of an appeal was the October 5, 2005 order. Therefore, a December 17, 2005 appeal was untimely and the commission has no jurisdiction over the appeal.

On the merits of the claims, Alaska Regional argues that the board's decision should be affirmed. It argues that Morgan presented no basis for excusing her late appeal of the administrator's decision denying her eligibility for reemployment benefits. Even if the board heard an appeal, it had substantial evidence on which to support the decision denying benefits. Alaska Regional argued the evidence was that Morgan did not file a request for hearing on time; therefore, the board's decision denying the time-barred claims was proper. Alaska Regional contends there was substantial evidence to support the board's denial of the claim based on a September 19, 2001 foot injury.

Alaska Regional argues that the board had substantial evidence in the record on the merits of the claim that "supports the Board panel's decision in favor of Alaska Regional Hospital."[54] Because there is substantial evidence on which the board could rely to deny continuing medical care, it further contends that Morgan's argument that "documentation about what was said and shown on evidence did not match" [the board's decision] does not compel reversal of the board's decision. Finally, Alaska Regional argues that Morgan establishes no due process violation based on board member conduct. Morgan failed to make objection during the board hearing and to argue this point in her appeal brief, so, Alaska Regional Hospital argues, it was waived.

Standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[55] Because the commission makes its decision based on the record before the board, the briefs, and oral argument,[56] no new evidence may be presented to the commission. The board's determination of the credibility of a witness appearing before the board is binding on the commission.[57]

The commission exercises its independent judgment on questions of law and procedure.[58] 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.[59] If members of this commission must exercise their independent judgment to interpret the

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[54] Appellee's Br. at 15.

[55] AS 23.30.128(b).

[56] AS 23.30.128(a).

[57] AS 23.30.128(b).

[58] AS 23.30.128(b).

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

law, where it has not been addressed by the Alaska State Legislature or the Alaska Supreme Court, we draw upon the specialized knowledge and experience of this commission in workers' compensation,[60] and adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[61]

Discussion.

This appeal presents two issues regarding the board's application of time-bars: the ten-day time limit on appeal of the administrator's decision to the board and the two-year limit invoked when a claimant fails to request a hearing on a controverted claim. The board's decision on the foot injury is challenged as unsupported by the evidence. The appellant raises a possible due process claim based on board member conduct. Finally, the appellee makes procedural challenges to the jurisdiction of the board and commission. We consider each issue in turn.

I. Morgan failed to timely appeal denial of re-employment benefits.

On March 18, 2002, the reemployment benefits administrator sent Morgan a determination that she was not eligible for reemployment benefits. 8 AAC 45.530(a) provides that the administrator will give the parties written notice by certified mail of the determination, the reason for the determination, and how to request review by the board of the determination. The record demonstrates that the administrator's notification met this standard, and Morgan does not argue otherwise.

AS 23.30.041(d) provides that within 10 days after the administrator's decision, "either party may seek review of the decision by requesting a hearing under AS 23.30.110." Again, the record is clear that Morgan did not file the form the administrator enclosed with his determination letter within 10 days, and Morgan does not argue otherwise.

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[60] *See Tesoro Alaska Petroleum Co. v. Kenai Pipeline Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood,* 53 P.3d 134, 139 (Alaska 2002).

[61] *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

Instead, Morgan argued that because she filed a new request for eligibility evaluation on May 14, 2002, the board should have considered that as an attempt to appeal and reviewed the initial determination that she was not eligible for reemployment benefits.[62] However, the second eligibility evaluation request was filed

[62] Morgan put forward two reasons why the administrator's decision should be overturned as an abuse of discretion. Her arguments do not present a legal basis to find an abuse of discretion by the administrator.

First, she argues that Dr. Pierson's prediction that she could return to positions she held in the last 10 years and would have no permanent impairment was faulty, therefore the determination that she was not eligible was erroneous. It was faulty, she claims, because he didn't complete her treatment before making it. A prediction necessarily incorporates some level of risk of error. AS 23.30.041(e) requires only a physician's prediction "that the employee will have permanent physical capacities that are less than the physical demands of the employee's job," that is, a physician need only make a reasoned forecast prior to medical stability. AS 23.30.041(f), setting out criteria for reemployment benefits, does not require the prediction in AS 23.30.041(e), providing criteria for an evaluation to determine *if* the employee is eligible under section 041(f), to wait on medical stability. Morgan's argument that Dr. Pierson could not make forecast because he did complete her treatment so that she reached medical stability would require more than a mere prediction. AS 23.30.041 was designed to encourage early consideration and evaluation of the need for vocational rehabilitation; waiting until an employee's treatment is complete for a subsection (e) prediction would defeat the legislative policy underlying the statute's design.

Second, Morgan claims that she is entitled to vocational reemployment benefits because the injury interrupted her studies, and thus delayed or precluded her entry into anticipated future employment which would pay her more. The workers' compensation act provides reemployment benefits for those whose injury may "permanently preclude an employee's *return to the employee's occupation at the time of injury*." It does not provide compensation for the kind of consequential future damages Morgan's claim incorporates. Even in the case of minors or trainees who are injured in a formal training program, and who "would have likely continued in that training program," the act merely allows the compensation rate to be based on the wage *at the time of injury*, instead of wages earned in the past. AS 23.30.220(8) (emphasis added). No special provision is made for a student's prospective career change in AS 23.30.041. If Morgan had persuaded the board that her injury prevented her from completing her degree (we note there is some evidence in the record that would have permitted the board to decide otherwise), this would not make her eligible for reemployment benefits if her injury did not preclude her from returning to work in her occupation at the time of injury *or* other positions she held in the prior ten years, AS 23.30.041(e)(2), *or* she had no permanent impairment, AS 23.30.041(f)(4).

more than 30 days after the deadline to seek review of the administrator's decision. It was followed by a letter informing her she must file an appeal of the administrator's decision and no action would be taken on her second request for an eligibility evaluation. Morgan was provided a copy of the proper form and instructed what section to complete. She did not file a written request for a review of the administrator's decision until almost three years later.[63] Given the record evidence establishing Morgan's level of education and work experience, we cannot say that the board erred in refusing to consider the second request for an eligibility evaluation as a late-filed appeal of the administrator's determination. There is substantial evidence in the record as a whole to support the board's decision that Morgan's appeal of the administrator's decision was filed too late. We conclude the board did not err in denying Morgan's appeal of the administrator's determination.[64]

II. Morgan failed to present evidence supporting legal excuse from operation of AS 23.30.110(c).

Morgan does not argue that she filed a request for hearing on time. She does not argue that she was unaware that her claim was controverted. She does not argue that the controversion forms she received failed to inform her of the two year time-bar. Instead, she argues she should be excused from late filing because of her many family worries and because she was trying to settle her claim.[65]

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[63] Morgan's April 2002 claim, R. 0055-56, does not refer to, or check, the request for board review of a reemployment benefits eligibility determination. The form contains reference to attached or additional sheets, but these are not found in the record.

[64] The board also found that Morgan was not eligible in any case because she had no permanent impairment. *Arsenia V. Morgan,* AWCB Dec. No. 05-0256 at 14. We agree that there is substantial evidence in the record to support this finding.

[65] Before the board, Morgan admitted she received and read the controversion notice. She argued "I would think that if I'm not doing anything and I'm not doing any pre-hearing, then I would lose it, but I have – I have been to so many prehearings . . . as long as I continue talking to the workmen's comp. and, you know, continue talking to Ms. Porcello or the adjusters I am doing [pursuing it]." Hrg. Tr. 58. Morgan stated in her written closing argument to the board that "I have tried several

The commission has had opportunity to consider the operation of AS 23.30.110(c) in other appeals.[66] We have noted that the Alaska Supreme Court previously rejected an attempt to read into the time-bar in AS 23.30.110(c) "a provisio that simply is not there" and enjoined the board, and now this commission, to "apply the statute as written" absent evidence of contrary legislative intent.[67] We agreed there is no evidence the legislature meant otherwise than what it said in AS 23.30.110(c): "If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied."[68] We have found this statute, unlike AS 23.30.100 and 23.30.105, makes no provision for the board to excuse failure to comply.[69] The board's regulations prohibit the board from waiving the requirements of law merely to excuse a failure to satisfy those requirements.[70]

However, we have also said that the board is not without power to excuse failure to file a request for hearing on time when the evidence supports application of a

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times to get a lawyer but my Christian belief and my pastor discouraged me," R. 0731, and in oral argument before the commission she said that her pastor discouraged her from requesting a hearing. However, she did not argue that her religion discourages its adherents from pursuing claims in public tribunals. We view Morgan's statements as explaining her actions by reliance on her pastor's advice, not as raising a religious accomodation argument.

[66] *Alaska Airlines v. Nickerson,* AWCAC Dec. No. 021 (October 19, 2006); *Bohlmann v. Alaska Constr. & Engineering, Inc.*, AWCAC Dec. No. 023 (December 8, 2006); *Tonoian v. Pinkerton Security,* AWCAC Dec. No. 029 (January 30, 2007).

[67] *Alaska Airlines,* AWCAC Dec. No. 021 at 10, *citing Tipton v. ARCO Alaska, Inc.,* 922 P.2d 910, 913 (Alaska 1999).

[68] *Alaska Airlines,* AWCAC Dec. No. 021 at 10.

[69] *Bohlmann*, AWCAC Dec. No. 023 at 12-13.

[70] 8 AAC 45.195; *Bohlmann,* AWCAC Dec. No. 023 at 12.

recognized form of equitable relief.[71] The board's decision does not review whether Morgan presented evidence justifying application of equitable relief. Because, as we discuss below, she presented no evidence to support a request for equitable relief, we conclude neither the arguments nor the evidence Morgan presented required the board to do so.

Morgan argued below, and again here, that she had many family problems. She implies that these problems caused so much emotional stress that they prevented her from filing a request for hearing. However, most of her family problems occurred after April 4, 2004.[72] Despite Morgan's use of phrases such as "my brain was about to explode having to deal with the issue that wasn't suppose to be started in the first place,"[73] "I was probably admitted to the Psych Ward pulling all my hair,"[74] and "I was totally confused"[75] there is no evidence that she was mentally incapacitated, and therefore not able to file a request for hearing. To the contrary, Morgan relates that she sought and obtained jobs of an administrative nature in this period, [76] that she began classes toward a degree in Health Care Administration from Wayland Baptist University,[77] and that she volunteered at the Eielson AFB legal office.[78] We find no

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[71] *Tonoian,* AWCAC Dec. No. 029 at 11.

[72] The board found that the two-year time-bar fell after April 4, 2003, despite the employee's claim on reconsideration (R. 0894) that the reasoning in *Aune v. Eastwind, Inc.*, AWCB Dec. No. 04-0259 (December 19, 2001) applied to her. We note that Alaska Regional Hospital argued at hearing that even if the board applied Aune, it would only extend the period to July 11, 2004. Hrg. Tr. 97-98.

[73] R. 0731.

[74] R. 0724.

[75] R. 0726.

[76] R. 0724-29.

[77] R. 0721.

[78] R. 0724.

evidence in the record to support a request for equitable relief based on mental incapacity.

We turn next to Morgan's contention that her claim should not be barred because she sought to settle her claim. We disagree. Morgan presents no case authority, and we have found none, supporting her argument that contacting Ms. Porcello and the Division of Workers' Compensation, with nothing more, allowed her claim to avoid the time-bar.

Morgan did not make out a case that she was misled by Ms. Porcello into believing Alaska Regional would not object to her filing a request for hearing late if she settled her claim. In hearing the employee admitted she received a February 4, 2004 letter from Alaska Regional's attorney stating:

> For this reason, I doubt your claim will be settled and it is likely that the parties will have to resolve [sic] to a hearing before the board to resolve your claims.
>
> As I told you, I will object to any request for a hearing before the medical reports are all in evidence. On the other hand, you do have the right to request a hearing when you believe that you are ready for hearing. If you wish to request a hearing, you might wish to contact Ms. Stuller for the appropriate form.[79]

After receiving this letter, Morgan could not reasonably believe that Alaska Regional wanted to settle with her on any terms.[80] From the time she received this letter, until after the time to request a hearing had expired, Morgan did not actively pursue settlement of her claim.[81] We also find there is no evidence that Morgan was led to

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[79] Hrg. Ex. 5; admitted Hrg. Tr. 66.

[80] Morgan testified she spoke with Alaska Regional's attorney in May, but Morgan's second settlement letter to Alaska Regional's attorney was not written until July 21, 2004 (Hrg. Tr. 69); by then, even a time-bar extended by *Aune* would have passed.

[81] In response to the question, "What did you do between February and May of 2004," Morgan replied, "I had an accident." Hrg. Tr. 69. Morgan's complaint that Alaska Regional refused to settle with her after she wrote them in July 2004, undermines any argument that she was misled, as Alaska Regional's conduct was consistent with its position that it did not want to settle her claim. Refusal to discuss

believe that she could obtain additional benefits through the board's intervention except by requesting a hearing. In her hearing brief, she described one exchange with the workers' compensation officer there: "She also said, 'If you think you are entitled to more benefits, you may ask for a hearing.' I told her I didn't [want] any hearing. I just wanted to end this all of this and go back to nursing school. She said, 'I can't help you.'"[82] There is no evidence in the record that would support a board grant of equitable relief from the time-bar based on misrepresentation by Alaska Regional or a error by the Division's staff.[83]

We agree that there is substantial evidence in light of the whole record supporting the board's findings that Morgan "failed to file an Affidavit of Readiness for Hearing concerning her claims against the employer, *or to otherwise request a hearing,* within the two-year time limit."[84] There is no evidence supporting a board grant of equitable relief due to misrepresentation by an opponent or for mental incapacity. We conclude the board did not err in denying Morgan's claims as barred by AS 23.30.110(c).

III. Substantial evidence in the record as a whole supports the board's decision that Morgan's claim for benefits for a foot injury is not compensable.

Morgan's claim for an injury to her foot was filed January 31, 2005. She did not file an affidavit of readiness for hearing on the claim, but it is clear the parties agreed in

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settlement could not reasonably lead Morgan to believe Alaska Regional Hospital would waive its defense based on the time-bar in return for a settlement agreement.

[82] R. 0731.

[83] We discussed at length the application of estoppel against government agencies in *Tonoian*, AWCAC Dec. No. 029 at 13-15.

[84] *Arsenia V. Morgan*, AWCB Dec. 05-256 at 11. Emphasis added.

a pre-hearing conference on March 31, 2005, and again at hearing, that the September 19, 2001 claim would be heard.[85]

The board found the employee's accident report,[86] coupled with her testimony,[87] raised the presumption that her claim was compensable. The board found that Dr. Stinson's reports that the employee related her foot pain occurred after the February 2004 auto accident, coupled with the absence of medical treatment between September 19, 2001 and the auto accident, were sufficient to overcome the presumption of compensability. The board relied on this same evidence (lack of treatment records and the employee's statements to Dr. Stinson that her foot pain was related to the auto accident) to find that the employee failed to persuade them that the claim for medical treatment and compensation was compensable.

We agree that this is, in the circumstances, substantial evidence to overcome the presumption and to support a finding that the need for treatment was not related to the event reported on September 19, 2001. We note, for example, that the air bed pump struck the top of Morgan's shoe clad foot, but the reports of pain to Dr. Stinson refer to pain on the plantar or bottom portion of the foot. Moreover, a record exists of the

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[85] R. 1684-85. Some confusion was introduced at the May 20, 2005 pre-hearing conference by the reference to Morgan's claim against Immediate Care (R. 1694), but at the opening of the hearing, the chair reviewed the claims that would be heard and secured Morgan's agreement that the claim for an injury to her foot on September 19, 2001 would also be heard. Hrg. Tr. 5-8.

[86] We assume the accident report referred to is that found at R. 0577.

[87] Morgan's testimony at hearing regarding her foot injury is brief and ambiguous. She testified that she had an injury on September 19, 2001, but that after the auto accident in 2004 she has pain after walking 30 minutes and cannot lift her leg. Regarding her symptoms, she said, "I know my foot was hurting from the top to – you know, to my – from -- my left side was hurting down to my foot, but not actually to my hip, you know, before the injury." Hrg. Tr. 50-51. On the other hand, her deposition testimony was more specific. She said an air bed (or air mattress) pump motor weighing, she estimated, 40 – 50 lbs fell onto the top of her foot. Morgan Depo. 24-5. She could not remember when she saw a doctor about it. Morgan Depo. 25. It was late, "probably three, four months later." Morgan Depo. 25.

employee reporting foot pain on September 11, 2001, before the pump motor struck her foot.[88]

We distinguish the situation presented in Morgan's case from *Hoth v. Valley Constr.*[89] In *Hoth,* the board rested its decision on the absence of reported wrist injury, Hoth's failure to go to a doctor when symptoms first reappeared, and Hoth's failure to attribute symptoms to the alleged work injury when he sought treatment six years later.[90] Hoth and his wife testified to the wrist being injured in the fall and specifically denied any other injury.[91] The court characterized the board's decision as resting on "extremely slight supporting evidence," and added that on the record in *Hoth,* there was "little more than speculation [to] support a finding of independent causation." [92]

In Morgan's case, however, there is more than speculation in this record to support a finding of alternate causation in the interval before Morgan sought medical care. The foot pain appeared as radicular pain in the whole left leg associated with back pain, and was located on the bottom, not top of the foot. There is some evidence of independent causation: the 2003 and 2004 automobile accidents were testified to by Morgan, and the 2004 accident is documented in the record. Morgan produced no record of a need for medical treatment of foot pain until well after the first automobile accident, and her complaints increased after the second. She reported no foot pain when she saw Dr. Beard the day after the pump motor struck her foot.[93] She reported

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88 R. 0573.

89 671 P.2d 871 (Alaska 1983).

90 671 P.2d at 874.

91 *Id.* The court noted that in the absence of a specific finding that the board chose to disbelieve a witness's testimony, the court would not assume that lack of credibility was a relevant factor in the board's decision. *Id.,* at n. 3.

92 *Id.*

93 0578-79.

no foot pain when seen at the Elmendorf AFB hospital a week later.[94] Coupled with Morgan's attribution of her foot pain to the 2004 accident in her reports to Dr. Stinson,[95] and its first appearance in conjunction with lower back, hip and leg pain,[96] the lack of any record of complaint (or even mention of the incident) to her physicians immediately following the incident, is, we agree, substantial evidence that an independent event caused the need for medical treatment. The lack of reported symptoms or treatment for years and Morgan's testimony that she couldn't remember when she saw a doctor about the injury, the late onset of radicular pain going down the leg to the foot instead of pain associated with foot trauma, and Morgan's attribution of the pain to her auto accident, taken together would be sufficient that a reasonable mind could accept it as eliminating the reasonable possibility that the September 19, 2001 accident was the cause of Morgan's claimed treatment and disability for pain in her foot.

For these reasons, we find the board had substantial evidence in light of the whole record to support its finding that the employee failed to establish by a

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[94] R. 0583.

[95] Like the courts, we are not permitted to assume that lack of credibility was a relevant factor in the board's decision. We note that the board relied on Morgan's reported statements that are inconsistent with the employee's claim, although not her testimony. It is not clear that Morgan believed the pain down the left side of her body was due to her foot injury. In such circumstances, the board should explicitly record its assessment of the witness's credibility in the decision, so that the board's position regarding its belief or disbelief of the testimony is clear.

[96] R. 1249. The first record of left foot pain we found is January 6, 2004, when she described "intermittent dyesthesias" into her "left lower extremity all the way to her foot" and that her left leg sometimes feels weak, as she is describing low back pain with an aching and burning sensation that goes down the left leg. This is the type of pain Dr. Stinson described as "left lower extremity radicular symptomatology," and which he ascribed to a lumbar disc injury. R. 1305. We also found a record of a report that "she occasionally has an aching sensation in both arches of her feet, *both right and left."* (Emphasis added). R. 1058. Neither pain was associated by the physician or Morgan with trauma to the top on the left foot.

preponderance of the evidence that the September 19, 2001 fall of an air bed pump motor on her foot caused her claimed need for medical benefits and compensation.

IV. Morgan's claim of error based on board member misconduct was waived.

In her points on appeal, Morgan claimed that one of the board members appeared to be dozing during the hearing. She did not discuss this point in her brief, and in oral argument to the commission she explained only that she felt that the member closing his eyes indicated a lack of respect for her. She did not point to any part of her testimony that the board may have missed, as, for example, a photo or video that the member would not have seen. More importantly, she failed to object at the time of hearing. Failure to object at the time of hearing waives the right to appeal procedural errors in the hearing.[97] We conclude that Morgan waived any claim of error based on a due process violation due to board member misconduct.

V. The procedural objections to the appeal are moot.

Having found substantial evidence to support the board's October 5, 2005 decision, and its denial of reconsideration, we conclude that the procedural objections to the commission hearing this appeal are moot.

The board could have allowed the time for reconsideration to merely expire, and so deny the petition.[98] However, because Morgan was acting as a self-represented litigant, the board did not err in issuing a written decision denying the petition for reconsideration in the interests of providing a clear termination of the proceedings to Morgan.

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[97] *Williams v. Abood,* 53 P.3d 134, 148 (Alaska 2002).

[98] We note the board met and considered the petition within 30 days of October 5, 2005, without waiting for a response from the employer.

Conclusion.

We have found that the board's decision was supported by substantial evidence in light of the whole record. We have found no legal errors requiring reversal or remand to the board. We therefore AFFIRM the board's decision denying Morgan's claims.[99]

Date: *28 Feb. 2007* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Chris N. Johansen, Appeals Commissioner

Signed
John Giuchici, Appeals Commissioner

Signed
Kristin Knudsen, Chair

APPEAL PROCEDURES

This is a final administrative agency decision. The appeals commission affirmed (upheld) the workers' compensation board decision denying Arsenia V. Morgan's workers' compensation claims against her employer. This decision becomes effective when it is filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. To find the date of filing, look at the Certification by the commission clerk on the last page.

Effective November 7, 2005, proceedings to appeal this decision must be instituted in the Alaska Supreme Court within 30 days of the filing of this decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration

[99] We note that ordinarily the only claims that would have been before the board would be those referenced in the affidavit of readiness for hearing. In this case, however, without objection from either party, the employee's January 5, 2005 claims were included in the list of issues for hearing in the March 31, 2005 pre-hearing summary, which "governs the issues and the course of the hearing." 8 AAC 45.065(c).

decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision was mailed to the parties, whichever is earlier. See AS 23.30.128(f).

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

You may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision. The commission will accept fax filing of a motion for reconsideration.

CERTIFICATION

I certify that the foregoing is a full, true and correct copy of the Final Decision in the matter of *Arsenia V. Morgan v. Alaska Regional Hospital and Broadspire/Arctic Adjusters*; Appeal No. 05-005; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *28th* day of *February*, 200*7*.

Signed
C. J. Paramore, Appeals Commission Clerk

I certify that on *2/28/07* a copy of the above Final Decision in AWCAC Appeal No. 05-005 was mailed to A. Morgan (certified) and Porcello and a copy was faxed to AWCB Appeals Clerk and Director WCD.

Signed
L. A. Beard, Deputy Appeals Commission Clerk