

Case: *Margaret E. (Yarbrough) Failla vs. Fairbanks Resource Agency, Inc., Alaska Insurance Guaranty Association, and Northern Adjusters, Inc., Alaska Workers' Comp. App. Comm'n Dec. No. 162 (June 8, 2012)*

Facts: Margaret (Yarbrough) Failla (Failla) injured her neck, back, and left shoulder lifting a patient while working as a nursing assistant for Fairbanks Resource Agency in October 2000. The employer initially paid temporary total disability (TTD) and medical care but controverted those benefits as of April 2001 based on Dr. Joosse's employer medical evaluation (EME) that concluded her complaints were psychosocial. In 2004, the board decided that Failla was entitled to TTD through June 6, 2002, the date she reached medical stability; and that she was entitled to ongoing medical benefits in the form of reasonable and necessary conservative care related to her lumbar and cervical conditions. (*Failla I*). The board denied, without prejudice, her claim for permanent partial impairment (PPI) because an impairment rating that Failla had received did not satisfy board requirements. This decision was not appealed. The employer again controverted her entitlement to medical benefits as of November 28, 2007, based on another EME. In addition to these medical benefits, Failla sought temporary partial disability (TPD), PPI, and permanent total disability (PTD) benefits. The board denied all her claims in a 2010 decision (*Failla II*). Failla appeals and the employer cross-appeals.

Applicable law: AS 23.30.200(a) provides in part, "Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability."

AS 23.30.190(a) provides in part, "In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person."

AS 23.30.180(a) reads in relevant part:

Loss of both hands, or both arms, or both feet, or both legs, or both eyes, or any two of them, in the absence of conclusive proof to the contrary, constitutes permanent total disability. In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be

- (1) area of residence;
- (2) area of last employment;
- (3) the state of residence; and
- (4) the State of Alaska.

AS 23.30.095(a) reads in relevant part:

The employer shall furnish medical, surgical, and other attendance or treatment, . . . for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if

continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.

Issues: Was the employer's controversion improper? Was a protective order violated? Did the employer interfere with Failla's treatment? Did substantial evidence support the board's denial of Failla's claims for TPD, PPI, and PTD? Did substantial evidence support the board's denial of medical benefits after a second independent medical evaluation (SIME) report of July 22, 2009? Did the board properly retain jurisdiction to consider modification of its order concerning any disputed medical bills incurred prior to July 22, 2009? Did substantial evidence support that Failla proved that she was entitled to medical care between November 28, 2007, and July 22, 2009?

Holding/analysis: The commission concluded that Failla waived all her arguments due to inadequate briefing, but it nevertheless addressed them on their merits. First, the employer's controversion was not improper. The commission agreed with the employer that (1) it did not file a controversion within 180 days of *Failla I*, and (2) even if it had, it was permitted to do so as long as the grounds for controversion arose after the board decision. Its controversion in January 2005 was based on Failla's failure to return medical releases, a legitimate basis for controverting. Second, the commission concluded there was no protective order in effect at the time of the July and September 2010 hearings because Failla rendered it inoperative when she signed releases for her mental health records. Third, the commission concluded the employer giving a doctor who was treating Failla copies of its controversion and an SIME report did not constitute interference with Failla's treatment.

Substantial evidence supported the denial of TPD. The board determined in *Failla I* that she reached medical stability on June 6, 2002. This determination was not appealed and Failla did not allege that she became TPD after reaching medical stability or any other exceptional circumstances. The commission agreed with the board that the medical stability finding was binding on the board in *Failla II* and thus it properly denied her TPD benefits.

Substantial evidence supported the denial of PPI because Failla did not receive an appropriate rating. Two doctors found 0 percent impairment and a third stated his rating in a range of percentages.

On the PTD claim, the commission concluded that:

substantial evidence, including Dr. McCormack's opinion that that she could return to work as a nursing assistant or any other job she had held in the ten years preceding her work injury, vocational rehabilitation specialist Carol Jacobsen's testimony about the availability of jobs that Failla had previously held in the Fairbanks labor market, and the employee's testimony about her current employment, supports the board's denial[.] Dec. No. 162 at 17-18.

On the claim for medical benefits after July 22, 2009, the commission concluded that:

The record contains substantial evidence on which the board could rely to conclude that Failla's work injury had resolved before July 22, 2009, including Dr. McCormack's 2009 SIME, Dr. Schilperoort's 2005 examination and 2007 supplemental report, Dr. Robinson's 2006 observations that Failla was not a good candidate for the pain clinic, Drs. Nelson's and Winn's 2006 diagnosis of somatoform disorder, and Dr. Winn's 2006 diagnoses of personality disorder and possible malingering. *Id.* at 18.

On the board's order retaining jurisdiction to modify its order to consider Failla's medical bills incurred before July 22, 2009, the commission reversed for two reasons. First, she could not prove the requirements for modification, because with due diligence, she should have been able to obtain the medical bills before the 2010 hearing. The hearing was nearly a year after the cutoff date of July 22, 2009, so Failla had adequate time to obtain, file, and serve any medical bills. Second, substantial evidence was lacking to support the July 22, 2009, cutoff date. The employer controverted Failla's claim for ongoing medical treatment on November 28, 2007. "[B]etween . . . November 28, 2007, and . . . July 22, 2009, none of the health care professionals who treated or evaluated Failla offered an opinion that would satisfy her burden of proof of an entitlement to conservative medical care for an injury that continued to be work-related." *Id.* at 21.