Alaska Workers' Compensation Appeals Commission

James Jones,
Appellant,

vs.

Frontier Flying Service, Inc.,
Appellee.

Final Decision and Order
Decision No. 018 September 7, 2006

AWCAC Appeal No. 05-003
AWCB Decision Nos. 05-0240 & 05-0298
AWCB Case No. 200021653

Final Decision and Order on Appeal from Alaska Workers' Compensation Board Decision No. 05-0240, issued September 22, 2005, and Decision on Reconsideration No. 05-0298 issued November 10, 2005, by the Fairbanks Panel, by Fred G. Brown, Chairman; Chris Johansen, Member for Management; and, John Giuchici, Member for Labor.

Appearances: James Jones, appellant, pro se; Patricia L. Zobel, DeLisio, Moran, Geraghty and Zobel, for Frontier Flying Service, Inc., appellee.

Commissioners: Jim Robison, Marc Stemp, and Kristin Knudsen.

By: Kristin Knudsen, Chair.

James Jones was a pilot for Frontier Flying Service, Inc., who injured his lower back helping to load an outboard motor into the back of an airplane in August 2000. He was paid temporary total disability compensation until compensation was controverted in March 2004. He appeals the board's denial of his claim for further temporary total disability compensation, permanent partial impairment compensation, and surgery to implant an artificial inter-vertebral disc in his spine. Because there is substantial evidence in light of the whole record to support the board's findings, we affirm the board's decision.

Factual background.

When summarizing the record as we do here, we do not make findings of fact. The facts recited are provided to place the appeal in context. We focus on those events

close in time to the cessation of Jones' compensation. In this decision, we provide an unusually lengthy and detailed discussion of the record before the board, so that the self-represented appellant will have a clear understanding of our reasons for concluding that the board had substantial evidence before it to support its decision.

Jones had a varied background as a pilot, airport manager,[1] business owner (flying school, air charter, aircraft restoration),[2] and police officer[3] in Texas. After a divorce, loss of his job as a police officer (1999), and the break-up of his air center business, he moved to Bethel in the summer of 1999 to fly for Hageland Aviation.[4] In April of 2000, he went to work for Frontier Flying Service in Fairbanks.[5] On September 8, 2000, he gave Frontier written notice of an injury to his lower back on August 18, 2000.[6]

Jones described the injury as occurring while helping two men load an outboard boat motor into the cargo bay of the plane in Bettles.[7] He felt a "snap" in his back and could not stand up straight.[8] He sat in the plane for a while until he could straighten up. He decided not to fly on to Anaktuvik Pass and left the motor behind, flying straight to Fairbanks.[9] He returned to work, but after about 10 days asked to be put on

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[1] Jones Depo. 11.

[2] Jones Depo. 11, 13.

[3] Jones Depo. 12-13.

[4] Jones Depo. 14.

[5] Frontier reported the date as April 21, 2000, R. 000001, but Jones described his training as beginning in February 2000. Jones Depo. 15.

[6] R. 000001.

[7] Jones Depo. 18-19.

[8] Jones Depo. 20.

[9] Jones Depo. 21.

non-cargo flights only.[10] He continued to work until an episode when his legs gave out and he fell.[11]

Jones first sought health care on September 9, 2000 at the Fairbanks Urgent Care Clinic.[12] He described that "my back feels all locked up" and a sensation "like an electrical short happens" that caused him to fall down.[13] The nurse practitioner at the clinic diagnosed a lumbar strain with radicular symptoms and prescribed anti-inflammatory medicine for him.[14] When he returned two weeks later, the nurse practitioner noted he had not taken the medicine.[15] Jones was prescribed additional medicine and given a referral to an orthopedist.[16] An MRI exam was done September 26, 2000, showing "minimal disc desiccation" at the L5-S1 vertebral disc, but no disc herniation.[17] Jones was referred to John Joosse, M.D., who diagnosed a "lumbar disc syndrome."[18] Since then, Jones has been referred to a number of consulting specialists,[19] has been evaluated, or evaluation has been attempted, by a number of

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[10] *Id.*

[11] Jones Depo. 22.

[12] R. 000209.

[13] SIME 00002. SIME citations are to the Second Independent Medical Examination binder page numbers, a part of the board's record that were not included in the record numbering sequence.

[14] *Id.*

[15] SIME 00006.

[16] *Id.,* R. 000211.

[17] SIME 00010.

[18] R. 000215.

[19] Dr. Joosse referred Jones to James Foelsch, M.D. for a neurological evaluation, and to David Flory, M.D., an anesthesiologist, for an epidural steroid injection. R. 000215. Jones changed his attending physician to Roy Pierson, M.D., who referred Jones for another epidural steroid injection, R. 000303, and to Stinson, M.D., an anesthesiologist and pain specialist. SIME 00087. Dr. Stinson referred Jones to

methods,[20] and has undergone a variety of forms of treatment without lasting improvement.[21] Over the course of time between September 2000 and March 2004 his diagnosis changed as well.[22]

Robert Trombley, Ph.D., a psychologist, R. 000435, for a psychological consultation and to Davis Peterson, M.D., and an orthopedist for a surgical consultation. SIME 00304. Jones did not return to Dr. Pierson, his attending physician, for reasons not stated in the record. He began seeing Victor Bartling, D.O., for "pain management." SIME 00308. Dr. Bartling referred Jones to Dr. Foelsch again for neurological consultation in 2003. SIME 00377. At the time of the hearing, Jones announced he was moving to Texas. At oral argument, he stated he had not found a Texas physician to be his attending physician. There is no record of a referral from his last attending physician of record, Dr. Pierson, or Dr. Bartling, whom he listed as his attending physician on his 2004 claim.

[20] X-rays taken in 2000 were negative. SIME 00004. A September 2000 MRI scan showed no disc herniation. SIME 00010. According to Dr. Foelsch, Jones was "unable to tolerate" a complete electromyography exam; he reported Jones had "low back pain without evidence of any axonal injury by very limited testing . . . no evidence . . . of a significant radiculopathy nor . . . myelopathy." SIME 00019. A second MRI scan in December 2000 showed "evidence of desiccation at L5-S1" and "minimal reactive sclerosis along the endplates" but was not significantly changed from the first MRI scan. SIME 00043. On August 7, 2001, a CT discogram showed a normal L4-5 disc and "grade 3" degeneration of the L5-S1 disc without annular tears and normal facet joints, according to the radiologist, Julee Holayter, M.D. R. 000439. Lumbar provocative discography (injection of dye and pressure in the disc, with X-ray images) on August 7, 2001, resulted in report of pain on pressurization of the L5-S1 disc and "spread of the radiocontrast dye to at least the posterior annular border." R.000418. Dr. Stinson, reading the same CT scan on August 8, 2001, found a "second degree annular tear in a finite location at the L3-4 disc with an otherwise unremarkable pattern" and a "II-III degree left posterolateral annular tear at the L5-S1 disc level with III degree degeneration." R.000430. An MRI in 2002 showed a small midline disc protrusion at the L5-S1 disc, no herniation at L4-5 and a slight annular bulge at the L3-4. SIME 00297.

[21] Jones had one epidural injection on October 24, 2000, but he reported to Dr. Joosse three days later that his pain was worse after the epidural injection. R. 000224. He was "emotionally distraught" and complained he "can't sleep, can't sit, can't walk, can't rest." R. 000224. Jones returned to Dr. Joosse December 4, 2000, again complaining his pain was no better and that the epidural had done nothing for him and that he continued to have episodic shocks, with a sensation of weakness in the back, and that "sometimes he [was] so weak that he can't get up." R. 000230. Shortly afterward, Jones went to Dr. Flory for a second epidural injection. (SIME 00046). The

In 2003, Jones saw a physician for treatment of his back pain five times: on March 25, 2003,[23] July 25, 2003,[24] July 29, 2003,[25] and, on October 30, 2003, he saw

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injection could not be completed, because Jones "started wiggling around the bed and screaming." On December 19, 2000, Jones reported that a TENS (transcutaneous electrical nerve stimulation) unit was working to relieve pain and physical therapy was helping. R. 000233. A piriformis injection by Dr. Valentz in February 2001 resulted in complete pain relief, R.000461, but there is no record that additional treatment for piriformis syndrome was provided. By April 19, 2001, Jones had returned to Dr. Pierson complaining of pain and daily fevers. SIME 00081. Dr. Pierson referred Jones to Kieth Gianni, M.D., for the fever; Dr. Gianni thought he was severely depressed. SIME 00084. Dr. Stinson who attempted IDETT (Intra-Discal Electro-Thermal Therapy) August 31, 2001, (R. 000414-417) with reported relief of all leg pain and substantial relief of back pain when "relaxed" (R.000428); facet joint injections January 3, 2002 (R. 000411); nerve blocks January 7, 2002 (R. 000407), without relief, and radiofrequency nerve ablation January 8, 2002, (R. 000405) which was abandoned due to the inability to isolate the appropriate nerve and stimulation of numbness and motor activity in both legs (R. 000406). In April and May 2002, Dr. Stinson tried facet injections and radio frequency rhizotomy (SIME 00273, 00278), with relief of some buttock pain. However, the back pain increased. In July 2002, Jones reported "extreme lower lumbar discomfort with almost any kind of physical activity" and Dr. Stinson reported he had "exhausted all conservative options." (SIME 00302) In October 2002, Jones reported painful hypersensitivity of his skin in addition to low back pain (SIME 00320), and in October 2003, rashes with hypersensitivity (SIME 00377).

[22] Dr. Pierson diagnosed "low back pain and left leg pain consistent with sciatica" on March 6, 2001, (SIME 00070), but on May 14, 2001, he described the diagnosis as "low back pain of uncertain etiology." (SIME 00087). Robert Trombley, Ph.D. diagnosed an "Adjustment disorder with depressed mood" (R. 000437). Dr. Stinson's diagnosis was "Left S1 joint arthropathy," "discogenic pain with chemical radiculitis on the left side," and "possible ham string syndrome resulting in 'double crush' clinical effect" on June 25, 2001, R. 000445; "right L4-5, L5-S1 facet arthopathy" on November 14, 2001 (R. 000424); "external L5-S1 disc pain with a sympathetic component" on January 4, 2002, (R. 000422). On October 10, 2002, Dr. Peterson diagnosed "degenerative disc disease at L5-S1 with probable discogenic pain source, leg pain most likely referred pain with no clinical evidence of radiculopathy or obvious sciatica" and "chronic central pain syndrome." R. 000235. Dr. Bartling evidently adopted this diagnosis, as he reported "lumbar disk disease, chronic central pain syndrome" by November 18, 2002. R. 000242.

[23] R. 000268.

[24] R. 000260.

Dr. Bartling.[26] He saw Dr. Foelsch on a referral from Dr. Bartling on August 18, 2003.[27] The care provided by Dr. Bartling was essentially conservative, with trials of new medication.

Frontier's insurer filed a notice of controversion of benefits on August 4, 2003.[28] Jones filed a claim for temporary disability compensation, medical benefits, and penalties for an unfair controversion on August 11, 2003.[29] In his claim he stated that he had "2 discs ruptured, 1 protruded, Lumbar region. 1 disc Fixed itself, one healed by IDET, Remaining disc was to be replaced with an artificial one."[30] He described the nature of his injury as a "fully ruptured/destroyed L5-S1 disc."[31] He stated that the insurer had denied his benefits claiming he had missed an employer medical examination.[32] Jones stated it was untrue that he had missed an employer medical examination and "it is the result of spite on the part of Jana Iwasaki of Wausau."[33]

In February 2004, Jones was seen by an employer medical evaluator,[34] Douglas Bald, M.D. Dr. Bald reported that in his opinion Jones was medically stable from the

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25 R. 000251.

26 R. 000256.

27 R. 000249.

28 R. 000005.

29 R. 000012. Jones later asserted this claim had been rescinded after his benefits had been reinstated. R. 000557.

30 R. 000012.

31 *Id.*

32 *Id.*

33 *Id.*

34 When Jones was injured, AS 23.30.095(e) provided, in part:

> The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a

injury sustained in his employment as early as March 2002; that no additional treatment was required; and, in no case should invasive treatment (surgery) be considered.[35]

Frontier, which had resumed payment of temporary disability compensation, filed a new controversion of the employee's compensation and certain medical benefits (neurostimulator, disk replacement surgery, or any invasive procedure) on March 28, 2004, based on Dr. Bald's report.[36] The employee filed a second claim on July 13, 2004,[37] which the employer promptly controverted on August 2, 2004.[38]

The parties stipulated that there were grounds to order a second independent medical examination by a board physician.[39] Dr. Bartling, Dr. Stinson and Dr. Peterson wrote letters responding to Dr. Bald's opinion.[40] The board appointed John McDermott, M.D., to perform an independent examination.[41] The board specifically requested an

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> physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the physician resides, furnished and paid for by the employer. . . . An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited.

35 R. 000090-104.

36 R. 000009, 000010.

37 R. 000037.

38 R. 000011.

39 R. 000566. *See,* AS 23.30.095(k).

40 SIME 00428-29, SIME 00430, and SIME 00427.

41 R. 000672.

impairment rating be done to determine the extent of permanent impairment resulting from the employee's back injury.[42] Dr. McDermott was also requested to give an opinion on whether Jones was medically stable, and the form of treatment that he should receive.[43]

Dr. McDermott examined Jones on December 16, 2004.[44] He reported that Jones had a "chronic pain syndrome," but that he was not disabled by any musculoskeletal injury.[45] Instead, his "diaphoretic pain focused and pain magnification issues as well as his acknowledged depression and other findings from medical records would overwhelmingly suggest issues beyond musculoskeletal system."[46] Dr. McDermott believed "there is no indication for surgical decompression to the spine" because there are no positive neurological findings.[47] In his view, surgery would not

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[42] R. 000676.

[43] R. 000676. When Jones was injured, medical stability was defined at AS 23.30.395(21):

> "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;

This definition was quoted to Dr. McDermott. The definition is unchanged, although the subparagraph was renumbered to AS 23.30.395(27) in 2005. We refer to the subparagraph number first in the remainder of this decision.

[44] R. 000105.

[45] R. 000109.

[46] R. 000109.

[47] R. 000109.

cause any improvement in his condition, his symptoms, or his ability to work.[48] He reported that Jones had been medically stable since about December 2002.[49]

As to a permanent impairment rating, Dr. McDermott believed Jones' pain magnification behavior made it impossible to give an objective rating in the manner required by the AMA Guidelines.[50] He believed the MRI findings have been relatively unchanged, and on the basis of the MRI scans, he also believed the objective findings [of degeneration] to pre-exist the injury.[51] Jones had no ratable permanent impairment regarding the lumbar spine.[52]

Frontier also obtained a psychiatric examination by Irvin Rothrock, M.D., who examined Jones on March 15, 2005.[53] Dr. Rothrock believed Jones was malingering, and that he probably had a personality disorder.[54] He doubted that Jones would benefit from psychiatric treatment as he "does not consider himself psychiatrically ill."[55] He did not believe that Jones had a compensable [i.e., work-related] psychological problem.[56] Jones had, Dr. Rothrock opined, little awareness or willingness to acknowledge that his problems might be related to something other than his August 2000 back injury. [57]

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[48] R. 000109.

[49] R. 000109.

[50] R. 000110. AMA Guidelines (American Medical Association Guidelines to the Evaluation of Permanent Impairment) Fifth Edition contains the method of calculating permanent impairment in workers' compensation cases. AS 23.30.190(b)-(d).

[51] R. 000110.

[52] R. 000110.

[53] R. 000111.

[54] R. 000118.

[55] R. 000119.

[56] R. 000119.

[57] R. 000118.

The arguments presented to the board.

Jones argued that he was not medically stable because he had been waiting for the insurer to approve disc surgery. He attacked the opinions of Dr. Bald and Dr. Rothrock, asserting that his behavior in those evaluations could be explained by medication or other circumstances. He argued the insurer's adjuster failed to act promptly to secure disc replacement surgery he believes will cure his pain, implying that the period of time between his request for the surgery and actually achieving it should be charged against the insurer as the cause of the delay. Jones argued that he should be allowed to attend a pain clinic and then, "if, after that's done, I still need the surgery, I should be evaluated for an artificial disk or fusion, whatever."[58] He argued the controversion was not supported by more than a report by a biased physician,[59] and that the controversion was improper because "[the employer's insurer] did everything they were supposed to do until they said that magic word 'surgery' and then everything stopped."[60]

Frontier argued that Jones had not made any appreciable improvement in his condition despite a wide variety of treatment with a number of doctors.[61] The presumption of medical stability was established by a lack of objectively measurable improvement for a period of 45 days; the presumption was not overcome by Dr. Bartling's opinion because he did not use the statutory definition of medical stability.[62] The physicians who did use the statutory definition of medical stability, Drs. Bald, Rothrock, and McDermott, agree Jones is medically stable.[63] Frontier argued that no

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58 Tr. 92.

59 Tr. 90.

60 Tr. 91.

61 Tr. 2.

62 Tr. 87.

63 Tr. 87.

additional treatment will make any difference to Jones' condition.[64] Finally, Frontier argued that the controversion was not frivolous because there was evidence supporting the controversion from Frontier's medical evaluators, with whom the board's examiner agreed.[65]

The board's decision.

The board applied the presumption of compensability to whether Jones' "back condition is still work-related."[66] The board found that Jones had attached the presumption of compensability, and that Frontier had overcome the presumption through the reports of Dr. Bald and Dr. Rothrock.[67] The board concluded that the employee was required to prove his claim by a preponderance of the evidence.[68] After briefly summarizing the opinions of Drs. Bald, McDermott, Bartling, and Stinson, the board found "there is no presumption raised that [Jones] is not medically stable."[69] The board then found that the opinions of Dr. Bald and Dr. McDermott "rebutted a presumption of compensability for TTD benefits, if it had been raised."[70] The board then stated:

> In sum, we find the employee cannot yet prove that he is not medically stable, and entitled to TTD benefits, because he has not yet undergone the disc replacement surgery, such as to demonstrate objectively measurable improvement. Based on Dr.

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64 Tr. 88.

65 Tr. 88.

66 *James L. Jones v. Frontier Flying Service, Inc.,* AWCB Decision No. 05-0240, 9 (September 22, 2005) (*James L. Jones I*), *aff'd on reconsideration, James L. Jones v. Frontier Flying Service, Inc., (James L. Jones II*), AWCB Decision No. 05-0298 (November 10, 2005).

67 *James L. Jones I,* 9.

68 *Id.*

69 *James L. Jones I,* 10.

70 *Id.*

> Pierson's testimony, and given the employee's age, we find it is premature to order disc replacement surgery.[71]

The board then chose to approve "the course of treatment recommended by Dr. Bartling in his January 26, 2005 letter," a comprehensive in-patient pain program.[72] The board noted that Drs. McDermott and Rothrock were unable to identify a motivation for the employee's suspected malingering and the board expressed the belief that the employee was motivated to return to work.[73] The board denied permanent partial impairment compensation based on the absence of a rating other than "no PPI rating applicable."[74] Finally the board agreed that Dr. Bald's and Dr. McDermott's reports were sufficient to support a controversion and therefore denied a claim for penalties for unfair or frivolous controversion.[75]

Jones sought reconsideration of the board's decision.[76] The board determined that Jones had produced no new evidence, and that he had merely reargued his position that the employer's physicians were not credible.[77] The board concluded Jones had "undertaken an impermissible attempt to retry his case" and denied the motion for reconsideration.[78] This appeal followed.

Our standard of review.

AS 23.30.128(b) and AS 23.30.122, read together, set out the standard of review the commission applies when it reviews board decisions. The board's findings regarding

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71 *James L. Jones I,* 10-11.

72 *James L. Jones I,* 10.

73 *Id.*

74 *Id.*

75 *Id.*

76 R. 000180-186.

77 *James L. Jones v. Frontier Flying Serv., Inc.,* AWCB Decision No. 05-0289, 10 (November 10, 2005) (*James L. Jones II*).

78 *Id.*

credibility of a witness before the board are binding upon the commission.[79] The board's findings of fact will be upheld by the commission if supported by substantial evidence in light of the whole record.[80] If the board's findings are supported by substantial evidence, the commission will not reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive.[81] The commission will not usurp the fact-finding role of the board. On questions of law or procedure, the commission is required to exercise its independent judgment.[82]

> *There is substantial evidence to support a finding that Jones' continuing condition is work related and the board's finding that Jones failed to prove he is not medically stable.*

Temporary total disability compensation is owed to employees who have not reached medical stability following a work-related injury.[83] Medical stability is reached when further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of

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[79] AS 23.30.128(b).

[80] AS 23.30.128(b).

[81] AS 23.30.122. The issue of whether there is substantial evidence to overcome the presumption is a question of law that we independently examine as required by AS 23.30.128(b). *See, Norcon, Inc. v. Alaska Workers' Compensation Bd.,* 880 P.2d 1051, 1054 (Alaska 1994). But, when deciding whether the presumption has been overcome, we do not weigh the testimony or the credibility of the witnesses; instead, the evidence tending to rebut the presumption is examined by itself and is not compared to conflicting evidence in the record. *See id.* We will instead test if the evidence relied on by the board is "substantial" evidence, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Grainger v. Alaska Workers' Comp. Bd.,* 805 P.2d 976, 977 n. 1 (Alaska 1991).

[82] On those occasions that we are required to exercise our independent judgment to discern a rule not previously addressed by the Alaska Supreme Court or the Alaska State Legislature, we adopt the "rule of law that is most persuasive in light of precedent, reason, and policy." *Guin v. Ha,* 591 P.2d 1281, 1284 n. 6 (Alaska 1979).

[83] AS 23.30.185.

improvement or deterioration resulting from the passage of time.[84] Medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence.[85] We begin our analysis of the board's decision with its determination that Jones had a work-related injury, which it described as his "continuing condition."[86]

Frontier did not deny that Jones had suffered a compensable injury on August 18, 2000. While Frontier argued to the board that Jones no longer had a condition requiring treatment, by not appealing the order to pay for a comprehensive in-patient pain program, Frontier now concedes that Jones' continuing condition is work-related. Instead, Frontier argued that there was sufficient evidence to raise the presumption that Jones was medically stable and that Jones had not produced sufficient evidence to overcome the presumption at the time of the hearing. Frontier agreed at oral argument before the commission that if Jones enters a pain program and demonstrates improvement he will again be entitled to temporary total disability benefits.

Jones argues that he has been temporarily totally disabled since March 5, 2004 because he is unable to work and suffers physical impairment, but, if he undergoes the surgery he desires and his physician proposed, his condition will improve. In other words, the future possibility of improvement as a result of surgery is evidence of the

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[84] AS 23.30.395(27), *formerly* AS 23.30.395(21) *renumbered 2005*.

[85] *Id*.

[86] We take the expression "continuing condition" to mean Jones' continuing pain symptoms after March 5, 2004. The board did not identify what that condition is, perhaps because there is some confusion in the record. Jones states emphatically that he suffers from a "central pain syndrome" which he relates to a "spinal cord injury." Tr. 44-47. Dr. Bartling wrote of a "chronic low back pain and chronic pain syndrome," R. 000473. Dr. Stinson describes it as "severe L5-S1 discogenic pain." The reference to "central pain syndrome" appears to have originated with Dr. Peterson, who described Jones' condition as "significant discogenic back pain at L5-S1" and "his central pain syndrome." R.000475. In his deposition, Dr. Peterson stated the term "central pain syndrome" does not apply to Jones, and more properly it should be described as a "possible regional pain syndrome which . . . involves some central elements." Peterson, Depo. 26. He did not intend to indicate any trauma to the central nervous system. *Id*.

"temporary" nature of his condition. Because he could have surgery, he argues, there is a reasonable expectation of improvement. Jones' argument seeks to draw a parallel to *Alyeska Pipeline Serv. Co. v. DeShong,*[87] in which the Alaska Supreme Court held that a combination of (1) a valid reason for delay in obtaining surgical treatment and (2) a final outcome after the surgery that demonstrated actual improvement together constituted "clear and convincing evidence" of no medical stability in the period preceding the surgery.[88] Jones also attacks the evidence of Dr. Bald and Dr. McDermott as insufficient to create a presumption of medical stability.

The board began by considering whether the employee's continuing condition was work-related; that is, whether the 2000 employment injury continued to be a substantial factor in bringing about the continuing condition. The board explicitly stated that it found the employee had raised a presumption[89] that his continuing condition was work-related through the opinion of Dr. Bartling,[90] and Frontier had rebutted that presumption through the opinions of Dr. Bald and Dr. Rothrock.[91] Dr. Bald opined that the employee had recovered from the only injury he sustained in his employment. Dr. Rothrock gave the opinion that the employee had no psychiatric injury as a result of the August 2000 injury. These opinions are substantial evidence which rebut the

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87 77 P.3d 1227 (Alaska 2003).

88 *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1233 (Alaska 2003).

89 AS 23.30.120(a)(1).

90 *James L. Jones I,* 8. Dr. Bartling's March 17, 2004 letter states "Since his injury of August 18, 2000, [Jones] has had severe pain and has had documentation with previous MRIs and CR discographs showing annular tear and degeneration at the L5-S1 region. Unfortunately, . . . he has not received adequate relief of his pain." R.000474. This is sufficient evidence to raise a presumption that Jones' claim is work-related. The Board's statement that "it is undisputed that the employee incurred an aggravation to his back condition on February 12, 2004" is puzzling, because Jones was not employed by Frontier or any other employer on February 12, 2004. We suspect this is a typographical error. It was undisputed that the employee incurred an injury in his employment in August 2000.

91 *James L. Jones I,* 9.

presumption that the employee's continuing pain is work-related. The board was correct when, at that point, it noted that the employee was required to prove his claim[92] for coverage of his "continuing condition."

The board failed to state explicitly that it found that Jones' continuing condition was work-related,[93] yet the board ultimately found Jones was entitled to certain medical benefits for treatment of chronic pain.[94] The board's discussion is confusing, but it is clear that the board engaged in a weighing of the medical opinions relating to the nature of Jones' condition, its work-relationship and the reasonableness of proposed medical treatment for it. Because Jones could not be entitled to medical treatment for an injury or illness that did not arise out of and in the course of employment, and because the board discussed the evidence attaching and overcoming the presumption,

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[92] Jones' August 10, 2003 claim was for temporary total disability compensation from August 10, 2000 forward, medical benefits, a 25% penalty, interest and attorney fees. R. 000013. He described his injury as "2 Discs ruptured, 1 protruded. Lumbar region. 1 Disc Fixed itself, one healed by IDET. Remaining disc was to be replaced with an Artificial one. Fully ruptured/destroyed L5-S1 Disc." R. 000012. An amended claim was subsequently filed July 13, 2004, by his attorney, Michael J. Jensen, requesting a Second Independent Medical Examination, permanent partial disability and transportation in addition to the previously claimed benefits. R. 000037-038. The claim form used by Mr. Jensen included a statement that reasons for filing the claim included "Rehabilitation" and "PPI to be determined." R. 000037.

[93] The board must "explicitly state whether the employee established a preliminary link between [the] employment and [the] physical impairment, whether the employer rebutted the presumption of compensability, and if so, whether the employee proved [the employee's] case by a preponderance of the evidence." *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352, 356 (Alaska 1992). The board neglected to explicitly state whether Jones proved his case by a preponderance of the evidence. In this case, the commission was able to infer from the board's other findings that the board found the employee proved work-relationship by a preponderance of the evidence. The commission urges the board to articulate explicit findings in an orderly fashion so that the board's reasoning may be readily understood. As we have said before, the commission will not fill in the gaps by making its own findings, *S&W Radiator Shop v. Flynn,* AWCAC Decision No. 016, 14 (August 4, 2006), because the commission does not make its own findings of fact on the merits of an appeal. If the board fails to make all the findings of fact necessary to apply the law, we must remand.

[94] *James L. Jones I*, 11.

it must be inferred that the board found that Jones' chronic pain after March 5, 2004, was work-related by a preponderance of the evidence.[95]

Our review of the record finds substantial evidence to support a board finding that the August 18, 2000 injury continues to be a substantial factor in bringing about Jones chronic pain. Dr. Bartling and Dr. Stinson agree that Jones' ongoing symptoms are related to the August 18, 2000 injury.[96] Dr. Peterson was reluctant to give an opinion on "potential injury mechanism pathways and factors regarding causation,"[97] and he was not familiar with Jones' condition after October 10, 2002,[98] but he could not say with certainty that Jones' annular tear or discogenic pain was not related to the work injury.[99] Finally, Dr. McDermott, the board-appointed examiner, in a clear and thorough report, states Jones has a chronic pain syndrome related to his workers' compensation claim.[100] Dr. McDermott's description of the course of Jones' condition is

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[95] The board did not include an explicit written finding that the employee proved by a preponderance of evidence that his continuing pain condition was work-related. Due to the inclusion of other findings in the decision, the commission was able to follow the board's reasoning, and the employer conceded the continuing condition was work-related by not appealing the board's award of medical benefits for treatment of the pain syndrome; thus, the commission was able to avoid remanding the case for more findings. The commission is aware of the delay and financial hardship a remand may impose on all parties. However, where a gap in the board's findings will not permit application of the law or intelligent review of the board's decision, we *must* remand the case to the board, because it is the board's responsibility to determine the facts.

[96] R. 000476 (Dr. Stinson: "This was injured in a work-related accident on August 18, 2000, since which time he has experienced ongoing intractable symptoms."); R. 000473 (Dr. Bartling: "I believe that Mr. Jones' degenerative disc pain and chronic pain syndrome are related to Mr. Jones' injury as substantiated by the history that I received from Mr. Jones and also by history obtained by Dr. Lawrence Stinson and Dr. Paul [sic] Peterson."].

[97] R. 000475.

[98] Peterson Depo. 29.

[99] Peterson Depo. 32-33.

[100] R. 000516. "Mr. Jones' diagnosis is chronic pain syndrome, status post low back injury, related to an industrial claim." R. 000516. Dr. McDermot also notes

succinct: "[Jones] had a lifting episode which then has progressed into [an] increasing spiral of pain and pain management issues."[101] We conclude there is substantial evidence in the record to support a finding by the board that Jones' August 18, 2000 injury is a substantial factor in bringing about his continuing condition.

Having established that the board had before it substantial evidence to find the continuing condition was work-related, we turn to the board's finding that the employee failed to establish he was not medically stable.[102] Medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days.[103] In this case, both Dr. McDermott, the board-appointed examiner, and Dr. Bald, found that the employee's condition had been medically stable for a period of more than 45 days. Dr. McDermott stated that Jones' condition had been unchanged since December 2002.[104] Dr. Bald stated on February 19, 2004 that Jones, "at this point in time, is clearly medically stable."[105] While we are again puzzled by the board's language,[106] we agree

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that Jones "diaphoretic pain focused and pain magnification issues as well as his acknowledged depression and other findings from medical records would overwhelmingly suggest issues beyond musculoskeletal system." R. 000516.

[101] R. 000516. Dr. Bald, while unwilling to state that the work injury was the cause of an injury to the L5-S1 disc, agreed that Jones "has had severe pain behavior and has been noted in the past by multiple examiners to have major psychogenic contribution to the perpetuation of his pain complaints to the point that he has developed a full blown, chronic pain syndrome from which he describes himself currently as totally disabled." R. 000504.

[102] Because temporary total disability benefits must end when an employee cannot be expected to demonstrate objectively measurable improvement "from the effects of the compensable injury," AS 23.30.265(27), it is important that the board identify the effects of the compensable injury that are the basis for its finding of lack of medical stability. *See, Brown v. State, Alaska Workers' Comp. Bd.,* 951 P.2d 421, 424 (Alaska 1997).

[103] AS 23.30.395(27); *formerly* AS 23.30.395(21) *renumbered 2005.*

[104] R. 000516.

[105] R. 000504, 000506.

that these reports are sufficient to raise a presumption that Jones was medically stable from the effects of his injury after March 5, 2004.[107]

After discussing the opinions of the physicians, the board found Jones "cannot yet prove that he is not medically stable." It would be more correct to say that Jones failed to produce "clear and convincing evidence" that he was not medically stable.[108] The presumption in former AS 23.30.395(21) may be rebutted, like the presumptions in AS 23.30.120(a), and once rebutted the presumption drops out; only the quality of the evidence that must be produced is different. Evidence produced to rebut the presumption that sufficient notice of the claim has been given, for example, need only be adequate to support a conclusion by a reasonable mind. To rebut the presumption

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[106] *James L. Jones I,* 10. The board stated "we find there is no presumption raised that he is not medically stable" and, referring to Dr. Bald and Dr. McDermott's reports, "we find these opinions constitute substantial evidence rebutting the presumption of compensability for TTD benefits, if it had been raised." The relationship between the presumption that a claim comes within the workers' compensation act in AS 23.30.120(a) and the presumption of medical stability was not well expressed by the board in this case. Because the employee may attach a presumption of compensability of a claim for temporary total disability, an employer in turn may produce substantial evidence, (i.e., such evidence that a reasonable mind could accept as adequate to support a conclusion), that the employee's condition has had no objectively measurable improvement for a period of 45 days. In effect, such evidence rebuts the "temporary" element of the employee's claim for temporary total disability. By producing such evidence, the employer raises in turn a presumption of medical stability, which the employee may rebut by producing "clear and convincing" evidence. Alternatively, an employer may produce substantial evidence that the employee is not totally disabled; such evidence will overcome a presumption that the claim for temporary total disability is compensable, but it will not raise a presumption of medical stability.

[107] Jones asserts that the board could not rely on Dr. McDermott and Dr. Bald because the two doctors did not agree on the date medical stability began. However, Dr. Bald did not attempt to estimate an earlier date; he confined himself to determining medical stability from the date of his examination. Moreover, the question is not whether Jones was medically stable *before* March 5, 2004; the question is whether he was medically stable *after* that date, and on this point both doctors agree.

[108] *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1232 (Alaska 2003) ("[T]here was substantial evidence to support the board's finding that she had *produced* substantial evidence that she was not medically stable.").

of medical stability, the evidence produced must be more than *adequate* to support a conclusion, it must be "clear and convincing" of the conclusion to the reasonable mind. Once the employee produces such evidence, the presumption is rebutted, and, because the presumption of a compensable claim for temporary total disability has been rebutted, the employee must prove all elements of the claim for temporary total disability by a preponderance of the evidence. The board must weigh the evidence at this point instead of examining the evidence produced in isolation.

Examining the evidence in the record carefully, we find there is substantial evidence to support the board's findings.[109] Jones failed to produce evidence that medical treatment he received after March 5, 2004 resulted in any objectively measurable improvement. His testimony to the board emphasized that he is not improving. Indeed, his lack of improvement is one of Jones' arguments for disc replacement surgery; in circular fashion he argues that availability of disc replacement surgery shows that his condition is capable of improvement with treatment,[110] and therefore temporary.

Jones did produce some evidence that he may, in the future, be a candidate for disc replacement surgery.[111] However, the evidence he produced did not explain how

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[109] Not only the reports of Dr. Bald and Dr. McDermott support a finding of medical stability. Dr. Bartling reported in February 2003 that Jones was "unchanged from examination on November 18, 2002," (SIME 00334), in July 2003 that "his low back pain is essentially unchanged," (SIME 00368). For more than 200 days, Dr. Bartling's reports reflect that Jones did not demonstrate objectively measurable improvement.

[110] Jones' testimony did not explain how disc replacement surgery would relieve his "central pain syndrome" if, as Jones claims, he sustained a spinal cord injury. We note that the record contains no physician statement that Jones sustained a central nervous system or spinal cord injury. Dr. Peterson stated he had no reason to believe Jones had a brain stem or spinal cord injury (Peterson Depo. 22) and none of the MRI scans or CT scans have demonstrated a herniated disc indenting the spinal cord or spinal stenosis.

[111] Dr. Peterson's October 10, 2002 report states that "in the future he may be a candidate for disc replacement surgery as it becomes available." (SIME 00321). However, his opinion was conditioned upon resolution of the pain syndrome, which he

the surgery would benefit his continuing condition (chronic pain syndrome) or express certainty that he would improve. Jones did not submit his attending physician's recommendation that the surgery be performed by a certain date, or a recommendation from a surgical consultant prepared to perform the surgery in the immediate future.[112] Jones' surgical consultant, Dr. Peterson, opined that an in-patient comprehensive pain clinic is the best immediate treatment option for him, and that any surgery may even make his pain syndrome worse.[113] This evidence is not evidence that could be clear and convincing to a reasonable mind that Jones' condition is not medically stable.

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stated "needs to be dealt with before any consideration of intervention is given." (SIME 00321). Dr. Bartling, a family practitioner, states that Jones "was felt by Dr. Pierson to be a candidate at some time for disc replacement" (SIME 00425), but there is no record of Dr. Pierson expressing that opinion. In his March 17, 2004 letter, Dr. Bartling concurs with Dr. Peterson's "recommendation [in the report of October 10, 2002] that he be considered a surgical candidate for disc replacement" (SIME 00428), which somewhat overstates Dr. Peterson's opinion. In June 2004, Dr. Bartling expressed his own opinion that "this surgery may allow for more future function." (SIME 00432). Dr. Stinson, writing in May 2005, cited Dr. Peterson's opinion and also suggested that Dr. Peterson's opinion is much stronger than it is: "Dr. Davis Peterson, a spine surgeon, believes he could achieve significant improvement in his symptomatology and function with this procedure [disc replacement]." (SIME 00430).

[112] Dr. Pierson is Jones' attending physician of record, but there is no record that Dr. Pierson saw Jones after he referred Jones to Dr. Stinson. Dr. Peterson, the orthopedic surgeon consulted by Dr. Stinson, stated that "at some point in the future a disc arthroplasty *may* be a reasonable option" but that "because of his central pain syndrome, *which could compromise outcomes even from this procedure,* I think he would be best managed with a very comprehensive pain program, such as that offered by University of Washington or the Virginia Mason Medical Center." R. 000475. Dr. Stinson referred Jones to Dr. Peterson for consideration of an artificial disc or other surgery in July 2002 (SIME 00302). There is no evidence in the record that Dr. Pierson, an orthopedic surgeon, was ever consulted by the employee regarding surgical treatment after July 2002.

[113] Peterson Depo. 26-27:

> I recommended that – that the pain syndrome needed to be evaluated more thoroughly before considering other interventions. . . I was concerned that if he had a pain syndrome, . . . any longer [sic] intervention could make him

Frontier concedes that if Jones attends a comprehensive pain clinic of the type recommended by Dr. Peterson and Dr. Bartling, and demonstrates objectively measurable improvement, he would no longer be medically stable. Dr. Peterson's March 16, 2004, letter recommends treatment at a "very comprehensive pain program, such as that offered by the University of Washington or Virginia Mason Medical Center," but it is not clear that Jones acted on that referral, asked his physician to send his records to those named facilities, or even provided a copy of Dr. Peterson's letter to his physicians. Dr. Bartling's letter of January 26, 2005, cited by the board,[114] recommended a comprehensive pain management team evaluation and that "the next step would be a comprehensive in patient pain program." While Dr. Bartling stated the nearest place for such an evaluation was Seattle, he did not name a specific program, and there is no evidence in the record that he initiated the process of sending Jones to such a program.[115]

The board did not find that the bare recommendation for such comprehensive in-patient pain program constituted clear and convincing evidence of a lack of medical stability. We note Dr. Bartling's (and Dr. Peterson's) recommendations were not accompanied by explanation of the improvement that would be gained, expert opinion expressing certainty that Jones would improve in such a program, evidence of steps

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> worse, especially regional pain syndromes are notorious for – for sometimes becoming worse with major intervention.
>
> Q. "Major intervention" being surgery?
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> A. Surgery of any sort, right.

[114] *James L. Jones I,* 11.

[115] In *DeShong,* 77 P.3d at 1233, the Supreme Court held that the board did not err in finding that an employer's delay in providing for a second opinion by resolving the employee's physician's confusion over securing a second opinion and the final outcome of the surgery produced clear and convincing evidence of no medical stability. In that case, the Court noted that in the circumstances of the case, a "reasonable mind could accept that the employee's delay in obtaining surgery was due to her ignorance of her rights to a second opinion." *Id.* Our review of the record reveals no similar circumstances of ignorance of rights here.

taken to refer Jones to a specific program, or Jones' admission to it. The board did not state that Jones overcame - or failed to overcome - the presumption of medical stability based on this recommendation, but it did find Jones could not establish he was not medically stable. We cannot say that the recommendation letters from Dr. Bartling and Dr. Peterson alone are evidence, which would be clear and convincing to a reasonable mind, that Jones was not medically stable after March 5, 2004. Even if they could be held to have overcome the presumption of medical stability, on reviewing the whole record, we cannot say that the board lacked substantial evidence to support a finding that the employee was medically stable after March 5, 2004.[116]

There is substantial evidence to support the board's choice of medical treatment as a reasonable alternative.

In *Phillip Weidner & Associates v. Hibdon,*[117] the Alaska Supreme Court provided an outline of the analysis the board should apply when considering a claim for specific medical benefits filed more than two years after an employee's date of injury. In *Hibdon,* the Supreme Court held that "a claim for medical treatment is to be reviewed according to the date the treatment was sought and the claim was filed with the Board."[118] During the two year period following the date of injury, the board's discretion to order medical treatment is limited to reviewing the reasonableness and necessity of the particular treatment sought by the employee and the employee's physician; after two years, the board has greater discretion to authorize "indicated" medical treatment "as the process of recovery may require" and may choose among reasonable, competing, medically acceptable alternatives.[119]

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[116] Frontier conceded that if Jones enters such a program and demonstrates objectively measured improvement, he will no longer be medically stable, and thus entitled to temporary disability compensation.

[117] 989 P.2d 727 (Alaska 1999).

[118] *Hibdon,* 989 P.2d 731-32. *See,* AS 23.30.095(a).

[119] *Hibdon,* 989 P.2d 731.

Jones filed his first claim for medical benefits on August 11, 2003,[120] clearly more than two years after his injury on August 18, 2000. In that claim, he wrote that a "remaining disc was to be replaced with an artificial disc." Jones argued to the board that he was given all treatment until surgery was mentioned to the adjuster, and then "suddenly everything stopped,"[121] apparently suggesting that the delay in bringing a claim should be charged against the insurer. However, the board did not find that the insurer delayed consideration of the surgery by controverting his claim prior to August 19, 2002, and the insurer paid both medical benefits and disability compensation throughout the two years following his injury. The surgery Jones sought involved implantation of a device not then approved by the U.S. Food and Drug Administration.[122] Even if Jones had filed a claim for the surgery before August 19, 2002, it is doubtful that the surgery he desired would have been within the realm of medically acceptable options when his claim was heard.[123] We conclude that in this case the board was not confined to determining whether the medical care sought by

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[120] R. 000012. We note that Jones later asserted that this claim, which he called a "request for hearing," was rescinded. R. 000557.

[121] Tr. 76-77.

[122] Tamara Jones testified the artificial disc was approved by the FDA on October 26, 2004, two years after the possibility of such surgery was first mentioned.

[123] Dr. Stinson referred Jones to Dr. Peterson for "evaluation and possible surgical intervention" (SIME 00302), including "for potential disc replacement which I [Dr. Stinson] understand is pending approval by the FDA." (SIME 00302). This is not a *recommendation* that Jones have surgery to implant an artificial disc. Jones did not see Dr. Peterson until October 2002. Dr. Peterson reported he expected FDA approval of an artificial disc "in a year or two." (SIME 00321). Dr. Peterson's report states that the chronic pain syndrome must be dealt with before any consideration of surgery and that he was "certain that any other intervention may magnify his pain syndrome." (SIME 00321). In short, Dr. Peterson's statement that Jones *may* in the future be a candidate for surgery not yet approved by the FDA is not a recommendation comparable to that in *Hibdon,* that the employee "should strongly be considered" for surgery. 987 P.2d 730.

Jones was reasonable, but that it could choose among competing medical alternatives.[124]

The board found that based on Dr. Pierson's testimony,[125] and the employee's age, it is premature to order disc replacement surgery. We find there is substantial evidence to support the board's finding. Dr. Peterson, the only surgeon who testified, stated that the employee's pain syndrome requires treatment before surgery or surgery could make the pain syndrome worse. This opinion is substantial evidence supporting the board's finding that surgery is premature. Jones argues that the board erred in considering his age (38 years old) because Dr. Peterson's report linked his age with fusion surgery, not disc replacement surgery. We disagree. We do not read the board's statement as necessarily reflecting Dr. Peterson's report. In considering competing medical alternatives, the board was within its discretion, and its considerable experience of back injuries, to consider whether a younger person may have a greater capacity for physical and mental rehabilitation or may delay irrevocable treatments such as disc fusion or disc replacement surgery.

The board chose to follow Dr. Bartling's recommendation for a comprehensive, in-patient pain clinic program. Dr. Peterson also believed that the employee's pain syndrome must be resolved prior to any surgery and in his March 16, 2004 letter recommended a "very comprehensive pain program." Dr. McDermott, although his opinion is not cited, also believed that Jones has a "chronic pain syndrome" and that his

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[124] The board mixed its discussion of the raising of the presumption of compensability to Jones's medical benefits in its discussion of the application of the presumption to his claim for temporary total disability compensation. It noted that "the primary treatment currently recommended" for Jones is disc replacement surgery by Dr. Peterson, Dr. Bartling and Dr. Stinson. *James L. Jones I,* 10. We do not believe the board intended to use the word "primary" in the sense of "first" because in the remainder of the paragraph the board notes that Dr. Peterson thought Jones too young for it at this time and Dr. Bartling felt a pain clinic was appropriate. We believe the board intended to refer to the treatment that was crucial, or most important, in Jones' claim.

[125] This is appears to be a name-confusion error; Dr. Peterson (not Dr. Pierson) testified.

"marked overlay of pain behavior, pain magnification, and his 'central core pain' syndrome" cloud issues concerning musculoskeletal injury. The employer medical examiner also agreed the employee has a chronic pain syndrome and believed that surgery should be avoided.[126] Dr. Bartling, Dr. Foelsch, Dr. Peterson, Dr. McDermott and Dr. Bald agree Jones has a chronic pain syndrome; Dr. Peterson and Dr. Bartling's opinions contain reasonable medical options for treatment of the chronic pain syndrome. We find their opinions are substantial evidence supporting the board's choice to order payment of a comprehensive, in-patient, pain program.[127] When the board has weighed competing medical opinions, the board's decision as to how much weight should be given one physician over another will not be disturbed by the commission unless we are left with the definite and firm conviction that a mistake has been made.[128] We are not convinced that a mistake has been made in this case. We conclude the board did not abuse its discretion in choosing a comprehensive, in-patient, pain program as one of the competing reasonable medical alternatives available to Jones.

There is substantial evidence to support the board's denial of permanent partial impairment compensation.

Awards of permanent partial impairment compensation are governed by AS 23.30.190. An award of permanent partial impairment compensation is based upon

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[126] R. 000488-89.

[127] We note that the board reserved jurisdiction to consider surgery in the future. While the only absolute proponent of the disc replacement surgery is Jones himself, the board had substantial evidence in Dr. Bartling's letter, and Dr. Peterson's testimony, to support a finding that such surgery may become reasonable in the future, on which to base a reservation of jurisdiction. However, we note that such reservations are not infinite, as the board's power to modify decisions is limited by AS 23.30.130.

[128] The board's assignment of the weight to be accorded competing medical opinion is conclusive and entitled to the same standard as a jury verdict in a civil trial. If, after a careful review of the whole record, we are left with a definite and firm conviction that a material mistake of fact has been made, we will not substitute our own findings of fact for the board's findings. We would remand the case to the board for further proceedings. AS 23.30.128(d).

an impairment rating made in accordance with the American Medical Association's Guides to the Evaluation of Permanent Impairment. In order to obtain an award of permanent partial impairment compensation, an employee must present evidence of a rating greater than zero percent.[129] This Jones failed to do. The board found that Dr. MacDermott, Dr. Rothrock and Dr. Bald "have said no PPI rating [is] applicable."[130] We agree that Dr. Bald[131] reported that Jones had no permanent impairment as a result of his work-related injury,[132] Dr. Rothrock reported Jones had no compensable psychological problem,[133] and Dr. MacDermott stated that the employee had "no ratable permanent partial disability with respect to the lumbar spine."[134] Our review of the record supports the board's finding that no other doctor had given the employee a rating of permanent impairment. The board's conclusion that Jones is not entitled to an award of permanent partial impairment compensation is supported by substantial evidence in light of the whole record.

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[129] An employee is entitled to a presumption of compensability of permanent impairment following a work-related injury. However, as the Supreme Court states,

> the presumption of compensability does not free an injured worker from the burden of introducing evidence as to the extent of the injury and the amount of medical expenses. Allocation of this burden to the claimant makes sense because the extent of injury and amount of medical expenses are unique in each case, and the worker often has greatest access to such information.

Tolbert v. Alascom, Inc., 973 P.2d 603, 607-608 (Alaska 1993) (citations omitted). Thus, Jones had the burden of introducing evidence "as to the extent of the injury" or the percentage of impairment he suffered.

[130] *James L. Jones I,* 11.

[131] R. 000103.

[132] An impairment rating of zero may be a valid permanent partial impairment rating, but it does not entitle the rated employee to an award of permanent partial disability compensation.

[133] R. 000119.

[134] R. 000110.

Conclusion.

The board's written decision neglects to explicitly state one finding of fact, fails to set its findings out in an well-organized fashion, does not articulate the board's application of the law to each portion of the employee's claim, and confuses some names. However, the board's decision contains sufficient findings to permit intelligent review, and the record as a whole amply supports the board's written findings. Despite the lack of orderly discussion and omission of an explicit finding, we were able to determine what legal standards the board applied and to parse out the board's reasoning. We conclude the board's findings are supported by substantial evidence in light of the whole record.

We AFFIRM the board's decision directing payment of a comprehensive in-patient pain clinic program for Jones (and denying a claim for disc replacement surgery) as a choice among competing reasonable medical alternatives.[135] We AFFIRM the board's denial of permanent partial impairment compensation. We AFFIRM the board's denial of temporary total disability compensation after March 5, 2004.

Date: *Sept. 7, 2006* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Marc D. Stemp, Appeals Commissioner

Signed
Jim Robison, Appeals Commissioner

Signed
Kristin Knudsen, Chair

[135] We request the Alaska Department of Labor and Workforce Development, Division of Workers' Compensation staff to provide guidance to Jones in how to obtain a referral from his attending physician of record (Dr. Pierson or Dr. Bartling) to a comprehensive in-patient, pain program as directed by the board.

APPEAL PROCEDURES

This is a final administrative agency decision. It becomes effective when filed in the office of the Alaska Workers' Compensation Appeals Commission unless proceedings to appeal it are instituted. 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 decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. 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 *James L. Jones vs. Frontier Flying Service, Inc.*; Appeal No. 05-003; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this _*7th*_ day of _*September*____, 200_*6*__.

__*Signed*_____
C. J. Paramore, Appeals Commission Clerk

I certify that a copy of this Final Decision in Jones v. Frontier Flying Serv., Inc., AWCAC Appeal No. 05-003 was mailed on _*9/7/2006*____ to J. Jones, (certified mail) P. Zobel, AWCB-Fairbanks, AWCB Appeals Clerk, and the Director of the Workers' Compensation Division at their addresses of record, and faxed to AWCB-Fairbanks, AWCB Appeals Clerk, and the Director of the Workers' Compensation Division.

___*Signed*_____
C. J. Paramore, Appeals Commission Clerk Date