Alaska Workers' Compensation Appeals Commission

Mark A. McAlpine, Appellant, vs. Denali Center and Sentry Insurance, a Mutual Company, Appellees.	Final Decision Decision No. 232 February 9, 2017 AWCAC Appeal No. 15-030 AWCB Decision No. 15-0132 AWCB Case No. 200906835

Final decision on appeal from Alaska Workers' Compensation Board Decision and Order No. 15-0132, issued at Fairbanks, Alaska, on October 8, 2015, by northern panel members Robert Vollmer, Chair, Rick Traini, Member for Labor, and Sarah Lefebvre, Member for Industry.

Appearances: Mark A. McAlpine, self-represented appellant; Zane D. Wilson, CSG, Inc., for appellees, Denali Center and Sentry Insurance.

Commission proceedings: Petition for review filed November 25, 2015; petition for review converted to appeal April 19, 2016; briefing completed October 25, 2016; oral argument held November 29, 2016.

Commissioners: James N. Rhodes, Philip E. Ulmer, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Mark A. McAlpine was injured in 2009 while working for Fairbanks Memorial Hospital (Denali Center).[1] He was found eligible for reemployment benefits.

[1] At the time of the injury, Mr. McAlpine's employer was identified as Fairbanks Memorial Hospital. *See Mark McAlpine v. Banner Health System*, Alaska Workers' Comp. Bd. Dec. No. 11-0125 (Aug. 24, 2011)(*McAlpine I*) and *Mark A. McAlpine v. Fairbanks Memorial Hospital*, Alaska Workers' Comp. Bd. Dec. No. 12-0200 (Nov. 16, 2012)(*McAlpine IV*). Subsequently, his employer was identified as Banner Health Systems. *See Hutto Consulting and Mark McAlpine vs. Banner Health System*, Alaska Workers' Comp. App. Comm'n Dec. No. 169 (Sept. 12, 2012)(*McAlpine III*). In *Mark*

Subsequently, Denali Center controverted medical benefits and filed a petition to terminate reemployment benefits. In 2012, the Alaska Workers' Compensation Board (Board) issued a decision granting Denali Center's petition to terminate reemployment benefits.[2]

In 2014, Mr. McAlpine filed a claim for compensation benefits (WCC) based on the same injury as was the subject of the prior proceedings.[3] Also in 2014, Mr. McAlpine filed a petition to vacate the Board's November 2012 decision (*McAlpine IV*) terminating his reemployment benefits.[4] In 2015, the Board issued its decision denying Mr. McAlpine's petition to vacate *McAlpine IV* on the ground that the petition was filed beyond the time allowed by law.[5]

Mr. McAlpine filed a petition for review of the Board's 2015 decision (*McAlpine V*).[6] The Commission converted the petition for review to a notice of appeal and the Commission affirms the Board's decision not to vacate *McAlpine IV* because the petition was untimely. The decision in *McAlpine V* is supported by substantial evidence.[7]

McAlpine v. Denali Center, Alaska Workers' Comp. Bd. Dec. No. 15-0132 (Oct. 8, 2015) (*McAlpine V*), on appeal here, his employer is identified as Denali Center. Denali Center is used in this decision to denote Mr. McAlpine's employer.

[2] *McAlpine IV*.

[3] *See* Response to Petition for Review, Exhibit B.

[4] *See* Response to Petition for Review, Exhibit A.

[5] *McAlpine V*. *See* AS 23.30.130(a).

[6] Mr. McAlpine filed a petition for reconsideration of *McAlpine IV* on October 24, 2015; at the prehearing conference on November 13, 2015, Mr. McAlpine was informed that the Board would not act on the petition for reconsideration.

[7] This decision concerns only Mr. McAlpine's appeal from *McAlpine V* and does not address any issues in Mr. McAlpine's 2014 WCC.

2. Factual background and proceedings.[8]

Mr. McAlpine was injured on May 17, 2009, while working as a certified nurse aide for Denali Center.[9] He was paid temporary total disability (TTD) compensation[10] and was treated conservatively with chiropractic treatment by William A. Tewsen, D.C.[11] On August 21, 2009, Douglas Bald, M.D., conducted an employer's medical evaluation (EME) and recommended continued conservative care.[12]

On January 5, 2010, the reemployment benefits administrator (RBA) found Mr. McAlpine eligible for reemployment benefits based on Dr. Tewsen's opinion that Mr. McAlpine would have a permanent partial impairment (PPI).[13] Dr. Tewsen referred Mr. McAlpine to Paul Jensen, M.D., who, on January 12, 2010, recommended nerve root injections.[14] The injections provided only temporary pain relief.[15] On March 22, 2010, Dr. Jensen reported he did not know when Mr. McAlpine would become medically stable or able to participate in vocational retraining.[16] On April 24, 2010, John Ballard, M.D., performed an EME, opining that Mr. McAlpine was not yet medically stable and that his symptoms could not be entirely explained by objective criteria or testing.[17]

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[8] We make no findings of fact. We state facts as set forth in the Board's decisions, except as otherwise noted.

[9] *McAlpine IV* at 2 (No. 1).

[10] R. 1-2, Compensation Report, February 24, 2011. For five weeks, from June 9 – July 18, 2009, he received temporary partial disability payments. *Id.*

[11] *McAlpine IV* at 2 (Nos. 2, 3).

[12] *McAlpine IV* at 3 (No. 9).

[13] *McAlpine IV* at 3 (No. 11).

[14] *McAlpine IV* at 4 (No. 12).

[15] *Id.*

[16] *McAlpine IV* at 4 (No. 14).

[17] *McAlpine IV* at 4 (No. 15).

On June 29, 2010, the rehabilitation specialist submitted a reemployment plan to the RBA.[18] That same day, Mr. McAlpine had back surgery, performed by Dr. Jensen.[19] Dr. Jensen expressed the opinion that Mr. McAlpine would be medically stable by September 29, 2010.[20] On September 29, 2010, Denali Center began paying reemployment stipend benefits,[21] and on September 30, 2010, the RBA notified the rehabilitation specialist, pursuant to AS 23.30.041(k), that the reemployment plan was not approved.[22]

On October 20, 2010, Mr. McAlpine reported to Jan DeNapoli, PA-C, that all of his "pre-op" symptoms had resolved.[23] John W. Joosse, M.D., conducted an EME on December 15, 2010.[24] He stated the substantial cause of Mr. McAlpine's disability and need for medical treatment was pain syndrome and behavioral issues, and he was "probably" medically stable.[25] On December 28, 2010, Mr. McAlpine reported to Providence Valdez Medical Center with complaints of lumbar pain after a slip and fall the previous day.[26] On January 18, 2011, the adjuster wrote to Dr. Jensen asking for an update and Ms. DeNapoli indicated on the letter that Mr. McAlpine's pre-operative

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[18] *McAlpine IV* at 5 (No. 18).

[19] *McAlpine IV* at 5 (No. 24).

[20] *McAlpine IV* at 5 (No. 26).

[21] *McAlpine IV* at 5 (No. 23). *See* AS 23.30.041(k) ("If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation . . . until the completion or termination of the process, . . . reduced by wages earned . . . to the extent that the wages earned, when combined with the compensation paid . . . , exceed the employee's temporary total disability rate.").

[22] *McAlpine IV* at 5 (No. 19). The Commission resolved a fee dispute regarding preparation of this plan in *McAlpine III*.

[23] R. 644.

[24] *McAlpine IV* at 5-6 (No. 27).

[25] *Id.*

[26] Appellant's Excerpt of Record at 590.

symptoms had resolved.[27] Mr. McAlpine had residual weakness to be addressed with physical therapy.[28] She also indicated the adjuster should coordinate a PPI rating.[29]

In Mr. McAlpine's visit to Alaska Neuroscience Associates on May 31, 2011, he stated he was having worse pain and was working with physical therapy to resolve it.[30] He did not have any bowel or bladder symptoms.[31] On June 9, 2011, he saw Ms. DeNapoli to review a recent MRI, and reported he was feeling a bit better and hoped for continued improvement.[32] He was to follow up on an as-needed basis since he had no new radicular symptoms.[33]

Dr. Joosse conducted another EME on September 19, 2011, in which he found Mr. McAlpine to be medically stable, and gave him a permanent partial impairment rating of zero, on the assumption the recommended neurological testing showed no radiculopathy or neuropathy.[34] On November 8, 2011, based on this report, Denali Center controverted medical benefits and filed a petition to terminate reemployment benefits.[35] On January 15, 2012, Dr. Joosse reviewed Mr. McAlpine's medical records and opined that Mr. McAlpine had been medically stable by mid-July 2009, and reiterated his zero impairment rating.[36] Dr. Joosse felt the substantial cause of Mr. McAlpine's symptoms

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27 Appellant's Excerpt of Record at 598.

28 *Id.*

29 *Id.*

30 *Id.* at 611.

31 *Id.*

32 *Id.* at 613.

33 *Id.*

34 *McAlpine IV* at 6-7 (No. 33) (It is unclear whether Mr. McAlpine had the testing done.)

35 *McAlpine IV* at 7 (No. 34).

36 *McAlpine IV* at 7 (No. 36).

was pain syndrome, likely psychiatric in origin, with functional and behavioral complaints that were not related to the 2009 work injury.[37]

On February 17, 2012, Denali Center's claims adjuster wrote to Dr. Jensen, inquiring whether he agreed with Dr. Joosse's January 15, 2012, report (enclosed with the correspondence).[38] Dr. Jensen's office, Alaska Neuroscience Associates, responded by checking "yes" (indicating agreement with Dr. Joosse's report), under the stamped signature of Ms. DeNapoli, a physician's assistant at Alaska Neuroscience Associates, who had evaluated Mr. McAlpine on numerous occasions.[39]

Denali Center's petition to terminate reemployment benefits was heard by the Board on June 28, 2012.[40] The Board initially excluded Dr. Joosse's 2011 and 2012 reports from evidence on the basis that Denali Center had made more than one change in EME physicians, which made Dr. Joosse an unauthorized change. The Board then denied Denali Center's petition.[41] Denali Center filed a petition for reconsideration and asserted Dr. Bald had made a referral to Dr. Ballard. Attached to the petition, Denali Center submitted a copy of the April 8, 2010, letter from Dr. Bald stating that he would no longer be performing EMEs and advising Denali Center to refer Mr. McAlpine to Dr. Ballard for future EMEs.[42]

On November 16, 2012, the Board granted the petition for reconsideration, agreed there was no unauthorized change in EME physician, and admitted Dr. Joosse's 2011 and 2012 reports into evidence. Based on consideration of these reports, the Board then

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[37] *McAlpine IV* at 7 (No. 36).

[38] *McAlpine IV* at 7 (No. 38).

[39] *McAlpine IV* at 9-10 (Nos. 42, 44-45, 52).

[40] *Mark A. McAlpine v. Fairbanks Memorial Hospital*, Alaska Workers' Comp. Bd. Dec. No. 12-0147 (Aug. 24, 2012) (*McAlpine II*).

[41] *McAlpine II* at 17. *See* 8 AAC 45.082. The Board did not exclude Dr. Joosse's 2010 report, which was issued prior to promulgation of the regulation 8 AAC 45.082(c) at a time when the controlling authority was *Guys With Tools, Ltd. v. Thurston*, Alaska Workers' Comp. App. Comm'n Dec. 062 (Nov. 8, 2007).

[42] *McAlpine IV* at 8 (No. 42).

granted Denali Center's petition to terminate reemployment benefits.[43] Mr. McAlpine was represented by counsel at this time.[44]

On November 17, 2014, Mr. McAlpine filed a claim for TTD benefits, medical benefits, and review of his eligibility for reemployment benefits. This claim appears to be still pending.[45] On December 12, 2014, Mr. McAlpine filed a petition to vacate the Board's November 2012 decision terminating his reemployment benefits.[46]

On October 8, 2015, the Board issued its decision denying Mr. McAlpine's petition to vacate, because the petition was filed beyond the time allowed by law for Board review of a compensation case.[47] The Board also concluded that Mr. McAlpine had not demonstrated grounds for modification.[48] Mr. McAlpine filed a petition for review of the decision and the Commission converted the petition to a notice of appeal on April 19, 2016.[49] The Commission affirms the Board's decision to deny Mr. McAlpine's petition to vacate the November 2012 (*McAlpine IV*) decision denying Mr. McAlpine reemployment benefits. The Commission does not address Mr. McAlpine's 2014 WCC seeking compensation benefits, which WCC remains pending.

3. Issues raised for review.

Mr. McAlpine states his issues for review as follows:[50]

(1) whether the Board properly denied the petition on the ground that it was untimely; (2) whether the Board's decision contains findings and analysis sufficient to support its decision; and (3) whether substantial evidence supports the Board's 2015

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43 *McAlpine IV*.

44 *Id.*

45 *McAlpine V* at 11 (No. 63).

46 *McAlpine V*.

47 *McAlpine V* at 21-22. *See* AS 23.30.130(a).

48 *McAlpine V* at 22-24.

49 Order on Petition for Review, Alaska Workers' Comp. App. Comm'n Appeal No. 15-030 (Apr. 19, 2016).

50 Petition for Review at 4.

findings regarding (a) the signature on Alaska Neuroscience Associates' response to the adjuster's February 17, 2012, inquiry and (b) medical stability.[51] The actual issue on appeal is whether Mr. McAlpine's petition was untimely and whether the Board's decision is supported by substantial evidence. The other issues are contingent and subsumed in that determination.

4. Standard of review.

The Board's findings of fact shall be upheld by the Commission if supported by substantial evidence in light of the record as a whole.[52] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[53] "The question of whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law."[54] On questions of law and procedure, the Commission does not defer to the Board's conclusions; rather it exercises its independent judgment.[55] In regarding the weight given to witnesses' testimony, including medical testimony and reports, the Board's decision is conclusive, even if the evidence is conflicting or susceptible to contrary conclusions.[56] Moreover, "[t]he Board has the sole power to determine the credibility of a witness"[57] and the Board's findings regarding the credibility of witness testimony are binding on the Commission.[58]

AS 23.30.130 governs modification of the Board's decisions. It states in pertinent part:

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51 Order on Petition for Review at 6.

52 AS 23.30.128(b).

53 *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

54 *McGahuey v. Whitestone Logging, Inc.,* Alaska Workers' Comp. App. Comm'n Dec. No. 054 at 6 (Aug. 28, 2007)(citing *Land & Marine Rental Co. v. Rawls,* 686 P.2d 1187, 1188-89 (Alaska 1984).

55 AS 23.30.128(b).

56 AS 23.30.122.

57 *Id.*

58 AS 23.30.128(b).

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

The regulation at 8 AAC 45.150 sets out the basis for granting modification.

> (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
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> (b) A party may request a rehearing or modification of a board order by filing a petition for rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.
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> (c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.
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> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
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> (1) the facts upon which the original award was based;
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> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
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> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
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> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

The Alaska Supreme Court (Court), in addressing review of petitions for modification in workers' compensation cases, has stated the Board "acts within its jurisdiction with respect to modification of the original claim when it decides whether the limitations period has run."[59] The Court further stated "[w]e have consistently held that an allegation of mistake should not serve as 'a back-door route to retrying a case because one party thinks he can make a better showing on the second attempt.'"[60] Moreover, the person seeking the modification must make a showing as to why any new evidence "could not have been discovered and produced at the time of hearing."[61]

5. Discussion.

a. Did the Board properly find the Petition for Modification to be untimely?

Whether the Board properly found Mr. McAlpine untimely filed his petition is the core issue on appeal. The Board denied Mr. McAlpine's petition for modification finding it was untimely and there was no basis upon which modification could be granted. The Board's authority to modify a decision is strictly controlled by AS 23.30.130(a) which provides "the board may, before one year after the date of the last payment of compensation benefits . . . or before one year after rejection of a claim, review a compensation case under the procedure prescribed in . . . AS 23.30.110 (emphasis added)." The Court has addressed the controlling nature of this statute. In *Hulsey*, the Court held this statute "imposes evidentiary standards for Board review of petitions and a limitations period in which Board review may occur. The Board thus acts within its

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[59] *Hodges v. Alaska Constructors, Inc.,* 957 P.2d 957, 960 (Alaska 1998) (*Hodges*) (citing *Hulsey v. Johnson & Holen,* 814 P.2d 327, 328 (Alaska 1991).

[60] *Id.* at 961 (citing *Interior Paint Co. v. Rodgers,* 522 P.2d 164, 169 (Alaska 1974)).

[61] *Id.* (citing 8 AAC 45.150(d)(2)).

jurisdiction with respect to modification of the original claim when it decides whether the limitations period has run."[62] The statute states a petition must be submitted within one year of the last payment of compensation benefits or a rejection of a claim.

Mr. McAlpine's claim for benefits was denied on November 16, 2012, in *McAlpine IV*. At this time Mr. McAlpine was represented by counsel. An appeal had to be filed 30 days after the November 2012 decision was issued. Mr. McAlpine was represented by counsel who understood the time frame for filing an appeal. No appeal was filed.

Further, Mr. McAlpine had until November 2013 to file a petition for modification. However, Mr. McAlpine did not file anything until December 15, 2014. On its face, and without considering any additional evidence, his petition was untimely. Following the Court's directions in *Hulsey*, the petition was properly denied.

At the time *McAlpine IV* was issued, Mr. McAlpine was represented by counsel who continued to represent him for another four months.[63] Mr. McAlpine also testified he consulted a second attorney for help in filing his petition for modification upon whose advice he relied.[64] He asserts that he relied, to his detriment, on statements from these two attorneys that they were handling matters for him. Even if Mr. McAlpine received inappropriate advice from counsel, bad advice does not relieve him of his obligation to file a petition timely. Any reliance on inaccurate or negligent advice does not and cannot excuse the untimely filing of his petition for modification. He may have recourse with the attorneys but not with the Board. The statute is clear that the time limit is one year and Mr. McAlpine did not file his petition within this one year time limit.

Mr. McAlpine asserts the time for filing his petition should be extended because from March 2013 he was unrepresented by counsel and the Board failed to advise him of any deadlines. However, the November 2012 decision clearly stated the time line for

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62 *Hodges* at 961 (citing 8 AAC 45.150(d)(2)).

63 *McAlpine IV* at 11 (No.62) (Mr. Franich withdrew on March 29, 2013).

64 Petition for Review at 6-8.

both reconsideration and modification.[65] Moreover, during a significant portion of the time for filing either an appeal or petition for modification, Mr. McAlpine was represented by counsel. There is no basis for extending the time limit.

The Board denied Mr. McAlpine's petition to vacate the November 2012 decision on the ground that it was untimely,[66] and the Board concluded that it would neither modify nor reconsider the November 2012 decision.[67] Nothing in the Board's 2015 decision altered or amended the reasoning or analysis set forth in the Board's November 2012 decision. The substantial evidence in the record demonstrates Mr. McAlpine did not timely request a modification of the November 2012 decision, and the Board properly denied his petition as untimely.

b. Did the Board's decision contain sufficient findings and analysis to support its decision?

Mr. McAlpine's petition for modification of *McAlpine IV* is based in part on allegations of change in condition and mistake of fact. However, even if his petition had been timely filed, he has not provided sufficient evidence to allow for modification of the November 2012 decision. He asserts he has new medical evidence which shows a substantial change in condition which he believes should alter the Board's findings in *McAlpine IV*. However, the new medical evidence references his current condition and not his condition in 2012. This evidence may support his new WCC but does not affect the findings in *McAlpine IV.*

McAlpine IV dealt solely with the issue of whether Mr. McAlpine was entitled to reemployment benefits. Under AS 23.30.041(f) "[a]n employee is not eligible for reemployment benefits if . . . (4) at the time of medical stability, no permanent impairment is identified or expected." Dr. Joosse, in September 2011, found Mr. McAlpine had no PPI as a result of the 2009 work injury. [68] Dr. Joosse also found Mr. McAlpine

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65 Appellant's Excerpt of Record at 334.

66 *See supra*, note 48.

67 *McAlpine V* at 24 (Conclusions of Law, No. 2).

68 *McAlpine V* at 8 (Nos. 36 and 39).

medically stable in the same report, and he reiterated this opinion after a records review in January 2012.[69] On March 1, 2012, Dr. Jensen's office indicated it concurred with Dr. Joosse's opinion when the PA-C (Jan DeNapoli) checked the "yes" box, stamped the form with her signature, and returned it by fax to the adjuster.[70] (Mr. McAlpine's objections to this form are discussed below). These medical opinions are uncontradicted in the record and constitute substantial evidence in the record as a whole.

The records from Drs. Tewsen, Bald, Ballard, and Jensen which indicate Mr. McAlpine was not yet medically stable are all dated in 2009 through 2011. For instance, on October 20, 2010, Mr. McAlpine reported to Ms. DeNapoli that his pre-operative symptoms had resolved.[71] In May and June 2011, Mr. McAlpine reported he was improving with no bowel or bladder problems and he hoped for continued improvement.[72] These reports support Dr. Joosse's findings in September 2011 and January 2012 that Mr. McAlpine was medically stable with no PPI.

Mr. McAlpine was statutorily medically stable by June 2011, pursuant to the presumption of medical stability at AS 23.30.395(28) when more than 45 days had elapsed without any change in condition. June 2011 is when Ms. DeNapoli advised Mr. McAlpine to follow-up with her on an as-needed basis since he had no new radicular symptoms. He had reported he was feeling better and anticipated continued improvement. Dr. Joosse's examination in September 2011 and his record review in January 2012 confirm the presumption of medical stability as there was no change in his condition. There are no medical records to the contrary and so Mr. McAlpine has not provided "clear and convincing evidence" to rebut the presumption.

Even without the form faxed from Dr. Jensen's office, Dr. Joosse's reports would constitute substantial evidence that Mr. McAlpine was medically stable and had no permanent partial impairment. The lack of a PPI rating is pertinent to the finding of

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69 *McAlpine V* at 8 (Nos. 36 and 39).

70 *Id.* at 9 (No. 42).

71 Record on Appeal at 644.

72 Appellant's Excerpt of Record at 611 and 613.

noneligibility for reemployment benefits because an employee must have some PPI to be eligible. Mr. McAlpine has provided no medical evidence showing a PPI rating as a result of the 2009 injury. Therefore, there is no basis for modifying *McAlpine IV* and the decision not to modify it in *McAlpine V* is supported by substantial evidence in the record as a whole.

Mr. McAlpine, at oral argument, asked the Commission to look at several medical records included in his Excerpt of Record, specifically documents at pages 644, 652-671, and 642-643. The Commission reviewed these specific documents in addition to reviewing the entire Excerpt of Record. The specific documents he wanted reviewed are as follows:

> Page 644: Letter from the Office of Kim B. Wright, M.D., dated 7/23/2013, advising Mr. McAlpine that Dr. Jensen's office retained all of Mr. McAlpine's medical records and that Jan DeNapoli had not brought his records with her.
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> Pages 642-643: form dated 4/13/2013, from State of Alaska, Division of Public Assistance and signed by Dr. Jensen, stating Mr. McAlpine needs 12 months to recover from his spinal cord injury, including his foot drop.
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> Pages 652-671: Medical records from David A. Lundin, M.D., (3/6/2014); Virginia Mason Medical Center Radiology Diagnostic Report (7/31/2014); University of Washington Medicine Valley Medical Center (8/14/2014); and Occupational Health Referral, David A. Lundin, M.D. (8/14/2014).

These records have importance to Mr. McAlpine's 2014 WCC pending before the Board, but they are insufficient evidence to alter either *McAlpine IV* or *McAlpine V*. These records do not address the issue of medical stability in 2012 or whether there is any PPI rating from the 2009 injury. Moreover, they do not attribute any current problems to the 2009 work injury, other than simply stating Mr. McAlpine relates his problems to the work injury. The records contain no medical opinion that the 2009 work injury is the substantial cause of his current condition.

To support a rehearing on grounds of change in condition, "a petition must set out in detail the history of the claim and the nature of change of conditions . . . without specification of details sufficient to permit the board to identify the facts challenged will

not support a request for a rehearing or modification."[73] As in *Lindhag,* Mr. McAlpine's primary argument is a mistake of fact. While there is some indication in the records of a worsening condition, the records do not connect the worsening to the work injury and do not indicate the work injury is the substantial cause. An alleged change in condition "cannot be used to retry the original issues."[74] The question in *McAlpine IV* was whether Mr. McAlpine was entitled to reemployment benefits. These new medical records do not provide evidence demonstrating that decision was erroneous.

c. Is the Board's decision supported by substantial evidence with regard to the signature on Alaska Neuroscience Associates' response and the question of medical stability?

Mr. McAlpine contends the Board erred in relying on the EME of Dr. Joosse and the form returned to the adjuster from Alaska Neuroscience Associates when it found he was medically stable in 2012 and no longer entitled to reemployment benefits. The issue of medical stability is discussed above. To reiterate, the Board addressed this issue, pointing out that the three doctors who found Mr. McAlpine not medically stable all treated him between 2009 and 2011, while Dr. Joosse saw Mr. McAlpine three times between 2010 and 2012. Those reports stating that Mr. McAlpine was not yet medically stable predated Dr. Joosse's examination and his finding that Mr. McAlpine was now medically stable. They do not rebut the presumption of medical stability nor do they contradict the findings of medical stability without PPI by Dr. Joosse.

As to the signature on the form sent to Dr. Jensen's office, Mr. McAlpine knew at the time of the 2012 hearing Dr. Jensen had not signed the form. Therefore, the lack of signature by Dr. Jensen is not newly discovered evidence that was unavailable for discovery in 2012. As the Board noted, all parties recognized that the signature of a physician's assistant is competent under the Act as a medical provider's signature. The lack of signature by Dr. Jensen is not a basis for reversing the 2012 decision since the signature was that of his physician's assistant. Mr. McAlpine questioned the validity of

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[73] *Lindhag v. State, Dep't of Natural Resources*, 123 P.2d 948, 957 (Alaska 2005).

[74] *Id.* at 958.

the form from Alaska Neuroscience Associates agreeing with Dr. Joosse's reports because he asserts the form was not signed by Dr. Jensen. The Board found the form was not signed by Dr. Jensen but was stamped signed by physician's assistant Jan DeNapoli. The Board explained that because a physician's assistant is defined as an "attending physician" for purposes of the Act, it did not matter whether Dr. Jensen or Jan DeNapoli signed Alaska Neuroscience Associates' response to the adjuster's letter.[75] The form was faxed from the office of Mr. McAlpine's attending physician and thus may be relied upon by the employer and by the Board. The Board found the form was stamped signed by Ms. DeNapoli and this finding is supported by the evidence in the record as a whole. It is supported by substantial evidence. The finding is not erroneous.

6. Conclusion.

The Board's decision to deny Mr. McAlpine's petition to vacate its 2012 decision does not address nor affect Mr. McAlpine's 2014 WCC for compensation benefits. His 2014 WCC remains pending. The Board's 2015 decision denying Mr. McAlpine's petition to vacate the November 2012 decision is AFFIRMED.

Date: _____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

James N. Rhodes, Appeals Commissioner

Philip E. Ulmer, Appeals Commissioner

Deirdre D. Ford, Chair

APPEAL PROCEDURES

This is a final decision. AS 23.30.128(e). It may be appealed to the Alaska Supreme Court. AS 23.30.129(a). If a party seeks review of this decision by the Alaska Supreme Court, a notice of appeal to the Alaska Supreme Court must be filed no later than 30 days after the date shown in the Commission's notice of distribution (the box below).

[75] *McAlpine V* at 22-23. *See supra*, notes 26, 27.

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

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

RECONSIDERATION

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

CERTIFICATE OF DISTRIBUTION

I certify that on _____ a copy of this Final Decision No. 232 was mailed to: M. McAlpine (certified mail-return receipt) and Z. Wilson at their addresses of record, e-mailed to: M. McAlpine, and faxed to: Z. Wilson, AWCB Appeals Clerk, and Director of DWC.

_____
K. Morrison, Appeals Commission Clerk