Alaska Workers' Compensation Appeals Commission

S&W Radiator Shop and Alaska National Ins. Co.,
Appellants,

vs.

Louise Flynn,
Appellee.

Final Decision and Order
Decision No. 016 August 4, 2006
AWCAC Appeal No. 05-009
AWCB Decision No. 05-00329
AWCB Case No. 199428635

Final Decision on Appeal of Alaska Workers' Compensation Board Order No. 05-0329, Fairbanks Panel, by Fred G. Brown, Chairman, and Chris Johansen, Board Member for Management.

Appearances: Robert J. Bredesen, Russell, Tesche, Wagg, Cooper and Gabbert, for appellants, S&W Radiator Shop and Alaska National Insurance Co.; Louise Flynn, *pro se*, appellee.

Commissioners: Marc Stemp, John Giuchici, Kristin Knudsen.

By Kristin Knudsen, Chair:

Louise Flynn reported she had carpal tunnel syndrome in both her wrists as a result of her work as a radiator mechanic in December 1994. The employer made payments of disability compensation and provided medical benefits without an award. Flynn was surgically treated for carpal tunnel syndrome and de Quervain's stenosing tenosynovitis before she was diagnosed with degenerative arthritis in both wrists. In December 1998, her left wrist was surgically fused due to the arthritis; a plate and screws were implanted to fix the fusion. In March 2002, the same procedure was done on her right wrist. The plate and screws were removed from the right wrist in April 2003.

Flynn filed a claim in 2004 for removal of the screws and plate in her left wrist. The board found Flynn was "entitled to medical and related benefits for the needed surgery to repair the complication of the 1998 surgery." Because the board failed to apply the well-established presumption analysis to Flynn's claim and to articulate findings sufficient to permit meaningful review, we vacate the board's order and remand this case back to the board for additional findings.

Factual background and proceedings.

The factual background related here is provided to place this appeal in context, and does not reflect findings of fact by the commission.

Flynn began working for S&W Radiator shop sometime in early 1992.[1] She acquired more responsibility, so that by the time she left in early 1995, in addition to the bench work repairing radiators, she was ordering stock, doing inventory, paperwork and bank deposits.[2] In December 1994 she reported she had carpal tunnel syndrome in both wrists to her employer.[3]

Flynn's left carpal tunnel was surgically "released" on March 23, 1995.[4] She has not worked for S&W Radiator since then. The left carpal tunnel surgery was followed in August 1995 by a surgical release of the first dorsal compartment of the left wrist to treat de Quervain's stenosing tenosynovitis.[5] In January 1996, she had a surgical release of the right carpal tunnel and the first dorsal compartment of the right wrist. [6]

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[1] R. 000001, Report of Occupational Injury or Illness, reflects a hire date of February 24, 1992; Flynn's testimony is that she "can go with" April 1992, but doesn't remember when she was hired. Flynn Depo. 41.

[2] Flynn Depo. 42.

[3] R. 000001; *Louise D. Flynn v. S & W Radiator & Auto Repair*, AWCB Decision No. 05-0329 at 1 (December 14, 2005).

[4] R. 000373.

[5] R. 000425.

[6] R. 000469.

On April 24, 1996, Flynn was determined to be medically stable and given a 23 percent permanent partial impairment rating, which S&W Radiator paid.[7]

Two years later, in June 1998, Flynn's attending physician referred her to the University of Washington, where she was evaluated by Thomas Trumble, M.D., in August 1998.[8] He found that Flynn's nerve conduction studies were normal, indicating she no longer had carpal tunnel syndrome.[9] Dr. Trumble reported radiographs showed "very progressive radiocarpal joint arthritis" of the right wrist, compared to the "mild joint space narrowing at the radiocarpal joint with films from approximately a year ago."[10] Bracing was recommended, with fusion an option.[11] A month later, Flynn elected fusion after discussing the issue with Dr. Tamai, who then notified S&W's adjuster of Flynn's decision.[12] On December 10, 1998, four years after she reported her injury to her employer, Flynn's left wrist was surgically fused at the radial-carpal and mid-carpal joints, and the fusion site fixed with a plate and screws.[13]

In January 1999, Flynn began to complain of right shoulder and elbow pain[14] that her attending physician, Dr. Tamai, reported in February 1999 might be the result of overuse following the left wrist fusion.[15] After an employer medical examination in September 1999, John E. Dunn, M.D., reported that Flynn had degenerative arthritis

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7 R. 000071.

8 R. 000555-558.

9 R. 000555-556.

10 R. 000556.

11 R. 000556.

12 R. 000560.

13 R. 000590-591.

14 R. 000609.

15 R. 000613.

that was not related to the employment by S&W Radiator.[16] The employer controverted payment of benefits for the right shoulder and elbow based on Dr. Dunn's report.[17]

In August 2000, Dr. Tamai referred Flynn to Dr. Trumble due to her continuing complaints of pain in her right wrist;[18] Flynn saw Dr. Trumble in October 2000.[19] X-rays revealed a cyst[20] in the capitate and scaphoid bones of the wrist, with mild degenerative changes throughout.[21] After a "lengthy discussion" with Dr. Trumble, Flynn underwent arthroscopic surgery for diagnosis and treatment of "any ligamentous instability or arthritic changes amenable to treatment."[22] This surgery occurred November 30, 2000.[23]

In March 2002, Flynn's right wrist was fused by Dr. Trumble at the right radial-carpal and mid-carpal joints.[24] In April 2003, the plate and screws implanted to fix the right wrist fusion were removed.[25] In the same operation, the scapho-tapezial joint of the right wrist was fused and fixed with two new screws.[26]

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16 R. 000639-640.

17 R. 000013. Flynn's claim did not list coverage for treatment of the right shoulder and elbow.

18 R. 000663.

19 R. 000670.

20 A "cyst," as used in this sense, is a hole in the bone.

21 R. 000670.

22 R. 000670.

23 R. 000691-92.

24 R. 000766-67.

25 R. 000882.

26 R. 000882.

S&W Radiator requested a second employer examination, which was performed by Charles Brooks, M.D., in June 2003.[27] Dr. Brooks concluded that the employee's degenerative arthritis in the wrists was probably not caused by the S&W employment.[28]. Based on Dr. Brooks' opinion, S&W controverted Flynn's benefits,[29] and Flynn filed a claim for permanent partial impairment compensation,[30] medical costs, attorney fees, penalties, interest, and "to overcome any contraversion on file."[31]

Dr. Tamai, Flynn's attending physician, did not agree with Dr. Brooks, stating he believed there was a "causal relationship regarding her work activity and the severity of her symptoms."[32] The parties submitted the dispute to a board-appointed medical examiner.[33] The board-appointed examiner, Paul Puziss, M.D., reported that, in his opinion, "All surgical treatments and other treatments after the de Quervain's releases are unrelated to her work activities."[34] He also noted that one of the screws in the left wrist plate appeared to have loosened, so there should be "consideration" of removal of the left wrist plate and screws.[35]

After the SIME report was received, the issues for hearing were limited in a pre-

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[27] R. 970-990.

[28] R. 000985-986.

[29] R. 000027.

[30] S&W had paid, and did not contest in this claim, the 23 percent permanent partial impairment rating made by Dr. Tamai in 1996. R. 000071. Dr. Tamai provided additional permanent impairment ratings as a result of the wrist fusions. R. 000940-941. S&W controverted additional permanent impairment compensation, R. 000052.

[31] R. 000069.

[32] R. 000992.

[33] R. 000967-969.

[34] R. 000963.

[35] R. 000963.

hearing conference to "whether any further benefits are due to the EE [employee] as a result of the 12/13/94 injury."[36] "Benefits" was not explicitly limited to medical benefits, but both parties in their hearing briefs to the board limited discussion to medical benefits.[37] The employee specifically requested removal of the screws and plate in the left wrist as suggested by Dr. Puziss.[38]

The parties' arguments to the board.

S&W argued that the presumption of compensability[39] had been overcome by substantial evidence – Dr. Brooks' and Dr. Puziss' opinions that the arthritis was not caused by the employment.[40] Without the presumption, Flynn bore the burden of proving the contested medical treatment (wrist fusions and related surgery) was work-related.[41] S&W argued that the "great weight of the evidence" was that the wrist

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[36] R. 001033.

[37] The discussion recorded in the pre-hearing summary was limited: "Mr. Eaglin stated that he would ask that the carrier be liable for any costs and time loss associated with the removal of the hardware from EE's left wrist. Ms. Russell indicated her client would not accept responsibility for any further treatment and/or benefits based on medical opinions in the file." R. 001033. The claim was presented to the board on the written record.

[38] R. 000112. There is no evidence in the record that Dr. Tamai, Flynn's attending physician, or Dr. Trumble, the consulting surgeon, recommended removal of the left wrist hardware.

[39] AS 23.30.120(a) provides in part:

> In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter;

The presumption that the claim comes within the provisions of the Alaska Workers' Compensation Act is frequently referred to as the "presumption of "compensability."

[40] R. 000094-95.

[41] R. 000095.

arthritis was not work-related, therefore, the employee's claim for additional medical care and benefits to treat the arthritis was not compensable.[42]

Flynn argued she need not prove the future surgery is work-related. The employer cannot challenge compensability, regardless of evidence that the need for treatment of arthritis was not caused by the employment, because the employer's "time to make that assertion – by way of contraversion, specifically – was back in 1998 when the event occurred."[43] Having paid for the left wrist fusion, S&W must pay for further treatment that arises out of or is necessitated by the fusion.[44] She acted reasonably in following her attending physician's advice, Flynn argued, and had it not been for the fusion following her workplace injury, she would not now need the repair recommended by Dr. Puziss.[45] She also urged the board to consider the desired surgery as analogous to a latent defect.[46]

S&W responded that payment of medical bills does not prevent an employer from later denying compensability, relying on *Childs v. Copper Valley Elec. Ass'n*.[47] Principles of waiver, express or implied, estoppel or quasi-estoppel do not apply to the case.[48] S&W also responded that the premise that further treatment that is within the "range of compensable consequences" is compensable only applies when the initial treatment was for a compensable condition.[49] Because the initial fusion was not

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[42] R. 000095-96.

[43] R. 000114.

[44] R. 000115.

[45] R. 000114-115. Flynn denies any issue of medical malpractice, but claims that the loosening of the screw is a "delayed manifestation of the after effects of hardware installation" or "complication." R. 000116.

[46] R. 000116.

[47] 860 P.2d 1184 (Alaska 1993).

[48] R. 107-109.

[49] R. 000109-110.

treatment for a compensable condition, liability for further treatment cannot be imposed on the employer.[50]

The board's decision.

In its decision, the board recited the presumption analysis developed by the Alaska Supreme Court.[51] The board summarized briefly the parties' positions about the presumption, but the board made no explicit finding that the employee had attached the presumption of compensability to her claim for future surgery.[52] It acknowledged that "to overcome the presumption once it attaches, the employer must present substantial evidence that the medical benefits claimed are not compensable."[53] Then the board elaborated on the Supreme Court's ruling in *Hibdon v. Weidner & Assoc.,*[54] restating it as "specific medical treatment sought by an injured worker, within two years of an injury is compensable, unless the employer can meet the 'heavy burden' of proving such care is unreasonable, unnecessary and outside the scope of medical practice." The board stated this ruling made "the employer's burden of rebutting the compensability of a particular treatment much greater than 'preponderance of the evidence.'"[55]

From this point, the board abandoned the language of the presumption and the presumption analysis. Instead, it turned to the employee's argument that, had it not

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[50] R.000110.

[51] *Louise D. Flynn v. S & W Radiator & Auto Repair,* AWCB Decision No. 05-0329, 5 (December 14, 2005).

[52] *Louise D. Flynn,* No. 05-0329 at 5. The board noted the employee produced evidence, but did not make a finding. ("the employee presented evidence that her 1998 wrist treatment was accepted as compensable. The employee also submitted the medical opinion of Dr. Tamai that her ongoing condition is work-related.").

[53] *Louise D. Flynn,* No. 05-0329 at 6, *citing Louisiana Pacific Corp. v. Koons,* 816 P.2d 1379, 1381 (Alaska 1991) and *DeYonge v. NANA/Marriott,* 1 P.3d 90, 96 (Alaska 2000).

[54] 989 P.2d 727, 731 (Alaska 1999).

[55] *Louise D. Flynn,* No. 05-0329 at 6.

been for the fusion surgery "following her workplace injury" she would not need surgical repair and removal of the hardware, and her argument that "equitable estoppel" applies to her claim. The board found that it had applied the "equitable remedy of estoppel" to board decisions. It recited the elements of estoppel as "[A]ssertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice."[56]

The board then found that Flynn "followed the counsel of her treating physicians and underwent surgery."[57] Failure to do so, the board stated, "could have resulted in a contention that she had failed to cooperate, resulting in the suspension of benefits."[58] The board then concluded:

> On balance, we find the employee is entitled to medical and related benefits for the needed surgery to repair the complication of the 1998 surgery. We reach this conclusion after finding the employee acted reasonably in following the recommendation of the treating surgeons, by submitting to the recommended course of medical care by undergoing the surgery. We also recognize that the employer could have sought an EME long before the June 15, 2003 examination by Dr. Brooks.[59]

The board ordered the employer to provide the employee with "the recommended surgical procedure to correct the complications arising from the 1998 surgery" and retained jurisdiction to decide compensation disputes.[60]

Our standard of review.

The commission is directed to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[61] The board has the

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[56] *Louise D. Flynn,* No. 05-0329 at 7, *citing Wausau Ins. Co. v. Van Biene,* 847 P.2d 584, 586-88 (Alaska 1993).

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Louise D. Flynn,* No. 05-0329 at 8.

sole power to assess the credibility of testimony presented to it,[62] and the board's findings as to the credibility of a witness appearing before it are binding on the commission.[63] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[64] The commission exercises its independent judgment on questions of law and procedure.[65]

The arguments presented to the appeals commission.

S&W Radiator argues that the board failed to make necessary findings of fact. S&W argues that the board failed to determine if the presumption attached, and if so, if it was overcome (as S&W contends it was overcome) by substantial evidence, and whether the employee proved her claim for future medical benefits, specifically surgery to remove the plate and screws in her left wrist, by a preponderance of the evidence. S&W Radiator also argues that payment of medical treatment does not constitute waiver of all future defenses to claims that arise out of the treatment. S&W Radiator argues the board improperly held its payment of Flynn's medical expenses against it, contrary to the Supreme Court's holding in *Childs v. Copper Valley Elec. Ass'n.*[66] The appellant urges the appeals commission to remand the case to the board.

The appellee, who is appearing without an attorney, argued forcefully that, by paying for the 1998 surgery the employer "accepted" her claim, and cannot now reject it. In some respects, she follows the argument laid out by her attorney before the

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[61] AS 23.30.128(b).

[62] AS 23.30.122.

[63] AS 23.30.122 provides that the board's findings are "subject to the same standard of review as a jury's findings in a civil action." AS 23.30.128(b) provides that the board's findings are "binding" upon the commission.

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

[65] AS 23.30.128(b).

[66] 860 P.2d 1184 (Alaska 1993).

board. The employer's insurer, she argues, should pay to remove the plate and screws it paid to implant. She asserts that the employer's insurer "approved" the prior surgeries, and so should not be allowed to deny another surgery. She believes that the employer's insurer has unfairly capped her claim at $100,000, because, she asserts, the employer did not challenge her medical benefits until the total payments it made reached that amount. The insurer had "ample time" to question "all aspects" of the case, and it is unfair that it is permitted to question her claim now.

The board failed to make necessary, explicit findings of fact on the disputed issues.

AS 23.30.128(b) grants this commission authority to "review discretionary actions, findings of fact, and conclusions of law by the board in hearing, determining, or otherwise acting on a compensation claim," but that authority cannot be exercised in the absence of a record of clear findings of fact by the board. The absence of recorded findings of fact to support the board's conclusions also leaves the board open to complaints of arbitrary and capricious decision-making, as the parties and the public cannot understand the board's reasoning. The requirement that the board make explicit findings of fact permits intelligent review of the board's decision.

The decision presented for review in this appeal does not contain necessary findings of fact. The board's decision recites the presumption of compensability analysis – an analysis so well-established in Alaska workers' compensation law it requires no further recitation here.[67] However, having recited it, the board abandoned the analysis without making the findings that would demonstrate the board followed it to its conclusion, or explaining why the presumption analysis should not apply. The board made no explicit finding whether or not the employee attached the presumption

[67] *DeYonge v. NANA/Marriott,* 1 P.3d 90 (Alaska 2000); *Carlson v. Doyon Universal-Ogden Servs.*, 995 P.2d 224 (Alaska 2000); *Veco, Inc., v. Wolfer,* 693 P.2d 865 (Alaska 1985); *Miller v. ITT Arctic Servs.,* 577 P.2d 1044 (Alaska 1978); *Burgess Const. Co. v. Smallwood,* 623 P.2d 312 (Alaska 1981); *Thornton v. Alaska Workmen's Comp. Bd.,* 411 P.2d 209 (Alaska 1966).

of compensability,[68] despite its comment that the employee presented the opinion of Dr. Tamai that her surgery was compensable. The board noted that the employer argued it had overcome the presumption with substantial evidence, but failed to make any finding whether or not the employer did overcome the presumption with Dr. Brooks' and Dr. Puziss' reports. If it found the presumption had been overcome, the board ought to have weighed the conflicting evidence, and made findings regarding the persuasiveness of the respective opinions. It failed to do so, and we cannot make those findings for the board.

Instead of completing the presumption analysis, the board detoured into a discussion of *Phillip Weidner & Assoc. v. Hibdon,*[69] and the Supreme Court's holding in that case. In particular, the board noted inaccurately that the Supreme Court increased weight of the presumption of compensability in claims for medical benefits within two years of injury by requiring "much greater than a 'preponderance of the evidence'" to rebut the presumption of compensability.[70] The board referred to the "heavy burden"

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[68] *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352, 356 (Alaska 1992).

[69] 989 P.2d 727 (Alaska 1999).

[70] The Supreme Court began its discussion in *Hibdon* by noting that the employer and its insurer "do not deny that Hibdon is entitled to medical benefits as a result of her work-related injury." 989 P.2d at 730. The Court then states:

> Under Alaska's Workers' Compensation Act, an employer shall furnish an employee injured at work any medical treatment "which the nature of the injury or process of recovery requires" within the first two years of the injury. The medical treatment must be reasonable and necessitated by the work-related injury. Thus, when the Board reviews an injured employee's claim for medical treatment made within two years of an injury that is undisputably work-related, its review is limited to whether the treatment sought is reasonable and necessary. (citations omitted).

989 P.2d at 731. Nothing in this language suggests that the Court in *Hibdon* discarded the traditional presumption analysis when examining causation – that is, the requirement that an injury "arise out of and in the course of employment." Indeed, it restates that requirement that the treatment be "necessitated by the *work-related*

to demonstrate that an employee's chosen treatment is not reasonable and necessary within two years of the injury, but did not explain why that burden should be

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injury." At 989 P.2d 732, n. 13, the Court describes the process of overcoming the presumption:

> The parties do not address the Board's determination that the presumption of compensability contained in AS 23.30.120(a) attached to Hibdon's claim, nor that Weidner and Alaska National overcame the presumption with substantial evidence. . . . After the presumption of compensability was rebutted, Hibdon's burden was to prove her claim by a preponderance of the evidence.

The Supreme Court ruled that Hibdon "proved her claim by a preponderance of the evidence." 989 P.2d at 732. Hibdon would not have been required to "prove her claim by a preponderance" if the presumption had not been rebutted. Nothing in the Court's holding suggests that the presumption in a medical treatment claim must be rebutted by producing "much greater than a preponderance" of the evidence. The Court's holding does not change the burden of proof. Once the presumption is rebutted, the employee must prove the claim by a preponderance of the evidence. In this, the Court adhered to a long line of authority that once the presumption is eliminated the employee has the burden of proof. *Allen v. Doyon Universal Servs.,* 999 P.2d 764 (Alaska 2000); *Osborne Constr. Co. v. Jordan*, 904 P.2d 384, 390 (Alaska 1995) ("If the employer successfully rebuts the presumption of compensability, the presumption drops out and the employee must prove all of the elements of the case by a preponderance of the evidence."); *Wien Air Alaska v. Kramer,* 807 P.2d 471, 474 n.4 (Alaska 1991) ("[O]nce the employer rebuts the presumption with substantial evidence, the presumption drops out and the employee must establish each element of his claim by a preponderance of the evidence.") *Veco, Inc. v. Wolfer,* 693 P.2d 865 (Alaska 1985); *c.f, Wollaston v. Schroeder Cutting, Inc.,* 42 P.3d 1065, 1067 (Alaska 2002) ("The burden is on the employer to prove noncompensabilty through substantial evidence.").

In one sense, *Hibdon* increases the employer's burden of persuasion once the employee has presented "credible, competent evidence" supporting all elements of a claim for medical treatment within two years of injury, 989 P.2d at 732. The elements of the employee's claim include that the treatment is "reasonably effective and necessary for the process of recovery," and the "treatment falls within the range of medically accepted options." *Id.* Conversely, the employer has the burden of persuading the board that the treatment is "neither reasonable and necessary nor within the realm of acceptable medical options under the particular facts." *Id.* It is a heavy burden, as the Court states, because an additional negative proposition must be proven – not because the employer has a burden of persuasion "much greater" than the preponderance of the evidence.

considered in this case. Flynn's claim was filed almost ten years after her injury, the report on which her claim is based was made nine years after the injury, and even the surgery leading to what the board termed "complications" occurred four years after the injury. The board's discussion of *Hibdon* suggests the board wrongly required much greater than preponderance of the evidence from the employer to rebut a presumption of compensability in Flynn's claim. However, in the absence of board findings reflecting application the presumption analysis, and without a board explanation of its departure from the presumption analysis it recited,[71] we cannot determine what standard the board did apply. We will not fill in the gaps in the board's findings.[72] We conclude a remand to the board is necessary.[73]

Application of estoppel or quasi-estoppel requires specific findings that were not made by the board.

Without making findings regarding the compensability of Flynn's claim, or explaining its reliance on *Hibdon*, the board decided the claim "on balance" of the equities. The board adopted the employee's argument that if the employer paid for the surgery to implant the plate and screws, the employer should pay to remove them. The board did not explain why the Act, or another principal of law, requires the employer to do so. Although the board recited the elements for estoppel,[74] the board failed to make

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[71] The board's discussion of *Hibdon* does not explain why the board abandoned the effort to determine whether Flynn's degenerative arthritis was work-related.

[72] *Bolieu v. Our Lady of Compassion Care Ctr.,* 983 P.2d 1270, 1276 (Alaska 1999) (remanding because of "the Board's failure to make reviewable findings of fact concerning" a contested issue); *Phillips v. Houston Contracting, Inc.,* 732 P.2d 544, 547 (Alaska 1987) (remanding where the board had not made all of the findings of fact which were necessary to apply the law).

[73] AS 23.30.128(d): "The commission may remand matters it determines were improperly, incompletely, or otherwise insufficiently developed."

[74] The board reported these elements as "assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice." *Louise D. Flynn, No. 05-0329*at 7; *citing, Wausau Ins. Cos. v. Van Biene,* 847 P.2d 584, 588 (Alaska 1993). Thus, the board's test required Flynn to produce substantial evidence

the findings of fact necessary to support application of estoppel to bar the employer from defending the claim on the basis that the condition (for which treatment was sought) was not work-related.

The Supreme Court has held that the board possesses authority to invoke equitable principles to prevent an employer from asserting statutory rights.[75] However, application of such principles must be supported by findings establishing that the party asserting the relief presented substantial evidence to support all elements of the desired form of equitable relief. For example, in *Smith v. Marchant Enterprises,*[76] the employee was not barred from asserting a claim against the alleged employer because the record did not contain evidence establishing all elements of quasi-estoppel.[77] In this case, the board made findings of fact that were not supported by substantial evidence in the record, and did not make necessary findings of fact to support application of estoppel, quasi-estoppel, or other equitable relief.

The board found, for example, that the employee reasonably relied on the advice of her treating physician to obtain the left wrist fusion in 1998, but made no findings that Flynn reasonably relied on a representation by S&W.[78] The board made no finding

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that S&W asserted a position by word or conduct, that she relied on S&W's assertion of its position, and that as a result of that reliance she was prejudiced. However, those are not the only elements of estoppel applicable to this case. As the Supreme Court stated in *Van Biene*, 847 P. 2d at 589, "one key element of estoppel is communication of a position, it follows that neglect to insist upon a right only results in an estoppel . . . when the neglect is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question."

[75] *Van Biene,* 847 P.2d at 588.

[76] 791 P.2d 354 (Alaska 1990).

[77] *Id.* at 356-57. *See also, Van Biene,* 847 P.2d at 589.

[78] By asserting that her conduct following her physician's advice is reasonable, Flynn seeks to hold S&W liable for a consequence of the recommendation of her attending physician or the consultant surgeon. There is no evidence that Dr. Tamai or Dr. Trumble was an agent or employee of the employer. Payment of physician's charges as required by AS 23.30.095(a) does not establish an agency or employee relationship. Essential elements of an agency relationship include a

that Flynn was prejudiced by the employer's payment of her medical bills. The board made no finding whether the employer was advantaged by paying Flynn's medical bills for the fusion. Finally, the board did not find the employer's neglect of a statutory right would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question – to request an employer medical examination and, on the basis of the result of that examination, to controvert coverage of arthritis.

In addition to failing to make findings to support application of estoppel, the board made a finding without substantial evidence, in light of the whole record, to support them. The board found that failure to undergo surgery in 1998 "could have resulted in a contention that [Flynn] had failed to cooperate, resulting in the suspension of her benefits."[79] We find no evidence in the record to support this finding.[80] S&W

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consensual agreement by the agent to act on behalf of the principal (in this case S&W) and for the principal's benefit, the agent's power to alter the legal relationship between the principal and third persons, and the principal's authority to control the purported agent (Dr. Tamai or Dr. Trumble). *Manes v. Coats,* 941 P.2d 120, 123-24 (Alaska 1997); *Nicholas v. Moore,* 570 P.2d 174, 176 (Alaska 1977). AS 23.30.095(i) makes "improper influencing or attempt . . . to influence a medical opinion of a physician who has treated or examined an injured employee" a misdemeanor. Since the employer-principal can not exercise "control" of the physician, the existence of an agency relationship between an employer and an attending physician is not permissible as a matter of law. If Flynn's argument is that Dr. Tamai or Dr. Trumble had "apparent agency" to bind the employer to a legal position regarding its liability to Flynn, the board failed to make findings to support application of "apparent agency" principles, notably that S&W communicated to Flynn that Dr. Tamai or Dr. Trumble had authority to "affect the legal relations" between S&W and Flynn. *Cummins v. Nelson,* 115 P.3d 536, 541-42, n. 12 (Alaska 2005).

[79] *Louise D. Flynn,* No. 05-0329 at 7. The general reasonableness of Flynn's conduct is not probative of Flynn's actual reliance on the *employer's assertion of a position* communicated to Flynn. Also, as we state below at n. 45, there was no evidence to support a "contention" that refusal to undergo surgery in 1998 would have been an "unreasonable" refusal of medical treatment.

[80] The record evidence is that Dr. Trumble, the Seattle surgeon, in August 1998 recommended continued bracing, but that "if this condition continues to progress, she may wish to consider wrist fusion at some time in the future." R. 000558. The next month, Dr. Tamai reported that he had discussed the issue with Flynn and Flynn had

would have incurred substantial penalties if it failed to pay compensation, or filed a controversion without evidence to support the controversion.[81] The board, not the employer, would have determined if Flynn unreasonably refused to submit to medical treatment and suspend benefits.[82] Thus, even if S&W had risked penalties to make such a contention on the evidence available in 1998, there is no evidence that such a contention would have resulted in suspension.

Flynn's argument, apparently adopted by the board, rests on the unsupported assumption that any employer medical examiner would have found that the degenerative arthritis in her wrists was not related to the employment if they had been examined in 1998. This position is inconsistent with the position Flynn took in 1998 that her need for treatment for arthritis was causally related to her employment.[83]

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made the decision to have fusion surgery, but he did not report his *recommendation*. R. 000212. The only contemporaneous medical recommendation was Dr. Trumble's opinion, conditioned upon further progression of the arthritis, that Flynn "may wish to consider" fusion in the future. Neither physician gave a strong opinion that a fusion was medically necessary in the immediate future to prevent further injury or loss of function. Therefore, the board did not have substantial evidence to support a finding that Flynn, if she had refused a wrist fusion in 1998, would have unreasonably refused medical treatment.

[81] AS 23.30.155(e), *Harp v. ARCO Alaska, Inc.,* 831 P.2d 352 (Alaska 1992).

[82] AS 23.30.095(d).

[83] Flynn argues both (1) that the medical evidence supported a causal relationship between the condition and the employment at the time surgery was performed, and (2) that it was so obvious that the condition was not work related that any medical examiner would have discovered the lack of relationship before the 1998 surgery and reported it to the employer. We note that quasi-estoppel will preclude a party from taking a position inconsistent with one the party has previously taken, when circumstances render assertion of second position unconscionable. *Keener v. State,* 889 P.2d 1063, 1067 (Alaska 1995). In applying the doctrine of quasi-estoppel, the trier of fact must consider whether the party asserting a position inconsistent with its first position has gained an advantage or produced some disadvantage through the first position, whether the inconsistency was of such significance as to make present assertion unconscionable, and whether the first assertion was based on full knowledge of facts. *Id.,* at 1067-68.

Without substantial evidence that an examination would have resulted in discovery of sufficient evidence to support an employer controversion before the 1998 surgery, lack of an employer medical examination is not causally connected to alleged neglect of a legal right to challenge compensability of the employee's degenerative arthritis.

The commission is also not convinced that the board established a nexus between (1), the neglect of a legal right (to request an employer medical examination between August 18, 1998, when the possibility of a fusion was first discussed,[84] and December 10, 1998,[85] when the fusion was performed); (2), the formation and communication of a message that the employer would not controvert benefits for arthritis in the future; and (3), Flynn's reasonable reliance on the employer's message.[86] We conclude that the board's application of estoppel, or quasi-estoppel, against the employer is not supported by sufficient findings of fact.

Payment of medical expenses alone is not an admission of further liability.

Flynn argues that by paying for surgery in 1998 the employer "accepted" liability for treatment of her arthritis and that this acceptance binds the employer to pay for all future treatment of her arthritis. The concept of payment constituting acceptance of liability or creating an enforceable agreement to assume liability, is not one supported Alaska law.

The Alaska Workers' Compensation Act requires employers to pay compensation and medical benefits within specific time periods or be subject to a penalty for late payment, "without an award, except where liability to pay compensation is controverted

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[84] R. 000557-558.

[85] R. 000590. Dr. Trumble's operative note contains a statement that he found "extensive degeneration of the [carpus] joint, particularly centered at the radiocarpal joint."

[86] We note that the employer did arrange for an employer medical examination in 1999 by Dr. Dunn, who reported that the employee's shoulder and elbow pain was due to arthritis and not work-related. Dr. Dunn did not give an opinion on the relationship between the 1998 wrist fusion and the employment.

by the employer."[87] Put another way, unless the employer has sufficient evidence to support a controversion, and gives proper notice of controversion, payment is required without an order from the board. By merely making payments required by law, the employer does not affirmatively consent to liability asserted by the employee or enter into a contractual obligation to make payment in the future, just as an employee does not manifest agreement with the compensation rate calculated by the employer by cashing a compensation check.

There is no provision in the Alaska workers' compensation statutes for formal "acceptance" of a claim after an initial period of investigation, as may be found in other states.[88] Alaska law requires an employer to notify the employee on a form that "the payment of compensation has begun or has been increased, decreased, suspended, terminated, resumed or changed,"[89] or if the right to compensation is controverted,[90]

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[87] AS 23.30.155(a). *See also*, AS 23.30.045(a) ("An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 – 23.30.215.");

[88] *See, e.g.,* Del. Code Ann. tit. 19, §2362(a) ("An employer or its insurance carrier shall within 15 days after receipt of knowledge of a work-related injury notify the Department and the claimant in writing of: the date the notice of the claimant's alleged industrial accident was received; whether the claim is accepted or denied; if denied, the reason for the denial; or if it cannot accept or deny the claim, the reasons therefor and approximately when a determination will be made."); Fla. Stat. §440.020(4) ("Upon commencement of payment as required . . . the carrier shall provide written notice to the employee that it has elected to pay the claim pending further investigation, and that it will advise the employee of claim acceptance or denial within 120 days. A carrier that fails to deny compensability within 120 days after the initial provision of benefits or payment of compensation as required . . . waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period."); Or. Rev. Stat. §656.262(6)(a) ("Written notice of acceptance or denial of the claim shall be furnished to the claimant by the insurer or self-insured employer within 60 days after the employer has notice or knowledge of the claim. Once the claim is accepted, the insurer or self-insured employer shall not revoke acceptance except as provided in this section.").

[89] AS 23.30.155(c).

[90] AS 23.30.155(a).

but does not require a notice of acceptance of liability. Alaska law requires payment within two weeks of knowledge of the injury.[91] If the employer controverts the right to compensation, notice must be sent within 21 days of knowledge of the injury, or if the employer controverts "the right to compensation after payments have begun," the notice must be filed within seven days of the installment due.[92] No statutory time limit is imposed on the period after payments have begun that an employer may controvert the right to compensation. Thus the act permits an employer to controvert the right to compensation at any time after payments are made without an award.[93]

There is sound policy underlying this system.[94] Requiring early payment without admission of liability benefits the injured employee, whose immediate need for treatment is not delayed by a period of investigation or employer reluctance to accept liability for unknown future benefits. Employees with borderline or weak claims to coverage benefit, as an employer is more likely to pay in order to avoid the expense and trouble of investigation and litigation, or from concern for an injured employee, if the payment is not an acceptance of liability for a questionable claim. The injured employee is less exposed to the risk of mistake due to hasty investigation, especially as the employer's ability to recover compensation paid made by mistake is limited. The employer benefits by taking ample time to organize its investigation and assemble

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[91] AS 23.30.155(b).

[92] AS 23.30.155(d).

[93] The right combination of facts and circumstances may establish an equitable bar against the employer denying coverage, but the question here is whether payment alone constitutes acceptance of liability. The employer may also affirmatively agree to liability, however, the Alaska Workers' Compensation Act requires that any agreement in regard to a claim, including an agreement that an employer assume liability for a particular condition, must be reduced to writing and comply with AS 23.30.012.

[94] The Alaska system is sometimes called a "voluntary pay" system, because payment is required to be made "voluntarily" without an award (order) from the board. However, since payment is required by law, payment is voluntary only in the sense that it is not made as a result of a board order.

evidence, so reducing litigation risk. Imposing late payment penalties on payments made without an award and without time to investigate is fairer if the payment does not constitute acceptance of liability. Finally, the system as a whole is spared the expense of increased litigation that would result if employers were encouraged to contest every claim because any payment could be characterized as an admission of liability. The Alaska Supreme Court recognized in *Childs v. Copper Valley Elec. Ass'n*[95] the force of such policy considerations when it held that payment of treatment expenses does not estop the employer from later contesting further liability. We therefore reject Flynn's argument that the employer "accepted" liability for further treatment by paying Flynn's medical expenses in 1998.

Conclusion

We conclude the board failed to apply the presumption of compensability to Flynn's claim and failed to record an explanation and sufficient findings of fact to support application of an equitable theory of liability. We VACATE the board's order and REMAND the case to the board for further findings of fact and conclusions of law.

Date: __*Aug. 4, 2006*_____ ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

__*Signed*_____
John Giuchici, Appeals Commissioner

__*Signed*_____
Marc D. Stemp, Appeals Commissioner

__*Signed*_____
Kristin Knudsen, Chair

FINALITY OF DECISION

This is a final decision in this appeal. The Commission does not retain jurisdiction over the appeal. Although this is a final decision in this appeal, this is **not** the final decision in the employee's claim for workers' compensation. This appeal resulted in a remand to

[95] 860 P.2d 1184, 1190 (Alaska 1993).

the board for further proceedings. The board's proceedings may result in an award of compensation and benefits or in a denial of the claim. Because this decision does not finally decide the employee's claim for compensation and medical benefits, the Supreme Court may, or may not, consider an appeal of this decision is premature. A party who wishes to appeal may wish to consult with an attorney before filing an appeal.

APPEAL PROCEDURES

This decision becomes effective when filed in the office of the Commission unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal 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. AS 23.30.129.

If a request for reconsideration of this 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. 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

A party 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.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of S&W Radiator Shop v. Flynn; Appeal No. 05-009; dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this ___*4th*_____ day of _*August*_____, 2006.

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

I certify that a copy of the foregoing Final Decision in AWCAC Appeal No. 05-009 was mailed on __*8/4/2006* to Flynn, Bredesen, the AWCB Fairbanks, and the Director of the Workers' Compensation Division at their addresses of record.

*C.J. Paramore*_____*Aug. 4, 2006*
Signature Date