

Alaska Workers' Compensation Appeals Commission

Douglas C. Jones,
Appellant/Cross-Appellee,

vs.

State of Alaska, Department of Natural
Resources,
Appellee/Cross-Appellant.

Final Decision

Decision No. 212 July 9, 2015

AWCAC Appeal No. 14-013
AWCB Decision Nos. 14-0042 and 14-0054
AWCB Case Nos. 200719434M,
200122670, 200211270, 200420434,
200510652, and 200611455

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 14-0042, issued at Anchorage, Alaska, on March 27, 2014, by southcentral panel members Linda M. Cerro, Chair, Rick Traini, Member for Labor, and David Kester, Member for Industry, and Alaska Workers' Compensation Board Final Decision and Order on Reconsideration and Modification No. 14-0054 issued at Anchorage, Alaska, on April 17, 2014, by southcentral panel members Linda M. Cerro, Chair, Rick Traini, Member for Labor, and David Kester, Member for Industry.

Appearances: Douglas C. Jones, self-represented appellant/cross-appellee; Craig W. Richards, Attorney General, and M. David Rhodes, Assistant Attorney General, for appellee/cross-appellant, State of Alaska, Department of Natural Resources.

Commission proceedings: Appeal filed May 19, 2014; cross-appeal filed May 29, 2014; briefing completed November 3, 2014; oral argument held on March 25, 2015.

Commissioners: James N. Rhodes, Philip E. Ulmer, Andrew M. Hemenway, Chair.

By: Andrew M. Hemenway, Chair.

1. Introduction

(a) Factual Background¹

Douglas C. Jones was a seasonal employee of the State of Alaska, Department of Natural Resources (DNR), working as a natural resources field technician. On

¹ We briefly summarize the facts as stated in the board's decision.

November 1, 2001, Mr. Jones was working in a trench when the trench collapsed, striking him on the back and neck and knocking him down. Mr. Jones obtained treatment from a chiropractor for the injury he incurred on that occasion.

Mr. Jones subsequently reported on-the-job injuries to his back while working seasonally for DNR in 2002, 2004, 2005, and 2006. In 2007, at his own request because he was unable to perform all the duties of a natural resources field technician, Mr. Jones was reassigned to a full-time non-seasonal position working in an office. Mr. Jones claimed that working in that position was causing back pain and was aggravating headaches related to the 2001 trench collapse. He started working as a janitor at The Alaska Club and, in November 2007, he resigned from state service. Subsequently, in July 2009, Mr. Jones reported he injured his back, shoulders, and head when a ladder collapsed beneath him while working for The Alaska Club. He was terminated from his employment at The Alaska Club in September 2012 and later worked for Carrs Safeway and at Walmart.

(b) Proceedings before the Board.

Mr. Jones filed claims for compensation relating to the 2001 trench collapse² and his 2007 office work³ which were the subject of a board hearing on February 14, 2014.⁴ The board found that the 2001 injury was a substantial factor in Mr. Jones' need for ongoing medical care for myofascial pain.⁵ It found that the 2001 injury was not a

² R. 166-167 (10/11/2011). See R. 23-26 (Alaska Workers' Comp. Bd. Case No. 200122670, Notices of Controversion 12/2/2011 and 4/10/2012).

³ R. 29-30 (7/6/2009). See R. 27-28 (Alaska Workers' Comp. Bd. Case No. 200719434M, Notice of Controversion 4/10/2012).

⁴ *Jones v. State*, Alaska Workers' Comp. Bd. Dec. No. 14-0042, pp. 1-2, 20 (No. 68), and 27 (No. 87) (Mar. 27, 2014).

On May 14, 2013, DNR filed an affidavit of readiness for hearing with respect to the 2009 and 2011 claims. R. 278. Mr. Jones objected to limiting the hearing to those two claims. R. 281. All of Mr. Jones' reported injuries were joined into a single case at a prehearing conference on December 29, 2011. R. 4661; see also R. 4675. However, the hearing, and the board's decision, addressed only the 2001 injury and his office work in 2007. See *Jones*, Bd. Dec. No. 14-0042, pp. 1-3.

⁵ *Jones*, Bd. Dec. No. 14-0042, pp. 43-49.

substantial factor in his need for medical care for bilateral shoulder symptoms, post-traumatic stress disorder (PTSD), or anxiety,⁶ and that Mr. Jones had not proven that he sustained a permanent impairment as a result of that injury.⁷ The board also found that Mr. Jones did not timely request reemployment benefits and that even if a timely request had been made, he was ineligible for an evaluation.⁸ Finally, with respect to his vision and headache problems, the board found neither the 2001 trench collapse nor the 2007 job was a sufficient causal factor in his need for treatment.⁹ Mr. Jones filed an appeal, and DNR filed a cross-appeal.

2. Issues Raised on Appeal

Turning first to Mr. Jones' appeal, we note that Mr. Jones' filings in support of his appeal provide only cursory and scattered objections to the board's decision. His arguments are undeveloped and his assertions are not supported by reference to the record or legal authority. Nonetheless, we are able to discern two basic allegations of error. First, Mr. Jones asserts that the proceedings before the board were fraught with wrongdoing.¹⁰ DNR withheld evidence, he says.¹¹ More broadly, he asserts that the

⁶ *Jones*, Bd. Dec. No. 14-0042, pp. 47-51.

⁷ *Id.*, pp. 51-53.

⁸ *Id.*, pp. 53-54.

⁹ *Id.*, p. 54-56.

¹⁰ At oral argument, Mr. Jones suggested that DNR should be held responsible for his injuries, because it did not comply with applicable Occupational Safety and Health Act (OSHA) regulations. *See* AS 18.60.010 – .105; R. 206-255. In that regard, we note that the job supervisor's report regarding the event states the incident occurred because "the excavation was not properly sloped or shored to prevent an accident. Under the conditions present, the employee should not have been allowed into the excavation." R. 4. However, the issue in this case is whether Mr. Jones incurred a compensable injury, not whether DNR followed applicable safety regulations.

¹¹ *See Jones Brief* ("Attorney General's office is withholding information in my worker's compensation claim"; "tampering with evidence in a worker's comp case"); *Jones Reply* ("The state of Alaska is hiding and withholding evidence in a workers compensation case that is vital information that should not be withheld.").

workers' compensation system is biased and pro-employer.¹² Second, he asserts that the board did not adequately review the entire record, dating back to 2001, for evidence that the 2001 incident resulted in a compensable injury in the form of debilitating myofascial pain, anxiety, stress, or PTSD.¹³ He asserts that a careful review of the entire record will reveal that he reported shoulder pain and stress "from the first day."¹⁴

DNR's cross-appeal focuses on the board's award of continuing medical care for myofascial pain. DNR argues that the board erred in relying on a doctor's 2011 deposition testimony as evidence of a need for continuing medical care, because the opinion expressed in the deposition was offered as a possibility, rather than a probability.¹⁵ Because the board erred in relying on that opinion, DNR argues, there is not substantial evidence to support the board's factual finding on this issue.¹⁶

3. Standard of Review

The board's findings regarding the weight to be accorded to witnesses' testimony, including medical testimony and reports, are conclusive, even if the evidence is conflicting or susceptible to contrary conclusions.¹⁷ We must uphold the board's factual findings if they are supported by substantial evidence in light of the whole record.¹⁸

¹² See Jones Brief.

¹³ See Jones Brief. ("I ask that you please review all information from 2001-2014." (emphasis in original); "My claims. . . should be reviewed from 2001 for stress."); Jones Reply ("Reported shoulder back neck pain from first day!").

¹⁴ Jones Reply.

¹⁵ See DNR Brief at 20.

¹⁶ See *id.* at 21-22.

¹⁷ AS 23.30.122.

¹⁸ AS 23.30.128(b).

4. Discussion

(a) Mr. Jones Did Not Establish Wrongdoing

Mr. Jones' allegation that DNR withheld evidence was the subject of a complaint he filed with the Office of the Ombudsman, in which Mr. Jones asserted that DNR had failed to produce photographs of the work site that were in its possession.¹⁹ The Ombudsman concluded that if any such photographs were at one time in DNR's possession, they were no longer.²⁰ The Ombudsman was able to obtain, through DNR, some photographs in the possession of a former DNR employee which were provided Mr. Jones and are in the record.²¹ Subsequently, DNR discovered the missing photographs and provided them to Mr. Jones.²² In addition, Mr. Jones claims to have provided information (including a tape recording, the contents of which he did not describe) to the assistant attorney general representing DNR.²³ Finally, Mr. Jones suggested at the hearing that the medical records could be incomplete,²⁴ and he asserts that an OSHA report should have been considered by the board.²⁵

Nothing in the record suggests that the work site photographs were intentionally withheld by DNR; rather, the evidence is that they were misplaced and were located only by chance.²⁶ In any event, those photographs were ultimately provided to Mr. Jones and, with the other information that Mr. Jones asserts was withheld by DNR, were in Mr. Jones' possession prior to the board hearing. These are not materials that

¹⁹ See R. 194-199, 4637-4638, 4648-4651.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See Jones Reply (Nov. 3, 2014) (photocopies of tape recording cassettes).

²⁴ See Hr'g Tr. 111:15–22, Feb. 4, 2014.

²⁵ See Jones Reply (November 3, 2014) ("OSHA's report would have been a very important report."). As we have previously mentioned, the record includes the job supervisor's acknowledgement that the trench was not properly sloped or shored. See *supra*, note 10.

²⁶ See *supra*, note 19.

were withheld by DNR; rather they are materials that Mr. Jones did not submit to the board.

Mr. Jones' broader assertion that the workers' compensation system is biased apparently stems from comments allegedly made to Mr. Jones during the course of mediation regarding bias on the part of doctors examining workers' compensation claimants,²⁷ coupled with his frustration related to the extended and complex course of proceedings regarding his multiple injuries over a lengthy period of time.²⁸ Mr. Jones' sense that the system is unfair reflects his view that DNR is not being held accountable for a traumatic injury that, in his view, is the result of DNR's violation of applicable safety regulations.²⁹

We addressed the potential for bias on the part of a physician performing an independent medical examination on behalf of the board at considerable length in *Olafson*.³⁰ As we explained in that decision, the process by which physicians are selected for participation in those examinations is structured to avoid partiality. In addition, specific conflict of interest rules apply to board-selected physicians. Furthermore, at hearing the parties may cross examine physicians, whether they are selected by the employer or the employee, or by the board, to elicit testimony relating to any perceived or potential biases. Given these safeguards, Mr. Jones' generalized suspicions, based on similarly generalized comments in the course of mediation,³¹ are far from sufficient grounds to question the board's decision. Similarly, Mr. Jones'

²⁷ See Hr'g Tr. 82:6 – 84:10.

²⁸ See Hr'g Tr. 50:12 – 55:22, 89:11 – 94:9.

²⁹ As Mr. Jones succinctly put it at oral argument, "I'm here for justice." See also, e.g., Hr'g Tr. 53:11-15, 84:17 – 85:9. See *supra*, notes 11, 19.

³⁰ *Olafson v. State, Dep't of Transp. and Public Facilities*, Alaska Workers' Comp. App. Comm'n Dec. No. 61 (Oct. 25, 2007).

³¹ The board, in a prior decision, declined to consider statements made to a party during mediation, in order to protect the efficacy of that process. See *McCullough v. Job Ready, Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0126 at 10, (Oct. 11, 2013), affirmed, *McCullough v. Job Ready, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 13-025 (Feb. 10, 2015).

frustration and sense of injustice, justified or not, is not a ground upon which we may disregard the facts as found by the board. Our task is simply to determine whether, in light of the record as a whole, there is substantial evidence to support those findings.

(b) Substantial Evidence Supports the Board's Denial of Benefits

*i. Work-Related Injuries and Medical Treatment.*³²

Mr. Jones was a seasonal outdoor worker in Alaska beginning in about 1992 when he was 30 years old, initially as an employee of the Alaska Conservation Corps and after about 1994 as a field technician for DNR.³³ He had a knee injury while working for DNR in 1995,³⁴ but no other on-the-job injuries at DNR until November 1, 2001. That day, he was working in a trench about seven feet deep when a slice of the trench wall sheared off, striking him in the back and shoulders, knocking him down, and covering him to his knees.³⁵ The injury occurred at the end of Mr. Jones' seasonal

³² In this section of our decision we make no factual findings. We restate the facts as set forth in the board's decision, providing context and detail with reference to specific evidence in the record, consistent with our obligation to review the record as a whole to determine whether the board's findings are supported by substantial evidence.

³³ See Hr'g Tr. 60:3-24; R. 45 (Douglas Jones Dep., Mar. 23, 2010, at 32:1 – 33:22).

³⁴ See R. 1685-1687.

³⁵ *Jones*, Bd. Dec. No. 14-042, p. 3 (No. 2). See R. 1-2 ("A wall of dirt approximately 5' long, 7' high and 6" to 8" thick separated from the wall of the hole") (Report of Injury, Nov. 8, 2001); R. 5-6 ("highest wall measured almost 7 feet"; "[I]t struck Doug Jones and knocked him down. He was partially buried to knee level. Doug did not lose consciousness.") (Chief Ranger's Report; Nov. 3, 2001); R. 2425 ("A sheet wall of dirt fell over me on my shoulder's and back knocking me down") (Physician's Report, Nov. 6, 2001); R. 2426, 2429-2430 ("Mr. Jones explains he was working in an 8' deep by 8 x 15 foot hole, shoveling, when a wall of dirt fell against him, knocking him into the opposing wall, knocking the wind out of him and causing a moderate degree of neck and back pain."; "He explains . . . [t]he dirt did break over the top of him and did knock him into the opposing wall") (Dr. Culbert, Nov. 5, 2001).

employment.³⁶ He returned to work the next day, and his seasonal layoff began shortly thereafter.³⁷

During his seasonal layoff, Mr. Jones was provided regular chiropractic treatment by his chosen provider, Dr. Gregory Culbert, D.C.³⁸ Mr. Jones returned to work for DNR the following season, on March 7, 2002. Dr. Culbert released him to his regular work without restriction³⁹ and released him from care on April 8, 2002.⁴⁰

Mr. Jones again injured his back shortly thereafter while working for DNR on May 30, 2002.⁴¹ On that occasion, he wrenched his back while moving logs and brush to a wood chipper.⁴² On June 4, 2002, he was treated by Dr. Culbert, who released him for light duty, and Mr. Jones returned to his job for the remainder of the season.⁴³ Dr. Culbert provided regular chiropractic treatment through the work season,⁴⁴ and for three weeks beginning in August, Mr. Jones received physical therapy treatment.⁴⁵ Because his symptoms continued, Dr. Culbert ordered an MRI and referred Mr. Jones to

³⁶ *Jones*, Bd. Dec. No. 14-0042, p. 3 (No. 3). Apparently, Mr. Jones had been scheduled to begin his annual leave on October 31, 2001, but was kept on for this specific job assignment. *See R. 5.*

³⁷ *Jones*, Bd. Dec. No. 14-0042, p. 3 (No. 3). *See R. 55-56 (Jones Dep. at 70:1 – 71:3, 74:9-12).*

³⁸ *Jones*, Bd. Dec. No. 14-0042, p. 4 (No. 6). *See R. 743-786.*

³⁹ *Jones*, Bd. Dec. No. 14-0042, p. 4 (No. 6). *See R. 779*

⁴⁰ *Jones*, Bd. Dec. No. 14-0042, p. 4 (No. 7). *See R. 783-786.*

⁴¹ *Jones*, Bd. Dec. No. 14-0042, p. 4 (No. 8) (Alaska Workers' Comp. Bd. Case No. 200211270). *See R. 7-12 (Report of Injury 6/12/2002, Compensation Reports), 56-57 (Jones Dep. at 77:13 – 78:23).*

⁴² *Id.*

⁴³ *See R. 2457.*

⁴⁴ *Jones*, Bd. Dec. No. 14-0042, p. 5 (No. 10). *See R. 787-810, 813-815, 817, 819, 821, 823, 826.*

⁴⁵ *Jones*, Bd. Dec. No. 14-0042, p. 5 (No. 11). *See R. 811-812, 816, 818.*

a physiatrist, Dr. Michel L. Gevaert, M.D.⁴⁶ The MRI, performed on December 19, 2002, showed a herniated right L4-5 disc,⁴⁷ and a nerve conduction study performed by Dr. Gevaert revealed mild to moderate chronic left S1 radiculopathy.⁴⁸ Dr. Gevaert suggested two options: surgery, if Mr. Jones wished to continue in his current heavy duty job, or a determination of medical stability, with possible job retraining.⁴⁹ Dr. Gevaert opined that Mr. Jones could not perform his current heavy duty job without recurrent episodes of exacerbated pain and temporary disability.⁵⁰ Mr. Jones elected not to have surgery, and continued his chiropractic treatments with Dr. Culbert.⁵¹

In May 2003, Dr. Gevaert rated Mr. Jones as having a 15% permanent partial impairment (PPI) and released him to return to work with light duty for six months and thereafter medium duty.⁵² He predicted that Mr. Jones would be unable to perform the duties of a landscape specialist for six months, but that in the meantime he would be

⁴⁶ *Jones*, Bd. Dec. No. 14-0042, p. 5 (No. 12). See R. 832-834, 837, 840-841. The American Academy of Physical Medicine and Rehabilitation's website describes a physiatrist as a physician specializing in physical medicine and rehabilitation who treats (nonsurgically) conditions affecting body mobility.

⁴⁷ *Jones*, Bd. Dec. No. 14-0042, p. 5 (No. 12). See R. 839 (Dr. Sisk, Dec. 20, 2002); R. 2812-2815 (Dr. Peterson, Feb. 13, 2003) (no lifting over 25 pounds, no repetitive lifting over 15 pounds, no excessive bending or twisting).

⁴⁸ *Jones*, Bd. Dec. No. 14-0042, p. 5 (No. 13). See R. 842-844 (Dr. Gevaert, Jan. 3, 2003).

⁴⁹ *Jones*, Bd. Dec. No. 14-0042, pp. 5-6 (No. 13). See R. 844 (Dr. Gevaert, Jan. 3, 2003).

⁵⁰ *Id.*

⁵¹ *Jones*, Bd. Dec. No. 14-0042, p. 6 (No. 16). See R. 846-856, 861-864.

⁵² *Jones*, Bd. Dec. No. 14-0042, p. 6 (No. 15). See R. 875-877. Dr. Gevaert initially rated Mr. Jones as 10% impaired, based on the lower back injury related to the herniated disc. See R. 865-867. Dr. Gevaert amended the rating to 15%, to account for pain in the interscapular area, after reviewing records relating to the 2001 trench injury at Mr. Jones' request. See R. 869, 1082-1083, 2824.

able to perform the duties of a landscape supervisor.⁵³ After his release, Mr. Jones returned to his seasonal position with DNR until September, with light duty status.⁵⁴ Dr. Culbert provided regular chiropractic treatments and Dr. Gevaert prescribed anti-inflammatory and muscle relaxant medication.⁵⁵ After Mr. Jones stopped working, Dr. Gevaert prescribed myofascial massage therapy, which Mr. Jones reported was greatly beneficial.⁵⁶ In December 2003, Dr. Gevaert deemed him medically stable and (as he had previously anticipated) able to work in a medium duty capacity.⁵⁷

⁵³ *Jones*, Bd. Dec. No. 14-0042, p. 6 (No. 15). *See* R. 871, 879. The duties of a landscape specialist involve medium work: grounds maintenance, mowing, weeding, repairing benches, roads, walks, buildings, etc., using hand tools. *See* R. 871.

⁵⁴ *See, e.g.*, R. 881 (“He states that he is performing light work, cleaning the outhouses on part service.”) (Dr. Gevaert June 16, 2003), R. 884 (“He continues to work light duty status and has been assigned to do so until December of this year.”) (Dr. Gevaert, July 22, 2003); R. 890 (“Approximately two weeks ago, he was at work lifting trash bags and noted increased back pain and muscle spasms. He was then taken off work and laid off seasonally.”) (Dr. Gevaert, Sept. 3, 2003).

⁵⁵ *Jones*, Bd. Dec. No. 14-0042, p. 6 (No. 16). *See* R. 881-888.

⁵⁶ *Jones*, Bd. Dec. No. 14-0042, p. 6 (No. 16). *See* R. 891, 895, 1089 (“He reports this treatment has helped him more than any other.”) (Dr. Gevaert, Jan. 26, 2004).

⁵⁷ *See Jones*, Bd. Dec. No. 14-0042, p. 7 (No. 18); R. 904 (Dr. Gevaert, Dec. 15, 2003) (“In my opinion, he is able to perform work in a medium work category. He should be able to lift 50 lb occasionally and 25 lb frequently.”). Notably, Dr. Gevaert’s release was for work in a modified position. *See* R. 1087 (Dr. Gevaert had “reviewed the Physical Demands for Modified Work as a Natural Resources Technician II” and predicting that Mr. Jones was “physically able to perform the physical demands of this job.”; December 15, 2003). It appears that the modified position that Dr. Gevaert reviewed at that time did not involve field work at all. *See* R. 1085-1086 (Position Description for a Natural Resources Technician II with duties such as preparing and conducting verbal and visual educational programs, and using electronic and print media).

Mr. Jones' request for reemployment benefits was denied in February 2004,⁵⁸ and he returned to his seasonal position in April 2004.⁵⁹ He received a lump sum payment for his PPI rating in May.⁶⁰ Mr. Jones received regular physical therapy treatment (including cervical traction)⁶¹ and was able to work, with pain, through the summer without further injury until September 8, 2004, when he strained his back and shoulder while moving a log.⁶² Therapeutic massage was prescribed for his myofascial pain.⁶³ His seasonal position ended at the end of September.⁶⁴ In November and December of 2004 Mr. Jones was provided physical therapy,⁶⁵ with no reported significant change in his symptoms.⁶⁶ A lumbar spine MRI and nerve conduction study revealed that the 2002 herniated disc had resolved, and showed disc degeneration with no stenosis, with minor neural foraminal encroachment.⁶⁷ Dr. Gevaert opined that the

⁵⁸ *Jones*, Bd. Dec. No. 14-0042, p. 7 (No. 18). The board's decision references a letter from the retirement benefits administrator to Mr. Jones dated February 3, 2004. The record includes a letter from the rehabilitation specialist to the retirement benefits administrator, dated January 22, 2004. R. 4753 (p. 1), 683-685 (pp. 2-4).

⁵⁹ *Jones*, Bd. Dec. No. 14-0042, p. 7 (No. 18). See R. 1098, 1102-1103.

⁶⁰ See *Jones*, Bd. Dec. No. 14-0042, p. 6 (No. 17); R. 12. Mr. Jones had previously received two weeks of temporary total disability payments, and periodic payments for his permanent partial impairment. See R. 12, 626 (5/5/2004 Compensation Report).

⁶¹ *Jones*, Bd. Dec. No. 14-0042, p. 7 (No. 19). See R. 1098, 1101, 1105, 1107-1115, 1119-1128.

⁶² *Jones*, Bd. Dec. No. 14-0042, p. 7 (No. 20) (Alaska Workers' Comp. Bd. Case No. 200420434). See R. 57-58 (Jones Dep. at 80:15 – 82:9); R. 1130-1131, 1134 ("He has continued to work despite the exacerbation of his pain that is linked to his job activities.") (Dr. Gevaert, Sept. 30, 2004).

⁶³ *Jones*, Bd. Dec. No. 14-0042, p. 7 (No. 21). See R. 1135-1136 (Catherine Giessel, F.N.P., Sept. 30, 2004).

⁶⁴ See R. 1134.

⁶⁵ *Jones*, Bd. Dec. No. 14-0042, p. 8 (Nos. 22-23). See R. 1144-1159.

⁶⁶ R. 1161.

⁶⁷ *Jones*, Bd. Dec. No. 14-0042, p. 8 (No. 24). See R. 1162-1170.

EMG was negative and that the MRI did not correlate with his symptoms, and released him to full duty work.⁶⁸

Mr. Jones returned to work at his seasonal position in 2005. He did not receive medical treatment that season, other than continued medication,⁶⁹ but did report he injured his back in late June while pulling down a snow fence, hauling it and loading it into a truck.⁷⁰ Towards the end of the season, in September, he began treatment at a pain clinic with Dr. Grant Roderer, M.D., an anesthesiologist with a subspecialty in pain medicine.⁷¹ Dr. Roderer provided spinal steroid injections and referred him to a physical therapist for therapy, which was provided through November 2005.⁷² In light of Dr. Gevaert's having released him to work, Mr. Jones requested a referral for a second opinion regarding his return to full duty, and Dr. Roderer referred him to Dr. Rafael Prieto, a physiatrist.⁷³ Dr. Prieto did not offer an opinion on Mr. Jones' ability to work; he assessed spinal pain, predominantly myofascial, with possible degenerative disk pain.⁷⁴

In January 2006, after seeing Mr. Jones at the pain clinic, Deborah Kiley, A.N.P., noted that Mr. Jones was "significantly anxious" and she referred him to a psychiatric

⁶⁸ *Jones*, Bd. Dec. No. 14-0042, p. 8 (No. 25). *See* R. 1170. Notwithstanding the phraseology of Dr. Gevaert's report, the release form was for medium duty, as previously (lifting up to 50 pounds occasionally and 25 pounds regularly). *See* R. 1171 (Dr. Gevaert, Feb. 9, 2005). This is the same as what Dr. Gevaert had indicated Mr. Jones could do in 2003. *See supra*, note 57. However, in response to a query from the adjuster, Dr. Gevaert indicated that Mr. Jones could lift up to 75 pounds and had no restrictions. R. 1172-1173.

⁶⁹ *See Jones*, Bd. Dec. No. 14-0042, p. 8 (No. 26).

⁷⁰ *Jones*, Bd. Dec. No. 14-0042, p. 8 (No. 27) (Alaska Workers' Comp. Bd. Case No. 200510652). *See* R. 13-14 (Report of Injury 7/7/2005 and Notice of Controversion 11/29/2005), 58-59 (Jones Dep. at 85:8 – 87:11).

⁷¹ *See Jones*, Bd. Dec. No. 14-0042, pp. 9-10 (Nos. 28-32); R. 908-910.

⁷² *Jones*, Bd. Dec. No. 14-0042, pp. 9-10 (Nos. 29-32). *See* R. 1982-2009, 2015-2024, 2027-2032, 2037-2040, 2067-2085.

⁷³ *Jones*, Bd. Dec. No. 14-0042, p. 10 (No. 30). *See* R. 2013.

⁷⁴ *Jones*, Bd. Dec. No. 14-0042, p. 10 (No. 31). *See* R. 920-922 (Dr. Prieto, Oct. 17, 2005), 2086 (Dr. Prieto, Dec. 12, 2005).

nurse practitioner, Catherine Barrett, A.N.P., who performed a behavioral health assessment on January 20, 2006.⁷⁵ A.N.P. Barrett noted that Mr. Jones was anxious about his work status, and felt that he had been treated badly by his employer.⁷⁶

Mr. Jones returned to his seasonal position in 2006. Physical therapy was provided after he reported injuring his back while lifting five gallon water jugs on July 11.⁷⁷ Dr. Roderer assessed degenerative disk disease, and provided a release to work in September, with no lifting above ten pounds.⁷⁸ He provided an epidural injection and Mr. Jones was given a TENS unit.⁷⁹

In January, 2007, Mr. Jones obtained a job at The Alaska Club, where beginning in March he worked as part of the cleaning staff.⁸⁰ On May 21, he filed with DNR a request for accommodation for a disability due to his inability to perform all of the duties of a natural resources technician (field).⁸¹ Mr. Jones was reassigned to a position as a full-time (*i.e.*, non-seasonal) natural resources technician (office).⁸² Mr. Jones claimed that working in that position was causing back pain and was aggravating

⁷⁵ See *Jones*, Bd. Dec. No. 14-0042, p. 11-12 (Nos. 38-39). See R. 2088-2097.

⁷⁶ *Jones*, Bd. Dec. No. 14-0042, p. 12 (No. 39). See R. 2094-2095.

⁷⁷ *Jones*, Bd. Dec. No. 14-0042, p. 12-13 (Nos. 41-42) (Alaska Workers' Comp. Bd. Case No. 200611455). See R. 16-18 (Report of Injury 7/27/2006 and Notice of Controversion 5/9/2007), 58 (Jones Dep. at 83:1 – 85:4). See R. 2113-2135.

⁷⁸ *Jones*, Bd. Dec. No. 14-0042, p. 13 (No. 42). See R. 2105-2111.

⁷⁹ *Jones*, Bd. Dec. No. 14-0042, p. 13 (Nos. 44-45). See R. 2126, 2138.

⁸⁰ *Jones*, Bd. Dec. No. 14-0042, p. 14 (Nos. 46-47).

⁸¹ *Jones*, Bd. Dec. No. 14-0042, p. 15 (No. 52). See R. 363-367, 373-379. Mr. Jones testified that he could have performed many of the job duties, but not the most strenuous ones. See R. 45 (Jones Dep. at 30:15 – 31:22). He testified that after the 2006 injury, he was reluctant to perform some of the duties required for his position. See R. 58-59 (Jones Dep. at 85:24 – 88:16).

⁸² *Jones*, Bd. Dec. No. 14-0042, p. 15 (No. 52). See R. 47-49 (Jones Dep. at 41:23 – 43:14, 46:21-25, 48:8-18).

headaches related to the 2001 trench collapse.⁸³ In October, A.N.P. Barrett examined Mr. Jones with regard to his reports of anxiety, headaches and stress.⁸⁴ In November, 2007 Mr. Jones resigned from state service.⁸⁵

Subsequently, in July 2009, Mr. Jones reported he injured his back, shoulders, and head when a ladder collapsed beneath him while working for The Alaska Club.⁸⁶ This incident resulted in a right rotator cuff tear diagnosis.⁸⁷ Mr. Jones reported another injury to his back while working for The Alaska Club on December 9, 2011.⁸⁸ He was terminated from his employment at The Alaska Club in September 2012, and later worked for Carrs Safeway and at Walmart.⁸⁹

ii. Medical Opinion Evidence

In addition to voluminous medical records from Mr. Jones' primary treating physicians – Dr. Culbert, Dr. Gevaert, and Dr. Roderer - and various specialists or physical therapists on referral from them, the record includes opinions and reports from four employer's medical examinations relating to the DNR injuries, and two board-appointed independent medical examinations.⁹⁰

⁸³ *Jones*, Bd. Dec. No. 14-0042, pp. 16-17, 29 (Nos. 53, 55-58, 93) (Alaska Workers' Comp. Bd. Case No. 200719434). *See* R. 20-22 (20071934, Report of Injury, 5/24/2009 and Controversion Notice, 8/16/2010), 48-49 (Jones Dep. at 44:15 – 46:20).

⁸⁴ *Jones*, Bd. Dec. No. 14-0042, pp. 16-17 (No. 57). *See* R. 1054-1062.

⁸⁵ *Jones*, Bd. Dec. No. 14-0042, pp. 19-20 (Nos. 64, 69). *See* R. 382, 456; R. 41, 47 (Jones Dep. at 17:5-16, 38:10 – 39:4).

⁸⁶ *Jones*, Bd. Dec. No. 14-0042, p. 20-21 (Nos. 70-73) (Alaska Workers' Comp. Bd. Case No. 200910052). *See* R. 457 (Report of Injury, 7/10/09). Mr. Jones testified that he injured only his right shoulder on this occasion. R. 43 (Jones Dep. at 24:13 – 25:12).

⁸⁷ *Jones*, Bd. Dec. No. 14-0042, p. 20-21 (Nos. 70-73).

⁸⁸ *Jones*, Bd. Dec. No. 14-0042, p. 28 (No. 89) (Alaska Workers' Comp. Bd. Case No. 201119610).

⁸⁹ *Jones*, Bd. Dec. No. 14-0042, p. 28 (No. 92). *See* R. 407-410.

⁹⁰ Mr. Jones was also examined by Dr. Richard Gardiner, an employer-selected expert, in connection with the 2009 injury at The Alaska Club. *Jones*, Bd. Dec. No. 14-0042, p. 24 (No. 81).

The employer's reports relating to the DNR injuries are from examinations in November 2005 (relating to the 2002 and 2005 injuries)⁹¹ by a physiatrist, Dr. Patrick Radecki, M.D.,⁹² and an orthopedic surgeon, Dr. Holm Neumann, M.D.,⁹³ in April 2007 (relating to the 2006 injury) by an orthopedist, Dr. Timothy R. Borman, D.O.,⁹⁴ in April 2010 (relating to the 2007 injury), by an ophthalmologist, Dr. Richard Bensinger, M.D.,⁹⁵ and a specialist in occupational medicine, Dr. Michael Allison, M.D.,⁹⁶ and in March 2012 (relating to all of the injuries) by a panel consisting of a neurologist, Dr. Alan J. Goldman, M.D. and an orthopedic surgeon, Dr. John Ballard, M.D.,⁹⁷ and, separately, by a psychiatrist, Dr. S. David Glass, M.D.⁹⁸

The board-appointed reports are from examinations in December 2010 (relating to the 2007 injury) by a specialist in occupational medicine, Dr. Timothy J. Craven, M.D.,⁹⁹ and an ophthalmologist, Dr. Leonard B. Alenick,¹⁰⁰ and in March 2013 (also relating to the 2007 injury) by Dr. Craven.¹⁰¹ In addition, the record includes Dr.

⁹¹ *Jones*, Bd. Dec. No. 14-0042, p. 10 (No. 33).

⁹² The record includes multiple copies of Dr. Radecki's report. *See, e.g.*, 939-955, 2041-2058. The latter copy of the report includes an anomalous page 19. *See* R. 2058.

⁹³ R. 956-961, R. 2060-2066.

⁹⁴ Dr. Borman supplemented his additional report after reviewing supplemental records. *See* R. 1029-1042, 2201 (April 27, 2007), 2208-2209 (July 11, 2007). A second supplemental report was provided by an orthopedic surgeon, Dr. Donald Schroeder, M.D. *See* R. 2212-2213 (August 16, 2007). The supplemental reports address Mr. Jones' ability to perform the job duties of a Natural Resources Officer I and a Natural Resources Technician II (office), respectively. *See id.*

⁹⁵ R. 1600-1608.

⁹⁶ *Jones*, Bd. Dec. No. 14-0042, pp. 22-24 (Nos. 77-79); R. 1467-1490.

⁹⁷ R. 4496-4603. The panel's initial report was clarified in an addendum. *See* R. 2615-2616.

⁹⁸ R. 4468-4479.

⁹⁹ *Jones*, Bd. Dec. No. 14-0042, pp. 25-26 (Nos. 83-84). *See* R. 1635-1645.

¹⁰⁰ R. 2395-2398.

¹⁰¹ R. 2622-2641.

Craven's deposition.¹⁰² None of the doctors testified at the hearing; Mr. Jones was the sole witness at the hearing.

iii. Board Rulings

The board denied the following benefits for medical care and disability compensation: (1) medical care for bilateral shoulder symptoms; (2) medical care for anxiety or PTSD; (3) permanent total disability; (4) additional (*i.e.*, beyond the 15% previously awarded) permanent partial disability; (5) medical care for vision and associated headache and neck complaints; and (6) temporary total disability.

iv. Sufficiency of the Evidence

Mr. Jones' generalized objection that the board did not adequately review the entire record is at odds with the thorough discussion of the evidence set forth in the board's decision.¹⁰³ Nonetheless, his objection is, in effect, an assertion that in light of the record as a whole, there is not substantial evidence to support the board's factual findings. We consider this objection in connection with each of the foregoing benefits denied by the board.¹⁰⁴

(1) Medical Care for Bilateral Shoulder Symptoms

The board found that the 2001 injury was not a substantial factor in Mr. Jones' need for medical care for his bilateral shoulder symptoms.¹⁰⁵ Mr. Jones disputes this

¹⁰² R. 95-135.

¹⁰³ *See Jones*, Bd. Dec. No. 14-0042, pp. 3-30.

¹⁰⁴ The board also denied reemployment benefits and attorney's fees. *See Jones*, Bd. Dec. No. 14-0042, pp. 53-54, 56-57. As to the former, the board found that Mr. Jones had failed to appeal the 2004 denial of reemployment benefits, and it observed that his 2011 request was untimely. *Id.*, pp. 7 (No. 18), 53. As to the latter, the board found that counsel had not filed an affidavit to support the claimed fees, and that, as Mr. Jones had stipulated, that attorney had "performed no cognizable services" in connection with the claims heard. *Id.*, p. 30-31 (Nos. 99-100). We see no mention of either benefit in Mr. Jones' appellate filings, and we consider these issues waived or abandoned. *See Coppe v. Bleicher*, Alaska Workers' Comp. App. Comm'n Dec. No. 164 at 14 (Aug. 1, 2012).

¹⁰⁵ *Jones*, Bd. Dec. No. 14-0042, pp. 47-49, 51.

finding, asserting that he reported shoulder pain “from the first day.”¹⁰⁶ However, he has not referred to any specific medical record showing a report of shoulder pain, and the board’s decision specifically notes the absence of any complaints by Mr. Jones of shoulder joint pain to his treating health providers prior to 2009.¹⁰⁷ Our independent review of those records confirms that Mr. Jones did not report shoulder pain until long after the 2001 incident.¹⁰⁸

It is true that, as the board noted, beginning in mid-2004, two years after Dr. Culbert released Mr. Jones from care for the 2001 injury, Dr. Gevaert noted occasional reports of pain radiating into the shoulders, and some mention of bilateral shoulder pain.¹⁰⁹ However, at issue with respect to the bilateral shoulder injury is not interscapular pain, but symptoms relating to the shoulder joints.¹¹⁰ To the extent that the pain Mr. Jones is experiencing in his shoulders is myofascial pain in the interscapular area, it is within the scope of the medical care that the board awarded. The board’s characterization of Mr. Jones’ reports as reports of interscapular pain (pain

¹⁰⁶ Jones Reply.

¹⁰⁷ *Jones*, Bd. Dec. No. 14-042, p. 48.

¹⁰⁸ We note, in particular, that Dr. Culbert’s initial report states that Mr. Jones did not report any symptoms in his upper extremities. R. 2427. His subsequent notes covering treatment through the date Mr. Jones was released from care for the 2001 injury, and beyond, are similarly devoid of any mention of shoulder pain. *See* R. 2404-2424; 666-667, 678-681.

¹⁰⁹ *See, e.g.*, R. 1893, 1897 (Dr. Gevaert, July 12 and 19, 2004).

¹¹⁰ *See Jones*, Bd. Dec. No. 14-0042, p. 47 (No. 2) (noting the presumption of compensability with respect to bilateral shoulder symptoms, “specifically bilateral acromioclavicular joint osteoarthritis and right rotator cuff tendinopathy.”).

between the shoulder blades), rather than of shoulder joint pain,¹¹¹ is consistent with the medical records.¹¹²

Mr. Jones has not identified any expert medical opinion connecting his 2001 injury with his bilateral shoulder joint symptoms. There is ample evidence in the record that Mr. Jones has degenerative conditions in both shoulders,¹¹³ and it is undisputed, for purposes of this appeal, that his 2009 injury while employed at The Alaska Club directly affected his right shoulder joint.¹¹⁴

We conclude that there is substantial evidence in light of the record as a whole to support the board's finding that Mr. Jones' 2001 injury is not a substantial factor in his current need for medical treatment for his bilateral shoulder symptoms.

(2) Anxiety or PTSD

As he did with respect his shoulder symptoms, Mr. Jones asserts that he reported stress "from the first day."¹¹⁵ Again, however, he has not referred to any specific medical record to support that assertion, and, again, the board's decision specially notes the absence of any complaints of anxiety prior to 2006,¹¹⁶ and of any assertion that he had nightmares regarding the incident prior to 2010.¹¹⁷ Our

¹¹¹ *Jones*, Bd. Dec. No. 14-0042, p. 48.

¹¹² *See, e.g.*, R. 2832 ("Review of medical records from Dr. Gregory Culbert confirm that he has had ongoing pain in the interscapular region") (Dr. Gevaert, May 14, 2003); R. 2838 ("He presents with chronic intermittent intrascapular [*sic*] pain.") (Dr. Gevaert, June 16, 2003); R. 912 (most problems "between his shoulder blades") (physical therapist, Oct. 4, 2005); R. 916 (steroid injection to decrease pain reported between shoulder blades) (Dr. Roderer, Oct. 12, 2005); R. 939 ("chief complaint of neck pain, pain between the shoulder blades, and low back pain") (Dr. Radecki, Nov. 12, 2005).

¹¹³ *See, e.g.*, R. 2571 (MRI, Dr. Chakri Inampudi, Jan. 15, 2010); R. 1436-1437 (MRI, Dr. Leonard D. Sisk, Aug. 27, 2009); R. 2553, 2582 (Dr. Moore, Oct. 22, 2009, Dec. 22, 2011).

¹¹⁴ *See Jones*, Bd. Dec. No. 14-0042, pp. 20-21, 24 (Nos. 71, 82).

¹¹⁵ *Jones Reply*.

¹¹⁶ *Jones*, Bd. Dec. No. 14-0042, p. 51.

¹¹⁷ *Jones*, Bd. Dec. No. 14-0042, p. 25 (No. 83).

independent review of the record confirms that Mr. Jones did not report anxiety or notable stress until long after the 2001 incident. When he finally did report stress, in 2004, it was in connection with reported differences of opinion with his employer regarding his work capacity, rather than concerning the psychological impact of the 2001 event.¹¹⁸ Beginning then, Mr. Jones increasingly expressed anxiety or stress, to the point that his own medical providers twice referred him to a psychiatric nurse practitioner, A.N.P. Barrett, for examination.¹¹⁹

That the initial incident in November 2001 was stressful is undoubtedly true: as Dr. Culbert reported, Mr. Jones was “quite shaken” by the event.¹²⁰ But Mr. Jones was subjected to significant stress from a variety of non job-related sources in the years following that incident, including an acrimonious divorce and the death of his brother, for whom he had provided care after a brain injury.¹²¹ A.N.P. Barrett’s reports do not suggest that the 2001 injury had any lasting psychological impact. Mr. Jones made no mention to her of any nightmares, recurring memories, or other symptoms relating to that event, and she specifically identified his current personal circumstances as responsible for his symptoms.¹²² Absent any diagnosis of a post-traumatic stress disorder, or any expert opinion that the 2001 incident resulted in a disabling mental injury, and given the expert opinion offered by DNR’s psychiatric expert that the 2001 incident was not a substantial factor in his psychological condition,¹²³ there is substantial evidence to support the board’s finding that the November 1, 2001, injury was not a substantial factor in his current need for medical care for anxiety or post-traumatic stress disorder.

¹¹⁸ See R. 1130 (Dr. Gevaert, Aug. 31, 2004).

¹¹⁹ See *Jones*, Bd. Dec. No. 14-0042, pp. 11-12, 16-17 (Nos. 38-39, 57); R. 1053.

¹²⁰ R. 2430.

¹²¹ See *Jones*, Bd. Dec. No. 14-0042, p. 51.

¹²² R. 1054-1062 (A.N.P. Barrett, Oct. 22, 2007); R. 1296-1301 (A.N.P. Barrett, Jan. 20, 2006).

¹²³ R. 4468-4479 (Dr. Glass, Mar. 2, 2012).

(3) Permanent Total Disability

The board found that Mr. Jones is not permanently and totally disabled.¹²⁴ Mr. Jones' filings with the commission do not identify any specific error in the board's finding on that issue, other than to assert that he is 100% disabled as a result of the 2001 injury.

In that regard, we observe that none of the doctors who has treated or examined Mr. Jones has expressed an opinion that he is permanently and totally disabled. Moreover, Mr. Jones continued working after he resigned from his position with DNR, and was still employed at the time of the hearing. Given the absence of any medical opinion that he is totally disabled, and the undisputed fact that he continued to work for a number of years after his employment with DNR ended, we conclude that there is substantial evidence, in light of the record as a whole, to support the board's finding that he is not permanently and totally disabled.

(4) Permanent Partial Disability

Mr. Jones was paid temporary total disability and permanent partial impairment benefits relating to the 2002 injury.¹²⁵ As with regard to permanent total disability, none of the doctors who has treated or examined Mr. Jones has expressed an opinion that he has a disability beyond the 15% partial disability rating previously awarded. There are multiple opinions in the record from DNR's examiners that he does not have a permanent partial impairment in excess of 15%.¹²⁶ We conclude that there is

¹²⁴ See *Jones*, Bd. Dec. No. 14-0042, p. 51-52. The heading to this portion of the board's decision references only the November 1, 2001, injury. *Id.*, p. 51. However, the board did not limit its finding to that specific injury. It concluded, rather, that "[Mr. Jones] has not met his burden of proof [that] he is permanently and totally disabled[.]" *Id.*, p. 52. We conclude that the board's factual finding is directed not only to causation, but also to the existence of a permanent and total disability.

¹²⁵ See *Jones*, Bd. Dec. No. 14-0042, p. 6 (No. 17). See R. 7-12.

¹²⁶ *Jones*, Bd. Dec. No. 14-0042, p. 52-53. See R. 955 (Dr. Radecki, Nov. 12, 2005) (regarding 2005 injury); R. 1041 (Dr. Borman, Apr. 21, 2007) (regarding 2006 injury); R. 1487 (Dr. Allison, Apr. 29, 2010) (regarding 2007 injury); R. 4599 (Dr. Ballard, Mar. 3, 2012) (regarding all injuries).

substantial evidence, in light of the record as a whole, to support the board's finding that he did not sustain a permanent impairment relating to the 2001 injury.

(5) Vision and Associated Headache and Neck Complaints

Because of the difficulty he had in performing the duties required in the field, in 2007 Mr. Jones requested and was granted reassignment to a lighter duty position with DNR. The new position was an office job, with most of the day spent working at a computer workstation. Within months after he took the new position, Mr. Jones resigned from his employment with DNR, asserting that he had developed severe headaches from working at the computer workstation.¹²⁷ In 2009 he filed a claim, asserting that he had developed severe neck and head pain and vision problems as a result of his working conditions in 2007.¹²⁸ The board determined that the 2001 injury was not a substantial factor in those conditions and that Mr. Jones' employment in an office environment was not their substantial cause.¹²⁹

After he began working at the new position, Mr. Jones began reporting substantially more severe headache and neck problems than previously and for the first time he reported vision problems as well, all of which he attributed to the new work environment. But, apart from the reports of an optometrist, Dr. Keene, the medical records do not support Mr. Jones' position that these symptoms were the result of the 2001 work injury or of his workstation conditions. Rather, apart from Dr. Keene, the medical records (including that of Mr. Jones' initial optometrist, Dr. Robert J. Fleckstein)¹³⁰ indicate that Mr. Jones' vision problems were not related to his work, or, if they were related, could be resolved through appropriate eyewear or routine workstation modifications.¹³¹

¹²⁷ See *Jones*, Bd. Dec. No. 14-0042, pp. 15-19.

¹²⁸ R. 29-30.

¹²⁹ *Jones*, Bd. Dec. No. 14-0042, pp. 54-56.

¹³⁰ See *Jones*, Bd. Dec. No. 14-0042, p. 16 (No. 54). R. 1345-1346 (Dr. Fleckstein, Oct. 1, 2007).

¹³¹ See, e.g., R. 2395-2398 (Dr. Alenick, Dec. 15, 2010).

The board discounted Dr. Keene's opinion, based on the opinions of the employer's medical experts to the effect that his diagnosis did not reflect accepted medical doctrine.¹³² It is the board's prerogative to assign weight to the medical opinions,¹³³ and in light of the record as a whole there is substantial evidence to support the board's findings that Mr. Jones' headache and vision symptoms at the time of his resignation were not the result of the 2001 work injury or his 2007 working conditions.

(6) Temporary Total Disability

Mr. Jones' 2009 claim was treated as a claim for temporary total disability benefits, based on his assertion that he was unable to continue working in his 2007 position. The board determined that Mr. Jones was ineligible for temporary total disability benefits for two independent reasons: first, the 2007 injury was not compensable, and second, Mr. Jones had not shown that he cannot earn comparable wages in other employment.¹³⁴

We have addressed the compensability of the 2007 injury above. Mr. Jones' prehearing brief asserted that he is "virtually unemployable[,]"¹³⁵ but it is undisputed that he continued to work after he resigned from his employment with DNR. There is, moreover, medical opinion evidence that he is capable of continued employment at the position he formerly held at DNR, including the opinion of his own treating physician, Dr. Roderer.¹³⁶

We conclude that there is substantial evidence, in light of the record as a whole, to support the board's findings on this issue.

¹³² See *Jones*, Bd. Dec. No. 14-0042, p. 22-23 (No. 77).

¹³³ See AS 23.30.122.

¹³⁴ *Jones*, Bd. Dec. No. 14-0042, p. 56.

¹³⁵ R. 635.

¹³⁶ R. 1069 (Dr. Roderer, Nov. 28, 2007). See also, *supra*, note 94.

(c) DNR's Cross-Appeal

The board awarded Mr. Jones ongoing medical and transportation benefits for chronic myofascial pain. The board determined that Mr. Jones had established the presumption of compensability through his own testimony, the opinion of Dr. Gevaert, and his history of symptomatic relief through conservative treatment.¹³⁷ It determined that DNR had rebutted the presumption through the opinions of Dr. Radecki and Dr. Glass, who opined that Mr. Jones' chronic pain was psychogenic in origin.¹³⁸

Weighing the evidence as a whole, the board determined that Mr. Jones had established that the 2001 injury was a substantial factor in a continuing need for treatment for myofascial pain.¹³⁹ In making that determination, the board relied on the diagnoses of his treating physicians, Drs. Culbert, Gevaert, and Prieto,¹⁴⁰ as well as the employer's examiners, Drs. Allison, Ballard, Goldman, Neumann, and Borman.¹⁴¹ But beyond those opinions, the board discussed in some depth the opinion on diagnosis and causation expressed by Dr. Craven in two written reports and in his deposition.¹⁴² The board characterized Dr. Craven's opinion as "[p]erhaps the most persuasive opinion on diagnosis and causation."¹⁴³

As described by the board, Dr. Craven "consistently opined [Mr. Jones] continues to suffer cervical, thoracic and lumbar myofascial pain as a result of the November 1, 2001 work injury[.]"¹⁴⁴ The board acknowledged, however, that Dr. Craven's written responses to questions about further treatment (posed to him by DNR following his second examination) "inexplicably contradict [his] unambiguous deposition

¹³⁷ *Jones*, Bd. Dec. No. 14-0042, p. 43.

¹³⁸ *Id.*

¹³⁹ *Jones*, Bd. Dec. No. 14-0042, p. 43.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*, pp. 43-44.

¹⁴² *Id.*, pp. 44-47.

¹⁴³ *Id.*, p. 44.

¹⁴⁴ *Id.*

testimony.”¹⁴⁵ The board disregarded those answers, explaining that in its view Dr. Craven may have been limiting his written responses following his second examination to Mr. Jones’ need for treatment with respect to the 2007 injury, which (as Dr. Craven observed in his introductory remarks) was the injury for which Dr. Craven had been asked (in connection with his second examination) to provide an opinion.¹⁴⁶

DNR’s cross-appeal focuses entirely on the board’s decision to disregard Dr. Craven’s written responses and to accept the opinions expressed by Dr. Craven in his deposition testimony.¹⁴⁷ DNR asserts that the board’s award “is founded on its assumption that . . . Dr. Craven . . . did not understand the written questions he answered in 2013.”¹⁴⁸ DNR argues that “[t]he Board failed to make sufficient findings of fact to support this assumption and there is not substantial evidence to support such an assumption.”¹⁴⁹

DNR’s argument begins with the proposition that “[w]hether the Board’s findings and assumptions are supported by ‘substantial evidence’ is a question of law.”¹⁵⁰ But the substantial evidence test applies to the board’s factual findings, not to its assumptions. Assumptions, by definition, are not proven facts: they are assumed facts. The board did not make a factual finding that Dr. Craven misunderstood the questions asked to him. Indeed, it made no assumption to that effect. Rather, it set forth its reasons for affording more weight to his first written report and his deposition testimony than to the second written report. The board’s assignment of weight to medical reports and testimony “is conclusive, even if the evidence is conflicting or

¹⁴⁵ *Id.*, p. 46.

¹⁴⁶ *Id.*, at 46-47.

¹⁴⁷ DNR Brief, pp. 19-24.

¹⁴⁸ DNR Brief, p. 19.

¹⁴⁹ DNR p. 19.

¹⁵⁰ DNR p. 19, note 15, *citing Sourdough Express, Inc. v. Barron*, Alaska Workers’ Comp. App. Comm’n Dec. No. 69 (Feb. 7, 2008) (emphasis added). Our discussion of the standard of review in that case makes no mention of assumptions. *Id.* at 12.

susceptible to contrary conclusions.”¹⁵¹ The board’s explanation as to why it disregarded Dr. Craven’s written responses in his second report may not be persuasive to DNR, but that is not a sufficient ground for us to reject the board’s determination regarding the relative weight to be afforded Dr. Craven’s opinions. Rather, the question for us is whether, in light of the record as a whole, there is substantial evidence to support the board’s factual findings that Mr. Jones presently suffers from myofascial pain, and that the 2001 injury was a substantial factor in the existence of that condition.

In that regard, DNR argues that there is not substantial evidence, because Dr. Craven’s deposition opinion testimony regarding Mr. Jones’ need for continuing treatment for myofascial pain has no probative value. It has no probative value, DNR asserts, because it was expressed as a possibility, rather than as a reasonable medical probability.¹⁵² This argument has been expressly and unequivocally rejected by the Alaska Supreme Court, and we reject it here.¹⁵³ As the court has said, “[a] statement by a physician using a probability formula is not required to establish employer liability in workers’ compensation.”¹⁵⁴

DNR’s argument, in any event, fails to take into account the record as a whole. The board’s decision does not rest entirely on Dr. Craven’s opinion. Rather, the board relied also on the opinions of other physicians (including some of DNR’s chosen examiners), Mr. Jones’ testimony, and his medical history in finding that Mr. Jones

¹⁵¹ AS 23.30.122.

¹⁵² See DNR Brief p. 20-21, *citing Maddock v. Bennett*, 456 P.2d 453 (Alaska 1969).

¹⁵³ One might argue that a medical opinion based on assumed facts that are not supported in the record has, as DNR puts it, no probative value. See, e.g., *Widmyer v. Southeast Skyways*, 584 P. 2d 1, 9-10 (Alaska 1978); *Guys With Tools, Ltd. v. Thurston*, Alaska Workers’ Comp. App. Comm’n. No. 62 at 16 (November 8, 2007). But the board is not an expert; it is the fact finder. It did not express a medical opinion, but rather explained its reasons for the weight it provided to opinions provided by the expert.

¹⁵⁴ *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007). See also, *De Rosario v. Chenega Lodging*, 297 P.3d 139, 148-149 (Alaska 2013).

continues to have chronic myofascial pain, that the 2001 injury was a substantial factor in the existence of that pain, and that ongoing conservative treatment is appropriate.¹⁵⁵ We conclude that there is substantial evidence, in light of the record as a whole, to support the board's finding that Mr. Jones has ongoing chronic myofascial pain and that the 2001 work injury was a substantial factor in the existence of that pain.

5. *Conclusion.*

The board's decision is AFFIRMED.

Date: July 9, 2015 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

James N. Rhodes, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Andrew M. Hemenway, 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 supreme court must be filed no later than 30 days after the date shown in the commission's notice of distribution (the box below).

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

¹⁵⁵ See *supra*, notes 137, 140-141.

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).

I certify that, with the exception of a change made in formatting for publication, this is a full and correct copy of Final Decision No. 212, issued in the matter of *Douglas C. Jones vs. State of Alaska, Department of Natural Resources*, AWCAC Appeal No. 14-013, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on July 9, 2015.

Date: July 10, 2015



Signed

K. Morrison, Appeals Commission Clerk