Alaska Workers' Compensation Appeals Commission

Randall Lewis, Appellant, vs. Hickel Investment Company and Alaska National Insurance Company, Appellees.	Final Decision Decision No. 268 September 18, 2019 AWCAC Appeal No. 18-015 AWCB Decision No. 18-0084 AWCB Case No. 201514492

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 18-0084, issued at Anchorage, Alaska, on August 22, 2018, by southcentral panel members Henry Tashjian, Chair, Rick Traini, Member for Labor, and Brett Stubbs, Member for Industry.

Appearances: Randall Lewis, self-represented appellant; Michelle M. Meshke, Meshke Paddock & Budzinski, PC, for appellees, Hickel Investment Company and Alaska National Insurance Company.

Commission proceedings: Appeal filed September 10, 2018; briefing completed April 1, 2019; oral argument held on June 25, 2019.

Commissioners: James N. Rhodes, Amy M. Steele, Deirdre D. Ford, Chair.

By: Deirdre D. Ford, Chair.

1. Introduction.

Randall Lewis injured his neck while working for Hickel Investment Company (insured by Alaska National Insurance Company)(collectively referred to herein as Hickel) on August 30, 2015. A dispute subsequently arose between Mr. Lewis and Hickel over the nature of his injury, the need for medical treatment after a certain point in time, and the date of medical stability. At a prehearing on May 22, 2018, the parties agreed to a hearing date of July 24, 2018, and set deadlines for filing witness lists, evidence, and briefs. Another prehearing was held on July 6, 2018, to discuss adding an issue for hearing.

On July 23, 2018, Mr. Lewis filed a petition for an extension of time to file his witness list and evidence, along with his witness list and additional evidence, including an x-ray of his shoulder not previously provided. At hearing, Mr. Lewis asked the Alaska Workers' Compensation Board (Board) for a continuance so "he would be able to continue treatment and prepare for hearing." The Board denied his request for an extension of time, but did admit some medical evidence and allowed the fiancée of Mr. Lewis, Ms. Susan Sellers, to testify. The Board opted to allow the hearing to go forward, stating no good cause existed upon which to grant the requested continuance.[1] The Board affirmed the decision of the Reemployment Benefits Administrator (RBA) Designee and denied Mr. Lewis the requested benefits, including additional medical treatment. Mr. Lewis timely appealed the Board decision denying him a continuance and benefits.

The Alaska Workers' Compensation Appeals Commission (Commission) now affirms the Board's decision on the appeal of the reemployment denial, but remands for a new hearing of the decision denying Mr. Lewis the other benefits he requested. The Commission has determined the Board erred in not granting Mr. Lewis the requested continuance under its discretionary authority in 8 AAC 45.195. Therefore, the matter is remanded to the Board for a new hearing. On remand, a hearing should be set as quickly as possible, given the Board's unexplained concerns over the time limitations in AS 23.30.110(c). In addition, Mr. Lewis should be provided direction in how to develop a witness list and how to arrange for witnesses to testify, including, if necessary, an explanation of the mechanism for requesting and serving subpoenas on witnesses. The Commission affirms the denial of the requested $20,000,000.00 in damages as this request is outside the scope of the Alaska Workers' Compensation Act (Act).

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[1] *Lewis v. Hickel Investment Company*, Alaska Workers' Comp. Bd. Dec. No. 18-0084 (Aug. 22, 2018)(*Lewis*).

2. Factual background and proceedings.[2]

a. Medical history.

On August 30, 2015, Mr. Lewis reported he sustained a repetitive motion injury to his cervical spine while working for Hickel.[3] Prior to this injury, he treated over several years for neck pain. The first report of neck pain was on July 29, 2005, when he saw Catherine A. Giessel, FNP-CS, who reported he complained of neck pain, which he had not previously described.[4] On February 22, 2008, he saw Jane Sonnenburg, PA-C, at Orthopedic Physicians Anchorage, and he reported symptoms including left shoulder pain. PA-C Sonnenburg, after reviewing x-ray imaging, diagnosed osteoarthritis of the left shoulder acromioclavicular (AC) joint and glenohumeral joint.[5] Mr. Lewis was also examined on April 20, 2015, by his treating physician, T. Noah Laufer, M.D., who reported pain complaints in his right hip, left shoulder, and back.[6]

Following the injury, on September 3, 2015, Mr. Lewis reported to Dr. Laufer that he had felt a twinge in his neck the previous Sunday around noon, and symptoms increased the rest of the day. He reported decreased range of motion, pain, muscle spasms (right greater than left over the trapezius muscles), and numbness and weakness of the right arm. He did not identify a specific trauma, but indicated he had been busy and performing frequent manual labor at work over a short period of time. Dr. Laufer released Mr. Lewis from work until September 8, 2015.[7]

On September 3, 2015, Mr. Lewis obtained a magnetic resonance imaging (MRI) study on referral from Dr. Laufer. John McCormick, M.D., found straightening of the cervical lordosis and marked disc space narrowing at C5-6 and C6-7 with large anterior

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[2] We make no factual findings. We state the facts as found by the Board, adding context by citation to the record with respect to matters that do not appear to be in dispute.

[3] R. 1.

[4] R. 525-526.

[5] R. 542-543.

[6] R. 1066-1069.

[7] R. 586-590.

osteophytes. He found no fractures or malignant changes, and stated the foramen were preserved and soft tissues were normal.[8]

Dr. Laufer, on September 4, 2015, reviewed the imaging, stating it showed "multilevel severe degenerative disease with neural impingement, but no acute process such as a ruptured disc or fracture." He opined Mr. Lewis's symptoms were consistent with a formation flare, and Mr. Lewis might benefit from a steroid injection or surgery.[9] On September 11, 2015, Dr. Laufer referred Mr. Lewis to the Alaska Spine Institute for specialized examination and treatment.[10]

On October 12, 2015, Michel L. Gevaert, M.D., evaluated Mr. Lewis at the Alaska Spine Institute. Dr. Gevaert reviewed the September 4, 2015, MRI, noting it showed "diffuse degenerative disc disease from C4 through C7, most severe at C5 and C6. There is foraminal stenosis of the right C5-6." He noted a past medical history including chronic low back pain, chronic neck pain in 2005, arthritis, asthma, and hypertension. His diagnoses included severe neck pain and pain referral in both upper extremities, sensory loss in the left upper extremity, positive Waddell signs, and a history of alcohol abuse. He prescribed MS Contin, Percocet, Norco, and Valium, and noted that currently-prescribed medications were Lisinopril, atorvastatin, morphine sulfate, diazepam, Valium, Norco, and Percocet. Mr. Lewis reported better control with Valium than opioids, and was reluctant to escalate opioids.[11]

On October 16, 2015, Dr. Gevaert performed a nerve conduction study, which indicated bilateral carpal tunnel syndrome affecting motor and sensory nerve fibers, normal ulnar nerve conduction study, but no electromyographic evidence of cervical radiculopathy. He opined Mr. Lewis would benefit from physical therapy, and switched his prescription from Percocet to Roxicodone. Dr. Gevaert listed Mr. Lewis's currently prescribed medications as Roxicodone, amlodipine, hydrochlorothiazide, MS Contin, and

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8 R. 591.

9 R. 594-596.

10 R. 598-601.

11 R. 606-608.

Vicodin.[12] On November 12, 2015, Dr. Gevaert administered an epidural steroid injection to Mr. Lewis.[13]

On December 2, 2015, Mr. Lewis saw Dr. Gevaert, who had a long discussion with him, and expressed concern about his delayed recovery in the 4-month span of off-work status "despite extensive physical therapy, appropriate pain management and one epidural steroid injection." Mr. Lewis showed an altered pain perception, and agreed to return to work full-duty for four hours per day, while continuing with physical therapy and pain management. Dr. Gevaert planned a follow-up appointment with Mr. Lewis "to evaluate if this strategy is effective," and issued a prescription for a home traction device and Bio-Freeze. Mr. Lewis was given a random drug screen, which found Nordiazepam, Oxazepam, Temazepam, Hydromorphone, and morphine, all of which were labeled inconsistent with Mr. Lewis's prescribed medications. The most recent prior record indicated Mr. Lewis was prescribed MS Contin and Roxicodone as of November 6, 2015.[14]

Dr. Laufer saw Mr. Lewis on December 10, 2015, at which time Mr. Lewis stated to that he did not feel ready for full-duty work, even if it was part-time. He stated he did not respond to the epidural injection. Dr. Laufer agreed to refer Mr. Lewis for a second opinion on returning to work, and opined Mr. Lewis was likely to have a reinjury or exacerbation fairly quickly, given his history. He opined Mr. Lewis would need fitness testing before returning to work.[15]

On December 18, 2015, Larry Kropp, M.D., performed a bilateral facet cervical median branch block on Mr. Lewis, and restricted him from work from December 2, 2015, through December 30, 2015.[16] On December 30, 2015, Dr. Kropp performed a right side median branch facet injection on Mr. Lewis, stating that the prior injection on the left had

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12 R. 615-616.

13 R. 658-659.

14 R. 643, 680-683, 684.

15 R. 691-694.

16 R. 698-699.

an excellent result.[17] On January 4, 2016, Mr. Lewis told Dr. Laufer the injections with Dr. Kropp had produced a positive outcome, but he had experienced a sudden onset of pain, feeling similar to his pain before the treatments, earlier that morning. Dr. Laufer stated, "He is looking like he will be permanently disabled."[18] On January 7, 2016, Dr. Kropp noted minimal to moderate results from prior nerve block injection, and recommended attempting conservative measures before resorting to more intensive procedures.[19]

On January 11, 2016, Mr. Lewis saw L. Trevor Tew, D.C., at Kanady Chiropractic Center, who diagnosed cervical disc displacement and recommended treatment with heat and traction five times a week for two weeks, followed by three times per week for two to four weeks.[20] On January 18, 2016, Mr. Lewis told Dr. Tew he had increased pain after the treatment on January 15, 2016. Mr. Lewis further indicated he was unable to move his left arm during the weekend. Dr. Tew reviewed an x-ray, and diagnosed an AC separation of Mr. Lewis's left shoulder, noting that Mr. Lewis had denied trauma to the area. Mr. Lewis was referred back to Dr. Laufer for further examination.[21]

Also on January 18, 2016, Brian G. Rogers, M.D., examined Mr. Lewis in the emergency room at Providence Alaska Medical Center. Dr. Rogers reviewed Mr. Lewis's x-rays and made a differential diagnosis of septic arthritis, dislocation, fracture, "before meals" separation, rotator cuff injury, and other etiologies. He stated the x-ray films showed what appeared to be a "before meals" separation, without evidence of fracture or dislocation, and referred Mr. Lewis to Dr. Laufer for further examination. Dr. Rogers's use of the term "before meals" is presumably a dictation error resulting from his use of

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17 R. 700-702.

18 R. 704-706.

19 R. 707-708.

20 R. 717.

21 R. 724.

the abbreviation "AC," which is also a medical abbreviation of "ante cibum," meaning "before meals." Dr. Rogers dictated his report using DragonSpeak software.[22]

On January 20, 2016, Dr. Laufer examined Mr. Lewis, noting that Mr. Lewis believed the new pain in his left shoulder was caused by the chiropractic treatment and was related to his workers' compensation injury. Dr. Laufer recommended imaging diagnostics.[23]

On January 27, 2016, Mr. Lewis obtained an MRI left arthrogram with contrast. Christopher M. Reed, M.D., interpreted the images and diagnosed:

1. Extensive circumferential glenoid labral tear. Anterior inferior para labral cyst.
2. Moderate glenoid chondrosis with severe subchondral cystic change of the posterior and inferior glenoid rim.
3. Severe acromioclavicular osteoarthritis and reactive marrow edema.[24]

On February 5, 2016, Robert J. Hall, M.D., examined Mr. Lewis and reviewed his MRI results. The MRI showed:

> intact rotator cuff. He has marked degenerative change of the acromioclavicular joint with very intense T2 signal consistent with edema on both sides of the AC joint, but . . . no evidence of AC separation. He has some significant degenerative change of the glenohumeral joint as well with peripheral subchondral cysts around the anterior, posterior, and inferior glenoid rims. This may or may not extend into the overlying glenoid labrum. He has loss of articular cartilage on the inferior half of the glenohumeral joint with osteophyte formation off the inferior aspect of the humeral head.

Dr. Hall diagnosed AC joint strain and osteoarthritis of the left glenohumeral joint, and recommended physical therapy.[25]

Dr. Laufer saw Mr. Lewis next on February 26, 2016, and noted Mr. Lewis reported that physical therapy had been helping with pain relief and he felt improvement.[26]

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22 R. 725-728.

23 R. 733-736.

24 R. 742-743.

25 R. 747-749.

26 R. 773-775.

Mr. Lewis attended an Employer's Medical Examination (EME) with Charles E. Craven, M.D., and Richard Rivera, D.C., on February 26, 2016. The EME doctors diagnosed:

1. Minor nontraumatic cervical straining event in the performance of regular work duties occurring on August 29, 2015, and August 30, 2015.
2. Cervical spondylosis and chronic neck pain, preexisting and documented as symptomatic prior to the described industrial event of August 30, 2015. In the panel's medical opinion, this diagnosis was not aggravated by the described work events of August 29, 2015, and August 30, 2015.
3. Preexisting symptomatic left shoulder pain, specifically left acromioclavicular osteoarthritis (as documented at Orthopedic Physicians Anchorage on February 22, 2008), which in the panel's medical opinion was not aggravated by the industrial event of August 29, 2015, or August 30, 2015. Additionally, there is no objective evidence of a left shoulder acromioclavicular separation occurring during the course of chiropractic manipulations based on forensic review of the medical records.
4. Electrodiagnostic evidence of bilateral median nerve mononeuropathy (carpal tunnel syndrome) with a normal physical examination in this regard today.
5. Subjective complaints which greatly outweigh objective examination findings on today's examination.

Drs. Craven and Rivera opined the work injury would have caused "at most . . . a minor nontraumatic soft tissue cervical strain, which would have been the substantial cause of [Mr. Lewis's] neck conditions for a period of not more than six weeks," and the injury was medically stable by October 15, 2015, with no permanent impairment or need for further treatment. They opined work restrictions were due to pre-existing degenerative conditions, and not the work injury.[27]

Following the release of the EME report, Drs. Hall and Gevaert both stated they concurred with the EME findings and treatment recommendations.[28]

On April 22, 2016, Dr. Laufer examined Mr. Lewis and noted Mr. Lewis attributed his recent left shoulder injury to the chiropractic treatment. Dr. Laufer stated it was

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[27] R. 776-800.

[28] R. 824-825.

difficult to say where the injury occurred, and noted the January 27, 2016, MRI was "notable for a large labral tear, degenerative cystic changes, severe degenerative changes in the acromioclavicular joint, and acute marrow changes." He opined Mr. Lewis had not reached stability, and would not be able to return to his job at the Captain Cook Hotel.[29] On the same day, Dr. Laufer drafted a letter for Mr. Lewis stating that he had suffered recent acute injuries to his neck and left shoulder, and suffered from underlying chronic debilitating disease in his lumbar spine and cervical spine, generalized osteoarthritis, and chronic pain. Dr. Laufer opined Mr. Lewis was unlikely to be able to attain or maintain meaningful employment.[30] On April 27, 2016, Dr. Laufer predicted Mr. Lewis would have a permanent impairment after medical stability, but would be able to perform light duty work with a 20- to 25-pound lifting limit. Dr. Laufer predicted Mr. Lewis would not have the physical capacity to work as a small-engine mechanic or a building maintenance repairer.[31]

On May 16, 2016, Dr. Hall examined Mr. Lewis, who reported his pain had not improved since the prior visit. Dr. Hall reviewed x-ray imaging taken the same day and now opined a grade 2 AC separation of Mr. Lewis's left shoulder was shown. He stated it would require surgery, a Mumford procedure. He added, "We once again discussed that his current injury is related to his neck strain in that the treatment for his neck strain resulted in the injury to his AC joint. The patient is satisfied with that explanation."[32]

On September 14, 2016, Dr. Laufer said he could not provide a formal disability rating, but opined that "the combination of his degenerative cervical spine, degenerative lumbar spine, and left shoulder osteoarthritis with labral tear" would prevent him from being gainfully employed.[33]

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29 R. 1081-1084.

30 R. 51.

31 R. 1722-1728.

32 R. 1085-1087.

33 R. 1766.

Dr. Craven, on September 29, 2016, reviewed updated medical records, reiterated his conclusions from the February 26, 2016, EME, and stated his opinions had not changed as a result of the updated records. He disagreed with Dr. Hall's finding of a grade 2 sprain of the AC joint, and noted Dr. Hall had previously opined it was no greater than grade 1. He opined that Mr. Lewis's AC joint symptoms were not caused by chiropractic treatment or a work injury, but by his pre-existing degenerative condition.[34]

On April 17, 2017, Dr. Hall examined Mr. Lewis following an April 11, 2017, arthroscopic debridement surgery with open Mumford and open biceps tenodesis procedures. Dr. Hall did not think more narcotics would provide much relief, and recommended trying Lyrica and Toradol. He referred Mr. Lewis for physical therapy.[35]

Bruce M. McCormack, M.D., examined Mr. Lewis on May 31, 2017, for a second independent medical evaluation (SIME). Dr. McCormack diagnosed:

> Chronic low back pain, predating 2002, but aggravated by industrial injury in 2002, with Waddell signs, chronic pain, narcotic dependence and escalation, credibility issues.
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> Neck strain due to 8/30/15 injury, chronic neck and pain [sic] after 12/2/15 due to factors other than the work injury. Intermittent neck pain noted in medical records with cervical MRI in July 2005, cervical symptoms November 2012.
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> Left shoulder arthritis, left shoulder impingement, unrelated to the chiropractic ministrations on 1/15/16 and 1/18/16. Shoulder pain diagnosed as AC joint arthritis 2/22/08.

Dr. McCormack stated the work injury had caused a cervical muscular strain and temporary aggravation of age-related changes to Mr. Lewis's cervical spine, and added the symptoms lasted until December 2, 2015, when Dr. Gevaert released Mr. Lewis to work part-time. He noted that, on that date, Mr. Lewis had tested positive for narcotics other than those prescribed, and had previously been treating for low back pain, which he had not mentioned at the evaluation. He stated there was an absence of objective findings of injury on MRI and nerve studies after the work injury, and indicated that

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[34] R. 1767-1777.

[35] R. 1376-1377.

Mr. Lewis's medical history and behavior suggested drug-seeking causes for the treatment sought after December 2, 2015. He opined Mr. Lewis was capable of returning to work as a maintenance engineer at the Captain Cook Hotel, with limitations on repetitive overhead work and lifting over 25 pounds. These limitations were not related to the work injury. Dr. McCormack found Mr. Lewis was not credible. He based his opinion on the fact that Mr. Lewis had suffered from low back pain for 15 years prior to the date of injury, but did not mention it at the examination. Mr. Lewis had also stated he had gone to the emergency room the same day as the January 2016 injury, but the medical records indicated otherwise. He also surmised Mr. Lewis showed signs of drug-seeking behavior. He asked Mr. Lewis about the chiropractic traction he had been treating with at the time of the left shoulder injury, and opined the traction would not have caused the injury.[36]

On May 7, 2018, Dr. Laufer noted Mr. Lewis was seeking medical evidence to refute the EME report, and discussed the issue at length with Mr. Lewis. Dr. Laufer stated:

> He definitely has a number of significant injuries and disabilities, most prominent of which is his neck and shoulder issues. These are attributed to work related injuries. He does not require any medication refills. I would be happy to advocate for him. He has not demonstrated dishonest behavior or any overt attempt to manipulate.[37]

b. Reemployment history.

On January 13, 2016, the Division of Workers' Compensation issued a letter informing Mr. Lewis that he had missed 90 consecutive days of work from the injury, and rehabilitation specialist Forooz Sakata was assigned to complete an eligibility evaluation to determine whether he would qualify for reemployment benefits.[38]

On March 1, 2016, rehabilitation specialist Sakata issued an eligibility evaluation report, stating she had not received responses to requests for predictions of permanent

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[36] R. 1264-1293.

[37] R. 1447-1449.

[38] R. 1469-1470.

impairment from Dr. Laufer. She also found Mr. Lewis had not previously declined the development of a reemployment plan, received job dislocation benefits, or waived reemployment benefits and then returned to work in the same or similar occupation in terms of physical demands to the position at the time of injury. However, she was unable to determine whether Mr. Lewis was eligible for reemployment benefits without the impairment predictions.[39]

On March 23, 2016, RBA Designee Deborah Torgerson suspended the eligibility determination to request additional information and documentation from Ms. Sakata. The RBA Designee noted that Mr. Lewis had previously waived reemployment benefits under a prior workers' compensation injury.[40]

On July 5, 2016, rehabilitation specialist Sakata issued an addendum to her March 1, 2016, eligibility evaluation report. She reported that Mr. Lewis had previously waived reemployment benefits after being injured while working at a job classified as "very heavy duty," but had not returned to a position with the same physical requirements afterwards. She recommended Mr. Lewis be found eligible for reemployment benefits.[41]

On July 22, 2016, the RBA Designee determined that Mr. Lewis was not eligible for reemployment benefits. She cited the opinions of Drs. Craven and Rivera, in which Drs. Hall and Gevaert concurred, indicating that Mr. Lewis had no permanent impairment from the work injury at the time of medical stability. She noted that Dr. Laufer's opinion did not agree with the others, but stated that while his opinions were considered by her they did not outweigh the substantial medical evidence found in the opinions of Drs. Craven, Rivera, Hall, and Gevaert.[42]

On August 1, 2016, Mr. Lewis filed a petition for review and modification of the reemployment benefits decision.[43]

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39 R. 1711-1717.

40 R. 1718-1720.

41 R. 2665-2666.

42 R. 2669-2970.

43 R. 76.

The Board affirmed the finding of the RBA Designee that Mr. Lewis was ineligible for reemployment benefits. Mr. Lewis appealed this decision.

c. Procedural history.

On May 11, 2016, Mr. Lewis filed a claim for temporary total disability (TTD), permanent total disability, medical costs, transportation costs, review of a reemployment eligibility decision, penalty, interest, and unfair or frivolous controversion.[44]

On June 7, 2016, attorney Jonathan P. Hegna filed an entry of appearance to represent Mr. Lewis. Attorney Hegna subsequently withdrew his representation on November 1, 2017.[45]

On June 20, 2016, Hickel controverted all benefits (effective as of October 15, 2015), based on the EME report issued by Drs. Craven and Rivera.[46]

On December 14, 2017, Mr. Lewis filed a petition to strike Dr. McCormack's SIME report. Mr. Lewis stated Dr. McCormack had a conflict of interest due to treating his brother, was prejudiced against Mr. Lewis, included irrelevant information in his report, and exceeded his mandate in conducting the SIME. Mr. Lewis was not represented at this time. The petition to strike was denied at a prehearing on March 6, 2018, and the denial was not appealed.[47]

On May 22, 2018, the parties attended a prehearing conference and agreed to a hearing on July 24, 2018, to address the merits of Mr. Lewis's claim. The parties agreed to file evidence by June 26, 2018, and briefs and witness lists by July 17, 2018. The prehearing conference summary noting the deadlines was served to Mr. Lewis at his address of record.[48] Mr. Lewis was given an additional copy of this prehearing conference summary when he visited the Division's Anchorage office on June 7, 2018.

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44 R. 45-46.

45 R. 75, 161.

46 R. 29.

47 R. 163, 2645-2648.

48 R. 2657-2659.

On July 6, 2018, the parties attended a prehearing conference, at which the parties stipulated to add an issue for the July 24, 2018, hearing. The prehearing conference summary issued was served on Mr. Lewis, and reiterated the deadlines for filing of evidence, briefs, and witness lists.[49]

On July 23, 2018, the day before the scheduled hearing, Mr. Lewis filed a petition for extension of time for filing of witness lists and evidence, and simultaneously filed a witness list and evidence packet. The witness list included Drs. Laufer, Hall, Eule, Colen, Gevaert, Tew, and McCormack, physical therapist Shasta Hood, and Mr. Lewis's fiancée, Ms. Sellers. Mr. Lewis's evidence packet included a scanned disabled parking placard, phone bill and usage records, and various medical records, some of which had been previously filed and some of which had not.[50]

At the July 24, 2018, hearing, Mr. Lewis stated he had not previously arranged for the attendance or testimony of any of the medical witnesses on his witness list. He intended to use their testimony to discredit them, particularly SIME physician Dr. McCormack. He objected to consideration of Dr. McCormack's report, stating that Dr. McCormack should not have had access to all the medical records he reviewed, he disagreed with Dr. McCormack's statements regarding their interaction, and he felt a complete exam had not been performed. He requested that his x-rays be introduced into evidence, since they showed an AC joint separation, and only Drs. Hall and Tew had seen them. He asserted he had tried to get Drs. Craven and Rivera to review the x-rays and they refused and Dr. McCormack refused to allow Ms. Sellers the time to retrieve the x-rays from their hotel.[51]

Mr. Lewis declined to testify on his own behalf at the hearing and did not call Ms. Sellers as a witness. He was advised that the hearing would be his only opportunity to add his testimony to the record concerning the merits of his workers' compensation

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49 R. 2662-2664.

50 R. 444-446, 334-443.

51 Hr'g. Tr. at 6:1 – 7:3, 21:3-13, 22:17 – 23:20, 46:19-24, July 24, 2018.

case, and he would not have that option in any appeal proceedings. Mr. Lewis felt the Board panel was prejudiced against him, and he left the hearing prior to its conclusion.[52]

Mr. Lewis attended the prehearings at which the date and issues for hearing were set. The prehearing conference summaries were sent to Mr. Lewis's address of record.[53] Mr. Lewis did not file records showing incurred transportation costs, attorney fees, or legal costs. He did not file written arguments for hearing, and did not provide extensive argument or testify at hearing. His specific arguments in support of many of the claimed benefits are unknown.[54]

Hickel paid Mr. Lewis TTD benefits from September 1, 2015, through March 9, 2016.[55]

3. Standard of review.

The Board's findings of fact shall be upheld by the Commission on review if the Board's findings are supported by substantial evidence in light of the record as a whole.[56] On questions of law and procedure, the Commission does not defer to the Board's conclusions, but rather exercises its independent judgment. "In reviewing questions of law and procedure, the commission shall exercise its independent judgment."[57] The Board's findings of credibility are binding on the Commission because the Board "has the sole power to determine the credibility of a witness."[58] Such a determination by the Board is conclusive "even if the evidence is conflicting or susceptible to contrary conclusions."[59] The Board's application of its regulations to a particular case are reviewed

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[52] Hr'g Tr. at 34:20 – 35:12, 36:5-8, 38:1-11, 40:19-20, 41:2 – 42:2, 44:10-16, 45:1-20, 46:6-9, 58:7-10.

[53] Hr'g Tr. at 13:10-25; R. 2657-2659, 2662-2664.

[54] *Lewis* at 13, No. 54; Record.

[55] R. 022; *Lewis* at 3, No. 6; R. 590, 597, 603, 604, 605, 609, 629, 644, 698, 703, 709, 746, 805.

[56] AS 23.30.128(b).

[57] AS 23.30.128(b).

[58] AS 23.30.128(b); AS 23.30.122.

[59] *Id.*

to determine if the Board's actions were "arbitrary, unreasonable, or an abuse of discretion."[60]

4. Discussion.

The issues before the Board were specific benefits Mr. Lewis thought were owed to him and the RBA Designee's decision denying him retraining benefits. Mr. Lewis also sought $20,000,000.00 in unspecified damages.

a. The Board erred in not granting a continuance.

The Commission reviews the Board's decision not to grant Mr. Lewis a continuance at hearing under the abuse of discretion standard.[61] The Commission finds the Board abused its discretion by not granting Mr. Lewis his requested continuance of the hearing on July 24, 2018, which was implicit in his request for an extension of time to file his evidence and witness list. He repeated his request at the hearing, stating he was asking for a two-month continuance while he tried to line up doctors to testify.[62] Hickel objected, contending the hearing date had been selected at a prehearing conference on May 22, 2018, which Mr. Lewis attended, and he agreed to the hearing date. The prehearing conference was two months prior to the hearing date. Dates for witness lists, and briefs were established at the prehearing and provided to the parties as part of the prehearing summary. The parties agreed to file evidence by June 26, 2018, and briefs and witness lists by July 17, 2018.

The Board noted that the prehearing conference summary containing the deadlines was sent to Mr. Lewis at his address of record.[63] The Board also provided Mr. Lewis with an additional copy of this prehearing conference summary when he visited the Board's Anchorage office on June 7, 2018. Mr. Lewis affirmed at hearing he received

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60 *See, Burke v. Raven Electric, Inc.*, 420 P.3d 1196, 1207, (Alaska 2018)(citing *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619, 623 (Alaska 2007).

61 *Id.*

62 Hr'g Tr. at 26:17 – 27:12.

63 Hr'g Tr. at 27:21-24; R. 2657-2659.

the prehearing conference summaries.[64] It is not clear from the record that anyone at the Board provided information to Mr. Lewis concerning the reasons for a witness list, how to arrange to have witnesses testify at hearing, and the importance that both parties timely file their witness lists.

On July 23, 2018, the day before the hearing, Mr. Lewis filed a petition for extension of time for filing of witness lists and evidence, and simultaneously filed a witness list and evidence packet. In the alternative, he requested a continuance so he could "continue treatment and prepare for hearing."[65]

The Board issued an oral order at hearing which it reiterated in its written decision, denying a continuance. The Board found it would be a manifest injustice to continue the hearing, but did not detail as to whom or how it would be a manifest injustice. Certainly, it was not an injustice to Hickel as it did not have any medical experts standing by to testify at the hearing. Hickel is not currently paying benefits to Mr. Lewis. The length of the continuance requested was for two months. Therefore, it does not appear that Hickel would have suffered any manifest injustice if a two-month continuance had been granted.

On the other hand, Mr. Lewis asked for an additional two months and submitted a late-filed witness list. He had not arranged for any of the witnesses to testify at the hearing, seemingly under the impression that if he filed the list, the witnesses would be available for him to examine or cross-examine. Neither party presented any witnesses.

The Board also gave as a reason for declining to continue the hearing that it was concerned that a continuance could cause Mr. Lewis to run into a time problem under AS 23.30.110(c). This is the statute which requires an affidavit of readiness for hearing (ARH) be filed within two years of the employer's post-claim controversion. The Board did not explain to Mr. Lewis the significance of its concerns nor the possibilities of extending the time to file a new ARH. Moreover, there was a possibility of manifest injustice to Mr. Lewis, since he was unprepared for the hearing and clearly upset.[66] Even

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64 Hr'g Tr. at 13:19-21.

65 *Lewis* at 1.

66 Hr'g Tr. at 34:6-8, 34:20 – 37:8.

though the hearing officer tried to calm him and to encourage him to testify and present witnesses, Mr. Lewis was seemingly unable to comprehend what he needed to do.[67] It was also evident Mr. Lewis did not understand what a witness meant or that he needed to contact witnesses and arrange for them to testify at hearing.[68]

The Alaska Supreme Court (Court) has held that a pro se claimant must not be held as strictly to rules as represented parties.[69] Moreover, it is troubling that the Board decided the case without full testimony from Mr. Lewis or his fiancée and without a full medical record as exemplified by the medical records he attempted to introduce at hearing. In *Smith v. CSK Auto, Inc.*, the Court noted that an incomplete record might not be reversible error in all cases. However, it is troubling when the Board renders an adverse decision on an incomplete record, especially in matters involving a pro se litigant.[70]

On remand, the Board should immediately schedule a new hearing date so Mr. Lewis does not run afoul of any time limitations in AS 23.30.110(c). The Board should define for Mr. Lewis when the time limitation in AS 23.30.110(c) will run. As well, on remand, it would be helpful if the Board provided an explanation to Mr. Lewis of the importance of timely filing a witness list, how to arrange for witnesses to testify, and how to apply for a subpoena, if necessary. The Board, on remand, should also consider any new medical evidence Mr. Lewis provided or attempted to provide at the first hearing. The Board should also address the concern of Mr. Lewis that his medical records prior to 2003 need to be excluded from the record, and explain why or why not those medical records are relevant to his claim.

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67 Hr'g Tr. at 34:6-8, 34:20 – 37:8.

68 Hr'g Tr. at 21:3-13.

69 *See, e.g., Tobar v. Remington Holdings LP*, Slip Op. No. 7402, ___ P.3d ___, at 11-12 (Alaska Aug. 30, 2019).

70 *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1012-1013 (Alaska 2009).

b. The Board did not err in affirming the RBA Designee's decision that Mr. Lewis is not eligible for reemployment benefits.

The Board affirmed the RBA Designee's decision that Mr. Lewis was not eligible for retraining benefits. The Board reviews a determination of eligibility for reemployment benefits under the abuse of discretion standard which the Court has held means a decision was issued "which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive."[71]

The RBA Designee chose to rely on the medical opinions of Drs. Craven, Rivera, Gevaert, and Hall and chose not to rely on the opinion of Mr. Lewis's treating physician, Dr. Laufer. The physicians relied on by the RBA Designee all stated that Mr. Lewis would be able to perform the job of Maintenance Engineer, his job at the time of injury. AS 23.30.041(e) states that "an employee shall be eligible for [retraining] benefits . . . by having a physician predict that the employee" will not have the physical capacity to perform the job at the time of injury. The Court has held that AS 23.30.041(e) "allows the applicant to designate a treating physician who must be consulted, and whose views must be considered."[72] The Court then went on to state that if the employer provides substantial evidence contrary to that of the treating physician, the RBA Designee has the discretion to determine upon which medical evidence to rely in determining the employee's eligibility.[73]

Here the RBA Designee expressly stated the rehabilitation specialist consulted with Dr. Laufer and that the RBA Designee considered his opinion. She also weighed the opinions of Hickel's EME physicians (Drs. Craven and Rivera) and two of Mr. Lewis's prior treating physicians (Drs. Gevaert and Hall). Those four opined, in opposition to Dr. Laufer, that Mr. Lewis had the physical capacities to perform his job at the time of injury. The RBA Designee found their opinions to be substantial evidence and she had the authority to rely on those opinions in opposition to relying on the opinion of Dr. Laufer.

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[71] *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985)(citation omitted).

[72] *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1106 (Alaska 1999).

[73] *Id.* at 1107.

No evidence was proffered, and none exists in the record, to support any contention that the RBA Designee's decision was arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive. Therefore, the Board properly affirmed the RBA Designee's decision and denied Mr. Lewis's petition for review and modification of that decision. Both the RBA Designee's decision, and the Board's decision affirming it, are supported by substantial evidence in the record as a whole and by the applicable law.

c. The Board properly denied the request of Mr. Lewis for $20,000,000.00 in damages.

Mr. Lewis seeks $20,000,000.00 in unspecified damages. He did not state the basis for his claim. Nonetheless, entitlement to workers' compensation benefits is determined solely by reference to the Act. The Act provides, among other benefits, for time loss, medical treatment when necessary, and retraining when the evidence supports a claim. The Act does not provide for or allow for other kinds of damages. The Court, in *Gilmore*, stated that the Act is the result of a basic compromise by which the employee gives up "common law claims against the employer in return for adequate compensation without the delay and expenses inherent in civil litigation."[74] The Board correctly denied this claim.

[74] *Gilmore v. Alaska Workers' Compensation Board*, 882 P.2d 922, 927 (Alaska 1994)(superseded by statute on other grounds).

5. Conclusion.

The Board's decisions denying Mr. Lewis's petition to review and modify the RBA Designee's decision on eligibility for retraining and his claim for $20,000,000.00 in damages are AFFIRMED. The remainder of the Board's decision is REVERSED and the matter REMANDED for action consistent with this decision.

Date: ___*18 September 2019*____ Alaska Workers' Compensation Appeals Commission

Signed
James N. Rhodes, Appeals Commissioner

Signed
Amy M. Steele, Appeals Commissioner

Signed
Deirdre D. Ford, Chair

APPEAL PROCEDURES

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

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

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

RECONSIDERATION

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

I certify that, with the exception of changes made in formatting for publication, this is a full and correct copy of Final Decision No. 268, issued in the matter of *Randall Lewis vs. Hickel Investment Company and Alaska National Insurance Company*, AWCAC Appeal No. 18-015, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on September 18, 2019.

Date: *September 19, 2019*

Signed

K. Morrison, Appeals Commission Clerk