

Alaska Workers' Compensation Appeals Commission

Carol S. Corey,
Appellant,

vs.

NANA Regional Corporation, Inc. and
ACE Indemnity Insurance Co.,
Appellees.

Final Decision

Decision No. 192 March 18, 2014

AWCAC Appeal No. 13-011
AWCB Decision Nos. 13-0065 and 13-0074
AWCB Case No. 200906699

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 13-0065, issued at Juneau, Alaska, on June 12, 2013, by southern panel members Marie Y. Marx, Chair, Bradley S. Austin, Member for Labor, and Charles M. Collins, Member for Industry, and Alaska Workers' Compensation Board Final Decision and Order on Reconsideration No. 13-0074, issued at Juneau, Alaska, on June 27, 2013, by southern panel members Marie Y. Marx, Chair, Bradley S. Austin, Member for Labor, and Charles M. Collins, Member for Industry.

Appearances: Carol S. Corey, self-represented appellant; Robert J. Bredesen, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, NANA Regional Corporation, Inc. and ACE Indemnity Insurance Co.

Commission proceedings: Appeal filed July 9, 2013; briefing completed November 25, 2013; oral argument held on January 29, 2014.

Commissioners: David W. Richards, Philip E. Ulmer, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Carol S. Corey (Corey), slipped and fell on a wet floor, injuring her left knee and hitting her head on a garbage can, while working in a school cafeteria for

appellee, NANA Regional Corporation (NANA Regional) on April 29, 2009.¹ NANA Regional paid disability benefits, either temporary total disability (TTD) or temporary partial disability (TPD), from May 8, 2009, through September 19, 2010.² The board awarded benefits for medical treatment for her left knee through November 4, 2012, and denied medical treatment for her thoracic and cervical spine after July 10, 2009.³ The board awarded TTD from November 30, 2009, to January 2010, but credited NANA Regional for TPD payments made during this same period toward its liability for TTD benefits.⁴

Corey appealed to the Workers' Compensation Appeals Commission (commission). She asserts that the board erred in not awarding her additional disability benefits after September 19, 2010, and permanent partial impairment (PPI) benefits, and should have found her lumbar spine condition compensable. The commission concludes that neither the PPI benefits nor the compensability of her lumbar spine were issues before the board and, therefore, the board did not err in failing to rule on these issues. Otherwise, the commission remands this matter to the board so that it may make sufficient findings in terms of any entitlement Corey might have to disability benefits after September 19, 2010.

2. Factual background and proceedings.

On April 29, 2009, Corey was injured when she slipped on a wet floor and fell, landing on her left knee and hitting her head on a garbage can while working part-time, about 20 hours a week,⁵ in a school lunchroom. Prior to the work accident, Corey had

¹ R. 0001. The report of injury indicates April 30, 2009, was the injury date, but Corey testified that her fall actually occurred on April 29, 2009. Hr'g Tr. 101:5-8.

² R. 0055-56.

³ *See Corey v. NANA Regional Corp., Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0065 at 26 (June 12, 2013)(*Corey I*).

⁴ *See Corey v. NANA Regional Corp., Inc.*, Alaska Workers' Comp. Bd. Dec. No. 13-0074 at 4 (June 27, 2013)(*Corey II*).

⁵ Hr'g Tr. 105:21-106:1.

been treated for cervical spine pain since 1989,⁶ most recently by Gordon L. Shepro, D.C. who began treating her in February 2009.⁷ After the work accident, on May 7, 2009, Dr. Shepro treated Corey for head, left knee, left hip, left shoulder, neck, and upper and middle back pain.⁸ Corey reported to him that she fell on her left knee and hit her head on a garbage can. Dr. Shepro's diagnoses included shoulder, knee, ankle, and cervical and thoracic spine strain/sprain.⁹ He initially recommended chiropractic adjustments and restricted Corey from working.¹⁰ Later that same month, Dr. Shepro recommended a left knee x-ray and left knee magnetic resonance imaging (MRI). The left knee x-ray was negative.¹¹ The MRI showed: "(1) grossly negative MRI of the left knee with trace physiologic joint fluid, and (2) tiny subchondral cyst of the proximal medial femoral condyle."¹²

Other doctors who examined Corey agreed that she suffered a thoracic and cervical strain as a result of the work injury but concluded that the strain would have resolved a few months after her injury. The employer medical evaluators, orthopedic surgeon Thad C. Stanford, M.D., and chiropractic orthopedist Charles A. Simpson, D.C., concluded that any thoracocervical strain had resolved as of the exam date, July 10, 2009, and "her current cervical spine problem is entirely related to this preexisting condition."¹³ Similarly, at another employer's medical evaluation (EME), more than a year later, on September 20, 2010, orthopedic surgeon Marilyn L. Yodlowski, M.D., and neurologist Gerald R. Reimer, M.D., concluded that the cervical thoracic sprain/strain suffered in the

⁶ Hr'g Tr. 74:14–77:9.

⁷ R. 0093, 1231, 1234.

⁸ R. 0667.

⁹ R. 0674-75.

¹⁰ R. 0677.

¹¹ R. 0709.

¹² R. 0665.

¹³ R. 0015.

April 2009 incident was the substantial cause of her initial need for medical treatment.¹⁴ But they concluded that any sprain/strain resolved three months after the date of injury and was no longer the substantial cause of the need for any further medical treatment.¹⁵

In terms of her left knee, for years after Corey's injury, she continued to suffer knee pain that was unexplained by the objective findings and examinations of doctors. Orthopedic surgeon Daniel Harrah, M.D., noted on June 23, 2009, that Corey's left knee had full range of motion, and there was no warmth, swelling, or effusion, and her joint lines were not specifically tender. He recommended physical therapy.¹⁶ Similarly, the EME doctors, Dr. Stanford and Dr. Simpson, observed in July 2009 that the measure of Corey's symptoms "does not correspond with objective clinical findings of abnormality. At this point in time, in the course of a musculoskeletal injury, we would expect at least some resolution of symptoms. In this case, she reports no improvement at all with regard to her left knee. This is certainly a red flag in terms of ongoing clinical treatment."¹⁷ They diagnosed a left knee contusion as a result of the work injury and recommended further conservative care with Dr. Harrah.¹⁸

A few months later, on September 23, 2009, Ted L. Schwarting, M.D., stated, "I cannot gain objective findings for her joint at this point," as Corey continued to report left knee pain and recommended a repeated MRI.¹⁹ A day later, a left knee MRI showed: (1) mild patellofemoral compartmental chondromalacia and (2) mild grade II cartilage loss along the posterior lateral tibial plateau, without associated underlying

¹⁴ R. 0041.

¹⁵ *Id.*

¹⁶ R. 1296.

¹⁷ R. 0015.

¹⁸ R. 0013-14.

¹⁹ R. 1355.

bony change.²⁰ On September 30, 2009, Dr. Schwarting stated, "The patient's pain is clearly out of proportion to the findings on the MRI."²¹

On October 14, 2009, Dr. Stanford again examined Corey for an EME and stated his impressions were: "(1) history of left knee injury with mild preexisting retropatellar degeneration and lateral tibial plateau degeneration, (2) possible chronic inflammation synovial, left knee, (3) possible reflex sympathetic dystrophy, left knee and leg, (4) possible psychologic exaggerated pain behavior, and (5) doubt secondary gain."²² He stated that he could not rule out the April 2009 work injury as the substantial cause of her conditions and need for medical treatment, and that Corey was not medically stable.²³

Dr. Schwarting released Corey to light duty work on November 13, 2009.²⁴ In January 2010, Corey returned to light duty work for NANA Regional and continued working for the rest of that school year and the next one. She was laid off for the 2011-2012 school year.²⁵

On August 31, 2010, physiatrist John Bursell, M.D., treated Corey for continued left knee pain and discussed with Corey a possible referral for knee arthroscopy. Dr. Bursell stated, "[t]he knee has bee[n] swelling."²⁶

On September 20, 2010, Drs. Yodlowski and Reimer examined Corey and diagnosed a left knee contusion and possible sprain/strain at a third EME.²⁷ Like earlier doctors, they stated, "there is no explanation for her ongoing pain complaints regarding her left lower extremity based on objective findings. Any contusion or a sprain/strain . . . is long resolved more than a year ago. She had no evidence of any ligamentous tear or

²⁰ R. 1356.

²¹ R. 1357.

²² R. 1361.

²³ R. 1362-63.

²⁴ R. 1364-65.

²⁵ Hr'g Tr. 103-105.

²⁶ R. 1424.

²⁷ R. 0040.

disruption, no instability of her knee, and no evidence of a bony contusion, fracture, or other post-traumatic finding.”²⁸ They concluded that any injury to the left knee that she had suffered due to the work incident would have resolved within three months from the date of injury.²⁹

NANA Regional controverted all benefits based on Drs. Yodlowski and Reimer’s EME report on October 22, 2010.³⁰ Up to this point, NANA Regional had paid Corey TTD benefits from May 8, 2009, through November 29, 2009, TPD benefits from November 30, 2009, through June 2, 2010, TTD benefits from June 3, 2010, through August 19, 2010, and TPD benefits from August 20, 2010, through September 19, 2010.³¹ On October 25, 2010, Corey filed a workers’ compensation claim requesting TTD, TPD, medical costs, and attorney fees and costs.³²

Eventually, on February 3, 2011, Dr. Harrah recommended left knee arthroscopy after Corey reported left knee pain and popping within the knee. He stated, “I think it is reasonable to proceed with arthroscopy with an evaluation . . . it is somewhat intellectually unsatisfying to go into an arthroscopy without a definitive diagnosis, but in most of these cases, a specific pathological lesion is found and corrected.”³³ On June 2, 2011, Dr. Harrah saw Corey again and recommended arthroscopic meniscectomy. He stated, “Although she had a negative MRI, MRIs can be negative, even with a significant tear in the meniscus.”³⁴

Dr. Harrah treated Corey for left knee pain on March 6, 2012. He stated, “[s]he is currently using crutches. The pain is increased with weightbearing and that is why she has resorted to crutches.” He also stated, “[a]s far as her overall issue, she

²⁸ R. 0040.

²⁹ R. 0041.

³⁰ R. 0023.

³¹ R. 0055-56.

³² R. 0064-65.

³³ R. 0518.

³⁴ R. 0519.

certainly has a lot more diffuse pain than most patients do with meniscal pathology. Once again, I do not expect knee arthroscopy to cure all of her aches and pains. She is fairly consistent in her complaints.”³⁵

On March 20, 2012, Corey saw orthopedic surgeon Lowell M. Anderson, M.D., for a second independent medical evaluation (SIME).³⁶ Dr. Anderson did not relate any of his diagnosed conditions to the April 2009 work injury, including her continued left knee pain and the condition of her cervical spine and low back.³⁷ He concluded the substantial cause of Corey’s need for medical treatment for her cervical and lumbar spine and her left knee medical treatment was the natural progression of her preexisting age-related and degenerative changes.³⁸

Dr. Harrah performed a left knee arthroscopic evaluation on May 4, 2012, and found a chondral fracture of both the medial and lateral tibial plateau consistent with her April 2009 injury. He also found a small meniscus tear and minor arthritic changes.³⁹ On July 24, 2012, Dr. Harrah further explained he found a linear fracture through the cartilage on both sides of the tibia, which was consistent with her April 2009 injury. He concluded Corey’s work injury resulted in these findings, stating, “I have never seen this type of damage in a nontraumatic setting.”⁴⁰

On February 27, 2013, Corey saw Dr. Anderson for a follow-up SIME.⁴¹ Dr. Anderson reviewed Dr. Harrah’s operative report and thought Corey’s April 2009 work injury was not the substantial cause of her cervical, thoracic, and lumbar spine symptoms and conditions.⁴² Regarding Corey’s left knee, he stated her April 2009 fall,

³⁵ R. 0521.

³⁶ R. 0492-510.

³⁷ R. 0505-06.

³⁸ R. 0507.

³⁹ R. 0523, 0531-32.

⁴⁰ R. 1112.

⁴¹ R. 0471-91.

⁴² R. 0488.

“could be considered the substantial cause of her claimed disability and need for medical treatment. Preexisting medial and lateral tibial plateau chondromalacia, more likely than not, was present. Chiropractic records from February 2009 indicate[] she was using a long knee ice pack for treatment of preexisting knee symptoms. . . .”⁴³ Dr. Anderson stated her work injury possibly aggravated her preexisting left knee chondromalacia, although he noted that, “[t]he claimed mechanism of injury . . . places significant question on this conclusion. Her broad variety of nonspecific complaints, symptom magnification[,] and non-physiologic findings, places additional question on this conclusion.”⁴⁴ He concluded Corey was medically stable six months following her left knee arthroscopy.⁴⁵ Dr. Anderson provided a PPI rating for her left knee of 3 percent.⁴⁶

At an April 25, 2013, deposition, Dr. Anderson further explained why he believed Corey’s surgical findings were not consistent with a fall forward onto the knee or a fall on the side of the knee. He explained typically, arthroscopic findings such as Corey’s are caused by a person landing on their feet with their legs fully straight.⁴⁷ He stated, “I think it would be highly unusual to have that type of described pathology to both sides of the joint from her described injury.”⁴⁸ He described Dr. Harrah’s findings as chondromalacia or “fissures” in the joint surface cartilage⁴⁹ and stated, “[c]alling that a fracture is probably an exaggeration of what was visualized. And, typically, a fissure is a degenerative process, in my opinion. . . .”⁵⁰ He further stated, “when you have a fissure to the joint surface, you can end up with nonspecific complaints, maybe some

⁴³ R. 0489.

⁴⁴ R. 0490.

⁴⁵ R. 0489.

⁴⁶ R. 0489-90.

⁴⁷ R. 0450-51.

⁴⁸ R. 0424.

⁴⁹ R. 0407.

⁵⁰ R. 0423.

aching to the knee, but the magnitude of discomfort she was complaining of is not consistent with the findings at the time of arthroscopy.”⁵¹ He acknowledged he misread Corey’s chiropractic treatment records, clarifying it was a May 2009 and not a February 2009 record that indicated Corey was using a long knee ice pack for treatment. However, he stated, “I would suspect that she probably had some preexisting symptoms, and there is a reasonable chance that type of injury she had could have aggravated those symptoms for a period of time without causing permanent damage.”⁵²

Eight pre-hearing conferences were held over the course of discovery for Corey’s claim. The first summary, on November 30, 2010, identified Corey’s injured body part as the left knee and identified her issues as TTD, TPD, medical costs, and attorney fees and costs.⁵³ The second summary, on January 25, 2011, listed the same issues and injured body parts.⁵⁴ The third, held on January 17, 2012, added cervical and thoracic spine as injured body parts; NANA Regional’s attorney consented to this change.⁵⁵ The next five conferences did not identify any additional injured body parts or benefits sought by Corey.⁵⁶ At all the prehearing conferences, attorney Kirsten Swanson represented Corey.⁵⁷

At the hearing on May 14, 2013, the board clarified that the issues were “temporary total disability, temporary partial disability, medical costs, including surgery, and attorney’s fees and costs, all relating to Ms. Corey’s left knee, cervical, and thoracic

⁵¹ R. 0433.

⁵² R. 0437-38.

⁵³ R. 1905.

⁵⁴ R. 1909.

⁵⁵ R. 1930.

⁵⁶ R. 1938-39 (prehearing conference held on January 8, 2012); R. 1941-42 (conference held on March 14, 2013); R. 1945-46 (conference held on April 23, 2013); R. 1947-48 (conference held on May 1, 2013); R. 1949-50 (conference held on May 9, 2013).

⁵⁷ R. 1905, 1909, 1930, 1938-39, 1941-42, 1945-50.

spine, and then also employer's petition for social security offset. . . ."58 The parties agreed those were the issues that the board would decide.⁵⁹ Virtually the entire hearing, including opening statements, the introduction of evidence, and closing arguments, was devoted to the compensability of the claim, with minimal evidence introduced on compensation payment issues.

Dr. Harrah was the only doctor who testified at the hearing.⁶⁰ He testified that Corey's work injury was the substantial cause of her left knee chondral fracture symptoms, disability, and need for left knee medical treatment.⁶¹ Dr. Harrah explained that Corey's type of crack was consistent with a traumatic event and not a degenerative condition⁶² and that Corey suffered a fracture rather than a fissure. Dr. Harrah explained that fissures are degenerative changes where multiple short cracks go every which way in contrast to a "fracture," where there is one crack with the surrounding cartilage normal or fairly normal.⁶³ He testified that Corey's chondral fracture went from one side of the knee to the other, one crack running the whole length of the knee.⁶⁴

Moreover, although Dr. Harrah agreed with Dr. Anderson that typically the way Corey's type of fracture occurs is by a person landing axially, he stated that sometimes a traumatic injury causes an unusual fracture that does not fit the expected one and this is what occurred in Corey's case.⁶⁵ Dr. Harrah also testified that about five percent of MRIs are inaccurate and can miss significant findings, and that is also what occurred

⁵⁸ Hr'g Tr. 4:11-15.

⁵⁹ Hr'g Tr. 4:15-18.

⁶⁰ Hr'g Tr. 2.

⁶¹ Hr'g Tr. 37:12-38:25.

⁶² Hr'g Tr. 20:2-15.

⁶³ Hr'g Tr. 38:7-40:8.

⁶⁴ Hr'g Tr. 19:18-20.

⁶⁵ Hr'g Tr. 40:9-41:19.

in Corey's case.⁶⁶ Dr. Harrah stated that Corey's diffuse pain symptoms were consistent with a chondral fracture.⁶⁷ He stated Corey was medically stable by six months after her left knee surgery.⁶⁸ The board concluded that Dr. Harrah was "very credible."⁶⁹

Corey testified at the hearing as well⁷⁰ and the board found her to be "credible."⁷¹ Among the subjects that she testified about was whether she worked the same hours for the same pay once she returned to light duty work in January 2010.⁷²

After attaching the presumption of compensability and concluding that it was rebutted, the board decided that Corey's slip and fall on April 29, 2009, caused a chondral fracture in her left knee. The board concluded that although Corey had minor preexisting left knee arthritis and a small meniscus tear, both of which were not work-related, the April 2009 fall was the substantial cause of Corey's need for left knee medical treatment until November 4, 2012.⁷³ The board also concluded that Corey's fall temporarily aggravated her preexisting cervical and thoracic spine conditions and was the substantial cause of her need for medical treatment until, but not after, July 10, 2009. The board consequently denied her claim for ongoing cervical and thoracic medical treatment.⁷⁴

The board awarded TTD for the period of September 20, 2009, to January 2010, based on Corey's testimony that she was unable to work during this period and Dr. Harrah's opinion that Corey's later-discovered chondral fracture resulted in

⁶⁶ Hr'g Tr. 18:17-20.

⁶⁷ Hr'g Tr. 25:22-26:11.

⁶⁸ Hr'g Tr. 59:19-61:6.

⁶⁹ *Corey I*, Bd. Dec. No. 13-0065 at 11.

⁷⁰ Hr'g Tr. 69-108.

⁷¹ *Corey I*, Bd. Dec. No. 13-0065 at 11.

⁷² Hr'g Tr. 105:21-107:10.

⁷³ *See Corey I*, Bd. Dec. No. 13-0065 at 21-22.

⁷⁴ *See id.* at 23.

significant disability.⁷⁵ But the board denied Corey's claim for TPD from January 2010 to May 2011 because it found she worked the same number of hours and was paid the same wage as she was prior to her work injury.⁷⁶ The board also granted NANA Regional's request for a Social Security offset and Corey's request for attorney fees and costs.⁷⁷

NANA Regional petitioned the board for reconsideration, arguing that the board erroneously awarded TTD for a time period in which NANA Regional had already paid disability benefits. The board agreed that it erred in ordering NANA Regional to pay additional TTD from September 20, 2009, to November 30, 2009, and vacated that award.⁷⁸ In addition, the board concluded that NANA Regional could credit its TPD payments for the period from November 30, 2009, to January 2010, toward its TTD liability for that same period.⁷⁹

Corey appealed.

3. *Standard of review.*

"Whether the board made sufficient findings is a question of law that we review de novo."⁸⁰ The commission must accept the board's credibility determinations and the board's assignment of weight to the evidence.⁸¹ "A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions."⁸² The commission's role is to evaluate whether substantial evidence in light of the whole

⁷⁵ See *Corey I*, Bd. Dec. No. 13-0065 at 23-24.

⁷⁶ See *id.* at 24-25.

⁷⁷ See *id.* at 25-26.

⁷⁸ See *Corey II*, Bd. Dec. No. 13-0074 at 4.

⁷⁹ See *id.*

⁸⁰ *Pietro v. Unocal Corp.*, 233 P.3d 604, 611 (citing *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006)).

⁸¹ AS 23.30.122; AS 23.30.128(b).

⁸² AS 23.30.122.

record supports the board's findings of fact.⁸³ Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion.⁸⁴ The commission applies its independent judgment to questions of law and procedure,⁸⁵ including the question of which issues were within the scope of the board's hearing.⁸⁶

4. *Discussion.*

a. *The compensability of the lumbar spine and PPI benefits cannot be considered on appeal because the board did not decide those issues.*

Corey argues that she should receive benefits for her lumbar spine as well as PPI benefits. Although at least one doctor discussed her lumbar spine and provided a PPI rating for her knee,⁸⁷ these issues were not within the scope of the board's hearing. The board's authority to hear and determine questions with respect to a claim is "limited to the questions raised by the parties or by the agency upon notice duly given to the parties."⁸⁸

The prehearing conferences narrow and define the issues that will be decided at hearing.⁸⁹ None of the eight prehearing conference summaries listed PPI or the

⁸³ AS 23.30.128(b).

⁸⁴ *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

⁸⁵ AS 23.30.128(b).

⁸⁶ *See Lynden Transport Inc. v. Mauget*, Alaska Workers' Comp. App. Comm'n Dec. No. 154, 8-9 (June 17, 2011).

⁸⁷ The SIME doctor, Dr. Anderson, concluded that the April 2009 fall at work was not the substantial cause of her lumbar spine condition, and provided a whole-person impairment rating of 3 percent based on her left knee condition. R. 0488, 0490.

⁸⁸ *Simon v. Alaska Wood Prods.*, 633 P.2d 252, 256 (Alaska 1981).

⁸⁹ 8 AAC 45.065(c) provides in relevant part that the prehearing conference summary "will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and course of the hearing." 8 AAC 45.070(g) provides: "Except when the board or its designee determines that unusual and extenuating circumstances exist, the summary . . . governs the issues and the course of the hearing."

compensability of Corey's lumbar spine as issues.⁹⁰ Also, the parties, both of whom were represented by attorneys, agreed at hearing that the issues before the board were the compensability of Corey's left knee and her thoracic and cervical spine, TTD, TPD, a Social Security offset, and attorney fees and costs.⁹¹ Thus, the board properly did not decide the compensability of Corey's lumbar spine and her eligibility for PPI because the parties had not raised those issues for the board to decide. Moreover, as for the commission, it cannot decide new issues on appeal because its role is to review board decisions, not to act as the initial fact-finder or decision-maker in workers' compensation cases.⁹²

b. The commission remands the issue of Corey's entitlement to temporary disability benefits after September 19, 2010, to the board.

Corey argues that the board erred in not awarding her disability benefits after September 19, 2010, because she did not have knee surgery until May 4, 2012, and she was without work for two years and received no compensation.⁹³ The commission concludes the board failed to make sufficient findings to deny benefits after September 19, 2010, and remands for the board to reconsider which periods, if any, Corey is entitled to either TTD or TPD benefits after September 19, 2010.

⁹⁰ R. 1905, 1909, 1930, 1938-39, 1941-42, 1945-50.

⁹¹ Hr'g Tr. 4:11-18.

⁹² See AS 23.30.128(b) (explaining the commission's role is to "*review* discretionary actions, findings of fact and conclusions of law by the board . . .") (italics added); and AS 23.30.128(a) and (c) (restricting the commission's ability to receive new or additional evidence to four narrow circumstances: applications for stays, attorney fees and costs on appeal, fee waivers on appeal, and dismissals of appeals for failure to prosecute or upon settlement). This can be contrasted with the board's authority. See AS 23.30.110 (providing in part that "the board may hear and determine all questions with respect to a claim"); AS 23.30.122 (giving the board the "sole power" to decide witness credibility and equating the board's findings of fact with a jury's finding in a civil action).

⁹³ Corey's Motion/Request for the commission to "reconsider TTD benefits." The commission infers that through this Motion/Request, Corey is contesting the board's failure to award her disability benefits, either TTD or TPD, after September 19, 2010.

Both TPD⁹⁴ and TTD⁹⁵ are payable only during “the continuance of the disability.” The Alaska Workers’ Compensation Act defines disability as “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.”⁹⁶ TPD is owed when the employee suffers a “decrease of earning capacity” due to the work injury; TTD is owed when the employee temporarily cannot earn any wages due to the work injury.⁹⁷ Both types of benefits

end

⁹⁴ AS 23.30.200 provides:

In the case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee’s spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

⁹⁵ AS 23.30.185 provides:

In the case of disability total in character but temporary in quality, 80 percent of the injured employee’s spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

⁹⁶ AS 23.30.395(16).

⁹⁷ The presumption of compensability, AS 23.30.120(a)(1), which allocates the burden of production, applies to both types of benefits. “Once an employee is disabled, the law presumes that the employee’s disability continues until the employer produces substantial evidence to the contrary.” *E.g., Grove v. Alaska Constr. & Erectors*, 948 P.2d 454, 458 (Alaska 1997); *Olson v. AIC/Martin, J.V.*, 818 P.2d 669, 672 (Alaska 1991), *Bailey v. Litwin Corp.*, 713 P.2d 249, 252 (Alaska 1986). If the employer produces substantial evidence, the presumption drops out and the claimant must prove the claim by a preponderance of the evidence. *Id.*

However, if a claimant has no “objectively measurable improvement for a period of 45 days,” the presumption of medical stability applies. AS 23.30.395(27). This presumption requires the claimant to rebut it with clear and convincing evidence. *Alyeska Pipeline Serv. Co. v. DeShong*, 77 P.3d 1227, 1232 (Alaska 2003)(*DeShong*).

when a claimant reaches medical stability.⁹⁸ Moreover, the Alaska Supreme Court has held that returning to work, without any consideration of medical stability, is sufficient to rebut the presumption of compensability for TTD benefits.⁹⁹

In Corey's case, NANA Regional ceased paying TTD and TPD benefits as of September 19, 2010, when it controverted Corey's claim based on Drs. Yodlowski and Reimer's opinion that Corey's work-related injuries would have resolved within three months after the fall.¹⁰⁰ The board declined to award TPD for the period from January 2010 to May 2011, concluding that Corey "worked the same number of hours, and at the same wage, as she did prior to her work injury."¹⁰¹ NANA Regional had paid disability benefits for a portion of this period, January 2010 to September 19, 2010. The board did not address whether Corey was entitled to any form of disability payments after May 2011. Neither the parties' arguments at hearing, nor the parties' hearing briefs, specified the timeframes for which Corey was seeking TTD and/or TPD benefits.¹⁰²

⁹⁸ AS 23.30.395(27) defines "medical stability" as the date after which further objectively measurable improvements from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence.

⁹⁹ *See Bailey*, 713 P.2d at 253-54 (noting "medical stability is *not* necessarily the point at which temporary disability ceases" and concluding that employee was no longer entitled to temporary disability benefits because he had returned to work and was earning more than he had before his injury, despite his arguments that had he not been injured, he could have earned more).

¹⁰⁰ R. 0023, 0041, 0043.

¹⁰¹ *Corey I*, Bd. Dec. No. 13-0065 at 25.

¹⁰² Corey's attorney stated in her hearing brief: "Ms. Corey seeks payment for the period when she remained medically unstable and unable to work." R. 0639.

The commission concludes that the board's decision lacks sufficient support in the record. Nothing in the record substantiates that Corey was earning the same wage when she returned to work for NANA Regional in January 2010. Corey testified that she worked the same number of hours for NANA Regional after she returned to work as before her injury.¹⁰³ But she testified that she was unsure whether her pay rate was the same when she returned to work after her injury;¹⁰⁴ the record contains no documentation of her pay rates before and after the work injury. In addition, the commission cannot ascertain the basis for the board determining that May 2011 would be the cut-off for any disability benefits. A layoff does not necessarily end entitlement to temporary disability benefits.¹⁰⁵

We remand for the board to decide if Corey was entitled to disability benefits after September 19, 2010, and to determine when her entitlement, if she was so entitled, to those benefits ended.

¹⁰³ Hr'g Tr. 105:21–106:1.

¹⁰⁴ Hr'g T. 106:2-107:10.

¹⁰⁵ *See DeShong*, 77 P.3d at 1227 (holding board did not err in awarding TTD to the claimant from the time she was laid off until her successful elbow surgery, even though claimant received unemployment benefits; claimant had overcome the presumption of medical stability and had to repay unemployment benefits). *See also Olson*, 818 P.2d at 673-74 (holding that the ability to perform any kind of work does not determine whether temporary total disability has ended; worker's earning potential and availability of employment must be considered); *Bailey*, 713 P.2d at 254 (holding that board's finding that claimant's gaps in employment were due to the economy and construction cycles, rather than due to his work-related injury, was supported by substantial evidence).

5. Conclusion.

For the above reasons, the commission AFFIRMS in part and REMANDS the board's decision, as modified on reconsideration.

Date: 18 March 2014 ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Signed

David W. Richards, Appeals Commissioner

Signed

Philip E. Ulmer, Appeals Commissioner

Signed

Laurence Keyes, Chair

This is a final decision on the merits of this appeal as to the appeals commission's affirmation of the board's decision in part. This is a non-final decision as to the appeals commission's remand of the matter in part to the board. The final decision portion of this decision becomes effective when distributed (mailed) unless proceedings to 1) reconsider the final decision portion are instituted (started), pursuant to AS 23.30.128(f) and 8 AAC 57.230, or 2) unless proceedings to appeal the final decision portion to the Alaska Supreme Court, pursuant to AS 23.30.129(a) are instituted. See Reconsideration and Appeal Procedures sections below.

The non-final portion of this decision becomes effective when distributed (mailed) unless proceedings to petition for review to the Alaska Supreme Court, pursuant to AS 23.30.129(a) and Rules of Appellate Procedure 401-403 are instituted. See Petition for Review section below.

To see the date of distribution look at the box below.

RECONSIDERATION

A party may request the commission to reconsider this decision as to the final decision portion by filing a motion for reconsideration. AS 23.30.128(e) and 8 AAC 57.230. The motion for reconsideration must be filed with the commission no later than 30 days after the day this decision is distributed (mailed) to the parties. If a request for reconsideration of a final decision is filed on time with the commission, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f).

APPEAL

The commission's final decision portion becomes effective when distributed unless proceedings to appeal to the Alaska Supreme Court are instituted (started). Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court no later than 30 days after the date this final decision is distributed¹⁰⁶ and be brought by a party-in-interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. *See* AS 23.30.129(a). The appeals commission and the workers' compensation board are not parties.

You may wish to consider consulting with legal counsel before filing an appeal. 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

More information is available on the Alaska Court System's website:

<http://www.courts.alaska.gov/>

PETITION FOR REVIEW

A party may petition the Alaska Supreme Court for review of that portion of the commission's decision that is non-final. AS 23.30.129(a) and Rules of Appellate Procedure 401-403. The petition for review must be filed with the Alaska Supreme Court no later than 10 days after the date this decision is distributed.¹⁰⁷

¹⁰⁶ A party has 30 days after the distribution of a final decision of the commission to file an appeal with the supreme court. If the commission's decision was distributed by mail only to a party, then three days are added to the 30 days, pursuant to Rule of Appellate Procedure 502(c), which states:

Additional Time After Service or Distribution by Mail.

Whenever a party has the right or is required to act within a prescribed number of days after the service or distribution of a document, and the document is served or distributed by mail, three calendar days shall be added to the prescribed period. However, no additional time shall be added if a court order specifies a particular calendar date by which an act must occur.

¹⁰⁷ A party has 10 days after the distribution of a non-final decision of the commission to file a petition for review with the Alaska Supreme Court. If the commission's decision was distributed by mail only to a party, then three days are added to the 10 days, pursuant to Rule of Appellate Procedure 502(c). *See* n.106 for Rule of Appellate Procedure 502(c).

You may wish to consider consulting with legal counsel before filing a petition for review. If you wish to petition the Alaska Supreme Court for review, you should contact the Alaska Appellate Courts *immediately*:

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I certify that this is a full and correct copy of Final Decision No. 192 issued in the matter of *Carol S. Corey vs. NANA Regional Corporation, Inc. and ACE Indemnity Insurance Company*, AWCAC Appeal No. 13-011, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on March 18, 2014.

Date: March 19, 2014



Signed

K. Morrison, Appeals Commission Clerk