Alaska Workers' Compensation Appeals Commission

Rainey Landry, Appellant, vs. Trinion Quality Care Services, Inc., Commerce and Industry Insurance Co., and Northern Adjusters, Inc., Appellees.	Final Decision Decision No. 137 August 26, 2010 AWCAC Appeal No. 09-025 AWCB Decision No. 09-0157 AWCB Case No. 200806675

Appeal from Alaska Workers' Compensation Board Decision No. 09-0157, issued at Anchorage on October 7, 2009, by southcentral panel members Deirdre D. Ford, Chair, Patricia Vollendorf, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Joseph A. Kalamarides, Kalamarides & Lambert, Inc., for appellant, Rainey Landry; Robert L. Griffin, Griffin & Smith, for appellees, Trinion Quality Care Services, Inc., Commerce and Industry Insurance Co., and Northern Adjusters, Inc.

Commission Proceedings: Appeal filed November 2, 2009; briefing completed April 26, 2010; oral argument on appeal presented June 2, 2010.

Commissioners: Jim Robison, Stephen T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.[1]

Rainey Landry (Landry), who worked at Trinion Quality Care Services, Inc. (Trinion), appeals the decision of the Alaska Workers' Compensation Board (board) that she was not injured in a fall while working as a personal care assistant for a disabled woman. Landry asserts that the board erred by failing to evaluate the testimony of Travis Cross, a locksmith who she asserts would have testified that the damage done to a medication safe could not have been done by a hammer and chisel, discrediting the testimony of Bill Chambers, the disabled woman's husband. She also asserts that the

[1] The commission wishes to express its gratitude to legal interns Laura Blair-Gano and Timothy Scheiderer, who assisted in the preparation of this decision.

board erred by disallowing the testimony of Paige Green, who she maintains would have testified that she witnessed Landry walk her patient, Kimberly Chambers, as a part of an exercise regimen.

Trinion contends that the board did not err as a matter of law in failing to evaluate Cross's testimony because the board did address his testimony in its decision and his testimony was immaterial to a determination of whether Landry's injury was work-related, and because Mr. Chambers himself agreed that he was initially mistaken about a tool that damaged the safe. The employer also contends that the board did not err in excluding the testimony of Paige Green because Landry did not file a timely witness list, and, even if she had, Green's testimony would not have changed the board's finding that no injury occurred.

The parties' contentions require the commission to decide whether substantial evidence supports the board's decision, whether the board evaluated Cross's testimony sufficiently to permit our review, and whether the board abused its discretion in excluding Green's testimony. The board's decision hinges on its finding that Landry was not credible. We conclude that substantial evidence in the record as a whole supports the board's denial of Landry's claim, that the board sufficiently considered Cross's testimony, and that the board acted within its discretion in excluding Green's testimony.

1. Factual background.

Landry asserts that on April 14, 2008, she injured her lower back while working as a personal care assistant for Trinion. Landry contends that Kimberly Chambers, who had suffered a stroke and was partially paralyzed, fell on top of her while she was helping Mrs. Chambers climb stairs.

Landry testified that on the day in question, her husband, Nathaniel Landry, came over to the Chambers' apartment to help lift Mrs. Chambers over to the commode. Mrs. Chambers weighed approximately 300 pounds.[2] Since Landry only weighed 180 pounds,[3] it required two people to assist Mrs. Chambers onto the

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[2] April 30, 2009 Hrg. Tr. 40:15.

[3] December 17, 2008 R. Landry Dep. 113:20-23.

commode.[4] After aiding his wife, Mr. Landry returned to his apartment.[5]

Landry testified that after Mrs. Chambers finished using the commode, she helped her begin walking exercises.[6] Landry would support Mrs. Chambers' paralyzed side by placing her left foot and leg under Mrs. Chambers' left foot and leg.[7] Landry testified that she walked with Mrs. Chambers for roughly ten minutes, or about ten laps around the small room.[8]

After she assisted Chambers in walking around the room, the next exercise was stair climbing. Landry testified that she helped Mrs. Chambers perform the stair exercises in the same manner as the walking exercises.[9] During the stair exercises, Mrs. Chambers and Landry would grasp the railing with their left hands.[10] Landry alleges that she and Mrs. Chambers made it up to the third step, then, according to Landry, Mrs. Chambers suffered a delusion and "threw her body and her head into me."[11] Landry fell to the bottom of the stairs.[12] Mrs. Chambers landed on top of Landry; however, Landry took the brunt of the fall on her lower back.[13] Unable to move, Landry screamed to her husband for help.[14] Mr. Landry testified that he entered the room, ensured that Mrs. Chambers was not hurt, and carried Mrs. Chambers to her

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4 December 17, 2008 R. Landry Dep. 97:10-22.

5 December 17, 2008 R. Landry Dep. 98:8-10. The Landrys and the Chambers were neighbors in an apartment building. December 17, 2008 R. Landry Dep. 97:1-2, 98:5-10.

6 April 30, 2009 Hrg. Tr. 40:18-21.

7 April 30, 2009 Hrg. Tr. 77:15-25.

8 December 17, 2008 R. Landry Dep. 99:20–100:3.

9 April 30, 2009 Hrg. Tr. 76:21–77:25.

10 April 30, 2009 Hrg. Tr. 77:9-11.

11 April 30, 2009 Hrg. Tr. 78:1-3; 78:22–79:3.

12 December 17, 2008 R. Landry Dep. 107:19–108:1.

13 December 17, 2008 R. Landry Dep. 104:25–105:6.

14 December 17, 2008 R. Landry Dep. 109:20–110:1.

bed.[15] He stated, "I went from underneath her shoulders and to her waist and kind of drug her with her feet. Picked her up and set her in the bed, kind of a half fireman carry type of deal, and set her in the bed."[16] He also testified that he then "kind of picked [his wife] up and got her into bed and laid her down[.]"[17]

In his deposition, Mr. Landry acknowledged that he had been on medical disability since 1996 due to a back injury suffered in a motor vehicle accident.[18] When questioned about his physical limitations, Mr. Landry stated: "I can't pick up 100 pounds. I can -- I can if there is an emergency or something like that, I can -- I mean, let me rephrase it. I can pick it up. I just can't pick it up frequently. . . . I can't repetitiously pick up 100 pounds but . . . if I had to pick up something, I could pick it up if it was super heavy."[19] Mr. Landry also admitted that he had sustained two concussions in the past that affected his memory.[20]

Mr. Landry further testified that after he assisted his wife to her bed, he returned to the Chambers' apartment to check on Mrs. Chambers.[21] He then called Mr. Chambers about the accident.[22] Mr. Landry testified in his deposition that Mr. Chambers informed him that he would be right over,[23] but at the hearing, Mr. Landry testified that Mr. Chambers told him he couldn't come right now.[24] In either scenario, Mr. Landry offered to check in on Mrs. Chambers periodically until

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15 April 1, 2009 N. Landry Dep. 73:6–76:16.

16 April 1, 2009 N. Landry Dep. 76:18-21.

17 April 30, 2009 Hrg. Tr. 118:8-10.

18 March 30, 2009 N. Landry Dep. 9:25–10:18.

19 March 30, 2009 N. Landry Dep. 31:4-11.

20 March 30, 2009 N. Landry Dep. 12:14-16.

21 April 1, 2009 N. Landry Dep. 84:17-24.

22 April 30, 2009 Hrg. Tr. 118:15-16.

23 April 1, 2009 N. Landry Dep. 94:2-4.

24 April 30, 2009 Hrg. Tr. 118:25.

Mr. Chambers arrived.[25] Mr. Landry testified that Mr. Chambers arrived at the apartment between 5 and 8 p.m.[26] Mr. Landry testified that Mr. Chambers informed him that same evening that Landry was fired because Mr. Chambers had acquired someone else to fill her position.[27]

Mr. Chambers, in contrast, testified that the accident did not occur and could not have occurred because his wife could not walk with only Landry assisting her.[28] Even though Mr. Chambers spoke to Mrs. Chambers on the day the accident allegedly occurred, he stated that he did not learn of the accident until the next day when he asked his wife and she denied it had occurred.[29] Mr. Chambers testified that he knew that Mrs. Chambers had not fallen because she bruised easily, and there were no bruises present on her body.[30] Mrs. Chambers was never deposed and was not available to testify because she died on December 26, 2008.[31]

Moreover, Mr. Chambers testified that his wife's major stroke left her paralyzed on her left side[32] and unable to "step up even two inches . . . . It is absolutely impossible for my wife to go up and down stairs, in April of 2008 . . . ."[33] Mrs. Chambers could not pick up a pencil off the table with her left hand, and she had no use of her left foot or leg.[34] Mr. Chambers testified that his wife also suffered from nerve damage, short-term memory loss, seizures, and blindness in both eyes.[35]

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[25] April 1, 2009 N. Landry Dep. 94:9-11; April 30, 2009 Hrg. Tr. 119:1-3.

[26] April 1, 2009 N. Landry Dep. 96:6-8; April 30, 2009 Hrg. Tr. 119:7-9.

[27] April 1, 2009 N. Landry Dep. 107:5-10.

[28] R. 0024, Affidavit of William Chambers, ¶ 6, July 30, 2008.

[29] March 30, 2009 C. Chambers Dep. 33:21–34:25, 37:18-24. Mr. Chambers is also known as Bill. March 30, 2009 C. Chambers Dep. 4:13-18.

[30] March 30, 2009 C. Chambers Dep. 38:9-10.

[31] March 30, 2009 C. Chambers Dep. 44:23–45:2.

[32] March 30, 2009 C. Chambers Dep. 12:8-10.

[33] R. 0024, Affidavit of William Chambers, ¶ 7, July 30, 2008.

[34] March 30, 2009 C. Chambers Dep. 12:16–13:10.

[35] March 30, 2009 C. Chambers Dep. 12:8-15, 27:1-20.

Mr. Chambers further testified that walking her was difficult because he had to support her entire weight.[36] Mr. Chambers never witnessed Landry walk with his wife.[37]

At the hearing, Keirsten Smart, who provides care coordination for homebound individuals,[38] supported Mr. Chambers' account of his wife's limitations. Smart stated that Mrs. Chambers suffered multiple cerebral strokes that affected her cognitive abilities.[39] She was legally blind, incapable of using her left hand, and required maximum assistance for her own personal care.[40] Although Mrs. Chambers suffered from short-term memory loss, Smart believed Mrs. Chambers likely would have remembered whether she fell with Landry.[41]

Smart testified that as of April 2008 Mrs. Chambers' physical and cognitive abilities were deteriorating.[42] She could not grip the rail with her left hand, and although she could move to the commode with assistance, Mrs. Chambers could not walk because she was unable to put weight on her left leg in order to pick up her right foot.[43] Smart stated that if someone put their left foot under Mrs. Chambers' left foot, they might be able to get her to take a couple of steps on a flat surface, but going up even a single step "would be incredibly difficult."[44] Moreover, she testified that no doctor had ordered a physical exercise regimen for Mrs. Chambers, and it would have been outside the prerogative of the personal care assistant to implement such procedures without a doctor's consent.[45] Smart thought Landry was "pretty grandiose in talking about the things that she thought that she could do that weren't consistent

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36 March 30, 2009 C. Chambers Dep. 14:2-24.

37 March 30, 2009 C. Chambers Dep. 20:19-20.

38 April 30, 2009 Hrg. Tr. 93:11–94:16.

39 April 30, 2009 Hrg. Tr. 95:8-13, 96:7-8.

40 April 30, 2009 Hrg. Tr. 95:12-25.

41 April 30, 2009 Hrg. Tr. 108:22–109:2.

42 April 30, 2009 Hrg. Tr. 97:7-22.

43 April 30, 2009 Hrg. Tr. 101:21-25, 102:14–103:16.

44 April 30, 2009 Hrg. Tr. 103:7-14, 105:17-23.

45 April 30, 2009 Hrg. Tr. 106:10-18.

with [Mrs. Chambers'] condition."[46] Smart testified that she never witnessed Mrs. Chambers walk, and she never witnessed Mrs. Chambers walk with Landry.[47]

On the other hand, Landry testified that Smart had visited her and Mrs. Chambers on two occasions, and Smart witnessed her walk with Mrs. Chambers.[48] Landry's husband also testified that he witnessed his wife exercise and walk Mrs. Chambers on previous occasions.[49] Landry stated that she could stand Mrs. Chambers up herself for the walking exercises.[50]

Not only did Mr. Chambers dispute whether it was possible for his wife to walk with assistance, he also gave a very different account of the events on April 14, 2008. He testified that Landry called him at work on April 14, 2008, and told him that his wife was asking for pain medication.[51] Mr. Chambers controlled his wife's medication by keeping it locked in a safe.[52] He told Landry not to worry because he would be off in a couple of hours and would personally dispense Mrs. Chambers' medication.[53] Landry then requested the combination to the medication safe, but Mr. Chambers refused to disclose it.[54] Landry replied that Mrs. Chambers was becoming agitated, but she, Landry, would tap on the safe to make Mrs. Chambers think she was retrieving the pain medication.[55]

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46 April 30, 2009 Hrg. Tr. 107:15-17.

47 April 30, 2009 Hrg. Tr. 98:12-23.

48 April 30, 2009 Hrg. Tr. 43:12-22.

49 April 30, 2009 Hrg. Tr. 115:12-20.

50 April 30, 2009 Hrg. Tr. 40:18-20.

51 March 30, 2009 C. Chambers Dep. 26:18-25.

52 April 30, 2009 Hrg. Tr. 174:25–175:10.

53 April 30, 2009 Hrg. Tr. 180:5-10, 179:18.

54 March 30, 2009 C. Chambers Dep. 28:14-21.

55 April 30, 2009 Hrg. Tr. 180:4-15.

Mr. Chambers testified that when he arrived home later that night, he discovered damage to the safe.[56] He also saw a hammer and a pipefitter's wedge lying next to the safe and initially believed those tools were used to damage the safe.[57] Mr. Chambers testified that when he confronted Landry about the damage, she replied that she tapped on the safe to humor Mrs. Chambers.[58] Because Mr. Chambers found the damage to be "serious," he fired Landry.[59] He then had Dana Kolb, another Trinion personal care assistant, come by later that evening to take pictures of the safe.[60]

Travis Cross, a locksmith who examined the damage to the safe, testified that the hammer and wedge found near the safe did not cause the markings on the safe. In his opinion, a smaller screwdriver and hammer were used.[61] Mr. Chambers acknowledged the he was mistaken in his initial assumption that the damage was caused by a hammer and wedge: "Well, I thought that was what they'd used to -- or Rainey or her husband. I know one of them had to do it -- to do the damage to the safe, but looking back I see that it was screwdriver marks."[62]

Mr. Chambers testified that the next morning, April 15, 2008, he called Trinion to report that he fired Landry.[63] Stacy Thomas, the Trinion employee who answered the phone, asked him if Landry had been injured, and he replied no.[64] Mr. Chambers testified that after he got off the phone with Trinion, he met the Landrys in the hallway of their apartment building and Mr. Landry told him that he and his wife were headed

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56 April 30, 2009 Hrg. Tr. 180:13–181:3.

57 April 30, 2009 Hrg. Tr. 177:22–178:13.

58 April 30, 2009 Hrg. Tr. 181:2-5.

59 April 30, 2009 Hrg. 181:2-5; March 30, 2009 C. Chambers Dep. 29:20.

60 March 30, 2009 C. Chambers Dep. 32:12–33:2.

61 April 30, 2009 Hrg. Tr. 55:23–57:11.

62 April 30, 2009 Hrg. Tr. 177:22-25.

63 April 30, 2009 Hrg. Tr. 181:14-18.

64 April 30, 2009 Hrg. Tr. 181:18-20.

to the hospital.[65] After the hallway encounter, Mr. Chambers immediately called Trinion to alert the company that Landry might file a workers' compensation claim.[66]

In the emergency room on April 15, 2008, Landry described her pain as "incapacitating" and that she had pain in her back, coccyx, and hip.[67] However, the emergency room physician, Dr. Gilbert Dickie, noted in his report: "There are no obvious external signs of trauma to my inspection.[68] Specifically on the back there is no bruising or deformity."[69] Landry testified that her husband did all or most of the speaking to the doctor for her because she was "in excruciating pain."[70] Thus, Mr. Landry pointed out several abrasions on Landry's body, but the doctor noted that the "abrasions . . . appear to be relatively normal skin to me."[71] In addition, Landry admitted that she did not tell the doctor that she had a history of back problems because she "never had a diagnosed back problem."[72] When asked whether she thought she was truthful about her history of back problems, she replied: "I do. I believe everyone gets sore backs."[73] She was also sure that she informed the emergency room doctor of the pain medications she was taking.[74] Dr. Dickie's notes indicated that Landry "[was] on no prescription medication."[75]

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65 April 30, 2009 Hrg. Tr. 181:20-25. Ms. Landry also acknowledged meeting Mr. Chambers in the hallway on the way to the emergency room. April 30, 2009 Hrg. Tr. 48:18-20.

66 April 30, 2009 Hrg. Tr. 181:25–182:3.

67 R. 0369.

68 *Id.*

69 R. 0370.

70 April 30, 2009 Hrg. Tr. 49:9-19, 86:11-14. December 17, 2008 R. Landry Dep. 153:22-23.

71 R. 0369.

72 December 17, 2008 R. Landry Dep. 153:10.

73 December 17, 2008 R. Landry Dep. 153:14-17.

74 December 17, 2008 R. Landry Dep. 153:18-23.

75 R. 0369.

Landry's history of back pain prior to the accident is extensive and she was taking a number of prescriptions for back pain and other ailments. At her deposition, Landry stated she had back pain for several years while working and going to school, but she did not have a specific injury.[76] She was first treated in 1996 by her chiropractor, Dr. Michael Keating, but he did not prescribe any medication.[77] She testified that Dr. Keating attributed her back pain to the fact that her legs are different lengths.[78] She first received narcotic pain medication for her back when she began treatment at Fort Richardson.[79] She started on Percocet and eventually changed to OxyContin.[80]

Beginning in 2004, Landry received prescriptions of Methadone and Promethazine for chronic back pain.[81] In December 2004, she received treatment for tailbone pain that resulted from a fall down stairs.[82] She testified that doctors at Fort Richardson switched her from OxyContin to Methadone in 2005.[83] In 2007, she saw Dr. Thornquist, who prescribed Roxicodone and Methadone for her left knee, left arm, and low back soreness and stiffness.[84] She switched providers to see Paula Korn, ANP, who continued to prescribe narcotics for chronic pain in her low back, left knee, and left arm.[85] Landry attributed her low back pain to "working a lot."[86] On April 11, 2008, three days before her claimed fall, she again saw Paula Korn complaining of pain in her

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76 December 17, 2008 R. Landry Dep. 121:20–122:7.

77 December 12, 2008 R. Landry Dep. 31:8-11; December 17, 2008 R. Landry Dep. 122:17–123:2-4, 124:13-19.

78 December 17, 2008 R. Landry Dep. 122:21-24.

79 December 17, 2008 R. Landry Dep. 123:5-17.

80 December 17, 2008 R. Landry Dep. 123:18-22.

81 R. 0790-849.

82 R. 0790.

83 December 17, 2008 R. Landry Dep. 136:23–137:2.

84 December 17, 2008 R. Landry Dep. 142:20–143:16.

85 December 17, 2008 R. Landry Dep. 143:23–144:1, 147:20–148:17.

86 December 17, 2008 R. Landry Dep. 149:19-22, 151:7-8.

left arm, left knee, and low back.[87] Paula Korn gave her prescriptions for Methadone, Roxicodone, Phenteramine, and Xanax.[88]

2. Board proceedings.

Trinion initially accepted Landry's claim, and paid temporary total disability (TTD) benefits.[89] On June 6, 2008, Landry filed a claim seeking a penalty and interest on TTD.[90] On September 3, 2008, Trinion answered by denying the claim, basing its denial on the affidavit of Mr. Chambers.[91] Landry amended her claim at the prehearing conference on September 16, 2008, to include ongoing TTD from September 3, 2008, permanent partial impairment (PPI), interest, and attorney fees.[92]

At a prehearing conference on November 20, 2008, both parties agreed that their respective witness lists were to be filed with the board on April 23, 2009.[93] On December 17, 2008, Landry first mentioned Paige Green in her deposition testimony,[94] raising the possibility that she could be a potential witness. Both parties filed their witness lists by the deadline, but Landry did not name Green as a witness.[95] On the first day of the hearing, Landry set forth her case and rested.[96] Trinion set forth its case except for one witness, Stacy Thomas, who could not attend the hearing. Both parties agreed to continue the hearing so that Thomas could testify at a later date and

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87 December 17, 2008 R. Landry Dep. 150:24–151:13.

88 R. 0372.

89 R. 0003.

90 R. 0010.

91 R. 0002.

92 R. 0884.

93 R. 0902-903 (setting the date for the hearing as April 30, 2009, and directing the parties to submit witness lists in accordance with 8 AAC 45.112, which requires witness lists to be filed with the board five working days before the hearing, which in this case was April 23, 2009).

94 December 17, 2008 R. Landry Dep. 173:25–174:3.

95 R. 0232-234.

96 April 30, 2009 Hrg. Tr. 137:22-23.

the parties could make their closing arguments.[97] The hearing was completed on July 13, 2009.[98]

On July 1, 2009, Landry filed an Amended Witness List naming Paige Green as a rebuttal witness.[99] Landry asserted that Green would have testified that she observed Landry walking Chambers up the stairs on at least two occasions.[100] Trinion opposed allowing Green's testimony, arguing that Landry missed the deadline for listing Green as a witness and that Green was not a true rebuttal witness.[101] Landry contended that she had reserved the right to call rebuttal witnesses as necessary, and that Green's testimony would rebut Smart's testimony about Mrs. Chambers' inability to walk, especially on stairs.[102]

The board excluded Green's testimony:

> The Board decided that it did not need to hear from Ms. Green as her testimony did not appear to offer any new insight into the matter at issue. Furthermore, her testimony was not actual rebuttal testimony because the issue to which she would have testified was neither new nor unexpected. Her testimony would have been offered to contradict evidence previously presented – namely the testimony of Ms. Smart and Mr. Chambers that Mrs. Chambers could not walk. However, the testimony of both witnesses was known beforehand and was neither new or a surprise. . . . More importantly, the board notes that Ms. Green was not present at the time of the accident and, therefore, her testimony could not shed light on whether the accident happened or happened as described.[103]

The board also noted that Green's testimony, had it been permitted, would not have changed its decision:

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97 April 30, 2009 Hrg. Tr. 210:7-13.

98 July 13, 2009 Hrg. Tr. 3:2-6, 54:14-16.

99 R. 0292-95.

100 July 13, 2009 Hrg. Tr. 9:10-20.

101 July 13, 2009 Hrg. Tr. 5:4-6:25. R. 296-300.

102 July 13, 2009 Hrg. Tr. 4:11–5:1.

103 *Rainey M. Landry v. Trinion Quality Care Services Inc.*, Alaska Workers' Comp. Bd. Dec. No. 09-0157, 29 (October 7, 2009) (D. Ford, Chair)(*Landry*).

> Assuming Paige Green would have testified that she saw the employee walk Mrs. Chambers around the living room, Ms. Green was not present on the day of the alleged injury and could not collaborate [*sic*] the employee's testimony about the fall. It is the employee's testimony about the alleged fall and the circumstances surrounding it that the Board finds not credible.[104]

Ultimately, the board denied Landry's claims. The board applied the three-step analysis regarding the presumption of compensability. The board concluded that Landry and her husband's statements that Landry fell and injured her back while caring for Mrs. Chambers was enough to attach the presumption.[105] But the board concluded that Mr. Chambers' affidavit rebutted the presumption.[106] The board then considered whether Landry proved her claim by a preponderance of the evidence.[107]

The board decided that Landry had not proven her case by a preponderance of the evidence because both of the Landrys were not credible.[108] The board relied, in part, on the report of the emergency room doctor who examined Landry the day after her claimed fall: the "doctor noted that the employee claimed no prior back problems and said she was not taking any medications. Neither was true."[109] Additionally, the board thought it unusual that despite Landry's complaint to the doctor that she had bruising, the ER doctor noted relatively normal skin on Landry's back, with no signs of abrasions or bruising.[110] The board believed that "bruises should have been apparent at the emergency room visit if she had fallen as alleged and bounced on the stairs landing with a 300 pound person on top of her."[111]

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104 *Landry*, Bd. Dec. No. 09-0157 at 35.

105 *See id.* at 31.

106 *See id.* at 32.

107 *See id.*

108 *See id*. at 32-33.

109 *Id.* at 32.

110 *See id*. at 33.

111 *Id.* at 33.

The board accepted the possibility that Landry might have been able to walk with Mrs. Chambers on occasion around the living room; however, the board thought it "seem[ed] incredible that she did it for 15-20 minutes at a time."[112] Mrs. Chambers was 250-300 pounds of "essentially dead weight," and the undisputed testimony was that it took two people to move her from her bed to the commode.[113] The board concluded that walking Mrs. Chambers around the room "would have been taxing, especially since the living room where Mrs. Chambers lived was not large" and contained furniture.[114] Thus, the board concluded:

> [I]t [is] difficult to believe that the employee was able to manage Mrs. Chambers on her own for 20 minutes on the day of the injury, walking her around the apartment and up 4 stairs, basically carrying a woman who weighed twice what the employee weighed.[115]

The board also noted that Landry "[had] a tendency to exaggerate facts."[116] Among the board's examples of this tendency was that Landry testified that she was studying to become a registered nurse when she only took one applicable course.[117]

The board also did not believe that Landry's husband was a credible witness. Even in an emergency, the board thought it unlikely that a man with a bad back and a bad knee could carry a load as heavy as Mrs. Chambers and then carry his wife, too.[118] The board also did not believe that Mr. Landry called Mr. Chambers about the accident.[119] The board noted that:

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112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.*

116 *Id.* at 35.

117 *See id.* at 35.

118 *See id.* at 33-34.

119 *See id.* at 34.

> Mr. Chambers, by everyone's testimony, was extremely concerned about his wife and arranged his work schedule to provide as much personal attention as he could. It stretches credulity that Mr. Chambers would tell Mr. Landry that he could not come home to check on his wife when told she had fallen.[120]

In regard to the testimony of Cross, the board discounted the issue of the damaged safe as not "significant in whether the employee had a work injury."[121] Although it may have been a reason why Mr. Chambers fired Landry, it was not relevant as "to whether the employee [was] credible or had a work-related injury."[122]

In contrast, the board found Mr. Chambers to be a credible witness.[123] The board concluded that he "seemed sincere and forthright in his testimony" and took special note that "[a]ll parties and witnesses agreed that he was extremely attentive to his wife and took a direct interest in her care."[124]

Therefore, the board denied Landry's claim. Landry appeals.

3. Standard of review.

"The board's findings of fact are to be upheld by the commission if supported by substantial evidence in light of the whole record."[125] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[126] "The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of

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120 *Id.* at 34.

121 *Id.*

122 *Id.*

123 *See id*. at 35.

124 *Id.* at 35.

125 AS 23.30.128(b).

126 *Pietro v. Unocal Corp.*, 233 P.3d 604, 610 (Alaska 2010) (quoting *Grove v. Alaska Constr. & Erectors,* 948 P.2d 454, 456 (Alaska 1997) (internal quotation marks omitted).

law"[127] and therefore independently reviewed by the commission.[128]

"The board is required to make findings only about questions that are both contested and material."[129] "Whether the [B]oard made sufficient findings is a question of law that we review de novo."[130]

The board has the sole power to determine the credibility of a witness and the board's findings concerning the weight to be accorded a witness's testimony is conclusive even if conflicting or susceptible to contrary conclusions.[131] The board's findings regarding the credibility of witness testimony are binding on the commission.[132] The findings of the board regarding credibility of witnesses are subject to the same standard of review as a jury's findings in a civil action.[133] A jury's findings in a civil action can be overturned only if the court finds that, viewing the evidence in the light most favorable to the non-moving party, no reasonable person could have reached such conclusion.[134]

The board is vested with wide discretion in controlling the order of proof.[135] Whether evidence introduced at hearing is proper rebuttal evidence lies within the

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

[128] *See* AS 23.30.128(b).

[129] *Pietro,* 233 P.3d at 610-11 (footnote omitted).

[130] *Id.* at 611 (citing *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006)).

[131] *See* AS 23.30.122.

[132] *See* AS 23.30.128(b).

[133] *See* AS 23.30.122.

[134] *See, e.g., Alaska Children's Servs., Inc. v. Smart*, 677 P.2d 899, 901 (Alaska 1984).

[135] *See* AS 23.30.135(a) (providing that the board may conduct its hearing in the manner by which it "may best ascertain the rights of the parties."); 8 AAC 45.120(b) providing that "[t]he order in which evidence and argument is presented at hearing will be in the discretion of the board[.]" *See also Sirotiak v. H.C. Price Co.*, 758 P.2d 1271, 1277 (Alaska 1988) (citing *American Nat'l Watermattress Corp. v. Manville*, 642 P.2d 1330, 1339 (Alaska 1982)).

board's sound discretion.[136] The board rulings that operate to exclude evidence are therefore reviewed for abuse of discretion.[137]

4. Discussion.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable.[138] To attach the presumption of compensability, employees must first establish a "preliminary link" between their injury and their employment.[139] If they do so, this presumption may be overcome when the employer presents substantial evidence that the injury was not work-related.[140] Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at this point.[141] If the board finds that the employer's evidence is sufficient, then the presumption of compensability drops out and the employee must prove her case by a preponderance of the evidence.[142] This means that the employee must "induce a belief" in the minds of the board members that the facts she is asserting are probably true.[143] At this point, the board weighs the evidence, determines what inferences to draw from the evidence, and considers credibility.

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136 *See Sirotiak,* 758 P.2d at 1277 (citing *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916, 932 (Alaska 1977)).

137 *See Schmidt v. Beeson Plumbing and Heating, Inc.*, 869 P.2d 1170, 1179 (Alaska, 1994) (citing *Adamson v. University of Alaska,* 819 P.2d 886, 889 n.3 (Alaska 1991)).

138 *See, e.g., Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996).

139 *See, e.g., Tolbert v. Alascom, Inc.,* 973 P.2d 603, 610 (Alaska 1999).

140 *See Tolbert*, 973 P.2d at 611 (explaining that to rebut the presumption "an employer must present substantial evidence that either '(1) provides an alternative explanation which, if accepted, would *exclude* work-related factors as a substantial cause of the disability; or (2) directly eliminates *any reasonable possibility* that employment was a factor in causing the disability.'") (italics in original, footnote omitted); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).

141 *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

142 *Miller*, 577 P.2d at 1046.

143 *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

Here, the board's decision hinged on the fact that it did not find Landry credible in her claim of falling on the stairs while walking Mrs. Chambers.[144] Because Mr. Chambers' affidavit provided sufficient evidence to overcome the presumption of compensability,[145] Landry had the burden of proving her claim by a preponderance of the evidence.[146] Because the board did not find that Landry was credible, she failed to "induce a belief" in the minds of the board members that the facts she asserted were true, and therefore failed to meet her burden of proving her case by a preponderance of the evidence.[147]

In her brief, Landry raises two issues that address questions of credibility.[148] First, Landry argues that the board did not give Travis Cross's testimony sufficient consideration and discussion, contending that Cross's testimony regarding the safe

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144 *See Landry*, Bd. Dec. No. 09-0157 at 32.

145 In her reply brief, Landry states: "if Chamber's [*sic*] testimony is not credible then appellees' case fails *ab initio*." Reply Br. 2. Landry seems to be raising the argument that because the board relied on Mr. Chambers' affidavit to rebut the presumption, his impeached credibility would cause that rebuttal to fail. First, Alaska case law is clear that arguments raised for the first time in a reply brief are deemed waived. *See Lakloey, Inc. v. Univ. of Alaska,* 141 P.3d 317, 323 n.18 (Alaska 2006). However, even if considered, the argument lacks merit because credibility is not considered at the second stage of the presumption analysis. *See Veco,* 693 P.2d at 869-70. Rather, the rebuttal evidence is looked at in isolation and if the quantum of evidence is sufficient, that is, such that a reasonable mind would accept as adequate to rebut the presumption, then the second step of the presumption analysis is met and the burden shifts to the employee. Here, looked at in isolation and without considering his credibility, the assertions in Mr. Chambers' affidavit are sufficient to rebut the presumption because they "directly eliminate[] *any reasonable possibility* that employment was a factor in causing the disability." *Tolbert*, 973 P.2d at 611 (italics in original, footnote omitted).

146 *See Miller*, 577 P.2d at 1046.

147 *See Saxton,* 395 P.2d at 72.

148 Appellant's Br. 2. In her Statement of Grounds filed on November 2, 2009, Landry also contended that the board erred as a matter of law by relying on the testimony of Keirsten Smart because she was not qualified as an expert witness. However, because this issue was not briefed, it is considered waived. *See Shearer v. Mundt*, 36 P.3d 1196, 1199 (Alaska 2001) ("[I]ssues not briefed or only cursorily briefed are considered waived.") (footnote omitted).

would have somehow impeached Mr. Chambers' credibility.[149] Second, Landry argues that the board should have allowed the testimony of Paige Green as a rebuttal witness, contending that Green's testimony that she had witnessed Landry walk Mrs. Chambers up the stairs would have lent credibility to Landry's testimony.[150] The commission concludes these arguments lack merit.

a. The board sufficiently considered and discussed Travis B. Cross's testimony.

Landry contends that the board erred by failing to consider the testimony of Cross.[151] Landry argues the board failed to discuss Cross's testimony and to decide whether he was credible, as required by AS 44.62.510[152] and defined in *Pietro v. Unocal Corp.,*[153] and *Rivera v. Wal-Mart Stores, Inc.*[154]

The purpose of AS 44.62.510 is to ensure that the board gives the commission enough information upon which to base its review.[155] The board need only make

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149 Appellant's Br. 23.

150 Appellant's Br. 24.

151 Appellant's Br. 21-23.

152 AS 44.62.510 provides that: (a) A decision shall be written and must contain findings of fact, a determination of the issues presented, and the penalty, if any. *See Brown v. Northwest Airlines*, 444 P.2d 529, 531-32 (Alaska 1968) (interpreting AS 44.62.510 as requiring the board to make findings of fact sufficient to explain the basis for its decision).

153 233 P.3d 604.

154 Alaska Workers' Comp. App. Comm'n Dec. No. 122 (Dec. 15, 2009).

155 *See Morrison-Knudson Company v. Vereen*, 414 P.2d 536, 539 (Alaska 1966) (stating "in future cases coming before the Board, the Board should . . . in its decision make findings which disclose the basis for its determination[s] . . . ."). *See also Smith v. Univ. of Alaska Fairbanks*, 172 P.3d 782, 789-91 (Alaska 2007) (holding board's findings were insufficient for review because Court could not determine whether board applied an incorrect legal rule, that lay testimony should be disregarded in complex medical cases, or whether the board instead evaluated the lay testimony but concluded that it had little probative value), *Manthey v. Collier*, 367 P.2d 884, 890 (Alaska 1962) (holding that board abused its discretion in failing to comply with mandate of section 19 of the Administrative Procedure Act by making no findings on the issue of to what extent employee's disability had improved or worsened, as this was the sole issue before the board).

findings of fact and conclusions of law regarding issues that are both "material" and "contested."[156] Findings are sufficient to permit intelligent appellate review when "at a minimum, they show that the Board considered each issue of significance, demonstrate the basis for the Board's decisions, and were sufficiently detailed."[157]

In *Pietro*, the Alaska Supreme Court held that adequate appellate review was impeded in part by the board's failure to evaluate lay testimony.[158] There, the board denied benefits to a claimant who alleged that his medical conditions developed as a result of his exposure to arsenic while working at a fertilizer plant.[159] The fundamental question before the board was "whether Pietro's neuropathy was caused by exposure to toxins over a long period of time or by his rheumatoid arthritis."[160] The lay testimony in question related to two contested issues that were directly relevant to that fundamental question: when Pietro's neuropathy developed relative to his rheumatoid arthritis and whether his work conditions exposed him to enough arsenic to cause health complaints.[161] Because this testimony was both contested and material, the court held that the board's failure to evaluate and make findings about it impeded adequate appellate review of the board's decision, and thus necessitated remand.[162]

Conversely, in *Rivera*, the commission rejected Rivera's argument that the board had erroneously failed to consider lay testimony, which she believed undermined medical testimony concerning the cause of her current disability.[163] The commission noted that testimony is "material" when it has some "logical connection with the

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156 *See Pietro,* 233 P.3d at 610-11 (citing *Bolieu v. Our Lady of Compassion Care Ctr.,* 983 P.2d 1270, 1275 (Alaska 1999)); *Lindhag v. State, Dept. of Natural Resources*, 123 P.3d 948, 953 (Alaska 2005).

157 *Pietro,* 233 P.3d at 612 (citing *Lindhag,* 123 P.3d at 953).

158 *See Pietro,* 233 P.3d at 613-14.

159 *See id.* at 606.

160 *Pietro*, 233 P.3d at 614.

161 *Id.* at 613.

162 *See Pietro*, 233 P.3d at 613.

163 *See Rivera*, App. Comm'n Dec. No. 122 at 2.

consequential facts (i.e., facts that have a legal consequence to them)."[164] The fundamental question before the board was whether Rivera's back pain resulted from muscle strains suffered at work, requiring medical treatment a year after the injury.[165] The lay testimony merely supported that the employee was suffering back pain, a fact not disputed by the employer's medical experts and immaterial to ascertaining whether the pain was work-related.[166] Thus, the commission concluded no findings were required on this testimony because it was neither contested nor material.[167]

In the instant case, any testimony regarding what type of tools were used to damage the safe was immaterial to the controlling issue of whether Landry was injured at work on the day in question. Although Landry claims the board made no findings on Cross's testimony, in actuality, the board discounted his testimony as immaterial, stating the "issue of the safe . . . does not go to whether the employee is credible or had a work-related injury."[168] Cross's testimony was entirely focused on the safe and what type of tools may have caused the damage that was found on the day of the alleged fall.[169] But the sole issue before the board was whether Landry fell at work while helping Mrs. Chambers up the stairs. Therefore, like the testimony in *Rivera*, Cross's testimony about the safe is not material because it lacks a "logical connection

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164 *Rivera*, App. Comm'n Dec. No. 122 at 9.

165 *See Rivera*, App. Comm'n Dec. No. 122 at 10.

166 *See id*.

167 *See id*. at 10-11. Rivera also argued that the board failed to evaluate the lay testimony of Rivera, her husband, and a co-worker regarding the back pain Rivera suffered while working, especially her inability to stand after sitting for her 15-minute break. Rivera argued this testimony was material to the second issue that the board answered, whether Rivera was totally disabled after January 2007. However, the commission concluded this lay testimony was not material to deciding total disability because, even if accepted as credible, the testimony did not support that she was totally disabled since there was no evidence that she was required to sit during her 15-minute break or that her actual job duties involved sitting for 15 minutes and then standing. *See id*. at 11-15.

168 *Landry*, Bd. Dec. No. 09-0157 at 34.

169 April 30, 2009 Hrg. Tr. 53:5–65:9.

with the consequential facts . . . ."[170] When evidence is not material to the board's decision, the board is not required to make findings on it.[171] Here, the board adequately considered Cross's testimony when it reached the conclusion that his testimony was immaterial.

Landry argues that Cross's testimony is in fact material because it would show that "[Mr.] Chambers' explanation of how the safe was damaged was not credible, and therefore, his testimony as to the events involving Rainey which occurred when he arrived at home were [*sic*] likewise not credible."[172] While it may be possible to draw this inference from the facts, it is also possible to conclude that Mr. Chambers was simply mistaken in his initial assumption as to which tool damaged the safe, as he admitted during his testimony.[173] The board's finding concerning the weight to be accorded a witness's testimony is conclusive even if other conclusions could possibly be drawn.[174] An appellate body "will not reweigh conflicting evidence, determine witness credibility, or evaluate competing inferences from testimony because those functions are reserved to the Board."[175] Thus, "even when conflicting evidence exists, we uphold the Board's decision if substantial evidence supports it."[176]

Accordingly, the commission concludes the board's findings on Cross's testimony were adequate to permit review and the board's treatment of Cross's testimony is consistent with AS 44.62.510 and its purpose.

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170 *Rivera*, App. Comm'n Dec. No. 122 at 9.

171 *See Brown v. Patriot Maintenance, Inc.*, 99 P.3d 544, 551-552 (Alaska 2004); *Ayele v. Unisea, Inc.*, 980 P.2d 955 (Alaska 1999).

172 Appellant's Br. 23.

173 April 30, 2009 Hrg. Tr. 177:22–178:3, 200:9-13.

174 *See* AS 23.30.122.

175 *Lindhag*, 123 P.3d at 952 (footnote omitted).

176 *Id*. (footnote omitted).

b. The board acted within its discretion in disallowing the testimony of Paige Green.

Landry asserts that the board erred in excluding Green's testimony. The board concluded that Green was not a proper rebuttal witness because the issue that her testimony concerned, whether Landry could help Mrs. Chambers walk, "was neither new nor unexpected" and, more importantly, that Green's testimony would not offer any new insights because she did not claim to have witnessed the actual accident.[177] Landry nevertheless argues that Green's name was timely submitted on an amended witness list, or in the alternative, her testimony should have been permitted as rebuttal testimony.[178] The commission concludes that the board did not abuse its discretion in excluding Green's testimony.

i. The amended witness list was not timely filed.

Both parties agreed that their witness lists were due on April 23, 2009, which was five working days before the scheduled hearing, in accordance with 8 AAC 45.112.[179] Paige Green was not included as a witness on the original witness list.[180] Because one of the employer's witnesses, Stacy Thomas, could not attend the hearing on April 30, 2009, the parties agreed that the board would hold the record open for Thomas's testimony and for closing arguments.[181] The hearing was eventually continued to July 13, 2009.[182] Paige Green first appeared on Landry's amended witness list filed on July 1, 2009.[183]

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177 *Landry*, Bd. Dec. No. 09-0157 at 29.

178 Appellant's Br. 24; Reply Br. 4-7.

179 R. 0902-903 (setting the date for the hearing as April 30, 2009, and directing the parties to submit witness lists in accordance with 8 AAC 45.112, which requires witness lists to be filed with the board five working days before the hearing, which in this case was April 23, 2009).

180 July 13, 2009 Hrg. Tr. 3:22-24.

181 April 30, 2009 Hrg. Tr. 210:7-12.

182 July 13, 2009 Hrg. Tr. 3:2-4.

183 Appellees' Exc. 57-60; R. 292-95.

Landry contends that because her amended witness list was filed more than five days in advance of the second hearing that it was timely.[184] In *Schmidt*, the Alaska Supreme Court held that the board had abused its discretion in not allowing the employee to amend his witness list because both an independent medical exam (IME) ordered after the first hearing and the employee's neck surgery raised new factual issues.[185] *Schmidt* is distinguishable from the present case because the board held two distinct hearings and significant factual issues developed between the two hearings. In the first hearing in *Schmidt*, the board ordered an IME and did not hear the merits of the employee's claims.[186] In addition to the IME, the employee in *Schmidt* underwent neck surgery relevant to his claims between the two hearings.[187]

In Landry's case, however, the board heard a day's worth of opening arguments and testimony on the merits before the parties agreed to continue the hearing solely for the unavailable witness's testimony and closing arguments:

> CHAIR FORD: . . . while we were off record we agreed to the extent possible we will go back on record at May 26 at a time that the board can convene the same panel for the testimony of Stacy Thomas and for closing arguments. . . . is my understanding correct?
>
> MR. KALAMARIDES: Correct.
>
> MR: GRIFFIN: That's the way I understand.
>
> MR. KALAMARIDES: Correct.[188]

Unlike *Schmidt*, the board did not decide any claim or issue any orders that would lead to more factual development after the April 30, 2009, hearing. Moreover, nothing else occurred between April 30, 2009, and July 13, 2009, that would change the facts in Landry's case or the nature of her claims. Thus, although the board heard testimony and arguments in Landry's case on two separate dates, in essence, this was one

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[184] Appellant's Br. 24 citing *Schmidt v. Beeson Plumbing and Heating*, 869 P.2d 1174, 1179-80 (Alaska 1994).

[185] *See Schmidt*, 869 P.2d at 1179-80.

[186] *See id.* at 1174-1175.

[187] *See id.* at 1179.

[188] April 30, 2009 Hrg. Tr. 210:6-13.

hearing with a long break. In *Schmidt*, in contrast, there were two distinct hearings – one granting an IME and one addressing the merits of his claims, with significant factual developments occurring between the two hearings.

Thus, the commission concludes the board could properly exclude Green's testimony as untimely under 8 AAC 45.112 and *Schmidt*.

ii. Paige Green was not a rebuttal witness.

"The standard for determining whether a rebuttal witness should be allowed to testify when the witness's name was not timely identified … [is] 'dependant on whether the testimony sought to be rebutted could reasonably have been anticipated prior to trial.'"[189] In the offer of proof, Landry asserts that Green would have testified that she observed Landry walking Mrs. Chambers up the stairs on at least two occasions.[190]

It is asserted in Landry's brief that Paige Green's testimony was added as "a rebuttal witness to Trinion's wholly circumstantial testimony that Rainey did not have a fall" and to testimony that "it was not possible to walk Kimberly up a flight of stairs."[191] It is difficult to perceive how this testimony could not have been anticipated prior to the April 30, 2009, hearing when from the beginning of the dispute over whether Landry was injured at work, the employer controverted in part because it was not possible for Landry to help Mrs. Chambers walk up stairs.[192] In addition, Landry's counsel admitted he knew of Green as a possible witness before the April 30, 2009, hearing.[193]

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[189] *Sirotiak v. H.C. Price Company*, 758 P.2d 1271, 1278 (Alaska 1988) (quoting *City of Kotzebue v. McLean,* 702 P.2d 1309, 1315 (Alaska 1985)).

[190] July 13, 2009 Hrg. Tr. 9:10-20.

[191] Appellant's Br. 24.

[192] R. 0002 (employer's controversion form); R. 0022-24 (Affidavit of William Chambers). *See Sirotiak*, 758 P.2d at 1278 (holding that the testimony sought to be rebutted – that two trucks collided at less than a 90 degree angle – could reasonably be anticipated prior to trial given that the extent of the damage to one of the trucks "was an issue the day the case started" and that the plaintiff's theory of the case required proof of a 90-degree collision).

[193] July 13, 2009, Hrg. Tr. 4:10-11.

Therefore, the commission concludes the board acted within its discretion in excluding Green's testimony because the need for her testimony could reasonably have been anticipated before hearing.[194]

c. Substantial evidence in the record supports the board's decision that Landry did not prove her case by a preponderance of the evidence.

Landry had the burden to "induce a belief" in the minds of the board members that the facts she was asserting were probably true.[195] She failed to induce this belief because the board found she and her husband were not credible.[196] Board findings on witness credibility are binding on the commission.[197] Moreover, substantial evidence supports the board's conclusion and, therefore, it cannot be said that viewing the evidence in the light most favorable to Trinion, no reasonable person could have made such a credibility determination.[198] Only the Landrys testified that the fall occurred. The substantial evidence that supports that the fall did not occur as well as that the Landrys were not credible witnesses includes: 1) the doctor's emergency room report, including Landry's apparent failure to disclose her previous back problems and

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[194] We also note that the board stated that even if Green had testified as Landry asserted she would, the board still would have denied Landry's claim because Landry wasn't credible. *See Landry*, Bd. Dec. No. 09-0157 at 35. Even if the board had believed that Landry could walk Mrs. Chambers on the stairs, it nevertheless cited numerous inconsistencies in her testimony that led to its conclusion that she was not credible. *See id*. at 34-35. Thus, even if Green's testimony was improperly excluded, such an error could be seen as harmless. *See Carlson v. Doyon Universal-Ogden Servs.*, 995 P.2d 224, 228 (Alaska 2000) (holding board's error in failing to attach compensability presumption was harmless where it conducted alternative analysis and concluded the presumption was rebutted in any event); *Dwight v. Humana Hosp.*, 876 P.2d 1114, 1120 (Alaska 1994) (holding that the failure to inform parties of right to SIME was not harmless error because, given equivocal medical evidence, a SIME could have influenced the board's decision to deny benefits).

[195] *See Saxton,* 395 P.2d at 72.

[196] *See Landry*, Bd. Dec. No. 09-0157 at 34-35.

[197] *See* AS 23.30.122, AS 23.30.128(b).

[198] *See, e.g., Smart*, 677 P.2d at 901.

medications, and the doctor's observations on the lack of bruising;[199] 2) Mr. Chambers' and Smart's testimony that Mrs. Chambers was too disabled to walk up stairs even with Landry's assistance,[200] especially given the undisputed weights of the two women[201] and the undisputed testimony on the need for two people to help Mrs. Chambers from her bed to the commode;[202] and 3) Mr. Chambers' different account of the events on April 14, 2008,[203] which the board considered credible.[204]

Thus, the commission concludes that substantial evidence supports the board's decision denying Landry's claim.

5. Conclusion.

The commission concludes the board did not err in its consideration of Cross's testimony and acted within its discretion in disallowing Green's testimony. Moreover, its decision was based on credibility determinations that are binding on the commission as well as substantial evidence. Therefore, the board's decision is AFFIRMED.

Date: *26 August 2010* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Jim Robison, Appeals Commissioner

Signed
Stephen T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

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199 R. 0369.

200 March 30, 2009 C. Chambers Dep. 12:16–13:10, 14:2-24; April 30, 2009 Hrg. Tr. 101:21-25, 102:14–103:16, 105:17-23.

201 April 30, 2009 Hrg. Tr. 40:15; December 17, 2008 R. Landry Dep. 113:20-23.

202 December 17, 2008 R. Landry Dep. 97:10-22.

203 April 30, 2009 Hrg. Tr. 174:25–175:10, 179:7–181:20; March 30, 2009, C. Chambers Dep. 28:14-21.

204 *Landry*, Bd. Dec. No. 09-0157 at 35.

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirmed the board's decision denying the employee's claim for benefits. This decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started). To see the date it is distributed, look at the box below. It becomes final on the 31st day after the decision is distributed.

Proceedings to appeal this decision must be instituted (started) in the Alaska Supreme Court within 30 days of the date this final decision is mailed or otherwise distributed 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

RECONSIDERATION

This is a decision issued under AS 23.30.128(e), so a party may ask the commission to reconsider this Final Decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion for reconsideration must be filed with the commission within 30 days after this decision was distributed or mailed. If a request for reconsideration of this 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).

I certify that, with the exception of changes made in formatting for publication and correction of typographical and grammatical errors, this is a full and correct copy of the Final Decision No. 137 issued in the matter of *Landry v. Trinion Quality Care Services, Inc.,* AWCAC Appeal No. 09-025, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on August 26, 2010.

Date: *August 31, 2010*

Signed
B. Ward, Appeals Commission Clerk