Alaska Workers' Compensation Appeals Commission

Eva M. Birotte, Appellant, vs. Portland Habitation Center and Alaska Insurance Guaranty Association, Appellees.	Final Decision Decision No. 171 November 9, 2012 AWCAC Appeal No. 12-002 AWCB Decision No. 11-0173 AWCB Case No. 199629871

Final decision on appeal from Alaska Workers' Compensation Board Final Decision and Order No. 11-0173, issued at Anchorage on December 8, 2011, by southcentral panel members Linda Cerro, Chair, Patricia Vollendorf, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Eva M. Birotte, self-represented appellant; Joseph M. Cooper, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees, Portland Habitation Center and Alaska Insurance Guaranty Association.

Commission proceedings: Appeal filed January 9, 2012; briefing completed August 14, 2012; oral argument was not requested by either party.

Commissioners: James N. Rhodes, S. T. Hagedorn, Laurence Keyes, Chair.

By: Laurence Keyes, Chair.

1. Introduction.

Appellant, Eva M. Birotte (Birotte), worked for appellee, Portland Habitation Center (Portland), in the laundry at Fort Richardson, Alaska, from July through October 22, 1996, when she was terminated.[1] Shortly after undergoing neck surgery in the form of a C5-6 anterior cervical fusion and discectomy on May 12, 1997,[2] she signed a

[1] R. 0001; Birotte Dep. 28:11–44:12.

[2] Appellees' Exc. 005.

Report of Injury on May 20, 1997.[3] Birotte attributed the need for neck surgery to a pinched nerve she suffered while working for Portland.[4] A workers' compensation claim (claim) filed on her behalf on June 11, 1998, sought awards of temporary total disability (TTD) benefits from October 25, 1996, and ongoing, medical costs, permanent partial impairment (PPI), penalty, interest, and attorney fees and costs.[5] Eventually, the claim was settled when the parties executed a Compromise and Release (C&R) in February 1999.[6]

On August 6, 2010, Birotte filed another claim, requesting, among other things, medical benefits consisting of formal supervised physical therapy.[7] By the time this claim went to hearing before the Alaska Workers' Compensation Board (board) on November 15, 2011, the relief sought by Birotte included setting aside the C&R, awarding TTD benefits, and requiring that a second independent medical evaluation (SIME) be performed subject to certain conditions.[8] The board denied Birotte's claim in all respects.[9] We, the Workers' Compensation Appeals Commission (commission), affirm the board's decision.

2. Factual background and proceedings.

The board made extensive factual findings.[10] We discuss them to the extent necessary to provide context to our decision.

As for the May 1997 Report of Injury, on its portion of the form, Portland noted that it had no notice of any injury and the medical records Portland attached reflected that: 1) Birotte had been diagnosed in September 1996 with cervical degenerative disc

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3 R. 0001.

4 Appellees' Exc. 001.

5 R. 0036-37.

6 Appellees' Exc. 004-10.

7 R. 0132-33.

8 *See Birotte v. Portland Habitation Center, et al.*, Alaska Workers' Comp. Bd. Dec. No. 11-0173, 1 (Dec. 8, 2011).

9 *See Birotte*, Bd. Dec. No. 11-0173 at 26.

10 *See id.* at 3-16.

disease; 2) she had been unable to work from December 14, 1995, until such time as her left arm pain resolved; and 3) she was released to work on October 4, 1996, with a lifting restriction of 20 pounds.[11] None of the attached medical records indicated that Birotte attributed her arm pain to her work for Portland.[12] On April 20, 1998, Birotte filed another Report of Injury, which stated that her injury occurred as a result of lifting and marking uniforms, pushing carts back and forth to different areas in the laundry, and handing racks of clothing to customers.[13]

On June 10, 1998, the law firm of Rehbock, Rehbock & Wittenbrader began its representation of Birotte.[14] The following day, a claim was filed on her behalf.[15] Portland answered and controverted the claim on June 30, 1998, denying all benefits, disputing the work-relatedness of Birotte's injuries, and asserting various legal defenses.[16] In August 1998, Birotte gave birth to her youngest child; the child had serious medical problems.[17]

On January 6, 1999, a prehearing conference was attended by both Birotte and her attorney. At the prehearing conference, Portland reported that an employer medical evaluation (EME)[18] was favorable to Birotte and that it would be receptive to a settlement proposal.[19] In a letter dated January 22, 1999, Birotte's counsel proposed to settle all past and future benefits, with the exception of future medical benefits, for the sum of $40,000.00, payment or indemnification by Portland for past medical costs, including liens

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[11] R. 0001-04. Apparently, Portland personnel were unaware of Birotte's cervical condition and her release to work during the timeframe she worked for Portland.

[12] R. 0001-04.

[13] R. 0008. Portland reiterated that it had no report of any work-related injury on file. R. 0009.

[14] R. 0031.

[15] R. 0036-37.

[16] R. 0046-48, 0013.

[17] Hr'g Tr. 62:1–64:13, Nov. 15, 2011.

[18] R. 0725-30.

[19] R. 3037.

or demands from medical providers, continuing medical benefits, and payment of attorney fees.[20]

On February 16, 1999, the parties signed a C&R. According to its terms, the agreement settled all past and future benefits, with the exception of future medical benefits, for $35,000.00, Portland would directly reimburse Medicare for the costs it paid for Birotte's cervical spine treatment, and would pay attorney fees. Future medical benefits remained open, subject to Portland's right to contest liability for them.[21]

The C&R contained the following express terms:

> It is the intent of this agreement to compromise all benefits which might be due to the employee pursuant to the terms of the Alaska Workers' Compensation Act, except future medical expenses as outlined above. . . . [T]his Compromise and Release shall be enforceable and shall forever discharge the liability of the employer and its workers' compensation carrier to the employee and her heirs, beneficiaries, executors and assigns, for all benefits which could be due or might be due pursuant to the terms and provisions of the Alaska Workers' Compensation Act, excepting only medical benefits as outlined above. The parties agree that future changes in law or change in interpretation of the law governing such payments, benefits or compensation, whether affected by the legislature, Alaska Workers' Compensation Board, or courts, shall have no effect upon this workers' compensation claim or this settlement agreement. It is agreed that the employee's injuries and disability, including any injuries and disabilities which arose prior to the injury referred to herein, are or may be continuing and progressive in nature and that the nature and extent of said injuries and resulting disability may not be fully known at this time. By execution of this Compromise and Release, the employee acknowledges her intent to release the employer and its workers' compensation insurance carrier from any and all liability arising out of or in any way connected with the work-related accident referred to above and any known or as yet undiscovered disabilities, injuries or other damages associated with said accident. This Compromise and Release shall be effective in discharging the employer and its workers' compensation carrier of all liability of whatsoever nature for all past, present and future compensation benefits.[22]

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[20] Appellees' Exc. 002-03.

[21] Appellees' Exc. 007-08.

[22] Appellees' Exc. 007-08 (emphasis added).

Birotte initialed each page of the C&R, below the acknowledgment that she had "Read and understood" its terms. She signed both the C&R and an accompanying affidavit stating:

> I, EVA BIROTTE, being first duly sworn, depose and say: I am the employee named in this Compromise and Release. I have read and understand what is stated in this document. To the best of my knowledge, the facts stated in this Compromise and Release are true and correct. No representations or promises have been made to me by the employer or carrier which have not been set forth in this document. I have signed the Compromise and Release freely and voluntarily for the purposes of settlement.[23]

Two-and-a-half years passed. She continued treating for radicular symptoms and pain with steroid injections.[24] During a December 30, 2003, appointment with her providers at Advanced Pain Centers of Alaska (APCA), she reported almost 90% pain relief from a radiofrequency ablation of the dorsal median nerve. Birotte did not consider her pain was so significant that she would undergo surgery at that time. She reported obtaining relief with physical therapy, and preferred symptomatic treatment with periodic epidural steroids or radiofrequency ablation to surgery.[25]

In early 2004, Birotte reported increasing pain, numbness, and burning to Gregory R. Polston, M.D., of APCA, and to physiatrist, J. Michael James, M.D., who performed electrodiagnostic (EMG) studies. In his records, Dr. James indicated that Birotte was suffering chronic left C7 radiculopathy without any significant change since July 2001. It was his opinion that she failed conservative and interventional pain measures, and was a candidate for cervical disc decompression and fusion.[26]

On June 28, 2004, Birotte met with Timothy I. Cohen, M.D., who had performed her cervical surgery in May 1997. She reported pain in the left neck and shoulder areas, radiating down into the arm and into all digits, with severe pain in her shoulder, relieved by steroid injections and nerve root blocks. Dr. Cohen noted that Birotte wanted to

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[23] Appellees' Exc. 010 (emphasis added).

[24] R. 1044-45, 1046, 1053, 1055-56, 1071, 1073.

[25] R. 1114.

[26] R. 1116, 1119.

proceed with the surgery he had recommended.[27] On July 28, 2004, Dr. Cohen performed C4-5 and C6-7 anterior cervical discectomies and arthrodesis with cadaveric tricortical structural graft requiring shaping, segmental plate and screw instrumentation, and exploration of her C5-6 fusion. His pre- and post-operative diagnoses were C4-5 and C6-7 disc herniations with spinal stenosis and mild radiculopathies.[28] On December 2, 2004, Dr. Cohen planned to have Birotte begin physical therapy.[29]

Birotte complained that her pain became worse after the surgery and continued treating at APCA, the treatment consisting of stellate ganglion blocks, radiofrequency ablation, cervical facet injections, and prescription pain medications, which provided some relief.[30] As of September 19, 2005, Dr. Polston planned to have Birotte resume physical therapy.[31] Between October 4, 2005, and May 22, 2006, she attended sixteen physical therapy sessions,[32] and between September 25, 2006, and May 8, 2007, she attended nineteen physical therapy sessions.[33] There were numerous cancellations and no-shows.[34]

On March 31, 2007, at Portland's request, Alan J. Goldman, M.D., performed a medical records review because Birotte was late for a scheduled EME and could not be seen. Dr. Goldman concluded her October 1996 work-related injury was the substantial factor in the need for her two cervical surgical procedures and those surgeries led to a spinal cord contusion and a chronic pain syndrome best characterized as being a

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[27] R. 1124-25.

[28] R. 1131.

[29] R. 1168.

[30] R. 1161, 1165, 1170, 1180, 1182, 1189, 1191, 1193-94, 1197, 1199, 1203, 1215.

[31] R. 1217.

[32] R. 1218-21, 1223, 1229, 1231-33, 1235-36, 1238-39, 1241, 1243-44, 1246-49, 1270-74.

[33] R. 1284-86, 1289, 1293, 1298, 1300-02, 1305-07, 1309, 1311-12, 1314-16, 1358-61.

[34] R. 1229, 1362, 1364.

sympathetic mediated pain syndrome. It was his opinion that no formal supervised physical therapy was necessary, however, Birotte ought to continue a home exercise protocol of stretching and flexibility of her upper extremities, neck, and shoulders. Dr. Goldman suggested newer, non-narcotic medications be considered for her pain. He did not believe she would benefit from removal of her cervical hardware. He noted most published reports on the success of spinal cord stimulation (SCS) in the lumbar spine suggested 40-50% of individuals receiving an SCS experienced at least a 50% reduction in pain over a period of several months to several years. After consulting with an orthopedist, Dr. Goldman opined that an SCS might be less effective for Birotte because her two cervical surgeries had altered her cervical anatomy, and could make placement of the stimulating wire difficult. He added that if serious consideration were to be given an SCS, a psychological evaluation ought to be conducted first.[35] On May 7, 2007, based on Dr. Goldman's March 31, 2007, review, Portland filed a Controversion Notice, denying ongoing formal supervised physical therapy.[36]

On May 14, 2007, Dr. Polston referred Birotte for a psychiatric evaluation to assess her goals and reasons for proceeding before he would recommend an SCS trial.[37] On May 30, 2007, she was seen by Catherine Barrett, ANP, for evaluation of any underlying depression, anxiety, or other symptoms, and her candidacy for an SCS. Ms. Barrett concluded she was not a candidate for an SCS at that time, given the extent of her depression and anxiety. Ms. Barrett noted if she were to be considered for an SCS in the future, Birotte would require psychological testing. Ms. Barrett suggested a trial of anti-depressants, and provided Birotte with samples of Lexapro.[38]

Birotte saw Ms. Barrett again on June 25, 2007, and reported a decrease in her psychiatric symptoms. Ms. Barrett prescribed Lexapro, dosage 15 mg and planned to

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35 R. 1318-53.

36 R. 0027.

37 R. 1362.

38 R. 1364-71.

follow up with her in one month.[39] When Dr. Polston saw Birotte on June 28, 2007, he noted her depression was improving, she was in good spirits, and she was benefiting from working with Ms. Barrett. Dr. Polston did not recommend continuing physical therapy.[40]

The next time Birotte consulted Ms. Barrett was on January 8, 2008. She reported having stopped taking the Lexapro after remission of her depressive symptoms, however, she became depressed again after her mother died in the fall. They discussed Birotte's need to be compliant with her mental health treatment regimen, she was restarted on Lexapro, dosage 10 mg, with an increase to 15 mg in two weeks, and she was to return in three weeks.[41] On February 14, 2008, Birotte reported to Ms. Barrett that she increased the Lexapro to 15 mg and that she was beginning to respond to the medication. They again discussed the need for Birotte to comply with her mental health treatment protocol. She was to return in one month.[42]

Medical records reflect that as of April 29, 2008, Birotte was not taking Lexapro.[43] Moreover, pharmacy records indicated that, through February 2, 2009, no Lexapro prescription appeared to have been filled for Birotte after the 45 tablets initially dispensed on June 25, 2007.[44]

Between July 28, 2008, and February 5, 2009, Birotte saw Deborah Kiley, ANP, and Grant T. Roderer, M.D.,[45] on a number of occasions.[46] On August 26, 2008, Ms. Kiley noted Birotte's resistance to using many suggested therapies, including medications, psychotherapy, and transcutaneous electrical nerve stimulation (TENS) unit.[47] During an appointment on October 6, 2008, Ms. Kiley prescribed TENS pads and encouraged Birotte

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39 R. 1376-77.

40 R. 1378-79.

41 R. 1394-96.

42 R. 1397-98.

43 R. 1406-07.

44 R. 3065-70.

45 Dr. Polston had left APCA.

46 R. 1424-33, 1440-45, 1447-53.

47 R. 1432.

to use the TENS unit with more regularity.[48] On December 4, 2008, they again discussed the use of the TENS unit. Ms. Kiley again noted continuing difficulty in impacting Birotte's pain without behavioral health modifications, which she had resisted.[49]

On February 5, 2009, on referral from Dr. Roderer's office, Birotte saw Dr. James for new EMG studies. His impression was chronic left C7 radiculopathy, mild chronic right C7 radiculopathy, mild carpal tunnel syndrome bilaterally, chronic pain syndrome with elements of complex regional pain syndrome to account for the dysesthesia/ hypersensitivity in the ulnar aspect of the right greater than the left hand, and postoperative cervical fusion C4 through C7. Dr. James noted that Birotte wished to be considered for a dorsal column stimulator trial, and expressed his opinion that this would be reasonable in an effort to control her neck and arm pain, and would potentially allow her to reduce the use of opiates for pain control.[50]

On February 18, 2009, Birotte was seen by psychologist Carol K. Slonimski, Ph.D., for a pre-surgical psychological evaluation prior to an SCS trial. Dr. Slonimski noted that Birotte was angry at having an SCS "pushed upon her," and was focused on having the cervical hardware removed. Dr. Slonimski did not recommend an SCS trial at that time because of the complex psychological situation surrounding Birotte's current pain symptoms and her focus on the cervical hardware as her primary pain-related concern.[51]

On March 3, 2009, Birotte saw Dr. Roderer. He was awaiting results of the psychological evaluation and wanted to refer her to a neurosurgeon, Paul L. Jensen, M.D., for a second opinion regarding further treatment options including surgery, removal of the plate placed for the fusion, and spinal cord stimulation. Dr. Roderer noted that Birotte understood that an SCS trial must be done prior to permanent implantation.[52]

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48 R. 1444.

49 R. 1452-53.

50 R. 1458-60.

51 R. 1465-67.

52 R. 1469-70.

On March 19, 2009, Birotte saw Dr. Jensen, who ordered x-rays and a computerized tomography scan.[53] At her next appointment with Dr. Jensen on April 2, 2009, he indicated that she would benefit from removal of the "long construct that has now prolapsed into the disc space at C3-C4[,]" and from removal of an "extremely large osteophyte over the C3-C4 junction[,]" which might help with range of motion. Dr. Jensen wrote "I do not plan on additional fusion, but feel this would be an appropriate step prior to placing a spinal cord stimulator."[54]

On June 17, 2009, Birotte told Dr. Roderer that she wished to have the hardware from the anterior cervical fusion removed if possible. He referred her again to Dr. Jensen to discuss further treatment options.[55] On July 16, 2009, she consulted Dr. Jensen, who said he did not think removing the anterior plate in her neck would improve her arm pain and that an SCS might ultimately be in her best interests. Dr. Jensen had previously referred Birotte to Shawn P. Johnston, M.D., a physical and rehabilitation medicine specialist, for EMG studies.[56] After seeing Birotte on July 9, 2009, Dr. Johnston indicated that "[s]ome of her symptoms may be of central origin if there was any involvement of the cervical spinal cord back in 2004. . . . I do think it would be reasonable to consider spinal cord stimulation if, in fact, this is of central origin as well."[57] On seeing Birotte on August 26, 2009, Dr. Roderer noted Dr. Jensen's belief that removing the plate from her anterior cervical fusion would not reduce her pain symptoms and that Dr. Jensen agreed with the use of an SCS for controlling her pain.[58]

On October 27, 2009, having again discussed an SCS with Birotte, Dr. Roderer noted her reluctance to consider an SCS trial at that time.[59] On December 30, 2009, she

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53 R. 1472-73.

54 R. 1476.

55 R. 1483-84.

56 R. 1490.

57 R. 1486-87.

58 R. 1491-92.

59 R. 1494.

asked Dr. Roderer to refer her for physical therapy due to muscle tightness and spasms. He made the referral for reevaluation and treatment as needed.[60] On January 19, 2010, Birotte was evaluated at Advanced Physical Therapy on referral from Dr. Roderer.[61]

On February 27, 2010, Dr. Goldman conducted another EME.[62] He reiterated his opinion that Birotte's work-related injury was "the substantial factor" which led to her two cervical surgeries, and was responsible for her multiple therapeutic interventions, current chronic pain syndrome, and electrophysiologic evidence of a C7 radiculopathy. In terms of appropriate treatment options, Dr. Goldman endorsed a home exercise physical therapy protocol with stretching, flexion, extension and graduated strengthening exercises on a daily basis. The exercise regimen was to be coupled with closely monitored medications, either narcotic or non-narcotic. He also concluded that Birotte would benefit from epidural steroid injections or selective nerve root blocks, and would need psychological support so that she could adjust to her current medical state and pain management. Dr. Goldman was not convinced that she was a candidate for an SCS because 1) there would likely be difficulty in placing the wire as a result of her multiple cervical procedures, 2) Birotte was skeptical of the procedure, and 3) Ms. Barrett, the psychiatric nurse practitioner, did not believe that Birotte was a candidate for an SCS. He noted that if she wanted to proceed with an SCS, a more thorough psychological evaluation with appropriate psychometric testing needed to be done.[63]

On April 19, 2010, Dr. Roderer stated he disagreed with Dr. Goldman's recommendations, and reiterated that Birotte ought to be allowed an SCS trial if she wanted to do so.[64] On June 8, 2010, Birotte returned to physical therapy for evaluation and treatment. The therapist recommended physical therapy once per week, for three

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60 R. 1496-97.

61 R. 1499-1501.

62 R. 1703-20.

63 R. 1718-19.

64 R. 1524.

weeks, to develop a home exercise program for sympathetic desensitization, including laterality training, mental imagery, and mirror training.[65]

On August 6, 2010, Birotte filed a claim for medical benefits, "physical therapy etc.," and "other[.]"[66] The claim related to an injury date of October 25, 1996, the same injury date as indicated on Birotte's Report of Injury that was filed on May 7, 1998.[67]

On October 12, 2010, Birotte saw Dr. Roderer, who noted that 1) she was doing "fairly well," 2) Percocet continued to help decrease her overall pain symptoms, and 3) she was receiving benefit from periodic cervical epidural steroid injections, the last one on June 24, 2010. Birotte was advised to return in two months, when a repeat injection would be considered.[68]

At a prehearing conference on November 2, 2010, Birotte's claim was amended to include requests for an SIME, TTD, and medical treatment. She also sought to have the C&R set aside and to recover the tuition she paid to the Career Academy for phlebotomy training. The parties stipulated to the SIME.[69]

On January 26, 2011, Birotte was notified the SIME was scheduled for March 30, 2011, with orthopedist James F. Scoggin, III, M.D., in Honolulu, Hawaii.[70] On February 8, 2011, she was notified that the date of the SIME had been changed to March 28, 2011.[71] Birotte did not attend the SIME, having missed her flight to Honolulu on March 27, 2011.

On May 3, 2011, the parties attended another prehearing conference to discuss case status given Birotte's failure to attend the SIME. On being contacted, Dr. Scoggin

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65 R. 1530-33.

66 R. 0132-33.

67 R. 0009.

68 R. 1552.

69 R. 3043-46.

70 R. 2886-87

71 R. 2898-99.

confirmed he would be able to respond to the board's questions solely on review of the medical records sent to him.[72]

Dr. Scoggin conducted an extensive records review. On May 31, 2011, he issued a 122-page SIME report. In his report, Dr. Scoggin stated appropriate future medical care for Birotte included Lidoderm patches, Percocet, Elavil, and/or Ambien, on an as-needed basis, to manage her pain and assist with sleep. According to Dr. Scoggin, her use of narcotic pain medication ought to be minimized, however, he noted that realistically, Birotte would probably need to continue with narcotic pain medication. He also noted that she benefitted from a TENS unit and recommended a home exercise program. It was his opinion that formal physical therapy, massage therapy, or chiropractic care were not likely to provide additional benefit in the future. He thought it was unlikely that Birotte would benefit from an SCS, and that epidural steroid injections or selective nerve root blocks would not provide any long-term benefit.[73]

Even though as recently as August 3, 2011, Dr. Roderer continued to advocate an SCS trial, and, if successful, implantation of a SCS device,[74] Birotte's medical records did not otherwise indicate she received psychological approval for an SCS.

3. Standard of review.

The commission is to uphold the board's findings of fact if they are supported by substantial evidence in light of the whole record.[75] The board's credibility findings are binding on the commission.[76] Its weight findings are conclusive.[77] We exercise our independent judgment when reviewing questions of law and procedure.[78] The board's

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72 R. 3049-50.

73 R. 2904-3025.

74 R. 1696.

75 Substantial evidence is such relevant evidence which a reasonable mind might accept as adequate to support a conclusion. *See, e.g., Norcon, Inc. v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051, 1054 (Alaska 1994).

76 *See* AS 23.30.128(b).

77 *See* AS 23.30.122.

78 *See* AS 23.30.128(b).

exercise of its discretion is reviewed for abuse; an abuse of discretion occurs if we are left with a "definite and firm conviction" that the decision reviewed was a mistake.[79]

4. Discussion.

a. Birotte's arguments are not well-developed.

Preliminarily, the commission observes that Birotte's briefing consisted primarily of an argument that she was still suffering from her work-related injury and required medical care in one form or another. As for setting aside the C&R, she maintained she did not understand its terms. Otherwise, there was no legal authority cited in support of her arguments,[80] which were repetitious and not well-developed. Consequently, as happened in another appeal we decided recently, "[t]he quality of her briefing greatly impairs any viable arguments she may have, as well as this [commission's] ability to deal with the issues presented."[81]

b. There is no compelling reason to set aside the C&R.

Birotte sought to have the C&R that was agreed to in February 1999 set aside. Her purpose in doing so presumably was to obtain benefits which would otherwise be foreclosed to her pursuant to that agreement.

There are recognized bases for setting aside a C&R. For example, it can be voided if the claimant was induced to agree to the C&R because of duress from, or coercion by, the employer.[82] A C&R can also be set aside if there was fraud or misrepresentation by the employer.[83] However, we do not understand Birotte to be

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[79] *Municipality of Anchorage v. Devon*, 124 P.3d 424, 429 (Alaska 2005).

[80] However, an adjudicative body is to base its decision on the law, whether cited by a party or not. *See Barlow v. Thompson*, 221 P.3d 998, 1003-04 (Alaska 2009).

[81] *See Parsons v. Craig City School District*, Alaska Workers' Comp. App. Comm'n Dec. No. 168, 10 (August 30, 2012) (citing *A.H. v. W.P.,* 896 P.2d 240, 243 (Alaska 1995)).

[82] *See Helstrom v. North Slope Borough*, 797 P.2d 1192, 1196-97 (Alaska 1990).

[83] *See Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093-94 (Alaska 2008).

arguing that Portland, through some sort of inappropriate conduct, induced her to sign the C&R. Rather, her basis for asking the board to set aside the C&R was that she did not understand its terms at the time she agreed to it. The reason ostensibly offered was that Birotte was experiencing unusual stress following the birth of her child who was born with severe health problems.

The evidence that Birotte did not understand the terms of the C&R consisted of her testimony to that effect. On the other hand, as the board noted, Birotte: 1) initialed each page of the C&R, acknowledging that she had "Read and understood" its terms; 2) swore an oath that she read and understood what was stated in the agreement; and 3) testified that she read the proposed C&R and reviewed it with her attorney, who explained its terms to her.[84]

We also distinguish Birotte's circumstances from those in another Alaska case in which an agreement was at issue, although one not involving a workers' compensation claim and C&R.[85] In *Hebert*, the Alaska Supreme Court (supreme court) was tasked with reviewing the trial court's ruling that an earnest money agreement to sell a home was void, based on a finding that the seller was unable to understand the nature and consequences of signing the contract. Noting that the seller "testified that she did not read or understand the earnest money agreement[,]"[86] the supreme court agreed with and upheld the trial court. Here, we understand Birotte to be asserting that the aforementioned stress at the time she signed the C&R prevented her from understanding its terms. However, unlike the seller in *Hebert*, Birotte was represented by counsel and acknowledged that she had read and understood the C&R.

We conclude that there was substantial evidence in the record as a whole supporting the board's findings that Birotte 1) *did* understand the terms of the C&R, and 2) was *not* incapacitated owing to stress over her child's health problems. We affirm its ruling not to set aside the C&R.

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84 Hr'g Tr. 68:1–69:14, Nov. 15, 2011.

85 *See Hebert v. Bailey*, 672 P.2d 1307 (Alaska 1983).

86 *Hebert*, 672 P.2d at 1310.

c. The SIME process did not require Birotte to be physically examined.

As discussed in subsection 4(d) below, among the disputes between Birotte's medical providers and Portland's EME physician, Dr. Goldman, was whether Birotte needed continuing care in the form of supervised physical therapy. As a way of resolving such disputes, AS 23.30.095(k) provides for SIMEs, the purpose of which is to have an independent medical expert provide opinions to the board on contested medical issues.[87] In this matter, once the parties agreed that an SIME was in order, Dr. Scoggin was selected to conduct the examination. Birotte was to fly to Honolulu to be evaluated by Dr. Scoggin. She missed her flight. The board decided to rely on a records review by Dr. Scoggin, rather than scheduling another appointment for Birotte to see him. We infer Birotte is arguing that, for the SIME to have evidentiary value to the board, it had to have included a physical examination of her.

With respect to this issue, we first note that a board regulation does not *require* a physical examination of the claimant in connection with an SIME.[88] Second, the commission must analyze whether, under the circumstances, it was an abuse of discretion for the board to rule that Birotte need not have been examined by Dr. Scoggin. In another appeal involving a medical evaluation, the supreme court held that the board abused its discretion when it denied benefits to a claimant who refused to attend an EME in Utah, after the claimant had moved from Alaska to Florida.[89] In

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[87] *See Seybert*, 182 P.3d at 1097.

[88] **8 AAC 45.092. Selection of an independent medical examiner**.

. . . .

(i) The report of the physician who is serving as an independent medical examiner must be done within 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary.

[89] *See Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1254-55 (Alaska 2007).

contrast, here, we are left with the firm conviction that the board was not mistaken when it decided that a physical examination of Birotte in conjunction with the SIME was unnecessary. The board based its decision on Dr. Scoggin's reassurance that he would be able to issue a report without physically examining Birotte, and the thoroughness of his ensuing report.[90] It was not an abuse of discretion for the board to rule as it did.

d. Birotte did not demonstrate by a preponderance of the evidence that she was entitled to supervised physical therapy.

Birotte's 2010 claim related back to the injury she reportedly suffered on October 25, 1996. Before the board, Birotte argued that she needed continuing care in the form of supervised physical therapy. Portland maintained that a home exercise regimen sufficed. Thus, the commission is presented with the issue whether Birotte made a case for more physical therapy, rather than the alternative at-home therapy Portland proposed. To resolve this issue, we bifurcate our discussion. First, applying the presumption of compensability analysis, did Birotte prove by a preponderance of the evidence, that she was entitled to medical benefits in the form of ongoing supervised physical therapy? Second, as ordered by the board, was the home exercise program following a brief period of physical therapy[91] a reasonable alternative?

A portion of a subsection of a statute that is part of the Alaska Workers' Compensation Act reads:

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require[.]

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90 *See Birotte*, Bd. Dec. No. 11-0173 at 22-23.

91 *See id*. at 23-24.

According to this subsection, employers are to provide employees who suffer work-related injuries with medical treatment "which the nature of the injury or process of recovery requires" within the first two years of the injury. When the board reviews an injured employee's claim for medical treatment made within two years of an injury that is unquestionably work-related, "its review is limited to whether the treatment sought is reasonable and necessary."[92] When reviewing a claim for continued treatment beyond two years from the date of injury, the board has discretion to authorize "indicated" medical treatment "as the process of recovery may require."[93] The board is not limited to reviewing the reasonableness and necessity of the particular treatment sought, but has latitude to choose among reasonable alternatives.[94]

With this distinction in mind, we set about applying the presumption of compensability analysis. AS 23.30.120(a)(1) provides that "[i]n a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that . . . the claim comes within the provisions of this chapter[.]" Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed compensable.[95] To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment.[96] If the employee establishes the link, the presumption may be overcome when the employer presents substantial evidence the injury was not work-related.[97] The employer's evidence is considered by itself and not weighed at this step in the analysis.[98] If the board finds the employer's evidence is sufficient, the presumption of

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92 *Philip Weidner & Associates v. Hibdon, Inc.* 989 P.2d 727, 731 (Alaska 1999).

93 *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664 (Alaska 1991) (*Carter*).

94 *See Carter*, 818 P.2d at 665.

95 *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996).

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

97 *See Tolbert*, 973 P.2d at 611.

98 *See Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

compensability drops out and the employee must prove his or her case by a preponderance of the evidence.[99] This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true.[100] The board then weighs the evidence, determines inferences to draw, and considers credibility.[101]

The board found that Birotte established the preliminary link between her injury and need for continuing care in the form of supervised physical therapy.[102] We agree. The board also found that Portland had rebutted the presumption through the evidence provided by Drs. Goldman and Scoggin.[103] Again, we agree. Ultimately, the board concluded that Birotte had not demonstrated by a preponderance of the evidence that she needed supervised physical therapy. We agree. Not only did the opinions of Drs. Goldman and Scoggin weigh in the board's thinking, most importantly, on June 8, 2010, when Birotte returned to physical therapy for an evaluation, *the therapist recommended physical therapy once per week, for three weeks, to develop a home exercise program*.[104] Dr. Roderer merely referred Birotte to physical therapy. The physical therapist, Dr. Goldman, and Dr. Scoggin were in agreement that a home exercise program would suit Birotte's needs. As opposed to supporting Birotte's assertion that she required supervised physical therapy, the preponderance of the evidence showed that a home exercise regimen was the better option. In accordance with established case law,[105] the board chose a reasonable alternative form of treatment.

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99 *See Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).

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

101 *See Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145, 1151 (Alaska 1989).

102 In January 2010, Birotte was referred to physical therapy by Dr. Roderer. R. 1499-1501.

103 Following his EME on February 27, 2010, Dr. Goldman thought Birotte should continue her home exercise program. R. 1719. In his SIME report, Dr. Scoggin recommended a home exercise program. R. 1690.

104 R. 1530-33. *See Birotte*, Bd. Dec. No. 11-0173 at 23-24.

105 *See Carter*, 818 P.2d at 665.

4. Conclusion.

We AFFIRM the board's decision in all respects.

Date: *9 November 2012* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
James N. Rhodes, Appeals Commissioner

Signed
S. T. Hagedorn, Appeals Commissioner

Signed
Laurence Keyes, Chair

APPEAL PROCEDURES

This is a final decision on the merits of this appeal. The appeals commission affirms the board, as set forth above. The commission's decision becomes effective when distributed (mailed) unless proceedings to reconsider it or to appeal to the Alaska Supreme Court are instituted (started).[106] For the date of distribution, see the box below.

Effective, November 7, 2005, 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 distributed[107] 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 is not a party.

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[106] A party has 30 days after the distribution of a final decision of the commission to file an appeal to 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] *See id*.

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/

RECONSIDERATION

This is a decision issued under AS 23.30.128(e). 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 no later than 30 days after the day this decision is distributed to the parties. If a request for reconsideration of this final decision is filed on time with the commission, any proceedings to appeal must be instituted no later than 30 days after the reconsideration decision is distributed to the parties, or, no later than 60 days after the date this final decision was distributed in the absence of any action on the reconsideration request, whichever date is earlier. AS 23.30.128(f).

I certify that, with the exception of changes made in typographical errors, this is a full and correct copy of the Final Decision No. 171 issued in the matter of *Eva M. Birotte v. Portland Habitation Center and Alaska Insurance Guaranty Association*, AWCAC Appeal No. 12-002, and distributed by the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, on November 9, 2012.

Date: *November 13, 2012*

Signed

B. Ward, Commission Clerk