

Alaska Workers' Compensation Appeals Commission

Karl B. Cameron,
Appellant,

vs.

TAB Electric and Liberty Northwest
Insurance,
Appellees.

Final Decision

Decision No. 089 September 23, 2008

AWCAC Appeal Nos. 07-022 & 07-038

AWCB Decision Nos. 07-009 1 & 07-0276

AWCB Case No. 200515003

Appeal from Alaska Workers' Compensation Board Decisions No. 07-0091, issued on April 19, 2007, by southcentral panel members John Abshire, Member for Labor, and Linda Hutchings, Member for Industry, and Darryl Jacquot, Chair, and No. 07-0276, issued on September 10, 2007, by southcentral panel members Mark Crutchfield, Member for Labor, Janet Waldron, Member for Industry and Darryl Jacquot, Chair.

Appearances: Karl B. Cameron, *pro se*, appellant. Jeffrey Holloway, Holmes Weddle & Barcott for appellees TAB Electric and Liberty Northwest Insurance.

Commission proceedings: Appeal filed May 18, 2007, assigned Appeal No. 07-022. Appellee's motion to stay board hearing denied, order staying appeal proceedings issued June 28, 2007. Appeal filed October 9, 2007, assigned Appeal No. 07-038. Appeal proceedings resumed and the appeals consolidated by order on November 1, 2007. Appellant's request for fee waiver and transcript at commission expense granted November 1, 2007. Appellant's motion to extend time to file brief granted January 23, 2008; appellant's request to reschedule oral argument granted April 23, 2008. Oral Argument on appeal presented June 25, 2008.

Commissioners: David W. Richards,¹ Philip Ulmer, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Philip Ulmer, Appeals Commissioner, and Kristin Knudsen, Chair.

¹ Appeals Commissioner David W. Richards was assigned to this appeal by order of the chair on Mar. 4, 2008.

Karl B. Cameron appeals the board's decisions denying and dismissing his claims for temporary total disability compensation² and permanent total disability compensation benefits.³ Cameron asserts the board abused its discretion by denying admission of medical evidence that he believed to be substantial from the Alaska Native Medical Center at his second hearing.⁴ He argues that the board erred by failing to attach the presumption of compensability to his claim for permanent total disability compensation and that he would be entitled to temporary total disability compensation during vocational rehabilitation. The appellees assert the board's decisions were supported by substantial evidence and the denial of evidence at the July 24, 2007, board hearing was proper and supported by regulation.

This appeal requires the commission to decide if (1) the board abused its discretion by denying admission at hearing of the appellant's additional medical records, presented and offered at time of hearing and not previously disclosed, (2) Cameron could receive temporary total disability compensation while medically stable, and (3) the board applied the three-part presumption analysis correctly to the permanent total disability claim.

The commission concludes the board did not abuse its discretion by refusing admission of appellant's medical records. Cameron concedes that the physicians agree that he is medically stable; the commission determines his argument that he is entitled to temporary total disability compensation is without merit. The commission concludes

² *Cameron v. TAB Elec., (Cameron I)* Alaska Workers' Comp. Bd. Dec. No. 07-0091 (Apr. 19, 2007) (D. Jacquot, Chair).

³ *Cameron v. TAB Elec., (Cameron II)* Alaska Workers' Comp. Bd. Dec. No. 07-0276 (Sept. 10, 2007) (D. Jacquot, Chair). Cameron did not appeal the board's denial of his claim for benefits related to a left shoulder injury.

⁴ Cameron also asserts that the board erred by failing to admit his hearing brief, but the board did admit the hearing brief as his argument, with the caution that factual assertions [by other declarants] in the brief not supported by evidence would be given little if any weight. Hrg Tr. 28:1-24, July 24, 2007. Cameron appealed the decision to deny him the opportunity to present witness testimony and a written statement, but, as discussed below, he failed to present more than cursory argument on this point.

that the board determination that the employee failed to raise a presumption of compensability as to his claim for permanent total disability compensation is error. Therefore, the commission remands this case for further findings on the appellant's claim for permanent total disability compensation and otherwise affirms the board's decisions.

1. Factual background and board proceedings.

In August 2005, Cameron fell as he entered a ditch in the course of his employment as an equipment operator for appellee, TAB Electric.⁵ A right shoulder strain resulted and TAB Electric initiated temporary total disability (TTD) payments soon thereafter.⁶ Cameron began treatment with Dr. Stephen Tower, who eventually performed surgery in an attempt to repair the shoulder.⁷ After some recovery time, Dr. Tower and the employer's medical evaluator, Dr. Jensen, both approved Cameron's return to light-duty desk work.⁸

During this time, Cameron was evaluated for eligibility for vocational reemployment benefits.⁹ Dr. Tower approved Cameron's return to work as an insurance sales agent, a position Cameron had previously held.¹⁰ The vocational reemployment specialist recommended that he was not eligible because there was an adequate labor market for insurance sales agents.¹¹ The administrator determined that Cameron was not eligible for vocational reemployment benefits on April 17, 2006.¹² Cameron did not appeal the administrator's decision.

⁵ R. 0001.

⁶ R. 0002.

⁷ R. 0123, 0509.

⁸ R. 0124, 0132.

⁹ R. 1281.

¹⁰ R. 1299-1301.

¹¹ R. 1287.

¹² R. 1304.

After some deterioration of the shoulder condition, Cameron underwent a second surgery on his right shoulder.¹³ TAB Electric continued temporary total disability compensation payments.¹⁴ Cameron was again released to full-time modified duty desk work by both Dr. Tower (June 2006)¹⁵ and Dr. Jensen (August 30, 2006).¹⁶ TAB Electric discontinued TTD benefits in August 2006 and initiated temporary partial disability (TPD) payments calculated on insurance agent wages.¹⁷ TPD compensation was continued until Dr. Jensen declared Cameron was medically stable in January 2007.¹⁸ Dr. Jensen also confirmed his earlier prediction of a permanent impairment of 17 percent of the whole man for the right shoulder injury.¹⁹ TAB Electric reported it paid a lump sum of permanent partial impairment compensation of \$30,090 on February 8, 2007.²⁰

Cameron filed a claim for TTD compensation on October 25, 2006.²¹ He wrote that Dr. Tower had not deemed him to be medically stable, and, although Dr. Tower had released him to light duty work, his employer had not offered him any work.²²

In February 2007, Dr. Tower wrote a letter regarding Cameron's ability to work as an insurance agent.²³ He wrote:

This is in reply to your letter of February 5, 2007, regarding whether or not Mr. Cameron had the physical capabilities to perform the job of insurance agent on a full-time basis from August 7, 2007 (sic). I do not believe he did have the physical

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- 13 R. 0534.
 - 14 R. 0002-4.
 - 15 R. 0535.
 - 16 R. 0789.
 - 17 R. 0004.
 - 18 R. 0165, 0008-10.
 - 19 R. 1154.
 - 20 R. 0008.
 - 21 R. 0021-22.
 - 22 R. 0021.
 - 23 R. 0169.

capabilities, but that is not necessarily related completely to his right shoulder but, rather, to a combination of issues regarding his right shoulder and other issues. This includes a profound hearing loss and the fact that amplification equipment is not available, which is needed to allow him to carry on the phone conversations necessary for such a position.²⁴

In the March 21, 2007, hearing on his TTD claim, Cameron presented a hearing brief, with attachments, he had not previously filed or served on the employer.²⁵ In his brief, Cameron attempted to challenge the reemployment administrator's decision and claim he was permanently totally disabled.²⁶ The board explained that the brief was late.²⁷ The board limited the issues it would decide to those listed in Cameron's October 24, 2006, TTD compensation claim.²⁸

Cameron argued to the board that

I never was allowed the rehabilitation program that's supposed to be allowed under workers' comp. law, that the woman that did take the rehabilitation plan erred in the fact that she didn't consider a man's income that he had generated over a 10-year period, . . . and whether that man was capable of making a living in the insurance industry . . . I think I should have been rehabilitated, I should have been allowed that claim. I was denied that claim, and now they're force – trying to force me to go to work, and they've gone to the doctor and asked him is this man capable of working in the insurance – and the doctor, of course, has said yes, and . . . I'm not capable of going to work in the insurance business. I can't get on the telephone. . . . And that's basically what my case is. I'm saying that I'm not – I haven't been afforded my rights under workers' comp. law.²⁹

²⁴ R. 0169.

²⁵ Hrg Tr. 5:15-6:15, Mar. 21, 2007. The hearing brief and attachments are at R. 1306-89.

²⁶ R. 1306, 1309-10.

²⁷ March Hrg Tr. 7:7-8. The chairman also explained the evidence attached to the brief was late. March Hrg Tr. 8:1-4.

²⁸ March Hrg Tr. 14:-9 – 15:4. Cameron had also filed a claim for temporary total disability compensation for his left shoulder on February 8, 2007. R. 0039-40.

²⁹ March Hrg Tr. 17:24 – 19:2.

Cameron testified his hearing loss prevents him from carrying on telephone conversations without amplification equipment because his hearing aids do not work with the telephone.³⁰ Cameron owns such equipment.³¹ He testified that he tried to put together his own agency, but he was not able to do so for financial reasons.³² He agreed that his physician was “definitely of that opinion [that an insurance agency would be appropriate] if – as long as I had the proper hearing equipment.”³³ Cameron did not contradict the eligibility evaluator’s report that he could perform other occupations and he did not present evidence addressing the issue of medical stability. The hearing officer reminded him that the issue of his rehabilitation eligibility was not before the board, and that he had not appealed the administrator’s decision.³⁴

The day after his hearing on his claim for TTD compensation benefits, March 22, 2007, Cameron filed a claim for permanent total disability (PTD) compensation based on injuries to both shoulders in the same August 16, 2005 accident.³⁵

The board issued a decision on April 19, 2007.³⁶ After discussing the evidence presented, including Cameron’s testimony,³⁷ the board reviewed the application of the presumption of compensability to a claim for compensation.³⁸ The board then stated:

Applying the presumption analysis described above to the evidence in this claim, we find as follows: We must first consider whether the presumption attaches. We find the employee has failed to do so. We find all doctors involved herein are in agreement that the employee can physically return

³⁰ March Hrg Tr. 21:21 – 22:22.

³¹ Cameron brought the equipment to the March 21, 2007, hearing on his claim for TTD compensation.

³² March Hrg Tr. 27:15 – 28:3.

³³ March Hrg Tr. 28:17-18.

³⁴ March Hrg Tr. 23:21 – 24:9.

³⁵ R. 0186-7.

³⁶ *Cameron v. TAB Elec., Inc. (Cameron I)*, Alaska Workers’ Comp. Bd. Dec. No. 07-0091 (Apr. 19, 2007) (D. Jacquot, Chair).

³⁷ *Id.* at 3.

³⁸ *Id.* at 4-5.

to work at insurance sales in regards to his shoulder injury. The employee testified he has the adaptive equipment which would allow him to converse on the telephone, he just doesn't utilize them for work purposes. Contrary to his assertions at hearing, we find the employee's 15 years being licensed to sell insurance, and the fact that he ran his own agency qualifies him for the SVP for Insurance Sales. His treating physician, Dr. Tower, specifically released him to his "desk job" as of June 15, 2006. He is not totally disabled, thus not entitled to TTD benefits. We conclude the employer properly recalculated the employee's benefits to temporary partial disability benefits beginning October 4, 2006. The employee's claims for continuing TTD and associated penalties and interest are denied and dismissed.³⁹

Cameron appealed this decision May 18, 2007.⁴⁰ TAB Electric requested the commission stay the board's hearing on Cameron's PTD compensation claim until the appeal was concluded. Instead, the commission stayed proceedings on the appeal until the board's decision on Cameron's PTD claim was issued.⁴¹

In a prehearing conference at the board on May 18, 2007, a hearing date was set on Cameron's PTD compensation claim.⁴² TAB Electric asked the board to continue the hearing so that the commission could issue a decision on the appeal.⁴³ A hearing on TAB Electric's petition was held July 12, 2007, and Cameron objected to a continuance, saying:

I don't think it should be stayed, I think I should have the hearing as scheduled. Filed a valid claim for permanent total disability. I have a right to have it heard. Mr. Holloway [TAB Electric's attorney] wants to have this postponed so he can win on the other end and then wipe this permanent total disability

³⁹ *Id.* at 5-6.

⁴⁰ Alaska Workers' Comp. App. Comm'n Appeal No. 07-022.

⁴¹ Order to Stay Appeal Proceedings, June 28, 2007.

⁴² R. 1270.

⁴³ R. 0207-08.

hearing out and I don't think it's right. I think I should have a right to have it heard.⁴⁴

The board denied TAB Electric's request for a continuance.⁴⁵

At the board hearing on his claim for PTD compensation on July 24, 2007, Cameron objected to the admission of the depositions of Carol Jacobson, R.N., and Dr. Jensen, asserting he did not have an opportunity to cross-examine the witnesses.⁴⁶ The board denied his objection, based on a showing that the employer had given Cameron notice of the depositions.⁴⁷

Cameron provided medical records from Alaska Native Medical Center to TAB Electric approximately 25 minutes before the start of the hearing and a witness statement just before the hearing. He served a brief and witness list July 19, 2007.⁴⁸ TAB Electric objected to the witness statement,⁴⁹ the witnesses shown on the late, incomplete witness list,⁵⁰ the hearing brief,⁵¹ and the medical records.⁵² Cameron argued that "my witness should be allowed and I believe that my medical records should be allowed."⁵³ The board refused to admit the offered medical records and witness statement on the basis that they had not been provided to the other party at least 20 days before the hearing date, and the late listed witness, noting that Cameron had been informed of these requirements and that the employer had not been able to

⁴⁴ Hrg Tr. 10:15-21, July 12, 2007.

⁴⁵ Hrg Tr. 11:10-13, July 12, 2007.

⁴⁶ Hrg Tr. 16:18-22, July 24, 2007.

⁴⁷ July 24 Hrg Tr. 17:1 – 18:18.

⁴⁸ R. 0204.

⁴⁹ July 24 Hrg Tr. 19:14-17.

⁵⁰ July 24 Hrg Tr. 20:14 – 22:1.

⁵¹ July 24 Hrg Tr. 22:1-3.

⁵² July 24 Hrg Tr. 22:5-8.

⁵³ July 24 Hrg Tr. 22:10-12. Cameron alleged that he tried to get the medical records earlier but that "this morning is the first time I was able to get the medical records." *Id.* at 22:14-15.

prepare to respond.⁵⁴ Cameron then requested a continuance, but the board refused the request, pointing out that at the July 12, 2007 hearing, Cameron had “adamantly insisted that this hearing go forward over Mr. Holloway’s objections.”⁵⁵

Cameron argued that “all my medical conditions should be considered, not just my right shoulder. . . . [M]y combination of my others are very evident in the medical records and that’s, basically, my statement.”⁵⁶ He argued that he “tried working with people and . . . can’t hold a job.”⁵⁷ He conceded that his main problem was his hearing and that his hearing aids were incompatible with most telephones.⁵⁸ He conceded he could work at a desk but argued he couldn’t find a desk job that didn’t require him to be using a telephone all the time.⁵⁹ He argued that the denial of reemployment benefits was based on a finding that he could go to work as an insurance agent with a telephone and, because it was “totally erroneous,” he was permanently totally disabled.⁶⁰

TAB Electric argued that Cameron had produced no evidence that he was permanently, totally unable to earn wages at any job that is readily available in the Alaska labor market. It argued that the medical evidence was uniform that Cameron had been released to light or sedentary work.⁶¹ It argued that the board had already found Cameron was not disabled, and that finding was binding on the panel hearing Cameron’s claim.⁶² In any case, it argued, Cameron produced no new medical evidence

⁵⁴ July 24 Hrg Tr. 24:3-14.

⁵⁵ July 24 Hrg Tr. 24:20-22.

⁵⁶ Hrg Tr. 31:11-12, 16-17, July 24, 2007.

⁵⁷ July 24 Hrg Tr. 33:9-10.

⁵⁸ July 24 Hrg Tr. 33:10-21.

⁵⁹ July 24 Hrg Tr. 33:22-25.

⁶⁰ July 24 Hrg Tr. 34:5-9.

⁶¹ July 24 Hrg Tr. 35:3-6.

⁶² July 24 Hrg Tr. 36:2-16.

suggesting otherwise that would attach the presumption of compensability.⁶³ It argued it presented ample evidence that there was work available in the community within Cameron's demonstrated experience, aptitudes and abilities.⁶⁴ It argued there was "absolutely no link or a showing of disability in this case" and that benefits should be denied.⁶⁵

The board issued its decision on September 10, 2007. The board's decision reviewed the evidence presented and the presumption analysis. The board then said:

Applying the presumption analysis described above to the evidence in this claim, we find as follows: We must first consider whether the presumption attaches. We find the employee has failed to do so; both the employer's physician, Dr. Jensen, and the employee's treating and surgical physician have opined that the employee can return to work as far as his right shoulder is concerned. Accordingly, we find he is neither permanently nor totally disabled, in regards to his compensable right shoulder condition. As we found earlier, the employee testified he has the adaptive equipment which would allow him to converse on the telephone, he just doesn't utilize them for work purposes. As we found earlier that the employee is not entitled to TTD, we likewise conclude he is not entitled to PTD benefits. The employee's claim for PTD benefits is denied and dismissed.

Regarding his claims for his left shoulder condition, we find the employee failed to raise the presumption of compensability that the left shoulder is related to the 2005 injury. Even if we found the employee raised the presumption with his own testimony the preponderance of the medical evidence does not support his claim for left shoulder compensability. The employee treating and surgical physician, Dr. Tower, concurs with Dr. Jensen that the employee's left shoulder condition has no relation to the 2005 injury, and is simply the result of degeneration associated with the aging process. The employee's left shoulder condition

⁶³ July 24 Hrg Tr. 35:2-11.

⁶⁴ July 24 Hrg Tr. 37:21 – 40:24.

⁶⁵ July 24 Hrg Tr. 40:23-25.

is not a compensable, work-related condition; the associated claims are denied and dismissed.⁶⁶

Cameron filed a second appeal, Appeal No. 07-038, which was consolidated with his first appeal.

2. *Standard of review.*

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the findings.⁶⁷ The commission does not consider evidence that was not in the board record when the board's decision was made.⁶⁸ A board determination of the credibility of testimony of a witness who appears before the board is binding upon the commission.⁶⁹

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Workers' Compensation Act.⁷⁰ 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 law.⁷¹ If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation⁷² to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."⁷³

⁶⁶ *Cameron v. TAB Elec., (Cameron II)* Alaska Workers' Comp. Bd. Dec. No. 07-0276, 6-7 (Sept. 10, 2007) (D. Jacquot, Chair).

⁶⁷ AS 23.30.128(b).

⁶⁸ AS 23.30.128(a).

⁶⁹ AS 23.30.128(b).

⁷⁰ AS 23.30.128(b).

⁷¹ *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

⁷² AS 23.30.007, .008(a). *See also Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987); *Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002).

⁷³ *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979).

3. Discussion.

Cameron's points on appeal in his second appeal were limited to his objection to the board's failure to allow his medical evidence and witness testimony: "Board Chairman refused to allow medical records from Alaska Native Medical Center which would have had a significant impact on the negative decision. They also refused to allow direct witness testimony or written letters related to the case."⁷⁴ Because Cameron does not argue he complied with the board's procedural regulations, the commission interprets this as an argument that the board abused its discretion by failing to waive strict application of procedural regulations to avoid manifest injustice. In his first appeal, Cameron asserted as grounds for his appeal the "failure of the Board to consider evidence and brief of the employee/injured worker."⁷⁵ The commission interprets this as an argument that the board did not have substantial evidence to support its findings of fact or that the board did not adopt the legal theory advocated by Cameron to the board and addresses these points later in this decision.

a. Cameron waived his argument objecting to the board's refusal to permit a witness on a late-filed witness list to testify at the July 24, 2007, hearing and to admit a witness statement.

The board's regulation, 8 Alaska Admin. Code 45.112, requires a witness list to be filed and served at least five working days before a scheduled hearing. Cameron was notified of this requirement and instructed to follow it in the pre-hearing conference on May 18, 2007. As a result of Cameron's failure to provide a complete witness list, the opposing party was unable to contact his witnesses (no telephone numbers were provided) or know the general area of proposed testimony (no description of the testimony was provided). The requirements for documentary evidence, such as the Rush statement, were discussed in the March 21, 2007,

⁷⁴ Appellant's Notice of Appeal, Oct. 8, 2007.

⁷⁵ Appellant's Notice of Appeal, May 18, 2007.

hearing.⁷⁶ Finally, Cameron stated he only planned to call one witness, Mr. Stosel, so any objection to the denial of an opportunity to present testimony from other witnesses was waived at the hearing.

Cameron does not challenge the validity of the board's regulations or argue that the board failed to inform him of the regulations. Instead, Cameron complains that the board *followed* its regulations instead of making an exception for him. The board may vary its procedures if manifest injustice to a party would result from a strict application of the board's regulation.⁷⁷ On appeal, Cameron must present some argument demonstrating how the board's failure to excuse his non-compliance resulted in manifest injustice. He did not show where he had presented evidence to the board that would allow the board to waive his non-compliance. He failed to show board error prejudiced the presentation of his claim, for example, by precluding him from presenting any evidence on a contested claim. Thus, he did not present an argument that the board abused its discretion by not waiving compliance.

The only evidence on the substance of the testimony Cameron's witness would offer is Cameron's statement at hearing that his witness would testify "about my abilities to work. In the menial positions that Northern Rehab has sent me a stack of stuff on."⁷⁸ Cameron did not explain why he did not file and serve a complete witness

⁷⁶ March Hrg Tr. 8:1-4. Rush's statement was described as a "written letter" by Cameron in his points on appeal; it was not identified as a sworn statement or affidavit. It could not, therefore, have been presented as preserved testimony. 8 Alaska Admin. Code 45.120(a) requires witnesses to testify under oath or affirmation. Because Rush was not available to testify as a witness at the hearing, her statement should have been served on the opposing party and been "in the board's possession 20 or more days before hearing." 8 Alaska Admin. Code 45.120(f). The reason for this requirement is to allow opportunity for cross-examination. Cameron's third listed witness was a physician at the Alaska Native Medical Center, but Cameron did not say that he intended to call her as a witness at the hearing.

⁷⁷ 8 Alaska Admin. Code 45.195.

⁷⁸ Hrg Tr. 23:18-20, July 24, 2007.

list on time⁷⁹ or why he did not give TAB Electric's attorney a copy of Christy Rush's statement 20 days before the hearing.⁸⁰

Cameron failed to identify the substance of his witnesses' testimony or their qualifications to offer opinion evidence in his appeal brief.⁸¹ His sole argument regarding the witness list is a single sentence suggesting that it is unfair that the board would have excused a pro se litigant's late-filed witness list if the litigant had no experience in board proceedings, but failed to excuse him.⁸² Beyond a conclusory statement in oral argument that the board's decision would have been different if it had

⁷⁹ Cameron's witness list was dated May 18, 2007, but the certificate of service is dated July 19, 2007, and the board's date stamp indicates it was filed July 19, 2007. R. 0204. July 19, 2007, was a Thursday. The hearing was held Tuesday, July 24, 2007. 8 Alaska Admin. Code 45.112 requires witness lists to be filed and served "five working days" before the hearing. Owing to the intervening weekend, the witness list was filed only three working days before the hearing. The witness list omits information required by 8 Alaska Admin. Code 45.112: the witness's telephone number and a "brief description of the subject matter and substance of the witness's expected testimony." 8 Alaska Admin. Code 45.112 also provides that "[i]f a party directed at a prehearing to file a witness list fails to file a witness list as directed or files a witness list that is not in accordance with this section, the board will exclude the party's witnesses from testifying at the hearing." An exception is provided for testimony recorded before the witness list was due.

⁸⁰ TAB Electric objected at hearing that "the employer has never seen this statement by this person named Christie Rush, has no idea who Christie Rush is, and it ha – was just served with this five minutes ago." Hrg Tr. 19:14-17, July 24, 2007.

⁸¹ Cameron stated in his brief to the commission that the evidence the board did not allow included "Alaska Native Medical Center medical records, a witness list and a hearing brief." Appellant's Br. 3. He did not argue why failure to allow the witnesses on his late-filed witness list prejudiced his case and why failure to waive the procedures in his favor resulted in "manifest injustice." 8 AAC 45.210.

⁸² Appellant's Br. 2-3. This argument presumes that Cameron had no experience before the board – i.e., that he is in the same class as other inexperienced pro se litigants, so it was not fair to treat him differently from other members of the class. However, Cameron, who had presented his temporary total disability compensation claim to the board in the preceding March, was not inexperienced or uninformed by the July 24, 2007, hearing. *See* March Hrg Tr. 7:1-7, rejecting a brief not filed a week before the hearing, and March Hrg Tr. 8:1-4, instruction Cameron that evidence must be filed 20 days before the hearing.

read his medical reports, he failed to explain how Rush's statement or Stosel's testimony might have resulted in a different outcome.

The commission generously interprets the briefs and arguments of self-represented litigants to allow them to make their appeal to the commission.⁸³ However, even a self-represented litigant has an obligation to produce *some* argument on a point he appeals.⁸⁴ Cameron did not do so, even when questioned by the commission in oral argument. By failing to argue the point in any but the most cursory way, Cameron waived his point on appeal objecting to the board's refusal to admit the Rush statement⁸⁵ and to allow his witness Stosel to testify.⁸⁶

⁸³ *Augustyniak v. Carr Gottstein Foods*, Alaska Workers' Comp. App. Comm'n Dec. No. 064, 11 (Nov. 20, 2007) (stating the "commission works hard to make the appeal process accessible to self-represented litigants" by giving instructions on the appeal process, informing litigants of deficiencies, providing opportunities to correct defaults, and making allowances for their need for more time); *Khan v. Adams and Assoc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 057, 6 (Sept. 28, 2007) ("So long as the commission is able to discern the pro se litigant's basic arguments on appeal, and the opposing party is able to discern and respond to them, the commission considers the brief adequate."); see also *Roberts v. State, Dep't of Rev.*, 162 P.3d 1214, 1222 n.30 (Alaska 2007) ("[B]ecause pro se litigants are held to less demanding standards and because Roberts's briefing before this court adds to his arguments below, we do not consider Roberts's arguments waived and address the merits." (citing *Gilbert v. Sperbeck*, 126 P.3d 1057, 1062 (Alaska 2005)); *Dougan v. Aurora Elec. Inc.*, 50 P.3d 789, 795 (holding "briefs of pro se litigant are held to a less stringent standard than those of attorneys" and that it was error to dismiss pro se litigant's claims on appeal without first giving notice of defects and an opportunity to remedy the defects.).

⁸⁴ A pro se litigant's inclusion of an argument in his or her points on appeal does not preserve the contention in the absence of meaningful briefing. See *Elsberry v. Elsberry*, 967 P.2d 1004, 1006 (Alaska 1998); *Zok v. State*, 903 P.2d 574, 576 n.2 (Alaska 1995). The Supreme Court has held that "even when a *pro se* litigant is involved, an argument is considered waived when the party 'cites no authority and fails to provide a legal theory' for his or her argument." *Peterson v. Ek*, 93 P.3d 458, 464 n.9 (Alaska 2004) (citing *A.H. v. W.P.*, 896 P.2d 240, 243 (Alaska 1995) (*pro se* appellant waived claims due to cursory briefing that did not cite to legal authority) and *Gates v. City of Tenakee Springs*, 822 P.2d 455, 460 (Alaska 1991) (treating as abandoned claims of pro se litigant raised below but argued only cursorily or not at all on appeal)).

⁸⁵ The commission notes Cameron presented no reason at the board hearing why Rush's statement was not filed and served 20 days before hearing; the board's

b. The board's denial of Cameron's request to admit evidence at the July 24, 2007, hearing was not an abuse of discretion.

In argument before the commission, and in his brief on appeal, Cameron focused on the refusal to admit medical records from Alaska Native Medical Center. He could not identify any particular document that would have established new evidence or could have changed the outcome of the hearing. He suggested the board did not have an MRI study of his left shoulder and records documenting he has manic depressive disorder.

Cameron's purpose in seeking admission of the records was to demonstrate that he had multiple medical conditions. The commission's review of the board's record reveals there are numerous medical records, including records from Alaska Native Medical Center, evincing Cameron's other medical conditions, including mental conditions. Because there was medical evidence in the record on which the board might have relied to find Cameron suffered from other disabling injuries or illnesses, including the particular illnesses and injuries cited by Cameron in his argument to the board, the commission concludes that Cameron failed to establish that he was prejudiced by the board's decision not to admit the late medical records.

Cameron conceded in oral argument that he did not request the Alaska Native Medical Center records until after the July 12, 2007, hearing on the employer's petition for continuance, but he argued the board should have continued the July 24, 2007, hearing, apparently to allow him to file the records on time. He argued to the commission that he did not understand the timelines or did not know what he was doing. He agreed he had stated he was ready for hearing when he filed his affidavit of

refusal to admit the statement given to the opposing party just before the hearing began was not an abuse of discretion.

⁸⁶ Stosel was listed as residing outside Alaska, R. 0204; but he may have been present at the hearing. Cameron only identified "Dennis Stusil here" as the witness he intended to call, Hrg Tr. 19:4-8, July 24, 2007. Later, an unidentified person asked if he could "make a statement as a co-counsel or whatever on [Cameron's] behalf." July 24 Hrg Tr. 32:15-16. After he said he had not entered an appearance as Cameron's counsel, his request was denied. July 24 Hrg Tr. 32:22 - 33:1.

readiness for hearing, but he argued he did not understand what it meant. He believed that the board could have asked his doctor to testify, or that he could have done so, to avoid prejudice to the employer.

The board's action denying admission of the medical records was not an abuse of discretion. AS 23.30.095(h) imposes on all parties to a claim a continuing duty to "file and serve all the reports [they may have in their possession or under their control] during the pendency of the proceeding." Cameron had developed a theory of permanent total disability as a result of his work-related condition combining with his other conditions by the March 21, 2007, hearing. He had a duty to retrieve, file and serve copies of the medical reports he believed relevant to his claim from that point forward. He conceded he had not requested the records from the Medical Center when he filed his affidavit stating he was ready for hearing. He did not request them shortly after the prehearing conference May 18, 2007, when he was instructed to file his evidence in accord with the regulations.⁸⁷ He did not request them until less than 20 days remained before the hearing and he did not collect them until the morning of the hearing. There is no evidence that Cameron made a good faith attempt to comply with the regulations or acted with due diligence.

The board's hearing officer noted that Cameron had insisted that the hearing go forth as scheduled less than two weeks earlier. The board does not abuse its discretion by denying a hearing continuance to the late evidence's *proponent* as a means of minimizing prejudice to the surprised party when, as here, the proponent had vigorously opposed the surprised party's earlier request for a continuance and the evidence is merely cumulative.⁸⁸ TAB Electric may have been entitled to a continuance

⁸⁷ R. 1270. 8 Alaska Admin. Code 45.052(c)(4) provides that medical reports received less than 20 days before hearing will be relied on only if the "parties expressly waive the right to cross-examination or, if the board determines that the medical report . . . is admissible under a hearsay exception of the Alaska Rules of Evidence."

⁸⁸ 8 Alaska Admin. Code 45.074 provides in pertinent part:
(a) A party may request the continuance or cancellation of a hearing by filing a

(1) petition with the board and serving a copy upon the opposing party; a request for continuance that is based upon the absence or unavailability of a witness

(A) must be accompanied by an affidavit setting out the facts which the party expects to prove by the testimony of the witness, the efforts made to get the witness to attend the hearing or a deposition, and the date the party first knew the witness would be absent or unavailable; and

(B) will be denied and the affidavit may be introduced at the hearing as the testimony of the absent witness if the opposing party stipulates that the absent witness would testify as stated in the affidavit;

(2) stipulation signed by all the parties requesting a continuance or cancellation together with evidence of good cause for the request.

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection:

(1) Good cause exists only when

(A) a material witness is unavailable on the scheduled date and the taking of the deposition of the witness is not feasible;

* * *

(I) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;

(J) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;

* * *

(L) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing.

under 8 Alaska Admin. Code 45.074(b)(1)(I) if it had requested one, but Cameron was not the “surprised” party; he was the person who requested the hearing and surprised TAB Electric with evidence. On other facts, the exploration of lesser meaningful sanctions by the board may be required, and failure to impose lesser sanctions may be an abuse of discretion,⁸⁹ but in view of the lack of showing of prejudice to Cameron, the cumulative nature of the evidence, the absence of evidence of a good faith attempt to comply with the regulations regarding medical records or due diligence, Cameron’s previous insistence that the hearing go forward, and Cameron’s concession that he did not request the records until after the time allowed to file and serve them had passed, the commission cannot say that the board’s strict application of its regulations resulted in manifest injustice.⁹⁰

(2) In its discretion and in accordance with this section, a continuance or cancellation may be granted

(A) by the board or its designee for good cause under (1)(A) - (H) of this subsection without the parties appearing at a hearing; or

(B) by the board for good cause under (b)(1)(I) - (L) of this subsection only after the parties appear at the scheduled hearing, make the request and, if required by the board, provide evidence or information to support the request.

⁸⁹ *Cf. Maines v. Kenworth Alaska, Inc.*, 155 P.3d 318, 325-26 (Alaska 2007) (holding that under Alaska R. of Civ. Pro. 37(b)(3), in the absence of a finding of willfulness by the offending party, the trial court’s discretion to impose sanctions for discovery violations is limited when the effect of the sanction it selects is to impose liability on the offending party, establish the outcome or preclude evidence on a central issue, or end the litigation); *Sykes v. Melba Creek Mining, Inc.*, 952 P.2d 1164, 1170-71 (Alaska 1998) (reversing trial court’s decision precluding expert witnesses from testifying as sanction for late witness list where there was little evidence of serious prejudice to opposing party, no consideration of lesser sanctions, and effect of sanction was to determine central issue in the litigation).

⁹⁰ 8 Alaska Admin. Code 45.195 provides:

Waiver of procedures. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed

c. The board's denial of temporary total disability benefits is upheld because Cameron concedes the evidence is that he is medically stable.

Cameron concedes on appeal that “the doctors’ opined his condition as medically stable.”⁹¹ He points to no medical evidence in the record that his work-related right shoulder injury, the basis of his claim for temporary total disability compensation, is not medically stable. He argues, however, that Dr. Tower would not release him to return to work due to all his conditions. He argues that if he is unable to return to work, he would be eligible for retraining benefits and “thus eligible for [temporary total disability] benefits.”⁹² Cameron is mistaken.

AS 23.30.185 provides:

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

By conceding that the doctors agree he is medically stable, Cameron agrees that he is not eligible for temporary disability benefits, because “[t]emporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.”

Cameron’s argument that if he were entitled to vocational reemployment benefits, he must be paid temporary total disability compensation, also fails. Cameron was injured after the adoption of AS 23.30.041(k), which states in part:

If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee’s temporary total disability rate. If the employee’s permanent impairment benefits are exhausted before the

merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of the law.

⁹¹ Appellant’s Br. 6.

⁹² *Id.*

completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages . . . until the completion or termination of the process

The statute clearly provides that on reaching medical stability before completion of a reemployment plan, as Cameron has done, temporary total disability compensation "shall cease." If Cameron had successfully appealed the denial of reemployment benefits eligibility, he might have been eligible for reemployment benefits under § .041(k) – but he did not appeal the administrator's denial of eligibility.⁹³ He would not, however, have been eligible for temporary total disability compensation even if an appeal were successful.⁹⁴

Because Cameron concedes that the medical evidence is that he is medically stable, and because temporary total disability compensation ceases if he is medically stable even if he were eligible for reemployment benefits, the commission concludes Cameron's appeal of the denial of temporary total disability compensation is without merit.⁹⁵ Any error in the board's application of the presumption of compensability and the restriction on its application provided for in the definition of medical stability⁹⁶ is harmless, as Cameron's claim became moot on Cameron's concession that the medical evidence is that he is medically stable. The board's decision denying further temporary total disability compensation is affirmed.

⁹³ AS 23.30.041(d) provides in part that "Within 10 days after the decision [on eligibility], either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion."

⁹⁴ Before the passage of § 3 ch 93 SLA 1982, the board may have permitted payment of temporary total disability benefits under AS 23.30.191, repealed by § 27 ch 93 SLA 1982.

⁹⁵ *Municipality of Anchorage v. Leigh*, 823 Alaska 1241, 1246-47 (Alaska 1992) (upholding the amendment of AS 23.30.185 to provide for termination of temporary total disability compensation on reaching medical stability as constitutional) and *id.* at 1244 n.7 (commenting that "by virtue of these amendments the [Alaska] Act was aligned with the workers' compensation statutes of many other states.").

⁹⁶ *Id.* at 1246.

d. The board failed to apply the presumption of compensability to Cameron's claim for permanent total disability compensation.

Cameron's permanent total disability compensation claim is based on his assertion that his right shoulder injury combined with his prior disabilities to make him permanently, totally disabled because he is unable to return to work in an occupation that is readily available in the Alaska job market. In support of his position, he presented his testimony that (1) his hearing loss prevents him from using a telephone because his hearing aids do not work with telephones and available adaptive technology does not work well; (2) he has tried to work but he cannot hold down a job; and, (3), he has other conditions (asthma, manic depressive illness, a ruptured stomach, back surgery, and a left shoulder injury that needs surgery) also limiting his ability to work. He presented a letter from Dr. Tower opining that Cameron did not "have the physical capabilities [to work in insurance sales], but that is not necessarily related completely to his right shoulder but, rather, to a combination of issues regarding his right shoulder and other issues. This includes a profound hearing loss and the fact that amplification equipment is not available."⁹⁷

The presumption, "in the absence of substantial evidence to the contrary, that (1) the claim comes within the provisions of this chapter,"⁹⁸ once raised shifts the burden of producing evidence to the employer.⁹⁹ The presumption supplies the "prima facie case," the elements of an employee's claim.¹⁰⁰ The employee, in order to raise

⁹⁷ R. 0169.

⁹⁸ AS 23.30.120(a).

⁹⁹ *Stephens v. ITT/Felec Servs.*, 915 P.2d 620, 624 (Alaska 1996); *Tinker v. VECO, Inc.*, 913 P.2d 488, 493 (Alaska 1996); *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981).

¹⁰⁰ 623 P.2d at 316; *compare Raab v. Parker Drilling*, 710 P.2d 423, 425 (Alaska 1985)(suggesting a prima facie case is the predicate to attaching the presumption: "In order for the presumption of compensability contained in AS 23.30.120(a)(1) to attach, the employee must establish some preliminary link between his disability and his employment. If a *prima facie* case of work-relatedness is made, the presumption of compensability attaches") *and Parris-Eastlake v. State*,

the presumption of compensability, need only present some evidence of a causal link between a permanent and total disability and the employment.¹⁰¹ In this case, the board found that Cameron had failed to do so:

We find the employee has failed to do so; both the employer's physician, Dr. Jensen, and the employee's treating and surgical physician have opined that the employee can return to work as far as his right shoulder is concerned. Accordingly, we find he is neither permanently nor totally disabled, in regards to his compensable right shoulder condition. As we found earlier, the employee testified he has the adaptive equipment which would allow him to converse on the telephone, he just doesn't utilize them for work purposes. As we found earlier that the employee is not entitled to TTD, we likewise conclude he is not entitled to PTD benefits.¹⁰²

Cameron claimed that his undisputed work-related right shoulder injury "combined with" his pre-existing conditions to prevent him from working.¹⁰³ The board's statement that "both the employer's physician, Dr. Jensen, and the employee's treating and surgical physician have opined that the employee can return to work as far as his right shoulder is concerned" may be a rejection of Cameron's legal theory of disability, or it may be a "shorthand" method of distinguishing the undisputed work-related injury from the injury disputed by the employer and discussed in the next paragraph of the board's decision. The reference to the "compensable" condition suggests the latter meaning.

26 P.3d 1099, 1105-6 (Alaska 2001)(suggesting prima facie case is the preliminary link: "Once the prima facie link was shown, the presumption of compensability attached and the burden shifted to the state to demonstrate by substantial evidence that the injury was not work-related.").

¹⁰¹ *Leigh v. Seekins Ford*, 136 P.3d 214, 216 (Alaska 2006).

¹⁰² *Cameron II*, Alaska Workers' Comp. Bd. Dec. No. 07-0276 at 6. It appears that the board used the test *for overcoming the presumption of compensability* described in *Groom v. State*, 169 P.3d 626, 637 (Alaska 2007), for cases in which the "the existence of a work-related injury was undisputed, and the only contested issue was whether the injury had resulted in the claimant's permanent total disability." However, as the Supreme Court noted, the test was applied at the second stage of the presumption analysis. *Id.*

¹⁰³ Hrg Tr. 31:10-12, July 24, 2007. TAB Electric conceded that Cameron had suffered a work-related right shoulder injury. R. 0104.

The board then notes Cameron's testimony at the March 21, 2007, hearing that he has adaptive equipment but he chose not to use it at work.¹⁰⁴

The board's reference to Cameron's earlier testimony, that contradicts his testimony at the July 24, 2007, hearing, and its reliance on earlier medical opinions that Cameron could return to light or sedentary work reveal that the board weighed Cameron's recent testimony against his earlier testimony and Dr. Tower's recent letter against his earlier reports and chose to rely on the earlier reports and testimony. At the first step of the presumption analysis, the board should not weigh the credibility of the evidence; the board must simply decide if the evidence, including testimony, would be sufficient to attach the presumption if it were believed. Weighing the credibility of the evidence occurs at the third step of the presumption analysis, not the first or second.¹⁰⁵

The commission concludes that the board's decision is incomplete, because the board over-leapt the first and second steps of the three-step presumption analysis, and skipped directly to assessing the credibility (instead of the sufficiency) of the evidence. Because the board failed to apply the correct legal analysis to the evidence before it, the commission remands this case to the board with instructions to make further findings in accord with this decision.

4. Conclusion.

The commission VACATES the board's order denying appellant's claim for permanent total disability compensation as a result of a right shoulder injury in Alaska Workers' Compensation Board Decision No. 07-0276 and REMANDS FOR FURTHER FINDINGS on the present record. The commission retains jurisdiction to review the board's final decision. Cameron did not appeal the board's order denying compensation for a left shoulder injury in the board's Decision No. 07-0276 so that order is final and is not affected by this decision on appeal. The commission AFFIRMS the board's order

¹⁰⁴ March Hrg Tr. 22:5-23 and 28:3-18; *compare* July 24 Hrg Tr:33:18-24.

¹⁰⁵ *Resler v. Universal Servs, Inc.*, 778 P.2d 1146, 1149 (Alaska 1989) ("[I]f the presumption of compensability has been successfully rebutted by the employer, the Board must *then* determine whether the employee has proved all elements of his claim by a preponderance of the evidence." (emphasis added)).

refusing admission of medical records, a witness statement and witness testimony in the July 24, 2007 hearing.

The commission AFFIRMS on other grounds the decision of the board denying appellant's claim for temporary total disability compensation, Alaska Workers' Compensation Board Decision No. 07-0091.

Date: 23 Sept. 2008

ALASKA WORKERS' COMPENSATION APPEALS COMMISSION



Not available for signature

David W. Richards, Appeals Commissioner

Signed

Philip Ulmer, Appeals Commissioner

Signed

Kristin Knudsen, Chair

APPEAL PROCEDURES

This is not a final decision on Mr. Cameron's appeal from Alaska Workers' Compensation Board Decision No. 07-0276 denying his workers' compensation claim for permanent total disability compensation. The effect of this decision is to remand the case back to the board to make further findings of fact and to determine if permanent total disability benefits are owed to Karl Cameron. The board is directed to make its findings on the present record, so no new hearing is required. The commission did not affirm or reverse the board's decision, it vacated the order so that the board could enter another decision using the correct legal analysis. The final order may or may not be different. The commission retained jurisdiction to review the board's final decision on remand. Mr. Cameron did not appeal the order in Decision No. 07-0276 denying his workers' compensation claim for compensation for a left shoulder injury; so that order is final and is not affected by the commission's decision on appeal. The commission also affirmed the board's procedural orders in the July 24, 2007, hearing.

The commission affirmed (approved) the board's decision (Alaska Workers' Compensation Board Dec. No. 07-0091) denying the employee's claim for temporary total disability compensation. This is a final administrative decision as to that claim. However, since the appeal of both claims were joined, Mr. Cameron may choose to appeal the commission's decision affirming the denial of temporary total disability compensation now, or wait until he has a final decision on the joined appeal.

Proceedings to appeal a commission decision must be instituted in the Alaska Supreme Court within 30 days of the service of a final decision and be brought by a party in interest against the commission and all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. See AS 23.30.129. Because this is not the final administrative decision on the claim for permanent total disability compensation, an appeal of the commission's decision on the claim for permanent total disability compensation might not be accepted.

Other forms of review are also available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under the Appellate Rules. If you believe grounds for review exist under Appellate Rule 402, you should file your petition for review within 10 days after the date this decision. You may wish to consider consulting with legal counsel before filing a petition for review or an appeal.

If a request for reconsideration of this final decision is timely filed with the commission, any proceedings to appeal, if appeal is available, 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).

If you wish to appeal (or petition for review or hearing) to the Alaska Supreme Court, you should contact the Alaska Appellate Courts *immediately*:

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

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration in accordance with 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after delivery or mailing of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision in Alaska Workers' Compensation Appeal Commission Appeal No. 07-038 (joined with Appeal No. 07-022), *Karl B. Cameron v. TAB Electric and Liberty Northwest Insurance*, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this 23rd day of September, 2008.

Signed
L. Beard, Appeals Commission Clerk

<u>Certificate of Distribution</u>	
I certify that on <u>9/23/08</u> a copy of this Final Decision No. 089 in AWCAC Appeal No. 07-038 (joined with Appeal No. 07-022) was mailed to K. Cameron (certified), and J. Holloway at their addresses of record, and faxed to AWCB Appeals Clerk, WCD Director and J. Holloway.	
<u>Signed</u> J. Ramsey, Deputy Clerk	<u>9/23/08</u> Date