ALASKA WORKERS' COMPENSATION BOARD

P.O. Box 115512 **Juneau, Alaska 99811-5512**

NOELLE L. MCCULLOUGH, Employee, Claimant, v. JOB READY, INC., Employer, and NORTH AMERICAN SPECIALTY INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER ON MODIFICATION AWCB Case No. 200206898 AWCB Decision No. 13-0126 Filed with AWCB Anchorage, Alaska on October 11, 2013

Noelle L. McCullough's (Employee) April 4, 2008 petition to modify *McCullough v. Job Ready, Inc.*, AWCB Decision No. 08-0056 (March 24, 2008) (*McCullough I*) was heard on September 11, 2013, in Anchorage, Alaska, a date selected on May 1, 2013. Non-attorney representative Barbara Williams appeared and represented Employee, who also appeared and testified. Attorney Randall Weddle appeared and represented Job Ready, Inc., and Wilton Adjustment Service, Inc. (Employer). There were no other witnesses. The record closed at the hearing's conclusion on September 11, 2013.

ISSUES

Employee contends *McCullough I* relied on false or misleading evidence including medical opinions. Consequently, she contends *McCullough I* made numerous factual errors. She contends

McCullough I should be modified because these errors materially affected the decision. Employee further contends she obtained newly discovered evidence, post-hearing, which she could not have discovered with due diligence before the December 2007 hearing giving rise to *McCullough I*. She seeks an order modifying *McCullough I* so her injury is found compensable.

Employer contends *McCullough I* made no factual errors. It contends Employee is simply trying to retry the case and her "newly discovered evidence" either could have been discovered before the December 2007 hearing or is irrelevant. Employer contends Employee's petition for modification should be denied.

Should *McCullough I* be modified?

SUMMARY OF DECISIONS

McCullough v. Job Ready, Inc., AWCB Decision No. 08-0056 (March 24, 2008) (*McCullough I*) denied and dismissed Employee's workers' compensation claim, stating her condition was not a work-related injury or illness.

In *McCullough v. Job Ready, Inc.*, AWCAC Decision No. 151 (April 12, 2011), the Alaska Workers' Compensation Appeals Commission affirmed *McCullough I* and held Employee's condition was not compensable.

On May 10, 2011, Employee appealed the Alaska Worker's Compensation Appeals Commission's April 12, 2011 decision to the Alaska Supreme Court. The court issued a stay of its proceedings in *McCullough v. Job Ready, Inc.*, Case No. S-14302, pending this decision on Employee's request for modification of *McCullough I*.

McCullough v. Job Ready, Inc., AWCB Decision No. 12-0110 (June 26, 2012) (*McCullough II*), an interlocutory decision and order, denied Employer's February 6, 2012 petition to dismiss Employee's January 23, 2012 workers' compensation claim and petition.

McCullough v. Job Ready, Inc., AWCB Decision No. 12-0123 (July 16, 2012) (*McCullough III*), addressed Employer's petition for reconsideration of *McCullough II*, and denied it.

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On April 8, 2002, Employee was working as an activity therapist in a child's home. Employee was caregiver for the non-verbal, autistic daughter of Richard Haynes and Amy Dimmick. Employee reported "I was seated at a table with my back to the entrance to the room. A person (client's father) entered and slapped me on the back on 4/8. It is still uncomfortable as of 4/10, especially when driving" (Employee; Report of Occupational Injury or Illness, April 10, 2002; experience, judgment, observations and inferences drawn from all the above).

2) The force of Haynes' contact to Employee's body and exactly where on her body the contact occurred is uncertain because Employee's descriptions change and vary and she is either unable or unwilling to clarify these points (Employee; experience, judgment, observations and inferences drawn from all the above).

3) On April 8, 2002, Haynes' hand contacted Employee's body somewhere in the right upper quarter of her back (inferences drawn from the entire record).

4) Employee later testified the blow was painful, pushed her over "into her lap" and left a mark visible for several hours (McCullough deposition, July 27, 2005, at 39-41; Employee).

5) Employee produced a witness who, an hour or so later when Employee went to the swimming pool saw a "mark" around the area where Haynes had "hit" Employee (Employee).

6) At the time of injury, Employee was about 6' 1" tall and weighed about 200 pounds. Employee was and is not overweight, is relatively large of stature and appears to be in good overall physical condition (Landstrom chart note, September 6, 2002; Fechtel EME report, December 7, 2002, at 3; judgment, observations).

7) Haynes later testified he gave Employee an "at-a-boy" type "friendly clasp on the shoulder," and said "I love a pushy broad," in admiration for what he thought Employee might do as an advocate when Haynes requested additional services for his daughter. Haynes did not notice Employee's body move forward when he clasped her shoulder; she "simply looked up from the book and said words to the effect, 'we do what we can.'" Following this, Employee appeared "normal." There was no "exclamation" and no reaction other than Employee's aforementioned comment. Haynes

noted no indication whatsoever Employee was in any type of distress. Later the same evening, Employee called Haynes and wanted to meet with him and his wife. They met that evening, and Employee was angry about the incident. Haynes explained to Employee he intended his remarks and his "at-a-boy" pat on the back to be a compliment. Employee mentioned she was not the type of person to "carry a grudge" and Haynes believed the issue was resolved (Haynes deposition, October 17, 2007, at 12-18).

8) On April 10, 2002, Employee saw physician assistant Lori Landstrom who documented Employee was slapped in the mid-back on April 8, 2002, and had "a quite significant startling slap." On this visit two days following the incident, PA Landstrom's physical examination revealed no acute distress, no deformity, bruising or swelling, no significant tenderness to palpation and full range of motion. Employee demonstrated only a "little bit of tenderness" in the "lower right scapula border." Employee had full sensation and strength bilaterally in her upper extremities and an "essentially normal right shoulder exam" (Landstrom chart note, April 10, 2002).

9) On April 15, 2012, seven days after the incident, Employee called police to report the incident. There was a mix-up in the trooper assignment, and the investigation was unfortunately delayed (Officer Johnson deposition, April 28, 2006, at 5-6; letter to Stephen Branchflower, Director, Alaska Office of Victim' Rights from William Tandeske, Commissioner of Public Safety, October 29, 2004).

10) On April 24, 2002 cervical and thoracic x-rays were normal except for a mild-moderate scoliosis and associated mild degenerative changes in the lower thoracic spine (x-ray reports, April 24, 2002).

11) On May 21, 2002, Employee reported to a physical therapist she was hit from behind on her shoulder blade on April 8, 2002, with an "open hand" and her pain began approximately two days later (Physical Therapy Evaluation, May 21, 2002).

12) On June 15, 2002, Alaska State Trooper James L. Johnson investigated Employee's reported assault and spoke with Employee. The interview was not tape-recorded. Trooper Johnson stated Employee told him Haynes slapped her on the back "so hard I was stunned, it was like being in a car wreck." Haynes stated Employee was "one pushy broad" when he slapped her (State of Alaska, Department of Public Safety, Case Number 02-23704, June 15, 2002).

13) Trooper Johnson interviewed Haynes on June 24, 2002. This interview was taped-recorded. Haynes told Trooper Johnson he was talking with Amy Dimmick in the kitchen about their daughter's future care. Haynes told Dimmick they should get Employee to negotiate for additional services for their daughter because Employee did not take "no for an answer" and was "forceful." When the conversation ended, Haynes left the room, walked past Employee who was sitting in a chair reading a book and "gave her a pat on the back and said, 'I love a pushy broad.'" Haynes admitted it was an awkward attempt at humor but Employee simply said "we do what we can." Haynes reported he and Employee were smiling and laughing, there was no "violence, slugging or hitting" involved, and Haynes thought no more of it until later that evening when Employee called a meeting with Haynes and Dimmick. At the meeting, Employee told Haynes and Dimmick there was a "socially unacceptable situation" earlier in the evening. Haynes thought Employee was referring to his "pushy broad" comment (*id*.).

14) Employee and Haynes are the only two eye-witnesses to the April 8, 2002 event. Haynes' accounts of the event to police and in his deposition are generally consistent; Employee's accounts on her injury report, to police, and to physicians over the years has been inconsistent, as will be further described in the factual findings below (experience, judgment, observations and inferences drawn from all the above).

15) Haynes further testified he walked outside to open the gates so Employee could leave. He believes Employee opened and closed the gates when she came into the house but he always as a matter of courtesy opens gates for people when they are leaving his property. He described the gates being constructed of PVC pipe and about eight feet tall and twelve feet wide (Haynes deposition, October 17, 2007, at 20-21).

16) Haynes also testified he was never involved in domestic violence (*id*. at 27).

17) Amy Dimmick did not recall hearing any noises coming from the other room on April 8, 2002. After Haynes left the room, Dimmick did not recall hearing Employee say anything. Eventually, Dimmick entered the room where Employee was sitting in front of the entertainment center sorting through a box of the daughter's arts and crafts supplies. Dimmick did not notice anything unusual and Employee seemed fine. Dimmick eventually reminded Employee it was time to take Dimmick's autistic daughter swimming. Dimmick went outside and closed the gate after Employee drove away. She described the "gate" as a "chain" across the driveway, which

weighed between 30 to 50 pounds and was about 20 feet long (Dimmick deposition, October 17, 2007, at 12-17).

18) Haynes' and Dimmick's description of the gate on their property, and Employee leaving their property on the date of injury was different and inconsistent, but more indicative of a poor memory on the part of one of them, than a lack of credibility on the part of either (experience, judgment, and inferences drawn from all the above).

19) Dimmick testified she and her son were at the library several months later when they ran into Employee. Dimmick was angry because she had been interviewed by the state troopers and just had to tell Employee she looked like she was feeling "just fine." Following her concededly sarcastic remark, Dimmick turned and left (Dimmick deposition, October 17, 2007, at 22).

20) On June 18, 2002, Employee saw Byron McCord, M.D., who planned on releasing Employee for full work around June 2002 (McCord report, June 18, 2002).

21) Employer paid Employee just over 26 weeks temporary total disability (TTD) benefits from April 9, 2002 through October 10, 2002, and paid Employee permanent partial impairment (PPI) benefits based on a five percent whole person PPI rating (Compensation Report, December 20, 2012).

22) On July 26, 2002, Employee saw Scot Fechtel, D.C., M.D., for an employer's medical evaluation (EME). Dr. Fechtel diagnosed a lower thoracic spine contusion "by history," resolved but with "chronic pain." He noted Employee's subjective complaints were not supported by objective findings. His diagnosis and causation opinion were based on "speculation" because he did not observe the incident and relied upon Employee's history. Dr. Fechtel stated the chronic pain syndrome is "subjective only." In his view, Employee was medically stable. He could not objectively substantiate Employee's claim of disability from work and home duties. Dr. Fechtel had no objective evidence with which to perform an impairment rating (Fechtel report, July 26, 2002, and 5-7).

23) On October 10, 2002, Employee saw Michael James, M.D. He stated: "Basically, we are dealing with a person with pain complaints far in excess of the physical findings. It would appear that her functional capacities are self-limited" (James chart note, October 10, 2002, at 3).

24) On December 7, 2002, Dr. Fechtel saw Employee again and diagnosed a lower thoracic spine contusion "by history," related to the April 8, 2002 incident at work, which had resolved. He noted minimal, underlying spine curvature and "hypersensitivity" to normal motion without

"objective pathology." Her physical examination was entirely normal. Nevertheless, Dr. Fechtel opined Employee had a five percent whole person permanent partial impairment rating based on subjective range of motion loss, and vague, non-verifiable sensory loss (Fechtel report, December 7, 2002).

25) On August 28, 2003, Employee asked Dr. James for an "Anchor ride pass." He told her she was not disabled enough to participate in this program. He recommended she get a car and stop "this social and the geographic isolation" precipitated by using public transportation (James chart note, August 28, 2003).

26) On October 17, 2003, Employee established care with Johnna Kohl, M.D. According to the report, Employee told Dr. Kohl she was healthy until two years earlier when, while working as a home care provider for a developmentally disabled child she was struck in the back by the "daughter of a client and fell to the ground." Employee contends this report is in error and she did not tell Dr. Kohl she was struck by the daughter of a client and fell to the ground (Kohl chart note, October 17, 2003).

27) On January 13, 2004, Dr. Fechtel reviewed his prior reports, and selected, subsequent records through 2003. He opined Employee had been evaluated for chronic thoracic spine pain and paresthesias complaints from "every medically reasonable point of view." He noted there was never any objective evidence of the injury and her "intractable pain" was unresponsive to any therapeutic attempt. He noted progressive depression with medications offered, but refused. Dr. Fechtel could not determine where her pain came from and consequently, there was nothing to relate it to her April 8, 2002 injury. He recommended she continue with eight weeks additional physical therapy and six months of medications to "complete treatment" for the work injury. Dr. Fechtel concluded it was time for Employee to "regain her life" in spite of ongoing pain complaints (Fechtel report, January 13, 2004).

28) On July 19, 2004, Employee's husband told Dr. Kohl Employee had a "very sheltered" upbringing. She had difficulty with the idea someone "hit her" and was especially having a hard time accepting there were no consequences for the offender (Kohl chart note, July 19, 2004).

29) On August 2, 2004, Employee saw Thomas Idhe-Scholl, M.D., psychiatrist. Employee reportedly told Dr. Scholl while at work in 2002 she was assaulted by her patient's father. She told Dr. Scholl she was sitting on a couch with "her back against the door." The father entered, hit her on her shoulder "which led to a fall." The father reportedly stated: "Here, you pushy

broad." As this came completely unexpectedly for her, Employee felt very threatened. To her surprise, pain from this event was much greater than she anticipated. Employee also reported a history of unsuccessful medical treatment to address her continuing symptoms. Employee told Dr. Scholl the police were not helpful after she reported the "assault" and the husband who assaulted her and his wife began "stalking" her. Apparently, Dr. Scholl accepted Employee's history as accurate. He initially considered posttraumatic stress disorder as a possible diagnosis given her history. However, Employee denied significant flashbacks, nightmares, or avoidance. Dr. Scholl opined Employee perceived this "attack" as a threat and it caused a loss of "sense of control" and integrity as a person. Given the subsequent events, "including being stalked" Employee had to give up most of her enjoyable activities. Dr. Scholl stated Employee became dependent on medical care providers with the need to constantly obsess over her care and share medical minutia with others (Idhe-Scholl report, August 2, 2004).

30) On May 27, 2004, Employee saw David Glass, M.D., for an employer's medical evaluation. Employee told Dr. Glass she was "struck forcibly on the back" by Haynes. Employee told Dr. Glass she was sitting "on a sofa" when the father of a child for whom she was caring entered the room and slapped her on the back causing her to bend forward with her head thrust into her lap. Employee reported immediate pain thereafter, which continued waxing and waning over the years. Dr. Glass opined Employee suffered from a pain disorder associated with psychological factors, because her subjective pain complaints were not in keeping with objective physical findings. He also said Employee may have a somatoform disorder and likely a personality disorder. He further opined the April 8, 2002 incident did not aggravate, accelerate or combine with any underlying psychological condition to produce Employee's then-current condition or need for psychiatric or medical care. In Dr. Glass' view, the April 8, 2002 incident was not a substantial factor in Employee's then-present physical or psychiatric condition, symptoms or diagnosis. She had not demonstrated a psychiatric disability or impairment because of the work incident (Glass report, May 27, 2004).

31) On May 27, 2004, Employee also saw Stephen Fuller, M.D., and Lynne Adams Bell, M.D., for an employer's medical evaluation. She told these physicians on the night in question she was sitting parallel to a table facing her client. Suddenly, Employee felt a forceful blow in the mid-thoracic spine, which "pushed her forward into her own lap." Employee reported being stunned and totally unprepared for this event. In their report, these physicians made reference to

"Dr. McGuire," whom Employee had never seen. This was a typographical or dictation error, as it closely followed an entry concerning Dr. McCord, whom Employee had seen. This minor error by itself does not detract from the report's credibility (Fuller and Adams report, May 27, 2004, at 7; experience, judgment).

32) Drs. Fuller and Bell diagnosed mild thoracic scoliosis, which pre-existed her injury. They deemed the incident a "negligible blow," which did not even leave "a bruise or mark." As noted above, when Employee first sought medical attention two days following the injury, the examining physician's assistant did not note any bruise or mark. When Drs. Fuller and Bell stated the blow did not leave a bruise or mark, they were referring to a bruise or mark seen by a medical provider soon after the injury and not to a mark Employee may have had on her back two hours after the event, while at the swimming pool. These physicians noted "the bottom line" is that she has no objective pathology upon which to base a valid diagnosis attributable to the April 8, 2002 work incident (*id*. at 16).

33) Drs. Fuller and Bell concluded Employee had no organic musculoskeletal pathology to support her subjective pain complaints. The April 8, 2002 work injury did not aggravate, accelerate, or combined with any underlying physical condition to produce her then-current condition and need for medical care. They opined she would have recovered from this event within two weeks, or by April 22, 2002. The April 8, 2002 incident was not a substantial factor in bringing about her then-present physical condition because her physical condition was objectively normal. In their view Employee never had any objective organic pathology directly resulting from the April 8, 2002 incident. Since October 10, 2002, she was not disabled and had been capable of performing her regular work at any and all times since April 8, 2002. Drs. Fuller and Bell opined Employee had been medically stable since April 8, 2002, with no permanent partial impairment and no need for any further medical treatment to address the April 8, 2002 work injury (*id*. at 15-22).

34) On June 23, 2004, Employer's counsel sent Dr. Kohl a questionnaire. Dr. Kohl stated she agreed with reports from Employer's recent independent medical evaluators who opined Employee had a "somatic disorder." However, Dr. Kohl said she did not know Employee prior to her injury so she could not comment on prior psychiatric functioning or whether the accident "was or was not" a cause of her current symptoms (letter, June 23, 2004).

35) On August 31, 2004, Employee's bone scan was unremarkable with exception of some degenerative changes (August 31, 2004).

36) On September 10, 2004, Employee saw Joella Beard, M.D. Dr. Beard agreed there was "considerable subjective overlay" to her functional loss. She agreed it is "highly unlikely" the subject event precipitated sufficient trauma to "cascade this degree of dysfunction." Employee did not appear to have fibromyalgia components. Dr. Beard noted a localized, identifiable objective response and Dr. Beard noted Employee felt flushed. However, the report on this point contains typographical errors, is poorly worded and is difficult to understand. Therefore, its significance is questionable (Beard report, September 10, 2004; experience, judgment).

37) On October 20, 2004, Employee saw G.L. Sternquist, D.C. She told Dr. Sternquist in April 2002 she was seated and turned slightly to the right while working with a child when the child's parent aggressively and unexpectedly "forcibly pushed Noelle forward to her knees" (Sternquist report, October 20, 2004).

38) On December 27, 2007, Greg Polston, M.D., wrote a letter stating he treated Employee for pain over her right scapula which she states began after being hit over this area on April 8, 2002. Dr. Polston opined "[b]ecause of the long duration of this injury I feel that it will most likely remain with her." However, Dr. Polston does not give a causation opinion stating the work injury was a substantial factor in causing Employee's continuing need for medical care or any disability (Polston report, December 27, 2007; experience, judgment).

39) Employee filed extensive Internet articles addressing chronic pain syndrome, complex regional pain syndrome and posttraumatic stress disorder. A review of these documents does not provide the panel with any particular assistance in resolving Employee's claim as the articles do not specifically address her situation and do not provide any causation opinions (experience, judgment, observations and inferences drawn from all the above).

40) On December 21, 2006, Ronald Turco, M.D., psychiatrist performed a second independent medical evaluation (SIME) on Employee. Dr. Turco noted Employee presents as a rather immature, naïve individual. Dr. Turco said Employee failed to answer numerous questions on the MMPI test administered in May 2004. Nevertheless, this test produced a profile indicative of hysterical magnification. Dr. Turco also administered the MMPI which produced a practically identical profile. There was an absence of any clinical pathology such as depression or anxiety. Only one scale was elevated; the scale representing hysterical magnification of symptoms. Dr.

Turco opined this would be consistent with a diagnosis of somatoform pain disorder or simply hysterical magnification which is embellishment of symptoms. Dr. Turco said Employee had no psychiatric diagnosis but possibly a pain disorder in which she expresses pain complaints without objective findings. Dr. Turco stated there were no objective findings to support Employee's chronic pain complaints. He stated she should be weaned gradually from her medications. The April 8, 2002 work injury was not a substantial factor in bringing about Employee's then-present condition or complaints. By contrast, Employee developed a degree of "infantilism" and maintains physical symptoms as a way of dealing with personal issues either consciously or unconsciously. Dr. Turco does not believe the April 8, 2002 injury was a substantial factor in either temporarily or permanently affecting Employee, specifically in respect to any disability. There is no indication any treatments had been helpful. He strongly encouraged discontinuing passive modalities. Within two weeks of the April 8, 2002 injury, Employee was medically stable in Dr. Turco's opinion. Employee was and is able to work as a teacher in elementary school or as a habilitation specialist. Employee suffered no work-related permanent partial impairment (Turco report, December 24, 2006, at 8-12).

41) Employee also filed an unofficial transcript of her visit with Dr. Turco. Assuming the transcript is accurate, it does not demonstrate Dr. Turco "cut employee off." Rather, it demonstrates Employee talked excessively so Dr. Turco had to occasionally interrupt her to perform his evaluation (unofficial transcript, December 22, 2006; experience, judgment and inferences drawn from all the above).

42) Employee told Dr. Turco that Dimmick "pinned her up against" the counter at the library sometime during the summer following the injury and subsequently stalked her (unofficial transcript, December 22, 2006).

43) According to the unofficial transcript, Employee told Dr. Turco in response to his question about whether or not she had any significant losses in her life, she knew a boy, who was a friend, who died during her first year of teaching. She explained the friend went to the hospital and asked to be put on suicide watch. She believes he hung himself with his sheets (*id.*).

44) Dr. Turco's a written SIME report is generally consistent with Employee's unofficial transcript of her visit with Dr. Turco (experience, judgment, observations and inferences drawn from all the above).

45) A prior panel heard Employee's claim on December 4, 5, 18, and 19, 2007 during four abbreviated hearings to accommodate her expressed limitations (*McCullough I*).

46) On January 30, 2008, Employee filed additional pleadings and attached additional evidence, stating: "I wanted to make sure that the Board had copies of items I read or showed as exhibits at hearing" (Employee's Brief, January 30, 2008).

47) On March 24, 2008, *McCullough I* denied Employee's claim (*McCullough I*).

48) On April 4, 2008, Employee timely filed a petition for, among other things, modification (Request for Reconsideration/Modification, April 4, 2008).

49) On September 3, 2013, Employee filed a 241 page hearing brief. Though thorough, the brief tends to ramble and is extremely repetitive. Employee's brief raises many issues that are "legal" questions over which this decision no longer has authority to decide, as Employee's case is on appeal to the Alaska Supreme Court. Employee contends key evidence, purportedly not available until recently, as well as evidence available during the December 2007 hearings was not considered in *McCullough I* (Employee's Hearing Brief, September 3, 2013).

50) As best as can be determined from the 241 page brief, Employee contends *McCullough I* made the following findings of fact, which were improperly weighed, or which were incorrect, or in some instances factual findings should have been made, which were not. The bullet points are Employee's error contentions; the check-marks contain this decision's factual findings addressing each point Employee raised:

- Ronald Turco, M.D., who performed an SIME on Employee on December 21, 2006, was not credible and his findings therefore should be given minimal consideration.
  - ✓ Dr. Turco's report is credible because it is supported by the medical and other evidence.
- Dr. Turco attributed statements to Employee during the SIME which Employee did not actually make.
  - ✓ Dr. Turco's report is a compilation of Employee's statements and conclusions drawn by Dr. Turco from her statements. It is generally consistent with Employee's unofficial transcript of her visit with Dr. Turco.

- Amy Dimmick and Richard Haynes, parents of the child with whom Employee was working at the time of the claimed injury, denied a history of domestic violence. However, new evidence shows this couple has a pattern or history of domestic violence.
  - ✓ It is unclear to what domestic violence Employee refers. Nevertheless, assuming Employee has evidence Haynes and Dimmick were involved in domestic violence, there is no evidence Employee knew about such violence on April 8, 2002, and no medical evidence her later-obtained knowledge could retroactively affect her mental or physical reaction to Haynes' pat on the shoulder in 2002.
- *McCullough I* misquotes Employee as saying the insult (being called a "pushy broad" by Haynes) which accompanied her back-slapping injury was more upsetting to Employee than his slap on her back.
  - ✓ *McCullough I* is corrected to reflect Employee's view that the pat on the shoulder (which Employee characterizes as something more forceful) was more upsetting to her then the "pushy broad" comment.
- *McCullough I* should consider new evidence of statements allegedly attributable to former hearing officer Darryl Jacquot, designated chair during the *McCullough I* proceedings, made to Employee during a chance encounter at an airport, that the decision in *McCullough I* was "flawed." This demonstrates the decision was wrong and should be modified.
  - ✓ Darryl Jacquot is deceased (official notice). Even if his statements are not considered hearsay because he is no longer available, they shed little light on this case because it is unknowable what former hearing officer Jacquot meant when he allegedly said his decision was "flawed."
- *McCullough I* overlooked, did not consider or did not properly weigh evidence of red marks on Employee's back several hours after the alleged injury.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence.
- *McCullough I* erroneously found Dr. Turco said Employee was malingering, when in fact he said she was not malingering.
  - ✓ Dr. Turco did not state Employee was malingering (Turco report, December 24, 2006).
- *McCullough I* mistakenly found Employee had a history of over-utilizing medical care.

- ✓ Employee did not have a pre-injury history of over-utilizing medical care (record).

- *McCullough I* failed to properly consider why she did not go to the police immediately following the injury.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence.
- *McCullough I* should consider statements allegedly attributable to former hearing officer Janel Wright, now Chief of Adjudications who unsuccessfully mediated the parties' disputes in 2007, to Employee that the board would never decide in Employee's favor, notwithstanding the evidence.
  - ✓ Employee's statements attributable to Janel Wright are hearsay. Furthermore, any such statements, if made at all, were made in the context of a confidential mediation and cannot be considered in this decision because doing so would have a chilling effect on mediation (experience, judgment).
- *McCullough I* gave too much weight to Officer Johnson's testimony, which Employee claims later evidence proves lacked credibility in part due to alleged "substandard" performance by Johnson in conducting the initial assault investigation in a related criminal complaint.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* did not consider evidence which Employee claims shows Officer Johnson was "stalking" Employee.
  - ✓ Officer Johnson was not stalking Employee (judgment).
- *McCullough I* was based, in part, on false statements made in Employer's hearing brief.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider only admissible evidence and independently weigh it.
- *McCullough I* should not have accepted Dr. Turco's testimony because of alleged *ex parte* communications between Dr. Turco and the insurance adjuster.
  - ✓ Employee has not demonstrated *ex parte* communications between Dr. Turco and the insurance adjuster (judgment).

- *McCullough I* assigned too much weight to the Minnesota Multiphasic Personality Inventory (MMPI) in determining how and the extent to which Employee experienced chronic pain.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* did not give enough weight to Internet medical evidence Employee presented.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- Former workers' compensation technician Patricia Graham received emails from Employee containing "evidence," which were never given to the *McCullough I* panel, and thus were overlooked.
  - ✓ Patricia Graham is no longer employed by the board. This allegation could not be independently verified. E-mail filing is not an appropriate way to file evidence with the board (official notice; observations).
- *McCullough I* overlooked the word "hit" in the injury report and instead focused on the word "slapped."
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* improperly found Employee both "consistent" and "inconsistent" in her testimony.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider Employee's consistency and credibility and independently weigh it.
- Employee has newly-discovered evidence concerning a fence on the Dimmick and Haynes property.
  - ✓ Pictures of the fence on the Dimmick and Haynes property could have been obtained prior to the *McCullough I* hearing, and are not newly-discovered evidence (experience, judgment).

- *McCullough I* erred in finding Dimmick never spoke to Employee after an incident at the library, where Employee alleges Dimmick "stalked" her and approached her in a threatening manner.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* erred in finding Dimmick said she saw Employee carrying materials when Dimmick later said she had not.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* found Dimmick said Employee never told Dimmick she was injured, but Dimmick admitted Employee had told her Employee was injured.
    - ✓ This is Employee's bare allegation of a factual error. Employee misconstrues this finding from *McCullough I*. Employee never told Dimmick she was injured at the time she was allegedly injured, even though Dimmick was in the adjacent room at the time the incident took place; she only told Dimmick she was injured after returning from the swimming pool later in the evening. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* found Haynes said Employee never told him she was injured, but Haynes admitted Employee had told him Employee was injured.
    - ✓ This is Employee's bare allegation of a factual error. Employee misconstrues this finding from *McCullough I*. Employee never told Haynes she was injured at the time she was allegedly injured, even though Haynes was necessarily present at the time the incident took place; she only told Haynes she was injured after returning from the swimming pool later in the evening. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- Employer's brief said Employee never stated she was injured or required treatment; Employee asserts this was actually the topic of the "family meeting" with Haynes and Dimmick later on the injury date.
    - ✓ This is Employee's bare allegation of a factual error. Employee misconstrues this finding from *McCullough I*. Employee never told Dimmick and Haynes she was injured at the time she was allegedly injured, even though both were present when the incident

took place; she only told them she was injured after returning from the swimming pool later in the evening. Nevertheless, the instant decision will consider this evidence and independently weigh it.

- *McCullough I* should have given greater weight to Sabrina Johnson's affidavit, because she saw red marks on Employee's back at the swimming pool shortly after the injury.

  ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

- A March 12, 2003 medical record was authored by advanced nurse practitioner Wilson, rather than by Michael James, M.D., as *McCullough I* found.

  ✓ *McCullough I* is corrected to show nurse practitioner Wilson authored the report, not Dr. James.

- *McCullough I* did not consider physician assistant Landstrom's affidavit.

  ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

- *McCullough I* attributed facts and opinions to Dr. James which were actually those of attorney Weddle, counsel for Employer.

  ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider Dr. James' opinions and independently weigh them.

- *McCullough I* should not have relied upon Dr. James for psychiatric opinions.

  ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will rely on Dr. Turco's psychiatric opinions and independently weigh them.

- *McCullough I* should not have relied upon Stephen Fuller, M.D., for psychiatric opinions.

  ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

- *McCullough I* should have considered the DSM-IV for definitions of relevant disorders and compared those definitions to definitions from medical experts upon which it relied.

  ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will rely upon Dr. Turco's opinions and independently weigh them.

- *McCullough I* misunderstood testimony from Johnna Kohl, M.D., and cited the wrong points from her opinion.

- ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider Dr. Kohl's opinions and independently weigh them.

• *McCullough I* relied incorrectly on findings from Lynne Adams Bell, M.D., that the incident left no mark on Employee's back, when Employee states it did.

- ✓ This is Employee's bare allegation of a factual error. The evidence shows the incident left no mark or bruise on Employee's back ever observed by a medical professional even only two days post-injury. Nevertheless, the instant decision will consider this evidence and independently weigh it.

• *McCullough I* erred by relying on Dr. Bell who said there were no objective findings pertaining to Employee's injury, when there were.

- ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

• *McCullough I* ignored photographic evidence of objective findings consistent with reflex sympathetic dystrophy (RSD).

- ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

• *McCullough I* overlooked the fact there was no evidence of ongoing medical problems before the work injury.

- ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

• *McCullough I* gave too much weight to opinions from David Glass, M.D., because Dr. Glass was confused.

- ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

• *McCullough I*'s typographical errors, such as "paid disorder" rather than "pain disorder" shows the panel did a poor job reviewing the evidence, as does Dr. Fuller's confusion over left versus right shoulders.

- ✓ This is Employee's bare allegation of a factual error. Hearing officers do their best to minimize typographical errors in decisions. Nevertheless, the instant decision will consider relevant evidence and independently weigh it.

- *McCullough I* improperly relied on a chart dated July 26, 2004, finding it was a "pain chart" when it was really a chart used by a chiropractor to demonstrate how chiropractic treatments work.
    - ✓ Chiropractors do not demonstrate on pain drawings how chiropractic treatments work. They used pain drawings to record where a patient says he or she feels symptoms (experience, judgment, observations).
- *McCullough I* improperly relied on Dr. Fuller, who also improperly relied on this chart, which was not completed by Employee.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider relevant evidence and independently weigh it.
- *McCullough I* made improper inferences when it decided there needed to be objective evidence of Employee's diagnoses.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider relevant evidence and independently weigh it.
- Dr. Fuller's malingering diagnosis is subjective and not supported by any other evidence.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- Dr. Fuller's suggestion Employee's pain migrated from the right to the left shoulder is based on his own error and his refusal to accept a chart correction.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* should not have relied on a doctor who misunderstood an idiomatic expression stating "thinking about something" making it hurt.
    - ✓ This is Employee's bare allegation of a factual error. Employee should not have used an idiomatic expression in a medical examination in a workers' compensation case. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- Dr. Fuller's referral to "Dr. McGuire" in his report, in spite of the fact Employee never saw a Dr. McGuire, demonstrates Dr. Fuller confused Employee with another patient.
    - ✓ Dr. Fuller's referral to Dr. McGuire was a simple dictation error because he had just previously referred to Dr. McCord, who has a similar name.

- Dr. Fuller misunderstood a report from Scot Fechtel, DC, about sensory loss on the right side versus sensory loss on the left side of Employee's back. Dr. Fuller misquoted Dr. Fechtel's medical record.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* erred by relying on Dr. Fuller's opinions because Dr. Fuller exaggerated and misrepresented the true facts.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* overlooked that tonsillitis and gastroesophageal reflux disease (GERD) are objective evidence related to Employee's injury.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- Dr. Glass refuted the wrong diagnosis and therefore *McCullough I* should not have relied upon him.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* gave too much weight to Dr. Turco who admitted he was unfamiliar with PTSD-associated features.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- Dr. Glass lacked adequate knowledge of the underlying facts, so *McCullough I* should not have relied upon his opinions; specifically, he did not understand Employee was upset, shaken and angry because of the hitting incident.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- Layne Vickers' post-hearing letter proved Employee had no PTSD or histrionic traits prior to the injury.
  - ✓ This letter was not newly discovered evidence, as Employee could have procured it prior to the *McCullough I* hearing (experience, judgment).

- *McCullough I* overlooked evidence of sweating specific to a particular bodily area found by Joella Beard, M.D.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: Dr. Beard does not make a causal connection between these findings and Employee's work injury (judgment).
- *McCullough I* overlooked findings from Gregory Polston, M.D., who found Employee's right arm to be cooler than her left.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: Dr. Polston does not make a causal connection between these findings and Employee's work injury (*id*.).
- *McCullough I* overlooked findings from Dr. Kohl, who recorded Employee had tachycardia as did a doctor in a Virginia clinic.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: No physician made a causal connection between these findings and employee's work injury (*id*.).
- *McCullough I* overlooked Employee's apparent panic at the hearing when discussing the above subjects.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this demeanor evidence and independently weigh it.
- *McCullough I* overlooked the testimony of lay witnesses who saw Employee on the evening of the injury event.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* overlooked the fact Employee woke up in the middle of the night with panic attacks, which she compares to "nightmares," although Employee does not recall specific bad dreams.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.

- *McCullough I* improperly considered numerous experts' statements suggesting Employee told Dr. Turco Employee had no trouble sleeping, when in fact this is inaccurate. A recording of Dr. Turco's evaluation would demonstrate this.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: Employee's unofficial transcript of her visit with Dr. Turco is somewhat vague on this point. In any event, it does not appear "loss of sleep" or "lack of loss of sleep" figure prominently into Dr. Turco's opinions.
- The instant decision should consider an email from Suzanne Fisler to the claimant, which was apparently sent to the board post-hearing but before the record in *McCullough I* closed.
    - ✓ This e-mail is not newly discovered evidence as Employee could have procured it prior to the *McCullough I* hearing (experience).
- The instant decision should consider new evidence in the form of a letter from Employee's former co-worker, which describes Employee's "calm nature" prior to the work injury.
    - ✓ This letter is not newly discovered evidence as Employee could have procured it prior to the *McCullough I* hearing (*id*.).
- *McCullough I* erred by failing to find what Employee was like pre-injury, based on post-hearing evidence.
    - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: Based on the evidence prior to hearing, there is no evidence Employee had any significant mental health issues, PTSD, or significant health problems. Post-hearing evidence demonstrating this point is not newly discovered as Employee could have procured it prior to the *McCullough I* hearing (record; experience, judgment).
- *McCullough I* says Employee may have some sort of "insect without a common name," but the insect has no bearing on this case.
    - ✓ The panel has no idea to what Employee refers. If this language appeared in *McCullough I*, it was an obvious typographical error (judgment).
- *McCullough I* erred by relying on medical opinions stating Employee had "somatization disorder" because she was over 30 years of age when the incident occurred, implying it is not possible to have this condition begin at her age.

- ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: More weight is given to Dr. Turco's expert, psychiatric opinions about mental-health diagnoses than to Employee's lay opinions or interpretations (judgment).

- *McCullough I* should have relied more on reports from Employee's psychiatrist, Eileen Ha, M.D., who had a better factual understanding.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: More weight is given to Dr. Turco's expert, psychiatric opinions then to Dr. Ha's, because he was the board's examiner and not an advocate for either party (*id*.).
- *McCullough I* found Employee was inconsistent in reporting her symptoms over the years, when it was the doctors who were inconsistent over the years, making it appear Employee was inconsistent.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: Employee's medical records are considered more accurate than Employee's recollections of what she told her physicians (*id*.).
- *McCullough I* lacked adequate analysis of lay testimony involved in Employee's claim, proving it did not consider this testimony.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* misstated Dr. Kohl's opinion, particularly a July 24, 2007 letter.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* ignored issues Employee raised about Dr. Turco's credibility.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it, as follows: Dr. Turco's opinions are credible because they are supported by the medical evidence in this case (*id*.).
- *McCullough I* should have discussed Dr. Turco's credibility because Employer paid him in excess of his charges for her SIME, which $1,200 he has kept to this day.

- ✓ Employee's contention lacks adequate evidence to support it. Even were these allegations true, they do not necessarily indicate bias on Dr. Turco's part (*id*.).

- *McCullough I* made a false finding when it says Dr. Kohl stated Employee has a disorder not related to work.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* erroneously found Drs. James, Beard, and Kohl said Employee has a disorder exaggerated by malingering, which they did not say.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider this evidence and independently weigh it.
- *McCullough I* erred by finding Employee's "own doctor" was Dr. James when Employee asserts Dr. James was picked by Employer.
  - ✓ The instant decision will independently consider Dr. James' opinions regardless of who selected him.
- Dr. Turco misled Employee about the board's actions and requests in respect to the SIME.
  - ✓ It is unclear to what Dr. Turco referred. Dr. Turco performed the psychiatric examination he felt necessary under the circumstances and this decision will not second-guess his expertise (*id*.).
- Dr. Turco improperly administered the MMPI test.
  - ✓ This is Employee's bare allegation of a factual error. It is not supported by any expert medical evidence (*id*.).
- *McCullough I* mistook Amy Dimmick's thoughts, feelings, and words for Employee's.
  - ✓ This is Employee's bare allegation of a factual error. Nevertheless, the instant decision will consider Employee's and Dimmick's testimony and independently weigh it.
- Dr. Turco inappropriately "cut her off" and did not allow Employee to answer his questions during her SIME.
  - ✓ This allegation is not supported by Employee's unofficial transcript of her visit with Dr. Turco (*id*.)..
- Dr. Turco referenced a police report he never had, and said the board stated Employee had "marital problems," which Employee says the board would never have said.
  - ✓ The record is not clear on this point (*id*.).

- Dr. Turco said Employee told him she had a boyfriend commit suicide in college, which is not true.
  - ✓ According to Employee's unofficial transcript of her visit with Dr. Turco, her statements could be interpreted to say her "friend," who was a "boy," committed suicide either while she was still in college perhaps doing student teaching, or immediately after college in her first year of teaching. Her history to Dr. Turco was not clear. Dr. Turco made a factual conclusion from what Employee said, just as the fact-finders in this decision did (*id*.).
- *McCullough I* should not have relied on EME Drs. Bell, Glass and Fuller because they said they were all present during her examination, when in reality they were not.
  - ✓ The instant decision relies on Dr. Turco (*id*.).
- Contrary to *McCullough I*'s finding, Dr. Beard did not agree with Dr. Glass' opinion.
  - ✓ The instant decision relies on Dr. Turco (*id*.).
- *McCullough I* should have weighed Dr. Campbell's testimony more heavily because he had better credentials and more experience than Dr. Turco.
  - ✓ Board hearing panels have the right to rely on whomever they choose (*id*.).
- Dimmick was untruthful or inaccurate about a chain used as a gate across her driveway when there was no such chain present at the time of Employee's injury.
  - ✓ Either Haynes or Dimmick appeared to have been inaccurate about the gate across her driveway at the time of Employee's alleged injury (*id*.).
- Employee has a photograph of the "gate," which she recently acquired, which shows Dimmick was wrong about the chain versus a different kind of gate.
  - ✓ The Haynes and Dimmick depositions demonstrate the inaccuracy. The photographs were not newly-discovered evidence as Employee could have procured this well before the *McCullough I* hearing (experience).
- *McCullough I* should not have found it took Employee "a week" to report the alleged assault to police as it was really only four to five days.
  - ✓ It took a week (letter to Stephen Branchflower, Director, Alaska Office of Victims 'Rights from William Tandeske, Commissioner, Department of Public Safety, October 29, 2004).

- *McCullough I* erred by not listening to a tape recording of a conversation Employee had with Capt. Bowman.
  - ✓ This is Employee's bare allegation of a factual error. The instant decision will not listen to Capt. Bowman's recorded telephone conference (judgment).
- Employee's new evidence includes an assault that occurred after the hearing was over and before *McCullough I* was issued.
  - ✓ If Employee is referring to Dimmick speaking to her at the public library, the instant decision does not consider this an "assault" (judgment).
- *McCullough I* inappropriately relied upon Dr. Turco's SIME report, because he allegedly did not respond "equally" to questions from Employer and Employee, demonstrating his bias against Employee.
  - ✓ If employee was dissatisfied with Dr. Turco's responses, she could have taken his deposition (experience).

51) Employee's 241 page hearing brief demonstrates her ability to formulate thoughts and put these on paper (experience, judgment, observations and inferences drawn from all the above).

52) Though Employee had assistance from a non-attorney representative at the September 11, 2013 hearing, she did an admirable job presenting her case with little assistance from her non-attorney representative (*id*.).

53) At hearing on September 11, 2013, Employee said she wanted to put this matter behind her and wanted to try working at least three days per week. Employee stated she had difficulty balancing her medication and overcoming its side effects. She argued "new information" became available "after-the-fact" and this information, along with numerous errors in *McCullough I* taken as a whole, could change the way fact-finders look at her case. Employee objected to Employer, physicians, and prior decisions "cutting and pasting" and dropping into documents information she refers to as "false statements." Employee acknowledged she was on medication, may be "slow-witted" and was feeling anxiety (Employee; Employee's hearing arguments).

54) Employer argued Employee is simply re-arguing the entire case. It maintains the modification statute does not provide for Employee's complaints about how a prior panel weighed particular evidence. Employer argued the " new evidence" provision does not refer to old evidence that was "newly discovered." It suggests the prior panel weighed the evidence

properly, came to its conclusions, and *McCullough I* should not be modified (Employer's hearing arguments).

55) Employee testified she was not afraid of Haynes at the time of the injury even though she had heard rumors about some sort of difficulty concerning Haynes and the local school. Employee was very vague in this regard (Employee; judgment and inferences drawn from the above).

56) Nevertheless, Employee testified that at the time of injury, when Haynes "slapped" or "hit" her on her back, he intended to hurt her (Employee).

57) The record, including Employee's prior deposition, does not clearly contain an explanation from Employee demonstrating or even adequately describing how hard Haynes touched her back at the time of injury (observations).

58) At hearing on September 11, 2013, the designated chair asked Employee if she could demonstrate how hard Haynes hit her, by perhaps striking the wall with her hand. Immediately upon hearing this request, Employee appeared extremely anxious, increased her breathing rapidly, sighed and, after regaining her composure ultimately declined to demonstrate. Employee noted hitting the wall with her hand would not be a good demonstration because the wall would not move and thus, there would be no "follow through." She believes the hit "knocked the sense out of" her and that is why she did not immediately say something either to Dimmick or to the other person speaking with Dimmick in the other room. Employee was sitting in a metal, folding chair when Haynes hit her. She could not describe whether or not Haynes "followed through" when he hit her, like a person would when swinging a bat in a baseball game. Employee stated this demonstrative request was very "stressful" (Employee).

59) Employee's various accounts to physicians about how her injury occurred vary considerably. Her accounts are inconsistent. In some instances Employee says she was sitting on a folding metal chair while in others it was a sofa or couch. In some cases Employee told physicians she was struck by Haynes' open hand on her shoulder, where in other instances she said he hit her hard enough to knock her to the floor, while at other times she averred he hit her hard enough to push her down in a foreword, seated flexion position. Given Employee's unwillingness to demonstrate the blow, it is impossible for an objective fact-finder to get a good grasp of exactly how hard Haynes hit Employee. Therefore, absent a better description or

demonstration, Employee's varied accounts of the event are given very little weight and are not credible (experience, judgment, observations and inferences drawn from all the above).

60) Haynes' account of the April 8, 2002 incident is more credible than Employee's accounts (*id*.).

61) Haynes' pat on Employee's shoulder did not exert adequate physical force on Employee to account for 11 years of alleged disability and need for medical care (*id*.).

62) Assuming for argument's sake, Dimmick and Haynes lied about domestic violence issues and had domestic violence problems before or after April 8, 2002, there is no evidence Employee knew of any such domestic violence as of April 8, 2002. Therefore, there would have been no reason for her to fear Haynes when he patted her on her back or shoulder on that date (*id*.).

63) The current designated chair reviewed thousands of pages of legal and medical documents in Employee's agency file. He also further reflected on all this evidence. The designated chair shared his review, reflections and insight with the panel members who drew their own conclusions from this, the parties' briefs which were read in their entirety and from listening to and observing Employee at the September 11, 2013 hearing. Had the current panel heard the same evidence as the original panel heard in December 2007, it would have come to the same legal conclusions and would have also denied Employee's claim, as the panel did in *McCullough I*, notwithstanding Employee's allegedly new evidence (*id*.).

64) *McCullough I* contained numerous typographical errors; this decision may also contain minor errors. However, Employee has not provided adequate evidence supporting her petition that *McCullough I* made mistakes in determination of facts, which would result in modification (*id*.).

PRINCIPLES OF LAW

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of

> compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

The Alaska Supreme Court discussed AS 23.30.130(a) in *Interior Paint Company v. Rodgers*, 522 P.2d 164, 168 (Alaska 1974) stating: "The plain import of this amendment [adding 'mistake in a determination of fact' as a ground for review] was to vest a deputy commissioner with broad discretion to correct mistakes of fact whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted"(*quoting O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971)). An examination of all previous evidence is not mandatory whenever there is an allegation of mistake in determination of fact under AS 23.30.130(a). In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). Section 130 confers continuing jurisdiction over workers' compensation matters (*id*.)

Nothing in AS 23.30.130(a)'s language limits the "mistakes in determination of fact" basis for review to issues relating solely to disability. "We hold that under Alaska's . . . compensation provisions there is no limitation as to the type of fact coming within the ambit of the statutory 'mistake in its determination of a fact' review criterion. More particularly, under AS 23.30.130(a), the Board has the authority to review an order in which a claim has been rejected because of a mistake in its determination of a fact even if the fact relates to the question of liability or causation." *Fischback & Moore of Alaska, Inc. v. Lynn*, 453 P.2d 478, 484 (Alaska 1969). *Lynn* adopted language from *Jarka Corp. v. Hughes*, 299 F.2d 534, 537 (2d Cir. 1962), which said:

> In order to modify a previous order on the theory of mistake, a new order should make it clear that it is doing so, should review the evidence of the first hearing and should indicate in what respect the first order was mistaken -- whether in the inaccuracy of the evidence, in the impropriety of the inferences drawn from it, or,

> as may be true in the present case, because of the impossibility of detecting the existence of the particular condition at the time of the earlier order.

Lynn also cited from a U.S. Supreme Court case construing language from the almost identical provision in the Longshoremen's and Harbor Workers' Compensation Act, which noted: "We find nothing in this legislative history to support the respondent's argument that a 'determination of fact' means only some determinations of fact and not others." *Lynn*, 453 P.2d at 483; *citing Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968), *rehearing denied*, 391 U.S. 929 (1968). If the board articulates mistakes of fact, it may ultimately rule it is no longer in accord with its initial conclusions, which new ruling must be supported by substantial evidence. *Lynn* 453 P.2d at 484-85. "Substantial evidence" is defined as such relevant evidence as a reasonable mind might find adequate to support a conclusion. *Williams v. State*, 938 P.2d 1065, 1069 (Alaska 1997).

> **8 AAC 45.150. Rehearings and modification of board orders.** (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
>
> (b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties in accordance with 8 AAC 45.060.
>
> (c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.
>
> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
>
> (1) the facts upon which the original award was based;
>
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and

> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
>
> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.
>
> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

ANALYSIS

Should *McCullough I* be modified?

Contrary to Employer's arguments at hearing, the law allows this decision to reweigh all the evidence. AS 23.30.130. The modification statute provides for broad discretion on petitions for modification. On other hand, this decision may review only some of the record and simply reflect on the existing evidence to come to new conclusions. It may affirm the prior decision. This decision took the latter approach and reviewed what the panel believes are the most pertinent evidence and has reflected on this vast array of materials. As stated above, the designated chair reviewed thousands of pages of medical records, legal documents and depositions. The designated chair shared his observations and conclusions with the two panel members who deliberated with the chair and relied upon their observations of Employee at hearing on September 11, 2013, and their independent review of the parties' extensive hearing briefs and exhibits.

The biggest problem with Employee's petition for modification is that even she cannot adequately describe or demonstrate the force Haynes applied to her body or even exactly where he applied it on April 8, 2002. In various reports, Employee told Employer, physicians and the police Haynes "slapped," "hit," "struck," or "assaulted" her from behind. Sometimes it was on the right shoulder area in the back; at other times it was more in the center of her back; while at still other times it was somewhere in between. How hard did Haynes apply force to Employee's body? Did he follow through like a person would while swinging a baseball bat? If Employee knows, she is not saying or at least not articulating it well enough for a fact-finder to attribute 11

years of pain, disability and need for medical treatment to an essentially negligible event. By Haynes' account, it was not even a "blow," but merely a "clasp" or "pat" on the shoulder.

It is hard to believe Haynes could have hit Employee hard enough to cause such dramatic damage and yet not leave a mark that could be seen by a medical expert a mere two days later. No medical person ever observed a bruise or mark. Though a witness at the swimming pool observed a mark somewhere on Employee's upper back an hour or two after the event on April 8, 2002, nothing suggests this was a bruise. It could have been a mark from Employee rubbing the area where Haynes patted her. Given the wide variety of Employee's descriptions, Haynes' testimony he clasped her shoulder and gave her an at-a-boy pat is more credible than Employee's varying accounts and descriptions, none of which shed much light on the event. AS 23.30.122.

Employee has listed a whole host of alleged factual errors from *McCullough I.* With very few exceptions, these are her bare allegations of mistake. Each objection was listed and responded to in the factual findings, above. None had any merit. Employee failed to demonstrate *McCullough I* made material errors in fact sufficient to support her petition for modification. In some instances, minor errors have been corrected. Accordingly, Employee's petition for modification will be denied.

CONCLUSION OF LAW

McCullough I will not be modified.

ORDER

1) Minor errors in *McCullough I* are corrected in accordance with this decision.
2) Employee's April 4, 2008 Petition for Modification is denied.

Dated in Anchorage, Alaska on October 11, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Ronald Nalikak, Member

_____
Mark Talbert, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filling a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the final Decision and Order on modification in the matter of NOELLE L. MCCULLOUGH v. JOB READY, INC., dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on October 11, 2013.

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Anna Sebeldia, Office Assistant