

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

CARMEN DUCASSE,

Employee,
Claimant,

v.

MAKING EMPLOYMENT CONNECTIONS,

Employer,
and

LM INSURANCE CORPORATION,

Insurer,
Defendants.

INTERLOCUTORY
DECISION AND ORDER

AWCB Case No. 201800417

AWCB Decision No. 22-0002

Filed with AWCB Anchorage, Alaska
on January 5, 2022.

Making Employment Connections' and its insurer Liberty Mutual Insurance Co.'s (Employer) November 9, 2021 petition to dismiss was heard in Anchorage, Alaska, on November 17, 2021, a date selected on October 5, 2021. Employer's September 14, 2021 hearing request gave rise to this hearing. Attorney Patricia Huna appeared and represented Carmen Ducasse (Employee). Attorney Martha Tansik appeared and represented Employer. Employee appeared telephonically and testified on her own behalf. At hearing Employer raised two preliminary issues, the first concerning Employee's witness list and the second concerning two documents related to her two witnesses' testimony, should she call them. However, Employee's attorney did not call her witnesses, rendering both issues moot. The record closed at the hearing's conclusion on November 17, 2021.

ISSUE

Employer contends Employee's workers' compensation claims (WCC) for temporary total disability (TTD) and permanent partial impairment (PPI) should be dismissed pursuant to AS 23.20.105(a) because she filed her claim more than two years after her last compensation checks.

Employee initially contended her claims for temporary total disability (TTD) and permanent partial impairment (PPI) should not be dismissed because she had had difficulty obtaining legal representation, the progress of her case was delayed due to the pandemic, and because of her difficulties with language issues, as English is her second language. She also contended the statute of limitations defense is generally disfavored and Employer was not prejudiced by the additional claims as the case was already being litigated.

1) Should Employer's petition to dismiss Employee's TTD and PPI claims be granted?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

- 1) On December 19, 2017, Employee injured herself at work when she was wheeling a Hoyer lift with a patient in it around a door. She attempted to slide the lift around and felt pain in her side. (First Report of Injury, January 5, 2018).
- 2) On December 27, 2017, chiropractor Thomas DeSalvo, D.C., treated Employee's back injury caused by lifting a patient at work. She complained of pain when she moved, stiffness, soreness, range of motion decrease and muscle ache. She also reported numbness in both arms immediately after the injury, shoulder pain, and pain when raising her left arm. Dr. DeSalvo restricted Employee from lifting patients for a "few more weeks". (DeSalvo clinic note, December 27, 2017).
- 3) On December 30, 2017, Employer accepted the work injury began to pay indemnity benefits and medical costs. (ICERS database, payment records, February 12, 2021).
- 4) On January 22, 2018, Employee filed a claim for a compensation rate adjustment and medical costs. She stated her reason for filing the claim was she was injured her back, ribs, and shoulder at work, hadn't been able to move very much or lift anything, and hadn't worked since December 19, 2017. (WCC, January 22, 2018).

- 5) On January 30, 2018, Employer answered and controverted the compensation rate adjustment only. Page two of the controversion contained notice Employee would lose her right to compensation benefits unless she filed a written claim within two years after the date she knew the nature of her disability and its connection to her employment after disablement. It also contained notice she had to file a written claim within two years of the last compensation payment. (Controversion, January 30, 2018).
- 6) On February 28, 2018, a lumbar magnetic resonance imaging (MRI) showed increased amounts of fluid in the left L4-5 facet joint, suggesting acute inflammation. There was also desiccation of disc material at L4-5 and L5-S1. (MRI report, February 28, 2018).
- 7) On March 14, 2018, on referral from Dr. DeSalvo, Employee saw Dr. Haggerty for her right rib pain and bilateral shoulder pain. She reported the work injury caused her pain. (Haggerty clinic note, March 14, 2018).
- 8) On March 22, 2018, a left shoulder MRI demonstrated an almost full thickness tear of the supraspinatus tendon, and distal infraspinatus and subscapularis tendinosis. (MRI report, March 22, 2018).
- 9) On April 2, 2018, Dr. Haggerty saw Employee and recommended surgery to repair her left shoulder. (Haggerty clinic note, April 2, 2018).
- 10) On May 7, 2018, Joseph Lynch, M.D., Employer's medical evaluator (EME) opined the work injury was the substantial cause of the need for Employee's left shoulder treatment, including the recommended surgery in the form of rotator cuff repair, bursectomy and intra-articular debridement. He released her to work in only a light duty capacity as a result of the December 19, 2017 work injury as it related to the left shoulder. He opined she was not yet medically stable as she still required treatment for her left shoulder injury, including surgery. Dr. Lynch stated her right shoulder condition was not related to the work injury. (EME report, May 7, 2018).
- 11) On May 28, 2018, Dr. Lynch opined Employee's work related L4-L5 facet joint strain had reached medical stability. He gave Employee's low back injury a two percent whole person PPI rating. (EME report, May 28, 2018).
- 12) On June 11, 2018, Dr. Haggerty repaired Employee's work-related left shoulder rotator cuff tear and labral tear. (Operative report, June 11, 2018).
- 13) On December 11, 2018, Employee received her final TTD payment. (ICERS database, payment report, February 22, 2019).

14) On December 11, 2018, Dr. Haggerty operated on Employee's right shoulder, performing biceps tenodesis, rotator cuff repair, labral repair, coracoplasty, distal clavicle excision, and subacromial decompression. (Operative report, December 11, 2018).

15) On February 4, 2019, Dr. Lynch reviewed Employee's medical history, imaging studies, and performed an in-person examination. He said Employee's left shoulder injury was medically stable on December 11, 2018, six months after her surgery and rated her left shoulder PPI as 4 percent whole person. Dr. Lynch noted Employee had had surgery on her right shoulder but opined the need for her right shoulder treatment was not related to the work injury. He opined Employee's treatment for her low back and left shoulder was reasonable and necessary and work-related. He again opined her work-related low back injury had reached medical stability on May 7, 2018. He did not recommend any additional treatment. Dr. Lynch opined Employee could return to the job of injury without restriction as it relates to her left shoulder and low back L4-5 facet sprain work injuries. (EME report, February 4, 2019).

16) On February 14, 2019, Employee received her final PPI payment. (ICERS database, payment report, February 22, 2019).

17) On February 14, 2019, Employer controverted all benefits based on Dr. Lynch's May 7, 2018 and February 4, 2019 EME reports. Specific benefits controverted were: 1) right shoulder treatment and disability benefits; 2) left shoulder acromioclavicular arthritis treatment and disability benefits; 3) future treatment and disability benefits related to the left shoulder clavicular excision; 4) treatment and disability for head contusion or concussion; 5) treatment or disability benefits for the L4-5 degenerative conditions; 6) treatment for the ribs and lumbar spine after May 7, 2018; 7) disability benefits after the date of medical stability, December 11, 2018; and 8) PPI over 6 percent. The second page of the February 14, 2019 controversion notice informs the time limits for filing a claim for compensation claims is within two years of employer's last voluntarily paid compensation. (Controversion, February 14, 2019).

18) On February 15, 2019, the AWCBC sent a letter to Employee informing her some benefits had been denied and a party who disagreed with the denial must file a written claim within two years of the controversion. It further instructed her she should contact the claim administrator or the nearest AWCBC office, with the contact information for each, if she had any questions. (AWCBC letter, February 15, 2019).

19) On March 12, 2019, attorney Timothy Twomey of Crowson Law Group entered his appearance on Employee's behalf. (Entry of appearance, March 12, 2019).

20) On May 13, 2019, Dr. Haggerty, in response to Employee's attorney's May 1, 2019 letter, stated he did not agree with Dr. Lynch's EME report. Dr. Haggerty opined the substantial cause of Employee's right shoulder pain and need for medical treatment was the December 19, 2017 work injury and she was not medically stable. He predicted Employee would sustain a PPI in direct relation to her work injury. (Haggerty responses to Employee's attorney's letter, May 13, 2019).

21) On February 24, 2020, Employee testified by deposition. She testified since her December 19, 2017 work injury, she had worked only a couple of days right after her injury doing light work. However, she was in a lot of pain and could not do that much, so they took her back off work. She stated her lower back hurt from 3 to 5 (on a scale of 0 to 10) and never went away completely. She had problems with numbness in both her hands. Her left shoulder still hurt at a 3 (on a scale of 0 to 10) and felt "tight." It was never pain-free. Her right side was also painful, at 3-4/10. Her hips hurt as well, at about 4-5/10. She stated her doctor planned to give her a shot in her low back, but she could not remember what kind of shot. There was no treatment recommended for her shoulders other than her home exercise plan. For her hips, she went to physical therapy. Regarding her activities of daily living, she testified she was able to walk for about 20 minutes in the grocery store, but she was unable to vacuum the house or pick something up off the floor. She was unable to stand for more than 20 minutes or sit for more than 20-30 minutes without taking a break. She had not worked since her work injury. (Employee's deposition, February 24, 2020).

22) On July 10, 2020, the Crowson Law Group filed its notice of withdrawal from representing Employee. (Notice of withdrawal, July 10, 2020).

23) February 14, 2021 was two years from the Employer's last compensation payment to Employee. (Observation).

24) On February 18, 2021, attorney Patricia Huna entered her appearance on behalf of Employee. (Entry of appearance, February 18, 2021).

25) On June 14, 2021, Employee treated with Dr. Adams for her left sacroiliac joint pain. Dr. Adams commented she had not seen him for over a year since she was locked down during the pandemic. He recommended trying conservative therapy in the form of a left sacroiliac joint injection. (Adams clinic note, June 14, 2021).

26) On June 21, 2021, Employee treated with Dr. Haggerty for right shoulder pain, which she still experienced with activity. Dr. Haggerty referred her for physical therapy. (Haggerty clinic note, June 21, 2021).

27) On June 29, 2021, Employee was evaluated for physical therapy. She complained of bilateral shoulder pain, with right shoulder pain greater than left. Physical therapist (PT) Michelle Hennessey noted Employee had initially injured herself at work, including both her shoulders and her low back. The physical therapy recommended and approved by Dr. Haggerty was for two times per week for four weeks. (PT clinic note, June 29, 2021).

28) On August 10, 2021, Employee filed a claim for TTD, PPI, medical and transportation costs, attorney fees and costs, and reemployment benefits. (WCC, August 20, 2021).

29) On August 27, 2021, Employee treated with Dr. Haggerty for her bilateral shoulder pain. She reported bilateral shoulder pain at 6/10 at rest and increased pain with activity. Dr. Haggerty referred her to physical therapy and planned to order a right shoulder MRI arthrogram. (Haggerty clinic note, August 27, 2021).

30) On August 30, 2021, Employer filed its petition to dismiss Employee's TTD claim as time barred under AS 23.30.105(a). (Petition, August 30, 2021).

31) On September 2, 2021, on referral from Dr. Haggerty, Employee continued physical therapy for bilateral shoulder pain. (PT clinic note, September 2, 2021).

32) On September 13, 2021, Employee filed her objection to Employer's August 30, 2021 petition to dismiss her claims for TTD. Employee contended there were several reasons she was not able timely file her claim. Employee had problems with legal representation and finding replacement counsel after attorney Twomey withdrew, the pandemic slowed the case, and she had language issues that added yet another layer of complexity. Employee also contended the statute of limitations is generally disfavored and Employer would suffer no harm with the addition of the TTD and PPI claims as the case was already in litigation. (Employee objection, September 13, 2021).

33) On September 14, 2021, Employer filed its revised petition to dismiss Employee's claims for TTD and PPI under AS 23.30.105(a). (Employer's revised petition, September 14, 2021).

34) On October 5, 2021, the parties agreed to a November 17, 2021 hearing date on Employer's September 14, 2021 petition to dismiss Employee's claim for TTD and PPI under AS 23.30.105. (PHC summary, October 5, 2021).

35) The October 5, 2021 prehearing was the first post-claim hearing at which all parties were given reasonable notice and an opportunity to be heard. Employer raised its AS 23.30.105(a) defense. (ICERS data base; Prehearing Conference Summary, October 5, 2021).

36) On October 28, 2021, Employee submitted her documentary evidence list, including: a July 7, 2020 letter to Employee from her prior attorney, Crowson Law Group, notifying her of the firm's withdrawal from representing her in her workers' compensation claims; and a list of workers' compensation claimant attorneys. (Employee's documentary evidence, October 28, 2021).

37) On November 2, 2021, PT David Farmer recommended an additional four weeks of physical therapy at three times per week for Employee's bilateral shoulder pain. Employee had been participating in physical therapy for her shoulder pain since June 21, 2021. (PT clinic note, November 2, 2021).

38) On November 9, 2021, Employee filed her witness list for the November 17, 2021 hearing, which included Employee and her daughter Tracy Ducasse. Tracy Ducasse's phone number was not given, nor was there a brief description of the subject matter and substance of her expected testimony. The witness list included "all rebuttal witnesses." (Employee's witness list, November 9, 2021).

39) On November 15, 2021, Employee partially withdrew certain claims made on August 10, 2021, including: (1) her claim for TTD from February 14, 2019 through the date of medical stability, with prejudice; (2) her claim for past PPI, with prejudice; (3) and transportation costs incurred since February 14, 2019, with prejudice. She also withdrew her claim for reemployment benefits that were made within two years after any past payment or award of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, or 23.30.200, with prejudice. Her claim for medical costs incurred since January 22, 2018 and attorney fees and costs incurred since August, 10, 2019 were not withdrawn. (Employee's amended WCC, November 15, 2021).

40) On November 17, 2021, Employee's attorney clarified she was withdrawing Employee's claims for: (1) TTD and temporary partial disability (TPD) prior to August 10, 2019, with prejudice; (2) PPI through November 17, 2021, with prejudice; (4) attorney fees and costs prior to December 2020, as that was when Employee had begun working on Employee's case and the prior attorney had not submitted a lien. (Hearing record, November 17, 2021).

41) On November 17, 2021, Employee testified she understood: (1) she was waiving her claim for TTD prior to August 10, 2019, with prejudice; (2) she potentially could claim TTD benefits after August 10, 2019; and (3) she was waiving her claim for PPI benefits through the date of the hearing, November 17, 2021, with prejudice; (4) she was not waiving claims for future PPI benefits; (5) she was waiving her claim for reemployment benefits for the present; (6) if she were awarded PPI or TTD benefits in the future, those would be still be open; and (7) her claim for attorney fees would be from December 2020. In addition, Employee is claiming all medical benefits from the date of injury and transportation costs from August 10, 2019, but waiving claims for transportation costs prior to August 10, 2019, with prejudice. (Hearing record, November 17, 2021).

PRINCIPLES OF LAW

AS 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . .

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
. . . .

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision on not only direct testimony, medical findings, 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 23.30.105. Time for filing of claims. (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event other than arising out of an occupational disease

shall be four years from the date of injury, . . . except that, if payment of compensation has been made without an award on account of the injury . . . , a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.

(b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this chapter is mentally incompetent or a minor, the provisions of (a) of this section are not applicable so long as the person has no guardian or other representative. . . .

The purpose of §105(a) is to protect the employer against claims too old to be successfully investigated and defended. *Morrison v. Knudsen Company v. Vereen*, 414 P.2d 536, 538. As noted by Professor Larson:

Failure to file a claim for compensation within the statutory period cannot be excused by an argument that the employer was not harmed by the lateness of filing. Like any statute of limitation, this one carries a conclusive presumption that the defendant is prejudiced by reason of the enhanced difficulty of preparing a defense.

Id. note 3 quoting to A. Larson, *The Law of Workers' Compensation*, Section 78.26 at 251 (1964).

Egemo v. Egemo Construction Co., 998 P. 2d 434 (Alaska 2000), held AS 23.30.105(a)'s statute of limitations starts running only when the injured worker (1) knows of the disability, (2) knows of its relationship to the employment, and (3) must actually be disabled from work. *Id.* at 441. A claim is not "ripe," requiring filing under § 105(a) until the work injury causes wage loss. *Id.* at 438-439. When an employee knew of his disability is a factual question reviewed under the substantial evidence standard. *Id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Alaska Housing Authority v. Sullivan*, 518 P.2d 759, 760-761 (Alaska 1964).

Egemo also found AS 23.30.105(a) allows for more than one disablement from a given injury or

event. It noted other jurisdictions have similarly recognized a single injury may give rise to multiple periods of disability. *Id.*, at 439. Each period of disability is characterized by a work-related injury or illness and wage-loss, and when these two factors are present, the clock begins to run again. *Id.*, at 440. *Egemo* found Alaska law provides a new medical treatment entitles an employee to restart the statute of limitations for medical benefits and extending that practice to disability benefits is logical. *Id.*

The limitations period under AS 23.30.105(a) is an affirmative defense, which must be raised in response to a claim. *Horton v. Nome Native Community Enterprises*, AWCB Decision No. 94-0139 (June 16, 1994). In workers' compensation cases, the employer bears the burden of proof to establish the affirmative defense of failure to timely file a claim. *Egemo*. Failure to file a claim within the period prescribed in § 105(a) is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard. The requirement under § 105(b) to raise the defense "at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard" has been interpreted to apply to the first prehearing conference following a claim's filing. *Nickerson v. Alaska Airlines*, AWCB Decision No. 05-0214 (August 19, 2005).

AS 23.30.041. Rehabilitation and reemployment of injured workers.

....

AS 23.30.180. Permanent total disability. (a) In the case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability....

...

AS 23.30.185. Compensation for temporary total disability. In the case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

AS 23.30.190. Compensation for permanent partial impairment; rating guides. (a) In the case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is \$177,000 multiplied by the employee's percentage of permanent impairment of the whole person. The compensation is payable in a single lump sum, except as otherwise

provided in AS 23.30.041...

....

AS 23.30.200. Temporary partial disability. (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

Murphy v. Fairbanks North Star Borough, 494 P.3d 556 (Alaska 2021), held, in addition to time loss benefits, permanent partial impairment is subject to the two-year limit of AS 23.30.105. Murphy received .041k stipend benefits after PPI benefits were exhausted, and *Murphy* decided the two-year limit to file for PPI began when PPI was exhausted, and stipend benefits commenced. *Id.* The two-year limit begins to run from the time the injured worker last received the specific benefit in dispute. *Id.*

AS 23.30.395. Definitions. In this chapter,

....

(16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

....

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

....

Cortay v. Silver Bay Logging, 787 P.2d 103 (Alaska 1990), held disability depends upon a claimant's earning capacity; the concept of disability compensation rests on the premise the primary consideration is not medical impairment but rather loss of earning capacity related to it.

8 AAC 45.065. Prehearings.

....

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request.

....

ANALYSIS

1) Should Employer's petition to dismiss Employee's TTD and PPI claims be granted?

"Disability" is the incapacity to earn the wages in the same or other employment an employee was receiving when injured. AS 23.30.395(16); *Cortay*. Employee's right to compensation for disability is barred unless her claim was filed within two years after she had knowledge of the nature of her disability and its relation to her employment after disablement. AS 23.30.105(a). However, if an employer voluntarily pays benefits without an award on account of the injury, a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, AS 23.30.180, AS 23.30.185, AS 23.30.190, AS 23.30.200, or AS

23.30.215. In the instant case, Employer voluntarily paid benefits under AS.23.30.185 (TTD), with the last payment made on December 12, 2018. It also paid AS 23.30.190 (PPI) benefits without an award, with the last payment made on February 14, 2019. The two-year limit limitation period applies to claims for PPI benefits. *Murphy*. Employer bears the burden of proof to establish its affirmative defense Employee failed to timely file a claim. *Egemo*

Employer properly raised its AS 23.30.105 affirmative defense at the first hearing on Employee's claim and Employee was given an opportunity to respond. AS 23.30.105(b); *Horton*. Employee filed her claim for disability and PPI on August 10, 2021. The November 17, 2021 hearing on Employer's petition for dismissal of Employee's TTD and PPI claims was the first hearing in this

case. Employer also raised its AS 23.30.105 defense at the first post-claim prehearing on October 5, 2021, which was the prehearing held to set the date for the November 17, 2021 hearing. AS 23.30.065; *Nickerson*. Once this requirement has been met, additional questions must be answered to determine if Employer has produced substantial evidence to prove its defense.

The next question is whether a claim was filed within two years of the last disability payment and the last PPI payment. AS 23.30.105; *Murphy*. Employee was injured on December 19, 2017. She received her last TTD payment on December 11, 2018, and her last PPI payment on February 14, 2019. Therefore, she was required to file her claims for TTD by December 11, 2020 and her PPI claim by February 14, 2021. *Id.* However, Employee did not file her claim for either benefit until August 10, 2021, eight months after the deadline for a TTD claim and almost six months after the deadline for a PPI claim, despite being represented by counsel from March 2019 to July 2020 and again from February 18, 2021 to the present.

Employee did not dispute, and the record establishes she has had knowledge of “the nature of her disability” and its “relation to the employment” since the December 19, 2017 work injury. AS 23.30.105(a); *Sullivan; Babler*. Employee filed her injury report on January 5, 2018, shortly after her work injury, stating she had injured her side when caring for a patient. When she treated with Dr. De Salvo on December 27, 2017, she reported a back injury when lifting a patient at work. She also complained of shoulder pain and pain when raising her left arm. Dr. DeSalvo restricted Employee from lifting patients “for a few weeks.” Since the work injury, apart from attempting a few days of light duty shortly after her injury, Employee has not returned to work. None of her treating physicians, Dr. DeSalvo, Dr. Haggerty, or Dr. Johnston have found Employee to be medically stable. None of her treating physicians have released her to anything but light duty work, with restrictions. Employee has been treated for her low back pain, radicular pain, bilateral shoulder pain, including bilateral shoulder surgeries, and physical therapy for her back pain and bilateral shoulder pain regularly since the work injury, with a hiatus from approximately October 2020 to June 2021 due to the pandemic. On June 14, 2021, Employee treated again with Dr. Adams for low back pain and on June 21, 2021, she again treated with Dr. Haggerty, who prescribed physical therapy first for the right shoulder, then, on August 27, 2021 for both shoulders. Employee continued with physical therapy until November 12, 2021, when four

additional weeks of physical therapy were recommended at two times per week. Employee has at all times since her work injury maintained her disability and need for medical treatment for her low back pain and bilateral shoulder pain are work-related.

The two-year limitation is to protect employers from old claims they will not have a reasonable or timely opportunity to investigate or defend against. *Morrison-Knudsen*. Failure to file a claim within two years from the time Employee knew or should have known the nature of her disability and its relation to her employment carries a conclusive presumption Employer was prejudiced by the filing delay. AS 23.30.001(1), (2), (4); *Larson*.

Employee has never ceased claiming her disabilities and need for medical treatment are related to her December 19, 2017 work injury. AS 23.30.105(a) bars Employee's right to disability benefits from December 11, 2018, the date of her last TTD payment, and to PPI benefits from February 14, 2019, the date of her last PPI payment, for the period of disability that began on December 19, 2017, the date of her work injury. Employer's petition for dismissal of Employee's claims for TTD and PPI benefits will be granted.

However, should Employee become medically stable, then experience a subsequent work-related period of disability, as for example when a new treatment is recommended, she may timely claim disability benefits. *Egemo*. If Employee becomes medically stable after the new period of disability and obtains a new PPI rating, she may timely claim PPI benefits. A new disablement period may also occur if a latent injury manifests itself. AS 23.30.105(a). Employer retains all defenses.

CONCLUSIONS OF LAW

Employer's petition to dismiss Employee's TTD and PPI claims should be granted.

ORDER

Employer's petition to dismiss Employee's TTD and PPI claims is granted.

Dated in Anchorage, Alaska on January 5, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Judith A DeMarsh,
Designated Chair

/s/
Pam Cline, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of CARMEN DUCASSE, employee / claimant v. MAKING EMPLOYMENT CONNECTIONS, employer; LM INSURANCE CORPORATION, insurer / defendants; Case No. 201800417; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on January 5, 2022

/s/
Kimberly Weaver, Office Assistant II