ALASKA WORKERS' COMPENSATION BOARD

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

AMOS M. SNODDY,	)	
	)	
Employee,	)	FINAL
Applicant,	)	DECISION AND ORDER
	)	
v.	)	AWCB Case No. 201102477
	)	
OLGOONIK DEVELOPMENT, LLC,	)	AWCB Decision No. 13-0121
	)	
Employer,	)	Filed with AWCB Anchorage, Alaska
and	)	on September 30, 2013
	)	
ZURICH AMERICAN INSURANCE. CO.,	)	
	)	
Insurer,	)	
Defendants.	)	
	)	

Amos Snoddy's (Employee) June 27, 2011 claim, as amended on November 9, 2012, and Olgoonik Development's (Employer) request for costs incurred because Employee failed to appear at two depositions and for 100 percent recoupment of any overpaid benefits, were heard on August 27 and August 28, 2013, in Anchorage, Alaska, dates selected on May 31, 2013. Attorney Charles Coe appeared and represented Employee who appeared and testified. Attorney Jeffrey Holloway appeared and represented Employer and its workers' compensation insurer. Other witnesses included Christina Snoddy who appeared and testified for Employee, and Serra Williams who appeared and testified for Employer. The record remained open until August 30, 2013, for Employee's supplemental attorney's fee affidavit and until September 6, 2013, for Employer's response. The record closed on September 6, 2013.

As a preliminary matter, the panel on its own motion suggested the parties discuss settling the case before the hearing began. After several minutes, the parties notified the chair they were unable to resolve the case and wanted to proceed with the hearing as scheduled.

ISSUES

Employee contends he permanently aggravated his pre-existing cervical condition when he slipped on the ice and fell while at work for Employer. He contends his current neck condition, which also affects his right upper extremity, arose out of and in the course of his work for Employer. Therefore, he contends his pre-existing and, as aggravated by his injury, current neck and related right upper extremity symptoms are compensable and he is entitled to all appropriate workers' compensation benefits.

Employer contends though Employee may have slipped and fallen at work and sustained a new, minor cervical strain, his work-related symptoms have resolved. It contends Employee did not temporarily or permanently aggravate his pre-existing cervical condition. Employer contends Employee's current cervical complaints and related right upper extremity symptoms are not "injuries" arising out of and in the course of his employment with Employer, and are not compensable.

1) **Did Employee have compensable neck and right upper extremity injuries?**

Employee contends he is entitled to temporary total disability (TTD) from June 8, 2011 through October 30, 2011, and from February 25, 2012 through April 17, 2013. However, Employee concedes he "had periods in between" these dates when he was working by necessity, which periods he contends should be "deducted" from his TTD award.

Employer contends not only is Employee not entitled to additional TTD, it overpaid Employee TTD. Furthermore, it contends Employee is not entitled to TTD during periods he already received TTD, worked for another employer or himself, or in any week in which he received unemployment compensation. It seeks an order denying his TTD claim.

2) **Is Employee entitled to additional TTD?**

Employee contends he is entitled to permanent partial impairment (PPI) benefits. However, he concedes he has not yet been rated by his physician.

Employer contends Employee is not entitled to any PPI benefits. It seeks an order denying his PPI claim.

3) Is Employee entitled to PPI?

Employee contends Employer should pay his medical providers' outstanding, work-related medical bills. He also contends Employer should pay for ongoing medical care for his neck and right upper extremity.

Employer contends Employee is entitled to no further benefits. Therefore, it seeks an order denying his claim for past and continuing medical care.

4) Is Employee entitled to medical benefits?

Employee contends the rehabilitation benefits administrator (RBA) designee erred by finding him not eligible for vocational reemployment benefits. He seeks an order either vacating the RBA designee's decision and remanding or finding him eligible for retraining benefits.

Employer contends the RBA designee did not err by finding Employee ineligible for reemployment benefits. It seeks an order denying Employee's appeal and affirming the RBA designee's decision.

5) Should the RBA designee's decision finding Employee ineligible for reemployment benefits be affirmed?

Employee contends he is entitled to interest on any benefits awarded. He seeks an order awarding statutory interest as applicable.

Employer contends Employee is entitled to no additional benefits. Therefore, it seeks an order denying Employee's interest claim.

6) Is Employee entitled to interest?

Employee contends he is entitled to attorney's fees and costs. He seeks an order awarding attorney's fees and costs on all issues on which he prevails.

Employer contends Employee is entitled to no additional benefits. Therefore, it seeks an order denying Employee's request for attorney's fees and costs. Alternately, if Employee prevails on any issues, Employer contends any requested attorney's fees and costs should be reduced by those attorney's fees related to issues upon which Employee did not prevail.

7) Is Employee entitled to attorney's fees and costs?

Employer contends Employee willfully failed or refused to appear for his deposition on two occasions. It contends it is entitled to costs expended for these missed depositions, from Employee. Employer seeks an order requiring Employee to reimburse Employer for these expenditures.

Employee contends he did not willfully miss his depositions. He contends he needed an attorney to represent him and did not feel comfortable without legal representation. He seeks an order denying Employer's petition to recover these deposition-related costs.

8) Should Employee be required to reimburse Employer for costs related to his missed depositions?

Employer contends it overpaid Employee benefits. It seeks an order determining the overpayment amount, and an order allowing Employer to take a 100 percent recoupment of any overpayments from any future benefits owed Employee.

Employee did not specifically address this issue. It is presumed Employee contends there was no overpayment and Employer's petition for recoupment should be denied.

9) Is Employer entitled to 100 percent recoupment of any overpayment from any benefits awarded Employee?

FINDINGS OF FACT

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

1) On October 25, 1999, Employee completed a pain chart at Community Chiropractic Clinic. Employee indicated right neck and right wrist shooting pains, tingling, and numbness. Employee rated his "neck-shoulder-arm" pain at "7" on a "0 to 10" scale with 10 being "severe pain" (pain chart, October 25, 1999).

2) On January 24, 2000, Employee reported to Peter Ryan, D.C., his primary complaint of right upper back pain, left neck pain, right shoulder pain and numbness, and right elbow and wrist numbness (chart note, January 24, 2000).

3) On August 3, 2001, Employee told Dr. Ryan he principally had numbness on his right side and neck, shoulder, elbow, wrist and hand. His pain level was a "7" (chart note, August 3, 2001).

4) On September 11, 2001, Employee told Dr. Ryan his principal complaint was pain, numbness, stiffness and soreness in both sides of his back. His right elbow and wrist were painful with numbness and tingling. His pain level was "8" (chart note, September 11, 2001).

5) On September 13, 2001, Employee told Dr. Ryan his main complaint was right-sided neck pain with tingling, stiffness, and soreness. His right shoulder had numbness and tingling as did his right wrist. Employee's right hand had numbness, tingling, stiffness and "weakness" and his pain level was "8" (chart note, September 13, 2001).

6) On June 11, 2002, Employee told Dr. Ryan he suffered from numbness, tingling, stiffness, and soreness in both sides of his upper back and his right and left shoulders, and his elbows, wrists, and hands, had pain with numbness. His pain level was "8" (chart note, June 11, 2002).

7) On November 25, 2002, Employee presented to Dr. Ryan with pain and numbness, tingling, and stiffness in the right side of his neck. Employee was troubled by pain with numbness in, among other things, his right wrist and hand. His pain level was "8" (chart note, November 25, 2002).

8) On December 30, 2002, Employee reported to Dr. Ryan he had right shoulder, wrist and hand pain with numbness, tingling and stiffness. His pain level had increased to "9" (chart note, December 30, 2002).

9) On July 8, 2003, Employee presented to Dr. Ryan with upper back and neck pain with numbness, tingling and stiffness. His pain level was "5" (chart note, July 8, 2003).

10) On November 4, 2003, Dr. Ryan reported Employee had right wrist pain with numbness, tingling and stiffness. His pain level was "6" (chart note, November 4, 2003).

11) On March 8, 2008, Employee began employment with Delta Development Group as Administrative Assistant (Delta Development Group acknowledgment, March 8, 2008).

12) On November 24, 2008, during a reevaluation, Dr. Ryan diagnosed Employee with cervical muscle spasm, cervical myalgia/myofascitis and nerve root and plexus disorder (Reevaluation Summary, November 24, 2008).

13) On November 24, 2008, Employee completed another pain chart noting he had sharp pain in the right neck at pain level "10," and numbness and tingling in the right wrist and hand region (Pain Chart, November 24, 2008).

14) On November 26, 2008, Dr. Ryan reported Employee had pain with numbness, tingling, and stiffness in, among other places, the right neck, hip, shoulder, and hand with his pain level at "7" (chart note, November 26, 2008).

15) On January 5, 2009, Employee told Dr. Ryan he had pain and numbness, tingling, and stiffness in both sides of his upper back, and right and left hands. His pain level was "6" (chart note, January 5, 2009).

16) On March 19, 2009, Dr. Ryan recorded Employee's pain level was at "8." Objectively, Dr. Ryan noted spasm in the left upper, middle and lower cervical ranges. Dr. Ryan also found subluxation with concomitant myospasms overlying the right lower cervical spine with "signs of spasm" detected in the right lower cervical area (chart note, March 19, 2009).

17) On October 20, 2009, Employee completed a form for Advanced Pain Centers of Alaska. He stated he had numbness and weakness in his right arm, and noted his pain was currently at level "10" and had been at this level for the past six months. Employee stated he had lost approximately four days of "usual activities" because of this pain (Patient Questionnaire, October 20, 2009).

18) On November 10, 2009, Employee told Dr. Ryan his neck pain was at level "8" and radiated into both arms at level "8." Employee had decreased cervical range-of-motion in all planes with pain. Dr. Ryan noted muscle tightness over Employee's cervical musculature. Dr. Ryan diagnosed, among other things, cervical region subluxation and cervical radiculitis (chart note, November 10, 2009).

19) On January 11, 2010, on referral from Lawrence Stinson, M.D., Employee had physical therapy. Employee reported neck and right upper extremity pain, which he said began gradually in September 2009. Employee described his symptoms as sharp pain in the cervical area with "tingling and weakness" in his right upper extremity, making it difficult for him to "grasp a pen while writing" (Advanced Physical Therapy, January 11, 2010).

20) On Employee's physical therapy intake information sheet, he wrote his primary symptoms for which he sought physical therapy treatment included: "Pain, numbness, loss of strength in right arm," which began on September 1, 2009, which he stated made Employee unable to "Hold things" or "Brace self with arms." Employee used the following words to describe his pain: "Ache, Sharp, Tingling, Throb, Pins/Needles" (Intake Information, January 11, 2010).

21) On or about January 11, 2010, Employee also completed a pain diagram at the physical therapy clinic. Employee circled his entire right neck and right upper extremity as the area in which he felt his symptoms (chart note, undated).

22) On January 11, 2010, on referral from Dr. Ryan, Employee saw Dr. Stinson. Dr. Stinson recorded Employee had a progressive, two-month history of right upper extremity radiculitis symptoms involving the shoulder and "extending down to the fingers." Employee said his symptoms varied between "aching to stabbing to numbness" and occurred on a daily basis and varied between pain level "3" and "10," with average pain at "8" (chart note, January 11, 2010).

23) On January 18, 2010, Employee saw Dr. Stinson in follow-up. Dr. Stinson advised Employee "very well may be a surgical candidate" (report, January 18, 2010).

24) On January 25, 2010, Employee saw Dr. Stinson again and reported increasing right upper extremity radiculitis pain interfering with his work as a delivery driver. Employee reported it was quite difficult for him to lift and carry with his dominant right arm. At times, Employee felt intermittent, decreased grip strength (chart note, January 25, 2010).

25) On January 25, 2010, Employee completed another pain diagram. Employee noted the entire back of his right shoulder and his entire right upper extremity had symptoms including numbness, and burning, stabbing, and aching pain (pain diagram, January 25, 2010).

26) On February 1, 2010, Employee saw Louis Kralick, M.D., on Dr. Stinson's referral. Employee described recent complaints of "severe neck pain" beginning in November 2009. Employee did not associate this pain with any significant injury or activity. Employee had "characteristic complaints" of sharp pain involving his right arm and had begun to feel numbness in the right arm involving the first three or four digits and forearm. Employee specifically stated he had been getting weak in his right hand and distal arm. Employee reported taking Advil 800 mg and Lyrica. Dr. Kralick noted Employee had a significant spinal problem from C4-5 down to the C6-C7 segment, with some possible foraminal narrowing noted as well at the right C7-T1 segment. Dr. Kralick wanted further diagnostic evaluation including x-rays and electrodiagnostic evaluation

of the right upper extremity, with follow-up for further treatment option discussions (Kralick report, February 1, 2010).

27) On November 9, 2010, Employee told Dr. Ryan he was doing slightly worse since his last visit and his right thumb had been cramping on him randomly (chart note, November 9, 2010).

28) On November 17, 2010, Employee told Dr. Ryan he was doing about the same. Employee described his neck pain radiating into his right arm at pain level "8" (chart note, November 17, 2010).

29) On February 25, 2011, Employee reported he injured his left elbow and back when he slipped and fell at work. This is the injury addressed in this decision (Report of Occupational Injury or Illness, February 28, 2011).

30) On February 28, 2011, the Employment Security Division sent Employer a letter stating Employee had filed an unemployment insurance claim listing the reason he was no longer working as "lack of work" (Request for Separation Information Letter, February 28, 2011).

31) On February 28, 2011, Employee saw Dr. Ryan. He noted neck pain radiating to the left arm, low-back pain, left arm tingling, and right hand pain with intermittent cramping. Dr. Ryan did not record any new injury and did not obtain a history of the February 25, 2011 slip and fall from Employee. With exception of right-hand cramping, all symptoms Employee reported to Dr. Ryan on this occasion were to his left side (chart note, February 28, 2011).

32) Between February 28, 2011 and March 23, 2011, Dr. Ryan saw Employee several times. On all these occasions, Employee complained of left-sided symptoms. He never mentioned a history of slipping and falling while working for Employer (chart notes, as dated).

33) On March 23, 2011, Employee told Dr. Ryan he was doing worse and had increased pain since that morning at about 10 o'clock while working on the computer and had to stop. Employee rated his neck pain radiating into his right arm at "10" and noted his right hand was intermittently cramping. This report looked very similar to Dr. Ryan's pre-injury reports. However, this report made no mention of a work injury with Employer (chart note, March 23, 2011; judgment, observations).

34) On March 30, 2011, Dr. Stinson removed Employee from work until April 11, 2011 (Return to Work Recommendations, March 30, 2011).

35) Beginning April 8, 2011, and continuing regularly with a couple of exceptions through July 22, 2011, Employee's payroll records show he received a weekly paycheck from an employer (paycheck documents, Employer's Hearing Evidence 72-86).

36) On April 11, 2011, Employee saw Dr. Stinson again. Notwithstanding the fact Employee was working, he advised Dr. Stinson he did not feel he could perform any work as almost any physical activity exacerbated his pain. He was unable to obtain an MRI the previous week because of his discomfort. Employee completed another pain diagram remarkably similar to those he prepared prior to his work injury. Dr. Stinson removed Employee from work again work from February 25, 2011 through May 11, 2011 (chart notes; pain diagram; Return to Work Recommendations, April 11, 2011).

37) On May 11, 2011, Employee saw his family physician at Medical Park Family Clinic. During this examination, Employee reportedly denied any numbness, tingling or weakness (chart note, May 11, 2011).

38) On May 17, 2011, Employee saw Dr. Kralick again. Employee reported having been injured at work on February 25, 2011, while carrying boxes into an office, when he slipped and fell landing on his left elbow. Employee advised Dr. Kralick he was taking Vicodin 7.5 mg for a "back injury." Employee reported he had constant numbness involving the right arm with radiation into the hand, predominately the first and third digits. Dr. Kralick removed Employee from work from May 17, 2011 to May 31, 2011 (May 17, 2011).

39) On or about May 27, 2011, Employer submitted notice to the RBA advising Employee had been disabled for 90 consecutive days because of his injury (Employer's Notice of 90 Consecutive Days of Time Loss for Injuries Occurring on or After November 7, 2005, May 27, 2011).

40) On May 31, 2011, as a result of Employee allegedly having missed 90 consecutive days from work as a result of his work-related injury, Deborah Reed, Workers' Compensation Technician, sent Employee a letter assigning Norman Silta as his rehabilitation specialist to complete an eligibility evaluation (letter, May 31, 2011).

41) On June 7, 2011, Employee completed information for his Employer's medical evaluation (EME) in Oregon. Employee stated he was not presently working (Star Medical intake form, June 7, 2011).

42) On June 7, 2011, neurosurgeon Thomas Rosenbaum, M.D., saw Employee as part of an EME panel. Dr. Rosenbaum diagnosed cervical spondylosis and an "inconsequential" cervical

strain by history secondary to the February 25, 2011 industrial injury (Rosenbaum EME report, June 7, 2011).

43) In response to the adjuster's specific questions, Dr. Rosenbaum stated the February 25, 2011 injury was not "the substantial cause" of Employee symptoms, noting he had significant, pre-existing cervical spondylosis. In Dr. Rosenbaum's view, the work injury did not aggravate, accelerate, or combine with a pre-existing condition to produce the necessity for medical treatment or any disability. In his opinion, Employee was undergoing active treatment before this injury and continued active treatment following the work event. Dr. Rosenbaum believed Employee was not treated for an "alternate pathology" following the work-related injury. Dr. Rosenbaum opined the reason Employee was referred for "surgical intervention" was not the work injury, but rather an "underlying pathology," which progressed over time. Though Dr. Rosenbaum felt surgery was reasonable, it was not related to the work injury. Dr. Rosenbaum said Employee was released to regular duty work in relationship to the work injury, which he stated did not play "a significant role" in regard to Employee's symptomatology. In Dr. Rosenbaum's opinion, Employee was medically stable with respect to his February 25, 2011 injury as there "was no significant injurious event." Lastly, Dr. Rosenbaum stated Employee had no ratable impairment referable to the industrial injury. Any impairment was related to Employee's pre-existing spondylosis, but, because that non-occupational condition was not medically stable he could not be rated according to Dr. Rosenbaum. Any rating for cervical spondylosis would be unrelated to Employee's work injury (*id*. at 28-30).

44) Dr. Rosenbaum reported the following exchange with Employee about his medical history:

> I inquired with regard to the claimant having any cervical pathology in the past. The claimant states that he has had no difficulties with his neck of any significance whatsoever previously. I then noted that there were prior medical records available for review, which did delineate that the claimant had treatment for his neck prior to his industrial injury, after he had just denied having any treatment whatsoever referable to the cervical spine. The claimant stated then on confrontation that he only had some occasional stiffness in his neck or tightness, but he had no other symptoms. I then inquired specifically if he had any right arm symptomatology predating his industrial injury of February 25, 2011, noting now that he reported that he had stiffness and tightness. The claimant categorically denied that he had had any right arm symptoms before. I then noted that the claimant's prior medical records did delineate right arm radiating symptomatology as well as numbness in the thumb, and the claimant stated, after the confrontation by me, that he did have some right arm symptoms. The

> symptoms, however, were not extreme or of any significance, and they were primarily just elbow discomfort (*id*. at 11).

45) On June 7, 2011, physiatrist Patrick Radecki, M.D., also saw Employee for an EME (Radecki EME report, June 7, 2011).

46) Employee advised Dr. Radecki he had a cornea injury at work but otherwise no significant on-the-job injuries. Dr. Radecki diagnosed chronic, long-term recurrent pain in the neck region with multiple, prior diagnoses of right upper extremity radiculitis pre-dating the February 25, 2011 work injury. Dr. Radecki opined after the work incident, Employee's initial symptoms were "overwhelmingly" in the left upper extremity. About a month following the injury, Dr. Radecki noted Employee's symptoms and weakness suddenly switched to the right, which in his opinion "makes no sense." Employee expressed only subjective symptoms and had no objective findings, according to Dr. Radecki. Dr. Radecki also found pre-existing MRI scan evidence of multilevel degenerative disc disease in the neck, unchanged with a repeat MRI following the subject injury (*id*. at 25, 29).

47) In response to the adjuster's specific questions, Dr. Radecki opined Employee had a "non-physiologic" presentation, the work incident was not "the substantial cause" of Employee's "present condition" and need for medical treatment, and Employee had reverted to his pre-existing condition of right upper limb pains and occasional subjective numbness in the C7 distribution, which predated his work injury. Dr. Radecki stated there was no evidence Employee's work injury aggravated, accelerated, or combined with any pre-existing condition to produce the necessity for the current medical treatment or any disability. Dr. Radecki said Employee's symptoms were all the same as his pre-injury symptoms and there was no medical evidence to show any objective change following his work-related incident. In Dr. Radecki's opinion, there was no evidence Employee had even a temporary aggravation of his pre-existing condition. Dr. Radecki opined surgical treatment would have a "very guarded prognosis" since Employee lacks a "specific objective abnormality," has lots of arthritic changes in his neck, and none of it is related to his February 25, 2011 work injury. He saw no need for additional chiropractic treatments or injections. Dr. Radecki opined physical therapy with neck traction might give Employee subjective improvement and some anti-inflammatories might help keep Employee from neck surgery. But, in his opinion, no additional treatment would be considered related to Employee's February 25, 2011 work injury in that there is no evidence the event

caused "any significant injury." Dr. Radecki did not believe Employee's work injury would "affect his job description," there was no objective restriction for Employee returning to work, and he was capable of doing his "regular work." According to Dr. Radecki, Employee reached medical stability relative to his February 25, 2011 injury, "if he was injured at all," no later than two months after the fall. Lastly, Dr. Radecki opined there is no evidence Employee had a "definite injury" on February 25, 2011, and there was no permanent partial impairment related to the event (*id*. at 32-34).

48) On June 14, 2011, specialist Silta sought opinions from attending physician Dr. Stinson who diagnosed work-related cervical disc displacement, with radiculitis. Dr. Stinson predicted Employee would incur a ratable PPI greater than zero percent arising from his work injury, in accordance with the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 6th Edition (*Guides*) (letter, June 14, 2011, response signed by Dr. Stinson, June 20, 2011).

49) Specialist Silta also submitted job descriptions for Construction Project Manager, and Mud-Plant Operator, and asked Dr. Stinson to predict whether Employee would have permanent physical capacities to perform the described jobs. To both inquiries, Dr. Stinson responded the answer was "undetermined, may have surgery" (*id*. at 5-8).

50) On June 24, 2011, Employer advised specialist Silta it was unable to offer Employee alternative work (letter, June 24, 2011).

51) On June 27, 2011, specialist Silta completed a reemployment benefits eligibility evaluation report for Employee and forwarded it to the RBA designee. Employee told specialist Silta he was at the time of his injury employed by Olgoonik as a Construction Project Manager. Employee advised specialist Silta of the following, 10-year, pre-injury work history:

Employer	Year	Job Description
Olgoonik	April 2010-present	Construction Project Manager
Delta Development	Early 2008-early 2010	Construction Project Manager
Baroid Drilling	1996-late 2003	Mud Plant Operator

52) On June 27, 2011, Employer filed a controversion denying medical treatment, temporary total and temporary partial disability, permanent partial impairment, and vocational retraining

benefits other than costs associated with the specialist assigned to perform the eligibility evaluation (Controversion Notice, June 23, 2011).

53) On June 27, 2011, Employee filed a claim seeking TTD from June 1, 2011, through a period "to be determined"; PPI if and when rated; medical costs "to be determined"; review of a reemployment benefit decision, not otherwise specified; a compensation rate adjustment; penalty; and interest (claim, June 27, 2011).

54) On July 1, 2011, specialist Silta inquired further of Dr. Stinson by enclosing several job descriptions purporting to cover Employee's 10-year work history prior to his injury. These job descriptions included: Construction Project Manager; Mud-Plant Operator; Loader and Unloader; Loader and Unloader (50%); and Shipping and Receiving Clerk (50%). In each instance, Dr. Stinson was asked to predict whether Employee had or in the future would have the physical capacities to perform the described jobs. In each instance, Dr. Stinson replied "No" (job descriptions, signed by Dr. Stinson, September 12, 2011).

55) On July 19, 2011, Employer filed a controversion denying TTD from June 7, 2011, forward; PPI; medical costs; reemployment benefits; a compensation rate adjustment; penalty; and interest (Controversion Notice, July 18, 2011).

56) On July 25, 2011, Employee filed a petition requesting a second independent medical evaluation (SIME) based upon a dispute between Dr. Kralick, who said Employee's "condition" was work-related, and Dr. Rosenbaum, the EME who said it was pre-existing (Petition, undated).

57) On August 3, 2011, the RBA designee wrote specialist Silta advising him he had not included some known, past employment in his eligibility evaluation. The RBA designee directed specialist Silta to obtain a more complete work history, prepare additional job descriptions as necessary and contact Employee's physician again for his review of these descriptions (letter, August 3, 2011).

58) On September 12, 2011, Employee met with Dr. Stinson and reviewed forms from specialist Silta. Dr. Stinson stated Employee's then-current medical condition was "not conducive to any of the possible vocations listed." These forms included job descriptions for: Construction Project Manager; Mud Plant Operator; Loader and Unloader; Loader and Unloader (50%); and Shipping and Receiving Clerk (50%). Dr. Stinson checked "no" on each job description stating Employee will not have the physical capacities to perform the described jobs (chart note; Job Descriptions, September 12, 2011).

59) On October 11, 2011, specialist Silta submitted his eligibility evaluation "addendum." Noting Dr. Stinson disapproved all job descriptions specialist Silta provided, and finding Employee met all other legal requirements, specialist Silta recommended Employee be found "eligible" for reemployment benefits (Reemployment Benefits Eligibility Evaluation Addendum, October 11, 2001).

60) On October 28, 2011, in conjunction with his employment with Wise Men Consultants, Employee completed a group life insurance "insurability" form. In response to specific health questions, Employee stated he had not, in the past five years, been prescribed medication or taken any medication requiring a prescription. Employee also stated during the previous five years he had not consulted a medical professional for any condition not listed in a prior question, or been advised by a medical professional to have any diagnostic tests or surgery (Group Life Insurance Evidence of Insurability Form, October 28, 2011).

61) On October 31, 2011, the RBA designee determined Employee "eligible" for reemployment benefits based upon specialist Silta's October 11, 2011 report. The RBA designee relied upon specialist Silta's report, which documented Dr. Stinson's prediction that Employee would not have permanent physical capacities to perform the physical demands of his job at the time of injury, or any job he held during the 10-year period prior to his injury. Dr. Stinson predicted at the time of medical stability Employee would have a PPI rating in excess of zero percent; Employer did not offer him physically appropriate alternative work; Employee had never been rehabilitated in a prior workers' compensation claim; and Employee never declined development of a reemployment benefits plan, or received job dislocation benefits and then returned to work in the same or similar occupation in terms of physical demands (letter, October 31, 2011).

62) Dr. Stinson, specialist Silta, and the RBA designee considered only the following job descriptions prior to the RBA designee finding Employee eligible for reemployment benefits: Construction Project Manager; Mud-Plant Operator; Material Handler; Material Handler (50%) and Shipping and Receiving Clerk (50%) (Reemployment Benefits Eligibility Evaluation Addendum, September 30, 2011, at 2). Dr. Stinson, specialist Silta, and the RBA designee in their first evaluation did not consider all jobs Employee held in the 10 years prior to his work injury, or those he held or received training for after his work injury (experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above).

63) On November 8, 2011, Employer filed a timely petition asking for review of the RBA designee's October 31, 2011 determination letter finding Employee eligible for reemployment benefits (Petition, November 4, 2011).

64) On January 6, 2012, Employee testified in his deposition that in the 10 years prior to his work injury, he worked as: a "fluid engineer" otherwise known as a "mud man" for Halliburton; a jewelry sales associate for Zales; a bush order processor for Costco; a security monitor for NANA; an inventory control and warehouseman for Colville; a material specialist for CH2M; the project manager on various inventory and construction projects for Opti Staffing Group; a material specialist and project manager for Delta Development; a security person and bouncer for Player's House of Rock; a shoe sales associate at Nordstrom's; and as project manager for Employer (Snoddy deposition, January 6, 2012, at 15-30).

65) On March 14, 2012, *Snoddy v. Olgoonik Development, LLC*, AWCB Decision No. 12-0054 (March 14, 2012) heard Employer's appeal from the RBA designee's eligibility determination. That decision remanded the case to the RBA designee with instructions to direct specialist Silta to conduct further investigation and report on Employee's pre-and post-injury employment, especially with respect to requirements set forth in the appropriate administrative regulations, as amended (*id*. at 25).

66) On April 16, 2012, Employee saw Dr. Stinson explaining he wanted to pursue vocational retraining and return to school to get a Project Management degree. Employee told Dr. Stinson he had worked intermittent, temporary contract jobs since being injured at work and was very careful about what he selected because his ongoing symptoms caused physical limitations. Employee reviewed with Dr. Stinson "different vocational offerings" provided by the reemployment specialist. Included were job descriptions for Salesperson, Jewelry; Salesperson, Shoes; Bouncer; Shipping and Receiving Clerk; and Guard, Security. Dr. Stinson checked the "no" box on each form stating Employee would not have permanent physical capacities to perform these jobs (chart note; job descriptions, April 16, 2012).

67) On July 11, 2012, Dr. Stinson referred Employee for a physical capacity evaluation for vocational retraining purposes (chart note, July 11, 2012).

68) On August 6, 2012, Dr. Stinson again reviewed job descriptions including: Salesperson, Jewelry; Salesperson, Shoes; Bouncer; Shipping and Receiving Clerk; and Guard, Security. On

each of these job descriptions, Dr. Stinson again checked the "no" box indicating Employee would not have permanent physical capacities to perform these jobs (job descriptions, August 6, 2012).

69) On September 14, 2012, Employee saw Edward Tapper, M.D., for an SIME. Employee reportedly told Dr. Tapper he never needed pain pills before this work injury (Tapper report, September 14, 2012, at 3). In his "comment and discussion" section, Dr. Tapper stated:

> As Mr. Snoddy presented to me, he had a specific injury on February 25, 2011, which he stated he reported, and then sought treatment with Dr. Ryan, his chiropractor. He was then referred to Dr. Stenson, (sic) and then Dr. Kralick, who recommended surgery.
>
> Mr. Snoddy told me that before this specific injury, he did not have loss of feeling in the right arm. He said he had seen Dr. Ryan for chiropractic treatment before his injury, for some aches and pains. He worked on the north slope (sic) performing construction and labor work, and when he came into town he would see Dr. Ryan for his aches and pains. . . .
>
> When I saw him, I was of the opinion that the February 25, 2011 employment injury was the substantial cause of his problems. However, after going through 430-some pages of medical records, they do not support his statements to me. He has been seeing Dr. Ryan for chiropractic care since 1999 or 2000, on a regular basis. Dr. Ryan's reports indicate neck pain and right arm pain, with numbness and tingling in the right arm for years and years, and noting his pain is sometimes better and sometimes worse. He saw Dr. Ryan on February 28, 2011. He also saw Dr. Ryan before than (sic), and he was actually under treatment with Dr. Stenson (sic) throughout 2010, undergoing at least three epidural steroid injections plus an MRI study which showed multilevel cervical spondylosis. EMG studies showed right C8 nerve root irritability, nothing severe. In any event, when he saw Dr. Ryan on February 28, 2011, there is no mention of a new injury of February 25, 2011, and all of Dr. Ryan's reports indicate radiculitis in the left arm and nothing about the right arm. Even on his pain drawings, he notes pain in the left shoulder (Page 229 of the records) (*id.* at 5).

70) Dr. Tapper concluded Employee had a pre-existing condition, and the work injury did not combine with it to cause Employee's disability or need for medical treatment. He was uncertain whether the work injury caused a "temporary aggravation" but opined the cause of Employee's present disability and need for treatment was "most likely the natural progression of his spinal stenosis and cervical spondylosis." Dr. Tapper stated "99% of the substantial cause" of Employee's complaints and symptoms was his pre-existing, multilevel cervical spondylosis and degenerative arthritis and "maybe 1%, if that" was from the work injury. He further opined Employee was

medically stable on September 14, 2012, and could probably return to work as a salesperson without any limitations except no heavy lifting and no repetitive use of his right hand. Dr. Tapper agreed with Drs. Rosenbaum and Radecki and did not think Employee had any ratable impairment from the February 25, 2011 work injury. He did not think Employee was suitable for any of the job descriptions provided for Dr. Tapper's review (*id*., at 4-8).

71) On September 19, 2012, specialist Silta wrote Dr. Stinson and provided additional job descriptions representing Employee's pre-injury 10-year work history. Specialist Silta asked Dr. Stinson to review these and provide appropriate comments (letter, September 19, 2012).

72) On October 1, 2012, Employee saw Dr. Stinson with the above-mentioned additional "vocational forms" for review. Dr. Stinson reviewed these with Employee and noted there was one job description for which Employee met the physical requirements. Employee agreed. Included in these job descriptions were: Construction Project Manager; Mud-Plant Operator; Loader and Unloader; and Shipping and Receiving Clerk (50%). To all these job descriptions, Dr. Stinson checked the "no" box, with exception of Construction Project Manager, for which Dr. Stinson checked the "yes" box, indicating he believed Employee did not have physical capacities to perform the former three jobs, but would be able to perform the latter position (chart note; job descriptions, October 1, 2012).

73) On October 1, 2012, Dr. Stinson again checked the "yes" box on a job description form for Construction Project Manager (job description, October 1, 2012).

74) On October 4, 2012, Employee saw Alan Roth, M.D., for an SIME. In response to Dr. Roth's request for Employee's past medical history, Employee reportedly stated:

> His past medical history is significant for chiropractic care for twenty years. He says he was treated only for low back discomfort after working out of high school. He came under the care of Chiropractor Ryan in the early 1990's and was treated there a couple of times a week. The patient states that he was only treatment for his mid back and lower back, and never was treated for neck concerns prior to his slip-and-fall at work. The record suggests a history completely different. He denies any neck or arm pain prior to his fall, whatsoever, in spite of the clear history of multiple cervical epidural blocks prior to the slip-and-fall on ice seen in the records. He denies any prior tingling or numbness to either upper extremity. He says that Dr. Stinson had provided a neck x-ray when he was treating him for a low back problem in 2010, and at that time an MRI of the neck and shoulders was completed (*id*. at 2).

In his "discussion" section, Dr. Roth stated:

> The patient, upon his history-taking, appears quite straightforward and is most convincing. He clearly gives a history of slipping on the ice, acutely developing neck pain radiating to the right arm, and shortly thereafter shoulder pain as well as elbow pain. He states that the elbow pain went away fairly rapidly. He denied any previous neck pain and said that although (and clearly gives a history) he had extensive chiropractic care over the years, it was for mid back and low back pain. He is convinced that the left shoulder was significantly injured at the time of his fall, but he remained largely asymptomatic until sometime in November; thereafter, he had an acute rupture, which he feels was related to the fall.
>
> On the other hand, there is the record. The record fairly dramatically and clearly indicates that the patient has been treated for 20 years chiropractically mainly for issues related to the neck, although some lower back treatment also had been provided. The patient has had years of radiating discomfort to the right upper extremity with tingling and numbness as well as weakness; and on extensive chiropractic evaluations, multiple documentation of loss of range of motion well prior to his work injury was noted. Long prior to his slip-and-fall on the ice on the last day on his job . . . he had multiple cervical epidural blocks, and in fact he had seen a neurosurgeon who told him that he had enough problems that he should seriously consider surgery for his neck. His complaints at that time were identical to those seen at present related to the right upper extremity and neck (*id*. at 12).

75) Dr. Roth opined Employee had a pre-existing cervical condition but the work injury was not a substantial cause for any aggravation or acceleration of the pre-existing condition. The work injury did not combine with the pre-existing condition above his pre-injury pain level. Absent the fall, Employee's need for treatment or disability would have been "identical." The substantial cause for Employee's neck and right upper extremity symptoms is the pre-existing degenerative disc and spine disease. Employee could probably benefit from cervical surgery; however, the work injury is not a substantial cause of the need for any recommended treatment. Employee would have been medically stable from his work injury 45 days after the injury date, though there was no objective evidence he suffered any injury. Dr. Roth opined Employee could work as a salesperson without limitation or restriction. Dr. Roth stated there would be no permanent partial impairment resulting from the work injury. Dr. Roth agreed with the EME physicians and said the work injury was not the substantial cause of the need for medical treatment from June 7, 2011, forward (Roth EME report, October 4, 2012).

76) Employee did not permanently injure his neck when he fell at work on February 25, 2011 (experience, judgment and inferences drawn from all the above).

77) On October 9, 2012, specialist Silta provided an eligibility evaluation "addendum." Following the remand decision in this case, the RBA designee directed specialist Silta to clarify Employee's pre- and post-injury employment. Specialist Silta re-interviewed Employee, exchanged e-mails to clarify dates, and reviewed "hundreds of pages" of documentation from previous employers. Specialist Silta determined Employee's work with Wise Men Consultants did not meet the SVP code and was immaterial. Similarly, Employee did not work for Cal Worthington Ford as an automobile salesperson long enough to meet the SVP code. However, Employee's work for: Fred Meyer Jewelers as a jewelry sales person; Nordstrom's as a shoe sales person; House of Rock as a bouncer; Zales as a jewelry sales person; and Costco as a Shipping and Receiving Clerk all met the SVP codes for those positions. Employee's self-employment as a House Repairer in 2009 did not meet the SVP code. In summary, specialist Silta reviewed Employee's revised, relevant employment, pre- and post-injury, and found Dr. Stinson approved Employee to return to work as a Construction Project Manager, the position he held at the time of his injury. Therefore, specialist Silta recommended Employee he be found "not eligible" for reemployment benefits (Reemployment Benefits Eligibility Evaluation Addendum, October 9, 2012).

78) On October 17, 2012, Employee e-mailed a brief note with an attachment to the RBA designee and others. Employee stated: "I forgot to attach the doctors (sic) note from Dr. Stinson in my last e-mail. Please add to file. thanks (sic) Amos Snoddy." The attachment was a revised job description for Construction Project Manager with the previously checked "Yes" box with the checkmark crossed out, and the "No" box checked, next to which Dr. Stinson wrote his initials and the date "10-16-12." Also included was a prescription form handwritten by Dr. Stinson upon which was written: "Will rescind approval for Construction Project Manager. [. . .] Should proceed with training for Senior Construction Manager." The note's middle portion was illegible (e-mail, October 17, 2012; job description, October 16, 2012; prescription form, October 15, 2012).

79) On October 23, 2012, "Julie" a former employee at Dr. Stinson's office hand-wrote a notation on the September 19, 2012 letter from specialist Silta to Dr. Stinson. The notation stated: "Could you please fax us this entire document, as when completed by Dr. Stinson, pg. 4 was not clear, per A Snoddy. Thank you, Julie, MA." Employee had told Dr. Stinson the Construction Project Manager job description was "not clear" and did not represent his job at the time of injury, in an effort to persuade Dr. Stinson to change his previously given approval for this job description. Dr.

Stinson complied with Employee's request (letter, September 19, 2012; hand-written notation, October 23, 2012; experience, judgment, and inferences drawn from all the above).

80) On October 24, 2012, Dr. Stinson completed a "clean" copy of the Construction Project Manager job description, and checked the "No" box stating Employee did not have permanent physical capacities adequate to perform the job (job description, October 24, 2012).

81) Dr. Stinson is Board-certified as an anesthesiologist and in pain management. Dr. Stinson began treating Employee on December 2, 2010, for neck pain with right, upper extremity radicular symptoms meaning "nerve root involvement." Employee was symptomatic and never appeared at Dr. Stinson's office unless he was hurting. Dr. Stinson provided a cervical, epidural steroid injection on December 2, 2010 (Dr. Stinson deposition, May 15, 2013, at 6-8).

82) Dr. Stinson had previously performed cervical epidural steroid injections on January 27 and February 12, 2010. Dr. Stinson opined the December 2, 2010 steroid injection must have been successful as he did not see Employee again until March 30, 2011, after his work injury (*id*. at 8-9).

83) In Dr. Stinson's opinion, on a more likely than not basis the work injury aggravated Employee's underlying cervical condition (*id*. at 10).

84) On examination post-injury, Dr. Stinson found decreased right hand grip strength and finger abduction compared to the non-dominant left hand. Dr. Stinson thought these findings made it worth "taking a look" to see what was wrong. Dr. Stinson removed Employee from work from February 25 2011, to at least May 11, 2011, so he could obtain imaging studies. He wanted Employee seen by a neurosurgeon. On April 20, 2011, Dr. Stinson performed another cervical, epidural steroid injection. The next time Dr. Stinson saw Employee after the second epidural steroid injection post-injury Employee seemed more symptomatic than even a year earlier. Dr. Stinson observed significant muscle spasm and guarding tenderness. In Dr. Stinson's opinion, Employee's cervical condition had gotten worse since he had seen him in 2010. Now, Dr. Stinson was "focused" on getting Employee to a neurosurgeon. Though Employee had some strength loss prior to the work injury, Dr. Stinson opined post-injury his strength loss was more "marked." Dr. Stinson compared and contrasted Employee's pre-injury and post-injury evaluations as follows:

> Well, I think that -- let me take a look one more time at my -- last epidural. Now, right, upper extremity radiculitis symptoms -- so he was having pain down the arm of December 2010. And he was -- and the pain was back up to a seven out of ten level. But we weren't talking about weakness at that point. And when I saw him again in March, I thought that was the more concerning issue (*id*. at 22).

Dr. Stinson explained Employee's initial left-sided symptoms and later right-sided symptoms as follows: The nucleus of a disc is like "battery acid." When a disc is torn, this acidic, toothpaste consistency material leaks out. Depending upon one's head and neck positioning, the nucleus pulposus from a cervical disc goes "wherever it happens to go" and irritates nerve roots, causing inflammation. In summary, the fact Employee experienced symptoms on the right side when he saw Dr. Stinson about a month after his fall, which caused immediate right-sided symptoms, is not a concern and not unusual (*id*. at 24-27).

85) Dr. Stinson initially approved a job description for Construction Project Manager then subsequently changed his mind and disapproved this job because he thought a construction project manager would be a job with "very low physical requirements" (*id*. at 31-32).

86) Dr. Stinson noted Employee had right grip and finger abduction strength loss on January 11, 2010, "like what he was the second time around when I saw him," but the difference was originally Employee responded to treatment and recovered. After the work injury, "he wasn't responding nearly as well." Some medical providers have devices a patient squeezes to record grip strength loss. Dr. Stinson has a patient squeeze his fingers to test the strength (*id*. at 31).

87) Dr. Stinson opined to a reasonable degree of medical certainty, the work injury aggravated, accelerated or worsened Employee's underlying condition resulting in Dr. Stinson recommending a change of job to a less physically demanding position. Employee would probably have a permanent physical impairment unless he had surgery and recovered, in which case Dr. Stinson would refer him to another physician for a PPI rating. When patients have consistent weakness in an upper extremity because of cervical disc displacement, "most people go on to surgery" (*id*. at 35-36).

88) Dr. Stinson was not asked to investigate Employee's case to determine a legal cause of his complaints. Dr. Stinson had not reviewed reports from: Drs. Tapper, Roth, Radecki, or Rosenbaum (*id*. at 45-46). On June 27, 2011, Dr. Stinson released Employee to return to work 20 to 25 hours per week, restricted to "minimal" weight. When reviewing job descriptions for a workers' compensation case, Dr. Stinson typically reviews the injured worker's past work history and what they feel physically capable of doing at the time of the interview (*id*. at 74). When Dr. Stinson reviewed job descriptions with Employee for reemployment purposes, he was unaware Employee had been involved in bench pressing or weightlifting activities. On October 1, 2012, Dr. Stinson approved Construction Project Manager as something Employee could perform. On October 15, 2012, Employee came to Dr. Stinson's office to discuss "an error" on his previous vocational

rehabilitation paperwork. At this point, Dr. Stinson changed his opinion and disapproved the same Construction Project Manager job description he had previously been given by the reemployment specialist (*id*. 81-83).

89) At hearing, Employee testified that on February 25, 2011, he was carrying a banker's box when his left foot slipped on the ice and he fell, jarring his whole body. Employee believes two co-workers saw him fall and he reported it to Human Resources. Employee described his situation after the fall as "pretty sore" and felt like he was "blindsided" as in football when one is hit by a tackler from the back or side without expecting it. Employee initially thought he would be "all right" but saw chiropractor Ryan the following Monday for left side, elbow, shoulder and back symptoms. Employee maintains he also told Dr. Ryan his neck was sore and his right upper extremity had numbness and tingling. Employee stated Dr. Ryan treated the left side, then the right. As the left side cleared up, Employee noticed the right side got worse. Employee believes he lost right hand range of motion following the fall, and developed numbness and tingling. He began to drop things in his right hand toward the end of March (Employee).

90) As for pre-injury neck symptoms, Employee testified he had some prior problems in 2010. Dr. Stinson had given Employee treatments and epidural injections and, in Employee's view, he was done treating for this episode in 2010. Employee testified no physician recommended surgery in 2010 or before. He could essentially do anything he wanted to do physically, including working out at the gym, but could not perform all parts of his job (*id*.).

91) Following the work injury, Dr. Stinson performed another epidural steroid injection, but contrary to his experience with previous injections, Employee believes he did not recover. In fact, he was getting worse. Dr. Stinson referred Employee back to Dr. Kralick who said he needed neck surgery. Employee said he does not want neck surgery but would have it "as a last resort" (*id*.).

92) In his view, Employee worked closely with reemployment specialist Silta. Employee reviewed various job descriptions, gave them to his physician who disapproved them all, and Employee was initially found eligible for reemployment benefits. Employee came up with an employment plan to become a Senior Project Manager and participated in an on-line program with Villanova University. However, a prior Board decision sent the matter back to the RBA designee for reconsideration. On remand, specialist Silta developed additional job descriptions, which were sent to Dr. Stinson. Dr. Stinson initially approved the Construction Project Manager job description and, on remand, Employee was found not eligible for reemployment benefits. Following this,

Employee met with Dr. Stinson and asked him to "reevaluate" the Construction Project Manager job description. During this meeting, according to Employee, Dr. Stinson changed his mind and disapproved the Construction Project Manager position. Employee claimed he hand-delivered the revised Stinson report to the RBA designee's office but no one ever reevaluated him for reemployment eligibility after Dr. Stinson subsequently disapproved the Construction Project Manager job description (*id*.).

93) As for his EME visits, Employee testified the limousine service was late getting him to the appointments. Consequently, the first EME physician Employee saw was "irate" because Employee was late. According to Employee, this physician asked a couple of questions and "that was it." Employee saw the next physician who he testified took his vitals, did a flexibility test, poked his hands with a toothpick and acted unprofessionally, in Employee's view (*id*.).

94) Employee maintained he never had symptoms like this before. For example, Employee testified he burned his right hand because he was unaware the heat source was burning his skin. Employee was aware the EME and SIME physicians had all his medical records. Consequently, Employee denied telling the EME or SIME physicians he never had any neck or right upper extremity symptoms before his work injury and said he told them he had these symptoms, but just not to this extent previously (*id*.).

95) Employee testified he used the gym after Employer controverted his medical benefits, so he could stay in shape. He performed "mild" physical exercise to strengthen his muscles, and did aerobics and yoga. Employee also used weight machines and in his view employed a "light" weightlifting regimen. Employee tore his left rotator cuff while lifting weights at the gym (*id*.).

96) Employee testified he had difficulty holding light-weight objects in his right hand because he cannot feel them. He claims to have broken his iPhone glass three times because he dropped the phone repeatedly. Employee wraps his keys around his finger so he does not drop them. He installed a "backup camera" on his vehicle so he did not have to turn his neck to back up (*id*.).

97) Employee contends Dr. Ryan's office is owed $95.00 but did not know the date of service for this bill. He also thinks Dr. Stinson has an outstanding balance but could not provide the amount. Employee believes Dr. Kralick's office is owed $250.00 related to this injury. He was not sure if statements related to these bills have ever been filed and served (*id*.).

98) When Employee's TTD benefits stopped in May 2012, he tried to return to work. He described, using highlighted calendars, the dates and places he worked from May 15, 2012.

Through November 2012. Employee returned to work full-time for AutoZone on April 18, 2013, doing inventory control. In Employee's view, none of these jobs were "physical positions" and he only worked because he had to live while his case progressed (Employee).

99) During cross-examination at hearing, Employee conceded there were some jobs he did not disclose to specialist Silta. In respect to his EME with Dr. Rosenbaum, Employee said he would tell Dr. Rosenbaum to his face he was "a flat-out liar" if he were present. According to Employee, SIME physicians left out important information. Employee testified he told Drs. Roth and Tapper the same thing he had told the EME physicians; *i.e.*, he never had neck and right upper extremity symptoms before this injury, like he has now. Employee denied telling these physicians never had any neck or right upper extremity symptoms. Employee testified he told Dr. Tapper he never needed pain pills before this injury. When confronted with Dr. Stinson's prescription notations for pain pills, Employee said he obtained prescriptions from Dr. Stinson but never took the medication. Employee characterized his pre-injury symptoms as "minor" stiffness or tightness in his muscles in the neck and right upper extremity (*id.*).

100) Employee agreed the symptoms he had on May 17, 2011, were the same as he had the last time he saw Dr. Kralick prior to his work injury. Employee conceded he did not disclose his then-current Fred Meyer Jewelry employment or Cal Worthington Ford sales work initially to specialist Silta (*id.*).

101) Employee admitted he received unemployment benefits from the State of Alaska and believes he applied on February 28, 2011. He denied receiving unemployment benefits in March or April 2011, and testified they began in May 2011. Employee conceded he was also receiving TTD benefits and working for Fred Meyer as a jewelry sales person at the same time. Employee believes he received about $220.00 per week unemployment insurance benefits, less child-support obligations (*id.*).

102) Employee reviewed his post-injury work history and conceded he was not totally disabled while employed with various employers (*id.*).

103) Employee admitted he was served with a September 28, 2011 deposition notice but did not appear because he had no attorney. He also agreed Employer rescheduled his deposition for December 6, 2011, at his request, but Employee again did not appear because he still did not have an attorney. Employee did not inform Employer he was not coming to the December 6, 2011 deposition (*id.*).

104) Employee testified he may have given an "off work slip" to his workers' compensation adjuster and asked for TTD benefits. He conceded he did not disclose to the adjuster he was working at Fred Meyer as a jewelry sales person, and contended the adjuster did not ask him whether he was receiving unemployment benefits so he did not disclose this information either (*id*.).

105) At first, Employee denied he had a motor vehicle accident in December 2012. Upon further reflection and when confronted with Dr. Ryan's December 3, 2012 chart note, Employee recalled he was rear-ended but testified this injury did not affect his right neck (*id*.).

106) As for his weightlifting activities, Employee said he was not bench pressing 205 pounds when he tore his left rotator cuff; it was actually only 65 pounds. Employee denied telling Dr. Roth he was benching 135 pounds (*id*.).

107) Employee admitted he never told Dr. Stinson he was actively working at any job he performed after his work injury. As for the approved-then-disapproved job description, Employee testified he told Dr. Stinson what the Construction Project Manager position "actually entailed in real life" (*id*.).

108) Employee said he did not know an MRI was a "diagnostic test." This is why he answered "No" to a question on group life insurance paperwork for which he applied, which inquired about previous diagnostic testing (*id*.).

109) Employee feigned ignorance as to what a "diagnostic test" was (experience, judgment, observations and inferences drawn from all the above).

110) Employee testified Dr. Ryan's reference to cervical spine spasms in his pre-injury medical records referred to the spinal column "from the base of the neck to the tailbone" (*id*.).

111) Employee testified his right upper extremity pain and numbness was "continuous" after the work injury, whereas before it was somewhat intermittent (*id*.).

112) Employee's LinkedIn page states he was employed by Orion Group from September 2011 through March 2012, and was president and owner of AMS Consulting, LLC, from March 2012 through the present. This webpage also states, in addition to his AA in accounting from University of Alaska, Employee has a BA in Project Management from Amhurst University. At hearing, Employee initially denied his LinkedIn page states he has a BA in Project Management. However, when he was shown the LinkedIn page, Employee agreed the BA degree was listed but referred to his prior testimony in which he said he did not complete his BA degree because he ran out of money (Employer's Hearing Exhibit #1, August 28, 2013; Employee).

113) Employee's undated resume also lists Employee's education as including a BA in Project Management in 2011, from Amhurst University (Employer's Hearing Evidence #870).

114) Employee does not have a BA in Project Management from Amhurst University (Employee).

115) Employee never explained why he listed the BA degree on his resume and LinkedIn page, when he does not actually have the degree (observations; record).

116) Employee's Social Security earnings records show he worked in the 10 years before his February 25, 2011 work injury as follows:

Employer	Year	Earnings
Halliburton Energy Services, Inc.	2001	$31,159.79
Halliburton Energy Services, Inc.	2002	$81.23
Zale Delaware, Inc.	2002	$10,081.95
Costco Wholesale Corp.	2002	$2,746.50
NANA Management Services, LLC	2002	$25,016.79
Costco Wholesale Corp.	2003	$860.75
NANA Management Services, LLC	2003	$1,897.39
Colville, Inc.	2003	$5,742.01
AES, Inc.	2003	$25,117.93
Colville, Inc.	2004	$20,117.25
CH2M Hill Alaska, Inc.	2004	$25,425.00
OPTI Staffing Group	2004	$2,883.75
CH2M Hill Alaska, Inc.	2005	$57,448.00
CH2M Hill Alaska, Inc.	2006	$78,964.00
CH2M Hill Alaska, Inc.	2007	$93,130.94
CH2M Hill Alaska, Inc.	2008	$5,185.50
Delta Development Group	2008	$85,192.00
Game On, LLC	2009	$72.00
Olgoonik Specialty Contractors, LLC	2010	$58,991.73
Nordstrom, Inc.	2010	$1,633.57
Environ, LLC	2011	$495.00
Direct HR, Inc.	2011	$15,191.34
Olgoonik Specialty Contractors, LLC	2011	$28,156.45

117) Employee's Social Security earnings and other records show he earned the following after his February 25, 2011 work injury:

Employer	Year	Dates Worked	Earnings
Fred Meyer Jewelers, Inc.	2011	3/26/11 through 7/12/11	$2,572.85
Wise Men Consultants	2011		$10,928.99
Nordstrom, Inc.	2011		$218.75
Cal Worthington Ford	2011	7/1/11 through 9/16/11	$4,444.32
Orion Project Services, LLC	2012		$19,440.00
TH1, LLC	2012		$3,500.00
Wise Men Consultants	2012		$4,291.83
Tony's Enterprises	2012		$3,400.00

118) On November 1, 2012, on remand the RBA designee determined Employee was not eligible for reemployment benefits for several reasons: 1) Specialist Silta's October 9, 2012 report recommending Employee be found not eligible based upon Dr. Stinson's prediction he would have permanent physical capacities to preform physical demands of Employee's job at the time of injury, Construction Project Manager; 2) Dr. Rosenbaum's June 7, 2011 EME report stated the work injury was not the substantial cause for Employee's disability and need for medical treatment or retraining. Dr. Rosenbaum also said no PPI was rated or expected; 3) Dr. Radecki's June 7, 2011 EME report concluded the work injury was not of any significance and not the substantial cause of Employee's current disability. He too stated Employee was medically stable and there was no PPI; 4) Dr. Tapper's September 14, 2012 SIME report concluded the work injury was not the substantial cause of Employee's disability, need for treatment or need for retraining. He concluded Employee could work as a jewelry, shoe or automobile salesperson without restriction and agreed with the EME physicians' opinions regarding no PPI; 5) Dr. Roth's October 4, 2012 SIME opinion concluded the work injury was not a substantial cause for any aggravation or acceleration of Employee's pre-existing cervical condition. He too opined Employee could return to work as a salesperson and had no impairment from his slip and fall injury with Employer; 6) Dr. Stinson's changed opinion concerning Employee's ability to return to work as a Construction Project Manager was not supported by medical documentation stating why Dr. Stinson first predicted Employee could return to that employment and subsequently changed his mind and said he could not. Noting the reemployment specialist consulted with Employee's attending physician as required by law, the RBA designee in her discretion decided since all four EME and SIME physicians agreed Employee

had no work-related PPI, this factor alone when weighed against Dr. Stinson's loan PPI prediction persuaded her to find Employee not eligible (letter, November 1, 2012).

119) On April 9, 2013, Employee through counsel supplemented his discovery responses to include a 1099 form from the Employment Security Division, for unemployment benefits Employee received in 2011 in the amount of $6,344.00 (letter with attached 1099, January 24, 2012).

120) On May 1, 2013, Employee corresponded with Kevin Emmons with Precise Construction concerning an Anchorage construction project Employee wanted (Coe letter, May 3, 2013, with attachments).

121) On May 3, 2013, Employee served a Notice of Intent to Rely to which he attached spreadsheets for his post-injury employment with: AutoZone; Verizon; GCI; and Tony's Enterprises. On May 16, 2013, Employee through counsel provided additional information about post-injury employment. Employee's spreadsheets and May 16, 2013 pleading revealed the following post-injury employment information:

Employer Name	Dates Worked
Orion Project Services/O M Consulting	September 11, 2011-March 2012
AutoZone/Texas Alliance Group	June: 5, 6, 7, 10, 12, 2012 July: 9, 19, 2012
Verizon/Shiener Group	September: 24, 25, 26, 2012 October: 1, 3, 4, 2012 November: 5, 7, 10, 13, 14, 16, 19, 21, 28, 29, 2012 December: 3, 4, 6, 11, 13, 17, 21, 2012
GCI/TH1	August 13-August 30, 2012
Tony's Enterprises	May 15, 2012-July 23, 2012

122) When Employee applied for employment with TH1 post-injury, he completed an employment application. He stated he did not have a physical disability and did not require any assistance or accommodation to perform the duties of the position for which he applied (Employment Application Supplement Form Equal Employment Opportunity Survey, undated; Employer's Hearing Evidence # 795).

123) On August 14, 2013, Employee served a supplemental response to Employer's interrogatories and stated he worked for AutoZone from April 18, 2013, through the present (Supplemental Responses to the First Set of Interrogatories to Employee, August 14, 2013).

124) The parties stipulated at hearing Employer paid Employee TTD from February 28, 2011 through June 7, 2011, and paid him §041(k) compensation from October 31, 2011 through January 15, 2012 (parties' oral stipulation at hearing).

125) Employee at hearing clarified he was not seeking benefits related to his left shoulder rotator cuff surgery (Employee's hearing statements).

126) Employee does not have any reason to suspect his attending doctors' records are incorrect or unreliable (Employee).

127) Employee initially testified EME doctors did not perform strength testing. He later agreed EME doctors did not "make up" strength recordings in their reports. Addressing this inconsistency, Employee said he meant they performed manual testing without using a machine designed to test strength, like some doctors use. To him, this meant they did no strength testing (*id*.).

128) Employee is a muscular, intelligent, educated and articulate person (experience, judgment, observations and inferences drawn from all the above).

129) Employee is not credible (*id*.).

130) Christina Snoddy is Employee's wife and has known him since about the 10th grade. Christina was a pharmaceutical representative for Alaska handling such medications as Lunesta and Lyrica (Christina Snoddy).

131) When Employee received a prescription for Lyrica, Christina showed Employee negative reports for this medication and told him it had problems. To Christine's knowledge, Employee never took this medication; he rarely takes pain pills, and is sensitive to pain medication (*id*.).

132) Employee had minor pain complaints prior to the work injury during the period Christina knew him since they lived together beginning in 2009. They were married about two years ago in 2011, and since they were married, Christina noticed a dramatic difference in Employee's musculature. Employee is a greeter at their church and will shake hands as members come in. Since the work injury, when Employee takes his seat at church, sometimes his right hand looks like he is crippled and he has difficulty straightening out his fingers. Christina occasionally has to pull his fingers out to straighten them. When dressing for church, occasionally Employee cannot straighten his shirt collar out or tie his necktie and she must do it for him. She never observed this before his work injury. Sometimes Christina must shave him and he occasionally drops things in the shower. They used to go four wheeling and mountain biking but now all he can do is walk

briskly. On one occasion after the work injury, while camping, Employee picked up a pot on the campfire and burned his hand, not realizing the pan was hot (*id.*).

133) Christina reviewed a *sub rosa* videotape depicting Employee in various activities. She never noticed before how much Employee now shifts things from his right hand to his left, even though he is right-hand dominant (*id.*).

134) Employee now has respiratory issues and takes Afrin at night, which he never had to take before this work injury. He suffers from sudden, chronic fatigue. Employee's face is "puffier" than it used to be. Once Employee's claim was controverted, Christina was concerned about losing their home versus getting Employee necessary medical treatment for his work injury. Christina, in her view, put excessive pressure on Employee to provide for his family after the injury, so he worked. Since the work injury, Employee has had erectile dysfunction which has never been documented prior to the injury. Employee would like to work out in the gym, but has lost considerable strength and is limited (*id.*).

135) Post-injury, Employee tried everything he could to develop his own business, AMS Consulting, and spent considerable time on his laptop (*id.*).

136) Christina was unaware Employee had difficulty shaking hands prior to the work injury. She was also unaware Employee had difficulties with his right upper extremity and his hand prior to the work injury. However, subjectively, any difficulties Christina observed with Employee's physical abilities before the work injury were far greater following the work injury (*id.*).

137) Adjuster Serra Williams is a claim supervisor for the company handling Employee's claim. She is familiar with Employee and his case because she was the adjuster on his case in 2011. Serra has adjusted 300 to 500 claims in the past three years. Adjuster's notes for an injured worker are electronic but medical records are paper. When an injured worker calls her, Serra makes an electronic note paraphrasing the conversation. E-mail messages from injured workers are cut and pasted into an injured worker's electronic file. Employee's electronic file included teleconferences on April 15, April 19, and May 11, 2011. On April 15, 2011, Employee told Serra he had no prior workers' compensation claims, had prior treatment to his back and neck in 2006 but no prior MRI for his back or neck. Employee told Serra he had not "applied" for unemployment insurance. She discussed disability compensation with him but he did not tell her he was working. She normally asks injured workers if they are working during this point in the conversation and if Employee told her he was working she would have documented it. However, she conceded there is no specific

statement or notes indicating she actually asked Employee whether or not he was working (Williams).

138) Serra subsequently learned Employee was receiving unemployment insurance and was employed as a jewelry sales person for Fred Meyer. She also subsequently learned he had a prior workers' compensation injury and had undergone a neck MRI in January 2010 (*id*.).

139) Similarly, in another case note entry from an April 19, 2011 teleconference, Employee did not disclose he was working for Fred Meyer or receiving unemployment insurance benefits. Serra was unaware when Employee first began receiving unemployment benefits. She would not have discussed temporary partial disability with Employee because the off-work slip she received from him was for total disability. Serra would not have discussed offsets for unemployment insurance with Employee either, because he told her he had not applied for unemployment. She had obtained a medical release from Employee, so she could have investigated and determined his prior medical history. Serra relied on Employee's truthfulness in responding to her questions (*id*.).

140) Serra could not recall the precise date when she first found out Employee was employed post-injury, which would have been his Fred Meyer job. He was receiving TTD on the date Serra found out he was working at Fred Meyer. When she heard he was working, Serra sent a private investigator to check it out but did not controvert his TTD benefits. She also sent Employee a certified letter with a request he state whether or not he was working. Employee never responded. Serra did not controvert Employee's TTD because she needed more proof than a tip from a sales associate stating Employee was working at Fred Meyer selling jewelry. The private investigator confirmed with the store manager Employee was in fact working. Serra could not remember the precise date she learned from the investigator Employee was working at Fred Meyer. She thinks this was right around the same time Employer sent Employee to the EMEs. Serra did not believe the store manager's confirmation was enough evidence to controvert TTD benefits either. Employer's attorney also did an investigation and learned later Employee was working elsewhere. Neither Serra nor Employer's attorney was ever able to catch Employee working at a job. Employer subsequently controverted Employee's claim based on the EME, not based on any suspicion or evidence he was working (*id*.).

141) On August 30, 2013, Employee filed his final affidavit of attorney's fees and costs. Employee requested $40,140.00 in attorney's fees at $360 per hour, and $2,466.70 in costs through the hearing date (Final Affidavit of Total Attorney Fees and Costs, August 30, 2013).

142) On September 5, 2013, Employer filed its objection to Employee's final affidavit of attorney's fees and costs maintaining its overall objection to any award. Employer specifically objected to any fees and costs related to Employee's unsuccessful defense of Employer's appeal from the RBA's ineligibility determination; Employee's unsuccessful discovery disputes; his attorney's discussion with a third-party attorney; and one duplicate entry for May 14, 2013 (Employer's Objection to Employee's Affidavit of Total Attorney Fees and Costs, September 4, 2013).

143) Employer itemized expenses it contends it incurred because Employee twice failed or refused to appear for his deposition. Employer incurred $522.00 in legal fees for the September 28, 2011 deposition, which Employee did not attend. It incurred $540.00 in legal fees for Employee's December 5, 2011 deposition, which he also failed to attend. Midnight Sun Court Reporters waived its appearance fee the first deposition but charged $180.00 for his no-show at the December 5, 2011 deposition. Employer seeks $1,242.00 from Employee representing fees and costs incurred for Employee's two missed depositions (Affidavit of Rebecca Holdiman Miller, August 19, 2013).

144) Employee never disobeyed a Board designee's order to appear for his deposition (record).

PRINCIPLES OF LAW

The board may base its decision not only on 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 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .

> . . .
>
> (e) An Employee shall be eligible for benefits under this section upon the Employee's written request and by having a physician predict that the Employee will have permanent physical capacities that are less than the physical demands of the Employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:
>
> (1) the Employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the Employee has held or received training for within 10 years before the injury or that the Employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.'
>
> (f) An Employee is not eligible for reemployment benefits if
>
> (1) the employer offers employment within the Employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the Employee to be employable in other jobs that exist in the labor market;
>
> (2) the Employee previously declined the development of a reemployment benefits plan under (g) of this section, received a job dislocation benefit under (g)(2) of this section, and returned to work in the same or similar occupation in terms of physical demands required of the Employee at the time of the previous injury;
>
> (3) the Employee has been previously rehabilitated in a former worker's compensation claim and returned to work in the same or similar occupation in terms of physical demands required of the Employee at the time of the previous injury; or
>
> (4) at the time of medical stability, no permanent impairment is identified or expected.

The RBA designee's decision must be upheld absent "an abuse of discretion on the administrator's [designee's] part." Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act (Act). The Alaska Supreme Court stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or

which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey v. Collier* 367 P.2d 884, 889 (Alaska 1962); *Black's Law Dictionary* 25 (4th ed. 1968).

The Administrative Procedure Act (APA) provides another definition used by courts in considering appeals from administrative agency decisions. It contains terms similar to those above and expressly includes reference to a "substantial evidence" standard:

> Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record. AS 44.62.570.

On appeal to the Alaska Worker's Compensation Appeals Commission and the courts, decisions reviewing RBA designee determinations are subject to reversal under the "abuse of discretion" standard in AS 44.62.570 incorporating the "substantial evidence test." While applying a substantial evidence standard a "[reviewer] may not reweigh the evidence or draw its own inferences from the evidence. If, in light of the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, then the order . . . must be upheld." *Miller v. ITT Arctic Services*, 367 P.2d 884, 889 (Alaska 1962). After allowing parties to offer admissible evidence, all the evidence is reviewed to assess whether the RBA designee's decision was supported by substantial evidence and therefore reasonable. *Yahara v. Construction & Rigging, Inc.*, 851 P.2d 69 (Alaska 1993). If, in light of all the evidence, the RBA designee's decision is not supported by substantial evidence, the RBA designee abused her discretion and the case is remanded for reexamination and further action.

> **AS 23.30.120. Presumptions** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *See, e.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011). Credibility is not examined at the second stage. *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. He must prove that in relation to other causes, employment was "the substantial cause" of the disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 at 8. The employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Runstrom*, AWCAC Decision No. 150 at 8.

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has sole discretion to determine weight accorded to medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 at 11 (August 25, 2008).

> **AS 23.30.155. Payment of compensation**. . . .
> . . .

> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.

Subsection 155(j) does not permit the offset of overpayments against medical benefits because this practice would require an employee to pay medical expenses, a practice prohibited under AS 23.30.095(f) [now renumbered AS 23.30.097(f)]. *Bockness v. Brown Jug, Inc*., AWCB Decision No. 97-0073 (March 26, 1997).

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

> **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. . . .

> **AS 23.30.395. Definitions.** In this chapter,
> . . .
>
> (24) 'injury' means accidental injury . . . arising out of and in the course of employment. . . .
> . . .
>
> (27) '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. 45 days; the presumption may be rebutted by clear and convincing evidence;

> **8 AAC 45.054. Discovery**. (a) The testimony of a material witness, including a party, may be taken by written or oral deposition in accordance with the Alaska Rules of Civil Procedure. . . .
>
> (b) Upon the petition of a party, the board will, in its discretion, order other means of discovery.
>
> **Alaska Civil Rule 31. Failure to Make Disclosures or Cooperate in Discovery**: **Sanctions**. . . .
> . . .
> **(b) Failure to Comply With Order**.
> ...
> (2) *Sanctions by Court in Which Action is Pending*. If a party . . . Fails to obey an order to provide or permit discovery . . . The court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: . . .
> . . .
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

In *Morgan v. Reliable Transfer Corp*., AWCB Decision No. 12-0157 (September 12, 2012), an injured worker failed to appear for a properly noticed deposition. Employer sought an order requiring the employee to reimburse its deposition costs. *Morgan* declined to do so, noting the Civil Rule sanctions applicable to depositions in workers' compensation cases only applied to "orders" requiring the injured worker to appear for his deposition. As there had been no Board order requiring an appearance, there was no employee refusal to obey such an order and there was no basis for sanctions. The request was denied.

ANALYSIS

1) Did Employee have compensable neck and right upper extremity injuries?

The fact Employee slipped and fell down at work on February 25, 2011, is not disputed. It is also undisputed he had symptoms to his left elbow and back as a result. This by definition is an "injury" which arose out of and in the course of Employee's work for Employer. AS 23.30.395(24). The EME and SIME physicians agree Employee possibly had a relatively minor, left cervical strain and

other minor aches and pains on his left side, though the evidence shows this resolved fairly quickly. But the real issue is whether Employee's post-injury and current right-sided neck-related disability and his need for medical treatment for his neck and his affected right upper extremity also arose out of and in the course of his employment with Employer. If they did, the cervical spine and related arm issues are also compensable "injuries." If they did not, the ongoing cervical spine problems are not a compensable "injury" and Employee is not entitled to benefits for his neck and related right upper extremity symptoms.

Employee indisputably had a work-related "accident" on February 25, 2011. But it remains to be seen if this caused a compensable "injury" to his neck, other than a minor, left-sided cervical strain. In short, does Employer have to pay workers' compensation benefits to address ongoing cervical and right upper extremity symptoms Employee had following this injury? To determine whether or not additional neck-related disability or need for medical treatment for Employee's neck arose out of and in the course of his employment, it must be found the work injury, in relation to other causes, is "the substantial cause" of Employee's disability and need for medical treatment related to his neck and by association his right upper extremity. AS 23.30.010(a).

This is a factual dispute to which the presumption of compensability applies. AS 23.30.120. Employee raises the presumption with Dr. Stinson's testimony. Dr. Stinson opines Employee's work injury permanently aggravated a pre-existing cervical condition and was the substantial cause of all post-injury disability and need for medical treatment for Employee's neck. This shifts the burden of production to Employer who must rebut the presumption with substantial evidence. Employer rebuts the presumption with opinions from Drs. Rosenbaum, Radecki, Roth and Tapper. *Runstrom*. These four physicians all agree Employee's work injury did not aggravate, accelerate or combine with the pre-existing condition to cause Employee's disability or need for treatment for his neck. Consequently, the presumption drops out and Employee must prove his "injury" claim by a preponderance of the evidence. *Saxton*.

The only identified, potential, substantial causes for Employee's post-injury disability and need for medical care are his pre-existing cervical condition and the work injury. Both EME and both SIME physicians agree Employee's work injury is not the substantial cause of any disability or need for medical treatment for his neck or right upper extremity other than for his minor left-sided neck

strain and other minor left-cited aches and pains, which resolved. Therefore, Employee had a compensable injury, which appropriately included treatment for his left-sided neck strain, and other left-sided symptoms not disputed. Only Dr. Stinson disagrees on the causation issue from a medical perspective. But Dr. Stinson never reviewed reports from Drs. Rosenbaum, Radecki, Roth or Tapper. Their opinions are amply supported by the medical record and give convincing, credible explanations about why these physicians came to their unanimous conclusions. AS 23.30.122. Dr. Stinson was also unaware of most of Employee's post-injury employment, which belies his claim he was increasingly disabled because of worsening symptoms. Furthermore, Dr. Stinson's causation opinion accepts Employee's reports of pre- and post-injury symptoms at face value. Dr. Stinson concludes Employee's post-injury symptoms are worse and more regular than they were pre-injury. But Employee is not credible and his post-injury symptom reporting is unreliable. Because he relied on an unreliable historian, Dr. Stinson's opinions will be given less weight. AS 23.30.122.

Employee has a long history of symptoms and medical care to address neck and right upper extremity symptoms identical to those he experienced after his injury. Employee reluctantly concedes on confrontation with prior records that he had similar symptoms before the work injury. He contends they were not as severe and constant as they were after the injury. However, Employee is simply not credible. AS 23.30.122. Four physicians, two EMEs and two SIMEs, recorded asking Employee about his medical history. All four said Employee denied any neck or right upper extremity symptoms prior to the work injury. When physicians confronted Employee with the plethora of medical evidence belying his historical reports, Employee conceded he had prior symptoms but not to the degree he has them now. Even this is inaccurate because the records show in some instances Employee's identical pre-injury symptoms were at a level "10" on a pain scale and "chronic." Furthermore, while it is conceivable one or perhaps even two examiners could misunderstand Employee's oral history, it is practically impossible for all four to have the same experience with Employee and misunderstand him when he reported he never had any neck or right upper extremity symptoms prior to his work injury. Consequently, Employee's testimony regarding his symptoms pre- and post-injury is given very little weight, as is any medical opinion that relies upon it. AS 23.30.122.

Given his false statements in his resume, LinkedIn page and on his post-injury group life insurance questionnaire, and his failure to inform specialist Silta about all his pre- and post-injury

employment, it is difficult to believe anything Employee says. For example, it is inconceivable an articulate, well-educated and intelligent person such as Employee, given his medical history, did not know an MRI is a "diagnostic" test. Employee's explanation for Dr. Ryan's use of the term "cervical spine" in myriad pre-injury records to mean "the spine from the base of the skull down to the tailbone," to conveniently minimize the spinal segment affected in the work injury is totally implausible. This decision gives Dr. Ryan credit for knowing basic spinal anatomy. It is difficult to believe Employee forgot he had an MRI and injections into his cervical spine in the months just prior to his work injury. Yet on his post-injury group life insurance questionnaire for one employer Employee denied he had, within the previous five years: seen a physician for any non-listed condition, was prescribed any medication or was given any "diagnostic tests." Employee's pre-injury medical records are the best source of information concerning Employee's pre-injury symptoms. He agreed he had no reason to doubt their validity. These records all support the inference Employee's continuing cervical and right upper extremity symptoms were identical in type, duration and severity pre- and post-injury. There were no objective changes on pre- and post-injury MRIs. All opining doctors but Dr. Stinson agreed there is no significant, objective difference in Employee's cervical condition pre- and post-injury.

Though the underlying "condition" is not the issue, "the substantial cause" of any disability or need for treatment arising from it is. AS 23.30.010(a). The medical evidence shows Employee's gradually deteriorating, pre-existing cervical condition was the substantial cause of any continued disability and need for medical care, and not his slip and fall on February 25, 2011. The overwhelming weight of medical evidence preponderates against Employee. Consequently, Employee cannot prove his claim that his ongoing neck and right upper extremity symptoms, need for medical care and any disability related to these symptoms arose out of and in the course of his employment with Employer, by a preponderance of the evidence. His claim for continuing benefits for his neck and right upper extremity will be denied. *Saxton.*

2) Is Employee entitled to additional TTD?

To receive TTD, Employee must have been both not medically stable and disabled from work because of his work injury for the periods during which he seeks TTD benefits. AS 23.30.185; AS 23.30.395(27). He seeks TTD from June 8, 2011 through October 30, 2011, and

from February 25, 2012 through April 17, 2013. This is a factual dispute to which the presumption of disability applies. Employee raises the presumption as to TTD with Dr. Stinson's testimony he removed Employee from work because of his work injury and he was not yet medically stable because he needs surgery. The burden of production shifts to Employer who must rebut the presumption with substantial evidence. Employer rebuts the presumption through opinions from Drs. Rosenbaum, Radecki, Roth and Tapper. These four physicians all agree Employee was medically stable anywhere from 45 days after his injury up to no later than September 14, 2012, and was not disabled thereafter as a result of his work injury. Therefore, Employee must prove his TTD claim by a preponderance of the evidence. *Saxton*.

As stated above, Employee is not credible. AS 23.30.122. Consequently, little weight is given to his testimony about pre- and post-injury neck and right upper extremity symptoms and to any physician relying upon Employee's non-credible reporting. As this decision determined Employee's ongoing neck and right upper extremity symptoms are not compensable, he is not entitled to any additional TTD related to those ongoing symptoms, which were caused by the gradual progression of his pre-existing, chronic neck condition. Employer has already paid TTD through June 7, 2011, based upon its EME opinion fixing medical stability. Employee has been compensated for disability for the work-related, minor, left-sided cervical strain and other minor left-sided symptoms arising out of and in the course of his February 25, 2011 injury with Employer. As his claim for additional TTD relates to symptoms from his pre-existing cervical condition, his TTD claim will be denied.

Notwithstanding Employee cannot prove his claim for additional TTD by a ponderous of the evidence, Employer also contends it overpaid Employee TTD benefits. Employer paid Employee TTD benefits from February 28, 2011 through June 7, 2011. TTD benefits are paid to injured workers who are unable to work at all. If Employee worked during any week in which he received TTD, he is not entitled to TTD for that week by definition. AS 23.30.185. He apparently believes he can be "disabled" for two days out of a given week, work for a couple of days, and still be entitled to TTD. Employee confuses the TTD concept with an alternative disability benefit. TPD benefits are based on an employee's wage-earning capacity after his injury and are 80 percent of the difference between the injured worker's spendable weekly wages before the injury and his wage-

earning capacity thereafter. AS 23.30.200. As Employee never made a TPD claim and his ongoing symptoms are not compensable the TPD point is moot.

The record shows Employee worked at times between February 28, 2011 and March 29, 2011. It is known he worked for Fred Meyer as a jewelry sales person from March 26, 2011 through July 12, 2011, earning $2,573.00. Accordingly, Employer overpaid Employee TTD, by the entire TTD payment, in any week during the period March 26, 2011 through June 12, 2011, because he was not temporarily totally disabled during that time and was working. Similarly, Employer overpaid Employee TTD in weeks in which Employee received unemployment insurance benefits. However, as discussed above, Employee was properly compensated for his minor, left cervical strain and left-sided symptoms with TTD for periods during which he was not working elsewhere, and not receiving unemployment insurance benefits up to June 7, 2011, the date this decision selected as his medical stability date. Employer's recoupment argument is addressed below.

3) Is Employee entitled to PPI?

This is a factual dispute to which the presumption of compensability applies. AS 23.30.120. Employee raises the presumption as to PPI with Dr. Stinson's testimony in which he predicts Employee will have a PPI rating following surgery. The burden of production shifts to Employer who must rebut the presumption by substantial evidence. Employer rebuts the presumption through opinions from Drs. Rosenbaum, Radecki, Roth and Tapper. These four physicians all agree Employee suffered no PPI as a result of his work injury. *Runstrom*. Therefore, Employee must prove his PPI claim by a preponderance of the evidence. *Saxton*.

The only evidence supporting Employee's PPI claim is Dr. Stinson's prediction Employee may have a PPI rating, especially if Employee has surgery. Dr. Stinson would refer Employee to someone else for the rating. Greater weight is given to the four medical experts who opined Employee has no ratable PPI for his work injury because as found above Employee's ongoing symptoms derive from his pre-injury cervical condition, which continues to deteriorate, and not from his work injury. AS 23.30.122. On balance, the overwhelming medical evidence supports a zero percent PPI rating attributable to Employee's work injury. Therefore, Employee's PPI claim will be denied.

4) Is Employee entitled to medical benefits?

This is a factual dispute to which the presumption of compensability applies. AS 23.30.120. Employee raises the presumption as to past and ongoing medical care with Dr. Stinson's testimony stating Employee's work injury aggravated his pre-existing condition and caused the need for medical care. The burden of production shifts to Employer who must rebut the presumption by substantial evidence. Employer rebuts the presumption through opinions from Drs. Drs. Rosenbaum, Radecki, Roth and Tapper. *Runstrom*. These four physicians all agree Employee's work injury is not the substantial cause of the need for additional medical treatment. Employee must prove his claim for medical benefits by a preponderance of the evidence. *Saxton*.

The only evidence supporting Employee's ongoing medical benefits claim is Dr. Stinson's opinion Employee's work injury is the substantial cause of his need for continued medical care. Greater weight is given to the four medical experts who opined Employee's work injury is not the substantial cause of his need for medical care because the overwhelming evidence shows Employee's ongoing need for medical care arises not from his work injury but from his pre-existing, non-occupational cervical condition. AS 23.30.122. Their opinions are fully supported by Employee's comprehensive medical records documenting recent, long-term, chronic cervical symptoms identical in type, duration and degree to symptoms Employee had following the work injury. On balance, the overwhelming medical evidence supports a finding Employee's work injury was not the substantial cause of his need for medical care. His chronic, slowly degenerating, non-occupational cervical condition is. Therefore, Employee's medical care claim will be denied.

5) Should the RBA designee's decision finding Employee ineligible for reemployment benefits be affirmed?

The issue is whether the RBA designee's second eligibility determination is supported by substantial evidence, and whether she abused her discretion. This is limited further to the question whether the RBA designee abused her discretion by finding Employee ineligible for rehabilitation and reemployment benefits because she exercised her discretion and relied upon opinions from four physicians rather than relying upon Employee's attending physician's lone, contrary opinion.

The RBA designee may abuse her discretion by issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive. *Sheehan*. The record is devoid of any such evidence in this case. An agency's failure to properly apply the controlling law may also be considered an abuse of discretion. *Manthey*. Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. *Miller*. The record is again devoid of any such evidence in this case.

By contrast, the RBA designee carefully reviewed four opinions from two EME and two SIME physicians. All these physicians came to the same conclusions. Only one part of these unanimous conclusions is necessary to resolve this issue: Employee had no ratable PPI as a result of his work injury with Employer. That finding alone is substantial evidence supporting the RBA designee's determination. If no PPI from the work injury is predicted, Employee is not entitled to reemployment benefits. AS 23.30.041(f)(4). This decision determines whether or not the RBA designee had substantial evidence upon which to base her discretionary determination. In this instance she did because Employee has no work-weighted PPI. *Irvine*.

Furthermore, all four physicians stated Employee could either return to his job at the time of injury, return to other positions he held before or after the injury, or if he could not return to his relevant jobs, it was not because of his injury; rather, it was because of his pre-existing cervical degenerative disease. In short, the RBA designee's decision is supported by substantial evidence and she made no legal error demonstrating any discretionary abuse. Accordingly, Employee is not entitled to reemployment benefits, and Employee's request for review of the RBA designee's ineligibility determination will be denied.

6) Is Employee entitled to interest?

This decision does not award Employee any additional benefits. Therefore, he is not entitled to interest and his interest request will be denied.

7) Is Employee entitled to attorney's fees and costs?

This decision does not award Employee any additional benefits. Therefore, he is not entitled to an associated attorney's fee and cost award and his attorney's fee and cost claim will be denied.

8) Should Employee be required to reimburse Employer for costs related to his missed depositions?

Employee did not appear for two properly noticed depositions. However, Employee did not disobey an order requiring him to appear. Therefore, possible sanctions do not apply. *Morgan*. Employer's request for an order requiring Employee to reimburse its deposition expenses will be denied.

9) Is Employer entitled to 100 percent recoupment of any overpayment from any benefits awarded Employee?

This decision found Employer overpaid Employee TTD benefits in weeks in which Employee worked and received unemployment insurance benefits. As Employee is not currently entitled to any additional benefits, there is nothing from which Employer could recoup its overpayments by withholding funds from future benefits. AS 23.30.155(j). Employer's request to recoup 100 percent of any and all overpayments is denied at this time. If in the future Employee becomes entitled to nine medical benefits again for his work injury, Employer may revisit the overpayment recovery issue.

CONCLUSIONS OF LAW

1) Employee had a compensable, minor left neck strain and left-sided symptoms, which resolved, but did not otherwise have a compensable neck and right upper extremity injury.
2) Employee is not entitled to additional TTD.
3) Employee is not entitled to PPI.
4) Employee is not entitled to medical benefits.
5) The RBA designee's decision finding Employee ineligible for reemployment benefits will be affirmed.
6) Employee is not entitled to interest.
7) Employee is not entitled to attorney's fees and costs.
8) Employee will not be required to reimburse Employer for costs related to his missed depositions.
9) Employer is not entitled to 100 percent recoupment of its overpayment from any benefits awarded Employee because no benefits are awarded Employee at this time.

ORDER

1) Employee's compensable injuries all resolved by June 7, 2011.
2) Employee did not have a compensable right neck and right upper extremity injury.
3) Employee's TTD claim is denied.
4) Employee's PPI claim is denied.
5) Employee's claim for medical benefits is denied.
6) The RBA designee's decision finding Employee ineligible for reemployment benefits is affirmed.
7) Employee's claim for interest is denied.
8) Employee's claim for attorney's fees and costs is denied.
9) Employer's request for determination of any overpaid TTD is granted. Employer overpaid Employee TTD in any week in which Employee worked or received unemployment insurance benefits.
10) Employer's request for 100 percent recoupment of its overpayment from any benefits awarded Employee is denied at this time. Employer may raise this issue in the future should Employee become entitled to a non-medical benefits from this injury.

Dated in Anchorage, Alaska on September 30, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

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Mark Talbert, Member

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Michael O'Connor, Member

APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. 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 because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation 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 grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

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 Final Decision and Order in the matter of AMOS M. SNODDY Employee / applicant v. OLGOONIK DEVELOPMENT LLC, Employer; ZURICH AMERICAN INS. CO., insurer / defendants; Case No. 201102477; dated and filed in the office of the Alaska Workers' Compensation Board in Anchorage, Alaska, and served upon the parties on September 30, 2013.

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Deborah Chung, Office Assistant