ALASKA WORKERS' COMPENSATION BOARD

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

DON E. DAVIS, Employee, Claimant, v. HECLA GREENS CREEK MINING CO., Employer, and ZURICH AMERICAN INSURANCE CO., Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201118486 AWCB Decision No. 13-0148 Filed with AWCB Juneau, Alaska on November 15, 2013

Don Davis' (Employee) January 25, 2012 claim and Employer's April 12, 2013 "petition to correct prejudicial error" were heard on November 5, 2013, in Juneau, Alaska, a date selected on June 11, 2013. Employee appeared, represented himself, and testified. Attorney Robert Blasco appeared and represented Hecla Greens Creek Mining Co. and Zurich American Ins. Co. (Employer). Witnesses Chris Neville, Teresa Cummins, and Ron Plantz appeared and testified for Employer. The record closed at the hearing's conclusion on November 5, 2013.

ISSUES

Employer contends *Wolfe v. State of Alaska*, AWCB Decision No. 12-0213 (December 19, 2012) and *Osborne v. Anchorage School District*, AWCB Decision No. 12-0191 (November 6, 2012) found John Cleary, M.D., not a credible witness. After the designee assigned Dr. Cleary as a second independent medical evaluation (SIME) neurosurgery specialist in this case, *Wolfe*

issued, and on January 17, 2013, Dr. Cleary conducted the SIME. Employer contends the Juneau panel has prejudged the issue of Dr. Cleary's credibility, based on its findings in *Wolfe*. Employer contends therefore to have a fair and impartial hearing and be afforded its due process rights, a new SIME neurosurgeon should be assigned in this case to replace Dr. Cleary.

Employee did not respond to Employer's petition so his contentions on this issue are unknown.

1) Should a new SIME neurosurgeon be assigned in this case to replace Dr. Cleary?

Employer contends Employee failed to timely report his injury. It contends AS 23.30.100 consequently bars his claims.

Employee acknowledges he did not timely report his work injury. He contends he reported it once Employee became aware it was more than just a "pulled muscle."

2) Does AS 23.30.100(d) bar Employee's claims?

Employee contends he is entitled to an order awarding low back medical treatment. He contends his need for low back treatment is ongoing and results from an October 2011 work injury.

Employer contends Employee did not have a work-related injury in the fall of 2011. It also contends Employee's need for medical treatment was caused by Employee's obesity and the non-work related natural progression of his preexisting spine conditions. Because Employee's past and current symptoms are not work-related and no medical treatment is needed for the work injury, it contends Employee is not entitled to medical treatment.

3) Is Employee entitled to low back medical treatment?

Employee contends he has been unable because of his injury to earn the wages he was receiving at the time of injury in the same or any other employment. He seeks an order awarding temporary total disability (TTD) benefits.

Employer contends Employee's inability to return to work is unrelated to any work injury. Employer seeks an order denying TTD.

4) Is Employee entitled to TTD benefits?

FINDINGS OF FACT

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

1) On March 26, 1994, Employee injured his low back while performing general labor for Leahcim Enterprises, Inc. (Report of Injury, April 7, 1994).

2) On March 30, 1994, an unknown provider at Bartlett Regional Hospital Emergency Department (Bartlett ER) treated Employee for back pain, diagnosed "L-S Strain," and restricted Employee from returning to work for approximately seven days. (Chart Note, Provider Name Illegible, March 30, 1994).

3) On February 20, 2000, Gordon Shepro, D.C., restricted Employee from working until February 21, 2000. The reason giving for the restriction was, "low back." (Authorization for Absence, Dr. Shepro, February 20, 2000).

4) On May 10, 2000, Dr. Shepro restricted Employee from working until May 15, 2000, due to "lumbosacral sprain/strain." (Authorization for Absence, Dr. Shepro, May 10, 2000).

5) On May 30, 2002, Employee injured his low back while working for Kennecott Greens Creek Mining Company while participating in a medical training class. (Report of Injury, June 24, 2002).

6) On June 6, 2002, Tracy Shultz, FNP, treated Employee for back pain and diagnosed low back pain with radiculopathy. Employee reported he was lifting a rescue sled with a person in it, twisted, and felt a pop in his low back. (Chart Note, Shultz, June 6, 2002).

7) On January 14, 2009, Norvin Perez, M.D., at Juneau Urgent Care and Family Medical Clinic (Juneau Urgent Care) treated Employee for upper and lower back pain, diagnosed low back pain, and restricted Employee from working until January 28, 2009, because of "back pain." Employee reported he injured his back moving furniture the day before. (Chart Note, Dr. Perez, January 14, 2009; Confidential Medical Absence Certification Form, Dr. Perez, January 14, 2009).

8) On February 2, 2009, Thomas Gundelfinger, D.C., opined Employee was unable to return to work because of acute low back pain. (Confidential Medical Absence Certification Form, Dr. Gundelfinger, February 2, 2009).

9) On February 5, 2009, Greg Dostal, M.D., treated Employee for various complaints including low back pain. Employee reported while moving furniture he felt a sharp pain in his low back. Dr. Dostal diagnosed paraspinous strain with "some hint of radiculopathy." (Chart Note, Dr. Dostal, February 5, 2009).

10) On February 7, 2009, Dr. Gundelfinger released Employee to full duty work without restrictions as of February 9, 2009. (Confidential Medical Absence Certification Form, Dr. Gundelfinger, February 7, 2009).

11) On February 17, 2010, an unknown therapist treated Employee for neck and shoulder tension and low back tightness. (Chart Note, Provider Name Illegible, February 17, 2010).

12) On an unknown date in August 2011, Dr. Gundelfinger treated Employee for mid and low back pain, diagnosed lumbago, and recommended a magnetic resonance imaging (MRI) scan, therapeutic massage, trigger point therapy, and micro current therapy. Dr. Gundelfinger opined Employee, "has had a flareup of his low back pain. He appears to have developed a discopathy." (Chart Note, Dr. Gundelfinger, Chart Note Date Illegible).

13) On August 3, 2011, an unknown therapist treated Employee's low back pain with various therapies including trigger point pressure and stated Employee's low back pain was secondary to aggravation of an "old injury to L3-L5 per pt." (Chart Note, Provider Name Illegible, August 3, 2011).

14) On August 15, 2011, an unknown provider released Employee to return to work without restrictions. (Confidential Medical Absence Certification Form, Provider Name Illegible, August 15, 2011).

15) On September 27, 2011, Eric Olsen, M.D., at Family Practice Physicians, treated Employee for back pain, diagnosed back pain, and referred Employee for physical therapy. Employee reported having low back pain for years and he "hurts every day. . . . He hurts when he is working, twisting under load, etc. . . . He would like to work on this as it is a chronic problem." Dr. Olsen referred Employee to physical therapy. (Chart Note, Dr. Olsen, September 27, 2011).

16) On October 26, 2011, an unknown provider at Juneau Urgent Care treated Employee for back pain, diagnosed lumbar strain, and stated, "No injury – pt. unsure what's causing back pain." (Chart Note, Provider Name Illegible, October 26, 2011).

17) On October 26, 2011, Darla Duran, ANP, released Employee to return to work without restrictions as of October 27, 2011. (Confidential Medical Absence Certification Form, Duran, October 26, 2011).

18) On October 26, 2011, Dr. Gundelfinger treated Employee for mid and low back pain, and diagnosed lumbago. He stated Employee, "has had acute onset of lower back pain and spasms. Onset possibly associated 'Mucker' (sic)" and "He will let us know about possibly (sic) of W/C." (Chart Note, Dr. Gundelfinger, October 26, 2011).

19) On October 28, 2011, Dr. Gundelfinger restricted Employee from working through October 29, 2011 because of low back pain. (Confidential Medical Absence Certification Form, Dr. Gundelfinger, October 28, 2011).

20) On November 1, 2011, physiatrist John Bursell, M.D., at Juneau Bone & Joint Center, treated Employee for low back pain, diagnosed discogenic low back pain without radiculopathy, and recommended a course of oral steroids and physical therapy. Employee reported the pain started, "about one week ago. There was no specific injury." (Chart Note, Dr. Bursell, November 1, 2011).

21) On November 8, 2011, Dr. Bursell treated Employee for low back pain, recommended a lumbar MRI, and restricted Employee from working pending further workup and treatment. (Chart Note, Dr. Bursell, November 8, 2011).

22) On November 14, 2011, a lumbar MRI showed disc degeneration at L4-5 and L5-S1 with disc protrusions at that level. (Radiologist Report, Theresa Shanley, M.D., November 14, 2011; Chart Note, Dr. Bursell, November 16, 2011).

23) On December 5, 2011, Employee contacted Employer's Mine Operations Manager Chris Neville to report a back injury that had occurred three years ago. Mr. Neville immediately relayed Employee's report to Employer's Health and Safety Manager Teresa Cummins, R.N. (Email from Chris Neville to Serra Williams, January 12, 2012; Davis Deposition 182:1-23, July 19, 2012; Neville).

24) On December 5, 2011, Ms. Cummins called Employee to ask about his work injury, and Employee told her he had injured himself "three to four years ago" using a mucker while

working. Employee stated since that time, the pain in his back has gradually gotten worse. (Cummins; To Whom It May Concern Letter from Teresa Cummins, December 7, 2011).

25) On December 7, 2011, Ms. Cummins provided Employee with a report of injury form. Employee told her, "I got to thinking about the day I was injured. I think it was in 2009." Based on this information, Ms. Cummins completed an online report of injury, describing the injury as, "Back pain from incident 3-4 years ago." (Report of Injury, December 7, 2011; Cummins; To Whom It May Concern Letter from Teresa Cummins, December 9, 2011).

26) On December 13, 2011, Employee reported he was injured on September 25, 2011, while working for Employer as a miner. Employee stated he was running a mucker and digging when rock broke loose and the back of the mucker slammed down and drove his buttocks into the seat. (Report of Injury, December 18, 2011; Claim, January 25, 2012).

27) On January 3, 2012, massage therapist Jenna O'Fontanella treated Employee for back pain. Employee reported a three year history of back pain that has worsened over time, specifically, "three years ago he was sitting on a piece of equipment when he took an impact from down below that hit his seat with him in seated position and jammed him upward . . . he was a bit sore from this that (sic) day but then it gradually went away until this year his back pain has gradually gotten worse." (Chart Note, O'Fontanella, January 3, 2012).

28) On January 12, 2012, Employee provided a recorded statement to Employer's adjuster in relation to Employee's reported work injury. Employee stated in January 2009 he was running a mucker, which is like an underground loader. He was prying on a rock, trying to get the rock to break. The rock broke, and it slammed the mucker down. Employee was thrust up and then because he had his seatbelt on, was pulled back down into his seat. Employee stated that was the start of his back problems. Then in October 2011, his back started bothering him again while Employee was working. Employee did not remember what he had done to make it start hurting again. Employee denied having any back pain prior to January 2009 and any non-work related back injuries. (Recorded Statement of Don Davis, January 12, 2012).

29) On January 17, 2012, Employer controverted all benefits based on Employee's untimely reporting of his injury. (Controversion Notice, January 17, 2012).

30) On January 25, 2012, Employee filed a workers' compensation claim for temporary partial disability (TPD) benefits and medical costs. (Claim, January 25, 2012).

31) On January 30, 2012, Dr. Bursell treated Employee for continued low back pain and stated Employee, "continues with significant low back pain without radiculopathy which has not responded to conservative interventions including relative rest, lumbar epidural steroid injections and physical therapy." Dr. Bursell reviewed with Employee his injury history. Employee stated he was driving a "Mucker" at work last October. He was prying up on rock, and the back of the Mucker was lifted off the ground, then slammed down driving him into the seat. He had onset of significant low back pain. Employee was able to work for seven days with the low back pain, but could not continue past that time due to the severity of his symptoms. Based on this injury history, Dr. Bursell opined Employee's injury was work-related. Dr. Bursell restricted Employee from working and referred Employee to Gordon Bozarth, M.D., for a surgical spine consultation. (Chart Note, Dr. Bursell, January 30, 2012).

32) On February 22, 2012, Dr. Bozarth treated Employee for severe low back pain and diagnosed lumbalgia, L4-5 and L5-S1 degenerative disk disease, possible right lower extremity radiculopathy, and possible right hip pathology. Employee reported:

> [H]e was working at Greens Creek Mine approximately two years ago when he sustained a trauma while working and that started his low back pain. He got somewhat better after this and then a year later re-injured it in a similar fashion. He states that in October 2011 while driving a truck at Greens Creek Mine that he had significant pain in his right lower back at the L4-5 and L5-S1 levels radiating into his right gluteal musculature.

(Chart Note, Dr. Bozarth, February 22, 2012).

33) On February 24, 2012, a pelvis and bilateral hip MRI and an abdomen and pelvis computed tomography (CT) scan were both unremarkable. (Radiologist Reports, Theresa Shanley, M.D., February 24, 2012).

34) On February 27, 2012, Dr. Bozarth opined Employee was a poor surgical candidate, stating, "I can find no significant cause to produce his current complaints." (Chart Note, Dr. Bozarth, February 27, 2012).

35) On March 19, 2012, Dr. Bursell treated Employee for low back pain, opined Employee's pain is coming from his sacroiliac joint, and recommended a sacroiliac joint injection for both diagnostic and therapeutic purposes. (Chart Note, Dr. Bursell, March 19, 2012).

36) On March 27, 2012, Dr. Bursell opined Employee's low back medical treatment was "due to his job as an underground miner." (To Whom It May Concern Letter from Dr. Bursell, March 27, 2012).

37) On March 28, 2012, Dr. Bursell treated Employee for continued low back pain and follow up to a right sacroiliac joint injection. Employee reported the injection resulted in significant pain relief. (Chart Note, Dr. Bursell, March 28, 2012).

38) On May 15, 2012, orthopedic surgeon Lance Brigham, M.D., and neurosurgeon Karl Goler, M.D., examined Employee for an employer's medical evaluation (EME). They diagnosed preexisting lumbar degenerative disc disease and opined Employee's September 2011 work injury did not worsen this condition nor was it the substantial cause of it or of any need for medical treatment. They stated the causes of Employee's problems are aging, deconditioning, and morbid obesity, with morbid obesity being the substantial cause and also opined Employee's preexisting degenerative changes were not worsened by any work injury. Their opinion was based on the lack of any records substantiating an industrial injury occurred on September 25, 2011. Drs. Brigham and Goler recommended no further treatment other than substantial weight loss and exercise and opined Employee was medically stable as of May 15, 2012, and could return to his job at the time of injury with no restrictions. Patrick's test was negative bilaterally and Employee did not have pain to palpation in the lumbosacral area. (EME Report, Drs. Brigham and Goler, May 15, 2012).

39) On June 15, 2012, Employer controverted all benefits based on Drs. Brigham and Goler's EME report. (Controversion Notice, June 15, 2012).

40) On July 16, 2012, Dr. Bursell treated Employee for continued low back pain, and diagnosed low back pain with sacroiliac joint dysfunction. (Chart Note, Dr. Bursell, July 16, 2012).

41) On July 19, 2012, Employee was deposed and reported his work injury occurred as follows: In October of 2011, he was operating an underground loader called a "mucker." He was prying on a rock with the mucker bucket and the back of the mucker lifted off the ground. The rock broke loose, and the back of the mucker slammed back down on the ground, driving Employee's spine into his seat. Employee explained he incorrectly listed his date of injury as September 2011 in his report of injury, stating the "mucker" injury occurred in October 2011, but Employee could not recall the exact date. When asked about his 1994 and 2002 back injuries, Employee could not remember injuring his back on these dates. When asked about Dr. Shepro's February 20, 2000 work restriction based on low back problems, Employee stated he had injured himself

multiple times over the years running "muckers" in the same way he had in October 2011 and this was one of those times. Employee did not report the February 2000 injury to Employer. Employee's last day working for Employer was October 25, 2011. At the end of each work day, Employee would complete and sign a time card listing information including the code number for the job worked that day. The code number for mucking was "0320." The first time Employee reported to anyone working for Employer that he had an injury possibly due to operating a "mucker" was on December 5, 2011. (Davis Deposition 53:6-24; 76:20-77:10; 105:5-111:9; 115:16-116:1; 152:14-158:7; 170:22-171:1; 182:1-183:2; 194:1-195:8, July 19, 2012).

42) On August 8, 2012, Dr. Bursell was deposed and explained his work-relatedness opinion was based on Employee's experiencing pain relief from sacroiliac joint injections and on Employee's reported injury and symptom history. Dr. Bursell explained a primary cause of sacroiliac dysfunction is jarring or torsional forces across the joint and opined the reported September 2011 injury is the substantial cause of need for medical treatment, "given the history that I have, understanding that I don't have any history of back injuries outside of work." Dr. Bursell recommended physical therapy and periodic steroid injections for sacroiliac joint pain and opined Employee could not return to his job at time of injury. He further explained lumbar spine degenerative changes alone would not keep Employee from returning to his regular job, stating the reason Employee cannot return to work is because of the pain he is experiencing from his low back, specifically the sacroiliac joints. He stated something happened with the sacroiliac joints to cause them to become symptomatic, because it is not a degenerative process. He opined Employee's work injury made his sacroiliac joint symptomatic, and because of these symptoms Employee cannot continue to be a miner. With regard to age and obesity as causative factors, Dr. Bursell stated obesity does not correlate to sacroiliac pain but it does to disk pain and age would not necessarily be a significant factor in this pain. He acknowledged if Employee had a history of prior lumbosacral sprains, this could be a contributing factor in his current sacroiliac joint pain if the prior injuries were significant and prolonged. When asked what would make an injury "significant," Dr. Bursell stated a significant injury or strain would be one that puts a person out of work for a number of weeks or might require prolonged therapy or epidural injections or surgery. (Bursell Deposition 17:17-22; 19:1-9; 23:2-4; 34:1-5; 35:22-25; 37:3-11; 38:10-18; 39:10-22; 46:5-47:23, 48:14-49:5, August 8, 2012).

43) On September 12, 2012, Employer petitioned for an SIME, based on the medical disputes between Employee's treating physician Dr. Bursell and EME physicians Drs. Brigham and Goler. (Petition for SIME, September 12, 2012).

44) On September 13, 2012, the parties appeared at a prehearing conference and stipulated to a panel SIME, with neurosurgery and orthopedics as the required medical specialties. (Prehearing Conference Summary, September 13, 2012).

45) On October 2, 2012, Drs. Brigham and Goler, in response to Employer's request for an EME report addendum following their receipt of additional medical records and Dr. Bursell's deposition, stated their opinions remain unchanged from their May 15, 2012 EME. (EME Addendum, Drs. Brigham and Goler, October 2, 2012).

46) On October 5, 2012, Dr. Goler was deposed and stated Employee did not have any sacroiliac pain with the Patrick's test, a test used to evaluate for sacroiliac joint dysfunction, administered at the EME. Employee also did not have pain to palpation in the lumbosacral area. (Goler Deposition, 20:1-21:19; 36:12-25; 45:19-20; 54:13-60:12, October 5, 2012).

47) On October 5, 2012, Dr. Brigham was deposed, stated sacroiliac joint pain is misunderstood, and opined the sacroiliac joint is very rarely damaged unless a person has major trauma. He opined Employee's pain complaints were the same as they were in 2009, and stated Employee's work did not aggravate, combine, or accelerate Employee's preexisting conditions or cause his need for medical treatment. (Brigham Deposition, 14:23-17: 1, October 5, 2012).

48) On October 11, 2012, the parties filed an SIME form signed by both parties. The parties again agreed to an SIME with neurosurgery and orthopedics specialists. (SIME Form, October 11, 2012).

49) On November 6, 2012, *Osborne*, which was heard by an Anchorage board panel, issued. *Osborne* addressed Dr. Cleary's ability to be impartial in that case, because Dr. Cleary had issued an SIME report before Employee's SIME evaluation had concluded. *Osborne* explained because Dr. Cleary's SIME report made conclusive determinations, prematurely and without a full medical record, his ability to render an impartial decision in that case was called into question. *Osborne* directed the board designee to ask Dr. Cleary questions regarding his ability to be impartial in that case. (*Osborne* at 12-17).

50) On November 30, 2012, the board designee assigned neurosurgeon Dr. Cleary and orthopedic surgeon Sidney Levine, M.D., as SIME physicians in the instant case. The parties

were notified the evaluations would occur on January 17, 2013. (SIME Letter from board designee, November 30, 2012; SIME Letter to Dr. Cleary, November 30, 2012).

51) On December 19, 2012, *Wolfe*, which was heard by a Juneau board panel, issued and factual finding 88 found Dr. Cleary not credible in that case. *Wolfe* explained:

> The reasons Dr. Cleary gives for his headache opinion lack support in the medical record and in basic common knowledge and sense. This lack of support is to such a degree that his credibility is significant undermined. Dr. Cleary's testimony resembled that of an advocate choosing arguments for a preconceived result, not an objective expert. Consequently, the board gives very little weight to Dr. Cleary's opinions on all issues *in this case* because he is not a credible witness.

(*Wolfe* at 26, 38 (emphasis added)).

52) On January 17, 2013, Employee saw orthopedic surgeon Sidney Levine, M.D., for an SIME. Dr. Levine diagnosed: (1) lumbar disc disease, most pronounced at L4-5 and L5-S1 level, and (2) low back strain. Dr. Levine opined Employee's September 2011 work injury was not the substantial cause of any disability. He stated Employee's September 2011 work injury combined with, accelerated and was an aggravation of his preexisting lumbar spine condition and necessitated some medical treatment, but opined the combination, acceleration and aggravation was not the substantial cause of any disability. Dr. Levine also opined the September 2011 work injury was the substantial cause of Employee's need for low back medical treatment for six months following his work injury. Employee was medically stable as of his May 15, 2012 EME with Drs. Brigham and Goler and could return to his regular work without restrictions. He further opined, "There is no evidence that the patient has sacroiliac joint disease." Dr. Levine recommended no further treatment other than weight loss and core strengthening exercise. He assessed three percent combined value whole person impairment under the Sixth Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) but opined 100 percent of the whole person PPI rating preexisted Employee's employment with Employer. Regarding prior injuries, Employee told Dr. Levine he had hurt his low back in the 1990s and again in 2002 working for Employer, but did not recall any other injuries or difficulty with his back other than that. Employee explained to Dr. Levine his work injury occurred as follows: on September 25, 2011, Employee was operating a mucker. While Employee was trying to pry a rock out of the face of a rock wall, the rock came loose and

slammed the mucker down onto the ground. The impact drove his spine into the bottom of his seat, which was seated on a metal frame. Employee experienced immediate pain within his low back, but continued working until his shift was completed five or six hours later. A few days post injury, he went to see Dr. Gundelfinger because of increasing back pain and after treating with Dr. Gundelfinger for a month with no relief of his symptoms, he began seeing Dr. Bursell. (SIME Report, Dr. Levine, January 17, 2013).

53) On January 17, 2013, Employee saw Dr. Cleary for an SIME. Dr. Cleary's diagnoses included: (1) alleged lumbar straining injury on September 25, 2011, (2) degenerative disc disease, L4-L5 and L5-S1, (3) morbid obesity, and (4) status post bilateral carpal ligament releases and status post knee arthroscopy. Dr. Cleary opined Employee did not have a work injury on September 25, 2011. He stated Employee sought medical treatment in September 2011 for recurring low back pain, as he had done multiple times in the past. Dr. Cleary stated Employee did not attribute his back pain to any work-related injury until "December 23, 2011," when he told Dr. Gundelfinger his lower back pain onset was possibly caused by a "mucker." Dr. Cleary opined there is no evidence any work injury combined with, accelerated or aggravated his preexisting lumbar spine condition or was the substantial cause of any need for medical treatment or disability. He stated Employee's pain complaints in the fall of 2011 are related to his preexisting, chronically symptomatic, lumbar spine degenerative disc and joint disease. He further opined there is no evidence of any sacroiliac disease, stating the disease is rare and related to arthritic conditions that affect the sacroiliac joints such as rheumatoid arthritis or major pelvic trauma. Dr. Cleary stated none of Employee's imaging evidenced this diagnosis. Employee explained to Dr. Cleary his work injury occurred as follows: on September 25, 2011, Employee was operating a modified loader called a "mucker." He placed the front edge of the mucker bucket underneath a rock to pry it up and break it off. The maneuver caused the rear-end of the mucker to rise and then the rock broke up, slamming the mucker back down. Employee was sitting on the mucker seat and the force drove him down into the bottom of the seat. He immediately had low back pain but he finished his shift. He went to see Dr. Gundelfinger because of increasing back pain and after treating with Dr. Gundelfinger for a few weeks with no improvement, he began seeing Dr. Bursell. (SIME Report, Dr. Cleary, January 17, 2013).

54) On January 21, 2013, Dr. Cleary issued his SIME report. *Id.*

55) On April 2, 2013, the parties appeared for a prehearing conference. The parties confirmed a June 11, 2013 hearing date and did not discuss Dr. Cleary's assignment as an SIME physician. Employer did not assert any objection to Dr. Cleary's assignment. (Prehearing Conference Summary, April 2, 2013).

56) On April 12, 2013, Employer filed a petition to "correct prejudicial error," asserting for the first time that because the Juneau hearing panel found Dr. Cleary not credible in *Wolfe*, Employer could not obtain a fair and impartial hearing before the Juneau panel. Employer did not contend Dr. Cleary is biased or that the designee did anything wrong. Employer requested the alleged error be rectified by assigning a new SIME neurosurgeon to replace Dr. Cleary. (Petition to Correct Prejudicial Error, April 12, 2013).

57) On May 30, 2013, the parties appeared for a prehearing conference. Employee contended he had been completely unable to work since his work injury because of his work injury. He orally amended his claim to add a request for TTD. The parties agreed to cancel the June 11, 2013 hearing so they could conduct discovery on Employee's new TTD claim. (Prehearing Conference Summary, May 30, 2013).

58) On June 11, 2013, the parties appeared for a prehearing conference. Employee withdrew his request for TPD and the parties agreed to a November 5, 2013 hearing on Employee's TTD and medical costs claims, Employer's defenses including its defense AS 23.30.100 bars Employee's claims, and Employer's April 12, 2013 petition. The board designee explained to the parties the board panel decides credibility on a case by case basis and opinions are formed based on the record and merits of each case. For example, although Dr. Cleary was found not credible in *Wolfe*, he was found credible in *Marin v. Klawock City School District*, AWCB Decision No. 12-0087 (May 14, 2012) and *Barger v. City of Wrangell*, AWCB Decision No. 12-0153 (September 6, 2012). (Prehearing Conference Summary, June 11, 2013).

59) On August 22, 2013, Employee was again deposed and stated he had three significant injuries on a mucker that he can remember. None of Employee's time cards for September or October 2011, list the "0320" code number for mucking. The only time card in the fall of 2011 referencing mucking is on October 22, 2011, where Employee commented, "Mucked stockpile of Pd2053 waste." (Davis Deposition 24:4-17; Exhibit 14, August 22, 2013).

60) On October 4, 2013, Dr. Goler was again deposed and opined Employee does not have a sacroiliac dysfunction based on the medical records and the physical examination of Employee at

the EME. Addressing Dr. Bursell's diagnosis of sacroiliac joint dysfunction based on sacroiliac joint steroid injections resulting in pain relief, Dr. Goler opined the use of an epidural injection is not an accepted medical diagnostic procedure. He stated the medication flows up and down the spinal canal, numbing everything. When injecting medication that numbs everything, "there is no way to associate what you find with any diagnostic precision." (Goler Deposition, 9:23-14:16, October 4, 2013).

61) "The Board" is composed of eighteen members, who are equally divided between representatives of labor and industry. Board hearing panels are comprised of one or two board members and a hearing officer acting as panel chair. AS 23.30.005.

62) The board's SIME list includes forty-nine physicians with various specialties. Three of the SIME physicians list neurosurgery as a specialty. (Department of Labor and Workforce Development Bulletin No. 12-04, Workers' Compensation Board's List of Independent Medical Examiners, November 26, 2012).

63) At hearing on November 5, 2013, the panel members stated they could be fair and impartial, have not prejudged or formed any opinion on any issue in the case, and any opinions formed in this case would be based on the records and merits of the case. (Record).

64) Chris Neville is Employer's Mine Operations Manager, a job he began three years previously. Prior to working as mine manager, he worked for Employer as Mine Superintendent. December 5, 2011, was the first date Employee told him or any other person working for Employer that Employee had injured himself operating a mucker. Employee reported he had injured himself two to three years previously operating the mucker. Employee did not report any other mucker-related injury and did not tell Mr. Neville about any September or October 2011 injury. Each employee is required to report a work injury the day it occurs. An employee completes a timecard at the end of each day. Each timecard asks "Did you have an injury on the job?" and an employee is required to check either "yes" or "no." If the answer is left blank, the timecard is returned to the employee to complete. All of Employee's September and October 2011 timecards are checked "no." It is crucial for an employee to report the injury the day it occurs for many reasons, including so the employee can immediately obtain medical treatment and Employer can help prevent the injury from worsening. In the time Mr. Neville has worked for Employer, no other employee has ever reported an injury from operating a mucker. (Neville).

65) Teresa Cummins is Employer's Health and Safety Manager. Ms. Cummins contacted Employee twice after he reported a mucker-related work injury. The first time, Employee told her he had injured himself "three to four years ago" using a mucker while working and that since that time, the pain in his back has gradually gotten worse. The second time, Employee told her, "I got to thinking about the day I was injured. I think it was in 2009." Employee did not report any other mucker-related injury and did not tell her about any September or October 2011 injury. In the time Ms. Cummins has worked for Employer, no other employee has ever reported an injury from operating a mucker. (Cummins).

66) Also at hearing on November 5, 2013, Employee stated he did not report his injury until December 5, 2011, because that was when he had evidence it was "more than a pulled muscle." He stated he was injured on October 22, 2011, when operating a mucker "scrapping the face" of a rock wall. He was driven into his seat so hard he felt nauseous and had to stop working for five minutes and walk around. Employee stated this had occurred two times previously, with the first one in 2000, but he could not remember the exact dates. He could not recall when the second one occurred but it was not in 2009. Employee stated he did not report any of these until December 2011, because he got better and went back to work, stating it was only after the third one where he did not get better and could not return to work. He does not recall Dr. Olsen treating him for back pain in September 2011 but does recall Dr. Olsen referring him to physical therapy. Employee checked "no" on his September and October 2011 timecards in answer to the question "Did you have an injury on the job?" Employee's October 22, 2011 timecard reports he was operating a mucker on a "stockpile" and not at the face of a rock wall. Employee states on December 5, 2011, he reported his October 2011 mucker-related injury to both Chris Neville and his direct supervisor Tony Arriaga. (Employee).

67) The panel members can be and will be fair and impartial. The panel makes factual determinations on a case by case basis, and opinions are formed based on the record and merits of each case. Any opinions formed in this case will be based on the records and merits of this case. (Record).

68) Chris Neville and Teresa Cummins are credible. (Experience, judgment, observations).

69) Employee is a poor historian and is not credible. *Id.*

70) Employee did not have a work-related injury in the fall of 2011 or have any mucker-related injury while working for Employer. Employee did not report any mucker-related work injury to Employer, or any agent of Employer, until December 5, 2011. (Record).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

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 23.30.005. Alaska Workers' Compensation Board.**
> . . .
>
> (f) Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board.

> **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. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise 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.

A finding reasonable persons would find employment was or was not a cause of the Employee's disability and impose or deny liability is, "as are all subjective determinations, the most difficult to support." *Rogers & Babler*, 747 P.2d at 534.

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.
> . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury or death, and authority to release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.
>
> (c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer by delivering it to the employer or by sending it by mail addressed to the employer at the employer's last known place of business. If the employer is a partnership, the notice may be given to a partner, or if a corporation, the notice may be given to an agent or officer upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

> (d) Failure to give notice does not bar a claim under this chapter
>
> > (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
> >
> > (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
> >
> > (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

AS 23.30.100(a) requires an injured employee to notify his or her employer of a work-related injury within thirty days of the injury. The purpose of this requirement is to let the employer provide immediate medical diagnosis and treatment to minimize the seriousness of the injury, and to facilitate the earliest possible investigation of the facts surrounding the injury. *Dafermo v. Municipality of Anchorage*, 941 P.2d 114, 118 (Alaska 1997). The Act excuses an employee's failure to give formal written notice where the employer has "knowledge of the injury." *Cogger v. Anchor House*, 936 P.2d 157, 162 (Alaska 1997). AS 23.30.100(d) gives the board discretion to excuse a failure to give timely notice if the employee has a satisfactory reason. *Collins v. Arctic Builders, Inc.*, 31 P.3d 1286, 1290 (Alaska 2001).

> **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 of compensability is applicable to any claim for compensation under the workers' compensation statute. *Id*.; (emphasis omitted). 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*, Alaska Workers' Comp. App. Comm'n Dec. No. 150 at 7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility of the parties and witnesses is not examined at the second stage. *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds the employer's evidence is sufficient, in the third step the presumption of compensability drops out, the employee must prove her case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, Alaska Workers' Comp. App. Comm'n Dec. No. 150 at 8 (March 25, 2011). This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *See 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.

> **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 finding of credibility "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 the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g*., *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). The board has the sole discretion to determine the weight of the medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, Alaska Workers' Comp. App. Comm'n Dec. No. 087 at 11 (Aug. 25, 2008). The board can choose not to believe its own expert. *Rosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013).

AS 23.30.122's legislative history states its intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." Section 122 clarifies and emphasizes the board's role in determining witnesses' credibility and weight to be accorded medical testimony and reports. *Rosario*, 297 P.3d 139, at 146. The board may determine credibility, even if the witness did not testify orally. *Id.*, at 146, n. 17.

Hanson v. Municipality of Anchorage, AWCB Decision No. 10-0175 (October 29, 2010) (*Hanson I*) and *Hanson v. Municipality of Anchorage*, AWCB Decision No. 12-0031 (February 21, 2012) (*Hanson II*) addressed the credibility issue. *Hanson I* found an EME physician not credible, stating the EME appeared to advocate for Employer rather than provide impartial medical opinions. *Hanson II* relied on the same EME physician's opinion for a subsequent issue in the same case. The employee moved for reconsideration of *Hanson II*, contending it erred by relying on the EME's opinion when *Hanson I* had found the EME not credible because the EME sounded at that time like an advocate for a party. *Hanson* on reconsideration explained the EME did not act in *Hanson II* as a party's advocate and *Hanson II* relied on the EME's opinion because it was supported by the record.

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **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 any period of disability occurring after the date of medical stability.
> **AS 44.64.050. Hearing Officer Conduct**.
> …
>
> (b) … The following fundamental canons of conduct shall be included in the code: in carrying out official duties, an administrative law judge or hearing officer shall

(1) uphold the integrity and independence of the office;

(2) avoid impropriety and the appearance of impropriety;

(3) perform the duties of the office impartially and diligently;

(4) conduct unofficial activities in ways that minimize the risk of conflict with the obligations of the office; and

(5) refrain from inappropriate activity in seeking employment with another agency or employer or in seeking reappointment.

8 AAC 45.092. Selection of an independent medical examiner. (a) The board will maintain a list of physicians' names for second independent medical evaluations...

(b) The list of physicians will be created as follows:

(1) The board or its designee will ask the Alaska Chiropractic Society, Alaska Dental Society, Alaska Optometric Society, and Alaska State Medical Association to make recommendations from within their respective specialty. The recommendations must be received by the board on or before November 1, 1989 and on or before November 1 of each year after that.

(2) By December 15 of each year, the board will publish a bulletin for the *Workers' Compensation Manual*, published by the department, listing the names of the physicians recommended by the Alaska Chiropractic Society, the Alaska Dental Society, the Alaska Optometric Society, and the Alaska State Medical Association as well as the names of independent medical examiners whose terms of appointment will expire in the following year. A copy of the bulletin is available upon request from the State of Alaska workers' compensation division, P.O. Box 25512, Juneau, Alaska 99802-5512.

(3) An attorney who meets the following criteria may, by March 1 of each year, submit a letter to the commissioner volunteering to serve on a panel to select physicians for inclusion on the board's list as described in (5) of this subsection. The attorney must

(A) be admitted to the practice of law in this or another state;
(B) have personally presented a total of five cases, no more than two of which were resolved by agreed settlements, for board decision during the calendar year preceding volunteering to serve on a panel; and

(C) in the calendar year preceding volunteering, have represented one class of litigants, either employee or employer, 90 percent of the time; based on the class of litigant that was represented 90 percent of the time,

the commissioner will classify the attorney as either an employee or employer attorney.

(4) By May 1 of each year, the commissioner shall choose, from the attorneys who volunteered in accordance with (3) of this subsection, two employee attorneys and two employer attorneys to serve on a panel to select physicians for inclusion on the board's list of physicians. The panel shall meet and select physicians by August 1 of each year. The commissioner shall provide staff to schedule the panel's meetings, publish notice of the meetings, and arrange facilities or other support for the meeting to assist the panel, but the panel members may not be paid for their work or expenses for participating on the panel.

(5) The panel members shall vote, or abstain from voting, upon the physicians whose names were listed in the bulletin published under (2) of this subsection or are suggested by a panel member, even if the physician's name did not appear in the bulletin. A physician who receives three affirmative votes will be sent by the board or its designee an application and a letter asking if the physician is interested in performing second independent medical examinations. Unless the board determines that good cause exists to extend the time, within 60 days after the date of the board's letter the physician must submit

(A) a completed application listing the physician's education, training, work experience, specialty, and the particular discipline in which the physician is licensed, as well as the names and addresses of professional organizations that have certified the physician or in which the physician is an active member;

(B) a copy of or proof of the physician's current license from the appropriate licensing agency in the state in which the physician practices;

(C) a certificate of insurance for the physician's current and enforceable professional liability insurance for the services performed; the certificate of insurance must provide for 30-day prior notice to the board of cancellation, nonrenewal, or material change of the policy; and

(D) a certificate of insurance for the physician's workers' compensation insurance if the physician has employees; the certificate of insurance must provide for 30-day prior notice to the board of cancellation, nonrenewal, or material change of the policy.

(6) If the physician complies with (5) of this subsection, the physician's name will be added to the board's list of independent medical examiners, effective November 1 of that year. Except as provided in (7) of this subsection and (c) of this section, the physician's name will remain on the list for three years.

After three years, the physician must be reselected in accordance with (5) of this subsection. If reselected, the physician will remain on the list unless

(A) three members of the panel described in (4) of this subsection recommend that the physician be removed from the list and the department determines that the removal of the physician is not inconsistent with this chapter; or

(B) the physician is removed from the list under (7) of this subsection or (c) of this section.

(7) Notwithstanding (d) of this section, the board may remove a physician's name from the list compiled in accordance with (6) of this subsection

(A) upon receipt of the physician's written notification that the physician no longer wants to perform second independent medical evaluations; or

(B) if, within 30 days after receipt of a written request, the physician does not annually submit a copy of or proof of licensing by the appropriate state agency, a certificate of insurance for professional liability insurance and, if required under AS 23.30, workers' compensation insurance.

(c) The board will, in its discretion, remove a physician's name from the list for

(1) the physician's repeated failure to

(A) timely file medical reports for treatment of injured workers;

(B) timely file written treatment plans when required by AS 23.30.095(c); or

(C) provide medical services and examinations to injured workers;

(2) the physician's failure to comply with an order of the board;

(3) revocation by the appropriate licensing agency of the physician's license to provide services;

(4) decertification of or disciplinary action against the physician by an applicable certifying agency or professional organization;

(5) disciplinary action taken against the physician by the State Medical Board, a representative of Medicare or Medicaid, or a hospital, for fraud, abuse, or the quality of care provided;

(6) fraudulent billing or reporting by the physician;

(7) knowingly falsifying information on the physician's application;

(8) conviction of the physician in a state or federal court of any offense involving moral turpitude or drug abuse, including excessive prescription of drugs;

(9) unprofessional conduct or discriminatory treatment by the physician in the care and examination of patients;

(10) use of treatment by the physician which is not sanctioned by the physician's peers or national provider associations as beneficial for the injury or disease under treatment;

(11) declaration of the physician's mental incompetency by a court of competent jurisdiction;

(12) failure by the physician to maintain professional liability insurance or, if required, workers' compensation insurance; or

(13) failure by the physician to annually submit a certificate of insurance for professional liability insurance and, if required, workers' compensation insurance.

(d) Before removing a physician's name from the list,

(1) the board will notify the physician, in writing, either by personal service or by certified mail of the proposed removal and the reason for it;

(2) a physician who receives a notification under (1) of this subsection may, within 30 days after the receipt of the notice, file a written request with the board for a hearing in accordance with AS 23.30.110;

(3) the board will issue a written decision within 30 days after the hearing, or, if no hearing is requested, the board will issue a written decision within 45 days after the written notice of proposed removal; the board's decision will be served on the physician personally or by certified mail, and will state whether the physician's name was removed from the list and the reason for the removal.

(e) If the parties stipulate that a physician not on the board's list may perform an evaluation under AS 23.30.095(k), the board or its designee may select a physician in accordance with the parties' agreement. If the parties do not stipulate to a physician not on the board's list to perform the evaluation, the board or its designee will select a physician to serve as an independent medical examiner to perform the evaluation. The board or its designee will consider these factors in the following order in selecting the physician:

(1) the nature and extent of the employee's injuries;

(2) the physician's specialty and qualifications;

(3) whether the physician or an associate has previously examined or treated the employee;

(4) the physician's experience in treating injured workers in this state or another state;

(5) the physician's impartiality; and

(6) the proximity of the physician to the employee's geographic location.

(f) If the board or its designee determines that the list of independent medical examiners does not include an impartial physician with the specialty, qualifications, and experience to examine the employee, the board or its designee will notify the employee and employer that a physician not named on the list will be selected to perform the examination. The notice will state the board's preferred physician's specialty to examine the employee. Within 10 days after notice by the board or its designee, the employer and employee may each submit the names, addresses, and curriculum vitae of no more than three physicians. If both the employee and the employer recommend the same physician, that physician will be selected to perform the examination. If no names are recommended by the employer or employee or if the employee and employer do not recommend the same physician, the board or its designee will select a physician, but the selection need not be from the recommendations by the employee or employer.

(g) If there exists a medical dispute under in AS 23.30.095(k),

(1) the parties may file a

(A) completed second independent medical form, available from the division, listing the dispute together with copies of the medical records reflecting the dispute, and

(B) stipulation signed by all parties agreeing

(i) upon the type of specialty to perform the evaluation or the physician to perform the evaluation; and

(ii) that either the board or the board's designee determine whether a dispute under AS 23.30.095(k) exists, and requesting the board or the board's designee to exercise discretion under AS 23.30.095(k) and require an evaluation;

. . .

(i) The report of the physician who is serving as an independent medical examiner must be done within 14 days after the evaluation ends. The evaluation ends when the physician reviews the medical records provided by the board, receives the results of all consultations and tests, and examines the injured worker, if that is necessary. The board will presume the evaluation ended after the injured worker was examined. If the evaluation ended at a later date, the physician must state in the report the date the evaluation was done. An examiner's report must be received by the board within 21 days after the evaluation ended. If an examiner's report is not timely received by the board, a party may file a petition asking that another physician be selected to serve as an independent medical examiner. The board or its designee will, in its discretion, select another physician to serve as an independent medical examiner, and will make the selection in accordance with this section.

…

8 AAC 45.105. Code of Conduct. (a) Nothing in this section relieves a board member's duty to comply with the provisions of AS 39.52.010 - 39.52.960 (Alaska Executive Branch Ethics Act) and 9 AAC 52.010 - 9 AAC 52.990. A board member holds office as a public trust, and an effort to benefit from a personal or financial interest through official action is a violation of that trust. A board member is drawn from society and cannot and should not be without personal and financial interests in the decisions and policies of government. An individual who serves as a board member retains rights to interests of a personal or financial nature. Standards of ethical conduct for a board member distinguish between those minor and inconsequential conflicts that are unavoidable in a free society, and those conflicts of interests that are substantial and material.

(b) The provisions of this section do not prevent a board member from following other independent pursuits, if those pursuits do not interfere with the full and faithful discharge of a board member's public duties and responsibilities under AS 23.30 and this chapter.

(c) The recusal of a board panel member for a conflict of interest under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a conflict of interest that is substantial and material; or

(2) shows actual bias or prejudgment.

(d) The recusal of a board panel member to avoid impropriety or the appearance of impropriety under the procedures set out in 8 AAC 45.106 may occur only if the recusal is based on clear and convincing evidence that the board panel member

(1) has a personal or financial interest that is substantial and material; or

(2) shows actual bias or prejudgment.

…

8 AAC 45.106. Procedures for board panel members to avoid conflict of interest, impropriety, and appearance of impropriety. (a) Before conducting a hearing on a case, each board panel member shall be given the names of the parties involved in the hearing and any other appropriate information necessary for the board panel member to determine if the individual member, or another member, has a conflict of interest as described in 8 AAC 45.105.

(b) If a board panel member determines that the member has a potential conflict of interest, the potential conflict of interest must be disclosed to the board panel chair before the hearing.

(c) Upon notification by a board panel member of potential conflict of interest under (b) of this section, the board panel chair shall request that the board panel member recuse oneself or refer the matter to the remainder of the board panel to determine if recusal is appropriate.

(d) If before a scheduled hearing begins, a party has knowledge of a potential conflict of interest or knowledge that a board panel member's circumstances may present a potential impropriety or appearance of impropriety, the party may file a petition with the commissioner, or the commissioner's designated hearing officer under AS 23.30.005(b), objecting to the board panel member and briefly outline the reasons. If a petition is filed under this subsection, the commissioner, or the commissioner's designated hearing officer, shall forward the objection to the board panel member who is the subject of the petition for the member's review. If the board panel member does not recuse oneself from the proceeding, the remaining board panel members shall determine whether the board panel member who is the subject of the petition may hear the case.

In *Pride v. Harris*, 882 P.2d 381, 384-85 (Alaska 1994), Pride, a party in a personal injury case, contended a judge was biased because the judge had previously presided over a separate custody case involving Pride. In making determinations in the custody case, the judge reached some negative conclusions regarding Pride. Pride argued that by presiding over the custody case, the judge had necessarily prejudged Pride's character and credibility in the personal injury case. The Alaska Supreme Court disagreed, stating:

> There is no rule *requiring* recusal or disqualification of a judge who previously has presided over a case involving the party seeking disqualification or recusal. Indeed, "every judge, when he hears a case or writes an opinion must form an opinion on the merits and . . . [often] an opinion relative to the parties involved. But this does not mean that the judge has a 'personal bias or prejudice.' " *State v. City of Anchorage,* 513 P.2d 1104, 1113 (Alaska 1973) (quoting *Tucker v. Kerner,* 186 F.2d 79, 84 (7th Cir.1950)). Accordingly, Judge Gonzalez concluded: "The fact that Mr. Pride may feel that Judge Rowland is biased against him is not sufficient to lead this Court to conclude that there is, in fact, an appearance of ... partiality on the part of Judge Rowland." This decision did not constitute an abuse of discretion.

Pride at 385. The court stated disqualification "was never intended to enable a discontented litigant to oust a judge because of adverse rulings made." *Id*.

ANALYSIS

1) Should a new SIME neurosurgeon be assigned in this case to replace Dr. Cleary?

A review of the prior proceedings is helpful to understanding the basis for Employer's petition. Employer and Employee stipulated to an SIME panel consisting of a neurosurgeon and orthopedist. On November 30, 2012, the designee assigned Dr. Cleary, neurosurgeon, and Dr. Levine, orthopedist, to conduct SIMEs in the instant case. On December 19, 2012, *Wolfe*, which was heard by a Juneau panel, found Dr. Cleary not credible in *Wolfe*. *Wolfe* declined to rely upon Dr. Cleary's opinions because it found they fell below the realm of what *Wolfe* considered common sense and the medical evidence. *Wolfe's* credibility findings were limited to *Wolfe*. On April 12, 2013, Employer contended the Juneau panel prejudged Dr. Cleary's credibility, based on *Wolfe's* determination Dr. Cleary was not credible in *Wolfe*. Based on this history, Employer requests the assignment of a new SIME neurosurgeon to replace Dr. Cleary.

Employer does not contend Dr. Cleary is biased or that the designee did anything wrong. Instead, it contends by finding Dr. Cleary not believable under AS 23.30.122 in *Wolfe*, the Juneau panel prejudged Dr. Cleary's credibility. Employer fails to point to any objective evidence decision-makers in this case prejudged Dr. Cleary's credibility. This is the first hearing in this case. Until this instant decision, the panel members did not issue any opinions relating to this case. Other than pointing to *Wolfe*'s factual findings, Employer points to no evidence supporting its prejudgment allegation. The panel members each confirmed prior to hearing they can be, and

will be, fair and impartial and have not prejudged or formed an opinion regarding Dr. Cleary's credibility in this case.

A panel makes factual determinations on a case by case basis and forms opinions based on the record and merits of each case. Though Dr. Cleary was found not credible in *Wolfe* he was found credible in *Marin* and *Barger*. Panels may choose to believe its own expert based on facts of one case, but disbelieve the same expert based on facts of a different case. SIME physicians are the panel's experts, but the panel can choose not to believe its own expert. *Rosario*, 297 P.3d at 147. A physician may even be found to be acting as an advocate in one proceeding in a case but relied on in a later proceeding in the same case. *Hanson I* and *Hanson II*. These are just a few examples showing how a panel makes factual determinations on a case-by-case and sometimes an issue-by-issue basis and forms opinions based on each case's record and merits.

The Act must be interpreted to ensure "quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to employers." AS 23.30.001. Employer's contention, if accepted, would thwart this intent. Any determination not to believe a treating, EME or SIME physician would require either a different panel to hear any subsequent case involving the physician or require appointment of a different SIME physician. The number of panel members and SIME physicians is limited. The designee would quickly run out of SIME physicians to appoint and panel members to hear cases. Also, if a determination to disbelieve a witness warrants these procedures, so does a determination to believe a witness. Employer's requested relief would bring workers' compensation cases to a standstill. The Act's procedures are based on the premise panel members have the ability to decide, and do decide, issues on a case by case basis, including witness credibility. If a panel member feels he or she cannot be fair and impartial in a case, 8 AAC 45.105 and 106's recusal procedures are applied. Because there is no evidence or reasonable argument to support it, Employer's petition will be denied.

2) Does AS 23.30.100(d) bar Employee's claims?

AS 23.30.100(a) requires an injured employee to notify his or her employer of a work-related injury within 30 days of the injury. Failure to give written notice does not bar a claim if the employer or employer's agent had knowledge of the injury, the employer was not prejudiced by

the delay, and the board excuses the failure to give notice on the ground that notice could not be given for a satisfactory reason. AS 23.30.100(d). The presumption analysis under AS 23.30.120 applies to the question of whether Employer had actual notice of Employee's injuries. To attach the presumption, Employee must first adduce some evidence actual notice was timely given. In determining whether the presumption has been raised, Employee's evidence is not weighed against other evidence, and credibility is not considered.

Employee testified he had three significant injuries on a mucker over the years, with the first one occurring in 2000, the last one on October 22, 2011, and the second one at some point in between. On October 26, 2011, Dr. Gundelfinger treated Employee for mid and low back pain, and stated, "has had acute onset of lower back pain and spasms. Onset possibly associated 'Mucker' (sic)" and "He will let us know about possibly (sic) of W/C." Despite Employee's knowledge on October 26, 2011, a work injury may have caused him disability and his need for low back medical treatment, Employee did not report an injury to Employer or any Employer agent until December 5, 2011. Even then, he told Employer his back injury had occurred three years previously. It was not until December 13, 2011, that Employee reported an injury had occurred in the fall of 2011. Whether Employee's injury occurred in 2000, September 2011 or October 2011, or at some point in between, Employee did not timely report it and Employer did not have actual knowledge of an injury within the 30-day limitation period for timely, formal notice. Employee fails to raise the presumption.

Even if Employee had raised the presumption, Employer would have rebutted it with substantial evidence Employee did not provide actual notice of an injury. Here, that consists of Employee's filed reports of injury, Employee's testimony December 5, 2011, was the first time he told anyone working for Employer about the injury or injuries, and Chris Neville's and Teresa Cummins' testimony Employee did not tell them of any injury until December 2011. Employee would then be required to prove by a preponderance of the evidence he gave actual notice of the injury, a burden he would not meet. It is undisputed Employer, or any Employer agent, did not have actual knowledge of a low back injury within the 30-day limitation period for timely, formal notice. Additionally, Employee gives no satisfactory reason why he could not give timely notice. His timecards explicitly asked "Did you have an injury on the job?" and Employee stated

"no" on each one. Employee's claim is barred under AS 23.30.100 for failure to file a timely report of injury.

3) Is Employee entitled to low back medical treatment?

If Employee's claim had not been barred under AS 23.30.100 for failure to file a timely report of injury, the presumption of compensability would be applied to his low back medical treatment claim. AS 23.30.120. Employee attached the presumption of compensability with Dr. Bursell's opinion Employee's work injury caused his need for low back medical treatment. Employer rebutted the presumption with Drs. Cleary, Brigham and Goler's opinions, who opined no work injury caused any need for low back medical treatment. The presumption drops out and Employee must prove his October 2011 work injury is the substantial cause of his need for low back medical treatment by a preponderance of the evidence.

In contrast to Employee's historical account of his treatment history, the medical records reflect Employee had low back symptoms prior to his work with Employer and also while working for Employer, but from non-work related events. On March 26, 1994, Employee injured his low back while working for a different employer, sought medical treatment at Bartlett Hospital and was restricted from working for seven days. In February and May 2000, Dr. Shepro treated Employee's low back and restricted Employee from working. Although in May 2002, Employee sought low back medical treatment after he hurt his back participating in a medical training class while working for Employer, on January 14, 2009, Employee again sought low back medical treatment because he had injured his back moving furniture. Dr. Gundelfinger restricted Employee from working for approximately four weeks. Employee sought low back medical treatment again on February 17, 2010, August 3, 2011, and September 27, 2011.

Although Employee testified he had injured himself multiple times over the years running "muckers" in the same way he had in October 2011, Employee is a very poor historian and his statements are not reliable. He told Employer in January 2012, that in January 2009, he injured his low back running a mucker and stated his back started bothering him again in October 2011, but he did not remember what he had done to make it start hurting again. Employee denied having any back pain prior to January 2009 and denied any non-work related back injuries. In

September 2011, he reported having low back pain for years and stated he "hurts every day." On October 26, 2011, he reported back pain unassociated with any injury and stated he was unsure what was causing his back pain. On November 1, 2011, he again stated his back pain was unassociated with any specific injury. Then on December 5, 2011, he told Employer he had a work injury which had occurred three to four years ago, while on December 13, 2011 he stated he had injured his back on September 25, 2011. On January 3, 2012, he reported he injured his back three years previously and stated the pain gradually went away until this year when the pain gradually got worse. Then on January 30, 2012, Employee told Dr. Bursell his recent onset of low back pain began in October 2011, after being slammed down into his seat while operating a mucker. In February 2012, he told Dr. Bozarth his low back pain began two years previously when he injured his low back operating a mucker and then reinjured it in October 2011 the same way. At hearing he stated he was injured while operating a mucker in 2000 and again on October 22, 2011, but not in 2009. His testimony is inconsistent and contradictory, and consequently is given very little weight. AS 23.30.122. The medical records show Employee had low back pain both prior to and after October 2011. Employee did not relate this back pain to any mucker-related injury until December 2011, and even then his statements varied considerably. Employee's testimony he had a mucker-related injury in September or October 2011, or at any time while working for Employer, is not credible. Employee did not have a mucker-related work injury in September or October 2011, or at any time while working for Employer. AS 23.30.122.

Dr. Bursell testified his opinion was based on the history Employee had provided regarding past injuries, specifically Employee's lack of any prior, significant, non-work related back injuries. He opined Employee's work activities made his sacroiliac joint symptomatic, and because of these symptoms Employee could not continue to be a miner. Dr. Bursell acknowledged if Employee had a history of prior lumbosacral sprains, this could be a contributing factor in current sacroiliac joint pain if the strains were significant, for example, if it put Employee out of work for a number of weeks. Dr. Levine opined Employee had no work-related disability but incurred some work-related need for low back medical treatment. His opinion was also based on an inaccurate injury history. Nothing in the record evidences Dr. Bursell was aware Employee had a history of low back complaints and symptoms, including a significant non-work related

low back injury in 2009 which put Employee out of work for approximately four weeks. Drs. Bursell and Levine were also unaware Employee did not have mucker-related work injuries. Their opinions are based on an inaccurate injury history. This inaccuracy is significant because these doctors based their opinions on Employee's lack of prior, significant, non-work related low back problems and a mucker-related work injury in the fall of 2011. Consequently, Drs. Bursell and Levine opinions are given less weight on this issue. AS 23.30.122.

In contrast, Drs. Cleary, Brigham and Goler's opinions were based on an accurate understanding of Employee's low back injury history. Drs. Cleary, Brigham and Goler are credible in their opinions based on their thorough analysis of Employee's medical records and detailed explanation of their opinions, and present strong and persuasive evidence Employee's symptoms and need for low back medical treatment are due to Employee's morbid obesity and the natural progression of Employee's preexisting lumbar spine degenerative disc and joint disease. Drs. Cleary, Brigham and Goler's opinions are credible evidence Employee's September or October 2011 employment with Employer was not the substantial cause of Employee's need for low back medical treatment, including treatment for any sacroiliac joint dysfunction.

A review of the entire record evidences Employee did not have a work injury in September or October 2011, or any mucker-related injury at any time while working for Employer. Consequently, such a work injury is not the substantial cause, or even a cause, of Employee's need for low back medical treatment, including sacroiliac joint dysfunction. The substantial cause of Employee's current and continuing need for low back medical treatment is Employee's obesity and non-work related natural progression of Employee's preexisting conditions. Accordingly, Employee's claim for ongoing low back medical treatment, including treatment for sacroiliac joint dysfunction, will be denied.

4) Is Employee entitled to TTD benefits?

Employee failed to meet his burden of proving his ongoing complaints and symptoms are work-related. Employee did not suffer a September or October 2011 work injury or any other mucker-related work injury while working for Employer. Therefore, such an injury is not the substantial cause of Employee's disability. The non-work related natural progression of Employee's

preexisting low back condition and morbid obesity is the substantial cause of Employee's past and ongoing disability. The foundation for Employee's TTD claim was the work-relatedness of his conditions and symptoms. In the absence of adequate proof of work-relatedness as discussed above in section three, Employee is not entitled to TTD.

CONCLUSIONS OF LAW

1) A new SIME neurosurgeon will not be assigned in this case to replace Dr. Cleary.
2) Employee's claims will be barred for failure to file a timely report of injury.
3) Employee is not entitled to low back medical treatment, including treatment for sacroiliac joint dysfunction.
4) Employee is not entitled to TTD benefits.

ORDER

1) Employer's request for assignment of a new SIME neurosurgeon in this case to replace Dr. Cleary is denied.
2) Employee's claims are barred for failure to file a timely report of injury.
3) Employee's claim for low back medical treatment is denied.
4) Employee's claim for TTD benefits is denied.

Dated in Juneau, Alaska on November 15, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____
Marie Y. Marx, Designated Chair

_____
Bradley S. Austin, Member

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Charles M. Collins, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the

board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of DON E. DAVIS, employee / claimant; v. HECLA GREENS CREEK MINING CO., employer; ZURICH AMERICAN INSURANCE CO., insurer / defendants; Case No. 201118486; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties on November 15, 2013.

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Sue Reishus-O'Brien, Workers' Compensation Officer