ALASKA WORKERS' COMPENSATION BOARD

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

ZORISLAV M. STOJANOVICH,	)	FINAL DECISION AND ORDER
	)	
Employee,	)	AWCB Case No. 201004694
Applicant,	)	
	)	AWCB Decision No. 13-0157
v.	)	
	)	Filed with AWCB Fairbanks, Alaska
NANA REGIONAL CORP., INC.,	)	on December 2, 2013
	)	
Employer,	)	
and	)	
	)	
ACE AMERICAN INSURANCE CO.,	)	
	)	
Insurer,	)	
Defendants.	)	
	)	

Zorislav Stojanovich's (Employee) claim his injury arose out of and in the course of his employment with NANA Regional Corporation, Inc., (Employer) was heard on September 19, 2013, in Fairbanks, Alaska. The hearing date was selected on May 13, 2013. Employee appeared in person, represented himself and testified. Robert Bredesen represented Employer and its insurer Ace American Insurance Co. Debbie Stojanovich, Employee's wife, testified in person. The record was held open to allow Employee to submit a written statement by Mark LaPlume and for the panel members to review the video depositions of Mark LaPlume, Roberta Richardson and David Grinde. The record closed when the panel next met and deliberated, on November 1, 2013.

ISSUE

Employee contends he suffered an acute injury to his hip while working as a kitchen helper for Employer, and this injury subsequently affected his neck and back. Employee relies on the opinion of his treating physician Douglas Prevost, MD, who opined Employee's March 23, 2010 injury is the substantial cause of his disability and need for medical treatment for his hip.

Employer contends Employee has a significant history of drug-seeking behavior and dishonesty, and is not a credible witness. Employer seeks an order finding Employee's disability and need for medical treatment for any allegedly injured body part did not arise out of and in the course of his employment with Employer and denying Employee's three workers' compensation claims.

Did Employee's disability or need for medical treatment for any body part arise out of and in the course of his employment with Employer?

FINDINGS OF FACT

All findings of fact in *Stojanovich v. NANA Regional Corporation*, AWCB Decision No. 11-0019 (February 22, 2011)(*Stojanovich I*), AWCB Decision No. 12-0188 (October 31, 2012)(*Stojanovich II*), AWCB Decision No. 13-0008 (January 17, 2013)(*Stojanovich III*), and *Stojanovich v. NANA Regional Corporation,* AWCB Decision No. 13-087 (July 25, 2013)(*Stojanovich IV*), are incorporated herein. The following facts and factual conclusions are reiterated from *Stojanovich I, Stojanovich II, Stojanovich III,* or *Stojanovich IV* or established by a preponderance of the evidence:

1) For several years prior to the alleged work injury, Employee treated with Brent Ursel, PA-C, and Robert Reeg, MD, for chronic lower back pain. Beginning in 2006, Employee obtained prescriptions for narcotic pain medication from both PA Ursel and Dr. Reeg simultaneously and had them filled at different pharmacies. Neither PA Ursel nor Dr. Reeg was aware Employee was obtaining narcotics from more than one source. (*See generally,* PA Ursel reports, Dr. Reeg reports, pharmacy records; depositions of PA Ursel and Dr. Reeg, taken May 11, 2012).

2) On July 19, 2009, Employee presented at the Providence Seward Medical Center emergency department complaining of heart palpitations. He was diagnosed with recurrent atrial fibrillation. As part of the routine diagnostic procedure, Employee underwent a urine toxicology screen.

Despite concurrent narcotic prescriptions provided by PA Ursel and Dr. Reeg, Employee's toxicology results were negative for opiates. (Providence ER records, July 19, 2009).

3) On January 18, 2010, at Employee's request, Dr. Reeg wrote a "To Whom It May Concern" letter:

> I am Zorislav Stojanovich's primary care provider. I have reviewed the letter from NMS dated January 14, 2010, in regard to the job description for remote kitchen helper.
>
> Based upon the information that I have available and from my interactions with the patient, I do believe that Mr. Stojanovich can perform the requirements of the job without presenting a health or safety risk to himself or anyone else.

(Dr. Reeg letter, January 18, 2010).

4) On January 20, 2010, Dr. Reeg reported:

> Patient is a 54 year-old male here to pick up the letter I wrote stating that it would be acceptable to perform a job for which he has applied. He also requests additional opiate prescription as he states that apparently the previous prescription was written for one OxyContin b.i.d. instead of two b.i.d.
>
> Approximately one week ago, I was contacted by Costco Pharmacy reporting some irregularities in patient filling his medications. He had filled a week's supply of his OxyContin four different times within a 12-day period. This prompted a call from Costco Pharmacy. I initially had been under the impression that patient's prescriptions were filled by Purdue. I had thought that he was getting prescription assistance from Pardue (sic) and had to get his medications there. It came to my attention that patient was seeing Brent Ursel, physician's assistant in town, and getting a monthly supply of Vicodin in addition to having OxyContin and Percocet prescribed by me, so this is a clear violation of his pain contract.
>
> Patient initially denied that he had gotten prescriptions filled at Costco. It is still not clear to me what the role of Purdue Pharmaceuticals has been in filling his prescriptions as it appears that his prescriptions have been filled at Costco. Nonetheless, I had a frank discussion with the patient, stating that his filling opiate prescriptions at two different providers is a clear violation of his pain contract. I will discuss that I will no longer provide opiates for chronic management of his pain. I have asked the Medical Assistant to contact Purdue Pharmaceuticals tomorrow to get further information as to what exactly has been dispensed from them.

(Dr. Reeg report, January 20, 2010).

5) On January 21, 2010, at Employee's request, Dr. Reeg prescribed a tapering schedule, to limit the discomfort of opiate withdrawal. (Dr. Reeg note, January 21, 2010).

6) On March 23, 2010, Employee alleges he "turned quickly to the right and felt a sharp pain in his right hip, felt something pop inside his hip" while working for Employer. (Report of Occupational Injury or Illness, April 4, 2010).

7) On March 23, 2010, Employee saw Employer's on-site medic, Jose Diaz, PA. Employee described his injury as "twisted my body to the right and hurt my hip and behind the butt." Employee indicated the injury occurred at 4:00 am. PA Diaz diagnosed right hip pain and recommended over-the-counter pain medications. (PA Diaz Medical Record of Injury, March 23, 2010).

8) Later in the day on March 23, 2010, Employee returned to the on-site medical clinic, where he was diagnosed with "hip pain – probably exacerbation [of] prior personal condition" and received acupuncture treatment. (Medical Record of Injury, provider signature illegible, March 23, 2010).

9) On March 24, 2010, Employee was sent home for additional treatment. (Medical Record of Injury, provider signature illegible, March 24, 2010).

10) On April 2, 2010, Employee saw Brent Ursel, PA, complaining of right hip pain. Employee reported he "was at work on March 23rd. He was standing at his station. He went to turn, and heard a click in his right hip. He had immediate pain." PA Ursel noted Employee walked with a limp and had difficulty rising from a chair. X-rays taken that day were negative for fracture or dislocation. PA Ursel referred Employee to Richard Garner, MD, an orthopedist and excused Employee from work until April 15, 2010. (PA Ursel report, April 2, 2010).

11) On April 19, 2010, Employee saw Dr. Garner. Employee reported he "was working on the North Slope at a kitchen counter, when he turned suddenly to the right and had immediate sharp, stabbing pain in the anterior right hip." The nurse's notes from that visit indicate Employee "thinks [he] twisted not sure if had foot planted." Dr. Garner ordered an MRI and diagnosed a probable labral tear. He noted, "It was my comment to the patient that his medication should be more than adequate, and I specifically declined to order him anything additional, nor would I go so far as to use the fentanyl patch, were that my decision." (Dr. Garner report, April 19, 2010).

12) On April 22, 2010, Employee underwent a hip MRI, which revealed subchondral cysts, labral tear, and early degenerative changes in the articular surface of the femoral head. (University Imaging Center Report, April 22, 2010).

13) On April 22, 2010, Employee followed up with Dr. Garner, who diagnosed a labral tear, probably acute, in the right hip superimposed on a moderate degree of osteoarthritis. Employee described his pain as "unrelenting," and he walked with a "markedly antalgic gait on the right." Dr. Garner prescribed Percocet for pain, but noted Employee was already on a fentanyl patch with Norco for breakthrough pain, as prescribed by PA Ursel, and "I informed him quite adamantly that I am not willing to be a source for this strength and level of pain medication on a regular basis." Dr. Garner recommended Employee undergo a total hip replacement. (Dr. Garner report, April 22, 2010).

14) On May 3, 2010, Employee sought a second opinion with Gregory Schumacher, MD. Dr. Schumacher noted Employee "was injured at work developing hip pain while working as a cook. MRI is consistent with a labral tear with some arthritis. He is complaining of acute anterior hip pain that came on out of the blue without any prodromal symptoms and certainly no great history of hip pain." Dr. Schumacher recommended physical therapy and possible arthroscopic surgery. (Dr. Schumacher report, May 3, 2010).

15) On May 11, 2010, Employee saw Tina McLean, PT, for physical therapy services. Employee reported "he was working at counter height when he went to turn and reach or place something behind him to his right. Apparently his right leg was planted on the floor when he felt a 'popping' in the right hip with immediate pain which worsened over the next several days." Employee rated his pain an "8" out of a possible "10," with "0" being no pain and "10" being the worst pain ever. (PT McLean report, May 11, 2010).

16) On May 12, 2010, Employee saw pain management specialist Alfred Lonser, MD. Employee reported "twisted my hip to the right saddenly (sic) at work." Dr. Lonser noted "[o]n reviewing the records, there is some mention regarding him being fired from his previous physician for filling multiple prescriptions of OxyContin. The patient disagrees with this stating that all of the prescriptions he was given were received from his pain specialist and if he filled multiple prescriptions, it was only because he was given multiple prescriptions." (Dr. Lonser report, May 12, 2010).

17) On June 15, 2010, John Swanson, MD, performed an employer's medical evaluation (EME). Dr. Swanson reviewed the medical records available to Employer at the time. Dr. Swanson diagnosed preexisting osteoarthritis of the right hip; possible exacerbation of symptoms due to preexisting osteoarthritis; preexisting physical dependence and possible psychological addition to

narcotics; preexisting pain medication seeking behavior; possible malingering; and behavioral signs with possible secondary gain. He opined no injury occurred at work and any need for treatment was due to Employee's preexisting osteoarthritis. (Dr. Swanson EME report, June 15, 2010).

18) On June 27, 2010, Dr. Swanson issued an addendum report, after reviewing surveillance footage of Employee taken May 7-8, 2010.

> When I saw this examinee on 06/15/10, he indicated that he could walk no more than half a block. He reported that he had to use a cane full-time in his right hand. He reported that he could stand in one spot only for two minutes. He reported difficulty getting in and out of a car. He reported that his wife had to carry the groceries. During the physical examination, the examinee used a cane in his right hand full-time. He asked his wife to help him arise from a chair as he indicated that he could not do this by himself. He had a right leg antalgic gait. The examinee did not use external support, did not limp, walked significant distances, freely entered and exited a car by himself, and stood for a significant time on the surveillance CD.
>
> The difference in the examinee's reported level of function during the history and his observed function during the physical examination on 06/16/10 versus the function observed during the surveillance CD on 05/07/10 and 05/08/10 fits the *AMA Guides to the Evaluation of Permanent Impairment* definition of malingering. Malingering is defined by the *AMA Guides* as a conscious deception for the purpose of gain." Confirmation of malingering is extremely difficult and generally depends on intentional or inadvertent surveillance. In this examinee's case, intentional surveillance demonstrates an examinee who far exceeds his reported and demonstrated function during the history and physical examination on 06/15/10, indicating malingering, which is not a disease but a volitional deception and requires no treatment.

Dr. Swanson revised his prior diagnosis of possible malingering to malingering. (Dr. Swanson addendum EME report, June 27, 2010).

19) On July 7, 2010, Employee underwent a routine urine toxicology screening. The toxicology report was negative for OxyContin and positive for morphine. At the time, Dr. Lonser was prescribing 80 milligrams of OxyContin twice per day and was not prescribing Employee morphine. Dr. Lonser testified he would have expected the OxyContin test to be positive. (Quest Diagnostics Report, July 16, 2010; Dr. Lonser deposition, September 14, 2012, at 11).

20) On July 26, 2010, Employer filed a controversion notice denying all benefits, stating "[t]he work incident of 03/23/10 was not the substantial cause of any injury, and the employee is otherwise malingering." (Controversion Notice, July 23, 2010).

21) On September 10, 2010, Employee filed a claim seeking temporary total disability (TTD), medical costs, transportation costs, a second independent medical evaluation (SIME), permanent partial impairment (PPI), and a finding of unfair or frivolous controversion. Employee described the injury: “I suddenly turned to the right and felt big pop and great amount of pain in my right hip. Later I found out that I suffered labral tear in my right hip.” In a separate, attached letter, Employee alleged Employer’s July 23, 2010 controversion was unfair, frivolous and “based on lies” by Employer’s medical evaluator John Swanson, M.D., who portrayed him as a “[p]sycho, liar and a person who is malingering.” (Claim, September 8, 2010; *see also* attached letter, undated, with “continued” explanation from block 17 on the claim).

22) On September 20, 2010, Gary Olbrich, MD, completed a records review EME. Dr. Olbrich, a specialist in addiction medicine and pain management, concurred with Dr. Swanson’s EME report and addendum, and further diagnosed opioid dependence and opined Employee was malingering. (Dr. Olbrich EME report, September 20, 2010).

23) On September 30, 2010, Employer filed an answer to Employee’s claim, and denied all benefits. Employer asserted various defenses including that the work injury was not the substantial cause of any injury, Employee was malingering, and Employer’s controversion was not unfair or frivolous, as it was supported by Dr. Swanson’s report. (Answer, September 28, 2010).

24) On September 30, 2010, Employer filed a controversion notice denying all benefits, stating “[t]he work incident of 03/23/10 was not the substantial cause of any injury, and the employee is otherwise malingering.” (Controversion Notice, September 28, 2010).

25) On October 25, 2010, Employer took Employee’s deposition. Employee described the March 23, 2010 injury:

> A. … And, like I said, I was facing the wall. And then suddenly, you know, because you have to work fast over there. So that’s how I do it. And I went like this, you know, to the right, turned to the right, you know what I’m saying? And I’m not sure if that floor contributed or not, you know what I’m saying to – that I twisted my – I twisted my body, you know what I’m saying, to the right. And I mean, right then, you know, I felt, you know, horrific pain, you know what I’m saying, right in the front of my hip.
>
> Q. Okay. Let me break this down, get a little more detail. Were you holding anything when you felt the pain?
>
> A. I don’t believe so. I don’t believe so, because I turned – I was going to grab something from that – you know what I’m saying, go back here. But then I

remember or somebody called me, I'm not sure, because I said my line of touch was broken because of what happened, you know what I'm saying, so I really don't remember.

Q. Were your feet planted? Did you actually – or did you just rotate or did you move your feet?

A. Well, I did move my feet, I believe, to the right, you know what I'm saying? A least the right leg, you know what I'm saying, to the right. And like I said, you know, I think that my leg went like this, you know what I'm saying, towards standing up. I never fell, you know. And when I made the movement, you know what I'm saying, and I felt horrific pain, so …

Q. And how was this movement any different than any other time you would have turned to the right, or was it the same?

A. I'm not sure. I don't know. What I'm saying is movement was probably the same, but what I'm saying, what affected, I don't know if I -- if I slipped with my leg, you know, with my foot or not, you know what I'm saying? Something did happen, so I don't know.

(Employee deposition, October 25, 2010, at 64-66).

26) On November 21, 2011, Dr. Prevost wrote a "To Whom It May Concern" letter, opining Employee's March 23, 2010 incident at work is the substantial cause of his disability and need for medical treatment.

> Mr. Stojanovich has been evaluated for complaints related to his right hip that began on March 23, 2010, when he injured his right hip while he was working as a cook. The patient has had severe pain in his right hip since that time and has been using a cane since May 12, 2010, due to the severity of pain he is experiencing. The patient has been having 10/10 pain in severity and he has been limping due to the severity of his pain. He is also not sleeping well at night. His workup has revealed clear evidence for femoral-acetabular impingement and a labral tear. Additionally, his radiographs show evidence for a cystic change in the superior lateral aspect of his hip and early joint space narrowing. In the history that the patient reported to me, he denied any pain whatsoever in his right hip prior to his injury at work.
>
> …
>
> My distinct impression of Mr. Stojanovich is that he is not malingering and that his pain is substantial. Mr. Stojanovich clearly does have evidence for osteoarthritis involving his hip, which generally does cause severe pain even at early stages. Examination of Mr. Stojanovich's hip does reveal a decrease in range of motion and significant pain on range of motion testing. His examination is classic for someone with osteoarthritis of the hip and significant pain associated with arthritis of his hip. I

> have found nothing whatsoever about Mr. Stojanovich's complaints or his history that would even remotely suggest malingering.
>
> …
>
> Based on the history provided to me, I do feel that Mr. Stojanovich's work injury on March 23, 2010, is the substantial cause for him developing hip pain. The patient denies any history of previous problems with his right hip whatsoever prior to that event. The patient has gone on to show evidence for the development of arthritis since this initial injury. It is my belief that the patient sustained a labral tear from the twisting event and that he may also have sustained some chondral injury at that time as well.

(Dr. Prevost letter, November 21, 2011).

27) On May 11, 2012, Employer took PA Ursel's deposition. PA Ursel testified Employee had not disclosed to him he was receiving narcotic pain medication through Dr. Reeg at Providence Seward Medical Center and that PA Ursel continued to prescribe a "fairly high dose" of hydrocodone to Employee throughout 2007, 2008 and 2009. PA Ursel first learned Employee was receiving narcotics from another physician in January 2010.

> A. We received a phone call from Costco pharmacy in Anchorage stating that he was receiving narcotics from myself and another provider.
>
> Q. And so what did you do at that point?
>
> A. Well, at that time I told him that we needed to, you know – that this wasn't – that this wasn't good; that, you know, that he was to receive narcotics from only one, you know, provider; that this was – this was not a good thing that he was receiving narcotic medications from two physicians and wasn't notifying either of us that the other one was prescribing.
>
> …
>
> Q. And have you had any further contact with Mr. Stojanovich since you last treated him or met with him on June 24, 2010?
>
> A. That was my last encounter with him.
>
> Q. How about outside the clinical setting; have you had any interactions with him or seen him?
>
> A. I have seen him driving around town. I have seen him at the local grocery store.
>
> Q. Do you recall when you saw him last?

A. I saw him driving in his vehicle this week, I believe it was, and within the last two weeks or so at Safeway.

Q. When you saw him at Safeway, was he walking around at all?

A. Yes, he was walking.

Q. And did he appear to have any difficulties walking?

A. No, he did not.

Q. Did he have a cane?

A. I don't recall if he was carrying a cane or not.

Q. Have you ever seen him outside of your office presenting in the way that he presented to you in your office, the slow, guarded gait sort of presentation?

A. I have seen him in various presentations around town. I don't think anything quite as memorable as how he presented in the clinic.

Q. Do you ever form opinions as to whether or not somebody requires a surgery or not, such as a hip replacement surgery?

A. Yes.

Q. And when you have seen him, particularly recently, walking, did you see any indications for a right hip replacement surgery, if you can answer?

A. Did I see, you know, any indications? Possibly. Was my impression that this was a man who needed a total hip replacement? No.

…

Q. And when you saw him using a cane, I'm not quite sure how to approach this, but I guess in chronic pain situations, there are times when people show up with props. Is that fair to say?

A. That's fair to say.

Q. And is it easy to tell when they are bringing you a prop as opposed to using a device because they actually need it?

A. It depends upon – it depends upon the person. Over the years of, you know, practice, my being burned several times by patients, I like to think that I'm reasonably astute at trying to ferret out those that are attempting to –

attempting to seek, for whatever reason, I can't say that I am a hundred percent, you know, at it, and occasionally people do, you know, are successful in presenting with other than their condition….

Q. When you have seen Mr. Stojanovich with a cane, did you ever form an impression either way as to whether he seemed to be using the cane for good cause or was he was using it at as a prop?

A. My casual observations of Mr. Stojanovich and his use of the cane was that he was not using it as an assistive device as it was intended.

(PA Ursel deposition, May 11, 2012, at 10-15, 25-26, 28-29).

28) On May 11, 2012, Employer took Dr. Reeg's deposition. Dr. Reeg testified when he first began treating Employee he had him sign a pain contract, in which Employee agreed to only receive narcotic medication from one source and to take his medication as prescribed. Dr. Reeg testified Employee did not disclose to him he was treating with PA Ursel and receiving narcotics through him.

Q. At what point do you recall learning about the involvement of Mr. Ursel, the physician's assistant?

A. I received a phone call from the pharmacy in Anchorage about some irregularities in his prescription, and so I spoke with that pharmacist, and he then informed me by faxing me a report of all the medications that he had received by different providers, and I reviewed it and I saw that he had been receiving medications from Mr. Ursel.

Q. And so what did you do in response to that?

A. At the next visit with Mr. Stojanovich, I declined to prescribe any further medications – any opiate medications.

…

A. Mr. Stojanovich was apologetic and respectful. He had understood that the irregularities were against what our agreement was, and yeah, it was fairly uneventful.

…

Q. When you initially terminated his narcotics prescription, I understand you didn't initially provide a tapering schedule.

A. Uh-huh.

Q. What sort of withdrawal symptoms would you normally expect someone to have given the medications he was on at the time?

A. Nausea, vomiting, abdominal pain, sweating, agitation, anxiety.

…

Q. What outward signs – let's say a coworker, what sorts of things might they observe?

A. Those same symptoms.

(Dr. Reeg deposition, 21-23).

29) On July 17, 2012, Employer took Dr. Prevost's deposition. Until that time, Dr. Prevost had been unaware Employee had received narcotic pain medications on a regular basis prior to his treatment with him. He was also unaware he had been fired for pain contract violations by another medical provider.

Q. … Is there anything in the [April 22, 2010 MRI report] which indicates that any of the abnormalities are acute?

A. Well, the report says that there are two, possibly three small subchondral cysts. Those are the cysts that we've referred to in the bone. Those are not acute; those are chronic in nature.

They do comment that there's a tear in the labrum. And that seems to communicate with these cysts. And the labral tear, it's difficult to determine age of that based on an MRI, but a labral tear could be an acute finding.

They do also say they see some early degenerative change in the cartilage surface of the femoral head, which would not be an acute finding; although, there can be cartilage injury to a joint that occurs from an injury that you may not – that can be acute that you wouldn't necessarily see on an MRI.

So, in a joint that – for instance in this situation, where the joint's not entirely healthy, you can damage the cartilage further from some new injury, and it would be difficult to differentiate and identify that on a – on an MRI what's new and what's old.

Q. Okay. Is it fair to say that the only way you can tell whether any of that is acute or not is based more on the symptom history provided to you, rather than what you actually see on the study?

A. That's correct.

…

Q. You say . . . you do feel that Mr. Stojanovich's work injury, on March 23, 2010, is the substantial cause for him developing hip pain. I take it that is based entirely on the history he gave to you?

A. It is.

Q. And I note that the letter does not go on to say that you believe the work incident is the substantial cause of the need for hip replacement surgery. Correct?

A. It does not say that.

Q. Do you have an opinion on that point?

A. Well, I always hate answering that question.

Q. I always hate asking it.

A. Very, very difficult. I mean, it's – you know, the – he had no symptoms before the injury; he had symptoms that started at the time of the injury, and he's had symptoms ever since then. So my feeling on it is that the substantial reason why he's coming in to see me and why we're considering a hip replacement is because he had that injury occur.

So the question is, if he had never had that injury, would he be in to see me for his hip. And the assumption is, not as immediately, not right away. At some point, based on his x-rays, he would have been in to see me. But at – you know, in the immediacy that I'm seeing him, right then and there and why we're getting ready to talk about hip replacement, my feeling is that we would not be there had he not had that injury happen right then.

Q. Okay. And that, again, is based entirely on his subjective reporting to you –

A. That's correct.

Q. -- and his presentation to you?

A. That's correct.

…

Q. [by Employee]

Is it possible that – I'm going to talk about the day I got injured – that I was standing towards the counter – is it possible that, you know when, I twist

sharply to the right – I'm not going to try now, because I ain't going to – I don't want to screw up my back again – or hip – what I'm saying is, the unsafe floor contributed to acceleration, or whatever – you know what I'm saying? – how I turned and stuff like that, if the floor was slick?

A. Well, if there was slipping, in addition to a twisting, you know, that should – that could really dramatically increase the force that the cartilage would see or the labrum would see.

Q. That's exactly what happened.

…

Q. [by Mr. Bredesen]

You asked him before what happened on the date of injury, correct?

A. I did.

Q. Did he mention any slipping?

A. I didn't record any of that in the chart. I remember mostly a twisting event that was described to me.

Q. And if he had mentioned a slip, in addition to the twist, would you likely have recorded that?

A. Probably.

(Dr. Prevost deposition, July 17, 2012).

30) On October 15, 2012, Employee underwent a hip MRI, which revealed an extensive labral tear and subchondral cysts, both larger than on the previous MRI. (University Imaging Center Report, October 15, 2012).

31) On December 13, 2012, Employee filed a second workers' compensation claim, alleging he injured his left hip on March 23, 2010 while working for Employer, and seeking a compensation rate adjustment. (Employee's claim, December 11, 2012).

32) On April 15, 2013, Employee filed a third workers' compensation claim, alleging he suffered a "right hip labral tear from a slip and twist on known unsafe floors that were never treated" on March 23, 2013, and stating "now I have neck and back injuries from the slip and twist hip injury." Employee sought permanent and total disability (PTD) benefits, medical and transportation costs, penalty and interest. (Employee's claim, April 10, 2013).

33) On August 5, 2013, Dr. Swanson performed a second EME. He reiterated his opinion Employee was magnifying his symptoms for secondary gain and engaging in drug seeking behavior. (Dr. Swanson EME report, August 5, 2013).

34) On September 9, 2013, Employer took Roberta Richardson's video deposition. Ms. Richardson was the human resources business partner for camp services for Employer. She credibly testified Employee had received a poor performance evaluation and the Slope operations manager and head chef were in the process of counseling Employee on performance issues when, on March 7, 2010, he lodged a formal complaint of sexual harassment by a supervisor. Ms. Richardson investigated the allegation, and "we weren't able to substantiate it or unsubstantiate it." The supervisor did not respond to inquiries and did not return to his job post. He was terminated for job abandonment. Because the source of the alleged harassment was no longer in the workplace, Ms. Richardson considered the situation remedied. On April 8, 2010, about three weeks after the alleged work injury, Ms. Richardson and Employee attended an in-person meeting to further discuss the harassment complaint. Employee suggested "it would be better for all parties involved if he were instead transferred to a remote security position," for which he was unqualified and paid more than double what the kitchen helper position paid. Ms. Richardson testified Employee appeared as "somebody that was in pain walking down the hallway trying to, you know, take their time and not rush themselves." When she later reviewed surveillance footage of Employee taken on May 7-8, 2010, she described Employee as a "[d]ifferent person. Not limping, not slow, not sore. Just fine." (Roberta Richardson deposition, September 9, 2013).

35) On September 9, 2013, Employer took David Grinde's video deposition. Mr. Grinde is the director of operations for NANA Management Services, a subsidiary of NANA Regional Corporation. He testified sometime in 2009 employees began filing a series of "near-miss reports," reporting kitchen floor slipping incidents that did not result in injuries. The issue was raised at numerous safety meetings, and in November 2009 the kitchen floor was replaced. Unfortunately, the new floor was not much improved from the old one, and employees continued to complain the floor was slippery. At a December 28, 2009 safety meeting, "we realized we still had a problem with the floor, so we just upped an awareness campaign, just trying to remind people on a daily basis we still got a slippery floor here, you know, just pay attention, and you know, manage that risk. Put out wet floor signs and, you know, asked our chefs to really elevate awareness on a continual basis around that exposure." Despite the increased caution, employees continued to file

near-miss reports, and the safety team decided to lay temporary carpet runners throughout the server and kitchen area, anywhere "people were likely to place their feet." Carpets were in place in all locations by February 28, 2010. No near-miss reports were filed after that time. On May 15, 2010, the floor was treated with a permanent sand application, which was "ugly," "but it worked." Mr. Grinde is not aware of any slipping incidents since the temporary carpets were placed in the kitchen and serving area. (David Grinde deposition, September 19, 2013).

36) Employee testified sometime between 3:00 and 4:00 am on March 23, 2010, he "made a sudden turn, felt a pop, heard a pop, felt pain and screamed." The injury was not witnessed. He described it as a "sharp, stabbing pain." Employee contends the kitchen floor was slippery. He "cannot say 100% I slipped, but something did happen to my body to extend my leg." He told Megan Imhoff, his supervisor, he had been injured, and she asked if he needed an ambulance, but he declined. At about 5:00 or 6:00 am, Mark LaPlume arrived for his shift and sent him to the clinic to be evaluated. He flew back to Seward the next day. (Employee).

37) When asked if he underwent a urinalysis to test for narcotics in his system at the time he was admitted to the hospital experiencing atrial fibrillation, Employee responded, "I don't remember." When asked if ten days prior to his hospital admission he had filled a prescription for 180 hydrocodone pills, he responded, "I don't remember." When asked about why the toxicology screens showed no traces of narcotics in his body during the period he was being prescribed high doses of hydrocodone, Employee testified the report was "in error." Employee admitted he obtained narcotics from two different doctors without their knowledge, and stated, "Did I make a mistake? Yes. But it is irrelevant. That is between me and my doctor only." When asked why a drug test performed in July 2010 by Dr. Lonser showed morphine in his system, but not the drug Dr. Lonser had prescribed him, Employee testified it was a "typo mistake." (*Id.*).

38) Debbie Stojanovich credibly testified she and Employee have been married for 19 years. Ms. Stojanovich describes her husband as an "honest person." She testified Employee did not have any hip injury before he went to work on the North Slope. His hip has slowly deteriorated to the point he is in constant pain and cannot drive. (Debbie Stojanovich).

39) Employee is not credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above).

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. . . .

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. 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.
>
> **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. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. 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….

Under the Act, an employer shall furnish an employee injured at work any medical treatment "which the nature of the injury or process of recovery requires" within the first two years of the injury. The medical treatment must be "reasonable and necessitated" by the work-related injury. Thus, when the board reviews an injured employee's claim for medical treatment made within two years of an indisputably work-related injury, "its review is limited to whether the treatment sought is reasonable and necessary." *Philip Weidner & Associates v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999).

AS 23.30.095(a) requires employers to pay for treatment necessitated by the nature of injury or the process of recovery up to two years after the injury date. After two years the board may authorize treatment necessary for the process of recovery or to prevent disability. In *Hibdon*, the Alaska Supreme Court noted "when the Board reviews a claim for continued treatment beyond two years from the date of injury, it has discretion to authorize 'indicated' medical treatment 'as the process of recovery may require.'" *Id.*, *citing Municipality of Anchorage v. Carter*, 818 P.2d 661, 664 (Alaska 1991). "If the treatment is necessary to prevent the deterioration of the patient's condition and allow his continuing employment, it is compensable within the meaning of the statute." *Leen v. R.J. Reynolds, Inc.,* AWCB Decision No. 98-0243 (September 23, 1998); *Wild v. Cook Inlet Pipeline*, 3AN-80-8083 (Alaska Super. Ct. Jan. 17, 1983); *see accord Dorman v. State*, 3AN-83-551 at 9 (Alaska Super. Ct., February 22, 1984).

> **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.
>
> (2) notice of the claim has been given;

Under AS 23.30.120, an injured worker is afforded a presumption the benefits he or she seeks are compensable. The Alaska Supreme Court held the presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, and applies to claims for medical benefits and continuing care. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279

(Alaska 1996); *Carter*, 818 P.2d at 664-665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991).

Application of the presumption to determine compensability of a claim for benefits involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, the claimant must adduce "some" "minimal," relevant evidence establishing a "preliminary link" between the disability and employment, or between a work-related injury and the existence of disability, to support the claim. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.,* 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to raise the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this stage in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989). If there is such relevant evidence at this threshold step, the presumption attaches to the claim. If the presumption is raised and not rebutted, the claimant need produce no further evidence and the claimant prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997).

In *Runstrom v. Alaska Native Medical Center,* AWCAC Decision No. 150 (March 25, 2011), the Alaska Workers' Compensation Appeals Commission held the 2005 legislative amendment to AS 23.30.010 altered the longstanding presumption analysis: ". . . [W]e conclude that the legislature intended to modify the second and third steps of the presumption analysis by amending AS 23.30.010 as it did." *Runstrom,* AWCAC Decision No. 150, at 3. The Commission held the second stage of the presumption analysis now requires the employer

> rebut the presumption with substantial evidence that excludes any work-related factors as the substantial cause of the employee's disability, etc. In other words, if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability, etc., the presumption is rebutted. However, the alternative showing to rebut the presumption under former law, that the employer directly eliminate any

> reasonable possibility that employment was *a factor* in causing the disability, etc., is incompatible with the statutory standard for causation under AS 23.30.010(a). In effect, the employer would need to rule out employment as *a factor* in causing the disability, etc. Under the statute, employment must be more than *a factor* in terms of causation. *Id.* at 7 (emphasis in original).

"Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611 (Alaska 1999); *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978).

Since the presumption shifts only the burden of production and not the burden of persuasion, the employer's evidence is viewed in isolation, without regard to any evidence presented by the claimant. Credibility questions and weight to give the employer's evidence are deferred until after it is decided if the employer has produced a sufficient quantum of evidence to rebut the presumption the claimant is entitled to the relief sought. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051 (Alaska 1994); *Wolfer*, 693 P.2d at 869.

Runstrom held once the employer has successfully rebutted the presumption of compensability,

> [the presumption] drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable. *Id.* at 8.

In *Rockstad v. Chugach Eareckson Support Services*, AWCAC Decision No. 140 (November 5, 2010), the Appeals Commission upheld the board's denial of the employee's claim, finding the board had properly discounted the weight of the employee's treating physicians' reports, as they were based on the employee's inaccurately reported history and symptoms. The board panel had noted, "While [Employee's treating physicians] are all fine doctors in their fields and well-meaning, in this case, their opinions are no more reliable than the false or exaggerated information provided them by an untruthful reporter." (*Rockstad v. Chugach Eareckson Support Services*, AWCB Decision No. 09-0195 (December 16, 2009).

> **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.

ANALYSIS

Did Employee's disability or need for medical treatment for any body part arise out of and in the course of his employment with Employer?

The issue of whether Employee's disability and need for medical treatment arose out of and in the course of his employment with Employer is a factual issue to which the presumption of compensability applies. AS 23.30.120; *Meek*. Employee attached the presumption he was injured in the course and scope of his employment for Employer with his hearing testimony and his treating physicians' reports. Specifically, Employee testified he quickly turned to the right and experienced severe pain in his right hip while working for Employer on March 23, 2010. PA Ursel, and Drs. Garner, Lonser and Prevost documented Employee's report he was injured at work on March 23, 2010, and diagnosed an acute right hip labral tear.

Without regard to credibility, Employer rebutted the presumption of compensability with the reports of Drs. Swanson's and Olbrich's reports. Specifically, Dr. Swanson opined no injury occurred at work on March 23, 2010, and therefore the substantial cause of Employee's symptoms was his preexisting osteoarthritis in the right hip. Dr. Swanson further opined Employee's subjective complaints were not substantiated by objective evidence, and Employee was magnifying his symptoms. Dr. Olbrich concurred completely with Dr. Swanson's opinion and further opined Employee suffers opioid dependence and is malingering.

The burden now shifts to Employee to prove by a preponderance of the evidence his disability and need for medical treatment for his hip arose out of and in the course of his employment with Employer. Employee relies on Dr. Prevost's November 21, 2011 opinion the March 23, 2010 incident at work is the substantial cause of his developing hip pain. Employee further relies on the opinions of PA Ursel, Dr. Garner and Dr. Lonser, all of whom classified Employee's condition as a work injury.

Employee initially described his injury to his medical providers and in his report of injury form and claim as twisting to the right and feeling pain. The first time Employee indicated he may have slipped on March 23, 2010, was at his October 25, 2010 deposition, when he indicated he might have slipped but was not sure. Later, at Dr. Prevost's July 17, 2012 deposition, Employee asked Dr. Prevost if a slippery floor could have contributed to his injury. Only after Dr. Prevost testified slipping could have dramatically increased the pressure on the hip cartilage did Employee definitively state he had slipped, saying "[t]hat's exactly what happened." In his April 10, 2013 claim, Employee described his injury as a "slip and twist on known unsafe floors that were never treated." At hearing, Employee testified he could "not say 100% percent" if he slipped.

David Grinde credibly testified the Tarmac Camp management was aware the flooring in the kitchen and serving area was slippery, as numerous near-miss reports had been filed and the issue had been raised at safety meetings. Management acted promptly to remedy the issue, replacing the floor. Unfortunately, the new flooring was also slick, and management decided to lay temporary carpets on the entire kitchen and serving area floors. Mr. Grinde testified this temporary fix was complete no later than February 28, 2010, nearly a month before Employee alleges he slipped in the kitchen. Mr. Grinde knew of no slipping incidents after that point. Employee's alleged injury was not witnessed. Employee's injury description is the only evidence it occurred, and his reports to his medical providers and testimony at deposition and hearing are not consistent.

Roberta Richardson testified she had a meeting with Employee on April 8, 2010, to discuss the outcome of Employee's sexual harassment allegation investigation. Ms. Richardson described Employee's demeanor as "somebody that was in pain." When she reviewed surveillance footage of Employee taken a month later, she described Employee as a "different person," "not limping, not slow, not sore. Just fine." On April 22, 2010, roughly two weeks before the surveillance footage was taken, Employee described his pain to Dr. Garner as "unrelenting" and walked with a "markedly antalgic gait" on the right side. On May 12, 2010, only a few days after the surveillance footage was taken, Employee described his pain to his physical therapist as "8" out of "10." Based on these inconsistencies, Dr. Swanson opined Employee magnified his pain symptoms and behavior. Dr. Olbrich concurred completely with Dr. Swanson's reports, and in addition, opined Employee suffered from opioid dependence and was malingering.

Just as Dr. Prevost and Dr. Garner had not viewed the video surveillance footage, not all of Employee's treating physicians were aware of Employee's history of pain contract violations and drug-seeking behavior. Dr. Lonser was aware Employee had been fired by a previous provider for filling multiple OxyContin prescriptions, but Employee told Dr. Lonser all prescriptions had been through his pain specialist, who had given him multiple prescriptions. Employee's treating physicians had no reason to doubt his reported symptoms, medical history, or the alleged mechanism of injury. Dr. Prevost was unaware of the pain contract violations until his deposition, and testified his opinion the alleged work injury is the substantial cause of Employee's development of hip pain is based entirely on Employee's reported symptom history. PA Ursel testified at his deposition he last treated Employee in June 2010, and since then had "seen him around town" and believed he used his cane more as a prop than as an assistive device. Dr. Lonser testified he was prescribing 80 milligrams of OxyContin twice daily and no morphine in July 2010, when a toxicology screen was negative for OxyContin and positive for morphine. He testified he would have expected the drug screen to be positive for OxyContin. Employee's explanation at hearing for the discrepancy in the toxicology results and Employee's prescription regimen – that it was a "typo mistake" – is unconvincing, especially in light of the July 2009 toxicology report, which was negative for opiates during a time Employee was receiving multiple prescriptions for narcotics from different providers. Employee's various treating physicians classify his hip condition as a work injury, but they relied on Employee's presented symptoms, reported history and alleged mechanism of injury and were unaware of his prior dishonesty.

As in *Rockstad,* Employee is not a credible witness, and providers' opinions who relied on Employee's statements in forming their conclusions are given little weight. AS 23.30.122. Only Drs. Swanson and Olbrich had the advantage of reviewing the complete medical records, including Employee's pain contract violations, toxicology inconsistencies and drug-seeking behavior. For this reason, their opinions are given considerable weight. AS 23.30.122.

As to his claims for benefits related to his back and neck, Employee raised the presumption of compensability with his testimony his back and neck were affected because of his altered gait due to the March 23, 2010 twisting injury. Employer rebutted the presumption with the reports

of Drs. Swanson and Olbrich, who opined no injury occurred on March 23, 2010 and any disability or need for medical treatment is due to Employee's preexisting osteoarthritis. At the third stage in the analysis, Employee presents no medical evidence supporting his assertion his neck and back have been affected by his altered gait. As noted above, Employee's testimony is given little weight as he is not credible. Employee's claims as they relate to his neck and back will be denied.

Employee's testimony and testimony from physicians upon whom he relies are given little weight, while Employer's medical experts' opinions are given greater weight. Accordingly, Employee failed to demonstrate by a preponderance of the evidence his hip injury arose out of and in the course of his employment with Employer or that any work injury is the substantial cause of his disability or need for medical treatment. His claims will be denied.

CONCLUSION OF LAW

Employee's disability or need for medical treatment for any body part did not arise out of and in the course of his employment with Employer.

ORDER

Employee's September 8, 2010, December 11, 2012 and April 10, 2013 claims are denied.

Dated in Fairbanks, Alaska on December 2, 2013.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____________________________
Amanda K. Eklund, Designated Chair

Unavailable for signature______________
Krista Lord, Member

_____/s/_____________________________
Rick Traini, 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 ZORISLAV STOJANOVICH, Employee/applicant v. NANA REGIONAL CORPORATION, Employer; ACE AMERICAN INSURANCE CO., insurer/defendants; Case No. 201004694; dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, on December 2, 2013.

Nicole Hansen, Office Assistant II