# ALASKA WORKERS' COMPENSATION BOARD

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

| | | |
|---|---|---|
| TRAVIS L. MYERS, | ) | |
| | ) | INTERLOCUTORY |
| Employee, | ) | DECISION AND ORDER |
| Claimant, | ) | |
| | ) | AWCB Case No. 201215483 |
| v. | ) | |
| | ) | AWCB Decision No. 17-0062 |
| STATE OF ALASKA, | ) | |
| | ) | Filed with AWCB Anchorage, Alaska |
| Employer, | ) | on June 2, 2017 |
| Defendant. | ) | |
| | ) | |

The State of Alaska's (Employer) February 2, 2017 petition to dismiss claims arising from unreported left ankle injuries was heard on April 27, 2017, in Anchorage, Alaska, a date selected on March 14, 2017. Attorney Elliot Dennis appeared and represented Travis L. Myers (Employee) who appeared and testified. Assistant Attorney General Anna Cometa appeared and represented Employer. Curtis Brown testified for Employer and Michael Clauson testified for Employee. *Myers v. State of Alaska*, AWCB Decision No. 17-0048 (May 1, 2017) resolved a separate issue. The record closed on the current issue when remaining panel members deliberated on June 2, 2017.

## ISSUE

Employer contends it first learned in Employee's recent deposition that he alleged four or five left ankle sprains while working for Employer in the years prior to his April 10, 2012 left ankle surgery. Employer contends he never reported these injuries to his supervisors and never filed formal injury reports. It contends Employee's failure to report these sprains prejudiced Employer because it could not investigate the allegations, provide prompt medical care or get an earlier employer's

medical evaluation (EME). Employer contends any "claims" for benefits Employee may make on pre-surgery left ankle sprains while in its employ, are barred under AS 23.30.100(d).

Employee contends he is making no claims for time loss for any ankle sprain or for medical benefits related to his April 10, 2012 ankle surgery. He contends his claim is for a latent reflex sympathetic dystrophy (RSD) condition resulting from his post-surgery work with Employer.

**Are Employee's claims to benefits on left ankle injuries occurring before his left ankle surgery barred?**

## FINDINGS OF FACT

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

1) Employee reported seven injuries while working for Employer: 2007 (low back); 2008 (left pinky and left foot pain while walking); 2009 (left knee); 2009 (left elbow); 2011 (left arm, leg, hip and back); 2011 (right ankle); and 2012 (reflex sympathetic dystrophy). (ICERS database).

2) Employee never formally reported a left ankle injury with Employer in writing on a board-prescribed Report of Occupational Injury or Illness. (Employee; ICERS database).

3) On February 10, 2011, a physician with the Veterans Administration (VA) referred Employee for a left ankle x-ray to check for "possible lateral instability." A radiologist performed x-rays and then compared these with x-rays from November 3, 1999, for Employee's service-connected left ankle injury. The report includes no history and does not say why the doctor referred Employee for the left ankle x-ray. (VA report, February 10, 2011).

4) On October 27, 2011, Employee reported his "left lateral ankle gives way" and recounted an ankle sprain "in the military" and said he "works as a guard for the military." The physician diagnosed "pens planus [flatfoot] with lateral impingement, left ankle instability." He recommended functional orthotics for Employee's ankle instability. The report makes no mention of any non-service-connected left ankle injury. (VA report, October 27, 2011).

5) On February 27, 2012, Employee said his left ankle "gives out" and he was requesting a left ankle magnetic resonance imaging (MRI). Employee reported no injury history. (VA report, February 27, 2012).

6) On March 3, 2012, Employee had a left ankle MRI. The radiologist found a "chronically ruptured anterior talofibular ligament" and a split tearing of the distal peroneus longus tendon. The only history provided is "ankle laxity." (MRI report, March 3, 2012).

7) On March 15, 2012, Employee said he had "a new injury on a chronic injury," and requested a referral to an orthopedic surgeon for chronic left ankle laxity. Employee reported:

> Last week he had to run 200 yards chasing an inmate. Now it [his left ankle] is very painful and swollen. He was given anti-inflammatory for his ankle that is not working well for him as it upsets his stomach.

Carolyn Gale, PA-C, found mild swelling and discoloration on the lateral side of the foot but no swelling around the anklebones. Employee said he had "foot flopping when he walks down the hall at work." Given the recent MRI results, PA-C Gale diagnosed an ankle sprain and a chronic ankle injury and referred Employee to Peter Ross, M.D., to address Employee's "many injuries in the past." (Gale report, March 15, 2012).

8) On March 17, 2012, Employee asked Lynn Carlson, M.D., for pain medicine while he awaited a surgical consult with Dr. Ross. Employee said he had six or seven ankle sprains historically. Employee's left ankle pain and physical limitations made him anxious and caused depression. Dr. Carlson diagnosed an unstable left ankle and depression. (Carlson report, March 17, 2012).

9) On March 19, 2012, a podiatrist diagnosed left ankle laxity based on the MRI findings. He recommended an "Evans ankle stabilization," but Employee was not interested in surgery. The podiatrist provided an Arizona brace for Employee while he "contemplates surgery." (VA report, March 19, 2012).

10) On March 21, 2012, Employee changed his mind and decided to go forward with left ankle surgery. (VA report, March 21, 2012).

11) On March 23, 2012, Employee told Dr. Ross he was a former Marine with "multiple ankle inversion injuries while in service." Employee worked as a prison guard at Wildwood Correctional Center (Wildwood). He presented with "chronic left ankle instability and frequent inversion injuries." Employee's treatment with the VA had been ineffective. A physician suggested surgery so Employee presented for a second surgical opinion. "In addition, a recent inversion injury has resulted in increased anterior lateral ankle pain which has precluded his return to work." Dr. Ross assessed left ankle post-traumatic instability, left ankle synovitis and referred Employee to an ankle specialist, Eugene Chang, M.D. (Ross report, March 23, 2012).

12) On March 23, 2012, Dr. Ross restricted Employee for work for two weeks pending further evaluation. (Ross Work Release, March 23, 2012).

13) On March 29, 2012, the VA approved Employee for left ankle reconstructive surgery with Dr. Chang. (VA report, March 29, 2012).

14) On April 5, 2012, Employee's work supervisor George Showalter signed Employee's request for Family Medical Leave for "Employee's serious health condition," namely, "Tendon in Ankle Needs Operation." The form Showalter signed further states Employee "must be absent from work due to incapacity or episodes of incapacity or need to work on an intermittent or reduced schedule." (Conditional Family Leave Notification, April 5, 2012).

15) Employer, through Showalter, knew no later than April 5, 2012, that Employee had a left ankle injury. (Experience, judgment and inferences drawn from the above).

16) On April 9, 2012, Employee reported a "longstanding history of ankle instability." He had multiple strains in the Marines. Employee reported "his ankle keeps giving out," and he has had "many periods of convalescence from his ankle discomfort and instability." Dr. Chang diagnosed left ankle instability with chronic pain and peroneal tendon discomfort. He recommended surgery but did offer an opinion about causation. (Chang report, April 9, 2012).

17) On April 10, 2012, Dr. Chang operated on Employee's left ankle to address instability, and removed him from work for three months. (Operative Report; Disability Status, April 10, 2012).

18) On April 30, 2012, Employer received a certificate from Dr. Chang stating Employee had ankle surgery on April 10, 2012, and needed to be off work for three months. (Certification of Health Care Provider, April 26, 2012).

19) On July 12, 2012, Employee told his VA counselor Employer insisted he return to work that evening and Employee felt anxious about this, because he was not fully healed from his ankle surgery done "to repair [a] chronic condition." (VA report, July 12, 2012).

20) On July 13, 2012, Employee continued his aquatic therapy for his left ankle. (Alaska Aquatic Therapy report, July 13, 2012).

21) By July 18, 2012, Employee said his 12 hour days with Employer caused "a lot of swelling" and discoloration on his left ankle and foot. (Alaska Aquatic Therapy report, July 18, 2012).

22) On July 19, 2012, Employee told his VA counselor he felt stressed about returning to work before his ankle had fully healed. (VA report, July 19, 2012).

23) On July 23, 2012, Employee said his legs continue to swell and turn purple at night. Dr. Carlson recommended Employee elevate his ankle at work. (Carlson report, July 23, 2012).

24) On August 3, 2012, Employee reported shooting pains at his ankle scars, which increased at night, and swelling near his ankle scars. (Alaska Aquatic Therapy report, August 3, 2012).

25) On August 14, 2012, Dr. Carlson referred Employee to physical and occupational therapy for left foot pain and charted that Employee's physical therapists suspected Employee might be developing complex regional pain syndrome (CRPS). Dr. Carlson considered Employee might have Reflex Sympathetic Dystrophy (RSD). Dr. Carlson did not offer an opinion on causation. (Carlson report, August 14, 2012).

26) By August 28, 2012, Dr. Carlson was actively treating Employee for RSD, also known as CRPS and recommended light duty so this condition could subside. He did not offer a causation opinion. (Carlson report, August 28, 2012; experience).

27) On August 31, 2012, Ruth Anderson, M.D., diagnosed Employee with CRPS in the left lower extremity, which had spread to involve his right lower extremity. Dr. Anderson did not offer a causation opinion. (Anderson report, August 31, 2012).

28) On September 11, 2012, Employee resigned from his job with Employer, effective September 12, 2012. In his resignation letter, Employee stated:

> Thank you for giving me the privilege to serve under your command as a correctional officer for the State of Alaska Department of Corrections. It is with great regret that I give you this letter of resignation. I have forged friendships with many of my co-officers that it saddens me to have to leave my friends as well as end my law-enforcement career.
>
> Months ago I was diagnosed with Reflex Sympathetic Dystrophy, (RSD) a rare condition I got as a result of having left ankle surgery on April 10, 2012. It is apparent at this time I am no longer able to care for the safety of myself, my co-workers as well as the incarcerated. It has become evident that I am unable to tackle this disease with the intensity needed while working. My last day will be on September 11, 2012. I sincerely wish the best for everyone, and I thank you all for the guidance and support. (Letter, September 11, 2012).

29) On September 12, 2012, Dr. Carlson removed Employee from work. He opined Employee's RSD was spreading and may become CRPS. Employee's RSD "began after complicated surgery on his left ankle." He offered no causation opinion. (Carlson report, September 12, 2012).

30) On September 13, 2012, Dr. Carlson said pain prohibited Employee from working. Dr. Carlson stated, "It is my opinion that this problem is work related because he was trying to work on an ankle that was still healing. The work was requiring long hours working on his feet." (Carlson report, September 13, 2012).

31) Dr. Carlson's September 13, 2012 report is the first causation opinion offered by a physician linking Employee's work with Employer to his alleged CRPS. (Experience, judgment and inferences drawn from the above).

32) On September 14, 2012, Employee told his VA counselor "he is filing Worker's [sic] Compensation Claim for his ankle." (VA report, September 14, 2012).

33) On September 15, 2012, a 3-phase bone scan disclosed osteomyelitis, also known as a bone infection. (Bone Scan, September 15, 2012; experience).

34) On September 21, 2012, Dr. Chang reevaluated Employee's left ankle and said though he was not an RSD expert, he was not ready to diagnose CRPS. (Chang report, September 21, 2012).

35) On September 27, 2012, Employee's left ankle MRI showed postoperative changes with probable tenosynovitis but no evidence for osteomyelitis or other infection. (MRI report, September 27, 2012).

36) On September 28, 2012, adjuster Clare Hiratsuka recorded Employee's telephonic statement. Employee heavily medicated but with assistance from his wife, stated his left ankle ligament "explosion" did not actually happen on the job, but it was nonetheless work-related from "being twisted" (Employee recorded statement, September 28, 2012, at 9-10). Employee felt his left ankle ligament "go" when he "stepped on a ladder" at home (*id*. at 15). Employee did not know at the time he had blown out his ligament and thought it was just a "small ankle sprain" (*id*.). Employee saw Dr. Chang for ankle surgery but "never said anything about" it being work-related because he was only worried about getting it fixed. Employee took personal leave between April 10 and July 12, 2012 for his ankle surgery and recovery (*id*. at 16-17). He does not think physical therapy caused his left ankle to regress. The therapist told him long hours at work were responsible for his ankle going "backwards" (*id*. at 18). The adjuster asked Employee if he ever hurt his ankle on the job with Employer. Employee answered "yes," and rather than giving injury details, said he "just iced it and took some Ibuprofen" (*id*. at 22). Employee said he saw Michael Applebee, a psychologist with the VA in Kenai for depression (*id*. at 28). On August 8, 2012, Applebee reportedly told Employee he would be unable to pursue a career in law enforcement because of his

left ankle injury (*id*. at 29-30). Employee gave the adjuster the name of his supervisor and some co-workers as witnesses that he was "having problems at work" with his left ankle (*id*. at 31-32).

37) Employee's reference to a discussion with Applebee on "August 8, 2012," is the only reference in the agency record to this date and could account for the "August 8, 2012" injury date stated on Employee's injury report and pending claim. (Experience, judgment, observations and inferences drawn from the above).

38) On October 1, 2012, Dr. Carlson stated, "Nowhere in the records that we have does it indicate that the cause of the original surgery had to do with pt's working environment. Pt was injured, and went back to work too early, and that caused the RSD. Pt drives around in a truck on terrain with lots of potholes, which causes more trauma to the feet because the feet hit the floor boards." Dr. Carlson further stated, "I am certain that his returning to work too soon after surgery was a or the major factor in his developing RSD/CRPS." (Carlson report, October 1, 2012).

39) On October 3, 2012, Employer began paying Employee temporary total disability effective September 14, 2012 and continuing, in case 201215483, with an injury date listed as August 8, 2012. The adjuster completing the form stated Employer's "knowledge date" was September 26, 2012, and its knowledge came from a "WCC" (Workers' Compensation Claim) Employee had submitted. Employer said it received medical documentation supporting time loss on September 28, 2012. (Compensation Report, October 4, 2012).

40) Though at hearing the parties mentioned the "WCC" referenced in factual finding 39, Employee's agency file does not include a claim dated prior to June 21, 2016. (ICERS database).

41) On October 11, 2012, Employer's Wildwood superintendent signed an injury report in case 201215483. Employee neither signed nor dated the report because he was "no longer State of Alaska employee." The report states the injury, which occurred on "August 8, 2012," was "Gradual deterioration of multiple body parts -- reflex sympathetic dystrophy." The form's bottom half states the "facility was not made aware" and "is unaware of any injury." (Report of Occupational Injury or Illness, undated).

42) On November 5, 2012, Dr. Carlson referred Employee to The Pain Center of Arizona, a specialty clinic for CRPS diagnosis and treatment. (Carlson letter, November 5, 2012).

43) On November 13, 2012, the division sent Employer's adjuster a letter stating Employee claimed injury while in its employ but the division had not received an injury report from Employer.

The letter advised Employer to file an injury report to avoid a penalty. (Letter, November 13, 2012).

44) On November 26, 2012, the division received from Employer the same injury report the Wildwood superintendent signed on October 11, 2012, referenced in factual finding 41. (Report of Occupational Injury or Illness, undated).

45) Employee had no part in completing the October 11, 2012 injury report. He has no idea who created this injury report. Employee does not know why someone created the injury report. He is not certain what is significant about August 8, 2012, stated as the injury date. (Employee).

46) On December 4, 2012, Dr. Carlson wrote:

> Mr. Myers injured his ankle while on active duty 1995-1999. His ankle began hurting again two years ago. He has had persistent ankle pain ever since. He went to surgery in April this year to repair his ankle. This was an extensive surgery on the ankle.
>
> When he returned to work, his foot and ankle still hurt, but for financial reasons he had to keep working. He was on his feet most of the day at work.
>
> Unfortunately, this extra pain which he experienced, triggered the development of RSD/CRPS, which has generalized to his other leg and the rest of his body.
>
> He has classic signs and symptoms of CRPS with signs of sympathetic overdrive and severe pain in his feet and various other parts of his body. He had a brief response to sympathetic nerve blocks, which further confirmed the diagnosis.
>
> Several physical medicine and rehab doctors have seen him and agree with the diagnosis.
>
> We all agree that at this point he should avoid all focal trauma to his extremities. We are using multiple other medications to treat his problem, including antihistamines, Lyrica, Effexor, Physical Therapy, and lifestyle changes to decrease inflammation.
>
> Currently he is unable to work because of the severe pain, his inability to put any weight on his feet, his inability to focus, his problems with cognitive function, and problems with fine motor skills, which can all happen with CRPS.
>
> It should be clear that with any disease, there are antecedents, triggers, and mediators of the disease. The antecedents in this case was [sic] injuries while on active duty in the Marine Corps and the immediate triggers to the RSD/CRPS were the ankle surgery and long hours of stress to his feet at work after the surgery. (Filling his job requirements at work). Mediators at this time are even minor trauma to his feet,

> emotional problems caused by the pain (which are known to increase inflammatory mediators/cytokines in the body).
>
> We are currently seeking specialized help in Arizona. (Carlson letter, December 4, 2012).

47) On March 28, 2013, in response to Employee's request for occupational disability benefits under the Public Employees 'Retirement System (PERS), based on disability from CRPS, consulting physician Deb Lessmeier, M.D., reviewed Employee's medical records and offered her opinion based on the following history:

> Mr. Travis L. Myers has a long-standing history of ankle instability, felt to be related to multiple strains suffered when he was in the Marines in the mid-1990s. He retired in 1999. . . . In 03/2012, he had a re-injury of his ankle, felt to be related to the chronic instability. This was an injury that occurred, I believe, while he was at work as a Correctional Officer. As a result of the visit for that injury, he was referred to surgery for evaluation of his ankle. . . .

Dr. Lessmeier reviewed Employee's remaining medical records and concluded:

> Based on this review, I do find that Mr. Travis Myers is disabled. I do believe that it was primarily the surgery and that it was the combination of the surgery combined with the physical and emotional stress of going back to work that led to the development of the CRPS. It appears from this review that the return to work and both the physical and emotional stress of this contributed to the development of the CRPS. Therefore, I am recommending that Mr. Travis L. Myers be approved for Occupational Disability. I also acknowledge that his ankle instability was pre-existing and that the need for surgery is not relate [sic] to his job. However, it is not the ankle surgery that is causing his disability; it is the CRPS. (Lessmeier report, March 28, 2013).

48) On July 16, 2013, the adjuster received Dr. Lessmeier's March 28, 2013 report. (*Id.*).

49) On October 13, 2014, Tashof Bernton, M.D., performed an employer's medical evaluation (EME) on Employee. After administering several tests, reviewing Employee's records and examining him, Dr. Bernton unequivocally concluded Employee does not have CRPS, and even if he does have it, it is not work-related because the surgery from which it came was not work-related. Dr. Bernton further opined Employee required no work-related treatment and has no work-related impairment or restrictions. A follow-up EME report came to a similar but more forceful conclusion. (Bernton reports, October 13, 2014; January 18, 2017).

50) Dr. Bernton's EME was Employer's first attempt under the Act to have Employee seen by its selected physician. (Observations and inferences drawn from the above).

51) On December 29, 2014, Employer denied Employee's right to benefits based on opinions from its EME. (Controversion Notice, December 23, 2014).

52) On December 29, 2014, Employer reported it had paid Employee TTD benefits from September 11, 2012 through December 31, 2014, totaling 120 weeks. Employer said the TTD ended because its EME released Employee to modified work on December 1, 2014, and Employer denied Employee's right to continuing benefits. (Compensation Report, December 24, 2014).

53) On February 10, 2015, Stephen Barkow, M.D., saw Employee on Dr. Carlson's referral and diagnosed him with CRPS. He concluded surgery sensitized Employee's left lower extremity and "repetitive trauma may exacerbate his symptoms of RSD." Dr. Barkow further said Employee "returned to work at an early time which has exacerbated his RSD symptoms." (Barkow report, February 10, 2015).

54) On June 21, 2016, Employee filed a claim in case 201215483 alleging "repetitive injury to ankle at work," which led to ankle surgery, a return to work and additional "repetitive injury to the ankle," which led to Complex Regional Pain Syndrome (CRPS). Employee alleges CRPS in his "full body" rendering him totally disabled with ongoing pain, severe depression, anxiety and Posttraumatic Stress Disorder (PTSD). Employee claims permanent total disability from December 23, 2014 and continuing; medical and related transportation costs; a penalty; interest; unfair or frivolous controversion; and attorney fees and costs. This claim did not amend any previously filed claim. (Workers' Compensation Claim, June 21, 2016).

55) On June 22, 2016, Employee amended his June 21, 2016 claim to correct a typing error. The claim amended no other previously filed claim. (Workers' Compensation Claim, June 22, 2016).

56) On July 13, 2016, Employer denied all requested benefits. Employer included a defense under AS 23.30.100 to "claims related" to "unreported injuries and/or untimely reported injuries." (Answer, July 13, 2016).

57) On January 16, 2017, Employee's wife Tina Myers testified he had "multiple" left ankle sprains working for Employer in a two-year span (Deposition of Tina Myers, January 16, 2017, at 24-25). Tina knew Employee did not "file any workers' compensation claims or refer to the injury for every time he sprained his ankle at work" prior to his left ankle surgery in 2012 (*id*. at 25).

58) On January 16, 2017, Employee testified he needed to have ankle surgery because driving around the Wildwood perimeter in a pickup truck repetitively "beat up" his feet on the floor because the road was so bumpy. He also injured his left ankle when he slipped while getting out of the vehicle once (Telephonic Deposition of Travis Myers, January 16, 2017, at 52-53).

59) On January 30, 2017, Employee testified "over the years," while working for Employer at Wildwood he had four or five left ankle sprains prior to his April 2012 left ankle surgery (Telephonic Deposition of Travis Myers, January 30, 2017, at 65-66). He could not recall telling anyone at work he had injured his ankle on four or five occasions (*id*. at 78). Employee recalls no details concerning these injuries (*id*. at 78-79). Employee did not always report left ankle injuries because they "healed in a couple days, and, you know, ice and it was better" (*id*. at 85).

60) On February 2, 2017, Employer filed a petition seeking an order "to dismiss any and all claims related to unreported injuries prior to the date of the Employee's surgery, April 10, 2012, pursuant to AS 23.30.100." (Petition, February 2, 2017).

61) Sergeant Curtis Brown is Training Security Sergeant at Wildwood. Brown is familiar with Employee, supervising him in 2009 through 2011 in the "pretrial side." Employee later went to the "sentence side." Brown was unaware Employee had any ankle sprains while under his supervision. He is unaware Employee ever completed any injury reports or paperwork related to any ankle injury. Brown does not recall any coworkers ever telling him that Employee injured his ankle at work. Protocol required injured workers to fill out a workers' compensation injury form if the worker told Brown about the injury. Brown would never neglect to have an injured worker complete paperwork, or complete it himself. It is not possible that Employee told him he was injured and Brown neglected to file a report. Brown has no recollection of ever seeing Employee limping or complaining about ankle pain while Brown supervised him. (Brown).

62) Brown is "very certain" he advises workers with any injury to complete an injury report. If a worker has a preexisting condition and believes his work made the condition worse, Brown would not necessarily inform them to file an injury report and would leave it up to the worker. Brown did not supervise Employee when he drove the perimeter rover vehicle. (*Id*.).

63) If Brown saw Employee sprain an ankle, he would first ask if Employee needed medical attention and then would tell him to file a workers' compensation report. If Employee told Brown he was chasing prisoners around and his ankle hurt, he would ask if employee was okay. To him, it takes more than "it hurts" to be an injury since everyone is tired at the end of the long shift. If all

Employee said was his ankle hurt Brown would ask him if he injured it on the job and if he said "yes," they would proceed to filing a form. Employee's shift was seven days per week, 12 hours per day. Brown makes a distinction between being "tired" and having "pain" at the end of the week, and being "injured" at the end of the week. (*Id*.).

64) Brown recalls Employee complaining about his lower back hurting. Brown surmised perhaps it was because of his duty belt, but this was not an "injury" in Brown's mind. Brown did nothing in response to Employee's lower back pain complaints. (*Id*.).

65) Brown does not understand the concept of "injury" under Alaska workers' compensation law. (Experience, judgment and inferences drawn from all the above).

66) On March 23, 2017, Employee's former supervisor George Showalter testified his work crews normally told him about all work injuries (Deposition of George Showalter, March 23, 2017, at 16-17). He has never heard of an employee getting hurt at work without telling him about the injury. If an injured employee told Showalter they had been hurt, he would do an immediate investigation and fill out workers' compensation paperwork (*id*.). At no time did any employee ever tell Showalter they were hurt and he failed to put it in writing (*id*. at 18). He knew Employee had ankle surgery while under Showalter's supervision (*id*. at 21). Showalter is not aware of Employee reporting any pre-surgery ankle injury to him, and had he done so it would have been in writing (*id*. at 21-22). Showalter unequivocally stated, "If it wasn't written, it didn't happen, and I didn't know about it. I would have written it down if it did happen" (*id*. at 23). Showalter did not know Employee had any ankle sprains at work before his left ankle surgery (*id*. at 25). He never saw Employee limping at work until after his left ankle surgery (*id*. at 34).

67) Michael Clauson currently works for the State of Alaska in the Division of Probation and Parole. Clauson previously worked at Wildwood as a Correctional Officer, leaving in August 2013. He attended the Correctional Officers Academy in 2009 with Employee. Clauson and Employee initially worked at Wildwood at the same post, but on different shifts. They later worked together on the same shift at Wildwood. In Clauson's opinion, injured workers reported only a "small fraction" of work injuries at Wildwood. Most injuries are minor and workers mentioned most injuries to supervisors but not in writing. Clauson would have to experience a "fairly significant" injury on the job to file formal paperwork. He believes law enforcement has a "culture" of not reporting injuries unless they are serious. Clauson frequently went to a chiropractor at week's end especially after he had been driving the rover vehicle around the perimeter at Wildwood. The

perimeter officer drove around the perimeter road to enforce security at Wildwood. The perimeter road was primarily gravel, dirt and full of potholes. It was "very rough." Every officer Clauson knew who rode in the rover vehicle complained about the rough perimeter road. Even at low speeds, the road "jerked you around" when the truck hit potholes. Each perimeter shift was about three hours minimum. On occasion, if the crew was shorthanded, a shift could last up to seven hours. Clauson's supervising sergeant always knew when Clauson had pain complaints after riding in the rover vehicle. To his knowledge, his supervisors never completed any injury paperwork on these occasions. (Clauson).

68) Clauson worked with Employee on the same shift for the same sergeant in part of 2011 and in 2012. If Clauson walked through a doorway and turned his ankle, he would tell his supervisor about it, depending upon how much pain he was in, and how it might affect his duties. Clauson would report any injury in writing if he felt it would affect his duties adversely. (*Id*.).

69) In Clauson's view, Employee is honest, hardworking, loyal, ethical and a good correctional officer. As a former Marine, Employee is not likely to report "every ache and pain" in Clauson's opinion. Employee wants to avoid a "weak" image. (*Id*.).

70) Employee has good and bad days in respect to his memory and his pain. He retains some memories of being a correctional officer at Wildwood. Employee resigned his post because he could no longer perform his duties given his pain. After his ankle surgery, Employee returned to work. Thereafter, Employee continued to perform physical therapy and he was seeing his primary care provider Dr. Carlson to address Employee's symptoms. Employee's pain increased and Dr. Carlson referred him to Dr. Anderson, a pain specialist. Employee reviewed his resignation letter dated September 11, 2012. In the first line of the second paragraph, in reference to when Employee's doctor diagnosed him with RSD, Employee said the words "months ago" should have been "weeks ago." Employee had assistance writing his resignation letter and he was taking pain medication at the time. (Employee).

71) Employee did not experience memory issues when he submitted his resignation letter. He had memory problems when Employer took his deposition. Employee's memory was better in 2012 than it is now. Employee did not prepare the letter; his wife prepared it for him. Employee's wife assisted with his medical care and should have known when the doctors diagnosed him with RSD. However, the letter she wrote contains a "typo." Employee's physical therapist thought he might have RSD, as did Dr. Carlson but Dr. Anderson is the one who diagnosed RSD. Employee meant to

turn this letter into his supervisor personally. Employee did not have an opportunity to review the letter before he signed it. He was taking pain medication at the time. When Employee returned to work after his left ankle surgery, he returned to his same seven-day on 12-hour-per-day shift. On occasion, upon returning to work after surgery Employee drove the perimeter rover vehicle. He had "extreme pain" in his left ankle after driving the vehicle at some point. Employee's left ankle swelled up and turned colors. Employee disagrees with Showalter's testimony that the provider road was "not that bad." On occasion, the rover wheel fell off the truck because the road was so bumpy. (*Id.*).

72) Employee has "serious memory problems." (Employee's hearing arguments).

73) Employee is not seeking lost time for his ankle sprain or medical benefits for his ankle sprain. He is seeking benefits related to RSD and CRPS. (*Id.*).

74) Employer is not asking for an order barring Employee's claim in its entirety. In his deposition, Employee said he sustained four or five ankle sprains at work in the two or three years prior to his left ankle surgery. Employee could not be more definitive about times, places and dates of his ankle sprains, and was uncertain if he told his supervisor. Employer contends this is significant because until Employee's deposition, Employer had no notice Employee was claiming benefits related to pre-surgery ankle injuries at work. Historically, Employee successfully filed injury reports for various injuries, including a pinky injury. Employer contends Employee is well aware how to file an injury report. It contends Employee's alleged injuries could have occurred as far back as eight years before Employee's work with Employer ended. Employer contends Employee's lawyer's questions at deposition and in his briefing suggest Employee was seeking reasons why he would not have reported ankle injuries. Employer is concerned Employee's history to a second independent medical evaluation (SIME) physician will include pre-surgery left ankle injuries, and could result in Employee eventually claiming pre-surgery benefits. Employer contends the prejudice arises because Employee can explain his alleged four or five pre-surgery left ankle injuries to the SIME physician, who could opine that these alleged left ankle injuries are the substantial cause of the need for left ankle surgery, which ultimately caused CRPS. Employer contends the SIME physician should not be able to consider Employee's alleged four or five pre-surgery left ankle injuries at work. It contends Employee needed to report these alleged injuries so Employer could accurately investigate these events, and ensure all medical attention, including getting an "earlier EME." Employer agrees Employee told its adjuster in a recorded statement

taken September 28, 2012, that he hurt his ankle stepping on a ladder at home. Employer contends RSD is not a "latent injury" and it developed quickly. Employer contends Employee should not be able to benefit from unreported pre-surgery injuries. (Employer's hearing arguments).

75) Employer agreed Employee sent it a non-board-served September 14, 2012 workers' compensation claim believing this was his "injury report." Employer does not dispute the fact Employee gave timely notice of his RSD. (Employer's hearing statements).

76) Employee's agency file does not contain the September 14, 2012 claim. (Observations).

77) Employee contends this is a classic "latent injury." His RSD symptoms did not appear until after he returned to work post-surgery. He contends there was no clear-cut RSD diagnosis until Dr. Anderson provided one on August 30, 2012. Employee contends the 30-day notice period began to run when Dr. Anderson gave her RSD diagnosis on August 30, 2012. Employee relies on *Dafermo* and other Alaska Supreme Court opinions to support his position. Likening *Dafermo* to his case, Employee contends Employer had actual notice he had an ankle injury, Employee did not think his ankle condition was work-related and no prejudice inured to Employer by failure to provide written notice of a medical condition, RSD, which never appeared until years later. (Employee's hearing arguments).

78) No party at hearing could identify the significance of "August 8, 2012," the injury date on the injury report Employer filed at the division's request. (Record).

## PRINCIPLES OF LAW

The board may base its decision not only on direct testimony and other tangible evidence, but also on its "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 23.30.100. 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 be signed by the employee or by a person on behalf of the employee. . . .

> (c) Notice shall be given 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.

*Andrews v. McGrath Light & Power, Inc.*, AWCB Decision No. 05-0236 (September 10, 2005), at 11, stated:

> The Board . . . lacks authority to render declaratory judgments or provide advisory opinions on matters for which there is no existing controversy (footnote omitted).

> **8 AAC 45.050. Pleadings**. (a) A person may start a proceeding before the board by filing a written claim or petition.
>
> (b) **Claims and petitions**.
>
> > (1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. . . .
> > . . . .
> >
> > (4) Within 10 days after receiving a claim that is complete in accordance with this paragraph, the board or its designee will notify the employer or other person who may be an interested party that a claim has been filed. The board will give notice by serving a copy of the claim by certified mail, return receipt requested, upon the employer or other person. The board or its designee will return to the claimant, and will not serve, an incomplete claim. A claim must

> (A) state the names and addresses of all parties, the date of injury, and the general nature of the dispute between the parties; and
> (B) be signed by the claimant or a representative.
>
> (5) A separate claim must be filed for each injury for which benefits are claimed, regardless of whether the employer is the same in each case. . . .

In *Jonathan v. Doyon Drilling, Inc., JV*, 890 P.2d 1121, 1123-24 (Alaska 1995), the Alaska Supreme Court addressed the word "claim" as used in AS 23.30.110. *Jonathan* found the Act does not define the word "claim," and concluded:

> Each of the first four uses of the word 'claim' in section 110 clearly refer to a pleading that must be filed with the Board. None of the other uses indicate that any different meaning is intended. 'There is a presumption that the same words used twice in the same act have the same meaning.' (Citations omitted).
> . . . .
>
> The more persuasive reading of the word 'claim' is as a written application for benefits filed with the Board. . . .

## ANALYSIS

**Are Employee's claims to benefits on left ankle injuries occurring before his left ankle surgery barred?**

This case is problematic on two levels. First, Employer petitions for an order dismissing left ankle injury claims, which Employee has yet to file. Second, Employee's claim, which he contends relates only to benefits arising from his CRPS condition, nevertheless alleges he had "repetitive injury to ankle at work," which resulted in ankle surgery, which resulted in CRPS. Employer's petition to dismiss raises legal questions to which the compensability presumption does not apply.

### *a) This decision will not give an advisory opinion.*

Employer's petition to dismiss relies on AS 23.30.100(d). Employer contends that Employee alleges several unreported but work-related left ankle injuries. It is undisputed Employee never gave Employer formal, written notice of any left ankle injury until he filed his June 22, 2016 claim, which references several. The statute upon which Employer relies states failure to give notice does not bar a claim under the Act if Employee meets certain requirements. Conversely, if Employee fails to meet these requirements, his failure to give notice bars a claim. The Act does not define

"claim." The Alaska Supreme Court says a "claim," for purposes of another time-limiting statute in the Act, is a "written application for benefits." *Jonathan*. Though the statute in *Jonathan* is not the same statute upon which Employer relies in this case, there is a presumption in the law "that the same words used twice in the same act have the same meaning." *Jonathan*. AS 23.30.100(d) also uses the word "claim." There is no reason to suspect a "claim" as defined in *Jonathan* does not also describe a "claim" subject to defenses raised under AS 23.30.100(d). *Rogers & Babler*.

Parties begin proceedings by filing a claim or petition. 8 AAC 45.050(a). The regulation is very clear. "A separate claim must be filed for each injury for which benefits are claimed, regardless of whether the employer is the same in each case." 8 AAC 45.050(b)(5). August 8, 2012 is the injury date associated with case 201215483. Employee contends he is not making claims for any benefits for any period prior to December 23, 2014. Accordingly, he has filed but one claim in case 201215483 with injury date August 8, 2012. Employer's petition seeks an order barring claims Employee has not yet filed in cases that do not yet exist. In this respect, Employer requests an advisory opinion barring these un-filed claims in the event Employee ever files them. This decision will not issue an advisory opinion. *Andrews*. Currently, AS 23.30.100 does not bar Employee's "claims" to benefits on left ankle injuries because the claims do not yet exist.

***b) The onus is on Employee to file separate claims for any claimed injury.***

No party at hearing could explain why injury date "August 8, 2012" is a significant date in this case. No medical record bears this date. Employee never said he hurt his left ankle at work on this date. The only reference to August 8, 2012 relates to a visit Employee had with psychologist Applebee. Employee implies he learned from Applebee on August 8, 2012 that he would never return to law enforcement because of his left ankle injury. Employee bases his June 22, 2016 claim in part on "repetitive," work-related ankle injuries. However, Employee's June 22, 2016 claim is not in accordance with the Act or the administrative regulations. His one and only claim requests benefits for more than one injury. This practice creates confusion and makes it difficult for Employer to defend against his claim, as evidenced by Employer's petition to dismiss non-existent "claims" under AS 23.30.100. It also makes Employee's pending June 22, 2016 "claim" difficult to adjudicate. *Rogers & Babler*. It seems as though Employee's primary contention is that his early return to work on an operated ankle resulted in CRPS, for which he is entitled to benefits, while his

backup contention in the same "claim" is that unspecified left ankle injuries at work necessitated the surgery, which resulted in CRPS. Filing his claim in this way, Employee may believe if he loses on his primary contention, perhaps he may prevail on his ill-defined secondary contention. If Employee contends various left ankle work injuries necessitated his April 10, 2012 left ankle surgery, or somehow independently resulted in CRPS, he must file separate claims for each left ankle injury. 8 AAC 45.050(b)(5). If Employee files such claims, a party may move to join the claims and Employer may defend one or more claims under AS 23.10.100. At this point, Employee's vague "claims" are incapable of cogent analysis. *Rogers & Babler*. Given his hearing arguments, Employee's pending June 22, 2016 claim alleges only CRPS arising from his work activities following his April 10, 2012 surgery until he resigned on September 11, 2012.

## CONCLUSION OF LAW

Employee's claims to benefits on left ankle injuries occurring before his left ankle surgery are not barred.

## ORDER

1) Employer's February 2, 2017 petition to dismiss unfiled claims under AS 23.30.100 is denied.
2) Employee's June 26, 2016 claim pertains only to alleged RSD and CRPS arising from his work with Employer following his April 10, 2012 left ankle surgery.
3) If Employee intends to seek benefits arising from any work-related left ankle injuries with Employer, he must file a claim for each left ankle injury and a party may petition to join all claims.

Dated in Anchorage, Alaska on June 2, 2017.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____unavailable for signature_____
David Ellis, Member

_____/s/_____
Patricia Vollendorf, Member

## PETITION FOR REVIEW

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

## RECONSIDERATION

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

## MODIFICATION

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

## CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of Travis L. Myers, employee / claimant v. State of Alaska, employer / defendant; Case No. 201215483; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on June 2, 2017.

/s/
Elizabeth Pleitez, Office Assistant