ALASKA WORKERS' COMPENSATION BOARD

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

CARMEN INFANTE, Employee, Claimant, v. CHENEGA CORP., Employer, and AMERICAN ZURICH INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201117269 AWCB Decision No. 14-0043 Filed with AWCB Anchorage, Alaska on March 27, 2014

Carmen Infante's (Employee) April 11, 2013 workers' compensation claim was heard on March 25, 2014, in Anchorage, Alaska, a date selected on August 29, 2013. Employee appeared, represented herself and testified with assistance from two Spanish language interpreters hired by the division, Alejandro Henriquez and Olivia De la Garza. There were no other witnesses. Attorney Adam Sadoski appeared and represented Chenega Corp. (Employer) and its workers' compensation insurer. The record closed at the hearing's conclusion on March 25, 2014.

ISSUES

Employer contends Employee's right shoulder claims should be denied for failure to give notice. It contends Employee only gave written notice of a left shoulder and left wrist injury. Therefore, it seeks an order barring Employee's claim for right-shoulder-related benefits under

AS 23.30.100. Alternately, Employer contends Employee loses the presumption of compensability for failure to give proper notice.

Employee did not expressly address this legal contention at hearing. However, she contends she always complained of right shoulder pain whenever she saw medical providers from the first time she sought medical care for this injury, and any references in her medical records to other body parts such as her left wrist, were erroneously made by providers.

1) Should Employee's April 11, 2013 claim for benefits related to right shoulder pain be barred for inadequate notice, or should she lose the presumption of compensability?

Employee contends the need for medical treatment, disability and any permanent impairment for her right shoulder arose out of and in the course of her employment with Employer, because she injured her right shoulder when she fell on November 6, 2011. She contends the November 6, 2011 work injury was the substantial cause of her need for medical care, disability and impairment related to her right shoulder. Employee seeks an order finding her right shoulder injury compensable.

Employer contends the need for medical treatment, disability and any permanent impairment for Employee's right shoulder did not arise out of and in the course of her employment with Employer. Accordingly, it contends her right shoulder injury is not compensable.

2) Did Employee's right shoulder injury arise out of and in the course of her employment with Employer, and was the November 6, 2011 injury the substantial cause of any disability or need for medical treatment?

Employee contends she has been unable to work because of her right shoulder symptoms since she was terminated on or about April 17, 2012. Employee contends she is entitled to temporary total disability (TTD) from April 17, 2012 and continuing.

Employer contends Employee previously said she would have continued working for Employer had she not been terminated for violating company rules regarding cell phone use. Employer

further contends Employee has no medical or other evidence showing she was not able to work after April 17, 2012, so her TTD claim should be denied.

3) Is Employee entitled to TTD from April 17, 2012, and continuing?

Employee contends she is entitled to medical costs and related transportation expenses for treatment to her right shoulder. She seeks an order awarding past and ongoing medical care for her right shoulder.

Employer contends as the right shoulder is either barred for failure to give proper notice, or not otherwise a work-related injury, Employee is entitled to no medical benefits for the right shoulder. It seeks an order denying Employee's medical benefit claim.

4) Is Employee entitled to medical and related transportation expenses for her right shoulder?

Employee contends she is entitled to a permanent partial impairment (PPI) benefit for her right shoulder. She relies upon a PPI rating from Edward Barrington, D.C.

Employer contends Employee's right shoulder injury is not compensable. Therefore, any PPI attributable to the right shoulder is not its responsibility. Employer contends Employee's PPI claim should, therefore, be denied.

5) Is Employee entitled to PPI benefits for her right shoulder?

Lastly, Employee contends she is entitled to interest, attorney fees and costs related to her April 11, 2013 claim.

Employer contends as no benefits are due and owing, no interest is awardable. Furthermore, Employer contends Employee's former attorney withdrew and there is no evidence Employee is entitled to any benefits justifying an associated attorney's fee and cost award.

6) Is Employee entitled to interest, attorney's fees or costs?

FINDINGS OF FACT

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

1) Employee was born in the early 1950s and raised in the Dominican Republic. She came to America in approximately 2000, and went to work for Employer as a housekeeper. Employee's first language is Spanish, though she reads and writes it very little. She reads and writes even less English. Employee has, at best, three year's elementary school education in the Dominican Republic (Employee).

2) Employee has difficulty communicating in any language, and remembering, and appears to confuse dates and places easily (judgment, observations and inferences drawn from all the above).

3) On November 6, 2011, Employee tripped and fell face-first while on the job as a housekeeper for Employer (Report of Occupational Injury or Illness, November 8, 2011; Employee).

4) Employee landed on her outstretched hands and testified she felt pain in several areas including her right shoulder and low back (Employee).

5) Employee's coworker "Mark" witnessed her fall, and her direct supervisor "Brian" witnessed her lying on the floor. Brian took photographs and Mark provided her with a pillow while Employee lay on the floor and waited for an ambulance to arrive (*id.*).

6) Employer had actual knowledge of Employee's injury, could have immediately questioned her about it through an interpreter had it so desired, and could have further investigated the injury, and probably did, by interviewing witnesses and co-workers and by sending her to an Employer-selected physician shortly after the injury (experience, judgment, and inferences drawn from all the above).

7) On November 6, 2011, paramedics attended to Employee at Employer's premises where the injury occurred. The paramedics' report lists "back pain (Non-Traumatic)" as the primary impression. The paramedic summary states Employee complained of "lower lateral back pain," and "left wrist pain" from a fall. It further says "bystanders stated" Employee tripped while pushing a cleaning cart and fell to the ground hands first. The report further states Employee "does not speak English," and says no one was available on scene to translate Spanish for the paramedics. The report describes paramedics examining Employee's back and abdomen with palpation and reports "tenderness and pain to right flank" referring to Employee's "back." Under a report section called "Assessment Exam," the paramedics describe Employee's right upper extremity as "normal." The paramedics assessed "right flank pain, Left [sic] wrist pain from fall," and transported Employee to Providence Hospital emergency room (Prehospital Care Report, November 6, 2011).

8) On November 6, 2011, Providence Hospital emergency department personnel evaluated Employee. Sami Ali, M.D., recorded Employee fell face forward while "leaving work" at the Clarion Hotel and injured "her left wrist, and lower back." Dr. Ali examined Employee's left wrist and found no obvious swelling or deformity but Employee reported pain on examination. Dr. Ali also noted Employee speaks Spanish and "the history is translated voluntarily by a family member." Dr. Ali examined Employee's lumbar region and found tenderness diffusely. He ordered a left wrist and low back x-ray. The lumbar spine x-rays showed very mild L4-5 degenerative disc disease with no fractures. The left wrist x-ray showed no acute fracture or malalignment, no radiodensity, no foreign object and no bone erosion. The radiologist interpreted the left wrist x-ray as being "normal." Based on this evaluation, Dr. Ali diagnosed wrist and low back pain, discharged Employee to home in "good" condition, and wrote a brief letter stating Employee could return to work on November 10, 2011. The available November 6, 2011 Providence Hospital emergency room reports do not indicate staff gave Employee a right wrist splint, or any other assistive device (Ali letter, November 6, 2011; Providence Hospital emergency room reports, November 6, 2011).

9) Employee testified her right shoulder began hurting when she fell and progressively worsened over the next few days. She testified she told the emergency room personnel as best she could that her right shoulder was her main problem (Employee).

10) On November 9, 2011, Employee returned to the Providence Hospital emergency department and saw John Withers, M.D. The report states Employee presented with "chest pain" following a fall three days earlier. The report states Employee tripped while leaving work and fell forward onto her wrists. It reiterates the November 6, 2011 report in which Employee said she felt "left wrist " and "lower back pain." The report further states Employee started experiencing "left chest wall" pain the day following the fall. Her pain was exacerbated by lifting her arms and by palpations. Dr. Withers examined Employee, including her extremities, and found among other things, "no tenderness." Dr. Withers ordered a chest x-ray, which showed no "acute process." Dr. Withers' impression was a "chest wall strain." His advice to Employee was to continue to take her medication and "wear your wrist splint." Dr. Withers wrote a brief letter stating Employee could return to work on November 12, 2011 (Providence hospital emergency room reports, November 9, 2011; Withers letter, November 9, 2011).

11) Employee testified she returned to the emergency room on November 9, 2011, because her right shoulder hurt so badly she was crying in pain (Employee).

12) Employee testified emergency room staff gave her a right wrist brace, which she brought with her to hearing and demonstrated its fit and function. Employee quickly put the wrist brace on her right wrist, and the brace appeared to fit properly. Employee was not clear but implied she received the right wrist brace at her first emergency room visit on November 6, 2011 (Employee; judgment, observations and inferences drawn from all the above).

13) The panel examined the wrist brace at hearing and determined it would only fit the right wrist (experience, judgment, observations).

14) On November 8, 2011, someone, but not Employee, completed Employee's portion of a typed injury report. The injury report form provides Employee's and Employer's names, addresses, telephone numbers, and other personal information concerning Employee. It also includes the year, month, day, hour and locality of Employee's injury. In block 14, the injury report's author checked a box marked "left" and on the following line typed the words "Soft Tissue-Head," followed by the words "Hit Her Shoulder on Cart-Landed on Her Face and Wrist" on the third line. In block 15, the words "EE tripped on her own feet, hit her shoulder on cart and landed on her face and wrist" are typed. Employee did not sign this report and no explanation is given on the form for the absence of her signature, though the form is dated November 8, 2011 (Report of Occupational Injury or Illness, November 8, 2011).

15) Employee's November 8, 2011 injury report states Employee injured, among other things, her "shoulder," but does not limit this to her left shoulder (*id.*; experience, judgment and inferences drawn from all the above).

16) On or about November 12, 2011, Employee returned to work for Employer. She testified she tried using her right arm to perform her normal duties, as she is right-handed, with her wrist brace attached. However, Employee had difficulty and gradually switched to doing her housekeeping work using her left hand. Employee testified Employer was unhappy with her work because she was using her left hand predominately, and was less effective using this extremity. During the time she continued to work, Employee testified her right shoulder pain worsened (Employee).

17) On December 15, 2011, Employer paid Employee TTD benefits from November 10, 2011 through November 11, 2011 (Compensation Report, December 21, 2011).

18) On or about April 17, 2012, Employer fired Employee when her supervisor caught her talking on her cell phone while on the job, which Employer prohibited (*id.*).

19) Employee testified, but for the firing, she could have and would have continued working for Employer, because she "adored" her job (*id*.).

20) On February 14, 2013, Employee saw Dr. Barrington at attorney Michael Patterson's referral. Dr. Barrington took Employee's history and examined her. He had limited medical records including emergency room x-ray reports from January 28, 2010, and November 7, 2011. Employee's friend accompanied her to Dr. Barrington's office as an interpreter. The interpreter did not speak English fluently. Nonetheless, Employee was able to describe "acute pain around her right shoulder and right arm." She also completed a pain diagram showing right shoulder pain and other symptoms. Dr. Barrington's history incorrectly listed the injury date as January 6, 2011. Employee described going to the emergency room on two occasions but told Dr. Barrington she had "no other treatment for this injury." Dr. Barrington reviewed a Providence Hospital emergency room x-ray report but noted there was no x-ray report for the right wrist. He also described reviewing a January 28, 2010 lumbar spine and chest x-ray from Providence Hospital, with reported findings similar to those set forth above. Dr. Barrington performed a PPI rating pursuant to the AMA *Guides the Evaluation of Permanent Impairment*, Sixth Edition, and determined Employee had a seven percent whole person impairment rating for her right shoulder and nothing for her right or left wrists (Barrington report, February 14, 2013).

21) From approximately February 27, 2013 through April 14, 2013, Employee vacationed in the Dominican Republic. While there, her right shoulder bothered her so she saw a physician, Perez Simo, M.D., who ordered diagnostic testing for Employee's right shoulder. These tests, described as "sonography," revealed a "demineralized bone matrix" and sclerosis at the right humeral greater tuberosity associated with periarthritis (radiology reports, March 6, 2013).

22) On March 8, 2013, Employee had a right shoulder soft tissue sonography in the Dominican Republic read by Wilson Lopez, M.D., as normal (Imaging Department report, March 8, 2013).

23) On April 11, 2013, attorney Michael Patterson entered an appearance on Employee's behalf and filed a claim. Employee's claim alleged she injured her right shoulder on November 6, 2011, when she fell at work. Employee claimed TTD from April 17, 2012 "forward," permanent partial impairment (PPI), medical costs and related transportation expenses, interest, and attorney's fees and costs (claim, April 11, 2013).

24) On May 1, 2013, Employee saw Christopher Manion, M.D., for a right shoulder evaluation. It is unclear how Employee came to see Dr. Manion, or who referred her. Dr. Manion's history

section states Employee's injury occurred on "November 16, 2012," when she slipped and fell. He concluded Employee had a hyperabduction injury to the right shoulder. Employee told Dr. Manion she continued to have significant right shoulder pain and had gone to Providence Hospital emergency department for radiographs, but Dr. Manion had neither the radiographs nor any reports. Given the wrong injury date, Dr. Manion recorded Employee was about "five months out" from her injury, and seeking further evaluation and treatment for her right shoulder. She denied any recent or remote history of right shoulder problems. Following his physical evaluation, Dr. Manion diagnosed right shoulder adhesive capsulitis. Dr. Manion recommended a right shoulder magnetic resonance imaging (MRI) scan (Manion report, May 1, 2013).

25) On May 3, 2013, Employee underwent a right shoulder MRI arthrogram. Radiologist John McCormick, M.D., read the scan as showing a supraspinatus tendon tear retracted by 2.4 cm. Employee also had a high-grade partial tear of the infraspinatus tendon with only a few intact fibers remaining, an interstitial tear of the subscapularis tendon, chronic degenerative changes involving the labrum with no definite tear seen, and chronic degenerative changes in the acromioclavicular joint (MRI report, May 3, 2013).

26) On May 6, 2013, Employee followed up with Dr. Manion who reviewed the MRI report. He recommended physical therapy to loosen Employee shoulder prior to surgery. Dr. Manion suggested rotator cuff reconstruction, subacromial decompression and an open Mumford procedure (Manion report, May 6, 2013).

27) On May 6, 2013, Employer filed an answer to Employee's claim and denied all benefits related to her right upper extremity, the body part upon which Employee's claim focused. Employer also alleged Employee's claims were barred for her failure to give timely notice (Answer to Employee's Workers Compensation Claim, May 6, 2013).

28) On May 6, 2013, Employer controverted Employee's claim for the same reasons stated in its answer (Controversion Notice, May 6, 2013).

29) On May 23, 2013, Employer filed a medical summary to which were attached Dr. Manion's medical records. Included with these records was a "Physician's Report" form. Two identical Physician's Reports, with sections one through three completed in handwriting, were attached to each of the two Manion records. The listed injury date was "November 6, 2013," and the body part listed is "Left shoulder – I fell going to the laundry." Block 22, which asks "Is Conditioned Work

Related?" is checked "yes." The physician's reports are not signed or dated but are attached to Dr. Manion's May 1, 2013 and May 16, 2013 reports (Physician's Reports, undated).

30) Employee did not complete these reports and does not recognize the handwriting on them (Employee).

31) On July 13, 2013, Employee saw Joseph Lynch, M.D., for an employer's medical evaluation (EME). An interpreter accompanied her. Dr. Lynch reviewed the available medical records including the November 6, 2011 and November 9, 2011 Providence Hospital emergency room reports. He also reviewed Dr. Barrington's PPI rating report and accompanying notes, reports from the Dominican Republic and Dr. Manion's records. After performing a physical examination, Dr. Lynch diagnosed Employee with a left wrist, low back and chest wall straining injury related to the November 6, 2011 fall; right shoulder chronic, age-related degenerative rotator cuff tear not related to the injury; pre-existing degenerative changes of the lumbar spine, age-related; pre-existing right acromioclavicular arthrosis of the right upper extremity, not related to the injury; and osteopenia, also not related to the injury. Dr. Lynch concluded Employee's right shoulder condition was consistent with a "massive age related degenerative rotator cuff tear" and concluded, based on the medical records, it was not related to the occupational injury. Noting the extremity examination from the initial injury date was "cut off" the photocopied records he was revealing, Dr. Lynch stated his opinion could change if there was a record manifesting complaints consistent with an acute right shoulder injury on November 6, 2011. Nevertheless, in Dr. Lynch's opinion, if the massive, retracted rotator cuff tear was caused by the November 6, 2011 injury, Employee would have had difficulty raising her arm, and would have expressed extreme pain and weakness, which would not have been "subtle findings" even in "the setting of a language barrier." Dr. Lynch opined "the substantial factor" contributing to Employee's right shoulder condition was age-related degeneration or some other cause not given by history or found in available medical records. Age-related degeneration was "the most significant factor" in the right upper extremity condition. Dr. Lynch found no medical evidence showing an acute right shoulder injury on November 6, 2011. In short, the minimal left wrist, lumbar and chest straining injuries Employee incurred on November 6, 2011, were all medically stable within three months of her injury. Employee needed no further treatment for the work-related portions of her complaints and any medical treatment for her right shoulder condition was not caused by the November 6, 2011 injury. Dr. Lynch further opined her November 6, 2011 work injury did not prevent Employee from doing her job at the time of injury,

though she would have difficulty doing it given her right shoulder situation, which in his view was not work-related. Lastly, Dr. Lynch identified no work-related PPI rating with respect to the November 6, 2011 injury (EME report, July 13, 2013).

32) On July 29, 2013, Dr. Barrington filed in the division's Juneau office a $1,200 claim for medical costs for his PPI rating performed on Employee's behalf. The division served this claim on all parties on August 1, 2013 (claim, July 25, 2013).

33) On July 29, 2013, Dr. Barrington also filed a petition stating: "To join as interested party under: 8 AAC 45.040" (Petition, July 25, 2013).

34) On August 2, 2013, the division's Juneau office sent Dr. Barrington a letter stating he filed five petitions, including the July 25, 2013 petition in this case, without having included proof of service on opposing parties. The division returned Dr. Barrington's petitions so he could complete proper service (Reishus-O'Brien letter, August 2, 2013).

35) On August 15, 2013, Employer filed an opposition to Dr. Barrington's petition to join alleging his PPI rating "for a right shoulder injury is frivolous and not compensable" (Opposition to Petition to Join, August 14, 2013).

36) On August 20, 2013, Employer answered Dr. Barrington's claim and denied his right to payment for providing a PPI rating for Employee's right shoulder, arguing the right shoulder was not a compensable injury (Answer to Workers' Compensation Claim, August 20, 2013).

37) On August 29, 2013, the parties through counsel appeared at the only prehearing conference held in this case. The prehearing conference summary does not mention Dr. Barrington's claim or petition, but reviews Employee's April 11, 2013 claim and subsequent, related pleadings. The parties stipulated to an oral hearing on Employee's claim on March 25, 2014. The parties were directed to file witness lists in accordance with the administrative regulations (Prehearing Conference Summary, August 29, 2013).

38) Dr. Barrington's claim and petition were not in the division's file in Anchorage when the August 29, 2013 prehearing conference was held (experience, judgment, observations and inferences drawn from all the above).

39) On September 16, 2013, Employer's attorney wrote to the workers' compensation officer who presided at the August 29, 2013 prehearing conference and requested that additional pleadings be identified in the prehearing conference summary. Employer's counsel's letter listed a controversion and answer to Dr. Barrington's claim for $1,200, without mentioning his name.

Absent from Employer's counsel's letter is any reference to Dr. Barrington, his claim or his petition. Employer served this letter on attorney Patterson but did not serve it on Dr. Barrington (Sadoski letter, September 16, 2013).

40) On November 14, 2013, attorney Patterson withdrew as Employee's representative (Notice of Withdrawal, November 14, 2013).

41) On February 25, 2014, the division served Employee and Employer, and their representatives, with a hearing notice for the March 25, 2014 hearing. The division did not serve Dr. Barrington, as he was not a party to Employee's claim, nor was Dr. Barrington's claim joined to it (Hearing Notice, February 25, 2014; experience, judgment, observations and inferences drawn from all the above).

42) Employee did not file a witness list prior to hearing (record).

43) On March 5, 2014, Employer deposed Dr. Lynch. Dr. Lynch's opinions and explanations are consistent with his written report (Lynch deposition, March 5, 2014).

44) At hearing on March 25, 2014, Employee attributed much of the confusion in this case concerning whether she injured her right shoulder or left wrist at the time of injury, to her language issues. She testified there was no interpreter in the ambulance or at the emergency room on either occasion in 2011. Employee stated her niece showed up at the November 6, 2011 emergency room visit, but only after the visit was essentially completed. Employee testified she was unable to communicate to anyone at the scene, to the paramedics, or to the emergency room attendants about her symptoms. She said the providers apparently wrote in the records whatever they wanted to put down. Employee adamantly maintained she reported right shoulder pain to every examiner. Most notably, Employee denied ever having had x-rays taken at Providence Hospital emergency room in November 2011. She testified she never left the small, hospital cubicle to get x-rays taken and staff never brought a portable x-ray machine to her bedside on either emergency room visit. She has no explanation for repeated references in her medical records to complaints of left wrist pain, and no complaints of right shoulder pain. Employee believes the medical providers must have been mistaken when they reported her physical complaints. Employee did not complete the physician's reports at Dr. Manion's office and has no explanation for why these mentioned left shoulder rather than right shoulder complaints (Employee).

45) Employee offered no explanation for why, if hospital personnel were x-raying the wrong body part, she did not complain or somehow gesture to them that they were making a mistake (Employee; observations).

46) Employee provided no medical opinion or any other evidence demonstrating she was not medically stable and was disabled effective April 17, 2012, or any time thereafter, as a result of her November 6, 2011 work injury (*id.*).

47) Employee presented no evidence of unpaid medical costs or related transportation expenses (*id.*).

48) Attorney Patterson filed no attorney's fee lien or itemization of attorney's fees or costs (*id.*).

49) Dr. Barrington did not participate in the hearing (*id.*).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers. . . .
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> **AS 23.30.005. Alaska Workers' Compensation Board.**
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> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes

of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

AS 23.30.070. Report of injury to division. (a) within 10 days from the date the employer has knowledge of injury or death or from the date the employer has knowledge of the disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall send to the division a report setting out

(1) the name, address, and business of the employer;

(2) the name, address, and occupation of the employee;

(3) the cause and nature of the alleged injury or death;

(4) the year, month, day and hour when and the particular locality where the alleged injury or death occurred; and

(5) the other information that the division may require. . . .

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
. . .

(e) the employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . .

AS 23.30.100. Notice of injury or death. (a) Notice of 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 40 to

> release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.
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> (c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer for 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 the Corporation, thebe given to an agent or officer upon the legal process may be served or who was in charge of the business in the place where the injury occurred.
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> (d) Failure to give notice does not bar a claim under this chapter
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> (1) If the employer, an agent of the employer in charge of the business and 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;
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> (2) the board exercises the failure on the ground that for some satisfactory reason notice could not be given;
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> (3) unless objection to the failure is raised before the board of the first hearing of a claim for compensation in respect to the injury or death.
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> **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
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> (1) the claim comes within the provisions of this chapter;
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> (2) sufficient notice of the claim has been given. . . .
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> (b) if delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute (*id*.; emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or his

injury and the employment. *See, e.g., Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the 2005 amendments to the Alaska Workers' Compensation Act (Act), if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence demonstrating a cause other than employment played a greater role in causing disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011). Because the fact-finders consider the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *See, e.g., Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

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

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

The board's finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *See, e.g*., *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 153 (Alaska 2007); *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007); *Municipality of Anchorage v. Devon*, 124 P.3d 424, 431 (Alaska 2005). The board has sole discretion to determine weight accorded to medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 at 11 (August 25, 2008). In determining whether there is substantial evidence to support

a Board decision, a court "must take into account whatever in the record fairly detracts from its weight." *Delaney v. Alaska Airlines,* 693 P.2d 859, 863-64 n. 2 (Alaska 1985), *overruled on other grounds,* 741 P.2d 634, 639 (Alaska 1987) (quoting *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1950)).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
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> **AS 23.30.155. Payment of compensation**. . . .
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> (p) An employer shall pay interest on compensation that is not paid when due. . . .
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> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
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> **8 AAC 45.142. Interest.** (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

The Alaska Supreme Court has stated *res judicata* and collateral estoppel principles apply in administrative proceedings. *McKean v. Municipality of Anchorage*, 783 P.2d 1169, 1171 (Alaska 1989). However, they only apply to Board proceedings to foreclose relitigation of the same issues between the same parties. *Alaska Public Interest Research Group v. State*, 167 P.3d 27 (Alaska 2007) (*AKPIRG*).

ANALYSIS

1) Should Employee's April 11, 2013 claim for benefits related to right shoulder pain be barred for inadequate notice, or should she lose the presumption of compensability?

The fact Employee fell on November 6, 2011, is not disputed. Absent substantial evidence to the contrary, it is presumed sufficient notice of the claim has been given. AS 23.30.120(a)(2). Employee's coworker, Mark, witnessed the fall. Shortly afterward, Mark obtained a pillow for Employee as she lay on the floor waiting for the ambulance. Employee's direct supervisor, Brian, soon appeared with a camera and took pictures of Employee lying on the floor. Photographing Employee's injury is part of Employer's investigation. It is likely Employer investigated further by questioning Mark, and other potential witnesses. Therefore, Employer had actual, first-hand knowledge that Employee fell on the job and was in pain. Since Employer investigated the matter immediately, while Employee still lay on the floor, there is no evidence Employer was prejudiced in any way, as discussed more fully below. AS 23.30.100(d)(1).

Neither party offered any evidence concerning who completed the November 8, 2011 injury report. Regardless who completed the written injury report, it was timely. It contained all required information, except Employee's signature. AS 23.30.070; AS 23.30.100. Apparently, Employer did not require her to sign it. Employee testified she did not complete the injury report and her testimony on this point is credible, as the report is typed, apparently on a computer. It is unlikely Employee could do this with her limited language skills. AS 23.30.122. Furthermore, the report speaks in the third-person, *e.g.*, "EE . . . hit her shoulder on cart," not in the first-person. Thus, it is unclear from where this injury information came. Nevertheless, the closest body parts listed near the "left" checked box are "Soft Tissue-Head." "Shoulder" is mentioned two lines beneath the "left" box, and again in block 15 where the form describes how the injury happened. The injury report does not delineate between left or right shoulder. Therefore, the "left" indicator more likely refers to a soft tissue head injury than to any other allegedly injured body part. In short, Employee's injury report, though not completed by her, clearly states she injured her "shoulder," and is not limited to only her left shoulder. In fact, there is no evidence, including medical records, stating Employee ever alleged a left shoulder area injury.

Therefore, Employee gave adequate, written notice of her injury in a timely manner. Her claim is not barred under AS 23.30.100(d)(2), which does not apply when adequate written notice is provided. Furthermore, because Employee gave actual, written notice of her injury in accordance with AS 23.30.100, AS 23.30.120(b) is also inapplicable. AS 23.30.120(b), relied upon by Employer to take away Employee's presumption, applies only if a "delay in giving notice" is "excused" under AS 23.30.100(d)(2). There was no delay in giving notice. Therefore, delay in giving notice was not excused and Employer's argument is without merit. Employee does not lose the presumption of compensability.

2) Did Employee's right shoulder injury arise out of and in the course of her employment with Employer, and was the November 6, 2011 injury the substantial cause of any disability or need for medical treatment?

This is a factual issue to which the presumption of compensability applies. AS 23.30.120. Employee raises the presumption with her injury report stating she injured her shoulder, and with her testimony. Falling on an extended arm and injuring one's shoulder is not a medically complex event. Therefore, medical evidence is not necessary to establish the preliminary link can raise the presumption. *Meeks.* Employer rebuts the presumption with medical records showing no right shoulder complaints for over a year after the injury, and with Dr. Lynch's EME report. *Runstrom*. The burden of production now shifts to Employee, who must prove her claim by a preponderance of the evidence. *Saxton*.

Employee has great difficulty communicating. English is not her first language and she demonstrated no English language speaking ability at hearing. Even her Spanish language ability appears limited, in reading and writing. Nevertheless, Employee's medical records are troubling. None of the contemporaneous medical records from the November 6 or November 9, 2011 emergency room visits mentions anything about Employee's right shoulder complaints, which she says she communicated to each medical provider. It is not clear how she communicated this, as she adamantly maintained she could not speak or understand English. Therefore, knowing she could not speak or understand English, one would assume Employee has developed a way to demonstrate what she is feeling to non-Spanish-speaking people, such as medical providers, through gesturing. While it is easy to imagine one or more medical providers could misunderstand what Employee was trying to demonstrate through gesturing, it is difficult

to believe consecutive medical providers from paramedics to emergency room nurses and doctors all got it wrong. One would also imagine paramedics and other healthcare providers in a community as culturally diverse as Anchorage would have developed a way to communicate effectively with patients who do not speak English as a first language. Therefore, Employee's testimony that she always reported right shoulder pain to all her medical providers beginning November 6, 2011, is not credible. AS 23.30.122.

Furthermore, one would expect if Employee injured her right shoulder, and a physician attempted to x-ray her left wrist, and paid no attention to her right shoulder, Employee would somehow communicate to the physician or radiographic technician that he or she was making a mistake. For example, a simple, repeated, exclamatory "no" in any language would seem to suffice. Yet, Employee testified no one x-rayed any part of her body in the emergency room on November 6, 2011 or November 9, 2011. The medical records say otherwise. In this respect, Employee's testimony is also not credible. AS 23.20.122.

The most troubling part about Employee's case is the right wrist brace she brought to hearing and demonstrated wearing. Employee testified she received this in the emergency room, possibly on November 6, 2011. Clearly, on November 9, 2011, when she returned to the emergency room, Employee's physician told her to "continue" to wear her wrist brace. It is difficult to understand why, if Employee did not fall and land on her right wrist, and did not complain of right wrist symptoms in the emergency room, the doctors would have given her a right wrist splint. Logically, if Employee fell on her right wrist on November 6, 2011, injuring herself sufficient to warrant getting a wrist splint, it is certainly conceivable she could have jammed her right shoulder at that same time, causing the condition demonstrated by the 2013 MRI scan. Alternately, since Employee returned to work following her accident, it is also conceivable if she tore her rotator cuff on November 6, 2011, and continued working for Employer and used her right upper extremity for several months thereafter, she could have continually aggravated the torn rotator cuff resulting in what Dr. Manion found on the 2013 MRI report. The right wrist splint evidence is difficult to reconcile with the left wrist x-rays performed in the emergency room, and with the lack of any mention of her right shoulder or even a right wrist complaint.

On the other hand, the MRI shows Employee's right shoulder is in horrible condition, at least by May 3, 2013. Dr. Lynch testified had this damage occurred on November 6, 2011, Employee's right arm would have essentially been useless, she would have been in extreme pain, and probably could not have raised her arm. Yet the emergency room reports at least tangentially show a "normal" upper extremity examination.

Benefits under the Act are only payable in respect to an injury arising out of and in the course of employment. AS 23.30.010(a). The injury must be "the substantial cause" of Employee's disability or need for medical treatment related to her right shoulder for which she claims benefits. *Id*. Given the medical facts in this case, demonstrated primarily through contemporaneous medical records, and taking into account Employee's language difficulties, it is most probable Employee did not tear her right rotator cuff when she fell on November 6, 2011. It is most probable the November 6, 2011 injury was not the substantial cause of Employee's present need for medical treatment for any condition found in her right shoulder on the May 3, 2013 MRI report. Though Employee's current right shoulder condition is regrettable, she has failed to demonstrate by a preponderance of the evidence that her November 6, 2011 fall at work for Employer is the substantial cause of the need for any treatment necessary to address the May 3, 2013 MRI findings, or any disability related to that treatment. In short, Employee failed to "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton*. Therefore, Employee's current right shoulder condition did not arise out of or in the course of her employment with Employer, the November 6, 2011 injury is not the substantial cause of the need for medical treatment or any disability related to findings on the May 3, 2013 MRI, and Employee's right shoulder is not compensable under the Act. AS 23.30.010.

3) Is Employee entitled to TTD from April 17, 2012, and continuing?

An injured worker, disabled by her work-related injury but not medically stable may be entitled to TTD benefits. AS 23.30.185. Employee seeks TTD from April 17, 2012, and continuing. She seeks TTD solely in respect to her right shoulder injury. As this decision found the right shoulder is not a compensable injury, Employee's claim for TTD will be denied.

4) Is Employee entitled to medical and related transportation expenses for her right shoulder?

An injured worker may be entitled to medical benefits and related transportation expenses for her work-related injury. AS 23.30.095. Employee's claim requests medical and related transportation expenses solely for her right shoulder. As this decision found the right shoulder not a compensable injury, Employee's claim for past and future medical costs and related transportation expenses for the right shoulder will be denied.

5) Is Employee entitled to PPI benefits for her right shoulder?

An injured worker may be entitled to PPI benefits for a work-related injury. AS 23.30.190. Employee's PPI claim relates solely to her right shoulder. As this decision found the right shoulder not a compensable injury, Employee's claim for PPI benefits will be denied.

6) Is Employee entitled to interest, attorney fees or costs?

A successful claimant is entitled to statutory interest on all benefits awarded. AS 23.30.155(p); 8 AAC 45.142. As this decision denies all benefits Employee seeks in her April 11, 2013 claim, no benefits will be awarded, none are due, and Employee is not entitled to interest. Employee's interest claim will be denied.

Similarly, though an injured worker may be entitled to an award of attorney's fees and costs if an attorney successfully obtains benefits in a claim, where no benefits are awarded, no attorney's fees or costs are awardable. AS 23.30.145. Furthermore, Employee's former attorney did not file a lien and did not itemize any attorney's fees or costs. Therefore, Employee's April 11, 2013 claim for attorney fees and costs will be denied.

Lastly, it is unfortunate Employer objected to Dr. Barrington's petition for joinder. Dr. Barrington's pending claim should have been resolved along with Employee's claim. However, it does not appear the workers' compensation officer was aware of Dr. Barrington's claim at the only prehearing conference held this case. Because it was not an issue raised or addressed at this hearing, and Dr. Barrington was not a party to this claim and did not participate in it, the question of whether or not *res judicata* and collateral estoppel apply to him, and whether or not

this decision is binding upon Dr. Barrington, will have to be decided at a hearing on his pending, July 25, 2013 claim. *McKean*; *AKPIRG*.

CONCLUSIONS OF LAW

1) Employee's April 11, 2013 claim for benefits related to right shoulder pain is not barred and she does not lose the presumption of compensability.
2) Employee's right shoulder injury did not arise out of and in the course of her employment with Employer and the November 6, 2011 injury was not the substantial cause of any disability or need for medical treatment for her right shoulder.
3) Employee is not entitled to TTD from April 17, 2012 and continuing.
4) Employee is not entitled to medical and related transportation expenses for her right shoulder.
5) Employee is not entitled to interest, attorney fees or costs.

ORDER

1) Employer's request for an order barring Employee's April 11, 2013 claim for benefits related to right shoulder pain under AS 23.30.100(a) is denied.
2) Employee's right shoulder condition is not compensable.
3) Employee's request for TTD from April 17, 2012 and continuing is denied.
4) Employee's request for medical and related transportation expenses for her right shoulder is denied.
5) Employee's request for interest, attorney fees and costs is denied.

Dated in Anchorage, Alaska, on March 27, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

_____
Linda Hutchings, Member

_____
Rick Traini, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of CARMEN INFANTE, employee / claimant; v. CHENEGA CORP, employer; AMERICAN ZURICH INSURANCE CO., insurer / defendants; Case No. 201117269; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on March 27, 2014.

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Kimberly Weaver Office Assistant