ALASKA WORKERS' COMPENSATION BOARD

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

ROBERT A. MORTICORENA, Employee, Respondent, v. EXTENDED STAY AMERICA, INC. Employer, and ZURICH AMERICAN INS. CO., Insurer, Petitioners.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201210653 AWCB Decision No. 14-0044 Filed with AWCB Fairbanks, Alaska on March 27, 2014.

Extended Stay America's (Employer) March 26, 2013 petition for reimbursement of costs for unreasonably failing to attend Employer's medical evaluation (EME) was heard on December 5, 2013 at Fairbanks, Alaska, a date selected on May 15, 2013. Attorney Robert Beconovich appeared and represented Employee, who did not appear. Attorney Adam Sadoski appeared and represented Extended Stay America (Employer). There were no witnesses. At the hearing's conclusion, the parties agreed to afford Employee's attorney until December 9, 2013, to supplement his fee affidavit and attempt to locate Employee; and Employer would be afforded until December 16, 2013, to enter any objections. The record closed on December 16, 2013.

ISSUES

Employer contends Employee unreasonably failed to attend a properly noticed EME on March 22, 2013. It contends Employee still has not provided any explanation for not attending and further contends there is no evidence of conduct beyond his control or extenuating circumstances that would justify good cause for not attending. In response to Employee's contentions he might

not have received the EME notice, Employer contends it followed the same procedure for this EME as it did for the first EME, which Employee attended. It also contends Employee has the burden to show good cause rather than it having the burden of showing good cause did not exist.

Employee's attorney represented he has not had recent contact with Employee. However, he makes two contentions on his client's behalf. First, he contends English is not Employee's first language and contends the services of an interpreter were required for Employee's deposition. Therefore, the EME notice may have presented language barriers to Employee's attendance. Second, Employee's attorney also questions whether Employee ever received the EME notice. He contends, if the EME notice was sent via certified mail, there should be a return receipt evidencing its delivery, but Employer has failed to produce one. Employee's attorney also contends Employee is working for another employer now and, perhaps, Employee's address is no longer valid. He contends Employer has the burden to establish Employee had knowledge of the EME, which it cannot.

1) ***Was Employee's failure to attend the EME unreasonable?***

Employer seeks $1,995.00 as a reimbursement for Employee's unreasonable failure to attend the EME. It requests an order pursuant to 8 AAC 45.090(g) to withhold future compensation as reimbursement for a cancellation fee.

Employee denies he unreasonably failed to attend the EME so reimbursement of the cancellation fee is not appropriate. Alternatively, he contends $1,150.00 of the $1,995.00 fee was for the EME physician to perform a records review, which resulted in production of an EME report that now appears in the record, so if any reimbursement is ordered, that amount should be adjusted accordingly.

2) ***Should Employee's future compensation be reduced pursuant to 8 AAC 45.090(g) to reimburse Employer for the cancelation fee?***

FINDINGS OF FACT

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

1) Employee is originally from Peru, and his primary language is Spanish. (Berney report, November 28, 2012; Khan report, October 16, 2012).

2) Employee has a preexisting history of perirectal abscesses, anal fistula and perianal condyloma. (Brenner report, March 11, 2006; Montano report, September 28, 2006).

3) On August 3, 2012, Employee reported a left knee injury and "butt bruising" after falling of a ladder while working for Employer as a maintenance engineer. (Report of Occupation Injury of Illness, August 3, 2012).

4) On August 3, 2012, Employee sought treatment for his left knee at the Fairbanks Memorial Hospital Emergency Department. X-rays showed no bony abnormalities or misalignments and the soft tissue shadows appeared unremarkable. Left knee sprain was diagnosed. Employee was given Vicodin and Motrin for pain and discharged. (Emergency Department report, August 3, 2012; X-ray report, August 3, 2012).

5) On August 14, 2012, Employee sought treatment for a perirectal abscess that began several days prior and had become progressively larger and more painful. He reported a prior history of perirectal abscesses, which are controlled when he takes his HIV medications, but when he discontinues his medication, the abscesses will reoccur. (Allen report, August 14, 2012).

6) On August 15, 2012, Danny Robinette, M.D. performed surgical drainage of Employee's perirectal abscess. (Robinette report, August 15, 2012).

7) On August 21, 2012, Employee filed a claim for an injury to his "left butt," seeking temporary total disability (TTD), permanent partial impairment (PPI), medical and transportation costs, penalty, and interest. (Claim, August 21, 2012).

8) On August 31, 2012, an abdominal magnetic resonance imaging (MRI) study showed a dilated right lobe at the liver lesion with characteristics of malignancy, including hepatocellular carcinoma. (MRI report, August 31, 2012).

9) On September 13, 2012, Employer controverted all benefits related to perirectal abscess. (Controversion Notice, September 13, 2012).

10) Following its September 13, 2012 controversion, Employer continued to file additional, periodic controversions. (Controversion Notices, October 10, 2012; October 22, 2012; March 26, 2013; June 6, 2013).

11) On September 19, 2012, Employee returned to the Fairbanks Memorial Hospital Emergency Department complaining of increased rectal pain and continuing left knee pain. A

pelvic computed tomography (CT) scan was ordered, which did not show any acute findings. Left knee x-rays were taken and compared to the August 3, 2012 x-rays. Again, the x-rays showed no bony abnormalities or misalignments and the soft tissue shadows appeared unremarkable. "Likely" knee strain and acute anal pain were diagnosed. Employee was prescribed Percocet and Motrin and discharged with instructions to follow-up with Dr. Robinette for probable surgery to address an anal fistula. (Emergency department report, September 19, 2012).

12) On October 16, 2012, Moazzem Khan, M.D. evaluated Employee for left leg pain. Electrodiagnostic testing did not reveal evidence of radiculopathy or a peripheral nerve injury. Dr. Khan's report states Employee has difficulty communicating in English. (Kahn report, October 16, 2012).

13) On October 29, 2012, Dr. Robinette evaluated Employee for chronic anal pain. Employee reported his workers' compensation claim for perirectal abscess had been controverted, which Dr. Robinette thought was "appropriate." Dr. Robinette performed a digital examination that indicated a possible anal fissure, but he could not obtain a good visualization of the fissure because of the extensive condyloma. He opined Employee's perirectal pain was secondary to persistent anal fistula. (Robinette report, October 29, 2012).

14) On November 2, 2012, Employer served Employee with notice of its intent to take his deposition on November 26, 2012. (Employer's notice, November 2, 2012).

15) On November 12, 2012, Dr. Robinette saw Employee for a pre-operative evaluation. He planned to proceed with fulgaration of the condyloma and a fistulotomy on November 14, 2012. (Robinette report, November 12, 2012).

16) On November 14, 2012, Dr. Robinette performed a fistulotomy and fulgaration of anal warts. (Robinette report, November 15, 2012).

17) Following surgery, Employee had a "fairly large open wound" and "a lot of superficial burns from fulgaration of the condylomata" that caused significant post-operative pain and extended Employee's inpatient admission. Preliminary pathology reports showed "some squamous carcinoma in the situ and some of the tissue excised overlying the fistula tract." The results of additional sections were pending. (Robinette report, November 19, 2012).

18) Employee's patient education nursing assessment notes language barrier as a consideration in patient education. (Simmerman report, November 15, 2012; observations).

19) On November 19, 2012, Employee was discharged. (Robinette report, November 19, 2012).

20) On November 19, 2012, pathology studies showed high grade intraepithelial neoplasia of the excised anal fistula and high grade dysplasia of excised condyloma. Possible margin involvement was also noted. (Pathology report, November 19, 2012).

21) On November 28, 2012, internist, Bertram Berney, M.D., performed an EME of Employee's perirectal condition. Employee was accompanied by an interpreter. During the evaluation, Dr. Barney noted inconsistencies in Employee's history of the injury and exaggerated pain behavior. He opined the substantial factor for that condition was impaired immunity secondary to HIV infection along with a propensity for perirectal abscesses and not the work injury. (Berney report, November 28, 2012).

22) On November 29, 2012, orthopedic surgeon, James Baldwin, M.D., performed an EME of Employee's left knee condition. Employee was accompanied by an interpreter. At the time of Dr. Baldwin's evaluation, Employee reported he was not having any knee pain. Rather, his primary complaint was a bulging lump in his left groin that had developed about eight days previous and left calf pain that had developed about four days previous. Employee was accompanied by an interpreter. During the evaluation, Employee asked to speak to Dr. Baldwin outside the presence of the interpreter. During this conversation, Employee discussed his "chronic illness" and explained to Dr. Baldwin he was distressed over difficulties with supporting his family. Dr. Baldwin diagnosed superficial vein thrombosis of the left calf. Because of calf pain and perirectal abscess pain, Dr. Baldwin was unable to perform a meaningful evaluation of Employee's left knee. He tentatively diagnosed left knee sprain related to the work injury based on history alone. Dr. Baldwin recommended Employee go to the local emergency room for an ultrasound before flying back to Alaska to rule out deep vein thrombosis. (Baldwin report, November 29, 2012).

23) On November 29, 2012, Employee was seen at the Providence Portland Medical Center Emergency Department. There is no record of an ultrasound being performed. He was diagnosed with a varicose vein and discharged with pain medication and instructions to follow-up with his primary care provider. (Providence Portland Medical Center Discharge Report, November 29, 2012; observations).

24) On December 5, 2012, Employer filed a petition seeking orders compelling Employee to attend a deposition and imposing sanctions on Employee for his failure to attend his deposition on November 26, 2012. (Employer's petition, December 3, 2012).

25) On December 14, 2012, Employee saw Dr. Robinette for a post-surgical follow-up. He reported minimal drainage from the area of surgery and excellent pain relief with prescribed Ibuprofen. Dr. Robinette's examination revealed a well-healed fistulotomy and the areas of fulgurated perianal condylomas were almost completely healed. There was no erythema or purulent drainage. Employee requested a return to work with lifting restrictions for two weeks. No further visits were planned and Employee was to follow-up on an as needed basis. (Robinette report, December 14, 2012).

26) Employee's medical record goes silent following his December 14, 2012 visit with Dr. Robinette. (Record; observations).

27) At a February 2, 2013, prehearing conference, the parties set Employer's December 5, 2012 petition for sanctions for hearing on April 11, 2013. (Prehearing Conference Summary, February 2, 2013).

28) On February 17, 2013, Employee attended a prehearing conference on Employer's December 3, 2012 petition for sanctions. Employee contended he had moved and did not receive notice of the deposition. He provided the designee with a new address, who updated Employee's address of record in the workers' compensation division's (Division) electronic database. (Prehearing Conference Summary, February 17, 2013; Division's electronic database event entry, February 17, 2013).

29) At a February 22, 2013 prehearing conference, Employee's attorney made a limited appearance to address Employer's December 5, 2012 petition for sanctions. Because the parties had agreed to take Employee's deposition the following month, Employer agreed to cancel the April 11, 2013 hearing on Employer's petition. (Prehearing Conference Summary, February 22, 2013).

30) On March 4, 2013, Employer wrote Employee informing him of an EME appointment on March 22, 2013. The center of the first page of the letter sets forth:

> **APOINTMENT INFORMATION/Friday March 22nd at 1:15pm**
> **Dr. Michael Frasier Jr.**

Facility/Address: Fairbanks Family Wellness, located at 3550 Airport Way, Suite 4, Fairbanks, AK 99705
Facility Phone number: 800-331-6622

The letter indicates it was sent via both certified and regular U.S. mail to Employee's address of record, last updated at the February 17, 2013 prehearing conference. (Employer's letter, March 4, 2013) (emphasis in original).

31) Employer did not file a signed return receipt evidencing delivery of the March 4, 2013, EME notice sent via certified mail. (Record; observations).

32) On March 21, 2013, Employee's attorney entered his appearance. (Entry of Appearance, March 21, 2013).

33) On March 22, 2013, Employee did not appear for the scheduled EME with orthopedic surgeon, Michael Frasier, Jr., M.D. Dr. Frasier conducted a records review and dictated that portion of his report. (Frasier report, May 28, 2013).

34) On March 27, 2013, Employer was billed an $845.00 no-show fee for the March 22, 2013 EME and $1,150.00 for Dr. Frasier's records review. (EME Invoice, March 27, 2013).

35) Prior to retaining counsel, Employee participated in two prehearing conferences on his own behalf. Neither summary indicates a language barrier. (Prehearing Conference Summary, October 2, 2012; Prehearing Conference Summary, February 7, 2013; observations).

36) On March 28, 2013, Employer filed its instant petition seeking reimbursement of costs arising from Employee's failure to attend the March 22, 2013 EME. (Employer's petition, March 26, 2013).

37) On May 15, 2013, the parties agreed to set the instant petition for hearing on December 5, 2013. (Prehearing Conference Summary, May 15, 2013).

38) On May 28, 2012, Employee participated in an EME with Dr. Frasier. An interpreter was present throughout the evaluation. Dr. Frasier noted Employee's complaints involved his lateral and posterior left thigh and not his knee. He diagnosed left knee sprain as a result of the work injury based on documented history only and opined that condition would have resolved 6-12 weeks from the date of injury. (Frasier report, May 28, 2013).

39) On October 4, 2013, Employee's address of record was again updated with the Division. (Division's electronic database, Employee's address history).

40) On December 6, 2013, Employee filed an affidavit of fees and costs setting for 2.1 hours attorney time billed at $350.00 per hour and $394.11 in costs. (Employee's affidavit, December 5, 2013).

41) Employer did not object to Employee's December 6, 2013 fee affidavit. (Record; observations).

42) The parties have not filed a transcript of Employee's deposition. (Record; observations).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

> **AS 23.30.095. Medical treatments, services, and examinations**.
> . . . .
>
> (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. . . . An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board or the court determining an action brought for the recovery of damages under this chapter, be forfeited. . . .

Medical evaluations are part of the discovery process and Employers have an explicit statutory right to medical examinations of injured workers by physicians of the employer's choosing. The limit of the employer's right is the "reasonable" standard in the language of AS 23.30.095(e). *Citro v. Municipality of Anchorage*, AWCB Decision No. 10-0087 (May 20, 2010). This has been interpreted to refer to reasonable times, frequency, location, physician qualifications, etc. *Palmer v. Air Cargo Express*, AWCB Decision No. 05-0222 (August 30, 2005). The reasonableness standard also applies to the method, means, and manner of

evaluation, and to the degree of invasiveness. *Ammi v. Eagle Hardware,* AWCAC Decision No. 05-004, at 12-13 (February 21, 2006). Under the statute neither injured workers nor the board has the right to refuse an EME unless it is unreasonable in some specific respect. *Travers v. Take Out Taxi*, AWCB Decision No. 96-0306 (July 29, 1996).

The Alaska Supreme Court commented on the reasonableness standard in *Thoeni v. Consumer Electronic Services,* 151 P.3d 1249 (Alaska 2007):

> Even though, as the board states, the employer does not have to select the examining physician to be the 'most convenient' for the employee, this does not mean that the employee's convenience should be completely discounted. The statute provides that the employer may request examinations 'at reasonable times' (footnote omitted). Although the statute does not make any comment on where the examination takes place, its requirement of a 'reasonable time' indicates that the legislature intended some consideration of the employee's ease in attending the examination. Furthermore, the board's regulations on selection of physicians for a second independent medical evaluation-when the board, rather than the employer, makes the selection-explicitly direct that 'the proximity of the physician to the employee's geographic location' be taken into account. *Id*. at 1254-55.

In *Halfrey v. University of Alaska,* AWCB Decision No. 97-0006 (January 10, 1997), the employee admitted at hearing he suspected the EME physician would approve the employer's proposed reemployment plan, which would end Employee's entitlement to reemployment benefits. He chose not to attend the EME. In that case, the board exercised its discretion and ordered the employee's benefits during the period of his refusal to attend an EME forfeited, reasoning "the employee carefully calculated the risks and benefits of attending the EME, then chose to refuse." *Id.* at 3.

In *Young v. Houston Contracting,* AWCB Decision No. 00-0115 (June 14, 2000), the employee attended an EME accompanied by a representative of the Alaska Injured Workers' Alliance (AIWA). The AIWA representative became combative when instructed he could not accompany the employee into the examination room, the police were called, and the examination did not go forward. In that case, the board found the employee had unreasonably refused to attend the EME and forfeited half of the employee's compensation for the period of refusal. *Id.* at 5.

In *Carswell v. Anchorage School District*, the employee notified the employer she would not attend an EME at the "last minute," due to a family emergency. The board "did not find the employee's rationale particularly compelling," and forfeited TTD benefits 14 days following the missed appointment. Because Employee "ceased resistance and attempted to reschedule the examination at the earliest possible date," the board deemed forfeiture of the entire period between the cancellation of the EME and the rescheduled EME three months later unnecessary. *Id.* at 7.

In *Freelong v. Chugach Alaska Services*, AWCB Decision No. 12-0044 (March 6, 2012), the employee did not attend a one-day EME because he wanted to spend time with his son at a "family celebration" before his son left for an extended overseas deployment. Noting Employee's son was home for several weeks and the family celebration was, in fact, a three-day open house with guests coming and going at different times, the board concluded the employee's non-attendance was unreasonable. However, because the employee notified the employer immediately upon receiving the EME notice he would be unable to attend, and because he also offered his availability at a later date, the board declined to order a forfeiture benefits.

> **AS 23.30.135. Procedure before the board.**
>
> (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
> . . . .
>
> **AS 23.30.155. Payment of compensation.**
> . . . .
>
> (j) If an employer has made advance payments or overpayments of compensation, the employer is entitled to be reimbursed by withholding up to 20 percent out of each unpaid installment or installments of compensation due. More than 20 percent of unpaid installments of compensation due may be withheld from an employee only on approval of the board.
> . . . .
>
> **AS 44.62.460. Evidence rules.**
> . . . .
>
> (e) Unless a different standard of proof is stated in applicable law, the

> (1) petitioner has the burden of proof by a preponderance of the evidence if an accusation has been filed under AS 44.62.360 or if the renewal of a right, authority, license, or privilege has been denied; . . . .

The preponderance of the evidence standard set forth at AS 44.62.460(e) applies to reimbursement proceedings in workers' compensation cases. *Denuptiis v. Unocal Corp.*, 63 P.3d 272; 277-78 (Alaska 2003). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **8 AAC 45.060. Service.**
> . . . .
>
> (b) . . . . Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. . . .
>
> (f) Immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address. . . .
>
> **8 AAC 45.090. Additional examination**.
> . . . .
>
> (c) If an injury occurred before July 1, 1988, an examination requested by the employer not less than 14 days after the injury, and every 60 days after that, is presumed reasonable, unless the presumption is overcome by a preponderance of the evidence, and the employee shall submit to an examination by the employer's choice of physician without further request or order by the board. . . .
>
> (d) Regardless of the date of an employee's injury, the employer must
>
> (1) give the employee and the employee's representative, if any, at least 10 days' notice of the examination scheduled by the employer;
>
> (2) arrange, at least 10 days in advance of the examination date, for the employee's transportation expenses to the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, at no cost to the employee if the employee must travel more than 100 road miles for the

> examination or, if the employee cannot travel on a government-maintained road to attend the examination, arrange for the transportation expenses by the most reasonable means of transportation; and
>
> (3) arrange, at least 10 days in advance of the examination date, for the employee's room and board at no cost to the employee if the examination under AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section, requires the employee to be away from home overnight.
>
> (e) If the employer fails to give timely notice of the examination date or fails to arrange for room and board or transportation expenses in accordance with (d) of this section, and if the employee objects to attending the examination because the employer failed to comply with (d) of this section, the employer may not suspend benefits under AS 23.30.095(e).
> . . . .
>
> (g) If an employee does not attend an examination scheduled in accordance with AS 23.30.095(e), AS 23.30.095(k), AS 23.30.110(g), or this section,
>
> (1) the employer will pay the physician's fee, if any, for the missed examination; and
>
> (2) upon petition by a party and after a hearing, the board will determine whether good cause existed for the employee not attending the examination; in determining whether good cause existed, the board will consider when notice was given that the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination; if the board finds
>
> (A) good cause for not attending the examination did not exist, the employee's compensation will be reduced in accordance with AS 23.30.155(j) to reimburse the employer the physician's fee and other expenses for the unattended examination; or
>
> (B) good cause for not attending the examination did exist, the physician's fee and other expenses for the unattended examination is the employer's responsibility.

In *Khan v. Adams & Associates,* AWCB Decision No. 06-0203 (July 21, 2006), the board found an injured worker's failure to attend an EME or notify anyone he could not attend warranted an order requiring the employee to reimburse the employer for the charges associated with the missed EME. Since that employee's claim was dismissed, there were no benefits from which the

charges could be withheld. Nevertheless, a 100% reduction from any future benefits the employee might obtain was ordered.

In *Greer v. State of Alaska,* AWCB Decision No. 10-0190 (November 26, 2010), the employee refused to attend a properly noticed EME unless the employer and EME physician agreed to allow her attorney to accompany her and to record the examination. The board found good cause existed to excuse her attendance because she provided timely notice of her intent not to attend, her reasons for not attending were justifiable, and her actions were not willful in the sense that she intended to cause financial harm to Employer or the EME physician. Employer's petition for reimbursement of the no-show fee was denied. *Id.* at 23-26.

In *Freelong,* although the board found the employee had unreasonably refused to attend an EME under AS 23.30.095(e), it declined to order reimbursement of a no-show fee under 8 AAC 45.090(g), because the employee gave the employer notice of his inability to attend well in advance of employer's ten-day notice period to avoid the fee. *Id*. at 16.

> **Rule 301. Presumptions in General in Civil Actions and Proceedings.**
>
> (a) **Effect.** In all civil actions and proceedings when not otherwise provided for by statute, by judicial decision or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast. The burden of going forward is satisfied by the introduction of evidence sufficient to permit reasonable minds to conclude that the presumed fact does not exist. If the party against whom a presumption operates fails to meet the burden of producing evidence, the presumed fact shall be deemed proved, and the court shall instruct the jury accordingly. When the burden of producing evidence to meet a presumption is satisfied, the court must instruct the jury that it may, but is not required to, infer the existence of the presumed fact from the proved fact, but no mention of the word "presumption" may be made to the jury.

ANALYSIS

1) Was Employee's failure to attend the EME unreasonable?

Employer contends Employee unreasonably failed to attend a properly noticed EME on March 22, 2013. It contends Employee still has not provided any explanation for not attending and

further contends there is no evidence of conduct beyond his control or extenuating circumstances that would justify good cause for not attending. Although Employee's counsel represents Employee has not been in contact with him, and although Employee did not appear for the hearing, he set forth two defenses on Employee's behalf: 1) the EME notice may have presented a language barrier for Employee that prevented his attendance; and 2) perhaps Employee was not in receipt of the EME notice.

As a preliminary issue, the parties also disagree on which party has the burden of proof and what facts the other is required to establish. Although AS 23.30.135(a) provides formal rules of evidence need not apply in workers' compensation proceedings, in this instance, they provide useful guidance. Here, the burden of proof is on Employer, as petitioner, to establish Employee unreasonably failed to attend its EME. AS 44.62.460(e). The standard Employer must meet is the preponderance of the evidence standard. *Id.*; *Denuptiis*. Once Employer has made a *prima facie* case the facts it asserts are true, the burden of going forward, but not the burden of proof, shifts to Employee to introduce evidence meeting or rebutting Employer's. Evid. R. 301. At all times, the "risk of nonpersuasion" remains on Employer. *Id.* In the final analysis, and regardless of whether the procedure is formal or informal, Employer must "induce a belief" in the panelists' minds Employee was probably without reasonable cause not to attend the EME. *Saxton*; AS 44.62.460(e).

Given this, it is not thought Employer's failure to file a signed return receipt for the EME notice is fatal to its petition. Employee is required to maintain an address of record for service with the board. 8 AAC 45.060(f). Even for formal service, service is complete at the time of deposit in the mail with sufficient postage and properly addressed to the party at his last known address. 8 AAC 45.060(b). At the time Employer sent the EME notice, Employee had already missed another required appointment in his case, his deposition. At the February 17, 2013 prehearing conference, Employee contended he had just moved and did not receive notice of the deposition. His address of record was updated. Less than three weeks later, Employer sent the EME notice via both certified and regular U.S. mail to Employee's recently updated address. It is reasonable, therefore, to conclude the EME notices were delivered. *Id.*

Employee's attorney also contends a language barrier may have prevented Employee's attendance. There is some evidence to support Employee's contention. For examples, Employee is originally from Peru and his primary language is Spanish. Dr. Moazzem Khan's October 16, 2012 report indicates, at that appointment, Employee had difficulty communicating in English. Additionally, Employee's patient education nursing assessment from his hospitalization notes language barrier as a consideration in patient education. Employee was also accompanied by interpreters at his EME's. Finally, although not evidence, since a transcript does not appear in the record, Employee's counsel contends Employee required the services of an interpreter at his deposition.

However, while the record indicates Employee may have found interpreter services useful, especially for technical, adversarial matters, such as depositions and EME's, it does not establish a language barrier significant enough to prevent attendance at an ordinary, scheduled appointment. As Employer contends, Employee kept, not one, but two, previous EME appointments. Furthermore, he kept a third, subsequent EME appointment. Prior to retaining counsel, and after receiving written notices, Employee attended two prehearing conferences and participated without any communication difficulties being noted. Although Dr. Khan found it difficult to communicate in English with Employee during his evaluation, there is no mention in the medical record of Employee requiring an interpreter to facilitate medical treatment. To the contrary, during Dr. Baldwin's evaluation, Employee saw fit to dismiss his interpreter in order to privately communicate with Dr. Baldwin regarding his chronic illness. Employee utilized interpreters on numerous occasions when he thought it appropriate to do so; and there is no reason to conclude he could not have sought interpretive services in this instance if the EME notice presented him with any difficulty.

In this case, Employer does not seek a forfeiture of benefits, and Employee does not contend the EME was, *per se*, unreasonable. Instead, Employer seeks reimbursement of the no-show fee and Employee's attorney suggests a couple of reasons why Employee may not have attended the EME. It is impossible to conclude a basis for non-attendance was reasonable when no basis has been provided to begin with. *Khan*, AS 23.30.095(e). Employee has failed to meet or rebut Employer's evidence. A preponderance of the evidence shows Employee unreasonably failed to

attend the EME.

2) ***Should Employee's future compensation be reduced pursuant to 8 AAC 45.090(g) to reimburse Employer for the cancelation fee?***

Employer seeks $1,995.00 as a reimbursement for Employee's unreasonable failure to attend the EME. In determining whether good cause existed for Employee's failure to attend the appointment, consideration is given to when notice was given the employee would not attend, the reason for not attending, the willfulness of the conduct, any extenuating circumstances, and any other relevant facts for missing the examination. 8 AAC 45.090(g). Here, Employee provided no notice of his non-attendance. Neither has he provided any explanation for not attending the EME since the missed appointment. His failure to also appear for this hearing is indicative of willful conduct. Although Employee's counsel suggests possible extenuating circumstances, these are not supported by evidence. For these reasons, it cannot be concluded Employee had good cause to not attend the EME and Employer is entitled to reimbursement of the cancellation fee.

However, Employee's point is well taken regarding the charge for Dr. Frasier's records review. It is unknown on what basis Employee can be held liable for that portion of the bill. Employee was in no way responsible for generating that charge and, as his attorney points out, Employer received the benefit of that service and Dr. Fraser's report now appears in the record. Therefore, Employee's future compensation, if any, should be reduced in an amount of $845.00.

CONCLUSIONS OF LAW

1) Employee's failure to attend the EME was unreasonable.

2) Employee's future compensation should be reduced pursuant to 8 AAC 45.090(g) to reimburse Employer for the cancellation fee.

ORDER

1) Employer's March 26, 2013 petition is granted in part and denied in part.

2) Employee's future compensation, if any, shall be reduced by $845.00.

Dated in Fairbanks, Alaska on March 27, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Zeb Woodman

PETITION FOR REVIEW

A party may seek review of an interlocutory of 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 Decision and Order in the matter of ROBERT A. MORTICORENA employee / respondent v. EXTENDED STAY AMERICA, INC., employer; ZURICH AMERICAN INS. CO., insurer / petitioners; Case No. 201210653; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, on March 27, 2014.

/s/_____
Darren Lawson, Office Assistant II