ALASKA WORKERS' COMPENSATION BOARD

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

ROBIN A. FREELONG, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case Nos. 200919643 & 200812594
CHUGACH ALASKA CORP., Employer,	)	AWCB Decision Nos. 14-0076
and	)	Filed with AWCB Fairbanks, Alaska On May 30, 2014
ZURICH AMERICAN INSURANCE CO., Insurer, Defendants.	)	

Robin Freelong's (Employee) claims were heard on October 31, 2013, a date selected on May 29, 2013. Pete Stepovich appeared and represented Employee, who appeared and testified on his own behalf. Attorney Robert Bredesen appeared and represented Chugach Alaska Services (Employer). Claims adjuster, Susan Hildreth, testified telephonically on behalf of Employer. The parties addressed numerous preliminary issues before the hearing commenced. Employee withdrew his claim for reemployment benefits. Employer withdrew its controversion of Employee's right shoulder condition and contended it had paid a two percent permanent partial impairment (PPI) rating from Sidney Levine, M.D., and will also be paying Employee interest on his right shoulder PPI. Employer further contended "a couple" of medical bills from Jimmy Tamai, M.D. and three prescriptions for Flector patches "fell through the cracks," but were being processed for payment with interest and penalty. Given its position Employee's left shoulder condition was medically stable, Employer further contended it should have paid Dr. Levine's six percent PPI rating for that condition, as well. Therefore, in an effort to correct this inconsistency, Employer contended it has

paid Employee's left shoulder PPI has been paid but it will also be paying Employee interest and penalty on that benefit. At the hearing's conclusion, the parties agreed their post hearing briefs and Employee's supplemental affidavit of attorney's fees would be due by November 15, 2013, and Employer would be afforded until November 22, 2013 to enter its objections to Employee's attorney's fees affidavit. Following the hearing, further litigation ensued over post-hearing briefs and attorney's fees. The record closed on February 10, 2014, when the parties stipulated to additional, post-hearing, issues being included in this decision.

ISSUES

Employee contends he injured both his left shoulder and his neck on December 13, 2009. He contends his post-injury complaints of neck pain, along with numbness and tingling down his arm into his hand, establishes a cervical injury on that date. Employee contends electrodiagnostic testing has confirmed a cervical condition. He relies on the opinions of his treating physician and Dr. Levine, who correlated the onset of his radicular symptoms to the December 13, 2009 work injury.

Employer contends the December 13, 2009 work injury did not compromise Employee's C6 nerve root nearly two years after the injury. Instead, it contends Employee's cervical symptoms are the result of many years of bone degeneration and is unrelated to his employment. Employer contends Employee's complaints of hand and arm numbness do not match a pattern for C6 radiculopathy, but rather suggests they are the result of muscle spasms secondary to shoulder pain or a previously undiagnosed carpal tunnel syndrome. It relies on the opinions of its medical evaluators and John Cleary, M.D.

1) Is Employee entitled to medical and transportation benefits for his cervical spine symptoms?

Employee contends the December 13, 2009 work injury continues to be the cause of his disability and, because Employer has not paid temporary total disability (TTD) after August 20, 2011, he contends he is entitled to TTD from that date. In response to Employer's contention Employee was not diligent in pursuing the left shoulder surgical recommendation, Employee contends he never refused surgery, but rather just wanted to take a cautious approach given the poor results of his first, left shoulder surgery.

Employer does not dispute it stopped paying TTD on August 20, 2011, but contends Employee is only entitled to TTD under two scenarios. First, Employer contends, if Employee's cervical symptoms are found compensable; then, it would owe TTD from August 20, 2011. However, it denies Employee's cervical symptoms are compensable. Second, Employer contends Employee may have been entitled to TTD for his left shoulder symptoms, but due to his failure to diligently pursue his treating physician's left shoulder surgical recommendation, he was presumed to be medically stable as a matter of law, and thereby no longer entitled to TTD benefits. It also contends Employee was medically stable in either March or April of 2011 when Employee's treatment ended. Employer relies on a January 2, 2012 report from one of its medical evaluators for the assertion Employee was presumed medically stable no later than April 15, 2011.

2) Is Employee entitled to TTD for his cervical spine symptoms?

Employee contends a previous decision suspended his TTD benefits for failure to attend an employer's medical evaluation (EME), but did not order those benefits forfeited. He, therefore, contends his TTD benefits should have resumed from the time his resistance to attending the EME ended.

Employer relies on an opinion of its medical evaluator and contends, because Employee was previously, medically stable, he was not entitled to continuing TTD.

3) Is Employee entitled to TTD for his left shoulder symptoms under Freelong I?

Employee contends he was entitled to continuing TTD for his left shoulder symptoms. His contentions are set forth above.

Employer disagrees, relying on its medical examiner's opinions on medical stability, as set forth above.

4) Is Employee entitled to any additional periods of TTD for his left shoulder symptoms?

Employee contends he is entitled to penalty payments for two periods of unpaid benefits. First, he contends Employer did not have a valid controversion in effect from August 20, 2011 until its December 27, 2011 controversion. Therefore, he contends penalty is owed from August 20, 2011 until a December 3, 2011 EME report that served as the basis for Employer's December 27, 2011 controversion. Second, Employee claims penalty on all benefits, including TTD, from August 18, 2012, the date an EME report concluded the 2009 work injury was the substantial cause of Employee's need for left shoulder surgery, until present.

Employer contends if Employee's cervical symptoms are found compensable, a penalty would not be owed because it has always disputed Employee's cervical condition in good faith. Alternatively, if Employee is seeking a penalty on unpaid left shoulder benefits, Employer relies on its medical examiner's opinions on medical stability set forth above and denies any penalty is owed.

5) Is Employee entitled to payment of penalties on unpaid TTD?

Employee seeks a finding of unfair or frivolous controversion. He makes no specific contentions on this issue, but rather refers to a hearing exhibit that lists Employer's controversions and states he will "leave [the issue] in the hands of the board . . . to make that call."

Employer denies it unfairly or frivolously controverted Employee's benefits and contends it has always disputed the compensability of Employee's neck and shoulder symptoms in good faith.

6) Did Employer unfairly or frivolously controvert Employee's benefits?

Employee seeks interest on past benefits awarded.

Employer contends, since no further benefits are owed, neither is interest.

7) Is Employee entitled to interest?

Employee seeks modification of *Freelong v. Chugach Alaska Services, Inc.*, AWCB Decision No. 13-0005 (January 14, 2013) (*Freelong II*), which held he made an unauthorized change of

physician. He contends he asked his treating physician at the time to order a magnetic resonance imaging study (MRI) of his left shoulder and the receptionist for his treating physician said "no." Consequently, he sought a consultation with another physician, who did order an MRI, which showed multiple tears in his shoulder. He cites 8 AAC 45.082(b)(4)(B) in support of his position, and contends, by not ordering an MRI, his treating physician refused to provide services which, by regulation, then afforded him an opportunity to substitute another physician.

Employer contends Employee did not present evidence in support of his current position at the original hearing and nothing in the record supports his "revisionist contention" now. It also objects to Employee's testimony at this hearing regarding an alleged conversation he had with the receptionist at his treating physician's office as hearsay.

8) Should Freelong II be modified?

Employee contends *Freelong II* did not decide the unauthorized change of physician issue with respect to Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report. He seeks a decision on Employer's petition. Employee's contentions with respect to Dr. Witham's report are the same as his contentions with respect to Dr. Kohlman's report, namely because Dr. Wade's refused to provide services, Dr. Witham was not an unauthorized change of physician.

Employer contends Employee is merely attempting to re-litigate *Freelong II*. It relies on the same basis to strike as it did with respect to Dr. Kohlman's report, namely, it is the product of an unauthorized change of physician.

9) Should Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report be granted?

Employee contends Employer intentionally disregarded the hearing chair's instructions on post-hearing briefings and used its opportunity to object to his attorney's fees as an opportunity to also present additional argument on other issues in order to gain an "unfair tactical advantage." He further contends Employer's post-hearing opportunity to object to attorney's fees should be limited to his supplemental fee affidavit only.

Employer contends it does not recall any post-hearing briefing limitations and contends Employee's litigation of other issues is relevant to an attorney fee award. In response to Employee's contention its post-hearing objections should be limited to his supplemental affidavit only, Employer contends the regulations do not impose such a limitation.

10) Should Employee's November 27, 2013 petition to strike Employer's November 20, 2013 objection to attorney's fees and costs be granted?

Employee seeks an award of reasonable attorney's fees and costs as set forth in his affidavits.

Employer objects to the fees set forth in Employee's affidavits, and contends much of his fees are the result of "spurious" petitions and "delay tactics."

11) Is Employee entitled to an award of attorney's fees and costs?

FINDINGS OF FACT

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

1) On August 28, 1990, Employee sought treatment from Cary Keller, M.D. He reported he was sandblasting in a 36-inch pipe when the hose blew apart injuring his left elbow. Dr. Keller diagnosed "acute contusion, left elbow." She prescribed pain medication, a sling and imposed lifting limitations. Dr. Keller also encouraged physical therapy. (Keller report, August 28, 1990).

2) On October 15, 1990, Employee saw Dr. Keller for a follow-up evaluation. He reported 50 percent improvement, but was complaining of numbness in his left hand. Dr. Keller recommended an electromyography (EMG) study and a nerve conduction velocity (NCV) study to rule out radial neuropathy. (Keller report, October 15, 1990).

3) On November 14, 1990, Scott Emery, M.D., performed a neurological evaluation and conducted electrodiagnostic testing. Employee reported noticing left hand numbness at his fourth and fifth digits. Upon examination, Employee had a full range of cervical motion without pain. His left shoulder was noted to be lower than his right. Employee had pain when Dr. Emery tested his extensor muscles of the forearm by dorsiflexion of the wrist, and had marked pain on supination or pronation against the wrist. Electrodiagnostic evidence did not show ulnar

neuropathy or C8 radiculopathy. Dr. Emery stated "some of [Employee's] sensory symptoms may arise at the level of the brachial plexus, perhaps associated with position of the left shoulder, or the prior history of clavicular fracture." (Emery report, November 14, 1990).

4) On August 4, 2008, Employee injured his right shoulder while working for Employer when he fell to the ground after jumping out of a trailer. (Report of Occupational Injury or Illness, August 8, 2008).

5) On October 30, 2008, Libby Silberling, PA-C, evaluated Employee's right shoulder and referred him to Michael Weber, PA-C, for further evaluation and treatment. (Silberling report, October 30, 2008; Silberling letter, October 30, 2008).

6) On November 3, 2008, PA-C Weber evaluated Employee's right shoulder symptoms and ordered x-rays. He noted Employee held his right shoulder substantially lower than his left. Range of motion in Employee's cervical spine was normal. PA-C Weber planned a magnetic resonance imaging (MRI) study if Employee remained symptomatic. (Weber report, November 3, 2008).

7) On November 3, 2008, right shoulder x-rays showed hypertrophic changes to both Employee's glenohumeral joint and acromioclavicular (AC) joint. (X-ray report, November 3, 2008).

8) On December 3, 2008, a right shoulder MRI showed hypertrophic changes to Employee's AC joint and a mildly hook-shaped acromium suggestive of possible impingement and irregularities of Employee's supraspinatus tendon suggestive of tendinosis without tear. (MRI report, December 3, 2008).

9) Employee treated conservatively with PA-C Weber for his right shoulder, which included Flexeril, Flector patches and physical therapy. (Weber report, May 4, 2009).

10) PA-C Weber referred Employee to David Witham, M.D., for a surgical consultation for his right shoulder. (Weber reply to Adjuster letter, May 7, 2009).

11) On August 17, 2009, John Joosse, M.D., performed an employer's medical evaluation (EME). Employee's cervical spine range of motion was "normal and painless." Dr. Joosse opined the work injury was the substantial cause of Employee's significant right shoulder bicipital tendinitis, supraspinatus tendonitis with interstitial tearing, and thought it aggravated Employee's preexisting impingement syndrome. He recommended arthroscopic surgery with an acromioplasty. (Joosse report, August 17, 2009).

12) On December 13, 2009, Employee injured his left shoulder unloading a truck bed while working for Employer. He was seen by the camp medic, Gary Buck, PA-C. Employee stated he felt a "twinge" in his upper, left arm while unloading a bucket of scaffolding knuckles and reported "twinges of pain" with arm movement along with numbness running down his arm. (Report of Occupational Injury or Illness, December 13, 2009; Record of Injury, December 13, 2009; Buck chart notes, December 13, 2009).

13) On December 15, 2009, Employee was seen by Janice Whatley, ANP, at the Fairbanks Urgent Care. He reported intermittent numbness and tingling following the December 13, 2009 work injury, as well as shoulder pain. ANP Whatley advised Employee to wear a sling, prescribed Ibuprofen and ordered an MRI. (Whatley report, December 15, 2009).

14) On December 17, 2009, a left shoulder MRI showed degenerative changes to Employee's supraspinatus and infraspinatus tendons, as well as his anterosuperior and posteroinferior labra. (MRI report, December 17, 2009).

15) On December 18, 2009, Dr. Witham evaluated Employee and agreed with Dr. Joosse's right shoulder arthroscopy recommendation. (Witham report, December 18, 2009).

16) On January 12, 2010, Mark Wade, M.D., evaluated Employee following referral from ANP Whatley. He diagnosed left shoulder tendonitis and recommended a cortisone injection and physical therapy. Employee was released back to work with light duty restrictions. (Wade report, January 12, 2010; Wade prescription, January 12, 2010).

17) Employee contends he was "laid off" at this point because Employer did not have light duty work available. (Cleary report, February 14, 2013).

18) Employee's job at the time of his injuries was a heavy demand level. Employer acknowledges it did not have modified work available for Employee during his claimed periods of TTD. (Employer's Post Hearing brief, November 15, 2013).

19) On February 11, 2010, Employee discussed his left shoulder symptoms with Dr. Witham. Dr. Witham advised Employee his left shoulder symptoms may or may not improve with time. He also discussed possible left shoulder acromioplasty with Employee. Employee did not want to proceed with surgery. Dr. Witham referred Employee back to PA-C Webber for day-to-day pain management. (Witham report, February 11, 2010).

20) On February 25, 2010, Employee filed a claim on his December 13, 2009 left shoulder injury, seeking temporary total disability (TTD) from December 13, 2009 ongoing, and penalty. (Claim, February 25, 2010).

21) On March 11, 2010, Dr. Wade opined the 2009 work injury was the substantial cause of Employee's left shoulder symptoms. (Dr. Wade's reply to Adjuster letter, March 11, 2010).

22) On March 26, 2010, Employee's representative filed an entry of appearance and an amended claim on his December 13, 2009 left shoulder injury, seeking TTD from December 15, 2009 ongoing, transportation costs, permanent partial impairment (PPI), compensation rate adjustment, penalty, interest and attorney fees and costs. (Employee's Entry of Appearance, March 26, 2010; Claim, March 26, 2010).

23) On April 13, 2010, Employer controverted TTD from December 15, 2009 until January 11, 2010; on the grounds Employee did not submit evidence to support disability benefits prior to January 12, 2010. It also controverted attorney's fees and costs on the grounds no benefits paid to Employee were the result of his attorney's work. Employer controverted penalty and interest on the grounds all benefits had been timely paid. (Controversion Notice, April 13, 2010).

24) On May 6, 2010, Employee filed a second claim for his December 13, 2009, left shoulder injury, seeking TTD from December 15, 2009 ongoing, transportation costs, permanent partial impairment (PPI), compensation rate adjustment, penalty, interest, a finding of unfair of frivolous controversion and attorney fees and costs. Employee's claim also alleged Employer engaged in discriminatory conduct by laying him off work in violation of AS 23.30.247 and further contended Employer or its agents committed fraudulent acts in violation of AS 23.30.250. (Claim, May 6, 2010).

25) On June 7, 2010, Gretchen Spies, PT, performed a physical therapy evaluation. Employee stated he thought he may have aggravated his neck at the same time he injured his left shoulder. He reported pain and weakness in his left shoulder as well as numbness and tingling that starts in his left shoulder and radiates down into his left hand. (Home Town Physical Therapy report, June 7, 2010).

26) At a June 9, 2010 prehearing conference, Employee's claims were set for hearing on August 12, 2010. (Prehearing Conference Summary, June 9, 2010).

27) On June 30, 2010, Employee reported to PT Spies the last physical therapy session "killed him." He stated he was unable to lift his left arm after the last visit and had increased pain on the

backside of his left shoulder. Employee also reported the numbness in his whole hand continued to persist and was more intense following his last visit. (Home Town Physical Therapy report, June 30, 2010).

28) On July 2, 2010, Employee continued to complain of numbness and tingling in his upper extremity. (Home Town Physical Therapy report, July 2, 2010).

29) On August 12, 2010, the parties agreed to cancel the hearing on Employee's claims set for that day and to submit a partial compromise and release (C&R) agreement. (Workers' Compensation Division's electronic events calendar, August 12, 2010).

30) On August 24, 2010, Employee saw Dr. Wade for a follow-up visit. He reported his left shoulder symptoms had not improved and also reported still having numbness in his left thumb. (Wade report, August 24, 2010).

31) On August 25, 2010, the parties submitted a partial C&R settling Employee's claims for TTD, penalty, interest and attorney's fees and costs through the date of its filing on August 25, 2010. They agreed Employee's weekly compensation rate was $954.53. (C&R, August 25, 2010).

32) On September 30, 2010, Dr. Wade recommended left shoulder arthroscopy with joint resection versus subacromial decompression. (Wade report, September 30, 2010).

33) On October 21, 2010, Dr. Wade again opined the 2009 work injury was the substantial cause of Employee's left shoulder symptoms. (Dr. Wade's reply to Adjuster letter, October 21, 2010).

34) On October 26, 2010, Janice Onorato, M.D., saw Employee for a neurological consultation on referral from Employee's family practitioner. The consultation was scheduled as a result of concern over Employee's complaints of numb and swollen feet. Employee also reported "paresthesias involving his hands, but he believes this is due to the bilateral rotator cuff injuries." (Onorato report, October 26, 2010).

35) On November 5, 2010, Dr. Wade performed diagnostic arthroscopy of Employee's left shoulder with excision of the distal clavicle and an anterior acromioplasty. (Dr. Wade operative report, November 5, 2010).

36) Following surgery, Employee would participate in physical therapy until March 31, 2011. (Home Town Physical Therapy reports, November 17, 2010 to March 31, 2011).

37) On December 17, 2010, Employee reported improvement in his left shoulder but was still concerned about numbness in his thumb. (Home Town Physical Therapy report, December 17, 2010).

38) On January 31, 2011, Employee reported "numbness in the digits of the left hand." (Home Town Physical Therapy report, January 31, 2011).

39) On March 1, 2011, Dr. Wade reported Employee "continues to complain about his left shoulder." Regarding interactions with Employer's claim adjuster, he wrote:

> I requested [Employee] call his claims adjuster, and she will call me back. Apparently she is on vacation until 03/07/2011. She knows to call and talk to me as I feel that as he is 4 months out from his surgery, [Employee] should be able to go back to work without any inhibitions or restrictions, but he contends that the job is too strenuous and he is not physically, able to do that. Hopefully, we can try and get him some type light [sic] duty for the next six weeks or so. At this point in time, his work status is put on hold until I can talk with his work claims adjuster with his workers' comp as no further development from this visit today was seen.

(Wade report, March 1, 2011).

40) On March 29, 2011, Dr. Wade responded to a letter from Employer indicating he anticipated Employee becoming medically stable by June 1, 2011. (Adjuster's letter, March 24, 2011).

41) On June 22, 2011, Martina Adam-Mariutto, PT, performed a functional capacities evaluation. PT Mariutto noted "neurological signs," such as decreased deep tendon reflexes in Employee's left arm and decreases sensation to light and sharp touch in the left C5, C6 and C7 dermatomes. She opined Employee could only lift, carry push and pull at the light duty level and recommended a neurological examination to rule out a brachial plexus injury. (Maruitto report, June 22, 2011).

42) On August 10, 2011, Dr. Onorato performed a neurological evaluation for left shoulder pain and left upper extremity paresthesias, which included nerve conduction studies. Employee reported his symptoms worsened following physical therapy. Dr. Onorato diagnosed "left median neuropathy at the wrist along with superimposed C6 versus C7 left cervical radiculopathy or perhaps both." There was no evidence of left brachial plexopathy or ulnar neuropathy around the elbow. She recommended a cervical MRI study. (Onorato report, August 10, 2011).

43) An August 19, 2011 cervical MRI showed a moderate disc bulge at C6-7 with a small annular tear, mild disc bulges at C2-6, moderate spinal stenosis at C5-6, and severe bilateral foraminal narrowing at C3-7. (MRI report, August 19, 2011).

44) On August 24, 2011, Employer controverted all benefits after August 20, 2011 based on Employee's failure to attend Employer's medical evaluation (EME) scheduled for that date. The notice states the controversion would continue "until Employee attends an IME." (Controversion Notice, August 24, 2011).

45) Employer stopped paying TTD on August 20, 2011. (Compensation Report, August 29, 2011; record, observations).

46) On August 24, 2011, Employer filed a petition for reimbursement of EME fees based on Employee's failure to attend the evaluation. It also sought an order to compel Employee's attendance at an EME. In defense of Employer's petition, Employee later contended he had a previously scheduled "family celebration" the weekend of the EME and chose to attend this event as his son was soon to be deployed to Bahrain for two years. He also contended he provided Employer ample notice he would not be available on August 20, 2011, but agreed to attend an EME scheduled any time after September 1, 2011. On the other hand, Employer later contended the issue for hearing was balancing its "due process IME rights" against Employee's interest in "spending a day with his adult son (in town for an entire month) to cook pork ribs." "It is the employer's position that lazily hanging out and cooking pork ribs is not so important an activity that an employee can justifiably refuse to attend an IME . . ." Employer continued:

> [Employee] refused to attend an IME on the grounds that it was in his best interest to hang out and cook pork. The fact he feels the need to take a ludicrous set of surrounding circumstances – a get together with his sisters, who live in town and he can see everyday, along with his son, who was home for an entire month, when the actual get-together occurred the day after the IME – and embellish them into a 'family reunion' or a 'weekend celebration' demonstrates a brazen contempt for his responsibilities under the Act. To further accuse the insurer of bad faith, and therefore seek to perhaps get the adjuster fired from her job, demonstrates a venomous quality beyond that.

Employer also alleged Employee filed a subsequent claim in retaliation for its petition for reimbursement of EME and contended Employee's case involved "unusual delays." (Employer's petition, August 24, 2011; Employer's hearing brief, January 25, 2012; *Freelong v. Chugach Alaska Services*, AWCB Decision No. 12-0044 (March 6, 2012) (*Freelong I*)).

47) On September 20, 2011, Employee filed a claim on his December 13, 2009 left shoulder injury, seeking TTD from August 20, 2011 ongoing, medical and related transportation costs, penalty, interest, a finding of unfair of frivolous controversion and attorney's fees and costs. In addition to the injury to Employee's left shoulder itself, his claim was also based on "[n]eurological symptoms and pain after [sic] Surgery in area of neck and shoulder." In a narrative, Employee repeatedly contended he had been "cooperative" with "the process," and further contended Employer's re-scheduled EME for December 10, 2011 should be scheduled sooner since benefits were not being paid "despite his cooperation and willingness to attend an EME." (Claim, September 19, 2011).

48) On September 27, 2011, a cervical MRI showed multilevel degenerative changes most pronounced at C3-4 and C5-6 with associated bony neural foraminal narrowing on the left at C5-6. (MRI report, September 27, 2011).

49) On September 28, 2011, Paul Jensen, M.D., evaluated Employee's cervical symptoms. Employee reported "progressive neck pain, left upper extremity radiculopathy with associated pain and weakness over the last 48 months." Dr. Jensen thought "most of Employee's symptoms were related to his neck" and recommended C5-6 and C6-7 decompressions and fusions. (Jensen report, September 28, 2011).

50) On October 5, 2011, Employer controverted TTD, medical and transportation costs, attorney's fees and costs, penalty, interest and "unfair or frivolous controversion" from August 20, 2011 "until the employee cooperates with IME discovery." (Controversion Notice, October 5, 2011).

51) On October 17, 2011, Dr. Jensen completed a physician's report form and checked the box indicating his opinion Employee's cervical symptoms was work related. He also added the comment: "If patient indeed injured himself the way he states he did." (Physician's Report, October 17, 2011).

52) Dr. Jensen's October 17, 2011, physician's report does not indicate what, if any, records he reviewed prior to forming his opinion, nor does it articulate any further basis for it. (*Id.*; observations).

53) On November 30, 2011, and December 3, 2011, orthopedic surgeon Keith Holley, M.D., and neurologist Eugene Wong, M.D., performed a panel EME. Their evaluation consisted of reviewing medical records dating back to 1985, and summarizing relevant medical records from

2008 onward. Both doctors conducted separate physical examinations. During Dr. Wong's neurological examination, he noted:

> [Employee] identifies a pain which he states originates from the top of the left shoulder and extends all the way down the entirety of the left upper extremity with involvement of all digits of the left hand. He emphasizes that all digits are involved. The pain is associated with a numbness and tingling sensation.

Drs. Wong and Holley opined: 1) Employee's right shoulder symptoms was preexisting but symptomatically aggravated by the 2008 work injury, 2) Employee's left shoulder symptom were preexisting but symptomatically aggravated by the 2009 work injury, and 3) Employee's cervical symptoms were a preexisting, degenerative condition not related to work. Drs. Holley and Wong concluded Employee's right and left shoulders were both medically stable and required no further treatment. They further concluded Employee could not return to the type of strenuous manual labor he formerly performed due to his age, numerous degenerative conditions, prior workers' compensation injuries, and because he had been out of work for over two years. (Holley & Wong report, December 3, 2011).

54) On December 27, 2011, based on Dr. Wong's and Dr. Holley's December 3, 2011 report, Employer controverted "[a]ll benefits regarding the employee's cervical condition, and further benefits regarding the employee's left shoulder condition." The controversion contends Employee's cervical condition was not related to his employment with Employer, and his left shoulder condition was medically stable and did not require further treatment. (Controversion Notice, December 27, 2011).

55) On January 2, 2012, Dr. Holley issued an addendum EME report and opined Employee's left shoulder condition was medically stable by April 15, 2011. His opinion was based on a purported March 1, 2011 report by Dr. Wade that recommended six more weeks' physical therapy and light duty work. (Holley report, January 2, 2012).

56) Dr. Wade's March 1, 2011, report did not mention physical therapy. A different March 1, 2011 report by Dr. Wade, which recommended six additional weeks' of physical therapy, could not be found in the record. (*Id.*; record; observations).

57) On January 10, 2012, Employer controverted TTD after April 15, 2011 based on its physician's opinion Employee was medically stable from that date. (Controversion Notice, January 10, 2012).

58) Employer's January 10, 2012, controversion was referring to Dr. Holley's January 2, 2012 addendum report, where he opined Employee was medically stable on April 15, 2011. (Observations, unique or peculiar facts of the case, and inferences drawn from the above).

59) On February 21, 2012, Employer filed a petition to consolidate Employee's 2008 right shoulder injury and his 2009 left shoulder injury cases. (Employer's Petition, February 17, 2012).

60) On March 6, 2012, *Freelong v. Chugach Alaska Services, Inc.*, AWCB Decision No. 12-0044 (March 6, 2012) (*Freelong I*) decided Employer's August 24, 2011 petition for reimbursement of EME fees. The decision concluded Employee had unreasonably failed to attend the EME and suspended benefits from August 20, 2011 until September 1, 2011, the date when it was determined Employee's "resistance" to the EME ended. However, the decision declined to order forfeiture of benefits or reimbursement of expenses for the missed EME. (*Freelong I*).

61) *Freelong I* also commented on Employer's rhetoric: "Contrary to Employer's contention in its brief, Employee's choice to spend the weekend with his extended family before his son was deployed did not demonstrate 'brazen contempt for his responsibilities under the Act.' Employer's characterization of the family event as 'hanging out and cooking pork' trivializes the event." (*Id.* at 16).

62) *Freelong I* was chaired and authored by a different hearing officer than this decision. (*Id.*).

63) On March 8, 2012, Employee filed an opposition to Employer's February 17, 2012 consolidation petition, contending consolidation would delay his remedies. (Employee's Opposition, March 7, 2012).

64) Case consolidation is generally recognized as an efficient method to facilitate case resolutions and is typically accomplished by stipulation of the parties. Consolidation seldom requires a ruling. (Experience, judgment, observations).

65) On April 9, 2012, Employer controverted all right shoulder benefits after December 3, 2011 based on Dr. Wong's and Holley's opinions the work injury was not the substantial cause of any ongoing symptoms in that shoulder. (Controversion Notice, April 9, 2012).

66) On May 3, 2012, Employee sought a second opinion on his left shoulder symptoms from Jimmy Tamai, M.D., who ordered a MRI arthrogram. (Tamai report, May 3, 2012).

67) A May 10, 2012, MRI of Employee's left shoulder did not show a full-thickness tear of the rotator cuff, but did show a partial thickness tearing of the distal supraspinatus tendon with associated tendonopathy, a small tear of the joint capsule in the rotator interval and a complex tear of the glenoid labrum. (MRI report, May 10, 2012).

68) On May 18, 2012, Dr. Tamai recommended left shoulder arthroscopy and potential open repair, revision surgery depending on the arthroscopic findings. (Tamai report, May 18, 2012).

69) On June 1, 2012, Employer filed a brief in support of its February 17, 2012 consolidation petition. It contended, since the one case involved Employee's right shoulder and the other case involved Employee's left shoulder and neck, the most efficient way to address "whole body issues" was to consolidate the cases. (Employer's brief, March 30 [sic], 2012).

70) On June 4, 2012, Employer filed a petition for a SIME and a SIME form seeking an evaluation of Employee's right shoulder, left shoulder and neck conditions on the issue of causation. Employer also sought SIME opinions on the issues of treatment, functional capacity, degree of impairment and medical stability. The form listed a neurosurgeon as the medical specialty. (Employer petition and SIME form, May 31, 2012).

71) On June 6, 2012, the designee ruled on Employer's February 17, 2012 petition to consolidate. Noting there appeared to be medical disputes involving the right shoulder, left shoulder and neck that might require an SIME, she determined consolidating the two cases would simplify the issues and allow the two cases to move forward more quickly and with greater efficiency and ordered Employee's 2008 and 2009 cases consolidated. (Prehearing Conference Summary, June 6, 2012).

72) On June 14, 2012, Employee served Employer with a medical summary containing Dr. Tamai's May 3, 2012 and May 18, 2012 reports, as well as the May 10, 2012 MRI report. (Medical Summary, June 14, 2012).

73) On June 28, 2012, Employee filed an amended claim on his December 13, 2009 left shoulder injury, which included his cervical condition, seeking TTD from September 1, 2011 and continuing, medical and related transportation costs, reemployment benefits "pending review and interpretation of appropriate statutes and regulations," compensation rate adjustment, penalty, interest, a finding of unfair of frivolous controversion and attorney fees and costs. (Claim, September 19, 2011).

74) Shoulder and spinal injuries are routinely litigated in Alaska's workers' compensation system. (Experience, observations).

75) On July 25, 2012, the parties agreed to an SIME for Employee's right shoulder, left shoulder and cervical conditions and agreed the "issue/dispute is causation." The parties further agreed to "non-SIME" issues, including need for treatment, functional capacity, degree of impairment and medical stability for each of Employee's conditions, but did not agree on a medical specialty. Employer contended the SIME should be performed by a neurosurgeon, Employee contended the SIME should be performed by a panel consisting of an orthopedic surgeon and a neurosurgeon. Employer contended it would forward Employee's May 10, 2012 left shoulder MRI to its EME panel before the SIME was scheduled to solicit their opinions on the recent evidence. The designee decided to select SIME specialties based on the outcome of the EME's opinion. If the EME physicians agreed left shoulder surgery was necessary, then the SIME would not include an orthopedic surgeon. However, if there was still a medical dispute, then the SIME would include both an orthopedic surgeon and a neurosurgeon. (Prehearing Conference Summary, July 25, 2012).

76) On July 30, 2012, Employer controverted numerous benefits, including TTD from September 1, 2011, PPI and medical and transportation costs. The controversion notice states: "The Employer relies on its independent medical evaluating physician [sic] who opined the employee was medically stable from his work injury as of April 15, 2011." The notice further states, "The employer controverts all further benefits and relies on the 12/03/2011 independent medical evaluation report by Drs. Wong and Holley, who opine the work incident is not the substantial cause of any ongoing injury to the right shoulder." (Controversion Notice, July 30, 2012).

77) Like Employer's January 10, 2012, controversion, its July 30, 2012 controversion was referring to Dr. Holley's January 2, 2012 addendum report, where he opined Employee was medically stable on April 15, 2011. However, unlike its January 10, 2012 controversion, which specifically disputed TTD after April 15, 2011; its July 30, 2012 controversion specifically disputes TTD after September 1, 2011. (Observations, unique or peculiar facts of the case, and inferences drawn from the above).

78) On August 6, 2012, Employer filed a brief on the medical specialty issue for the SIME. It contended the parties agreed to an SIME with a neurosurgeon because causation of Employee's

need for neck surgery was at issue. However, Employer contended at the time of Drs. Wong's and Holley's December 3, 2011 EME report, Employee was not treating for his left shoulder and its EME physicians opined the shoulder was medically stable. It contended Dr. Tamai only later proposed surgery and, Employer only recently became aware of Employee's desire to proceed with the surgery at a prehearing conference. Employer contended, since it has agreed to forward the May 10, 2012 MRI to its EME physicians, until it hears back from them, there was not a dispute involving Employee's left shoulder to warrant an SIME involving an orthopedic surgeon. (Employer's Brief, August 3, 2012).

79) Employee also filed a brief on the SIME specialty issue, although it was neither date-stamped, nor was its receipt noted in the workers' compensation division's electronic events calendar. Employee contended, since he had primarily been evaluated by orthopedic surgeons, and since his case involved his right and left shoulders, the SIME should include an orthopedic surgeon. (Employee's Brief, August 3, 2012; observations).

80) The type of medical specialist to perform a SIME is typically arrived at by stipulation of the parties and seldom requires a ruling. (Experience, observations).

81) At an August 17, 2012 prehearing conference, the parties discussed the appropriate medical specialty for the SIME. Employer contended there was not a dispute concerning Employee's left shoulder condition so the SIME should be performed by a neurosurgeon. Employee contended he had primarily been treated by orthopedic surgeons, so the SIME should include both a neurosurgeon and an orthopedic surgeon. The designee delayed ruling on the medical specialty pending receipt of an addendum EME report. (Prehearing Conference Summary, August 17, 2012).

82) On August 18, 2012, Dr. Holley reviewed additional medical records, including the May 10, 2012 MRI and Dr. Tamai's May 3, 2012 and May 18, 2012 reports. In his addendum report, he added a new diagnosis of partial thickness rotator cuff tear and opined the 2009 work injury and the 2010 surgery were the substantial cause of Employee's current left shoulder condition. Dr. Holley stated Employee's left shoulder condition was not medically stable. He agreed with Dr. Tamai's surgical recommendation for Employee's left shoulder and opined Employee would not be able to return to strenuous manual labor. (Holley report, August 18, 2012).

83) On August 24, 2012, Employer emailed Employee and the designee and attached a copy of Dr. Holley's August 18, 2012 report to its email message. It informed them Dr. Holley thought

diagnostic arthroscopy of Employee's left shoulder was reasonable and necessary treatment. Employer concluded its email by requesting Employee notify it when his surgery was scheduled. (Employer's email, August 24, 2012).

84) On August 24, 2012, Employee's representative replied to Employer's email of the same date. He contended an orthopedic surgeon was still required for the SIME because Employee's right shoulder was still in dispute. Employee's representative also asked Employer if it was going to accept compensability of Employee's left shoulder condition and reinstate benefits. If not, he contended, there were still disputes over Employee's left shoulder that should be evaluated by an orthopedic surgeon. Employee's representative concluded: "Once you get back to me, I will discuss surgery potentials with [Employee]. (Employee's email, August 24, 2012).

85) On August 28, 2012, Employee's family doctor, Elizabeth Kohnen, M.D., wrote a letter to Employee. At the beginning of the letter, Dr. Kohnen stated she is "somewhat concerned about [Employee's] ongoing pain and potential unemployability [sic] from unresolved orthopedic issues." She purports to do a "summary" of Employee's medical records in order to "help" Employee, his insurance carrier or Employer's workers' compensation carrier "develop a plan on where to go from here." She then acknowledged: "I do internal medicine and primary care and so I am clearly not an expert in this field." Dr. Kohnen wrote Employee "has a work-related injury in 2009," and summarizes some of the medical evidence pertaining to Employee's left shoulder and cervical spine. She concluded the letter by stating she thinks "it would be helpful to strongly consider surgery for one or both of these conditions," and urged Employee to let her know if "there is something [she] could do to expedite such [sic] as surgery." (Kohnen letter, August 28, 2012).

86) Given the extent of medical records in this case, Dr. Kohnen's August 28, 2012 letter is of negligible probative value. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

87) On September 6, 2012, the parties participated in a prehearing conference. The summary states:

> EE's atty requested this PHC. EE's atty wanted to know the status of benefits from 9/1/11 to present (TTD, medicals and attorney's fees and costs) since the left shoulder surgery was accepted by ER. ER's atty stated that his client has authorized the shoulder surgery but does not know if EE is intending on moving forward with the surgery and that will determine what benefits will be paid. The left shoulder surgery is not an issue for the SIME. EE's atty stated that benefits from the 9/1/11 controversion may need to be addressed at the SIME. It is EE

> atty's position that EE is not medically stable at this time. EE's atty stated that the new medical evidence provided by Dr. Holley concurring that left shoulder surgery is appropriate and that the condition is directly related to the work injury was just received; EE has not had time to make the necessary appointments regarding left shoulder surgery.

Employee also contended there was still a dispute over his right shoulder symptoms. Employer disagreed there was a dispute over Employee's right shoulder symptoms. Employee contended he had not treated for his right shoulder because it was controverted and because his left shoulder problems were worse. Employer contended, based on Dr. Holley's most recent opinion, it would "check on" benefits from the time of controversion. Employee requested that the SIME not be scheduled until after a follow-up prehearing conference. The designee, noting the parties had stipulated to an SIME for Employee's neck, right shoulder and left shoulder symptoms, ruled the right shoulder will be included in the SIME. The designee also ordered the SIME panel will consist of an orthopedic surgeon for Employee's right shoulder symptoms and a neurosurgeon for his neck symptoms. (Prehearing Conference Summary, September 6, 2012).

88) The record does not contain a September 1, 2011 controversion. It is presumed the September 6, 2012 prehearing conference summary's reference to a "9/1/11 controversion," refers to Employer's July 30, 2012 controversion, which controverted benefits after September 1, 2011. (Record, observations, experience, unique or peculiar facts of the case, judgment).

89) At a September 21, 2012, prehearing conference, Employer contended it was going to file an amended answer and controversion regarding Employee's left shoulder. Employee contended SIME questions should not be due until he had a chance to review Employer's amended answer and controversion. The designee set an October 5, 2012 deadline for the parties to submit modified SIME questions. Employee declined to sign the SIME form and contended he may file a revised SIME form since causation of his left shoulder symptoms is not in dispute. Employee also reported he had not requested a surgical referral yet from Dr. Tamai, but he had discussed the proposed surgery with Dr. Kohnen and was researching potential surgeons. (Prehearing Conference Summary, September 21, 2012).

90) On September 21, 2012, Employer controverted TTD from September 1, 2011, PPI, medical and transportation costs, attorney's fees and costs, "review of reemployment benefits," compensation rate, penalty, interest, and "unfair controversion." Its controversion was based on numerous grounds, including, 1) the December 3, 2011 EME reports opining Employee was

medically stable from April 15, 2011; 2) Dr. Wong's and Dr. Holley's opinions work was not the substantial cause of ongoing right shoulder injury; 3) "[E]mployee's left shoulder condition was medically stable, as a matter of law, so long as the employee does not accept and then diligently proceed with treatment. The employer and the carrier have preauthorized the procedure recommended by the attending physician;" 4) Employee did not have a permanent impairment rating beyond amounts already paid; 5) Employee was found ineligible for reemployment benefits; 6) Employee's compensation rate for the 2009 injury was established by a previous compromise and release agreement; 7) interest was not due because benefits had been timely paid; and 8) Employer was unaware of any basis for Employee's claims for penalties and a finding of unfair or frivolous controversion. (Controversion Notice, July 30, 2012).

91) On September 24, 2012, Employer filed an amended answer to Employee's June 28, 2012 claim and admitted responsibility for medical treatment and related transportation costs arising from Employee's 2009 left shoulder injury. It also contended: "Employee's left shoulder condition is medically stable, as a matter of law, so long as the employee does not accept and then diligently proceed with the treatment. The employer and carrier have preauthorized the procedure recommended by the treating physician." Employer denied all other claims for benefits and asserted numerous other defenses. (Employer's Answer, September 21, 2012).

92) On September 26, 2012, Employer sent its modified SIME questions to the designee. Employer's question number ten sets forth the definition of medical stability under the Alaska Workers' Compensation Act. It then asks:

> Regardless of the causes of Mr. Freelong's diagnosed condition(s), has he reached medical stability as defined above for each condition? If so, when was stability reached? If not, when will medical stability likely be reached?
>
> Regarding the left shoulder surgical recommendation, the IME opinions assumed he would proceed with the surgery and therefore considered Mr. Freelong [sic] left shoulder to be *not* medically stable. However, this assumption was incorrect as Mr. Freelong has shown no interest in the surgery since it was recommended last May. In light of the fact he has not treated for the left shoulder, and has not tried, in any way, is Mr. Freelong's left shoulder medically stable under the Alaska definition?

(Email from Employer to the designee, September 26, 2012) (emphasis in original).

93) On October 5, 2012, Employee sent the designee "modified SIME questions" that included questions concerning his left shoulder. (Employee's modified SIME questions, October 5, 2012).

94) On October 8, 2012, Employee signed Employer's May 31, 2012 SIME form after adding "Orthopedic Surgeon" as the medical specialty, in addition to the neurosurgeon as submitted by Employer. Employee also modified Employer's SIME form by adding "pertaining to neck and right shoulder only" under the causation section of the form. (SIME form, October 8, 2012).

95) On October 8, 2012, Employee wrote the designee to object to certain of Employer's modified SIME questions on the basis the issues were not dispute and sought specific limitations on Employer's questions. Employee also noted in his letter he had added an orthopedic surgeon to the form. (Employee letter, October 8, 2012).

96) On October 9, 2012, Employer wrote the designee in response to Employee's October 8, 2012 letter. It contended the parties had stipulated to SIME issues at the July 25, 2012 prehearing conference and those issues included the issues Employee's October 8, 2012 letter sought to exclude. (Employer letter, October 9, 2012).

97) On October 9, 2012, Employee filed Dr. Kohnen's, August 28, 2012 letter as a supplemental medical record. (Employee's supplemental SIME medical record, October 9, 2012).

98) On October 11, 2012, Employee filed a petition to strike Employer's SIME questions and to stay the SIME until such time as the issue of Employer's SIME questions could be decided. (Employee's Petition, October 11, 2012).

99) On October 31, 2012, a prehearing was held to address the parties' petitions concerning the SIME and SIME questions. Employee contended the SIME should not be scheduled until disputes over the SIME questions are decided. Employer contended all questions must be sent to the SIME physician and the Act does not provide for a stay of the SIME process. Employee asserted new medical evidence following the parties' stipulation has changed the issues in dispute. In response to an inquiry from Employer, Employee reported he was interested in having neck and shoulder surgeries but he still needed to do more research on choosing a surgeon. Employer pointed out Employee has not followed-up with his treating physician for pre-authorized left shoulder surgery. (Prehearing Conference Summary, October 31, 2012).

100) On November 1, 2012, Employer filed a cross petition to strike medical records filed by Employee. It contended Employee had stipulated to a SIME several months ago, but has been "dragging his feet ever since." Employer further contended Employee's objections to its questions were a delaying tactic. It sought to exclude Dr. Kohnen's, August 28, 2012 letter as the product of

an unauthorized change of physician, "*while **refusing** to follow-up with his attending physician for preauthorized medical treatment*." (Employer's petition, October 30, 2012) (emphasis in original).

101) On November 2, 2012, Employee filed an "expedited petition for medical and TTD benefits related to his left shoulder condition." He contended both his physician and Employer's physicians agree his left shoulder condition is work related and not medically stable. Employee contended Employer lacked authority to withhold compensation and benefits and further contended compensation can only be suspended by a board order. He cited AS 23.30.095(d) in support of his position. (Employee's Petition, November 2, 2012).

102) On November 20, 2012, Employee saw Dr. Witham for complaints of left shoulder pain and "popping." In his report, Dr. Witham acknowledged previously treating Employee's right shoulder. He also reviewed a "packet of medical records" Employee brought with him to the appointment and presented a summary of Employee's course of treatment for his left shoulder in his report. Dr. Witham stated he agreed with Dr. Tamai's left shoulder surgical recommendation. He also wrote: "I do not, however, believe that this will resolve his other medical issues involving his neck, shoulder, and upper extremity. I do not believe that this will provide him with a pathway to return to employment as a laborer." (Witham report, November 20, 2012).

103) Given the extent of medical records in this case, Dr. Witham's November 20, 2012 report is of negligible probative value. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

104) On November 23, 2012, Employer filed an answer to Employee's November 2, 2012 petition. It contended: 1) the Act does not provide a mechanism for "expedited" rulings; 2) it had authorized left shoulder surgery "months ago" and Employee has "unreasonably refused to proceed with it;" and 3) by refusing to proceed with the recommended surgery, Employee "rendered himself medically stable in light of AS 23.30.395(27)." (Employer's Answer, November 21, 2012).

105) At a November 29, 2012 hearing, Employee's representative contended Employee was still researching surgeons for his recommended surgery. (Record).

106) On December 10, 2012, Employee filed a medical summary with a supplemental SIME binder containing Dr. Witham's November 20, 2012 report. (Medical Summary, December 10, 2012).

107) On December 26, 2012, the designee notified Employee his SIME appointments had been scheduled with neurosurgeon John Cleary, M.D., for February 14, 2013; and with orthopedic surgeon Sidney Levine, M.D., for February 15, 2013. (Designee's letter, December 26, 2012).

108) On January 14, 2013, *Freelong v. Chugach Alaska Services, Inc.*, AWCB Decision No. 13-0005 (January 14, 2013) (*Freelong II*) decided Employee's October 11, 2012 petition to stay the SIME and strike Employer's SIME questions, and Employer's October 30, 2012 cross petition to strike medical records. In defense of Employer's October 30, 2012 petition to strike Dr. Kohnen's August 28, 2012 letter, Employee contended Dr. Kohnen had treated him for many years and she had observed his medical condition both before and after the injury. He pointed out there are other records from Dr. Kohnen in the medical record and asserted the letter should not be stricken because her opinion was relevant to his claim. The decision prominently commented on the amount of litigation that had occurred in the case to date, especially with regards to the SIME. It then decided Employee's left shoulder condition should be an SIME issue; struck some of Employer's SIME questions; declined to stay the SIME and struck Dr. Kohnen's August 28, 2012 letter from the SIME record as the product of an unauthorized change of physician. (*Freelong II*).

109) *Freelong II* did not award compensation or benefits. (*Id.*).

110) On January 15, 2013, Employee filed an affidavit of readiness for hearing (ARH) on his November 2, 2012 "petition" for medical and TTD benefits. (Employee's ARH, January 14, 2013).

111) On January 22, 2013, Employer filed its opposition to Employee's January 14, 2012 ARH on the basis the SIME would not occur for another month and depositions might also be necessary following the SIME. (Employer's Opposition, January 17, 2013).

112) On January 23, 2013, Employee filed a petition to disqualify Dr. Cleary as a SIME physician. He objected to Dr. Cleary serving as a SIME panelist on the basis he was biased against claimants. Employee cited numerous board decisions to stand for his proposition Dr. Cleary was not an impartial evaluator. (Employee's Petition, January 23, 2013).

113) Petitions to disqualify a SIME physician are extremely rare in workers' compensation proceedings. (Experience; observations).

114) On January 29, 2013, Employee filed a petition for reconsideration of *Freelong II*. He specifically objected to the decision's inclusion of the left shoulder causation issue in the SIME and detailed his efforts to ascertain his benefits status with Employer following Dr. Holley's

August 18, 2012 addendum report. Employee stated Employer was engaging in "foot-dragging" in responding to his request for clarification of his benefits status. (Employee's Petition, January 29, 2013).

115) On January 31, 2013, Employee filed a petition for expedited consideration of his January 23, 2013, petition to disqualify Dr. Cleary. Referencing the February 14, 2013 evaluation with Dr. Cleary, Employee contended, "unless the process is sped up in terms of arranging a properly noticed hearing date, prior to the scheduled SIME, the employee's Petition for Disqualification will not be heard in time." He contended if he was examined by Dr. Cleary, the result would be "manifestly unjust and prejudicial to the employee." (Employee's Petition, January 30, 2013).

116) On January 31, 2013, Employee filed an ARH on his January 31, 2013 petition for expedited consideration. (Employee's ARH, January 31, 2013).

117) On February 1, 2013, Employer controverted Employee's November 20, 2012 consultation with Dr. Witham for his left shoulder condition on the basis it was an unauthorized change of physician. Employer contended Dr. Wade was Employee's left shoulder surgeon. (Controversion Notice, February 1, 2013).

118) On February 4, 2013, Employer filed a petition to strike Dr. Witham's November 20, 2012 report as the product of an unauthorized change of physician. It contended Dr. Witham had never been Employee's attending physician for his left shoulder, and further contended "[i]t is simply mystifying that the employee would go to such lengths to generate another unauthorized medical opinion, while **refusing** to follow-up with his attending physician for pre-authorized medical treatment." Employer requested an "emergency prehearing" and an "immediate Board hearing" for an "emergency decision" and a "summary Board order." (Employer's Petition, February 1, 2013) (emphasis in original).

119) On February 6, 2013, Employer filed an answer to Employee's January 23, 2013 petition to disqualify Dr. Cleary and his January 30, 2013 petition for expedited consideration. The answer states:

> Employee's counsel has filed a petition accusing SIME physician Dr. John Cleary of incompetency, impartiality [sic], and truthfulness [sic]. The petition is not supported by any evidence. It instead relies purely upon Board decisions, most if not all of which the [Employee's law office] has grossly distorted. The petition is both frivolous (i.e., [sic] of minimal importance; legally worthless) and spurious (i.e. feigned; fictitious). . . . Dr. Cleary, incidentally, has nearly 50 years of neurosurgical experience including service in the military as a surgeon during the

> Vietnam era. The Board should not tolerate such slandering of its panel members, or anyone for that matter. Rather, the Board should seriously consider invoking its contempt powers should [Employee's law firm] persist with this petition. The employer and carrier would welcome an award of fees and costs. . . .

(Employer's Answer, February 4, 2013).

120) On February 6, 2013, Employee filed a petition to stay the scheduled SIME so that his numerous SIME petitions could be heard and decided. (Employee's Petition, February 5, 2013).

121) At a February 12, 2013 prehearing conference, the designee granted Employee's January 29, 2013 petition for reconsideration of *Freelong II* because of potential confusion in the decision regarding subsequent modifications to the original SIME form. With respect to his petition to disqualify Dr. Cleary as an SIME physician, Employee acknowledged he had no personal knowledge of Dr. Cleary's bias, but rather had based his petition on other board decisions and explained he filed the petition out of an abundance of caution, so the board could "be sure" Dr. Cleary was impartial. The designee ruled Employee's January 31, 2013, ARH on his petition of the same date for expedited consideration of his January 23, 2013 petition to disqualify Dr. Cleary was premature and void. The parties also set forth their contentions with respect to Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report.

> With respect to Employer's petition to strike Dr. Witham's report as an SIME record, [Employer] contends the basis for his petition to strike is the same as his basis to strike Dr. Kohnan's letter: it is the product of an unauthorized change of physician. . . .
>
> [Employer] contends Employee is attempting to re-litigate the issue of unauthorized change of physician, which was decided by *Freelong III* [sic]. [Employee] contends he does not think that decision decided that issue, and further contends he has not presented [his] basis for changing from Dr. Wade to Dr. Tamai, which was Dr. Wade's "refusal" to order an MRI.

The designee, after engaging in the following analysis, decided not to forward Dr. Witham's November 20, 2012 report to the SIME physician's, and held Employer's February 4, 2013 petition in abeyance:

> Each party is partially correct in their contentions regarding what was decided in the last D&O. Employer is correct - the issue of unauthorized change of physician was addressed and decided concerning Dr. Kohnan's [sic] letter. Employee is also correct to the extent the decision did not decide the issue as it pertains to Dr. Witham's report. [Employee] contends he has not presented [his] basis for changing from Dr. Wade to Dr. Tamai, which was Dr. Wade's "refusal"

> to order an MRI. If Employee did not present the argument he now wants to make, it certainly was not because he was denied an opportunity to do so. The prehearing summary of October 31, 2012 clearly set Employer's petition to strike Dr. Kohnen's letter as an issue for hearing, and *Freelong III* [sic] demonstrates Employee was afforded an opportunity to present whatever arguments he wished.
>
> Since *Freelong III* [sic] provides the relevant potions [sic] of AS 23.30.09 [sic] and decisional authority controlling the issue, they are intentionally omitted here. A review of Dr. Witham's report shows it was specifically prepared to address Employee's "[l]eft shoulder pain and popping." Similar to Dr. Kohnen's letter, Dr. Witham report provides a very brief history of treatment and diagnoses by Employee's treating physicians, including Drs. Wade and Tamai. In his assessment, Dr. Witham renders opinions on the treatment and prognosis of Employee's left shoulder.
>
> Employer's petition must be decided by a full board panel. 8 AAC 45.082(c). However, the review of Dr. Witham's report indicates the issue is entirely analogous to the Dr. Kohnen letter decided by *Freelong III*. It has been previously established Employee has already once changed his treating physician for his left shoulder from Dr. Wade to Dr. Tamai. Both doctors have opinions in the record. Dr. Witham's report would be yet another.
>
> Employee contends the Dr. Witham's report should be forwarded until such time as Employer's petition is decided, and speaks of letting "the horse out of the barn," presumably referring to the SIME report. Although a designee cannot decide the issue alone, given the analogous nature of Dr. Witham's report to Dr. Kohnen's letter, the fact that it has been established Employee has already once changed his treating physician, the clear and absolute language of the regulation, which directs reports or opinions will not be considered "in any form, in any proceeding, or for any purpose," it would [be] extremely imprudent to let "the horse out of the barn" and forward the report, since the SIME report will certainly be issued before Employer's petition is heard and decided. [The designee] was correct in exercising her discretion to not forward the report. Therefore, in another exercise of discretion, Dr. Witham's report will not be forwarded until a full board panel decides it should be. Following receipt of the SIME report, Employee will have ample opportunity, afforded by regulation, to present Dr. Witham's report to the SIME panel and elicit additional evidence on it.
>
> Many of the considerations discussed above concerning Employee's petition, also apply to Employer's petition. The SIME is the day after tomorrow. A full board hearing is required. As a practical matter, the parties' petitions cannot be addressed in advance of the SIME. Additionally, like Employee's petition, there is no valid ARH on Employer's, either. For all these reasons, Employer's petition will be heard in due course following the filing of an ARH.

(Prehearing Conference Summary, February 12, 2013).

122) On February 14, 2013, Dr. Cleary performed the neurosurgical SIME. He deferred all questions regarding Employee's bilateral shoulder conditions to Dr. Levine. With respect to Employee's cervical symptoms, Dr. Cleary opined the substantial cause of Employee's cervical condition was "multilevel cervical spondylosis and severe bilateral foraminal stenosis, first reported on the August 19, 2011 MRI." He stated Employee's condition was consistent with the effects of aging in a person genetically predisposed to spinal osteoarthritis. On a more likely than not basis, Dr. Cleary thought Employee's condition "long preceded" both the 2008 and 2009 work injuries. He noted Employee did not complain of neck pain at the time of the injuries and pointed out both PA-C Weber's November 3, 2008 report and Dr. Joosse's August 17, 2009 report recorded normal cervical ranges of motion. After the December 13, 2009 injury, Dr. Cleary also noted Employee did not complain of neck pain to Dr. Witham on December 18, 2009, or to Dr. Wade on January 22, 2010. He then stated the "first symptom that could be of cervical origin" was PA-C Buck's December 13, 2009 report, which noted numbness running down Employee's arm. Dr. Cleary then referred to numerous post injury reports from various physical therapy providers, as well as Drs. Wade and Onorato, documenting numbness and tingling in various portions of Employee's left upper extremity. Dr. Cleary summarized the chronology of Employee's cervical condition as follows:

> It was following the December 13, 2009 injury that the various physical therapists reported numbness in the left upper extremity, particularly the thumb and 'whole hand,' and following the Functional Capacity Evaluation, concern was raised with regard to a cervical radiculopathy. This resulted in Dr. Onorato's consultation and cervical MRI study which showed severe multilevel bilateral foraminal stenosis due to osteoarthritis and resulted in the neurosurgical consultation with Dr. Jensen. It is the undersigned's medical opinion and, more likely than not, that Mr. Freelong did not sustain a cervical straining injury on August 4, 2008 or December 13, 2009, and that his cervical spondylosis was long standing.

Dr. Cleary discussed overlapping symptoms from two neurological conditions involving Employee's left upper extremity:

> The significant finding on Dr. Onorato's examination, electrodiagnostic study, was 'left median neuropathy at the wrist.' This is consistent with numbness in the whole hand; the numbness in the left thumb, which Ms. Spies and her follow physical therapists had been reporting, may have been secondary to the C6 nerve root. The absent left upper extremity reflexes are undoubtedly as a result of the severe foraminal narrowing on the left . . . . A left carpal tunnel syndrome, as determined by Dr. Onorato's electrodiagnostic testing is consistent with the numbness in the left thumb and whole hand as described by the therapists and Dr.

> Wade's office, [sic] numbness in the thumb would favor the C6 nerve root. However, there is an overlap of these symptoms.

Dr. Cleary repeatedly cited Dr. Keller's October 15, 1990 report, which noted left hand numbness at the time of Employee's elbow injury, in support for his opinion Employee's cervical spondylosis predated the work injuries. However, he remarked the focus of electrodiagnostic studies at the time of the 1990 elbow injury were Employee's ulnar nerve rather than his median nerve. He thought Employee's cervical spondylosis was an "incidental finding during the work-up for the left upper extremity complaints of numbness," and the numbness was subsequently "found consistent with a left carpal tunnel syndrome, or alternatively a C6 radiculopathy . . . ." In response to SIME questions, Dr. Cleary stated: "[t]he medical records reviewed do not have a history of complaints with regard to the neck, but that is not unusual in cervical spondylosis," and "[i]t is not uncommon for patients with cervical spondylosis to report a history of being asymptomatic prior to an injury." Dr. Cleary also denied any history of "post-employment conditions" in Employee's case. He opined Employee's disability was caused by his bilateral shoulder injuries and stated "[t]here is nothing to indicate that the work injury of December 13, 2009 in which [Employee] was lifting a "bucket" of scaffolding knuckles" [sic] off the bed of the truck played any role in aggravating or accelerating the pre-existing multilevel cervical spondylosis." (Cleary report, February 14, 2013).

123) On February 15, 2013, Dr. Levine performed the orthopedic SIME and addressed all questions submitted to him pertaining to Employee's bilateral shoulder conditions and his cervical condition. He opined both Employee's right and left shoulder symptoms were the result of the respective 2008 and 2009 work injuries, notwithstanding preexisting arthritic conditions in each shoulder. Dr. Levine further opined the 2008 and 2009 work injuries aggravated, accelerated and combined with Employee's preexisting shoulder conditions to cause permanent changes that resulted in his disability and need for medical treatment. With respect to Employee's cervical condition, he wrote December 13, 2009, was when Employee "felt cervical neck and radicular symptoms," and further stated:

> [I]t is reasonable to expect that the symptoms of radiculopathy did arise as a result of the incident of 12/13/09 and to some extent were misdiagnosed. It is clear from the report of Dr. Oniorato, 8/10/11, that the patient had a history of radiculopathy beginning at the time of the injury and examination did reveal electrophysiological evidence of cervical radiculopathy, possibly at both the C6 and C7 levels at which time it was recommended that he undergo an MRI study.

Dr. Levine next wrote the MRI showed severe bilateral foraminal narrowing at C3-4, C4-5, C5-6 and C6-7 and stated those findings were "obviously of a longstanding nature." However, since the MRI was performed two years after the injury, he was unable to conclude with a reasonable medical probability the findings were present prior to the work injury. Later in his report, Dr. Levine explained: "[w]ith regard to the left shoulder and cervical spine, the substantial factors relate to lifting a heavy bucket on 12/13/09. Those were superimposed on prior arthritic conditions which were not rendered symptomatic until the injuries described above." Dr. Levine stated he agreed with Dr. Jensen's opinion concerning the work relatedness of Employee's cervical condition. He also attributed certain cervical related work restrictions to the injury of December 13, 2009. Dr. Levine was unaware of any post-employment injuries. He opined the proposed shoulder surgeries were medically reasonable and necessary treatment, but he did not think Employee was a surgical candidate for Dr. Jensen's proposed cervical surgery. Dr. Levine stated Employee was medically stable if he did not elect to proceed with shoulder surgery and, if Employee did proceed with shoulder surgery, he would be medically stable within six months following surgery. He assigned Employee the following permanent impairment ratings: ten percent impairment of the upper extremity for his left shoulder, four percent impairment of the upper extremity for his right shoulder and six percent impairment of the whole person for his cervical spine. He thought Employee was limited to sedentary or light duty work, but opined Employee could improve to medium duty work status with the proposed surgery. (Levine report, February 20, 2013).

124) On February 21, 2013, Employer answered Employee's February 6, 2013 petition to stay the SIME. Employer contended, since the SIME had already occurred, Employee's petition was moot. It also contended all Employee was seeking to accomplish was to delay asking a single question of the SIME physicians. Employer characterized Employee's petition as "frivolous," "dishonest," and "malicious." It contended Employee's only purpose was "to vandalize a fine Alaskan Employer." (Employer's Answer, February 19, 2013).

125) On March 7, 2013, Employer filed a petition to compel discovery. Employer contended Employee indicated at a recent prehearing conference he knew of individuals who had knowledge that would tend to indicate Dr. Cleary is dishonest, incompetent or biased. Employer contended Employee refused to provide the identity and contact information of the individuals or what facts

those individuals were believed to possess. It sought an order compelling Employee to disclose the alleged information. (Employer Petition, March 5, 2013).

126) At a March 26, 2013, prehearing conference, the parties informed the designee they needed additional time to determine whether they would settle the case, attempt mediation or determine issues for hearing as a result of the SIME report. A follow-up prehearing conference was scheduled. (Prehearing Conference Summary, March 26, 2013).

127) At an April 29, 2013 prehearing conference, the parties notified the designee they were exploring a partial settlement. Employer stated it had approved Employee's left shoulder treatment with Dr. Kirby, and would consider reinstating TTD, but reported Employee's neck condition was still unresolved. The parties agreed to extend deposition deadlines. A follow-up prehearing conference was scheduled. (Prehearing Conference Summary, April 29, 2013).

128) On May 21, 2013, Employee filed a petition for modification of *Freelong II*, contending it erroneously found he had changed physicians. Specifically, Employee cited 8 AAC 45.082(b)(4)(B) and alleged the following mistake of fact:

> Review of the Board's compact disc recording of the hearing . . . reveals that employee's representative advised the Board that the [sic] Dr. Wade would not authorize an MRI, so he saw Dr. Tamai who examined him and ordered an MRI, which showed multiple tears. . . . Clearly, it was a mistake of fact for the Board to determine that the employee changed doctors in this instance.

Employee further contended:

> The Board's striking of the 08/28/12 letter, in addition to finding Dr. Kohnen an excessive change of physician, is an overly harsh remedy given the facts. If the Board feels compelled to apply some sort of penalty to the situation, a simple striking of Dr. Kohnen's letter would appear to be the fairest solution.

(Employee's Petition, May 21, 2013).

129) At a May 29, 2013 prehearing conference, Employer contended depositions were scheduled for the SIME physicians and it requested a hearing date. Employee initially opposed scheduling a hearing because, he contended, additional discovery might be necessary following the depositions. The parties agreed to an October 31, 2013, hearing date for Employee's claims. (Prehearing Conference Summary, May 29, 2013).

130) On May 31, 2013, the parties took Dr. Levine's deposition. When questioned regarding his physical examination finding of decreased sensation in Employee's left hand, Dr. Levine stated he "questioned its severity" because it involved the entire hand and all the fingers. He characterized

the finding as "non-physiologic" because "it doesn't follow any distinct nerve root distribution, meaning that if there was an injury to a specific nerve coming out of the neck, then it would involve certain fingers." However, in Employee's case, he did not think it was the result of a direct injury to a nerve. (Levine dep., May 31, 2013, at 14).

131) Dr. Levine testified several times Employee told him he felt immediate pain in his neck at the time of the December 13, 2009, injury. (*Id.* at 30; 41).

132) Dr. Levine thought Employee's report of neck pain at the time of injury was significant because it tied his neck pain to the "timeframe for his injury." He also stated: "And it would have a -- sounds like some radicular symptoms -- I mean pain radiating or tingling in the left upper extremity. That would be neck pain and some nerve irritation." (*Id.* at 31).

133) If Employee did not report neck pain at the time of injury, Dr. Levine thought it might affect his conclusions and "there would be a question of whether he hurt his neck at that time," (*Id.* at 31; 38).

134) Dr. Levine opined the work injury caused Employee to become symptomatic and explained the mechanism of injury:

> [L]ifting the bucket would have put strain on his shoulder, pulled across . . . the muscles going into his neck. . . . And then, if he had narrowing where the nerves were coming out at that time, the nerves did not have the ability to move freely because they are tight. And, that would have stressed those nerves . . . ."

He stated this process combined with arthritis in Employee's neck to cause him permanent damage. (*Id.* at 41; 42-43).

135) Dr. Levine would not change his conclusions regarding Employee's injury. (*Id.* at 59).

136) On June 24, 2013, the parties took Dr. Cleary's deposition. Based on Employee's present complaints, his description of the mechanism of injury and his description of what he felt at the time, Dr. Cleary thought "all the strain was in Employee's shoulders." (Cleary dep. at 10-11).

137) Dr. Cleary noted differences and similarities between his examination and Dr. Levine's. Employee made "marked facial grimacing" when Dr. Levine examined his cervical range of motion. Employee did not when Dr. Cleary examined him. There was no tenderness on palpation to the neck during both doctor's examinations. (*Id.* at 14-15.)

138) During Dr. Cleary's examination, Employee had a positive "Hoffman's sign" on his right but not on his left, markedly increased knee reflexes and a positive "Babinski sign" on the left. These findings suggested there was a problem with Employee's cervical spinal cord. (*Id.* at 16).

139) Dr. Cleary thought Employee had early myelopathy. (*Id.* at 17).

140) In Dr. Cleary's opinion, there has been a "big loosening of the criteria for [neck] surgeries." He felt the term "radiculopathy" is now "very widely used and it is meaningless" because the criteria for radiculopathy is not met. Dr. Cleary stated you should not operate on somebody because they have radicular symptoms, but rather radicular findings, like absent reflexes, weakness, muscle atrophy, and numbness in the distribution of the nerve root. (*Id.* at 19).

141) Dr. Cleary opined the whole arm numbness Employee reported was consistent with a brachial plexus, whereas Employee's myelopathy explains his lower extremity problems, which is caused by pressure in the neck from hereditary arthritis. (*Id.* at 28).

142) According to Dr. Cleary, Employee's left upper extremity numbness was the result of muscle spasms in his thoracic outlet caused by his shoulder pain. He explained, because of the proximity of the shoulder and neck, when the shoulder muscles spasm, the brachial plexus is compressed. He opined Employee's numbness and tingling were symptoms associated with his shoulder injury rather than a cervical injury. (*Id.* at 21; 27; 52; 64).

143) Dr. Cleary stated Dr. Emery's 1990 report indicated Employee had "tennis elbow," and with tennis elbow "he was already having spasms in his thoracic outlet that caused numbness in his hand." (*Id.* at 24-25).

144) According to Dr. Cleary, Employee's severely arthritic neck may now be generating symptoms from that condition. (*Id.* at 65).

145) Dr. Cleary repeatedly stated Employee did not have radicular symptoms while treating at Home Town Physical Therapy in 2010. (*Id.* at 58; 66).

146) Dr. Cleary disagreed with Dr. Levine's opinion that the work injury caused Employee's foramen to stretch a nerve because Employee would then have a specific neurological complaint such as reflex changes in a nerve root distribution. If Employee's C6 nerve root were injured, "you would expect to have . . . . [w]eakness in the biceps and loss of biceps reflex . . . That is quite different than how [Employee] presented. It is very rare to see a single nerve root injury to be a major traction injury." (*Id.* at 31-32).

147) Contrary to Dr. Levine, who could not say Employee's cervical spondylosis was preexisting, Dr. Cleary stated "the severity of the spondylosis at multiple levels in the foramen . . . didn't happen in two years." (*Id.* at 33).

148) Dr. Cleary explained Dr. Onorato's October 26, 2010 examination findings did not indicate acute C6 radiculopathy, but his examination findings indicated "[h]e has it now, but that is the nature of this condition, you know, it progresses." (*Id.* at 35).

149) Dr. Cleary opined Employee's many complaints about numbness in his hand were the result of his carpal tunnel syndrome, which would have affected his thumb, index finger and middle finger, and not C6 radiculopathy. He stated the January 14, 2010 Home Town Physical Therapy assessment just concentrated on the thumb. A diagnosis of C6 radiculopathy would have required a provider to have checked reflexes, motor strength in the biceps and some sensory testing, "which I haven't seen here." (*Id.* at 40-41).

150) Dr. Cleary thought Dr. Onorato's August 10, 2010 report was "interesting" where she noted Employee complained of left upper limb weakness. Dr. Cleary thought the symptom was more indicative of arm pain than a neurologic defect. (*Id.* at 49).

151) Dr. Cleary stated Employee showed C6 nerve root symptoms in his pain diagram. "We know he has a C6 root, but it doesn't explain all the numbness in all the fingers that he has here…. he has developed a C6 radiculopathy. (*Id.* at 55).

152) At a July 9, 2013 prehearing conference, the parties agreed the relevant body parts for hearing were Employee's right shoulder, left shoulder and neck condition. In addition to his May 12, 2013 petition for modification, Employee set forth his issues for hearing, including TTD from 8/20/2011, ongoing, medical and transportation costs, unfair or frivolous controversion, penalty, interest and attorney's fees and costs. He also reserved PPI as an issue pending ratings. The parties agreed all other previous petitions were moot. (Prehearing Conference Summary, July 9, 2013).

153) On July 17, 2013, Employee wrote the designee to clarify his positions on his claim for PPI, TTD, penalty and interest. He contended he sought payment of PPI based on Dr. Levine's rating, payment of TTD from August 20, 2011, and penalties and interest based on the unpaid PPI and TTD amounts. (Employee's letter, July 14, 2013).

154) On September 10, 2013, Employee was evaluated by Peter Millett, M.D., in Vail Colorado. Dr. Millett wanted to obtain new MRI's of Employee's left shoulder, right shoulder and cervical spine. He also discussed surgical intervention for Employee's left shoulder, including arthroscopy, debridement, possible rotator cuff repair, possible revision, subacromial decompression, biceps tenodesis and possible AC joint resection. Dr. Millett held open a surgery date the following day

in the event Employee chose to proceed with left shoulder surgery. (Millett report, September 10, 2013).

155) On September 11, 2013, Dr. Millett performed surgery on Employee's left shoulder. Surgical procedures consisted of an arthroscopy with attempted debridement, subcoracoid decompression, subacromial decompression with acromioplasty, AC joint resection and partial claviculareсtomy and subpectoral biceps tenodesis. (Millett report September 11, 2013).

156) Employer contends it resumed paying TTD following Employee's surgery. (Record).

157) Employee does not dispute Employer's contention it resumed TTD payments following his surgery. (*Id.*)

158) At a September 18, 2013 prehearing conference, the parties agreed Employee's May 12, 2013 petition for modification would be included as an issue for hearing. They also agreed the issues Employee raised in his July 14, 2013 letter would be treated as amendments to his claims. (Prehearing Conference Summary, September 18, 2013).

159) On October 28, 2013, Employee filed affidavits of attorney and paralegal fees and costs along with two statements. The first statement listed services from August 9, 2011 through January 25, 2012. Attorney time was billed at $275.00 per hour and paralegal time was billed at $150.00 per hour for combined fees of $8,585.00. It also listed $29.90 in costs bringing the total amount to $8,614.90. The second statement listed services from March 1, 2012 through October 28, 2013. Attorney time was billed at $300.00 per hour and paralegal time was billed at $160 per hour for combined fees of $36,132.00. It also listed $1,564.72 in costs bringing the total to $37,696.72. (Employee Fee Affidavits, October 28, 2013).

160) Employee's fee affidavits show paralegal Pete Stepovich conducted the vast majority of work on behalf of Employee. His hourly rates of $150.00 and $160.00 per hour are reasonable. Conversely, attorney Mike Stepovich spent relatively little time working on Employee's claims. His rates of $275.00 and $300.00 per hour are also reasonable. (*Id.*; experience, judgment, observations).

161) Fee awards in excess of $100,000.00 are extremely rare in workers' compensation cases. (Experience, observations).

162) On October 28, 2013, Employer filed its hearing brief, contending TTD for Employee's left shoulder condition is not warranted because Employee was medically stable as a matter of law because he did not diligently pursue Dr. Tamai's surgical recommendation. Employer bolstered its

previously asserted AS 23.30.095(d) defense by citing AS 23.30.395(27), and contended Employee could not rebut medical stability under the "clear and convincing" standard of that statute. Its brief further stated:

> It is [Employer's] position, as stated in the September 2012 controversion, that an employee must accept and diligently pursue a surgical recommendation before the presumption can be *clearly and convincingly* be [sic] deemed rebutted. One cannot expect an injury to improve through medical treatment which does not occur. Dr. Levine recognized this logical truth in his report. (emphasis in original).

(Employer's Hearing Brief, October 25, 2013).

163) On October 31, 2013, Employee testified as follows at hearing. He was hired 13 weeks prior to the December 13, 2009 injury and worked at various locations for Employer. Employee had been working at Prudhoe Bay for six weeks at the time of the injury. He described pulling a bucket of scaffolding knuckles off a truck's tailgate, which "jerked" his arm downward. Employee heard a "snap" in his left shoulder, a short time later his shoulder became painful and he had numbness and tingling down his left arm. The pain was in his left upper arm, left shoulder and into his neck, but mostly in his left shoulder. Employee denied previous left arm or cervical issues and contended the numbness and tingling he felt following the 1990 injury had previously resolved. At the time of the injury, he was treated with ice and over the counter medications at the BP medical facility. Since the job was "shutting down" for Christmas, Employee went to an urgent care facility in Fairbanks the next day. Dr. Wade initially prescribed physical therapy, but later undertook surgery since Employee was not improving. He was in more pain following the surgery. Employee could not move his hand and fingers. He could not turn his head or look up or down and stated he had never had that problem before. Dr. Wade referred him to Dr. Onorato, and then to Dr. Jensen following the cervical MRI, who proposed cervical fusion surgery. Employer paid him compensation until August 20, 2011, and then again for a period in November and December of 2011. He did not receive additional compensation again until his recent surgery in Vail, Colorado. Employer did not "pay a single dime" of his medical bills. Employee stated he went to Dr. Tamai to get an MRI because Dr. Wade would not order one. Dr. Tamai recommended surgery and prescribed "pain patches" and Neurontin. It was very difficult to pay for his prescriptions because his benefits had been controverted, but he had medical coverage under his wife's policy. Employee saw his family doctor, Dr. Kohnen, for medication prescriptions and stated he went to see Dr. Witham to see what he thought about his left shoulder

condition. He stated he "looked at a lot of surgeons" to perform his surgery because he did not want "another bad experience" like with Dr. Wade. Employee would have used Dr. Witham, but contended Dr. Witham had declined to perform the surgery. At the time of the hearing, Employee stated he is still recovering from the surgery with Dr. Millett and he still has "a lot of neck issues going on." It hurts to turn his neck to the left and he feels left arm numbness and tingling. He continues to get prescriptions filled through Dr. Kohnen and has a follow-up with Dr. Millett on November 19, 2013. On cross examination, Employee denied knowing what a bronchial plexus is, what parts of the arm C6 "goes to," or whether carpel tunnel syndrome can cause numbness and tingling. He was asked about the 1990 injury and stated he had been "shot out of a pipe." Employee did not remember talking to Dr. Keller about a brachial plexus injury in 1990, and stated his left hand numbness resolved within two weeks of that injury. He did not remember talking to Dr. Joosse about left hand numbness in 1995. Employee did not recall talking to the safety manager the day after the injury. At the time he saw Dr. Tamai, he was surprised there were still tears in his shoulder. Although Dr. Tamai offered to perform the shoulder surgery, Employee did not like him very much. After seeing Dr. Witham, he started looking for another physician to perform the shoulder surgery. Dr. Witham had recommended Richard Kirby, M.D., but Dr. Kirby did not accept workers' compensation patients so Dr. Kirby recommended Dr. Millett. Employee stated he contacted Dr. Kirby after the SIME appointments. (Freelong).

164) Employee testified he went to Dr. Wade's office and asked for an MRI. When he did, the receptionist left, came back and told him "no." Employer objected on grounds of hearsay. The chair overruled Employer's objection and stated the testimony fell under the statement for purposes of medical diagnosis and treatment exception. (*Id.*; Record).

165) The record does not contain other evidence Dr. Wade refused to order a MRI. (Record; observations).

166) Employer asked Employee a series of questions on cross-examination regarding the lack of neck complaints in numerous medical records following the 2009 injury. Employee stated he told Dr. Wade about his neck pain every time he saw him and did not know whether Dr. Wade "wrote it down." Employee believed he told all the physical therapists about his neck pain and did not have an explanation why physical therapy notes did not mention neck pain. Employee stated he told a particular physical therapist about his neck pain every time he saw him and "why he did not

write it down is beyond me." He did not know why Dr. Kohnen did not document neck pain in her reports. (Freelong).

167) Employee denied he told Dr. Jensen he had experienced neck pain for the last 48 months on September 28, 2011, and testified he tried to get Dr. Jensen to "correct" his report "[s]everal times. Half a dozen times." (*Id.*).

168) Employee exhibited both verbal and physical changes in his demeanor during Employer's cross-examination. Employee was uncomfortable answering Employer's questions on the absence of neck complaints in the medical records following the 2009 injury. (Record; experience, judgment, observations and inferences drawn from the above).

169) The numerous records Employer questioned Employee on do not document neck complaints. (Record; observations).

170) Employee is not credible regarding his purported neck complaints to providers following the December 13, 2009 work injury. (Record; experience, judgment, observations and inferences drawn from the above).

171) On October 31, 2013, Susan Hildreth testified as follows at hearing. She started working in a claims department in 1999 and has been a licensed adjuster since 2006. Ms. Hildreth now works as a claims specialist for Employer and she oversees all domestic workers' compensation claims. She was unable to pay numerous statements submitted to her by Employee's providers because they were not submitted on the necessary Health Insurance Claim Form. The statements included those attached to an October 27, 2012 proof of service; a February 29, 2012 statement from Alaska Neuroscience Associates; statements dated November 28, 2011 and November 30, 2011; and a July 23, 2012 statement from Orthopedic Surgical Associates. The Health Insurance Claim Form is an industry standard. (Hildreth).

172) At the conclusion of the hearing, the chair requested post-hearing briefs "on just two issues;" specifically, a chronology of Employer's controversions and evidence of Employee's disability. The chair also advised the parties, "What we're looking for here is not argument, just the facts if you will." (Record; Hearing Tr. at 165).

173) The chair also afforded Employee two weeks following the hearing to supplement his attorney's fees, and afforded Employer an additional week after that to object to Employee's attorney's fees. (*Id.*).

174) It is common practice for hearing chairs to afford employees a period of time following a hearing to file a supplemental affidavit of attorney's fees and costs, and to afford employers a period of time following that to object to an employee's attorney fees and costs. (Experience).

175) On November 18, 2013, the parties filed their post-hearing briefs. (Employee's Post Hearing Brief, November 15, 2013; Employer's Post Hearing Brief, November 15, 2013).

176) On November 18, 2013, Employee filed an amended affidavit of fees and costs with an attached statement that listed services from October 19, 2013 through November 15, 2013. Attorney time was billed at $300.00 per hour and paralegal time was billed at $160 per hour for additional combined fees of $4,372.00. It also listed $7.42 in costs bringing the total additional amount of fees and costs to $4,379.42. (Employee Fee Affidavits, November 15, 2013).

177) On November 22, 2013, Employer filed an objection to Employee's attorney's fees and costs. It contended Employee was paid $5,946.01 in attorney's fees in connection with the parties August 25, 2010 C&R. Employer also contended Employee submitted a fee affidavit for $8,585.00 in fees and $29.90 in costs for work done leading up to *Freelong I*, a split decision that did not enter a fee award. It then listed numerous objections to Employee's fee affidavits. "In June 2012, 3.2 hours was billed to prepare a WCC, then .4 hours to review his own WCC when served back on him. . . . it is unclear why he would reasonably spend 20+ minutes reading a two-page pleading he filed himself." Employer objected to roughly $4,000.00 incurred in late January to early February 2012 while litigating SIME questions. Employer characterized Employee's efforts during this period as "delay tactics" and a "form of vandalism." It also characterized Employee's efforts to disqualify Dr. Cleary as delay tactics and contended Employee made numerous misstatements of fact in his January 23, 2013 petition regarding Dr. Cleary's record of alleged bias. Employer objected to other "obvious delay tactics" during the SIME process, such as litigation over the SIME form, SIME medical specialties, specific issues to be addressed by the SIME and what SIME questions should be asked. It objected to alleged medical delays in Employee's case, contending Employee failed to pursue his left shoulder surgery for nearly two years. Employer contended Employee did not gather evidence to pursue his May 17, 2013 petition for modification and instead, only relied on his own hearsay. It contended 60 percent of Employee's time was spent litigating the cervical causation question, 20 percent was spent on litigating "non-meritorious procedural matters," 10 percent on his TTD claim and 10 percent on

his left shoulder surgery, "narrow" sanctions claims, and "miscellaneous items accepted at the beginning of the hearing." (Employer's Objection, November 20, 2013).

178) In addition to entering its objections to Employee's attorney fees, Employer also presented additional arguments on Dr. Cleary's credibility, the medical stability issue and the unauthorized change of physician issue in its November 20, 2013 objection. (*Id.*; observations).

179) On November 27, 2013, Employee filed a petition to strike Employer's November 20, 2013 objections to his attorney's fees and costs on the basis Employer's objection was a "back door attempt to reargue the case under the guise of an [objection]." He contended Employer "intentionally disregarded the board's instructions [on post-hearing briefs] in an attempt to gain an unfair tactical advantage." Employee sought an order striking Employer's November 20, 2013 objection, instructing Employer to file another objection and an order instructing Employer "to refrain from further argument of the issues in this case . . . ." He also sought an award of additional attorney's fees. (Employee's Petition, November 27, 2013).

180) The content of a party's pleadings is infrequently litigated in workers' compensation cases. (Experience; observations).

181) On December 6, 2013, Employer filed an answer to Employee's November 27, 2013 petition to strike, contending it did not recall the imposition of post hearing limitations and, alternatively, if post-hearing limitations were imposed, Employee was not prejudiced by its objection. It contended Employee's "*ad hominem* attacks upon the character of Dr. Cleary, attacks founded upon grossly mistaken case citations, as well as distortions of Dr. Cleary's testimony" were relevant to a fee award. Employer contended Employee's stalling tactics should not be rewarded with an "inflated" fee award. (Employer's Answer, December 4, 2013).

182) On December 11, 2013, Employee filed a reply to Employer's December 4, 2013 answer, contending Employer's arguments were "frivolous" and exhibited "faulty logic." Regarding post-hearing filings, he contended there was "no ambiguity as to the intended scope of employer's response," yet Employer made "unrepentant attempts" to put forth additional argument. Employee renewed his request for orders striking Employer's answer, instructing Employer to file another answer and an award of additional attorney's fees. (Employee's Reply, December 11, 2013)

183) On December 20, 2013, Employer filed a "supplemental answer" to Employee's December 11, 2013, reply. It included a series of quotations from the hearing transcript concerning its

opportunity to object to Employee's claimed attorney's fees following the hearing, stated Employee had been mistaken and requested denial of Employee's November 27, 2013 petition. (Employer's Supplemental Answer, December 18, 2013).

184) On January 9, 2014, Employee filed an affidavit of readiness for hearing (ARH) on his November 27, 2013 petition to strike Employer's November 20, 2013 objections to his attorney's fees and costs. (Employee's ARH, January 8, 2014).

185) On February 10, 2014, the parties attended a prehearing conference on Employee's January 8, 2014, ARH and stipulated this decision should decide Employee's November 27, 2013 petition to strike Employer's November 20, 2013 objections to his attorney's fees and costs. In addition to his petition to strike, Employee further contended Employer's post-hearing objections should be limited to Employee's supplemental affidavit of fees and costs only rather than both his initial and supplemental affidavits. Employer contended the regulations do not limit its ability to object to Employee's supplemental affidavit only. The parties stipulated to Employee's November 27, 2013 petition to strike being heard on the written record; and that decision being included in this decision and order. (Prehearing Conference Summary, February 10, 2014).

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, 533-34 (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 the need for medical treatment of an Employee if the disability . . . or the Employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the Employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . 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 the need for medical

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

Compensation or benefits are owed under AS 23.30.010 if employment was "the substantial cause" in bringing about the disability or need for medical treatment. A preexisting disease or infirmity does not disqualify a claim if employment aggravated, accelerated, or combined with disease or infirmity to produce death or disability. *Thornton v. Alaska Workers' Compensation Board*, 411 P.2d 209; 210 (Alaska 1966) (applied under the current AS 23.30.010 in *City and Borough of Juneau v. Olsen*, AWCAC Decision No. 185 (August 21, 2013) at 15-16).

An aggravation of a preexisting condition occurs when a job worsens an employee's symptoms such that she can no longer perform her job functions, even when the job does not worsen the underlying condition. *Hester v. State, Public Employee's Retirement Board*, 817 P.2d 472; 476 (Alaska 1991). For an employee to establish an aggravation claim, the employment need only have been the substantial factor in bringing about the disability. *Olsen* at 17-18 (*citing DeYonge v. NANA/Marriott*, 1 P. 3d 90 (Alaska 2000)). Whether employment is the substantial cause of the need for medical treatment requires an evaluation of the relative contributions of the employment and the preexisting condition. *Id.* Aggravation of a preexisting condition may be found absent any specific traumatic event. *Providence Washington Insurance v. Banner*, 680 P.2d 96; 99 (Alaska 1984). To prove a work injury combined with a preexisting condition, to produce a disability, the employee must show: 1) the disability would not have happened "but for" an injury sustained during the course and scope of employment, and 2) reasonable persons would regard the injury as the cause of the disability and attach responsibility to it. *Thurston v. Guys With Tools*, 217 P.3d 824; 828 (Alaska 2009) (applied under the current AS 23.30.010 in *Olsen* at 18).

> **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. . . . The board may authorize continued treatment or care or both as the process of recovery may require. When

> medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . . .
>
> (d) If at any time during the period the employee unreasonably refuses to submit to medical or surgical treatment, the board may by order suspend the payment of further compensation while the refusal continues, and no compensation may be paid at any time during the period of suspension, unless the circumstances justified the refusal.
>
> (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. The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians. 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. . . . (emphasis added).
> . . . .

An employer may not unilaterally suspend an employee's benefits based an employee's unreasonable refusal of medical treatment. *Metcalf v. Felec Services*, 784 P.2d 1386; 1389 (Alaska 1990). Instead, employers may petition the Board to suspend benefits as soon as they are able to make out a good faith case of unreasonable refusal. *Id.* The Board is the entity empowered to suspend an employee's benefits by order. *Id.* The Employer or insurer is not. *Id.* However, by negative implication, the Board's authority is limited to suspending *further* benefits. *Id.* (emphasis in orginal). Requiring the insurer to petition to the Board before suspending benefits based on unreasonable refusal of medical treatment is sound policy. *Id.*

The question of whether a claimant as unreasonably refused medical treatment is a complex one. *Flour v. Mendoza*, 616 P.2d 25; 27 (Alaska 1980) (citing 1 A. Larson, The Law of Workmen's Compensation s 13.22, at 3-419 (1978)). It involves a multitude of variables, including claimant's age and physical condition, his previous surgical experience, the ratio of deaths from the operation, the percentage of cures, and many others. *Id.* at 28 (quoting Larson (citation omitted). The statute at AS 23.30.095(d), construed in accordance with the "liberal humanitarian purposes" of the workers' compensation act, requires that the refusal be held reasonable if a conscious weighing of the results of having the surgery could have led to a refusal, regardless of whether such weighing actually occurred. *Id.* at 28.

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette v. Arctic Lights Electric, Inc.,* AWCB Decision No. 05-0135 (May 19, 2005). The purpose of the "one change of physician" rule is to curb potential abuses, especially doctor shopping. *Bloom v. Tekton, Inc*., 5 P.3d 235, 237 (Alaska 2000). However, the statute has been consistently interpreted to allow an employee an opportunity to "substitute" a new physician in cases where the current treating physician is either unwilling or unable to continue providing care. *Id.* at 238. These substitutions do not count as changes in attending physicians. *Id.* Allowing an employee to substitute an attending physician under these circumstances is consistent with the well-settled rule under the statute an injured worker is presumed entitled to continuing medical treatment. *Id.* The substitution policy ensures that the employee's right to continuing care by a physician of his choice will not be impeded by circumstances beyond the employee's control. *Id.*

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;
> . . . .

The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including claims for medical benefits and for continuing care. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991). The presumption of compensability continues during the course of an injured worker's recovery from injury and disability. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). Once an employee is disabled, the law presumes the employee's disability continues until the employer produces substantial evidence to the contrary. *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567, 573 (Alaska 2012) (citing *Grove v. Alaska Constr. & Erectors*, 938 P.2d 454, 458 (Alaska 1997) and *Bailey v. Litwin Corp.*, 713 P.2d 249, 254 (Alaska 1986)).

The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question." A finding reasonable persons would find employment was a cause of the employee's disability and impose liability is, "as are all subjective determinations, the most difficult to support." *Rogers & Babler*, 533-34. However, there is also no reason to suppose Board members who so find are either irrational or arbitrary. *Id.* at 534. That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." *Id.*

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, Employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id.* Employee need only adduce "some," "minimal," relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987); establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). The witnesses' credibility is of no concern in this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, employment must be the substantial cause of the disability or need for medical treatment. AS 23.30.010(a). In *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011), the Alaska Workers' Compensation Appeals Commission (commission) set out how to apply the presumption analysis for claims arising after November 5, 2005. An employer can rebut the presumption with substantial evidence a cause other than employment played a greater role is causing the disability and is not required to rule out employment as a factor in causing the disability. *Id.* at 7. "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Id.* at 8.

"Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). Employer's evidence is viewed in isolation, without regard to Employee's evidence. *Id.* at 1055. Therefore, credibility questions and weight accorded Employer's evidence is deferred until after it is decided if Employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994) (*citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992)).

If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381; *citing Miller v. ITT Services,* 577 P 2d. 1044, 1046. 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).

> **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 legislative history of AS 23.30.122 states the intent was "to restore to the Board the decision making power granted by the Legislature when it enacted the Alaska Workers' Compensation Act." *De Rosario v. Chenega Lodging*, 297 P.3d 139, 146 (Alaska 2013). The Alaska Workers' Compensation Appeals Commission is required to accept the board's credibility determinations. *Id.* The Alaska Supreme Court defers to board determinations of witness credibility. *Id.* If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, and elects to rely on one opinion rather than the other, the Supreme Court will affirm the board's decision. *Id.* at 147. The board may choose not to rely on its own expert. *Id.* It is error for the commission to disregard the board's credibility determinations. *Id.* at 145-147.

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

> **AS 23.30.130. Modification of awards.** (a) Upon . . . the application of any party in interest . . . because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits …whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
> . . . .
>
> **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 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

The Alaska Supreme Court in *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-975 (Alaska 1986), held attorney's fees awarded by the board should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, to ensure adequate representation. However, fully compensatory does not mean an attorney automatically receives full, actual fees. *Williams v. Abood*, 53 P.3d 134; 147 (Alaska 2002). In *Bignell*, the Court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on the merits of a claim. (*Id.* at 973). The board was instructed to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney's fees for the successful prosecution of a claim. (*Id.* at 973, 975).

In *Lewis-Walunga v. Municipality of Anchorage*, AWCAC Decision No. 123 (December 28, 2009), the AWCAC stated "AS 23.30.145(a) establishes a minimum fee, but not a maximum fee." A fee award under AS 23.30.145(a), if in excess of the statutory minimum fee, requires the board to consider the "nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries." *Id.* Holding there is no presumption under the Act an attorney's claimed fees are "reasonable," the Commission also observed the following regarding the economics of workers' compensation litigation:

> The appellant's argument rests on another mistaken premise - that every such case requires aggressive, even uneconomical, litigation without regard to the expenditure of public resources or the attorney's time. All litigation involves a balancing of the resources the case is likely to consume and the importance of the right, or value of the benefit, sought to be obtained. . . . Most workers' compensations claims, large or small, do not require the litigation resources consumed by other civil actions in employment or labor law. . . .
>
> The possibility of an unrewarding attorney fee if the claim is unsuccessful is the only check on wasteful over-litigation of a claim in the Alaska Workers' Compensation Act. Unlike a plaintiff in a personal injury action, the injured worker is protected from the impact of improvident litigation. He may not be charged attorney fees without approval of the board, and, if he loses, he need not pay his employer's fees. The economic burden of wasteful litigation choices in the workers' compensation system is not borne by the injured worker if he is the party making the choices; it is borne by the public in the expense of an overburdened system, employers in higher defense costs and higher premiums, other injured workers whose claims are stalled in a system rendered inefficient, and by the attorney ethically compelled to proceed when his client persists in a doubtful claim. The worker's claim may not succeed, but if he loses, his claim is all he loses. When the employer or insurer makes litigation choices, the possibility of payment of the employee's attorney fees, in addition to their own, is a consequence that must be weighed in making a choice to continue to litigate.
>
> The legislature chose to shield the worker from improvident pursuit of a claim; but it did not choose to shield his attorney. The legislature's choice represents a balance between assuring the injured worker access to representation and freedom to file claims without fear of financial consequences on one hand and avoiding unnecessary litigation of doubtful claims and unreasonable costs to the public and employers on the other. The commission will not disturb the balance struck by the legislature.

Id. at 7-8 (*rev'd on other grounds*, 249 P.3d 1063, 1070 (Alaska 2011) (Commission erred by not awarding attorney's fees to the "successful party" on appeal after granting appellant the "very relief [she] requested").

The Alaska Supreme Court does not disapprove of determining a reasonable fee award by comparing the value of benefits sought to the value of benefits awarded. *Fireman's Fund Ins. Co. v. Bouse*, 932 P.2d 222; 243 (Alaska 1997). Similarly, the Court also does not disapprove of determining a reasonable fee by taking into account the number of issues litigated; the complexity of those issues; and the resulting benefit to the employee. *Williams* at 147. However, determining a reasonable fee by comparing the value of benefits awarded to the value of services performed is suspect. *Lewis-Walunga* at 5.

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the

> division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due.
> . . . .

In the same way medical claims are revived whenever there is new treatment, disability claims related to new treatment are revived. *Egemo v. Egemo Const. Co.*, 998 P.2d 434; 440 (Alaska 2000). An employer must begin paying benefits within 14 days after receiving knowledge of an employee's injury, and continue paying all benefits claimed, unless or until it controverts liability. *Suh v. Pingo Corp.*, 736 P.2d 342, 346 (Alaska 1987). Section 155(e) gives employers a direct financial interest in making timely benefit payments. *Granus v. Fell*, AWCB Decision No. 99-0016 (January 20, 1999). It has long been recognized §155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). An employee is also entitled to penalties on compensation due if compensation is not properly controverted by the employer. *Williams v. Abood*, 53 P.3d 134, 145 (Alaska 2002). Medical benefits are considered "compensation" for the purpose of AS 23.30.155. *Id.* at 145. If an employer neither controverts employee's right to compensation, nor pays compensation due, §155 imposes a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992).

A controversion notice must be filed "in good faith" to protect an employer from a penalty. *Harp*, 831 P.2d at 358. "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper." But when nonpayment results from "bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *State of Alaska v. Ford,* AWCAC Decision No. 133, at 8 (April 9, 2010) (citations omitted). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Harp*, 831 P.2d at 358 (citation omitted). Evidence in Employer's possession "at the time of controversion" is the relevant evidence reviewed to determine its adequacy to avoid a penalty. *Id.* If none of the reasons given for a controversion are supported by sufficient evidence to warrant a decision the claimant is not entitled to benefits, the

controversion was "made in bad faith and was therefore invalid" and a "penalty is therefore required" by AS 23.30.155. *Id*. at 359.

The Alaska Workers Compensation Appeals Commission held in *Ford*, and reiterated in *Mayflower Contract Services, Inc. v. Redgrave*, AWCAC Decision No. 09-0188 (December 14, 2010), the requisite analysis to determine whether a controversion is frivolous or unfair under AS 23.30.155(o):

> First, examining the controversion, and the evidence on which it was based in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion, the board must decide if the controversion is a 'good faith' controversion. Second, if the board concludes that the controversion is not a good faith controversion, the board must decide if it is a controversion that is frivolous or unfair. If the controversion lacks a plausible legal defense or lacks the evidence to support a fact-based controversion, it is frivolous; if it is the product of dishonesty, fraud, bias, or prejudice, it is unfair. But, to find that a frivolous controversion was issued in bad faith requires a third step -- a subjective inquiry into the motives or belief of the controversion author.

Id. Redgrave also added clarification to the three-part test under the *Ford*:

> A controversion based upon a legal defense (such as that AS 23.30.095(a) barred the claim, or that a current medical opinion was required) is a "good faith" controversion (the first step of the analysis) if it is objectively "not legally implausible" or consists of "colorable legal arguments … based in part on undisputed facts;]" (citation omitted), it is frivolous (the second step of the analysis) if it is "completely lacking" in plausibility, (citation omitted). It may be found to be subjectively in bad faith (the third step of the analysis), if it is "utterly frivolous," that is, has "such a complete absence of legal basis ... that ... there is no possibility of mistake, misunderstanding, ... or other conduct falling in the borderland between bad faith and good faith. (citation omitted).

Redgrave at 16.

The third step, the subjective inquiry, is necessary because an invalid controversion that results in a penalty under AS 23.30.155(e) doesn't necessarily subject an employer to a referral under AS 23.30.155(o). *Sourdough Express, Inc. v. Barron,* AWCAC Decision No. 06-0304, at 20-21 (February 7, 2008). This inquiry acknowledges there is a "borderland" between good faith and bad faith where a controversion may be filed and later found invalid because of honest mistakes, inadvertent processing errors, partial or technical insufficiency, error, negligence, and petty or

reasonable misunderstandings. *Id.* Therefore, the third step of the test is designed to separate an invalid controversion that only merits a penalty from one that also merits a referral to the Division of Insurance Director because it was issued with "no possibility of mistake, misunderstanding or other conduct falling in the borderland between good faith and bad faith." *Redgrave* at 16. However, "proof of malign motive" is not required for referral. *Rockstad v. Chugach Eareckson,* AWCAC Decision No. 108, at 3 (May 11, 2009).

The courts have consistently instructed the board to award interest for the time-value of money, as a matter of course. *See Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984); *Harp v. Arco Alaska, Inc.*, 831 P.2d 352 (Alaska 1994); *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1191 (Alaska 1993). For injuries which occurred on or after July 1, 2000, AS 23.30.155(p) and 8 AAC 45.142 require payment of interest at a statutory rate, as provided at AS 09.30.070(a), from the date at which each installment of compensation is due.

> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

In *Vetter v. Alaska Workmen's Compensation Board.,* 524 P.2d 264 (Alaska 1974), the court explained disability benefits under the Act. "The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment." *Id.* at 266. An award of compensation must be supported by a finding the claimant suffered a decrease in earning capacity due to a work-connected injury or illness. *Id.*

> **AS 23.30.247. Discrimination prohibited.** (a) An employer may not discriminate in hiring, promotion, or retention policies or practices against an employee who has in good faith filed a claim for or received benefits under this chapter. An employer who violates this section is liable to the employee for damages to be assessed by the court in a private civil action.
> . . . .

> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.** (a) A person who (1) knowingly makes a false or misleading statement,

representation, or submission related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter; (3) knowingly misclassifies employees or engages in deceptive leasing practices for the purpose of evading full payment of workers' compensation insurance premiums; or (4) employs or contracts with a person or firm to coerce or encourage an individual to file a fraudulent compensation claim is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120 - 11.46.150.

. . . .

AS 23.30.395. Definitions. In this chapter,

. . . .

(27) “medical stability” means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence .

. . . .

In order to lower costs and facilitate resolution of disputes, the Legislature adopted a clear definition of medical stability. *Municipality of Anchorage v. Leigh*, 823 P.2d 1241; 1245 (Alaska 1992). The practical effect of the statute is to restrict the application of the presumption provided in AS 23.30.120. *Id.* at 1246. The statute is not arbitrary since it bears a reasonable relationship to a legitimate, rational, governmental policy. *Id.* at 1247.

8 AAC 45.050. Pleadings.

. . . .

(b) **Claims and petitions.** . . . .

(c) **Answers.** . . . .

(d) **Replies.** . . . .

(e) **Amendments.** . . . .

(f) **Stipulations.** . . . .

8 AAC 45.082. Medical treatment.

. . . .

(b) A physician may be changed as follows:

. . . .

(2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service

. . . .

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

. . . .

(B) the attending physician . . . refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians;

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

. . . .

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its supervisory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

(2) the actual fare for public transportation if reasonably incident to the medical examination or treatment; and

(3) ambulance service or other special means of transportation if substantiated by competent medical evidence or by agreement of the parties.

. . . .

(e) A reasonable amount for meals and lodging purchased when obtaining necessary medical treatment must be paid by the employer if substantiated by receipts submitted by the employee. Reimbursable expenses may not exceed the per diem amount paid by the state to its supervisory employees while traveling.
. . . .

8 AAC 45.120. Evidence. (a) Witnesses at a hearing shall testify under oath or affirmation. . . . Except as provided in this subsection and 8 AAC 45.112, a party who wants to present a witness's testimony by deposition must file a transcript of the deposition with the board at least two working days before the hearing. . . .
. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. . . . Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

(f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing….
. . . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

8 AAC 45.150. Rehearings and modification of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
. . . .

(d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail

(1) the facts upon which the original award was based;

> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.

(e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

(f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

8 AAC 45.180. Costs and attorney's fees.

. . . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

> (1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. . . .
>
> (2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

. . . .

f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

. . . .

(h) Board approval of an attorney fee is not required if the fee is paid by the employer to the employer's attorney.

> **8 AAC 45.182. Controversion.** (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155 (a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.
>
> (b) If a claim is controverted on the grounds that another employer or insurer is liable, as well as on other grounds, the board will, upon request under AS 23.30.110 and 8 AAC 45.070, determine if the other grounds for controversion are supported by the law or by evidence in the controverting party's possession at the time the controversion was filed. If the law does not support the controversion or if evidence to support the controversion was not in the party's possession, the board will invalidate the controversion, and will award additional compensation under AS 23.30.155(e).
> . . . .
>
> (d) After hearing a party's claim alleging an insurer or self-insured employer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,
>
> > (1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the director for action under AS 23.30.155 (o); or
> >
> > (2) if the board determines a self-insured employer frivolously or unfairly controverted compensation due, the board will, at the time its decision and order are filed, provide a copy of the decision and order to the commissioner's designee for consideration in the self-insured employer's renewal application for self-insurance.
>
> (e) For purposes of this section, the term 'compensation due,' and for purposes of AS 23.30.155 (o), the term 'compensation due under this chapter,' are terms that mean the benefits sought by the employee, including but not limited to disability, medical, and reemployment benefits, and whether paid or unpaid at the time the controversion was filed.

ANALYSIS

1) Is Employee entitled to medical and related transportation benefits for his cervical spine symptoms?

This is a factual question to which the presumption of compensability applies. Employee raises the presumption with his own testimony linking his cervical condition to the December 13, 2009 work injury. He also raises the presumption with the opinions of his treating physician, Dr. Jensen, and

one of the two SIME physicians, Dr. Levine, who opined Employee's cervical condition was related to the December 13, 2009 work injury. *Cheeks*. Without regard to credibility, Employer rebuts the presumption with the opinions of its EME physicians, Drs. Wong and Holley, who opine Employee's cervical condition was a preexisting, degenerative condition unrelated to his employment. Employer also rebuts the presumption with the opinion of the other SIME physician, Dr. Cleary, who opined Employee's cervical condition was the result of aging in a person genetically predisposed to osteoarthritis and not the work injury. *Runstrom*. Employee is now required to prove by a preponderance of the evidence the work injury is the substantial cause of his disability or need for medical treatment. *Saxton*.

In his October 17, 2011 physician's report, Dr. Jensen indicated Employee's cervical condition was work related by checking a box on a form report. In an apparent reference to the mechanism of injury, he also qualified his opinion with the statement: "If patient indeed injured himself the way he states he did." Dr. Jensen completed his report a week after first evaluating Employee and his report does not indicate what, if any, records he reviewed prior to forming his opinion. Neither does his report articulate a specific basis for his opinion. While Dr. Jensen's opinion takes into account the December 13, 2009 work injury's contribution to Employee's need for medical treatment, it does not expressly evaluate any other cause, such as age-related, degenerative conditions, as a possible factor. Based on these considerations, Dr. Jensen's report is afforded little weight.

Dr. Wong and Dr. Holley's evaluation consisted of reviewing medical records dating back to 1985 and summarizing relevant medical records from 2008 onward. Both physicians conducted separate physical examinations. While Dr. Wong's and Dr. Holley's report cites Employee's preexisting, degenerative condition as the cause of his need for medical treatment, it does not expressly evaluate the December 13, 2009 work injury as a possible factor. Instead, their report summarily excludes Employee's employment as a cause of his condition. But, based on their review of Employee's entire medical record, and because their report represents concurring opinions from two medical specialties, Dr. Wong's and Dr. Holley's report is afforded greater weight than Dr. Jensen's report.

Resolution of the instant issue requires an evaluation of the relative contributions of different causes of Employee’s need for medical treatment. AS 23.30.010(a). As noted above, Dr. Jensen did not expressly evaluate possible non-work causes and, conversely, Drs. Wong and Holley did not expressly evaluate potential work related causes. However, as their reports show, both SIME physicians considered both work and age-related contributions to Employee’s need for medical treatment. Dr. Levine’s report acknowledged Employee’s severe bilateral foraminal narrowing at C3-4, C4-5, C5-6 and C6-7 was “obviously of a longstanding nature.” His report then went on to consider the contribution of the December 13, 2009, work injury along with the contribution of Employee’s degenerative condition. Dr. Levine explained in his report: “[w]ith regard to the left shoulder and cervical spine, the substantial factors relate to lifting a heavy bucket on 12/13/09. Those were superimposed on prior arthritic conditions, which were not rendered symptomatic until the injuries described above.”

Like Dr. Levine’s report, Dr. Cleary’s report also acknowledged Employee’s severe bilateral foraminal stenosis, which “long preceded” both the 2008 and 2009 work injuries. His report also considered the contribution of the December 13, 2009 injury, as did Dr. Levine’s. However, unlike Dr. Levine, Dr. Cleary pointed to the absence of reported neck pain and to reports of normal cervical ranges of motion following the work injury as evidence the work injury did not cause Employee’s current need for cervical treatment.

Both SIME physicians also considered the relative contribution of the December 13, 2009 work injury at their depositions. Dr. Levine described the mechanism of injury and how he thought the work injury aggravated Employee’s preexisting, degenerative condition:

> [L]ifting the bucket would have put strain on his shoulder, pulled across … the muscles going into his neck…. And then, if he had narrowing where the nerves were coming out at that time, the nerves did not have the ability to move freely because they are tight. And, that would have stressed those nerves ….”

Dr. Cleary came to the opposite conclusion at his deposition. Based on Employee’s present complaints, his description of the mechanism of injury and his description of what he felt at the time, Dr. Cleary thought “all the strain was in Employee’s shoulders,” so the work injury did not cause Employee’s present need for medical treatment. Therefore, while Dr. Levine’s and Dr. Cleary’s opinions are, potentially, of much greater probative value than the opinions of Dr.

Jensen, Dr. Wong and Dr. Holley because they consider both work and non-work related factors, each of their opinions suffer other, significant, infirmities that call their reliability into question.

With respect to Dr. Cleary, his statements and opinions contain so many contradictions it would be difficult to chronicle them in their entirety. Dr. Cleary opined in his report the substantial cause of Employee's cervical condition was "multilevel cervical spondylosis and severe bilateral foraminal stenosis, first reported on the August 19, 2011 MRI." It is unclear how citing a post injury imaging study alone would support his opinion excluding work as the cause of Employee's need for medical treatment. Next in his report, Dr. Cleary stated the "first symptom that could be of cervical origin" was PA-C Buck's December 13, 2009 report, which noted numbness running down Employee's arm. Dr. Cleary then referred to numerous other post injury reports from various physical therapy providers, as well as Drs. Wade and Onorato, which document numbness and tingling in various portions of Employee's left upper extremity. Again, it is unclear how a multitude of post injury reports, including PA Buck's report the day of the injury, all documenting numbness and tingling in Employee's left upper extremity, support Dr. Cleary's opinion Employee's need for medical treatment was not the result of the work injury. Dr. Cleary's report further states he thought Employee's cervical spondylosis was an "incidental finding" during the work-up for the left upper extremity complaints of numbness, and the numbness was subsequently "found consistent with a left carpal tunnel syndrome, or alternatively a C6 radiculopathy." Once again, it is unclear how post injury findings of C6 radiculopathy, be they incidental or not, support Dr. Cleary's opinions. In fact, the multitude of reports cited by Dr. Cleary, all documenting post injury numbness and tingling in Employee's left upper extremity, tend to support Employee's, not Employer's, theory of causation.

There are further examples of contradictory statements by Dr. Cleary. As set forth above, he initially cited the lack of neck complaints in post injury medical records as evidence Employee did not suffer a cervical work injury, but later in his report, he stated it is not uncommon for patients with cervical spondylosis to not have a history of neck complaints. He also wrote: "[i]t is not uncommon for patients with cervical spondylosis to report a history of being asymptomatic prior to an injury." Additionally, during his deposition, Dr. Cleary stated if Employee's C6 nerve root

were injured, you would expect to have weakness in the biceps. Later, he remarked he found Dr. Onorato's August 10, 2010 report "interesting" because she documented left upper arm weakness.

Furthermore, it was also during Dr. Cleary's deposition he put forth a new theory of a condition involving Employee's brachial plexus. Dr. Cleary very cogently explained how pain from Employee's shoulder injury caused muscle spasms which, because of their close proximity to Employee's thoracic outlet, compressed the brachial plexus to produce sensations of whole arm numbness. Upon reading the deposition transcript, Dr. Cleary's brachial plexus theory initially seems quite plausible; however, the plausibility of his theory evaporates at the point he cites Dr. Emery's 1990 report in support of the theory. Dr. Cleary stated that report indicated Employee had "tennis elbow" at the time and, with tennis elbow, "he was already having spasms in his thoracic outlet that caused numbness and tingling in his hand." So, while Dr. Cleary very logically explained how muscle spasm in Employee's shoulder could, because of its close proximity to the thoracic outlet, compress the brachial plexus, he never explained how an injury involving Employee's elbow, some distance removed from the thoracic outlet, could also compress the brachial plexus. Neither did Dr. Cleary ever explain why compression of the brachial plexus from tennis elbow, if it is even possible, would only produce numbness and tingling in the hand, while compression of the brachial plexus from shoulder spasm would produce whole arm numbness. Perhaps there are medical explanations for these inconsistencies; however, if there are, they are neither set forth in Dr. Cleary's report, nor his deposition testimony. Finally, Dr. Cleary's brachial plexus theory ignores the results of Dr. Onorato's August 10, 2011 nerve conduction studies, which found no evidence of left brachial plexopathy. Dr. Cleary's opinions cannot be relied upon because of their many contradictions. AS 23.30.122; *De Rosario*.

Dr. Levine's opinions also raise concerns over their reliability, though through no fault of his own. Just as Dr. Cleary attributed great significance to the lack of neck complaints in the post injury medical record, Dr. Levine, conversely, placed significant weight on statements Employee made during the SIME evaluation where he reported feeling neck pain at the time of injury. In fact, Dr. Levine testified several times Employee told him he felt immediate pain in his neck at the time of the December 13, 2009 injury. He also reservedly acknowledged, if Employee did not report neck

pain at the time of injury, it "might" affect his conclusions and "there would be a question of whether [Employee] hurt his neck."

The reliability of medical reports has been judged by the truthfulness of claimants with the physicians who author such reports. *Rockstad.* In this particular case, during cross-examination at hearing, Employer repeatedly questioned Employee on the absence of neck complaints in the medical record following the December 13, 2009 injury. Employee stated he told Dr. Wade about his neck pain every time he saw him and did not know whether Dr. Wade "wrote it down." Employee believed he told all the physical therapists about his neck pain and did not have an explanation why physical therapy notes did not mention neck pain. Employee stated he told a particular physical therapist about his neck pain every time he saw him and "why he did not write it down is beyond me." Employee did not know why Dr. Kohnen did not document neck pain in her reports. Employee exhibited both verbal and physical changes in his demeanor during Employer's cross-examination. Employee was uncomfortable with Employer's line of questioning, and the numerous records Employer questioned Employee on do not, in fact, document neck complaints.

Employee is not credible regarding purported neck complaints to providers following the December 13, 2009 work injury. AS 23.30.122. Employee's incredulity also calls into question the reliability of Dr. Levine's opinions, which were expressly based on Employee's representations he felt immediate neck pain at the time of the December 13, 2009 injury. Dr. Levine thought Employee's report of neck pain at the time of injury was significant because it tied his neck pain to the "timeframe for his injury." He also stated: "And it would have a -- sounds like some radicular symptoms -- I mean pain radiating or tingling in the left upper extremity. That would be neck pain and some nerve irritation." Although Dr. Levine's testimony at this point is somewhat inarticulate, it can be fairly interpreted to mean, because Employee's reported neck pain contemporaneous with the injury, Dr. Levine attributed the cause of his cervical condition to the work injury, which included the onset of radicular symptoms, and further suggested to him the work injury had irritated a nerve.

It is believed there is a much more reliable report in the medical record. Employee first saw Dr. Jensen for an evaluation of his cervical spine symptoms on September 28, 2011. During that visit, Employee reported "progressive neck pain, left upper extremity radiculopathy with associated pain and weakness over the last 48 months." Notwithstanding Employee's testimony he tried "[s]everal times," or a "half dozen times," to get Dr. Jensen to "correct" the report, it is believed this statement to his treating physician is a far more candid reporting of the onset of his symptoms than either his hearing testimony or his representations to Dr. Levine. However, both Dr. Levine's report and his deposition testimony make clear, his opinion is based on Employee becoming symptomatic at the time of injury, not nearly two years prior to the work injury. Employee is not credible on the issue of experiencing neck pain at the time of injury and, since Dr. Levine relied on Employee's statements, his opinions cannot be relied upon, either. AS 23.30.122; *Rockstad*; *De Rosario*.

It is unfortunate that, between two SIME opinions, neither is reliable because there is an acute need for probative and reliable medical opinions in this case. Employee potentially suffers from multiple, overlapping conditions, which further complicates an evaluation of the relative causes of his need for medical treatment. In particular, Employee's complaints of whole-hand numbness seem to have confounded numerous physicians in this case. After performing nerve conduction studies, Dr. Onorato reported multiple, uncertain diagnosis of "left median neuropathy at the wrist along with superimposed C6 versus C7 left cervical radiculopathy or perhaps both." At his deposition, Dr. Levine also commented on Employee's presentation, where he stated he questioned the severity of his finding of decreased sensation in Employee's left hand because it involved the entire hand and all the fingers. He characterized the finding as "non-physiologic" because "it doesn't follow any distinct nerve root distribution." Dr. Levine explained if there was an injury to a specific nerve coming out of the neck, then it would involve certain fingers, but in Employee's case, he did not think the finding was the result of a direct injury to a nerve. Dr. Cleary commented on Employee's whole-hand numbness and overlapping conditions at length in his report:

> The significant finding on Dr. Onorato's examination, electrodiagnostic study, was 'left median neuropathy at the wrist.' This is consistent with numbness in the whole hand; the numbness in the left thumb, which Ms. Spies and her follow physical therapists had been reporting, may have been secondary to the C6 nerve

> root. . . . A left carpal tunnel syndrome, as determined by Dr. Onorato's electrodiagnostic testing is consistent with the numbness in the left thumb and whole hand as described by the therapists and Dr. Wade's office, [sic] numbness in the thumb would favor the C6 nerve root. However, there is an overlap of these symptoms.

Later at his deposition, Dr. Cleary cited the absence of a specific neurological complaint in a nerve root distribution as a basis for disagreeing with Dr. Levine's opinion. He opined Employee's many complaints about numbness in his hand were the result of his carpal tunnel syndrome, which would have affected his thumb, index finger and middle finger, and not the result of a C6 radiculopathy. Dr. Cleary stated: "We know he has a C6 root, but it doesn't explain all the numbness in all the fingers that he has here…." Furthermore, Dr. Wong, one of the EME physicians, also referenced Employee's whole-hand numbness when he curiously noted Employee emphasized "all digits are involved" in his portion of the report.

As set forth above, Employee caused the presumption to attach, and Employer rebutted it. Employee was required to prove by a preponderance of the evidence the work injury is the substantial cause of his disability or need for medical treatment. In the absence of reliable SIME opinions, resolution of this issue returns to the reports of Dr. Jensen and Drs. Wong and Holley. Also set forth above, based on their review of Employee's medical record, and because their report represents concurring opinions from two medical specialties, Dr. Wong's and Dr. Holley's report is afforded a greater weight than Dr. Jensen's report. In the final analysis, Employee has failed to prove by a preponderance of the evidence the work injury is the substantial cause of his disability or need for medical treatment, and his claim for medical and related transportation costs related to his cervical condition will be denied. *Koons*.

2) Is Employee entitled to TTD for his cervical spine symptoms?

The law provides for payment of TTD to compensate an employee for loss of earning capacity caused by a work injury. AS 23.30.185. For the reasons set forth above, since Employee cannot establish the 2009 injury was the substantial cause of his need for medical treatment of his cervical spine symptoms, neither can he establish the 2009 injury was the substantial cause of a disability from that condition, so his claim for TTD based on his cervical spine complaints will be denied.

Given this result, the issue is no longer Employee's entitlement to TTD *per se*, since Employer has accepted the compensability of Employee's left shoulder condition. The issue is now whether Employee is entitled to additional TTD for his left shoulder under *Freelong I*.

3) Is Employee entitled to TTD for his left shoulder symptoms under Freelong I?

The Act provides for suspension of benefits by operation of law when an employee refuses to attended an EME. AS 23.30.095(e). However, only the board can later order a forfeiture of those benefits. *Id*. It is undisputed Employer controverted and stopped paying TTD on August 20, 2011 based on Employee's failure to attend an EME on that same date. On October 5, 2011, Employer controverted again, on the same basis. In this case, *Freelong I* decided Employee had unreasonably failed to attend the EME and affirmed a suspension benefits from August 20, 2011 until September 1, 2011. However, that decision expressly declined to order the forfeiture of benefits during the suspension period. Therefore, *Freelong I* had the effect of a compensation order and Employee was entitled to a resumption of his continuing TTD benefits from August 20, 2011 until Employer next controverted with substantial evidence he was no longer disabled. AS 23.30.155(a); *Runstrom*.

The law provides TTD will not be paid past the date of medical stability. AS 23.30.185. It further provides medical stability will be presumed in the absence of objectively measurable improvement for a period of 45 days. AS 23.30.395(27). After its August 20, 2011 and October 5, 2011 controversions, Employer next controverted Employee on December 27, 2011. That notice denied "further" left shoulder benefits based on Dr. Wong's and Dr. Holley's December 3, 2011 opinion that condition was medically stable. Employer refined its December 27, 2011 controversion on January 10, 2012, and denied TTD for Employee's left shoulder condition, specifically after April 15, 2011, based on Dr. Holley's January 2, 2012 addendum report. That report was, in turn, based on a purported March 1, 2011 report by Dr. Wade, where Dr. Wade had recommended six more weeks' of physical therapy and light duty work. However, the accuracy of Dr. Holley's January 2, 2012 report is suspect.

First, although the record contains a March 1, 2011 report by Dr. Wade that states, "[h]opefully, we can try and get him some type light [sic] duty for the next six weeks or so," a March 1, 2011 report by Dr. Wade that mentions six additional weeks' of physical therapy could not be found. Second, even if such a report by Dr. Wade did exist, an examination of other portions of the record shows Dr. Holley's April 15, 2011 medical stability date to be a bit early. On March 29, 2011, Dr. Wade responded to a letter from Employer indicating he anticipated Employee becoming medically stable by June 1, 2011. Additionally, Employee continued physical therapy until March 31, 2011, which indicates his providers thought his left shoulder continued to benefit from that treatment. Following the June 22, 2011 physical capacities evaluation, the focus of Employee's medical treatment clearly shifted to his cervical condition. Therefore, according to Dr. Wade, Employee's left shoulder condition may have became medically stable by June 1, 2011 at the latest or, according to Employee's physical therapy records and the application of AS 23.30.395(27), by May 15, 2011 at the earliest. Since Dr. Wade's date was merely an estimate, and since Employee's physical therapy records are documented treatment, the most reliable evidence in the record indicates Employee's left shoulder was medically stable on May 15, 2011. *Id.*

Freelong I effectively addressed and disposed of Employer's August 20, 2011 and October 5, 2011 controversions. As set forth above, that decision also had the effect of a compensation order and Employee was entitled to a resumption of his continuing TTD benefits from August 20, 2011. Employee also continued to enjoy a presumption his disability remained compensable following that date as well. AS 23.30.120; *Olson*; *Runstrom*. Meanwhile, *Freelong I* required Employer to resume paying Employee's continuing TTD benefits until it next controverted liability. *Suh*. It did so on December 27, 2011, based on Drs. Wong's and Holley's opinions Employee's left shoulder was medically stable. Since the record demonstrates Employee's left shoulder condition was, in fact, medically stable at the time of Employer's December 27, 2011 controversion, Employee's entitlement to TTD ceased on that date. AS 23.30.185.

Incidentally, the question of exactly when Employee's left shoulder condition became medically stable in 2011 is academic in this analysis. Even though this decision just determined Employee first became medically stable on May 15, 2011, it is not thought this determination can be retroactively applied to now excuse Employer's failure to have resumed paying Employee's

continuing TTD benefits under *Freelong I*. As *Runstrom* explained, once Employee was disabled, the law presumed his disability continued until Employer produced substantial evidence to the contrary. That evidence came in the form of Employer's December 27, 2011 controversion. Moreover, *Metcalf* makes clear, the Board's authority is limited to suspending *further* benefits. *Id.* (emphasis in original). Therefore, this decision will not attempt to retroactively vacate Employer's original obligation to have resumed paying Employee's continuing TTD payments under *Freelong I*, but will instead deny Employee further TTD benefits after December 27, 2011 based on the substantial evidence in support of Employer's controversion of that date.

4) Is Employee entitled to any additional periods of TTD for his left shoulder symptoms?

As a preliminary matter, Employer has acknowledged the compensability of Employee's left shoulder condition and contends Employee "could" be entitled to TTD, but he is not because he was presumed to be medically stable. The record demonstrates Employer has long opposed additional TTD on the basis of different theories of medical stability. It both simultaneously and alternately contends Employee was medically stable on April 15, 2011, and also contends Employee rendered himself medically stable by not "diligently" pursuing Dr. Tamai's May 18, 2012 surgical recommendation. It relies on Dr. Holley's January 2, 2012 addendum report as the basis for its former contention, and AS 23.30.095(d) and AS 23.30.395(27) for the latter.

Although it was determined above Employee's left shoulder initially became medically stable on May 15, 2011, the law recognizes there can be multiple, alternating periods where a claimant is medically stable, followed by periods where he is not medically stable. AS 23.30.095(c). In the same way medical claims are revived whenever there is new treatment, disability claims related to new treatment are also revived. *Egemo*. Employee sought further treatment for his left shoulder condition from Dr. Tamai on May 3, 2012. On May 10, 2012, a MRI showed multiple tears in Employee's left shoulder and, on May 18, 2012, Dr. Tami recommended left shoulder surgery. At that point, Employee's condition was no longer medically stable, reviving his claim for disability compensation. *Id.*

Employer did not then resume voluntary TTD payments; however, it maintained its controversion based on Dr. Holley's now outdated January 2, 2012, medical stability opinion. Eventually,

Employer did seek a more current medical opinion from Dr. Holley who, on August 18, 2012, confirmed Employee's left shoulder was not medically stable and concurred with Dr. Tamai's surgical recommendation. Dr. Holley further opined the 2009 work injury and Dr. Wade's subsequent surgery were the substantial causes of Employee's persistent left shoulder symptoms.

Even in light of Dr. Holley's EME addendum, Employer still did not resume voluntary TTD payments. Instead, on September 21, 2012, it served a new controversion with respect to Employee's left shoulder and served a corresponding amended answer. Its amended answer admitted responsibility for medical treatment and related transportation costs arising from Employee's 2009 left shoulder injury, but explicitly denied TTD from September 1, 2011. Incidentally, the significance of Employer's September 1, 2011 date is not understood. The only readily identifiable correlation to that date in the record is in *Freelong I*, which concluded that was the date Employee's "resistance" to attending the August 20, 2011 EME ended. Nevertheless, Employer's answer also contended: "Employee's left shoulder condition is medically stable, as a matter of law, so long as the employee does not accept and then diligently proceed with the treatment." "The employer and the carrier have preauthorized the procedure recommended by the attending physician." Employer's September 21, 2012 controversion also explicitly denied TTD from September 1, 2011, and contained the same medical stability language as its answer. Although not expressly cited, Employer was formally raising its AS 23.30.095(d) defense.

If AS 23.30.095(d) is to be applied in this case, it may only be applied from September 21, 2012, the date Employer first asserted the defense, for the following reasons. Like the analysis of Employee's entitlement to TTD under *Feelong I* above, *Metcalf* makes clear, §095(d) can only be prospectively applied. In that case, the Alaska Supreme Court also considered, and rejected, employer's contention prospective application of the statute "opens the door for employees to purposefully drag out a hearing, obtain unnecessary continuances, and otherwise connive to enlarge the period during which benefits are still being paid." *Id.* at 1389. The Court pointed out insurers are free to petition the Board "as soon as they are able to make out a good faith case of unreasonable refusal," and concluded "requiring the insurer to petition the Board before suspending benefits on this ground is sound public policy." *Id.* at 1389-90.

Second, while AS 23.30.185 provides for termination of TTD payments based on medical stability once they have begun, it is unknown how AS 23.30.095(d), or AS 23.30.395(27) for that matter, can be retroactively applied to obviate Employer's preexisting obligation to have restarted TTD payments in the first place. Here, again, *Metcalf* is clear. An employer must obtain Board approval before it can "cut off" an employee's benefits, and the Board's authority is limited to suspending *further* benefits. *Id.* at 1388-89 (emphasis in original).

Third, Employer contends Employee cannot produce clear and convincing evidence to rebut a presumption of medical stability under AS 23.30.395(27). However, Employee does not need to, since Employer provided that evidence in the form of Dr. Holley's August 18, 2012 EME report, which clearly indicated Employee remained not medically stable without surgery.

Fourth, Employer's medical stability defense to its liability for TTD highlights the interrelationship between disability and the availability of medical treatment. Employee remained under constant controversion, both before and after Dr. Tamai's May 18, 2012 surgical recommendation, based on Dr. Holley's outdated January 2, 2012 medical stability opinion. It not understood how Employee could render himself medically stable by refusing surgical treatment that was not being provided at the time. As Employer pointed out in its hearing brief, it is a "logical truth," "[o]ne cannot expect an injury to improve through medical treatment which does not occur." However, Employer did formally authorize surgery on September 21, 2012, and not only did its answer and controversion of the same date provide Employee notice of its defense, but they also clearly set forth Employer's expectation that Employee would proceed with surgery in a timely manner now that it had been finally authorized.

During the pendency of this litigation, Employer has repeatedly alleged Employee refused to proceed with surgery; and Employee has repeatedly defended his positions by contending he was merely, carefully, researching surgeons following the less than successful surgical result from his first left shoulder surgery. The Alaska Supreme Court has acknowledged the issue of whether a claimant's refusal to proceed with surgical treatment is reasonable is a complex factual determination involving a multitude of variables. *Felix* at 27, 28. The Court suggested variables for consideration, including a claimant's age and physical condition, his previous surgical

experience, the ratio of deaths from the operation, the percentage of cures, and many others. *Id.* at 28. However, the Court cautioned the issue cannot always be automatically determined by medical statistics and expert testimony alone. *Id.*

In this case, the record lacks substantial evidence of most of the Court's suggested variables. However, it is noted the surgery under consideration in this case was arthroscopic shoulder surgery, not brain surgery or organ transplantation. It is also noted, in addition to notice of Employer's §095(d) defense, Employee also had the benefit of being forewarned of Employer's expectations for him to proceed with treatment in a timely manner once it had approved his surgery.

Nevertheless, Employee's less than successful surgical result from his first left shoulder surgery is initially considered reason enough for him to have proceeded with caution. *Felix.* Though, by the time of Employer's September 21, 2012 surgical authorization, Employee had already had the benefit of a four month "head-start" on AS 23.30.395(27) to have begun carefully researching his next surgeon. Additionally, Employee was afforded another 45 days under the statute. Still, it took Employee more than another 10 months after that to select his surgeon and undergo the surgery. Even after serious consideration is given to Employee's first left shoulder surgical experience, nearly a year and a half is not thought reasonable when considering application of a 45 day statute. *Id.*; *Felix; see also Leigh* (the Legislature's desire to lower costs and facilitate resolution of disputes is a rational basis for AS 23.30.395(27)). Therefore, by not proceeding with surgery in a timely manner following Employer's formal authorization, by operation of statute, Employee became medically stable 45 days later, on November 6, 2012. AS 23.30.395(27). Employee is entitled to TTD from May 3, 2012, when he began treating again for his left shoulder, through November 5, 2012, the date before he became medically stable. AS 23.30.185.

5) Is Employee entitled to payment of penalties on unpaid TTD?

Employee contends he is entitled to penalty payments for two periods of unpaid benefits. First, he contends Employer did not have a valid controversion in effect from August 20, 2011 until its December 27, 2011 controversion. Therefore, he contends a penalty is owed from August 20, 2011 until Dr. Wong's and Dr. Holley's December 3, 2011 EME report that served as the basis for

Employer's December 27, 2011 controversion. Second, Employee claims penalty from August 18, 2012, the date an EME report concluded the 2009 work injury was the substantial cause of Employee's need for left shoulder surgery, to present.

Both Employee's points are well taken. A good faith controversion protects Employer from penalty. *Harp*. With respect to the first period Employee claims, it was determined above Employee is entitled to TTD from August 20, 2011 until December 27, 2011. During the relevant period of time, Employer filed a series of controversions, including its August 20, 2011 and October 5, 2011, controversions, based on Employee's failure to attend the August 20, 2011 EME; and its December 27, 2011 controversion of "further" left shoulder benefits, based on Dr. Wong's and Dr. Holley's December 3, 2011 EME report.

Freelong I determined Employee had unreasonably failed to attend the EME and suspended benefits from August 20, 2011 until September 1, 2011. However, that decision expressly declined to order the forfeiture of benefits during the suspension period. Thus, upon issuance of *Freelong I*, Employee's suspended TTD came due for the period between August 20, 2011 and August 31, 2011, but not penalty, since the suspension was by board order. AS 23.30.155; *Shirley*. Additionally, by finding Employee's resistance ended on September 1, 2011, *Freelong I* effectively addressed and disposed of Employer's August 20, 2011 and October 5, 2011 controversions. Therefore, Employer no longer had controversions in place to protect it against penalty from September 1, 2011 onward, resulting in both TTD and penalty due for the period from September 1, 2011 until Employer's next valid controversion on December 27, 2011. AS 23.30.155. Employee is entitled to penalty on his TTD benefits from September 1, 2011 until December 27, 2011, not December 3, 2011, as Employee contends. *Id.*; *Harp*.

With respect to the second period Employee claims, it was determined above Employee is entitled to TTD from May 3, 2012 through November 5, 2012. During the relevant period of time, Employer filed a series of controversions, including its January 10, 2012 and July 30, 2012 controversions based on Dr. Holley's January 2, 2012 opinion Employee's left shoulder was medically stable since April 15, 2011; and its September 21, 2012 controversion, based on its AS 23.30.095(d) defense. Incidentally, in what is presumed to have been a clerical error, even though

Employer's September 21, 2012 controversion acknowledged the compensability of medical benefits for Employee's left shoulder condition and preauthorized Employee's surgery, it also retains the same language from its January 10, 2012 and July 30, 2012 controversions, referring to Dr. Holley's January 2, 2012 opinion, which stated Employee was medically stable. It is not believed Employer intended to contend Employee was both medically stable, and not medically stable, at the same time.

Nevertheless, it is undisputed Employee could not return to his former occupation on account of his left shoulder symptoms. Employee sought further treatment on May 3, 2012, reviving his claim for disability and, on June 14, 2012, he served Employer with a medical summary containing Dr. Tamai's May 3, 2012 and May 18, 2012 reports, as well as the May 10, 2012 MRI report. These records clearly set forth the medical basis for Employee's disability. *See* AS 23.30.155(b) (compensation becomes due on 14th day after Employer has "knowledge of the injury"). Employee's June 14, 2012 medical summary was substantial evidence of his disability. Employer was required to either pay compensation within 14 days or controvert. AS 23.30.155(a)-(b); *Suh*. It initially did neither, which subjects it to penalty. AS 23.30.155(e). Eventually, it controverted on July 30, 2012 in continued reliance on Dr. Holley's - now stale, January 2, 2012 medical stability opinion.

Harp prescribes, for a controversion notice to be in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find the claimant is not entitled to benefits. Employer's January 10, 2012 controversion safely falls into the "good faith" category. However, *Harp* also made clear, evidence in Employer's possession at the time of controversion is relevant to the adequacy of the controversion. When that evidence is taken into consideration here, Employer's subsequent, July 30, 2012 controversion becomes precarious.

The Commission has recognized evidence legally sufficient to support a controversion can later be rendered insufficient by subsequent events. *Ford* at 35 (a physician's statement an employee could continue to work without surgery was not sufficient to support a controversion of disability compensation related to the surgery after it had occurred). While Dr. Holley's January 2, 2012,

opinion on medical stability might have initially supported Employer's January 10, 2012, controversion, in light of Employee's June 14, 2012 medical summary documenting new medical treatment and diagnosis, Employer's July 30, 2012 controversion no longer represented a continued, good faith, reliance on that opinion. *Harp* at 358 (citations omitted); *Ford*. Based on information Employer had, not information Employee could produce, it was "objectively 'legally implausible'" Dr. Holley's earlier opinion could still stand for the proposition Employee continued to be medically stable on July 30, 2012. *Redgrave*. Neither did Employer's July 30, 2012 controversion set forth any "colorable legal arguments …. based in part on undisputed facts." *Id.* To conclude otherwise would mean employers would enjoy complete immunity from penalty by simply perpetually controverting an employee based on a single, stale report to the exclusion of all subsequent medical evidence.

Employer's July 30, 2012 controversion was not in good faith. Accordingly, Employee is entitled to penalty on this basis, as well as Employer's initial failure to timely pay or controvert. *Harp*. Therefore, Employee is also entitled to penalty on his TTD from May 3, 2012, when he again sought treatment for his left shoulder, through November 5, 2012, the date before he became medically stable. AS 23.30.155(e).

6) Did Employer unfairly or frivolously controvert Employee's benefits?

Employee seeks a finding of unfair or frivolous controversion. He makes no specific contentions on this issue or with respect to any given controversion, but rather refers to a hearing exhibit that lists Employer's controversions and states he will "leave [the issue] in the hands of the board … to make that call." Since Employee apparently seeks a global determination with respect to each controversion filed over the course of litigation, this decision will analyze them accordingly.

The law prohibits unfair claims settlement practices, which includes unfair or frivolous controversions under the Act. AS 23.30.155(o) (citing AS 21.36.125). A controversion must be supported by law or evidence in an employer's possession at the time notice is served. 8 AAC 45.182(b). Under *Ford*, to determine whether Employer unfairly or frivolously controverted Employee's benefits, it must first be determined whether Employer acted in bad faith. This initial determination of bad faith requires an examination of the controversion itself, and the evidence

upon which it was based, in isolation, without assessing credibility, and drawing all inferences in favor of the controversion. The Commission later clarified the first part of Ford's three-part test in *Redgrave*. A controversion based upon a legal defense is a "good faith" controversion if it is objectively not legally implausible or consists of colorable legal arguments based in part on undisputed facts. *Id.* If none of the reasons given for a controversion is supported by substantial evidence to warrant a decision a claimant is not entitled to payment, the controversion was "made in bad faith." *Harp* at 358.

a) Employer's August 24, 2011 and October 5, 2011 controversions.

The Act affords Employer opportunities to have Employee examined by a physician of its own choosing and provides for the suspension and forfeiture of benefits should Employee refuse to submit to an examination. AS 23.30.095(e). On August 20, 2011, Employee failed to attend an EME. Employee did not dispute he failed to attend the EME, but rather contended the EME conflicted with a previously scheduled family celebration. Employer's August 24, 2011 and October 5, 2011 controversions were based on Employee's failure to attend an August 20, 2011 EME. At the time they were filed, Employer's controversions had a basis in law or fact and were not a product of bad faith. *Harp.*

b) Employer's December 27, 2011, January 10, 2012 and April 9, 2012 controversions.

The Act requires payment of compensation and benefits when an employee's disability or need for medical treatment "arose out of and in the course of employment." AS 23.30.010(a). It requires an employer to provide medical care as the "process of recovery requires." AS 23.30.095(a). On December 3, 2011, Drs. Wong and Holley concluded Employee's right and left shoulder conditions were both symptomatically aggravated by the respective work injuries, but also concluded both shoulders were medically stable and required no further treatment. They further opined Employee's cervical symptoms were unrelated to his employment. Employer based its December 27, 2011 controversion on this report. On January 2, 2012, Dr. Holley specifically concluded Employee's left shoulder was medically stable by April 15, 2011. Employer based its January 10, 2012, April 9, 2012 and July 30, 2012 controversions on this report. At the time they were filed, Employer's first three controversions had a basis in law and fact and were not a product

of bad faith. *Harp*. However, as set forth in specific detail above, Employer's July 30, 2012 controversion was not served under the initial threshold of good faith. Therefore, it will be examined under the second and third parts of the three-part test in *Ford* to ascertain whether it was frivolous or unfair and should be referred under AS 23.30.155(o).

c) Employer's July 30, 2012 controversion.

If the controversion lacks a plausible legal defense or lacks the evidence to support a fact-based controversion, it is frivolous; if it is the product of dishonesty, fraud, bias, or prejudice, it is unfair. *Ford*. As was set forth above, Dr. Holley's opinion Employee was medically stable on April 15, 2011 no longer supported Employer's contention Employee was medically stable on July 30, 2012. Therefore, it was frivolous. *Id*. An unfair controversion, on the other hand, requires it to be the product of dishonesty, fraud, bias, or prejudice. A determination of whether Employer's July 30, 2012 controversion was unfair in this case is difficult.

However, ultimately, it is not necessary to determine whether the controversion was unfair. As is discussed more fully below under the issue of attorney's fees, this case has been vigorously and, at times, even fiercely litigated by both parties. As the findings of facts above suggest, the parties' litigation has, at times, taken rather personal tones. Under these circumstances, a controversion that is the product of dishonesty, fraud, bias, or prejudice is not inconceivable.

However, on the other hand, it is also noted, at the time of Employer's July 30, 2012 controversion, the parties were aggressively litigating SIME issues. Pleading practice during this period of time was intense. Furthermore, the record in this case is voluminous. Under these circumstances, even though Employer's July 30, 2012 controversion was frivolous, and even if it was unfair, it is just as likely the product of "honest mistakes, inadvertent processing errors, partial or technical insufficiency, error, negligence, and petty or reasonable misunderstandings," as it was the degree of bad faith that would merit a referral under §155(o). *Barron*. Therefore, Employer's July 30, 2012 controversion will not be referred.

d) Employer's September 21, 2012 controversion.

Employer's next controversion occurred on September 21, 2012. In addition to requiring an employer to provide medical care as the "process of recovery requires," AS 23.30.095(a), the Act also provides TTD may not be paid for any period of disability occurring after the date of medical stability, AS 23.30.185, and states medically stability will be presumed after 45 days in the absence of objectively measurable improvement, AS 23.30.395(27). Compensation may also be suspended when Employee unreasonably refuses medical treatment. AS 23.30.095(d).

On May 18, 2012, Dr. Tamai recommended left shoulder arthroscopy but Employee did not proceed with the surgery. On August 24, 2012, Employer notified Employee its physician agreed Dr. Tamai's recommend surgery was reasonable and necessary medical treatment and, on September 6, 2012, stated it had preauthorized the surgery. Again, Employee did not proceed with treatment. On September 21, 2012, Employer formally authorized surgery and controverted Employee's left shoulder condition, which it contended, was medically stable as a matter of law so long as Employee did not proceed with treatment. Still, Employee did not proceed with surgery until September 11, 2013. At the time it was filed, Employer's controversion had a basis in law or fact and was not a product of bad faith. *Harp.*

e) Employer's February 2, 2013 controversion.

The Act generally limits both employees and employer to one change of their respective physicians. AS 23.30.095(a). If the Board finds a party has made an unlawful change of physician, the reports, testimony or opinions of that physician cannot be considered in any form, in any proceeding or for any purposes. 8 AAC 45.082(c). Employee has treated with and sought the opinions of numerous physicians for his left shoulder symptoms, including: Drs. Wade, Tamai and Kohnen, and referrals to Drs. Onorato and Merritt. On November 20, 2012, Employee solicited another opinion letter from Dr. Witham and filed it on a medical summary on December 10, 2012. On February 1, 2013, Employer controverted Dr. Witham's evaluation contending it was an unlawful change of physician. At the time it was filed, Employer's controversion had a basis in law or fact and was not a product of bad faith. *Harp.*

7) Is Employee entitled to interest?

The law provides for an award of interest to compensate for the time value of money. AS 23.30.155(p). For the reasons set forth above, Employee is entitled to interest on his TTD from August 20, 2011 through December 26, 2011; and on his TTD from May 3, 2012 through November 5, 2012. *Id.*

8) Should Freelong II be modified?

Employee seeks modification of *Freelong II*, which held he made an unauthorized change of physician. He contends he asked Dr. Wade's office for a MRI, and Dr. Wade's office told him "no." Consequently, he sought a consultation with Dr. Tamai, who did order an MRI, which showed multiple tears in his shoulder. Employee cites 8 AAC 45.082(b)(4)(B) in support of his position and contends, by not ordering an MRI, Dr. Wade refused to provide services to him which, by regulation, then afforded him an opportunity to substitute Dr. Tamai.

Employee's desire to "modify" *Freelong II* in this regard is met with several legal and factual obstacles. First, the Act does not provide for modification of a decision, *per se*, but rather modification of an award. AS 23.30.130. Although *Freelong II* decided issues, it did not award benefits. Since Employee seeks to modify a legal determination rather than an award, the decision cannot be modified. *Id.*

Second, in order to modify an award, the statute requires a mistake of fact, *id.*, and the regulation requires a petitioner to specifically plead the fact alleged to be erroneous, 8 AAC 45.150(d)(2). Employee's petition states: "Clearly, it was a mistake of fact for the Board to determine that the employee changed doctors in this instance." Therefore, rather than setting forth an alleged mistake of fact, Employee's petition is instead based on his disagreement with the decision. Mere disagreement with a result in a decision is not a basis for modification. AS 23.30.130.

Third, Employee's petition further states: "Review of the Board's compact disc recording of the hearing . . . reveals that employee's representative advised the Board that the [sic] Dr. Wade would not authorize an MRI, so he saw Dr. Tamai who examined him and ordered an MRI, which showed multiple tears." Thus, it is possible Employee intended to contend the mistake of fact was

the decision's failure to consider certain "evidence" in the form of representations of Employee's representative. However, representations of a representative are not evidence. 8 AAC 45.120.

Fourth, Employee's argument in *Freelong II* was based on his contention Dr. Kohnen's August 28, 2012 letter was relevant to his claim. Here, Employee's argument is now based on Dr. Wade's alleged refusal to treat. Thus, rather than seeking modification based on an alleged mistake of fact, in actuality, Employee is merely attempting to re-argue *Freelong II* under a new theory. The statute does not afford an opportunity to modify an award based on novel argument. AS 23.30.130.

Fifth, at this hearing, Employee testified he requested a MRI from Dr. Wade's office but the receptionist told him "no." Employer objected on the basis of hearsay. In workers' compensation proceedings, hearsay evidence is permitted to supplement direct evidence but is not, alone, sufficient to support a finding of fact. 8 AAC 45.120(e). Thus, regardless of his stated basis for doing so, the hearing's chair properly allowed Employee's testimony. However, Employee's hearsay testimony stands alone in the record, which does not contain any evidence Dr. Wade refused to order a MRI. Since there is no fact, let alone a mistake of fact, upon which to modify the decision, the decision cannot be modified. AS 23.30.130.

Finally, Employee's theory strains the purpose of the statute and its corresponding regulation. The Alaska Supreme Court has explained AS 23.30.095(a) allows an employee an opportunity to "substitute" a new physician in cases where the current treating physician is either "unwilling or unable to continue providing care." *Bloom* at 238. Allowing an employee to substitute attending physicians when the employee's current physician becomes "unwilling or unavailable to treat" is consistent with the well-settled rule an injured worker is presumed entitled to "continuing medical treatment." *Id.* The substitution policy ensures that the employee's right to continuing care by a physician of his choice will not be impeded by circumstances beyond the employee's control. *Id.*

With the Court's explanations in mind, even if it had been established Dr. Wade's receptionist told Employee Dr. Wade would not order an MRI, it is not thought, in the exercise of his independent, professional, medical judgment, Dr. Wade's decision to not order a single, diagnostic test amounts to an "unwillingness to treat," or rises to a denial of "continuing medical treatment." *Id.* In other

words, AS 23.30.095(a) and the corresponding regulation at 8 AAC 45.082(b)(4)(B), do not stand for the proposition Employee can obtain whatever medical care he demands, but rather ensure he can continue receiving the care he needs. *Accord Jaouhar v. Marenco, Inc.*, AWCB Decision No. 98-0166 (June 24, 1998) (holding employee's choice to treat with a new physician after her previous physician refused to refer her to a pain management clinic was a change of physician). For the foregoing reasons, *Freelong II* will not be modified.

9) Should Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report be granted?

Employee seeks a decision on Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report. This issue is closely related, though not identical to, the issue decided immediately above. While *Freelong II* decided Dr. Kohnen's August 28, 2012 letter was the product of an unauthorized change of physician, it did not explicitly decide whether Dr. Witham's report was also an unauthorized change. The parties previously argued their respective positions on the propriety of admitting Dr. Witham's letter at a February 12, 2013 prehearing conference, after which, the designee undertook the following analysis:

> Each party is partially correct in their contentions regarding what was decided in the last D&O. Employer is correct - the issue of unauthorized change of physician was addressed and decided concerning Dr. Kohnan's [sic] letter. Employee is also correct to the extent the decision did not decide the issue as it pertains to Dr. Witham's report. [Employee] contends he has not presented [his] basis for changing from Dr. Wade to Dr. Tamai, which was Dr. Wade's "refusal" to order an MRI. If Employee did not present the argument he now wants to make, it certainly was not because he was denied an opportunity to do so. The prehearing summary of October 31, 2012 clearly set Employer's petition to strike Dr. Kohnen's letter as an issue for hearing, and *Freelong III* [sic] demonstrates Employee was afforded an opportunity to present whatever arguments he wished.
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> Since *Freelong III* [sic] provides the relevant potions [sic] of AS 23.30.09 [sic] and decisional authority controlling the issue, they are intentionally omitted here. A review of Dr. Witham's report shows it was specifically prepared to address Employee's "[l]eft shoulder pain and popping." Similar to Dr. Kohnen's letter, Dr. Witham report provides a very brief history of treatment and diagnoses by Employee's treating physicians, including Drs. Wade and Tamai. In his assessment, Dr. Witham renders opinions on the treatment and prognosis of Employee's left shoulder.

> Employer's petition must be decided by a full board panel. 8 AAC 45.082(c). However, the review of Dr. Witham's report indicates the issue is entirely analogous to the Dr. Kohnen letter decided by *Freelong III* [sic]. It has been previously established Employee has already once changed his treating physician for his left shoulder from Dr. Wade to Dr. Tamai. Both doctors have opinions in the record. Dr. Witham's report would be yet another.
>
> Employee contends the Dr. Witham's report should be forwarded until such time as Employer's petition is decided, and speaks of letting "the horse out of the barn," presumably referring to the SIME report. Although a designee cannot decide the issue alone, given the analogous nature of Dr. Witham's report to Dr. Kohnen's letter, the fact that it has been established Employee has already once changed his treating physician, the clear and absolute language of the regulation, which directs reports or opinions will not be considered "in any form, in any proceeding, or for any purpose," it would [be] extremely imprudent to let "the horse out of the barn" and forward the report, since the SIME report will certainly be issued before Employer's petition is heard and decided. [The designee] was correct in exercising her discretion to not forward the report. Therefore, in another exercise of discretion, Dr. Witham's report will not be forwarded until a full board panel decides it should be. Following receipt of the SIME report, Employee will have ample opportunity, afforded by regulation, to present Dr. Witham's report to the SIME panel and elicit additional evidence on it.
>
> Many of the considerations discussed above concerning Employee's petition, also apply to Employer's petition. The SIME is the day after tomorrow. A full board hearing is required. As a practical matter, the parties' petitions cannot be addressed in advance of the SIME. Additionally, like Employee's petition, there is no valid ARH on Employer's, either. For all these reasons, Employer's petition will be heard in due course following the filing of an ARH.

Based on the facts and authority established in *Feelong II*, this decision adopts the designee's analysis provided the February 13, 2013 prehearing conference summary. As he pointed out, Employee had already exercised his one change of physician and, just as with Dr. Kohnen's letter, Employee is again attempting to introduce yet another solicited medical opinion into the record. Employee candidly acknowledged as much at hearing when he stated he went to see Dr. Witham to see "what he thought" about his left shoulder condition. Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report will be granted.

10) Should Employee's November 27, 2013 petition to strike Employer's November 20, 2013 objection to attorney's fees and costs be granted?

As has been characteristic of this case, following the hearing, contentious litigation again ensued over post-hearing briefs and attorney's fees. Although the regulations permit an employee to supplement his attorney's fees application by testimony at hearing, it is common practice for hearing chairs to afford employees a period of time following a hearing to file a supplemental affidavit of attorney's fees and costs, and to afford employers a period of time following that to object to an employee's attorney fees and costs. 8 AAC 45.180(d)(1). This is particularly true when post-hearing issues require the parties' attention, as was the case here. The process most often occurs by stipulation for the parties at the conclusion of a hearing.

At the conclusion of this hearing, the chair afforded Employee two weeks to supplement his attorney's fees affidavit, and allowed Employer an additional week after that to object to the fee application. The chair also requested post-hearing briefs to include a factual presentation of the chronology of Employer's controversions and evidence of Employee's disability, such as physician opinions, etc. The chair further cautioned the parties, "What we're looking for here is not argument, just the facts if you will."

Employee's petition is well taken. First, Employer was granted an additional week after Employee filed his supplemental affidavit to object to Employee's fees, not to present additional argument on the merits of other issues. Second, even though the chair's cautionary instruction to the parties regarding additional argument pertained to their post-hearing briefs rather than Employer's objection to Employee's supplemental affidavit *per se*, the clear import of the instruction was to avoid ongoing argument on issues other than attorney's fees following the hearing. Yet, when Employer filed its fee objections, it continued to argue the issues of Dr. Cleary's credibility, medical stability and unauthorized change of physician. Employer's November 20, 2013 objection will be stricken in part. AS 23.30.001(4); AS 23.30.135(a). However, this decision will not adopt Employee's proposed remedy of striking Employer's objections in their entirety only to require it to refile its fee objections. For purposes of administrative efficiency, the panel will simply disregard those portions of Employer's objections that are stricken, namely its arguments on issues other than attorney fees. AS 23.30.001(1); AS 23.30.135(a).

Finally, Employee also contended at the February 10, 2014 prehearing conference Employer's objections should be limited to only his supplemental fee affidavit. He cited no authority that stands for his proposition and none is known. Contrary to Employee's assertion, the purpose of post-hearing supplementation and objections are to afford Employee an opportunity to submit all of his attorney's time for a fee award, and to afford Employer an opportunity to enter all of its objections to the time submitted. Therefore, Employer's objections will not be further limited by this decision. AS 23.30.135(a).

11) Is Employee entitled to attorney's fees and costs?

In *Lewis-Walunga*, the Commission commented extensively on the Act's attorney fee statute and the balance the Legislature attempted to strike between ensuring an injured worker's ability to obtain representation on one hand, and avoiding unnecessary and unreasonable litigation costs on the other. Holding there is no presumption under the Act an attorney's claimed fees are reasonable, it wrote:

> The appellant's argument rests on another mistaken premise - that every such case requires aggressive, even uneconomical, litigation without regard to the expenditure of public resources or the attorney's time. All litigation involves a balancing of the resources the case is likely to consume and the importance of the right, or value of the benefit, sought to be obtained. . . . Most workers' compensations claims, large or small, do not require the litigation resources consumed by other civil actions in employment or labor law. . . .
>
> The possibility of an unrewarding attorney fee if the claim is unsuccessful is the only check on wasteful over-litigation of a claim in the Alaska Workers' Compensation Act. Unlike a plaintiff in a personal injury action, the injured worker is protected from the impact of improvident litigation. He may not be charged attorney fees without approval of the board, and, if he loses, he need not pay his employer's fees. The economic burden of wasteful litigation choices in the workers' compensation system is not borne by the injured worker if he is the party making the choices; it is borne by the public in the expense of an overburdened system, employers in higher defense costs and higher premiums, other injured workers whose claims are stalled in a system rendered inefficient, and by the attorney ethically compelled to proceed when his client persists in a doubtful claim. The worker's claim may not succeed, but if he loses, his claim is all he loses. When the employer or insurer makes litigation choices, the possibility of payment of the employee's attorney fees, in addition to their own, is a consequence that must be weighed in making a choice to continue to litigate.

> The legislature chose to shield the worker from improvident pursuit of a claim; but it did not choose to shield his attorney. The legislature's choice represents a balance between assuring the injured worker access to representation and freedom to file claims without fear of financial consequences on one hand and avoiding unnecessary litigation of doubtful claims and unreasonable costs to the public and employers on the other. The commission will not disturb the balance struck by the legislature.

Id. at 7-8.[1] This case in particular warrants careful attention to the Legislature's considerations when applying the fee award statute.

As this decision's findings of facts indicate, and as mentioned at various points during the analysis, this case has involved an extraordinary amount of litigation. The parties have extensively litigated numerous issues, including issues infrequently litigated and usually determined by stipulation of the parties, such as whether to consolidate cases and selecting the SIME medical specialty. The parties not only litigated the content of SIME questions, but even litigated the content of pleadings. They sought to re-argue decided and agreed-upon issues, and continued to argue issues pending decision. They even manufactured a new pleading to extend argument: a "supplemental answer" to a reply. *See* 8 AAC 45.050 (setting forth permissible pleadings).

One party is not specifically identified as more culpable than the other in this regard. Rather, the parties' litigation tactics can best be described as "mutual combat," to borrow a doctrine from another area of law. Furthermore, the contentious and, even personal, nature of the parties' litigation is striking, even by workers' compensation standards. This is especially true when one considers this case does not involve an unsophisticated, *pro se*, claimant motivated by extraneous,

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[1] *Lewis-Walunga's* subsequent history is noted. The Alaska Supreme Court later reversed and remanded the Commission's decision on other grounds. *Lewis-Walunga*, 249 P.3d 1063, 1070 (Alaska 2011) (Commission erred by not awarding attorney's fees to the "successful party" *on appeal* under AS 23.30.008(d) after it granted appellant the "very relief [she] requested"). The Court's decision did not disturb, review, or comment on, the Commission's analysis and holding on the issue of a presumption of reasonable attorney's fees under AS 23.30.145(b). Later, on remand from the Commission, *Lewis-Walunga*, AWCB Decision No. 12-0010 (January 13, 2012) awarded employee all her claimed attorney's fees after "[c]areful review of the record and the parties' post-remand briefing [sic] revealed that the employee received benefits in excess of $86,000 as a result of [her attorney's] efforts, not the $20,000 as the prior board believed." *Id.* at 1, 5-6. The decision's conclusion prominently states: "[Employee's attorney] has *met his burden* of establishing by a preponderance of the evidence that he is entitled to an award of actual attorney fees in the amount of [full amount claimed]," indicating it followed the Commission's holding on the presumption of attorney fee issue. *Id.* at 6 (emphasis added).

non-relevant, job-related disgruntlements; but rather two experienced workers' compensation representatives.

A sampling of the parties' arguments reveals, when answering Employee's petition to disqualify Dr. Cleary, Employer accused Employee of "slandering" Dr. Cleary, while simultaneously calling Employee's petition "frivolous (i.e., of minimal importance; legally worthless) and spurious (i.e. [sic] feigned; fictitious)." Employer described Employee's petition to stay the SIME as "frivolous," "dishonest," and "malicious," and contended Employee's only purpose was "to vandalize a fine Alaskan Employer." Likewise, Employee portrayed Employer's answer to his petition to strike objections to his attorney's fees as "frivolous;" and contended Employer was making "unrepentant attempts" to put forth additional arguments contrary to the hearing chair's instructions. Early in this case, *Freelong I* was chaired and authored by a different hearing officer, who also saw fit to comment on the rhetoric: "Contrary to Employer's contention in its brief, Employee's choice to spend the weekend with his extended family before his son was deployed did not demonstrate 'brazen contempt for his responsibilities under the Act.' Employer's characterization of the family event as 'hanging out and cooking pork' trivializes the event." *Freelong I* at 16.

Issue is not taken with a party opposing the other's so-called "frivolous" arguments. To the contrary, the prayers for relief in each of the party's alleged "frivolous" pleadings were, in fact, ultimately unsuccessful. Neither is issue necessarily taken with heightened rhetoric, especially when it is employed in a good faith response to the other party's objectionable litigation practices. Rather, these examples best serve to illustrate the cause and effect the parties' litigation choices had on the course of litigation as a whole, as well as the committed pursuit of litigation without any consideration being given to a "balancing of resources."

In addition to Employer's sharp rhetoric, examples of Employee's inordinately, improvident, litigation choices abound. His commitment to litigating the unauthorized change of physician issue is a choice example. He introduced that as an issue with respect to Dr. Kohnen's August 28, 2012 letter in *Freelong II*; and later pursued petitions for reconsideration and modification of that decision. Employee continued to pursue that issue at this hearing and also sought an

additional decision on yet another document - Dr. Witham's November 20, 2012 report. Responding, Employer characteristically wrote: "It is simply mystifying that the employee would go to such lengths to generate another unauthorized medical opinion, while refusing to follow-up with his attending physician for pre-authorized medical treatment."

Employee clearly solicited both opinions with the intention of inserting them into the medical record, which is precisely the type of doctor shopping the statute was intended to prevent. However, it is not at all clear what he sought to accomplish. Given the volume of the medical record in this case, Dr. Kohnen's August 28, 2012 letter and Dr. Witham's November 20, 2012 report are of negligible value. Even if they had not been stricken, they would have been insignificant in advancing Employee's interests. Should Employee wish to continue obtaining medications from his family physician, perhaps he might be able to do so through a referral. Moreover, as pointed out above, not only did Employee change his theory on the issue as he pursued additional litigation; but then, he ultimately produced only uncorroborated hearsay in support of his revised theory at hearing.

Employee made no specific contentions regarding his unfair or frivolous controversion claim, but rather left this issue "in the hands of the board to make the call." Yet, even with no theory for his claim, he still pursued the issue to hearing. Similarly, with respect to his petition to disqualify Dr. Cleary, Employee initially argued, if Dr. Cleary examined him, the results would be "manifestly unjust and prejudicial." Later, Employee conceded he had no personal knowledge of Dr. Cleary's impartiality and explained he just filed his petition to "be sure" Dr. Cleary was impartial. Even with no evidence in support of his petition, he litigated the issue to a ruling.

Consolidation of Employee's right and left shoulder injuries is another example. Even though case consolidation is generally recognized as an efficient method to facilitate case resolutions, and is typically accomplished by the parties' stipulation, Employee opposed consolidation, contending it would delay his remedies. Yet, the claims were consolidated, which ultimately resulted in payment of right shoulder PPI benefits without any additional right shoulder litigation. Consolidation did not delay Employee's remedies, it expedited them, resulting in an

immense conservation of litigation resources. Furthermore, rather than informally amending claims already filed, Employee filed serial claims, which triggered Employer's obligations to file serial answers, and resulted in further litigation costs. Moreover, Employee's May 6, 2010 claim contended Employer engaged in discriminatory conduct in violation of AS 23.30.247 and further contended Employer committed fraudulent acts in violations of AS 23.30.250. Both are serious allegations. But, not only did Employee fail to produce any evidence, let alone sufficient evidence, to support his allegations, there is no indication he even investigated them.

Each party has accused the other of delay. Both are correct. Employee's litigation choices certainly delayed case resolution and increased costs, as just explained. Meanwhile, Employer opposes an "inflated" fee award and seeks a significant reduction in Employee's claimed fees based on his litigation choices. However, Employer's resistance is noteworthy, too.

Instead of using Dr. Holley's August 18, 2012 report to clarify the left shoulder benefits, Employer instead proceeded to send Employee a series of contradictory and confounding messages. It did not resume paying TTD benefits, or withdraw any of its previous left shoulder controversions; and, on August 24, 2012, sent a non-specific email to Employee's representative explaining Dr. Holley thought Dr. Tamai's proposed surgery was reasonable and necessary medical treatment. However, Employer did not explicitly acknowledge the compensability of the condition or preauthorize surgery. Instead, Employer requested Employee to notify it when his surgery was scheduled. Employee's representative replied to Employer's email the same day, seeking clarification. He expressly asked Employer if it was accepting the compensability of Employee's left shoulder condition and stated he would discuss surgery with Employee once Employer got back to him.

Yet, additional clarification from Employer was not forthcoming. At a September 6, 2012 prehearing conference, Employer contended it had authorized Employee's left shoulder surgery but, again, the record does not show a withdrawal of Employer's previous controversions. Neither does it contain a prior, express written authorization for surgery, or any sort of express acknowledgment accepting compensability. At best, Employer's August 24, 2012 email only implies an acceptance of compensability, and Employer's statement at the September 6, 2012 prehearing conference was its counsel's representation, which was not otherwise evidenced in

litigation documents. Moreover, at the next prehearing conference on September 21, 2012, Employer stated it was going to file an amended answer and a new controversion on Employee's left shoulder condition. Had Employer changed its mind on the purported surgical authorization?

Even though Employer did subsequently follow through with both the amended answer and a new controversion, additional clarification was still not provided. Its September 21, 2012 controversion purported to dispute left shoulder compensability based on Dr. Holley's outdated, January 2, 2012 opinion on medical stability, notwithstanding Dr. Holley's August 18, 2012 report; and, at the same time, stated it had "preauthorized the procedure recommended by the treating physician." Employee remained understandably confused at this point.

During this period, Employee repeatedly sought clarification of his left shoulder benefits at prehearing conferences, which Employer was reluctant to give. In addition to not resuming payment of TTD benefits upon issuance of *Freelong I*, Employer's failure to resume TTD payments after receiving Employee's June 14, 2012 medical summary, or after receiving Dr. Holley's August 18, 2012 report; it's contradictory September 21, 2012 controversion, and its reluctance to clarify left shoulder benefits and acknowledge others, forestalled case resolution just as certainly as Employee's litigation choices did. There is no better evidence of this than when, on the hearing date itself, Employer arrived and presented Employee with a laundry list of benefits just accepted.

This decision is not intended to discourage zealous advocacy. Just because many issues litigated in this case are seldom litigated in other cases, and are instead settled by parties' stipulations, does not necessary mean there is never a cause to litigate them. However, this case is unique because of the striking number of these issues that were litigated. It is also difficult to understand how much of the litigation discussed above was reasonably connected to the prosecution or defense of claims. Instead, the record indicates most of the litigation occurring after the parties' July 25, 2012, agreement to perform an SIME was rather personal in nature and appears to have been undertaken for reasons other than strictly securing benefits or defending liabilities.

Furthermore, the litigation resources expended in this case are grossly disproportionate when one takes into account the number of issues litigated; the complexity of those issues; and the resulting benefit to the employee. *Williams*. This is especially true when one considers the vast majority of Employee's claimed fees of nearly $50,000.00 were generated by a paralegal, who was only billing at $160.00 per hour, as opposed to an attorney, billing at $350.00 per hour. Had all legal work on behalf of Employee been performed by an attorney, Employee could easily be claiming fees in excess of $100,000.00 in this case. Fee awards in excess of $100,000.00 are extremely rare in even the most complex worker's compensation cases.

The term "fully compensatory" does not mean Employee automatically receives full, actual fees. *Williams*. Given the parties' penchant for mutual combat, would seem appropriate for each party to bear a portion of their own attorney's fees. However, the board has no authority to regulate Employer's attorney's fees. 8 AAC 45.180(h). Whether Employer's attorney's fees were "inflated," is a matter between Employer and its counsel. However, Employee claims nearly $50,000.00 in fees. The statute provides for an award of reasonable fees upon the successful prosecution of the claim. AS 23.30.145(b). In determining fees, the nature, length and complexity of the services performed will be considered, as well as the amount of resulting benefits to beneficiaries. *Bignell*; 8 AAC 45.180(d)(2). Costs may be awarded relating to issues prevailed upon at hearing. 8 AAC 45.180(f). The contingency nature of workers' compensation claims must also be considered. *Bignell*.

Shoulder and spinal injuries are routinely litigated in the workers' compensation system and normally do not present any unique challenges for counsel. However, this case ultimately involved both Employee's shoulders as well as his cervical spine, and Employee's left hand numbness may involve multiple, overlapping conditions. The medical record is also voluminous. Aside from these considerations, however, the extent to which the litigation was lengthy and complex was largely self-imposed through deliberate litigation choices. Additionally, the main issue for hearing was the compensability of Employee's cervical condition, on which he was unsuccessful. The potential value of cervical condition benefits, including medical and indemnity, equal or exceed the Employee's left shoulder benefits. *Bouse*.

Employee's counsel's efforts resulted in Employer agreeing to pay two percent PPI for Employee's right shoulder, six percent PPI for his left shoulder, a "couple" of medical bills from Dr. Tamai and three prescription charges. Employee's counsel was instrumental in Employee eventually receiving his left shoulder surgery with Dr. Millett. In addition to these benefits, this decision also awards approximately ten months TTD and penalty for most of the TTD periods. Considering the large number of issues Employee chose to unsuccessfully litigate; their relative lack of complexity, and the resulting benefits to Employee, his claimed fees of nearly $50,000.00, most of which were billed by a paralegal at $160.00 per hour, are not reasonable. *Williams*.

As discussed above, the litigation tempo dramatically increased following the parties' July 25, 2012 stipulation to perform an SIME. A review of Employee's fee affidavits shows he incurred $37,680.00 of his claimed $50,000.00 in attorney's fees following that date. Employee is entitled to full reasonable attorney's fees for services performed with respect to issues on which he prevailed. *Bouse* at 241. Comparison of Employee's fees to issues he successfully litigated demonstrates one-half of his claimed attorney's fees after July 25, 2012 were reasonably connected to issues on which he prevailed. *Id*. This proportion accounts for Employer's contributions to driving litigation costs, such as its resistance to resuming TTD benefits, its resistance to paying PPI benefits, and other miscellaneous litigation issues that precipitated appropriate responses from Employee, such as Employee's petition to strike Employer's argumentative SIME questions and his petition to strike Employer's argumentative objections to his attorney's fees. Meanwhile, Employer presents no objections to Employee's costs, and it is not immediately known how any of his claimed costs would not have been related to securing an obtained benefit. Therefore, Employee will be awarded $30,249.00 in fees and all of his costs, for a total of $31,851.04.

CONCLUSIONS OF LAW

1) Employee is not entitled to medical and related transportation costs for his cervical condition.
2) Employee is not entitled to TTD for his cervical condition.
3) Employee is entitled to additional TTD for his left shoulder symptoms under *Freelong I*.
4) Employee is entitled to an additional period of TTD for his left shoulder symptoms.
5) Employee is entitled to penalty on his TTD benefits.
6) Employer's July 30, 2012, controversion was frivolous.

7) Employee is entitled to interest on his TTD benefits.

8) *Freelong II* will not be modified.

9) Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report will be granted.

10) Employee's November 27, 2013 petition to strike Employer's November 20, 2013 objections to attorney's fees will be granted in part.

11) Employee is entitled to attorney's fees and costs.

ORDERS

1) Employee's claim seeking medical costs, transportation costs and TTD for his cervical condition is denied.

2) Under *Freelong I*, Employer shall pay Employee TTD set forth above.

3) Employer shall pay Employee an additional period of TTD set forth above.

4) Employer shall pay Employee penalty on his TTD benefits set forth above.

5) Employer's July 30, 2012 controversion is not referred to the Director.

6) Employer shall pay Employee interest on his TTD benefits set forth above.

7) Employee's May 21, 2013 petition for modification of *Freelong II* is denied.

8) Employer's February 4, 2013 petition to strike Dr. Witham's November 20, 2012 report is granted. Dr. Witham's November 20, 2012, report is stricken from the medical record.

9) Employee's November 27, 2013 petition to strike Employer's November 20, 2013 objections to his attorney's fees is granted in part. The Board panel will disregard those portions of Employer's objections addressing issues other than attorney's fees.

10) Employer shall pay Employee attorney's fees and costs as set forth above.

Dated in Fairbanks, Alaska on May 30, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/____________________________
Robert Vollmer, Designated Chair

/s/____________________________
Sarah Lefebvre, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 accordance with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of ROBIN A. FREELONG, employee / claimant; v. CHUGACH ALASKA SERVICES, INC., employer; ZURICH AMERICAN INS., insurer / defendants; Case Nos. 200919643 and 200812594; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, on May 30, 2014.

/s/____
Darren Lawson, Office Assistant II