ALASKA WORKERS' COMPENSATION BOARD

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

ALBERTO E. RODRIGUEZ, Employee, Claimant, v. FLUOR ALASKA, INC., (WILTON ADJUSTMENT CO.), AHTNA FACILITY SERVICES, INC., (ALASKA NATIONAL INSURANCE CO.), HOUSTON CONTRACTORS, (AIG/INSURANCE CO. OF THE STATE OF PENNSYLVANIA), DAVIS CONSTRUCTORS & ENGINEERS, INC., (ALASKA NATIONAL INSURANCE CO.), HOUSTON CONTRACTING/ARCTIC SLOPE REGIONAL CORP., (SELF-INSURED), and SHAW ENVIRONMENTAL (ZURICH INSURANCE/CARL WARREN & CO.). Employers and Insurers. Defendants.	FINAL DECISION AND ORDER AWCB Case Nos. 200324728, 200403748, 200424619, 200525006, 200623578, 200623579, 200920539 AWCB Decision No. 14-0080 Filed with AWCB Anchorage, Alaska, on June 11, 2014

Alberto Rodriguez's (Employee) April 25, 2011 workers' compensation claim was heard on April 16, 2014, in Anchorage, Alaska, a date selected on February 6, 2014. Attorney Eric Croft appeared and represented Employee, who appeared and testified. Other attorneys appeared and represented employers as follows: Donald Thomas for Fluor Alaska, Inc. (Fluor); Rebecca Holdiman-Miller for AHTNA Facility Services, Inc. (AHTNA); Robert McLaughlin for Houston Contractors (Houston I); Richard Wagg for Davis Constructors & Engineers (Davis); John Wallace for Houston Contracting/Arctic Slope Regional Corp. (Houston II); and Constance

Livsey for Shaw Environmental (Shaw). Other witnesses for Employee included Timothy Laufer, M.D., and second independent medical examination (SIME) physician Edward Tapper, M.D. The record closed at the hearing's conclusion on April 16, 2014.

ISSUES

Fluor, AHTNA, Houston I, Davis and Shaw contend Employee's claims against them are barred under AS 23.30.100 because Employee failed to give timely notice of his injuries. Alternately, these employers contend they did not have actual knowledge of Employee's injury and his failure to give notice prejudiced them. These employers further contend there was no satisfactory reason why Employee could not have given them notice, but even if the failure is excused, Employee loses the presumption of compensability.

Employee admits he never reported the 2003 Fluor injury as "work-related," but contends Fluor was aware he hurt his back. He contends he reported his 2004 Fluor injury directly to his supervisors, putting Fluor on notice. He contends Fluor eventually accepted both claims in 2006 and paid medical benefits, resolving this notice issue. As for subsequent employers, Employee contends he could not have given them notice within 30 days because there was no specific injury and he was only made aware of the causal connection between his symptoms and his subsequent employment after Dr. Tapper's June 1, 2012 SIME report. Employee contends giving notice within 30 days of June 1, 2012, for employment spanning from 2006 through 2009, would have been meaningless and would have done nothing to assist the affected employers.

1) Are Employee's claims against Fluor, AHTNA, Houston I, Davis and Shaw barred for failure to give notice?

Fluor, AHTNA and Shaw contend Employee's claims against them are barred under AS 23.30.105 because he failed to timely file claims. Fluor contends Employee's claims against it are barred because more than four years passed from Employee's Fluor injuries without a disability claim having been filed and no disability claim was filed within two years after Fluor last paid Employee any benefits. AHTNA contends Employee's claim against it is barred effective March 14, 2008, four years after his AHTNA injury, because no claim against it was

filed until December 20, 2012. Shaw contends Employee's claim against it is barred because he failed to file it within two years of his last Shaw employment.

Employee contends his claims against these employers are not barred under AS 23.30.105 because he could not file a claim for benefits against any employer until he became disabled. Employee further contends he was unaware there was a causal connection between his work with other employers subsequent to Fluor until he received Dr. Tapper's June 1, 2012 SIME report. As Employee filed and served claims against all these employers no later than June 17, 2013, he contends his claims should not be barred under AS 23.30.105.

2) Are Employee's claims against Fluor, AHTNA and Shaw barred as untimely filed?

Employee contends his work injuries with Fluor in 2003 and 2004 were "a substantial factor" causing his need for medical care for his left shoulder and low back beginning in 2006, and continuing. He seeks an order finding Fluor liable for medical benefits for his left shoulder and low back since it last paid medical benefits in 2006, and continuing. Alternately, Employee contends "taken as a whole," his employment from 2003 through 2008 with Fluor, AHTNA, Houston I, Davis, Houston II and Shaw aggravated his preexisting conditions and is "the substantial cause" of his need for medical care under the "last injurious exposure rule." Lastly, Employee contends his 2005 through 2008 Houston I and Houston II employment, or his 2009 Shaw employment aggravated his preexisting conditions making these employers liable for medical benefits under the last injurious exposure rule.

Fluor contends Employee worked for five years after leaving his Fluor employment, and Fluor is not responsible to him for any medical care he incurred beginning in 2006. It contends subsequent employers would be liable under the "last injurious exposure rule." AHTNA and Houston I, contend they are not responsible to Employee for any medical care and subsequent employers would be liable under the "last injurious exposure rule." Davis and Houston II contend Employee's work for them was not "the substantial cause" of the need for treatment and subsequent employers would be liable under the last injurious exposure rule. Shaw contends Employee's work with it was not "the substantial cause" of Employee's need for medical

treatment. Shaw further contends the "last injurious exposure rule" does not apply to post-2005 claims.

3) Which, if any, employer is responsible for Employee's need for left shoulder and low back treatment beginning in 2006, and continuing?

Employee contends he has been permanently totally disabled (PTD) since either September 25, 2009, or September 13, 2011, and continuing as the result of his employment with one or more party-employer. He seeks past and continuing PTD from the liable employer.

All party-employers contend they are not liable to Employee for PTD. However, Fluor stipulated Employer was PTD beginning September 25, 2009. AHTNA, Houston I, Davis, Houston II and Shaw stipulated Employee was PTD effective September 13, 2011.

4) Is Employee entitled to PTD benefits?

Employee contends his PTD rate should be $814 per week based upon his earnings at the time of his 2003 and 2004 Fluor injuries. Alternately, he contends his PTD rate should be $652 per week based upon his 2009 earnings when he became disabled.

The first five potentially liable employers did not address the PTD rate issue in either their briefs or their oral arguments. Shaw contends if Employee is entitled to PTD benefits, his weekly rate is limited to no more than his gross weekly earnings at the time of injury.

5) Is a PTD rate adjustment claim ripe for decision?

Employee contends he is entitled to statutory interest. He seeks interest on all benefits awarded.

All six employers contend they do not owe Employee any benefits. However, none contend he is not entitled to interest as provided by law in the event he prevails on his claims.

6) Is Employee entitled to interest?

Fluor and Shaw contend they are entitled to a Social Security disability offset. They request an order granting the offset if they are found liable for Employee's benefits.

Employee does not completely oppose an appropriate Social Security offset. He contends this decision should calculate any offset attributable to the liable party.

7) Are Fluor or Shaw entitled to a Social Security offset?

FINDINGS OF FACT

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

1) Employee attended school through the 4th grade in Cuba and came to the United States when he was about nine years old. In America, Employee attended through the 9th grade. Employee dropped out of school and went to work in construction in Florida (Employee).

2) Employee has no diploma or GED (Employee deposition, March 3, 2006, at 9).

3) Around 1970, Employee was hospitalized briefly after his Honda rolled several times (David Mulholland, D.C., chart note, October 16, 1992).

4) On September 28, 1992, in an unrelated injury Employee reportedly fell through a grate and hit his mid-back on a casing (Report of Occupational Injury or Illness, October 8, 1992).

5) On October 6, 1992, Employee saw a chiropractor for the grate incident and presented with mid-thoracic pain and minor, right thigh numbness. He had lost no time from work and had no prior chiropractic care though he reported the rollover accident where he "sustained a chip fracture of his fourth lumbar vertebra." An x-ray showed low thoracic lateral and anterior compression wedging defects and an L-4 anterior compression fracture. The assessment was a mid-thoracic sprain/strain, contusion and subluxation (David Mulholland, D.C., chart note, October 16, 1992).

6) On December 27, 2001, Employee complained about "shoulder pain" for the "last three months" but the report does not specify which shoulder. Shoulder x-rays were normal and the diagnosis was shoulder "arthralgia" (Richard Taylor, M.D., chart note, December 27, 2001).

7) On February 12, 2002, Employee had "follow-up" on "left" shoulder pain, implying the 2001 visit was for the left shoulder (Taylor chart note, February 12, 2002).

8) On January 2, 2003, Employee began working for Fluor as a laborer (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

9) While working for Fluor at a remote site in Shemya, Alaska, Employee repeatedly twisted while he lifted, dumped and mixed 30 to 40 cement "super bags" which weighed approximately 94 pounds each (experience, judgment; Employee).

10) While so doing on or about March 14, 2003, Employee injured his low back when he was rapidly lifting, twisting and carrying cement bags at a "batch plant." His symptoms got worse until he could no longer stand it and could barely walk. He self-treated by putting ice bags on his back. All the superintendents saw him and asked what happened. He told them his back hurt (Employee deposition, March 3, 2006, at 23-24).

11) Having low back pain, and radiating pain down one or more legs as a result of twisting while lifting extremely heavy objects repeatedly is not a medically complex concept, and is commonly seen in workplace injuries. The work Employee described doing for Fluor as a laborer in 2003 caused Employee to have low back and leg pain and symptoms, and was a substantial factor causing him to receive medical care to relieve his low back pain and leg symptoms (experience, judgment, observations and inferences drawn from all the above).

12) On April 3, 2003, Employee saw Noah Laufer, M.D., for "leg discomfort." Employee said he suffered an L-4 compression fracture at age 18 and was currently working at a cement plant in Shemya lifting 30 to 40, 100 pound cement bags per day. Employee was experiencing L-4 distribution pain and paresthesias. Employee's symptoms hurt worse immediately upon awakening and at the end of the day. Taking Bextra improved his symptoms somewhat, but even after resting and being off work, Employee's back still hurt. Dr. Laufer suspected Employee's left leg symptoms were secondary to a vertebral injury or disc disease at L-4. Dr. Laufer ordered x-rays (Laufer chart note, April 3, 2003).

13) On April 3, 2003, lumbar spine x-rays showed mild disc space narrowing at L-2 and L-3, moderate osteophytes at L-2 and L-3 and a "few small osteophytes throughout." There was "some facet joint hypertrophy at multiple levels," and the radiologist's impression was "moderately severe degenerative changes" (x-ray report, April 3, 2003).

14) April 3, 2003, was the first "compensable event" for Employee's March 14, 2003 low back injury with Fluor, since he had lost no time from work and this was the first date Employee

received medical care specifically attributable to his Fluor employment (experience, judgment, observations and inferences drawn from all the above).

15) May 3, 2003, was the 30th day after April 3, 2003 (*id*.).

16) Employee did not make a written injury report with Fluor for the cement bag lifting within 30 days of any date in March or within 30 days of April 3, 2003 (Employee deposition, March 3, 2006, at 38-39; Report of Occupational Injury or Illness, December 30, 2004; inferences drawn from all the above).

17) Employee provided no reason why he could not have made a written notice to Fluor of his March 14, 2003 injury, within 30 days of the event, regardless of the exact date, or within 30 days of April 3, 2003, the first compensable event following the injury (experience, judgment, observations and inferences drawn from all the above).

18) Fluor provided no evidence refuting Employee's testimony. Though Employee admitted he did not report to his Fluor supervisors he had a "work related" back injury, his Fluor supervisors had sufficient, actual notice and knowledge he had a back injury while working for Fluor at a remote site when they observed him icing his back in the break room, asked him what happened and he said he hurt his back (record; judgment and inferences drawn from the above).

19) Fluor provided argument but no evidence demonstrating it was prejudiced as a result of Employee's failure to give written notice of his March 14, 2003 work injury (record).

20) Given its actual knowledge of Employee's March 14, 2003 low back injury, Fluor could have immediately investigated facts surrounding the incident, reassigned Employee to other duties and sent Employee for prompt medical evaluation and treatment had it desired (experience, judgment and inferences drawn from the above).

21) On June 19, 2003, Employee had continued low back pain with radiation down both legs. Employee told his doctor he "lifts for work." Dr. Laufer's diagnosis was "low back pain" with distant history of a vertebral fracture (Laufer chart note, June 19, 2003).

22) Dr. Laufer ordered a lumbar magnetic resonance imaging (MRI) scan because Employee continued to have low back pain and leg symptoms following the March 14, 2003 Fluor injury (Alaska Regional Hospital Diagnostic Imaging Service referral, June 19, 2003; experience, judgment and inferences drawn from the above).

23) On June 19, 2003, Employee's lumbar spine MRI showed multilevel spondylosis with spondylolysis at L-5; no spondylolisthesis; mild, foraminal encroachment secondary to a

circumferential annular bulge at L3-L4; and mild foraminal encroachment on the left and moderate on the right at L4-L5 (MRI report, June 19, 2003).

24) On June 20, 2003, Dr. Laufer reviewed Employee's MRI results, diagnosed low back pain and lumbar disease with bilateral lower extremity radiation, prescribed narcotics for pain control and suggested steroid injections (Laufer chart note, June 20, 2003).

25) Beginning June 23, 2003, Employee had his first of 25 lumbar epidural steroid injections, which continued through October 8, 2009 (see chart below).

26) Dr. Laufer ordered the June 23 and July 30, 2003 epidural steroid injections to treat Employee's lumbar and leg symptoms from the 2003 Fluor injury (*id*.; judgment and inferences drawn from the above).

27) On July 30, 2003, Employee reported improved symptoms following his second epidural steroid injection. Employee's pain was especially bad during his previous Shemya trip and he was unable to work at full capacity. He was concerned this may threaten his laborer job as he was "unable to keep up." Employee had radiation into both buttocks and legs with the left being greater than the right, and pain with walking at times. Dr. Laufer diagnosed "degenerative back disease." Employee reported he had "6 years to go until retirement." Dr. Laufer did not order restricted duty or any work limitations (Laufer chart note, July 30, 2003).

28) On September 23, 2003, Dr. Laufer referred Employee to orthopedic surgeon Davis Peterson, M.D., to evaluate the March 14, 2003 Fluor injury (Laufer fax, September 23, 2003).

29) On September 29, 2003, Employee had chronic low back pain. Employee's work involved less heavy lifting and he noticed the most severe pain occurred while walking. Employee experienced sharp pain radiating into his left buttock like "someone had a blowtorch on [his] backside" (Laufer chart note, September 29, 2003).

30) On January 14, 2004, Employee injured his left shoulder and reinjured his low back while lifting a 300 pound power-washer while working for Fluor. Employee was lifting with other workers and had let go because his left shoulder and low back hurt (Employee; Report of Occupational Injury or Illness, April 14, 2004; Employee deposition, March 3, 2006, at 42-44, and at Exhibit 2).

31) On January 14, and 15, 2004, Employee verbally reported the January 14, 2004 left shoulder and low back injury to his Fluor supervisor who told Employee he would not report it. The foreman failed to complete a written report. Fluor had actual notice and knowledge of

Employee's January 14, 2004 left shoulder and low back injuries (*id*.; experience, judgment and inferences drawn from the above).

32) Dr. Laufer recommended epidural steroid injections three through 25 to treat Employee's lumbar and leg symptoms from the January 14, 2004 Fluor injury (see chart below; judgment, experience and inferences drawn from the above).

33) On January 27, 2004, Employee saw Dr. Peterson and described left and right low back pain and radiating leg and foot pain with weakness. Dr. Peterson recorded that six months prior to this appointment, Employee was twisting and felt "an acute back pain, quite severe" across his back and shortly thereafter developed buttock, and posterior thigh and calf radiation. Dr. Peterson obtained x-rays, which demonstrated a Grade I listhesis of approximately 6 to 7 millimeters, which was not present on the June 19, 2003 MRI report. Dr. Peterson observed Employee had one-inch calf atrophy on the left "probably from chronic radiculopathy." Employee mentioned he had six years before he could retire. Dr. Peterson stated: "We discussed the possible need for change of occupation if he is unable to continue working in heavy labor." Dr. Peterson recommended Employee maximize his trunk and back strength and try to reduce his weight because there is "a significant chance in the future he may require decompression stabilization at L5-S1," which would "effectively also end his laboring career." Dr. Peterson was not optimistic "as to his continued future as a laborer." Dr. Peterson did not provide any work restrictions or limitations (Peterson chart note; x-ray report, January 27 2004).

34) On January 27, 2004, Employee had chronic low back pain for which his physician had first seen him in April 2003 "for work-related pain." Employee said his pain had been constant since then but the pain was managed with fairly low-level narcotics. Employee had just come from Dr. Peterson's office and "had been hoping for a miracle" but noted Dr. Peterson "didn't have one." Employee also reported Dr. Peterson told him surgery was a possibility and he might need to change professions. Employee was headed back to Shemya and said he had six years left until eligibility for full, union retirement benefits. He was trying to maximize his hours and planned to be working in Shemya for about three months. Dr. Laufer diagnosed chronic low back pain complaints dating to April 2003, which Employee related to specific incidents while twisting at work (Laufer chart note, January 27, 2004).

35) Employee's January 27, 2004 visits with Drs. Peterson and Laufer were the first "compensable events" for Employee's January 14, 2004 low back injury with Fluor because he

had lost no time from work and these were the first appointments Employee had for his low back after January 14, 2004 (record; experience, judgment and inferences drawn from all the above).

36) February 26, 2004 was the 30th day after January 27, 2004 (observations).

37) It is undisputed Employee did not file a written injury report with Fluor for the January 14, 2004 injury by February 26, 2004 (Report of Occupational Injury or Illness, April 9, 2004).

38) Fluor presented argument but no evidence it was prejudiced by Employee's failure to file a written injury report by February 26, 2004 (record).

39) Given its actual knowledge of Employee's January 14, 2004 left shoulder and low back injuries, Fluor could have immediately investigated facts surrounding the incident, reassigned Employee to other duties and sent Employee for prompt medical evaluation and treatment had it desired (experience, judgment and inferences drawn from all the above).

40) On April 5, 2004, Employee complained of worsening back pain and asked for pain medication to take as needed while at work. Employee was "considering converting to WC," and filing a workers' compensation claim. His physician noted Employee's weight and prior compression fracture were contributors to his then-current symptoms and recommended weight loss. Employee's diagnosis included "chronic back pain" (Laufer chart note, April 5, 2004).

41) On April 8, 2004, Employee ceased working for Fluor (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

42) On April 9, 2004, Employee wrote Fluor stating he was injured on January 14, 2004, lifting a power-washer at Building 616. He reported this to his supervisor, Everett Sonnentag on January 14, 2004, and again on January 15, 2004, and his supervisor filed no injury report. Employee also said he reported his injury to Fluor supervisor Jerry Boggs during safety meetings (Employee; Employee deposition, March 3, 2006, at 42-44, and at Exhibit 2).

43) On April 9, 2004, Employee told his doctor he was laid off on March 8, 2004, and was "converting" his care to workers' compensation. His physician noted having first seen Employee for back pain on April 3, 2003, at which time Employee attributed his pain to lifting 100 pound cement bags. Dr. Laufer said Employee "initially did not want to report as WC." Dr. Laufer concluded Employee had low back pain with radiation secondary to multiple factors including his weight and a workers' compensation injury (Laufer chart note, April 9, 2004).

44) As of April 14, 2004, Employee had not yet had a "compensable event" arising from the January 14, 2004 left shoulder injury because he had lost no time from work and had not seen a physician for left shoulder treatment (judgment and inferences drawn from all the above).

45) On April 14, 2004, Fluor completed an injury report for Employee's January 14, 2004 power-washer lifting incident. The report states Employee had an injury to his "shoulder and back" when lifting a power-washer. April 8, 2004 was the date Fluor first knew the injury "was work related." Rich Silvey, Fluor's safety manager, doubted the report's validity and stated in the appropriate place on the form: "SAFETY MANAGER DOES NOT AGREE THERE WAS NO REPORT OF INJURY." The injury report bears a facsimile transmission heading from Fluor's adjuster Wilton Adjustment Services showing Wilton faxed this report to someone on February 6, 2004 (emphasis in original; Report of Occupational Injury or Illness, undated by Employee, but Fluor-dated April 14, 2004).

46) On April 20, 2004, Employee saw Dr. Peterson again at Dr. Laufer's referral. He described a January 14, 2004 event when he had lifted a large power-washer, injuring his low back. Employee said an April 16, 2004 epidural steroid injection significantly moderated his back, buttock and radiating leg pain but he still had discomfort. He was continuing to work and doing much better than he was prior to the injection. Employee's examination findings were similar to Dr. Peterson's previous exam. Dr. Peterson opined as Employee was doing better with his epidural injection, he would hold off referring him for pain management. Dr. Peterson noted Employee was still functioning and "doing a lot of lifting and carrying in a bridge project." Dr. Peterson opined if Employee became progressively disabled and unable to control his distal, radicular pain, "we may still need to consider decompression and stabilization." In Employee's case, surgery "would be a last resort" (Peterson Physician's Report, April 20, 2004).

47) Dr. Peterson's April 20, 2004 Physician's Report is the first specific mention in Employee's medical records of the January 14, 2004 power-washer lifting incident (observations).

48) Following Employee's two Fluor injuries, Employee continued working, but not "as well as [he] could have if [he] was not injured" (Employee deposition, March 3, 2006, at 12).

49) On June 1, 2004, Employee saw Dr. Peterson following a recent lumbar epidural steroid injection. Employee reported "dramatic diminution of leg pain" and said he was looking for remote construction work. Employee's physical examination was essentially normal and Dr.

Peterson assessed a known, Grade I spondylolisthesis, listhesis early Grade II, with probable, chronic radiculopathy on the left at L5, and intermittent radiculitis secondary to foraminal stenosis. Dr. Peterson discussed Employee's "options" but Employee preferred to continue construction work as long as possible since he only had about five years left to retirement. Dr. Peterson advised Employee if he deteriorated to being unable to function by back and leg pain, or developed severe progress of his radiculopathy preventing his occupation, he would require retraining and Dr. Peterson would consider decompression stabilization. If surgery were done "it would most certainly require change in occupation retraining which the patient prefers to avoid if possible." Employee was limited to three epidurals every six-months (Peterson Physician's Report, June 1, 2004).

50) On June 2, 2004, Employee gave a recorded statement to Fluor's insurance adjuster for the January 14, 2004 injury. Employee hurt his shoulder and lower back lifting a power-washer. His foreman was assisting and Employee said "guys I got to let go." He asked the foreman if he should report it and the foreman responded using language Employee would not repeat "in front of a lady." Employee asked the foreman the next day if he should report it on Fluor's "little yellow cards" and the foreman refused and said "I'm not going to do that" and called Employee "the same name." Later the same day Employee went to the foreman's room and showed him his shoulder, which was "black and blue" (Rodriguez statement, June 2, 2004, at 4). When specifically asked if he injured his right or left shoulder in January 2004, Employee specified he hurt his left shoulder (*id*. at 4). In reference to his left shoulder injury, Employee stated it, "was just a bruise I think, that's it," and said, "I've had no problems with it since then" (*id*. at 8). Employee said he "could have" had a back injury "a year ago" (*id*. at 10). He was uncertain and explained: "You know back injuries are very strange. You can go, move the wrong way quickly sometimes and you don't even know it until 3 or 4 weeks from now" (*id*.). Employee mentioned seeing Dr. Laufer for his back before the January 14, 2004 injury and received "medicine for [his] back" (*id*. at 11). His doctor never put work restrictions on him because Employee "made sure he didn't do that cause [sic] that makes [it] a little harder for the company to hire you" (*id*. at 14). Employee understood all the questions (*id*. at 19).

51) On June 7, 2004, Fluor filed the January 14, 2004 injury report, referenced above (Report of Occupational Injury or Illness, undated by Employee, but Fluor-dated April 14, 2004).

52) On June 25, 2004, Employee requested and received from Dr. Laufer a referral for decompression therapy from Brent Wells, D.C. (Laufer referral, June 25, 2004).

53) On June 28, 2004, Employee saw Dr. Wells and explained on January 14, 2004, he had lifted a very heavy power-washer with several coworkers. Employee dropped the power-washer and felt pain in his back and "shoulder." Employee told Dr. Wells he had mainly low back and left leg symptoms. He frequently lifted over 50 pounds up to 100 pounds in his work activities. He was taking Vicodin and Flexeril as needed. Dr. Wells diagnosed spondylolysis at L5; moderate to severe degenerative change in the lumbar spine; lumbar disc bulges at L3-L4 and L4-L5; left lower extremity pain likely myelopathic or radicular; and left calf atrophy. There is no shoulder examination or diagnosis mentioned. Dr. Wells recommended lumbar spine x-rays (Wells Initial Examination Report, June 28, 2004).

54) Employee's June 28, 2004 visit with Dr. Wells was the first "compensable event" for Employee's shoulder, because he had no disability from the shoulder injury and his appointment with Dr. Wells was the first time he incurred a medical bill for the left shoulder after the January 14, 2004 Fluor injury (record; experience, judgment and inferences drawn from all the above).

55) The written injury report Fluor completed for Employee's January 14, 2004 shoulder injury on April 14, 2004, and filed on June 7, 2004, was filed before Employee's first compensable event in respect to his shoulder (observations).

56) On June 29, 2004, Employee's lumbar spine x-rays revealed a moderate, L4 compression fracture with approximately 40 percent vertebral height loss; moderate L2-3 and L3-4 degenerative disc disease; mild degenerative disc disease L4-5; and a suggestion for Grade I spondylolisthesis at L5 on S1 (Providence Imaging x-ray report, June 29, 2004).

57) On July 2, 2004, Employee told Dr. Laufer he wanted an additional lumbar steroid injection. Employee continued to insist on reaching his goal of at least five more years in the construction industry (Laufer chart note, July 2, 2004).

58) On July 6, 2004, Dr. Peterson recorded discussing Employee's situation with Dr. Laufer, who was concerned about Employee's frequent epidural steroid injections. Dr. Peterson suggested Employee not exceed three epidural steroid injections in a six-month period. He reiterated if Employee developed progressive radiculopathy he may still need to consider stabilization and decompression (Peterson Physician's Report, July 6, 2004).

59) On July 6, 2004, Dr. Wells stated Employee's low back "condition" was work-related and caused by the January 14, 2004 work injury with Fluor (Wells Physician Report, July 6, 2004).

60) On August 6, 2004, Employee said he worked from July 8, 2004 through August 2, 2004, sandblasting in Ninilchik, Alaska. Employee had to "watch the pot," which required lifting 100 sandbags. Employee was sore but felt he had done well (Laufer chart note, August 5, 2004).

61) On August 14, 2004, Employee saw Mark Leadbetter, M.D. for an employer's medical evaluation (EME) required by Fluor's insurance adjuster. Dr. Leadbetter's EME report is not considered in this decision because Employee subsequently filed a request for cross-examination, never waived his right to cross-examine him and Dr. Leadbetter was never produced for cross-examination (Leadbetter EME report, August 14, 2004; Request for Cross-Examination, December 13, 2004; Employee's hearing statements, April 16, 2014).

62) On September 2, 2004, Dr. Laufer reviewed Employee's chart and noted Employee had no pre-Fluor low back pain complaints at his office (Laufer chart note, September 2, 2004).

63) On September 10, 2004, Employee had a flexibility and lifting test at Fairbanks Urgent Care Center. Employee successfully completed the test, which included lifting 70 pounds from floor to chest level eight to 10 times (Fairbanks Urgent Care Center report, September 10, 2004).

64) On September 10, 2004, Employee also underwent a physical examination at Beacon Occupational Health and Safety Services, Inc., for employment with AHTNA. Employee reported "back pain or injury" and "joint pain or injury" and referenced back pain from April 3, 2003 through January 14, 2004, and reported having broken a bone in his spine in 1971 (Physical Examination, October 10, 2004).

65) On September 16, 2004, a physician at Fairbanks Urgent Care Center said Employee did not have a medical condition that would place him at risk for employment in the described job (Fairbanks Urgent Care Center., September 16 2004).

66) On September 20, 2004, Employee began working for AHTNA performing asbestos abatement. Employee also shoveled dirt from around pipelines to install anodes. He described this as a "heavy job." Employee had tried to get dispatched to lighter jobs because his shoulders were hurting (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

67) On November 8, 2004, Employee ended his AHTNA employment (*id.*).

68) On November 11, 2004, in conjunction with an epidural steroid injection, radiologist Harold Cable, M.D., noted Employee had recurrent leg pain predominately on the left and in the

interior, lateral thigh. Dr. Cable advised Employee his four epidural injections within the past year, mostly within the last six months, was beyond the recommended amount of epidural because of possible "adrenal suppression." After prolonged discussion, Dr. Cable performed the epidural but advised Employee he did not advise undergoing another epidural injection for at least six months. Dr. Cable suggested possibly referring Employee to a pain management group for alternative therapies (Cable radiographic report, November 11, 2004).

69) On November 15, 2004, Employee saw Derek Hagen, D.O., for back pain. His report states it is "no longer a Workmen's [sic] Compensation case." Employee reportedly used painkillers and muscle relaxers on an occasional basis but preferred to avoid painkillers. Employee reported his weight had been increasing and it definitely affected his back pain. Dr. Hagen diagnosed discogenic back pain and referred Employee to Alaska Spine Institute (Hagen chart note, November 15, 2004).

70) On November 16, 2004, Dr. Peterson wrote a letter and suggested if Employee's construction activities continued to aggravate his back he may need to consider changing occupations. If his leg symptoms became progressive and not responsive to epidural steroid injections, Employee would need to "consider" decompression and lateral fusion. Dr. Peterson opined Employee's spondylolysis was congenital or developmental but could predispose him to early disc degeneration and secondary foraminal stenosis. His symptom onset related to twisting "suggests a work aggravation." Dr. Peterson lacked sufficient facts to determine whether twisting at work was a "major factor" in Employee developing radiculopathy or was merely a temporary aggravation. Absent the twisting, it was "conceivable" Employee may have gone on "by natural history alone" to develop radiculopathy based on his preexisting condition (Peterson letter, November 16, 2004).

71) On December 2, 2004, Employee saw Michael Gevaert, M.D., for a pain management evaluation. Employee explained he had been a union laborer for over 25 years and would like to retire in five years. His low back and radicular pain in his left lower extremity started in January 2004, when he felt sudden back pain. Several weeks later, Employee developed numbness in the lower extremities. He described having epidural steroid injections, the first four of which resulted in substantial, transient, temporary pain relief. Employee said Dr. Peterson recommended surgical intervention and changing jobs, but Employee told Dr. Gevaert he wanted to continue until retirement in five years, and wanted to discuss his treatment options. Dr.

Gevaert noted significant, left calf atrophy. Employee had left leg symptoms and previously had right leg symptoms as well, though not recently. Dr. Gevaert noted an unresolved legal issue in respect to "the etiology of his present condition." Employee stated his condition was work-related but said his workers' compensation insurer had denied it. Employee's pain level was currently seven on a "0 to 10" pain scale and ranged between "2 and 10." Walking, standing, physical activity and lifting made his pain worse, while rest alleviated it. Dr. Gevaert diagnosed low back pain with left L5-S1 radiculopathy; anterolisthesis at L5-S1, dynamic 7 to 8 mm; marked left calf atrophy; and motor and sensory deficits in the left L5-S1 distribution. Dr. Gevaert opined Employee "will need a spinal fusion at some point" but he was not ready for a surgical procedure as he wants to continue with his present job until retirement. In Dr. Gevaert's opinion, the "likelihood that he will be able to work the next five years is very slim." He recommended Employee accept jobs less physically demanding, to prolong his laborer career. Dr. Gevaert suggested Employee stop his present employment and consider a light-duty job. He did not think Employee should postpone surgery given he was experiencing a "fair amount of motor and sensory loss" and had significant left leg atrophy (Gevaert letter, December 2, 2004).

72) On December 14, 2004, Employee filed a claim for his low back in case 200403748 for the January 14, 2004 injury. Employee explained he was carrying a power-washer when he experienced a pinching feeling and pain down his legs. Employee requested permanent partial impairment, ongoing medical costs, reimbursement to Employee's private health carrier, attorney's fees and costs (Workers' Compensation Claim, December 13, 2004).

73) On December 14, 2004, and again on November 20, 2005, Employee's prior attorney filed a *Smallwood* objection to Dr. Leadbetter's August 14, 2004 EME report. Employee did not waive his *Smallwood* objection, so Dr. Leadbetter's report is not considered in this decision (Employee's hearing statements).

74) On March 15, 2005, Employee reported he had only "4 1/2" years for maximum retirement benefits, and had been off work since December 23, 2004. His back was starting to hurt with occasional sharp pinching in the left sciatica, which was familiar to Employee as he had the same symptoms "last year." Employee requested another epidural steroid injection. Employee reportedly told his doctor: "As long as the shots work, I'll do those instead of surgery" (Laufer chart note, March 15, 2005).

75) On March 18, 2005, Employee called his physician seeking a referral to an endocrinologist to see whether or not he could have more than five epidural steroid injections per year (Laufer chart note, March 18, 2005).

76) On May 9, 2005, Employee began working for Houston I as a laborer at Pump Station 12. This job included replacing pipe, which was heavy work. Employee felt his back was getting worse and he needed another epidural steroid injection. He wanted to avoid surgery (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

77) On May 13, 2005, an unidentifiable physician completed a post-hire health questionnaire for Houston I. Based on another doctor's opinion, this physician stated Employee had a medical condition that would place him at risk for the described job, and limited him to lifting no greater than 20 pounds (Fairbanks Urgent Care Center, May 13 2005).

78) On May 13, 2005, John Gillis, M.D., cleared Employee for work at light duty restriction with no lifting over 20 pounds on a frequent basis (Gillis prescription, May 13, 2005).

79) This light-duty restriction was the first specific restriction Employee had received from a physician since his Fluor injuries (observations).

80) On May 16, 2005, Employee saw Dr. Laufer seeking clearance to return to full-duty work. Employee reported good results from numerous epidural steroid injections, with adequate pain control and rare narcotic use. Employee was upset by Dr. Gillis' recent paperwork limiting his lifting, stating, Dr. Gillis "didn't even see me" (Laufer chart note, May 16, 2005).

81) On May 16, 2005, Employee underwent flexibility and lifting tests. Employee received a full score and was able to lift 70 pounds from floor to chest level eight times resulting in an "acceptable" test (Laufer Flexibility & Lifting Testing, May 16, 2005).

82) On May 16, 2005, Dr. Laufer found Employee was "asymptomatic" and released him to return to work with "no restrictions" (Laufer prescription, May 16, 2005).

83) On May 17, 2005, an unidentifiable physician with Fairbanks Urgent Care Center noted he had discussed Employee's work status with Dr. Laufer who said Employee's medical condition placed him at increased risk of injury. Dr. Laufer concurred restricting Employee to lifting less than 50 pounds was appropriate (Fairbanks Urgent Care Center, May 17 2005).

84) On July 7, 2005, Employee told Dr. Laufer his back pain was "baseline" (Laufer chart note, July 7, 2005).

85) On July 18, 2005, Scott Nordstrand, Deputy Attorney General, wrote to then Gov. Frank Murkowski concerning Senate Bill 130, under consideration by the Alaska Legislature. Gov. Murkowski had requested the Department of Law review this bill and explain its intent and effect. Among other things, the "new law" would change an injured worker's burden of proof from showing his employment was "a substantial factor" in his need for treatment or disability to "the substantial cause." In respect to the "last injurious exposure rule," Nordstrand explained this rule was not abrogated by these changes and party would have to show the "last injury" in a stream of injuries was "the substantial cause," rather than "a substantial factor" causing the need for medical treatment or disability for the last injurious exposure rule to place liability on the last employer under the "new law" (Nordstrand letter, July 18, 2005, at 46 n. 150).

86) On September 16, 2005, Employee told Dr. Laufer he was the "old man on the job" and encouraged younger workers to perform heavy lifting. Dr. Laufer reviewed Employee's medications and gave him something stronger than Vicodin as he was not abusing medication (Laufer chart note, September 16, 2005).

87) This was the first increase in Employee's painkillers since his Fluor injuries (observations).

88) On October 4, 2005, Employee mused whether he could have another epidural steroid injection for his low back, though he did not yet need one but would like to have the "option open." Employee's low back pain was not at a level for which he wished to have treatment (Laufer chart note, October 4, 2005).

89) On October 10, 2005, Employee ended his employment with Houston I (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

90) On October 11, 2005, Employee reported "very mild" low back pain, asked Dr. Laufer about another epidural injection for his low back and wanted the injection if necessary upon his return after four weeks' working (Laufer chart note, October 11, 2005).

91) On November 7, 2005, the "new law" requiring employment be "the substantial cause" of an injured worker's need for medical care or disability became effective. Employee's Fluor, AHTNA and Houston I employment was all before the new law's effective date (experience, judgment, observations and inferences drawn from all the above).

92) On November 15, 2005, the parties attended a prehearing conference in case 20032472844 for injury date March 14, 2003, and in case 2004037484 for injury date January 14, 2004. The

2004 injury included Employee's "shoulder," though the conference summary does not differentiate which shoulder (Prehearing Conference Summary, November 15, 2005).

93) On December 19, 2005, Employee filed an amended claim in case 200324728 and 200403748. This claim appears identical in all respects to the previous claim, except it includes the 2003 case number (Workers' Compensation Claim, on December 16, 2005).

94) On January 5, 2006, Fluor filed an answer to Employee's claim denying any benefits were owed, based upon Dr. Leadbetter's EME report. Fluor listed as affirmative defenses AS 23.30.100, a preexisting condition and the right to assert additional defenses (Answer to Workers' Compensation Claim, January 5, 2006).

95) On January 9, 2006, the parties attended another prehearing conference in cases 200324728 and 200403748. The 2003 claim pertained to Employee's low back, while the 2004 claim applied to his back and unspecified shoulder. However, a notation in the prehearing conference summary states: "Shoulder issue is resolved." The summary further states: "Mr. Rodriguez stated that he continues to work with restrictions, as he is unable to lift anything over 50 pounds" (Prehearing Conference Summary, January 9, 2006).

96) On January 9, 2006, Employee began working for Davis. Employer worked as a "general laborer," and occasionally did "fire watch" which he described as "medium work" (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

97) Employee said his Davis work was watching "heaters at night and cleanup basically" and he described as a "pretty easy job actually" (Employee deposition, March 3, 2006, at 11).

98) On March 3, 2006, Fluor took Employee's deposition. Employee said if he had 30 years with the union as of March 3, 2006, "definitely [he'd] retire right now and get [his] operation" (Employee deposition, March 3, 2006, at 18). Employee admitted he had a low-back-injury-automobile-accident when he was 18 years old, but lived "all these years without no [sic] problem" (*id*.). Employee explained he got epidural steroid injections to block a nerve from "pinching." The doctors told him if the shots worked there was no need to have an operation (*id*. at 20). As a union "A-lister," Employee had some ability to select from various jobs, so following his Fluor injuries he would not take "extra heavy" jobs because he could not "go as fast" as a younger person (*id*. at 21). Employee's his first Fluor injury happened when he was rapidly lifting, twisting and carrying cement bags at a "batch plant." He was uncertain of the date, but his symptoms got worse until he could no longer stand it and could barely walk. He

self-treated by putting ice bags on his back. All the superintendents saw him and asked what happened; he said "my back hurts" (*id*. at 23-24). When Employee saw Dr. Laufer on April 3, 2003, he did not report this as a work injury because he "wasn't sure," and "did not want to create something that [was] not there." Employee did not know what was wrong with him at the time (*id*. at 34). Employee conceded Dr. Laufer told him on or near the first visit that he had a work-related injury and he should tell his employer. Employee did not want to do that because he did not believe Dr. Laufer until he went to a specialist and realized he had a real problem (*id*.). By June 2003, Dr. Laufer was telling Employee he should not be doing heavy lifting at work (*id*. at 36). Employee knew a guy who had a similar situation and had shots in his back. Employee did not want to believe he could no longer do laborer work, so he decided he too would try to get epidural steroid injections to continue working. Eventually, however, he saw Dr. Peterson whose opinions "scared" him (*id*. at 36-37). Employee was more careful at work once he had seen Dr. Peterson (*id*. at 37). Dr. Laufer never said not to work. Employee was concerned Fluor "would tell me to go home, I was making money there, a living" (*id*. at 38). Consequently, before filing his written injury report, Employee admittedly never reported the March 14, 2003 work injury to anyone with Fluor as "being work related" (*id*. at 39). As for the January 14, 2004 incident, Fluor's young foreman wanted him to carry a power-washer. It weighed about 300 pounds and Employee suggested they use the forklift. The foreman declined and he and other workers tried to move the power-washer by hand. Employee pulled his shoulder and reinjured his low back. He had to let go of the power-washer because of pain. He later took his shirt off and showed his supervisor his shoulder and wanted the supervisor to file an injury report but he refused and called Employee a name he "can't say in front of a lady" (*id*. at 39). Employee reported the January 14, 2004 incident immediately to Everett Sonnentag and Jerry Boggs, who were his supervisors. At the time, and as of his 2006 deposition, Employee thought he had only a "bruised shoulder" and thought the shoulder was "no problem" (*id*. at 40-41). Employee did not plan on "retiring," but rather, wanted to get his union retirement then do something easier like fix computers or be a safety man (*id*. at 55). Following Employee's second Fluor injury in January 2004, his pain was worse than it was at the time of his 2006 deposition, mainly because the epidural shots worked fairly well (*id*. at 57).

99) On March 20, 2006, Employee had flexibility and "lift" testing, passed it "without difficulty or pain," and was able to lift 70 pounds from floor chest level with 10 repetitions (Laufer Flexibility & Lifting Testing, March 20, 2006).

100) On April 11, 2006, Employee complained of right and left shoulder pain since January 14, 2004, while he was working with Fluor. He attributed this to the January 14, 2004 power-washer lifting incident. Employee was currently working but not performing much heavy lifting. Dr. Laufer performed an examination and diagnosed bilateral impingement syndrome consistent with "years of heavy lifting" and physical labor, first reported as a complaint on April 14, 2004. Dr. Laufer found this a "relatively new complaint" in his office but consistent with a "work-related injury." Employee was not going be at work for the following five days and noted he is not doing a particularly demanding job. Dr. Laufer would consider a steroid injection into Employee's shoulders after his upcoming knee surgery (Laufer chart note, April 11, 2006).

101) On April 11, 2006, right and left shoulder x-rays revealed degenerative changes in the AC joint, and acromion and humeral head changes consistent with impingement in the right shoulder, and evidence of impingement in the left shoulder (Cable x-ray report, April 11, 2006).

102) On April 14, 2006, Employee had right knee surgery (Alaska Regional Hospital Operative Report, April 14, 2006).

103) On April 20, 2006, Employee ceased working for Davis (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

104) On April 25, 2006, on a medical questionnaire apparently for a pre-hire physical with Houston II, Employee said he had back pain and had injured both shoulders the same day as his low back, on January 14, 2004, but was "not still treating." In reference to his bilateral shoulders, Employee said he had "no problems now" and no treatment was being rendered, but Employee "just wanted [the employer] to know" and may start shots on his shoulders soon (Fairbanks Urgent Care Center, April 25 2006).

105) On April 26, 2006, Employee began working for Houston II and cleaned "pigs," which clean inside the trans-Alaska oil pipeline. He used a shovel and pick to break dirt off pigs, and did this from 2006 through 2008. Employee described this as "heavy" work. During his Houston II employment, Employee suffered frostbitten fingers and had knee surgery (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

106) On April 27, 2006, an unidentifiable physician at Fairbanks Urgent Care Center stated Employee did not have a medical condition that would place him at risk for the described job (Fairbanks Urgent Care Center, April 27, 2006).

107) On May 1, 2006, Employee requested bilateral epidural steroid injections into his shoulders for pain reduction. He was on his way to Valdez to work relatively light duty without much heavy lifting (Laufer chart note, May 1, 2006).

108) On July 12, 2006, Employee reported exacerbation of his low back pain, stating he had to take four pills every day. His new working schedule was four weeks on and two weeks off in Valdez seven days a week, 12 hours a day with moderate lifting using a handcart. Employee was taking Percocet more regularly than before. Dr. Laufer recommended another lumbar epidural steroid injection (Laufer chart note, July 12, 2006).

109) On August 23, 2006, Employee reported his shoulders were doing well following his injections, and he was working in Valdez doing janitorial work. He sought a disability evaluation "per his lawyer" for his workers' compensation injury. Employee was about three years from retirement, and had "done remarkably well considering his disability, and would like to continue working if at all possible" (Laufer chart note, August 23, 2006).

110) On September 20, 2006, Employee's former attorney filed an affidavit and supporting documentation requesting attorney's fees and costs in cases 200324728 and 200403748. In his affidavit, Employee's former counsel stated: "The Employer/Carrier has agreed to accept the past medical benefits in the above claim and resolve the lien with the Alaska Laborers-Employers Trust Fund. . . ." (Affidavit of Robert A. Rehbock, July 18, 2006).

111) On October 10, 2006, the board signed an order approving a stipulation for attorney's fees and costs entered between Fluor and Employee. The stipulation states in part: "The Employer/Carrier has agreed to accept Employee's claim in regard to past medical benefits and resolve directly, without harm, loss of medical benefits, or cost to Employee, [liens] with the Employee's private health carrier. . . ." The stipulation and order further states: "This agreement between the parties is not a compromise of future rights of Employee and/or defenses of the Employer/Carrier. There being no further disputes in regard to Employee's application dated 11/28/05, the 11/28/05 claim is withdrawn and the hearing scheduled for August 29, 2006 should be canceled" (Stipulation for Attorney Fees and Costs, Statement and Order of the Board, October 10, 2006).

112) On November 16, 2006, Employee complained of right shoulder pain, and Dr. Laufer gave him another steroid injection. Dr. Laufer diagnosed right shoulder pain probably secondary to impingement, but progressing. As Employee's response to the injection was less favorable than before, Dr. Laufer scheduled another MRI (Laufer chart note, November 16, 2006).

113) On November 20, 2006, a right shoulder MRI revealed complete tears of the supraspinatus and infraspinatus tendons with moderate retraction of the musculotendinous junction of the supraspinatus; severe degenerative hypertrophy of the AC joint with prominent subclavicular and subacromial osteophytes; tear of the interior labrum and capsule with prominent tear of the subscapularis tendon; there was also a probable tear at the insertion of the biceps tendon, which may represent a SLAP tear (MRI report, November 20, 2006).

114) On November 22, 2006, Employee saw his physician for follow-up of continued right shoulder pain. Dr. Laufer reviewed the recent shoulder MRI, which he said was significant for "quite severe damage." After reviewing the radiologist's findings, Dr. Laufer commented these findings were "certainly much more dramatic than either his exam or history would suggest." Dr. Laufer referred Employee to an orthopedist for a right shoulder evaluation (Laufer chart note, November 22, 2006).

115) On December 27, 2006, Employee requested another epidural steroid injection for his low back symptoms. Dr. Laufer stated Employee's pain "is probably due mostly to body habitus." Employee's back exam was notable for tenderness lower than it had been previously, now at the L5-S1 area as well as in the sacrum. Dr. Laufer diagnosed acute exacerbation of chronic low back pain due to degenerative disc and joint disease (Laufer chart note, December 27, 2006).

116) Employee continued working for Houston II in 2007, performing the same duties described above (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

117) On January 3, 2007, Employee saw Doug Prevost, M.D., for right shoulder complaints. Employee said he sustained a right shoulder injury in 2003 while working construction and lifting bags of cement on a repetitive basis. Employee said the pain "had improved somewhat" since 2003 but, "approximately one year ago" he developed increasing right shoulder pain. He saw Dr. Laufer in April 2006 for steroid injections in his right shoulder with some improvement. Since then, Employee's right shoulder symptoms had been persistent. Right shoulder symptoms caused Employee difficulty with some job requirements. Dr. Prevost reviewed Employee's radiographic studies and examined him. Dr. Prevost reviewed treatment options but Employee

stated he was not able to take time off work. Accordingly, Dr. Prevost injected Employee's right shoulder with steroids and prescribed physical therapy. Dr. Prevost recommended right shoulder surgery sometime in the next six months (Prevost chart note, January 3, 2007).

118) On February 8, 2007, Dr. Peterson took x-rays of Employee's lumbar spine and found spondylolysis at L5, with 20 mm listhesis, a "Grade II." This x-ray finding compared to a "6 to 7" mm listhesis found in 2004. Though the listhesis had increased over 10 mm in two years, Employee reported no neurological complications or symptoms. His back pain was his most disabling symptom. Dr. Peterson did not have much to offer surgically and found Employee had "relatively good level of function" given his weight (Peterson chart note, February 8, 2007).

119) On March 22, 2007, Dr. Laufer said Employee was "remarkable for his tenacity and ability to continue working despite some fairly significant orthopedic problems including chronic low back pain sometimes with sciatica symptoms" (Laufer chart note, March 22, 2007).

120) July 24, 2007, Employee reported working in Valdez on a fairly regular four-week schedule, cleaning the robotic pipe-line-cleaning pig (Laufer chart note, July 24, 2007).

121) On September 11, 2007, Employee requested another lumbar epidural steroid injection. He found them quite beneficial and said they had enabled him to continue working despite what his doctor described as "quite significant disease" (Laufer chart note, September 11, 2007).

122) In 2008, Employee continued working for Houston II, performing the same duties described above (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

123) On January 9, 2008, Employee complained of low back and bilateral knee pain, stating he had a harder time than normal completing his work shift. He requested another lumbar epidural steroid injection. He typically got two months relief from an injection (Laufer chart note, January 9, 2008).

124) On May 15, 2008, Dr. Laufer commented Employee was a "remarkable" person with a history of fairly severe degenerative disc disease in his back, and other issues. Despite predictions as far back as 2003 that Employee would not be able to continue working, "he has continued to work and has done remarkably well in both cardiac stress tests as well as flexibility and lifting tests." Employee requested another flexibility and strength test, which Dr. Laufer thought was reasonable (Laufer chart note, May 15, 2008).

125) On May 16, 2008, Employee underwent another flexibility and stress test. Dr. Laufer reported Employee performed reasonably well and lifted 70 pounds floor to chest level "8 to 10"

repetitions without difficulty. Dr. Laufer opined it was reasonable for Employee to continue working in his current state and anticipated improvement once Employee had his knee replaced (Laufer letter, May 16, 2008; Flexibility & Lifting Testing, May 16, 2008).

126) On June 28, 2008, Dr. Laufer noted Employee admitted to five to six Percocet per day over his last shift, which was unusual for him. Employee reported his pain had been more severe over his last shift than it was previously (Laufer chart note, June 25, 2008).

127) On July 2, 2008, Colin Hickenlooper, PA-C, at Orthopedic Physicians Anchorage released Employee to return to work with no restrictions (Disability Status, July 2, 2008).

128) On August 8, 2008, Employee reported having recently tripped over a rock at the Moose's Tooth restaurant and falling. He broke his finger and complained of left shoulder pain (Laufer chart note, August 8, 2008).

129) On September 17, 2008, Dr. Laufer noted Employee "has been amazing in his capacity to continue working." Employee was determined to continue until he reached a retirement age "he feels is appropriate." Dr. Laufer cautioned him about potential damage he could have with various interventions and Employee understood there may come a time when Dr. Laufer declined specific treatments notwithstanding Employee's strong desire to pursue them (Laufer chart note, September 17, 2008).

130) On December 8, 2008, Employee ceased working for Houston II (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

131) On December 31, 2008, Employee underwent bilateral total knee replacement surgery (Alaska Regional Hospital Operative Report, December 31, 2008).

132) On January 22, 2009, Employee had part of his right index finger amputated to remove gangrene resulting from frostbite (Alaska Regional Hospital Operative Report, January 22, 2009).

133) On February 6, 2009, Employee had parts of two fingers on his left hand amputated secondary to gangrene from frostbite injury (*id*., February 6, 2009).

134) On May 6, 2009, notwithstanding the above surgical procedures to his knees and hands, Employee obtained a full duty work release from his orthopedic surgeon effective May 5, 2009 (Disability Status, May 6, 2009).

135) On May 22, 2009, Employee obtained from Dr. Laufer a full release with no restrictions in regard to his low back so he could work for Shaw (Laufer Disability Certificate, May 22, 2009).

136) On May 28, 2009, Employee began working for Shaw. He drove a riding lawnmower on a military base and used a Weed Wacker. He had difficulty carrying a weed-wacker at times, though he worked five days a week, eight hours per day. "Bouncing around" on the lawnmower bothered his back but Employee characterized this as "a pretty easy job" (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

137) On June 1, 2009, Employee reported right shoulder pain and said he had been working on base mowing lawns on a "stand-up mower." Employee was working 40 hours a week which was a "light load for him." He requested and obtained a right shoulder steroid injection (Laufer chart note, June 1, 2009).

138) On August 13, 2009, Employee requested and obtained a left shoulder steroid injection for pain (Laufer chart note, August 13, 2009).

139) On September 25, 2009, Employee ceased working for Shaw. His job with Shaw ended because there was a seasonal layoff. Employee had "back problems" riding the lawnmower, but he had no "normal" injury. Employee conceded that in his 2010 deposition he said he had no "injuries" while working for Shaw (Employee; Shaw Environmental's Hearing Brief, April 9, 2014, Exhibit 1).

140) Employee described no specific accident or injurious event on any particular day during his AHTNA, Houston I, Davis, Houston II or Shaw employment (Employee).

141) On September 16, 2009, Employee saw Brian Carino, M.D., for shoulder pain. His left shoulder hurt more than his right. Employee traced his "rotator cuff injury" to 2003 when he sustained a "work injury." Treatment for other health concerns such as knees and frostbite delayed his ability to obtain shoulder treatment. However, he "has now since re-aggravated his shoulder injuries." Dr. Carino diagnosed bilateral cuff tendinitis with impingement and recommended physical therapy (Carino chart note, September 16, 2009).

142) Employee had another union dispatch set to begin October 3, 2009, working for Price-AHTNA in Valdez, Alaska, working scaffolding, which he was not able to fulfill because of his lumbar surgery following his 25th epidural steroid injection, discussed below (Employee; Hearing Brief of AHTNA Facility Services, Inc., and Alaska National Insurance Company, April 9, 2014, Exhibit 4; experience, judgment and inferences drawn from all the above).

143) On October 8, 2009, Employee had the last in a series of 25 lumbar epidural steroid injections. Later the same day, Employee went home, heard a "pop" and developed severe low

back pain, leg numbness, tingling, and weakness and had a prominent hematoma extending from T12 to L5-S1. This hematoma resulted in a "significant, mass effect upon the thecal sac." The emergency room called Marshall Tolbert, M.D., for consultation. Dr. Tolbert examined Employee, reviewed his records and recommended multilevel hemilaminectomies to decompress the thecal sac, bilateral laminectomies at L4-L5 to correct preexisting stenosis, and foraminotomies at the same level to relieve any preexisting compression due to degenerative changes. Employee underwent surgery that evening (Alaska Regional Hospital Operative Report, October 9, 2009).

144) As of October 9, 2009, Employee could no longer compete in the labor market for full time work given his age, education, training, experience and residual symptoms and limitations arising from his October 8, 2009 surgery, which resulted from the cumulative effect of 25 epidural steroid injections. On October 9, 2009, Employee became permanently totally disabled. The 2003 and 2004 Fluor injuries were a substantial factor in Employee's permanent total disability because they were the primary reason he received 25 lumbar epidural steroid injections (experience, judgment, and inferences drawn from all the above facts).

145) The October 9, 2009 back surgery was the event that disabled Employee (*id*.).

146) Employee was not going to go "under the knife" just because a doctor told him that someday he would probably have to undergo back surgery. Everything started while Employee worked for Fluor. He understood he was obtaining epidural steroid injections every three to six months to block nerve pain, and if the pain came back Employee would take pain pills until his next injection. Employee's understanding of an "injury," changed after Dr. Tapper's report, which said the subsequent employers were responsible for his disability and need for medical treatment. In June 2010, Employee intended to return to work. His "mind" wanted to return to work, but his body would not let him. Employee did not think he had any work restrictions in June 2010 and so far as he knew, in June 2010 Dr. Tolbert gave him an unconditional work release. Employee received unemployment benefits for several weeks after leaving Shaw. He then retired from his union, "regular retirement," not "medical retirement," to obtain union benefits. He did not want to retire, but had to. He was eligible to get full union retirement at age 57. His previous testimony that he thought he could return to work for Houston was truthful testimony; he wanted to believe it was true; he always wanted to go back to work. However, in retrospect, Employee now knows he cannot return to work because he can barely walk a block.

Employee's FMLA suit was about Houston miscounting days he should have had been off under federal law. So, when Employee said in his federal complaint that he could not find work, he meant he could not find work for the period at issue in the FMLA suit, and in fact, he could not find work until he found it with Shaw. Employee was "fooling himself" thinking he could return to work back in 2010. Employee realized he was actually permanently totally disabled effective September 25, 2009, when Social Security said he was disabled. This also happened to be Employee's last day working for Shaw. Employee's actual problems started in 2003 and 2004, and the only way he could return to work at any job was by getting repetitive epidural steroid injections. He blames each employer for him having to get repeated epidural steroid injections. Fluor paid for some of his epidural start injections, but after a time, Employee's health benefits paid for subsequent treatment for his lumbar spine and shoulders. Employee thinks his lumbar spine predominately disables him. If Employee's back was the same as it was while he was working, his shoulders would probably not keep him from working (Employee).

147) On October 12, 2009, the hospital discharged Employee and removed him from work for a minimum of six weeks (Alaska Regional Hospital Discharge Summary, October 12, 2009).

148) On October 20, 2009, Employee told Dr. Laufer he was unable to go to his Valdez job as planned and lost his employment because he developed epidural bleeding in a clot following the October 8, 2009 epidural steroid injection (Laufer chart note, October 20, 2009).

149) If the 25th epidural steroid injection had not required emergency surgery with resultant disability, Employee would have probably continued working (Employee; experience, judgment and inferences drawn from all the above).

150) On November 17, 2009, Dr. Laufer reviewed paperwork for Employee's attorney. He told Employee he would continue to act on his behalf as long as he could act honestly, and Employee was comfortable with this. Dr. Laufer wrote a post-dated work release for him, "which is consistent with chart findings" (Laufer chart note, November 17, 2009).

151) Employee's lumbar surgery for emergent evacuation of a lumbar epidural hematoma was a direct result of the spinal epidural injection performed by Dr. Cable (Alaska Regional Hospital History and Physical, January 19, 2010).

152) The two surgeries made a permanent change in Employee's underlying lumbar condition (experience, judgment and inferences drawn from the above).

153) On January 19, 2010, Employee had surgical repair of a lumbar pseudomeningocele resulting from his emergency lumbar surgery (Alaska Regional Hospital Discharge Summary, January 23, 2010).

154) On January 23, 2010, the hospital released Employee following pseudomeningocele surgery. The operative findings showed a small hole in the dura, which was repaired. The surgeon noted the dura was "exceedingly thin and quite fragile, most likely due to the 23 steroid injections, placed within a very tight spinal canal" (Alaska Regional Hospital Discharge Summary, January 23, 2010).

155) In March and April 2010, Employee participated in physical therapy for his lumbar spine (Integrative Patient Update, April 21, 2010).

156) On May 21, 2010, Employee advised Dr. Laufer he anticipated being deployed to the Gulf of Mexico for an oil spill cleanup job, as he had extensive experience during the Exxon Valdez oil spill. Employee had maintained all his hazmat cards and was high on the union dispatch list. He wanted to take care of various health concerns before leaving. Accordingly, Employee requested bilateral shoulder injections, which were provided (Laufer chart note, May 21, 2010).

157) On June 20, 2010, Houston II took Employee's deposition in conjunction with a frostbitten finger case. Beginning in April 2006, Employee's job with Houston II included cleaning the robotic, pipeline-cleaning "pig." He worked four weeks on two weeks off, seven days per week, 10 to 12 hours per day (deposition of Alberto a Rodriguez, June 29, 2010, at 15-17). Employee averred he had no other injuries while working for Houston II (*id*. at 21). He subsequently went to work for Shaw, where he also had no injuries (*id*. at 29-30). Though Employee considered himself retired, it was only "for now," and he hoped to soon go back to work for Houston (*id*. at 30). Employee went to the hall nearly every day and thought he might go to the Gulf of Mexico for an oil spill cleanup. When he went to the hall, Employee thought he had "none whatsoever" physical work restrictions (*id*. at 31). Employee received unemployment benefits one week in May 2009 and received some in October 2009 (*id*. at 32-33). Employee had bilateral shoulder issues involving rotator cuffs, but no surgery yet. These shoulder problems caused no functional limitations but Employee had occasional shoulder pain (*id*. at 36). Employee acknowledged he had a back and shoulder "claim" from when he worked in Shemya, Alaska for Fluor (*id*. at 37-38). Employee referenced his low back injury and October 9, 2009 low back surgery and averred Dr. Tolbert had released him from that surgery without any restrictions (*id*. at 39-40).

Employee did not think he would have trouble doing his Houston II job again (*id*. at 66). In context, Employee's answer appears to reference his finger injuries not precluding him from returning to his Houston II job, since he "did it with [his] black fingers -- three fingers [he] had, and [he] couldn't hardly move those at the end" (*id*. at 66-69).

158) On July 9, 2010, Employee told Dr. Laufer he was looking for work unsuccessfully (Laufer chart note, July 9, 2010).

159) On August 26, 2010, Employee had bilateral shoulder MRI scans. The radiologist compared the right shoulder MRI with the previous study from November 20, 2006. Employee's right shoulder showed progressive degenerative changes of the glenohumeral joint with a "now chronic thickness tear," retraction and atrophy at the supraspinatus muscle; a smaller full thickness tear of the infraspinatus tendon with some mild atrophy of that muscle; chronic tears/injuries to the biceps tendon and the bicipital labral complex and the anterior labrum; and a chronic anterior capsular injury. Employee's left shoulder demonstrated extensive, chronic pathology of the left shoulder girdle to include a full thickness tear; retraction and atrophy of the supraspinatus musculotendinous complex; a probable chronic small tear of a portion of the infraspinatus tendon; extensive subscapularis tendinosis/tendinopathy; chronic severe biceps tendinosis/tendinopathy with significant pathology of the associated by bicipital-labral complex; chronic extensive pathology of the labrum associated with at least moderate degenerative changes of the glenohumeral joint; and advanced acromioclavicular degenerative changes with associated spurring (MRI reports, August 26, 2010).

160) On September 15, 2010, Employee told Dr. Carino he wanted to proceed with shoulder surgery, beginning with the right shoulder (Carino chart note, September 15, 2010).

161) On October 22, 2010, Dr. Carino performed left shoulder surgery for a "massive rotator cuff tear, chronic." Employee traced this injury back to 2003 while working construction and had been treating it non-operatively to this point (Alaska Regional Hospital Operative Report, October 22, 2010).

162) On November 5, 2010, Employee sought historical clarification for workers' compensation issues from Dr. Laufer. Dr. Laufer stated Employee's right shoulder pain was clearly documented in the records and his complaints correlated with an injury or insult in 2004, and he was a surgical candidate (Laufer chart note, November 5, 2010).

163) On November 5, 2010, in a separate document Dr. Laufer stated the January 14, 2004 [Fluor] work injury was the substantial cause of symptoms in Employee's "shoulders" and the need to treat those symptoms. Dr. Laufer opined Employee needed shoulder surgery and he had cared for Employee for multiple issues including his shoulders and back, and had provided shoulder injections as a temporary measure while Employee's other health issues were being addressed. In Dr. Laufer's opinion, as of November 5, 2010, Employee was not medically stable (Laufer questionnaire responses, November 5, 2010).

164) On December 4, 2010, the Social Security Administration notified Employee he became disabled under Social Security guidelines on September 25, 2009. Employee's initial, Social Security monthly entitlement was $2,040 (Social Security Notice of Award, December 4, 2010).

165) On December 30, 2010, Dr. Carino performed right shoulder surgery on Employee (Alaska Regional Hospital Operative Report, December 30, 2010).

166) On January 10, 2011, Fluor's prior attorney filed a *Smallwood* objection to Dr. Carino's November 10, 2010 report and Dr. Peterson's November 16, 2004 report. Fluor did not waive its *Smallwood* objection to Dr. Carino's report, and Dr. Carino was not presented for cross-examination. Dr. Carino's November 10, 2010 report is not considered in this decision. Fluor waived its *Smallwood* objection to Dr. Peterson's report (Request for Cross-Examination, January 10, 2011; Fluor's hearing statements).

167) In 2011, Employee had extensive physical therapy primarily for his shoulders (Integrative Physical Therapy notes, February 16, 2011 through September 7, 2011).

168) On March 15, 2011, Dr. Laufer stated the March 14, 2003 and January 14, 2004 work injuries were the substantial cause of Employee's current symptoms in his back and the need to treat those symptoms. Dr. Laufer noted Employee was on Social Security Disability and not working. He recommended Employee continue medications, physical therapy, range of motion and strengthening exercises. Employee's back and shoulders may require additional surgery. In response to the question whether or not Employee's back and shoulder were medically stable, Dr. Laufer said "no," his back was "relatively stable" and Employee needed medications as Employee has a "high pain tolerance" (Laufer questionnaire responses, March 15, 2011).

169) On March 15, 2011, Dr. Laufer stated Employee had an "incredibly complicated past medical history" with many complaints "likely related to his work." Dr. Laufer noted there "are not references to his shoulder complaints in the records, but he has complained of bilateral pain

and impaired ROM for several years." Dr. Laufer thought these concerns were simply "overshadowed by more acute issues and the complexity of his medical care" (Laufer chart note, March 15, 2011).

170) On April 25, 2011, Employee filed a claim against Fluor using the 2003 case number for the January 14, 2004 injury. Employee claimed he injured his right and left shoulders and sought permanent partial impairment, medical costs, attorney's fees and costs (Workers 'Compensation Claim, April 25, 2011).

171) On May 16, 2011, Fluor filed an answer to Employee's April 25, 2011 claim. Fluor stated in part: "Employer and Carrier . . . do not deny that employee was injured in the course and scope of employment on 01/14/04. Employer and carrier do not deny that employee injured his shoulder on 01/14/04. However, per the employee's deposition testimony on 03/03/06, employer maintains that employee merely bruised his shoulder and that by 03/03/06 the injury to his shoulder had resolved." Fluor also relied upon Dr. Leadbetter's EME report. Fluor further stated Employee represented to it and to the board on January 9, 2006, that the shoulder issue had been "resolved." Therefore, Fluor denied Employee was entitled to medical or impairment benefits pertaining to his bilateral shoulders. As affirmative defenses, Fluor argued Employee's claim was barred by equitable estoppel, laches, or other equitable principles. Fluor objected to Employee coming back five years later asserting his shoulder problems dated back to the 2004 Fluor injury. It claimed prejudice by its inability to investigate Employee's claims in a timely fashion through the EME process or otherwise and averred Employee's claim may be barred by AS 23.30.105(a) (Answer to Workers' Compensation Claim, May 16, 2011).

172) On May 17, 2011, Fluor re-deposed Employee. He explained his Fluor duties as he had in previous testimony and reports. Employee said at AHTNA he was the "competent person," doing paperwork with some shoveling required (Deposition of Alberto E. Rodriguez, May 17, 2011, at 28-29). At Houston I, Employee cleaned oily waste and pipeline "pigs." Employee used special tools, scrapers, and pressure washers to remove wax and oily residue from the pigs. Employee performed this job for almost three years (*id*. at 33-34). The last job Employee had was mowing lawns on base for Shaw. Employee retired after that job because retirement paid more money than unemployment (*id*. at 37-38). He also retired because he had back operations around October 9, 2009, when an epidural steroid injection Dr. Cable gave him went bad (*id*. at 39-40). Employee claimed a back and shoulder injury while working for Fluor on January 14,

2004 (*id*. at 44). On that date, Employee was attempting to lift a power-washer with other employees, using his shoulders so he would not further injure his back. While so doing, Employee had a sharp pain in his back and his arms were hurting "big-time." He had bruises on "both shoulders." Employee had to "really push to get it reported" (*id*. at 44-45). Employee reviewed his previous Fluor deposition where he mentioned he bruised his "shoulder," singular, and stated: "Well, that's my word at the time, I couldn't help that." But, he meant both shoulders (*id*. at 47). Employee acknowledged his first deposition said "shoulder," he reviewed it within 30 days, and did not change it to both shoulders, stating "I must have overlooked it" (*id*. at 48-49). Employee maintained he said "shoulders" and "back" all along on his initial injury report (*id*. at 52). Employee reviewed a recorded statement he gave to adjuster Valerie Moore and affirmed he told Moore he injured his "left shoulder" when moving the power-washer (*id*. at 57). Employee claims he injured both shoulders on January 14, 2004 (*id*. at 65). Employee implied his narcotic pain medication went "all through his body" and perhaps his early medical records do not reflect shoulder pain because the medication numbed the pain (*id*.). Employee has $2,000 a year deductible from his health insurance (*id*. at 91). Employee gets Social Security disability mainly because of his back limitations (*id*.). None of the jobs Employee held after Fluor and before 2007 injured his back or shoulder (*id*. at 93). Employee recalls frequently mentioning his shoulders to Dr. Laufer but, since his appointments are only 30 minutes long, Dr. Laufer typically focused on his most pressing concern (*id*. at 94). On January 14, 2004, Employee's shoulder pain was sharp, "like a pulled muscle," which is what he thought it was in the beginning (*id*. at 95). Employee claims his January 14, 2004 bilateral shoulder injuries were part of a progressive cumulate trauma to his shoulders over the years (*id*. at 96). The shoulder pain started with Fluor (*id*. at 97).

173) On May 31, 2011, the parties attended a prehearing conference and Employee advised he would file a back claim in case 200324728 (Prehearing Conference Summary, May 31, 2011).

174) On June 14, 2011, the Social Security Administration notified Employee he would receive $1,530 each month and advised his "present workers' compensation payments of $894.80 do not affect your Social Security benefits" (Social Security letter, June 14, 2011).

175) On July 7, 2011, Employee filed a claim against Fluor for injury date January 14, 2004, in case 200324728, which apparently had been designated the "master case" number. Employee claimed a back injury and sought an order finding he was injured in the course and scope of his

employment with Fluor, and claimed temporary total disability from his October 2009 surgery until the date he retired in March 2010, medical bills, permanent partial impairment and attorney's fees and costs (Workers' Compensation Claim, July 7, 2011).

176) On July 28, 2011, Fluor answered Employee's July 7, 2011 claim denying Employee was entitled to a board order finding he was injured in the course and scope of his Fluor employment and denied he was entitled to any benefits. Fluor also asserted various equitable and statutory defenses as it had before (Answer, July 28, 2011).

177) On August 11, 2011, the parties appeared at a prehearing conference. Employee explained his "shoulder claim" had been "withdrawn" because treatment for his back injury had masked shoulder pain but it was apparent to Employee that his shoulder had never fully recovered. The parties also agreed to an EME and SIME (Prehearing Conference Summary, August 11, 2011).

178) On September 13, 2011, Dr. Laufer responded to questions from Employee's counsel. He opined Employee could not regularly and continuously work eight hours a day five days a week for a full year and compete with able-bodied workers given his medical conditions. Dr. Laufer further opined Employee's medical conditions were the substantial reason he retired after reaching age 57 rather than continuing to work. Dr. Laufer recommended continued conservative management for Employee's lumbar disc disease, weight loss and physical therapy. Dr. Laufer also stated he and others had advised Employee five or more years earlier to "consider retirement" (Laufer questionnaire responses, September 13, 2011).

179) On October 4, 2011, Dr. Laufer wrote a letter to Marilyn Yodlowski, M.D., who would be seeing Employee later that day for Fluor's employer medical evaluation (EME). Dr. Laufer said, among other things: "Despite half a dozen significant impairments, and the advice of multiple physicians to consider disability, [Employee] managed to continue working 5 years beyond any of our expectations" (Laufer letter, October 4, 2011).

180) On October 4, 2011, Employee saw Dr. Yodlowski for the EME. Employee said on March 14, 2003, he was lifting and carrying 94 pound cement bags. While doing so, he had to turn and twist. "He did not have any kind of accident, incident, or traumatic event." Rather, while doing these physically demanding duties he felt sharp pain developing across his lower back. Employee continued working, the pain continued and worsened, but Employee finished his remaining three weeks on the job and did not report any injury or seek medical attention at that time. Upon returning Anchorage, Employee saw Dr. Laufer his attending physician and received

epidural steroid injections and pain pills. On January 14, 2004, Employee was carrying a power-washer and felt pain in his shoulders and upper back. "Again he did not have any specific accident, incident or traumatic event." Responding to Dr. Laufer's October 4, 2011 letter to her, Dr. Yodlowski stated the medical records available to her do not clearly identify "that a specific physician other than Dr. Laufer has indicated Mr. Rodriguez should be completely and totally disabled from any kind of work." Dr. Yodlowski diagnosed the following: 1) left shoulder, status post arthroscopic operative repair of a rotator cuff tear involving the supraspinatus and infraspinatus; status post debridement of biceps tendon and glenoid labrum; status post debridement/synovectomy of the glenohumeral joint and the acromioclavicular joint. The diagnoses leading to these surgical procedures included osteoarthritis/degenerative joint disease of the acromioclavicular joint with consequential impingement syndrome leading to severe tendinosis/tendinopathy and degenerative process of the rotator cuff and eventual rotator cuff tear with atrophy of the supraspinatus muscle; degenerative changes of the glenohumeral joint with synovitis and tearing of the glenoid labrum, most likely representing degenerative changes and rupture of the biceps tendon; 2) right shoulder, status post arthroscopic surgical debridement of the torn, degenerative rotator cuff, again in the setting of osteoarthritis/degenerative joint disease of the acromioclavicular joint with consequential impingement; synovitis of the glenohumeral joint suggesting an inflammatory arthritic process; biceps tendon rupture; and a large rotator cuff tear of the supraspinatus and portion of the infraspinatus; 3) low back spondylolysis; spondylolisthesis; inter-vertebral disc degeneration; and facet arthropathy. In Dr. Yodlowski's opinion, these lumbar conditions were treated with extensive and excessive epidural steroid injections over six years. As a result, Employee subsequently "developed an epidural hematoma following one of the epidural steroid injections, which then required surgical treatment including multilevel laminectomies." This was further complicated by development of a pseudomeningocele and dura leak, "likely secondary to tissue deterioration from prolonged and multiple exposures to epidural steroids"; 4) status post bilateral total knee replacements; 5) connective tissue disorder; 6) morbid obesity; 7) prolonged use of opioids with likely narcotic dependence/addiction; 8) history of bilateral fingertip amputations of unclear etiology, but, which in Dr. Yodlowski's opinion was not supported by any evidence in the medical records of frostbite; 9) bilateral pedal edema with chronic venous stasis changes; 10) status post left wrist arthrodesis in the distant past of uncertain etiology; 11) history of possible left lower extremity

fracture and lumbar fracture; 12) multiple other medical problems including vertigo and achalasia. Throughout her EME report, Dr. Yodlowski emphasized Employee "did not have any specific accident, incident or traumatic event," to his low back or shoulders while working for Fluor (Yodlowski EME report, October 4, 2011, 1-48).

181) The person writing the EME letter to Dr. Yodlowski incorrectly set forth the legal causation test by stating: "For injuries that occurred before November 7, 2005, in order for the employment to have liability for the *condition*, it must be determined that the employment is 'a substantial factor' of the disability or need for medical treatment" (emphasis added). The author then asked Dr. Yodlowski to explain whether the March 14, 2003 Fluor work incident caused "any *condition*" she diagnosed for Employee's lumbar spine (emphasis added). Dr. Yodlowski opined Employee does not have any condition "that was in any way caused" by his work for Fluor on March 14, 2003. At most, the cement lifting work caused a lumbosacral sprain/strain, a self-limiting condition which resolved within three months after the work. Dr. Yodlowski emphasized there is no medical or scientific basis for thinking construction work caused "development of his degenerative disease." Dr. Yodlowski stated the March 14, 2003 Fluor work was a substantial factor resulting in a lumbosacral sprain/strain and related treatment for three months. In her opinion, any additional treatment measures "including 24 epidural steroid injections" were in "no way" necessitated by the lumbosacral sprain/strain. In Dr. Yodlowski's opinion, these injections are not indicated for treating acute sprain/strain injury. These were treating the pre-existing degenerative disease. Dr. Yodlowski stated Employee "may have had some symptomatic exacerbation of his pre-existing conditions," but there was no objective evidence of any "permanent pathological worsening of those conditions." In her view, the March 14, 2003 Fluor incident was resolved by June 2003, and there was no resulting disability, impairment or inability to return to work. Dr. Yodlowski opined, if Employee is not able to work, it is because of the underlying, natural degenerative process, which continued to worsen, compounded by the results of excessive epidural steroid injections, which required two surgical repairs. Other things, which "all contribute" to his inability to work as a laborer at age 60, include his bilateral knee osteoarthritis, degenerative changes in his shoulders bilaterally, general deconditioning and morbid obesity (*id*. at 49-51).

182) Similarly, in respect to the January 14, 2004 Fluor employment, the EME letter author asked Dr. Yodlowski: "Please explain whether the January 2004 work incident caused any

condition you diagnose as to lumbar spine and bilateral shoulders" (emphasis added). Notably, Dr. Yodlowski further stated: "If anything, the January 2004 work activities may have been associated with lumbosacral sprain/strains as of 2003, as well as symptomatic exacerbation of the non-work-related degenerative changes, spondylolysis and spondylolisthesis." In her opinion, the January 2004 Fluor employment was not "the" substantial or "a" substantial factor in shoulder treatment. In short, Dr. Yodlowski opined the January 14, 2004 Fluor employment was a lumbosacral sprain/strain, which would have resolved by April 2004. Again she mentioned while Employee may have had "a symptomatic exacerbation" of his ongoing chronic low back degenerative conditions, these conditions were "not caused by the January 2004 incident" and the incident is not "a substantial factor in his inability to return to work" (*id*. at 51-53).

183) The EME letter's author provided Dr. Yodlowski with the following information:

> In addition to work being the primary cause, the work can also cause either a temporary or permanent aggravation of a pre-existent condition. An example of a temporary aggravation would be where one has symptoms while on one's feet at work, but the work neither caused nor permanently worsened the underlying pre-existent condition. In the case of a temporary aggravation, it may require the need for limited treatment to bring the symptoms under control, it may require just being off work for a period, or it may require more extensive treatment before the condition is back to the baseline that was present at the time the individual went to work (*id*. at 51).

184) Based on the above, when asked whether Employee had a temporary or permanent aggravation of a preexistent back or shoulder condition as a result of his Fluor employment, Dr. Yodlowski said there was no permanent aggravation. However, given his preexisting lumbosacral disease, deconditioning level, and morbid obesity, "it is not surprising that he had an exacerbation of symptoms of those conditions." As for Employee's shoulders, since there was no mention of any sign, symptom, complaint or physical finding of "an acute shoulder injury," there is no evidence from the medical records Employee sustained any injury leading to his subsequently discovered, degenerative shoulder conditions or any permanent aggravation to those conditions in either March 2003 or January 2004 (*id*. at 53).

185) In Dr. Yodlowski's opinion, Employee's degenerative disease of his lumbosacral spine, intervertebral disc degeneration, facet arthropathy, spondylolisthesis, spondylolisthesis, shoulder arthritis and tendinopathy, were not caused by either the March 2003 or January 2004 Fluor employment. However, they were temporarily aggravated and "may have become more

symptomatic at work." Any treatment for these temporary aggravations due to Fluor employment would only be for a three-month period following each work incident (*id*. at 54).

186) In Dr. Yodlowski's opinion, Employee reached medical stability from his Fluor sprains/strains within three months of each incident; therefore, Employee has "long been medically stable." In her opinion, Employee had soft tissue and non-specific lumbar spine injuries while working for Fluor in 2003 and 2004. Consequently, pursuant to the American Medical Association *Guides the Evaluation of Permanent Impairment*, (*Guides*) Dr. Yodlowski provided a two percent whole person lumbar spine impairment for both Fluor injuries. As she did not believe Employee had a shoulder injury while working for Fluor, Dr. Yodlowski gave zero impairment for the bilateral shoulders (*id*. at 56).

187) Given all of Employee's medical conditions, Dr. Yodlowski believes it is unlikely Employee can return to his previous laborer position. However, in her view, his inability to return to work as a laborer was not caused by any work injury in March 2003 or January 2004 with Fluor. The fact Dr. Laufer released Employee to return to work with no restrictions on multiple occasions since he last worked for Fluor further supported Dr. Yodlowski's view that neither the March 2003 nor January 2004 Fluor employment is responsible for Employee's inability to return to his normal employment full-time (*id*. at 57).

188) Dr. Yodlowski opined the March 2003 and January 2004 Fluor incidents were not even "a substantial factor" in his ultimate inability to return to work as a laborer. Every other factor or condition, however, was a substantial factor, including: His age; morbid obesity; significant degenerative lumbosacral spine disease; spondylolysis; spondylolisthesis; consequences of extensive epidural steroid injections leading to a hematoma and dural tear requiring surgery and multiple laminectomies; bilateral, total knee replacements; severe pedal edema and venous stasis in his lower extremities; a connective tissue disorder; prolonged opioid pain medication use; deconditioning and bilateral shoulder osteoarthritis and degenerative changes (*id*. at 57-58).

189) In Dr. Yodlowski's opinion, Employee's continued work as a laborer after he left Fluor's employment did not worsen his lumbar spine or bilateral shoulder conditions either. In her view, medical literature attached to her report supports this opinion. That is, underlying heredity and genetic factors are what caused Employee's degenerative conditions in his shoulders and low back to progress. In Dr. Yodlowski's opinion, remaining at work and being active would more likely reduce symptoms rather than cause any pathological worsening of an underlying

condition. She stated remaining at work through November 2005 was not a substantial factor in causing Employee's disability or need for shoulder or spine treatment (*id*. at 58).

190) The *Journal of Bone & Joint Surgery* article attached to Dr. Yodlowski EME report suggests research conducted from 1996 through 2006 led to a "dramatic shift" in understanding how "disc degeneration" is caused. Previously, heavy physical loading often associated with occupation was the main suspect and risk factor for disc degeneration. This was known as a "wear-and-tear" phenomenon. This study on twins suggested physical loading, specific occupations and sports play a relatively minor role in disc degeneration. According to the 2006 article, research indicated heredity had a dominant role in disc degeneration and would explain the variance of up to 74 percent seen in adult populations studied to date. Several genes have also been identified, which were associated with disc degeneration. The authors note disc degeneration is not synonymous with back pain and related disability. They also noted there is no standard definition for disc degeneration and measuring degeneration lacks adequate reliability and precision. Signs of disc degeneration have been found in children. Cadaver studies demonstrated annular tears and endplate cartilage pathology in three- to 10-year-old children. This study focused on "exposure-discordant" identical twins and exposures suspected of accelerating disc degeneration. It was thought focusing on twins would include environmental factors, genes, and other variables and influences both twins presumably would have experienced throughout their lives. One study included 45 pairs of identical twins highly discordant for exposure to motorized vehicles and whole body vibration. This study did not find an association between lumbar-disc degeneration and extensive lifetime driving histories. This led to a conclusion that driving had no notable effect on disc degeneration. Most of the studies summarized in the article showed a high degree of similarity and degenerative findings observed in twins. This led to the theory suggesting a substantial genetic influence. The article also consistently found studies showed L4 through S1 lumbar discs were more degenerated than were L1 through L4 discs, suggesting "lifetime physical exposures" have a role in disc pathogenesis because aging, genes and all systemic factors would be expected to affect all discs similarly. However, the article suggested additional effects of specific loading exposures beyond those of "activities of daily living" appear to be "relatively minor." The article notes "this review of disc degeneration does not extend to back pain and other symptoms." Genetic factors could influence

the size and shape of spinal structures, which could affect the spine's mechanical properties and its response to external forces (Battie and Videman, *J Bone Joint Surg Am.* 2006; 88:3-9).

191) On November 8, 2011, the parties attended a prehearing conference. The summary references both shoulders as part of Employee's January 14, 2004 claim (Prehearing Conference Summary, November 8, 2011).

192) On January 17, 2012, Employee filed another claim against Fluor in case numbers 2000324728 and 200403748 requesting benefits for his back and an unspecified "shoulder." Employee sought temporary total disability from October 2009 through March 2010, permanent total disability, permanent partial impairment, medical costs, and attorney's fees and costs (Workers' Compensation Claim, January 17, 2012).

193) Employee tends to alternate between claiming benefits for only his left "shoulder" to claiming benefits for both "shoulders" (observations and inferences drawn from all the above).

194) On February 13, 2012, Fluor answered Employee's January 17, 2012 claim denying it owed him any benefits (Answer to Employee's Claim for Benefits, February 7, 2012).

195) On March 20, 2012, Dr. Laufer reviewed Employee's situation and stated both Employee's shoulder and back injuries are thought to be secondary to work-related injuries (Laufer chart note, March 20, 2012).

196) On June 1, 2012, Dr. Tapper saw Employee for an SIME. He found Employee a "very difficult historian" who could not give a good, lineal employment history. Employee explained he injured his low back on March 14, 2003, while working for Fluor mixing bags of cement. He later reinjured his back and injured his shoulders when lifting a power-washer working for Fluor on January 14, 2004. Employee's main complaint was an inability to walk very far without sitting down due to back pain. His back pain was worse than his shoulder pain. Employee had difficulties with activities of daily living. Dr. Tapper performed a physical examination and reviewed four job descriptions which purportedly encapsulated nine jobs Employee held between March 8, 2004 and October 2009. In his view, these jobs over five and one-half years significantly worsened and accelerated Employee's overall need for treatment and disability. Dr. Tapper opined all employment after March 8, 2004 required Employee to work on his feet, to bend, lift, work around hazardous equipment and work in bad weather. Dr. Tapper said the jobs described in this time frame significantly worsened "his condition." Therefore, Dr. Tapper concluded Employee's employment between 2004 through 2009 "is the substantial factor in his

ultimate disability." As for the 2003 and 2004 Fluor injuries, Dr. Tapper opined these "contributed" to his current symptoms and need for treatment, but were not "the substantial cause." Dr. Tapper opined Employee deteriorated at a much greater rate in the subsequent time period between 2004 and 2009, and "that time period is the substantial factor in his disability and need for treatment." Dr. Tapper found poor documentation for the 2003 and 2004 Fluor injuries, which he concluded were "not reported in a timely manner." He agreed considerable medical evidence showed Employee continued working despite significant pain in his shoulders and back. Dr. Tapper would have advised Employee in 2008 and 2009 to stop working and seek more intensive treatment for his back and shoulders. In Dr. Tapper's view, Employee's back and shoulder pain limitations combined with other injuries and conditions and eventually caused him to retire in March 2010. At that point, "he could not work at all." Dr. Tapper opined Employee does not have permanent physical capacities to return to his prior employment as a laborer. He concluded Employee "can hardly walk" and is dependent on narcotic medication. Dr. Tapper pointed to the difference between the January 27, 2004 and February 8, 2007 x-rays, which showed a dramatic increase in Employee's lumbar spondylolisthesis, as support for his opinion that Employee's functional capacity changed while working for subsequent employers after his Fluor employment ended. Employee's physical capacities are "very limited in all daily living activities at the present time" including walking, standing, sitting, bending, using his arms, sleeping, housework, yard work and sexual activities. In summary, in Dr. Tapper's opinion, "the substantial cause" of Employee's "problems" is the work he performed from 2004 to 2009, and not the two years at Fluor, between 2002 and 2004. Comorbidities included obesity, multilevel degenerative disc disease in his lumbar spine, spondylolisthesis, and massive, surgical decompression from T12 to S2 complicated by a dural leak requiring a second surgery. Dr. Tapper opined Employee is "significantly disabled" and "the substantial cause" of this is his lifetime work as a laborer, but not specifically the two-year period he worked for Fluor. Employee's condition is primarily a cumulative wear-and-tear superimposed on preexisting, congenital predispositions especially regarding his back. Dr. Tapper reiterated Employee did not file claims "in a timely manner" (Tapper SIME report, June 1, 2012, at 1-9).

197) On October 15, 2012, Dr. Tolbert responded to a letter from Employee's counsel. Dr. Tolbert agreed Employee appeared to be permanently and totally disabled from his work-related conditions, particularly his back. However, Dr. Tolbert would refer him to a vocational

rehabilitation expert for further evaluation. It was "unknown" to Dr. Tolbert whether Employee's back and other work-related conditions caused him to retire rather than continue to work, as he did not see Employee until December 2009. It was also "unknown" whether Employee's work from 2004 onward aggravated Employee's preexisting spondylolisthesis (Tolbert questionnaire responses, October 15, 2012).

198) On December 5, 2012, Dr. Tolbert saw Employee for continuing back pain and follow-up on his October 9, 2009 and January 19, 2010 low back surgeries. Employee had also been referred to Dr. Tolbert because fluid was collecting in his back in the surgical area which had required remedial surgery in January 2010. Employee was concerned about his workers' compensation case and wondered why Dr. Tolbert had not decisively stated that all his low back problems stemmed from his workplace injury. Regarding the workers' compensation claim, Dr. Tolbert's opinion had not changed in that "he is unable to comment" on Employee's initial injury and "pre-injury/immediate post-injury clinical condition because he did not begin treating" him until "nearly five years after his workplace injury" (Tolbert report, December 5, 2012).

199) On December 17, 2012, Employee filed an injury report against AHTNA listing a July 7, 2004 injury date. The report stated Employee's work from 2004 through 2009 injured and aggravated his back (Report of Occupational Injury or Illness, December 10, 2012).

200) Employee did not file his December 10, 2012 injury report against AHTNA within 30 days of July 7, 2004 (*id*.).

201) AHTNA presented argument but no evidence it was prejudiced by Employee's failure to file a written injury report within 30 days of his last AHTNA employment in 2004 or within 30 days of Dr. Tapper's June 1, 2012 SIME report (judgment, observations and inferences drawn from all the above).

202) On December 17, 2012, Employee filed an injury report against Houston I listing a May 5, 2005 injury date. The report stated Employee's work from 2004 through 2009 injured and aggravated his back (Report of Occupational Injury or Illness, December 6, 2012).

203) Employee did not file his December 10, 2012 injury report against Houston I within 30 days of May 5, 2005 (*id*.).

204) Houston I presented argument but no evidence it was prejudiced by Employee's failure to file a written injury report within 30 days of his last Houston I employment in 2005 or within 30

days of Dr. Tapper's June 1, 2012 SIME report (judgment, observations and inferences drawn from all the above).

205) On December 17, 2012, Employee filed an injury report against Davis listing a January 9, 2006 injury date. The report stated Employee's work from 2004 through 2009 injured and aggravated his back (Report of Occupational Injury or Illness, December 10, 2012).

206) Employee did not file his December 10, 2012 injury report against Davis within 30 days of January 9, 2006 (*id*.)

207) On December 17, 2012, Employee filed an injury report against Houston II listing an April 20, 2006 injury date. The report stated Employee's work 2004 through 2009 injured and aggravated his back (Report of Occupational Injury or Illness, December 6, 2012).

208) Employee did not file his December 6, 2012 injury report against Houston II within 30 days of April 20, 2006 (*id*.).

209) Houston II presented no argument or evidence it was prejudiced by Employee's failure to file a written injury report within 30 days of his last Houston II employment in 2008 or within 30 days of Dr. Tapper's June 1, 2012 SIME report (judgment, observations and inferences drawn from all the above).

210) On December 17, 2012, Employee filed an injury report against Shaw listing a May 5, 2009 injury date. The report stated Employee's work from 2004 through 2009 injured and aggravated his back (Report of Occupational Injury or Illness, December 10, 2012).

211) Employee did not file his December 10, 2012 injury report against Shaw within 30 days of May 9, 2009 (*id*.).

212) Shaw presented argument but no evidence it was prejudiced by Employee's failure to file a written injury report within 30 days of his last Shaw employment in 2009 or within 30 days of Dr. Tapper's June 1, 2012 SIME report (judgment, observations and inferences drawn from all the above).

213) On December 24, 2012, Employee filed a claim against AHTNA, Houston I, Davis and Houston II seeking the same benefits he sought from Fluor (Workers' Compensation Claim, December 20, 2012).

214) On December 31, 2012, Employee filed a petition to join 14 employers and their carriers based on Dr. Tapper's SIME report (Petition to Join, December 31, 2012).

215) On January 14, 2013, Houston II answered Employee's December 6, 2012 claim, denied it owed him any benefits and raised the same defenses it argued at hearing (Answer to Worker's Compensation Claim, January 14, 2013).

216) On January 15, 2013, Davis answered Employee's December 20, 2012 claim, denied it owed him any benefits and raised the same defenses it argued at hearing (Answer to Employee's Worker's Compensation Claim, January 14, 2013).

217) On January 22, 2013, Houston I answered Employee's claim, denied it owed him any benefits and raised the same defenses it argued at hearing (Answer to Employee's Workers' Compensation Claim, January 18, 2013).

218) On June 17, 2013, Employee filed a claim for benefits against Shaw, seeking the same benefits he sought from Fluor (Workers' Compensation Claim, June 13, 2013).

219) On July 29, 2013, Shaw answered Employee's June 13, 2013 claim, denied it owed him any benefits and raised the same defenses it argued at hearing (Amended Answer of Shaw Environmental to WCC Dated 06/13/2013, July 26, 2013).

220) Employee's claims against AHTNA, Houston I, Davis, Houston II and Shaw were not filed within two years of the date Employee became disabled on October 9, 2009 (judgment, observations and inferences drawn from all the above).

221) On June 20, 2013, Paul Tesar, M.D., orthopedic surgeon, saw Employee for an EME for a prior party to this action, which was subsequently dismissed. Employee's chief complaint was low back and bilateral lower extremity symptoms. Employee related his symptoms to a 2003 injury when he was mixing cement and had to carry 90 pound bags to a hopper. He did this activity for several months, 12 weeks on two weeks off. He developed back symptoms and was unable to walk a block. He continued working with epidurals and pain medicine. Dr. Tesar referred to Drs. Yodlowski's and Tapper's reports. He also reviewed Employee's medical records in five volumes, apparently ending with Dr. Tapper's June 1, 2012 report. Dr. Tesar performed a physical examination and diagnosed several, preexisting or unrelated conditions including: Possible compression fracture, lumbar spine; status post-operative right wrist fusion; obesity; lumbar spondylosis; thoracic spondylosis; cervical spondylosis; chronic low back pain with bilateral leg symptoms; bilateral osteoarthritis in his knees with meniscal tears, status post-operative repair; bilateral acromioclavicular joint degenerative disease status post-operative repair; status post-operative multiple epidural steroid injections, lumbar spine, with epidural

hematoma, status post-operative laminectomy and hematoma evacuation, postoperative dural repair with recurrence; vascular compromise, status postoperative partial finger amputations; connective tissue disease; opioid addiction; and chronic venous insufficiency. Dr. Tesar did not believe there was any progressive deterioration in Employee spine that was not age-appropriate given his degenerative disease. Furthermore, he opined Employee's work activity from 2004 to 2009 was not a substantial factor in his disability, complaints or need for treatment. In respect to Dr. Tapper's opinion about the progressive spondylolisthesis at L5-S1 between 2004 and 2009, Dr. Tesar noted neither Dr. Yodlowski nor Dr. Tapper had the diagnostic studies to review. However, according to Dr. Tesar's report, neither did he. Dr. Tesar questioned Dr. Peterson's 2007 x-rays showing a grade II spondylolisthesis, given, in Dr. Tesar's view, September 21, 2010 x-rays showing a grade I spondylolisthesis, unchanged from the original x-rays. He noted spondylolisthesis will not become "less over time." Dr. Tesar agreed with Dr. Yodlowski's twin studies and stated Employee's genetics, heredity and obesity played a significant part in developing his symptomatology, especially in relation to his knees (Tesar EME report, June 20, 2013, at 1-19).

222) On September 21, 2013, Keith Holley, M.D., orthopedic surgeon, performed an EME on Shaw's behalf. Dr. Holley reviewed Employee's medical records, took a history and performed an evaluation. Dr. Holley diagnosed a lumbar sprain/strain the substantial cause of which was the 2003 Fluor work injury; lumbar spondylosis with chronic back pain and radicular symptoms, the substantial cause of which is morbid obesity and natural, age-related progression of lumbar spine degenerative changes; lumbar epidural hematoma following epidural steroid injections, status post decompressive L1 through L5 laminectomies; lumbar pseudomeningocele, status post attempts at drainage and repair, the substantial cause of which is the L1 to L5 laminectomies required to treat the epidural hematoma; bilateral shoulder rotator cuff tears, chronic, status post arthroscopic debridement and rotator cuff repair in 2010, the substantial cause of which is a natural progression of chronically untreated rotator cuff tendinopathy; right and left index finger and middle finger amputation 2009, the substantial cause of which was exposure and frostbite with subsequent infection and gangrene; advanced, bilateral knee osteoarthritis, status post simultaneous bilateral total knee replacements in December 2008, the substantial cause of which was morbid obesity, genetic factors, and age-related progression of degenerative changes in both knees (Holley EME report, September 21, 2013, at 1-16).

223) Though the EME letter's author provided a generally correct "causation" statement under Alaska law for injuries occurring after November 7, 2005, the author asked Dr. Holley to list all causes he believed contributed to Employee's low back and bilateral shoulder "conditions, disability, and need for treatment." The letter asked Dr. Holley to apportion responsibility among these causes. Dr. Holley responded: "The substantial cause for both the lumbar spine and bilateral shoulder conditions are non-occupational in my opinion." He cited poor documentation of any work-related injuries reported in contemporaneous medical records and Dr. Holley found Employee's history of these work injuries is "vague at best." Employee does not relate any specific injury to either his low back or shoulders during his Shaw employment, "rather just ongoing chronic pain which was aggravated by his work activities." Given the Alaska definition of "substantial cause," Dr. Holley would not consider Employee's Shaw employment as "the substantial cause of any of the diagnosed conditions relative to all other causes" (*id*. at 16-17).

224) Dr. Holley generally concurred with Drs. Yodlowski's and Tesar's opinions, and studies referenced by Dr. Yodlowski (*id*. at 17).

225) Dr. Holley found no evidence of any significant temporary or permanent aggravation of Employee's preexisting conditions resulting from his Shaw employment. Dr. Holley agreed Employee continued working with frequent visits to his doctors to get injections to "mask pain and continue working." In Dr. Holley's opinion, Employee's Shaw employment was not the substantial cause in the need for any future medical treatment or disability. However, Dr. Holley opined Employee qualifies as PTD unless he was retrained to a totally sedentary job. In his opinion, Employee's PTD status is not the result of his Shaw employment (*id*. at 18-19).

226) Dr. Laufer referred Employee for lumbar epidural steroid injections to address his lumbar spine pain as follows:

ESI	**DATE**	**LEVEL**	**EMPLOYER**	**PROVIDER**
1	June 23, 2003	L4-L5	Fluor	McCormick
2	July 30, 2003	L4-L5	Fluor	McCormick
3	April 16, 2004	L4-L5	Off	Cable
4	April 28, 2004	L4-L5	Kiewit	Cable
5	May 26 2004	L4-L5	Kiewit	McCormick
6	September 10, 2004	L4-L5	Off	Cable

7	November 11, 2004	L3-L4	AHTNA	Cable
8	March 17, 2005	L4-L5	Off	Cable
9	July 8, 2005	L4-L5	Houston I	McCormick
10	September 16, 2005	L4-L5	Houston I	McCormick
11	November 30, 2005	L4-L5	Off	McCormick
12	April 20, 2006	L4-L5	Houston II	Cable
13	July 12, 2006	L4-L5	Houston II	McCormick
14	October 12, 2006	L4-L5	Houston II	Cable
15	December 28, 2006	L4-L5	Houston II	McCormick
16	May 9, 2007	L4-L5	Houston II	Cable
17	September 13, 2007	L4-L5	Houston II	Cable
18	January 14, 2008	L4-L5	Houston II	Cable
19	January 18, 2008	L4-L5	Houston II	McCormick
20	April 10, 2008	L4-L5	Houston II	Cable
21	June 27, 2008	L3-L4	Houston II	McCormick
22	October 31, 2008	L3-L4	Houston II	McCormick
23	April 17, 2009	L3-L4	Off	Cable
24	August 7, 2009	L3-L4	Shaw	Cable
25	October 8, 2009	L3-L4	Off	Cable

227) On September 30, 2013, Davis filed a *Smallwood* objection to Dr. Moreland's January 12, 2012 and July 16, 2012 reports. These objections were not waived, but they and the associated medical records are not relevant to the issues decided in this decision (Request for Cross-Examination, September 27, 2013; Davis hearing arguments).

228) On October 2, 2013, Shaw filed a *Smallwood* objection to Dr. Moreland's January 12, 2012 and July 16, 2012 reports. These objections were not waived, but they and the associated medical records are not relevant to the issues decided in this decision (Request for Cross-Examination, October 2, 2013; Shaw hearing statements).

229) On December 27, 2013, Davis filed a *Smallwood* objection to Dr. Moreland's January 12, 2012, and July 16, 2012 reports. These objections are not waived, but they and the associated medical records are not relevant to the issues decided in this decision (Davis hearing statements).

230) On January 30, 2014, neurosurgeon Karl Goler, M.D., performed a record review EME for Houston I. Dr. Goler reviewed questions from Houston I's attorney and reviewed Employee's medical records through approximately September 16, 2013. Dr. Goler opined Employee has multilevel, lumbar degenerative disc disease complicated by obesity, managed with excessive epidural steroid injections leading to epidural hematoma and significant cauda equine compression treated with multiple surgeries including surgery for recurrent chronic seroma. As for Employee's employment with Houston I, Dr. Goler opined the employment was not a substantial factor in bringing about the above diagnoses. In Dr. Goler's opinion, lumbar disc degeneration is primarily genetically controlled and work is not the primary or even a secondary factor creating lumbar, degenerative disc disease. Since Employee's employment with Houston I from May 2005 through October 2005 was not "the substantial factor" in bringing about these diagnoses, in Dr. Goler's opinion, the primary cause of these diagnoses would be genetics, and long-standing morbid obesity would also play a significant factor. Employee's work with Houston I did not aggravate or accelerate any preexisting condition. In his opinion, treatment Employee received subsequent to October 2005 was not required because of Employee's work with Houston I. Employee's Houston I employment did not create a ratable permanent impairment. In Dr. Goler's view, the medical records are "so comprehensive" it is unlikely a physical examination would add any additional data to change his opinions. Dr. Goler disagreed with Dr. Tapper's report (Goler EME report, January 30, 2014, 42-46).

231) On February 6, 2014, the remaining parties appeared at a prehearing conference. The board designee granted Employee's petition for joinder and stated all claims against all remaining parties would be heard the same time at a hearing set for April 16, 2014. The issues listed in dispute included PTD benefits from September 25, 2009 forward and medical care relating "only to Employee's left shoulder and low back." The designee stated the issues at hearing would be in the following order: 1) all objections to the designee's joinder ruling; 2) all procedural defenses; and 3) "remaining" employers would present their arguments on the merits (Prehearing Conference Summary, February 6, 2014).

232) On March 11, 2014, Shaw filed a petition requesting a Social Security offset. No other documentation supported the petition (Petition, March 11, 2014).

233) On March 24, 2014, Fluor filed a petition requesting a Social Security offset. No other documentation supported the petition (Petition, March 24, 2014).

234) On April 7, 2014, Fluor filed a petition requesting Employee's claims be dismissed under AS 23.30.100, AS 23.30.105 and AS 23.30.110(c) (Petition, April 4, 2014).

235) Dr. Laufer treated Employee regularly for over 11 years. Employee had degenerative changes in his low back, which were visible on imaging and confirmed by other physicians. However, these degenerative conditions were probably asymptomatic before Employee's injuries with Fluor. In Dr. Laufer's opinion, it is difficult to balance a suggestion for surgery versus obtaining an epidural, which is designed to reduce inflammation in the spine. Epidural steroid injections do not fix anything and may weaken tissue. Though Dr. Laufer does not worry much about causation, lifting heavy objects would cause anyone's back to hurt. He agrees with Dr. Tapper's opinion stating subsequent work also aggravated or accelerated Employee's underlying condition. In Dr. Laufer's view, medical literature has very little evidence concerning back pain. There are studies demonstrating numerous contributors to back pain and it is "always a tenuous connection." Dr. Laufer was surprised Employee continued to work; he has a high pain tolerance. Employee's pain tolerance was evidenced by his nearly gangrenous, "rotten," gallbladder, which in this instance was almost an "incidental finding" when he complained of abdominal pain, though he required "near-emergency" gallbladder surgery. Dr. Laufer suspected Employee's work with Shaw driving a lawnmower also aggravated his back. The cement lifting work with Fluor is consistent with Employee's symptoms and is a substantial factor in his current disability to a reasonable degree of medical probability. Dr. Laufer is not certain what Employee was doing in his subsequent jobs, but suspected these aggravated his lumbar condition. The same is true of Employee's work for Houston II cleaning robotic pigs (Laufer).

236) Dr. Laufer recalls Employee raising shoulder complaints, though it may not always be recorded in his notes because Employee typically presented with a "list of complaints." He cannot recall specifically the first-time Employee mentioned his right shoulder. Prior shoulder complaints would be important, though he was not aware of prior shoulder complaints before Dr. Laufer saw Employee. He understands workers' compensation reporting requirements for physicians. He does not consider it part of his standard of care to report everything an injured worker says. An acute rotator cuff tear would become symptomatic within a couple of days from the inciting event and the pain would be usually intense. If a healthy rotator cuff was injured as a result of a traumatic event, a person would be in acute, intense pain. However, an already damaged rotator cuff held by "the last thread" might not cause immediate, extreme pain. Dr.

Laufer did not recall whether Employee complained of extreme pain in his right shoulder when he first saw him after January 14, 2004. Dr. Laufer's April 3, 2003 report does state what Employee was doing when he hurt himself, but Dr. Laufer would not have necessarily commented upon causation in his notes. As a family doctor, Dr. Laufer cannot itemize every single complaint for Employee. An MRI is only valuable given clinical symptoms. In other words, if Employee said he was in pain and there is something to correlate with the pain on an MRI, then the MRI becomes important. Dr. Laufer agreed Employee's MRI shows significant preexisting conditions in the lumbar spine. Dr. Laufer could not say whether the vertebral translation was present prior to the first x-ray demonstrating it, but Employee never complained of any low back symptoms to his knowledge prior to his Fluor employment. Dr. Laufer questions any physician's ability to point to any specific event causing an injury. However, he disagrees with the "sprain/strain" diagnoses because Employee's pain did not stop. By definition, continuing pain in the lumbar spine is not a "sprain/strain." Employee could have, however, had a sprain/strain superimposed on an underlying medical condition and the sprain/strain would eventually resolve. A test on September 10, 2004, which showed he had full flexibility and lumbar range of motion demonstrated Employee had recuperated from any "sprain/strain" he received while working for Fluor. As for the shoulders, Dr. Laufer opined the lifting test Employee took in September 2004 could have been accomplished by Employee depending upon how the lifting was done. Employee would have had difficulty lifting above the shoulders, but not so much below that, had he had an acute rotator cuff tear in January 2004. Dr. Laufer would not return a patient to full duty work if he felt the patient had not resolved from a "sprain/strain." In respect to the August 13, 2005 report from Dr. Gillis, Dr. Laufer believed his partner did not examine Employee before giving him work restrictions. Therapist Tibbs thought Employee should not go back to work and limited Employee's lifting to no greater than 50 pounds, even though he passed his flexibility and lifting test. Obesity became a factor because Dr. Laufer wanted Employee to be able to continue to work if he wanted. Dr. Laufer agreed with Dr. Tapper's opinion that Employee's work after Fluor had a cumulative effect on his symptoms. Dr. Laufer admired Employee's "doggedness" wanting to repeatedly return to work notwithstanding his symptoms. Dr. Laufer provided temporary handicapped parking permits for Employee because he had difficulty walking. By October 2009, Dr. Laufer provided a permanent handicap parking permit because Employee was having difficulty walking following

his hematoma surgery. Dr. Laufer decided on his own to provide the permanent parking permit (*id*.).

237) Dr. Laufer agreed Drs. Gevaert and Peterson both said in 2004 that Employee would probably need surgery someday. Had Employee decided to have had surgery 2004, Dr. Laufer would not have had an objection (*id*.).

238) In Dr. Laufer's mind, he ties Employee's back pain to Employee lifting cement bags for Fluor. Dr. Laufer feels partly responsible for Employee continuing to work because he "enabled him" to do so. Employee is unusual because Dr. Laufer has never seen anyone get this many epidural steroid injections. Employee is an incredibly hard worker. Dr. Laufer does not believe Employee ever lied to him. Over the years, Employee regularly asked for "return to full duty" work releases from Dr. Laufer. Dr. Laufer would never provide a full work release to a patient if he did not think the patient was capable of working (*id*.).

239) Three epidural steroid injections per year is the "general rule." It also depends on where the injections are given. Dr. Laufer cannot say which Employment period was responsible for the final epidural steroid injection on October 8, 2009 (*id*.).

240) Generally speaking, Dr. Laufer would defer to orthopedic physicians on causation issues. However, orthopedic surgeon Dr. Peterson said in January 2004 there was substantial chance Employee would need surgical fusion, but by April 2004, Dr. Peterson said surgery would be a last resort. Dr. Laufer is not uncomfortable with surgical ambiguity, as neither he nor Dr. Peterson wanted Employee to have surgery (*id*.).

241) In Dr. Laufer's opinion, the 2003 Fluor lifting incident was the first time Employee complained of significant back pain, and it was this pain that prompted Dr. Laufer's referrals for epidural steroid injections and this pain was the proverbial "straw that got his back" (*id*.).

242) Dr. Tapper confirmed his opinions from his SIME report remained the same. Employee's 2003 and 2004 Fluor injuries contributed to Employee's injury but were not the substantial cause. An injury can cause one lumbar vertebra to slip down over another. In 2004, the slippage in Employee's spine was 6 to 7 mm, while by 2007 it had increased to 20 mm. Dr. Tapper used this objective evidence to support his opinion that there were more traumas going on after 2004 in Employee's lumbar spine. In forming his opinion, Dr. Tapper considered all possible factors including obesity, Employee's age, and injuries. Employee was a "terrible historian," and could not explain exactly what he did for each employer. In Dr. Tapper's opinion, all the employment

after 2004 was "the substantial cause." By April 2003, Employee already had significant degenerative disc disease. Dr. Tapper thought there were some credibility issues with Employee because he was "bound and determine to work." Dr. Tapper speculated Employee probably had treatment to his low back in the 90s all the way up through 2003 (Tapper).

243) Dr. Tapper's speculation about Employee having low back treatment in the 1990s through 2003, is not supported by any medical records (judgment, observations and inferences drawn from all the above).

244) Dr. Tapper confirmed the October 2009 epidural steroid injection was complicated by the massive hematoma and subsequent bleed. Dr. Tapper opined "for sure" the lawn mowing with Shaw "caused some problems." But on the other hand, Employee had ongoing epidural steroid injections, and would receive them regularly while he was working. The lawnmower incident "would not do him any good," but Dr. Tapper does not have any particular opinion about whether or not the last epidural steroid injection was necessitated by Shaw's employment period (Tapper).

245) Dr. Laufer tried to help Employee out, and keep him working. He tried injections and medication. Dr. Tapper gives Employee credit for trying to keep working, but Employee was basically "wrecking himself." The hematoma and bleed in 2009 were "the last straw." In Dr. Tapper's opinion, "everything [Employee] did" at work "accelerated" the degenerative process. Had Employee been sedentary, he might not have gotten worse. Dr. Tapper assumed the job descriptions he was given accurately portrayed the work Employee did during the appropriate times. Surgeons always look at spondylolisthesis as a "surgical lesion," needing a fusion, and would typically tell a person not to do heavy labor. In Dr. Tapper's opinion, back surgery is "not all that great." Dr. Tapper would not have had any reason to advise Employee to not have back surgery in 2004, had Employee chosen to do so (*id*.).

246) Employee did not give Dr. Tapper specifics as to actual work he did for each employer. Without that information Dr. Tapper would not be able to decide which employer was responsible for Employee's "condition." Dr. Tapper based his opinion on the vertebral slippage that was demonstrated on Employee's back x-rays between 2004 through 2007 (*id*.).

247) Employee's work with Fluor in 2003 and 2004, including his March 14, 2003 and January 14, 2004 injuries were "a substantial factor" in his continuing need for 25 epidural steroid injections into his lumbar spine. All 25 lumbar epidural steroid injections were a continuation of

Dr. Laufer's treatment for Employee's March 14, 2003 and January 14, 2004 work injuries with Fluor. Employee's work with other employers after January 14, 2004, caused temporary exacerbations of Employee's low back pain. Employee's March 14, 2003 and January 14, 2004 Fluor injuries caused Employee's asymptomatic preexisting lumbar conditions to become permanently symptomatic, and to require medical treatment through epidural steroid injections, pain medication, physical therapy and other modalities. Employee's emergency lumbar surgical procedures in October 2009 to address a large hematoma were the direct result of his 25 epidural steroid injections. Because the March 14, 2003 and January 14, 2004 Fluor injuries were "a substantial factor" in Employee's need for the epidural steroid injections, the March 14, 2003 and January 14, 2004 Fluor injuries were also "a substantial factor" causing the need for emergency lumbar surgery in October 2009, and subsequent lumbar surgery, with resultant permanent total disability (experience, judgment, observations and inferences drawn from all the above).

248) Employee's January 14, 2004 Fluor injury was "a substantial factor" in his continuing need for left shoulder medical care and treatment. Employee's work with other employers after January 14, 2004, caused temporary exacerbations of Employee's left shoulder pain. Employee's January 14, 2004 Fluor injury caused Employee's asymptomatic preexisting left shoulder conditions to become permanently symptomatic, and to require medical treatment through steroid injections, pain medication, physical therapy and other modalities. Employee's January 14, 2004 Fluor injury was "a substantial factor" in Employee's need for left shoulder surgery on October 22, 2010 (experience, judgment, observations and inferences drawn from all the above).

249) On February 6, 2014, the board's designee granted Employee's petition to join the party-employers to his claim. The employers would be given an opportunity to object to joinder at the hearing set for April 16, 2014 (Prehearing Conference Summary, February 6, 2014).

250) On April 8, 2014, the parties clarified and limited Employee's issues for hearing. These included: PTD from September 25, 2009 forward and medical expenses "relating only to the injury to EE's left shoulder and lower back." Defense issues included objections to the designee's joinder order, a petition to dismiss filed by one employer and "Social Security offsets where applicable" (Prehearing Conference Summary, April 8, 2014)

251) At the April 16, 2014 hearing, no party objected to joinder (record).

252) At the April 16, 2014 hearing, Employee read a document. Employee's demonstrated ability to read was poor for a person his age (experience and judgment).

253) Employee is about 5'8" tall. His weight has been medically recorded over the years as ranging from 265 pounds in 1992, to an average of about 290 pounds beginning in 2001, to a high of 320 in 2007. He is obese, mainly abdominally. There is no evidence Employee's weight ever prohibited him from working successfully as a laborer (Mulholland report, October 16, 1992; Taylor report, February 12, 2002; Laufer report, July 24, 2007; experience, judgment, observations and inferences drawn from all the above).

254) Employee has an extremely high pain threshold (Laufer; judgment, observations and inferences drawn from all the above).

255) All party-employers contend they are not liable to Employee for PTD. However, Fluor stipulated Employer was PTD beginning September 25, 2009. AHTNA, Houston I, Davis, Houston II and Shaw stipulated Employee was PTD effective September 13, 2011 (hearing stipulations).

256) Employee and all employers participating in this hearing reserved their respective attorney's fee and cost claims for another hearing, if necessary (Prehearing Conference Summary, April 8, 2014).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). 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." However, there is also no reason to suppose Board members who so find are either irrational or arbitrary. That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable" (*id*.).

For injuries occurring on or before November 6, 2005, the law stated:

> **AS 23.30.010. Coverage.** Compensation is payable under this chapter in respect of disability or death of an employee.

A preexisting disease or infirmity does not disqualify a claim under the work-connection requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the death or disability for which compensation is sought. *Thornton v. Alaska Workmen's Compensation Board*, 411 P.2d 209, 210 (Alaska 1966). In *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 533-34 (Alaska 1987), the Alaska Supreme Court held an injured worker must only prove "but for" the subsequent trauma the claimant would not have suffered disability "at this time, or in this way, or to this degree." In short, for injuries arising on or before November 6, 2005, *Rogers & Babler* held the claimant must prove the aggravation, acceleration or combination was "a substantial factor" in the resulting disability (*id*. at 533).

In *Hester v. State, Public Employees' Retirement Board*, 817 P.2d 472 (Alaska 1991) the Alaska Supreme Court suggested when a job worsens an employee's "disease" so he can no longer work, such constitutes an "aggravation," even when the job does not actually worsen the underlying "condition" (*id*. at 475). *Hester* noted increased pain or other symptoms can be "as disabling as deterioration of the underlying disease itself" (*id*. at 476 n. 7).

In *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979), the Alaska Supreme Court held that where employment with successive employers contributed to a worker's disability, the employer at the time of the most recent injury bearing a causal relation to the disability was solely liable for all workers' compensation benefits due. The court rejected the board's view that the injured worker was totally disabled before his last job, because there was no evidence he failed to perform his job duties satisfactorily prior to his last employment period (*id*. at 593). After reviewing the way other states handled situations in which employment with successive employers contributed to an injured worker's disability or need for medical care, *Saling* adopted the "last injurious exposure rule," which it found was more compatible "with existing Alaska law" (*id*. at 595). Among other things, *Saling* believed the last injurious exposure rule was fairer, quicker, more equitable, simpler and more straightforward than apportionment schemes used in other states (*id*. at 597).

In *Peek v. SKW/Clinton*, 855 P.2d 415, 416 (Alaska 1993), the Alaska Supreme Court stated: two determinations must be made under the last injurious exposure rule: "(1) whether employment with a subsequent employer 'aggravated, accelerated, or combined with' a pre-existing condition; and, if so, (2) whether the aggravation, acceleration or combination was a 'legal cause' of the disability, *i.e*., 'a substantial factor in bringing about the harm,'" (quoting *Saling*, 604 P.2d at 597, 598). To be "a substantial cause" bringing about the harm, subsequent employment must be so important in bringing about disability that a reasonable person would regard it as a cause and attach responsibility to it. *State v. Abbott*, 498 P.2d 712, 727 (Alaska 1971).

In *Doyon Universal Services v. Allen*, 999 P.2d 764 (Alaska 2000), the Alaska Supreme Court reiterated its "particularly expansive view of 'work-connectedness,'" which is the "remote site" doctrine. "The crux of this doctrine is that everyday activities . . . normally considered non-work-related are deemed a part of a remote site employee's job for workers' compensation purposes. . . ." (*id*. at 768-69). *Allen* stated because a worker at a remote site is required, "as a condition of employment, to eat, sleep and socialize on the work premises, activities normally divorced from his work" are part of the "working conditions" covered by the Act (*id*. at 768).

For injuries occurring on or after November 7, 2005 the law states:

> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .

Effective November 7, 2005, the legal "causation" definition changed to "contract" the Act's coverage. For injuries occurring on or after November 7, 2005, the board must evaluate the relative contribution of all causes of disability and need for medical treatment and will award benefits if employment is, in relation to all other causes, "the substantial cause" of the disability or need for medical treatment. *City of Seward v. Hanson*, AWCAC Decision No. 146 at 10 (January 21, 2011).

In *State of Alaska v. Dennis*, AWCAC Decision No. 036 at 11-13 (March 27, 2007), the commission stated the "last injurious exposure" rule provides: "The last employer: (1) whose employment aggravated, accelerated or combined with the prior injury (*i.e*., is a cause in fact), and (2) whose employment is a legal cause of the disability is liable for the whole payment of the disability compensation" (*id*. at 11; emphasis in original). *Dennis* explained the 2005 amendments to the Act only modified the definition of "legal cause" from "a substantial factor" to "the substantial cause." The 2005 amendments did not abrogate the "last injurious exposure" rule, which still operates to prevent apportionment of liability of injury among employers (*id*.).

> **8 AAC 45.065. Prehearings**. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
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> (1) identifying and simplifying the issues. . . .
>
> . . .
>
> (c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .
>
> **AS 23.30.070. Report of injury to board**. (a) Within 10 days from the date the employer has knowledge of an injury or death or from the date the employer has knowledge of a disease or infection, alleged by the employee or on behalf of the employee to have arisen out of and in the course of the employment, the employer shall send to the board a report setting out
>
> (1) the name, address, and business of the employer;
> (2) the name, address, and occupation of the employee;

> (3) the cause and nature of the alleged injury or death;
> (4) the year, month, day, and hour when and the particular locality where the alleged injury or death occurred; and
> (5) the other information that the board may require. . . .

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires. . . .

> **AS 23.30.100. Notice of injury**. . . . (a) Notice of an injury . . . in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury . . . to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury . . . and be signed by the employee or by a person on behalf of the employee. . . .
>
> . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> > (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
> >
> > (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
> >
> > (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

In *Kolkman v. Greens Creek Mining Co*., 936 P.2d 150 (Alaska 1997), the board denied an injured worker's claim because his employer, though it had actual notice of his heart attack on the job, did not have notice the worker claimed his heart attack was work-related. The board had relied on *State v. Moore*, 706 P.2d 311 (Alaska 1985), which had been read to require not only notice of injury within 30 days, but notice that the injury was "work-related." In other words, "simple knowledge" of an injury under *Moore* was not enough. Reviewing AS 23.30.100, the Alaska Supreme Court said to the extent *Moore* may be read to add a third requirement to the two-part statutory test for notice, *Moore* was "disapproved" (*id*. at 155). *Kolkman* acknowledged

the relatively short 30-date timeframe within which an injured worker must report an injury, and the fact an injury's work-relatedness is often "gradually" and "not dramatically" acquired. *Kolkman* further noted it is often difficult to fix the day from which the 30-day notice requirement begins to run, and highlighted the distinction between AS 23.30.100 and the immediately following statute, AS 23.30.105, which requires both knowledge of the injury and knowledge of its work-relatedness. As for prejudice to the employer, *Kolkman* held the employer provided no evidence to support a conclusion it was prejudiced by the late notice. As the employee did not know his injury was work-related until almost a year after the fact, his obligation to provide notice did not arise until that time (*id*. at 156).

Cogger v. Anchor House, 936 P.2d 157 (Alaska 1997) revised and clarified the general notice rule, which previously stated that the court read a "reasonableness standard" in the 30-day rule for an injured worker to give his employer notice of a workplace injury, much like a "discovery rule" for statutes of limitations in civil cases (*id*. at 160). The previous notice rule stated the 30-day reporting period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained" (*id*., citing *Alaska State Housing Authority v. Sullivan*, 518 P.2d 759, 761 (Alaska 1974)). *Cogger* noted this rule required an injured worker to give written notice to his employer when he "could reasonably discover an injury's compensability." However, *Cogger* further noted the exact date when an employee could reasonably discover compensability "is often difficult to determine." But, on the other hand, missing the short limitation period "bars a claim absolutely." Therefore, "for reasons of clarity and fairness," *Cogger* held the 30-day period: "Can begin no earlier than when a compensable event first occurs." However, it is not necessary a claimant fully diagnose his or her injury for the 30-day period to start running (*id*. at 160). Based on *Cogger's* facts, the court rejected the argument that the 30-day limitation period began when the injured worker knew he had a serious back problem. Rather, *Cogger* stated the clarified rule, which says the injury became compensable when Cogger visited the emergency room and incurred medical costs for his work-related injury (*id*.).

Under *Cogger's* facts, the court also found the employer had actual knowledge of Cogger's injury. The court reiterated it is not important the employer have knowledge of the "work-

relatedness" of an injury, but, read literally, the statute only requires the employer's knowledge of the injury "and no more" (*id*. at 161-162). As to whether Cogger's employer was prejudiced by his failure to give timely written notice, the court stated a delay of two to 12 days, four months after the alleged event occurred, was not prejudicial. First, the court reasoned since the injury was not compensable until Cogger received medical treatment to address it, he did not have any obligation to report it until he received medical treatment. At that point, once Cogger received treatment, Cogger's employer could do little more than Cogger did to alleviate his pain. The record in *Cogger* did not indicate he received insufficient medical care once he decided his injury warranted treatment (*id*. at 162). The Alaska Supreme Court also agreed the delay in Cogger's notice was not prejudicial by hampering the employer's investigation. When an employer has actual knowledge equivalent to a legally sufficient written report, "it would require an exceptional set of circumstances for this difference in the form of which the information was conveyed to prejudice the employer" (*id*.). The court further noted Cogger's delay in furnishing this information (from two to 12 days) "could not have been prejudicial in terms of investigating an incident which occurred four months before and to which there were no eyewitnesses besides the employee" (*id*. at 163).

In *Dafermo v. Municipality of Anchorage*, 941 P.2d 114 (Alaska 1997), the board held the employer was prejudiced because the injured worker did not give timely written notice of his alleged work injury (*id*. at 116). On appeal, the Alaska Supreme Court held the board's finding Dafermo's employer was prejudiced by the late notice was not supported by substantial evidence (*id*. at 117-118). *Dafermo* held prejudice to the employer caused by Dafermo's failure to give notice is not prejudice that renders the exception to the notice requirement inapplicable. The board found Dafermo was not required to provide notice until after he received his physician's letter. Thus, Dafermo's "failure to give notice" did not occur until 30 days had passed from his receiving this letter. Any prejudice to the employer resulting from Dafermo's failure to give notice would have had to occur between the date in October 1991 when the 30-day notice period expired and November 1, 1991, the date on which he gave notice in fact. Any prejudice stemming from events during 1985 or 1986, the period during which Dafermo failed to tell the employer he suspected his eye problems might be work-related, is irrelevant. *Dafermo* noted:

"Whatever prejudice that may have occurred then was not caused by Dafermo's failure to provide notice in October 1991" (*id*. at 118). Consequently, given these facts *Dafermo* said:

> No substantial evidence could support a finding that Dafermo's failure to give notice in October 1991 prejudiced MOA's interests in either early investigation or prompt medical diagnosis and treatment. Years had passed since Dafermo first began having eye problems. Any prejudice that resulted from MOA's inability to promptly investigate Dafermo's claim and provide early diagnosis and treatment had long since been sustained by the time of Dafermo's failure to provide notice. Furthermore, after all these years, there is no evidence that a delay of a few additional days or weeks during October 1991 would have had any significant impact on MOA's ability to investigate, secure a diagnosis, or provide treatment. . . . Because of this, and because Dafermo's 1986 conversations with Korz and Stout gave "agent[s] of the employer in charge of the business in the place where the injury occurred . . . knowledge of the injury," both the "knowledge" and "lack of prejudice" prongs of the AS 23.30.100(d)(1) exception to the notice requirement were satisfied. As a result, Dafermo's failure to provide notice within thirty days of his receipt of the Steinberg letter should have been excused (*id*. at 118-119).

Hammer v. City of Fairbanks, 953 P.2d 500 (Alaska 1998) held: "Knowledge" does not appear to be a "term of art." In context, it means no more than "awareness, information, or notice (footnote omitted) of the injury. . . ." (*id*. at 505).

In *McGahuey v. Whitestone Logging, Inc*., 262 P.3d 613 (Alaska 2011), a worker was involved in a bunkhouse fight. He did not file an injury report for the fight for over a year. When he finally filed, McGahuey alleged he injured his hip, lower back, and ear in the fight. His employer controverted benefits because McGahuey did not give timely injury notice. The worker then alleged he had verbally informed his supervisor about the injuries. After a hearing, the board determined McGahuey's claim was barred because he did not give his employer timely notice. The board performed an alternative analysis assuming McGahuey had given timely notice and decided the claim was not compensable on its merits. The commission affirmed the decision. The Alaska Supreme Court in *McGahuey* affirmed because the commission correctly determined substantial evidence in the record supported the board's decision on the claim's merits (*id*. at 615). *McGahuey* also said if "written notice is not given as required, the claim is barred" (*id*. at 616). However, *McGahuey* found, "the Commission and the Board both erred in failing to identify when the 30-day period for giving written notice began, but that the error was

harmless" (*id*). The court reiterated the 30-day period for giving written notice "can begin no earlier than when a compensable event first occurs" (*id*., citing *Cogger*, 936 P.2d 160). The court reasoned the date the 30-day period began to run is important not only in determining whether formal notice was timely but also in assessing prejudice to the employer if notice was late (*id*.).

> **AS 23.30.105. Time for filing of claims**. (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event . . . shall be four years from the date of injury . . . except that if payment of compensation has been made without an award on account of the injury . . . a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.
>
> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard. . . .

W. R. Grasle Co. v. Alaska Workmen's Compensation Board, 517 P.2d 999 (Alaska 1974), held a 1962 amendment to AS 23.30.105 abrogated the four-year statute limitations for filing a claim. The court reasoned:

> Although we have attempted to give meaning to every provision of the amended statute, we find no time frame in which the four-year statute may operate subsequent to the amendment. A disability which becomes apparent immediately upon the occurrence of some mishap will be more quickly barred by the two-year limitation; a disability which does not fall within the actual or chargeable knowledge of the claimant until four years have passed must be treated as a latent defect for which the four-year period is waived by the 1962 amendment. Only where the claimant acquires knowledge of the nature of his disability and its relation to his employment more than two years but less than four years from the date of 'injury' could the four-year period apply, but we would find a result allowing a two-year filing period to an applicant who acquired knowledge four or more years after the mishap and a shorter period to an applicant who acquired knowledge in more than two but less than four years incongruent with the liberal purposes motivating the latency amendment (*id*. at 1002).

In *Collins v. Arctic Builders, Inc.*., 31 P.3d 1286 (Alaska 2001), a worker was exposed to asbestos while on the job. More than 20 years later, the employee developed chest pain and was diagnosed with chronic asbestos disease. He became aware of this diagnosis in 1990 and claimed to have tried to file a claim for workers' compensation benefits in 1991, before the two-year statute had run. Because the board did not address this argument, the case was remanded. However, the Alaska Supreme Court in *Collins* noted AS 23.30.105 required the injured worker to file his claim within two years of his actual or chargeable knowledge of his disability and its relationship to his employment (*id*. at 1289). *Collins* held the injured worker had actual knowledge of his work-related asbestos injury when a physician told him his work-related asbestos exposure with the employer was probably the cause of his then-current disease.

> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter;
> (2) sufficient notice of the claim has been given. . . .
>
> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute (*id*.; emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or his injury and the employment. For injuries occurring before November 7, 2005, the employer may rebut the presumption at the second stage with evidence showing the injury did not arise out of or in the course of the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the November 7, 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center,* AWCAC Decision No. 150 at 7 (March 25, 2011). Because the employer's

evidence is considered by itself and not weighed against the employee's evidence, under either statutory scheme, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985). If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. He must prove that in relation to other causes, employment was "the substantial cause" of the disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered.

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) reiterated the well-settled rule: "'Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption" (*id*. at 573).

The presumption need not be applied when liability for or entitlement to benefits is not disputed, as in cases where only the benefit amount is at issue. *Rockney v. Boslough Construction Co*., 115 P.3d 1240 (Alaska 2005). Lay evidence in relatively uncomplicated cases is adequate to raise the presumption and rebut it. If an injured worker raises the presumption and the employer fails to rebut it, the board may rely on the injured workers' uncontradicted testimony that after his injury he was unable to perform all his job duties. *VECO, Inc. v. Wolfer*, 693 P.2d 858 (Alaska 1985). If an employer fails to rebut the raised presumption, the injured worker is entitled to benefits based solely on the raised but unrebutted presumption. *Williams v. State, Department of Revenue*, 938 P.2d 1065 (Alaska 1997).

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

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When

doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 at 11 (August 25, 2008).

> **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.
> . . .
>
> (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. . . .

> **AS 23.30.180. Permanent total disability**. (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . In all other cases permanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
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> (1) area of residence;
> (2) area of last employment;
> (3) the state of residence; and
> (4) the State of Alaska. . . .

In *J.B. Warrack Company v. Roan*, 418 P.2d 986, 988 (Alaska 1966), the Alaska Supreme Court described PTD and stated:

> For workmen's compensation purposes total disability does not necessarily mean a state of abject helplessness. It means the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. The evidence here discloses that Roan is a carpenter but is unable physically to follow that trade. He is not qualified by education or experience to do other than odd jobs provided they are not physically taxing. As the Supreme Court of Nebraska has pointed out, the 'odd job' man is a nondescript in the labor market, with whom industry has little patience and rarely hires. Work, if appellee could find any that he could do, would most likely be casual and intermittent. In these circumstances we believe the Board was justified in finding that appellee was entitled to an award for permanent total disability under the Alaska Workmen's Compensation Act (footnotes omitted).

Bailey v. Litwin Corp., 780 P.2d 1007, 1011 (Alaska 1989) addressed the question whether PTD benefits end at retirement:

> The permanent disability award constitutes a substitute remedy for the remedy which was lost when the Legislature took away the right to sue an employer for damages. If an applicant were denied a permanent disability award simply because he has retired, he would be deprived of his quid pro quo in that legislative bargain (citation omitted).
> . . .
>
> If permanent disability or death benefits become payable, they are not limited to the period of what would have been claimant's active working life. . . . This being so, if a man is permanently and totally disabled at age sixty, it is not correct to say that his benefits should be based on the theory that his probable future loss of earnings was only five years of earnings. The right to have compensation benefits continue into retirement years is built into the very idea of workmen's compensation as a self-sufficient social insurance mechanism.

> **AS 23.30.187. Effect of unemployment benefits**. Compensation is not payable to an employee under AS 23.30.180 or AS 23.30.185 for a week in which the employee receives unemployment benefits.

In *Alyeska Pipeline Service Co. v. DeShong*, 77 P.2d 1227 (Alaska 2003), the Alaska Supreme Court, in addressing the board's interpretation of a statute, affirmed the board's order allowing and requiring an injured worker to repay unemployment benefits before she could receive TTD. AS 23.30.187 states an injured worker cannot receive TTD in any week in which she also received unemployment. Yet the board found this did not preclude the worker from paying the unemployment back so she could receive board-ordered TTD (*id*. at 1237).

> **AS 23.30.225. Social security and pension or profit sharing plan offsets**. . . .
>
> (b) When it is determined that, in accordance with 42 U.S.C. 401 - 433, periodic disability benefits are payable to an employee . . . for an injury for which a claim has been filed under this chapter, weekly disability benefits payable under this chapter shall be offset by an amount by which the sum of (1) weekly benefits to which the employee is entitled under 42 U.S.C. 401 - 433, and (2) weekly disability benefits to which the employee would otherwise be entitled under this chapter, exceeds 80 percent of the employee's average weekly wages at the time of injury. . . .

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in . . . AS 09.30.070 (a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.

(b) The employer shall pay the interest

(1) on late-paid time-loss compensation to the employee or, if deceased, to the employee's beneficiary or estate;
(2) on late-paid death benefits to the widow, widower, child or children, or other beneficiary who is entitled to the death benefits, or the employee's estate;
(3) on late-paid medical benefits to

(A) the employee or, if deceased, to the employee's beneficiary or estate, if the employee has paid the provider or the medical benefits;
(B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits; or
(C) to the provider if the medical benefits have not been paid.

8 AAC 45.225. Social security . . . offsets. . . .
. . .

(b) An employer may reduce an employee's weekly compensation under AS 23.30.225(b) by

(1) getting a copy of the Social Security Administration's award showing the

(A) employee is being paid disability benefits;
(B) disability for which the benefits are paid;
(C) amount, month, and year of the employee's initial entitlement; and
(D) amount, month, and year of each dependent's initial entitlement;

(2) computing the reduction using the employee or beneficiary's initial entitlement, excluding any cost-of-living adjustments;

(3) completing, filing with the board, and serving upon the employee a petition requesting a board determination that the Social Security Administration is paying benefits as a result of the on-the-job injury; the petition must show how the reduction will be computed and be filed together with a copy of the Social Security Administration's award letter;

> (4) filing an affidavit of readiness for hearing in accordance with 8 AAC 45.070(b) ; and
>
> (5) after a hearing and an order by the board granting the reduction, completing a Compensation Report form showing the reduction, filing a copy with the board, and serving it upon the employee. . . .

ANALYSIS

1) Are Employee's claims against Fluor, AHTNA, Houston I, Davis and Shaw barred under AS 23.30.100?

The law requires an injured worker to give "to the board and to the employer" written notice of an injury "within 30 days of such injury." AS 23.30.100. Failure to give notice is an absolute bar to benefits, with several notable exceptions. *Cogger*. Failure to give such notice does not bar a claim if the employer or its agent in charge in the place where the injury occurred "had knowledge of the injury" and the employer or carrier has not been prejudiced by the employee's failure to give notice; or if the failure is excused on the ground for some satisfactory reason notice could not be given; or unless objection to the failure is raised at the first hearing. AS 23.30.100(d)(1-3). The law presumes "sufficient notice of a claim has been given." AS 23.30.120(a)(2). Five out of the six employers in this case have raised the timely-notice objection at the first hearing on Employee's case. Their objections are analyzed in order:

A) Fluor claims:

Employee has two claims against Fluor; one in 2003 and one in 2004. These are analyzed separately:

(i) March 14, 2003 injury:

Employee admitted he did not give anyone verbal or written notice that his March 14, 2003 lumbar spine injury incurred while lifting heavy cement bags was "work related" prior to filing his formal injury report in 2004. *Kolkman*. He did not give verbal or written notice because he was working, earning money, thought Fluor would send him home and he did not want to stop working. However, Employee also said his Fluor supervisors all saw him in the break room at Shemya icing his back, asked him what happened and he told them he hurt his back. "Knowledge" simply means "awareness." *Hammer*. Shemya, Alaska, is a remote site and

consequently most reasons why Employee could have "hurt his back" while on site would be compensable under the "remote site doctrine." *Allen*. It is unclear whether Employee contends the break room conversation was sufficient injury "notice" to his Fluor supervisors. If a factual issue is not disputed, the statutory presumption analysis need not be applied. AS 23.30.120; *Rockney*. However, it is clear Fluor contends no notice was given. Therefore, the statutory presumption of compensability analysis will be applied.

The word "claim" in the phrase "sufficient notice of the claim" in AS 23.30.120(a)(2) read in context means "injury" because AS 23.30.120(b) provides one acceptable excuse for an injured worker's failure to give "notice" under AS 23.30.100(d)(2). The latter section refers to "notice of injury." Therefore, "claim" is meant in this subsection to be interpreted broadly and "claim" and "injury" are used interchangeably in this section. Whether Employee gave "notice of an injury" to his supervisors and whether Fluor therefore had actual knowledge of his injury is not a complex issue requiring any special or unusual evidence. Employee raised the statutory presumption that he gave "sufficient notice of the claim," *i.e*., of his "injury," with his testimony that he told his Fluor supervisors on site in Shemya that he "hurt his back." He did not need to tell them he thought his injury was work-related. *Kolkman*. This evidence raised the notice presumption and shifted the production burden to Fluor. Fluor offered no contrary evidence disputing Employee's testimony. Fluor did not overcome the raised presumption. Therefore, Employee prevails on this notice issue for the March 14, 2003 injury on the raised but unrebutted presumption. *Williams*.

Since Employee told his Fluor supervisors he hurt his back, Fluor had actual "knowledge" of the injury. AS 23.20.100(d)(1) prevents Employee's claim from being barred because Fluor had actual knowledge of the injury if Fluor was not prejudiced by Employee's failure to give written notice. *Hammer*. Fluor presented argument but no evidence that it was prejudiced by Employee's failure to give written notice of his March 14, 2003 lumbar injury. Employee's supervisors could have sent him from the break room to the clinic or investigated what he was doing but chose to do neither. Therefore, AS 23.30.100(d)(1) saves this claim against Fluor and it will not be barred.

(ii) January 14, 2004 injury:

Fluor in its May 16, 2011 answer to Employee's April 25, 2011 claim expressly did not deny he was injured on January 14, 2004, and admitted he injured his shoulder on January 14, 2014, though it thought Employee only suffered a "bruise" based on what Employee thought at the time. Nevertheless, whether Employee gave notice of his January 14, 2004 lumbar spine and left shoulder injury to Fluor is still apparently disputed. Therefore, the statutory presumption of compensability applies to this issue. AS 23.30.120(a)(2). Again, these are not medically complex injuries. *Wolfer*. Employee raised the presumption with his own testimony. Employee said his foreman told him to assist in lifting and moving a heavy power-washer. Upon lifting it, Employee had to let go because he hurt his shoulder and back. Employee's foreman was Fluor's agent in charge of business in the place where the injury occurred. The foreman saw and heard Employee's complaints. He shortly thereafter told additional Fluor supervisors about his back and shoulder injuries. This raises the presumption that sufficient injury notice was given, and shifts the production burden to Fluor. *Meek.*

Fluor offered no testimony rebutting Employee's testimony. Arguably, the safety manager's statement on the injury report: "Safety manager does not agree there was no report of injury," though ambiguous because it lacks punctuation, could be read as denying Employee told anyone about his injury. *Tolbert*. Therefore, Fluor's injury arguably rebutted the sufficient notice presumption. Employee must prove he gave notice by a preponderance of the evidence. *Runstrom*. Employee's account of lifting the power-washer and his report to his foreman and other Fluor supervisors thereafter has been consistent and credible throughout his statements, depositions and hearing testimony. AS 23.30.122; *Smith*. Employee gave notice to his Fluor supervisor in charge of the business in the place where the injury occurred and Fluor had actual "knowledge" of the injury. *Hammer*. Thus, AS 23.30.100(d)(1) prevents Employee's claim from being barred because Fluor had actual knowledge of the injury if Fluor was not prejudiced by Employee's failure to give written notice. Again, Fluor presented argument but no evidence it was prejudiced by Employee's failure to give written notice of his January 14, 2004 lumbar spine and left shoulder injuries. Fluor could have investigated further or required Employee to get medical attention but did not. Therefore, AS 23.30.100(d)(1) also saves this claim against Fluor and it will not be barred.

B) AHTNA claim:

Employee worked for AHTNA from approximately September 20, 2004 through November 8, 2004. Employee's corrected injury report lists September 9, 2004 as the date he was injured with AHTNA. How this administrative injury date was derived is unclear, as it occurred before Employee worked for AHTNA. AHTNA contends Employee's claim against it is barred under AS 23.30.100 because Employee did not provide it with timely notice of any lumbar spine or left shoulder injury. It is undisputed Employee did not file a written injury report with AHTNA until December 17, 2012. It is undisputed this is more than 30 days after the last day Employee worked for AHTNA in 2004. *McGahuey*. There is no evidence any AHTNA supervisor had actual knowledge Employee had any low back or left shoulder injury while in its employ. *Hammer*. The sufficient notice presumption analysis therefore need not be applied. AS 23.30.120(a)(2); *Rockney*. AHTNA raised the notice issue at the first hearing on the matter. AS 23.30.100(d)(3). Therefore, Employee's claim against AHTNA can be saved only if there is a reason to "excuse" Employee's delay in giving notice, and Employee bears the burden of proof. AS 23.30.100(d)(2).

Employee acknowledged, in his lay opinion, he had no specific injurious event while employed with AHTNA. It was not until June 1, 2012, when Dr. Tapper provided his report that it became apparent he believed Employee's AHTNA employment was included in Dr. Tapper's understanding of "the substantial cause" of Employee's 2009 disability and need for medical treatment. Therefore, since before this date no physician had stated his work with AHTNA caused injury to his low back or left shoulder, Employee would not have had any reason to give verbal or written notice to AHTNA. *Kolkman*. By definition, according to Dr. Tapper, any injury Employee suffered with AHTNA was "latent" rather than obvious. Therefore, Employee's lack of any knowledge there was a causal connection between his AHTNA employment and his lumbar spine and left shoulder injuries is a satisfactory reason notice could not be given within 30 days of Employee's last AHTNA employment.

The fact Employee indisputably did not give AHTNA written notice of injury within 30 days of Dr. Tapper's June 1, 2012 SIME report is immaterial. By the time Employee obtained Dr. Tapper's June 1, 2012 SIME report making the causal connection, approximately eight years had

passed since Employee last worked for AHTNA. At that point, there was still no injurious event for AHTNA to "investigate," and as there never was a singular injurious event, AHTNA could make no contemporaneous investigation eight years after-the-fact. Sending Employee to a physician for evaluation and treatment for a 2004 injury was possible but would have been fruitless, other than for forensic reasons. AHTNA could have done an EME notwithstanding any time delays. Eight years after-the-fact, the purposes behind AS 23.30.100 were no longer applicable. *Dafermo*. Therefore, the law and this decision excuse Employee's failure to give timely written notice of an AHTNA injury under AS 23.30.100(d)(2), and his claim against AHTNA will not be barred under AS 23.30.100(a). However, he loses the statutory presumption of compensability on his claim's merits against AHTNA. AS 23.30.120(b).

C) Houston I claim:

Employee worked for Houston I from approximately May 9, 2005 through October 10, 2005. Employee's injury report lists May 5, 2005 as the date he was injured with Houston I. How this injury date came to be is unclear, as it occurred before Employee worked for Houston I. It is undisputed Employee did not file a written injury report with Houston I until December 17, 2012. It is undisputed this is more than 30 days after the last day Employee worked for Houston I in October 2005. *McGahuey*. The statutory presumption analysis need not be applied. *Rockney*. The remaining analysis for the Houston I injury is identical to the analysis for the AHTNA injury, and that analysis is included here by reference for brevity. Seven years after-the-fact, the purposes behind AS 23.30.100 were no longer applicable. *Dafermo*. Therefore, the law excuses Employee's failure to give timely written notice of a Houston I injury under AS 23.30.100(d)(2), and his claim against Houston I will not be barred under AS 23.30.100(a). He loses the statutory presumption of compensability on his claim's merits against Houston I. AS 23.30.120(b).

D) Davis claim:

Employee worked for Davis from approximately January 9, 2006 through April 20, 2006. It is undisputed Employee did not file a written injury report with Davis until December 17, 2012. It is undisputed this is more than 30 days after the last day Employee worked for Davis in April 2006. *McGahuey*. The statutory presumption analysis need not be applied. *Rockney*. The

remaining analysis for the Davis injury is identical to the AHTNA analysis. Six years after-the-fact, the purposes behind AS 23.30.100 were no longer applicable. *Dafermo*. Therefore, the law excuses Employee's failure to give timely written notice of a Davis injury under AS 23.30.100(d)(2), and his claim against Davis will not be barred under AS 23.30.100(a). He loses the statutory presumption of compensability on his claim's merits against Davis. AS 23.30.120(b).

E) Shaw claim:

Employee worked for Shaw from approximately May 28, 2009 through September 25, 2009. Employee's injury report lists May 5, 2009 as the date he was injured with Shaw. Again, this administrative injury date is before Employee worked for Shaw. It is undisputed Employee did not file a written injury report with Shaw until December 17, 2012. It is undisputed this is more than 30 days after the last day Employee worked for Davis in September 2009. *McGahuey*. The statutory presumption analysis need not be applied. *Rockney*. The remaining analysis for the Davis injury is identical to the AHTNA analysis. Three years after-the-fact, the purposes behind AS 23.30.100 were no longer applicable. *Dafermo*. Therefore, the law excuses Employee's failure to give timely written notice of a Shaw injury under AS 23.30.100(d)(2), and his claim against Shaw will not be barred under AS 23.30.100(a). He loses the statutory presumption of compensability on his claim's merits against Shaw. AS 23.30.120(b).

2) Are Employee's claims against Fluor, AHTNA and Shaw barred under AS 23.30.105?

Fluor contends Employee's disability claims against it are barred under AS 23.30.105 because more than four years passed from the injury date, without Employee filing a disability claim. *Grasle*. Alternately, as Fluor never paid him any disability benefits, it contends Employee had to file a disability claim no later than April 14, 2008, four years after his last Fluor injury date. Since he filed no disability claim against Fluor until January 17, 2012, Fluor contends his claim is barred. AHTNA makes a similar argument but contends Employee's claim against it should be barred as of March 14, 2008. As Employee's claim against AHTNA was filed December 20, 2012, it contends his claim against AHTNA is barred. Shaw contends Employee last worked for

it in September 2009, but filed no claim against Shaw until June 2013, nearly four years after his Shaw employment ended. Shaw contends Employee's claim against it should be barred.

Employee contends he did not have a valid PTD claim against any employer until he became disabled in September 2009. He further contends Dr. Tapper's July 1, 2012 SIME report was the first medical opinion his disability might be attributable to his subsequent employers since 2004, including AHTNA and Shaw. Since he filed claims against Fluor on July 7, 2011, AHTNA on December 24, 2012 and Shaw on June 17, 2013, Employee contends his disability claims against these employers are not barred under AS 23.30.105(a).

Employee seeks two main benefit categories from Fluor, AHTNA and Shaw: PTD and medical benefits. By its plain language, the law barring untimely claims only applies to "disability" benefits such as PTD; it does not apply to medical benefits. AS 23.30.105(a).

This decision found Employee became disabled on October 9, 2009. Therefore, Employee's July 7, 2011 claim against Fluor was timely filed within two years of the date Employee became disabled and will not be barred. AS 23.30.105(a); *Grasle*. Because Employee had no specific injurious event while working for AHTNA or Shaw, Dr. Tapper's June 1, 2012 SIME report became the first medical evidence linking Employee's subsequent employment with AHTNA and Shaw to his disability and need for treatment. June 1, 2012 became the date Employee had knowledge of "the nature of his disability" and "its relation to his employment," with AHTNA and Shaw, after his 2009 disablement. By law, Employee had two years from June 1, 2012 to file claims against AHTNA and Shaw. AS 23.30.105(a); *Collins*. Since Employee filed his claim against AHTNA on December 24, 2012, and his claim against Shaw on June 17, 2013, both claims were timely filed and neither will be barred under AS 23.30.105.

3) Which, if any, employer is responsible for Employee's need for left shoulder and low back treatment beginning in 2006, and continuing?

Part of Employee's medical benefits claim includes his request for reimbursement of $2,000 per year, for five years, which he claims he paid out of his own pocket as his health insurance deductible. He seeks a $10,000 award for this from the responsible employer. The only

evidence on this issue is Employee's testimony that he paid a $2,000 deductible on his health insurance annually. This is inadequate to raise the statutory presumption of compensability that this claim comes within the Act's provisions. AS 23.30.120(a)(1). All Employee's testimony shows is that he paid $2,000 annually as a deductible for some medical care he received, but not necessarily for his left shoulder and low back subject of this claim. For example, without additional evidence, it cannot be determined whether this deductible was paid to medical providers for Employee's bilateral knee operations or other medical conditions not addressed in this decision. For the same reason, Employee cannot prove this part of his claim by a preponderance of the evidence. *Saxton*. Perhaps Employee's non-work-related medical expenses used up his deductible before his health insurer began paying for work-related injuries. Employee presented no bills or receipts showing the first $2,000 he paid annually for medical care deductibles went to medical providers treating his left shoulder or low back injuries. Employee's claim for an order reimbursing $10,000 for insurance deductibles will be denied.

Employee still retains the presumption of compensability against Fluor. AS 23.30.100(d)(1). Houston II did not raise the AS 23.30.100 defense, so Employee retains the presumption of compensability against Houston II. However, because the law and this decision excused Employee's failure to give written notice of his injuries to AHTNA, Houston I, Davis and Shaw within 30 days, he loses the presumption of compensability on the merits of his claims against these employers. AS 23.30.100(d)(2); AS 23.30.120(b).

Employee seeks medical benefits since 2006 for his left shoulder and low back from the legally responsible employer. The only reason AHTNA, Houston I, Davis, Houston II and Shaw are parties to this claim is because Dr. Tapper's SIME report suggested all employment with these employers combined was "the substantial cause" of Employee's need for medical treatment since 2004. Nevertheless, as Employee and other parties have raised the last injurious exposure rule, these employers' potential liability will be addressed. *Saling*. The last prehearing conference summary in this case lists Employee's left shoulder and low back as the only injuries to be decided. Therefore, this decision will not address the right shoulder. 8 AAC 45.065(c).

A) Left shoulder:

Because the last injurious exposure rule has been invoked, this decision will analyze the left shoulder claim beginning with Employee's most recent employer and work backwards.

(i) Shaw:

Because he lost the presumption of compensability against Shaw, Employee must prove his Shaw employment was "the substantial cause" of his need for left shoulder medical care since 2006. The key inquiry is not what caused Employee's underlying left shoulder condition or what the substantial cause of his left shoulder condition is either. *Thornton*; *Hester*. Rather, the relevant question is the substantial cause of the need to treat his left shoulder. AS 23.30.010(a). Since Employee did not begin working for Shaw until May 28, 2009, his Shaw employment could not be the substantial cause of his need for medical treatment before May 28, 2009 and his claim for medical treatment from Shaw before May 28, 2009 will be denied.

As for medical treatment Employee received for his left shoulder after May 28, 2009, and Shaw's potential liability for it, this decision must evaluate the relative contribution of all causes of Employee's need for medical treatment for his left shoulder. *Hanson.* Based upon the voluminous medical opinions referenced in the factual findings above, these arguably include: Whatever caused his December 27, 2001 and February 12, 2002 left shoulder pain; his March 14, 2003 Fluor injury; his January 14, 2004 Fluor injury; his AHTNA, Houston I, Davis, Houston II and Shaw employment; his trip and fall at the Moose's Tooth restaurant in 2008; a combination of all employment he held since 2004; his obesity; aging; and natural degeneration through time.

Shaw is responsible for medical treatment to Employee's left shoulder only if the Shaw employment, in relation to these other enumerated causes, was "the substantial cause" of the need for any left shoulder medical treatment. *Hanson*. Employee clearly had a preexisting left shoulder condition when he began working for Shaw. The record discloses little about what caused Employee's December 27, 2001 and February 12, 2002 left shoulder pain. Thus, sparse information leads to the conclusion those are not significant causative factors. Little evidence suggests Employee's March 14, 2003 Fluor injury affected his left shoulder, ruling it out as a causative factor. Employee's January 14, 2004 Fluor injury is the main event to which

Employee ascribes causation for his subsequent left shoulder symptoms and need for treatment. Dr. Laufer supports this view. Therefore, the January 14, 2004 Fluor injury remains in contention as a causative factor. Employee's AHTNA, Houston I, Davis, Houston II, and Shaw employment probably irritated Employee's left shoulder and caused symptoms to some extent temporarily. Little is known about his trip and fall at the Moose's Tooth restaurant in 2008 and the medical records do not support a significant increase in left shoulder symptoms attributable to that event. Dr. Tapper's view that a combination of all employment he held since 2004 is the substantial cause of Employee's left shoulder issues is not helpful in this legal analysis. Employee's obesity never stopped him from working throughout his adult life, and there is no clear connection to obesity, which in his case is mainly abdominal, and symptoms in the left shoulder. Aging and natural degeneration of his left shoulder through time are certainly possibilities, though Employee's left shoulder, according to Dr. Laufer, was in far worse shape than his "history or symptoms would suggest." These remaining, possible causative factors do not by comparison outweigh the January 14, 2004 Fluor injury as the substantial cause of Employee's left shoulder symptoms and resulting need for medical treatment beginning in 2006.

Contrary to Shaw's contentions, the Act's 2005 amendments did not abrogate the last injurious exposure rule. *Dennis*. Nevertheless, the only complaint Employee had with his left shoulder while working for Shaw was pain while using a weed wacker. He did not think he injured his left shoulder while working for Shaw. Based upon this evidence, Employee's Shaw employment was at best a minimal cause of need for left shoulder medical treatment from the time Employee began working for Shaw in May 2009 and thereafter. However, when compared to the other causative factors Shaw employment was not "the substantial cause" of the need for any left shoulder treatment from May 28, 2009 through the present. The Shaw employment was not so important in bringing about the need for left shoulder treatment "that a reasonable person would regard it as a cause and attach responsibility to it." *Abbott; Peek.* Therefore, the last injurious exposure does not place liability on Shaw and Employee's claim for left shoulder medical care against Shaw will be denied. *Rodgers & Babler*.

(ii) Houston II:

Employee had a preexisting left shoulder condition when he began working for Houston II. *Thornton*. Employee retains the presumption of compensability against Houston II. He raises the presumption with Dr. Tapper's SIME testimony stating all employment since 2004 was the substantial cause of Employee's need for medical treatment. Houston II rebuts the raised presumption through Dr. Holley's EME report, which states the need to treat Employee's left shoulder arose from natural, degenerative changes and not from any employment. This shifts the burden back to Employee, who must prove his Houston II employment was the substantial cause of his need for left shoulder treatment since 2006. AS 23.30.120; *Runstrom.*

Employee described his Houston II employment as lengthy, heavy duty labor. Among other things, Employee frequently used hand tools such as picks and power-washers to clean pipeline pigs. Employee worked for Houston II from approximately April 26, 2006 through December 8, 2008, a period far longer than he worked for any other defendant employer. However, the length of time Employee worked for this employer is not necessarily the dispositive factor in determining whether or not Employee's work with Houston II was "the substantial cause" of his need for left shoulder medical care from April 26, 2006 forward. Clearly, any claim Employee has for left shoulder medical care against Houston II before April 26, 2006 will be denied, as he was not working for Houston II at that time.

This decision must weigh the same causative factors it did in the Shaw analysis, and that analysis is incorporated here by reference for brevity. The fact Employee's left shoulder had significant degenerative changes evident on radiographic images before he worked for Houston II, though material evidence is not dispositive. *Thornton*. Employee had more lumbar epidural steroid injections while working for Houston II than he did working for any other employer, partly because he worked for this employer for a longer time. Employee had four lumbar epidural injections in 2006, two and 2007, and five in 2008. Though epidural steroid injections are not directly related to Employee's left shoulder, the number and frequency of these injections could demonstrate Employee was working hard at Houston II and required more shots to alleviate his lower back pain. A reasonable mind could conclude Employee was also using his left shoulder while he was working hard, and this conclusion is supported by Employee's general testimony

concerning his Houston II employment. Nevertheless, Employee did not believe he injured his left shoulder while working for Houston II. AS 23.30.122.

Though a specific injurious event at Houston II, or with any other employer, is not necessary to constitute an "injury" under Alaska law, injured workers will frequently notice the difference between generalized, chronic pain and an unusual increase in such pain brought on by strenuous work activity. *Thornton*. The weight of the evidence makes a more compelling, closer case against Houston II than it did against Shaw for Employee's left shoulder. The Houston II employment was "a factor" in causing Employee to have left shoulder symptoms. However, weighing all the above evidence, as was the case with Shaw, it cannot be said Employee's Houston II employment was "the substantial cause" of his need for left shoulder medical care from 2006 forward. It was, at best, a relatively minor cause. AS 23.30.122; *Abbott; Peek*. Therefore, the last injurious exposure rule does not place liability on this employer and Employee's claim for medical treatment for his left shoulder against Houston II will be denied. *Rogers & Babler*.

(iii) **Davis:**

Employee had a pre-existing left shoulder condition when he began working for Davis. Because he lost the presumption of compensability against this employer, Employee must prove his Davis employment was "the substantial cause" of his need for left shoulder medical care since 2006. AS 23.30.010(a). Employee worked for Davis from approximately January 9, 2006 through April 20, 2006. Employee did not think he injured his left shoulder while working for Davis. In fact, he said his Davis employment was a "pretty easy job actually." Davis' evidence and arguments focus on the substantial cause of Employee's underlying "condition" as the determining factor. Davis' analysis is incorrect, as the law requires employment to be the substantial cause of the need for medical treatment, not the substantial cause of the underlying condition being treated. AS 23.30.010(a). Nevertheless, the last injurious exposure analysis for Davis is identical to the Shaw analysis, which is incorporated here. Though Employee's Davis employment possibly caused minimal left shoulder pain, based on the factual findings above and the Shaw analysis the Davis employment was not the substantial cause of his need for left shoulder medical care. AS 23.30.122; *Abbott; Peek*. A reasonable mind would not attribute

liability to Davis and the last injurious exposure rule will not place liability on Davis for the left shoulder. Employee's claim against Davis for left shoulder care will be denied. *Rodgers & Babler*.

(iv) Houston I:

Because he lost the presumption of compensability against this employer, Employee must prove his claim by a preponderance of the evidence. AS 23.30.120(b). Employee had a preexisting left shoulder condition when he began working for Houston I. *Thornton*. Since Employee's work for Houston I preceded the November 7, 2005 statutory changes, Employee must only prove his Houston I employment was "a substantial factor" in his need for left shoulder medical care from 2006 forward. Under this analysis, Employee may have numerous "substantial factors" contributing to his need for medical care, and if his Houston I employment was among those substantial factors, it too is "a substantial factor," and liability would be placed upon Houston I under the last injurious exposure rule. *Saling*. Employee worked for Houston I for about five months in 2005. He did not think he injured his left shoulder while working for Houston I. Most the EME physicians do not think Employee's 2005 employment with Houston I was a substantial factor in his need for left shoulder treatment. His attending physician did not think so either. Their lay and expert opinions, respectively, are given considerable weight. AS 23.30.122. Only Dr. Tapper attributes cause to Houston I, and that was in conjunction with his work for all post-Fluor employers. His opinion is given less weight as it does not address the medical-legal burden of proof. AS 23.30.122. There is little if any evidence suggesting the Houston I work played any role in Employee's need for left shoulder treatment in 2006. The medical evidence weighs heavily against Houston I being a substantial factor in Employee's need for left shoulder medical treatment beginning in 2006 and a reasonable mind would not attribute cause to it. AS 23.30.122; *Abbott; Peek*. Considering all the above factual findings and medical evidence, Employee's work for Houston I in 2005 was not a substantial factor causing the need for medical treatment to his left shoulder beginning in 2006 and thereafter. The last injurious exposure rule will not place liability on Houston I and his claim for left shoulder medical care against Houston I one will be denied. *Rodgers & Babler*.

(v) AHTNA:

Because he lost the presumption of compensability against this employer, Employee must prove his AHTNA employment was "a substantial factor" in his need for left shoulder medical care since 2006. AS 23.30.120(b). The analysis for this employer is identical to the Houston I analysis, which is incorporated by reference. Employee worked for AHTNA from around September 20, 2004 through November 8, 2004. He and his attending physician did not think he injured his left shoulder while working for AHTNA. Their opinions are given considerable weight. AS 23.30.122. Only Dr. Tapper makes a causation link and his opinion is lesser weighed for the reasons already stated. AS 23.30.122; *Smith*. As was the case with the other employers, based on the totality of evidence, a reasonable person would not regard Employee's work for AHTNA as a cause and attach responsibility to it for Employee's left shoulder treatment. *Abbott; Peek*. Therefore, the last injurious exposure rule does not place liability on AHTNA and his claim against AHTNA for his left shoulder will be denied. *Rodgers & Babler*.

(vi) Fluor:

The above analysis leaves Fluor as the remaining employer that could be liable for Employee's left shoulder medical treatment beginning in 2006. Employee retains the presumption of compensability against Fluor. AS 23.30.120. He raises the presumption with Dr. Laufer's testimony stating Employee's Fluor employment was a substantial factor in Employee's need for medical treatment, and with his lay testimony that his left shoulder injury started on January 14, 2004. *Meek*. Fluor rebuts the raised presumption through Dr. Holley's EME report, which states the need to treat Employee's left shoulder arose from natural, degenerative changes and not from any employment, and Dr. Yodlowski's opinion that genetics probably play some role in Employee's left shoulder condition. *Tolbert*. The burden shifts to Employee, who must prove his Fluor employment was a substantial factor in his need for left shoulder treatment since 2006. *Runstrom*; *Saxton*.

Both Employee and Dr. Laufer are credible witnesses. AS 23.30.122; *Smith*. Employee consistently blamed his January 14, 2004 Fluor injury as the start of his left shoulder symptoms. Dr. Laufer recalled Employee mentioning his shoulders early-on following the January 14, 2004 power-washer incident, and confessed he may not have included every complaint in his medical

records as he only had 30 minutes to see Employee at each visit. Employee typically had numerous complaints. Experience demonstrates that medical records are not always completely accurate, notwithstanding Dr. Yodlowski's contrary view. Medical records from treating physicians are not necessarily kept in the same manner as those for EME doctors, as most treating doctors probably do not expect to be cross-examined. This is especially true in this case, where Dr. Laufer said "causation" was never his main concern while treating Employee.

Employee described a particular event wherein he and others lifted a power-washer weighing approximately 300 pounds. It is not difficult to imagine lifting such an object could cause or could aggravate, accelerate, or combine with a possibly preexisting left shoulder condition and cause Employee left shoulder symptoms. *Hester*. Though Employee does not need to prove the January 14, 2004 power-washing-lifting incident was a substantial factor causing his underlying left shoulder condition, which was significant, such a lifting incident could conceivably cause at least some of the internal issues found on Employee's later radiographic studies. *Thornton*; *Hester*. As Dr. Laufer said, one could damage or aggravate already damaged shoulder components in a specific injury and then continue to work and even pass lifting tests, as Employee did, depending upon how the lifts were performed. Employee successfully lifted 70 pounds from floor to chest level eight to 10 times on several occasions after the January 14, 2004 injury. Had he needed to lift this amount overhead, perhaps he might not have passed these tests. But he passed them and continued to work. Employee has a high pain threshold and unusual determination to keep working, as evidenced by his frostbitten and amputated fingers and gangrenous gallbladder, the latter discovered only as an incidental finding when he complained of "abdominal pain."

He had a specific, identifiable injury while lifting the power-washer and immediate shoulder pain. A specific event is not required to constitute an "injury" under Alaska law, contrary to Dr. Yodlowski's implied position. *Thornton*. Employee's injury account and Dr. Laufer's medical opinions are given greater weight than opinions from physicians who saw Employee only once for forensic examinations, and came to different conclusions about his left shoulder. AS 23.30.122; *Moore*. Other than Dr. Yodlowski's statement genetics "probably" played some role in the left shoulder "condition," there is no medical evidence documenting this theory. Post-

2004 employment has already been eliminated as a substantial factor or the substantial cause requiring Employee's left shoulder treatment. Dr. Tapper's SIME report is given less weight because his opinion does not address the proper legal standards. AS 23.30.122; *Smith*. The weight of evidence shows Employee began treating for his left shoulder injury as soon as he felt his symptoms warranted it following the January 14, 2004 injury. He had other pressing concerns, primarily his lumbar spine, to deal with.

The record demonstrates Employee never actually ended his left shoulder treatment but rather, obtained just enough ongoing medical care for his left shoulder to enable him to continue working. In short, Employee injured his left shoulder on January 14, 2004, while lifting the power-washer, never re-injured his left shoulder while working for another employer or through a non-work-related incident, and continued to treat his Fluor left shoulder injury throughout his employment until the 25th lumbar epidural steroid injection ended his employment permanently. At that point, there was no reason for Employee to further delay medical treatment for his left shoulder, as he was already disabled by his back. Therefore, the weight of medical and credible lay evidence supports the conclusion that Fluor is responsible for Employee's left shoulder medical care beginning in 2006. Employee's Fluor employment was so important in bringing about his need for left shoulder treatment "that a reasonable person would regard it as a cause and attach responsibility to it." *Abbott; Peek*. The 2010 left shoulder surgery was simply the culmination of more conservative treatment, which no longer worked, and probably could have occurred much sooner, but did not, because Employee continued to work successfully.

This result comports with the fact that in 2006 Fluor accepted liability for Employee's past medical bills. This decision further recognizes the fact Fluor admitted in its answer to his claim that Employee hurt his left shoulder in 2004. The fact Employee later stated it was only a "bruise" and got better is immaterial. He is not a physician and so long as he could get an injection or take pain pills and continue working, it is not surprising the internal derangement of Employee's left shoulder was of no immediate concern to him. Similarly, the fact Employee could have had left shoulder surgery years earlier does not obviate the fact that he did not. No physician ever told him to stop working because of his left shoulder. Some may have suggested it, but none ordered him to stop, nor could they stop him from working. Employee consistently

passed physical examinations at subsequent employment and Dr. Laufer consistently released him to full duty work. Employee treated the results of the January 14, 2004 Fluor injury as conservatively as he could, for as long as he could until the Fluor left shoulder injury required surgical intervention. Therefore, Employee's claim for left shoulder medical treatment against Fluor from 2006 forward will be granted. *Rodgers & Babler*.

B) Low back.

Employee raised the presumption with his testimony and Dr. Laufer's opinions. *Meek.* Fluor rebuts it with Dr. Yodlowski's opinions. *Tolbert.* The same analysis for the left shoulder injury is incorporated here by reference, for brevity. The only additional "substantial factor" for the low back, not included with the left shoulder is Employee's 1992 compression fracture at L4, which at least one physician said was "a factor" contributing to his low back symptoms. Applying the same last injurious exposure analysis, incorporated here by reference for brevity, the result is the same. All subsequent employers are ruled out as either a substantial factor or the substantial cause of Employee's need for low back treatment since 2006 and continuing for the same reasons as they were for the left shoulder. *Saling*.

The case against Fluor for the low back is more clear-cut than it was for the left shoulder. Employee hurt his low back twice while working for Fluor. The 2003 and 2004 Fluor injuries set in motion symptoms for Employee's lumbar spine, notwithstanding the genesis of the underlying spinal "conditions." *Hester*. There is no question repeatedly lifting 94 pound bags of cement and assisting to lift a 300 pound power-washer can cause low back pain. It is for this low back pain, not the underlying condition, that Employee began receiving epidural steroid injections. As was the case with Employee's left shoulder, Employee never ceased treating the effects from the Fluor low back injuries, notwithstanding his work for other employers. Dr. Laufer, as Employee's long-time attending physician, is the person most familiar with Employee's medical situation. Dr. Laufer prescribed epidural steroid injections, pain medication and other treatment so Employee could continue working and regularly examined him after his two Fluor injuries. He attributes Employee's need for lumbar spine medical care to the Fluor incidents. His opinion is given greatest weight. AS 23.30.122; *Moore*.

EME physicians have focused primarily on causation of Employee's underlying spinal "conditions." As was the case with the left shoulder, the focus is not on what caused Employee's underlying spinal conditions. The Fluor employment does not have to be a substantial factor causing any spinal condition. It simply has to be a substantial factor causing Employee's need to treat his lumbar spine symptoms. The credible medical and lay evidence in this case amply shows it was. Therefore, Dr. Yodlowski's opinion and evidence that genetic and hereditary factors are the predominant cause of "degenerative disc disease" is immaterial. Employee does not contend his work for Fluor caused degenerative disc disease or any other spinal condition. For sure, a work injury could cause a medical condition. For example, a person could fall from a ladder and break a femur. The "condition" is a broken femur, and the employment caused the condition. Many work injuries, however, are not so clear-cut. As for Fluor, all Employee has to show is that his Fluor employment was "a substantial factor" causing the need for medical treatment to his low back. It could be one of many substantial factors, including heredity, weight, age, and normal degeneration, but so long as it is "a" substantial factor, Fluor is liable. Employee's weight is no doubt "a substantial factor" too. But he has been obese most of his adult life and this factor never stopped him from working before his Fluor injuries, and for many years after. He has met his burden of proof and persuasion in this regard. AS 23.30.122; *Saxton*.

Employee's case is extraordinary. He is the antithesis of the average injured worker. A typical injured worker in a contested case has a work injury, goes to his physician, obtains medical treatment and gets restricted from work. Following a period of medical treatment and disability, the injured worker is normally sent to an EME. Frequently, the EME physician will opine the injured worker needs no more medical care and is released to full-time duty without restrictions. In contested cases, injured workers frequently dispute this assertion and claim they cannot work and need more medical care. Occasionally, allegations of secondary gain, malingering or disability syndrome are suggested as possible motivators for why an injured person has not returned to work.

By contrast, Employee has a strong work ethic and high pain tolerance. Even after being injured twice at Fluor, he still wanted to continue working. Some physicians suggested he might want to consider changing careers, and said he might someday need lumbar surgery. He did everything

he could to stay in the workforce and his attending physician regularly released him to work without any physical restrictions. Employee consistently passed strenuous pre-hire physical examinations indicating his ability to continue working, notwithstanding his left shoulder and low back "conditions." Employee advised each successive employer about his various physical infirmities and each hired him. His honesty is refreshing. The evidence shows Employee was successful in every job he held after his Fluor employment. There is no evidence Employee was feigning work or "gold bricking." In short, Employee simply kept treating the effects from his Fluor injury until the 25th epidural steroid injection went bad, which required additional medical care to Employee's lumbar spine. The last medical care (extensive surgery) for the previous medical care (epidural steroid injections) is what disabled him.

Dr. Yodlowski's opinions are given little weight as she attributed everything but Employee's Fluor employment injuries to the "a substantial cause" list. *Smith*. Drs. Yodlowski's, Goler's and Holley's opinions are given little weight because they mostly addressed the cause of Employee's underlying low back "conditions," rather than the need for medical treatment. *Hester*. Dr. Yodlowski said the Fluor incidents were only a temporary "sprain/strain," both of which resolved within a few months. Nevertheless, she gave Employee a two percent permanent partial impairment rating for his low back. Her opinions sounded like advocacy for Fluor. AS 23.30.122. In some regards, her opinions support Employee's position. For example, Dr. Yodlowski opined continued work and activity would actually make Employee's symptoms feel better. Assuming this were true, no wonder he could continue to work for other employers after his Fluor injuries until the 25th epidural went bad. Further, Dr. Yodlowski admitted the January 14, 2004 Fluor injury caused "symptomatic exacerbation" of the underlying lumbar condition, which is precisely why Dr. Laufer began prescribing epidural steroid injections. She also conceded the "excessive" epidural steroid injections required two surgical repairs. These two surgical repairs -- in other words the ultimate treatments to address the results of the previous treatments -- are what disabled Employee in 2009. All physicians who offered an opinion on the subject agreed the epidural steroid injections are what caused the need for the two lumbar surgeries in 2009. *Rockney*; *Moore*.

Dr. Holley said Employee obtained the epidural injections to "mask pain" so he could continue to work. It worked, until the 25th injection. Dr. Tapper's opinions are given less weight because he questioned Employee's "credibility" because he was "bound and determined" to work. This is an unusual statement as normally doctors question an injured worker's motives and honesty when he refuses to work. Dr. Tapper's opinions are further weakened because he speculates Employee probably had low back treatment as far back as the 90s, which is not supported by the evidence. *Smith*. The fact some surgeons stated Employee could have had lumbar surgery years sooner is immaterial. As Dr. Tapper stated, all surgeons look at spondylolisthesis "as a surgical lesion" even though having surgery for this condition admittedly "is not that great."

As Dr. Laufer convincingly stated, the lumbar epidural steroid injections all trace back to Employee's Fluor injuries. AS 23.30.122; *Smith*. Therefore, Employee's claim against Fluor for low back medical care since 2006 will be granted. Fluor will pick up where it left off after its 2006 stipulation. Fluor is liable for Employee's low back medical care since 2006 and continuing. Therefore, his claims against the other employers will be denied as moot.

The parties at hearing did not discuss specific medical bills at issue in this case. However, attached to Employee's hearing brief as "Exhibit 8" is evidence of medical services rendered in this case paid by Employee's health insurance, which Employee contends are part of his requested award. Fluor did not raise an objection to these bills and they do not appear to be disputed. It is unclear from the record whether or not these are the only medical bills in dispute, or if there are unpaid medical bills related to Employee's left shoulder or low back. Fluor will be directed to reimburse Employee's health insurer for his left shoulder and low back pursuant to the exhibit and fee schedule. AS 23.30.095(a).

4) Is Employee entitled to PTD benefits?

All employers in this case stipulated that at some point Employee became PTD because of his injuries, though all denied liability for PTD benefits. As Employee's PTD status is not in dispute, the presumption of compensability is not applied. *Rockney*. The evidence shows Employee continued working until October 8, 2009, when he had his last epidural steroid injection. It was this injection which caused the need for additional medical care and treatment,

which disabled Employee permanently. Employee was receiving these epidural steroid injections to treat his original Fluor injuries. The two surgeries made a permanent change in Employee's underlying lumbar condition, which is now extensively operated and medically altered forever. Employee's permanent disability began October 9, 2009.

His is not a medically complex PTD case. He was born in Cuba, dropped out of high school in America in the ninth grade, has no high school diploma and no GED. At hearing, Employee demonstrated poor reading ability. Employee had extensive lumbar surgery and complications all of which, alone, effectively preclude him from consistent, readily available employment given his age, education, training, experience and physical symptoms arising from his two Fluor injuries. *Roan*. As Dr. Holley stated in his September 21, 2013 EME report, Employee qualifies for PTD status as he is unable because of his Fluor injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable labor market for them does not exist. *Bailey*. Dr. Yodlowski agrees Employee probably cannot work as a laborer. Drs. Tapper and Tolbert both agree Employee is PTD. Effective October 9, 2009, Employee was the "odd lot" worker, notwithstanding the parties' stipulation to other PTD dates. Though it would not be surprising if Employee returned to work someday, the medical and lay evidence overwhelmingly shows Employee has not been able to work on a full-time, consistent, readily available basis since October 9, 2009 and his request for PTD benefits against Fluor will be granted. *Roan*; AS 23.30.122. Fluor will be ordered to pay Employee PTD benefits beginning October 9, 2009, through the continuance of his total disability because of his Fluor injuries. AS 23.30.180. If Employee received unemployment benefits during any period in which this decision awards PTD benefits, Employee is entitled to PTD in those weeks only if he reimburses unemployment for these amounts. AS 23.30.187; *DeShong*. Social Security offsets are addressed below. Since Fluor is liable to Employee for PTD benefits beginning October 9, 2009, Employee's claims for PTD against all other employers will be denied as moot.

5) Is a PTD rate adjustment claim ripe for decision?

The last, relevant prehearing conference summary controls the hearing's course and issue addressed. 8 AAC 45.065(c). The April 8, 2014 prehearing conference summary does not indicate Employee has a PTD rate adjustment claim. Shaw is the only employer who even

addressed this issue in its brief, probably because the other employers were not on notice this was an issue for hearing. Because the PTD compensation rate adjustment claim was not properly raised prior to the April 16, 2014 hearing, it is not ripe for this decision and will not be decided.

6) Is Employee entitled to interest?

Interest in workers' compensation cases is mandatory. AS 23.30.155(p); 8 AAC 45.142. This decision determined Fluor is liable to Employee and his medical providers for medical benefits for Employee's left shoulder and lumbar spine injuries. Fluor will be directed to pay statutory interest at the appropriate rates to Employee or his medical providers as required by law. Fluor is also responsible to pay Employee PTD benefits beginning October 9, 2009, through the continuance of his disability resulting from his Fluor injuries. Fluor will be directed to pay Employee statutory, prejudgment interest on the PTD benefits.

7) Are Fluor or Shaw entitled to a Social Security offset?

Fluor and Shaw are the only two employers who petitioned for a Social Security offset. As Shaw has no liability to Employee for disability benefits, its petition will be denied as moot. As for Fluor's petition, 8 AAC 45.225(b) requires an employer seeking to reduce an employee's weekly compensation under AS 23.30.225(b) to file a petition requesting a determination that Social Security disability benefits are being paid as a result of the work-related injury. In addition to the petition, the regulation required Fluor to compute the reduction using Employee's initial Social Security disability entitlement, and the petition must show how the reduction was computed. Fluor filed only the petition requesting the offset without the supporting documentation or calculations. Because Fluor did not comply with the regulation, its pending request for a Social Security disability offset will be denied without prejudice.

CONCLUSIONS OF LAW

1) Employee's claims against Fluor, AHTNA, Houston I, Davis and Shaw are not barred under AS 23.30.100.

2) Employee's claims against Fluor, AHTNA and Shaw are not barred under AS 23.30.105.

3) Fluor is responsible for Employee's need for left shoulder and low back treatment beginning in 2006, and continuing.

4) Employee is entitled to PTD benefits.

5) A PTD rate adjustment claim is not ripe for decision.

6) Employee is entitled to interest.

7) Fluor and Shaw are not entitled to a Social Security offset.

ORDER

1) Any and all petitions to dismiss Employee's claims under AS 23.30.100 and AS 23.30.105 are denied.

2) Fluor is ordered to pay Employee's medical benefits under AS 23.30.095 for his left shoulder and low back, since 2006 including his 2009 lumbar spine surgery and its sequelae and his 2010 left shoulder surgery.

3) Fluor is order to reimburse Employee's health insurer for left shoulder and low back medical benefits it paid on his behalf, in accordance with Exhibit 8 attached to his hearing brief.

4) Employee's request for an order awarding his past, out-of-pocket health insurance deductible payments is denied.

5) Fluor is ordered to pay Employee PTD benefits from October 9, 2009, through the continuance of his disability as a result of his Fluor injuries.

6) If Employee received unemployment benefits in any week in which this decision awarded PTD benefits, he is entitled to PTD benefits for those weeks only after demonstrating he has repaid the unemployment benefits.

7) Employee's PTD rate adjustment claim is denied as not ripe, without prejudice.

8) Fluor is ordered to pay Employee and his medical providers or insurer statutory interest on all benefits awarded in this decision.

9) Fluor's request for a Social Security disability offset is denied without prejudice.

10) Shaw's request for a Social Security disability offset is denied as moot.

11) Employee's claims against AHTNA, Houston I, Davis, Houston II and Shaw are denied.

Dated in Anchorage, Alaska, on June 11, 2014.

ALASKA WORKERS' COMPENSATION BOARD

_____
William Soule, Designated Chair

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of ALBERTO E. RODRIGUEZ, Employee / claimant v. FLUOR ALASKA, INC.; AHTNA FACILITY SERVICES; HOUSTON CONTRACTING; DAVIS CONSTRUCTORS & ENGINEERS; HOUSTON CONTRACTORS/ARCTIC SLOPE REGIONAL CORP.; SHAW ENVIRONMENTAL; employers, and WILTON ADJUSTMENT CO., ALASKA NATIONAL INSURANCE CO., AIG/INSURANCE CO. OF THE STATE OF PENNSYLVANIA, ALASKA NATIONAL INSURANCE CO., ZURICH INSURANCE/CARL WARREN & CO., insurers / defendants; Case Nos. 200324728, 200403748, 200424619, 200525006, 200623578, 200623579, 200920539; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on June 11, 2014.

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Anna Sebeldia, Office Assistant