ALASKA WORKERS' COMPENSATION BOARD

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

MARK L. KLINE, Employee, Claimant, v. LYNDEN TRANSPORT, Employer, and ACE AMERICAN INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No(s). 200415281 AWCB Decision No. 14-0113 Filed with AWCB Fairbanks, Alaska on August 13, 2014

Mark Kline's (Employee) June 5, 2012 claim seeking medical costs was scheduled on the hearing docket on February 24, 2014 and heard in Fairbanks, Alaska on May 8, 2014. Employee appeared and testified on his own behalf. Attorney Robert Griffin appeared and represented Lynden Transport (Employer). Thomas Dietrich, M.D., appeared telephonically and testified for Employer. The record originally closed at the hearing's conclusion on May 8, 2014, and was re-opened on June 24 to obtain compensation reports and reports of injury that were not available in the Workers' Compensation Division's electronic database. The record closed on July 2, 2014 when the reports were received.

ISSUE

Employee contends he began seeking medical treatment on May 31, 2012 for severe low back pain that began as he bent over to adjust the brakes on a child's bicycle. He contends either the work injury of December 2, 2003, when he hurt his back lifting the tongue of a tandem dolly, or the

work injury of July 9, 2004, when he hurt his lower back unloading and moving heavy pallets, are a substantial factor in his ongoing need for medical treatment. Employee contends he would not need medical treatment now if he had not injured his back working for Employer "in the first place." He denies his current need for medical treatment is the result of age-related degenerative disease because the "disintegration" of his spine is not occurring at all levels, but rather is just occurring at the same levels he previously injured at work. He seeks an award of medical costs.

Employer denies either of the 2003 or 2004 work injuries are a substantial factor for Employee's need for medical treatment beginning in 2012. Rather it contends Employee's need for medical treatment is the result of significant progression of degenerative disc disease between 2004 and 2012, as evidenced by a comparison of magnetic resonance imaging (MRI) studies from those years. Employer relies on the opinions of its medical evaluator (EME) and the second independent medical evaluator (SIME) and requests the denial of Employee's claim.

Is Employee entitled to an award of medical costs as a result of his December 2, 2003 and July 9, 2004 work injuries?

FINDINGS OF FACT

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

1) Employee has a long history of spinal symptoms and injuries. (Record).

2) In 1985, Employee injured his mid-back while working at a tire shop in Anchorage. The injury was very painful and he could not stand up straight for two weeks. Employee did not seek treatment at the time, and the injury resolved three weeks later. He stated the injury was in the same location arthritis "mysteriously" showed up in 2004. (Kline dep. at 36-38).

3) In 1994, Employee injured his low back lifting a desk while working for Transworld Moving. The pain was so severe he dropped to the floor and could not get up for ten minutes. Employee's legs also went numb. He was off work for approximately a week. L5 myositis was diagnosed. (*Id*. at 40-42; Physician's report, November 17, 1994).

4) In 1995, Employee began working for Employer, where he remained employed as a local truck driver until December 2004. (Kline dep. at 22; 24).

5) On February 7, 1999, Employee was involved in a motor vehicle accident and sought treatment for neck and low back pain the next day. Acute cervical strain, lumbar strain and

spasm were diagnosed and Employee was prescribed Flexeril, Vicodin and Lodine. Tenderness was noted at L5-S1, but by February 12, 1999, Employee reported a dramatic improvement in his symptoms and stated he "feels good." (DeNapoli notes, February 8, 1999; Keller notes, February 8, 1999; DeNapoli notes, February 12, 1999).

6) Employee's lower back pain from the motor vehicle accident was in the same place as his pain from the 1994 lifting injury at Transworld Moving. (Employee dep. at 47).

7) In May of 2001, Employee suffered his first back injury while working for Employer. He was lifting Caterpillar (CAT) pads out of the mud that weighed 125 to 150 pounds apiece. Employee guessed there was approximately 15,000 pounds of CAT pads altogether. Employee did not seek treatment at the time, but his symptoms "just kept getting worse." He waited "four, five or six months" but finally sought treatment when he got tired of having to hunch and bend over. (Kline dep. at 25; 48).

8) On October 19, 2001, Employee saw C.Y. Basquin, D.C., and reported he injured his back while moving a snow machine. The pain was radiating into Employee's buttocks and upper, posterior thighs. Dr. Basquin's notes also indicate Employee reported injuring his back at work six to eight months earlier. Employee stated he just went in to have his back looked at, and he missed a couple days work after that. (Basquin notes, October 19, 2001; Kline dep. at 56).

9) Because Employee's symptom never completely resolved, he next sought treatment at the Tanana Valley Clinic (TVC). (Kline dep. at 56).

10) On March 15, 2002, Employee was seen at TVC by Eric Meffley, PA-C. Employee reported chronic low back pain, which started about a year ago. PA Meffley noted Employee was moody, testy and irritable. A lumbar x-ray showed narrowing of the L5-S1 disc space indicating degenerative disc disease. PA Meffley reviewed "standard back treatment options" with Employee, prescribed Vioxx, offered physical therapy, and scheduled an appointment with David Witham, M.D. (Meffley notes, March 15, 2002; x-ray report, March 15, 2002).

11) On March 15, 2002, Employee reported injuring his back on October 7, 2001 "as a result of repetitive motion, involving heavy lifting at work." (Report of Occupational Injury or Illness, March 15, 2002).

12) Employee continued to seek treatment at TVC. He felt like his pain was getting worse and he was getting spasms. Flexeril was prescribed. (TVC chart notes, March 22, 2002 to April 8, 2002).

13) On March 26, 2002, Employee saw PA Meffley at TVC. PA Meffley's chart notes state: "Pt walks in today after 3 phone calls in last 2 hrs. Wants release to work. Notes he is now claiming workers compensation from a presumed injury to his back after unloading tractor truck by hand months ago." PA Meffley requested Employee avoid heavy lifting until his appointment with Dr. Witham. (Meffley notes, March 26, 2002).

14) On April 8, 2002, Employee saw Victor Bartling, D.O., at TVC and reported chronic low back pain, which started last summer when he was lifting heavy steel plates. Dr. Bartling took Employee off work pending an orthopedic evaluation and added Vioxx to Employee's medication regimen. (Bartling report, April 8, 2002).

15) On April 11, 2002, Employee saw Dr. Witham and reported chronic low back pain, which he related to moving heavy steel beams at work last year. Dr. Witham reviewed x-rays and assessed a large central disc herniation at L4-5 or L5-S1. A magnetic resonance imaging (MRI) study was ordered. (Witham report, April 11, 2002).

16) An April 18, 2002 lumbar MRI showed a central disc protrusion at L4-5 without canal stenosis and a central disc protrusion at L5-S1 without canal stenosis. Both protrusions were thought to be abutting nerve roots at their respective levels. (MRI report, April 18, 2002).

17) On April 26, 2002, Employee followed up with Dr. Witham. Dr. Witham thought the April 18, 2002 MRI was consistent with Employee's reported symptoms. He recommended ongoing, conservative, non-operative management of symptoms and thought continued work restrictions were appropriate. Dr. Witham expected a resolution or improvement in Employee's symptoms over the upcoming months. (Witham report, April 26, 2002).

18) On June 25, 2002, Employee followed up with Dr. Witham, who had expected Employee to be able to return to full duty but now doubted Employee's ability to return to full duty as a delivery truck driver. Dr. Witham provided Employee with a note for continued work restrictions and recommended against surgical intervention, which was "fraught with complication." (Witham report, June 25, 2002).

19) On July 3, 2002, Anthony Woodward, M.D., performed an employer's medical evaluation (EME). Because Employee initially sought treatment after moving a snow machine, and because the Employee's first mention of the CAT pad work injury was nine or ten months after the incident, Dr. Woodward could not attribute the onset of Employee's low back pain to work activities. Instead, Dr. Woodward noted Employee had a history of chronic recurrent low back

pain, which he thought was the "major contributing cause of Employee's current low back condition. (Woodward report, July 3, 2002).

20) By July of 2002, Employee's back pain "eased up a whole bunch" and he went back to full duty work. (Kline dep. at 60).

21) On August 1, 2002, Employee saw Dr. Witham, who reported "[Employee] has some questions regarding the history of his low back injury and how it relates to the claim as well as some questions regarding the independent medical examination that he recently underwent. I have tried to answer all of these as clearly as I can and he will follow up on a prn basis." (Witham chart notes, August 1, 2002).

22) Employer contends it is significant Dr. Witham did not link Employee's central disc herniation or low back pain to a work injury. (Employer's Brief at 5, May 1, 2014).

23) On September 18, 2002, Employee saw John Joosse, M.D. for a "second opinion" on his controverted workers' compensation claim. Dr. Joosse discussed the imaging studies with Employee and answered "multiple questions." He reviewed medical records for 1 ½ hours and had a "lengthy discussion" with Employee. Dr. Joosse advised Employee to keep a diary and to seek medical attention as required. (Joosse notes, September 18, 2002).

24) Employer contends it is significant Dr. Joosse did not link Employee's central disc herniation or low back pain to a work injury. (Employer's Brief at 5-6, May 1, 2014).

25) At his deposition, Employee recalled his visit with Dr. Joosse and stated Dr. Joosse reviewed with him an x-ray that was taken at TVC. Dr. Joosse explained the bone spurs that were "hanging off my spine" show there was "no possible way" he could have been injured in 2001 because "[s]omething like that takes … a year or more at least." (Kline dep. at 61).

26) Employee thinks Dr. Joosse is a "good doctor." (*Id*.).

27) On October 2, 2002, Employee injured his lower back while moving a heavy pallet of boiler parts during a delivery. (Report of Occupational Injury or Illness, October 7, 2002).

28) On December 20, 2002, Employee injured his lower back while lifting a 200 pound tandem dolly tongue at work. Employee's pain was in the same location as the 2002 CAT pad injury, but it got progressively better during the rest of 2003. (*Id*. at 65; 66; 69; Report of Occupational Injury or Illness, December 23, 2002).

29) On December 2, 2003, Employee injured his lower back while cranking landing gear in cold weather. (Report of Occupational Injury or Illness, December 6, 2003).

30) On December 6, 2003, Employee sought treatment at TVC for low back pain. He reported two work incidents in the past week: he was pulling on a strap and tripped on something buried in the snow, which caused him back pain, and he was turning a stiff crank on lifting equipment, which increased his back pain. Low back strain was assessed and Employee was taken off work for two days and prescribed Celebrex. (Rogers report, December 6, 2003).

31) On December 8, 2003, lumbar spine MRI showed the L4-5 disc space was "borderline" in height and also showed mild, but definite, narrowing at L5-S1. Minor spurring involving the mid and lower lumbar spine ventrally was also noted. Focal sclerosis at the upper aspect of the sacroiliac joint indicated degenerative changes. The impression was degenerative changes at L4-5 and L5-S1 and minor osteoarthritic spurring. (MRI report, December 8, 2003).

32) On February 3, 2004, Employee presented at TVC for an evaluation of low back pain and was seen by Michael Pomeroy, PA-C. Employee reported exacerbating his low back symptoms while trying to loosen the frozen wheel stand on a trailer. During a general discussion about back pain, Employee became very agitated with PA Pomeroy and suggested PA Pomeroy was lying about his radicular symptoms. PA Pomeroy attempted to explain disc bulges, disc protrusions and "horrible disc herniations," but Employee was reluctant to listen and often interrupted while becoming increasingly more "animated." Employee requested narcotic pain medications and PA Pomeroy declined. Employee became increasingly more agitated and threatening and then terminated the patient encounter. PA Pomeroy noted Employee rose from the chair without difficulty and seemed to ambulate well. PA Pomeroy noted he would not see Employee again on his schedule. (Pomeroy report, February 3, 2004).

33) On July 9, 2004, Employee injured his lower back while moving heavy pallets with a pallet jack. (Physician's report, August 8, 2004; Report of Occupational Injury or Illness, July 26, 2004).

34) On July 23, 2004, Employee contacted the on-call physician at TVC and reported an increase in low back pain with symptoms radiating down into his legs. Employee was provided with a prescription for an unknown number of Vicodin. (Gho report, July 30, 2004).

35) On July 26, 2004, Employee was evaluated for low back pain at TVC's clinic and given a prescription for Vicodin. (TVC Clinic Visit Form, July 26, 2004).

36) On July 30, 2004, Employee was seen at TVC for low back pain. Employee reported to PA-C Stephanie Gho he had been out of Vicodin since the day before. PA Gho noted this

equated to "fairly significant Vicodin use," and declined to provide another prescription. (Gho report, July 30, 2004).

37) On August 9, 2004, Employee sought an evaluation with Dr. Joosse for lower back pain. He reported he was unhappy with TVC. On examination, Dr. Joosse noted Employee moves smoothly, flexes slowly, could reach his ankles, and had no spasms, no tenderness and no sciatic notch tenderness. Dr. Joosse ordered a 35 pound work restriction, advised Employee to walk or swim, and prescribed a new lumbar support. (Joosse chart notes, August 8, 2004).

38) On August 27, 2004, the following phone message taken by "Nurse Belinda" appears in Employee's medical record: "We are unable to schedule this patient with Dr. Witham for his back. If there are any questions, please speak with Dr. Witham." Employee contends this was a refusal by Dr. Witham to see him. (Fax from Lynden Transport, August 30, 2004).

39) Employee began treating with Charles Steiner, M.D. at TVC. (Steiner letter, September 22, 2004; record; observations).

40) On August 31, 2004, a lumbar spine MRI was taken and compared with two prior MRI's of April 18, 2002 and December 10, 2003. Disc bulging was present at L4-5 and L5-S1 and was similar in appearance to the previous MRI's. "Significant progression of discopathy [was] not obviously apparent as compared with the comparison studies." (MRI report, August 31, 2004).

41) On September 8, 2004, Employee saw Dr. Steiner for a follow-up visit. Dr. Steiner reviewed the August 31, 2004 MRI. Dr. Steiner thought Employee's recurrent flare-ups of severe incapacitating back pain and sciatica "support and further confirm what has apparently been previous orthopedic opinion, that he should find a new line of work." He noted Employee's job requires a lot of heavy physical lifting and twisting and it was a job Employee was no longer capable of performing. Dr. Steiner spent 25 minutes with Employee, more than half of that time counselling Employee on back pathology, pathophysiology of his current back pain, and on the unlikely prospect of Employee being free from back pain if he continued doing heavy work. Dr. Steiner issued a 20 pound work restriction and refilled Employee's Bextra and Flexeril. He also discussed physical therapy with Employee, who did not think it would be helpful, as well as vocational rehabilitation. (Steiner report, September 8, 2004).

42) On September 22, 2004, Dr. Steiner referred Employee to Upshur Spencer, M.D. in Anchorage for an orthopedic evaluation. (Steiner letter, September 22, 2004)

43) On October 6, 2004, Employee saw Dr. Spencer. Dr. Spencer assessed multilevel degenerative disease at L4-5 and L5-S1 as well as "leg symptoms," which he thought were likely related to degenerative changes in Employee's spine. Dr. Spencer talked to Employee at great length about his symptoms, the imaging studies and physical findings. His report states: "It was somewhat undetermined whether or not the work environment has caused these degenerative changes, however the work he is involved in certainly could exacerbate those symptoms." Dr. Spencer recommended against surgery and instead recommended smoking cessation, non-steroidal anti-inflammatory medications and aerobic exercise. Employee requested a permanent partial impairment (PPI) rating, but Dr. Spencer declined to perform a rating because it was not part of his practice. (Spencer report, October 6, 2004).

44) On December 1, 2004, Employee was seen at TVC for an inability to sleep because of back pain. Employee was given a refill of his Bextra and Flexeril as well as prescription for Ambien to help with his sleep. (Grandpre report, December 1, 2004).

45) On December 6, 2004, Dr. Steiner prescribed a trial use of a transcutaneous electrical nerve stimulation (TENS) unit. (Steiner report, December 6, 2004).

46) On January 5, 2005, Dr. Steiner referred Employee to Gregory Polston, M.D., at Advanced Pain Centers of Alaska. Employee also had reported the TENS unit had helped with his pain. (Polston letter, January 5, 2005).

47) On January 6, 2005, Dr. Polston performed a right L5 tranforaminal epidural steroid injection. (Polston report, January 6, 2005).

48) Employee participated in physical therapy from January 11, 2005 until May 26, 2005. (Advanced Physical Therapy Discharge Summary, August 15, 2005).

49) On February 2, 2005, lumbar x-rays with bending views showed disc space narrowing at L3-4 through L5-S1 with endplate spurring, no spondylolisthesis and normal lumbar segmentation. (X-ray report, February 2, 2005).

50) On March 2, 2005, Employee returned to Dr. Polston and reported the steroid injection had provided him with complete pain relief for approximately four hours and then the pain steadily increased over the next two days. Dr. Polston decided to try a left side injection at L5-S1. (Polston report, March 2, 2005).

51) On March 3, 2005, Dr. Polston performed a left L5 transforaminal steroid injection. (Polston report, March 3, 2005).

52) On March 18, 2005, Dr. Dietrich performed an EME and diagnosed chronic degenerative changes at the three lower lumbar levels, with no clear evidence of radiculopathy. His report states: "Mr. Kline has had injuries to his back, both related to work activity and off work activity. Despite a history of some hostility toward his medical attendants in the past, he presents himself as a credible historian." Dr. Dietrich thought the "alleged injury in May 2001, the alleged incident of October 3, 2001, the incident of December 20, 2002, as well as the December 2, 2003, and the July 9, 2004 injuries" had a "significant impact" on Employee's chronic low back pain. He opined the December 2003 and July 2004 injuries served as aggravations of Employee's underlying condition. He also stated: "The work activity at [Employer] prior to that time was a substantial factor in [Employee's] overall condition." Dr. Dietrich thought Employee was medically stable, required no further treatment and recommended against fusion surgery. Concluding his report, Dr. Dietrich stated: "In my opinion, the cumulative effect of the work injuries primarily prior to the December 2003 incident combined with his preexisting degenerative change to result in his present condition. His present symptoms are likely more severe now than they would have been without the work injuries." (Dietrich report, March 18, 2005).

53) On November 25, 2005, a compromise and release (C&R) agreement was approved that settled all indemnity benefits and left open only medical benefits related to Employee's December 2, 2003 and July 9, 2004 work injuries. (C&R, November 25, 2005).

54) On March 22, 2005, Employee saw Dr. Steiner for a follow-up visit. Employee reported the TENS unit was working well for daytime pain, but he thought Ambien was necessary for uninterrupted night-time sleep. Dr. Steiner recommended surgery for Employee's low back symptoms and discussed the mechanical effects of fusion surgery. Employee had not decided whether to proceed with spinal fusion or disc replacement. Dr. Steiner prescribed Flexeril, Bextra and additional Ambien and TENS patches. (Steiner report, March 22, 2005).

55) On March 31, 2005, Dr. Polston performed a three-level lumbar discography, which produced concordant pain at the L3-L4, and similar, but not concordant, pain at L5-S1. (Polston report, March 31, 2005).

56) On May 19, 2005, Employee was evaluated by James Eule, M.D, in Anchorage. Dr. Eule reviewed imaging studies and Dr. Polston's discography report. He ordered another MRI and thought the results of the discography made "a complex problem more difficult" for Employee.

Because Employee stated he was suffering more from leg pain than from back pain, Dr. Eule thought Employee's radicular symptoms were caused by chemical radiculitis. (Eule report, May 19, 2005).

57) A May 19, 2005 lumbar MRI showed small to moderate sized protrusions at L4-5 with mild canal stenosis; tiny midline protrusions at L2-3, L3-4 and L5-S1 without significant mass effect neural elements. Desiccation of disc material at all lumbar levels was also noted. (MRI report, May 19, 2005).

58) On October 13, 2005, Dr. Polston administered right L4-5 and L5-S1 intra-articular facet injections. (Polston report, October 13, 2005).

59) On November 7, 2005, Employee reported good but temporary results from the lumbar facet injections. Dr. Polston thought Employee was a good candidate for a lumbar radiofrequency neurotomy procedure.

60) On December 20, 2005, Marc Slonimski, M.D., performed right L2, L3, L4 and S1 radiofrequency medial branch rhizotomy. (Slonimski report, December 20, 2005).

61) On January 4, 2006, Employee saw Dr. Slonimski for a follow-up visit and reported a 50 percent improvement in his usual back pain, as well as significant improvement in his lumbar spine mobility. (Slonimski report, January 4, 2006).

62) Through 2006, Employee testified his pain management doctors were just "unplugging" his pain by prescribing pain killers, at which point he "flat quit." He was, however, "eating lots of - well, whatever I could get my hands on, Ibufrofen and Tylenol, and I mean a lot of it." Employee's pain leveled off to where it was tolerable. (Kline dep. at 76-77).

63) On March 20, 2006, March 21, 2006 and April 18, 2006, Employee's reported his low back pain remained at three or four out of 10 and Dr. Slonimski suggested a possible nuceloplasty procedure at L3-4. (Slonimski reports, March 20, 2006; March 21, 2006 and April 18, 2006).

64) On June 26, 2006, Dr. Dietrich issues an addendum report that reiterated Employee was medically stable and required no additional treatment. Dr. Dietrich specifically recommended against Dr. Slonimski's proposed nuceloplasty procedure. (Dietrich addendum report, June 26, 2006).

65) On February 5, 2007, Employee saw Dr. Slonimski for a return visit. He reported his pain remained at 3/10. Dr. Slominski was still considering nuceloplasty. (Slonimski report, February 5, 2007).

66) Employee repeatedly testified he had no medical treatment in 2008, 2009, 2010 or 2011, though his back pain got progressively worse during that period of time. (Kline dep. at 83; 84; 85).

67) On May 30, 2012, while adjusting the brake cable on his child's bicycle, Employee bent over to pick a pair of pliers off the ground and his back "slipped." The pain was so severe it put him on the ground. Employee was on the ground for about 15 minutes and then managed to crawl into the house. He kept having spasms in his back and the pain was so severe it made him cry. Employee lay on the floor until the next morning, when he had to go to the bathroom. Employee managed to go to the bathroom, but could not make it back from the bathroom. He then tried to get into a chair, but could not, and just gave up. Employee refused to a call a doctor and his wife finally called an ambulance. (Kline dep. at 84-86; Emergency Department report, May 31, 2012).

68) Employee's previous back pain episodes had not been as severe as this one. (Kline dep. at 87; 88).

69) On May 31, 2012, Employee was transported to the Fairbanks Memorial Hospital Emergency department, where he was given morphine and hydromorphone injections, and discharged with prescribed Percocet, Zanaflex and Naprosyn. (Discharge Summary, May 31, 2012; Emergency Department report, May 31, 2012).

70) On June 14, 2012, a lumbar MRI showed multilevel lower lumber spondylosis and facet joint arthrosis of modest severity. Mild endplate spurring was also noted at several lumbar levels. (MRI report, June 14, 2012).

71) On June 14, 2012, Employee filed the instant claim seeking medical benefits. (Claim, June 5, 2012).

72) On June 15, 2012, a repeat lumbar MRI was performed and compared to the MRI of the previous day and the August 31, 2004 MRI. It showed: 1) mild disc desiccation at L1-2 without disc protrusion or canal compromise, which appeared progressive; 2) mild degenerative disc disease at L2-3, which was progressive and included mild diffuse disc bulging as well as a shallow left paracentral disc protrusion with no significant canal narrowing; 3) mild degenerative

disc disease at L3-4 with diffuse disc bulging and a small, shallow, central disc protrusion with minor bilateral foraminal narrowing that had progressed from the prior exam; 4) moderate degenerative disc disease at L4-5 with diffuse disc bulging and central annular tearing and an underlying small central disc protrusion with minimal foraminal narrowing, which had progressed from the previous study; and 5) moderate degenerative disc disease at L5-S1 with diffuse disc bulging and no evidence of foraminal compromise, which had progressed from the previous study. (MRI report, June 15, 2012).

73) On November 16, 2012, Dr. Dietrich performed an EME. Dr. Dietrich noted a significant progression of degenerative change at multiple levels since the 2004 MRI study, but could not find an explanation for radicular pain symptoms. There was no evidence of vascular insufficiency and no evidence of spinal canal or lateral recess stenosis. He also could not identify any areas of nerve compression on the most recent MRI study. Although Dr. Dietrich thought there was a "suggestion" of peripheral neuropathy in Employee's right lower extremity, Employee's low back pain could not be explained on the basis of that condition. He opined although there had been some continuity in Employee's symptoms over time, it would be difficult to attribute Employee's ongoing symptoms to a specific 2004 work injury because of a lack of an explanation of Employee's right leg symptoms. In response to Employer's question whether he thought the December 2003 and July 2004 work injuries were still a substantial factor in causing Employee's more recent symptoms or need for treatment, Dr. Dietrich did not think that Employee's ongoing symptoms were reasonably attributable to those work related incidents. (Dietrich report, November 16, 2012).

74) At a January 15, 2013 prehearing conference, the parties stipulated to a SIME. (Prehearing Conference Summary, January 15, 2013).

75) On July 15, 2013, James Coulter, M.D., performed an second independent medical evaluation (SIME) and diagnosed Employee with multilevel degenerative disc disease at L3-4, L4-5 and L5-S1 with associated disc bulging and protrusion; vertebral facet osteoarthritis of moderate to severe degree, especially at L4-5 and L5-S1, which had gradually progressed over the last 10-15 years. Dr. Coulter thought contemporaneous medical records were sufficient to diagnose multiple musculo-ligamentous strains as a result of Employee's employment. He stated: "It is my opinion an agreement with Dr. Dietrich, neurosurgical IME, that the work injuries of 2003 and 2004 did temporarily combine with and aggravate his back and leg

symptoms to cause the need for medical treatment, but there is a paucity of objective evidence that the 2 lumbar strains in question accelerated the lumbar spondylosis or facet arthritis to cause increased bulging or protrusion of any lumbar disc level." Dr. Coulter emphasized: "[a]s noted supra the aggravation was only temporary…." He further opined: "the aggravation[s] … although significant, never rose to the level of becoming 'the substantial cause,' which remained due to degenerative spinal disease…. The degenerative disc changes and facet arthropathy are caused by heredity and aging." (Coulter report, July 15, 2013).

76) Dr. Coulter repeatedly refers to "the substantial cause" in his report. (*Id.*).

77) The board provided Dr. Coulter with the legal definition of "a substantial factor" in its referral letter. (Board's referral letter, May 21, 2013).

78) Employer presented its questions to Dr. Coulter using the "a substantial factor" standard. (Coulter report, July 15, 2013).

79) In response to Employer's question whether the work injuries were "a substantial factor" in causing Employee's current low back symptoms or his need for medical treatment, Dr. Coulter answered: "Yes, they were a substantial factor, but not 'the substantial cause' which at all times concerned here, has been the degenerative spinal disease of multilevel lumbar spondylosis and facet osteoarthritis related to age and heredity." (*Id*. at 37).

80) Dr. Coulter repeatedly stated he agreed with Dr. Dietrich. (*Id*. at 32; 35; 36).

81) On October 24, 2013, Employer took Employee's deposition. Employee's descriptions of the work injuries and his medical treatment were consistent with the written record. (Kline dep., October 24, 2013; observations).

82) Employee believes Employer "targeted" him by making him lift "really heavy stuff" because he was a union leader. He stated: "They used me like a forklift." (Kline dep. at 24).

83) Describing the CAT pad incident, Employee testified Employer sent him and "a kid" to pick up the CAT pads, but Employee "actually picked them up because he felt sorry for the kid." "He could barely lift one. And I just couldn't see getting him crippled." (*Id*. at 25-26).

84) In 1992, Employee also had worked for Carlisle doing similar work as he did for Employer. However, he got fired from that job because he had a "personality clash" with a co-worker, who "just wasn't a very good worker." Employee explained: "a guy threatened to blow my family up and I come [sic] a little unstuck on that." (*Id*. at 31-32).

85) After being fired from Carlisle, Employee said: "Somebody stole my unemployment." He then clarified he was the victim of identity theft and somebody had used his identity to claim his unemployment benefits and that person had exhausted the benefits. (*Id*. at 32-33).

86) Describing the 1999 motor vehicle accident, Employee stated the driver who hit him "got out of it." He explained:

> Well, she had a witness who couldn't have seen the surface of the road but said he seen something he couldn't see. And then come to find out he was one of her best friends, because he was caught smoking pot with her, you know. And ended up it was dismissed and they settled out of court. But they basically got out of it. They should have paid me. She was wrong…. That was wrong. That was wrong.

(*Id*. at 45).

87) Employee believes he was loyal to Employer. He explained he did not seek medical attention in 2001 because, he "figured [he] would "tough it out." He stated: "Yeah. I knew I was injured, but I was loyal to my employer and I didn't go in and seek medical attention right away. I kept working. I was tough." (*Id*. at 47; 49).

88) Employee does not like doctors. (*Id*.).

89) Employee does not trust doctors. (Id. at 63; 64; 67; 73).

90) Employee does not trust lawyers. (Kline).

91) Employee believes Employer is dishonest. (Kline dep. at 65-66).

92) Employee saw Dr. Joosse because he had a "conflict" with Dr. Witham. Employee did not trust Dr. Witham because Dr. Witham was "pro-employer." (Kline dep. at 60-61).

93) While reviewing Employee's x-ray, Dr. Joosse explained to Employee "there was no possible way" he could not have injured his back in October of 2001 because of the length of his bone spurs. The bone spurs were "hanging off [his] spine, because they couldn't have grown in four months. Something like that take [sic] a year – a year or more at the least." (*Id*. at 61-62; 72).

94) Employee testified at length regarding the disappearance of the x-ray Dr. Joosse discussed with him:

> A: ….And that x-ray has since disappeared. I couldn't find it. I went down – I took it down with me for a Social Security evaluation in Anchorage and it disappeared. And I can't get another one, because that was good evidence. Odd coincidence it disappeared. And that was the only one that disappeared.

Q: I'm sorry. That was or not the only one?

A: That was the only one that disappeared, the only x-ray, because it was – it was good evidence that weighted the fact that there's no possible way I could have been injured in October of 2001. That was in Joosse's own words – Dr. Joosse own words – because of the length of the bone spurs. They couldn't have grown in four months time.

Q: And you took that to a Social Security hearing in Anchorage?

A: Yeah. A few years back, and it disappeared. And that was the only x-ray that disappeared. It's just an odd coincidence, because it was very good evidence. And I can't reproduce another one.

Q: I'm – I don't have a good understanding where it disappeared at.

A: I took it down there. I took all my x-rays and MRI's down to Anchorage. And –and when I came back and they – I thought they'd given them all back to me, but they hadn't.

Q: And "they" being….

A: That one was gone.

Q: "They" being the people at Social Security?

A: Yeah. The doctors that evaluated me down there.

Q: So….

A: But yeah, it showed the big bone spurs hanging off my spine. There's no way that could have happened in the time length. It had to have happened earlier than….

Q: Did – I get that part. It took – did –did you ask the people at Social Security, hey, where's my x-ray?

A: I just presume it's gone. I'm never going to see that again. And I've tried to get a copy of it, and I can't even – that was the first x-ray that was taken at the Tanana Valley Clinic in – in – it was like January or something of 2002.

Q: Yeah.

A: It was the first one, the first doctor I seen there. I don't remember his name. And – and – but that x-ray has since disappeared. And that was – I had it and then it was gone. The only people that had used them x-rays was Social

> Security people, the Anchorage doctors down there when they sent me down for an evaluation. I was pretty disappointed when I couldn't get it reproduced.
>
> Q: Well, you don't think [Employer] had anything to do with that, do you?
>
> A: I don't know. I don't trust doctors. After what I've seen with workers' comp, I don't trust doctors.
>
> Q: Okay.

(*Id*. at 61-63).

95) After Employee stopped taking Percocets in 2007, he would get anti-inflamatories and muscle relaxers, such as Flexeril, from friends. He explained: "But mostly just anti-inflamatories and lots of them. I mean, I'd go through a bottle of Tylenol or Ibuprofen like gangbusters." (*Id*. at 80).

96) When Employee stopped taking Percocets he got so "sick of dealing with workers' comp and the insurance company [he] just wanted to choke somebody." (*Id*. at 81).

97) Employer's counsel asked Employee if he treated in 2011 because Employer did not have any treatment records:

> Q: Same question about 2011. I don't have any records of treatment:
>
> A: Same reason. When you get so mad you want to choke somebody, you better step away from the table.
>
> Q: Do we need to step away from the table now?
>
> A: No.

(*Id*. at 83).

98) Employee explained he sought treatment in 2012 under his wife's "direction" and "prodding," because she thought he was going to "get something out of it." (*Id*. at 89).

99) Employee testified all the doctors have said it is undetermined if work caused his degenerative disc disease. (*Id*. at 75).

100) On November 25, 2013, Employer took Dr. Coulter's deposition. Dr. Coulter explained the progression of degenerative disc disease: "Generally progresses and causes more disc bulging. As the disc degenerates, it loses water content and gradually, over the years, a matter years, the disc space narrows down. And even as far back as 2002, the L4-5 space was narrowing on plain x-rays and MRI." (Coulter dep. at 19).

101) Dr. Coulter noted the 2002 and 2004 MRI's "bracketed" the two injuries and stated "a significant progression of disc pathology wasn't apparent compared to the prior study." (*Id*. at 21).

102) Dr. Coulter opined the 2003 and 2004 work injuries were temporary aggravations to Employee's preexisting condition. (*Id*. at 23).

103) Dr. Coulter thinks Employee's current condition is due to the natural progression of his degenerative disc disease and facet osteoarthritis. (*Id*. at 28).

104) Dr. Coulter stated the 2003 and 2004 work injuries were "probably not" responsible for Employee's need for medical treatment in 2012. (*Id*. at 32).

105) Dr. Coulter testified a reasonable person would not regard the 2003 and 2004 injuries as being responsible for Employee's need for treatment in 2012. (*Id*. at 34).

106) Prior to the commencement of the hearing, Employee engaged in aggressive questioning panel members, wanting to know which of them had medical credentials. He then explained, since none of the panelists had medical credentials, and since his case involves medical evidence, he did not understand how the panel could decide his case. (Experience).

107) At hearing, Dr. Dietrich testified on behalf of Employer as follows: He examined Employee in 2005 and 2012 and performed a records review for Employer in 2006. In 2005, Employee had chronic low back complaints. He diagnosed degenerative changes at Employee's lower two lumbar levels. Employee also had a couple of work incidents in 2003 and 2004 and made a "pretty good" recovery from these acute episodes. Employee has a predisposition for underlying back pain. Work was a substantial factor in Employee's need for medical treatment in 2005. In his 2006 addendum, he thought Employee has suffered work related strains, which were superimposed on Employee's underlying degenerative disc disease. Employee told him in 2012 his pain had become worse over the years. The May 30, 2012 incident involved acute low back pain. The 2012 MRI shows the progression of Employee's degenerative changes in his lower lumbar spine at all levels, particularly the lower two lumbar levels. When asked if work was the cause of Employee's need for treatment in 2012, Dr. Dietrich opined: "Basically, no. You really can't make that connection." He explained Employee experiences acute episodes arising from the tearing of annular fibers. These are not really "sprains" or "strains." Employee will experience spasms, then he heals. Employee has had a number of these episodes over the years, some were work related, and some were not work related. Dr. Dietrich explained the

degenerative process comes first and it progresses. It makes Employee more susceptible to acute pain episodes. He did not think Employee's employment was a substantial factor in Employee's need for medical treatment. On cross-examination. Dr. Dietrich explained back pain is generally caused by a bulging disc irritating posterior longitudinal ligaments and muscles "trying to hold it still." In response to Employee's question whether a bulging disc can cause "slack" in the spine causing it to "slip," he denied a bulging disc is a cause of spinal instability. Dr. Dietrich explained any movement can trigger Employee's symptoms. In response to Employee's question why only certain of his levels seem to be affected, he explained there is a certain "predilection" at certain levels to suffer degenerative disc disease, especially the lower lumbar levels. Dr. Dietrich also stated almost everyone is affected by degeneration at L4-5 and L5-S1 because of the mechanics of the spine. For example, a 70 year old man would have degenerative changes, but his lower two lumbar levels would be most affected. (Dietrich).

108) Dr. Dietrich is credible. (Experience, judgment, observations and inferences drawn from the above).

109) At hearing, Employee testified as follows: He does not feel his current spine symptoms are age-related because the "disintegration" of his spine is not occurring at all levels, just the levels effected by previous work injuries. His back has become progressively worse since he worked for Employer and his symptoms would not have occurred if he was not originally injured at work. Celebrex and Lyrica have helped, but he cannot afford medication. Instead, he buys "illegal pills" "off the street" for his back symptoms. Employee described numerous work injuries, including the CAT pad incident, moving heavy pallets, stacking 55 gallon drums and lifting the tongue of the tandem dolly. His spine was not damaged before working for Employer and there is no prior MRI to demonstrate to the contrary. When specifically asked by a panel member for medical evidence his symptoms are work-related, Employee cited Dr. Polston's March 31, 2005 discography. He contended the discography showed Drs. Spencer and Dietrich had "missed" a herniated disc the "next level up." (Kline).

110) During the hearing, Employee engaged in aggressive questioning of panel members, wanting to know if they would have moved or stacked certain items without help, such as pallets and 55 gallon drums. (Record).

111) Employee was an above-average historian concerning details of his work injuries and medical treatment. (Experience).

112) Employee is credible on the details of his work injuries and his spinal symptoms. (Experience, judgment, observations and inferences drawn from the above).

113) Employee's demeanor at hearing was such that all three panel members shared a concern he might engage in violent conduct. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from the above).

114) More workers' compensation claims are filed on spinal injuries than any other single type of injury. Most spinal claims involve the L4-5 and L5-S1 disc spaces. (Experience).

PRINCIPLES OF LAW

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). 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.* at 534.

At the time of Employee's December 3, 2003 and July 9, 2004 injuries, the Act provided:

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

Decisional law interpreted former AS 23.30.010 to require payment of benefits when employment was "a substantial factor" in disability or need for medical treatment. *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979). Employment is "a substantial factor" in bringing about the disability or need for medical care where "but for" the work injury, a claimant would not have suffered disability at the time he did, in the way he did, or to the degree he did, and reasonable people would regard it as the cause and attach responsibility to it.

Fairbanks North Star Borough v. Rogers and Babler, 747 P.2d 528 (Alaska 1987). A preexisting disease or infirmity does not disqualify a claim if employment aggravated, accelerated, or combined with disease or infirmity to produce death or disability. *Thornton v. Alaska Workers' Compensation Board*, 411 P.2d 209 (Alaska 1966). Aggravation of a preexisting condition may be found absent any specific traumatic event. *Providence Washington Insurance v. Banner*, 680 P.2d 96 (Alaska 1984).

During a 2005 legislative re-write, the Act was amended to require work be "the substantial cause" of the disability or need for medical treatment in order for compensation to be payable to an employee. AS 23.30.010(a).

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The Employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the Employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured Employee has the right of review by the board.
>
> **AS 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter. . . .

"The text of AS 23.30.120(a) (1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Therefore, an injured worker is afforded a presumption all the benefits she seeks are compensable. *Id.* Medical benefits including continuing care are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application for the Employee's injury date involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, Employee must

establish a "preliminary link" between the "claim" and his employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Employee need only adduce "some," "minimal" relevant evidence (*Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987)) establishing a "preliminary link" between the "claim" and the employment. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316. The witnesses' credibility is of no concern in this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

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

If an employer, in appropriate cases not involving "work-relatedness," produces substantial evidence rebutting the presumption, the presumption drops out, and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381; *citing Miller v. ITT Services*, 577 P 2d. 1044, 1046. The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

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

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

ANALYSIS

Is Employee entitled to an award of medical costs as a result of his December 3, 2003 and July 9, 2004 work injuries?

This is a factual question to which the presumption of compensability applies. Employee raised the presumption of compensability with his testimony describing his numerous work injuries, including the tandem dolly incident, and connecting those injuries to contemporaneous symptoms. *Wolfer*. Employer rebutted the presumption with the reports and testimony of its EME physician, Dr. Dietrich, and the SIME physician, Dr. Coulter, who opined Employee suffered from acute, work-related episodes. *Miller*. Employee is required to prove by a preponderance of the evidence either the December 2, 2003 or July 9, 2004 work injuries are "a substantial factor" in his current need for medical treatment. *Koons.*

Employee's claim is based on his theory the "disintegration" of his spine is not occurring at all levels of his spine, but rather just at the levels affected by previous work injuries. Therefore, Employee contends his 2003 and 2004 work injuries are a substantial factor in his need for medical treatment in 2012. However, Dr. Dietrich effectively addressed Employee's theory at hearing. He explained there is a certain "predilection" at specific levels to suffer from degenerative disc disease, particularly the lower two lumbar levels, because of the mechanics of the spine. Dr. Dietrich's testimony also comports with the panel's lay experience in this area. More workers' compensation claims are filed on spinal injuries than any other single type of injury. Most of those involve the L4-5 and L5-S1 disc spaces.

Employee specifically cites Dr. Polston's March 31, 2005 discography as evidence in support of his claim. That study found pressurization at L3-4 produced pain concordant with Employee's symptoms. Employee contends the discography showed Drs. Spencer and Dietrich had "missed" a herniated disc the "next level up." However, without more, this study does not represent what Employee contends it represents.

First, the February 2, 2005 x-rays had already shown disc space narrowing at L3-4 and, in fairness to Dr. Dietrich, his March 18, 2005 EME report had already diagnosed multilevel degenerative disc disease that included L3-4. Additionally, even if the March 31, 2005 discography was evidence establishing Employee suffered a L3-4 protrusion at work, it still would not explain how one of his work injuries remained a substantial factor in his need for medical treatment some seven years later. In fact, even at the time, the significance of the discography confounded one of Employee's providers. Dr. Eule thought the results made "a complex problem more difficult" for Employee because his primary complaint was leg pain rather than back pain.

Years later, Dr. Dietrich shared the same thoughts as Dr. Eule. In his November 16, 2012 EME report, Dr. Dietrich thought although there was a "suggestion" of peripheral neuropathy in Employee's right lower extremity, his low back pain could not be explained on the basis of that condition. He opined although there had been some continuity in Employee's symptoms over time, it would be difficult to attribute Employee's ongoing symptoms to a specific work injury because of a lack of an explanation of Employee's right leg symptoms. In fact, if anything, the March 31, 2005 discography seems to have added confusion to finding a medical explanation for Employee's symptoms. It does not, as Employee contends, establish either the 2003 or the 2004 work injuries were a substantial factor in his need for medical treatment in 2012.

To the contrary, even though Dr. Dietrich originally thought Employee's work activities had combined with his preexisting degenerative changes to produce a need for treatment in 2005, he also thought those aggravations had resolved by the time of his March 18, 2005 report, at which time he declared Employee medically stable. Employee last worked for Employer in December of 2004. Moving ahead to November 16, 2012, Dr. Dietrich noted a significant progression of

degenerative change in Employee's spine at multiple levels since 2004, and did not think the work injuries were still reasonably attributable to Employee's symptoms in 2012. Dr. Dietrich's hearing testimony was consistent with his report. At hearing, he repeatedly described the 2012 incident as an "acute" episode, and when he was specifically asked whether work was the cause of that episode, Dr. Dietrich succinctly and definitively answered: "Basically, no. You really can't make that connection."

In his July 15, 2013 report, Dr. Coulter also noted Employee's multilevel degenerative disc disease at L3-4 through L5-S1 with associated disc protrusions had progressed over the last 10-15 years and opined Employee's vertebral facet osteoarthritis had progressed to a moderate to severe degree. He expressly agreed with Dr. Dietrich and stated the 2003 and 2004 work injuries did temporarily combine with and aggravate Employee's preexisting back and leg symptoms to cause the need for medical treatment at the time, but there is a "paucity of objective evidence that the 2 lumbar strains in question accelerated the lumbar spondylosis or facet arthritis to cause increased bulging or protrusion of any lumbar disc level." The key evidence in this case is clearly the June 15, 2012 MRI, which demonstrates Employee's degenerative condition had progressed at every level, whereas the 2002 and 2004 MRI's that bracketed the two injuries at issue here did not show a significant progression of disc pathology at the time. The 2012 MRI also included new findings of disc desiccation at L1-2 and disc desiccation with disc bulging at L2-3. Although Employee contends the "disintegration" of his spine is not occurring at all levels, the June 15, 2012 MRI decidedly demonstrates otherwise.

As an ancillary matter, even though Dr. Coulter was correctly provided with a definition of the "old Act" "a substantial factor" standard in his referral letter, and even though Employer correctly presented the former standard in its SIME questions, Dr. Coulter repeatedly refers to "the substantial cause" standard in his July 15, 2013 report. Potentially muddling this analysis, in response to Employer's question whether the instant work injuries were "a substantial factor" in causing Employee's current low back symptoms or his need for medical treatment, Dr. Coulter answered: "Yes, they were a substantial factor, but not 'the substantial cause' which at all times concerned here, has been the degenerative spinal disease of multilevel lumbar spondylosis and facet osteoarthritis related to age and heredity."

Though potentially muddling, it is not thought Dr. Coulter's confusion over the correct legal standard necessarily precludes any reliance on his opinion. This is because other statements by Dr. Coulter indicate his answer above to Employer's question represents word-choice confusion rather than a genuine dispute of opinion concerning legal causation. For examples, he repeatedly states in his SIME report he agrees with Dr. Dietrich's opinions; he opined the 2003 and 2004 work injuries were temporary aggravations to Employee's preexisting condition; he thinks Employee's current condition is due to the natural progression of his degenerative disc disease and facet osteoarthritis; he stated the 2003 and 2004 work injuries were "probably not" responsible for Employee's need for medical treatment in 2012. Finally, Dr. Coulter testified a reasonable person would not regard the 2003 and 2004 injuries as being responsible for Employee's need for treatment in 2012**,** an essential component of the Court's test for "a substantial factor" set forth in *Rogers and Babler*.

The record contains substantial evidence Employee had a degenerative spine long before he began working for Employer in 1995. This evidence includes the 1985 tire shop, and the 1994 desk lifting, injuries. Employee's lumbar spine was again injured in the 1999 motor vehicle accident. These events predate even the unreported 2001 CAT pad incident. Additionally, Employee testified at length about his pre-existing degenerative condition at his deposition when discussing the 2002 TVC x-ray that showed bone spurs "hanging off his spine." He contended the x-ray was "good evidence" he was not injured at work in 2002 because the length of the bone spurs demonstrated they could not have grown that much between the time of his reported injury and the time the x-ray was taken.

In his March 18, 2005 EME report, Dr. Dietrich wrote: "Mr. Kline has had injuries to his back, both related to work activity and off work activity. Despite a history of some hostility toward his medical attendants in the past, he presents himself as a credible historian." Today, this decision finds Employee much as Dr. Dietrich did in 2005. Both during his deposition and at hearing, Employee demonstrated articulated hostility toward Employer, the board panel, numerous physicians, attorneys, former co-workers, insurance companies, and the other driver and a witness to a motor vehicle accident he was involved in. He aggressively attempted to elicit testimony from panel members and questioned their ability to make a decision in this case. However, like Dr.

Dietrich in 2005, this decision also finds Employee is an above-average historian. He accurately recalled details of his medical treatment and work injuries and was credible on the issues of his work injuries and spinal symptoms.

There is no doubt Employee worked hard and engaged in heavy physical labor during the nearly ten years he worked for Employer. There is similarly no doubt about the persistence and severity of his symptoms. However, the instant decision must be issued based on the medical evidence in the record, which clearly documents the progression of Employee's degenerative disc disease from long before Employee began working for Employer, through his tenure of employment, and continuing until 2013, nearly a decade after Employee stopped working for Employer. Even Employee candidly acknowledged at his deposition every doctor has opined it is undetermined whether work caused his degenerative disk disease. The two critical factors in this analysis are how far removed in time the work injuries are from Employee's 2012 need for medical treatment, and the June 15, 2012 MRI that shows the extent to which Employee's spine had degenerated since last being employed by Employer. Given these facts, as well as Dr. Dietrich's and Dr. Coulter's opinions, it cannot be said Employee would have required medical treatment at the time he did, in the way he did, or to the degree he did, if it were not for the 2003 or 2004 work injuries such that reasonable people would regard the work injuries as the cause and attach responsibility to them. *Rogers & Babler*. Employee has failed to carry his burden and his claim will be denied. *Koons*.

CONCLUSION OF LAW

Employee is not entitled to an award of medical costs as a result of his December 3, 2003 and July 9, 2004 work injuries.

ORDER

Employee's June 5, 2012 claim is denied.

Dated in Fairbanks, Alaska on August 13, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Robert Vollmer, Designated Chair

/s/_____
Sarah Lefebvre, Member

/s/_____
Mark Talbert, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MARK L. KLINE, employee / claimant; v. LYNDEN TRANSPORT, employer; and ACE AMERICAN INSURANCE COMPANY, insurer / defendants; Case No. 200415281; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on August 13, 2014.

/s/_____
Darren R. Lawson, Office Assistant II