ALASKA WORKERS' COMPENSATION BOARD

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

BENJAMIN E. BODI, Employee, Claimant, v. JOHNSON'S TIRE SERVICE, Employer, and REPUBLIC INDEMNITY CO. OF AMERICA, Insurer, Defendants.	)	FINAL DECISION AND ORDER ON MODIFICATION AWCB Case No. 201206222 AWCB Decision No. 14-0149 Filed with AWCB Anchorage, Alaska on November 7, 2014

Johnson's Tire Service's October 30, 2014 petition for reconsideration and modification was heard on the written record on November 4, 2014 in Anchorage, Alaska. This hearing date was selected on November 3, 2014 on the board's own motion. Attorney Joseph Cooper represented Johnson's Tire Service and Republic Indemnity Co. of America (Employer). Benjamin E. Bodi (Employee) did not appear. The record closed at the hearing's conclusion on November 4, 2014.

ISSUES

Employer contends *Bodi v. Johnson's Tire Service*, AWCB Decision No. 14-0145 (October 29, 2014) (*Bodi I*) should be reconsidered or modified. *Bodi I* held it was error to proceed with the hearing in Employee's absence when the board's file had not been updated to show Employee's new telephone number and attempts to reach Employee at his prior telephone number failed. As a result, *Bodi I* did not address the merits of Employer's petitions. Employer asserts Employee's new telephone number was also not in service on the day of the hearing, and attempts to reach

him at that number would have been futile. Employer asks that the substantive issues raised in *Bodi I* be addressed. Because Employee did not participate, his position is unknown, but it is presumed he is opposed to reconsideration or modification.

1. Should the holding in Bodi I that it was error to proceed with the hearing be reconsidered or modified?

If *Bodi I* is reconsidered, Employer contends Employee's claim should be dismissed because Employee's injury did not occur in the course and scope of his employment. Employee's position is unknown, but it is presumed he is opposed to dismissal.

2. Should Employee's claim be dismissed because the injury did not occur in the course and scope of the employment?

If *Bodi I* is reconsidered, Employer contends that because it filed a controversion notice stating Employee's injury did not arise in the course and scope of the employment, the RBA designee erred in finding Employee eligible for reemployment benefits. Because Employee did not appear at hearing, his position is unknown, but it is assumed he contends the RBA designee did not err.

3. Did the RBA designee err in finding Employee eligible for reemployment benefits?

FINDINGS OF FACT

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

1. Employee worked for Employer as a tire technician. On April 22, 2012, he reported an injury to his right shoulder. He did not report a traumatic injury, but stated "worked really hard; shoulder started to hurt really bad; kept working through it, and it went out." (Report of Injury, May 1, 2012).
2. On May 9, 2012, Employee was seen by Gary Benedetti, M.D. Dr. Benedetti noted Employee reported that he did not feel a tear or a pop, just the sudden onset of pain. Employee reported no prior shoulder injuries, but stated he would occasionally get a pop in his shoulder with a dull ache when the pop occurred. After reviewing an MRI, Dr. Benedetti diagnosed a small right rotator cuff tear/strain and a probable small superior labrum tear. He prescribed physical therapy. (Dr. Benedetti, Chart Note, May 9, 2012).

3. On June 6, 2012, Dr. Benedetti filed a physician's report, but did not respond to the question asking if the condition was work related. (Dr. Benedetti, Physician's Report, June 6, 2012).
4. An MRI with contrast on June 8, 2012 showed a prominent superior labrum anterior-posterior (SLAP) lesion including complex tears. (Robert Bridges, M.D., MRI Report, June 8, 2012).
5. On August 2, 2012, Dr. Benedetti performed an arthroscopic SLAP and anterior labral repair. (Mat-Su Regional Medical Center, Operative Report, August 22, 2012).
6. Because Employee was unable to return to work for 90 consecutive days, an eligibility evaluation was ordered on August 30, 2012. (Letter, Darlene Charles to Employee, August 30, 2012).
7. On March 6, 2013, Employee was seen by Ross Brudenell, M.D., for a second opinion concerning pain following his surgery. (Orthopedic Physicians Anchorage, Chart Note, March 6, 2013).
8. On April 10, 2013, Dr. Brudenell responded to a letter from Employer's adjuster asking if the work activities of April 22, 2012 were the substantial cause of Employee's continued need for treatment. Dr. Brudenell answered that the work activities were the substantial cause. (Letter, Jessica Rush to Dr. Brudenell, April 9, 2013, with handwritten responses).
9. On June 5, 2013, Employee was seen by John Swanson, M.D., for an employer's medical evaluation (EME). Dr. Swanson explained the type of injury Employee suffered required some trauma and was not caused by wear and tear. Given Employee's explanation of how the injury occurred, Dr. Swanson stated Employee's shoulder injury did not occur at work on April 22, 2012, but was the result of a prior unreported injury. (Dr. Swanson, EME Report, June 5, 2013).
10. On June 12, 2013, Employer controverted all benefits based on Dr. Swanson's EME Report. The controversion notice states, "The employer relies upon Dr. Swanson's June 5, 2013 report, wherein he opined that the reported April 22, 2013 work injury is not the substantial cause of the employee's right shoulder condition and need for treatment." (Controversion Notice, June 11, 2013).
11. On August 1, 2013, the RBA designee determined Employee was eligible for reemployment benefits. The eligibility determination letter included a footnote stating:

> I am aware of the fact that Northern Adjusters has controverted your claim based upon the opinion of Independent Medical Evaluator Dr. John Swanson. Dr. Swanson concluded that your April 22, 2012 injury is not the substantial cause of the employee's right shoulder condition and need for treatment. I cannot resolve the issue of compensability, on (sic, only) the Board can address this issue. However, I based my determination on the opinion of your attending physician, Dr. Brudenell. (Eligibility Determination, August 1, 2013).

12. On August 13, 2013, Employer filed a petition seeking review of the RBA designee's eligibility determination. Employer contended that its June 11, 2013 controversion had the effect of denying all benefits because the injury did not arise out of and in the course of employment, and, consequently, the reemployment process should have stopped under 8 AAC 45.510(b). (Petition, August 13, 2013).
13. On February 24, 2014, Employer filed a petition seeking "dismissal of this claim." Employer contended that Employee did not sustain an injury in the course and scope of his employment. (Petition, February 20, 2014).
14. A prehearing conference was held on April 11, 2014. Employee attended telephonically. Employer explained its position that work was not the substantial cause of Employee's current shoulder condition. Employee pointed out that his treating physician had a different opinion. The board designee explained the adjudication process, and Employee stated he would file for the benefits he felt he was owed. (Prehearing Conference Summary, April 11, 2014).
15. An undated Post-it note in the board file indicates Employee asked to have his telephone number changed. However, Employee's telephone number in the board's computerized database was not updated. (Record).
16. On August 20, 2014, another prehearing was held. The board designee was unable to reach Employee at the number in the board's computerized database. A hearing was set for October 15, 2014 on Employer's petitions for review of the RBA designee's eligibility decision and to dismiss Employee's claim. The prehearing conference summary was served on Employee by mail at his address of record on August 21, 2014. (Prehearing Conference Summary, August 20, 2014).
17. On September 15, 2014, notice of the October 15, 2014 hearing was mailed to Employee at his address of record. (Hearing Notice, September 15, 2014).

18. At the October 15, 2014 hearing, the chair was unable to reach Employee at the telephone number in the board's computer database, and orally ruled that the hearing should proceed in Employee's absence as Employee had received notice of the hearing. (Record).
19. *Bodi I*, which issued on October 29, 2014, held the hearing chair had erred in proceeding with the hearing given the board's failure to update Employee's telephone number. Consequently, *Bodi I* did not address Employer's petition for review of the RBA designee's eligibility finding or Employer's petition to dismiss. (*Bodi I*).
20. On October 30, 2014, Employer filed a petition for reconsideration of *Bodi I*. Employer contended Employee's new telephone number was also no longer in service, and it would have been futile to call him at that number. (Petition, October 30, 2014).
21. On October 30, 2014, with its petition for reconsideration, Employer filed the affidavit of Teresa Reed. Ms. Reed stated that on July 25, 2014, she had called Employee's new telephone number and received a message that the number was not reachable. Prior to October 14, 2014 she had tried to reach Employee at his new number and received the same message. Again on October 30, 2014, she tried to reach Employee at that number and again received the same message. (T. Reed, Affidavit, October 30, 2014).

PRINCIPLES OF LAW

Sec. 23.30.001. Intent of the legislature and construction of chapter. It is the intent of the legislature that

(1) This chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

(2) Worker's compensation cases shall be decided on their merits except where otherwise provided by statute. . . .

Sec. 23.30.005. Alaska Workers' Compensation Board.
. . .

(h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible.

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

AS 23.30.010. 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.

Sec. 23.30.041. Rehabilitation and reemployment of injured workers.
. . . .

(d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:

> (1) the employee's job at the time of injury; or
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> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.'
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> . . . .

The RBA's decision must be upheld absent "an abuse of discretion on the administrator's [designee's] part." *Miller v. ITT Arctic Services*, 367 P.2d 884, 889 (Alaska 1962). Several definitions of "abuse of discretion" appear in Alaska law although none appear in the Alaska Workers' Compensation Act (Act). The Alaska Supreme Court stated abuse of discretion consists of "issuing a decision which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. University of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985). *See also Tobeluk v. Lind*, 589 P.2d 873, 878 (Alaska 1979). An agency's failure to apply controlling law or to exercise sound, reasonable and legal discretion may also be considered an abuse of discretion. *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1013 (Alaska 2009); *Irvine v. Glacier General Construction*, 984 P.2d 1103, 1107, n. 13 (Alaska 1999); *Manthey v. Collier*, 367 P.2d 884, 889 (Alaska 1962).

The Administrative Procedures Act, at AS 44.62.570, provides another definition used by courts in considering appeals from administrative agency decisions. It contains terms similar to those cited above, and expressly includes reference to a "substantial evidence" standard:

> Abuse of discretion is established if the agency has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. . . . If it is claimed that the findings are not supported by the evidence, abuse of discretion is established if the court determines that the findings are not supported by (1) the weight of the evidence; or (2) substantial evidence in the light of the whole record.

Determining whether an abuse of discretion has taken place is aided by the practice of allowing additional evidence at the review hearing, based on the rationale expressed in several superior court opinions addressing board decisions. *See, e.g., Kelley v. Sonic Cable Television*, Superior

Court Case No. 3AN 89-6531 CIV (February 2, 1991); *Quirk v. Anchorage School District*, Superior Court Case No. 3AN-90-4509 CIV (August 21, 1991).

> **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; . . . .

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, including medical benefits. *Carter*, 818 P.2d at 665; *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991).

Application of the presumption involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or her injury and the employment. *See, e.g., Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). Medical evidence may be needed to attach the presumption of compensability in a complex medical case. *Burgess Constr. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). However, an employee "need not present substantial evidence that his or her employment was a substantial cause of his disability." *Fox v. Alascom, Inc.*, 718 P.2d 977, 984 (Alaska 1986) "In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility." *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

If the employee establishes the preliminary link, then the employer can rebut the presumption by presenting substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability or need for medical treatment or by substantial evidence that employment was not the substantial cause. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (Mar. 25, 2011) at 7); *Atwater Burns Inc. v. Huit*, AWCAS Decision No. 191 (March 18, 2014). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Fireman's Fund Am. Ins. Companies v. Gomes*, 544

P.2d 1013, 1015 (Alaska 1976). The determination of whether evidence rises to the level of substantial is a legal question. *Id*. Because the employer's evidence is considered by itself and not weighed at this step, credibility is not examined at this point. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-870 (Alaska 1985).

If the presumption is raised and not rebutted, the claimant need produce no further evidence and prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997). "If the employer rebuts the presumption, it drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable." *Runstrom* at 8.

> **AS 23.30.130. Modification of awards.**
> (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
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> (b) A new order does not affect compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and payment made earlier in excess of the decreased rate shall be deducted from the unpaid compensation, in the manner the board determines.

> **AS 44.62.540. Reconsideration.**
> (a) The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. If no action is taken on a petition within the time allowed for ordering reconsideration, the petition is considered denied.

> (b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and argument that are permitted, or may be assigned to a hearing officer. A reconsideration assigned to a hearing officer is subject to the procedure provided in AS 44.62.500. If oral evidence is introduced before the agency, an agency member may not vote unless that member has heard the evidence.

"A party to a worker's compensation case has three methods by which to pursue its position before the board's award is final. The party may raise the issue in a pleading, [footnote omitted], petition for review of all or part of the case within the time limits set forth in AS 44.62.540, [footnote omitted], or, in the case of a factual mistake or a change in conditions, it may ask the board to exercise its discretion to modify the award at any time until one year after the last compensation payment is made [footnote omitted]." The "appropriate recourse for allegations of legal error is a direct appeal or petition to the board for reconsideration of the decision within the time limits set by AS 44.62.540(a)." *George Easley Co. v. Estate of Lindekugel*, 117 P.3d 734, 743-44 (Alaska 2005).

> In order to modify a previous order on the theory of mistake, a new order should make it clear that it is doing so, should review the evidence of the first hearing and should indicate in what respect the first order was mistaken-whether in the inaccuracy of the evidence, in the impropriety of the inferences drawn from it, or, as may be true in the present case, because of the impossibility of detecting the existence of the particular condition at the time of the earlier order.

Fischback & Moore of Alaska, Inc. v. Lynn, 430 P.2d 909, 911-12 (Alaska 1967)

> **8 AAC 45.070. Hearings**
> . . . .
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> (f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,
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> (1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;
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> (2) dismiss the case without prejudice; or
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> (3) adjourn, postpone, or continue the hearing.

Jonathan v. Doyon Drilling, Inc., 890 P.2d 1121, (Alaska 1995), note that the word "claim" is not defined in the Act, and is used in two contexts. In some places "claim" refers to an injured worker's right to compensation; in others it refers to a written application for benefits. In *Summers v. Korobkin Const.*, 814 P.2d 1369 (Alaska (1991), the Supreme Court held that an injured worker, who was not then receiving medical treatment, was entitled to a prospective determination of compensability.

8 AAC 45.510. Request for reemployment benefits eligibility evaluation
(a) For injuries occurring on or after November 7, 2005, if the employee has been totally unable to return to the employee's employment at time of injury for at least 60 consecutive days, but less than 90 consecutive days, as a result of the injury, the employee or employer may request an eligibility evaluation for reemployment benefits. The requesting party must file with the administrator and serve all other parties with

(1) a written request for the evaluation;

(2) a physician's prediction the injury may permanently preclude the employee from returning to the employee's job at the time of the injury; and

(3) documentation the employee has been totally unable to return to the employee's employment at the time of the injury for at least 60 consecutive days, but less than 90 consecutive days, as a result of the injury.

(b) The administrator shall consider a written request for an eligibility evaluation for reemployment benefits, unless the employer controverts on grounds the employee's injury did not arise out of and in the course of employment, on grounds the employee's total inability to return to the employee's employment at the time of injury is not a result of the injury, or on grounds identified under AS 23.30.022 , 23.30.100, 23.30.105, or 23.30.250. If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference regarding the controversion no later than 30 days after the board receives the matter. If a claim is filed and if requested by the employee, the board will conduct a hearing no later than 90 days after the prehearing conference in accordance with 8 AAC 45.060(e) and 8 AAC 45.070(b) (3), limited to the grounds set out in this subsection.

8 AAC 45.522. Ordering an eligibility evaluation without a request
(a) For injuries occurring on or after November 7, 2005, if an employee has been totally unable to return to the employee's employment at time of injury for 90 consecutive days as a result of the injury, the administrator shall refer the employee for an eligibility evaluation, unless the employer controverts on grounds identified under AS 23.30.022 , 23.30.100, 23.30.105, and 23.30.250, or

> 8 AAC 45.510(b) . If reemployment benefits have been controverted on any of these grounds, the administrator shall forward the matter to the board to conduct a prehearing conference and hold a hearing in accordance with 8 AAC 45.510(b).

ANALYSIS

1. Should the holding in Bodi I that it was error to proceed with the hearing be reconsidered or modified?

Implicit in *Bodi I*'s determination that it was error to proceed with the hearing without attempting to contact Employee at his new telephone number is the inference that such an attempt might have been successful. Ms. Reed's affidavit provides substantial evidence the inference in *Bodi I* was incorrect, and *Bodi I* will be modified.

Employee was properly served with notice of the October 15, 2014 hearing at his address of record. Additionally, the August 20, 2014 prehearing conference summary, which included the date of the hearing, was properly served on Employee at his address of record. Although board error resulted in the use of an incorrect telephone number in attempts to contact Employee at the hearing, that error was harmless as the number provided by Employee was also inoperable. The determination in *Bodi I* that it was error to have proceeded with the October15, 2014 hearing in Employee's absence was incorrect. Because Employee was properly served with notice of the hearing and the board would have been unable to reach him by telephone even if the correct number had been used, the hearing should have proceeded in Employee's absence.

2. Should Employee's claim be dismissed because the injury did not occur in the course and scope of the employment?

Employer's February 24, 2014 petition seeks dismissal of Employee's "claim." As the Supreme Court noted in *Jonathan*, the Act uses "claim" in two contexts; it can mean an injured worker's right to compensation, or it can refer to a written application for benefits. Typically, petitions to dismiss a claim are seen in connection with an application for benefits. In this case, Employee has never filed an application for benefits (a Workers' Compensation Claim). What Employer is actually seeking is a determination as to whether Employee's injury occurred in the course and scope of his employment – essentially a prospective determination of compensability. *Summers*

held that an Employee is entitled to a prospective determination of compensability. There would seem to be no reason an Employer cannot also request such a determination.

Where an employer files a petition to dismiss a claim and the employee has not filed a Workers' Compensation Claim, the ambiguity raises a concern that the employee may not have adequate notice that his right to benefits may be at issue. An employee is unlikely to be concerned whether or not a "claim" is dismissed when he hasn't filed a claim. In this case, however, at the April 11, 2014 prehearing conference, Employer explained it was seeking to dismiss on the grounds that work was not the substantial cause of Employee's shoulder condition, and Employee stated his doctors disagreed. Despite the possibly confusing title of Employer's petition, Employee clearly understood that Employer was seeking a ruling as to whether his injury occurred in the course and scope of his employment.

The presumption of compensability applies to the question of whether or not an injury occurred in the course and scope of employment. Employee needed only "some," or "minimal," relevant evidence to raise the presumption. In determining whether the presumption is met, credibility is not considered nor is the evidence weighed against competing evidence. Dr. Brudenell's April 10, 2013 opinion that Employee's April 22, 2012 work activities were the substantial cause of Employee's need for treatment is sufficient to raise the presumption.

To rebut the presumption, Employer was required to present substantial evidence demonstrating that employment was not the substantial cause or that a cause other than employment played a greater role in causing Employee's disability and need for medical treatment. Again, credibility is not considered nor is the evidence weighed against competing evidence at this step. Employer successfully rebutted the presumption through Dr. Swanson's June 5, 2013 report. Because Employer rebutted the presumption, Employee must prove by a preponderance of the evidence that the work injury was the substantial cause of his disability or need for medical treatment

Only Dr. Brudenell and Dr. Swanson offered opinions as to the cause of Employee's disability or need for medical treatment. More weight is given to Dr. Swanson's opinion for several reasons. Dr. Brudenell first saw Employee on March 6, 2013, after Employee's surgery and almost eleven

months after Employee reported the injury. There is no evidence that Dr. Brudenell reviewed Employee's earlier medical records or the report of injury. His opinion is offered only as a short "fill-in-the-blank" response, and he gives no explanation of his cursory answer. In contrast, Dr. Swanson examined Employee, spoke to Employee about the work incident, and reviewed Employee's medical records. Dr. Swanson explained that Employee's description of his activities at the time were inconsistent with the mechanisms of injury that might produce Employee's injury. Dr. Swanson's opinion is given greater weight. Employee failed to prove by a preponderance of the evidence that his injury occurred in the course and scope of his employment. Employer's petition to dismiss will be granted.

3. Did the RBA designee err in finding Employee eligible for reemployment benefits?

Because Employee's injury did not occur in the course and scope of his employment, he is not entitled to reemployment benefits. Whether the RBA designee abused her discretion or not is a moot issue.

CONCLUSIONS OF LAW

1. *Bodi I*'s holding that it was error to proceed with the hearing will be reconsidered and modified.

2. Employee's claim will be dismissed because the injury did not occur in the course and scope of his employment.

3. Whether the RBA designee erred in finding Employee eligible for reemployment benefits is moot as the injury did not occur in the course and scope of his employment.

ORDER

1 Employer's October 30, 2014 petition for reconsideration is granted. *Bodi I*'s decision that it was error to proceed with the October 15, 2014 hearing in Employee's absence is reconsidered and modified. It was not error to proceed with the hearing in Employee's absence.

2. Employer's February 24, 2014 petition to dismiss is granted. Employee's injury did not occur in the course and scope of his employment with Employer.

3. Employer's August 13, 2013 petition seeking review of the RBA designee's finding that Employee was eligible for reemployment benefits is moot.

Dated in Anchorage, Alaska on November 7, 2014.

ALASKA WORKERS' COMPENSATION BOARD

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Ronald P.- Ringel, Designated Chair

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David Kester, 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 BENJAMIN E. BODI, employee / claimant; v. JOHNSON'S TIRE SERVICE, employer; REPUBLIC INDEMNITY CO. OF AMERICA, insurer / defendants; Case No. 201206222; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on November 7, 2014.

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Pamela Murray, Office Assistant