# ALASKA WORKERS' COMPENSATION BOARD

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

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| MICHAELA HUNTER,<br><br>Employee,<br>Applicant,<br><br>v.<br><br>FAIRBANKS NORTH STAR BOROUGH,<br><br>Self-insured Employer,<br>Defendant. | ) | FINAL DECISION AND ORDER<br><br>AWCB Case No. 201210897<br><br>AWCB Decision No. 14-0160<br><br>Filed with AWCB Fairbanks, Alaska on December 9, 2014 |

Michaela Hunter's (Employee) July 8, 2014 petition requesting temporary total disability (TTD) benefits under the Alaska Workers' Compensation Act (Act) was heard on October 16, 2014 and October 30, 2014, in Fairbanks, Alaska. The case was heard by a two-member panel, a quorum under AS 23.30.005(f). The hearing date was selected on September 3, 2014. Employee appeared, represented herself and testified. Attorney Wendy Doxey represented the Fairbanks North Star Borough (Employer). Renee Dick and Bev Shuttleworth testified in person. Sallie Stuvek testified by telephone. The record was held open to receive a letter from Northern Lights Pain Management. The record closed when the panel next met and deliberated, on November 6, 2014.

## ISSUE

Employee contends she is entitled to TTD benefits for the period June 9, 2014 to August 8, 2014 as she was not medically stable and her work injury prevented her from working during that period.

Employer contends Employee became medically stable 45 days after her last documented medical treatment, or February 28, 2014, and has been medically stable since that time. Employer further contends even if Employee was not medically stable, she voluntarily withdrew from the job market and is thus not entitled to TTD benefits.

*Is Employee entitled to additional TTD benefits?*

## FINDINGS OF FACT

Evaluation of the record as a whole establishes the following facts and factual conclusions by a preponderance of the evidence:

1) On March 24, 2008, Employee applied for a seasonal groundskeeping position with the Fairbanks North Star Borough Parks and Recreation Department (FNSB). In her cover letter, she stated "I have been educated professionally in Education with a Bachelors [sic] Degree and Paralegal Studies with an Associates [sic] Degree." On the FNSB application, she indicated she had "intermediate" proficiency with Microsoft Word and Excel and experience with PowerPoint. (Employee Cover Letter and Application, March 24, 2008).

2) From 2008 to 2012, Employee worked as a seasonal groundskeeper for Employer. During the school year, Employee worked as a substitute teacher. (Employee; record).

3) On July 30, 2012, Employee reported she had injured her "arms – elbows and wrists" while "weedwacking, moving plywood, using screw gun" working for Employer as a seasonal groundskeeper. (Report of Occupational Injury or Illness, July 30, 2012).

4) Employer accepted the compensability of the injury and began paying TTD benefits and medical benefits. (Record).

5) On April 9, 2013, Employee met with FNSB Human Resources Director Sallie Stuvek for an Americans with Disabilities Act (ADA) accommodation meeting. Employee and Stuvek jointly determined Employee was no longer able to perform the necessary functions of her position as groundskeeper, and together determined Employee was eligible and qualified for placement in five open positions: Chena Lakes Ranger Aide, Pioneer Park Aide, Pioneer Park Guide, Library Assistant II, and Temporary Office Aide and Parks & Recreation. (S. Stuvek Memorandum to Employee re: ADA Accommodation – Job Placement Offer, April 9, 2013).

6) Employee elected to transfer to the Temporary Office Aide position with the Parks & Recreation Department. She worked there during summer 2013 and returned to substitute teaching in the fall. (Employee; Stuvek).

7) On January 14, 2014, Employee saw Michael McNamara, MD. Employee complained of continued elbow pain. Dr. McNamara referred Employee to elbow specialist Robert Valentz, MD, and ordered nerve conduction studies. (Dr. McNamara report, January 14, 2014).

8) On January 21, 2014, Dr. McNamara completed a Fitness for Duty form, indicating Employee was released to light duty work but restricted to only occasionally lifting up to ten pounds and occasionally pushing and pulling no greater than five pounds. (Dr. McNamara Fitness for Duty report, January 21, 2014).

9) On February 17, 2014, James Foelsch, MD performed nerve conduction studies, which were normal. Dr. Foelsch diagnosed bilateral elbow pain, probably secondary to local inflammation, and probable tendinitis. He noted there was no involvement of the ulnar nerve. Dr. Foelsch recommended Employee return to her treating physicians for management. (Dr. Foelsch nerve conduction study; February 17, 2014).

10) Employee did not receive any further treatment after undergoing the nerve conduction studies. (Employee; record).

11) On June 12, 2014, Dr. McNamara referred Employee to Dr. Valentz at Northern Lights Pain Management for "pain management and possible trial of Neurontin." (June 12, 2014).

12) On July 9, 2014, Cindy L. at Northern Lights Pain Management wrote a letter:

> We received a referral from Dr. McNamara's office on June 12, 2014. At this time we are unable to schedule you for an appointment due to verbal denial from your workers compensation adjuster. Any further questions need to be directed to your workers compensation adjuster. (Northern Lights Pain Management letter, July 9, 2014).

13) On July 9, 2014, Employee filed a petition, which stated:

> I am, Michaela Hunter and I come to the Workers Compensation Board for a review of my case my request is made for the following reasons:
>
> 1) To clarify my status. I have been under TDY (sic, TTD) status since my injury. The last time I was paid for my time was in January of this year when I attended my doctor's appointment in Anchorage. I have been employed as a Substitute Teacher with the FNSB School District for approximately 6 years. I worked this job in the fall and winter. My primary school I work at makes accommodations for me and I have taken

> off work in the past year because of pain in my arms. I was notified in January of this year my previous job with FNSB was eliminated and I could apply for other jobs. I have been trying to find other jobs outside of FNSB with no success.
>
> 2) I wrote my doctor a letter on June 6, 2014 asking for a prescription of 800mg of ibuprofen and was told that was not possible and I would be referred to the Pain Management Clinic in Fairbanks. I contacted them to see what I needed to do and the services they provide. I gave them my Workers[’] Compensation information. They contacted me for clarification of information, I gave it. I then received a voice mail from the Pain Management Clinic and was informed that FNSB had declined my treatment because they think I have Rheumatoid Arthritis.
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> 3) I contacted the FNSB to find out why on June 26, I spoke with Tony Shumate, I asked about why I had been declined and was told that he, Mr. Shumate would contact Bev Shuttleworth by phone or e-mail because she was working out of the office. I have not heard back from the FNSB. I have no other contact from them. My last letter was on June 23, 2014. I have checked my mail regularly, last July 8, 2014.
>
> 4) I have been working on getting blood work done that Dr. McNamara ordered. After needed clarification from the doctor about what my hormone level or diabetes level had to do with my Workers[’] Compensation injury, it was condensed down to Rheumatoid Arthritis. I am borrowing money from a friend and I will complete this test by July 15, 2014.
>
> I have been doing everything I have been asked to do. I still have pain in my elbow, especially my left elbow. I have not been able to find employment at this time and wonder what is next. So I am requested [sic] a hearing to find out my status and what the next steps are in this process. (Employee Petition, July 8, 2014).

14) On July 29, 2014, Employer filed its answer to Employee’s July 8, 2014 petition:

> The Employer, Fairbanks North Star Borough School District, (sic) received a Petition from the Employee that appears to be a request for a pre-hearing conference. The Board appears to have treated it as such, and has set a pre-hearing conference in this matter for August 5, 2014. To the extent the petition is requesting some other form of relief, the Employer disputes the petition complies with 8 AAC 45.050(b), and denies that any benefits are due and owing under the Act, and asserts that all compensation has been paid when due. (Employer’s Answer to Employee’s Petition, July 29, 2014.)

15) On August 8, 2014, Employer filed a controversion notice, denying temporary partial disability (TPD) benefits and TTD benefits, stating

> Employee's last medical evaluation was 1/14/14. In accordance with AS 23.30.395 medical stability is presumed in the absence of objectively measurable improvement for a period of 45 days. Employer asserts medical stability not later than 02/28/14. Employee asserted at PHC 8/5/14 entitlement of TTD benefits from 5/24/14 and ongoing. AS 23.30.185 states TTD benefits may not be paid for any period of disability occurring after the date of medical stability. (Controversion Notice, August 8, 2014).

16) On August 14, 2014, Michael Fraser, MD conducted an employer's medical examination (EME). Regarding medical stability, Dr. Fraser noted, "Ms. Hunter specifically states that she began having significant improvement in May 2014, and therefore, I feel medical stability has been attained at the date of this examination." (Dr. Fraser EME, August 14, 2014).

17) On September 19, 2014, the parties attended a prehearing conference (PHC). The parties agreed to set the issue of whether Employee is entitled to additional TTD benefits for hearing on October 16, 2014. (PHC Summary, September 19, 2014).

18) On September 26, 2014, reemployment specialist Alizon White completed a job market survey. Ms. White surveyed numerous Fairbanks businesses with available light duty positions matching Employee's qualifications and concluded "that there was (during the summer of 2014) and/or is a market for the employee's services in her area of residence with wages ranging from $10.00 to $20.82 per hour." (A. White letter to B. Shuttleworth, September 26, 2014).

19) On September 26, 2014, FNSB Personnel Assistant Renee Dick wrote a letter indicating the following position vacancies were advertised during the period January 1, 2014 to September 26, 2014:

| Position | Salary | Frequency | Status |
|---|---|---|---|
| Chena Lake Ranger Aide | $12.50/hr. | 3 | Seasonal |
| Pioneer Park Aide | $12.50/hr. | 3 | Seasonal |
| Administrative Assistant I (Pioneer Park) | $20.82/hr. | 1 | Full Time .75/ Part time .25 |

Ms. Dick wrote:

> Further, on April 9, 2013, Ms. Hunter attended an ADA accommodation meeting wherein it was agreed that based upon her restrictions at that time and her employment history she qualified for the positions identified above along with positions of Library Assistant II and Temporary Clerical Pool positions. (R. Dick letter, September 26, 2014).

20) On October 9, 2014, Employee submitted a written brief, which reads in part:

> My final evidence is the partial lists I submitted of Things I can't do, Things I struggle with and Things unable to do for employment. I included this list because I believe the current evaluation of my physical limitations is not accurate for what I am able to do.
>
> I feel that I am within the statutes for my request of benefits. The employer, in their Employer's Notice of Intent To Reply (sic) asserts that there are numerous jobs that I could have obtained.
>
> Their assertion of my skill level is not quite right. I could, before my injury type approximately 30wpm. Now it is less than 20wpm. I am not skilled above basic skills with Microsoft Word or Excel. I had these classes over 8 years ago and retain the skills of what I use. I do not use Excel. Last year while working for FNSB at Pioneer Park, I was given an Excel tutorial which I worked on in the mornings. I did not complete it as there were other things going on in the morning that did not allow for me to finish or retain that knowledge. I have no knowledge of Power Point or Access.
>
> All of the jobs that are listed in the Genex report do not take into account that I am only looking for summer work. I am not looking for a year round full time job. They do not take into account that if I have over used my arms or slept without my sleeping accommodations that I do not work the next day because it is hard to focus and function when you are hurting.
>
> They also assert that I teach K-12. The restrictions I have had in place for better part of my employment with FNSBSD are for 3rd grade and up. My skill set does not reach below that any more. It has been 20 years since I have had formal education for my teaching degree and a lot of things have changed which has limited my scope of work.
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> Their final assertion is that there were open positions with FNSB within the Parks and Recreation Department and that someone called to tell me of the Pioneer Park position.
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> No one called me from FNSB to inform of any openings. This can be illustrated with a copy of my phone records. I have no other phone besides my cell phone so this is easily verifiable. The only person that called and talked with me was Renee Dick in January 2014. She told me that my position had been eliminated and told me I could apply for other jobs.
>
> I am aware that if FNSB offered me a job and I declined I would not be eligible for benefits. I have not turned down any employment offers that have been provided to me.

> I have not and will not apply for any positions at FNSB. During my time there, there were certain events that happened that were detrimental to me. Starting in 2006 I was bullied by several of my supervisors. I was called "Big Girl", I was told that no one liked me, I was the butt of many jokes , and at one point was excluded from the morning meetings for volunteering to help with a User Group that needed some help with a project. I was asked if the safety cone I was carrying was my new hat, I was sent out to work by myself often and was told to keep my head down and work because none of the other supervisors wanted me on their crews and that I had nowhere else to go. It became so bad that I started seeing a counselor in 2010 because I did not like what was happening with me. It helped.
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> The next thing that helped was working at Pioneer Park. Working with Sandy Harrington was a blessing. I can remember feeling like a beaten dog when I started there. With time, patience and encouragement I began to find my way back. . . .

(Employee Hearing Brief, October 9, 2014).

21) Renee Dick credibly testified about her role as a personnel assistant for Employer and Employer's recruitment process. She testified Employee had contacted her multiple times over the years. Ms. Dick was heavily involved in the summer recruitment for seasonal employees. Each year in February she would send out recall letters to prior seasonal employees. In January 2014, she contacted Employee to inform her the position she had worked in had been eliminated. The temporary office position at Pioneer Park had been replaced by a half-time year-round position. She notified Employee she was "more than welcome to apply" for the new position. It was a newly budgeted position and would likely be posted in July. She told Employee to "keep an eye out" for open positions, but Employee did not apply for any positions with the FNSB. (Dick).

22) FNSB Human Resources Director Sallie Stuvek credibly testified about her position for Employer and her interactions with Employee. She received a complaint from Employee on June 20, 2011. Employee complained about negative interactions with her co-worker, the parks caretaker, the fact she was using cleaning chemicals without gloves, and that some of the equipment was not of satisfactory quality. Ms. Stuvek contacted Employee's supervisor and co-worker and directed them to have "better interaction" with Employee. She contacted the OSHA representative and provided Employee with protective gloves and contacted the Parks and Recreation director to ensure Employee's concerns were addressed. On July 8, 2014, she closed

the file and did not hear again from Employee. This was the typical manner in which complaints are addressed in the Human Resources department. (Stuvek).

23) Stuvek further testified Employee was placed on modified duty at the library and the FNSB administrative center after her injury. Employee was able to do the light duty work. In April 2013, Stuvek met with Employee to discuss accommodations for her injury. Employee had received a medical report stating she would not be able to perform the necessary functions of the parks and recreation groundskeeper position. At that time, FNSB had 27 open positions. Stuvek reviewed the positions and determined based on Employee's resume and medical restrictions, she was eligible for five positions. She and Employee agreed Employee qualified for those positions and she could accept her choice from the list. Employee selected the temporary office aide position for Parks and Recreation at Pioneer Park. She clearly met the minimum qualifications for that position. Employee said it was "no problem" and that she had experience with Microsoft Word and Excel. She worked in that position for the summer of 2013. Stuvek checked with Employee's supervisor who had "no problems or concerns." Unfortunately, that specific position was eliminated for budgetary reasons and because the supervisor determined some amount of administrative support was necessary year-round. The position was converted to full time in the summer and half-time in the winter. Stuvek stated it "would have been highly likely" Employee would be accepted for that new position if she had applied, as she had specific experience. *(Id.)*

24) Stuvek reviewed Dr. McNamara's January 14, 2014 fitness for duty recommendation, which released Employee to light duty work. She testified Employee could have done the Pioneer Park administrative assistant position and any of the others listed on the April 9, 2013 memorandum. If Employee had requested accommodations in any of those positions, "we would have done what we could to keep her working." *(Id.)*

25) Bev Shuttleworth credibly testified about her work as claims adjuster for Employer and interactions with Employee. At the August 5, 2014 PHC, Employee "led [her] to believe" Employee had applied at McDonald's and Walmart. When asked for a copy of the applications, Employee told her she didn't keep copies. Reemployment specialist Alizon White told Ms. Shuttleworth those positions would not be appropriate for Employee, as they exceeded her lifting restrictions. However, Ms. White told her there were numerous opportunities available in Fairbanks for positions Employee could perform. Ms. Shuttleworth spoke to Employee about

applying for jobs with Employer, but Employee told her it was not in her "mental best interest" to work at the FNSB. She said she knew there were positions open she was qualified for but she would not apply because of her mental health issues. Employee has never filed any claims for mental distress. Ms. Shuttleworth is not aware of any medical restrictions that keep Employee from working full-time. (Shuttleworth).

26) Ms. Shuttleworth testified Employee never requested a follow-up visit with Dr. McNamara and despite his referral to Dr. Valentz, Employee never saw Dr. Valentz. A receptionist from Dr. Valentz's office called Ms. Shuttleworth about scheduling an appointment for Employee, and she told her while the Act does not require preauthorization, there was no medical controversion in Employee's case and employers have thirty days from receiving medical bills to either pay or controvert. She testified she did nothing to prevent Employee from seeing Dr. Valentz. (*Id.*).

27) Employee testified about her work for Employer, her injury, and her attempts to secure employment after her seasonal position at Pioneer Park ended. For several years, Employee has worked as a substitute teacher during the school year and a groundskeeper for Employer during the summer. Her summer employment (May – September) accounts for approximately two-thirds of her annual income. (Employee).

28) When asked about the skill levels she represented on her 2008 resume, she testified those contradict her current skill levels, as she has "lost a lot" of computer knowledge since 2008. She testified she would "have no idea what I would do if I had to do a PowerPoint presentation." She testified she is "not looking for a year-round full-time job." When asked what accommodations she needs to work full-time, she testified she needs a pillow between her arms and her chair to elevate her arms. She further stated there may be days "where I overdid it the day before" that she needs to call in on short notice. She testified as a substitute teacher she can choose not to work on certain days. (*Id.*).

29) Employee enjoyed her light duty position as an administrative aide at Pioneer Park. In that position she did filing, answered phones, answered questions from the public, did data entry and had "some training" with Excel. She testified she would have gone back in 2014 if the same position had been available. (*Id.*).

30) Sometime in the summer of 2014, Employee spoke with the managers at McDonald's and Walmart and informed them she was limited to no repetitive motion, occasional lifting above her

head, occasionally lifting five pounds, and that "on some days if I have a bad day I won't be in the next day." Both managers told her "it would be difficult to accommodate me." She did not apply for work there. She did not apply for any other positions during the summer 2014. She did not review whether the FNSB had any positions open during the summer 2014. (*Id.*).

31) Employee indicated she understands the legal definition of medical stability, but to her "medical stability is not only my arms, it's me as a whole person, coming to terms with the fact I am not the same person I was." While she definitively stated she is not seeking any benefits related to mental stress or injury, she testified she was bullied while working for FNSB and sought counseling to improve her mental outlook. She attended regular counseling appointments through the summer 2014 and "by August I was ready. I'm mentally ok and I like myself again. I can go to an employer and like what I can do." When asked if she had any mental health records indicating she was not medically stable after May 2014 due to anxiety or depression, she stated "I never filed a mental health claim and never talked to Bev Shuttleworth about my mental health. I would never do that because it would make me weak to her, like prey." When asked why she did not apply for any FNSB jobs after May 2014, Employee stated she chose not to ever work for the FNSB again to protect her mental health. She stated "As a free single white woman, I can choose where and when I want to work." (*Id.*).

PRINCIPLES OF LAW

> **AS 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) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> 3) this chapter may not be construed by the courts in favor of a party;
> 4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or

peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
> **…**
> (f) Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board….
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> **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.
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> **AS 23.30.045. Employer's liability for compensation.** (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180 - 23.30.215….
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> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter.
> (2) notice of the claim has been given; . . . .

Under AS 23.30.120, an injured worker is afforded a presumption the benefits he or she seeks are compensable. The Alaska Supreme Court held the presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, and applies to claims for medical benefits and continuing care. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-665 (Alaska 1991). An

employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991).

Application of the presumption to determine the compensability of a claim for benefits involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, the claimant must adduce "some" "minimal," relevant evidence establishing a "preliminary link" between the disability and employment, or between a work-related injury and the existence of disability, to support the claim. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to raise the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). The presumption of compensability continues during the course of the claimant's recovery from the injury and disability. *Olson v. AIC/Martin J.V.*, 818 P.2d 669, 675 (Alaska 1991). Witness credibility is not weighed at this stage in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989). If there is such relevant evidence at this threshold step, the presumption attaches to the claim. If the presumption is raised and not rebutted, the claimant need produce no further evidence and the claimant prevails solely on the raised but un-rebutted presumption. *Williams v. State*, 938 P.2d 1065 (Alaska 1997).

In *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011), the Alaska Workers' Compensation Appeals Commission held the 2005 legislative amendment to AS 23.30.010 altered the longstanding presumption analysis: "…[W]e conclude that the legislature intended to modify the second and third steps of the presumption analysis by amending AS 23.30.010 as it did." *Runstrom*, AWCAC Decision No. 150, at 3. The Commission held the second stage of the presumption analysis now requires the employer

> rebut the presumption with substantial evidence that excludes any work-related factors as the substantial cause of the employee's disability, etc. In other words, if the employer can present substantial evidence that demonstrates that a cause other than employment played a greater role in causing the disability, etc., the presumption is rebutted. However, the alternative showing to rebut the

> presumption under former law, that the employer directly eliminate any reasonable possibility that employment was *a factor* in causing the disability, etc., is incompatible with the statutory standard for causation under AS 23.30.010(a). In effect, the employer would need to rule out employment as *a factor* in causing the disability, etc. Under the statute, employment must be more than *a factor* in terms of causation. *Id.* at 7 (emphasis in original).

"Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-612 (Alaska 1999); *Miller* at 1046.

Since the presumption shifts only the burden of production and not the burden of persuasion, the employer's evidence is viewed in isolation, without regard to any evidence presented by the claimant. *Id.* at 1055. Credibility questions and weight to give the employer's evidence are deferred until after it is decided if the employer has produced a sufficient quantum of evidence to rebut the presumption the claimant is entitled to the relief sought. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051 (Alaska 1994); *Wolfer* at 869.

*Runstrom* held once the employer has successfully rebutted the presumption of compensability,

> [the presumption] drops out, and the employee must prove, by a preponderance of the evidence, that in relation to other causes, employment was the substantial cause of the disability, need for medical treatment, etc. Should the employee meet this burden, compensation or benefits are payable. *Id.* at 8.

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

> **AS 23.30.395. Definitions.** In this chapter,
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>
> "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> …
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> "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the

> possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence; . . . .

In *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974), the Alaska Supreme Court stated:

> The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. An award for compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness.

*Vetter* further held where a claimant, through voluntary conduct unconnected with his or her injury, leaves the labor market, there is no compensable disability. Expanding on its ruling in *Vetter*, however, the Court, in *Cortay v. Silver Bay Logging*, noted the definition of "disability" in AS 23.30.395 says nothing about an employee's reasons for leaving work. The issue is whether the claimant is able to work despite his injury, not why he is no longer working. 787 P.2d 103, 106 (Alaska 1990).

Interpreting both *Vetter* and *Cortay*, the Alaska Workers' Compensation Appeals Commission, in *Strong v. Chugach Electric Assoc. Inc.*, AWCAC Decision No. 128 (February 12, 2010), held where an employee's unemployment is because of his work injury, and his earning capacity is impaired, he is entitled to compensation. *Strong* set the legal standard as "unemployed but willing to work and making reasonable efforts to return to work" when deciding if an unemployed injured worker's loss of earnings is due to a compensable disability or an otherwise non-compensable voluntary withdrawal from the work force. (*Id.* at 20).

## ANALYSIS

*Is Employee entitled to additional TTD benefits?*

Employee's entitlement to TTD turns on factual issues to which the presumption of compensability applies. Specifically, in this case, determination of the date Employee became medically stable will

decide the issue of whether she is entitled to additional TTD beyond that already paid by Employer. Without regard to credibility, Employee attaches the presumption of compensability she was not medically stable from June 9, 2014 to August 8, 2014, by her testimony she continued to improve physically over the summer of 2014 and by August she "was ready" to pursue full-time work.

Without regard to credibility, Employer successfully rebutted the raised presumption with Dr. Fraser's opinion Employee became medically stable in May 2014. Employer further rebutted the presumption with documentary evidence and witness testimony showing Employee voluntarily withdrew herself from the job market in the summer 2014. Specifically, Employer relies on Alizon White's job market survey and the testimony of Sallie Stuvek and Renee Dick.

Once Employer rebuts the presumption of compensability, Employee must prove her entitlement to additional TTD benefits by a preponderance of the evidence. Employee is unable to meet this burden. Medical stability is presumed in the absence of objectively measurable improvement from the effects of a compensable work injury for a period of 45 days. Here, the last treatment record is Dr. McNamara's January 14, 2014 report, in which he refers Employee for nerve conduction studies and additional lab work. Nerve conduction studies taken on February 17, 2014 were normal and Dr. Foelsch recommended follow-up with Employee's treating physicians. Employee did not return to Dr. McNamara, though he did refer her to Dr. Valentz for pain management on June 12, 2014. Employee never saw Dr. Valentz. While there is some dispute about why Employee did not follow-up with Dr. Valentz, Bev Shuttleworth credibly testified about her conversation with the receptionist at his office, informing her there was no controversion in Employee's case. Employee did not give a clear explanation at hearing for why she never followed-up with either Dr. McNamara or Dr. Valentz.

To rebut the presumption of medical stability, Employee must present clear and convincing evidence she was not medically stable from June 9, 2014 to August 8, 2014. There are no medical reports concerning medical stability during that period. Employee testified she was not ready to return to work during that period. She stated "medical stability is not only my arms, it's me as a whole person, coming to terms with the fact I am not the same person I was." While she definitively stated she is not seeking any benefits related to mental stress or injury, she testified

she was bullied while working for FNSB and sought counseling to improve her mental outlook. She attended regular counseling appointments through the summer 2014 and "by August I was ready. I'm mentally ok and I like myself again. I can go to an employer and like what I can do." Nonetheless, there are no mental health records in the board's file supporting Employee's contention she was not medically stable or linking her mental health issues to any work injury. Employee has not rebutted the presumption of medical stability. Her claim for TTD benefits from June 9, 2014 to August 8, 2014, will be denied.

Assuming for the sake of argument Employee had proven she was not medically stable for the claimed period, she is not entitled to TTD benefits because she willfully removed herself from the job market. Dr. McNamara released Employee to light duty work. Sallie Stuvek and Renee Dick testified there were FNSB positions available during the summer of 2014 for which Employee was qualified and which could accommodate her physical restrictions. Alizon White conducted a job market survey concluding there were jobs available in Fairbanks matching Employee's qualifications and physical restrictions. Employee did not apply for any FNSB job, and while she spoke to managers at McDonald's and Walmart, she made no real effort to obtain work. Her testimony at hearing demonstrates she did not intend to find full-time work during the summer of 2014. She stated "[a]s a free single white woman, I can choose where and when I want to work." This is certainly true. However, an employee cannot choose to remove herself from the job market and still be entitled to time loss benefits. Employee's claim for TTD benefits will be denied.

## CONCLUSION OF LAW

Employee is not entitled to additional TTD benefits.

## ORDER

Employee's July 8, 2014 petition seeking TTD benefits is DENIED.

Dated in Fairbanks, Alaska, this 9th day of December, 2014.

ALASKA WORKERS' COMPENSATION BOARD

/s/_____
Amanda K. Eklund, Designated Chair

/s/_____
Lake Williams, Member

## APPEAL PROCEDURES

This compensation order is a final decision and becomes effective when filed in the Board's office, unless it is appealed. Any party in interest may file an appeal with the Alaska Workers' Compensation Appeals Commission within 30 days of the date this decision is filed. All parties before the Board are parties to an appeal. 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 because the Board takes no action on reconsideration, whichever is earlier.

A party may appeal by filing with the Alaska Workers' Compensation Appeals Commission: (1) a signed notice of appeal specifying the board order appealed from; 2) a statement of the grounds for the appeal; and 3) proof of service of the notice and statement of grounds for appeal upon the Director of the Alaska Workers' Compensation Division and all parties. Any party may cross-appeal by filing with the Alaska Workers' Compensation 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 grounds upon which the cross-appeal is taken. Whether appealing or cross-appealing, parties must meet all requirements of 8 AAC 57.070.

## RECONSIDERATION

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

## MODIFICATION

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

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MICHAELA HUNTER, employee v. FAIRBANKS NORTH STAR BOROUGH, self-insured employer; Case No. 201210897, dated and filed in the office of the Alaska Workers' Compensation Board in Fairbanks, Alaska, and served on the parties this 9th day of December, 2014.

/s/_____
Darren Lawson, Office Assistant II