ALASKA WORKERS' COMPENSATION BOARD

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

PEDRO ERPELO, Employee, Claimant, v. TRIDENT SEAFOODS, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201102068 AWCB Decision No. 17-0045 Filed with AWCB Anchorage, Alaska, on April 21, 2017

Pedro Erpelo's (Employee) January 9, 2015 claim was heard on March 22, 2017, in Anchorage, Alaska, a date selected on May 8, 2014. Employee appeared by telephone, represented himself and testified. Attorney Jeffrey Holloway appeared and represented Trident Seafoods and its insurer (Employer). Tagalog language interpreter Felicisima Felina appeared by telephone and provided translation. The record closed at the hearing's conclusion on March 22, 2017.

ISSUES

Employee contends Employer "illegally" completed his injury report by not stating the injury facts correctly. He contends Employer reported "misleading" facts implying the injury was his fault. Employee requests an order assessing a civil penalty against Employer for fraud.

Employer stipulated the injury report could say whatever Employee wanted it to say. The parties so stipulated. Employer contends the injury report did not affect Employee's benefits and does not form the basis for a civil penalty assessment against Employer.

1) Should this decision order a civil penalty against Employer?

Employee contends he is entitled to reimbursement for past medical care for his work injury and medical transportation expenses. He also seeks an order for continued future medical care.

Employer contends it already paid bills and mileage for which Employee seeks reimbursement. It contends Employee failed to provide evidence for any remaining bills or mileage owed. Employer contends Employee presented no medical evidence to support his claim for future medical care.

2) Is Employee entitled to additional medical benefits?

FINDINGS OF FACT

A preponderance of the evidence establishes the following facts and factual conclusions:

1) On February 22, 2011, Employee signed an injury report. The report states Employee injured his right wrist, and it describes the injury as follows, "Was waiting to unload broiler when his hand was crushed by the hopper." Employee takes issue with this report as being incorrect and says it is misleading. He further contends this report is "illegal" and Employer's actions should result in a civil penalty assessment against Employer. Employee contends the injury description should state, "Had just signaled the lead butcher to lower/open the hopper when my hand was crushed by the closing/elevating hopper." Employee is concerned that the way the injury description is currently worded makes it sound like the injury is his fault, when he contends it was not. (Report of Occupational Injury or Illness, February 22, 2011; Employee).

2) At hearing, Employer and Employee stipulated that block 15 on the February 22, 2011 injury report is amended to state, "Had just signaled the lead butcher to lower/open the hopper when my hand was crushed by the closing/elevating hopper." (Parties' stipulation, March 22, 2017).

3) Employer accepted the injury as compensable and began paying Employee benefits. Employee agrees he received disability and medical benefits, which Employer only stopped following an

employer's medical evaluation (EME), which Employee concedes has nothing to do with this civil penalty issue. (Compensation Report, October 14, 2011; Employee).

4) Upon relocating to New Jersey in 2011, Employee began treating with George Alber, M.D. for his work injury. Employee said he was dissatisfied with Dr. Alber's services, so he changed physicians to John Cristini, M.D. in 2012. Dr. Cristini referred Employee to specialist John Bednar, M.D. Eventually, Employee's primary care provider Peter Kuponiyi, M.D., saw Employee for high blood pressure issues. Employee said Dr. Kuponiyi observed his hand issues during the physical examination, talked to him about it and referred him to specialist Joseph Harhay, M.D., for additional treatment. Employee did not see Dr. Kuponiyi for his work injury and Dr. Kuponiyi's referral to a hand specialist was incidental to his high blood pressure examination. (Employee; experience; judgment and inferences drawn from the above).

5) Dr. Alber was Employee's first attending physician. Employee exercised his one "free" physician change when he changed to Dr. Cristini who made an appropriate referral to Dr. Bednar. Neither Dr. Cristini nor Dr. Bednar referred Employee to Dr. Harhay. (Observations).

6) On February 4, 2013, Dr. Bednar at Philadelphia Hand Center saw Employee for his work injury and charged him $155. (Employee).

7) On March 4, 2013, Dr. Bednar saw Employee again and charged him $155. (*Id*.).

8) On October 20, 2014, Dr. Bednar saw Employee again and charged him $470. (*Id*.).

9) On November 10, 2014, Dr. Bednar again treated Employee and charged him $155. (*Id*.).

10) Employee on referral from Dr. Bednar saw Salvatore Russomeno, M.D., at Mid-Atlantic Rehabilitation Associates who also provided services for his work injury. Employee says he paid Dr. Russomeno's bill. However, Employee did not provide a bill for this provider. (*Id*.).

11) Employee says he paid all the above-referenced medical bills from his own pocket and wants reimbursement from Employer. Except for the above, there are no work-related medical bills remaining unpaid. Employee admits he did not provide Employer with a medical mileage transportation log, because "he didn't think of it." (*Id*.).

12) On June 26, 2014, the board's designee gave Employee advice on how to obtain evidence to support his claim. (Prehearing Conference Summary, June 26, 2014).

13) On February 25, 2015, the parties set forth their arguments at a prehearing conference. Employee said his treating physician had referred him to another physician for an examination and treatment. Employer's representative said it had received no additional medical records from any

physician with recommendations for further treatment. Employee temporarily disconnected from the prehearing conference, but he later called back. During the latter conversation, the board's designee "explained the adjudications process" to him and said:

> Designee further verified that once discovery is complete (*i.e.*, once Employee has produced/filed his documents supporting the need for further treatment) . . . either party may file an Affidavit of Readiness for Hearing (ARH) form to notify the Alaska Workers' Compensation Board (AWCB) that a Hearing is necessary.

14) On January 12, 2017, the board's designee told Employee to file his evidence and witness list in a timely manner. (Prehearing Conference Summary, January 12, 2017).

15) Employee says on February 16, 2017, Joseph Harhay, M.D., told him he had recurrent carpal tunnel syndrome and needed surgery. Employee has carpal tunnel surgery scheduled with Dr. Harhay for March 24, 2017. Employee wants Employer to pay for the surgery and any future treatment he needs for his hand. When asked if he provided a medical record from a physician, stating his need for recurrent carpal tunnel surgery arose from his work injury surgery, Employee said "no," but he would obtain such a document from his physician at the next appointment. Employee said his doctor told him the work injury with Employer caused the need for surgery but they did not write it down in a report. (*Id.*).

16) Employee attached several medical records on which he wanted to rely to his hearing brief. These records recount his work injury with Employer. None includes a physician's opinion stating Employee's need for recurrent carpal tunnel surgery arose out of or in the course of his work injury with Employer. None says the work injury was the substantial cause of the need for the additional medical treatment. (Judgment; observations).

17) On February 24, 2017, Employer filed and served Employee's reimbursement requests for his work-related medical expenses and a chart showing Employer's payments. Employee's materials include a comprehensive, hand-written mileage log for medical transportation from 2011 through 2013. Employer's materials include an inclusive list of all medical bills Employer paid on Employee's behalf, including the provider's name, the service date, and the amounts. Employer paid Dr. Bednar's February 4, 2013 bill for $310 and his March 4, 2014 bill for $470, in February 2015. Employer contends it never received actual bills with appropriate billing codes from Employee for the October and November 2014 doctor visits for which Employee seeks reimbursement. Employer did not receive these otherwise inadequate "bills" until three weeks prior

to hearing, attached to Employee's brief. Employer contends this two and one-half year tardiness violates AS 23.30.097(h), which requires payment only if Employer receives the medical records within 180 days after the medical service date or after the date the provider knew about Employee's claim and its relationship to his employment. Employer contends Employee presented no evidence he paid these bills from his own pocket. Employer's payment chart also shows on September 30, 2013, it paid Employee all medical mileage from 2011 through 2013, which he previously provided on a proper medical transportation log. Employer contends, consistent with Employee's admissions, it has not received any additional medical transportation logs. Recalling an earlier hearing in this case, Employer noted Employee delayed his initial effort to bring his medical benefits and transportation claim to hearing in 2014 because he said he needed additional time to prepare his evidence. Nevertheless, Employee admitted he failed to present additional evidence. Employer contends the board's designees at numerous prehearing conferences told Employee he needed to obtain and provide supporting documentary evidence but he failed to do so. (Affidavit of Service, February 24, 2017; Employer's hearing arguments).

18) Employer contends there is no written evidence supporting Employee's hearsay allegation that someone at the insurance company gave him permission to change from Dr. Alber to Dr. Cristini. Further, Employer contends Employee failed to provide written notice of his physician change as required by law. It contends Employee then switched from Drs. Cristini and Bednar to Dr. Kuponiyi who inappropriately referred him to Dr. Harhay. Thus, Employer contends it cannot be liable for treatments or services provided by Dr. Harhay, who is an excessive change-of-physician. (Employer's hearing arguments).

19) Employer further contends a prior board decision found a second independent medical examiner (SIME) David Gaw, M.D., credible. It contends three physicians, including Dr. Gaw, three years ago, all agreed Employee needed no further medical care for his work injury. Employer notes recent medical reports Employee just provided indicate he now needs medical treatment, but no records provide causal opinions supporting his claim. Employee told Dr. Gaw the numbness and tingling in his wrist had resolved. Employer questions why Employee now has symptoms in his right hand some three years following Dr. Gaw's examination. Employer contends these new symptoms require supporting medical evidence to establish a presumption in Employee's favor. Further, Employer previously demanded its right to cross-examine Dr. Bednar on his opinions, but Employee never provided him for questioning. (Employer's hearing arguments).

20) Employee said he had a fair hearing and the interpreter was helpful. (Employee's hearing statements).

PRINCIPLES OF LAW

The board may base its decision on not only 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 23.30.095. 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. . . . 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. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .

> **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. . . .

Benefits sought by an injured worker are presumptively compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between his injury and the employment, with "some" evidence. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). If the employer rebuts the presumption, it drops out and the employee must prove his case by a preponderance of the evidence, meaning he must "induce a belief" in the fact finders' minds that the facts being asserted 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 board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> A**S 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 . . . a mistake in its determination of a fact, the board may, 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.

> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions**. (a) a person who (1) knowingly makes a false or misleading statement . . . related to a benefit under this chapter; (2) knowingly assists, abets, solicits, or conspires in making a false or misleading submission affecting the payment, coverage, or other benefit under this chapter . . . is civilly liable to a person adversely affected by the conduct. . . .

> **8 AAC 45.050. Pleadings.** . . .
> . . . .
>
> (f) **Stipulations**.
> . . . .
>
> (2) Stipulations between the parties may be made at any time in writing before the close of the record or may be made orally in the course of the hearing or a prehearing. . . .

> **8 AAC 45.082. Medical treatment**. . . .
> . . . .
>
> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) . . . or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer. . . .

> **8 AAC 45.120. Evidence**. . . .
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. . . . Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

ANALYSIS

1) Should this decision order a civil penalty against Employer?

Employee takes offense at the wording Employer used in the injury report to describe how Employee's injury occurred. Employee contends the wording made it look like he was responsible for his injury, though he was not. At hearing, Employer and Employee stipulated to the precise wording Employee wanted on the injury report. Thus, Employee's concern as to the wording is resolved. 8 AAC 45.050(f)(2). Nevertheless, Employee contends the wording was intentionally "misleading," and this should subject Employer to paying a civil penalty. AS 23.30.250(a).

The law allows for a civil penalty assessment on any person who "knowingly makes a . . . misleading statement" related "to a benefit" awardable under the Act. AS 23.30.250(a). The law also implies such "misleading" statement, to be actionable, must affect "payment, coverage, or other benefit" under the Act. *Id*.; *Rogers & Babler*. Employee did not provide evidence or even contend Employer "knowingly" made a misleading statement on his injury report. He simply disagrees with the wording. Employer readily stipulated to the precise language Employee thought best described his work injury. Furthermore, Employee did not explain how Employer's imprecise wording about how his injury occurred related "to a benefit" under the Act. It does not. Lastly, Employee admitted the injury report language had no bearing whatsoever on his benefits, because Employer accepted the claim and paid benefits until an EME resulted in a subsequent denial. Employee conceded the denial had nothing to do with the way Employer worded his injury report. Therefore, Employee's civil penalty claim has no merit.

2) Is Employee entitled to additional medical benefits?

Employee contends he paid work-related medical bills from his own pocket. He seeks reimbursement for these bills from Employer. Employee also contends Employer owes him medical mileage. Employer contends it already paid the medical bills and related mileage and Employee failed to provide evidence to raise the presumption Employer owes additional medical benefits. Some of these issues raise factual disputes to which the presumption analysis applies. AS 23.30.120; *Meek*. Employee raises the presumption as to Dr. Bednar's February 4, 2013 and March 4, 2014 medical bills through his testimony stating he paid these bills and the medical billing invoices with appropriate codes, attached to his brief. *Tolbert*. Employer rebuts the raised presumption with its medical payment spreadsheet showing it already paid these bills. *Huit*. Consequently, Employee must prove Employer owes him reimbursement for these particular bills, by a preponderance of the evidence. *Saxton*.

Employee's testimony and invoices for Dr. Bednar's February 4, 2013 and March 4, 2014 medical bills are credible. AS 23.301.122; *Smith*. So is Employer's spreadsheet. *Id*. Therefore, it appears Dr. Bednar twice received payment for the same services -- once from Employee and once from Employer. Were this decision to require Employer to reimburse Employee for these same expenditures, it would require Employer to pay twice for the same services. Nothing in the Act requires such a result. Employee's remedy lies not with Employer, but with Dr. Bednar's office. This decision will direct him to contact Dr. Bednar, show him Employer's spreadsheet and this decision and request Dr. Bednar return to him any double payments for these two service dates.

Employee also seeks reimbursement for his November 10, 2014 visit with Dr. Bednar and a bill he paid to Dr. Russomeno. He did not provide an itemized statement with appropriate billing codes for either bill. A medical billing statement is not a difficult thing for him to obtain. *Rogers & Babler*. His testimony regarding these unproved bills is inadequate to raise the presumption. *Tolbert*. He must prove his claim for these bills by a preponderance of evidence. *Saxton*. Without a legible, appropriate medical billing statement with billing codes, Employee has nothing to support his claim and cannot meet his burden of proof in respect to the November 10, 2014 bill or Dr. Russomeno's bill. *Id*. Though Employee knew from prehearing conferences he had to obtain, file and serve evidence supporting his claim, and had done it before, he admitted he did not provide adequate

evidence and did not "think about" providing a medical mileage log. Employee cannot meet his burden of proof in respect to any additional billings or medical mileage. *Id*.

Lastly, Employee seeks an order requiring Employer to pay for his carpal tunnel surgery scheduled for March 24, 2017. When asked for a medical record stating his need for surgery arose out of and in the course of his employment and the work injury was the substantial cause of the need for surgery, Employee conceded he had no such document. AS 23.30.010(a). He planned to get one at his next visit. Employee said his physician told him the need for surgery arose out of his work injury. This is hearsay. 8 AAC 45.120(e). While hearsay is admissible in these proceedings and can supplement or explain direct evidence, it is insufficient by itself to support a finding unless it would be admissible over objection in civil actions. *Id*. Direct evidence could include a physician's written opinion stating the injury was the substantial cause of the need for surgery. Employee admittedly presented no direct evidence on the causation issue. Employer correctly notes that three years ago, three physicians stated Employee needed no additional medical care for his work injury. While these physicians' opinions do not necessarily mean Employee could never have additional care for his injured hand, the three-year span makes it even more problematic to allow Employee to raise the presumption of compensability with his own testimony and a hearsay comment from a physician. Without a raised presumption, Employee must prove his claim by a preponderance. Without an appropriate written medical opinion, this he cannot do. *Saxton*.

Furthermore, Employee's hearsay account of what Dr. Harhay told him is not admissible because Dr. Harhay is an unlawful physician change. AS 23.30.095(a). Dr. Alber was Employee's first chosen physician. When Employee became dissatisfied with his care, he changed to Dr. Cristini who referred him to Dr. Bednar. It is immaterial whether Employer's representative authorized the change to Dr. Cristini, because Employee did not need anyone's permission to make this lawful physician change. *Id*. Furthermore, contrary to Employer's contentions, Employee has a right to see primary care provider Dr. Kuponiyi for high blood pressure issues and not have this physician count as an unlawful change. The mere fact Employee mentioned his right hand issues to Dr. Kuponiyi and he reported symptoms does not make Dr. Kuponiyi an unlawful change.

The problem Employee has with this issue, however, is the fact he acted on Dr. Kuponiyi's referral to a third specialist, Dr. Harhay. Employee could not see Dr. Harhay without a referral from Drs. Cristini or Bednar, or without Employer's consent. AS 23.30.095(a). Employee admits he saw Dr. Harhay strictly on Dr. Kuponiyi's referral. Therefore, this decision cannot consider Dr. Harhay's opinions and will not order payment to him in any event. 8 AAC 45.082(c). Employee failed to prove Employer is liable for his March 24, 2017 carpal tunnel surgery. *Saxton*.

The law allows Employee to seek modification of this decision if he believes it made a factual error. AS 23.30.130(a). To request modification, Employee must file a petition for modification and attach supporting documentation and arguments within one year from this decision's issuance date, as set forth below. Employee is encouraged to contact a workers' compensation technician at (907) 269-4980 for assistance if required. Employee also has the right to appeal, as set forth below.

CONCLUSIONS OF LAW

1) This decision will not order a civil penalty against Employer.
2) Employee is not entitled to additional medical benefits.

ORDER

1) Employee's January 20, 2015 claim for a civil penalty against Employer and for additional medical benefits is denied.
2) Employee is directed to contact Dr. Bednar's office and request a refund.

Dated in Anchorage, Alaska, on April 21, 2017.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
Stacy Allen, 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 Pedro Erpelo, employee / claimant v. Trident Seafoods, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201102068; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on April 21, 2017.

/s/ _____
Nenita Farmer, Office Assistant