ALASKA WORKERS' COMPENSATION BOARD

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

WILLIAM C. RICHMOND, Employee, Claimant, v. ALASKA MECHANICAL, Employer, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201509458 AWCB Decision No. 17-0082 Filed with AWCB Anchorage, Alaska on July 20, 2017

William Richmond's (Employee) June 30, 2015 claim as amended was heard on July 18, 2017, in Anchorage, Alaska, a date selected on April 25, 2017. Attorney Thomas Geisness appeared by telephone and represented Employee, who appeared by telephone and testified as the only witness. Attorney Colby Smith appeared and represented Alaska Mechanical and its insurer (Employer). As preliminary matters, Employer objected to a July 12, 2017 letter from Elisha Powell, M.D., because it was late-filed, hearsay and Employee did not present Dr. Powell for cross-examination. Employer also objected to Employee's late-filed hearing brief. Employer contended Employee should be limited to statutory minimum attorney fees, as his lawyer failed to file an attorney fee affidavit. Lastly, Employer contended Employee's attorney asked the second independent medical evaluation (SIME) physician questions but has not paid the bill for the responses. At hearing, an oral order declined to consider Dr. Powell's July 12, 2017 report. Given that order, Employer

withdrew its objection to Employee's hearing brief. The designated chair treated the attorney fee issue as an argument. Employee and his attorney agreed to pay the SIME physician's bill for responding to Employee's questions. This decision examines the oral order declining to consider Dr. Powell's July 12, 2017 report and addresses Employee's claims on their merits. The record closed at the hearing's conclusion on July 18, 2017.

ISSUES

Employer contended the factfinders should not consider Dr. Powell's July 12, 2017 letter because Employee did not file it timely, it was hearsay and Employee failed to provide Dr. Powell for cross-examination.

Employee contended he meant no intentional harm by filing Dr. Powell's July 12, 2017 letter late, and filed it as soon as he could. He did not intend to call Dr. Powell as a witness.

1) **Was the oral order declining to consider Dr. Powell's letter correct?**

Employee contends his work injury was the substantial cause of his disability and need for medical treatment for his right hip. He seeks an order finding the right hip is a compensable injury. As the right hip is compensable, Employee contends he is entitled to temporary total disability (TTD) and permanent partial impairment (PPI) benefits, interest, attorney fees and costs.

Employer contends Employee did not injure his right hip at work. Therefore, it contends he is entitled to no additional TTD, PPI, interest, attorney fees or costs.

2) **Is Employee's right hip a compensable injury?**

FINDINGS OF FACT

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

1) On May 29, 2015, Employee had low back pain with right-sided radicular symptoms. He reportedly had done "extremely well" since his last low back surgery in 2002. The report states:

> Unfortunately[,] he was working in the village of Kipnuk, Alaska, on May 7, 2015, when he lifted a toolbox and began having substantial right-sided radicular symptoms. He was seen in Kenai, and an MRI was obtained that showed lumbar disc displacement at L2-L3 on the right side causing compression at the L3 nerve root.

Mark Flanum, M.D., examined Employee and found "mild weakness of the right hip flexor," but his hip range of motion was "non-irritable." After reviewing x-rays and Employee's May 27, 2015 MRI, Dr. Flanum diagnosed a symptomatic lumbar disc herniation at L2-3 following a workplace injury, and multi-level disc degeneration and neural foraminal stenosis. Dr. Flanum opined the disc herniation was a result of Employee's "May 7, 2015" work injury, which precipitated pain in the L3 dermatomal pattern. Dr. Flanum recommended a right L3-4 transforaminal epidural steroid injection and physical therapy. He restricted Employee to sedentary duty and provided pain medication. (Dr. Flanum report, May 29, 2015).

2) On May 29, 2015, Employee reported his symptoms were in his back, buttock, leg and right groin. In the "worst pain" category, Employee said his back was 30 percent and his leg was 70 percent. In the "location" category, Employee included anterior thigh symptoms. The form does not have a specific location titled "hip." (New Spine Patient Intake sheet, May 29, 2015).

3) On May 29, 2015, Employee completed a pain drawing. On the "front" silhouette, he made various markings including near the beltline and others on various parts of the right lower extremity. Some markings on the pain drawing correspond to Employee's right groin area. Employee made no marks on the figure marked "back." (Pain diagram, May 29, 2015).

4) On June 1, 2015, Dr. Flanum removed Employee from work pending reevaluation. (Disability Status form, June 1, 2015).

5) On June 3, 2015, Employee explained he hurt himself while working for Employer as a carpenter on "May 7, 2015," while he was carrying a plastic tote toolbox weighing around 70 pounds out of a house. Employee stepped sideways through the first door into a mudroom and the floor was approximately seven to eight inches lower than the floor from which he stepped. Stepping down is what "bit" him. Employee said he reported the injury to his supervisor after returning to Anchorage when, after a couple days, his pain did not subside. Employee felt similar pain a couple days later when he unloaded his empty toolbox, which "threw my back into the same injuries. . . ." Employee made it clear, "my fucking back was fucking hurt." Employee did

not mention his leg or hip. He first obtained medical care on May 22, 2015. (Statement of William Richmond, June 6, 2015).

6) On June 30, 2015, Employee filed a claim stating on "May 15, 2015" he was carrying a toolbox out of a building and "down stairs," when he injured a "lower back disk." Employee's injury included "leg" and lower back pain. Employee said the insurer denied his claim because he put the wrong injury date on his original form. He requested TTD, PPI, medical costs and related transportation, penalty and interest. (Workers' Compensation Claim, June 30, 2015).

7) On August 31, 2015, Employee reported:

> He says his biggest pain now is in the area of the right hip. It is groin pain. There is not much lateral pain. He is no longer having any radicular-type symptoms. He just has a chronic achy low back pain.

Employee had irritability with femoral acetabular impingement testing and some irritability with internal rotation at the right hip. Hip x-rays showed mild degenerative changes. Dr. Flanum diagnosed right groin pain consistent with a possible labral tear and an MRI-documented L2-3 disc protrusion. Dr. Flanum recommended an MRI arthrogram and follow-up with a hip specialist. (Dr. Flanum report, August 31, 2015).

8) On August 31, 2015, Employee testified Employer had work at the place he was injured, but because he had past issues with a supervisor, Employee refused to work "under that guy." (Deposition of William Richmond, August 31, 2015, at 16). When injured, Employee was working for Employer at Kipnuk, Alaska remodeling the school. (*Id*. at 22). Prior to the injury, Employee returned from "R&R" to find his superintendent and supervisor had quit. An individual named "Ron" was the new supervisor and, when Employee learned this, he declined to work under Ron who wanted him to go outside in gale-force winds and apply siding to a building. (*Id*. at 25-26). Refusing to work for Ron, Employee bought his own ticket home on Friday, May 15, 2015. (*Id*. at 26). Leaving work had nothing to do with an injury. (*Id*. at 28). . Employee described his toolbox as a "big Tupperware container," weighing, "to guess, 160 pounds." (*Id*. at 45). Employee later clarified it could have weighed 100 pounds. (*Id*. at 46). Employee recalled:

> Q. And what happened?
>
> A. I directly tried to pick it up. Tote, say -- let's say for dimension sizes it's two-foot wide, three-foot-long, two-foot tall packed full. I couldn't pick it up. So I

> tipped it on end. I knelt down. I rolled one end on this leg, stood it up on that leg and managed to stand up. Once I got to stand up erect, out the door I go. You go out the door. You can't fit through the doorway like that, so you got to go sideways through the doorway. There is a step at the doorway.
>
> Stepped down there. Turned, stepped down onto the outer porch and then down the stairs. Then I dropped it on the sled.
>
> Q. And is this when you feel like you got hurt?
>
> A. I got hurt when I picked it up. I know I did. I set it on this -- and I went to the doctor and -- I went home. The next morning I woke up, I hurt really bad. The next day I couldn't even walk. I'm laying on my couch. I just wanted to get to the bathroom. It's a struggle to go 15 feet.
>
> But it hurt on the front of my hip. And when I went to the doctor, I says, Doc -- he goes, where does it hurt? I go, right there. Well, does it hurt in your leg? Yeah, I said, it hurts in my leg a little bit, but most of the pain is right here. So that's when he went to give me a shot in the back.
>
> Q. So did you feel a pop or snap or anything?
>
> A. (Shakes head.) That's the thing; I didn't feel a thing. (*Id*. at 48-49).
> . . . .
>
> Q. Friday. You are feeling --
>
> A. I didn't feel anything.
>
> Q. The first time you felt any pain was when you woke up --
>
> A. Saturday morning.
>
> Q. When you woke up at home.
>
> A. And I probably woke up in the middle of the night and felt pain, and I'm thinking to myself, this is going to go away, but it just got worse. . . . (*Id*. at 51-52).

He could not recall whether he used a nearby chair to assist in lifting the toolbox. Employee continued:

> Q. And when you lifted this box, you mentioned that you sort of turned it on end on end, correct?

A. I stood it on end so I could get my leg underneath that end and roll it up onto this hip, and that's when I managed to get up.

Q. And --

A. I struggled, as I recall, to get up, pretty hard.
. . . .

Q. And did you feel -- so when you -- so you didn't feel any pain that day on Friday, and then Saturday when you were at home you woke up in the morning with pain?

A. Right. Now, I won't say that I didn't feel any pain, but it just wasn't enough pain to get my attention.

Q. And where were you feeling it on Saturday when you woke up at home?
. . . .

A. Right hip, right where I set the box. And we did an x-ray at the doctor's office, and there is nothing broken in there, thank God.

Q. Now, how come everything on here says --

A. Back. Because that's what I thought I did. I didn't know that the front of the leg -- I told the doctor when I went in there, Doc, it's right here. And I'm thinking it's because I've had serious back injuries before that it was the back, not knowing.

A. So you don't feel like you injured your back?

Q. I did. I injured my back, too, because I felt it in the leg, but not to the severity of this upper hip. (*Id*. at 52-53).
. . . .

Q. And so you felt like it was the lifting of the box is what caused these problems?

A. It was the box that caused the problem.

Q. And when you -- so you felt -- you woke up on Saturday at home, you felt it on your right leg, tightness going down to your ankle?

A. I felt the pain in the front of my hip was the worst thing I felt. You do feel the ache going down the leg, but the primary thing you are feeling is that front. I mean, it's like I couldn't even move my leg. It didn't want to move at the hip. And I'm thinking the bathroom is right there, I got to go. So it's a battle. (*Id*. at 54-55).
. . . .

> Q. And actually -- and so the first time -- again, this was something that didn't start when you were lifting the box?
>
> A. No.
>
> Q. But it's something you felt once you are home?
>
> A. Yeah. I mean adrenaline was running pretty high that afternoon . . . to get on the plane. I mean, you are going to be there at the airplane or you are going to sit there until you get the next one, and who knows when that will be. . . . (*Id*. at 58).

After asking Employer's counsel to stand up so he could see better, Employee again explained, and demonstrated, how his injury occurred:

> Q. You have to talk me through it.
>
> A. I'm down, bent down. Okay.
>
> Q. Okay. So you're on your knees.
>
> A. I grab the box. I can't pick it up, so I roll it on the end and I roll it up onto this hip. And whether I used the chair or set the corner, I can't recall. But that's how I --
>
> Q. Okay. So to understand it, then, what you -- you were on your knees on the ground?
>
> A. I was on my knees on the ground.
>
> Q. You put the box kind of in your lap, so to speak.
>
> A. Right, on the one side.
>
> Q. And then you used a chair to sort of leverage yourself to the --
>
> A. I can't remember if I used the chair under the end of the box, but I remember that the chair was right there. And eventually I got the box up to the table height. That's when I took it out the door. . . . (*Id* at 65).

9) On September 2, 2015, a right hip MR arthrogram showed Employee had a small labral tear in and minimal tendinopathy. (MRI report, September 2, 2015).

10) On September 17, 2015, EME John Ballard, M.D., reviewed Employee's medical records and opined the causes "for his degenerative arthritis of his right hip" would be "age and genetics." Dr. Ballard explained:

> The work injury that he described in the records of lifting a toolbox and having right radicular symptoms is not going to cause the arthritis or groin pain. That is secondary to age and genetics.

Dr. Ballard opined the work injury was not the substantial cause of Employee's hip treatment and was not a mechanism to cause a traumatic hip injury, including a labral tear. He opined the hip symptoms arose from arthritic changes. In Dr. Ballard's opinion, Employee was medically stable from his work injury. (Dr. Ballard report, September 17, 2015).

11) On September 22, 2015, Employer denied Employee's claim based on Dr. Ballard's September 17, 2015 records review EME report. (Controversion Notice, September 22, 2015).

12) On April 21, 2016, Dr. Powell arthroscopically repaired Employee's right labral tear. Employee claimed his May 2015 work injury caused right hip and groin pain that had continued since the injury date. (Operative Report, April 21, 2016).

13) On May 23, 2016, Dr. Powell's physician's assistant reiterated Employee was disabled and should avoid prolonged sitting, standing, bending and squatting until reevaluated on July 5, 2016. (Disability Work Status report, May 23, 2016).

14) On July 13, 2016, Dr. Flanum's office continued Employee's disability and restrictions related to his right hip surgery. (Disability work status report, July 13, 2016).

15) On November 21, 2016, Robert Langen, M.D., examined Employee for a second independent medical evaluation (SIME):

> Mr. Richmond . . . was trying to lift a heavy plastic box that was filled with tools. He estimates that the box weighed over 100 pounds, and states that as he tried to lift the box, he fell over backwards, and experienced pain in the low back as well as the right groin area. (Langen report, November 21, 2016, at 17).

Dr. Langen diagnosed diffuse degenerative arthritis in the lumbosacral spine; herniated disc at L2-3 with compression of the L3 nerve root; lumbosacral sprain; femoroacetabular impingement; and degenerative joint disease in the right hip. (*Id*. at 28). These were all causes of Employee's disability and need for medical treatment. (*Id*. at 29). Dr. Langen opined the work injury aggravated Employee's preexisting condition temporarily to cause disability and the need for treatment. (*Id*.). In his view, preexisting right hip degenerative changes were the substantial cause of the need for the right hip surgery. (*Id*. at 30). Dr. Langen based his opinion on the lack of any complaints or right hip diagnoses until about three months post-injury. He further explained the

femoral acetabular impingement (FAI) and right hip degenerative disease did not arise from the injury because bony deformities cause FAI, which would have long predated the work injury and would not be consistent with the "mechanism of injury." Similarly, Dr. Langen opined bony deformities cause degenerative arthritis, not a single trauma. (*Id*.). In his opinion, the work injury was the substantial cause of Employee's initial disability period for his lumbar spine, but by August 31, 2015, increased back pain caused by the sprain had returned to "pre-injury status." Dr. Langen opined the FAI and degenerative right hip disease had not caused any subsequent disability. (*Id*. at 31). In his view, any disability related to the FAI and hip degeneration ended on August 17, 2016, when Employee had a return-to-work note. (*Id*.). Similarly, Dr. Langen said Employee became medically stable for his right hip problem on August 17, 2016. (*Id*. at 32). In Dr. Langen's opinion, Employee needs no further medical treatment. (*Id*. at 33).

16) On March 14, 2017, Dr. Langen reviewed additional records provided by Employee's attorney. Dr. Langen concluded the records did not demonstrate "significant" hip pain present at the time Dr. Flanum examined Employee on May 29, 2015. The newly reviewed records did not alter Dr. Langen's previously expressed opinions. (Dr. Langen addendum, March 14, 2017).

17) On April 25, 2017, Employee clarified his TTD claim included May 15, 2015 through August 16, 2016. The parties stipulated to a July 8, 2007 hearing, and agreed to file their evidence on or before June 28, 2017, and their witness lists and briefs on or before July 11, 2017. (Prehearing Conference Summary, April 25, 2017).

18) On June 9, 2017, Dr. Flanum reviewed his May 29, 2015 chart note and stated Employee had reported right groin pain "consistent with" an intra-articular hip pathology. He also noted Employee did not have a limp or irritable hip motion at that visit. He deferred to Dr. Powell, the surgeon, for "causation for his hip pathology" opinions. (Flanum letter, June 9, 2017).

19) On July 11, 2017, Employer filed and served its hearing brief with Dr. Flanum's June 9, 2017 opinion letter attached. (Employer's Hearing Brief, July 11, 2017).

20) On July 12, 2017, Dr. Powell wrote a letter to Employee's attorney at the lawyer's request:

> I have reviewed Mr. William Richmond's records and chart at your request. I believe his right hip FAI and degenerative arthritis in his right hip predated the injury/incident at work. However, his injury at work could have aggravated his right hip arthritis. The injury at work could have also resulted in a right hip labral tear. Based on the medical record, in my opinion, Mr. Richmond's work injury

> was a substantial factor in either causing or aggravating labral tear, that required medical treatment. (Dr. Powell letter, July 12, 2017).

21) On July 13, 2017, Employee filed a mis-dated pleading, to which was attached Dr. Powell's July 12, 2017 letter opinion. There is no evidence Employee served this on Employer. (Hearing Evidence, June 28, 2017).

22) On July 14, 2017, Employee filed and electronically served Employer with Dr. Flanum's June 9, 2017 and Dr. Powell's July 12, 2017 opinion letters to attorney Geisness. (Hearing Evidence, July 14, 2017).

23) On July 14, 2017, Employer immediately filed a valid request to cross-examine Dr. Powell on his July 12, 2017 letter. (Request for Cross-Examination, July 14, 2017).

24) On July 17, 2017, Employee filed and served Dr. Flanum's June 9, 2017 and Dr. Powell's July 12, 2017 opinion letters to attorney Geisness, for the first time on a medical summary. (Medical Summary, July 13, 2017).

25) At hearing on July 18, 2017, Employee's testimony was at times consistent with his recorded statement and deposition, with a few notable exceptions: First, Employee testified his right hip was too painful to straddle the snowmachine taking him to the plane to leave Kipnuk. Consequently, Employee said he had to ride "sidesaddle" on the snow machine to the Kipnuk airport. Second, he testified unidentified "girls in Bethel" on the way back from Kipnuk gave him some pain medication. Third, Employee said he took painkillers before he went to bed the evening he returned from Kipnuk. Lastly, when asked how he hurt his right hip, Employee testified his hand slipped off a handle on the plastic tote toolbox and he fell and hit his shoulders on the floor. Specifically, Employee said he hurt his right hip while getting the tote onto a chair. When confronted at hearing with these inconsistencies, Employee said he thought long and hard about how he possibly could have injured himself. After a while, at some point after his deposition, these previously omitted or added details "all came back to me," he said. (Employee).

26) Recollection is better closer in time to an event. (Experience, judgment, observations).

27) Employee's hearing testimony overall was not credible. (Judgment and inferences drawn from the above).

28) At hearing, Employee further clarified his TTD claim included September 1, 2015 through August 16, 2016. He further explained his TTD claim related to his right hip injury only. The parties had previously resolved issues related to the low back. (Employee's hearing statements).

29) In respect to the unpaid SIME bill, attorney Geisness said, "We will pay" Dr. Langen's bill for responding to his questions. Attorney Geisness also said he meant no mischief or harm when he filed Dr. Powell's July 12, 2017 opinion letter, which he filed as soon as he received the letter. (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 23.30.010(a). Coverage**. (a) . . . compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. When determining whether or not the . . . 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 the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

> **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; . . . .

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. *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). The fact-finders do not weigh credibility at this stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

If the employer's evidence rebuts the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds, *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016)). This means the employee 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). In the third step, evidence weight and credibility are considered. *Wolfer*.

> **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).

> **8 AAC 45.120. Evidence**. . . .
> . . . .
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> (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.
>
> (g) A request for cross-examination filed under (f) of this section must (1) specifically identify the document by date and author, and generally describe the type of document; and (2) state a specific reason why cross-examination is being requested.
>
> (h) If a request is filed in accordance with (f) of this section, an opportunity for cross-examination will be provided unless the request is withdrawn or the board determines that
>
> (1) under a hearsay exception of the Alaska Rules of Evidence, the document is admissible;
> (2) the document is not hearsay under the Alaska Rules of Evidence; or

> (3) the document is a report of an examination performed by a physician chosen by the board under AS 23.30.095(k) or AS 23.30.110(g).
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> (i) If a hearing is scheduled on less than 20 days' notice or if a document is received by the board less than 20 days before hearing, the board will rely upon that document only if the parties expressly waive the right to cross-examination or if the board determines the document is admissible under a hearsay exception of the Alaska Rules of Evidence.

8 AAC 45.900. Definitions. (a) In this chapter
. . . .

> (11) 'Smallwood objection' means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician. . . .

In *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976), the Alaska Supreme Court found "the statutory right to cross-examine is absolute and applicable to the board." *Id*. at 1265. In a previous case, the court suggested procedures the board could adopt to ensure parties have the right to cross-examination. In response, the board amended 8 AAC 45.052(c) and 8 AAC 45.120 to provide for notice and an opportunity for cross-examination.

ANALYSIS

1) Was the oral order declining to consider Dr. Powell's letter correct?

Dr. Powell performed right hip surgery on Employee on April 21, 2016. Nearly 15 months later on July 14, 2017, Employee filed and served Dr. Powell's July 12, 2017 opinion letter. Since Employee filed Dr. Powell's letter initially as "hearing evidence," rather than on a medical summary, Employer's relief in respect to this letter fell properly under 8 AAC 45.120. Employer immediately and effectively asserted its right to cross-examine Dr. Powell in compliance with 8 AAC 45.120(f). Employee subsequently filed the same letter on a medical summary. Employer did not have to *Smallwood* the same document twice. 8 AAC 45.900(11).

Though Employee listed Dr. Powell on his witness list, he did not call him at hearing. Employee had almost 15 months during which to obtain Dr. Powell's causation opinions, file and serve them, and if Employer objected to the opinions on hearsay or other grounds, depose Dr. Powell and preserve his testimony for hearing. Employee did not take this approach. Employee obtained and

filed this document less than 20 days before the hearing. Employer did not waive its right to cross-examine Dr. Powell. Dr. Powell's letter to attorney Geisness is a document created solely for litigation purposes and is hearsay. *Rogers & Babler*; 8 AAC 45.120(f), (g), (h), (i). Employee offered no basis to admit and consider Dr. Powell's July 12, 2017 report without according Employer its right to cross-examine him. Therefore, because the report is hearsay to which Employer objected, and Employee did not present Dr. Powell for cross-examination, the oral order declining to consider his July 12, 2017 letter was correct. *Smallwood*. Furthermore, as discussed below, Dr. Powell's opinion letter did not address the correct legal standard, in any event.

2) Is Employee's right hip a compensable injury?

This case is about Employee's right hip. The parties resolved low back issues prior to hearing. Employee contends he hurt his low back and right hip at work for Employer on May 14, 2015. Employer contends Employee temporarily aggravated his preexisting low back problem and did not injure his right hip at all. These contentions create factual disputes to which the statutory presumption of compensability applies. AS 23.30.120(a)(1); *Meek*. Without regard to credibility, Employee raises the presumption through his own testimony and Dr. Flanum's opinion. Employee recounted having no prior right hip pain and feeling right hip pain immediately following his work injury on May 14, 2015, and continuing. On June 9, 2017, Dr. Flanum said Employee had reported right groin pain consistent with an inter-articular hip pathology. *Wolfer*; *Tolbert*. Without regard to credibility, Employer rebuts the raised presumption with opinions from Drs. Ballard and Langen, both of whom opined the work injury was not the substantial cause of the need for right hip treatment and any related disability. *Wolfer*; *Huit*. Because Employer rebutted the presumption, Employee must prove his right hip claim by a preponderance of the evidence. *Runstrom*; *Saxton*.

To prevail on his right hip claim, Employee must show his work with Employer, in relation to all other possible causes, was "the substantial cause" of his need for right hip treatment and any related disability. AS 23.30.010(a). Dr. Flanum treated Employee for his low back symptoms. Employee says he told Dr. Flanum at his May 29, 2015 appointment that his right hip hurt. The written report does not specifically so state. However, markings on Employee's pain silhouette appear over the right groin area and Dr. Flanum subsequently stated Employee had initially

reported right groin pain "consistent with" an inter-articular hip pathology. However, Dr. Flanum also said Employee did not have a limp or irritable hip motion on May 29, 2015. Dr. Flanum did not offer a causation opinion for the right hip symptoms, but deferred to Dr. Powell, the hip expert. Employee's pain drawing by itself does not imply, suggest or address causation.

By August 31, 2015, over three months post-injury, Employee said his biggest pain was now his right hip. He no longer had radicular symptoms and returned to his chronic, achy low back pain. Dr. Flanum found Employee had hip irritability and ordered an MR arthrogram. The September 2, 2015 right hip arthrogram disclosed for the first time a torn right labrum. No causation opinions or conclusions arise from this radiographic report. *Rogers & Babler*. To this point, Employee has no medical evidence stating his work injury with Employer was the substantial cause of the need to treat his right hip and of any related disability. The only other medical evidence Employee offered addressing causation was Dr. Powell's July 12, 2017 opinion letter, which this decision will not consider for the above-stated reasons. Dr. Powell's July 12, 2017 letter, if considered, would raise the presumption of compensability. However, it does not meet the appropriate legal standard. The letter addressed "a substantial factor" rather than "the substantial cause" of Employee's need for right hip care and related disability. AS 23.30.010(a). In short, Employee referenced no admissible medical evidence supporting his right hip claim.

That leaves Employee's lay testimony as the only admissible evidence supporting his claim. Experience shows Employee's memory of the injury should have been clearer closer to the event. *Rogers & Babler*. In this regard, his reports and testimony are troublesome. Employee changed his injury account significantly over time. On June 1, 2015, Employee signed an injury report stating he hurt only his "lower back" carrying a toolbox. On June 3, 2015, Employee gave a recorded statement and said on the injury date he hefted a 70-pound toolbox and walked sideways through a door into a mudroom and stepped down to a lower floor. Employee said stepping down is what "bit" him and he felt similar pain a couple days later when he unloaded his empty toolbox, which "threw my back into the same injuries." Employee was clearly referring to his back, a point he emphasized with phonetic intensives. He also said he first received medical care on May 22, 2015, and did not mention interim medications. He did not mention his hip on his injury report or in his recorded statement, both given within about two weeks of the alleged right hip injury.

A little over three months after his injury, in his August 31, 2015 deposition Employee said he hurt his back and hip when he lifted the toolbox, which he now said weighed anywhere from 100 pounds to perhaps 160 pounds, before he went out the doorway. Employee repeatedly said, on the injury date, "I didn't feel a thing," or at least whatever he may have felt "just wasn't enough pain to get my attention." This is another way of saying, "I didn't feel a thing." *Rogers & Babler*. Employee reiterated he really did not feel any pain until the next day after he awoke at home.

By contrast, nearly two years later at hearing Employee for the first time said he stopped at an unidentified counter in Bethel, presumably on his way home from Kipnuk, and some women gave him analgesics for his hip pain. If Employee felt no pain until he awakened Saturday morning, there would have been no reason for him to take analgesics on his way back from Kipnuk. He also said for the first time he took pain pills before he went to bed after returning home on Friday evening. If Employee had no hip pain, there would have been no reason for him to take additional pain pills before he went to bed. *Rogers & Babler*. In his deposition, Employee discussed his plane ride home from Kipnuk and never mentioned receiving analgesics or taking any pain pills.

Though in his deposition he could not recall whether he used a chair to assist in lifting the tote, at hearing Employee said he injured his right hip lifting the tote into the chair. Employee first mentioned he had fallen backwards while lifting the tote and injured his back to Dr. Langen during his SIME. At hearing, Employee for the first time said his hand slipped off a handle on the tote and he fell backwards and landed on his shoulders. Most notably, at hearing Employee, again for the first time, said he knew he had injured his hip as soon as he came out the door in Kipnuk because he was unable to straddle a snowmachine that was to deliver him to the airport, because his hip hurt. Employee said he had to ride the snowmachine "sidesaddle" to the airport.

When asked at hearing about some of these glaring inconsistencies, Employee said he had been pondering his injury and "it all came back" to him at some point after his deposition. Employee's unreasonable, circular explanations are not credible. AS 23.30.122; *Smith*. For example, he felt no pain at all when the injury occurred but had to ride a snowmachine sidesaddle to the Kipnuk airport, took analgesics he received from "the girls in Bethel" and took pain pills at home before he went to bed. Employee used this revised history to bolster his right hip claim. He told the

SIME doctor he fell backwards, to justify his back injury. Employee said the tote's weight varied anywhere from 70 pounds up to 160 pounds, to further bolster his back and boost his right hip injury. In retrospect, Employee asserted he injured his right hip when he lifted the tote, yet he had no symptoms. Absent medical evidence, and given his non-credible testimony, Employee cannot meet his burden of proof or persuasion. *Saxton*. Employee's right hip is not work-related.

Employee clarified his TTD claim related only to his right hip. As Employee's right hip is not work-related, he is not entitled to additional TTD or PPI for his right hip. Because he is entitled to no benefits for his right hip, Employee is entitled to no interest, attorney fees or costs.

CONCLUSIONS OF LAW

1) The oral order declining to consider Dr. Powell's letter was correct.
2) Employee's right hip is not a compensable injury.

ORDER

1) Employee's right hip is not a compensable injury.
2) Employee's TTD and PPI benefits claims and his claims for interest, attorney fees and costs claims are denied.

Dated in Anchorage, Alaska on July 20, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Rick Traini, 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 William C. Richmond, employee / claimant v. Alaska Mechanical, employer; Insurance Company of the State of Pennsylvania, insurer / defendants; Case No. 201509458; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on July 20, 2017.

/s/
Elizabeth Pleitez, Office Assistant