

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

RAMIRO C. LEMUS,)
Employee,)
Claimant,)
v.)
MILLER CONSTRUCTION COMPANY,)
Employer,) FINAL DECISION AND ORDER
and) AWCB Case No. 201604611M
ALASKA NATIONAL INSURANCE) AWCB Decision No. 17-0118
COMPANY,)
Insurer,) Filed with AWCB Juneau, Alaska
Defendants) On October 6, 2017.
and)
NORTHERN ADJUSTERS, INC.,)
Insurer,)
Defendants.)

Ramiro C. Lemus' (Employee) March 7, 2016 and April 26, 2016 claims, as amended, and Alaska National Insurance Company's (Alaska National) May 26, 2016 petition to join were heard on August 22, 2017 in Juneau, Alaska. This hearing date was selected on May 17, 2017. Attorney Mark Choate appeared and represented Ramiro C. Lemus (Employee). Attorney Aaron Sandone appeared and represented Miller Construction Company (Employer) and Northern Adjusters, Inc. (Northern Adjusters). Attorney Vicki Paddock appeared and represented Employer and Alaska National Insurance. Witnesses included Employee and Fabrieta Lemus, Daniel Harrah, M.D., Dorothy Hernandez, M.D., Robert Miller Jr., and Nathan Purvis for Employee. Ivette Lugo served as an English-Spanish interpreter. As a preliminary issue, an oral

order by the panel granted Alaska National's petition to join Northern Adjusters. The record remained open until September 6, 2017 to allow Employee and Northern Adjusters to file documentation supporting claimed attorney's fees and costs. The record closed after deliberations concluded on September 21, 2017.

ISSUES

Alaska National contends Northern Adjusters should be joined as a party because it is an entity against whom a right to relief may exist. Alaska National contends not joining Northern Adjusters could affect Employee's ability to obtain complete relief for his right shoulder injury.

Northern Adjusters objects to being joined and contends it is not a party against whom a right to relief may exist. Northern Adjusters contends Employee did not file a claim against Northern Adjusters and Northern Adjusters has a notice defense which would bar a claim.

Employee contends he injured his right shoulder while working for Employer during either Alaska National's or Northern Adjuster's period of coverage, and not joining Northern Adjusters could affect his ability to obtain complete relief for his right shoulder injury.

1) Was the oral order to join Northern Adjusters as a party correct?

Employee contends he timely reported a work injury because his supervisor had knowledge of his right shoulder injury.

Northern Adjusters and Alaska National contends Employee's claims should be denied because he did not timely report a work injury. Alternatively, Northern Adjusters and Alaska National contends should the failure to provide notice be excused, it should be excused under AS 23.30.120(b) and Employee must then prove his claim by a preponderance of the evidence without the benefit of the presumption of compensability.

2) Are Employee's claims against Alaska National and Northern Adjusters barred for failure to give timely notice?

Employee contends he sustained a right shoulder injury while working for Employer on the Auke Bay roundabout in Juneau, Alaska when the jackhammer he was using slipped. Employee contends the work injury occurred during the summer of 2014. Alternately, Employee contends the work injury occurred in 2013 or in 2015.

Alaska National contends a non-work related 2015 right shoulder injury is the substantial cause Employee's disability and need for medical treatment. Alternatively, Alaska National contends if there was a work-related injury, the preponderance of the evidence proves it did not occur in 2014, during the period Northern Adjusters was Employer's insurance carrier.

Northern Adjusters contends the July 29, 2014 medical record and job labor journal directly eliminates any reasonable possibility Employee's employment with Employer in 2015 was a factor in causing Employee's right shoulder injury. Northern Adjusters contends if there was a work injury, the preponderance of the evidence proves it did not occur in 2015, during the period Alaska National was Employer's insurance carrier.

3) Did Employee injure his right shoulder while in the course and scope of employment with Employer?

Employee contends he is entitled to temporary total disability (TTD) and medical benefits from either Alaska National or Northern Adjusters for his right shoulder.

Both Alaska National and Northern Adjusters contend as Employee does not have compensable injuries, he is not entitled to TTD or medical benefits. Both seek an order denying Employee's claim.

4) Is Employee entitled to disability and medical benefits from either Alaska National or Northern Adjusters?

Employee contends he is entitled to a reasonable attorney's fee and costs award.

Alaska National and Northern Adjusters contend as Employee should not be awarded benefits, he is not entitled to attorney fees. Alternatively, should Employee be awarded benefits, Alaska National and Northern Adjusters object to Employee's attorney's hourly rate.

5) Is Employee entitled to attorney's fees and costs?

Northern Adjusters contends it is entitled to attorney's fees and costs should it be joined as a party under AS 23.30.155(d).

Alaska National objects to an award of attorney's fees and costs to Northern Adjusters.

6) Is Northern Adjusters entitled to attorney's fees and costs?

FINDINGS OF FACT

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

- 1) On July 11, 2013, Employee visited the emergency room for left shoulder pain. Employee reported three days of increasing left anterior shoulder pain and denied any injury, trauma or heavy lifting. An x-ray revealed mild degenerative change of the acromioclavicular joint with no fracture or dislocation. Employee was diagnosed with acute left shoulder pain. (Beatrice Brooks, M.D., Hospital Record, July 11, 2013).
- 2) On September 22, 2013, Employee complained of left shoulder pain. He reported he woke up with the pain and there was no history of trauma. Employee stated it was hard to work and he was doing light duty work. (Juneau Urgent Care, Chart Note, September 22, 2013).
- 3) On November 19, 2013, Employee followed up with Daniel Harrah, M.D. for left shoulder pain. Employee reported the pain had been bothering him since July when he was using a jackhammer and it slid out. Dr. Harrah diagnosed a left rotator cuff tear and acromioclavicular joint arthrosis. He recommended an arthroscopic evaluation, debridement, a probable open cuff repair and open distal clavicle excision. (Harrah, Medical Report, November 19, 2013).

- 4) On January 13, 2014, Dr. Harrah recommended a rotator cuff repair and distal clavicle excision on Employee's left shoulder. (Harrah, Medical Report, January 13, 2014).
- 5) On May 14, 2014, Employee visited Dorothy Hernandez, M.D. and complained of left shoulder pain. Employee reported he injured it while at work pulling on a jackhammer. An exam of Employee's right shoulder, including range of motion, was normal. (Hernandez, Medical Report, May 14, 2014).
- 6) On June 11, 2014, Employee saw Dr. Hernandez again for left shoulder pain with an onset of one year ago. He reported the mechanism of injury was a jackhammer at work and falling on to his shoulder. Dr. Hernandez noted Employee's upper right shoulder was normal, including normal range of motion. Employee's left shoulder had decreased abduction and decreased internal rotation and tenderness at the subacromial space. Employee was prescribed 60 5mg-325mg hydrocodone-acetaminophen pills for one month. (Hernandez, Medical Report, June 11, 2014).
- 7) On July 3, 2014, Employee visited Dr. Hernandez and complained of chronic and stable left shoulder pain. Dr. Hernandez noted Employee's upper right shoulder was "benign." Employee was prescribed 60 5mg-325mg hydrocodone-acetaminophen tablets for one month. (Dorothy Hernandez, M.D., Medical Report, July 3, 2014).
- 8) On July 29, 2014, Dr. Hernandez examined Employee as he complained of left great toe pain and right shoulder pain different than his prior chronic left shoulder pain. Employee reported no trauma caused his right shoulder pain. Dr. Hernandez found acromioclavicular joint point tenderness. Employee was prescribed 90 5 mg-325 mg hydrocodone-acetaminophen pills for one month. (Hernandez, Chart Note, July 29, 2014).
- 9) On September 30, 2014, Employee visited Dr. Hernandez for other medical issues. Dr. Hernandez noted Employee's left shoulder had decreased abduction. (Hernandez, Chart Notes, September 30, 2014).
- 10) On October 29, 2014, Employee saw Dr. Hernandez for left shoulder pain. Employee was hesitant to consider left shoulder surgery because he was dealing with bills for his baby born in October of 2014. (Hernandez, Medical Report, October 29, 2014).
- 11) On January 16, 2015, Employee reported acute left shoulder pain during his visit with Dr. Hernandez. Employee's right shoulder had decreased abduction. (Hernandez, Chart Notes, January 16, 2015).

12) On February 12, 2015, Employee visited Dr. Hernandez and complained of right shoulder pain beginning two weeks ago in early February 2015. Employee reported the mechanism of injury was unknown because there was no trauma and the pain started while he was in bed. Employee's right shoulder had decreased abduction and pain with internal rotation and his left shoulder had decreased abduction to 110 degrees. Dr. Hernandez ordered an MRI of Employee's right shoulder. (Hernandez, Chart Notes, February 12, 2015).

13) On February 23, 2015, an MRI of Employee's right shoulder showed a moderate sized full-thickness tear of the supraspinatus with a small stump of tendon remaining attached to the supraspinatus foot plate, some insertional tendinopathy of the infraspinatus and subscapularis without tearing, and moderate acromioclavicular joint hypertrophy with fluid in the bursa. (Jon Ekstrum, M.D., MRI Report, February 23, 2015).

14) On February 26, 2015, Employee saw Daniel Kim, M.D. and complained of acute right shoulder pain with the onset beginning three weeks ago and an unknown mechanism of injury. Pain with abduction and flexion was noted. (Kim, Chart Notes, February 26, 2015).

15) On February 27, 2015, Employee visited Ted Schwarting, M.D., for severe right shoulder pain since running a jackhammer three weeks ago. Employee reported he had pain the next day and "has marked difficulty and pain at night." Employee reported his right shoulder pain is much worse than his left and as he is right handed, he is concerned about his ability to work as a construction worker. No muscle atrophy was noted upon examination. Dr. Schwarting diagnosed a right shoulder rotator cuff tear and acromioclavicular joint arthritis and recommended surgery for Employee's rotator cuff tear. He provided Employee a handwritten letter to take to his boss at work to discuss surgical correction of his right shoulder. (Schwarting, Medical Report, February 27, 2015).

16) On March 16, 2015, Employee saw Dr. Kim and reported ongoing left and right shoulder pain beginning six weeks ago. Dr. Kim recommended surgical repair of his right rotator cuff as soon as possible but it was not scheduled pending approval of his claim. (Kim, Chart Notes, March 16, 2015).

17) On April 14, 2015, Employee saw Dr. Hernandez and complained of acute right shoulder pain. Employee could not afford surgery at the time and was cleaning because he is unable to work construction due to his shoulder. Employee's right shoulder had decreased abduction,

decreased adduction, decreased internal rotation and pain with internal rotation. (Hernandez, Chart Note, April 14, 2015).

18) On May 4, 2015, Employee visited the emergency room complaining of right shoulder pain. He reported he injured his right shoulder two months ago while pulling a heavy object at work. (Erik P. Denninghoff, M.D., Hospital Chart Notes, May 4, 2015).

19) On May 22, 2015, Employee saw Dr. Hernandez for chronic bilateral shoulder pain. His right shoulder had decreased abduction, pain with abduction, decreased adduction and pain with internal rotation and his left shoulder had decreased abduction and decreased internal rotation. Employee was still working in construction but reported it moderately limited his activities. Dr. Hernandez recommended physical therapy but Employee stated there was a payment issue so she recommended Employee continue with home exercises to avoid adhesive capsulitis. (Hernandez, Chart Note, May 22, 2015).

20) On July 21, 2015, Employee visited the emergency room complaining of right shoulder pain. Employee reported he works construction, has a “broken tendon” with no known injury, and he takes medication for it and surgery had been recommended. (Jim Andreas, R.D., Hospital Record, July 21, 2015).

21) On August 3, 2015, Employee saw Dr. Hernandez and reported worsening right shoulder pain sudden in onset about two weeks prior, changing from behind to on top of his shoulder. He stated activity and position change triggered his shoulder pain. Employee’s right shoulder had tenderness at the right subacromial space and decreased abduction, pain with abduction, decreased internal rotation and pain with internal rotation. (Hernandez, Chart Note, August 3, 2015).

22) On December 17, 2015, Employee visited the emergency room complaining of severe right shoulder pain. Employee reported he slipped on ice the day before and fell directly on his shoulder. X-rays performed showed no fracture. He was diagnosed with a traumatic right rotator cuff sprain. (Brooks, Hospital Record, December 17, 2015; Steven Stickler, M.D., X-Ray Report, December 17, 2015).

23) On February 11, 2016, an Employee Report of Occupational Injury or Illness to Employer for a shoulder injury stating a date of injury of July 2012 was filed under AWCB case number 201603017. Employee did not sign or date the form, it does not state which shoulder was injured

and does not provide a description of how the injury happened. (Employee Report of Occupational Injury, February 11, 2016; Observation).

24) On February 25, 2016, an Employer First Report of Occupational Injury was filed for an injury to Employee's right shoulder on July 1, 2012 while trying to gain control of a jackhammer that slipped out of his hand under AWCB case number 201603017. (First Report of Occupational Injury, February 25, 2016).

25) On March 7, 2016, Employee filed an Employee First Report of Occupational Injury for an injury to his left shoulder on March 16, 2015 under AWCB case number 201604611. He did not provide a description of how the injury happened. (Employee First Report of Occupational Injury, March 7, 2016).

26) On March 7, 2016, Employee filed a claim in AWCB case number 201604611 for TTD and medical costs for a left shoulder injury he sustained on March 16, 2015 while pulling a guardrail. (Claim, March 7, 2016).

27) On March 14, 2016, Alaska National filed a controversion notice under AWCB case number 201603017 denying all benefits stating:

[Employee] is currently claiming a right and left shoulder injury. The right shoulder injury, per submitted medical documentation, occurred on/around 02/06/2015. Alaska National Insurance did not have an active policy for Miller Construction on that date of injury. The report of injury submitted by the injured worker verifies that he suffered a 'shoulder injury' in July of 2012. All medical documentation submitted regarding the left shoulder indicates a left should injury occurred in July of 2013. The employer has no report of injury matching the facts of loss conveyed in our initial contact with [Employee]. It does not appear that this injury was report to the employer until the report of injury was filed on 02/11/16.

(Controversion Notice, March 14, 2016).

28) On March 24, 2016, a First Report of Occupational Injury was filed under AWCB case number 201603017 for Employee's shoulder injury caused by pulling on a guard rail on March 16, 2015. (First Report of Occupational Injury, March 24, 2016).

29) On March 25, 2016, Alaska National Insurance filed an amended answer under an "unassigned" AWCB case number denying Employee's March 7, 2016 claim stating:

- There has been no Report of Injury filed for a 03/16/15 date of injury.
- The claim is barred under AS 23.30.100 or otherwise barred by law or equity.
- The employer does not have any medical evidence linking the employee's medical condition and need for surgery to a work injury on 03/16/15.

- Employee's work is not the substantial cause of his injury or disability, or need for medical treatment, if any.

(Answer, March 25, 2016).

30) On March 29, 2016, Alaska National Insurance filed an amended answer under an "unassigned" AWCB case number stating the injury date is after the coverage period for Alaska National as coverage ended on January 1, 2015. (Amended Answer, March 29, 2016).

31) On March 31, 2016, Northern Adjusters filed a controversion notice under AWCB case number 201604611 denying all benefits for failure to give timely notice of injury under AS 23.30.100. (Controversion Notice, March 31, 2016).

32) On March 31, 2016, Northern Adjusters filed an answer under AWCB case number 201604611 denying Employee's March 7, 2016 claim asserting there was no evidence a licensed medical provider has excused the employee from work on medical grounds due to a March 16, 2015 work injury with Employer, Employee failed to provide timely notice under AS 23.30.100, and there was no evidence of any unpaid medical bills related to a March 16, 2015 occupational injury with Employer. (Answer, March 31, 2016).

33) On April 26, 2016, Employee, Alaska National and a claim adjuster for Northern Adjusters attended a prehearing conference on AWCB case number 201604611. Employee orally amended his March 7, 2016 claim for a left shoulder injury to include a right shoulder injury. (Prehearing Conference Summary, April 26, 2016).

34) On April 26, 2016, Employee filed a claim for medical costs under AWCB case number 201603017 for a right shoulder injury sustained on July 1, 2012. No description of the injury was provided. (Claim, April 26, 2016; Observation).

35) On May 5, 2016, Alaska National filed an answer under AWCB case number 201603017 denying Employee's April 26, 2016 amended claim contending the claim was "barred under AS 23.30.100, AS 23.30.105, AS 23.30.110(c), or otherwise barred by law or equity" and "there is no medical evidence to support the claim." (Answer, May 5, 2016).

36) On May 20, 2016, Northern Adjusters filed an amended answer under AWCB case number 201604611 to Employee's April 26, 2016 amended claim reasserting its prior answer. (Amended Answer, May 20, 2016).

37) On May 23, 2016, Alaska National filed a controversion notice under AWCB case number 201603017 denying medical benefits, contending "The claim is barred under AS 23.30.100, AS

23.30.105, AS 23.30.110(c), or otherwise barred by law or equity” and “there is no medical evidence to support this claim.” (Controversion Notice, May 23, 2016).

38) On May 26, 2016, Alaska National filed a petition under AWCB case number 201603017 requesting joinder of an additional insurer, Northern Adjusters, for dates of coverage from January 1, 2015 to the present. (Petition, May 26, 2016).

39) On May 25, 2016, Alaska National filed an amended answer under AWCB case number 201604611 to Employee’s April 26, 2016 amended claim stating there was no evidence to support Employee’s contention a work injury occurred in 2012. (Amended Answer, May 25, 2016).

40) On June 10, 2016, Northern Adjusters filed an answer under AWCB case number 201604611 to Alaska National’s May 26, 2016 petition to join opposing the petition and noting Alaska National had agreed to hold the petition in abeyance until a later date. (Answer, June 10, 2016).

41) On June 16, 2016, the board designee administratively joined AWCB case numbers 201604611 and 201603017 and made AWCB case number 201604611M the master case number. (Prehearing Conference Summary, June 16, 2016).

42) On June 20, 2016, Alaska National filed a reply under AWCB case number 201603017 to Northern Adjusters June 10, 2016 answer agreeing to hold the May 26, 2016 petition in abeyance pending Employee’s deposition and discovery. (Reply, June 20, 2016).

43) On June 27, 2016, Alaska National and Northern Adjusters deposed Employee. Employee testified he last worked for Employer in November 2015. (Employee, Deposition, June 27, 2016, at 8). He left work to get his right shoulder fixed. (*Id.* at 9-10). Employee injured his right shoulder while using a 90 pound jackhammer to install a sign at the Auke Bay roundabout when it slipped and he pulled it back to avoid hitting a truck. (*Id.* at 10-13). He went to the hospital that night because his right shoulder really bothered him and the doctor offered to provide Employee a note but he did not want to take time off work. (*Id.* at 14). He told Robert Miller he hurt his shoulder and was sent to another construction project at the elementary school to pick up garbage and clean after he hurt his shoulder. (*Id.* at 12-14). Employee did not remember the date the right shoulder injury occurred, but it was summer when the roundabout and elementary parking lot were being worked on at the same time. (*Id.* at 15-16). Employee also operated a roller machine after he injured his right shoulder. (*Id.* at 16). Employee hurt his left shoulder moving a guardrail while working for Employer before the roundabout incident.

(*Id.* at 29). Employee did not tell anyone about the left shoulder injury. (*Id.* at 22). Employee did not remember any injury occurring in 2015, but if he does not take pain medication he cannot sleep or do anything. (*Id.* at 39-40).

44) On July 20, 2016, Northern Adjusters filed a petition to dismiss Employee's claims under AWCB case number 201604611M. Employer contended:

There is no evidence that the employee injured his right shoulder while employed with Miller Construction in 2015. The employee described his injury as occurring during a prior year. Based on the employee's testimony, the March 16, 2015 claim should be dismissed.

(Petition, July 20, 2016).

45) On August 3, 2016, Alaska National filed an answer under AWCB case number case 201604611M to Northern Adjuster's July 20, 2016 petition to dismiss arguing there are medical records documenting an injury and treatment to the right shoulder in 2015. (Answer, August 3, 2016).

46) On August 10, 2016, Employee filed an answer under AWCB case number 201604611M opposing Northern Adjuster's July 20, 2016 petition to dismiss, contending there were medical records documenting an injury and treatment for the right shoulder in 2015. (Answer, August 10, 2016).

47) On August 24, 2016, Employee visited Dr. Hernandez for right shoulder pain. Employee reported he injured his right shoulder while at work in late January/February 2015 while working with a jackhammer. Employee's right shoulder had decreased range of motion, including pain with abduction, pain with adduction and decreased internal rotation. (Hernandez, Chart Notes, August 24, 2016).

48) On October 6, 2016, Employee visited the emergency room for severe right shoulder pain. Employee reported the right shoulder pain started about 18 months ago and is still present. He denied a recent injury. Employee had a prescription for 90 oxycodone and his last refill had been on September 7, 2016. Employee was provided three oxycodone and told to follow up with his physician. (Nathan Peimann, M.D., Hospital Report, October 6, 2016).

49) On December 1, 2016, Employee saw Dr. Hernandez and reported pain in both shoulders, right more painful than the left with onset 1 year ago. Employee stated he was unable to use a jackhammer due to the limited range of motion in his right shoulder. Dr. Hernandez ordered an MRI. (Hernandez, Chart Note, December 1, 2016).

50) On December 8, 2016, an MRI of Employee's right shoulder showed a full-thickness supraspinatus tendon tear and infraspinatus tendinosis/low-grade partial tearing. (Jerrell L. Ingalls, M.D., MRI Report, December 8, 2016).

51) On December 16, 2016, Employee visited Don Schneider, M.D. for right shoulder pain and reported an onset of 1.5 years ago. Employee stated it felt like something came loose. Employee had no pain with palpitation but decreased range of motion to internal and external rotation and to abduction and it was painful to hold his arm abducted against resistance. (Schneider, Chart Note, December 16, 2016).

52) On March 25, 2017, Employee visited the emergency room for an injury to his right shoulder. Employee reported he was walking and experienced sudden pain in his right shoulder, there was no known injury, but he has prior shoulder tendon issues. An x-ray showed moderate acromioclavicular joint hypertrophy. Employee was diagnosed with a traumatic right rotator cuff rupture and complete tear. Allison Mulcahy, M.D. recommended Employee wear a shoulder sling and undergo surgery to repair his rotator cuff. (Mulcahy, Hospital Report, March 25, 2017; Jeffrey Zuckerman, X-Ray Report, March 25, 2017).

53) On March 30, 2017, Employee saw Richard Welling, M.D. and reported constant right shoulder pain beginning three days ago when he was walking and bent over to tie his shoes. Employee felt a pop in his shoulder and severe acute pain. Employee has not worked since November 2015. (Richard Welling, M.D., Chart Note, March 30, 2017).

54) On April 6, 2017, Employee visited Dr. Hernandez and reported constant right shoulder pain beginning two weeks ago. Employee had decreased abduction, pain with adduction and decreased external rotation to 20 degrees and acromioclavicular joint tenderness. (Hernandez, April 6, 2017).

55) On May 1, 2017, Northern Adjusters filed a controversion notice under AWCB case numbers 201604611M and 2016030317 denying all benefits for Employee's right shoulder stating:

There is no evidence that the employee sustained any injury to his right shoulder while employed by Miller Construction in 2015. The employee testified in his deposition that he injured his right shoulder while operating a jackhammer while working on an Auke Bay roundabout/Auke Bay Elementary School project. The employer's records show that this project was completed in August 2013. As the employee described his injury as occurring on a project during the summer of 2013, the employer and carrier/adjuster deny all benefits related to the March 16, 2015 date of injury.

(Controversion Notice, May 1, 2017).

56) On May 17, 2017, Employee orally amended his claims in AWCB case numbers 201603017 and 201604611 to include claims for attorney's fees and costs. The board designee scheduled a hearing on Employee's claims and Alaska National's May 26, 2016 petition to join. (Prehearing Conference Summary, May 17, 2017).

57) On May 19, 2017, Employee reported worsening constant right shoulder pain beginning two months ago. The mechanism of injury provided by Employee was using a jackhammer. He denied any acute injury and stated he was walking with his kids and bent down to tie his shoes and felt "acute pain" and his mobility seems to have gotten worse. (Hernandez, Chart Note, May 19, 2017)

58) On May 19, 2017, Employee saw Dr. Hernandez and reported right shoulder pain caused by using a jackhammer. He denied any acute injury. Employee was walking with his kids and bent down to tie his shoes and felt acute right shoulder pain. (Hernandez, Chart Note, May 19, 2017).

59) On June 5, 2017, Northern Adjusters filed an amended answer under AWCB case number 201604611M to Employee's May 17, 2017 amended claim, incorporating all prior answers and denying claims for attorney's fees and costs contending there was no nexus between any work performed by Employee's attorney and benefits gained by Employee. (Answer, June 5, 2017).

60) On June 6, 2017, Alaska National filed an amended answer under AWCB case number 201604611M to Employee's May 17, 2017 amended claim, denying medical benefits and attorney fees and/or costs and listing three affirmative defenses: (1) the claim is barred under AS 23.30.100, AS 23.30.105, AS 23.30.110(c) or otherwise barred by law or equity; (2) there is no medical evidence to support Employee's claim; and (3) there is no evidence to support an injury to the right shoulder in 2012. (Answer, June 6, 2017).

61) On June 9, 2017, Amit A. Sahasrabudhe, M.D., performed an Employer Medical Evaluation (EME) and diagnosed Employee with bilateral shoulder pain, worse right than left, secondary to full thickness rotator cuff tears. When asked to identify all causes of Employee's disability and need for medical treatment for his right shoulder, he stated, "all causes of [Employee's] disability include natural history and age related processes, general home activities, and possibly the 'jackhammer incident' depending on which history one believes or is accurate." Dr. Sahasrabudhe stated he was unable to conclude with any reasonable degree of medical certainty that any work related injury is the substantial cause of either of Employee's shoulder complaints

based upon Employee's poor history and the inconsistent histories documented in the medical records. He opined "to a reasonable degree of medical probability, there was no time following the 'work injury' when the employment was the substantial cause of any disability or need for treatment." (Sahasrabudhe, EME Report, June 9, 2017).

62) On July 10, 2017, Employee followed up with Dr. Schwarting for right shoulder pain. Employee reported he injured his right shoulder while using a jackhammer in 2015. Dr. Schwarting recommended an MRI and prescribed a self-directed stretching program for management of adhesive capsulitis. Dr. Schwarting noted Employee was "somewhat difficult to communicate with secondary to limitations of Spanish and his legal representative helped" translate. Another MRI was recommended. (Schwarting, Chart Note, July 10, 2017).

63) On July 27, 2017, Employee, Northern Adjusters and Alaska National attended a prehearing conference. The board designee noted Northern Adjusters requested the prehearing conference due to confusion or inaccuracies in the last prehearing summary concerning the dates of injury and the shoulders injured for the claims. The summary noted Employee orally amended his claim to clarify the left shoulder injury occurred in July of 2013 under AWCB case number 201603017 and the right shoulder injury occurred in the summer of 2014 under AWCB case number 201604611. (Prehearing Conference Summary, July 27, 2017).

64) On August 1, 2017, Employee and Northern Adjusters filed a stipulation under AWCB case number 201604611M to withdraw Employee's claim against Northern Adjusters and to dismiss Northern Adjusters as a party. The stipulation was signed by Employee and Northern Adjusters. (Stipulation, August 1, 2017).

65) On August 8, 2017, Alaska National filed a notice of withdrawal of controversion under AWCB case number 201604611M withdrawing the controversion of benefits related to a left shoulder work injury in July 2013. (Withdrawal of Controversion, August 8, 2017).

66) At hearing on August 22, 2015, Dr. Harrah testified he is a full-time orthopedist surgeon. He last saw Employee in 2013 for left shoulder full thickness rotator cuff tear which retracted one centimeter. Dr. Harrah never independently examined Employee's right shoulder. Rotator cuff tears can be caused by degenerative age processes and also by traumatic injury, or a combination of both. Rotator cuff tears can be asymptomatic. At age 40 most people do not have rotator cuff tears; at age 70, at least 50 percent of people have rotator cuff tears. Rotator cuff tears are highly variable between patients. Normally he sees two types of patients, the first type of patient

reports the shoulder bothers them off and on and then finally come in, while the second type of patient reports no symptoms prior to a traumatic event which is followed by a lot of symptoms. The set in of dysfunction for rotator cuff tears varies. In his experience, what brings patients in for treatment for rotator cuff tears is pain and weakness, when they cannot sleep or lift objects due to pain. The norm is for a small tear to progress to a large tear. Large tears have more dysfunction. There can be atrophy in muscles and the treatment outcome is not as good if you wait too long to treat the injury. Atrophy means the muscles shrink down and become replaced with fat. The capsule of shoulder provides stability and the muscles to coordinate movement of the arm. The shoulder changes its mechanics with a rotator cuff injury because there is an imbalance in the muscle movements and this creates a pattern of dysfunctional movement so the shoulder problems progress. Atrophy is a poor prognostic factor. In two patients with same size tear, one may have atrophy and the other may not. Sometimes onset is fast, sometimes slowly or not at all. Employee's right shoulder MRI did not show any fatty atrophy. It is impossible to determine whether Employee sustained an acute injury by reviewing the February 2015 MRI. As we age, the rotator cuff thins and weakness and tears become common. We do not know what Employee's rotator cuff was like before the MRI because there was no prior data. Employee was under 50 so his cuff would be expected to be in relatively good condition but we do not know. Dr. Harrah experienced difficulty communicating with Employee due to Employee's language barrier, although Employee normally brought someone to assist in translating. Dr. Harrah obtains history from the patient and the medical records that come with the patient, including an MRI or exam study, and also from a physical exam. He commonly sees patients delay surgery until seasonal work ends. (Dr. Harrah).

67) Dr. Hernandez testified she is a family practitioner. Employee has been her patient since May of 2014. She communicates with Employee in Spanish which is not her first language, although she is fluent. Like many patients, Employee varies in how he tells her his medical complaints and he does not offer all of his complaints at once. It can be difficult to obtain details from Employee on when or how complaints occur. Employee told her he was working full-time in 2014 when he visited her for his left shoulder injury and he was concerned the left shoulder surgery recommended by Dr. Harrah would impair his ability to continue working. On July 29, 2014, she did not go into significant detail on his right shoulder complaints as he had another medical complaint and several studies were completed to address the other complaint. It seems

the next time the right shoulder became a major issue for Employee was February 2015, when the pain became intolerable. Employee reported it was an acute injury but Employee did not say there was any trauma; he stated it occurred when he was in bed. Most patients vary what they report. Employee does not offer information unless specifically asked and which is common of many patients. Employee has a limited education, he is not a savvy person and she does not believe Employee lied. (Dr. Hernandez).

68) Nathan Purvis testified he is an engineering assistant for the State of Alaska Department of Transportation. In the summers of 2013 and 2014 he worked for R&M Engineering as an engineering assistant conducting construction inspections. Mr. Purvis met Employee while inspecting the Auke Bay School parking lot for R&M Engineering. He observed Employee helping complete compaction work and pipe setting for drainage settings and culverts for water runoff in the parking lot. The compaction work was heavy difficult physical labor because it required compacting bedding materials around the culverts, sometimes in awkward positions, and required manhandling a jumping jack in tight quarters. Employee indicated to him he had injured his shoulder on the roundabout job. Mr. Purvis never worked on the Auke Bay roundabout. After the shoulder injury, Employee was put on light duty. Mr. Purvis did not witness Employee's shoulder injury and he could not recall which shoulder was injured, nor could he recall whether it was the summer of 2013 or 2014 when Employee was injured. Employee told him he needed to make money while the construction season was still going on and he would take care of his shoulder afterwards. Employer swapped workers back and forth between the parking lot and the Auke Bay roundabout as needed because work was being done on both projects while Mr. Purvis was inspecting the parking lot. (Mr. Purvis).

69) Fabieta Lemus testified she has lived with Employee for almost five years. Employee complained his right shoulder hurt before their daughter was born on October 3, 2014 but she does not remember the exact date of the injury. Employee has not able to hug their son since his shoulder injury. (Ms. Lemus).

70) Employee testified he worked as a laborer for Employer. He stopped working for Employer two and a half years ago because he was not able to do his job anymore due to his right and left shoulder injuries. He injured his left shoulder while working for Employer on a guard rail around mile 26 of Glacier Highway. He injured his right shoulder while working for Employer using a 90 pound jackhammer on the Auke Bay roundabout project in Juneau, Alaska. He did

not recall when the right shoulder injury occurred. The foreman, Robert Miller, knew he was injured because he was there. Employee was sent to the Auke Bay school parking lot to do light duty after the injury, picking up garbage and driving a construction machine back and forth. He was working light duty at both the Auke Bay school parking lot and the roundabout. Even when he was taking pain medication the pain would not go away. He continued working on light duty after he injured his right shoulder but was not sure when he stopped working. Employee went to the doctor after the injury but he does not remember whether he saw Dr. Kim or Dr. Hernandez. Employee believes he went to the doctor two days after the right shoulder injury because the pain was unbearable. Dr. Kim provided a note but he did not give it to Employer because he wanted to continue working. (Employee).

71) Robert Bruce Miller Jr. testified he is employed by Employer as a superintendent, parking manager, and estimator. He worked on the Auke Bay school parking lot and utilities improvement project and the Auke Bay roundabout project. Both projects were two-year projects and finished one-year apart; when one was finishing the other was starting. The Auke Bay school parking lot started a year before the roundabout and the projects overlapped by a couple months. He did not recall specifically when the projects began, overlapped or ended. Employee performed labor work, pipe layer work, and ran a loader and roller. Some of the work involved heavy physical labor. Employee installed sign bases using a jackhammer at the Auke Bay roundabout project. Mr. Miller first remembered Employee being injured when the foreman at the Auke Bay school project, Anton Miller, called him and told him Employee was injured installing signs. It is customary to use a jackhammer to install signs. He did not sign or see a report of injury. Reports of injury are handled by office staff. When an employee tells him he is injured, he instructs the employee to go to the doctor and fill out a workers' compensation report at the office. Mr. Miller never saw a note from Employee's doctor. He placed Employee on light duty after Employee told him he went to the doctor and they discussed the work Employee could do or felt comfortable doing with his shoulder injury. He was not sure which shoulder was injured and was not aware Employee had injured both shoulders. He was aware there were two events where Employee injured a shoulder but did not know which shoulder was injured during each event. (Mr. Miller).

80) On August, 21, 2017, Northern Adjusters filed hearing brief exhibits. Exhibits 3A, 3b and 3C contained job labor journals for Employee's work with Employer from January 2013 through

December 2015. The journals indicate Employee worked on the Auke Bay School in 2013 but not in 2014 or 2015 and Employee worked on the Auke Bay roundabout in 2013 and 2014 but not in 2015. (Northern Adjuster’s Hearing Brief Exhibits 3A, 3b and 3C).

72) Employee is a poor historian and is not credible. (Experience, judgment, observations).

73) Alaska National was the carrier for Employer through December 31, 2014. (Record).

74) Northern Adjusters was the carrier for Employer beginning on January 1, 2015. (Record).

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;

.....

(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). An adjudicative body must base its decision on the law, whether cited by a party or not. *Barlow v. Thompson*, 221 P.3d 998 (Alaska 2009).

8 AAC 45.040. Parties.

.....

(d) Any person against whom a right to relief may exist should be joined as a party.

.....

(f) Proceedings to join a person are begun by (1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties; or (2) the board or designee serving a notice to join on all parties and the person to be joined.

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

(1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join; or

(2) fails to timely object in accordance with this subsection, the right to object to the joinder is waived, and the person is joined without further board action.

(i) If a claim has not been filed against the person served with a petition or notice to join, the person may object to being joined based on a defense that would bar the employee's claim, if filed.

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;

(4) whether a claim was filed against the person by the employee; and

(5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim.

8 AAC 45.050. Pleadings.

....

(f) Stipulations.

(1) If a claim or petition has been filed and the parties agree that there is no dispute as to any material fact and agree to the dismissal of the claim or petition, or to the dismissal of a party, a stipulation of facts signed by all

parties may be filed, consenting to the immediate filing of an order based upon the stipulation of facts. . . .

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.

AS 23.30.095. Medical treatments, services, and examinations.

(a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. 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. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

AS 23.30.100. Notice of injury or death.

(a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.

(b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury or death, and authority to release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of

death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.

....

(d) Failure to give notice does not bar a claim under this chapter

(1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;

(2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;

Failure of an employee to give timely formal notice may be excused where the employer had actual knowledge of the employee's injury and the failure to give notice was not prejudicial to the employer. *Cogger v. Anchor House*, 936 P.2d 157, 160 (Alaska 1997). Timely written notice of an injury is required both because it lets the employer provide immediate medical diagnosis and treatment to minimize the seriousness of the injury, and because it facilitates the earliest possible investigation of the facts surrounding the injury. *Tinker v. Veco, Inc.*, 913 P.2d 488, 492 (Alaska 1996).

The thirty-day period begins to run when the worker could reasonably discover an injury's compensability. *Cogger*, 936 P.2d at 160. The exact date when an employee could reasonably discover compensability is often difficult to determine, and missing the short thirty-day limitation period bars a claim absolutely. For reasons of clarity and fairness, the Alaska Supreme Court has held the thirty-day period can begin no earlier than when a compensable event first occurs. However, it is not necessary that a claimant fully diagnose his or her injury for the thirty-day period to begin. *Id.* The Court has read a "reasonableness" standard, analogous to the "discovery rule" for statutes of limitations, into the statute. *Alaska State Hous. Auth. v. Sullivan*, 518 P.2d 759, 761 (Alaska 1974). *See also, Kolkman v. Greens Creek Mining Co.*, 936 P.2d 150 (Alaska 1997). Under this standard, the thirty-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Kolkman*, 936 P.2d at 761 (*quoting* 3 Arthur Larson, *Workmen's Compensation* §

78.41, at 60 (1971)). Generally, informing a co-worker who is not a supervisor does not satisfy the statutory requirement to provide knowledge to employer. *Cogger* at 161.

In *Coppe v. Bleicher*, 318 P.3d 369, 377 (Alaska 2014), the Alaska Supreme Court said, addressing AS 23.30.100, that the board had erred in deciding the presumption analysis did not apply because AS 23.30.120(b) only deprives a claimant of the presumption of compensability “[i]f delay in giving notice is excused by the board under AS 23.30.100(d)(2).” If the delay is excused under AS 23.30.100(d)(1), the presumption applies. *Id.*

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

(b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a worker’s claim. At the first step, the claimant need only adduce “some” “minimal” relevant evidence establishing a “preliminary link” between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach 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). To make a prima facie case the employee must present some evidence 1) that he has an injury and 2) that an employment event or exposure could have caused it. The employee need only adduce “some,” “minimal” relevant evidence establishing a “preliminary link” between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). “In making the preliminary link determination, the Board may not concern itself with the witnesses' credibility.” *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Kramer* at 473-74, quoting *Smallwood* at 316. To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). “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, 611-12 (Alaska 1999). At the second step of the analysis, the employer’s evidence is viewed in isolation, without regard to the claimant’s evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381. At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must “induce a belief” in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

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).

AS 23.30.145. Attorney Fees.

(a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first \$1,000 of compensation or part of the first \$1,000 of compensation, and 10 percent of all sums in excess of \$1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . . In determining the amount of fees, the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

(b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion (actual or in fact) is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id.* at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id.* In this latter scenario, reasonable fees may be awarded. *Id.* at 152-153.

AS 23.30.155. Payment of compensation.

....

(d) When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

....

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 the employee 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.

8 AAC 45.063. Computation of time.

(a) In computing any time period prescribed by the Act or this chapter, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is included, unless it is a Saturday, Sunday or a legal holiday, in which case the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday.

....

ANALYSIS

1) Was the oral order to join Northern Adjusters as a party correct?

Any person against whom a right to relief may exist should be joined as a party. 8 AAC 45.040(d). In determining whether a right to relief against Northern Adjusters exists, the five subsections in 8 AAC 45.040(j) must be considered, including: whether the person timely objected to joinder, whether their presence is necessary for complete relief and due process among the parties, whether their absence may affect their ability to protect an interest or subject a party to a substantial risk of incurring inconsistent obligations, whether a claim was filed against the person by the employee, and whether a defense would bar the claim if it were filed.

Employee has alleged more than one possible date of injury for a right shoulder injury and has alleged he sustained a left shoulder injury while working for Employer. Alaska National and Northern Adjusters are successive insurers for Employer. Northern Adjusters timely objected to joinder with its June 10, 2016 answer opposing Alaska National's May 26, 2016 petition to join. Northern Adjusters contends there is no chance of an inconsistent obligation if it is not joined as a party because Employee changed his date injury for his right shoulder injury at the prehearing conference on July 27, 2017 to the summer of 2014 and stipulated with Northern Adjusters to withdraw and dismiss any claims against Northern Adjusters on August 1, 2017. However, Alaska National, a party to Employee's claim, did not sign the stipulation as required under 8 AAC 45.050(f). Contrary to the stipulation, Employee contended in his hearing brief and his hearing testimony the injury to his right shoulder occurred in 2014 or 2015. Alaska National Insurance contends the best medical evidence supports a 2015 injury, and Alaska National Insurance is defending Employee's claim on the merits. If Employee is ultimately found to have sustained a work injury in 2015 which is the substantial cause of his disability and need for medical treatment, Northern Adjusters would be liable for benefits because Northern Adjusters Employer's carrier in 2015.

Northern Adjuster contends it should not be joined because Employee did not file a claim or report an injury for a right shoulder injury during its period of coverage. However, on April 26, 2016 Employee amended his claim for a left shoulder injury sustained on March 16, 2015 to include a right shoulder injury, and Employee still contends the injury to his right shoulder occurred in 2014 or 2015. Northern Adjusters contends Employee's claim for a right shoulder injury should be barred for failure to give timely notice. However, there is a dispute regarding notice, as Employee contends he provided timely verbal notice to his supervisor. The oral order to join Northern Adjusters as a party was correct.

2) Are Employee's claims against Alaska National and Northern Adjusters barred for failure to give timely notice?

An injured worker is required to give written notice of a workplace injury to the Board and to the employer within 30 days of the injury. AS 23.30.100. Employee contends he suffered an injury to his right shoulder while working for Employer using a jackhammer at the Auke Bay

roundabout. However, Employee has alleged more than one possible date of injury for a right shoulder injury, either summer of 2014 or 2015, and has also alleged he sustained a left shoulder injury while working for Employer. Alaska National and Northern Adjusters are successive insurers for Employer.

Employee testified in his deposition he went to the hospital the night he injured his right shoulder because the pain really bothered him and afterward Mr. Miller assigned him to light duty to pick up garbage at the Auke Bay School. At hearing, Employee testified he believed he went to the doctor two days after he injured his right shoulder because the pain was unbearable and afterward he was assigned to light duty at the Auke Bay School parking lot. Given Employee's testimony the right shoulder pain from the jackhammer work injury caused him to seek medical attention and go on light duty shortly afterwards, it is reasonable to conclude a compensable injury had been sustained when Employee first sought medical care for a right shoulder injury. *Cogger; Robers & Babler.*

The only appearance in the medical record of a right shoulder injury in 2014 was on July 29, 2014, when Employee visited Dr. Hernandez and reported right shoulder pain with no trauma. Based on the medical record and Employee's testimony, the 30-day notice period for a summer 2014 injury began to run on July 29, 2014. Therefore, written notice was due by August 28, 2014 for a summer 2014 injury. AS 23.30.100(a) and (b). The first appearance in the medical record in 2015 of a right shoulder injury connected to Employee's work for Employer was on February 27, 2015 when Employee complained of severe right shoulder pain since running a jackhammer three weeks ago. Based on the medical record and Employee's testimony, the 30 day notice period for a 2015 injury began to run on February 27, 2015. Therefore, written notice was due by March 30, 2015 for a 2015 injury. AS 23.30.100(a) and (b); 8 AAC 45.063(a). Employee filed written notice of a July 2012 shoulder injury on February 11, 2016. Employee filed a second written notice of a March 16, 2015 shoulder injury on March 7, 2016. Employee did not provide written notice within 30 days of the first compensable event for either the 2014 or 2015 dates of injury. AS 23.30.100(a) and (b).

Formal notice may be excused where the employer had actual knowledge of the employee's injury and the failure to give notice was not prejudicial to the employer. AS 23.30.100(d); *Cogger*. Employee testified he told Mr. Miller he injured his right shoulder while working on the Auke Bay roundabout and afterwards due to his shoulder injury, Mr. Miller assigned him to light duty picking up trash at the Auke Bay School parking lot. Mr. Miller also testified he assigned Employee to light duty after Employee went to the doctor for a shoulder injury. While Miller testified he could remember two events involving an injury to Employee's shoulders, he could not recall which shoulder Employee injured in the events. The job labor journal indicates Employee worked on the Auke Bay School project in 2013 only, not in 2014 or 2015. Employee claimed a left shoulder injury occurred in July of 2013. A review of the medical record shows Employee first reported left shoulder pain on July 11, 2013 and he reported working light duty when he visited Juneau Urgent Care for left shoulder pain on September 22, 2013. The medical record provides no evidence Employee's right shoulder was injured in 2013. Based on the medical record, Mr. Miller's testimony, Employee's testimony, and the job labor journal, Employee has not proven Employer had actual knowledge of a right shoulder injury while working on the Auke Bay roundabout. *Id.* Employee's March 7, 2016 and April 26, 2016 claims, as amended, are barred under AS 23.30.100 for failure to file a timely report of injury.

3) Did Employee injure his right shoulder while in the course and scope of employment with Employer?

Assuming Employee had provided timely notice of a work injury, Employee has failed to prove his claim by a preponderance of the evidence. Employee claims he sustained a right shoulder injury while working for Employer when he used a jackhammer at the Auke Bay roundabout. Without regard to conflicting evidence and without considering credibility, Employee raised the presumption through his testimony and with Dr. Schwarting's July 10, 2017 medical report stating Employee injured his right shoulder while using a jackhammer in 2015. *Wolfer*. Because Employee raised the presumption, substantial evidence was required to rebut it. *Smallwood*. The presumption was rebutted with Dr. Sahasrabudhe's opinion there was no time when Employee's work was the substantial cause of any right shoulder disability or need for medical treatment and the July 29, 2014 and February 12 and 26, 2015 medical records documenting non-work related 2014 or 2015 injuries. *Huit; Tolbert; Wolfer*.

Once the employer rebuts the presumption of compensability, an employee must prove his claim by a preponderance of the evidence. *Koons*. Credibility and conflicting evidence are considered at this step. Employee must provide it is more likely than not he sustained a right shoulder injury while working for Employer while using a jackhammer at the Auke Bay roundabout. The weight of the evidence indicates he did not.

While Employee is sincere in his assertion he sustained a right shoulder injury while working for Employer using a jackhammer at the Auke Bay roundabout, the evidence indicates he is a poor historian and his assertions as to his right shoulder injury are not reliable. The mechanism of injury Employee provided doctors varied. On July 14, 2014, Employee complained of right shoulder pain to Dr. Hernandez but stated there was no trauma to his right shoulder. On February 12, 2015 Employee stated there was no trauma to his right shoulder and his right shoulder pain started in bed. Though Employee's testified his right shoulder pain was severe shortly after the jackhammer incident, it is reasonable to conclude Employee's memory was more reliable at the time of the injury and Employee likely would have reported that incident to the doctors treating his right shoulder. However, Employee first attributed his right shoulder injury to an incident with a jackhammer on February 27, 2015 when he reported to Dr. Schwarting he had experienced right shoulder pain since running a jackhammer three weeks prior. Dr. Schwarting's July 10, 2017 report that Employee's right shoulder was injured while using a 2015 is given little weight because his statement is dependent upon the history provided by Employee and Employee is not credible.

Employee asserted his limited education and difficulty speaking and understanding English resulted in confusion and sometimes contradictory information regarding the mechanism of injury. However, this assertion is not credible. Employee's treating physician Dr. Hernandez speaks Spanish fluently and Employee first saw her for his right shoulder pain on July 29, 2014. Employee did not report a right shoulder jackhammer incident to Dr. Hernandez until August 24, 2016, more than two years after he first treated with her for his right shoulder. At that time, he reported he injured his right shoulder while at work "in late January/February 2015."

Employee's testimony he injured his right shoulder at the Auke Bay roundabout and shortly afterwards was placed on light duty at the Auke Bay School is contradicted by the job labor journals and the medical record. The job labor journals are given more weight because they were records kept during the time in question. The job labor journals are substantial evidence eliminating any reasonable possibility that Employee's right shoulder was injured in 2015 while working for Employer because they prove Employee did not work on the Auke Bay roundabout in 2015. The job labor journals are substantial evidence eliminating any reasonable possibility that Employee's right shoulder was injured in 2014 because they prove Employee did not work on the Auke Bay School parking lot in 2014. The medical record provides no evidence Employee's right shoulder was injured in 2013. In fact, the medical records document only a left shoulder injury in 2013 and a November 19, 2013 medical report attributes the left shoulder injury to an incident with a jackhammer. The preponderance of the evidence shows Employee did not sustain a right shoulder injury while working for Employer while using a jackhammer at the Auke Bay roundabout in Juneau, Alaska in 2013, 2014 or 2015. *Koons; Saxton*. Employee did not sustain a right shoulder injury while in the course and scope of work for Employer. Employee's March 7, 2016 and April 26, 2016 claims, as amended, are not compensable against either Alaska National or Northern Adjusters. AS 23.30.010(a).

4) Is Employee entitled to disability and medical benefits from either Alaska National or Northern Adjusters?

Employee claimed for TTD and medical benefits for his right shoulder injury. As this decision determined Employee was not injured in the course and scope of his employment with Employer, he is not entitled to any benefits and his claim will be denied.

5) Is Employee entitled to attorney's fees and costs?

An award of compensation or other benefits is a prerequisite to an award of attorney's fees and costs under either AS 23.30.145(a) or (b). As Employee has not prevailed on his March 7, 2016 and April 26, 2016 claims for a right shoulder injury, as amended, and no benefits were awarded, Employee is not entitled to any attorney's fees and costs. AS 23.30.145; *Harnish*. Employee's claim for attorney's fees and costs will be denied.

6) Is Northern Adjusters entitled to attorney's fees and costs?

AS 23.30.155(d) requires a liable insurer to reimburse attorney fees and costs to an insurer which prevails in showing itself not liable for an employee's claimed benefits when payment is controverted solely on the ground another insurer of the same employer may be responsible. Because Alaska National did not controvert solely on the grounds that Northern Adjusters may be responsible for all or a portion of the benefits Employee claimed and Alaska National was not found liable for Employee's claim, Northern Adjusters is not entitled to attorney's fees and costs. Northern Adjusters request for attorney's fees and costs will be denied.

CONCLUSIONS OF LAW

- 1) The oral order to join Northern Adjusters as a party was correct.
- 2) Employee's claims against Alaska National and Northern Adjusters are barred by failure to give timely notice.
- 3) Employee was not injured within the course and scope of his employment with Employer.
- 4) Employee is not entitled to TTD or medical benefits from either Alaska National or Northern Adjusters.
- 5) Employee is not entitled to attorney's fees and costs.
- 6) Northern Adjusters is not entitled to attorney's fees and costs.

ORDER

- 1) Alaska National's May 26, 2016 petition to join Northern Adjusters as a party is granted
- 2) Employee's March 7, 2016 and April 26, 2016 claims for a right shoulder injury, as amended, for any and all benefits against Alaska National are denied.
- 3) Employee's March 7, 2016 and April 26, 2016 claims for a right shoulder injury, as amended, for any and all benefits against Northern Adjusters are denied.
- 4) Northern Adjusters' request for an award of attorney's fees and costs is denied.

Dated in Juneau, Alaska on October 6, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/

Kathryn Setzer, Designated Chair

/s/

Charles Collins, Member

/s/

Bradley Austin, 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 RAMIRO C LEMUS, employee / claimant; v. MILLER CONSTRUCTION COMPANY, employer; NORTHERN ADJUSTERS, INC., insurer / defendants; ALASKA NATIONAL INSURANCE COMPANY, insurer / defendants; Case No. 201604611M; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on October 6, 2017.

/s/

Dani Byers, Technician