ALASKA WORKERS' COMPENSATION BOARD

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

SHANNON LONGWAY-MAROTTA, Employee, Claimant, v. COLASKA, INC., Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201612550 AWCB Decision No. 17-0137 Filed with AWCB Anchorage, Alaska on December 8, 2017

Colaska, Inc.'s (Employer) August 24, 2017 petition for a second independent medical examination (SIME) and Shannon Longway-Marotta's January 3, 2017 claim were heard in Anchorage, Alaska, on September 20-21, 2017, dates selected on June 19, 2017. Attorney Elliott Dennis appeared and represented Employee who appeared and testified. Attorney Rebecca Holdiman-Miller appeared and represented Employer and its insurer. Witnesses included Travis Foreman, Shereen Whitford and Sharla Hintermeister who testified for Employee, and Amber Creeger, Karen Zemba and Toby Tuttle who testified for Employer. As a preliminary matter, an oral order denied Employer's SIME petition and overruled its objection to a medical record not previously filed on a medical summary. This decision examines the oral SIME and medical record orders, and decides Employee's claim on its merits. The record remained open for Employer's objection to Employee's attorney fee and cost request, and closed on November 30, 2017, when the panel met to review the extensive evidence and to deliberate.

ISSUES

Employer contended medical opinions from its employer's medical evaluator (EME) Scot Youngblood, M.D., created medical disputes when compared with opinions from Employee's attending physician. Given these disputes, Employer requested an SIME.

Employee vigorously opposed an SIME and contended Employer waived its right to request an SIME, its SIME request was a delaying tactic and there was already adequate medical information in this case, rendering an SIME unnecessary. She sought an order denying the SIME request.

1) **Was the oral order denying the SIME petition correct?**

Employer objected to admission of a medical record from Sean Taylor, M.D., because Employee failed to file it 20 days prior to hearing. Employer also objected on grounds that the document is not a business record and was inadmissible hearsay.

Employee offered Dr. Taylor's report into evidence noting she had just given it to her attorney after finding it in her personal belongings at home. Employee contended that although she did not file it on a medical summary, the medical report is admissible as a simple business record.

2) **Was the oral order admitting Dr. Taylor's May 5, 2017 record correct?**

Employee contends her work injury with Employer continued to disable her after Employer laid her off, ending her light duty employment. She seeks temporary total disability (TTD) benefits from December 2, 2016, and continuing until she reaches medical stability or returns to work.

Employer contends it continued Employee's salary through December 1, 2016. Thereafter, it contends several physicians found Employee medically stable and able to return to her regular employment. Therefore, Employer contends Employee is not entitled to TTD benefits.

3) **Is Employee entitled to TTD benefits?**

Employee contends her medical care and treatment, including diagnostic evaluations, is not yet completed. She requests an order requiring Employer to pay for additional diagnostic testing and, if necessary, treatment.

Employer contends Employee completed her medical treatment for the work injury. It contends any additional diagnostics are unreasonable and unnecessary or unrelated to the work injury. Employer seeks an order denying Employee's request for continuing medical care.

4) Is Employee entitled to additional medical care for her work injury?

Employee contends she is entitled to a vocational reemployment eligibility evaluation because her work injury with Employer has caused disability from her job for more than 90 days. She contends her work injury caused a permanent partial impairment (PPI) and restricts her from returning to her normal work.

Employer contends several physicians released Employee to return to her regular employment, without restriction. It further contends the same physicians predicted no ratable PPI resulting from Employee's work injury.

5) Is Employee entitled to a vocational reemployment eligibility evaluation?

Employee contends her lawyer provided valuable legal services in obtaining benefits to which she is entitled. She requests an order awarding actual attorney fees and costs.

Employer contends Employee is entitled to no additional benefits. Therefore, it contends her lawyer is not entitled to any attorney fees or costs. Employer also contends the requested attorney fees are excessive in time and in hourly rate.

6) Is Employee entitled to an award of attorney fees and costs?

FINDINGS OF FACT

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

1) Between 2009 and 2013, Employee saw providers at Sunshine Community Health Center in Talkeetna, Alaska. The record template includes and repeats, among other things, complaints including "chronic neck, shoulder, back pain" related to a 1991 snowmachine wreck. The providers prescribed medication for Employee's chronic pain complaints. There is no indication of treatment specifically addressing Employee's "shoulders." (Sunshine Community Health Center records, December 31, 2009 to May 30, 2013).

2) Between 2011 in 2014, Employee saw Matthew Peterson, M.D., for chronic pain issues resulting from the snowmachine crash 20 years prior. Employee's main complaints were cervical and low back pain and pain throughout her back, including the upper back near the shoulder blades. Dr. Peterson offered no "shoulder" diagnoses. Concurrent physical therapy records show therapy applied mainly to Employee's back from her neck to her lumbar spine and do not demonstrate particular treatment directly addressing any shoulder issues and especially no anterior shoulder complaints. (Peterson reports; Back & Neck Center reports, 2011-2014).

3) On August 18, 2016, a municipal bus drove through a construction zone and hit the signing paddle in Employee's right hand, causing her right arm and shoulder to suddenly and forcefully hyperextend backwards. (Employee).

4) On August 22, 2016, Nicole Pressman-Schneider, M.D., examined Employee for her work injury. Employee gave a history of her August 18, 2016 injury and stated she had "no similar problems in right shoulder previously." Dr. Pressman-Schneider said Employee had right shoulder pain and muscle spasm, had a "work-related injury," did not say she was medically stable, and removed her from work for up to seven days. (Physician's Report, August 22, 2016).

5) On September 12, 2016, Timothy Olson, PA-C, examined Employee, diagnosed a rotator cuff sprain and shoulder pain, and continued her restrictions. (Olson report, September 12, 2016).

6) On November 7, 2016, Tucker Drury, M.D., examined Employee, diagnosed right shoulder impingement and rotator cuff tendinopathy with right shoulder AC joint osteoarthritis, and continued Employee's five-pound lifting restriction. (Drury report, November 7, 2016).

7) On November 18, 2016, Dr. Youngblood performed an EME and concluded Employee had a right pectoralis major strain. The August 18, 2016 work injury is the substantial cause of the strain. In Dr. Youngblood's opinion, Employee's condition had resolved and she is medically

stable effective November 18, 2016, with no ongoing disability or need for further treatment and no objective basis to limit her activities. (Youngblood report, November 18, 2016).

8) By at least December 1, 2016, Employer had Dr. Youngblood's EME report and controverted Employee's benefits based on his report. (Controversion Notice, December 1, 2016).

9) On December 5, 2016, Dr. Drury diagnosed Employee with right shoulder impingement, rotator cuff tendinopathy, AC joint osteoarthritis and a possible brachial plexus injury with right upper extremity radiculopathy. He recommended a brachial plexus magnetic resonance imaging (MRI). Dr. Drury also said Employee was partially disabled and still limited to no lifting with her right upper extremity and no lifting greater than five pounds for four weeks. Dr. Drury stated Employee had right shoulder pain and this "is a workers' compensation injury, date of injury 08/18/16." He had no comment on Dr. Youngblood's EME report because he had not seen it. (Drury reports; Disability Work Status, December 5, 2016).

10) On December 9, 2016, Employer's adjuster received Dr. Drury's December 5, 2016 reports and Disability Work Status form. (*Id.*; observations).

11) On January 13, 2017, Employee timely requested an SIME. Employee based her request on medical disputes set forth in Dr. Drury's December 5, 2016 report versus Dr. Youngblood's November 18, 2016 EME report. Employee lists disputed medical issues as treatment and medical stability. Employee's attorney signed the SIME form, but Employer's attorney did not. (Petition; Second Independent Medical Evaluation (SIME) Form, January 13, 2017).

12) On January 13, 2017, Employee served the January 13, 2017 SIME petition and form on Employer along with the medical records documenting the medical disputes. (*Id.*).

13) Drs. Drury's and Youngblood's November 18, 2016 and December 5, 2016 medical reports created medical disputes. (Experience, judgment observations).

14) On January 25, 2017, Employer opposed Employee's SIME request on grounds the parties lacked medical records and diagnostic films. Employer contended until discovery was complete, "the parties are unable to accurately determine if an SIME is warranted." (Opposition to Employee's Petition for SIME, January 25, 2017).

15) There was no further action on Employee's SIME request. (Observations).

16) To make its own timely request, Employer had to request an SIME within 60 days of December 9, 2016. Sixty days from December 9, 2016, was February 7, 2017, a date that was neither a weekend nor a holiday. (Observations).

17) On March 8, 2017, Dr. Drury reviewed electrodiagnostic testing and a brachial plexus MRI with Employee. He decided Employee had no active shoulder problem but referred her to Dr. Taylor for further care. Dr. Drury recommended Employee "remain at her current [light-duty] work status until definitive management by Dr. Taylor." (Drury report, March 8, 2017).

18) On April 20, 2017, Dr. Taylor recommended Employee have a cervical MRI to rule out neck issues as a cause for Employee's continued right upper extremity symptoms, and a blood chemistry panel to rule out thyroid issues as a pain source. (Taylor report, April 20, 2017).

19) On May 5, 2017, Dr. Taylor provided a "Work/School Status Note," which said Employee was currently treating with him for an orthopedic condition and could do, "No lifting over 5 pounds and no overhead work." (Taylor record, May 5, 2017).

20) On July 12, 2017, Employee was the restrained driver of a vehicle when another vehicle hit it on the passenger's front side. At the emergency room, Employee complained of paraspinal low back, mid back and neck pain and a headache. There is no mention of shoulder pain. Extensive diagnostic imaging did not include any shoulder images. (Mat-Su Regional Medical Center records, July 12, 2017).

21) On August 8, 2017, Dr. Peterson performed a right shoulder, subscapularis and supraspinatus tendon injection on Employee. After reviewing Employee's work injury Dr. Peterson said, "I do believe the patient's pain is directly related to this injury." (Peterson report, August 8, 2017).

22) On August 16, 2017, Employee reported 20 to 30 percent pain reduction from the injection for up to a few hours but felt no functional improvement. (Peterson report, August 16, 2007).

23) On August 24, 2017, Employer first requested an SIME based on "newly received records from Algone." (Petition, August 24, 2017).

24) Employer's August 24, 2017 SIME request was untimely. (Experience, judgment, observations and inferences drawn from the above).

25) At the September 20, 2017 hearing, on the preliminary SIME issue Employer contended its EME physician's opinions differed from Employee's attending doctor regarding causation, compensability, medical care and medical stability. (Employer's hearing arguments).

26) By contrast, Employee contended it has already been 13 months since her work injury and the board should rely on the existing evidence to decide the case. She contended, notwithstanding existing medical disputes between the EME and her physician, she does not

want an SIME because her treating doctor has a plan to isolate her pain generator, diagnose it and treat the problem. He contended the record already has adequate information from which the board could make factual findings and render a decision. (Employee's hearing arguments).

27) On the objection to Dr. Taylor's May 5, 2017 report, Employer contended the board should not allow Employee to show up with a new medical record at hearing and have the record admitted as evidence without Employer's opportunity to question the author. Employer also objected on grounds that a medical record is not a "business record." (Employer's arguments).

28) Employee contended this record is clearly admissible as a "business record" under the appropriate evidentiary rule. (Employee's arguments).

29) An oral order at hearing denied Employer's SIME petition on grounds there is adequate evidence in the agency record upon which to base a decision. Another oral order admitted Dr. Taylor's May 5, 2017 medical record under 8 AAC 45.052(c)(4) with an instruction to Employee to file this record on a medical summary. The order concluded Dr. Taylor's report was a "business record" under Alaska Civil Rule 803(6), there were no foundational objections and the document was therefore admissible over Employer's objection. (Oral orders at hearing).

30) Part of the oral order offered Employer an opportunity to depose Dr. Taylor on his May 5, 2017 report. Employer declined the offer. (Record).

31) On September 21, 2017, Employee filed formally Dr. Taylor's May 5, 2017 "Work/School Status Note." (Medical Summary, September 21, 2017).

32) Travis Foreman is Employee's significant other. He works as a project manager. He has over 30 years' experience in construction including roadwork and is familiar with traffic control and flagging duties. He has known Employee for over 27 years and they have been a couple for four years. Prior to her work injury, Employee rode motocross on her own motorcycle. She also rode in the couple's physically demanding Razor all-terrain vehicle (Razor or ATV). Employee did not ride the motorcycle after the work injury and she has only ridden in the Razor once or twice with great subsequent pain. She is not able to lift a cast iron frying pan or a milk container with her right hand since the work injury. Foreman is not aware Employee had any pre-injury disabilities. He is familiar with the July 16, 2016 motor vehicle accident Employee had with his truck. The truck did not rollover but sustained damage to the front end, hood and grill. The insurance company did not total the truck and it is back on the road. Employee was stiff and sore for a couple of days following the injury. Employee was back at "full speed" by the time she had

the work injury. In his view, she could not have returned to her regular job unless she was fully capable and physically able. Foreman does not think Employee could perform flagger duties safely since her injury because she is limited in use of one arm and flagging is a physically demanding position. He is familiar with Employee's 2017 motor vehicle accident. Foreman took Employee to the emergency room where doctors examined and released her. Employee looked shaken up and in shock. Foreman cannot say Employee was actually in any pain. Employee has a good reputation in the industry as a flagger. Foreman noted the airbags did not deploy on the Chevrolet truck during Employee's 2016 vehicle accident. (Foreman).

33) Employee has been a flagger for over 16 years. She is not currently working because she cannot carry more than 10 pounds, which is not compatible with her job duties as a flagger. The August 18, 2016 work injury is her first workers' compensation injury. Employer hired her as a traffic control supervisor. Her job was to control all traffic on a road construction project, including supervising other flaggers and setting up traffic control devices. She successfully completed a "fit test" before beginning work. This test included a physical examination and performing physical activities like carrying a 40-pound toolbox up and down stairs. (Employee).

34) On the injury date, a People Mover bus drove past Employee as she was flagging and hit the flagging paddle she was holding, knocking it from her hand. Employee was facing the traffic as the bus passed her. When the bus hit the sign, it jerked her right arm backwards. At first, Employee felt no pain. Once the "adrenaline wore off," Employee began feeling right shoulder pain. During the shift, Employee got some over-the-counter pain medication from a crewmember. Employee's accident happened on a Thursday and she obtained medical treatment for the first time the following Monday. Toby, Employer's "safety guy," called her Monday morning and told her to go to Physicians' Care Associates (PCA) in Eagle River. PCA did not release Employee to return to work. The "safety guy" told her Employer wanted to give her light duty work. Given this information, PCA altered her restriction to five-pound lifting limitations. Employee started physical therapy and obtained a magnetic resonance imaging (MRI). PA-C Olson referred her to Dr. Drury, an orthopedic specialist. A cortisone injection Employee had in her shoulder joint helped for only three days. Employee says a medical record stating it worked for three weeks is not accurate. While released to "light-duty," Employee "never really did anything," and called in from home for assignments. Eventually, Toby told Employee the season was ending and Employer wanted to lay her off so she could collect unemployment. Employee

explained she was not able to work and thus could not obtain unemployment. Upon hearing this, Toby briefly had Employee come into the office and read the Occupational Safety and Health Administration manual eight hours per day. Toby told Employee to change her doctor to an Anchorage physician, since she worked in Anchorage. Employee put in a request to change doctors. He later told her, "never mind, just leave it." Employee felt pressure to quit her job and obtain a work release to return to full duty. She never got a release to full duty because she cannot carry any significant weight for any distance. Employee's symptoms span from her upper "chest" area to her upper right shoulder and then down her right arm into her fingers, which occasionally tingle. (*Id*.).

35) Employee can pick up between five to 10 pounds but she cannot hold it for very long. She cannot carry objects unless they are extremely light. (*Id*.).

36) Employee said the examination with Dr. Youngblood was "the shortest doctor's appointment I've ever had." He did "a couple little things" and that was all. The entire visit with the doctor was about 15 minutes and comprised mostly of him asking questions. Following this examination, Employer laid her off. She disagreed with Dr. Youngblood's assessment that she was medically stable and could return to regular work. Once Employee learned Employer controverted her benefits, she called her doctor and physical therapist and canceled her appointments because she had no way to pay for the medical care. She had one more appointment with Dr. Drury on December 5, 2016, and he continued her physical limitations and recommended more physical therapy as well as diagnostic testing to address her work injury. Employee had union-provided health care coverage through February 2017, but this does not cover work-related injuries. Employee believes she needs additional medical care and her current condition is "not acceptable" for the rest of her life. Employee's main symptoms are in the front area of her shoulder. (*Id*.).

37) The only benefit Employee received from workers' compensation was medical care. Employee eventually obtained an MRI and a brachial plexus nerve test in February 2017. (*Id*.).

38) Employee had thyroid cancer in the past but it never affected her shoulder area where she currently has pain. She disagrees with Dr. Taylor's suspicion that her thyroid medication levels being off may account for some of her pain. Her medication levels have varied over the years and she never noticed any right shoulder area pain resulting from this. (*Id*.).

39) Employee looked for work post-injury but found nothing within her physical limitations. Her job with Employer paid about $30 per hour. In Employee's view, she could not pass the required "fit test" and could not currently perform her job duties. Her job with Employer included flagging, which means holding the sign all day long. However, prior to signing, she had to set up and take down her "devices," including signs and sign stands. There may be six to eight signs on various approaches to the work area. The signs are four feet by four feet and weigh approximately 13 to 15 pounds each. The sign stand is heavy, not including the sandbags she puts on the legs to keep them from tipping over. "Candlesticks" are typical traffic control devices used to line out lanes and Employee had to move these around frequently. Employee could not perform these duties with only one hand. Even when her right hand and arm were normal, she could not perform her full range of duties with only her left upper extremity. (*Id*.).

40) Employee has had previous injuries where she injured her back and neck area, but always "in the back," near her shoulder blades, not "in the front" where the pain is now. Her previous snowmachine and auto accidents did not injure her right shoulder or upper extremity. Employee can no longer ride her recreational vehicles like she did prior to her work injury. (*Id*.).

41) Employer continued to pay Employee her normal wages through the end of November 2016. Employer laid her off approximately December 1, 2016. At some point, Employee decided to go on Medicaid to see if she could get her body fixed. She saw Dr. Peterson for this purpose. He provided an ultrasound-guided injection into her shoulder tendons, which provided some relief. Dr. Peterson recommends additional injections. She would like to try these. Other physicians and Dr. Peterson's office recommended an epidural injection in her spine to address the nerve issue through her upper extremity. Employee never had similar symptoms before this work injury. Employee's supervisor Toby said he would find out where he was supposed to send her and after checking, told her to go to a facility in Eagle River. She did not ask Toby for advice about where to go. He brought it up. Employee just walked in for an appointment that she did not make. She did not think she had a choice. She initially went to OPA in the Valley but then saw Dr. Taylor in Anchorage. Employee does not attribute neck pain to her work injury with Employer. After Employee's July 16, 2016 motor vehicle accident, "everything" in her upper body hurt, but "in the back." She took four days off work for that accident, including two days over the weekend. (*Id*.).

42) As for her July 12, 2017 motor vehicle accident, Employee did not tell Dr. Peterson about this when she saw him soon after the accident because she was "not affected by it" and just had "muscle pain." Employer played a recorded-statement Employee gave to a Geico adjuster related to this July 12, 2017 motor vehicle accident. When asked by the adjuster if she was "injured" in the motor vehicle accident, Employee selected her words carefully and specified she was "hurt" in the accident. She explained pretty much all of her back was a "little stiff and sore." The airbags did not deploy. Employee lost no time from work from this auto accident. She ranked her pain level at "3 to 6" on a "10" scale. Employee said the pain she described to the adjuster is not the same as her pain from her work injury. She did not say she hurt her neck in the auto accident and when she went to the emergency room, the doctors asked her questions about her neck and Employee said she simply responded to their questions. The motor vehicle accident did not cause increased symptoms for her work injury. Employee followed the emergency room physician's advice and saw a clinic in Palmer, Alaska. She told the Palmer physician she was fine and just had some "muscle pain." The only medications Employee received from the auto accident were from the emergency room. She does not think she has much pain from her neck from the work injury. Rather, the bus incident at work affected her anterior shoulder and related area. In her pre-hire physical with Employer, Employee filled out a questionnaire in which she listed "shoulder pain." She again clarified she had posterior shoulder area pain in the past, and her pain resulting from the work injury is anterior shoulder area pain extending somewhat into the chest region parallel to her armpit. Dr. Peterson's recommended injections are in the same areas where she described her current symptoms. Employee's pain related to her work injury has never resolved. Dr. Peterson's injections provided some benefit but pain management helps "a lot." In that regard, her symptoms "have improved." Employee could not have done a cashier position at a packaging store post-injury because the boxes are sometimes heavy. Employee filed a complaint with Dr. Youngblood's professional medical board for failure to perform an adequate examination and for saying she is capable of working. In Employee's view, this opinion, which she believes is unwarranted, resulted in her treatment stopping and placing her life "in turmoil." (*Id*.).

43) Employee had a winter job prior to the flagging season and planned to continue working after the season ended. At the time of her work injury, Employee was not legally married and

could claim her son on alternate years as a dependent. Employee earned $16,026 in wages in 2015. Though low for her, this was her highest year's earnings recently. (*Id*.).

44) Shereen Whitford is records custodian for Algone Clinic. She explained Employee's medical records and dates of service at this facility. (Whitford).

45) Sharla Hintermeister has known Employee since childhood. They kept in touch over the years. Hintermeister reconnected with Employee most recently in 2014. Their respective families would go camping together, ride a Razor or ATV and ride dirt bikes. After Employee's work injury, she could no longer ride the Razor. Prior to the work injury, Employee was physically active and rode the Razor all the time. Razor riders wear a restraining harness. Post-injury, Hintermeister saw that Employee could not lift a dog's water dish. Hintermeister associated with her every other weekend before the work injury. (Hintermeister).

46) Amber Creeger is Employer's insurance adjuster. Creeger sees many EMEs and in her opinion, most EMEs are "50/50" in favor of the employer versus the injured worker. She thinks Dr. Youngblood is "very fair" and "a lot of the times" he opines in the injured worker's favor. As part of her investigation, Creeger obtained an "ISO report." These reports list any reported insurance claims involving a particular claimant. ISO reports automatically update annually. A September 9, 2016 ISO report recorded the work injury and a motor vehicle accident with Progressive on July 6, 2016. An August 23, 2016 ISO report again showed the work injury and the July 6, 2016 motor vehicle accident. A July 20, 2017 ISO report showed the work injury and a July 12, 2017 incident with Geico. By the August 23, 2016 ISO report, the July 6, 2016 claim was no longer open, having closed on August 18, 2016. The ISO report lists a $927 settlement amount. Creeger admitted she has no idea who received the $927 settlement in the Progressive case. Creeger and her company do not keep statistics on how EME physicians opine in each case. However, EME vendors occasionally send them lists setting forth their specialties. She deals with three to four vendors in Alaska. (Creeger).

47) Karen Zemba is human resources director for Employer and is familiar with Employee's case. She handles payroll and financial issues. According to Employer's records, Employee started paid status on April 27, 2016, and her wages ended December 1, 2016. According to Employee's W-2 form, she earned $39,835.28 in 2016. Wages paid to Employee after her injury date were $18,506.96. The 2016 season would have ended October 24, 2016. From her start date to her injury date in 2016, Employee earned $21,328.32. Zemba acknowledged many

flaggers frequently work more than 40 hours per week. However, after her work injury Employee worked only 40 hours per week on light duty. As the season winds down, typically overtime also reduces. Zemba does not know if additional flagging jobs continued throughout winter 2016. (Zemba).

48) Toby Tuttle is Employer's safety supervisor. Tuttle is a board-certified safety supervisor familiar with Employer's flaggers' duties. Some are less work intensive. Some flaggers only hold a sign 80 percent of the time, while for others this comprises 100 percent of their duties. Tuttle is familiar with Employee's August 18, 2016 injury. Her flagger duties varied and included setup, takedown, and some traffic direction. In Tuttle's experience, some flaggers may just hold the sign. On the injury date, Employee's duty involved holding a "Stop/Slow" paddle. He does not know how much the device weighs, but it has a long handle placed on the ground so the flagger does not need to hold the paddle in the air constantly. Tuttle would be surprised if the paddle weighed 10 pounds. In his opinion, a flagger could easily hold and turn the paddle with one hand. Tuttle had Employee doing sedentary work at home following her injury early on, and later had her come to the office to perform sedentary duty. In respect to medical care, Tuttle said 90 percent of the time injured workers ask him where he would like them to go for treatment. Tuttle said, "I refer them" to one of two places Employer uses and advises them they can choose for themselves. Employer has a preferred provider list. He discussed it with Employee. He "gave her recommendations" where she could go for care if she wanted. Tuttle denied specifically telling Employee to go to Orthopedic Physicians Alaska or Anchorage Fracture & Orthopedic Clinic. Tuttle strongly denied suggesting Employee change her medical care location to better correlate with her work. (Tuttle).

49) Dr. Peterson is a pain specialist, board-certified in anesthesia with a subspecialty pain-management certification from the American Board of Anesthesia. (Deposition of Matthew Peterson, M.D., September 8, 2017, at 3). He first saw Employee for the work injury with Employer on July 31, 2017. Employee's initial complaints included right shoulder and cervical spine pain. (*Id*. at 4). On the first visit, Dr. Peterson reviewed a cervical spine and brachial plexus MRI. (*Id*.). While Dr. Peterson was uncertain what Employee said, he was under the impression a bus hit her right shoulder. (*Id.* at 5). Employee said most of her pain was over the front of her right shoulder. (*Id*.). Employee described her right upper extremity being hyperextended as if it was "being thrown back behind her." Dr. Peterson suspected a soft tissue

injury to ligaments and tendons. (*Id.* at 6). He explained how "overstretched tendons and ligaments" never really come back to full strength, much like an over-stretched rubber band. This could account for Employee's "persistent pain and dysfunction of the right shoulder." (*Id.*). Upon being advised that the bus hit a traffic sign in Employee's hand rather than striking her shoulder, Dr. Peterson said this made no difference. "I think ultimately it resulted in her right upper extremity being hyperextended behind her and ultimately stretching all of the soft tissue in the front of the shoulder." (*Id.* at 6-7). When asked about a treatment plan, Dr. Peterson stated:

> I had a plan with her. Or I guess I still have a plan with her. I talked with her about not knowing for sure where the pain generator was. I said, you know, it seems to be coming from the shoulder, but it certainly could be the neck or combination of both. And I recommended to her a structure-specific diagnostic workup, which basically means I don't know what structure is causing the pain, but as an interventional pain specialist, using imaging, whether I'm using a live x-ray or fluoroscopy or ultrasound, I can guide my needles into particular areas or particular tissue and anesthetize that tissue and hopefully through that process identify a pain generator. (*Id.* at 7-8).

Dr. Peterson injected Employee's anterior right shoulder on August 8, 2017, with material designed to anesthetize any pain sources and help her ligaments heal. However, immediately after the injection Employee expressed continued pain complaints leading Dr. Peterson to conclude the anterior glenohumeral joint or shoulder capsule was probably not the pain-generating source. (*Id.* at 7-9). Dr. Peterson expected to reevaluate Employee two weeks later, but that was the last time he saw her. (*Id.* at 9). On August 16, 2017, PA-C Shortridge saw Employee in Dr. Peterson's office. She reported 20 to 30 percent pain reduction but no functional improvement following the injection. Given these results, Dr. Peterson planned a cervical epidural steroid injection to assess whether pain was coming from her cervical nerve roots. (*Id.* at 10). Thereafter, Dr. Peterson wanted to put Employee through a "diagnostic workup" systematically looking at different structures to find a "potential pain generator" until "either a diagnosis is found or ultimately excluded, in which case at that point she would be ruled from my standpoint at maximum medical improvement." (*Id.* at 10-11). Dr. Peterson is confident that if the pain generator is in her shoulder, he should be able to identify it. (*Id.* at 12). In Dr. Peterson's view, Employee is in the "diagnostic mode" because he does not really know what structure to treat. (*Id.*). Dr. Peterson opined Employee is currently not at "maximum medical improvement." (*Id.* at 13).

> Q. . . . With respect to the cause of her complaints, do you have an opinion as to whether her complaints of pain are caused by the August 18, 2016 on-the-job injury?
> . . . .
>
> A. With what I know of her, yes. I think it was due to the mechanism of injury.
>
> Q. . . . And would that mechanism of injury cause her to -- cause her disability?
>
> A. It certainly could, yes. (*Id.*).

Dr. Peterson recommends at least four to six additional treatments including diagnostic injections to discover the pain generator. If the pain generator turns out to be a tendon or ligament, Employee may need physical therapy and deep tissue massage therapy to treat the problem. (*Id.* at 15-16). If Employee does not heal, Dr. Peterson would then try "biologic therapy" using either platelet rich plasma or bone marrow to stimulate tissue healing. (*Id.* at 16). He has had positive results with this therapy on other patients. (*Id.* at 16). Employee may also need a functional capacity evaluation once she has reached maximum medical improvement. (*Id.*). When asked if Employee could currently work as a flagger, Dr. Peterson stated:

> A. I would think so. I think she would have to use her other extremity. I think it would be difficult to use the right upper extremity, you know, through a whole eight-hour shift with it extended, assuming she is standing there holding a flag. I think that's going to cause her a fair amount of pain. But she does have two extremities. I think she could use her other extremity and continue to work, yes. (*Id.* at 17).

Dr. Peterson does not know if an employer would allow someone with an injured arm to utilize the other extremity to work as a flagger. (*Id.* at 18). Dr. Peterson said Employee also complained about right chest pain, which he attributed to the pectoralis muscles. (*Id.*). Dr. Peterson's "working diagnosis" is a soft tissue injury. He further explained:

> Q. And as far as looking at the question Elliott Dennis presented to you about causation, if you don't have a diagnosis at this time . . . are you able to provide an opinion as to what the mechanism of injury actually caused?
>
> A. Yes. My working diagnosis of soft tissue -- and again, by definition I'm considering soft tissue meaning tendons and ligaments, with the -- with the right upper extremity being hyperextended with the impact, all of the soft tissue, the tendons and ligaments that attached to the front of the shoulder were stretched

> beyond their typical range of motion and that stretching has injured those tissues. . . . (*Id.* at 19).

Dr. Peterson saw a "blackened out" area in Employee's shoulder when he performed his ultrasound-guided injection. This finding suggests a torn ligament or tendon that has filled in with torn fibers or scar tissue. (*Id.* at 23-24). This blackened out finding is a "hypechoic" area. (*Id.* at 25). Dr. Peterson did not recall if Employee had a right shoulder injection in October 2016. Nevertheless, unless she had the same extra-articular injection he provided it would not change his opinion or treatment plan. He assumes any previous injection was intra-articular, which in his opinion is meaningless for the diagnostic workup to which he refers. (*Id*. at 25-26). To the best of Dr. Peterson's recollection, previous electrodiagnostic studies did not show any brachial plexus or nerve damage suggesting a cervical spine pain source. (*Id.* at 26). The September 2016 right shoulder MRI supports his opinion because it shows "that she does have pathology of the shoulder, specifically tendinopathy of at least two of the four rotator cuff muscles, specifically the supraspinatus and infraspinatus and also the acromioclavicular joint osteoarthritis." (*Id.* at 28). In his opinion, it is difficult to tell if the tendinopathy was acute or chronic, but tendinopathy suggests a chronic, ongoing issue. (*Id.* at 29). He did not recall treating Employee for neck and back pain complaints in 2014, though records show he did. Algone Clinic changed over to a new record-keeping system and, while any prior treatment records were available in archives, Dr. Peterson did not have those before him to review. (*Id.* at 31-32). Reviewing his prior treatment records for Employee from 2014 "possibly would" affect his opinions. (*Id.* at 32). Further explaining his return-to-work opinion, Dr. Peterson said Employee probably could not have returned to work beginning on her injury date. She had an "acute injury phase" and probably up to 12 weeks would be long enough to get through the acute phase after which Employee should have been able to return to work using her other extremity. (*Id.* and 34-35). Dr. Peterson defers to Dr. Drury's five-pound weight lifting restriction. (*Id.* at 35). Dr. Peterson opined that if there is additional diagnostic work and additional treatment, Employee might have additional healing. (*Id.* at 36). Employee's attorney provided Dr. Peterson with his medical records for review. He was not treating Employee for shoulder pain in 2014. He was treating her for neck and lower back pain. After reviewing all his previous chart notes, Dr. Peterson said, "I don't think anything in there would change my assessment or testimony in regards to her right shoulder pain, no." (*Id.* at 39). Only one mention on one note

stated Employee complained of pre-injury shoulder pain. The bulk of her complaints were cervical spine and lower back. (*Id.*). While the September 2016 MRI shows a history of a right shoulder injury, Dr. Peterson did not think based on Employee's physical examination, that the MRI findings were consistent with her August 18, 2016 work injury. However, he did not base Employee's current diagnoses on the MRI. (*Id.* at 40). The MRI findings showed superior, lateral shoulder issues while her initial presentation following the work injury was "very focused anterior." (*Id.*). After reviewing his October 29, 2014 chart note concerning Employee's snowmachine crash 20-plus years earlier, Dr. Peterson did not change his opinion for her current "anterior shoulder pain" (*id.* at 41) nor would he defer to Dr. Drury's causation opinion:

> Q. And why is that?
>
> A. Because I'm still under the impression that it's anterior shoulder soft tissue, and Dr. Drury is an orthopedic surgeon looking more at is there a surgical lesion or something that can be fixed surgical. And if not, he may be more inclined to say that the patient is at maximum medical improvement, where if it's indeed soft tissue, it's possible there's something that's overlooked. And so I still believe she needs that specific soft tissue diagnostic workup. (*Id.* at 42).

When asked how he could form a causation opinion without knowing the source of Employee's pain, Dr. Peterson stated, "Based on mechanism of injury." (*Id.*). Dr. Peterson also recommends a diagnostic ultrasound by third party, Rise Diagnostics. (*Id.* at 44).

50) Dr. Youngblood is an orthopedic surgeon who, in addition to his private orthopedic surgery practice, performs employer's medical evaluations on injured workers in several states. (Telephonic Deposition of Scot Youngblood, M.D., September 8, 2017, at 6). He examined Employee in November 18, 2016. (*Id.* at 7). Employee's complaints included right anterior shoulder and chest pain. (*Id.*). Dr. Youngblood reviewed Employee's medical records and diagnostic imaging and diagnosed a right, pectoralis major strain without evidence of tear or disruption, substantially caused by the August 18, 2016 work injury. He found her injury medically stable and her subjective complaints in excess of objective findings. (*Id.* at 9). In Dr. Youngblood's opinion, all diagnostic imaging and testing done following his examination supports his opinion because it shows nothing more than arthritis in her neck. In his view, there is no objective evidence to support a current diagnosis, which could be a pain generator. (*Id.* at 10-11). Dr. Youngblood opined Employee's medical treatment did not make her better, but in

fact made her worse. (*Id*. at 11). While he found no evidence showing a pectoralis major tendon tear, "It can actually be with the same mechanism of injury that she described, an abduction and external rotation, when the bus rearview mirror hit her sign." (*Id*. at 12). On Dr. Youngblood's review of the right shoulder MRI, the pectoralis major tendon is intact. (*Id*. at 14). He disagrees with Dr. Peterson's assessment that an ultrasound can show an abnormality in the shoulder capsule that would somehow be a pain generator. He said the ultrasound procedure is "just simply not used in orthopedic practice. I've never even heard of that." (*Id*. at 16-17). In Dr. Youngblood's opinion, platelet-rich plasma injections are of limited benefit in very few clinical settings, including tennis elbow. He opined there are no good studies for using these injections in the shoulders. (*Id*. at 18-19). He agrees with Dr. Drury that Employee's pain is not coming from her "ball-and-socket joint" or glenohumeral joint, "it was coming from elsewhere." (*Id*. at 20). Dr. Youngblood clarified, "So when orthopedic surgeons talk about the shoulder, they talk about the ball-and-socket or glenohumeral joint." (*Id*. at 22). He does not recommend any additional medical diagnostics or treatment. These would all be unnecessary and unreasonable after his November 18, 2016 examination, in his opinion. (*Id*. at 24). As for Dr. Peterson's recommended diagnostic injections:

> A. Well I guess it depends on where exactly the pain is. But typically you want to target an injection based on where the pain complaints are where you think the pathology might be.
>
> So I'm not really sure where he would be injecting medication. I don't know what a putative diagnosis would be, you know, a provisional diagnosis. So I would disagree with any injections. (*Id*. at 25).

Dr. Youngblood also opined there is no objective evidence to indicate any impairment or disability, and therefore, no justification for a work restriction. (*Id*. at 25). Employee did not mention her July 2016 motor vehicle accident to Dr. Youngblood. (*Id*. at 26). In his opinion, Employee had a "completely normal physical examination" with exception of some tenderness over the pectoralis major tendon. (*Id*. at 28). Dr. Youngblood said Employee had a subacromial injection already. Therefore, if Dr. Peterson was concerned symptoms were coming from Employee's tendons, Dr. Drury's subacromial injection would have addressed that issue, in Dr. Youngblood's opinion. (*Id*). According to Dr. Youngblood, Dr. Drury documented only 10 percent pain relief after 10 minutes when he re-examined her following the injection. In

Dr. Youngblood's view, this is not a positive diagnostic test, since these injections are "usually pretty good for evaluating the rotator cuff." (*Id*. at 29). (*Id*. at 30). Regarding his treatment philosophy vis-à-vis Dr. Peterson's:

> A. So I will let Dr. Peterson speak for himself. But I can only say that in orthopedic surgery we're looking objectively at the musculoskeletal structures, whether it's the bone, the cartilage, the ligaments, the tendons, the muscles, and were trying to find something that is pathologically altered, pathologically wrong, and try to fix it and address it.
>
> And when I look objectively at the anatomic structure on her imaging, on examination, and the prior history, there's nothing abnormal. She has age-related arthritis in her neck that's mild, and she has mild rotator cuff tendinopathy, which just means that, you know, like the rest of us, she's getting older. So there's nothing objectively abnormal. And as an orthopedic surgeon, I can't tell you what to treat. (*Id*. at 32).

Following Dr. Youngblood's EME, Employee filed a complaint with the State of Alaska medical board. The complaint alleges Dr. Youngblood "failed to do a complete and thorough evaluation of her injuries." (*Id*. at 33). He disagrees, citing his 13-page report. Dr. Youngblood said he spent "at least 45 minutes in the room with her." Dr. Youngblood denied Employee's complaint affected his opinion. (*Id*. at 35). Dr. Youngblood conceded he is not a pain doctor, and stated:

> Q. And Ms. Marotta's complaints have been that she is experiencing pain; is that not correct?
>
> A. That is correct. I have no doubt she is complaining of pain. (*Id*.).

Dr. Youngblood did not diagnose Employee with "pain behaviors" but simply said he could not explain her subjective pain complaints. (*Id*. at 37). He agrees there can be explanations for pain complaints, which fall outside the scope of an orthopedic examination. (*Id*. at 38). When he saw Employee, she said she was experiencing pain and Dr. Youngblood had no reason to doubt her. He just could not substantiate it. (*Id*. at 48).

> Q. And with respect to the mechanism of injury, if a large bus struck her traffic sign, her paddle, and tore it out of her hand and caused her arm to hyperextend out, is that the sort of mechanism that could cause a pain-producing injury to the human body?
>
> A. Yes. (*Id*.).

Dr. Youngblood qualified his answer by saying without objective evidence of a tendon tear, fracture or dislocation, any soft tissue swelling and pain should resolve within a few weeks. (*Id*. at 49). Dr. Youngblood performs EMEs for insurance companies during vacation and time off from his work as a physician with the Navy. He does 15 to 17 in any given two-day trip. He is paid $525 for an examination. (*Id*. at 50). Dr. Youngblood performs EMEs on Fridays and Saturdays once a month. (*Id*. at 6).

51) Dr. Taylor is a physician specializing in physical medicine and rehabilitation. (Deposition of Sean D. Taylor, M.D., September 11, 2017, at 3-4). Dr. Drury referred Employee to him for electrodiagnostic studies and, "then I kind of gave an opinion at the end of that about things that I thought would be reasonable to look into." (*Id*. at 4). Employee's complaints included right shoulder pain radiating into the right upper extremity, tingling in the fingers and right hand, shoulder weakness and occasional neck pain. Employee did not complain of any chest pain. (*Id*. at 6). He performed a brief examination, which was normal, and he did not make a diagnosis. (*Id*.). Dr. Taylor referred Employee to Algone Pain Clinic for pain management because his clinic does not provide that service. (*Id*. at 10). Dr. Taylor wondered if Employee's thyroid issues could be contributing to her myofascial and muscular pain. (*Id*. at 11). When asked if he agreed with Dr. Youngblood's diagnosis of a strain, Dr. Taylor said, "You know, I really wasn't present for that exam. So, I mean, it seems a plausible diagnosis, but." (*Id*. at 13). He agreed if Employee's diagnosis was a strain, that she should be medically stable by three months post-injury and have no permanent impairment. (*Id*. at 14). As for work restrictions, Dr. Taylor said the right shoulder MRI showed tendinitis and tendinopathy. In his opinion, it is reasonable to restrict Employee from overusing the right upper extremity and no overhead work for 12 weeks, which he said would make those conditions worse. (*Id*. at 15). Dr. Taylor also discussed the cervical MRI. He found "degenerative changes with uncovertebral osteophytes," which he said were preexisting. (*Id*. at 16). Immediately following this cervical discussion, when asked if it was therefore his opinion that, "the substantial cause of Ms. Marotta's condition and need for treatment, then, is not related to the August 2016 work incident," Dr. Taylor said "yes." (*Id*. at 16). As for diagnostic injections and platelet rich plasma, Dr. Taylor said platelet rich plasma treatments are good for tendinopathy and can help them heal. (*Id*. at 17). He agrees with Dr. Peterson that ultrasonic shoulder imaging can provide additional information useful in forming a diagnosis. (*Id*.). Other than the above, he did not think there is a need for further

diagnostics. (*Id*.). On cross-examination, Dr. Taylor agreed Employee's injury and resultant trauma could cause specific injuries to nerves and tendons. (*Id*. at 18). He would expect such a trauma to cause soft tissue damage in the shoulder. (*Id*.). In response to questions about Employee's pain, Dr. Taylor said:

> Q. So when you say that there is no objective evidence of an injury, what is the explanation for the pain?
>
> A. I don't think we really know yet for her. My theory was she had, you know, a musculoskeletal strain type injury, and that maybe this has persisted because of her thyroid disease that was out of line. (*Id*. at 22).

In respect to Employee's ability to work as a flagger, Dr. Taylor said:

> A. If her other side is unaffected, yeah, she would be able to do her job.
>
> Q. Do her job with the left hand?
>
> A. Yeah, if she's not on medications that are sedating, like Norcon or muscle relaxers or anything like that.
>
> Q. Have you been provided with a job description for that?
>
> A. I don't think so. But, I mean, if she had to pick up, like, road cones, and pick up signs, and equipment and that kind of stuff, I don't think he would be able to do that portion of her job.
>
> Q. Or put them out?
>
> A. Yeah. (*Id*. at 24).

When given Dr. Peterson's treatment plan for Employee, Dr. Taylor agreed it would be appropriate for her to have pain generators identified as Dr. Peterson described. (*Id*. at 25). He further stated:

> A. I don't -- I think his approach to differential injections is reasonable in terms of figuring out, you know, what structure is causing her pain, but in terms of the etiology of the pain, I don't think we know. . . . (*Id*. at 30-31).
> . . . .
>
> Q. What about the injections that Dr. Peterson is doing or proposing?

> A. You know, those can be therapeutic and diagnostic. I think those are reasonable. (*Id*. at 32).

Dr. Taylor has no reason to doubt Employee is experiencing the pain complaints she registers. He has not been able to find objective evidence linking her pain complaints to her work injury. (*Id*.). Dr. Taylor reiterated that he does not believe the work injury is a legal cause of her "condition" or need for treatment. (*Id*. at 35). The right shoulder MRI Employee had in September 2016 may have missed a labral tear because the scan was without contrast. (*Id*. at 36). Addressing Employee's neck, Dr. Taylor said the x-rays showed narrowing in the fourth and fifth intra-vertebral spaces and mild anterior osteophyte formation indicative of preexisting degenerative changes in the neck. Given these studies, Dr. Taylor opined the work injury is not the substantial cause of her need for medical care, at least for her neck. (*Id*. at 39-40). Dr. Taylor agrees a physical capacity evaluation would help to determine what Employee can and cannot do. (*Id*. at 43-44).

52) There is no medical opinion in Employee's file showing her thyroid is the substantial cause of her post-injury symptoms, disability or need for medical treatment. (Observations).

53) There is sufficient medical evidence in this case with which to make a decision on Employee's claim. (Experience, judgment, observations and inferences drawn from the above).

54) In her deposition, Employee stated she did not recall ever treating for any right shoulder or right arm pain before her work injury. (Deposition of Shannon L. Longway-Marotta, February 16, 2017, at 64). When asked if she ever had right shoulder pain before her work injury, Employee testified consistent with her hearing testimony and stated:

> A. Not in the front. I mean, I've had like in the back from my back. You know, it's been sore before, you know. I've never had-- this is all front, I've never had anything front and arm. (*Id*.).

55) On September 15, 2017, Marcia Fowler stated she has worked as a paralegal for attorney Dennis for over 20 years. In this case, Fowler only charged for her paralegal time and she does not duplicate Dennis' work. Fowler incurred 21.3 hours paralegal time and she charges $175 per hour. Employee's paralegal and initial out-of-pocket costs in this case total $4,203.25. (Affidavit for Award of Paralegal Fees, September 14, 2017).

56) On September 19, 2017, Employee presented a bill for Dr. Peterson's deposition, which the panel found particularly useful in this case. Dr. Peterson billed $1,312.50, which Employee

requests as an out-of-pocket litigation cost. (Supplemental Affidavit of Counsel Proving Additional Costs, September 18, 2017).

57) On September 21, 2017, attorney Dennis demonstrated he incurred $12,000 in additional attorney fees since his first fee affidavit. Dennis' total, actual attorney fees incurred in this case are $57,654.84 through September 21, 2017. (Second Affidavit of Counsel to Supplement Record for Award of Attorney Fees, September 21, 2017).

58) Based on Dennis' extensive experience as a litigator and his experience representing parties in workers' compensation cases, $375 per hour is a reasonable, actual attorney fee commensurate with other attorneys who represent injured workers. (Experience, judgment).

59) Attorney Dennis' evidence, briefing and hearing presentation were extremely useful to the panel in deciding this case. (*Id.*).

60) On September 29, 2017, Employer objected to Employee's attorney's hourly rate and overall charges. It contends Employee's case was not complex. Employer compares its lawyer's attorney fees and costs, which it asserts were under $20,000, to attorney Dennis' significantly higher bill. Employer further contends it capitulated on some medical benefits Employee had requested, simplifying the issues even further. It seeks a reduction in Dennis' attorney fees by at least 37.95 hours, should Employee prevail. Employer particularly objects to the time Dennis spent on Employee's hearing brief. It seeks an order reducing the hourly rate to $300 per hour for the attorney and to $150 per hour for his paralegal. Employer lists numerous, specific entries it contends are duplicative or clerical for which attorney Dennis or his paralegal should not be paid. (Employer's Objections to Attorney and Paralegal Fees, September 29, 2017).

61) Upon review, the lawyer's and paralegal's efforts are not duplicative, but the attorney's efforts are appropriately supervisory. Employee's attorney presented an excellent case against a competent defense in a complex case with numerous witnesses. (Experience, judgment).

62) Employee contends she is not yet medically stable. As for continuing treatment, Employee needs care because she is still in pain from her work injury. Dr. Peterson is the only "pain doctor" who has examined her. Dr. Youngblood admitted he is unfamiliar with Dr. Peterson's recommended treatment, which Employee contends is not surprising because he does not use those procedures. Employee contends Dr. Youngblood as an orthopedic surgeon works on bones, while Dr. Peterson works on pain as a board-certified anesthesiologist. She contends Dr. Peterson has a working diagnosis and wants to provide treatment to alleviate Employee's

pain. Employee further contends Dr. Youngblood does not rebut the presumption raised by Dr. Peterson's recommended treatment. Even if Employer rebutted the presumption, Employee contends the board should give Dr. Peterson's opinion more weight and award his recommended treatment. Dr. Youngblood does not doubt Employee has pain; he could just find no objective evidence of why. Employee contends something is going on that Dr. Peterson says he can fix. She contends her soft tissue injury needs more work to find the cause. Consequently, Employee contends she is entitled to TTD benefits from December 2, 2016, to the present, medical care not paid for by Medicaid, a vocational reemployment evaluation and attorney fees and costs. She reserves her claim for permanent partial impairment until she is medically stable. (Employee's hearing arguments).

63) Employer contends the factfinders should focus on the medical evidence. It contends all the medical evidence substantially supports Employer's position. Employer contends Employee failed to meet her burden of proof. Employer further contends Employee lacks credibility because she said she had no prior shoulder injuries, though it contends her medical records indicate otherwise. Employer also takes issue with Employee's statement to the Geico adjuster regarding an automobile accident and contends Employee left out important details concerning prior injuries and medical treatment. Employer contends the medical evidence upon which Employee relies is entitled to little weight. It contends the factfinders should rely on the EME Dr. Youngblood's opinions. (Employer's hearing arguments).

PRINCIPLES OF LAW

> **AS 23.30.010. Coverage**. (a) . . . [C]ompensation or benefits are payable under this chapter for disability . . . or the need for medical treatment . . . if the disability . . . or the . . . 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 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 the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . 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 . . . 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 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. . . .

The board may base its decision not only on direct testimony and other tangible evidence, but also on its "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). The claimant in *Richmond v. Alaska Mechanical*, AWCB Decision No. 17-0082 (June 20, 2017), lost his right hip claim because he failed to produce medical evidence offering a causation opinion. Further, the board discredited the claimant's testimony because it was revisionist history and inconsistent. (*Id*. at 14-16). In *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007), the Alaska Supreme Court quoted with approval from Professor Larson's venerated treatise and said:

> The compensation process is not a game of 'say the magic word,' in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature. What counts is the real substance of what the witness intended to convey, and for this purpose there are more realistic approaches than a mere appeal to the dictionary.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers**. . . .
> . . . .
>
> (c) . . . If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. . . .

> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .
>
> (k) In the event of a medical dispute . . . between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

In *Weidner v. Hibdon*, 989 P.2d 727 (Alaska 1999), the Alaska Supreme Court held that compensable medical treatment must be reasonable and necessitated by the work-related injury. Furthermore, *Hibdon* held the board's review of treatment recommended within two years of the

injury date is limited to whether the treatment sought is reasonable and necessary. Since the claimant presented credible, corroborated medical evidence from her physician stating the treatment she sought was reasonable and necessary and fell within the "realm of medically accepted options," she proved her claim for medical care by a preponderance of the evidence.

> **AS 23.30.120. Presumptions** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter. . . .

Benefits sought by an injured worker are presumptively compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between his injury and the employment. *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 is weighed, inferences drawn and credibility considered. *Wolfer*. An injured worker is entitled to a presumption of continued work-related disability. *Kodiak Oilfield Haulers v. Adams*, 777 P.2d 1145 (Alaska 1989).

> **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 finding of credibility "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). The board has sole discretion to determine weight accorded to medical testimony and reports. When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 at 11 (August 25, 2008).

> **AS 23.30.145. Attorney Fees**. (a) Fees for legal services rendered in respect to a claim . . . may not be less than 25 percent on the first $1,000 of compensation. . . . When the board advises that a claim has been controverted . . . 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. . . .

Attorney's fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). In *State v. Cowgill*, 115 P.3d 522 (Alaska 2005), the board had ruled in Cowgill's favor on her controverted claim (*Cowgill v. State*, AWCB Decision No. 00-0147 (July 18, 2000)). The employer appealed, and the superior court reversed. On remand, the board reviewed its past decision and came to a similar result. The employer appealed again, eventually taking the case to the Alaska Supreme Court, which explained what constitutes adequate board findings to support an attorney's fee award. The *Cowgill* court stated:

> The board explained that the
>
> > claim was vigorously litigated by very competent counsel. The range of litigated benefits to the employees was significant (between $0.00 and $24,300.00 in PPI benefits). . . . [W]e find the medical evidence was fairly complex. Last, we find the employer raised unique arguments regarding attorney's fees, not previously decided. (*Cowgill*, 115 P.3d 522 at 526).
>
> **AS 23.30.155. Payment of compensation**. . . .
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

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.

AS 23.30.395. Definitions. In this chapter,

. . . .

(16) 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

. . . .

(28) 'medical stability' means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. . . .

8 AAC 45.052. Medical summary. . . .

. . . .

(c) . . . .

. . . .

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska rules of evidence. . . .

8 AAC 45.092. Selection of an independent medical examiner. . . .

. . . .

(g) If there exists a medical dispute under AS 20.30.095(k),

. . . .

(2) a party may petition the board to order an evaluation; the petition must be filed within 60 days after the party received the medical reports reflecting a dispute, or the party's right to request an evaluation under AS 23.30.095(k) is waived. . . .

8 AAC 45.180. Costs and attorney's fees. . . .

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the costs were incurred in connection with the claim. The following costs will, in the board's discretion, be awarded to an applicant:

(1) costs incurred in making a witness available for cross-examination;

. . . .

(3) costs of obtaining medical reports;

(4) costs of taking the deposition of a medical expert, provided all parties to the deposition have the opportunity to obtain and review the medical records before scheduling the deposition;

. . . .

(9) expert witness fees, if the board finds the expert's testimony to be relevant to the claim;

. . . .

(13) reasonable travel costs incurred by an applicant to attend a hearing, if the board finds that the applicant's attendance is necessary;

(14) fees for the services of a paralegal or law clerk, but only if the paralegal or law clerk

(A) is employed by an attorney licensed in this or another state;

(B) performed the work under the supervision of a licensed attorney;

(C) performed work that is not clerical in nature;

(D) files an affidavit itemizing the services performed and the time spent in performing each service; and

(E) does not duplicate work for which an attorney's fee was awarded;

. . . .

(17) other costs as determined by the board. . . .

Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(6) **Business records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, options, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired

> of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of the preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. . . .

In *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000), a personal injury case, the Alaska Supreme Court held "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule," unless there is some reason to doubt the records' authenticity (*Id.* at 1027). Ingersoll asked Dobos to admit that Ingersoll's medical records were genuine under the Alaska Civil Rules. Dobos refused, arguing the evidence was hearsay. He wanted Ingersoll to put the records' author on the stand at her expense so he could question them. During trial, Ingersoll called her doctors to testify and lay a foundation for the records. On appeal, the Alaska Supreme Court noted medical records are exceptions to the hearsay rule under Evidence Rule 803(6) and imposed sanctions against Dobos for failing to admit the genuineness of Ingersoll's medical records. The court reasoned, "Requiring testimony that medical records were made and kept in the regular course of business is a waste of time unless there is some reason to believe that the records are not genuine or trustworthy" (*Id.* at 1028). Further, the Court said Dobos could have called doctors to the stand himself after he denied Ingersoll's request to admit their records. (*Id.*).

ANALYSIS

1) Was the oral order denying the SIME petition in this case correct?

The parties knew by shortly after November 18, 2016, when Dr. Youngblood issued his EME report, that there were medical disputes between Dr. Youngblood and Employee's attending physician. Employee initially requested an SIME in January 2017, which Employer opposed, but she took no further action on her request. AS 23.30.095(k). On June 19, 2017, the parties agreed to the September 20, 2017 hearing date. About a month before hearing, Employer requested an SIME. However, Employer waived its right to request an SIME by making an untimely request. 8 AAC 45.092(g)(2). Nevertheless, the fact a party waives its right to request an SIME does not mean one will not occur. An SIME is a discretionary medical examination. An SIME is not mandatory. AS 23.30.095(k). The medical evidence in this case, including

several medical depositions, is well documented and presented. There is adequate medical evidence to decide this case. *Rogers & Babler*. Therefore, the oral order denying Employer's SIME request was correct.

2) Was the oral order admitting Dr. Taylor's May 5, 2017 record correct?

At hearing, Employee presented a newly acquired medical record from Dr. Taylor, which Employee had recently given to her attorney. Employer objected on grounds Employee failed to file the record on a medical summary at least 20 days prior to hearing. Employer did not make foundational objections to the record but contended a medical record is not a "business record." Employee contended the document was a "business record" admissible under the applicable evidence rule. An oral order required Employee to file the subject record on a medical summary. Though the record had not yet been filed on a medical summary at the time of hearing, its recent acquiring fits best under 8 AAC 45.052(c)(4).

Factfinders will not rely on medical records obtained and served less than 20 days before hearing unless a party expressly waives its right to cross-examine the record's author, or the medical record is admissible under a hearsay exception in the Alaska Rules of Evidence. 8 AAC 45.052(c)(4). Alaska Rule of Evidence 803(6) refers to "business records" as admissible exceptions to the hearsay rule. Rule 803(6) specifically identifies such records to include a "report, record . . . in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity." This description fits Dr. Taylor's report perfectly. If it was the "regular practice of that business activity to make and keep the memorandum, report, [or] record" the document is an admissible business record absent a valid foundational objection. Dr. Taylor's subject record is a routine contemporaneous chart note similar to thousands like it presented as evidence in workers' compensation cases. *Rogers & Babler*. There is no reason to believe Dr. Taylor's report was not a normal, medical record fitting the business records exception. The Alaska Supreme Court in *Dobos* admonished an attorney for insisting a party call a medical witness to lay a foundation for what was clearly a medical record. Employer declined an offer to leave the record open for Employer to depose Dr. Taylor on this record. *Dobos*. The oral order admitting it over Employer's objection was correct.

3) Is Employee entitled to TTD benefits?

The parties agreed Employer continued Employee's wages until her lay off around December 1, 2016. Therefore, to date, Employer has paid Employee no TTD benefits. Employee contends her work-related disability continued after Employer laid her off. Employer contends Employee's work-related disability ended effective November 18, 2016, when Dr. Youngblood said she was medically stable and could return to work without any restrictions. It contends the work injury is no longer the substantial cause of Employee's disability. These contentions create factual disputes to which the presumption analysis applies. AS 23.30.120(a)(1); *Meek.*

Without regard to credibility, Employee raises the presumption through her own testimony, lay witnesses and Drs. Pressman-Schneider, Drury's, Peterson's, Taylor's and PA-C Olson's medical opinions. *Tolbert.* Employee recounted she never had similar anterior shoulder symptoms prior to the bus hitting her signing paddle on August 18, 2016, and could participate actively and fully in work and recreational activities. Foreman and Hintermeister agreed Employee was active prior to her injury, but was much less active post-injury, with complaints of symptoms in her right upper extremity causing considerable physical limitations. On August 22, 2016, Dr. Pressman-Schneider diagnosed a work-related injury and removed employee from work for a week. PA-C Olson continued these restrictions on September 12, 2016. On December 5, 2016, Dr. Drury, referencing the work injury recommended additional diagnostic evaluation and treatment and said Employee was partially disabled and limited to lifting with her right extremity to not greater than five pounds for four weeks. Dr. Peterson said the work injury caused a soft tissue injury, which requires diagnostic evaluation and treatment. Dr. Taylor said Employee probably could not return to her full duties if they included moving cones, signs and equipment in addition to signing. Without regard to credibility, Employer rebuts the raised presumption with Dr. Youngblood's opinion stating Employee had a completely normal right shoulder examination, no diagnosis and no objective evidence to demonstrate the need for additional treatment or any work-related disability. *Wolfer*; *Huit.* Consequently, Employee must prove her claim by a preponderance of the evidence. *Runstrom*; *Saxton*.

The parties do not dispute the accident. All physicians opining on the question agree a bus hitting Employee's signing paddle would have caused her disability and the need for medical treatment for at least 12 weeks following the injury. Employee does not claim benefits related to her cervical spine. Early diagnostics and medical opinions ruled out a significant injury to Employee's right shoulder "joint." A principal dispute in this case involves causation and Employee's disability, if any, related to her work injury after Employer laid her off. Employee claims TTD benefits from December 2, 2016, and continuing until she either returns to work or becomes medically stable. To be entitled to TTD benefits, Employee must show causation, disability from her work injury and must show she was not medically stable from December 2, 2016, forward. AS 23.30.185.

A) Causation.

Benefits are payable if, in relation to other causes, the work injury remains the substantial cause of Employee's disability following her lay off in December 2016. AS 23.30.010(a). According to the medical records, opinions and arguments causes for Employee's continued, alleged disability include a soft tissue injury from her work accident with Employer, preexisting neck issues, symptoms arising from a pre-injury July 6, 2016 motor vehicle accident, symptoms arising from a post-injury July 12, 2017 motor vehicle accident, preexisting right shoulder problems and possible thyroid complications.

There is no credible evidence showing Employee's preexisting neck condition is causing her current right upper extremity and chest symptoms. Employee credibly stated she did not feel any symptomatic increase in her right shoulder symptoms following the July 6, 2016 or the July 12, 2017 motor vehicle accidents. There is no convincing contrary evidence. Indeed, Dr. Youngblood said Employee had a completely normal physical examination. Employee credibly stated her current right shoulder symptoms are anterior, while prior records reflect posterior pain mainly around her shoulder blades and other areas in her "back." Past medical records support Employee's testimony, as they do not demonstrate treatment directed toward any anterior shoulder issues. Her past pain diagrams also do not reflect symptoms in the area in which she has them currently. There is no evidence showing thyroid imbalances are causing Employee's right upper extremity and chest symptoms. Furthermore, Employee credibly said

she has had thyroid imbalances in the past and these have never caused her current symptoms. AS 23.30.122; *Smith*.

Considerable medical evidence supports Employee's position. On December 5, 2016, Dr. Drury said Employee's continued right shoulder pain is from a "workers' compensation injury, date of injury 08/18/16." On August 8, 2017, Dr. Peterson stated Employee's continued pain "is directly related to this injury." He later unequivocally stated the August 18, 2016 work injury caused Employee's pain complaints "due to the mechanism of injury." Employer contends Dr. Peterson failed to use the proper legal standard for causation. However, Dr. Peterson need not say any magic words to make the intent of his opinion clear that the work injury was the substantial cause of Employee's pain. *Smith v. UAF*. He further found a "blackened out" or "hypechoic" area while performing an ultrasound-guided injection, suggesting a torn ligament or tendon in Employee's right shoulder area. After reviewing his 2014 chart notes, Dr. Peterson said these records would not change his assessment in regards to Employee's right shoulder pain. He distinguished his opinion from an orthopedic surgeon's because surgeons look for something surgical to fix. If orthopedic surgeons can find nothing, they may overlook a soft tissue injury. Dr. Peterson's causation opinion warrants significant weight. AS 23.30.122; *Smith*. Employer likens Dr. Peterson's opinion to the medical evidence in the *Richmond* decision and relies on that case to support its position. *Richmond* is easily distinguishable from this case. The claimant in *Richmond* offered no medical evidence supporting his claim and his history was not credible.

Dr. Taylor did not expressly agree with Dr. Youngblood's diagnoses but simply said, "So, I mean, it seems a plausible diagnosis, but." The only opinion Dr. Taylor gave with certainty was that the work injury was not the substantial cause of Employee's cervical condition and need for treatment. Aside from the fact that this "cervical condition" opinion does not address the proper causation standard even for the neck, since Employee is not claiming benefits related to her cervical condition, this latter opinion is entitled to no weight. AS 23.30.122; *Smith*.

This leaves Dr. Youngblood's opinion based upon his premise Employee has no current work-related diagnosis. He admits he has no reason to doubt Employee is experiencing pain in her right shoulder area, but takes a different approach, and simply says there is no diagnosis that

could cause pain, arising from the work injury. Dr. Youngblood can find no objective cause for Employee's pain, all the while agreeing there may be pain generators outside an orthopedic examination's scope. Nevertheless, in Dr. Youngblood's opinion, if he as an orthopedic surgeon can find no orthopedic injury or some "pathologically altered, pathologically wrong" defect to repair, the inquiry ends there and no further diagnosis or treatment efforts are reasonable or necessary. The pectoralis major strain with which he initially diagnosed Employee is resolved, in his opinion. On the other hand, Dr. Youngblood did not suggest Employee was faking her symptoms or had "pain behaviors." He admitted her work accident could cause a pain-producing injury. Dr. Youngblood offers no explanation, much less an alternative one, for Employee's continued pain. His opinion is therefore entitled to less weight. AS 23.30.122; *Smith*; *Moore*.

The lay evidence further supports Employee's position. Foreman has known Employee for decades and they have been a couple for four years. He credibly explained she had no observable right shoulder disability before the work injury and could participate in recreational activities like operating an ATV without difficulty. Following the work injury, Foreman said Employee could no longer participate in these activities and had difficulty holding things in her right hand. He further confirmed the pre-injury or post-injury motor vehicle accidents did not noticeably affect Employee's right shoulder. His testimony is credible. AS 23.30.122; *Smith*.

Hintermeister corroborated Foreman's testimony. Hintermeister frequently camped and rode ATVs with Employee before the work injury. Employee had no observable difficulty with these activities. Post-injury, however, Employee could not ride in an ATV and had difficulty lifting small objects. Her testimony is also credible. AS 23.30.122; *Smith*.

Employee credibly explained how her injury occurred and how her right shoulder pain has continued since the event. She can lift items weighing up to 10 pounds in her right hand, but cannot hold them for long. Employee consistently explained she had previous pain "in the back" near her shoulder blades but never had pain in the anterior shoulder as she has since the work injury. She can no longer participate in recreational activities like riding ATVs. Employee credibly said she never had symptoms similar to her current ones before the work injury. Neither of the two motor vehicle accidents caused or increased the symptoms Employee felt after her

work injury. Employee's testimony is credible. AS 23.30.122; *Smith*. Employer implied preexisting conditions or these motor vehicle accidents might have injured Employee's right shoulder and could be causing her current symptoms. There is no convincing medical evidence stating they did. *Saxton*. Creeger's testimony was not particularly useful. AS 23.30.122; *Smith*.

Based upon this evidence, to the extent Employee has continuing disability or need for medical treatment to her right "shoulder area" including her anterior chest near her right shoulder these arose out of and in the course of her work injury with Employer. The evidentiary weight shows the work injury is the substantial cause of any continuing disability or need for medical treatment since her lay off. AS 23.30.010(a).

B) Disability.

On August 22, 2016, Dr. Pressman-Schneider removed Employee from work because of her work injury. On September 12, 2016, PA-C Olson continued Employee's previous restrictions. On November 7, 2016, Dr. Drury continued Employee's five-pound lifting restriction. Employee is entitled to a presumption of continued disability. *Adams*. However, on November 18, 2016, Dr. Youngblood said Employee's work injury was resolved and she was no longer disabled. On December 5, 2016, Dr. Drury continued Employee's five-pound lifting restriction and said she was partially disabled. On March 8, 2017, Dr. Drury reviewed electrodiagnostic testing and referred her to Dr. Taylor for more care. Dr. Drury suggested she remain at her current work restriction until definitive management from Dr. Taylor. On May 5, 2017, Dr. Taylor again completed an off-work note stating she could lift no more than five pounds and could perform no overhead work. While initially stating Employee could return to work 12 weeks post-injury, Dr. Taylor clarified and said if she had to pick up traffic devices, "I don't think she would be able to do that portion of her job." This evidence is credible and entitled to considerable weight. AS 23.30.122; *Smith*.

By contrast, Dr. Youngblood said Employee had nothing more than a shoulder strain, which had resolved, and she could return to full duties without any restrictions. In his view, Employee had a normal right shoulder examination with no objective findings. However, Dr. Youngblood did not doubt Employee complained about shoulder pain and, while it was not coming from the

shoulder joint itself, "it was coming from elsewhere." He had no reason to doubt Employee's pain complaints but simply could not substantiate them objectively. He agreed there could be explanations for pain that fall outside the scope of an orthopedic examination. It is difficult to credit Dr. Youngblood's testimony because in his view, if an orthopedic surgeon cannot discover an objective source of pain, no further inquiry is necessary. AS 23.30.122; *Smith*; *Moore*.

Dr. Peterson opined Employee could return to work about 12 weeks post-injury because she could use her left arm and hand to hold her signing paddle. Dr. Peterson admitted, however, he did not know if an employer would take Employee back as a flagger with only one usable upper extremity and deferred to Dr. Drury's five-pound weight lifting restriction. Since Dr. Peterson was not aware of Employee's full duties as a flagger, and it is unclear whether he was aware of the "fit test," his opinion on this issue is entitled to less weight. AS 23.30.122; *Smith*; *Moore*.

Foreman credibly testified that following her work injury, Employee could not lift a cast iron frying pan or milk container with her right hand. Foreman, who has some construction experience and is familiar with flagging in general, did not think Employee could perform her full duties post-injury. His lay observations are credible. AS 23.30.122; *Smith*. Hintermeister credibly collaborated Foreman's observations and said Employee had difficulty post-injury lifting a dog's water dish. Employee concurs and says she could not pass a "fit test," because she would have to carry a 40-pound toolbox up a flight of stairs, which she cannot do. Employee further credibly stated her job with Employer included more than simply standing with a sign on a pole. She had to move cones, other traffic devices, signs and sandbags. Employee could not perform these duties since her lay off. Employee's observations fit exactly with Drs. Drury's and Peterson's continuing physical limitations and Dr. Taylor's opinion she could not do the full gamut of her flagger duties. This evidence is also credible and entitled to significant weight. AS 23.30.122; *Smith*; *Moore*.

By contrast, Tuttle testified in hypothetical terms explaining what a flagger could or might do in some circumstances. He agreed Employee's actual duties varied and including setup, takedown and some traffic direction, discussed by Dr. Taylor as duties Employee could not perform. Tuttle did not say Employer offered Employee continued light duty after her lay off. He did not say

Employer would hire Employee as a flagger with duties limited to using only her left hand to hold a flagging sign 100 percent of the time. His hypothetical testimony was not useful on this issue. AS 23.30.122; *Smith*. Employer's other witnesses' testimony was also not helpful.

This evidence shows Employee could not perform all her flagger duties at any time post-injury through the present because of her work injury with Employer. Therefore, her injury incapacitates her from earning the wages she was receiving at the time of her injury and she remains disabled. AS 23.30.395(16). A lay off during a period of disability does not mean the disability ends with the end of employment. There is no evidence Employee has worked anywhere since her lay off. Therefore, her disability is temporary but total. However, the TTD inquiry does not end here.

C) Medical stability.

Employee is not entitled to TTD benefits after the date of medical stability. AS 23.30.185. Dr. Pressman-Schneider did not say Employee was medically stable. PA-C Olson and Dr. Drury did not say she was medically stable. On November 18, 2016, Dr. Youngblood said Employee was medically stable. Clear and convincing evidence rebuts his opinion. AS 23.30.395(28).

On December 5, 2016, Dr. Drury recommended additional diagnostic testing and said Employee remained partially disabled and limited to lifting no greater than five pounds with her right upper extremity. On March 8, 2017, Dr. Drury referred Employee to Dr. Taylor for additional care. On May 5, 2017, Dr. Taylor said Employee was treating her and she could lift no more than five pounds and could perform no overhead work. On July 31, 2017, Dr. Peterson began treating Employee for her work injury and performed an ultrasound-guided tendon injection for her right shoulder. In September 2017, Dr. Peterson said he has a plan to perform a structure-specific diagnostic workup to isolate Employee's pain generator. Once he isolates the pain generator, Dr. Peterson intends to treat the source with various modalities. He expressly stated Employee is not at "maximum medical improvement" and he expects to identify the cause of her pain and effectively treat it. Again, Dr. Peterson need not say magic words to get his intended point across that Employee is not yet medically stable and can improve with additional care. *Smith v. UAF*. Dr. Peterson's opinions are credible and entitled to considerable weight. AS 23.30.122;

Smith; *Moore*. Dr. Taylor only states Employee is medically stable if her diagnosis was simply a strain. He does not say she is medically stable if, as Dr. Peterson suspects, Employee has a soft tissue injury, which he can identify and treat. Further, Dr. Taylor agreed with Dr. Peterson that his methodology to identify the pain generator and potentially treat it with platelet rich plasma is useful and "can help them heal." Dr. Youngblood's opinion that Employee was medically stable in November 2016 stands alone and is contrary to the weight of the medical evidence, which shows Employee does not simply have a muscle strain. Given Dr. Peterson's opinion, which is entitled to the most weight, Employee is not medically stable. AS 23.30.395(28).

In summary, Employee has proven by a preponderance of the evidence that her work injury with Employer continues to disable her and she is not yet medically stable. Therefore, Employee's claim for TTD has merit. She is entitled to ongoing TTD benefits from December 2, 2016, until she reaches medical stability or returns to work, plus interest. AS 23.30.185; AS 23.30.155(p). The parties have enough evidence with which to derive the proper TTD rate. In the event of a dispute over the TTD rate, the parties may bring this issue to a hearing.

4) Is Employee entitled to additional medical care for her work injury with Employer?

Dr. Peterson is a "pain doctor" and Dr. Youngblood admittedly is not. Dr. Peterson intends to diagnose and treat a soft tissue injury different from that Dr. Youngblood initially diagnosed. Given the above analyses, and because Dr. Peterson recommended his diagnostics and treatment for Employee within two years of her injury, and Dr. Taylor agrees the recommended care is appropriate, Dr. Peterson's treatment is within the realm of medically accepted options to address Employee's work-related soft tissue injury and she is entitled to his care. *Hibdon*.

5) Is Employee entitled to a vocational reemployment eligibility evaluation?

This decision found Employee disabled from December 2, 2016, because of her work injury. Her work injury disabled Employee from her work for more than 90 consecutive days. Consequently, Employee is entitled to an eligibility evaluation for reemployment benefits. AS 23.30.041(c).

6) Is Employee entitled to an award of attorney fees and costs?

Employee prevailed on all issues in this controverted case. She is entitled to TTD benefits from December 2, 2016 and continuing until medical stability or until she returns to work, and statutory interest. This is a significant benefit. Employee will receive the care Dr. Peterson recommends for her work injury, which is also an important benefit for her. She is entitled to an eligibility evaluation for reemployment benefits, to which she may or may not be entitled. Employee's attorney ably represented her against a competent adversary in a medically complex and difficult case with many medical and lay witnesses. She claims $57,654.84 in actual attorney fees billed at $375 per hour. AS 23.30.145(a).

Employer objects to some of Employee's attorney fees, both as to rate and time incurred. It also contends Employee's attorney and his paralegal duplicated effort in some instances. The panel carefully reviewed Employee's attorney fee affidavits. An attorney must supervise a paralegal. 8 AAC 45.180(f)(14)(B). Nothing in the attorney fee affidavits appear duplicative. *Rogers & Babler*. Employer's objections to the requested fees are mainly conclusory. For example, Employer contends Employee incurred considerably more in attorney fees than did its own lawyer. Therefore, Employer reasons Employee's attorney fees are too high. However, Employee's attorney fees are contingent whereas Employer's are not. Nevertheless, some objections to Employee's attorney fees have merit. For example, on August 21, 2017, attorney Dennis spent 1.80 hours on a petition to continue the hearing, which he did not pursue. Similarly, on August 25, 2017, he incurred 1.0 hour preparing a non-opposition to Employer's petition for an SIME and petition to continue the hearing, both of which positions Employee later abandoned. On September 7, 2017, attorney Dennis incurred .9 hour withdrawing the petition to continue the hearing and opposing the SIME petition. These efforts totaling 3.7 hours did not assist in prosecuting Employee's claim. Employer's other specific objections to individual entries have no merit.

Employee's attorney has considerable experience in workers' compensation cases and is an experienced litigator. His case preparation, briefing and hearing presentations were exceptionally helpful to the panel in deciding this case. His $375 per hour rate is commensurate with what other claimant's lawyers charge and is in fact less than many. *Rogers & Babler*. It is

a reasonable, fully compensable rate. Therefore, Employee's attorney is entitled to $56,267.34 ($57,654.84 – (3.7 x $375 = $1,387.50) = $56,267.34) in actual attorney fees. Employer did not object to Employee's costs, other than the paralegal rate. Employer offered only conclusory arguments concerning the rate, which is reasonable. *Id.* Employee is entitled to $5,515.75 in litigation costs. 8 AAC 45.180(f)(1), (3), (4), (9), (13), (14), (17).

CONCLUSIONS OF LAW

1) The oral order denying the SIME petition in this case was correct.
2) The oral order admitting Dr. Taylor's May 5, 2017 record was correct.
3) Employee is entitled to TTD benefits.
4) Employee is entitled to additional medical care for her work injury with Employer.
5) Employee is entitled to a vocational reemployment eligibility evaluation.
6) Employee is entitled to an award of attorney fees and costs.

ORDER

1) Employer shall pay Employee TTD benefits from December 2, 2016, to the present, and continuing until she reaches medical stability or returns to employment.
2) Employer shall pay Employee statutory interest on past TTD benefits.
3) Employer shall pay for Dr. Peterson's recommended treatment for Employee's right shoulder area in accordance with this decision. It shall also pay any unpaid, properly documented work-related medical expenses to providers or to Employee, and related medical mileage, plus interest in accordance with the law.
4) Employee is entitled to a vocational reemployment eligibility evaluation.
5) Employer shall pay Employee's attorney $56,267.34 in actual attorney fees, and $5,515.75 in litigation costs.
6) The parties shall calculate Employee's compensation rate pursuant to the law.

Dated in Anchorage, Alaska on December 8, 2017.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Amy Steele, Member

/s/
Pam Cline, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 Shannon Longway-Marotta, employee / claimant v. Colaska, Inc., employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201612550; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on December 8, 2017.

/s/
Nenita Farmer, Office Assistant