ALASKA WORKERS' COMPENSATION BOARD

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

RUSSELL T. DILLON, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201218016
DENALI HEATING & REFRIGERATION, LLC, Employer,	)	AWCB Decision No. 15-0068 Filed with AWCB Fairbanks, Alaska on September 23, 2015
and	)	
LIBERTY NORTHWEST INSURANCE, Insurer, Defendants.	)	

Russell T. Dillon's (Employee) January 3, 2013 and May 3, 2013 claims were heard on June 11, 2015 in Fairbanks, Alaska. The hearing date was selected on February 4, 2015. Attorney James Hackett appeared and represented Employee. Attorney Martha Tansik appeared and represented Denali Heating and Refrigeration, LLC (Employer). Employee appeared telephonically and testified. Other witnesses included Robert Lewis, D.O., testifying for Employee. Ambrose Kpaduwa, Cindy Jorgenson, and Sharona Fisher appeared telephonically, all testifying for Employer. The record closed on August 24, 2015 to allow Employer to submit an updated index of medical evidence it relies on, and for Employee to respond.

ISSUES

As a preliminary matter, Employee filed a written objection to Employer's introduction into evidence the affidavit of George Browning, Employee's former supervisor at Employer, now

deceased. Employee contended Mr. Browning's death on May 9, 2015 deprives him of his right to cross-examine adverse witnesses. Employee requested the affidavit be excluded.

Employer contended the affidavit should be admitted because it is a statement made under oath offered as evidence of alleged material facts, to wit: because Browning was working with Employee on the day of the alleged injury, the affidavit is relevant evidence concerning the mechanism of injury, which is in dispute. Further, Employer contended Employee's hearing brief itself refers to statements allegedly made by Browning to Employee. An oral order issued admitting the affidavit of Browning.

1) Was the oral order admitting the affidavit of George Browning correct?

Employer contends Employee did not provide timely notice under AS 23.30.100 of either the alleged cervical spine condition, or the left or right hand conditions. Employer contends Employee filed a claim for these conditions at least 170 days after the alleged events. While Employer concedes notice may be excused where there is an opinion from a physician regarding causation or if the Employer had actual knowledge of the event and was not prejudiced, Employer contends none of these factors exist here. Alternately, if sufficient reason is found to excuse Employee's duty to report the injury, Employer contends Employee should lose the presumption of compensability.

Employee contends Employer knew he was having problems with his hands as a result of his work. Employer contends lack of notice, if any, does not prejudice Employer with regard to the cervical spine condition, or the left or right hand conditions.

2) Should Employee's May 3, 2013 claim be barred for inadequate notice, or should he lose the presumption of compensability?

Employee contends he is entitled to temporary total disability (TTD) from November 13, 2012 through the present, permanent partial impairment (PPI) benefits, and medical costs for treatment for a cervical spine condition and related bilateral hand conditions. Employee also seeks penalty, interest, and attorney's fees and costs.

Employer contends Employee has a significant history of pre-existing head, cervical spine, and left and right hand conditions. Employer contends Employee has sustained repeated traumatic head injuries not related to work, before and after the alleged November 2012 work injuries. Employer contends Employee's description of the mechanism of injury and alleged subsequent condition presents serious factual inconsistencies. Employer contends Employee presents no medical evidence supporting his claim related to either cervical spine and head, or bilateral hand conditions. Because it argues Employee is not credible, Employer contends his testimony does not support his claim. Employer requests Employee's January 3, 2013 and May 3, 2013 claims be denied.

3) Is Employee's work for Employer the substantial cause of his disability or need for medical treatment for his bilateral hand conditions or his head and neck?

FINDINGS OF FACT

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

1) On November 15, 2012, Employee was working as a heating, ventilation, and air conditioning (HVAC) technician for Employer, doing work at the Bulgogi Grill in Fairbanks. (Timecards, Employer's Hearing Evidence, p.122-125). Employee later testified his hand "raked across the dirty evaporator fins. . . and cut to the point where I was spewing blood down into the refrigerator compartment. . . ." (Employee Deposition at 49, November 11, 2013).

2) Employee's timecards show he also did HVAC work for Employer at a McDonald's restaurant between October 22, 2012 and November 15, 2012. Employee logged hours at the McDonald's on most week days during that period. (Timecards, Employer's Hearing Evidence, p.122-125).

3) Employee's last day with Employer was November 19, 2012. (*Id.*).

4) On December 4, 2012, Employee presented to the emergency department at Fairbanks Memorial Hospital, where he was seen by Art Strauss, M.D. Dr. Strauss noted:

> The patient presents. . . with right hand pain. The patient states that he was installing some parts at his job for an HVAC company when his hand was caught in some evaporated coils causing some scratches across it. . . since that time, he has had numbness in his thumb, index and middle fingers and has had overall discomfort. . . His reason for coming in today is because it has been 2 weeks and it has not improved. . . It appears he does have some impingement of the medial

> and radial nerves, **likely exacerbated due to his employment**. . . . (Strauss Chart, December 4, 2012) (emphasis added).

Dr. Strauss diagnosed right hand pain and neuropathy, prescribed steroids and recommended ibuprofen, and advised a follow-up with an orthopedist. (*Id.*).

5) On December 7, 2012, Employee presented to the Fairbanks Rescue Mission, where he was seen by Michael Pomeroy, PA-C. PA-C Pomeroy's findings were similar to Dr. Strauss'. Pomeroy opined Employee's symptoms were consistent with carpal tunnel syndrome, and ordered a nerve conduction study. Pomeroy did not opine on causation. (Pomeroy Chart, December 7, 2012).

6) On December 10, 2012, Employer filed a report of injury, which states Employee was "servicing refrigeration equipment, cut R hand on evaporator, became infected." (Report of Occupational Injury or Illness, December 10, 2012).

7) On January 3, 2013, Employee's attorney filed a claim for TTD from November 18, 2012 through "ongoing," PPI, medical costs, penalty, unfair or frivolous controversion, and attorney's fees and costs. (Workers' Compensation Claim, January 3, 2013). The claim described the injury as: "Cut hand while working at customer jobsite (Bulgogi Grill)." The date of injury noted was November 16, 2012. (*Id.*).

8) Employee's pre-injury medical record is significant, and describes many injuries to the head and neck, both as a result of work injuries and non-work events. (Observations). Most significant or relevant of these are:

- On July 19, 2007, Employee was hit in the right side of the head with a piece of lumber while working in Olympia, Washington. Employee reported losing consciousness and experiencing blurry vision. (Washington Department of Labor & Industries Report, July 20, 2007).

- On March 24, 2008, Employee reported a "work-related severe extension / rotation and compression injury to his lower cervical & upper thoracic region, with severe muscular & ligamentous injury along with disc protrusion signs & symptoms. . . ." (Randall Cole, DC Report, March 24, 2008).

- On May 16, 2008, Employee reported a "constant pain in his neck with significant crepitus, snapping and popping with movement. He reports he gets frequent headaches that are chronic. He says at times he will get pain radiating down his arms and down his legs and on an occasional basis his hands will go numb. . . ." (Terry Martens Report, May 16, 2008).

- On October 27, 2008, Robert St. Denis, DC interpreted an x-ray study taken that day: "Multiple levels of degenerative changes in the cervical, thoracic, and lumbar spine with a lack of mobility in the cervical spine and possible ligamentous laxity in the lumbar spine which has resulted in abnormal structure and function, which has the patient experiencing radicular symptoms and headaches and pain." (St. Denis Report, October 27, 2008).

- On January 17, 2009, Employee treated with Dr. St. Denis. While many of the handwritten chart notes are indecipherable, Employee complained of tightness, soreness, and pain in his neck, headaches, and numbness radiating to his arms. (St. Denis Report, January 17, 2009).

- On August 25, 2009, Employee was seen by Drs. Byam and Stump for an employer's medical examination (EME) in connection with the July 19, 2007 Olympia work injury. The doctors reviewed Employee's medical records and imaging studies, and diagnosed, "Cervical and lumbar spondylitic degenerative disc disease pre-existing and lit up by the occupational injury of July 19, 2007. . . there is nothing to suggest that there is a radiculopathy of the cervical or lumbar spine. . . The lumbar condition is by history related to the original industrial injury, however, his condition, including both the cervical and lumbar regions, are fixed and stable. . . ." (Byam, Stump EME Report, August 25, 2009).

- On October 23, 2009, Employee presented to Wenatchee Valley Clinic in Washington, where he was seen by Jason Rahme, M.D. Chart notes state Employee was suffering from the consequences of a construction accident in July 2007, where his left temple was pinned against a wall by a machine continuously pushing him in that direction. Employee has had severe neck pain since then and a dramatic impairment to the quality of life. Drs. Carpenter and St. Denis were treating Employee and had recommended surgery after a couple of years of chiropractic care. At the time, Employee was seeing a chiropractor 3 times per week and undergoing 3-point traction. Dr. Rahme assessed neck pain status post work-related injury and recommended considering surgery. (Rahme Chart, October 23, 2009).

- On December 7, 2009, Employee presented to Dr. Rahme for follow-up. Dr. Rahme noted chronic pain. Employee signed a pain management contract because Employee was taking his oxycodone slightly more than was recommended. (Rahme Chart, December 7, 2009).

- On January 5, 2010, Employee presented to Steven Hufman, M.D. at the Wenatchee clinic. Dr. Hufman's chart note states Employee presents with a "very complicated history." On July 15, 2007, Employee was using a hole saw when it bound, twisting him clockwise. Employee hit his left temple, causing a loss of consciousness and injuring his neck and lumbar region. Neurosurgeon Dr. Carpenter told Employee he needed a C6-C7 disc replacement. Employee

reported 9 to 10 pain, with no relief in the last year at any time. (Hufman Chart, January 5, 2010).

- On February 12, 2010, Employee again presented to Dr. Hufman. Employee's neck pain was 8 out of 10. Employee complained of "right sided numbness and weakness." (Hufman Chart, February 12, 2010).

- On February 12, 2010, Employee was seen by Dr. Hufman for a recurrence of his neck pain. Dr. Hufman notes, "Russell comes in stating that since being seen last Dr. St. Denis did something in his neck, is much worse now, so he has had an immediate flareup. Currently he ranks his pain as 8 on a 0 to 10 scale. . . Assessment: Multiplicity of complaints, none that are consistent with a C6-C7 disc degeneration. Also complaining of right-sided numbness and weakness. It is not clear that it can be consistently identified with any current clinical finding. The patient shows quite a bit overt pain behavior and pain magnification. . . ." (Hufman Report, February 12, 2010).

- On February 18, 2010, Dr. Hufman noted severe neck pain at a 9 level. Dr. Hufman assessed C6-C7 degenerative disc with ongoing chronic neck pain. (Hufman Chart Note, February 18, 2010). Employee would continue to seek care at the Wenatchee clinic several more times, with the chart notes reflecting substantially similar complaints and symptoms. (Observations).

- On May 10, 2010, Employee was treated at Arctic Chiropractic in Fairbanks for what he noted was moderate to severe burning pain in his neck, and headaches. (Arctic Chiropractic Intake Form, May 10, 2010).

For the next several months, Employee continued to receive treatment for neck and back pain, and bilateral hand numbness from various providers. (Employer's Hearing Exhibit E; Observations).

- On March 11, 2011, Employee presented to the emergency department in Fairbanks for a head injury. The chart states, "…The patient apparently was at a bar, had a beer and then fell off his chair and hit his head. . . he has a history of seizure disorder and states that he does remember hitting his head and states he did not lose consciousness. . . ." (Fairbanks Memorial Hospital Emergency Department Chart, March 11, 2011).

- On June 26, 2011, Employee presented to the emergency department reporting he was assaulted. The diagnosis was acute left orbital wall fracture, acute left upper eyelid laceration, and acute alcohol intoxication. (Fairbanks Memorial Hospital Emergency Department Chart, June 26, 2011).

- On September 2, 2011, Employee presented to the emergency department complaining of headache, nausea, and vomiting. The chart states, "The patient 5 weeks ago was assaulted with a baseball bat, sustained left sided facial fractures including… sinus fracture, orbital floor fracture… the patient has not sought follow up and states the vomiting began 3 days ago. . . ." (Fairbanks Memorial Hospital Emergency Department Chart, September 2, 2011).

- On November 5, 2011, Employee presented to the emergency department after being found unresponsive in a parking lot outside of a Safeway store. The chart notes indicate acute alcohol intoxication. (Fairbanks Memorial Hospital Emergency Department Chart, November 5, 2011).

- On January 9, 2012, Employee was incarcerated at the Fairbanks Correctional Center. Employee reported to medical staff he had been accosted and hit on the head with an unknown object. Employee was sent to Fairbanks Memorial Hospital for additional treatment. (Fairbanks Correctional Center Inmate Health Form, January 9, 2012).

- On March 5, 2012, Employee presented to the emergency department with symptoms of acute alcohol intoxication, and suspected gastrointestinal bleeding. (Fairbanks Memorial Hospital Emergency Department Chart, March 5, 2012).

- On March 13, 2012, Employee presented to the emergency department. The chart states: "Per EMS, pt fell down a flight of stairs 3 days ago, crawled to a cab and into his apt where he has been laying for the past 2 days. Pt reports back pain and numbness b/l just below knees down and not being able to walk. . . He has had severe neck pain since that time. He says it is 8/10 in intensity. . . He says his pain is all up and down his neck. . . . " (Fairbanks Memorial Hospital Emergency Department Chart, March 13, 2012). Employee underwent an MRI study of the cervical spine, interpreted by Mark Burton, M.D. Dr. Burton found mild canal narrowing C3-C4, C4-C5, and C6-C7, degenerative changes, neuroforaminal narrowing at those levels, and left-sided disc protrusion and severe neuroforaminal narrowing at C6-C7. Dr. Burton opined, "**Findings are similar to the 11/19/2010 exam apart from worsening at the C3-C4 level. No cord contusion is identified**." (Burton Report, March 13, 2012) (emphasis added).

- On March 15, 2012, Employee presented to the emergency department: "The patient is brought by ambulance, somewhat dramatically moaning on the stretcher. He reports that initially he has back and neck pain and told the nurse he is not leaving until his pain is addressed. He told me he thinks he is having GI bleeding. . . The patient states he has not had alcohol for 48 hours. He was seen here recently for GI bleeding where also said he had no alcohol and quit drinking, but his alcohol was 178. The patient smells of alcohol in the department, and myself and most of the nurses agree, he appears to have been drinking." (Fairbanks Memorial Hospital Emergency Department Chart, March 15, 2012).

- On April 24, 2012, Employee presented to the emergency department and was diagnosed with acute alcohol intoxication and overconsumption of prescription sleeping pills. (Fairbanks Memorial Hospital Emergency Department Chart, April 24, 2012).

- On April 26, 2012, Employee presented to the emergency department stating he had fallen from a height of ten feet from a ladder at his home. Employee fell and struck his head on a kitchen counter. Employee was diagnosed with acute alcohol intoxication, a closed head injury, and acute chest wall contusion. (Fairbanks Memorial Hospital Emergency Department Chart, April 26, 2012).

- On April 29, 2012, Employee presented to the emergency department complaining of head trauma after an assault. Medical staff determined Employee was "very intoxicated," and diagnosed multiple face and scalp contusions. (Fairbanks Memorial Hospital Emergency Department Chart, April 26, 2012).

- On April 30, 2012, Employee presented to the emergency department and was diagnosed with acute alcohol intoxication. The incident giving rise to the hospital visit was an altercation with a cab driver over fare, and Employee was arrested and brought to the emergency department. Medical staff noted "the patient's alcohol level was an impressive 411." (Fairbanks Memorial Hospital Emergency Department Chart, April 30, 2012).

- On May 8, 2012, Employee presented to the emergency department after a fall at a Wal-Mart store. Employee's alcohol level was "extremely high, over 400." (Fairbanks Memorial Hospital Emergency Department Chart, May 8, 2012).

- On June 13, 2012, Employee presented to the emergency department stating he was assaulted and stabbed, and that he was vomiting blood. Medical staff noted there was no assault or stabbing, but rather that Employee was suffering a GI bleed from chronic alcohol abuse. (Fairbanks Memorial Hospital Emergency Department Chart, June 13, 2012).

- On July 27, 2012, Employee presented to the emergency department and told medical staff he was at home when two individuals broke in, assaulted him, hit him on the head, and now he cannot see. Employee was acutely intoxicated with alcohol. (Fairbanks Memorial Hospital Emergency Department Chart, July 27, 2012).

Employee has also sought treatment for various hand conditions over the years prior to his employment with Employer. (Observations). Most significant or relevant are:

- On November 15, 1984, Employee filed a report of injury claiming a piece of glass cut his finger, causing "loss of feeling, and rise in upper joint hand pain…"

while he was working in Douglas, Alaska. (Report of Occupational Injury or Illness, November 15, 1984, AWCB No. 198426625).

- On April 30, 1990, Employee was using a hand saw while working when the saw jumped and caused a laceration to his left thumb. (Washington Department of Labor & Industries Report, April 30, 1990).

- On March 16, 1993, Employee dislocated his right wrist while working lifting appliances in Juneau, Alaska. (Report of Occupational Injury of Illness, March 31, 1993, AWCB No. 199304825).

- On March 7, 2008, Employee reported headaches, right arm numbness and pain, which was also extending into his left arm. (Carpenter Report, March 7, 2008).

- On April 22, 2008, Employee reported "bilateral arm numbness mostly on his right side and now some on the left side. . . " Reviewing an MRI study, Dr. Cole opined, "The patient has degenerative disc disease of his cervical spine with disc osteophyte complex on the left side. . . ." (Cole Report, April 22, 2008).

- On November 3, 2011, Employee presented to the emergency department complaining of pain in his left hand after smashing it with a hammer several days prior. The chart stated, "He is fairly intoxicated, apparently fell out in the lobby and struck his head, fell out of a chair. . . . (Fairbanks Memorial Hospital Emergency Department Chart, November 3, 2011).

- On March 4, 2012, Employee presented to the emergency department and reported cuts to his hands from broken glass after someone attempted breaking into his house. The chart note indicates acute minor lacerations to both hands. (Fairbanks Memorial Hospital Emergency Department Chart, March 4, 2012).

9) Employer's hearing brief states there are no medical records for the period October 8, 2012 to December 4, 2012, and that despite multiple attempts, Employer was unable to obtain Veteran's Administration records. (Employer's Hearing Brief, August 13, 2015).

10) On December 12, 2012 Employee presented to Richard Cobden, M.D., at Steese Orthopedic Associates in Fairbanks. Dr. Cobden's chart note states:

> Russell injured his right arm while working at Denali Heating and Refrigeration, where he has worked for the **last several years**. He suffered multiple lacerations over his right arm and subsequently developed swelling and what appears to be full-blown carpal tunnel syndrome. . . He denies alcohol use (records revealed from the emergency room suggests that he has been seen for alcohol intoxication in the past). . . . (Cobden Chart, December 12, 2012) (emphasis added).

11) On January 6, 2013, Employee was hospitalized for three days after being brought by ambulance. Employee complained of hematemesis and melena. Medical staff quoted Employee telling them he "only drank three times" since the summer of 2012. Staff reviewing Employee's chart noted, "…in evaluation of the chart, he was in the emergency room 6 times between 09/07 and 10/08 with alcohol intoxication. . . He denies any history of trauma. He denies any falls. However, he did have some bruising and when asked if he had been falling, he reports that he has been very dizzy and maybe he did after the fall. . . ." The emergency department diagnosis was, *inter alia*, a history of multiple facial injuries and lumbar disc disease. (Fairbanks Memorial Hospital Emergency Department Chart, January 6, 2013).

12) On February 17, 2013, Employee presented to the emergency department for acute alcohol intoxication. Employee specifically denied any complaints or concerns, or any recent illness or injury. (Fairbanks Memorial Hospital Emergency Department Chart, February 17, 2013).

13) On February 23, 2013, Employee presented to the emergency department for acute alcohol intoxication. He complained of right arm pain after a security guard twisted his arm. (Fairbanks Memorial Hospital Emergency Department Chart, February 23, 2013).

14) On March 15, 2013, Employee underwent an MRI study related to neck pain and arm radiculopathy. The study was reviewed by David Evans, M.D, who found:

> 1. Moderate degenerative cervical spondylosis appear similar [to previous March 13, 2012 MRI study], with disc osteophyte complex at C6-C7 producing mild spinal canal narrowing and minimal ventral cord margin impingement without edema or myomalacia.
>
> 2. Varying degrees of neuroforaminal narrowing as above, most severe on the right at C3-C4, C4-C5 and C7-T1 and on the left at C6-C7.
>
> 3. Degree of spinal canal and neuroforaminal narrowing appear similar to previous study. (Evans Report, March 15, 2013).

15) On March 28, 2013, Employee presented to the emergency department for acute alcohol intoxication, which caused him to fall down a flight of stairs. Employee was transported by ambulance in a stabilizing collar and on a rigid backboard. Employee told medical staff he was "out" for a couple of minutes. (Fairbanks Memorial Hospital Emergency Department Chart, March 28, 2013).

16) On April 9, 2013, Robert Lewis, D.O., Employee's chiropractor, wrote a "To Whom it May Concern" letter, which stated:

> Russell Dillion [sic] has been treated off and on for a neck condition for 3 years. He had successfully completed treatment until recently when he injured his neck again. As a result it is recommended that he find employment in an industry that is less strenuous and were [sic] he would be less prone to injury. . . . (Lewis Letter, April 9, 2013).

17) On April 21, 2013, Employee presented to the emergency department for acute alcohol intoxication, and also for a laceration to his forehead after he fell out of a bed in a detox facility. (Fairbanks Memorial Hospital Emergency Department Chart, April 21, 2013).

18) On April 25, 2013, Employee presented to the emergency department complaining of chest pain. The chart states: "…He told the EMS that he was having chest pain. He denies drinking any alcohol for 3 days. While in my presence, he then told the nurse he had one beer last night. Later, he told me he had no alcohol for 2 days. . . ." The chart indicated a final diagnosis of acute alcohol intoxication. (Fairbanks Memorial Hospital Emergency Department Chart, April 25, 2013).

19) On April 30, 2013, Employee presented to Alena Anderson, M.D., at Spine Care Specialists of Alaska, in Fairbanks. Dr. Anderson's chart notes reflect Employee told her ". . . this is a workers' compensation [case] in which he injured his cervical region after being hit with a trap door that weighed about 300 pounds." Employee told Dr. Anderson the injury occurred in November 2012, and since then he has had pain in the cervical region accompanied by popping and grinding in the neck with any type of movement. (Anderson Chart Note, April 30, 2013).

20) The above is the first mention in Employee's medical records of a possible cervical spine/head injury connected to work for Employer. (Observations).

21) On May 3, 2013, Employee's attorney filed a claim for TTD from November 13, 2012 through "present," PPI, medical costs, penalty, unfair or frivolous controversion, and attorney's fees and costs. (Workers' Compensation Claim, May 3, 2013). The claim described the injury as: "Climbing up a man ladder through a horizontal door to the roof at McDonald's, when the weight of snow on the heavy roof door caused the door to fall, striking the left side of head; developed numbness in hands, and a couple of days later claimant could not feel right hand when received abrasions and injuries to his right hand while working." The date of injury was listed as

"11/13-14/12; 11/16/12." (*Id.*). The claim was served that day on the law firm of Burr, Pease & Kurtz, Employer's/Insurer's attorney. (USPS Certified Mail Return Receipt).

22) On May 22, 2013, Employee underwent a CT study, interpreted by Jessica Panko, M.D., after complaining of "chronic left frontal headaches since left orbital trauma August 2011." (Panko Report, May 22, 2013). Dr. Panko found healed fracture deformities involving the left facial bones without acute abnormality and a bone volume loss greater than what would be expected for an individual of Employee's age. (*Id.*).

23) On May 24, 2013, Employer filed an answer to Employee's May 3, 2013 claim. The answer admitted Employee timely reported a right hand laceration on November 16, 2012. It also stated the right hand laceration portion of Employee's claim has been open and medical expenses received to that date have been paid. The answer denied, or asserted affirmative defenses to, time loss or medical benefits related to any cervical spine/head injury, and any other claims for benefits not related to the right hand laceration. (Answer, May 24, 2013).

24) On June 5, 2013, George Browning, Employee's supervisor at Employer, executed an affidavit:

> 1. I was Mr. Dillon's supervisor while he was an apprentice with Denali Heating and Refrigeration, LLC.
>
> 2. I worked with Mr. Dillon the week of November 12-18th, 2012 and was with him during the jobs at McDonalds on November 14th and 15th. We did not work at McDonalds on November 13, 2012.
>
> 3. McDonalds employs maintenance staff to keep the roof and service hatch clear of snow. It is the only facility we service which does. To the best of my recollection, the McDonalds' roof had been cleared of snow prior to our work.
>
> 4. I stood at the bottom of the ladder. . . while Mr. Dillon climbed onto the roof at McDonalds. From the position I would have seen if Mr. Dillon was injured or had difficulties with the hatch.
>
> 5. To the best of my knowledge, Mr. Dillon was not hit on the head by the hatch to the roof, nor did Mr. Dillon ever tell me he was hit in the head by the hatch to the roof.
>
> 6. I was present when Mr. Dillon cut his right hand on November 16, 2012, and this injury was timely reported. (Affidavit of George Browning, June 5, 2013).

25) Browning died on May 19, 2015 at his home in North Pole, Alaska. (Fairbanks Daily News-Miner Obituary, May 17, 2015, filed with Employee's Objection to Employer's Affidavit, May 20, 2015).

26) On June 24, 2013, Employer controverted all benefits. The controversion notice stated: "Employee failed to provide timely written notice of the [sic] any left hand injury to the Employer as required by AS 23.30.100(a). Furthermore, no medical records establish a causal link between the carpal tunnel syndrome in the left hand and Employee's short employment with Employer." (Controversion Notice, June 24, 2013).

27) On November 11, 2013, Employee testified in his deposition:

> Q: And so had you ever previously injured your neck, aside from the 2007 injury?
>
> A: No. No.
>
> Q: Not in any car accidents or anything else?
>
> A: No.
> . . . .
>
> Q: Had you previously like fallen or hit your head?
>
> A: No. I partied pretty good in Hawaii. I probably tripped and fell on the beach a few times and - but that was not work-related or anything like those.
>
> Q: And I - well I'm asking beyond work-related. So at any point in time in the last, let's say 10 years, 12 years, had you fallen and hit your head on something?
>
> A: Not that I remember. . . . (Employee Deposition at 39, November 11, 2013).

28) On February 13, 2014, Employee was seen by Charles Craven, M.D. for an employer's medical examination (EME). In addition to examining Employee, Dr. Craven received pre- and post-injury medical records. Dr. Craven also described the contents and subjects covered during Employee's November 11, 2013 videotaped deposition. Dr. Craven attempted to review x-rays, but upon opening the images, they were found to be of another individual. The MRI study of March 13, 2009 was reviewed. Dr. Craven agreed with Dr. Evans' interpretation of the MRI. (Craven EME Report, February 13, 2014).

29) Dr. Craven diagnosed: i) Right hand laceration substantially caused by the November 16, 2012 work injury, resolved; ii) alleged cervical spine injury occurring in the course of employment for Employer two or three days prior to the right hand laceration. The mechanism of injury would be consistent with a cervical strain. Dr. Craven opined Employee's then-current cervical complaints are not substantially caused by the work injury; iii) History of cervical spondylosis preexisting and unaltered by the alleged injury occurring on November 12 or 13, 2012. Forensic review of the medical records reveals ample evidence of ongoing neck symptomatology predating the then-current alleged work injury with regard to Employee's spine; iv) Bilateral sensory abnormalities in a non-dermatomal, non-physiological, and non-anatomical pattern. Forensic review of the medical records reveals Employee has had similar documented sensory aberrations in the past. Dr. Craven opined the sensory abnormalities are not substantially caused by the alleged injury occurring on November 12 or 13, 2012, or the hand laceration documented on November 17, 2012; v) Electrophysiological evidence of carpal tunnel syndrome, not caused by the right hand laceration while working for Employer; and vi) A history of multiple hospital admissions for complications secondary to chronic alcoholism to include multiple falls with resultant head trauma, while intoxicated. (*Id.*).

30) Dr. Craven stated the first documentation in the medical history referring to an alleged cervical spine injury was on April 30, 2013, nearly four and a half months after the injury's occurrence. Further, any effects of such an injury would have resolved by December 7, 2012, the date of a negative neck examination. Dr. Craven opined no surgical intervention was necessary to address Employee's carpal tunnel syndrome complaints. With regard to Employee's cervical spine complaints, Dr. Craven opined Employee's cervical spine complaints were pre-existing, which substantiates the chronic symptomatology. Dr. Craven thought it unlikely any surgical or non-surgical approach would completely relieve Employee's cervical spine complaints. Instead, Dr. Craven suggested cessation of alcohol use, which has produced multiple intoxication-related falls and aggravation of the cervical spine problems. Regarding the right hand laceration, Dr. Craven opined there is no evidence of an active condition, and therefore no further treatment is recommended. (*Id.*).

31) Dr. Craven placed no restrictions on Employee's physical work capacities. He opined Employee had reached medical stability with regards to both the hand and cervical spine conditions no later than December 4, 2012, and assessed no permanent partial impairment. (*Id.*).

32) On February 27, 2014, Employer controverted medical benefits, TTD, TPD, PTD, PPI, and vocational rehabilitation, based on Dr. Craven's February 13, 2013 EME report. (Controversion, February 27, 2014).

33) On May 19, 2014, Employee presented to orthopedic surgeon Daniel Johnson, D.O. Dr. Johnson's chart states:

> Patient complains of back and neck pain, with stiffness and instability. . . Pain is ongoing for several years from previous injuries started in 2001. He tried to return to regular work yesterday, however, ended up in severe pain and stiffness secondary to working. . .
>
> X-rays reviewed of the lumbar spines shows mild degenerative changes. Moderate spondylosis. CT reviewed of the head shows moderate spondylosis without acute fractures.
>
> The patient has arthritis of his cervical, thoracic and lumbar spine. He has had multiple spinal injuries and problems. Due to this I recommend permanent restrictions of lifting no greater than 15-20 pounds on a repetitive nature. . . . (Johnson Chart, May 19, 2014).

34) On June 13, 2014, Employee presented to the emergency department after an assault. The chart states:

> Patient presented confused and asking repetitive questions on arrival to the ED in Fairbanks last night after getting into a physical altercation with a bouncer at a strip club in which his head was reportedly hit against the ground forcibly. Here in the ED, the patient is sleeping comfortably but is arousable. His right ear is bleeding and patient complains of blood in his mouth. (Providence Alaska Medical Center Emergency Department Chart, June 13, 2014).

A CT study was performed of Employee's head and cervical spine. Findings included extensive acute subarachnoid hemorrhage, hemorrhagic contusions of the frontal and asubdural lobes measuring 3 mm thick along the left frontal lobe, intracranial gas along the right temporal bone and right occipital bone trace blood along the tentorium cerebelli, right occipital lobe and anterior to posterior oriented right temporal bone fracture without depression, and blood in the middle ear and blood in the right mastoid. A CT of the cervical spine found spondylosis but no radiographic findings of trauma. (Homer Radiology Report, June 13, 2014).

35) On July 15, 2014, Employee presented via ambulance to the emergency department after an assault. The chart states:

> [Patient presents] complaining of right temporal head, right ear pain and dizziness. The patient has been experiencing these symptoms since sustaining a concussion in Fairbanks one month ago on 6/13/14. He states he was struck in the head while "trying to intervene" to protect "a young lady." The patient was medically evacuated to a Providence Hospital. He believes he was bleeding out of the right ear for weeks. The patient is concerned, as the hearing out of his right ear has remained compromised and he continues to have headaches. He complains of difficulty sleeping for the last few days due to headaches. His vision is "skewed on the right side" as well. (Providence Alaska Medical Center Emergency Department Chart, July 15, 2014).

36) On August 6, 2014, Employee presented to the emergency department complaining of worsening headaches. The chart states:

> [Patient] presents with an intermittent headache for the past month, worsening today. The patient was a victim of assault on 6/13/14 and was admitted for a basilar skull fracture, subarachnoid hemorrhage and a left frontal cerebral contusion. He was discharged on 6/24/14 with prescriptions for Zofran, oxycodone, Flomax and Protonix. He was supposed to followup with ENT for right ear hearing loss. He was seen in the ED on July 15th for evaluation of a persistent headache and decreased hearing on right since the assault. On exam the patient states that he ran out of oxycodone four days ago. He reports that he has been tempted to use alcohol to treat his headache. He rates his pain 10/10 in severity. . . . (Providence Alaska Medical Center Emergency Department Chart, August 6, 2014).

37) There is no indication in the above two hospital records that Employee mentioned any work-related injuries for Employer. (Observations).

38) Employee testified: His last day of work with Employer was November 17, 2012. The Monday following his hand injury, he had lost feeling in his hands and went in to Employer to show Cindy Jorgenson his injuries, with whom he discussed the condition. Employee continues to have loss of sensation of his hands, which he never had prior to the work injury with Employer. Employee is seeking medical treatment for his carpal tunnel syndrome as part of his claim. Employee is "absolutely sure" the cervical neck and head injury occurred at the McDonald's restaurant on College Road, though he is not certain of the exact date. While he conceded he had some hand pain and numbness prior to the Bulgogi grill laceration, following that injury, the condition was substantially worse. Prior to that injury, he had never had the degree of numbness in his hands he is currently experiencing. (Employee).

39) Employee had great difficulty describing the mechanism of the alleged cervical neck and head injury at the McDonald's restaurant. For example, Employee could not definitively say whether the door fell on his head while he was climbing through it onto the roof, or whether he pushed the door open with his head, causing injury. Employee's recollection of his own medical history, including prior head and cervical injuries, is inconsistent and unreliable. Employee has often been less than candid with medical staff concerning his alcohol use and medical history. (Observations; judgment; inferences from all of the above). In his deposition, Employee testified he had never experienced loss of sensitivity in either hand prior to the November 2012 hand injury. (Employee Deposition at 107-108, November 11, 2013). Employee's medical record contains many inconsistencies and untruths conveyed by Employee to providers, especially concerning his use of alcohol. Employee has been inconsistent with medical staff about his hand pain, and injuries to his head or neck over the years. (*Id.*).

40) Employee is an unreliable historian and he is not credible. (*Id.*).

41) Robert Lewis, D.O., testified: He is a doctor of chiropractic with a practice in Fairbanks. Dr. Lewis treated Employee for neck conditions. He did not have Employee's medical records with him at the time of his testimony, and so was testifying from memory. The last time he had seen or reviewed Employee's medical records was several months prior to hearing. Dr. Lewis did not recall the mechanism of injury, only that "something fell on [Employee's] head." Dr. Lewis recalled the injury was related to work. (Lewis).

42) During cross examination, Dr. Lewis revealed he was not aware of the majority of Employee's previous serious head and neck injuries. (Observation). Dr. Lewis testified familiarity with these records would factor in to his causation opinion. (Lewis).

43) Ambrose Kpaduwa is the owner of a number of McDonald's restaurant franchises in the Fairbanks area. Kpaduwa testified: the McDonald's restaurant on College Road in Fairbanks was closed permanently in 2008. In 2012, he used the HVAC services of Employer at his restaurants. To his knowledge, there has never been any mechanical problem with the roof access doors at any of his restaurants. He would estimate the typical roof hatch door at his restaurants weighs 150 pounds. Because of security concerns, whenever the roof or HVAC systems are serviced, restaurant maintenance staff unlock and open the roof hatch doors for service technicians, and then close and lock them after technicians finish their work. (Kpaduwa).

44) Cindy Jorgenson was the office manager for Employer as of August 2010. Jorgenson testified: Employee was hired on October 22, 2012. Employee's last day of work was November 19, 2012. Around Thanksgiving of 2012, Jorgenson became aware Employee cut his right hand while working at the Bulgogi Grill. She did not see the injury. Jorgenson was not aware the injury was causing numbness or loss of sensation in his hands. Jorgenson invited Employee in to complete a report of injury form, which he did. Jorgenson was unaware Employee had suffered any head or neck injuries while working for Employer. In December 2014, Employer went out of business. (Jorgenson). Jorgenson's signature appears on the December 10, 2012 report of injury form. (Observations).

45) Sharona Fisher has been a claims specialist for Employer's insurer, Liberty Mutual, since May 2013. Fisher has been the adjuster on Employee's file since November 4, 2014, but has knowledge of prior events from Liberty's records. Fisher testified: Liberty was first notified of a claim by Employee on December 17, 2012. Liberty has never received a medical opinion or recommendation taking Employee off work, or any medical documentation of time loss from work. (Fisher).

46) There has been no second independent medical evaluation (SIME) either ordered or agreed to in this case. (Observations).

47) Employee's attorney orally withdrew Employee's claim for unfair or frivolous controversion. (Employee's Hearing Argument).

48) On August 4, 2015, the record was re-opened and Employer was directed to file a compilation of the medical opinions and reports it references throughout its June 4, 2015 hearing brief. (Letter Order, August 4, 2015). On August 14, 2015, Employer filed the supplemental brief with its hearing exhibits indexed as requested. (Record). Employee did not file its optional response. The record closed on August 24, 2015. (*Id.*).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> > (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter. . . .

The board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
>
> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury or death, and authority to release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.
>
> (c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer by delivering it to the employer or by sending it by mail addressed to the employer at the employer's last known place of business. If the employer is a partnership, the notice may be given to a partner, or if a corporation, the notice may be given to an agent or officer upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.
>
> (d) Failure to give notice does not bar a claim under this chapter

> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
>
> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
>
> (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

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

The thirty-day period begins to run when the worker could reasonably discover an injury's compensability. *Cogger*, 936 P.2d at 160. The exact date when an employee could reasonably discover compensability is often difficult to determine, and missing the short thirty-day limitation period bars a claim absolutely. For reasons of clarity and fairness, the Alaska Supreme Court has held the thirty-day period can begin no earlier than when a compensable event first occurs. However, it is not necessary that a claimant fully diagnose his or her injury for the thirty-day period to begin. *Id*. The Court has read a "reasonableness" standard, analogous to the "discovery rule" for statutes of limitations, into the statute. *Alaska State Hous. Auth. v. Sullivan*, 518 P.2d 759, 761 (Alaska 1974). *See also, Kolkman v. Greens Creek Mining Co.*, 936 P.2d 150 (Alaska 1997). Under this standard, the thirty-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Kolkman*, 936 P.2d at 761 (*quoting* 3 Arthur Larson, Workmen's Compensation § 78.41, at 60 (1971)). Generally, informing a co-worker who is not a supervisor does not satisfy the statutory requirement to provide knowledge to employer. *Cogger* at 161.

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
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> (1) the claim comes within the provisions of this chapter;
>
> (2) sufficient notice of the claim has been given;
>
> (3) the injury was not proximately caused by the intoxication of the injured employee or proximately caused by the employee being under the influence of drugs unless the drugs were taken as prescribed by the employee's physician;
>
> (4) the injury was not occasioned by the willful intention of the injured employee to injure or kill self or another.
>
> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.
>
> (c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 665 (Alaska 1991); *Meek*, 914 P.2d at 1279; *Moretz v. O'Neill Investigations*, 783 P.2d 764, 766 (Alaska 1989); *Olson v. AIC/Martin J.V*., 818 P.2d 669, 675 (Alaska 1991).

The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). In making its preliminary link determination, the board need not concern itself with the witnesses' credibility. The evidence necessary to raise the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *Id*.

As for the second step of the analysis, to rebut the presumption under former law, the employer's substantial evidence had to either 1) provide an alternative explanation which, if accepted, would exclude work-related factors as a substantial cause of the injury, etc.; or 2) directly eliminate any reasonable possibility that employment was a factor in causing the injury, etc. In contrast, under the new statutory causation standard, the employer may rebut the presumption by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. To do so, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 09-0186 at 6-7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

In *Ashwater-Burns v. Huit*, AWCAC Decision No. 13-016 (March 18, 2014), the Commission discussed the board's citing of *Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992), which pre-dated the 2005 amendments to the Act, for the proposition that "[a]n employer has always been able to rebut the presumption of compensability with an expert opinion that the claimant's work was probably not a substantial cause of the disability." *Gibson*, 836 P.2d at 942. Updating this pronouncement in keeping with the 2005 amendment providing that employment must be the substantial cause of the disability for it to be compensable, the Commission held in *Huit* that an employer can rebut the presumption with an expert opinion that employment was probably not the substantial cause of the claimant's disability. *Huit* at 14-15.

The Alaska Supreme Court has held "substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Miller v. ITT Arctic Svcs.*, 577 P.2d 1044 (Alaska 1978). *See also, Rogers Elec. Co. v. Kouba*, 603 P.2d 909 (Alaska 1979); *Burgess Const. Co. v. Smallwood*, 623 P.2d 312 (Alaska 1981); *Black v. Universal Svcs. Inc.*, 627 P.2d 1073 (Alaska 1981).

If the board finds the employer's evidence is sufficient to rebut the presumption, in the third step the presumption of compensability drops out, the employee must prove his case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the disability or need for medical treatment. *Runstrom* at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Runstrom* at 8.

The presumption of compensability does not apply to an undisputed issue. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1244 (Alaska 2005). The presumption analysis does not apply to "every possible issue in a workers' compensation case." *Burke v. Houston NANA, LLC*, 222 P.3d 851, 861 (Alaska 2010).

A preexisting infirmity does not disqualify a workers' compensation claim under the work-connection requirement if the employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *DeYonge v. NANA/Mariott*, 1 P.3d 90, 97 (Alaska 2000). *See also Hester v. State, Public Employees' Retirement Bd.*, 817 P.2d 472 (Alaska 1991). A preexisting disease or infirmity does not disqualify a claim if the work aggravated, accelerated, or combined with the disease or condition. *Cook v. Alaska Workmen's Comp. Bd.*, 476 P.2d 29 (Alaska 1970); *Burgess Constr. Co. v. Smallwood*, 623 P.2d 312 (Alaska 1981).

The AWCAC further commented on the legal standard for proving "aggravation" and "combination" claims for injuries occurring after the 2005 amendments in *City of Juneau v. Olsen*, AWCAC Decision No. 185 (August 21, 2013):

> The starting point is the [S]upreme [C]ourt's statement, under former law, that "for an employee to establish an aggravation claim under workers' compensation law, the employment need only have been 'a substantial factor in bringing about the [need for medical treatment].'" Here, it follows that, for Olsen to establish an aggravation claim under the 2005 amendments to the Act, she must show that her employment was the substantial cause in bringing about the need for treatment in the form of the implantation procedure. Second, AS 23.30.010(a) requires the board to evaluate the relative contribution of different causes of the need for medical treatment. Consequently, in the

> present context, we hold that the board needs to evaluate the relative contribution of the two causes of Olsen's knee pain, the preexisting arthritis and the work incidents. The next step is for the board to apply the presumption of compensability analysis in these specific circumstances. Because there is consensus that Olsen attached the presumption and CBJ rebutted it, this task is made simpler. The only remaining question is whether Olsen can prove by a preponderance of the evidence that employment, that is, the work incidents, were the substantial cause in bringing about her need for the implantation procedure….

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings are "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 the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007).

> **AS 23.30.135. Procedure before the board**. (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .

> **AS 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.

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

AS 23.30.145(b) requires an employer to pay reasonable attorney's fees when the employer delays or "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim. *Harnish Group, Inc.*, 160 P.3d at 150-51.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
>
> **8 AAC 45.120. Evidence.**
> . . . .
>
> (e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.
>
> **Alaska Rule of Evidence 804. Hearsay Exceptions - Declarant Unavailable.**
> . . . .
>
> (a) Definition of Unavailability. Unavailability as a witness includes situations in which the declarant
> . . . .
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. . . .
>
> (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

> (5) Other Exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

ANALYSIS

1) Was the oral order admitting the affidavit of George Browning correct?

Technical rules of evidence generally do not apply in board proceedings. 8 AAC 45.120(e). The Board will generally admit relevant evidence of the type which responsible persons are accustomed to rely, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. *Id*. Here, Employee did not challenge the affidavit of George Browning on authenticity, or under a charge of falsification of the document. Employee simply contends he will be unable to cross-examine the affiant. However, since Browning is deceased, the affidavit is the most reliable available evidence of his observation of Employee's alleged cervical spine and head injury while working at the McDonald's restaurant for Employer. There is no evidence the affidavit has been forged, altered, or that its authenticity is otherwise suspect. The circumstances of the injury occurring on the day in question are a material issue in dispute; the affidavit is therefore highly relevant. The affidavit is also admissible under Alaska Rule of Evidence 804(b)(5) as a hearsay exception, because all of the requirements of that rule are met. Therefore, the oral order admitting the affidavit of George Browning was correct, and the affidavit may be used to support a finding of fact. AS 23.30.135; 8 AAC 45.120(e).

2) Should Employee's May 3, 2013 claim be barred for inadequate notice, or should he lose the presumption of compensability?

Employer was aware of Employee's November 15, 2012 hand laceration soon after the fact. Employer's office manager invited Employee in to complete a report of injury form and it was filed on December 10, 2012. However, this issue is somewhat complicated by the fact that Employee alleges the loss of sensation and numbness in his hands are related to, or aggravated by, the alleged cervical spine/head injury. Employee contends he never experienced the hand symptoms prior to the November 15, 2012 laceration, and also that the condition worsened after the cervical spine/head injury. Employer contends it was prejudiced by Employee's failure to give timely notice of the cervical spine/head injury, and that Employee's claim is therefore barred. Since this legal issue is controlled by statute, which has been interpreted by Alaska Supreme Court, and because the presumption does not apply to "every possible issue" in a case, the presumption analysis will not be applied. AS 23.30.100; *Burke*.

An injured worked is required to give notice of a workplace injury to the Board and to the employer within 30 days. AS 23.30.100(a). Timely notice of a workplace injury is required both because it allows an employer provide immediate medical diagnosis and treatment to minimize seriousness of injury, and because it facilitates the earliest possible investigation of the facts surrounding an injury. *Tinker*. Failure to provide timely notice that impedes either of these objectives may prejudice an employer. *Id.* However, notice may be excused where the employer had actual knowledge of the employee's injury and the failure to give notice was not prejudicial to the employer. AS 23.30.100(d); *Cogger.* It is not always evident when an injury occurs when more than one body part or function will become symptomatic. *Kolkman*. In cases where a particular injury is latent, i.e., it does not arise immediately or directly from the work injury, the Alaska Supreme Court has held the 30-day period begins to run from the date of the first "compensable event." A "compensable event" happens when an injured worker becomes disabled or incurs a medical expense related to the workplace injury. *Cogger*. Therefore, the first question in the analysis is when the 30-day written notice period began to run. *Id.*

Employee has filed two claims in this case: the first on January 7, 2013 for the Bulgogi Grill hand laceration, and the second on May 3, 2013 for the McDonald's cervical spine/head injury.

Employer admits the November 15, 2012 hand laceration was timely reported. Employee contends the cervical spine/head injury occurred several days prior to the hand laceration. A dispute remains as to the timeliness of the alleged cervical spine and head injury claim.

The first appearance in the medical history of a cervical spine injury connected to Employee's work for Employer was on April 30, 2013, when Employee sought treatment with Dr. Anderson at Spine Care Specialists in Fairbanks. Employee's supervisor at Employer, George Browning, affied he was present when Employee worked for Employer at the McDonald's restaurant, and would have seen or known if Employee was hit by the roof door. Cindy Jorgenson, former office manager for Employer, testified she had no knowledge of the alleged cervical spine/head injury. Employer did not receive notice of that injury until May 3, 2013, when Employee's claim was served. Given Employee's extensive and complicated medical history, especially with regards to frequent non-work injuries to the head, it is reasonable to suppose Employee may not have known or understood the medical connection between the McDonald's roof door hitting him on the head, and any subsequent resulting conditions until he sought treatment with Dr. Anderson on April 30, 2013. *Rogers*; *Tinker*; *Kolkman.* Therefore, the 30-day notice period contemplated by AS 23.30.100 runs from the date Employee treated with Dr. Anderson on April 30, 2013. *Id*.

Actual knowledge can serve as a substitute for formal written notice only where the employer "has not been prejudiced" by the failure to provide formal notice. *Cogger*. Employer received actual knowledge of the injury on the day the May 3, 2013 claim was served and therefore well within the 30-day limitation period for timely, formal notice. Employer suffered no prejudice in related to the timeliness of Employee's medical treatment. Employee began seeking medical care for what he now believed may have been a work-related injury. Employer also had an immediate opportunity to investigate the injury to determine if there was any basis for a work connection, and require Employee, if necessary, to obtain a medical evaluation by a doctor of Employer's choosing. There is no evidence the approximately seven-month delay from the time the injury should have been formally reported in writing and was in fact formally reported prevented or inhibited Employer's investigation. The main witness to the McDonald's door incident was George Browning, who was working with Employee that day. Browning died on

May 9, 2015 - almost exactly two years after the claim was filed - and so Employer had ample time to obtain his affidavit testimony. Employer has not identified any evidence or witness testimony it was unable to obtain due to delayed notice. There was no prejudicial delay. Therefore, Employee's delay in giving notice is excused under AS 23.30.100(d)(1) and Employee will not lose the presumption of compensability. AS 23.30.001; AS 23.30.135; *Tinker*; *Kolkman*; *Cogger.*

3) Is Employee's work for Employer the substantial cause of his disability or need for medical treatment for his bilateral hand conditions or his head and neck?

Employee has claims for two separate, but possibly related, work injuries: one for bilateral hand conditions and another for a cervical spine and head injury. Because each alleged condition raises separate issues as to medical history and causation, they will be analyzed in turn.

A) The bilateral hand conditions

The parties do not dispute Employee suffered a hand laceration on November 15, 2012 in the course of employment for Employer while working at the Bulgogi Grill. Employee contends following that injury he developed numbness, loss of sensation, and ongoing problems with both hands. Employer argues there is no medical evidence showing an infection, lasting symptoms, or carpel tunnel syndrome related to the November 15, 2012 injury. This creates a factual dispute to which the presumption of compensability applies. AS 23.30.120.

A claimant's injury is presumed to be compensable when he demonstrates a "preliminary link" between the disability and his employment. *Burgess.* In determining whether the presumption is raised, credibility is not considered nor is the evidence weighed against competing evidence. *Tolbert*. Employee raises the presumption on his claim for his ongoing bilateral hand conditions with his testimony. *Burgess*; *Meek*; *Tolbert*; *Wolfer*. Employer rebuts the presumption with Dr. Craven's February 13, 2014 EME report, in which he opined Employee reached medical stability with regards to the hand laceration no later than December 4, 2012 and experienced no lasting impairment as a result of that injury. *Runstrom*; *Wolfer*. Because Employer successfully rebutted the presumption, Employee must prove, by a preponderance of the evidence, the work

injury was the substantial cause of his need for medical treatment for the bilateral hand conditions. *Saxton*.

While an injured worker's own testimony may be accorded due weight when testifying as to his own condition or need for medical treatment, Employee is not credible and is a poor historian. AS 23.30.001; AS 23.30.122; AS 23.30.135; *Rogers*. Employee also has a history of being untruthful with medical providers, as has frequently been the case concerning his use of alcohol during his many visits to the emergency department. *Id.* Employee's testimony at his November 11, 2013 denied a history of head or neck injuries, which is plainly contradicted by the medical records. Therefore, Employee's testimony regarding his hand conditions is given very little weight. *Id*.

No physician has ever recommended Employee take time off of work due to the November 2012 hand laceration. The medical evidence Employee offers in support of his claim for the hand conditions is the December 4, 2012 report of Dr. Strauss, which states "[i]t appears [Employee] does have some impingement of the medial and radial nerves, likely exacerbated due to his employment." While PA-C Pomeroy's December 7, 2012 findings were similar to Dr. Strauss' concerning the carpal tunnel symptoms, Pomeroy did not make an opinion as to causation. But Dr. Craven's February 13, 2014 EME report opined Employee reached medical stability with regards to the hand laceration no later than December 4, 2012 and experienced no lasting impairment as a result of that injury. Because Dr. Craven's report included analysis of all or substantially all of Employee's medical records, it receives the greatest weight. AS 23.30.001; AS 23.30.122; AS 23.30.135; *Rogers*. Employee has not adequately demonstrated any inconsistencies or issues with the reliability or credibility of Dr. Craven's report. Employee's contention that the cervical spine and head injury aggravated or somehow combined with his bilateral hand conditions is also not supported by the weight of the evidence because there is no medical evidence clearly making that connection. Simply put, Employee has not pointed to any medical evidence or opinion unequivocally linking the November 15, 2012 hand laceration to Employee's need for ongoing treatment for bilateral hand conditions. Employee does not prove, by a preponderance of the evidence, that work for Employer is the substantial cause of his disability or need for treatment concerning his bilateral hand conditions and carpal tunnel.

Employee's January 3, 2013 claim related to the hand laceration incident at the Bulgogi Grill will be denied.

B) The cervical spine conditions

Employee contends he was hit on the head with a door while working for Employer at a McDonald's restaurant, which caused him ongoing cervical spine and head conditions, and possibly aggravated or accelerated his bilateral hand conditions. Employer contends Employee's cervical spine and head conditions are unrelated to his employment, that the injury could not have happened as described, or that they are the result of extensive pre-work injuries or conditions. This creates a factual dispute to which the presumption of compensability applies. AS 23.30.120.

Employee raises the presumption on his claim for ongoing cervical spine and head conditions with his testimony. *Burgess*; *Meek*; *Tolbert*; *Wolfer*. Employer rebuts the presumption with Dr. Craven's February 13, 2014 EME report, which opined any effects of such an injury would have resolved by December 7, 2012, the date of a negative neck examination, and that Employee's ongoing cervical spine and head conditions were due to pre-existing conditions or pre-work injuries. *Runstrom*; *Wolfer*. Because Employer successfully rebutted the presumption, Employee must prove, by a preponderance of the evidence, the work injury was the substantial cause of his disability and need for medical treatment for the cervical spine and head conditions. *Saxton*.

As above, Employee is not credible and is a poor historian. AS 23.30.001; AS 23.30.122; AS 23.30.135; *Rogers*. Employee's testimony regarding his cervical spine and head conditions is given very little weight. *Id.* Employee relies on the opinions and testimony of Dr. Lewis to establish a connection between his cervical spine and head complaints and work for Employer. However, Dr. Lewis had not seen or reviewed Employee's medical records for several months before the June 11, 2015 hearing. Dr. Lewis was also not aware of the majority of Employee's prior head and neck injuries. Because Dr. Lewis is not familiar with a large portion of Employee's relevant medical history, Dr. Lewis' testimony is given very little weight. *Id.* In contrast, Dr. Craven's February 13, 2014 EME report, which included analysis of substantially

all of Employee's medical records, is given the most weight. *Id.* Dr. Craven placed no restrictions on Employee's physical work capacities. He opined Employee had reached medical stability with regards to the cervical spine conditions and head no later than December 4, 2012. A preexisting condition does not disqualify a claim under the Act if Employee's employment aggravated, accelerated or combined with the infirmity to produce disability or the need for medical treatment. *DeYonge*. Worsened symptoms are compensable under the Act. *Hester*. However, as with the alleged hand conditions, there is no physician opinion establishing a connection between the alleged McDonald's roof door incident and Employee's claimed disability and need for treatment for his cervical spine and head conditions or injuries.

Most prominent, however, is Employee's extensive history of serious head and neck injuries prior to his work for Employer. As early as May 16, 2008, Employee was reporting "a constant pain in his neck with significant crepitus, snapping and popping with movement. . . frequent headaches that are chronic. . . pain radiating down his arms and down his legs and on an occasional basis his hands will go numb. . . ." Martens Report, May 16, 2008. By January 5, 2010, Dr. Carpenter opined Employee needed a C6-C7 disc replacement, due to a work injury just prior. By the spring of 2012 - several months before beginning employment with Employer - Employee had been hospitalized repeatedly for serious and repeated trauma to the head and neck. Dr. Evans' March 15, 2013 MRI report found primarily degenerative changes related to neck pain and arm radiculopathy. Dr. Panko's May 22, 2013 CT report found healed fracture deformities involving the left facial bones without acute abnormality and a bone volume loss greater than what would be expected for an individual of Employee's age. Dr. Johnson's May 19, 2014 review of Employee's x-rays and CT study found mild degenerative changes and moderate spondylosis without acute fractures. These, combined with Dr. Craven's EME report and Employee's extensive history of head and neck injuries, lead to the conclusion that employment with Employer resulted in, at most, a temporary aggravation of Employee's pre-existing conditions not related to work which resolved by the time Dr. Craven opined medical stability. Employee has not proved he was disabled as a result of the alleged work injury with Employer for the periods he claimed. His claim for timeloss benefits will be denied. Further, Employee has failed to show his employment was the substantial cause of any disability or his need for treatment for his head and neck injuries. Evaluating the relative contribution of

different causes of need for medical treatment, the preponderance of the evidence shows it is Employee's extensive history of head trauma unrelated to work that is the most probably cause of the need for treatment for his head and neck. *Olsen.* Employee's May 3, 2013 claim for benefits related to the McDonald's roof door injury will be denied.

Under AS 23.30.145(a), attorney's fees may be awarded based on compensation awarded. Under AS 23.30.145(b), fees may be awarded when a claimant successfully prosecutes a claim. Here, Employee was not awarded any compensation, and he was not successful in prosecuting his claims. Therefore, there is no basis upon which attorney fees may be awarded and Employee's claim for attorney's fees and costs will be denied. *Id.*

CONCLUSIONS OF LAW

1) The oral order admitting the affidavit of George Browning was correct.

2) Employee's May 3, 2013 claim is not barred for inadequate notice, nor should he lose the presumption of compensability.

3) Work for Employer is not the substantial cause of Employee's disability or need for medical treatment for his bilateral hand conditions or his head and neck conditions.

ORDER

1) Employee's January 3, 2013 and May 3, 2013 claims are denied.

2) Employee is not entitled to attorney's fees and costs.

Dated in Fairbanks, Alaska on September 23, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____
Matthew Slodowy, Designated Chair

_____
Julie Duquette, Member

_____
Jacob Howdeshell, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of RUSSELL T. DILLON, employee / claimant; v. DENALI HEATING & REFRIGERATION, LLC, employer; LIBERTY NORTHWEST INSURANCE CO., insurer / defendants; Case No(s). 201218016; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 23, 2015.

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Pamela Murray, Office Assistant