ALASKA WORKERS' COMPENSATION BOARD

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

DARYL WILLIAMS, Employee, Claimant, v. MCDONALDS CORP. & ACE INSURANCE CO., and ARCTIC TERRA, LLC, & UMIALIK INSURANCE CO., Employers and Insurers, Defendants.	)	FINAL DECISION AND ORDER AWCB Case Nos. 198708515, 201403502 AWCB Decision No. 15-0116 Filed with AWCB Anchorage, Alaska on September 17, 2015

Daryl Williams' (Employee) October 8, 2014 claims were heard on June 16, 2015, in Anchorage, Alaska, a date selected on April 1, 2015. Attorney Keenan Powell appeared and represented Employee, who appeared and testified. Attorney Colby Smith appeared and represented McDonald's Corporation and its insurer (McDonald's). Attorney Robin Gabbert appeared and represented Arctic Terra, LLC, and its insurer (Arctic). At hearing, the designated chair noticed the hearing had not been properly noticed. All parties waived their right to 10 days' notice, and the hearing proceeded. Additional witnesses included Jason Kersten, Alex Lommel, Tiffaney Shangin, Harold Graham and Tommie Savina, all of whom testified for Arctic. The record remained open until July 17, 2015, for the parties to file additional documents including closing arguments. The record closed on August 12, 2015, when the panel met to deliberate after the filing deadline had passed and the panel had reviewed the parties' post-hearing documents.

There were several preliminary matters: Employee invoked the "exclusionary rule" and asked for Arctic's witnesses to be excluded from hearing until they testified. No party objected and the

witnesses were excluded. Employee and McDonald's asked that the record be left open to receive a deposition of Mark Flanum, M.D., and supplemental attorney's fee and cost affidavits. No party objected and the hearing record remained open until July 17, 2015, to receive Dr. Flanum's deposition and the parties' supplemental fee and cost affidavits.

Arctic withdrew its original hearing brief Exhibit 5, as it was an incorrect exhibit, and submitted a replacement Exhibit 5. Employee objected to the replacement Exhibit 5 because it was not filed at least 20 days prior to the hearing, and because it included a paralegal's interpretation of medical records. McDonald's contended so long as Arctic had a witness testify at hearing that everything on Exhibit 5 had previously been provided on a medical summary, McDonald's had no objection. Arctic contended its demonstrative Exhibit 5 was based primarily upon Wal-Mart prescription records. An oral order overruled Employee's objection to replacement Exhibit 5, and left the record open until July 6, 2015, for Employee's written objections to the exhibit.

Arctic objected to any request for attorney's fees from Employee or from McDonald's, because Arctic contended attorney's fee affidavits were to be filed and served no later than June 10, 2015, but were not timely filed. Arctic contended an agreement to file hearing briefs late was limited to briefs but conceded had Employee asked for additional time to file her attorney's fee affidavit, Arctic would have agreed. Employee contended the parties agreed to postpone filing hearing briefs and attorney's fee affidavits until June 12, 2015, as they were attempting to settle the case. McDonald's contended the three-day attorney fee affidavit regulation does not apply to it as an employer. Nevertheless, McDonald's contended the pushed-back filing and serving deadlines applied to all deadlines including attorney's fee affidavits. The panel took Arctic's objection under advisement and did not enter an oral order at hearing.

McDonald's conceded Employee never received a permanent partial impairment (PPI) rating following his 1987 work injury and related surgery. Consequently, McDonald's agreed to pre-authorize a PPI rating for the 1987 work injury with McDonald's, if done at Alaska Spine Institute and if done in accordance with the 3rd Edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment* (*Guides*). Following discussion about this approach, the designated chair noted McDonald's offer and did not rule on the matter at hearing.

As the last preliminary matter, Arctic asked that the hearing record be left open to receive a deposition from an "unavailable" witness Margie Mulder. Arctic contended Mulder was unavailable because she had inadequate time to review her case file and prepare for hearing, given the parties' settlement discussions. Arctic contended Mulder would testify about discussions she had with Dr. Flanum, and contended it was unfair to leave the hearing record open for one party to preserve and present evidence the party could have obtained earlier, like Dr. Flanum's deposition, and not allow another party the same privilege. Employee objected to leaving the record open for Mulder's deposition, stating Arctic provided no good cause showing why witness Mulder could not be present at hearing. Employee distinguished Arctic's request to cross-examine Dr. Flanum from Arctic's failure to present a properly prepared witness at hearing. McDonald's objected on hearsay grounds to Mulder testifying about Dr. Flanum's allegedly inconsistent statements. An oral order denied Arctic's request to leave the record open for Mulder's testimony since she was on Arctic's witness list and could have testified at hearing. This decision examines the various oral orders, addresses the parties' preliminary issues and decides Employee's claim on its merits.

ISSUES

At hearing, Employee contended Arctic's replacement hearing brief Exhibit 5 should not be considered as it was not filed and served at least 20 days prior to the hearing.

Arctic contended an assistant mistakenly attached the wrong Exhibit 5 to its hearing brief. It contended the exhibit should be admitted and the record held open for Employee to object.

McDonald's had no objection to replacement Exhibit 5 so long as a witness testified at hearing that the documents listed thereon had previously been filed and served on medical summaries.

1) **Was the oral order admitting replacement hearing brief Exhibit 5 and leaving the record open for Employee to respond to Arctic's replacement exhibit correct?**

Arctic objected to Employee's and McDonald's attorney's fee and cost affidavits as untimely. It contended if Arctic is found liable for Employee's benefits, Employee and McDonald's should only be entitled to statutory minimum attorney's fees.

Employee contends the parties agreed to push back filing deadlines because they were attempting to settle the case. He contends his attorney's fee affidavit should be accepted as filed.

McDonald's contended the attorney's fee filing deadline does not apply to employers. But it agreed with Employee and contended it understood all deadlines were pushed back to June 12, 2015. McDonald's contended the attorney's fees affidavits should be accepted as timely filed.

2) Should Employee's and McDonald's attorney's fee and cost affidavits be accepted as timely filed?

At hearing, Arctic contended the hearing record should be left open to admit the deposition of unavailable witness Mulder who Arctic contended would impeach Dr. Flanum's testimony. It contended the record was already left open to receive Dr. Flanum's deposition and Arctic should be accorded the same privilege in respect to Mulder's testimony.

Employee contended Arctic failed to demonstrate why Mulder could not be present at hearing. He contended Arctic should not be allowed to "stuff" the record post-hearing with additional evidence after Arctic had heard the evidence and could coach its witness.

McDonald's contended Mulder's testimony is hearsay. Accordingly, it objected to leaving the hearing record open to receive Mulder's deposition.

3) Was the oral order declining to leave the record open for Mulder's deposition correct?

Employee contends his 1987 McDonald's injury and resultant surgery are "a substantial factor" in his current need for surgery, physical therapy and steroid injections. Alternately, Employee contends his January 24, 2014 Arctic injury is "the substantial cause" of his need for treatment. He contends either McDonald's or Arctic, or both, should be liable for benefits beginning January 24, 2014.

McDonald's contends, while Employee's 1987 injury caused a past need for surgery and past disability, Employee successfully returned to work for nearly 25 years after his 1987 work

injury. McDonald's contends, with the possible exception of any ratable PPI caused by the 1987 work injury, the "last injurious exposure rule" places liability on Arctic for Employee's benefits beginning January 24, 2014.

Arctic contends Employee's 1987 McDonald's injury caused his current lumbar "condition." It also contends Employee's attending physician's opinion should be given lesser weight because he does not have as much experience as an orthopedic surgeon as the other two physicians rendering causation opinions in this case. Therefore, Arctic contends any benefits payable since January 24, 2014, are McDonald's responsibility.

4) Are either McDonald's or Arctic liable to Employee for benefits beginning January 24, 2014?

Employee contends he has not been medically stable and has not worked since January 24, 2014. Therefore, Employee contends he is entitled to temporary total disability (TTD) from McDonald's or Arctic from January 24, 2014 and continuing until he reaches medical stability or is no longer disabled.

McDonald's does not make a specific contention on Employee's right to TTD. In general, McDonald's contends Employee failed to prove McDonald's is responsible for any TTD.

Arctic contends Employee's 1987 McDonald's injury is not only "a substantial factor" in his "condition" after January 24, 2014 it is also "the substantial cause." It contends McDonald's should be liable for any TTD. Alternately, Arctic contends it already paid Employee TTD through August 26, 2014. Since two medical experts stated Employee became medically stable before August 26, 2014, Arctic contends not only is Employee not entitled to additional TTD from Arctic, Arctic has overpaid him TTD if it is liable at all.

5) Is Employee entitled to additional TTD from either McDonald's or Arctic?

Employee contends he is entitled to PPI benefits from either McDonald's or Arctic, or both. He contends he was never provided a PPI rating after his 1987 McDonald's injury, and contends he suffered additional PPI after his 2014 work injury with Arctic.

McDonald's concedes Employee never received a PPI rating following surgery for his 1987 McDonald's injury. At hearing, McDonald's pre-authorized a PPI rating performed by Alaska Spine Institute done under the *Guides* 3rd Edition for the 1987 injury. McDonald's contends Employee is entitled to no additional PPI from it following his 2014 injury with Arctic.

Arctic contends Employee may be due PPI benefits from his 1987 McDonald's injury. However, it contends Employee is not entitled to any PPI from Arctic resulting from his 2014 work injury.

6) Are Employee's PPI claims against McDonald's or Arctic ripe?

Employee contends he is entitled to medical treatment to address his past and continuing symptoms following his January 24, 2014 work injury with Arctic. He contends either McDonald's or Arctic is liable for these medical benefits and related transportation expenses.

McDonald's contends substantial evidence shows Employee is not entitled to additional medical care or transportation expenses from McDonald's. McDonald's contends the evidence shows Employee's January 24, 2014 work injury with Arctic is the substantial cause of his need for medical care and any related transportation expenses since that date.

Arctic contends Employee's 1987 McDonald's injury is the substantial cause of his current condition and need for treatment. It contends Employee's January 24, 2014 work injury with Arctic is not the substantial cause of his need for any additional treatment and Employee's claim for medical care and related transportation expenses against it should be denied.

7) Is Employee entitled to medical benefits and related transportation expenses from either McDonald's or Arctic?

Employee contends a penalty under AS 23.30.155(e) should be levied against Arctic because it failed to timely pay PPI, a separate §155(e) penalty should be imposed against Arctic because it failed to authorize or controvert surgery, and contends a penalty under §155(e) should be assessed against McDonald's on TTD and medical benefits, and McDonald's should be found to have unfairly or frivolously controverted his right to TTD and medical benefits under §155(o).

McDonald's does not make a specific contention in respect to Employee's right to penalties or to findings of frivolous or unfair controversions. Rather, McDonald's contends Employee failed to show he has ever been entitled to additional benefits from McDonald's after his January 24, 2014 work injury with Arctic. Therefore, it contends no penalty against McDonald's may be assessed.

Arctic contends if no benefits from Arctic are due, there can be no penalty assessed. Arctic contends Employee failed to demonstrate a basis for an unfair or frivolous controversion finding.

8) Should either McDonald's or Arctic be assessed a penalty, or should a finding they made an unfair or frivolous controversion be made?

Employee contends he is entitled to statutory interest on any benefits unpaid when due. He seeks interest from either McDonald's or Arctic.

McDonald's does not make a specific contention about Employee's right to interest. Rather, McDonald's contends Employee failed to demonstrate he has ever been entitled to additional benefits from McDonald's after his January 24, 2014 work injury with Arctic. Therefore, it contends no interest against McDonald's may be assessed.

Arctic contends if no benefits from Arctic are due, there can be no interest awarded. Arctic contends Employee failed to demonstrate a basis for an interest award against Arctic.

9) Is Employee entitled to interest from either McDonald's or Arctic?

Employee contends he is entitled to actual attorney's fees and costs from either McDonald's or Arctic. He requests an attorney's fee and cost award pursuant to his lawyer's itemizations.

McDonald's does not make a specific contention with respect to Employee's request for attorney's fees and costs. McDonald's contends Employee failed to show he has ever been entitled to additional benefits from McDonald's after his January 24, 2014 work injury with Arctic. Therefore, it contends no attorney's fees against McDonald's may be awarded. However, McDonald's contends if it prevails against Employee's claim and Arctic is found liable, Arctic is responsible to pay McDonald's attorney's fees and costs.

Arctic contends Employee has failed to demonstrate he is entitled to additional benefits from Arctic. Therefore, it contends no attorney's fees against Arctic may be awarded. However, Arctic contends if it prevails against Employee's claim and McDonald's is found liable, McDonald's is responsible to pay Arctic's attorney's fees and costs.

10) Is any party entitled to an award of attorney's fees and costs?

FINDINGS OF FACT

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

1) On May 26, 1987, Employee saw Michael Geitz, M.D., for his 1987 McDonald's work injury. Employee reported sustaining a contusion and twisting injury to his low back when he fell down four steps at McDonald's. His injury began as back pain only, but he now had right, posterior leg pain and intermittent right leg numbness. Employee had been taking Tylenol 3 and Flexeril, used heat and had his activities restricted. On examination, Employee had a normal gait, straight leg raising test on the right caused shooting pain up his back, but no static symptoms. The examiner found mild lumbar spasm. There were no hard sensory deficits and an x-ray report showed a normal lumbar sacral spine without fractures. Dr. Geitz diagnosed lumbar sciatic syndrome and recommended a computerized tomography (CT) scan and continued rest, heat, muscle relaxers and minimal prescription pain medication. (Geitz report, May 26, 1987).

2) On June 9, 1987, Employee returned to Dr. Geitz for further evaluation. His leg pain now predominated over his back pain and Employee's right leg was subjectively weaker than the left. Employee had a positive right straight leg raising test and his ankle jerk on the right was now absent, which was a change from his prior visit. CT scan results showed a ruptured disc at L5-S1 predominately on the right. Dr. Geitz changed his diagnosis to herniated lumbar disc at L5-S1 on the right, discussed treatment options, and Employee decided to investigate a micro discectomy. Dr. Geitz arranged for Employee to see Michael Newman, M.D., orthopedic surgeon for surgery. (Geitz report, June 9, 1987).

3) On June 12, 1987, Employee saw Dr. Newman for evaluation. Employee reported bilateral back and leg pain, with symptoms on the right greater than the left since his McDonald's injury on May 15, 1987. Employee had right leg numbness in the S1 distribution and had made little or no improvement with conservative treatment. Dr. Newman reviewed the CT scan and opined

Employee probably had a sequestered fragment at L5-S1, which rendered him a surgical candidate, but not for chymopapain injections or a percutaneous discectomy. Employee wanted to continue with conservative measures, which Dr. Newman said was "totally appropriate." (Newman report, June 12, 1987).

4) On June 16, 1987, Employee returned to Dr. Geitz. Employee's findings were unchanged and Dr. Geitz discussed alternative treatment with him. Employee wanted to think surgery over a bit more before making a decision. (Geitz report, June 16, 1987).

5) On July 14, 1987, Employee told Dr. Geitz his leg pain had decreased, he did not want surgery and wanted to try physical therapy and continued conservative management. Dr. Geitz recommended physical therapy and a "back school." (Geitz report, July 14, 1987).

6) On September 11, 1987, Employee told Dr. Geitz his back pain equaled his leg pain. He was somewhat improved, but got worse following five hours sitting with poor back support. His left leg hurt occasionally, but not as consistently as his right leg. Dr. Geitz suggested since it had been three months post-onset, the chances Employee would have spontaneous improvement were diminished. Dr. Geitz suggested surgery. Employee wanted to think about it. (Geitz report, September 11, 1987).

7) By October 14, 1987, Employee told Dr. Geitz he had no change in his symptoms and he was incapacitated by pain. Dr. Geitz recommended a myelogram because Employee complained of intermittent left-sided symptoms, which were no longer bothering him. (Geitz report, October 14, 1987).

8) On October 15, 1987, Dr. Geitz performed a right, L5-S1 hemilaminectomy and disc excision on Employee. (Operative report, October 15, 1987).

9) By October 28, 1987, Employee was doing well with no leg pain. He was sleeping well, and Employee had a negative right straight leg raising test. (Dr. Geitz report, October 28, 1987).

10) On December 9, 1987, Employee told Dr. Geitz he was subjectively better than before his surgery and his back and general strength were returning. He had no radicular symptoms. Dr. Newman assessed an "excellent" postoperative course and recommended gentle, therapeutic exercises and walking, and continued Employee's work restrictions, which were lifting no greater than 30 to 35 pounds and no repetitive lifting or twisting motions. (Geitz report, December 9, 1987).

11) On December 16, 1987, Employee called Dr. Geitz from California stating he was in "extreme pain" in his back and down his right leg. Employee wanted Dr. Geitz to provide a prescription but Dr. Geitz's staff told Employee they could not give him a prescription in California and suggested he go to a local emergency room. (Geitz report, December 16, 1987).

12) On December 22, 1987, Dr. Geitz released Employee to return to modified work in two to three weeks, with no lifting over 30 to 35 pounds and no repetitive lifting or twisting motions. (Physician's Report, December 22, 1987).

13) On December 30, 1987, Employee saw Dr. Geitz after returning from California. He reported having had some back and achy gluteal pain about a week after he left for California but he was now better. Employee's neurological examination was unremarkable but he had some "facet type symptoms." Dr. Geitz recommended minimal pain medications, activity restriction and physical therapy for McKenzie exercises and magnatherm. Dr. Geitz released Employee to return to work without restrictions. (Geitz report; Physician's Report, December 30, 1987).

14) On February 3, 1988, Employee returned to Dr. Geitz reporting he was "not doing too bad." He still had some achy back and gluteal pain but no radicular symptoms. Employee's straight leg raising and sciatic stress tests were negative. His gait pattern was smooth. Physical therapy notes documented Employee's progress and recommended work hardening. Dr. Geitz prescribed work hardening for two months, Dolobid for discomfort and a possible lumbar corset depending upon how he did in therapy. He told Employee to return in two months. (Geitz report, February 3, 1988).

15) On February 12, 1988, Employee told Dr. Geitz he had slipped and fallen at home while taking out the garbage on February 10, 1988. Employee went to the local emergency room and had back pain with no leg pain. Dr. Geitz diagnosed a lumbar strain with paraspinal muscle spasm. Employee's straight leg raising test was negative and he had no change in neurological findings. Dr. Geitz opined this lumbar strain injury occurred because of Employee's preexisting condition. Otherwise, Dr. Geitz did not think it would have bothered him at all when he fell. Dr. Geitz recommended a lumbar corset, Clinoril as an anti-inflammatory and continued work hardening. (Geitz report, February 12, 1988).

16) On March 25, 1988, Employee saw Dr. Geitz for follow-up after his slip and fall. Employee had some low back spasm and his forward flexion was limited "but exaggerated." Employee's straight leg raising test was negative. He was participating in physical therapy and

complained this caused pain and fatigue. Employee also complained of chronic, right-sided pleuritic chest pain, and Dr. Geitz told him to see a general practice physician for this problem. Dr. Geitz's diagnosis remained "lumbar strain," and recommended Employee continue work hardening. "I find no clinical indications for any further surgery." (Geitz report, March 25, 1988).

17) On April 27, 1988, Employee told Dr. Geitz he had seen a physician who wanted to admit him to the hospital for his pleuritic chest pain. Employee's physicians resolved this "severe problem" and Employee felt better. A week earlier had been his last therapy session for his lumbar strain and Employee had more pain since physical therapy stopped. His forward flexion was still uncomfortable but straight leg raising and sciatic stretch tests were still negative. There was no radiculopathy evident. Dr. Geitz diagnosed back pain and lumbar strain status post laminectomy, and degenerative disc disease. Employee's back pain persisted but was controlled with activity and therapy. Employee was on no medications. As expected, his surgery relieved pressure from a nerve root. Dr. Geitz recommended continuing home exercises including walking and losing weight. Dr. Geitz said, "I doubt this patient can return to his previous employment." Dr. Geitz imposed a 20 to 25 pound maximum lifting restriction with no repetitive bending or twisting. Dr. Geitz suggested, an "IME and a settling of his compensation claim." (Geitz report, February 27, 1988).

18) On May 25, 1988, Employee saw Dr. Geitz and complained of achy, intermittent back and right leg pain that went to the knee. He had no left leg symptoms. Walking made him feel better. He was wearing a lumbar corset at home but was not working. Employee had not heard from the adjuster regarding an "IME or finalizing this problem." Employee's forward flexion was limited but exaggerated. He had a very flat affect. Employee walked without a limp and his straight leg and sciatic stretch tests were negative. He had no muscle loss and his reflexes were unchanged. Dr. Geitz concluded Employee's history, physical examination suggested mechanical type back symptoms with no clinical evidence of a recurrent disc. Employee did not want to consider further surgery, and Dr. Geitz did not think any further tests were going to do anything but confuse the issue. Consideration for Employee to undergo a further computerized tomography (CT) scan or magnetic resonance imaging (MRI) scan would be: (1) consideration for further surgery, and (2) incapacitating symptoms, neither of which he had. Dr. Geitz's recommendations remained unchanged from the previous visit and he released Employee to light

duty with 22 to 25 pound lifting restriction, anti-inflammatory medicines and continued Tylenol for back pain. He was to return as needed. (Geitz report, may 25 1988).

19) On June 9, 1988, Employee returned to Dr. Geitz. Employee had mostly lumbar back pain with intermittent, right achy leg pain at night but not every day and not related to activities. Employee felt "the back pain [was] incapacitating." He wanted to proceed with an MRI and possibly consider a fusion procedure for degenerative disc disease as he was not working. On examination, Dr. Geitz found no neurological change, no motor issues and no sensory loss. Employee's straight leg raising and sciatic stretch tests were negative. Forward flexion had improved with Employee's hands eight inches from the floor, which was the best flexion Dr. Geitz had seen from Employee. Employee had full side to side motion and no spinal tenderness. Dr. Geitz diagnosed degenerative lumbar disc disease and recommended a lumbar spine MRI. Following the MRI, Dr. Geitz would consult with other physicians. Dr. Geitz was not sure if surgery would help Employee but he was going to inquire of other experts. (Geitz report, September 9, 1988).

20) On June 17, 1988, Employee did not appear for his appointment with Dr. Geitz "to discuss fusion." (Geitz report, June 17, 1988).

21) On June 29, 1988, Employee did not appear for his appointment with Dr. Geitz "to discuss surgery." (Geitz report, June 29, 1988).

22) On November 30, 1988, Employee saw Dr. Geitz and said his back was "doing pretty well." Employee reported he was "doing much better." On examination, Dr. Geitz found no signs of sciatic irritation. Employee's MRI scan did not show a true disc herniation but only degenerative disc disease at L5-S1 "as expected." Dr. Geitz reviewed several "job description papers" and suggested Employee try to get back to work with some limitations "as tolerated within the limitations of the descriptions." He was to return as needed. (Geitz report, November 30, 1988).

23) There are no medical records in Employee's agency file making any reference to "back pain" until nearly 20 years later on September 26, 2008. (Observations).

24) On September 26, 2008, Employee, while working for Alaska Trailblazing, reported to the Providence Hospital emergency department with "back pain." Specifically, Employee said he had "right flank pain," which had begun the previous evening while he was sleeping. Employee had this symptom for about a week, but the prior evening it became much worse and, at times

"quite severe." On examination, the physician found "positive right-sided low back pain" and no "abdominal" pain. Employee's lower extremity examination was normal. He had mild tenderness to palpation in the "right flank reproducing the patient's symptoms." Diagnostics included blood testing and an abdominal and pelvis CT scan. The CT scan revealed mediastinal adenopathy consistent with his sarcoid diagnosis. Employee also had liver changes consistent with cirrhotic liver disease with hepatic congestion and splenomegaly. The CT scan, given for "back pain," focused on Employee's chest and abdomen and not on his lumbar spine. The emergency room treated Employee with Toradol and Morphine and his symptoms improved. The final diagnosis was presumed cirrhosis with secondary abdominal and flank pain. Employee was told to take Ibuprofen for discomfort, increase fluids and drink no alcohol as it could be "lethal for the patient." Employee was referred to an internist for an abdominal ultrasound and further evaluation and treatment. (Providence emergency room reports, September 26, 2008).

25) Employee's September 26, 2008 medical reports are not evidence he was complaining of significant low back pain. (Experience, judgment and inferences drawn from the above).

26) On October 21, 2012, Employee returned to Providence Hospital emergency department again complaining of "abdominal pain." Employee also had left-sided chest pain. At about 10:19 AM, Employee initially told the nurse he had, in priority order, (1) abdominal pain, (2) back spasms, (3) "N/v," which probably means nausea and vomiting, and (4) chest pains, all for about four hours. The report does not specify where the "back spasms" were. By about 1:45 PM, Employee had requested pain medication. By about 2:29 PM, Employee reported the Vicodin he had been given was working. Employee's then-current medications included: Verapamil; Vardenafil; Furosemide; Prednisone; Potassium Chloride; and Cholecalciferol. His lower extremity and neurological examinations were normal. Radiographic studies disclosed a large, calcified opaque gallstone; splenomegaly; a nodular liver consistent with cirrhosis; a right, inferior renal cyst; and a splenic cyst. The final diagnosis was "abdominal pain, unclear etiology." (Providence emergency room report, October 21, 2012; experience, judgment and inferences drawn from all the above).

27) Employee's October 21, 2012 medical report is not evidence he was complaining of significant low back pain. (Experience, judgment and inferences drawn from the above).

28) On May 11, 2013, Employee went to the Providence Hospital emergency room with chief complaints including "abdominal pain" and "back pain." Employee explained he had chronic

pancreatitis and abdominal pain for "roughly the past 7 months." He had been "vomiting since yesterday" and had vomited between six to 12 times in the previous 24 hours. He had "[s]ome lower back pain that is mild." Employee's past medical history included, among other things, neuropathy. Employee's then-current medications included: Hydrocodone; Acetaminophen 10-325; Amitriptyline; Furosemide; Verapamil; Lisinopril; Prednisone; Oxycodone; Acetaminophen 5-325; Pancrelipase; Pantoprazole Sodium; Sennosides-Docusate Sodium; Vardenafil; and Cholecalciferol. On examination, Employee's back showed no thoracic or lumbar spine midline tenderness, no muscle tenderness, and he had full range of spinal motion. Extremity examination showed no evidence of lower extremity symptoms. Hospital-administered medication made Employee "feel so much better" and reduced his pain level to "5 which is tolerable" for him. The "final impression" did not include any low back diagnoses, pain or symptoms. (Providence emergency room report, May 11, 2013).

29) Vomiting can cause back spasms and pain. (Experience, judgment and inferences drawn from all the above).

30) Employee's May 11, 2013 medical report is not evidence he was complaining of significant low back pain. (*Id*.).

31) On January 24, 2014, Employee slipped and fell on ice while working for Arctic when he got out of his pickup truck onto a slippery parking lot. (Report of Occupational Injury or Illness, January 24, 2014).

32) On January 25, 2014, Employee reported to the Providence Hospital emergency room and said he had fallen on the ice while getting out of a truck and had landed on his left hip. Since then, he had pain across his lower back mostly on the left and left buttock pain but no radiating pain down his leg. The examiner found moderate tenderness of the left lower lumbosacral area. A pelvis x-ray showed no fracture and the final impression was "low back pain." His "current" listed medications included: Lisinopril; Insulin; Ondansetron; Prednisone; Hydrocodone/Acetaminophen; Furosemide; Oxycodone; Cyclobenzaprine and Verapamil. It is difficult to determine from the record whether Employee had been taking these medications before he went to the emergency room, or whether some were given to him at the emergency room. However, the "After Visit Summary" section, listed Employee's medications as Oxycodone; Prednisone; and Verapamil and states: "Notice: This list has one medication(s) that are the same as other medications prescribed for you. Read the directions carefully, and ask your

doctor or other care provider to review them with you." The take-home instructions from the emergency room also directed Employee to begin taking Hydrocodone and Skelaxin. (Providence emergency room report, January 25, 2014; experience, judgment, observations and inferences drawn from all the above).

33) On January 27, 2014, Employee reported to the emergency room again for reevaluation of his acute, left hip pain since he had fallen on the ice two days prior. His pain radiated up and down his back and both legs. The emergency room physician, stated, "He has chronic back pain due to a ruptured disc." The doctor diagnosed a low back strain, and recommended conservative measures. The emergency room physician also prescribed Valium for "muscle strain" and as a "muscle relaxant." According to the record, Hydrocodone, also known as Norco had been prescribed for abdominal pain and Prednisone had been prescribed for sarcoidosis. (Providence emergency room report, January 27, 2014).

34) On January 31, 2014, Employee had lumbar spine x-rays interpreted as showing a mild anteriolisthesis of L4 on L5 with moderate disc space narrowing. X-rays also showed a large, calcified gallstone and no evidence of spondylosis at L4 and no spinal instability on flexion and extension views. (Beck x-ray report, January 31, 2014).

35) By January 31, 2014, Employee was complaining about tingling down the back of his left leg. X-rays showed a large gallstone and grade I spondylolisthesis of L4 over L5 with well-maintained disc heights. Employee's then-current medications included Verapamil; Prednisone; Lasix; and Levitra. The physician's assistant assessed low back pain with spondylolisthesis at L4-5 and radicular left leg pain. He recommended sedentary work pending MRI results. (Farrell report, January 31, 2014).

36) On February 3, 2014, Employee had a lumbar spine MRI form by Dr. Beck at Turnagain Radiology, which demonstrated severe neural foraminal stenosis at L4-L5 and L5-S1, most pronounced on the right at L5-S1. It also showed severe facet arthropathy at L4-L5 and L5-S1 and a nondisplaced pars defect suspected on the right at L5. Alternatively, these findings could be postoperative changes. There was fluid in both facet joints at L4-L5 and, when correlated with lumbar spine x-rays, there was a reduction in the anterolisthesis of L4 on L5 noted on the x-rays. The radiologist concluded "instability at this level is likely, as the alignment of the L4 and L5 vertebral bodies with the patient in the supine position appears fairly normal." Lastly, there was *situs inversus* demonstrated as there was no solid organ in the right upper quadrant to

correspond with the expected liver location, but there was a large, solid organ in the left upper quadrant that could either be massive splenomegaly, or the liver in the wrong place. (Beck MRI report, February 3, 2014).

37) On February 5, 2014, Employee saw a physician's assistant with Orthopedic Physicians Alaska's (OPA) "spine team" for further evaluation. He related his January 24, 2014 work injury and said he went to the emergency room the next day and "was given pain medication." His then-current medications included Verapamil and Furosemide. After examining Employee reviewing his x-rays and MRI films, PA-C Michael Dyches diagnosed: (1) Incidental *situs inversus* as opposed to massive splenomegaly on MRI; and (2) recent onset low back pain with radiographic evidence of grade I to II anterolisthesis of L4 on L5 with associated foraminal stenosis at L4-5 and L5-S1. PA-C Dyches referred Employee to physical therapy and prescribed Valium and Motrin. He told Employee to share these findings with his primary care physician. (Dyches report, February 5, 2014).

38) On February 5, 2014, Employee also saw Rachel Samuelson, M.D., his primary care physician at Providence Family Medicine Center. Employee reported his work injury with Arctic and stated he had left sacrum pain, which sometimes traveled down his left leg. Back pain also caused him trouble sleeping at night. Relevant to this case, Dr. Samuelson diagnosed back pain, and noted Employee was followed by OPA for this problem. It is not clear from the record whether OPA recommended Flexeril and Tylenol, or Dr. Samuelson prescribed it. (Samuelson report, February 5, 2014; experience, judgment, observations).

39) On February 12, 2014, Arctic's former adjuster Savina wrote a letter to PA-C Farrell requesting his opinions about Employee's situation. (Savina Letter, February 12, 2014).

40) On February 24, 2014, PA-C Dyches responded to Savina's February 12,013 letter and diagnosed Employee with a lumbar strain; L4 on L5 anterolisthesis; and "L4-5/L5-S1" degenerative disc disease. Employee was able to perform light duty for six weeks beginning February 5, 2014, with no lifting greater than 15 pounds. PA-C Dyches recommended physical therapy and stated Employee's work injury with Arctic is the substantial cause of the need for treatment. PA-C Dyches opined treatment would continue for six weeks beginning February 5, 2014. In her letter to the physician's assistant, Savina said she had received a call from Wal-Mart pharmacy on February 6, 2014, "wanting authorization for medications." These included Cyclobenzaprine from Dr. Samuelson, Metaxalone from the emergency room physician, and

Valium from PA-C Dyches. Savina said, "All medications were approved," but Employee was informed the only medications to be approved in the future would need to come from an OPA provider. (Dyches responses, February 24, 2014).

41) On March 12, 2014, Employee saw PA-C Dyches and reported only slight improvement from physical therapy. His left lower back pain was at a "7 out of 10" pain level. He had no pain radiating into his lower extremities. Employee's primary care provider managed his pain medications "given his history of liver disease." PA-C Dyches diagnosed left low back pain attributed to a recent fall at work in January. Employee's left lower back pain could be caused by foraminal stenosis on the left of L4-5 and the associated anterolisthesis. Employee discussed his treatment options, and decided to continue with physical therapy. His then-current medications included Motrin; Prednisone; and Verapamil. PA-C Dyches recommended continued physical therapy and a possible epidural steroid injection on the left at L4-5 if Employee did not improve. (Dyches reports, March 12, 2014).

42) Notwithstanding the above, on March 19, 2014, PA-C Dyches referred Employee to Alaska Spine Institute (ASI) for an epidural steroid injection at L4-5 on the left. (Patient Referral Form, March 19, 2014).

43) On March 25, 2014, Employee had a left transforaminal epidural steroid injection at L4-five, performed by Larry Levine, M.D., at ASI. (Levine report, March 25, 2014).

44) On April 14 2014, Employee returned to OPA-C Dyches to report on his transforaminal epidural steroid injection performed on March 25, 2014. Employee said the injection gave him two days of "60% pain relief." Reviewing Employee's situation, PA-C Dyches said Employee "would be a good candidate for L4-5 fusion and possible microdecompression as well at L5-S1 versus fusion at L5-S1, as well." PA-C Dyches referred Employee to Mark Flanum, M.D., for a surgical consultation. Employee's then-current medications included ASA; Lisinopril; Prednisone; and Verapamil. (Dyches report, April 14, 2014).

45) On April 28, 2014, Employee saw Dr. Flanum for his Arctic injury. He had predominantly low back pain but substantial left-sided radicular symptoms and weakness in his left lower extremity. Employee's then-current medications included Verapamil; Furosemide; ASA; Norco; and Prednisone. Dr. Flanum examined Employee, reviewed his x-rays and MRI reports and diagnosed Employee with a slip-and-fall injury in "a work place setting" now with evidence of acquired spondylolisthesis, severe disc degeneration and neural foraminal stenosis generating

low back pain and lumbar radiculopathy. Dr. Flanum opined Employee would benefit from surgical decompression and stabilization and recommended an L4 to S1, posterior, lumbar interbody fusion. "The patient is unclear if he would like to proceed with surgery at this time." Dr. Flanum wanted to review Dr. Geitz's records and obtain a computerized tomography (CT) scan, to better define Employee's anatomy. Employee would let Dr. Flanum know if he wanted to proceed with surgery. Dr. Flanum's orders included "Schedule Surgery." (Flanum report, April 28, 2014).

46) On May 1, 2014, Employee went to the Providence emergency room for his back pain. Employee told the physician. He had a disc injury "and is going to get surgery by Dr. Flanum, but is waiting on the paperwork from workman's compensation that will allow him to do so." Employee said his back and left leg hurt and he usually takes Hydrocodone for pain but has been out for at least a month. The final diagnosis was lumbar disc disease with radiculopathy. The physician gave Employee Hydrocodone and Zofran and a prescription for home use with a referral to his family physician. (Providence emergency room report, May 1, 2014).

47) On May 16, 2014, Employee returned to the emergency room again complaining of chronic back pain and sharp leg pain from disc disease. Employee reported he had been seeing PA-C Dykes at OPA and "plans to have surgery once paperwork is completed." The emergency room physician gave Employee a Toradol and Morphine injection. (Providence emergency room report, May 16, 2014).

48) On May 19, 2014, Savina wrote a letter to Dr. Flanum seeking his opinions. (Savina letter, May 19, 2014).

49) On May 27, 2014, Employee went to the Alaska Regional Hospital emergency room for back pain. According to the report, Employee's back pain came on months earlier, was still present and was gradual in onset. He reportedly had chronic low back pain for years due to his lumbar disc herniation but the pain had been uncontrolled lately. Employee had fallen in January, "exacerbating his pain." He took Hydrocodone occasionally when the pain got bad but usually took Ibuprofen. Employee was supposed to have surgery within the next month or so. "Patient denies an injury." The clinical impression was chronic back pain, lumbar herniated disc with sciatica. The emergency room physician restricted Employee to the lifting no greater than 10 pounds and no bending or stooping, and prescribed Vicodin. (Alaska Regional emergency room report, May 27, 2014).

50) On June 17, 2014, Employee had a CT scan on which the radiologist found (1) severe, central canal stenosis at L4-5, secondary to a broad-based disc protrusion, flavum hypertrophy and facet hypertrophy. The stenosis was further accentuated by a mild, degenerative anterior subluxation of L4 on L5 from the degenerative facet disease; (2) moderate, bilateral neural foraminal encroachment at L4-5; and (3) mild to moderate bilateral neural foraminal encroachment at L5-S1. (Bridges Final Report, June 17, 2014).

51) On June 24, 2014, Employee saw Dr. Samuelson. He currently did not have any pain medications, was "contemplating" back surgery with a physician at OPA and had an appointment the next day to discuss surgery. (Samuelson report, June 24, 2014).

52) On June 25, 2014, Employee returned to Dr. Flanum for follow-up and to review the CT scan results. Employee reported continued low back and bilateral radicular symptoms with the left being greater than the right. He had returned to the emergency room twice to obtain pain medication since he was last seen in April. Dr. Flanum reviewed the CT results with Employee and reiterated his recommendation for surgery. Employee had "a lot of concerns" about surgery because he had a prolonged recovery from his previous surgery. Dr. Flanum explained to Employee that surgery today is very different than it was 25 years ago. Employee was "reluctant to commit." Dr. Flanum offered pain management to avoid surgery and Employee was to let Dr. Flanum know how he wanted to proceed. (Flanum report, June 25, 2014).

53) On June 13, 2014, Arctic's former adjuster Savina sent Dr. Flanum a letter requesting his opinions. (Savina letter, June 13, 2014).

54) On June 26, 2014, Dr. Flanum responded to Savina's May 19, 2014 letter. He limited Employee to light duty only, limited by pain secondary to spondylolisthesis and stenosis. Dr. Flanum recommended lumbar decompression and fusion surgery, and stated the Arctic injury was the substantial cause for this treatment. (Dr. Flanum response, June 26, 2014).

55) On June 26, 2014, Dr. Flanum also responded to Savina's June 13, 2014 letter and said the January 24, 2014 work incident with Arctic is the substantial cause of Employee's current need for treatment to his low back at L4-5 and L5-S1. Dr. Flanum said Employee had undergone physical therapy and an epidural steroid injection. Dr. Flanum would be the attending physician and would provide medicine for pain control. Employee's current, low back treatment options included surgery, physical therapy, medication, steroid injections and time. Surgery was the treatment most likely to improve Employee's low back condition, manage his symptoms and

minimize need for further treatment. Dr. Flanum said Employee's workplace injury with Arctic caused the need for treatment, and he believed Employee might be capable of returning to work as a laborer or maintenance supervisor after surgery. (Dr. Flanum response, June 26, 2014).

56) On July 29, 2014, Employee saw Marilyn Yodlowski, M.D., orthopedic surgeon, for an employer's medical evaluation (EME) at attorney Gabbert's request on Arctic's behalf. Dr. Yodlowski did not have all medical documents when she performed her examination, but CD imaging studies were subsequently reviewed and Dr. Yodlowski finalized her report on August 29, 2014. Employee reportedly told Dr. Yodlowski that Dr. Flanum wanted to perform surgical fusion, but he was not sure whether he wanted to proceed because he was uncertain how much it would help. Employee told Dr. Yodlowski he had no "back problems" or back treatment for the past 10 years. She noted a six-year gap in the medical records between January 23, 2008 and January 25, 2014. Dr. Yodlowski said it was unclear whether, when Employee went to the emergency room on January 25, 2014, he was already taking narcotic pain medication or if they were prescribed in the emergency room. In reviewing Employee's medical records, Dr. Yodlowski occasionally underlined statements she noted in medical reports. For example, Dr. Yodlowski underlined a statement in a January 31, 2014 lumbar spine x-ray report interpreted by Marc Beck, M.D., finding "no evidence of instability" on flexion and extension imaging at L4-L5 spinal level. However, on a February 3, 2014 MRI report interpreted by Dr. Beck, Dr. Yodlowski did not underline his statement finding "instability . . . is likely," as there was a difference between the alignment of the L4 and L5 vertebral bodies with Employee in the supine position versus the standing position. In response to specific questions from attorney Gabbert, Dr. Yodlowski opined there was no evidence of instability. She did not think Employee needed any additional diagnostic studies or tests to complete her evaluation. Dr. Yodlowski diagnosed: (1) history of right, L5-S1 disc herniation treat with hemilaminectomy in October 1987; (2) long-standing, chronic degenerative disc disease, particularly at L4-5 and L5-S1 manifested by severe disc degeneration, desiccation, bulging, large disc osteophyte complexes and hypertrophy of the ligamentum flavum. This was also demonstrated by severe facet arthritis and arthropathy with hypertrophy, enlargement and inflammation of the facet joints, resulting in further narrowing and stenosis of the spinal canal and narrowing of his neural foramen; (3) degenerative grade I to grade II spondylolisthesis of L4 on L5; and (4) lumbar "sprain/strain" sustained in January 2014,

now resolved and no longer a current condition. (Yodlowski EME report, July 29, 2014, finalized August 29, 2014).

57) When asked to identify "all causes of Mr. Williams' current condition(s) as diagnosed," Dr. Yodlowski opined the degenerative changes throughout the lower lumbar lumbosacral spine are chronic, long-term processes that occurred over many years. These conditions were caused by a combination of Employee's "age and hereditary factors." They long predated the January 24, 2014 injury. By the time Employee had an MRI a few weeks after his injury, it was clear all these degenerative conditions were well-established and "already severe." Employee was diagnosed with degenerative disc disease in his lumbar spine more than 25 years earlier on September 9, 1988. To summarize, Dr. Yodlowski said, "I do not identify the fall on 01/24/14 as contributing to any of the current conditions." Any lumbosacral sprain strain Employee suffered on that date was resolved and no longer a current condition. (*Id*.).

58) When asked which of the identified causes is "the substantial cause" of "Mr. Williams' condition and need for medical treatment," Dr. Yodlowski opined "at a point three months after the 01/24/14 event . . . the work injury was no longer the substantial cause of Mr. Williams' condition." She opined it was "important to note that [at] no time was the work event ever 'the substantial cause' of those chronic long term degenerative changes." Dr. Yodlowski did not answer the second half of the question and did not give an opinion about the substantial cause of the need for medical treatment. (*Id*.; observations and inferences drawn from all the above).

59) In Dr. Yodlowski's opinion, Employee was medically stable with respect to "any sprain/strain." Accordingly, using the AMA *Guides to the Evaluation of Permanent Impairment*, 6th edition, (*Guides*) Dr. Yodlowski determined Employee had a one percent whole-person PPI rating for his "sprain/strain" attributable to the Arctic injury. Employee's conservative treatment, including physical therapy, non-narcotic pain medication and imaging studies can be considered reasonable and necessary for the Arctic injury. The epidural steroid injection was neither reasonable nor necessary to treat the work-related sprain/strain. Dr. Yodlowski disagreed with Dr. Flanum's recommendation for a surgical fusion and opined there is no evidence of instability warranting this procedure. In any event, the proposed surgical treatment is for the preexisting, chronic, long-standing degenerative changes and their consequences. Dr. Yodlowski opined the work-related sprain/strain needs no further medical treatment. If Employee developed documented instability or a progressive neurological deficit, then surgical treatment

with decompression and fusion would be indicated. In Dr. Yodlowski's opinion, there are no physical restrictions caused by the January 24, 2014 event. However, given Employee's advanced, severe degenerative changes, restrictions would be based primarily on his tolerance level. Employee is unlikely to participate in anything beyond medium level capacity. (*Id*.).

60) On September 2, 2014, Arctic paid Employee for the first time TTD from January 25, 2014 through August 26, 2014. (Compensation Report, September 19, 2014).

61) On September 3, 2014, Arctic's attorney entered her appearance. (Entry of Appearance, September 2, 2014).

62) On September 3, 2014, Arctic filed a notice denying Employee's rights to all benefits. Arctic cited Employee's history of a right L5-S1 disc herniation and hemilaminectomy in 1987, and the resultant "long-standing chronic and severe degenerative changes of the lumbar spine, particularly at L4-5 & L5-S1." Arctic relied upon Dr. Yodlowski who stated Employee's January 2014 work injury caused only a lumbar "sprain/strain," which is "now resolved." The denial notice said "the substantial cause" of any ongoing back pain is Employee's long-term chronic degenerative condition and the Arctic injury ceased to be the substantial cause by April 24, 2014. Notably, the denial states Employee had a seven percent PPI rating due to spinal stenosis, seven percent due to spondylolisthesis and one percent "due to the work injury." The notice further states, relying upon Dr. Yodlowski's report, Employee's back is stable and needs no surgical fusion. Any surgery would be due to his preexisting, severely degenerative spine, not the January 2014 Arctic injury. (Controversion Notice, September 2, 2014).

63) Arctic never paid Employee any PPI. (Compensation Report, September 19, 2014).

64) On September 19, 2014, attorney Gabbert wrote to the Rehabilitation Benefits Administrator objecting to a referral for an eligibility evaluation based upon Dr. Yodlowski's opinion and Arctic's related controversion. (Gabbert letter, September 19, 2014).

65) On October 8, 2014, Employee filed a claim against Arctic requesting TTD from January 24, 2014, and continuing; PPI; medical and related transportation costs; an unspecified penalty; interest; a finding of an unfair or frivolous controversion; and attorney's fees and costs. (Workers' Compensation Claim, October 7, 2014).

66) On October 8, 2014, Employee also filed a claim against McDonald's requesting the same benefits as he requested from Arctic. (Workers' Compensation Claim, October 7, 2014).

67) On October 9, 2014, the division served the Arctic claim on, among other people, Arctic's attorney. (*Id*.).

68) On February 16, 2015, Employee saw Sidney Levine, M.D., for a second independent medical evaluation (SIME). Employee gave Dr. Levine a medical history similar to that he gave to other physicians. Dr. Levine reviewed Employee's medical records and his MRI and radiographic CDs. He opined causes of Employee's disability included chronic disc disease at L4-5 and L5-S1 with grade I spondylolisthesis and a superimposed low back strain. Dr. Levine did not answer the second part of the board's question, and did not list all causes of the need for medical treatment. Instead, he recommended specific treatment, including analgesic agents; physical therapy; and muscle relaxants for the straining injuries. In respect to the degenerative changes, Dr. Levine suggested surgical treatment, including a repeat lumbar laminectomy with discectomy and arthrodesis at L4-5 and L5-S1. (Levine SIME report, February 16, 2015).

69) In Dr. Levine's opinion, the January 24, 2014 Arctic injury either aggravated, accelerated or combined with a preexisting condition to cause disability or need for treatment. He did not specify or explain. However, in Dr. Levine's opinion, the Arctic injury produced a temporary change in Employee's condition. Dr. Levine stated the substantial cause of Employee's disability or need for medical treatment "is the preexisting disc disease and spondylolisthesis of L4-5 and L5-S1." He explained that since 1987, Employee had developed a progressive degeneration at the L4-5 and L5-S1 levels "that obviously are of a long-standing nature and predated the industrial injury of 01/24/2014." (*Id*.).

70) Dr. Levine stated Employee's disability from the Arctic injury, which had been superimposed on the significant degenerative disc disease, would have ended by July 24, 2014. Dr. Levine selected July 24, 2014, as the medical stability date for the Arctic injury. No additional medical treatment was required for the Arctic injury. In Dr. Levine's opinion, any work limitations or restrictions were unrelated to his Arctic injury, but nonetheless would prevent him from prolonged standing or sitting, repetitive bending or stooping, pushing or pulling, and from lifting more than 25 pounds. (*Id*.).

71) Dr. Levine gave Employee a three percent whole-person PPI rating pursuant to the *Guides*, 6th Edition. He used a *Guides* table for non-specific chronic, or chronic recurrent low back pain also known as chronic sprain/strain, symptomatic degenerative disc disease, facet joint pain, and SI joint dysfunction, as the basis for this rating. It is not clear from Dr. Levine's report whether

he attributed this three percent rating to the preexisting condition or to the Arctic injury. (*Id*.; experience, judgment and inferences drawn from all the above).

72) Arctic asked Dr. Levine if Employee's May 15, 1987 work injury with McDonald's was a substantial factor "in causing his current low back condition, need for medical treatment or disability." Dr. Levine opined the McDonald's injury "was the substantial cause" but he did not specify of which of the above-referenced three choices it was "the substantial cause." He explained the McDonald's injury was "a substantial factor" with subsequent development of back pain as his condition worsened with time. (*Id*.).

73) McDonald's asked Dr. Levine to list all causes of Employee's disability or need for medical treatment from April 24, 2014 to the present and continuing. Dr. Levine said Employee's disability was caused by his chronic back condition, prior surgery, degenerative spondylolisthesis at L4 on L5 and severe discogenic disease at L5 and S-1. However, he also stated Employee's "complaint/symptoms relate to an aggravation of the underlying condition." He further stated, "It was because of his preexisting condition that a straining injury to his low back occurred." Though the McDonald's injury and surgery was "a substantial factor," in Dr. Levine's opinion, Employee had a substantial condition in his low back "that he apparently was unaware of" and the Arctic injury "brought that underlying injury to light." Dr. Levine agreed Employee's narcotic use prior to the Arctic injury could have masked problems with recurring back pain that otherwise might have been patent. McDonald's also asked Dr. Levine to apportion any PPI rating to the Arctic injury, if he believed the Arctic injury is the substantial cause of any PPI rated. Dr. Levine reiterated his three percent whole-person PPI rating. (*Id*.).

74) Dr. Levine suggested medical treatment could include surgical treatment, physical therapy, acupuncture and occasional muscle relaxants. Palliative care was not reasonable or necessary. In Dr. Levine's opinion, the Arctic injury was not the substantial cause of the need for any treatment. He anticipated Employee could perform sedentary or light work. (Id.).

75) On February 25, 2015, Dr. Levine's office served his report on all parties. (Proof of Service by Mail, February 25, 2015).

76) On April 29, 2015, Dr. Flanum responded to attorney Smith's letter. Dr. Flanum stated the McDonald's injury was a substantial factor in Employee's disability. It resulted in deterioration of the disc at the L5-S1 level. Dr. Flanum said Employee's Arctic injury was the substantial cause of his current need for treatment. Dr. Flanum recommended surgery at L4 to S1 with

decompression and fusion. Dr. Flanum stated the Arctic injury was the substantial cause "of his need for work restrictions." (Flanum letter, April 29, 2015).

77) On May 18, 2015, McDonald's deposed Dr. Levine. Dr. Levine was actively performing lumbar surgery when Employee originally had his surgery following his McDonald's injury in 1987. Employee did not have a fusion at that time. A hemilaminectomy does not have the same effect as a fusion has on the lumbar level above the operative site. In 1987, Employee's L4-L5 level was normal. Dr. Levine acknowledged there were no medical records showing Employee had any back problems from 1988 to 2014. Dr. Levine was unaware of Employee's physical work for the 25 year interim between injuries. If Employee never had the January 24, 2014 Arctic injury, he would not have needed a lumbar fusion from L4 to S1. (Levine deposition, May 18, 2015, at 22-23). It would be "somewhat speculative" to say Employee would have needed the same surgery if he had never slipped and fallen on the ice on January 24, 2014. (*Id*. at 24). Employee had a bad back and when he fell on the ice it "was lit up." In Dr. Levine's opinion, had there just been a slip on the ice alone without a bad back, "[w]e wouldn't see anything like this." (*Id*.). Dr. Levine clarified his opinion and stated Employee's McDonald's injury and subsequent surgery is at least a substantial factor in his current back problem. His January 24, 2014 Arctic injury is also a substantial factor in his current back problem. However, it remained Dr. Levine's position that, taking those two substantial factors into account, the January 2014 Arctic injury was not the substantial cause requiring the need for fusion, but rather the preexisting condition was the substantial cause. (*Id*. at 26). Dr. Levine testified:

> Q. Sure. Was Mr. Williams' January 2014 injury with Arctic Terra the substantial cause of his symptoms that he currently has concerning his back?
>
> A. I believe that the incident caused him to have symptoms, but I believe that those kind of symptoms should have subsided within six months, had he not -- if they had not been superimposed on such a bad back.
>
> Q. If they had subsided and gone away and he didn't have a bad back, would you recommend a fusion?
>
> A. No.
>
> Q. But you are recommending a fusion?
>
> A. Yes.

> Q. You wouldn't be recommending that fusion if Mr. Williams didn't have the symptoms in part that he presented to you, correct?
>
> A. Yes.
> . . . .
>
> Q. Let me ask you this: Dr. Levine, another issue I had is, you indicated in your report that he had incurred a three percent whole person impairment?
>
> A. Yes. That's based on straining of his low back.
>
> Q. Meaning -- when you say straining of his low back, that's what you're referencing, the January 24th, 2014 injury?
>
> A. Yes.
>
> Q. He had incurred a permanent impairment for what you opine was a temporary condition that's resolved?
>
> A. Yes.
>
> Q. Could you explain that to me? My head's not big enough to understand that?
>
> A. I understand the question. I believe that one can have a disability that ends at some point in time, and so I've indicated that I thought six months was a time when it's reasonable, that that would have resolved, but I know that he still has some symptoms and did have an injury. I thought it was appropriate that he be provided that level of disability. (*Id*. at 28-31).

78) On cross-examination, Dr. Levine reviewed specific records and agreed an orthopedic surgeon mentioned considering a fusion-type procedure in 1988. (*Id*. at 39). He agreed the current MRI scan, x-ray and CT scan findings all began with the McDonald's injury and subsequent surgery and progressed over time. (*Id*. at 42-45). Dr. Levine opined that a person with the findings Employee has on his studies should not have been doing heavy manual labor, though he did not believe Employee was aware of these changes in his lumbar spine. (*Id*. at 46). Arctic's attorney pointed out she was aware there was "some discrepancy" among physicians as to whether or not Employee had spinal instability, which would normally be one indicator for fusion. Dr. Levine said he did not see objective evidence of instability, though in his view Employee would still be a surgical candidate for fusion without instability because of the severe arthritis in his facet joints. Dr. Levine reiterated his written opinions from his report and said the January 24, 2014 injury caused a flareup in Employee's symptoms that was temporary, and those

symptoms resolved after six months, even though he still has symptoms. (*Id*. at 51). In Dr. Levine's opinion, the McDonald's injury was the substantial cause of Employee's "continuing condition, disability and need for treatment" after the six-month temporary aggravation resolved around July 24, 2014. (*Id*. at 52). Dr. Levine stated whoever is responsible for the 1980s injury and surgery should be responsible for Employee's current surgery. (*Id*. at 52-53).

79) On further cross-examination, Dr. Levine said Employee did not need a fusion surgery between 1988 and 2014. "If he was doing his work, had no pain as indicated, then he would not have required a fusion." Dr. Levine would not recommend "surgery on asymptomatic patient." (*Id*. at 61-62). Notwithstanding one emergency room record wherein Employee reportedly said he had "chronic back pain," and taking Employee's testimony at face value that he had none, in Dr. Levine's opinion, the Arctic slip and fall injury is what caused Employee's low back to become symptomatic. (*Id*. at 62-63). Dr. Levine further testified:

> THE WITNESS: I believe it was his preexisting condition that became symptomatic following the slip-and-fall that required the need for surgery.
>
> Q. Would his pre-existing condition become symptomatic had he not had that fallen 2014?
>
> A. Well, not at that point in time.
>
> Q. Looking at what we do have where he did have that slip-and-fall in January of 2014, that as you stated, was what brought on the symptoms; is that correct?
>
> A. Yes.
>
> Q. Is that also why the fusion is being recommended at this time?
>
> A. The fusion is being recommended because he remains symptomatic.
>
> Q. According to his own testimony, he became symptomatic because of the January 2014 injury; is that correct?
>
> A. Yes. (*Id*. at 62-65).
>
> . . . .
>
> Q. What is the substantial cause of the need for fusion at this time?
>
> A. I still think it's his preexisting condition that was aggravated by that fall.

> Q. The aggravation of the fall, you're referring to the January 2014 fall?
>
> A. Yes.
>
> Q. You're saying that that aggravation is what caused the need for the surgery at this time?
>
> A. Yes. (*Id*. at 64-65).

Arctic's attorney advised Dr. Levine that beginning in 2005, the law changed. According to Arctic's attorney, the law requires "that you look at all the causes of a potential problem of a condition, disability and need for treatment." Given that definition, Dr. Levine was asked: "[W]hat cause more than any other cause is the substantial cause of Mr. Williams' disability and need for medical treatment?" Dr. Levine said, "The degenerative changes in his back that were initiated with the prior disc herniation and surgery." (*Id*. at 66).

80) McDonald's attorney asked Dr. Levine the following:

> Q. Let me try again. Let's assume you can have -- in Alaska, if you have injury that is the substantial cause of symptoms alone, and that would require the need for treatment, no objective worsening to a degenerative condition. If you have that hypothetical --
>
> A. Let me get it, though. If you have someone who has a condition like Mr. Williams, and that underlying condition doesn't change --
>
> Q. Correct.
>
> A. And what's the next part?
>
> Q. Then [he] has symptoms develop because of an aggravation at work, like he did with his January 2014 fall, and now the opinion is that he needs a fusion. My question becomes, is the substantial cause for that treatment a result of the symptoms that arose from his fall in January 2014?
>
> A. Yes. Because he's symptomatic now, he requires the surgical treatment. If he was asymptomatic in spite of this preexisting underlying condition, he wouldn't require surgery. (*Id*. at 68).

81) Arctic's attorney asked Dr. Levine, "[I]f the Golden Gate Bridge became so rusty and so faulty in its structure that an ant walking across the bridge caused the bridge to need repairs, would you say -- or let's say it caused the bridge to collapse. Would the ant walking across the

bridge be the substantial cause and the need for those repairs to the bridge, or would it be the underlying deterioration of the condition of the bridge?" Dr. Levine responded, "I would say it would be the underlying deterioration of the condition of the bridge." (*Id*. at 69)

82) At hearing on June 16, 2015, Employee said he slipped on the stairs while working at McDonald's in 1987 and fell injuring his low back. This injury resulted in surgery and Employee continued to see his physician until late 1988. Employee agreed there were no medical records showing he treated thereafter for back pain and said he "really didn't have any." During the interval between his McDonald's and Arctic injuries, Employee worked construction for about 15 to 20 years. He did landscaping for his last two employers beginning in 2001. While landscaping, Employee worked at least 40 hours a week with occasional overtime. He never turned down work or lost time from work because of low back pain. Just before working for Arctic, Employee worked for Alaska Trailblazing. While at Alaska Trailblazing, Employee won awards for being the "most dependable," a "backbone employee," having the "best attitude" and was named "employee of the year." Employee has numerous health issues including diabetes, "chest problems," hypertension, cirrhosis, sarcoidosis, kidney problems, an ankle injury, thrombocytopenia, gallstones and neuropathy. Employee's physician gave him pain medication for his "chest problems" but not for the other conditions. In 2000, Employee went to a doctor for an ankle injury he incurred while playing basketball. When asked about his deposition testimony wherein Employee said he received no pain medication between 1988 and 2014, Employee said he understood the question and only received pain medication from one physician for his chest pain. (Employee).

83) Employee explained his Arctic injury. He was checking sidewalks for ice and snow and pulled up to a bakery. As he exited his vehicle, Employee stepped out with his left foot and it gave way on the ice and he fell to the ground. Employee called his supervisor "Alex" and told him he "felt pretty good at the time." Employee told Alex he had fallen and suggested Arctic get some sand spread out in the parking lot. Subsequently, Employee called Arctic's owner "Jason" and told him what happened. Employee did not initially think he was injured. Employee went home and slept and when he awoke the next day, Employee's hip bothered him so he went to the emergency room. Before going to the emergency room, Employee called Arctic and said he was injured when he fell. (*Id*.).

84) Employee treated with Dr. Flanum and tried conservative measures like physical therapy. Conservative therapies did not work. In particular, a stimulator device caused muscle spasms and an epidural steroid injection only helped for a couple days. By April 28, 2014, another physician had recommended surgery. Employee wanted to obtain surgery and expected it would occur in May 2014. However, when he called his doctor's office they advised Arctic's insurer had refused to authorize the surgery. (*Id.*).

85) Since his 2014 injury with Arctic, Employee's back pain has ranged between "7 and 8" on a pain scale. Currently, Employee takes Ibuprofen for back pain. Employee wants to have surgery for his back so he can recover and go back to work. (*Id.*).

86) On cross-examination by Arctic, Employee admitted he knew he was under oath during his prior deposition. In respect to his deposition testimony about going to California and calling his physician complaining about low back pain in 1987, Employee explained he questioned the account during his deposition because he did not remember it. Once he saw the medical records, Employee began recalling the incident. Employee still did not recall a December 1988 conversation with his physician about incapacitating low back pain and did not think he complained of it at that time. Employee admitted he was taking pain medications and an anti-inflammatory before he went to the emergency room the day after his 2014 Arctic injury. Employee could not explain his deposition answer in which he denied having taken any pain medications before his work injury with Arctic other than to suggest he was confused by the question during his deposition. Employee acknowledged his primary physician prescribed all his medications, which included pain medicine and an anti-inflammatory, though he could not recall why the anti-inflammatory had been prescribed. Similarly, Employee did not recall telling people in the emergency room after his 2014 Arctic injury that he had "chronic back pain" because of a previously ruptured disc. Although he did not recall, Employee thought the medical records should disclose why his physician had prescribed Flexeril. Employee denied he had been to the emergency room for "multiple pain medication prescriptions over the past 12 months." When pressed further, Employee said he probably had gone to the emergency room for pain medication "for some other things," but "not for a back injury." (*Id.*).

87) Employee recalled telephone conversations with his prior adjuster Savina. He recalled talking with her about his McDonald's injury and related surgery and admitted he told her he would have continued to pursue the claim with McDonald's because he received no vocational

retraining, but he could not locate the adjuster. Employee said a comment he made to Savina about him being "retired" was made in jest. (*Id.*).

88) Employee denied he was in employment "disciplinary proceedings" when he slipped and fell at work with Arctic. In Employee's view, any such matters were "done and over with" by then. He admitted he missed two meetings and said something happened that rescheduled the first meeting. As for the second meeting, he was at home because he had fallen and could not attend. Employee conceded there was a possibility he thought Arctic might be replacing him because he had some incidents with coworkers, around the time of his work injury. (*Id.*).

89) Employee did not believe he had ever been cleared by his primary care physician for surgery, although they discussed it. Employee had "Obamacare" briefly at a cost of about $7.00 per month, but could not afford to continue it because he had no money. (*Id.*).

90) On cross-examination by McDonald's, Employee stated he was not in incapacitating back pain between 1988 and 2008. Between 1988 in 2008, Employee never called a physician and asked for back pain medication. Between 1989 and 2014, Employee was getting pain medication, but not for back pain. Employee fathered six children after 1989. He worked between 1989 to 2014 doing, among other things, cement and asphalt work. Panels used in cement work weighed about 80 pounds apiece and were the heaviest thing he had to lift. Employee did this job for about a year and sought no medical care or prescriptions for his low back. Subsequently, when performing landscaping work, Employee lifted trees weighing about 80 to 90 pounds. Some trees weighed up to 500 pounds and Employee and others would move them around. He did this for seven years and became a supervisor. He worked 40 to 60 hours per week as a landscaper and never sought medical care or prescriptions for low back pain. In his view, the back surgery Employee had for his McDonald's injury "fixed" his back. As for a September 26, 2008 medical record from an emergency room referring to "right flank pain on and off, hurts between ribs," Employee could not remember the visit but did recall, while gesturing at hearing to his rib area, that he did have some pain in that region. Employee concluded the September 26, 2008 medical report was not referring to the low back pain he currently feels. In Employee's opinion, following recovery from his McDonald's injury and related back surgery, Employee did not have back pain or "back problems" that prevented him from working. Following his January 2014 Arctic injury, Employee could not do things he wanted to do and has difficulty sleeping at times. He has not been able to work since his Arctic

injury. He was able to work between 1989 and 2014. In his view, after Employee recovered from his McDonald's injury his low back pain was "0." Employee realizes he had a 1987 and a 2014 low back injury. In his view, the 2014 injury causes his current inability to go to work and his need for additional medical treatment. (*Id.*).

91) On re-direct, Employee explained he sees his family practice doctor for diabetes and she works at Providence. So, when Employee was talking in his deposition about going to "Providence" before his 2014 work injury with Arctic, he was referring to going to see his family practice physician at Providence, not going to the Providence emergency room. Employee acknowledged he could have gone to the emergency room to treat for back pain if he had any prior to his 2014 work injury with Arctic, even though he may not have had health insurance. Employee denied his joking comment to "Tiffany" about "retiring" was referring to an opportunity to "cash in" on his workers' compensation claim with his employer. (*Id.*).

92) At hearing on June 18, 2015, Arctic's owner Jason Kersten said he previously had worked with Employee for just over 10 years and had worked with him at Alaska Trailblazing. Employee was a "good worker." and, after Kersten started his own business, he called Employee and solicited him to come to work for Arctic because Employee was a "perfect fit" for Kersten's new business. Kersten knew Employee had a previous back injury because Employee told him. According to Kersten, Employee would once or twice a year take time off for various medical issues, including a "back problem" but Kersten was not able to say how he knew Employee's time off was specifically for back pain. Notwithstanding this, Kersten had no concerns over Employee's ability to physically perform his duties at Alaska Trailblazing or at Arctic. Other employees also complained from time to time "after a long day" that their backs were sore. According to Kersten, Employee "seemed physically fit" so Kersten did not ask him many questions about his prior work injury. Kersten had no reason to believe Employee faked his Arctic injury for any reason; to do so would have been "weird." Kersten never saw Employee have a work injury during the time they worked together. Employee was not terminated or reprimanded for his role in disagreements with a female co-worker. Arctic's January 2014 Craigslist advertisement for additional workers had nothing to do with Employee, his job performance or his work injury. (Kersten).

93) At hearing on June 16, 2015, Employee's direct supervisor with Arctic, Alex Lommel, said he had known Employee for about nine years, having worked with him at Alaska Trailblazing.

Lommel knew Employee had a back injury years earlier while working for McDonald's, though he was uncertain how he learned this fact. He was unaware Employee ever took time off because of a sore back or back problems while they worked together at Alaska Trailblazing. As Employee's supervisor at Arctic, Lommel knew after "long shifts" workers might do an easier "kind of a cleanup shift" detailing properties to give them rest. He usually tried to give Employee "first crack at those" because he was "the most senior employee." On other occasions, Employee would "turn down the shift just because he was burnt out from the previous shifts." However, Lommel did not recall Employee ever specifically turning down a regular work shift based on back pain. On occasion, Employee would turn down an offer of additional work and let others take it though he would take the shift if absolutely necessary. (Lommel).

94) On cross-examination by McDonald's, Lommel contradicted Kersten's testimony somewhat about the Craigslist ad and said, as a result of conflict between Employee and his female coworker Hope, "one of them had to go." If differences between Hope and Employee could not be worked out at a personnel meeting, Arctic would terminate one of them and train a replacement. Lommel said Hope was ultimately fired. Lommel has no reason to doubt Employee fell in the parking lot at the Fire Island Bakery as he stated. To Lommel, a "long shift" of snow shoveling could be only six hours because the work is difficult. Employee occasionally shoveled snow for six to 12 hours a day. Lommel clarified his prior testimony and said occasionally, after working a six to 12 hour shift, Employee would say he was "sore" and wanted to go home. On these rare occasions, Employee might turn down an additional shift. It is common for snow shovelers to get tired and to not want to fill another shift immediately. It was Arctic's rule to always let the younger guys do "the heavy labor stuff." Lommel made sure Arctic's employees were aware of this policy though some co-workers complained about Employee not doing as much heavier work. According to Lommel, Employee was not required to do much physical work because he was a supervisor and because he had prior back "problems." Notwithstanding Employee's occasional "soreness" complaints, Lommel never felt it necessary to fill out an injury report even after Employee shoveled 12 hours per day. Employee never specifically told Lommel he needed time off because his back hurt. Yet, somehow Lommel knew, in general, that there were times "he was aware" Employee was taking time off because of back pain. (*Id.*).

95) On further examination, Lommel stated he and his wife were driving down the street in the spring of 2014, and were coincidentally following Employee's vehicle when they saw him "chair dancing" while listening to music on the truck radio. Lommel's wife commented that "it doesn't look like his back hurts to me." Lommel conceded neither he nor his wife were medical doctors and could not comment on whether what they observed Employee doing that day negated his need for back surgery. (*Id*.).

96) At hearing on June 16, 2015, Tiffany Shanigan testified she worked with Employee at Arctic in 2012. She was unaware Employee "had issues or problems with his back." When Shanigan worked on Employee's crew, crewmembers other than Employee did most the physical labor. Shanigan contradicted Lommel's testimony somewhat and stated no one ever told her Employee was not to do heavy manual labor. She was unaware Employee had a work injury with Arctic. While she worked with him, Employee never complained "too much," except for "after a hard night or days of work, you know, the typical my back is sore" comment. Shanigan conceded, "You know, anybody would get sore after a hard night or days of work." She was "aware" Employee took time off work because of a "sore back." She saw Employee two or three times after his work injury with Arctic and he did not appear to have any "back problems." Employee told Shanigan he had not returned to work because "I'm retired." (Shanigan).

97) On cross-examination, Shanigan admitted she had no medical training and could not tell from looking at a person what was going on with their health. She agreed Employee had no duty or reason to tell her about his then-current medical situation at a happenstance meeting. (*Id*.).

98) Shanigan further testified though she worked "closely" with Employee, she never knew of him having "back problems." In her view, everybody had soreness working at Arctic. (*Id*.).

99) Shanigan reiterated her testimony that she was "aware" Employee had taken time off because of "problems with his back" but did not explain how she came to this awareness. (*Id*.).

100) At hearing on June 16, 2015, Harold Graham said he had been a laborer with Arctic for about three years. For about a year and a half, Graham worked with Employee at Arctic. Employee was a "hard worker." He was unaware Employee had a past back injury. Graham also contradicted Lommel's testimony somewhat by stating he too was unaware Employee was not supposed to be doing heavy lifting. Graham said he heard Employee complain "about back problems," at the "end of long days." Graham was aware Employee occasionally missed work, but Graham had no idea why and could not say it was because of "back problems." All Graham

knew was, after working 12 hours Employee might not show up the next day. Graham conceded he did not know it was specifically back problems that kept home, but after shoveling snow for 12 hours "my back would hurt too." Graham confirmed that Employee would sometimes run the ice melt. Graham spoke with Employee after his work injury and, when asked if he was coming back to work, Employee he said he was "done, he's retired." (Graham).

101) On cross-examination, Graham conceded Employee never sat in the truck and complained that his back hurt, causing Graham to do the "grunt work." Graham did the grunt work because that was his job and because he did not have a driver's license to operate the plow truck. (*Id*.).

102) At hearing on June 16, 2015, Arctic's former adjuster Savina said she previously handled Employee's claim with Arctic for about nine months. When she would speak with Employee, Savina would "absolutely" keep notes. According to Savina's notes she first had a discussion with Employee on January 31, 2014, after his work injury at Arctic. Employee told her he hurt his low back in "1986," left Alaska, returned, and tried to find the insurer for his first injury but could not locate them. Savina said she felt bad Employee could not find the previous insurer and told him about the defunct insurer fund. Employee reportedly told Savina had he known where to find the insurance company for the "1986" injury he would have received ongoing treatment. Savina took that to mean had Employee known where the first insurer was, he would have received ongoing medical care for his back before the Arctic injury. According to Savina, Employee said had he known he could have reopened his claim with McDonald's, he would have. In Savina's opinion, Employee would have received medical care for his back if he had known who could or would have paid for his care. She inferred from Employee's remarks that he "must have" had continued back problems after his McDonald's injury or else she would not have made her adjuster note comment. Employee reportedly told Savina he thought L4-5 was the same area where he had back surgery in 1987. (Savina).

103) As for medical treatment, Savina could not recall Employee ever specifically requesting authorization for back surgery. She seemed to recall Employee did not want to have back surgery. She was not sure why. At least surgery was not something "he wanted to jump lightly into." She could not recall Employee ever telling her "he wanted to have back surgery now." According to a June 25, 2014 adjuster's note, Employee was going to see Dr. Flanum that day and "think about surgery." It was Savina's impression that Employee was still considering surgery. Nothing in her notes suggested Employee ever made a request for or decided to have

surgery. When specifically asked whether she knew Employee had made a decision on surgery by the time she left her employment with Employer's insurer, Savina stated, "I'm not sure I can answer that. I really don't recall." Savina saw the claim Employee's attorney filed and was "upset" it made a surgical request as she could not recall Employee asking for surgery. (*Id*.).

104) On cross-examination, Savina said, notwithstanding her belief Employee did not want surgery she hired an EME because the claim's "complexities" and Employee had a prior back injury. When asked if she was aware that on or about April 28, 2014, Dr. Flanum had recommended surgery, Savina reviewed her adjuster's notes, which had not been filed with the board, and found a June 11, 2014 note stating Dr. Flanum had recommended surgical stabilization and decompression. When asked if Dr. Flanum's office had contacted her to authorize surgery, Savina said she had looked over her notes and found a July 14, 2014 entry where "they called and asked me if the file was open and billable," and she told Dr. Flanum's office it was, and told them an EME was scheduled. According to the adjuster's note, the caller from Dr. Flanum's office called merely to determine whether or not the file was open and billable. She could not recall if the caller used those words. Savina was only "assuming" the caller asked her if it was "open and billable." This occurred shortly after a board decision had come out about "authorization" and she did not want to "stub her toe" and do it wrong. Savina averred no one called her for surgical authorization or to see if the case was open and billable before July 14, 2014. According to Arctic's attorney, Savina contacted her attorney's office at least by July 1, 2014, to assist with Employee's case. Arctic's lawyer scheduled the EME on July 1, 2014. Savina's notes do not say when she received the EME report, and she does not have a copy. Savina could not recall if she ever paid Employee a one percent PPI rating. Savina testified she never refused a surgical preauthorization request. (*Id*.).

105) On June 18, 2015, Employee filed his objection to Arctic's replacement hearing brief Exhibit 5. Employee contends there were no Wal-Mart records produced and attached to an October 15, 2014 medical summary. Further, Employee objected to the exhibit, which purports to be a summary of prescriptions Employee filled two years prior to his Arctic injury. Employee objects to the exhibit as being inadmissible because it is "inaccurate, includes a vast amount of irrelevant information (information not related to a documented prescription pain medication on the date of service) and because the employer Arctic Terra failed to provide documents upon which it was based." Employee further contends Exhibit 5 reflect speculation on the part of the

person who created the document and is thus inadmissible. (Employee's Objection to Admission of Arctic Terra's Exhibit 5, June 18, 2015).

106) On June 23, 2015, Arctic filed a reply to Employee's objection to its amended hearing brief Exhibit 5. Arctic contends Employee waived his *Smallwood* objection to the document, which had already been admitted at hearing. Arctic clarified several points in the document. (Reply to Employee's Objection to Admission of Arctic Terra's Exhibit 5, July 23, 2015).

107) On July 6, 2015, Dr. Flanum gave a post-hearing deposition. He is an orthopedic surgeon and has been practicing for about seven years. He treated Employee's low back following his Arctic injury. In Dr. Flanum's opinion, decompressive surgery such as Employee had after the McDonald's injury is not likely to result in stress on adjacent spinal segments or lead to degenerative problems. (Flanum deposition, July 6, 2015, at 8). The past medical records show Employee's 1987 surgery was only at the L5-S1 level. The previous surgery at L5-S1 would not cause the problems Employee currently has at L4-L5, according to Dr. Flanum. (*Id*. at 9). Dr. Flanum opined Employee's McDonald's injury was not a substantial factor of any "condition" at L4-L5. (*Id*.). Objective medical evidence from 1987 demonstrated at that time, Employee's L4-L5 level had no issues. (*Id*. at 10). When asked if a person could have an MRI study demonstrating significant degenerative problems and still not have pain, Dr. Flanum said:

> A. Absolutely. I would suggest five people in this room all have something that a spine surgeon could make an argument would benefit from surgery, but I don't think anyone here is signing up today.
>
> Q. What you're suggesting then is that it's based on what the patient is telling you, correct?
>
> A. I treat patients, not MRIs.
> . . . .
>
> Q. And so, in your opinion, is it fair to say that the January 24th, 2014, injury with Arctic Terra is the substantial cause of making Mr. Williams' degenerative back conditions at L4-5 and L5-S1 symptomatic?
>
> A. Yes.
>
> Q. And based on the symptoms, you feel like the January 24th, 2014, work injury is the substantial cause for the current recommended surgery?
>
> A. Yes. (*Id*. at 13-14).

On cross-examination, Dr. Flanum identified instability at the L4-5 level. He noted on the January 31, 2014 standing x-rays, in flexion Employee had approximately four degrees kyphosis with flexion and 11 degrees of lordosis in extension. He also had approximately 12 millimeters of anterolisthesis of L4 on L5 in flexion. By comparison and contrast, when Employee was lying flat on his back in the MRI scanner on February 3, 2014, the scan demonstrated he had "maybe a millimeter of anterolisthesis of L4 and L5 with substantial fluid within those facets of L4-5, meaning, as he goes from laying on his back to standing, his L4 vertebra moves approximately 11 millimeters anterior, or a little over a centimeter. That's how I'm finding that he has instability." (*Id*. at 16-17). Decompressive surgery will not fix the instability; it requires a fusion. (*Id*. at 17-18). Dr. Flanum explained the process as follows:

> Q. Did he acquire this instability in the fall of 2014?
>
> A. No.
>
> Q. How did it come to be?
>
> A. He got up every day for 20 years and had an arthritic facet. But it wasn't symptomatic. That's what he tells me. He didn't fracture his back. He just pinched a nerve enough to make it symptomatic. So this degenerative spondylolisthesis and stenosis is the straw being dropped on the camel's back, and every day from 1988 to 2014 was another piece of straw, and then on January 2014 it put the big piece of straw on and his nerve, he said -- his nerve said, that's it, I'm done. (*Id*. at 18).

108) Dr. Flanum is familiar with Providence Hospital emergency room records and the electronic system the hospital uses. Sometimes the Providence system combines prescribed medications during the visit with "current medications." However, looking at Employee's January 25, 2014 emergency room report, Dr. Flanum could conclude Employee was taking pain medications before he got to the emergency room. (*Id*. at 24). Dr. Flanum conceded a hospital record noting Employee had multiple prescriptions for pain medications over the past 12 months could indicate he had been having symptoms prior to his January 24, 2014 fall. However, if Employee was taking narcotics for other conditions such as sarcoidosis, these drugs may mask any low back pain to some degree. (*Id*. at 32-33). As of April 28, 2014, Dr. Flanum was recommending the surgical fusion procedure but Employee was still "unsure" if he wanted to proceed. (*Id*. at 33-34). Dr. Flanum did not agree with Dr. Levine's opinion about the

McDonald's injury destabilizing Employee's spine and causing degeneration at multiple levels. He based his opinion on the imaging studies that showed no involvement at the L4-5 level from the McDonald's injury and no disruption of bony elements. (*Id*. at 37). Dr. Flanum is aware of no medical literature demonstrating that degeneration of one lumbar spinal level causes the next level to become unstable or degenerative. (*Id*.). Employee's other discs, as of February 3, 2014, looked "pretty pristine, above average." (*Id*. at 38). Dr. Flanum agreed "something other than," the January 2014 injury was the substantial cause of Employee's advanced facet arthropathy at L4-5, and resultant spinal stenosis within stability and his severe neural foraminal stenosis and advance degenerative changes at L5-S1. (*Id*. at 40-41). Dr. Flanum last saw Employee on June 25, 2014. At that time, Employee still had concerns about surgery. So far as Dr. Flanum knows, Employee never contacted him to say he wanted to move forward with surgery. (*Id*. at 41). In Dr. Flanum's view, Employee could have a two-level fusion and possibly return to his normal work with Arctic. (*Id*. at 42). Arctic's attorney asked Dr. Flanum, given Employee's McDonald's injury, subsequent surgery, degenerative changes over time with age and the Arctic injury, what was the substantial cause of Employee's "low back problems and need for surgery?" Dr. Flanum struggled with how to answer the question, given Employee's progressive, degenerative condition and some evidence Employee may have been taking narcotics before the Arctic injury. Nevertheless, he concluded, "So if I believe the patient and the information he provided me at that time, I'd say the fall in January 2014 is the substantial cause." (*Id*. at 45).

109) On re-direct examination, Dr. Flanum conceded, notwithstanding binders full of Employee's medical records, he had never been shown a single medical record between November 30, 1988 through January 24, 2014, indicating Employee was receiving narcotics or pain medication because he was having "back problems." (*Id*. at 51). Similarly, Dr. Flanum had seen no medical report from Employee's family practice physician stating he complained of chronic problems through the years, or was seeking medication to treat his back. (*Id*.).

110) Dr. Flanum is aware patients with Employee's other conditions including sarcoidosis, neuropathy and on occasion cirrhosis have pain complaints associated these medical conditions. (*Id*. at 53-54). In reference to Employee's September 26, 2008 medical report in which his chief complaint was "back pain," Dr. Flanum explained that the diagnosis was presumed cirrhosis and abdominal flank pain secondary to cirrhosis. He explained the "flank" is on the side of the abdomen. "Flank pain" is different than "back pain." (*Id*. at 55). Even though Dr. Flanum had

not seen Employee since June 25, 2014, he could say to a reasonable degree of medical probability that Employee still needs the surgery he previously recommended. (*Id.*).

111) On July 15, 2015, Employee filed his supplemental hearing brief addressing Dr. Flanum's testimony. Employee cited portions from the deposition supporting his position and argued, among other things, greater weight should be given to Dr. Flanum's testimony because "his analysis included evaluation of all the pertinent evidence whereas Drs. Yodlowski and Levine's opinions ignored or discounted important evidence." (Employee's Memorandum Regarding the Deposition Testimony of Dr. Flanum, July 15, 2015).

112) On July 15, 2015, Employee filed his supplemental attorney's fee and cost affidavit. Attorney Powell bills at $360 per hour for attorney time and $180 per hour for performing her own paralegal duties. Employee's lawyer incurred $36,576 in legal services and $3,553.27 in costs for a total of $40,129.27. (Supplemental Affidavit of Counsel Regarding Fees and Costs, July 15, 2015).

113) On July 17, 2015, McDonald's filed its supplemental hearing brief addressing Dr. Flanum's deposition. McDonnell cited portions of Dr. Flanum's deposition that supported its position. (Employer's Supplemental Hearing Brief, July 17, 2015).

114) On July 17, 2015, McDonald's filed its supplemental attorney's fee and cost affidavit. Attorney Smith was billed at $195 per hour; legal assistant Christy Niemann was billed at $150 per hour and legal assistants Jeannie Tatum and Tracy Lyons were billed at $110 per hour. McDonald's incurred $27,904.50 in attorneys and paralegal fees and $4,256.59 in legal costs in this case, totaling $32,161.09.

115) On July 17, 2015, Arctic filed its brief addressing Dr. Flanum's deposition testimony. Arctic suggests the "bottom line" is whether Employee's January 24, 2014 injury was "the substantial cause" of "his condition and need for surgery." Arctic pointed to Dr. Flanum's testimony concerning the cause of his underlying lumbar spine conditions. Arctic contends Dr. Flanum's testimony is internally inconsistent with his reports. It contends Dr. Flanum's opinion should be given minimal weight. Arctic further contended the board should rely upon a Social Security administrative law judge's findings that Employee's complaints were not completely credible. The Social Security judge also discounted OPA's opinions based on the judge's perceived lack of credibility in Employee's reported symptoms to his providers. (Employer Arctic Terra's Closing Brief, July 17, 2015).

116) On July 17, 2015, Arctic's attorney filed a supplemental affidavit of attorney's fees and costs incurred defending Employee's claim from June 10, 2015 through July 17, 2015. Shareholder attorney time was billed at $230 per hour; associate attorney time was billed at $185 per hour and paralegals were billed at $125 per hour. Total attorney's fees for this time period were $19,767. Costs incurred from June 10, 2015 through July 17, 2015 were $1,624.76. Total fees and costs requested for this time totaled $21,391.76. (First Supplemental Affidavit of Actual Attorney's Fees for Employer, Arctic Terra, LLC, July 17, 2015).

117) Medical providers sometimes draw their own conclusions from patients' histories, which conclusions are not always correct. (Experience, judgment and observations).

118) Employee is not well-educated, is not particularly articulate and has performed heavy duty work for most of his working life. (*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 . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .
> > . . . .
> >
> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony 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). A finding reasonable persons would find employment was a cause of the employee's disability and impose liability is, "as are all subjective determinations, the most difficult to support." However, there is also no reason to suppose Board members who so find are either irrational or arbitrary. That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." (*Id*.).

> **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 the

> need for medical treatment . . . if the disability . . . or . . . 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 . . . 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 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. . . .

Effective November 7, 2005, the legal "causation" definition changed to "contract" the Act's coverage. For injuries occurring on or after November 7, 2005, the board must evaluate the relative contribution of all causes of disability and need for medical treatment and will award benefits if employment is, in relation to all other causes, "the substantial cause" of the disability or need for medical treatment. *City of Seward v. Hanson,* AWCAC Decision No. 146 at 10 (January 21, 2011).

In *Hester v. State, Public Employees' Retirement Board,* 817 P.2d 472 (Alaska 1991) the Alaska Supreme Court suggested when a job worsens an employee's "disease" so he can no longer work, such constitutes an "aggravation," even when the job does not actually worsen the underlying "condition." (*Id*. at 475). *Hester* noted increased pain or other symptoms can be "as disabling as deterioration of the underlying disease itself." (*Id*. at 476 n. 7).

In *Ketchikan Gateway Borough v. Saling,* 604 P.2d 590 (Alaska 1979), the Alaska Supreme Court held that where employment with successive employers contributed to a worker's disability, the employer at the time of the most recent injury bearing a causal relation to the disability was solely liable for all workers' compensation benefits due. The court rejected the board's view that the injured worker was totally disabled before his last job, because there was no evidence he failed to perform his job duties satisfactorily prior to his last employment period. (*Id*. at 593). After reviewing the way other states handled situations in which employment with successive employers contributed to an injured worker's disability or need for medical care,

Saling adopted the "last injurious exposure rule," which it found was more compatible "with existing Alaska law." (*Id.* at 595). Among other things, *Saling* believed the last injurious exposure rule was fairer, quicker, more equitable, simpler and more straightforward than apportionment schemes used in other states. (*Id.* at 597). In *Peek v. SKW/Clinton*, 855 P.2d 415, 416 (Alaska 1993), the Alaska Supreme Court stated: two determinations must be made under the last injurious exposure rule: "(1) whether employment with a subsequent employer 'aggravated, accelerated, or combined with' a preexisting condition; and, if so, (2) whether the aggravation, acceleration or combination was a 'legal cause' of the disability, *i.e.*, 'a substantial factor in bringing about the harm.'" (Quoting *Saling*, 604 P.2d at 597, 598).

In *State of Alaska v. Dennis*, AWCAC Decision No. 036 at 11-13 (March 27, 2007), the commission stated the "last injurious exposure" rule provides: "The last employer: (1) whose employment aggravated, accelerated or combined with the prior injury (*i.e.*, is a cause in fact), and (2) whose employment is a legal cause of the disability is liable for the whole payment of the disability compensation." (*Id.* at 11; emphasis in original). *Dennis* explained the 2005 amendments to the Act only modified the definition of "legal cause" from "a substantial factor" to "the substantial cause." The 2005 amendments did not abrogate the "last injurious exposure" rule, which still operates to prevent apportionment of liability of injury among employers. (*Id.*).

In *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000), the Alaska Supreme Court reiterated that preexisting conditions do not disqualify a claim under the work-connection requirement if the employment injury aggravated, accelerated or combined with the pre-existing infirmity to produce the disability for which compensation is sought. The court stated so long as the work injury worsened the injured person's symptoms, the increased symptoms constitute an aggravation, "even when the job does not actually worsen the underlying condition." (*Id.* at 96).

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . .

The Alaska Supreme Court in *Phillip Weidner & Associates v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999) stated that "when the Board reviews an injured employee's claim for medical

treatment made within two years of an injury that is undisputably work-related, its review is limited to whether the treatment sought is reasonable and necessary." *Hibdon* decided treatment was reasonable and necessary when substantial evidence supports the requested treatment, because "[c]hoices between reasonable medical options and the risks entailed should be left to the patient and his or her physician." (*Id*. at 733).

> **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. . . .

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. (*Id*.; emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or his injury and the employment by adducing "some evidence" showing his claim arose out of his employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239 (Alaska 1987). For injuries occurring before November 7, 2005, the employer may rebut the presumption at the second stage with evidence showing the injury did not arise out of or in the course of the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the November 7, 2005 amendments to the Act, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 7 (March 25, 2011).

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. He must prove that in relation to other causes, employment was "the substantial cause" of the disability or need for medical treatment. *Runstrom*, AWCAC Decision No. 150 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.

Lay evidence in relatively uncomplicated cases is adequate to raise the presumption and rebut it. If an injured worker raises the presumption and the employer fails to rebut it, the board may rely on the injured workers' uncontradicted testimony that after his injury he was unable to perform all his job duties. *VECO, Inc. v. Wolfer*, 693 P.2d 858 (Alaska 1985). If an employer fails to rebut the raised presumption, the injured worker is entitled to benefits based solely on the raised but unrebutted presumption. *Williams v. State, Department of Revenue*, 938 P.2d 1065 (Alaska 1997). The presumption of compensability applies when an employer controverts continuing entitlement to temporary benefits. *Bauder v. Alaska Airlines, Inc.*, 52 P.3d 166 (Alaska 2002).

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

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). 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 23.30.135. 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. . . .

The Alaska Supreme Court in *Egemo v. Egemo Construction Co*., 998 P.2d 434, 441 (Alaska 2000), said when a claim for benefits is premature, "it should be held in abeyance until it is timely, or should be dismissed with notice that it may be refiled when it becomes timely."

> **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. . . .

In *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152 at 9 (May 11, 2011), the commission addressed the employer's claim the board erred by awarding attorney's fees under both §145(a) and (b). Though the commission vacated the board's decision on other grounds, it discussed attorney's fee awards anticipating the issue would arise again, and stated:

> Although the Supreme Court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (footnote omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (footnote omitted). Subsection (b) may apply to fee awards in controverted claims, (footnote omitted) in cases in which the employer does not controvert but otherwise resists, (footnote omitted) and in other circumstances (footnote omitted). It is undisputed that Uresco controverted Porteleki's claim.
>
> Thus, we see no reason his attorney could not seek fees under either AS 23.30.145(a) or (b) and find no error in the board's decision to award fees under the higher of (a) or (b).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating

(1) that the right of the employee to compensation is controverted;
(2) the name of the employee;
(3) the name of the employer;
(4) the date of the alleged injury or death; and
(5) the type of compensation and all grounds upon which the right to compensation is controverted.

. . . .

(d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due. When payment of temporary disability benefits is controverted solely on the grounds that another employer or another insurer of the same employer may be responsible for all or a portion of the benefits, the most recent employer or insurer who is party to the claim and who may be liable shall make the payments during the pendency of the dispute. When a final determination of liability is made, any reimbursement required, including interest at the statutory rate, and all costs and attorney fees incurred by the prevailing employer, shall be made within 14 days after the determination.

(e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.

. . . .

(o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

(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. . . .

Employers must either pay or controvert benefits without an award but may controvert any time after payments are made. AS 23.30.155(a). A controversion notice must, however, be filed and it must be filed in good faith to protect an employer from a penalty for nonpayment of benefits. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *Id.* at 358.

The employer must possess sufficient evidence in support of the controversion that, if the employee does not introduce evidence in opposition to the controversion, the board would find the employee not entitled to benefits. *Id.* The controversion and the evidence on which it is based must be examined in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion. *State of Alaska v. Ford*, AWCAC Decision No. 133 at 21 (April 9, 2010). When an employer has insufficient evidence an employee's disability is not work-related, the controversion was in bad faith, invalid and a penalty is imposed. *Harp* at 359.

The Alaska Supreme Court has broadly interpreted "controversion" when reviewing attorney's fee awards. In *Alaska Interstate v. Houston*, 586 P.2d 618, 620 (Alaska 1978) the court said:

> To require that a formal notice of controversion be filed as a prerequisite to an award of the statutory minimum attorney fees would serve no purpose that we are able to perceive. It would be a pure and simple elevation of form over substance because the nature of the hearing, the pre-hearing discovery proceedings, and the work required of the claimant's attorney are all unaffected by the existence or not of a formal notice of controversion when there is a controversion in fact.

Cases like *Alaska Interstate* gave rise to the "controversion-in-fact" concept. Board decisions have long held "for purposes of a referral to the Division of Insurance under AS 23.30.155(o), 'controversions' need not be formal or written controversions." *Tweden v. UPS*, AWCB Decision No. 03-0153 (July 3, 2003).

Bouse v. Fireman's Fund Ins. Co., 932 P.2d 222, 240-41 (Alaska 1997) under AS 23.30.155(d) made an unsuccessful insurer pay the attorney's fees and costs of a successful insurer in a case where two employers fought over liability for the claimant's benefits. *Bouse* said:

> Providence Washington argues that the statute means that the prevailing insurer is entitled to attorney's fees and costs only where no other grounds are raised for controversion of the claim. Fireman's Fund argues that the sentence containing the word 'solely' is intended to ensure the worker receives benefits to which he/she is clearly entitled regardless of which insurer ultimately pays and to limit such automatic payment to situations where it is clear that at least one employer or insurer will be liable. Fireman's Fund argues that the attorney's fees clause is included to discourage insurers from trying to join other insurers with little evidence against them in hopes of a 'nuisance action' settlement.
>
> The court agrees with the interpretation urged by Fireman's Fund. The last sentence of AS 23.30.155(d) stands independently of all other sentences. Although both of the relevant sentences deal with the last injurious exposure rule, they address different issues. The 'solely' sentence is there to guarantee benefits to injured employe[e]s. The last sentence is there to provide reimbursement, including attorney's fees, to the insurer who prevails. Accordingly, the court concludes that the Board properly ordered Providence Washington to reimburse Fireman's Fund['s] attorney's fees.
>
> **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 23.30.190. 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. . . .

Lumbar spine injuries occurring in 1987 would ordinarily be rated for PPI under the *Guides* 3rd edition. The *Guides* 3rd edition had a three-pronged approach for rating lumbar spine PPI. First, a rating was derived under Table 49 for impairment due to "specific disorders of the spine." Impairment computed from Table 49 was combined with range-of-motion impairment values based upon inclinometer measurements, and these were both combined with any impairment due to neurological deficits. Raters used the Combined Values Chart to compute the final, whole person PPI rating. *Guides* 3rd edition, at 72-74, 246. The *Guides* 6th edition has a protocol for determining an overall rating and then reducing the rating by any impairment that preexisted the current rating. *Guides* 6th edition, at 25-26. But in *Municipality of Anchorage v. Hanson*, AWCAC Decision No. 182 (June 13, 2013), the commission said:

> In summary, applying the reasonable basis standard of review, there are a number of reasons for concluding that the board erred when it used the Guides 3rd Edition for rating Hanson's 1992 injury. Among them are the lack of evidence relative to the 1992 injury, the markedly different methodologies between the 3rd and 6th editions for rating lumbar spine impairment, and the admonition to use the same edition of the Guides when apportioning PPI between injuries. On remand, the board should determine whether the 1992 injury can be rated under either the 3rd or 6th edition of the Guides, whether both injuries can be rated using the same edition of the Guides, and apportion impairment between the injuries, if, in the board's estimation, that is possible. In the process, the board should state its findings in each of these respects. (*Id*. at 12).

On remand before the board, both *Hanson* parties agreed the *Guides* 6th Edition must be used to rate both injuries in dispute. The board did not have to resolve two of the remanded questions. *Hanson v. Municipality of Anchorage*, AWCB Decision No. 13-0165 (December 20, 2013).

> **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;

The Alaska Supreme Court in *Municipality of Anchorage v. Leigh*, 823 P.2d 1241 (Alaska 1992), said the presumption in the "medical stability" definition limits the application of the employee-friendly presumption of compensability. Nevertheless, *Leigh* said an injured worker can rebut the raised medical stability presumption by having the treating physician give an opinion stating further objectively measurable improvement is expected to result from additional medical treatment. The commission in *Lowe's HIW, Inc. v. Anderson*, AWCAC Decision No. 130 (March 17, 2010), said the "medical stability" definition creates a "counter-presumption" shifting the burden to the injured worker.

8 AAC 45.063. Computation of time. . . .

(b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

8 AAC 45.142. Interest. (a) If compensation is not paid when due, interest must be paid at the rate established in . . . AS 09.30.070 (a) for an injury that occurred on or after July 1, 2000. If more than one installment of compensation is past due, interest must be paid from the date each installment of compensation was due, until paid. If compensation for a past period is paid under an order issued by the board, interest on the compensation awarded must be paid from the due date of each unpaid installment of compensation.
The (b) The employer shall pay the interest

(1) on late-paid time-loss compensation to the employee or, if deceased, to the employee's beneficiary or estate;
(2) on late-paid death benefits to the widow, widower, child or children, or other beneficiary who is entitled to the death benefits, or the employee's estate;
(3) on late-paid medical benefits to

(A) the employee or, if deceased, to the employee's beneficiary or estate, if the employee has paid the provider or the medical benefits;
(B) to an insurer, trust, organization, or government agency, if the insurer, trust, organization, or government agency has paid the provider of the medical benefits; or
(C) to the provider if the medical benefits have not been paid.

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

(b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145(a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.
. . . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed, and, if a hearing is scheduled, must be filed at least three working days before the hearing on the claim for which the services were rendered; at hearing the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the filing of the affidavit. Failure by the attorney to file the request and affidavit in accordance with this paragraph is considered a waiver of the attorney's right to recover a reasonable fee in excess of the statutory minimum fee under AS 23.30.145(a), if AS 23.30.145(a) is applicable to the claim, unless the board determines that good cause exists to excuse the failure to comply with this section.

8 AAC 45.182. Controversion. (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.

(b) If a claim is controverted on the grounds that another employer or insurer is liable, as well as on other grounds, the board will, upon request under AS 23.30.110 and 8 AAC 45.070, determine if the other grounds for controversion are supported by the law or by evidence in the controverting party's possession at the time the controversion was filed. If the law does not support the controversion or if evidence to support the controversion was not in the party's possession, the board will invalidate the controversion, and will award additional compensation under AS 23.30.155(e).

(c) If the most recent employer or insurer does not pay in accordance with AS 23.30.155(d), the board will, in its discretion, award additional compensation under AS 23.30.155(e) against the most recent employer even though the board has not determined which employer or insurer is liable. If additional compensation is awarded in accordance with this subsection, the additional compensation may not be reimbursed under AS 23.30.155(d) if the most recent employer ultimately prevails on the liability dispute.

(d) After hearing a party's claim alleging an insurer or self-insured employer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,

(1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the director for action under AS 23.30.155(o); or

. . . .

> (e) For purposes of this section, the term 'compensation due,' and for purposes of AS 23.30.155(o), the term 'compensation due under this chapter,' are terms that mean the benefits sought by the employee, including but not limited to disability, medical, and reemployment benefits, and whether paid or unpaid at the time the controversion was filed.
>
> **8 AAC 45.195. Waiver of procedures**. A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

1) Was the oral order admitting replacement hearing brief Exhibit 5 and leaving the record open for Employee to respond to Arctic's replacement exhibit correct?

The legislature wants the Alaska Workers' Compensation Act to provide quick, efficient and fair delivery of benefits to injured workers at a reasonable cost to employers and requires hearings to be fair and impartial to all parties. All parties must have an opportunity for their arguments and evidence to be "fairly considered." AS 23.30.001(1), (4). Arctic's attorney explained that a wrong Exhibit 5 got attached to Arctic's hearing brief. Such innocent mistakes are not uncommon in a busy litigation practice. Arctic substituted replacement Exhibit 5 to its hearing brief over Employee's objection. While it would be unfair to not allow Arctic to remedy its mistake, it would be equally unfair to not allow Employee an opportunity to review the new document and respond post-hearing. The oral order at hearing cured both issues and protected the parties' rights. The oral order was correct. AS 23.30.135; 8 AAC 45.195.

2) Should Employee's and McDonald's attorney's fee and cost affidavits be accepted as timely filed?

At hearing, Arctic objected to Employee's and McDonald's attorney's fee affidavits as untimely. 8 AAC 45.180(b), (d). The parties revealed they had been attempting to settle the case prior to hearing. It is not unusual for parties to attempt to save money by not preparing and filing expensive pleadings if there is a settlement possibility. Employee and McDonald's both understood the parties' agreement to include postponing all filing and serving deadlines until June 12, 2015. Further, at hearing Arctic's attorney admitted had another party requested

additional time to file their attorney's fee and cost affidavit, she would have agreed to a time extension. Arctic did not contend it was prejudiced by the "late" filings, and did not argue it had inadequate time to review the attorney's fees and cost affidavits. In this instance, it appears the parties may have misunderstood each other's intentions in regard to filing deadlines. The parties' attorney's fee and cost affidavits will be accepted as timely filed. 8 AAC 45.063. To cure any possible prejudice, if this decision finds Arctic liable for any additional benefits to Employee, Arctic will be given seven days after this decision is issued to file and serve any objections to any other parties' attorney's fee and cost affidavits, and those parties will be given an additional three days to respond. In this way, all parties' rights will be best protected and ascertained. AS 23.30.135; 8 AAC 45.195.

3) Was the oral order declining to leave the record open for Mulder's deposition correct?

Arctic claimed Mulder was not available to testify and asked for an order leaving the record open so her deposition could be obtained and filed post-hearing. Employee objected because Arctic failed to provide good cause demonstrating Mulder was not available. McDonald's objected on hearsay grounds, as Mulder was to testify about conversations she had with Dr. Flanum. But the only reason Arctic gave for Mulder's "unavailability" was the fact Mulder was not prepared for hearing as she had not had enough time to review her file. Arctic listed Mulder on its witness list. The oral order did not prevent Arctic from calling Mulder as a witness at hearing; it refused to leave the record open to allow Arctic to call her as a witness post-hearing. Mulder's situation differs from Dr. Flanum's circumstance in at least two ways: First, no party objected to Dr. Flanum's unavailability to testify at hearing, or to the request to leave the record open for his deposition; second, Dr. Flanum became unavailable because of surgery, not because he was unprepared to testify. The oral order provided Arctic with an opportunity to call Mulder as a hearing witness, and under these circumstances, was correct. AS 23.30.001(4); AS 23.30.135.

4) Are either McDonald's or Arctic liable to Employee for additional benefits?

The parties do not dispute Employee's contention that either McDonald's or Arctic is liable for Employee's current disability and need for medical treatment. Employee does not care from

where his benefits come as long as he obtains them. The real dispute here is between McDonald's and Arctic, both of whom point the liability finger at the other.

Similarly, the parties do not deny Employee had a May 15, 1987 injury with McDonald's and a January 24, 2014 injury with Arctic. McDonald's concedes Employee's 1987 injury caused disability and need for surgery to repair a herniated disc and McDonald's paid Employee's benefits without dispute. However, McDonald's contends Employee recovered completely from the 1987 injury and returned to work doing heavy labor for nearly 25 years before being injured at his Arctic job in 2014. Arctic concedes Employee had a lumbar "sprain/strain" injury in January 2014, but it contends Employee recovered anywhere from three to six months later, and any continuing disability or need for medical care arises from the 1987 McDonald's injury.

Though at least one party focuses its attention on Employee's undeniable, preexisting lumbar spine "conditions," the real questions are whether McDonald's was "a substantial factor" in Employee's need for medical treatment at some point after his January 24, 2014 Arctic injury and whether the Arctic injury remains "the substantial cause" of Employee's need for medical care and disability. McDonald's contends the "last injurious exposure rule" places full liability on Arctic for Employee's disability or need for medical care if Employee's work for Arctic continues to be the substantial cause of his current disability and need for medical treatment. Arctic contends McDonald's is both a substantial factor and the substantial cause of Employee's continuing disability and need for medical care.

The real causation dispute arises the day after April 24, 2014, the date upon which Dr. Yodlowski said Employee's "sprain/strain" resolved and Arctic was no longer liable. Continuing causation between two potentially liable employers raises a factual dispute to which the statutory presumption of compensability must be applied. AS 23.30.120; *Meek.* Employee raises the presumption against McDonald's with Dr. Levine's deposition testimony stating the McDonald's injury is both "a substantial factor" and "the substantial cause" of Employee's current disability and need for medical care. Employee raises the presumption against Arctic with his own testimony stating he had no low back pain or treatment from late 1988 until he slipped and fell on the ice while working for Arctic on January 24, 2014, and through Dr.

Flanum's testimony stating the Arctic injury is "the substantial cause" of his disability and need for medical care. *Cheeks*. McDonald's rebuts the raised presumption through Dr. Flanum's testimony stating the Arctic injury is the substantial cause of Employee's disability and need for medical care. *Tolbert*. Arctic rebuts the raised presumption through Dr. Levine's testimony stating the McDonald's injury is the substantial cause of Employee's disability and need for medical treatment. *Runstrom*. Employee must prove, by a preponderance of the evidence, that either his McDonald's injury is a substantial factor or his Arctic injury is the substantial cause of his current disability or need for medical care beginning April 25, 2014. *Saxton*.

The parties presented considerable lay and medical evidence supporting their positions. With the exception of Employee's testimony, all lay witnesses testified on Arctic's behalf. Arctic's "co-worker" lay witnesses were not particularly helpful or persuasive. Most co-workers testified Employee was a good worker and generally reliable. Kersten hired Employee to work at Arctic after Kersten opened his own business because he knew Employee, had worked with him, knew he was a good worker and Employee was a perfect fit for Kersten's business. It is not likely Kersten would have hired Employee to work at Arctic if Employee had demonstrated pain behavior related to a continuing low back problem over the many years Kersten had known him. *Rogers & Babler*. Kersten said he was aware Employee had a sore back from time to time and lost time from work because of it, but Kersten could not explain how he became aware of this fact. Though Kersten is credible, his testimony is not very persuasive. AS 23.30.122; *Smith*.

The same is true of Lommel, Shanigan and Graham. Each witness spoke highly of Employee. Each claimed to have been "aware" Employee had a "sore back" occasionally and even took time off from work or turned down extra shifts because of it. Yet none of these witnesses could explain how they came by this awareness or whether Employee simply had muscle pain like the rest of the workers did, or if was complaining of back pain similar to that he experienced after he slipped and fell while working for Arctic. None said they were aware he had any leg symptoms. Further, the lay witnesses all agreed shoveling snow or moving ice melt even for just a few hours a day was hard work and would cause even the youngest among them to have ordinary back pain. Arctic presented these witnesses in an effort to demonstrate Employee had ongoing, consistent low back complaints even before the January 24, 2014 slip and fall. Some lay

witnesses conceded they only assumed Employee took time off work or turned down extra shifts because of back pain, probably based upon their own experiences. As was the case with Kersten, though the witnesses were generally credible, their testimony was not persuasive and did not convincingly demonstrate Employee had any significant, long-standing low back complaints, or any leg complaints, before he slipped and fell down on the ice on January 24, 2014. AS 23.30.122; *Smith*. No co-worker lay witnesses suggested Employee was unable to perform his normal work duties before he fell down on the ice. Some lay witnesses contradicted other witnesses by stating they were unaware Employee was supposed to have lighter duty work based on his supposed history of "back problems."

Savina, Arctic's other lay witness, implied Employee may have had long-term, continuing low back problems from 1988 to the present by relating a conversation she had with Employee shortly after his Arctic injury. According to Savina, Employee said he wished he had been able to find McDonald's insurer, so he could have pursued more benefits. From this statement, Savina inferred Employee probably had continuing low back problems from 1988 and probably would have continued to receive treatment had he been able to find the proper insurer. But assuming Employee made this statement, it is speculation to infer what "benefits" he meant, and if he would have continued to receive treatment from 1988 until 2014. *Rogers & Babler*. Employee testified he wanted to contact McDonald's adjuster to explore vocational rehabilitation. His explanation is credible. AS 23.30.122; *Smith*. Employee's medical records show he had no difficulty going to the emergency room to obtain medical care for his various maladies whenever necessary. The fact there are minimal medical records showing Employee complained of low back symptoms from late 1988 until he slipped and fell on January 24, 2014, is more compelling evidence supporting his position and testimony and is entitled to greater weight than Savina's inferences. AS 23.30.122; *Smith*. The May 27, 2014 Alaska Regional Hospital emergency room history is an anomaly in that it states Employee's pain was "chronic" and "gradual" and he "denies an injury," though it also states he had fallen. In context, this purported history makes little sense and is given slight weight. *Id.*

Medical evidence on continuing causation is also split. Dr. Yodlowski is given less weight because her report in some instances looks like advocacy for Arctic's position. For example, Dr.

Yodlowski underlined certain statements in Employee's medical records during her medical record review, which she believed supported Arctic's position. Specifically, Dr. Yodlowski underlined radiologist Dr. Beck's comment from an x-ray report stating there was no evidence of spinal instability at L4-5. However, Dr. Beck later interpreted a lumbar spine MRI scan to show evidence of instability at L4-5. Yet Dr. Yodlowski not only failed to underline the latter statement, but affirmatively stated in her EME report that there was no evidence of lumbar spine instability. AS 23.30.122; *Smith*.

Furthermore, and perhaps most notably, Dr. Yodlowski's EME report is barely adequate to rebut the presumption of compensability on the continued causation issue raised against Arctic. Though Dr. Yodlowski answered the questions she was asked, neither the "causation" questions nor the answers address the legal causation standard. *Rogers & Babler*; AS 23.30.010(a). The medical-legal causation question is whether the work injury, in relation to other causes, is the substantial cause "of the disability . . . or need for medical treatment." The question is decidedly not whether the work injury, in relation to other causes, is the substantial cause of any underlying condition. The word "condition" does not appear anywhere in AS 23.30.010(a).

For example, Arctic's attorney asked Dr. Yodlowski, "Please identify all causes of Mr. Williams' current condition(s) as diagnosed." Not surprisingly, Dr. Yodlowski stated the "cause" of all the diagnosed conditions in Employee's lumbar spine is a combination of Employee's age and hereditary factors. The next question asked Dr. Yodlowski, "Which of the identified causes is 'the substantial cause' of Mr. Williams['] condition and need for medical treatment?" Again, this question inserts the word "condition" and significantly alters the medical-legal causation test set forth in the statute because it requires the physician to find both the substantial cause of the condition *and* the need for medical treatment. AS 23.30.010(a). While Arctic may think the error was remedied by also citing an explanatory paragraph from a commission decision, Dr. Yodlowski's answer demonstrates she focused on the substantial cause of Employee's "current condition," not the substantial cause of his disability and need for medical treatment. In fact, while Dr. Yodlowski answered the first part of this question, she failed to address the second part and never said whether or not the Arctic injury was the

substantial cause of Employee's need for medical treatment. Her answer focused completely on what caused Employee's underlying lumbar spine "conditions."

Question five similarly states an incorrect standard. Responding to it, Dr. Yodlowski said by April 24, 2014, the Arctic work injury was no longer the substantial cause of Employee's "condition" and made a point to note at "no time was the work event ever the substantial cause of those chronic long-term degenerative changes." But for her answer to question 11, where she said the Arctic injury was "no longer the substantial cause in the need for palliative treatment," and without the panel drawing all reasonable inferences from that statement, Dr. Yodlowski's report would not have rebutted the presumption of continuing disability. *Bauder*; *Ford*. For all these reasons, Dr. Yodlowski's opinions are given little weight. AS 23.30.122; *Smith*.

SIME physician Dr. Levine appears to have relied heavily upon Dr. Yodlowski's report. He too overlooked Dr. Beck's subsequent opinion there was instability in Employee's lumbar spine at L4-5. Arctic's written question asked him if Employee's McDonald's injury was a substantial factor "in causing his current low back condition, need for medical treatment or disability." Dr. Levine said the McDonald's injury was, but did not specify of which above-referenced three choices it was "the substantial cause." Improperly injecting the word "condition" into the question irreparably altered the answer, and results in a less-than-helpful response. *Rogers & Babler*. Furthermore, Dr. Levine's report failed to list all causes of the need for medical treatment. Rather, Dr. Levine recommended specific treatment, apparently misunderstanding the question. Dr. Levine said the Arctic injury aggravated, accelerated or combined with Employee's preexisting back condition to cause a temporary disability and need for treatment. Yet, Dr. Levine also attributed a three percent PPI rating to the Arctic injury.

Dr. Levine stoically maintained his position that the McDonald's injury was both a substantial factor and was also, rather than the Arctic injury, the substantial cause of Employee's current need for medical treatment. However, McDonald's attorney skillfully examined Dr. Levine until he testified, "I believe it was his preexisting condition that became symptomatic following the slip-and-fall that required the need for surgery." *DeYonge*. Notwithstanding otherwise "sticking to his guns," Dr. Levine conceded Employee did not need lumbar fusion surgery at any time

between 1988 until 2014, the January 2014 injury was what "brought on the symptoms" and a fusion was recommended "because he remained symptomatic" thereafter. At deposition, Arctic's questions to Dr. Levine focused on Employee's underlying medical condition. For example, Arctic's suggestion Dr. Levine must "look at all the causes of a potential problem of a condition, disability and need for treatment" and then select the substantial cause of his disability and need for medical treatment blurs the medical-legal standard. AS 23.30.010(a). McDonald's clarified the standard and Dr. Levine ultimately conceded, "Because he's symptomatic now, he requires the surgical treatment. If he was asymptomatic in spite of this preexisting underlying condition, he wouldn't require surgery." *DeYonge*. Thus, although Dr. Levine initially said "the magic words" to support Arctic's position, the gist of his relevant testimony supports McDonald's position and supports Employee's case. To this latter extent, Dr. Levine's testimony is given considerable weight. AS 23.30.122; *Smith*.

Lastly, Dr. Flanum strongly supports the Arctic injury as the substantial cause of Employee's disability and need for medical treatment. His opinions are clear and address the proper medical-legal causation test. He pointed to objective medical evidence showing Employee's L4-5 level had no issues between 1987 and 2014. Even acknowledging Employee had degenerative processes going on at L4-5 during the intervening years, Dr. Flanum convincingly stated a person could have an MRI study demonstrating significant degenerative problems and have no symptoms. As he astutely noted, Dr. Flanum treats "patients, not MRIs." *Hester*. He agreed with Dr. Levine that the January 24, 2014 Arctic injury was the substantial cause making Employee's degenerative back conditions at L4-5 and L5-S1 symptomatic, and is the substantial cause for the current recommended surgery. *DeYonge*. Unlike Dr. Yodlowski and Dr. Levine, Dr. Flanum identified instability at L4-5 level and explained how he and Dr. Beck discerned this by comparing standing x-rays in flexion and extension views, to supine MRI films. Dr. Flanum's opinions are more believable than contrary views from Dr. Yodlowski. His opinions will be given the most weight. AS 23.30.122; *Smith*; *Moore*.

Arctic suggests Drs. Yodlowski and Levine have much more combined experience as orthopedic surgeons than does Dr. Flanum. But Arctic has not shown why this additional experience is automatically entitled to greater weight. Dr. Flanum's, and to some extent Dr. Levine's opinions

have been given greater weight, for the reasons set forth above. Arctic also suggests Dr. Flanum should not be given too much weight as he only saw Employee two or three times. Using Arctic's logic, very little weight should be given to Drs. Yodlowski and Levine, as they both saw him only once. Similarly, Arctic faults Dr. Flanum's testimony because he did not thoroughly review Employee's medical records, as did Drs. Yodlowski and Levine, and was not privy to Dr. Levine's deposition. But Dr. Flanum noted and commented on the L4-5 instability seen by Dr. Beck on MRI. Dr. Yodlowski noted but did not comment on this finding. Dr. Levine never even noted it. This suggests Dr. Flanum did a more thorough and careful record review. Furthermore, neither Drs. Yodlowski nor Levine had the benefit of Dr. Flanum's deposition before formulating their opinions. *Rogers & Babler.*

Employee's credibility also factors into this analysis. All medical evaluators relied upon his history. If Employee's history is incorrect, this would affect his medical examiners' opinions and the weight accorded them. *Rogers & Babler*. It is likely McDonald's and Arctic searched thoroughly for Employee's past medical records. Limited records referenced by Arctic do not demonstrate Employee had any significant low back or radicular left leg pain from 1988 until he slipped and fell on January 24, 2014. One or two records suggesting Employee said he had "chronic low back pain" arising from his 1987 McDonald's injury are an aberration not repeated in abundant additional records. It would not be unusual for a medical provider, after learning a person had a back injury and subsequent surgery, to infer the person had ongoing back pain thereafter. *Rogers & Babler*. In this case, such inferences would be incorrect based on the credible medical records and lay testimony. Employee credibly stated he did not tell his medical providers he had chronic low back pain after 1988 and before the January 24, 2014 injury.

Savina's account of Employee's search for McDonald's adjuster at some previous time does not specify a particular time span or suggest the degree to which Employee may have believed he needed additional medical care. Employee's vocational rehabilitation explanation for this comment was credible. AS 23.30.122; *Smith.* Most importantly, Savina's inferences from Employee's statement are not supported by Employee's actual medical records which show no significant low back pain or treatment in the intervening years. Employee's deposition testimony about pre-injury narcotic use was inconsistent. However, he credibly explained he took narcotics

on some occasions, but not for back pain. He may have been, as he stated, confused about the question and may have thought Arctic's lawyer had meant if he had ever been prescribed or taken narcotics for his back. *Roger & Babler*.

The preponderance of credible lay and medical evidence demonstrates Employee had asymptomatic low back conditions prior to his January 24, 2014 Arctic injury. The Arctic injury aggravated, accelerated and combined with the preexisting condition to cause ongoing symptoms and is the substantial cause of Employee's disability thereafter and is the substantial cause of Employee's quiescent condition now requiring medical care. *Peek*; *Hanson*; *DeYonge*. McDonald's contribution to Employee's disability and need for medical treatment after his January 24, 2014 Arctic injury is immaterial as the "last injurious exposure rule" is still alive and well and imposes full liability on the last employer whose employment is the substantial cause of disability or need for treatment. *Saling*; *Dennis*. Arctic will be held liable for Employee's continuing benefits under the Act following his January 24, 2014 Arctic injury.

5) Is Employee entitled to additional TTD from either McDonald's or Arctic?

This decision imposes liability for any ongoing benefits to which Employee might be entitled on Arctic. Employee must show he was disabled and not medically stable to be entitled to additional TTD. AS 23.30.185. Arctic conceded Employee suffered a "sprain/strain" under its employ and eventually paid him TTD benefits from January 25, 2014 through August 26, 2014. There is a presumption he remains disabled. *Bauder*. The presumption of compensability will be applied. AS 23.30.120; *Meek*. Employee raises the presumption through his own testimony, and through emergency room records restricting him to lifting no more than 10 pounds and Drs. Levine's and Flanum's opinions stating Employee needs a lumbar fusion. *Cheeks*. Dr. Yodlowski's report stating the Arctic injury is no longer the substantial cause of the need for treatment, effective April 24, 2014, rebuts the presumption albeit barely. *Runstrom*. Employee must prove he is entitled to continuing TTD by a preponderance of the evidence. *Saxton*.

The first question is whether Employee remains "disabled." Employee has limited education and has performed heavy manual labor for most his adult life. Even his work with Arctic was as a working supervisor. Employee's emergency room and attending physicians restricted him from

work following the January 24, 2014 injury and said he was limited to anywhere from sedentary to light duty. It is undisputed Arctic eventually paid him TTD benefits from January 25, 2014 through August 26, 2014, though Arctic suggests it overpaid him after April 24, 2014. Employee convincingly testified he cannot physically perform his normal duties because his back and leg pain restrict him. AS 23.30.122; *Smith*. This is consistent with Employee's medical records. There is no evidence Arctic offered Employee lighter duty work or that he has worked since his Arctic injury. He needs surgery to treat his symptoms. Employee's uncontradicted lay testimony that he can no longer perform his normal work duties is sufficient to demonstrate his Arctic injury incapacitates him from earning the wages which he was receiving at the time of his injury. *Wolfer*; *Williams*. Therefore, Employee remains disabled. AS 23.30.395(16).

The next question is whether Employee is medically stable. Several medical providers, including Drs. Levine and Flanum state Employee needs lumbar fusion surgery. Dr. Yodlowski's opinion stating Employee was medically stable in respect to a "sprain/strain," is not helpful as the recommended surgical procedure does not address that condition. Therefore, it is given lesser weight. AS 23.30.122; *Smith*; *Moore*.

Dr. Yodlowski's medical stability opinion is adequate to raise the "counter presumption" that Employee is medically stable. *Leigh*. Employee rebuts the "counter presumption" with clear and convincing evidence. Dr. Flanum opined Employee is expected to improve following lumbar fusion surgery. Dr. Flanum's opinion regarding improvement is clear and convincing evidence he is not medically stable as lumbar surgery is expected to improve his situation. AS 23.30.395(28); *Anderson*. Therefore, credible medical and lay evidence demonstrates Employee remains disabled and is not yet reached medical stability. Therefore, Arctic has not overpaid Employee and he is entitled to additional TTD. Arctic will be directed to begin paying Employee TTD effective August 27, 2014, the day after it was terminated, and continuing until Employee is either no longer disabled or is medically stable.

6) Are Employee's PPI claims against McDonald's and Arctic ripe?

Employee claims PPI from McDonald's, Arctic or both. AS 23.30.190. McDonald's conceded Employee had never been rated for PPI following the 1987 injury. It agreed to authorize a PPI rating at a specific facility done according to the *Guides* edition in effect at the time Employee was medically stable from his 1987 injury. While McDonald's offer is commendable, the passage of time creates some difficulties. The *Guides* 3rd edition would be used to rate Employee's permanent impairment following his surgery for the 1987 injury. The 3rd edition used a three-pronged approach. A rating was given pursuant to "impairments due to specific disorders of the spine," as set forth in Table 49. This rating was combined with impairment caused by loss-of-range-of-motion and by any neurological deficits. While the Table 49 impairment is fairly easy to discern, it may prove difficult to obtain accurate impairments for motion loss or neurological deficits. *Rogers & Babler*. Therefore, at this point it is unclear whether Employee's 1987 McDonald's injury can be rated using the 3rd or 6th edition. *Hanson*.

By contrast, Employee will be entitled to a PPI rating once he recovers from his lumbar fusion surgery, assuming he proceeds with it, and becomes medically stable again. Current PPI ratings are done according to the *Guides* 6th edition. The 6th edition has a protocol for determining an overall PPI rating and then reducing the rating by any impairment that preexisted the current ratable injury. Given the circumstances, Employee's PPI claims are not a ripe and will be held in abeyance. *Egemo*. However, Arctic will be ordered to pay for a PPI rating for Employee pursuant to the *Guides* 6th edition protocol. If lumbar fusion surgery is no longer indicated, or if indicated and Employee chooses not to have it, Employee's PPI rating will be performed immediately if he is still medically stable. If lumbar fusion or some other surgical procedure is still indicated and Employee chooses to have it performed, Arctic will pay for his PPI rating after Employee is deemed medically stable. If, after Employee becomes medically stable following surgery and after Employee obtains a PPI rating for his Arctic injury, the Arctic PPI is reduced by PPI attributable to McDonald's, Employee and McDonald's can bring the McDonald's PPI issue back for a hearing if they cannot otherwise agree. *Egemo*.

7) Is Employee entitled to medical costs and related transportation expenses from either McDonald's or Arctic?

This decision has found Arctic liable for Employee's continuing benefits. At least two physicians, Drs. Levine and Flanum have recommended lumbar surgery to address Employee's work injury. This decision will not second-guess Employee's physicians. The recommended surgery is both reasonable and necessary. Both surgical recommendations were made within two years of Employee's Arctic injury, as was Employee's explicit request for surgery made at hearing. *Hibdon*. Consequently, assuming the surgery is still indicated and Employee wants it, Arctic will be ordered to pay for this procedure and related transportation expenses. AS 23.30.095(a). Employee said he had no unpaid, outstanding medical bills, though one bill may have gone to collections. Arctic will be directed to pay all work-related medical bills. AS 23.30.095(a).

8) Should either McDonald's or Arctic be assessed with a penalty or with a finding they made an unfair or frivolous controversion?

This decision has determined McDonald's, with the possible exception of PPI to be rated in the future, has no liability to Employee for any additional benefits under the Act. There were no benefits payable from McDonald's without an award. AS 23.30.155(e). Therefore, no penalties will be assessed against McDonald's. Furthermore, the statute allowing for a referral to the division of insurance in the event an employer frivolously or unfairly controverted compensation due was not in effect when Employee injured himself at McDonald's on May 15, 1987. Therefore, this statute will not be applied retroactively and there will be no finding of a frivolous or unfair controversion against McDonald's. AS 23.30.155(o).

By contrast, Arctic's EME physician Dr. Yodlowski gave Employee a one percent PPI rating for his "sprain/strain" injury he incurred on January 24, 2014. Yet, Arctic inexplicably then controverted "all benefits," necessarily including PPI, based upon Dr. Yodlowski's report. Arctic did not explain why it should not have paid Employee PPI benefits based upon the rating given him by Arctic's EME physician, within 14 days of receiving Dr. Yodlowski's rating. AS 23.30.155(a), (b). Controversions may be filed any time after payments are made. AS 23.30.155(a). But a controversion must be timely filed, and filed in good faith, to avoid a

penalty. *Harp*. Had this case gone to hearing solely on Employee's PPI claim, and had the only evidence presented been Dr. Yodlowski's report viewed in isolation, Employee would have been entitled to $1,770 in PPI benefits. *Ford*. These benefits would have been payable without an award. AS 23.30.155(a). Therefore, without assessing credibility, and drawing all reasonable inferences in favor of the controversion, Arctic's PPI controversion lacked sufficient evidence to support it and was invalid. *Ford*. Arctic will be ordered to pay Employee a 25 percent penalty on Dr. Yodlowski's one percent PPI rating ($1,770 x 25 percent = $442.50). AS 23.30.155(e).

Furthermore, given Arctic provided no argument or evidence suggesting it should not have paid Employee the PPI rating assessed by its own physician, its controversion of PPI benefits was frivolous and unfair. This decision will ask the director to promptly notify the division of insurance that Arctic has frivolously and unfairly controverted PPI benefits due under this chapter. AS 23.30.155(o). The fact this decision holds Employee's PPI claim in abeyance is immaterial. The Act is a self-executing statutory scheme, Arctic's EME physician provided a PPI rating for the Arctic injury and Arctic inexplicably controverted the rating and never paid it.

Further, Arctic through Savina had medical evidence showing the Arctic injury was the substantial cause of Employee's disability from at least the admitted "sprain/strain" injury as of January 25, 2014, when he went to the emergency room. Savina first spoke to Employee on January 31, 2014, and began he claim investigation. Subsequent medical providers said he was limited to desk or sedentary work and none released him to full duty. For example, on June 26, 2014, Dr. Flanum told Sabina Employee was limited to light duty and specifically stated his slip and fall with Arctic was the substantial cause of his disability and need for treatment. Savina said Dr. Flanum's office called her on July 14, 2014 to check on the status of Employee's case and Savina told Dr. Flanum's office it was "open and billable." Arctic had collected adequate medical records to send Employee to an EME by July 29, 2014.

Given the above, before Dr. Yodlowski's EME report there was no medical evidence stating his Arctic fall was the not the substantial cause of his disability and need for treatment. If a hearing on Employee's TTD had been held before Dr. Yodlowski completed her EME report, and had the only evidence adduced been Employee's medical records, he would have been entitled to

TTD and medical care from Arctic based on his records. *Harp*. Yet Arctic paid Employee nothing until September 2, 2014, when it paid him TTD from January 25, 2014 through August 26, 2014, and never controverted his right to TTD until September 3, 2014. Kersten and Lommel knew about the injury and Employee's disability by January 25, 2014, when he went to the emergency room and was restricted from work. Given the pre-EME medical evidence, Arctic had to either pay him TTD with fourteen days of January 24, 2012, or controvert Employee's right to TTD on or before the 21st day after it had knowledge of his injury. AS 23.30.155(a), (b), (d). Arctic neither paid nor controverted until September 2, 2014.

Dr. Yodlowski did not complete her EME report until August 29, 2014. Savina could not recall when she received Dr. Yodlowski's report, and there is no evidence it was faxed to anyone, so it must have been received after August 29, 2014. Thus, Arctic had no evidence to support not paying Employee TTD until sometime after August 29, 2014. Therefore, Arctic will be directed to pay Employee a 25 percent penalty on the TTD it has already paid him from January 25, 2014 through August 26, 2014 ($13,892.88 x 25 percent = $3,473.22). AS 23.30.155(e).

Furthermore, since Arctic provided no argument or evidence suggesting it should not have paid Employee TTD, and never controverted TTD within 21 days of his injury, its failure to pay TTD amounting to a controversion-in-fact was frivolous and unfair. This decision will ask the director to promptly notify the division of insurance that Arctic has frivolously and unfairly controverted TTD benefits due under this chapter. AS 23.30.155(o); *Alaska Interstate*; *Tweden*.

Employee has not convincingly demonstrated Dr. Flanum's office ever specifically called to request surgical authorization. Dr. Flanum credibly stated to his knowledge Employee never gave him the go-ahead to proceed with surgery and was still thinking about it effective the last time Dr. Flanum saw him. AS 23.30.120; *Smith.* Therefore, no penalty will be assessed against Arctic for failure to pre-authorize lumbar surgery.

9) Is Employee entitled to an interest award from either McDonald's or Arctic?

Interest is mandatory. There is no evidence Arctic paid Employee interest on TTD it paid on September 2, 2014. Arctic will be ordered to pay statutory interest to Employee on past paid TTD and on past-due TTD awarded in this decision. AS 23.30.155(p); 8 AAC 45.182.

10) Is any party entitled to an award of attorney's fees and costs?

The parties agreed either McDonald's or Arctic would be liable for any benefits to which Employee may be entitled. Thus, it has been clear all along that at least one employer would be liable. Employee has successfully prosecuted his claim against Arctic. Employee's attorney has provided an affidavit of attorney's fees and costs. Employee faced stiff opposition from primarily from Arctic, which controverted his claim. Employee's lawyer has successfully obtained significant benefits including an order requiring Arctic to pay for lumbar surgery, PPI and considerable disability benefits. The benefits awarded to Employee are substantial. Employee's attorney will be awarded attorney fees under AS 23.30.145(a). *Porteleki*. However, Arctic will be given seven days from this decision's date to file and serve objections to Employee's attorney's fee and cost affidavit. Employee will be given an additional three days to respond to Arctic's objections.

McDonald's also seeks attorney's fees and costs from Arctic as a prevailing employer. AS 23.30.145(d). McDonald's successfully defended against Employee's claim while at the same time defending against Arctic's defense that McDonald's rather than Arctic is liable for Employee's ongoing benefits. In last injurious exposure cases, the prevailing employer is entitled to reimbursement, including attorney's fees and costs from the losing employer. *Bouse*. Therefore, Arctic will be directed to reimburse McDonald's for attorney's fees and costs incurred in defending against this claim. Arctic will be given seven days from this decision's date to file and serve objections to McDonald's attorney's fee and cost affidavit. McDonald's will be given an additional three days to respond to Arctic's objections.

CONCLUSIONS OF LAW

1) The oral order admitting replacement hearing brief Exhibit 5 and leaving the record open for Employee to respond to Arctic's replacement exhibit was correct.

2) Employee's and McDonald's attorney's fee and cost affidavits will be accepted as timely filed.

3) The oral order declining to leave the record open for Mulder's deposition was correct.

4) Arctic is liable to Employee for benefits beginning January 24, 2014.

5) Employee is entitled to additional TTD from Arctic.

6) Employee's PPI claims against McDonald's and Arctic are not ripe.

7) Employee is entitled to medical costs and related transportation expenses from Arctic.

8) Arctic will be assessed with a penalty and with a finding it made an unfair and frivolous controversion.

9) Employee is entitled to an interest award from Arctic.

10) Employee and McDonald's are entitled to an award of attorney's fees and costs from Arctic.

ORDER

1) Employee's October 8, 2014 claim against Arctic is granted.

2) The oral orders entered at the June 16, 2015 hearing are affirmed as correct.

3) Arctic is liable to Employee for benefits beginning January 24, 2014, and continuing, in conformance with this decision.

4) Arctic is ordered to pay Employee TTD benefits beginning August 27, 2014, and continuing until Employee is either no longer disabled or is medically stable.

5) Arctic is ordered to pay Employee's medical benefits and related transportation expenses in accordance with this decision.

6) Arctic is ordered to pay Employee $442.50 as a penalty on Dr. Yodlowski's PPI rating under AS 23.30.155(e).

7) Arctic is ordered to pay Employee $3,473.22 as a penalty on TTD previously paid under AS 23.30.155(e).

8) The director is asked to notify the division of insurance that Arctic's controversion of Dr. Yodlowski's one percent PPI rating, and its failure to either timely pay or controvert Employee's right to TTD, were frivolous and unfair.

9) Arctic will pay Employee's and McDonald's attorney's fees in accordance with this decision.

10) Arctic has seven days from this decision's date to file and serve objections to any other parties' attorney's fee and cost affidavits. Employee and McDonald's have an additional three days thereafter to respond to Arctic's objections.

11) Jurisdiction is reserved over attorney's fees and costs to resolve any disputes.

12) Arctic is ordered to pay for a PPI rating performed by Employee's physician in accordance with this decision

Dated in Anchorage, Alaska on September 17, 2015.

ALASKA WORKERS' COMPENSATION BOARD

_____

William Soule, Designated Chair

_____

Amy Steele, Member

_____

Patricia Vollendorf, 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 Daryl Williams, employee / claimant v. McDonald's Corp., employer & ACE Insurance Company, insurer; & Arctic Terra LLC, employer; Umialik Insurance Company, insurer / defendants; Case Nos. 198708515; 201403502; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 17, 2015.

_____

Vera James, Office Assistant