ALASKA WORKERS' COMPENSATION BOARD

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

CAMERIC BRADY, Employee, Claimant, v. AFS CONSTRUCTION, Employer, and ALASKA NATIONAL INSURANCE, Insurer, Defendants.	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201508404 AWCB Decision No. 15-0148 Filed with AWCB Anchorage, Alaska on November 12, 2015

Preliminary issues related to Cameric Brady's (Employee) May 27, 2015 claim were heard on October 21, 2015, in Anchorage, Alaska, a date selected on July 30, 2015. Attorney Tasha Porcello appeared and represented Employee, who appeared and testified. Attorney Vicki Paddock appeared and represented AFS Construction and Alaska National Insurance (Employer). Additional witnesses included Marshall West, Brenda Murdock, Mark Brady and Ambur Obermann, all of whom testified for Employee, and Andrew Stone and Estelle Tokash, both of whom testified for Employer. The record closed at the hearing's conclusion on October 21, 2015. At hearing, Employee objected to Employer's over-length brief and to two pages attached as part of Employer's hearing brief Exhibit "A." An oral order gave Employee four additional minutes for his opening statement or closing arguments to account for the two additional pages in Employer's brief. No action was taken at hearing on Employee's second

preliminary objection. This decision examines the oral order giving Employee more time to argue, and decides the other preliminary issues presented on their merits.

ISSUES

As a preliminary matter, Employee contended Employer's hearing brief exceeded the allowable page length. He contended he should be given some accommodation to prevent Employer from having an unfair advantage arguing its position at hearing.

Employer conceded its brief was too long. Employer contended the brief length regulation should be relaxed, or alternately, Employee could have a reasonable additional time for argument.

1) **Was the oral order giving Employee additional argument time correct?**

Employee contended it requested payroll discovery from Employer and received very little response. He contends Employer's hearing brief nonetheless has attached time and payroll information he had never seen before. Employee contended two pages should be stricken.

Employer contended daily payroll records had been destroyed. It contended Stone would refer to the subject documents during his hearing testimony so they should be admitted.

2) **Should Employer's time and payroll exhibit attached to its hearing brief be considered?**

Employee contends an injury, which he says occurred in June 2014, arose out of and in the course of his employment. He contends he lied to initial medical providers about the work injury because he was naïve, had been fired by Employer, had no other job, had no money and because his mother told him the emergency room would not see him absent a recent emergency.

Employer contends Employee's own report shows if he suffered an injury, it happened when he fell off a ladder at home after Employer had terminated his employment for cause. Employer

contends the injury did not arise out of or in the course of his employment with Employer and Employee's claim should be denied.

3) Did Employee suffer a compensable injury while working for Employer?

Employee contends he gave actual notice of a low back injury at work to Stone immediately following the event, and Stone did nothing to address his injury. He contends Employer subsequently failed to give written notice of the injury to the division and to Employer's insurer.

Employer contends, even assuming Employee was injured on the job as he states, Employee failed to give timely verbal or written notice as required by law, Employer was prejudiced by the lack of notice and his claim should, therefore, be barred.

4) Is Employee's claim barred for failure to give written notice?

FINDINGS OF FACT

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

1) On or about June 16, 2014, Employee, while working for Stone, was at work trying to move a heavy sign made from logs when the sign started to tip over. Employee tried to steady the sign and while so doing, twisted and injured his back. Within minutes, Employee spoke to Stone and told him he had just injured his back moving the sign. Stone gave Employee additional work but did not tell him how to formally report his injury and did not timely complete and file an injury report with the board or with Stone's workers' compensation carrier. (Employee).

2) On the injury date, Stone, as the employer, knew Employer's name, address and business and also knew Employee's name, address and occupation. Through Employee's verbal report, Stone also had actual knowledge of the year, month, day and hour Employee claimed to have been injured moving the sign and knew the cause. (Experience, judgment and inferences drawn for the above).

3) On June 22, 2014, Stone called Employee, told him he was a liability to the company and fired him. (Employee).

4) On July 4, 2014, Employee reported to the Alaska Regional Hospital emergency room complaining of lumbar pain. Employee said he had fallen approximately 12 feet from a ladder at home the day prior. The emergency room obtained several lumbar spine x-rays, which showed no

fractures or malalignment, and the physician provided Flexeril and Percocet and discharged Employee to home. (Alaska Regional Hospital reports, July 4, 2014).

5) On July 31, 2014, Employee returned to the emergency room for treatment. Employee reiterated that on July 3, 2014, he had fallen approximately 12 feet from a ladder at home. The emergency room referred Employee to Alaska Spine Institute (ASI) for follow-up. (Alaska Regional Hospital report, July 31, 2014).

6) On December 10, 2014, Employee returned to the emergency room to treat a lumbar sprain he said occurred when he fell from a ladder in June 2014. A magnetic resonance imaging (MRI) scan demonstrated an annular tear at L4-5, with an associated small central disc protrusion superimposed on a small broad-based disc bulge. Employee reported having followed up with ASI but did not have the required $1,000. Emergency room staff advised Employee he could be seen at neighborhood clinics, which provided reduced "sliding-scale" medical care to indigent people. (Alaska Regional Hospital report, December 11, 2014).

7) On May 27, 2015, Employee filed a claim for benefits. Describing how the injury happened, Employee stated, "lifting logs on a jobsite." As for his reason for filing the claim, Employee stated:

> I sastained [sic] a back injury while working on a job site [sic] the pain has been severe and long-lasting. It has made finding and maintaining employment difficult due to my limited physical capabilities now. I was unaware of being able to file a workmans [sic] comp claim at the time of injury. I told the owner of my injury when it happened, and continued to work the rest of the week. He called me at home on a Sunday, a day off work, and fired me without stating a reason. (Workers' Compensation Claim, May 27, 2015).

Employee's claim states he had severe back pain and discoloration. He sought unspecified temporary disability, permanent partial impairment, and medical costs. The claim lists, in different color hand-written ink, the injury date as "6/25/14." (*Id*.). Filed concurrently with Employee's claim was a medical summary to which was attached Alaska Regional Hospital emergency room notes from visits he had on July 4, 2014, July 31, 2014 and December 10, 2014. (*Id*.; Medical Summary, May 27, 2015).

8) On August 5, 2015, Employee saw Susan Klimow, M.D., for his low back pain. Employee told Dr. Klimow his condition was "injury related," and resulted from "bending (picked up a heavy log) and lifting." (Klimow report, August 5, 2015).

9) On September 21, 2015, Employee saw Edward Barrington, D.C., for his low back injury. In his history to Dr. Barrington, Employee stated:

> In June of 2014, Cam was working at a construction site as a laborer and heavy equipment operator and, on a particular day was given the job of moving a sign post which was created from the use of several logs attached together. He was dragging the logs, bending over when the slope of the ground pulled the logs to the side and he was unable to prevent them from sliding, twisting his back. He let go immediately because of pain in his lower back. He was seen at ED, but gave the cause of his pain as a fall from a ladder, instead of the work related incident. He says he didn't fall, but made up the story at ED, believing he would be seen faster. . . . (Barrington chart note, September 21, 2015).

10) On September 23, 2015, Employee said in deposition he had been with his girlfriend Obermann for about 10 years. Nonetheless, when asked how to spell her last name, Employee misspelled Obermann. (Deposition of Cameric Brady, September 23, 2015, at 8). Employee completed the 10th grade, did not graduate from high school and does not have a government equivalency diploma (GED). (*Id*. at 11). Employee had worked for Stone in January and February 2014. During this time, he rode around with Stone in a company vehicle and did shoveling, plowing and laborer's work. (*Id*. at 31). Other than a tax form, Employee completed no paperwork for Stone. (*Id*.).

11) Stone told Employee he would be working in the winter at first, "just basically proving myself that I would be there every day and making sure that I was a reliable worker and I knew what I was doing, that I wasn't basically incompetent." Once Employee proved he was reliable, Stone said he was going to put Employee "on the books" and train him to be an operator using a "roller." Stone paid Employee $20 per hour "under the table," and continued to pay him the same rate when Stone later hired him as a permanent, fulltime employee. (*Id*. at 32-33).

12) Employee's last day working for Employer was Sunday, June 22, 2014. On that date, Stone called Employee while Employee was at his mother's home visiting, and fired him. (*Id*.).

13) Employee said he walked into work the day after his back injury, and Stone saw him holding his back. Stone "yelled" at Employee and told him to turn around and go back and said he would not work with Employee. Employee called Obermann to come take him home. (*Id*. at 35).

14) Employee recalled an incident when he left his wallet on Employer's equipment at a jobsite at Big Lake, Alaska. Fearing his wallet might be stolen Employee called Stone and asked him to

retrieve it. During this teleconference, Stone "yelled" at Employee. The wallet incident happened anywhere from a week to one or two days prior to Employee's work injury. (*Id*. at 38-39).

15) The work injury with Employer happened on June 16 or June 17, 2014. (*Id*. at 61). There were no witnesses. Employee was dragging a sign constructed from logs down a pavement road. He went off the pavement onto a dirt slope and the sign started to topple. Employee tried to stop it from falling and it "ripped" him towards the ground. Employee let the sign go when he felt burning pain in his back. Employee estimated the sign weighed perhaps 300-400 pounds. He moved the sign because Stone told him to. (*Id*. at 63-64). Following the injury, and after having knelt on the ground for a minute or two:

> Then I stood up, walked the couple feet up to the top of the pavement, walked over to where Andrew [Stone] was talking to the older man. . . . When I walked up to him, him and Andrew [Stone] were splitting. And Andrew [Stone] walked towards the car, and I walked straight to Andrew [Stone] and proceeded to tell him that my back was injured and that I was in pain.
>
> And a semi-truck was coming down the road as I was telling him this. So that took more precedence because, in his mind, it was more important. . . .
> . . . .
>
> So he, as the truck was pulling in, he was asking me if I thought I could use the hose and spray down the gravel as it's being dumped. . . . (*Id*. at 65-66).

Employee told Stone he was not sure if he could use the hose as his back hurt. Nevertheless, Stone gave Employee the hose and told him to spray down the gravel, while Stone ran over to the semi-truck to give the driver instructions. Employee initially did not turn on the hose and Stone got upset that he had not sprayed the gravel. Employee told Stone his back was extremely painful and Stone told him to "at least try." Employee turned the hose on and the water pressure made his back hurt more. Nonetheless, Employee sprayed the gravel, put the hose down and told Stone he was not sure he could do anything else because his back was really hurting. Stone gave Employee "little odds and ends" to do but basically ignored him for the rest of the day. As described above, Stone sent Employee home the next day, but Employee worked the second day. Employee did not think the crew worked on Friday, June 20, 2014. (*Id*. at 66-67).

16) Employee did not complete any work-injury paperwork with Stone. Stone never told him how to report injuries on the job. The day it happened, Employee also told co-worker Ty Clapper about his work injury and how it had occurred. (*Id*. at 68).

17) Employee first sought medical care for his work injury on July 4, 2014, at Alaska Regional Hospital. Employee said he lied to emergency room physicians and told them, "I fell off of a ladder." Employee said he lied, "Because I was scared and in pain, and I had no job and no money. And I was scared that they -- that I wasn't going to get treatment." Employee thought emergency rooms would not see him if it "wasn't an emergency" and he was not "bleeding." Employee has never fallen from a ladder. (*Id*. at 69, 86).

18) Employee did not file a timely, written injury report because he did not know anything about workers' compensation. Though he had two prior, minor work injuries, a thigh injury with a grinder when Employee worked for an employer under the table, and one involving his thumb while he worked for Lowe's, Employee knew nothing about workers' compensation insurance. Employee was about 18 years old when the prior injuries occurred. His under-the-table-employer told him if he needed to get his thigh stitched up, the employer would pay for it. Employee thought his other former employer, Lowe's, paid for the entire thumb injury. Employee personally completed no paperwork for either prior work injury. (*Id*. at 88).

19) Employee first learned about workers' compensation insurance while working at Big Ray's. A customer came in to buy boots and noticed Employee was having difficulty bending over. The customer asked Employee what was wrong and Employee explained his situation. Coincidentally, the customer had recently gone through a workers' compensation claim himself and returned the next day with helpful paperwork. The customer told Employee he needed to go to the board's offices and find out what to do about his case. "That's how I got started." (*Id*. at 87-89).

20) On October 5, 2015, Employer filed, among other things, pay stubs and other payroll information regarding Employee. (Affidavit of Service, October 2, 2015).

21) On October 9, 2015, Employee objected to two documents attached to Employer's October 5, 2015 service affidavit. He objected to the hand-written "2014 Plows Dates Jan/Feb" because it was a "summary" not accompanied by business records relevant to the summary. Employee also objected to the "AFS Services-Employee's Time or Wage Sheet for Ending Date 6/21/14" on grounds it was irrelevant, as Employee had admitted at deposition he was not injured on June 25, 2014, and was not certain of the exact injury date. Employee also argued the original timecards showing hours Employee worked were the "best evidence." (Objection to Evidence Filed by AFS & Alaska National Insurance Request for Partial Exclusion, October 9, 2015).

22) At hearing on October 21, 2015, Employee objected to Employer's hearing brief being at least two pages too long. He requested more time to argue. (Employee's hearing arguments).

23) Employer's attorney admitted the brief was over length and said she had been out of town and unable to finalize her brief. This resulted in Employer's brief inadvertently being about two pages over-length. She requested a brief-length modification or waiver. (Employer's hearing arguments).

24) The panel issued an oral order giving Employee four extra minutes to argue. (Record).

25) West has known Employee since second grade and they are close friends. Prior to June 2014, Employee and West would ride dirt bikes, disc golf, hike, snowboard and run dogs together. He never knew Employee to "give in to pain," and Employee was always "working doing something." West knows Employee injured his back in June 2014, because Employee told him and they could no longer do their usual activities together. Employee told West he was at work moving something very heavy when it pulled him down and he "tweaked" his back. Employee now frequently uses a cane. West does not believe Employee would use a cane or other prop to gain sympathy. In West's view, "Cameric doesn't fake anything" and would never lie about anything. Employee never complained to West before June 2014 of any broken bones or back pain or injuries, and the two would frequently go to the gym where Employee appeared to be in very good health. West has never been on workers' compensation, is not familiar with it, but knows it exists. Employee knew in June 2014 that he hurt his back at work in June 2014. (West).

26) West is credible. (Experience, judgment and observations).

27) Murdock is employed by Big Ray's. Employee provided customer service in footwear from approximately December 2014 to September 9, 2015, and Murdock was his manager. Employee did not use a cane when Murdock hired him, but at some point began using one. Eventually, Employee was no longer able to perform his duties at Big Ray's and Murdock modified his position. Employee was no longer required to lift heavy boxes. Murdock modified Employee's job duties because he was in pain. Employee would willingly accept overtime duties. Murdock noticed Employee had difficulty at times "expressing himself." Employee also missed work "a lot." To Murdock's knowledge, Employee was always truthful and never lied to her about anything. Murdock eventually terminated Employee because he could not continue his modified work duties due to absences caused by pain. He was not eligible for rehire because Murdock could not rely upon Employee to be physically able to work his assigned schedule. Employee told Murdock, he "had a back injury," which accounted for his pain. Employee told Murdock he was injured on a

previous job but did not provide details. He told Murdock about his prior injury with Employer within 30 days of being hired by Murdock. Murdock has workers' compensation notices posted on her job site, but never discussed workers' compensation issues with Employee, as he was never injured while working for her. (Murdock).

28) Murdock is credible. (Experience, judgment and observations).

29) At hearing, Employee's testimony was generally consistent with his deposition, and provided additional details. Employee had various injuries as a child, including broken bones. For example, he broke his wrist on several occasions but kept riding his bike and doing tricks even while wearing a cast. His injuries did not keep Employee from being active. Employee was "held back" in the first grade, had an "individual education plan" (IEP), was involved in "special education" classes and eventually made it to the 10th grade. Notwithstanding these special programs, Employee did not receive good grades in anything except for gym classes. Before working for Employer, Employee held primarily construction jobs. (Employee).

30) Prior to May 2015, Employee did not know anything about workers' compensation, did not know it existed, and was unaware an employer would pay disability and medical benefits if Employee was injured on the job. One day while working at Big Ray's, Employee helped a customer who was having difficulty trying on new boots. Employee was also having difficulty bending over and the customer noticed him grimacing. The customer asked Employee what was going on, and Employee explained he had been injured on the job and his back hurt. The customer asked Employee if he had been through the workers' compensation process, and Employee said he was unfamiliar with workers' compensation. The customer explained the workers' compensation process to Employee, who that evening went home and told his fiancée Obermann. The next day, the same customer came back and gave Employee some workers' compensation information. Employee reviewed the paperwork and the next day went to the division's Anchorage office to talk to a workers' compensation technician. (*Id.*).

31) Employee's fiancée Obermann works at a café. Prior to meeting Stone, Employee asked Obermann to speak to café customers to see if anybody needed help, as Employee was looking for a job. Obermann obtained Stone's business card and Employee called him. Employee and Stone met at the café and discussed employment. Stone offered Employee a job shoveling and plowing snow. The first time Employee worked for Employer shoveling snow, Stone told Employee he had to prove himself to Stone to show his reliability before he could become a permanent employee.

Employee shoveled snow for Employer at Alaska Rubber, The Cattle Company Restaurant, Hair Play by Color and at some apartment buildings near International Airport Road. Employee did not keep written records. Employee worked for Employer usually around three times per week shoveling and spreading ice melt. Employer's calls for him to work depended upon how much snow fell. He was paid in cash until springtime, around breakup. After breakup, having proven he was a good worker and was competent, Employer put Employee "on the books." Beginning April 28, 2014, Employee was officially working for Employer. (*Id*.).

32) Employer does not have any actual "buildings" on its property. Employer has trailers called "Conexes." While he worked for Employer from January 2014 through June 2014, Employee would occasionally go into a Conex to obtain tools. During the time he worked for Employer, Employee never saw a form called an "Employers' Notice of Insurance." (*Id*.).

33) On the injury date, at a worksite near Big Lake, Alaska, Stone instructed Employee to move a heavy sign constructed from logs. Employee bent over to move the sign and dragged it 50-70 yards. Having another 50-70 yards to go, he decided to take a shortcut down an incline to save time. The sign dug into the dirt and started to fall over. As Employee tried to prevent the sign from falling, the sign pulled and twisted him to the ground. Employee's back immediately hurt and began burning. Employee estimates the sign weighed approximately 300 pounds. (*Id*.).

34) Following the injury, Employee walked immediately over to Stone and told him he had just hurt his back, and though he did not know how bad it was, "it burned." Stone said nothing in respect to Employee's injury report. Stone saw a truck coming and told Employee to take a water hose from Stone and spray the gravel road down. Employee complied, and pressure from the water hose made his back hurt more. After finishing the water spraying job, Employee continued his shift, picked up debris and performed other light duty tasks. (*Id*.).

35) Stone never told Employee to file any paperwork and did not give him anything to complete or file. Employee did not know he was supposed to fill out forms for his work injury. On the injury day, before leaving work, Employee called Obermann on his cell phone and told her he had injured his back. He also told Obermann he had informed Stone about his injury. Obermann suggested he take it easy for the rest of the day. Employee rode back to get his own vehicle on the injury date in Employer's truck, driven by co-worker Ty. Employee also told Ty he had injured his back on the job. Ty said, "Okay, cool." Employee has had no contact with Ty since the injury. Later the same

evening, Employee called his mother and uncle, who came over to his house to check on him. Employee told them about his injury. (*Id*.).

36) Employee went to work the day after the injury because Obermann suggested he not call in sick, but at least try to work. Arriving at work, Employee walked toward the company vehicle to put his boots in the truck. Stone saw him walking with an altered gait and a hunched-over posture. Stone said, "Nope, nope, just go home, I don't even want you here like that." Employee started walking home because Obermann had just dropped him off and he had no vehicle. Employee called Obermann, who turned around and returned to take Employee home. The following day, Employee reported to work and did lighter duty jobs. When Stone asked him to do things Employee felt he could not do, Ty helped him by doing those heavier jobs. The following Sunday, while at his mother's house, Employee got a call from Stone. Stone told Employee he was "a liability to his company." Without any explanation, Stone told Employee he was terminated. Employee asked Stone what he had done wrong, and Stone said Employee had done nothing wrong. Employee immediately told his mother and uncle he had been terminated. (*Id*.).

37) Employee disagreed Stone terminated him because he had driven a company vehicle without his driver's license. Sometime prior to his work injury, Employee had left his wallet in a company roller. Employee forgot about his wallet until he was driving home in the company vehicle. Employee called Stone and asked him to grab his wallet and bring it into Anchorage so he would not lose his money and identification. Stone agreed to get the wallet but told Employee he locked it in a compartment in one of the company's vehicles. Stone was not angry when Employee called him about the wallet but seemed "flustered" and implied he had too much to do already without worrying about the wallet. It was not a memorable incident to Employee. When he was terminated, Employee made no connection between the firing and his wallet or the work injury. (*Id*.).

38) As for the July 4, 2014 emergency room record, Employee admitted he lied to the emergency room staff. He was in pain, had no money, had no job, was afraid he would not get appropriate treatment and did not know what to do about his work injury. Employee's mother suggested if he made up a story about a recent injury and went to the emergency room the hospital would have to treat him. Employee and his mother "came up with a fib" to ensure he could be seen at the hospital because he was in significant pain. Employee does not blame his mother for his actions and takes full responsibility for his admitted lie to the emergency room providers. (*Id*.).

39) Employee was not employed for anyone between his termination by Employer in June 2014, and early December 2014. He took it easy, lay around on his couch and tried to recover. Eventually, as bills piled up, Employee decided he needed to look for work to assist Obermann in paying their bills. Employee subsequently went to work at Big Ray's. Employee had health insurance at Big Ray's but it did not "kick in" until 90 days after his hire. The first time Employee returned to a doctor, other than the emergency room, was when his Big Ray's health insurance coverage began. Employee saw Dr. Klimow and he tried to explain how he was injured. But Dr. Klimow wanted to know what Employee did on the job, so he explained what his duties were. Employee believes Dr. Klimow misunderstood what he was telling her, or conversely, he misunderstood what Dr. Klimow had asked him. In any event, the injury history Dr. Klimow recorded was not accurate and she did not give Employee an opportunity to tell the whole story. Dr. Klimow checked his vitals and prescribed medication, but in Employee's view, did not do a very thorough examination. Medications included a muscle relaxant and painkillers. (*Id*.).

40) When Employee began working for Big Ray's in December 2014, he was initially able to do all required duties, even without pain medication. However, when he started working at Big Ray's and obtained health insurance Employee saw Dr. Klimow for an injection, which, she told him, had helped some patients recover from similar injuries. Dr. Klimow's injection made his symptoms worse. No doctor prescribed a cane, but on Obermann's suggestion, Employee obtained one because he was having difficulty on uneven ground. Employee does not use the cane all the time. Dr. Klimow referred him to a surgeon, and Employee has an appointment in mid-November. (*Id*.).

41) Employee eventually changed doctors from Dr. Klimow to Dr. Barrington because Employee did not think Dr. Klimow was properly treating his condition. Employee had prior experience with chiropractors and thinks they know more about spine injuries. (*Id*.).

42) In conjunction with filing his workers' compensation claim, Employee went to the emergency room, obtained his records and filed them along with his claim, even though he knew the records contained his false report to emergency room staff. (*Id*.).

43) Employee spoke with adjuster Tokash. He concedes he may have misunderstood Tokash's question during the interview, and thinks he may have told her "logs" pulled him to the ground and he cannot recall expressly telling her about moving the sign made out of logs. (*Id*.).

44) Once he was officially on Employer's books, Employee completed yellow timesheets every day for Employer, documenting his hours worked. (*Id*.).

45) Since his work injury with Employer, Employee has been unable to participate in activities he previously enjoyed, and believes he needs additional medical treatment. (*Id.*).

46) On cross-examination, Employee conceded Ty was just another Employee and was not his supervisor. Had Employee seen the "Employers' Notice of Insurance" form, he would not have known what it was. When questioned about a statement in his deposition about Stone's reaction to being told Employee had left his wallet on a machine, Employee explained that in his mind, "being a liability to the company," is not a "reason" for termination. Employee expected Stone to tell him what he did to make him a liability. He further explained Stone may have been angry Employee was still driving the company vehicle without his operator's license, and in fact, Stone told him to pull over and let Ty drive the truck the rest of the way. Employee, Stone and Ty together set the subject sign up at the job site in Big Lake in the first instance. Employee recounted an experience when he was younger and had broken ribs and received poor treatment at the emergency room because he had no insurance. Employee admitted he was aware of the Anchorage Neighborhood Health Clinic, and did not believe he had to have insurance to go there, but he did have to have money. He also did not go to the clinic because he "does not like doctors." Employee's attorney gave him Dr. Barrington's name as a chiropractor who would likely see him without insurance. He did not receive Dr. Barrington's name from Dr. Klimow. Employee does not recall getting any work limitations from the emergency room, but Dr. Klimow restricted him to specific, light duty limitations. Dr. Barrington tried to refer Employee for additional care, but no one will see him until the case is resolved. Employee can read, but all he reads are car magazines. (*Id.*).

47) Employee is credible. His demeanor was cool, calm and collected. Employee did not appear nervous or anxious at any time, even while answering difficult questions about lying to emergency room staff. He made eye contact with panel members at appropriate times and was sincere. His answers were not evasive, but were certain and confident unless he could not recall something, which was rare. His responses were mostly consistent with his deposition, and when they varied. Employee provided plausible explanations. Employee displayed no guile. (Experience, judgment and observations).

48) Brady, age 43, is Employee's uncle. One weekday evening, while Brady was present Employee called his mother to say he had injured his back. Brady and Employee's mother went to Employee's home later to discuss the matter. Employee said he had injured his back at work that day while he was moving a "lumber log sign." The following Sunday, Employee came to his

mother's home while Brady was again present, and reiterated that his back was still hurting. While there, Employee took a telephone call from his boss. Employee told Brady he had just been fired and Stone had told him he had "become a risk to his company." So far as Brady knows, Employee has a good work ethic. Employee would not use a cane to generate sympathy. Prior to June 2014, Brady and Employee did some activities together, such as hiking. Since his injury, Employee spends most of his time at home. Employee has always been honest with Brady, and does not make excuses. Brady's Employer has a sign in his shop mentioning workers' compensation, and Brady knows the purpose for workers' compensation insurance. However, Brady never discussed with Employee reporting the work injury or workers' compensation in general. (Brady).

49) Brady is credible. (Experience, judgment and observations).

50) Stone has owned AFS Construction for 18 years. Employer paves driveways, builds retaining walls and does snow removal seasonally. No ladders are used in Employer's work. According to Stone, Employees are not asked to lift or move heavy items on the job. Employer uses a backhoe and a skidder to move heavy objects at work. Employer usually has three employees in the summer. When Employee worked for Employer, there were four employees. Stone is on job sites with his employees and is a working owner. According to Stone, he tells his new hires to report work injuries by telling them to, "Come to me." Once an injury is reported to him, Stone will report it to his insurance company. Stone says the "Employers' Notice of Injury" poster is "normally" posted in the orange Conex, and the information on it is "clearly verbalized to [new hires] when they start." Stone has had employees injured on the job and he immediately reported the injuries to his insurance company. (Stone).

51) Stone met Employee at Judy's Café, where Obermann worked. Obermann put Stone in contact with Employee. Stone put Employee to work, in his view as "casual labor." He did not call Employee every day but only when needed to shovel walkways. Stone keeps records of snow falls and, according to him, Employee worked for him cleaning snow off walkways twice in 2014. Stone does most snow removal himself and often needs no assistance. (*Id*.).

52) Employee officially went "on the books" in April 2014. As a full-time worker, Employee's job description included cleaning, sweeping, shoveling and compacting. Employee operated a roller and a plate compactor and drove company vehicles. According to Stone, Friday, June 20, 2014 was Employee's last day on the job. Stone said he terminated Employee because Employee was driving

a company vehicle without a valid driver's license in his possession. The termination conversation between Stone and Employee happened by telephone on June 22, 2014. (*Id.*).

53) The job on which Employee claims to have been injured began around May 1, 2014. Stone agreed he had signs on the job site. He described the signs' construction from logs in a way similar to the way Employee described them. The signs were made prior to the trucks' arrival sometime around May 28, 2014. Stone and his employees built the signs, scooted them into the loader or skidder bucket, and placed the signs where they needed to go. According to Stone, the signs were placed and never moved again until all the trucks were gone. Stone does "not recall" asking Employee to move the sign during the last week he was employed. (*Id.*).

54) According to Stone, "at no time" did Employee mention an accident or injury on the job to him. Had Employee told him he was injured on the job, Stone would have followed protocol and notified his insurance company about an accident or injury. Stone said he never noticed Employee looking like he was injured and Stone never modified his job assignments. When asked if he sent Employee home from work during his last week of employment, Stone said "I do not recall sending him home." (*Id.*).

55) Sometime around late May or early June 2015, Employee called Stone and asked him for the name of his workers' compensation insurance carrier and Stone told Employee to ask his physician to call him, and that is where the conversation ended. Stone did "not recall exactly" Employee stating he had a work injury, but did remember telling Employee to have his physician call him. According to Stone, this was the first inkling he had of Employee's alleged injury. (*Id.*).

56) Stone knows workers' compensation policy premiums factor into his business but he says this would not influence whether or not Stone reported an injury that happened on his worksite. (*Id.*).

57) On cross-examination, Stone said the "Employers' Notice of Insurance" is posted on the east wall in the orange Conex. When a person walks into the Conex, the poster is about two thirds the ways down the wall facing the doorway. There is only one sign. Stone places the poster on the same hook on the same wall every year when he gets a new poster. Whenever he hires a new employee, Stone says he verbalizes to them the fact they are covered by workers' compensation. When asked specifically when he told Employee he was covered by workers' compensation, Stone said, "I don't recall." Similarly, Stone could not recall where he was when he told Employee about workers' compensation coverage. When pressed about his injury reporting protocol, Stone denied saying he would call his insurance company, but said he would "fill out the paperwork." Stone later

clarified and said he would "communicate" this information by calling his insurance company. However, when Employee called Stone in 2015 and asked for his workers' compensation insurance information, Stone said he "wasn't quite sure how to handle it." He simply asked Employee to have his physician call. Stone had no explanation for why he did not tell Employee his insurance company's name. Stone said he did not call his insurance company because he expected Employee to "get back to me." (*Id*.).

58) Stone is generally aware he is supposed to fill out an injury report when he becomes aware of an injury. Stone said he was "surprised" when Employee called him for the insurance information. The only thing Stone told Employee during the telephone conversation in 2015 was to "have your physician contact me." According to Stone, it was a very short conversation. (*Id*.).

59) According to Stone's records, in January and February 2014, Employer only plowed snow twice. Stone's crews clear snow when at least two inches fall. Stone prepared Employer's hearing brief Exhibit A, page two (the same document as Employee's Hearing Exhibit #2), and gave it to his attorney. According to Stone, this exhibit shows the only two dates in 2014 when Employee would have assisted him with snow removal, as they were the only two days in those months with adequate snow for Employer's crew to perform its snow removal services. (*Id*.).

60) Stone reviewed Employee's Hearing Exhibit #3, which purports to show snowfalls in Anchorage in January, February and March 2014. Stone had no explanation for why he did not include all snow days in which more than two inches fell in January, February or March 2014 as part of Employee's days worked on Employer's hearing brief Exhibit A, page two. (*Id*.).

61) Stone's attorney had previously asked him to provide daily timesheets or contemporaneous records for his employees' hours in June 2014. He did not provide this information because he took the data from the daily timecards, put it on a piece of paper and turned it into his certified public accountant. Stone implied he then discarded the original daily documents. The only records Employer had were those represented by Employee's Hearing Exhibit #5, which only show total hours worked, and not days worked or hours worked per day. (*Id*.).

62) Stone was not aware he had to keep individual timecards under state law. (*Id*.).

63) Stone spoke with his workers' compensation insurer after Employee filed his claim. The adjuster asked Stone if Employee had reported an injury to him and asked about Employee's termination as well as other information. Stone "did not recall" if he told the adjuster he was going to do "a little investigation" about the alleged injury. The adjuster wanted to know if Employee

worked for Employer and the date he was terminated. Stone provided all the requested information but could "not remember" if the adjuster wanted to speak to other employees, including Ty. (*Id.*).

64) On re-direct examination, Stone reiterated that in January, February and March 2014, if snowfall exceeded two inches, he probably would not have done snow removal by himself but would have required assistance from someone. Ty occasionally assisted him on such occasions as a "casual worker." Ty no longer works for Employer and did not work for it in 2015. When revisiting the telephone conversation with Employee in 2015, Stone said Employee did not specifically say how he got injured on the job, but simply said he had a legal right to know who Employer's insurance carrier was for work injuries. (*Id.*).

65) On further cross-examination, when pressed further on his telephone discussion with Employee in 2015, Stone said, "I don't recall that" Employee referenced a specific injury. (*Id.*).

66) At hearing, Employee played a recording of the 2015 telephone conversation he had with Stone. In the recording, Stone sounded cheery when he answered the phone and initially had brief, casual conversation with Employee. Employee asked Stone for the name of his workers' compensation insurance carrier. Stone asked, "For what?" Employee said, "When I hurt my back last year at your job, it still has not gone away and it's not getting any better and I've gone to the doctor about five times and they are telling me to go down this line because this is the way it happened." Employee said he now needed Stone's insurance information. Stone calmly told Employee to "put that it in writing to me." Employee tried to explain he first needed the insurance information, but Stone cut him off and said, "I'm not giving it over the phone." Stone told Employee if he thought he had a claim, Employee should give "them" Stone's personal cell phone number and have "them" call him and Stone would provide the information directly. Stone agreed the recording accurately captured the conversation. (*Id.*).

67) Stone could not remember telling the adjuster he had terminated Employee on Saturday, June 21, 2014, as reflected in the adjuster's notes, rather than on Sunday, June 22, 2014. Stone could "not recall" the date the wallet incident occurred. As for why Stone picked June 22, 2014, to terminate Employee for not having his driver's license with him, Stone said, "I don't know." Stone suggested perhaps Employee had forgotten his wallet on Friday, June 20, 2014, and that is why Stone terminated him on Sunday, June 22, 2014. (*Id.*).

68) Stone stated Ty had helped him clear snow in January, February and March 2014 on several occasions, but volunteered, "I didn't look up those dates." When immediately asked if he "kept records," Stone said "no, no I did not." (*Id*.).

69) On re-direct, Stone reiterated he was "surprised" when Employee called him in 2015 and said he had been injured because it had been so long since Employee worked for Stone. Stone clarified that the wallet incident, "I think it happened that [last] week." (*Id*.).

70) Stone did not sound surprised or angry during his teleconference with Employee in 2015. (Experience, judgment, observations and inferences drawn from the above).

71) On further cross-examination about the wallet, Stone became agitated and conceded he could not recall when the wallet incident occurred. (Stone).

72) In response to his attorney's question, Stone agreed he may have chosen June 22, 2014 to tell Employee his services were no longer needed as he frequently called workers the night before to tell them if he needed them on the job the next day. (*Id*.).

73) Stone does not believe the snowfall records were accurate. But, if they were accurate, he would have had someone helping him with snow removal each time snowfall exceeded two inches. Stone said Employee's two snow removal experiences with him in January and February 2014 were sufficient for Stone to judge Employee's abilities as a reliable worker and hire him full time in April 2014. Stone agreed with Employee's rendition of the snow removal contracts Stone had in January, February, and March 2014. Employer guaranteed snow removal within six to eight hours. If heavy snow fell overnight, Employer's crew would go back and follow-up the next morning. (*Id*.).

74) When specifically asked if the "Employers' Notice of Insurance" was hanging in the orange Conex while Employee worked for Employer, Stone said, "I think it was." Stone agreed Employee would occasionally go into the orange Conex to obtain tools. The orange Conex is 20 feet long. Tools have specific spots in the Conex but Stone cannot recall exactly where he put the tools. (*Id*.).

75) Stone said he had "informal meetings" with employees when he hired them to tell them about workers' compensation coverage. Stone said the conversations would go something like this: "Here's what we do; this is what you're required; you're expected to show up to work on time; and I have full workers' compensation insurance and insurance on all the vehicles." (*Id*.).

76) Stone estimates Employee was without his driver's license in his possession for about 45 minutes. When Employee called him about the wallet, Stone told Employee to pull over and let Ty complete the drive back to Anchorage. Stone was concerned that if there was an accident,

Employee was supposed to have his license with him. Stone was unaware of any ramifications should Employee be caught by police without his operator's license on his person. Stone was concerned only because Employee had been driving a company vehicle. Stone agreed Employee, not he, would have received any traffic ticket had Employee been pulled over or been in an accident. According to Stone, he returned Employee's wallet to him at his home the same evening and did not lock it in a piece of equipment as Employee had stated. (*Id*.).

77) Stone is not credible. His demeanor was nervous, anxious, and uncomfortable and he at times appeared frustrated. His testimony was sometimes uncertain and inconsistent. Stone "did not recall" many important points. (Experience, judgment and observations).

78) Tokash has been a claims examiner since about 1996 and is the adjuster in this case. Her first written notice of Employee's injury came on June 2, 2015, when she received his claim served upon her by the board. Upon receiving the claim, Tokash performed her standard "three-point contact." In an ordinary case, this means she would call the employer, the injured worker and the medical provider within 24 hours of receiving the case. Tokash spoke with Stone first on June 2, 2015. Tokash interviewed Employee on June 12, 2015. She asked Employee to describe the accident, his injury, the body parts injured, his symptoms, diagnosis, his treatment, disability status and any previous injuries to the same body parts, earnings information, personal information and similar questions. According to Tokash, Employee provided this information. Tokash said Employee told her he injured his mid- to low-back and felt a popping while "lifting and moving logs," that he was cutting into six- to eight-foot lengths at the Big Lake job. According to Tokash, Employee said he had been cutting trees into logs, did not mention the trees had been made into a sign and did not mention a sign at all. As for whether Employee told Employer about his injury when it happened, Tokash said she did not ask Employee that question. (Tokash).

79) Prior to receiving Employee's claim, Tokash had received no medical records from any provider. If she had, she would have investigated immediately to determine whether the injury was work-related and thus her responsibility. Tokash may or may not have requested an independent medical evaluation depending upon what Employer and Employee had to say. Hypothetically, if Tokash calls an employer and the employer agrees an injured worker has fallen on the job and hurt his knee, and the medical records state the worker's diagnosis was typical of such injury, the presumption of compensability would require Tokash to pay for medical treatment immediately. This was a common occurrence in Tokash's experience. Further, Tokash said even if an employer

denied an injury happened on the job because the employer saw the person fall while dancing, if the injured employee said it was work-related, the presumption would still require Tokash to pay benefits because she would have no evidence supporting a denial. In her experience, if an injured worker receives treatment, he is likely to improve. Tokash says she wants injured workers to get the best treatment available and get better as soon as they possibly can. (*Id.*).

80) Tokash was unaware Employee was seeking medical treatment for a work injury until June 2, 2015, when she received his claim. It was nearly a year between the alleged injury date and the date Tokash became aware Employee was requesting treatment. Had she had notice of Employee's need for medical treatment closer to his June 2014 alleged injury, she would have paid for treatment, "absolutely." When asked if, in her opinion, the insurance company had been prejudiced by lack of written injury notice within 30 days, Tokash said, "Yes. That's why the statute says prompt reporting, because the sooner a claim is reported the faster we can get on it and get the treatment that's needed and do the investigation that needs to be done." Further, if an injured worker is disabled, the insurance company has to provide disability benefits, which is costly to the insurer. According to Tokash, Employee provided her with no medical bills for his work injury. The only medical bill Tokash had received from a provider was one bill from AK Spine & Pain, which she controverted. Tokash said she had received no medical records stating Employee was disabled, or that he had been disabled for more than 90 days following his alleged injury. (*Id.*).

81) On cross-examination, Tokash reviewed page two of Employer's hearing brief and agreed the June 1, 2015 claim was not the insurer's first notice of Employee's injury, because Employer had a teleconference with Employee before that date. Tokash agreed Employee had provided the medical records containing his lie to the emergency room staff along with his original claim. She also agreed the insurer received, on June 2, 2015, the medical records stating Employee had fallen from a ladder at home. According to Tokash, when she first spoke with Employee on June 12, 2015, he told her he hurt his back lifting log segments. Further, Employer told her Employee was fired before June 24, 2015, and did not use ladders on the job, so the inconsistencies caused her to controvert the claim. Tokash stated she would not have approved the controversion until after she had spoken to Employee. Tokash claims her notes do not state the time of day she spoke with Employee on June 12, 2015, but she concluded it must have been before 1:22 PM, the time the controversion was authorized. However, Tokash acknowledged she did not enter a summary of her conversation with Employee until 4:21 PM on June 12, 2015. Tokash explained that sometimes she

does not get her hand-written "running notes" inserted into the database until later that day, because she gets busy doing other things. (*Id.*).

82) Tokash reiterated she had spoken with Stone first, and it was "quite possible" she had all the information stated in her June 12, 2015 controversion by June 9, 2015. Employee asked Tokash during this conversation why she was not paying the claim and she reiterated to him the same points listed in her controversion. She also referred Employee to Employer's June 9, 2014 answer. Tokash agreed the answer was consistent with her controversion. She eventually agreed the factual basis for the controversion issued on June 12, 2015, was information already in the adjuster's file by no later than June 9, 2014. Tokash conceded the controversion was based upon the lack of a timely, written injury report and upon emergency room medical records and Stone's interview. Tokash relied upon the medical report from the emergency room. She did not ask Employee to explain the discrepancy between the emergency room medical reports and the account given on his claim, because she called Stone back and asked him instead. It was the "falling off a ladder" history that was inconsistent with Employer's work. Tokash did not create a note with a reference to going back to ask Stone about Employee's account of lifting logs while at work and hurting his back. On June 4, 2015, however, Tokash sent Stone an e-mail asking if he recalled Employee hurting his back lifting logs at work. In her view, Employee's account stated in his claim that he was injured "lifting logs on job site" is a completely different and inconsistent story than his testimony that he was "injured lifting a sign made of logs." (*Id.*).

83) Tokash asked Stone if any former co-workers were available for interview. Stone told her one employee had died and the others no longer worked for Stone. She did not speak to any of Employee's former co-workers. Tokash is generally aware of factors that go into determining workers' compensation insurance premiums. If an employer has multiple injuries within a certain time period, this will have a worse effect upon their premium rates than a single, catastrophic injury. There is also a direct correlation between payroll and workers' compensation insurance premiums. In Tokash's view, "casual labor" occurs when an employer does not have enough personnel to complete a job, so they hire day laborers, who are not covered by workers' compensation insurance the same way as a seasonal worker. However, in Tokash's opinion, seasonal, on-call workers are covered by workers' compensation insurance. (*Id.*).

84) Had Tokash spoken to Employee's co-workers, this would not have affected her decision to pay or controvert medical care. It was already "too late" by the time she received the claim. In

respect to her adjuster's notes, Tokash said, "Most things go in as you're doing it," but the three-point contact information might not. (*Id*.).

85) Tokash has had situations where she received a timely injury report, only to learn that the employer knew nothing about the alleged injury. In such circumstances, she would call the injured worker, tell them what the employer had told her, and interview the injured worker to obtain his side of the story. Based on this limited information, in such cases, Tokash in some instances would file a controversion. Tokash would do this all within 24 hours. In this case, had Employee filed his injury report the day he allegedly hurt himself on the job, Tokash would have called him within 24 hours and presumably he would not have gone to the emergency room two weeks later and lied about how the injury occurred. Even if Stone had told her, "We don't lift and carry logs," if there was any lifting and carrying on the job Tokash would have still paid benefits subject to further investigation. If, in the same scenario, Tokash had received a written injury report 32 days after the alleged injury had happened, such an occurrence would "not be crazy" and she would still have paid while she investigated further. In Tokash's opinion, the emergency room records in this case were "a huge factor" in her decision to controvert. (*Id*.).

86) Obermann testified as a rebuttal witness. She knows Stone. She did not recall Stone dropping off Employee's driver's license in June 2014, and since she knows what he looks like, Obermann would have remembered seeing Stone at her house dropping off the license. Obermann said Employee worked snow removal for Stone several times each week, on call. She specifically remembers heavy snowfall for at least two days in March 2014, during which Employee worked shoveling snow for Stone. Obermann was certain Employee shoveled snow for Employer several times a week each week in January, February and March 2014. Obermann recalls the day Employee was injured. She took him to work the following day. After dropping Employee off at work, she headed off to the café where she works. However, Employee called Obermann and asked her to turn around, come back and pick him up. Employee told Obermann he was "sent home" because of his apparent physical condition as he walked over to the work truck. To Obermann, Employee looked like he was in pain. He was walking slowly and kept putting his hand on his lower back. (Obermann).

87) Obermann has worked for her employer for about eight years but knows nothing about workers' compensation insurance. There is no break room at the café where she works and she is

not familiar with any posted notices concerning workers' compensation insurance. She has never had a work-related injury. (*Id*.).

88) Obermann is credible. Her demeanor was calm, cool and collected. Her answers were sincere and consistent with Employee's recollections. (Experience, judgment and observations).

89) Employer was not prejudiced by Employee's failure to provide formal, written notice of his work injury within 30 days of its occurrence or within 30 days of the first compensable event that occurred when he went to the emergency room. It was not prejudiced because Employer knew all essential facts about Employee's work injury on the day it occurred and on the next day when Stone sent Employee home from work. (Experience, judgment and inferences drawn from the above).

90) Employee argued the panel should keep an "open mind" and consider all the evidence before deciding any witnesses' credibility. He conceded the "two main players," Employee and Stone, were the two people who had a vested, financial interest in this claim. However, Employee argued other witnesses who had no real interest in the outcome, West and Brady, both testified Employee had always been truthful to them and had told them he injured his back on the job as he stated, before Employer terminated him. Employee contends neither witness has anything to gain from this case. Similarly, Murdoch has no interest in the case, but knew Employee never lied to her, worked hard, but could not perform his duties because of pain from his work injury with Employer. By contrast, Employee points to weather records and two witnesses' testimony that show there was significantly more snowfall in January, February and March 2014 than Stone is willing to admit. Employee contends Employer was required by state law to keep timecards for three years. Yet, Employer destroyed timecard records and relied upon his memory and perhaps destroyed or withheld records used to compile an unreliable estimate of time Employee worked for him shoveling snow. He did not produce the "best evidence" showing the extent of Employee's work before being hired full time. Employee contends it is not credible that Employee worked only two days, one in January and one in February, and Stone was so impressed with him that he hired him full-time in April. Employee argued it is further inconceivable that under these circumstances, Stone would then fire Employee because he left his driver's license on a piece of equipment and drove a company vehicle on one occasion for less than 45 minutes. Obermann and Employee both said Stone never delivered Employee's wallet to Employee's home. Employee argues Stone must have known by at least the day after the injury that Employee was claiming he hurt his back at work. He contends under Alaska Supreme Court precedent, Stone's sending Employee home from

work the day after the injury constituted Employer's actual notice of an injury even if Employee never told Stone how he had injured his back. Employee argues Alaska law required Employer to post the "Employers' Notice of Insurance" in at least three conspicuous places on the worksite. Stone admitted he posted only one poster in the orange Conex trailer and Employee suggests it was in an area where it was unlikely Employee would see it. Employee contends had Stone complied with state statutes concerning posting workers' compensation notices, it is more likely Employee would have filed a written injury notice. Nonetheless, Employee argued the "fallback position" statute protects Employee by requiring Employer to file a written injury notice once Employer has actual knowledge an injury has been alleged. Employee argues the cases cited by Employer in its brief are distinguishable and not persuasive authority in this case. Employee admitted he initially lied to a physician about how he was injured. He does not try to justify his lie, but contends his desperate lie should not color his other statements and sworn testimony later. In his view, a true scammer would have tried to hide the emergency room records and conceal his lie. By contrast, Employee attached the emergency room records to a medical summary filed with his claim. By comparison, Employee argues Stone hired and paid people off the books to "scam the system" and avoid paying Medicare, payroll and Social Security taxes. Stone's workers' compensation premiums also remained lower. Employee contends Stone is the one who is "gaming the system." Employee points to the audio recording of his conversation with Stone as evidence of Stone's lack of veracity. On the recording, when Employee asked for Stone's workers' compensation information, Stone paused for a moment and calmly asked, "For what?" Stone sounded neither surprised nor angry. Employee suggests, had Stone not been already aware of Employee's work injury, he would have reacted at least in a surprised manner or perhaps angrily, but he did not. Employee contends the insurer has not been prejudiced by Employee's admitted failure to give a 30-day written injury notice. In this instance, Tokash simply took Stone's word to deny Employee's claim without even talking to Employee before deciding to controvert. He contends the result would have been the same regardless of a timely, written injury report. Employee contends it was not a coincidence he was fired immediately following his work injury with Employer. Lastly, Employee contends Dr. Barrington's medical opinion supports his claim because the diagnosis is consistent with a twisting injury to his lower back, similar to the actual injury Employee described. (Employee's hearing arguments).

91) Employer agrees this case is about witness credibility. But it contends Employee told at least three separate and distinct stories about how he injured his back. Employee repeated the same story about falling from a ladder at home on several visits to the emergency room. By December, Employee was telling a second story to Murdock. Employer contends eleven months after the alleged injury, Employee finally conjured up a work injury lifting logs on the job. When Employee spoke with Tokash about how the injury happened, he described cutting logs on the job and did not mention lifting a sign. Only at his deposition did Employee for the first time state he injured his back while lifting and moving a sign made out of logs. Employer argued Stone "didn't really recall" ever asking Employee to move the sign and did not know why it would have been moved. Employer questions why Employee, on his own without a doctor's prescription, decided he needed a cane to ambulate. Employer further wonders why Brady, Employee's uncle, who was familiar with workers' compensation issues, would not have advised Employee about how to handle his work injury early on. In Employer's view, Obermann is biased and has an obvious interest in Employee obtaining benefits as they live together and share financial burdens. Employer contends the "Employers' Notice of Insurance" issue is a "red herring," as Employee admitted he would not have known what the workers' compensation posting meant had he read it. Employer challenges the accuracy of snowfall records relied upon by Employee, as being far too high. Employer contends no actual evidence supports various inferences Employee raises from the testimony. Employer further contends Employee failed to prove by a preponderance of the evidence that he suffered an injury on the job with Employer, and timely reported it to Stone. Employer emphasized it was Employee's duty to provide written notice to Employer if he thought he had been injured on the job. It contends the "first compensable event" occurred when Employee went to the emergency room for medical care on July 3, 2014. Therefore, Employee had to provide a written injury notice to Employer no later than August 3, 2014. It is undisputed he did not. Employer contends Tokash established prejudice to Employer and the insurer by demonstrating she would have followed up promptly with medical treatment for Employee had he given timely written notice. From July 2014 through December 2014, Employee received minimal medical care while occasionally visiting emergency rooms. Employer contends had Employee timely reported an injury on the job, he could have received proper treatment and recovered more quickly. It contends Employee knew about clinics where he could receive reduced-fee or free medical care, but simply chose not to go because he "didn't like doctors." As it appears Employee's condition has worsened, Employer reasons the

insurer, if Employee prevails, is now on the hook for his worsened condition, and that is wrong. Employer contends Employee is not credible and has fabricated a work injury to obtain benefits. It seeks claim dismissal. (Employer's hearing argument).

92) If Employer or its insurer were prejudiced in this case, they were prejudiced by Stone's inaction after he obtained actual knowledge of Employee's work injury on the injury date. (Experience, judgment and inferences drawn from the above).

93) January, February and March 2014 saw considerable snowfall with many days receiving more than two inches. (Experience, judgment and observations).

94) Communication is often difficult and misunderstanding often occurs. (*Id.*).

95) Employers, especially those with small staffs, do not ordinarily tell workers they are covered by workers' compensation insurance during new hire orientation. (*Id.*).

PRINCIPLES OF LAW

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

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

establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

AS 23.30.030. Required policy provisions. . . .

. . . .

(3) As between the insurer and the employee . . . notice to or knowledge of the occurrence of the injury on the part of the insured Employer is notice or knowledge on the part of the insurer. . . .

AS 23.30.070. Report of injury to board. (a) Within 10 days from the date the employer has knowledge of an injury . . . alleged by the employee . . . to have arisen out of and in the course of the employment, the employer shall send to the board a report setting out

(1) the name, address, and business of the employer;
(2) the name, address, and occupation of the employee;
(3) the cause and nature of the alleged injury or death;
(4) the year, month, day, and hour when and the particular locality where the alleged injury or death occurred; and
(5) the other information that the board may require. . . .

AS 23.30.100. Notice of injury or death. (a) Notice of an injury . . . in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury . . . to the board and to the employer.

(b) The notice must be in writing, contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury . . . and be signed by the employee or by a person on behalf of the employee. . . .
. . . .

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

> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
>
> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given. . . .

In *Tinker v. VECO, Inc*., 913 P.2d 488 (Alaska 1996), a person suffering from diabetes had frostbite to his right foot in February 1986 while on the job. He did not file a written notice, but informed his project manager about the frostbite. Shortly thereafter, Tinker noticed a blister on his right big toe, which ultimately became infected and required surgery. In January 1989, Tinker filed his written notice for the 1986 frostbite incident. The board rejected Tinker's frostbite claim finding notice was not properly given under AS 23.30.100(b), and finding his failure to provide proper notice was not excusable under AS 23.30.100(d)(1). (*Id*. at 491). On appeal, the Alaska Supreme Court held Tinker's failure to give timely, written notice of his frostbite injury was excusable even though Tinker did not give written notice of the frostbite injury until almost three years after it was sustained. The board had decided Tinker's employer had actual "knowledge" of his frostbite but also decided it had been prejudiced by Tinker's failure to give timely "written notice." (*Id*.).

Tinker said timely written notice of an injury is required "both because it lets the employer provide immediate medical diagnosis and treatment to minimize the seriousness of the injury, and because it facilitates the earliest possible investigation of the facts surrounding the injury." Therefore, "a failure to provide timely notice that impedes either of these two objectives prejudices the employer." *Tinker* said the first question to answer in deciding whether an employer has been prejudiced by an employee's failure to give written notice is "[w]hether this written notification would have informed [the employer] of anything about which [the employee] had not already told [his supervisors]." If a legally sufficient written notice "would have only duplicated the same information" the injured worker had already communicated to his employer, "it would require an exceptional set of circumstances for this difference in the form of which the information was conveyed to prejudice the employer." (*Id*. at 492). The court concluded Tinker had given his employer "what he knew of his injury at the time," including a "statement of the time, place, nature and cause of the injury" and, consequently, "no additional information would

have been necessary." *Tinker* held no substantial evidence supported a finding that the employer was prejudiced simply because the knowledge obtained was received through verbal communication instead of written notice. Had an intervening event prevented supervisors from communicating to management the information they had received, Tinker said there might be a factual basis for finding that Tinker's failure to convey his injury information through a formal, written channels had prejudiced the employer. The court noted nothing prevented the in-charge agents to whom Tinker had reported his injury "from informing the appropriate company personnel of an injury that occurred at a worksite under their control." Consequently, *Tinker* noted "any prejudice that may have resulted is attributable to the failure of communication within the company and not to the manner in which Tinker informed of his injury." (*Id*.). The court concluded Tinker did not deprive his employer of either the opportunity to investigate the injury or to seek prompt medical diagnosis and treatment. (*Id*. at 493).

In *Kolkman v. Greens Creek Mining Co*., 936 P.2d 150 (Alaska 1997), the board denied an injured worker's claim because his employer, though it had actual notice of his heart attack on the job, did not have notice the worker claimed his heart attack was work-related. The board had relied on *State v. Moore*, 706 P.2d 311 (Alaska 1985), which had been read to require not only notice of injury within 30 days, but notice that the injury was "work-related." In other words, "simple knowledge" of an injury under *Moore* was not enough. Reviewing AS 23.30.100, the Alaska Supreme Court said to the extent *Moore* may be read to add a third requirement to the two-part statutory test for notice, *Moore* was "disapproved." (*Id*. at 155). As for prejudice to the employer, *Kolkman* held the employer provided no evidence to support a conclusion it was prejudiced by the late notice. (*Id*. at 156).

The Alaska Supreme Court in *Cogger v. Anchor House*, 936 P.2d 157 (Alaska 1997) addressed a situation in which Cogger belatedly claimed he injured his low back while carrying a heavy toolbox while climbing stairs at work in April 1992. He was the only witness to this incident. Cogger said he stopped briefly on the stairs after the lifting incident, resumed his duties, verbally reported the injury to coworkers and supervisors but did not timely, formally report it in writing. In July 1992, while on a fishing expedition without his medication, Cogger's back pain worsened. On July 15, 1992, Cogger went to an emergency room for his increased back pain.

When asked by emergency room physicians about the cause of his pain, Cogger did not specifically mention the toolbox incident and "denied any specific instance of the onset of the pain." Cogger simply reported a three-month low back pain history. On a disputed date in August 1992, Cogger's wife told his supervisor the injury was work-related. Cogger filed a workers' compensation claim against his employer on September 9, 1992, based upon the toolbox incident. (*Id*. at 159). The board denied Cogger's claim under AS 23.30.100, citing the 30-day notice requirement and noting Cogger waited from July 13, 1992, until September 9, 1992, to submit written notice. The superior court affirmed, and Cogger appealed. (*Id*.).

Cogger noted under AS 23.30.100, an injured worker "must provide formal written notice to his or her employer within thirty days of an injury" to be "eligible for workers' compensation." Missing the short limitation period for giving notice "bars a claim absolutely." But, the court added it is not necessary a claimant fully diagnose his or her injury for the 30-day period to start running. (*Id*. at 160). *Cogger* rejected the argument that the 30-day period began when the injured worker knew he had a serious back problem. Rather, *Cogger* stated a new rule, which "for reasons of clarity and fairness," says the 30-day period begins to run no earlier "than when a compensable event first occurs," which in Cogger's case occurred when he visited the emergency room and incurred medical costs for his work-related injury. (*Id*.).

Cogger also found the employer had actual knowledge of Cogger's injury. The court reiterated it is not important for the employer to have knowledge of the "work-relatedness" of an injury, but, read literally, the statute only requires the employer's knowledge of the injury "and no more." (*Id*. at 161-62). The court reasoned Cogger's supervisors admittedly knew he had a back condition, knew it deteriorated in July 1992 necessitating medical treatment and disability, knew several job duties required lifting, which could potentially strain his low back, and consequently, "Cogger's employer had sufficient actual knowledge of Cogger's injury to trigger the protections of the statute." *Cogger* noted the distinction between an employer's "notice" and "knowledge" of an injury, and said, "The workers' compensation statute excuses an employee's failure to give formal written notice where the employer has 'knowledge of the injury.' AS 23.30.100(d)(1)."

As to whether Cogger's employer was prejudiced by his failure to give timely written notice, the court stated a delay of between two to 12 days, four months after the alleged event occurred, was not prejudicial. (*Id*. at 162). The Alaska Supreme Court also agreed the delay in Cogger's notice was not prejudicial by hampering the employer's investigation. *Cogger* reiterated that when an employer has actual knowledge equivalent to a legally sufficient written report, "it would require an exceptional set of circumstances for this difference in the form of which the information was conveyed to prejudice the employer." (*Id.*). The court further noted Cogger's delay in furnishing this information "could not have been prejudicial in terms of investigating an incident which occurred four months before and to which there were no eyewitnesses besides the employee." (*Id*. at 163).

In *Dafermo v. Municipality of Anchorage*, 941 P.2d 114 (Alaska 1997), the board held the employer was prejudiced because the injured worker did not give timely written notice of his alleged work injury. (*Id*. at 116). On appeal, the Alaska Supreme Court held the board's finding Dafermo's employer was prejudiced by the late notice was not supported by substantial evidence. (*Id*. at 117-18). *Dafermo* held prejudice to the employer caused by Dafermo's failure to give notice is not prejudice that renders the exception to the notice requirement inapplicable. The board found Dafermo was not required to provide notice until after he received his physician's letter. Thus, Dafermo's "failure to give notice" did not occur until 30 days had passed from his receiving this letter. Any prejudice to the employer resulting from Dafermo's failure to give notice would have had to occur between the date in October 1991 when the 30-day notice period expired and November 1, 1991, the date on which he gave notice in fact. Any prejudice stemming from events during 1985 or 1986, the period during which Dafermo failed to tell the employer he suspected his eye problems might be work-related, is irrelevant. *Dafermo* noted: "Whatever prejudice that may have occurred then was not caused by Dafermo's failure to provide notice in October 1991." (*Id*. at 118). Consequently, given these facts *Dafermo* said:

> No substantial evidence could support a finding that Dafermo's failure to give notice in October 1991 prejudiced MOA's interests in either early investigation or prompt medical diagnosis and treatment. Years had passed since Dafermo first began having eye problems. Any prejudice that resulted from MOA's inability to promptly investigate Dafermo's claim and provide early diagnosis and treatment had long since been sustained by the time of Dafermo's failure to provide notice.

> Furthermore, after all these years, there is no evidence that a delay of a few additional days or weeks during October 1991 would have had any significant impact on MOA's ability to investigate, secure a diagnosis, or provide treatment. . . . Because of this, and because Dafermo's 1986 conversations with Korz and Stout gave 'agent[s] of the employer in charge of the business in the place where the injury occurred . . . knowledge of the injury,' both the 'knowledge' and 'lack of prejudice' prongs of the AS 23.30.100(d)(1) exception to the notice requirement were satisfied. As a result, Dafermo's failure to provide notice within thirty days of his receipt of the Steinberg letter should have been excused (*id*. at 118-19).

Hammer v. City of Fairbanks, 953 P.2d 500 (Alaska 1998) held "knowledge" does not appear to be a "term of art." In context, it means no more than "awareness, information, or notice (footnote omitted) of the injury. . . ." (*Id*. at 505).

In *McGahuey v. Whitestone Logging, Inc*., 262 P.3d 613 (Alaska 2011), a worker was involved in a bunkhouse fight. He did not file a written injury report for the fight for over a year. When he finally filed, McGahuey alleged he injured his hip, lower back, and ear in the fight. His employer controverted benefits because McGahuey did not give timely, written injury notice. McGahuey then alleged he had verbally informed his supervisor about the injuries. After a hearing, the board determined McGahuey's claim was barred because he did not give his employer timely written notice. The board performed an alternative analysis assuming McGahuey had given timely notice and decided the claim was also not compensable on its merits. The commission affirmed the decision. The Alaska Supreme Court in *McGahuey* affirmed because the commission correctly determined substantial evidence in the record supported the board's decision on the claim's merits. (*Id*. at 615). *McGahuey* also said if "written notice is not given as required, the claim is barred." (*Id*. at 616). However, *McGahuey* found, "the Commission and the Board both erred in failing to identify when the 30-day period for giving written notice began, but that the error was harmless." (*Id*). The court reiterated the 30-day period for giving written notice "can begin no earlier than when a compensable event first occurs." (*Id*., citing *Cogger*, 936 P.2d 160). The court reasoned the date the 30-day period began to run is important not only in determining whether formal notice was timely but also in assessing prejudice to the employer if notice was late. (*Id*.).

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

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

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. *Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). For injuries occurring after the 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). Because the board does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds 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. *Runstrom*.

Lay evidence in relatively uncomplicated cases is adequate to raise the presumption and rebut it. *VECO, Inc. v. Wolfer*, 693 P.2d 858 (Alaska 1985).

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

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

> **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. . . .

> **8 AAC 45.114. Legal memoranda.** Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must
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> (1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established;
>
> (2) not exceed 15 pages, excluding exhibits, unless at a prehearing the board or its designee determined that unusual and extenuating circumstances warranted a longer memorandum; if the board or its designee granted permission at prehearing to file a legal memorandum exceeding 15 pages, excluding exhibits, it must be accompanied by a one-page summary of the issues and arguments;

> **8 AAC 45.116. Opening and closing argument.** Except when the board or its designee determines that unusual and extenuating circumstances exist, the amount of time at a hearing for a party's opening and closing arguments, including a statement of the issues, will be a combined total of not more than 20 minutes.

> **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 giving Employee additional argument time correct?

Parties' hearing memoranda are limited to 15 pages, excluding exhibits. 8 AAC 45.114. Employee objected to Employer's hearing brief because it was 19 pages long, including the first unnumbered page, which contained only the case caption and other identifying information. Employer admitted its brief was inadvertently too long. Employer contended the hearing brief regulation should be modified or waived. 8 AAC 45.195. Further, parties are typically limited to 20 minutes for opening and closing arguments. 8 AAC 45.116. Rather than strike Employer's hearing brief, or not consider the last four pages, the panel issued an oral order giving Employee four additional minutes to make his arguments at hearing. This oral order allowed the panel to consider Employer's over-length brief and at the same time gave Employee a fair opportunity to make lengthier oral arguments addressing additional material set forth in the brief. The oral order ensured fairness and assisted the panel in best ascertaining the parties' rights. AS 23.30.001(1); AS 23.30.135.

2) Should Employer's time and payroll exhibit attached to its hearing brief be considered?

Employee relied primarily upon formal rules regarding "best evidence" as grounds for his objection to Employer's time and payroll exhibits attached to its hearing brief. At the hearing's conclusion, Employee seemed to suggest the original objection to the two documents attached to Employer's hearing brief had become moot. Given the parties' ultimate reliance on these documents, the time and payroll exhibits will be considered. *Rogers & Babler*.

3) Did Employee suffer a compensable injury while working for Employer?

The primary issue in this case is whether Employee's back injury arose out of and in the course of his employment with Employer. AS 23.30.010(a). The parties are not arguing at this juncture over whether the employment was the substantial cause of any specific disability or need for any medical treatment. Little medical evidence was adduced or discussed at hearing. The issue is

whether Employee's injury happened on the job as he subsequently stated, or if it happened elsewhere, which is what he told his initial medical providers. This issue creates a factual dispute to which the presumption of compensability must be applied. *Meek*; *Coppe*.

Whether Employee got hurt as he stated on the job is not a complex issue requiring any special evidence to raise the statutory presumption. *Wolfer*. Without regard to credibility, Employee raises the presumption with his testimony in which he explained how he was injured on Employer's job moving a heavy sign constructed from logs, how and why he lied to emergency room personnel to obtain medical treatment and how he subsequently learned he was covered by workers' compensation insurance and could file a claim. *Tolbert*. Employer rebuts the raised presumption through Stone's testimony that Employee never mentioned an injury to him and Stone never saw Employee acting like he was injured, and through Employee's emergency room records in which he told medical providers he had injured his back the day before when he fell off a ladder at home. *Runstrom*. The burden of production shifts back to Employee who must prove his injury occurred at work as he stated, by a preponderance of the evidence. *Saxton*.

This case is as unusual as it is difficult. It is unusual because Employee claims a work injury, admittedly lied to his initial medical providers about the injury and said it was not work-related so he could get medical care, recanted his story and then filed a claim seeking benefits fully conceding he had lied previously. It is difficult only because of the diametrically opposed accounts of the events surrounding the alleged injury. One fact, and one factual conclusion, cannot be denied. First, it is a fact Employee lied to his initial medical providers. He admitted as much. There is no question about it. Second, either Employee or Stone was lying under oath at hearing. There is no question about that factual conclusion, either. In cases where witness credibility is at issue, parties often resort to "gotcha" moments to impugn an opponent's witnesses' credibility. Determining who is lying and who is telling the truth at a hearing is perhaps the fact-finders' most difficult task and such subjective determinations are the most difficult factual findings and conclusions to support. *Rogers & Babler*.

The fact-finders have the witnesses' testimony and demeanor as well as extrinsic evidence to consider in determining credibility. First, Employee presented himself well at hearing. His

testimony was sincere, candid and he appeared to have no guile. Employee convincingly explained in detail how he injured his low back moving a heavy sign constructed from logs on the job site while working for Employer near Big Lake. He also believably stated he immediately told Stone about his injury. Employee also told his fiancée Obermann, his uncle Brady and his friend West he had hurt his low back while working for Employer in June 2014. One would expect Employee to tell his closest relatives and friends about this occurrence. All three witnesses corroborated Employee's account, to a greater or lesser degree, depending upon the details he shared with them about his work injury with Employer. AS 23.30.122; *Smith*.

Employee credibly said he tried to return to work for Employer, at Obermann's urging, the day following the injury only to be sent home by Stone, who saw him walking with an altered gait, grimacing and holding his lower back. Obermann corroborated Employee's story and returned to Employer's premises to pick Employee up and take him home. AS 23.30.122; *Smith*. Apart from Employee's lie to emergency room personnel about how the injury occurred, the medical records and related expert medical opinions support symptoms and a diagnosis that conceivably could have been caused or aggravated by the actual injury as Employee described it in his deposition and at hearing. AS 23.30.122; *Smith*.

The evidence against Employee having had an injury arising out of and in the course of his employment with Employer on or about June 16, 2014, includes Stone's statement that Employee never reported an injury to him, the emergency room records stating Employee hurt his back when he fell from a ladder at home weeks after he had already been fired from employment with Employer, Dr. Klimow's medical records stating the injury resulted from bending and picking up a heavy log and lifting, language from Employee's claim and Tokash's testimony about what Employee told her had caused his injury. This evidence will be analyzed in order.

a) Stone's statement that Employee never reported an injury to him is not credible.

About the only thing of which Stone was certain at hearing was that Employee never reported an injury to him and Stone never saw Employee look or act like he was in pain. The main

difference between Employee's testimony on this point and Stone's testimony was their demeanor at hearing. Unlike Employee, Stone's demeanor at hearing was nervous, anxious, and uncomfortable, and at times Stone appeared frustrated. Stone's testimony was often uncertain and inconsistent. He did "not recall" several important points. For example, Stone did not recall asking Employee to move the heavy log sign but never specifically denied instructing him to do so. Employee described the event with specific detail. Stone did not recall sending Employee home from work during Employee's last week of employment, again not specifically denying it. By contrast, both Employee and Obermann definitively stated Stone sent him home, as Employee said because of his visible pain behavior, and Stone offered no explanation why Employee obviously was not at work on a day when he otherwise should have been. Stone twice did "not recall exactly" Employee stating he had a work injury when he called and asked for Stone's workers' compensation information. But in the recorded telephone conversation played at hearing, Employee can clearly be heard to say, in response to Stone's question, that he had a work injury the year prior.

Though Stone repeatedly swore he indoctrinates all new employees, explaining they are covered by workers' compensation insurance, he could not recall when or where he had this conversation with Employee. Experience shows most employers do not advise new hires they are covered by workers' compensation. *Rogers & Babler*. Stone could not recall if he told the adjuster he was going to investigate the alleged injury. He could not remember the adjuster asking him if she could speak to Stone's other employees. One would think co-workers, especially Ty, could quickly corroborate or dispel Employee's injury account. Though the adjuster's notes stated otherwise, Stone could not remember telling the adjuster he had terminated Employee on June 21, 2014, rather than on June 22, 2014. Similarly, after testifying in detail about where he has, for years, hung the "Employers' Notice of Insurance," Stone said "I think it was" hanging there during the time Employee worked for him, but apparently he was not certain. Stone did not know why he selected June 22, 2014 as the date he terminated Employee. After first stating he did not know the date the wallet incident occurred, Stone said the incident must have happened during Employee's last week at work. When Employee's counsel pointed out the discrepancy in his testimony, Stone became visibly agitated and curtly admitted he could not recall when the wallet incident had occurred.

Further, and perhaps most compelling against Stone's credibility was his testimony that he only hired Employee to work for him a total of two days in January, February and March 2014. Employee and Obermann specifically contradicted this testimony. Without regard to weather service documents, the panel's experience and observations recall there were more than two days in January, February, and March 2014, in which more than two inches of snow fell. *Rogers & Babler*. It is true Ty may have occasionally assisted Stone in clearing snow during this period. But Stone was attempting to minimize Employee's work for him "under the table." He provided no timecards to support his position. Stone's testimony Ty and Employee were "casual workers," suggested he did not inform his insurance company that Ty or Employee were "employees" or that Stone had additional payroll. Both Stone and Tokash admitted these factors would have increased Stone's workers' compensation premiums. Most notably, it is completely unbelievable Stone would hire Employee to work only one day in January and one day in February, and based upon that limited work experience, hire Employee full-time two months later in April 2014. AS 23.30.122; *Smith*.

On the other hand, assuming Stone was so impressed by Employee's performance on two days in January and February that he hired him full-time in April, it is then completely unbelievable Stone would fire Employee for driving a company vehicle for less than 45 minutes without his operator's license in his possession. In truth, based upon Employee's and Obermann's credible testimony, Employee worked for Stone several times per week from January through March. Stone gave no indication he thought Employee was a bad worker. To the contrary, Employee had proven to Stone over three months' work that he was reliable. It is not conceivable Stone would have fired Employee under any circumstances for driving less than 45 minutes without his operator's license on his possession without first admonishing Employee and simply telling him never to do it again. Stone admitted that Employee, not Stone, would be the one ticketed for not having his operator's license in his possession in the event of an accident or a traffic stop.

b) The emergency room records stating Employee hurt his back when he fell from a ladder are given less weight.

The fact Employee lied to the emergency room staff is troublesome. It shows Employee is capable of lying when he is desperate. It raises the specter that Employee lied at hearing as well.

But, Employee was not under oath when he spoke to the emergency room physicians and he has since recanted the history he gave to his earliest medical providers. For the reasons stated above, Employee's hearing testimony was credible. There is no evidence Employee has a ladder at home or fell from one at any time. The falling-from-the-ladder incident never occurred. Further, Employee is young and not well-educated. Unrebutted hearing testimony shows he suffers from a mild cognitive problem, which placed him in special education classes in high school. He lacks a GED. He even misspelled his fiancée's last name. There is no evidence he completed any paperwork for his prior two works injuries. Therefore, Employee's explanation of his naïveté about workers' compensation under these circumstances is believable. Based on this credible evidence, the emergency room records will be given less weight. AS 23.30.122; *Smith*.

c) Dr. Klimow's medical records are not dispositive.

Dr. Klimow's medical reports state Employee told her his low back condition was "injury related" and resulted from "bending (picking up a heavy log) and lifting." Employee credibly explained that Dr. Klimow seemed more interested in his job duties than what precisely caused Employee's injury. AS 23.30.122; *Smith*. As Murdoch noted, Employee sometimes has difficulty with self-expression. Communication can be, and often is, difficult. *Rogers & Babler*. In short, unless dictated verbatim, a physician's medical notes are a compilation and interpretation of what the patient tells the doctor. In this instance, Dr. Klimow's notes containing Employee's injury history, though not identical, are also not completely dissimilar from his deposition and hearing testimony. The minor differences in wording do not impugn Employee's credibility and do not dictate any particular result.

d) Language from Employee's claim is not dispositive.

In his May 27, 2015 claim, Employee said he hurt his back, "lifting logs on a jobsite." With due respect to adjuster Tokash's opinion, this brief description is not fatally dissimilar from Employee's deposition and hearing testimony in which he stated he injured his back lifting a sign constructed from logs. Either way, Employee said he was "lifting logs on a jobsite" when he injured his back. Again, the minor differences in wording do not impugn Employee's credibility and do not dictate any particular result.

e) Tokash's testimony about what Employee told her had caused his injury is not dispositive.

Employee reportedly told Tokash he injured his back "lifting and moving logs." Again, this account is not completely dissimilar from Employee's deposition and hearing testimony. According to Tokash, Employee further told her he had been cutting trees into six- to eight-foot lengths at the Big Lake job and never mentioned lifting a sign. But Tokash conceded she did not always promptly transfer her hand-written "running notes" into her computer diary, from which she refreshed her recollection at hearing. Experience teaches that communication is often difficult and miscommunications and misunderstandings are common. *Rogers & Babler*. Employee candidly admitted perhaps he misunderstood the adjuster's question. For these reasons, Tokash's recollection and her notes are given less weight. AS 23.30.122; *Smith*.

In summary, Employee is credible and Stone is not. AS 23.30.122; *Smith*. A back injury resulting from bending, lifting and twisting a heavy object is commonplace. *Rogers & Babler*. Employee's credible testimony is adequate to prove his case once all the evidence has been weighed and credibility has been determined. AS 23.30.120. Therefore, Employee had a specific, work-related event, felt symptoms and suffered an injury that arose out of and in the course of employment with Employer on or about June 16, 2014, when he moved a sign constructed from logs on the job and hurt his lumbar spine. AS 23.30.010(a). The remaining question for this preliminary hearing is whether Employee's claim is otherwise barred for failure to provide formal, written notice of this injury within 30 days.

4) Is Employee's claim barred for failure to give written notice?

The law requires an injured worker to give "to the board and to the employer" written notice of an injury "within 30 days of such injury." AS 23.30.100. Failure to give notice is an absolute bar to benefits, with several notable exceptions. *Cogger*. Failure to give such notice does not bar a claim if the employer or its agent in charge in the place where the injury occurred "had knowledge of the injury" and the employer or carrier has not been prejudiced by the employee's failure to give notice; or if the failure is excused on the ground for some satisfactory reason notice could not be given; or unless objection to the failure is raised at the first hearing.

AS 23.30.100(d)(1)-(3). The law presumes "sufficient notice of a claim has been given." AS 23.30.120(a)(2). "Knowledge" simply means "awareness." *Hammer*.

Employee contends he immediately told Stone he had injured his back on the date it happened, after moving a heavy sign made from logs. Employer contends Employee never mentioned an on-the-job injury or looked like he was in pain. This creates a factual dispute concerning Employer's knowledge, to which the presumption of compensability must be applied. *Meek*; AS 23.30.120. The word "claim" in the phrase "sufficient notice of the claim" in AS 23.30.120(a)(2), read in context with other statutes, includes "sufficient notice of the injury" because AS 23.30.120(b) references AS 23.30.100(d), which provides an excuse for an injured worker's failure to give "notice" when the employer has knowledge "of the injury." Therefore, "claim" is meant in AS 23.30.120(a)(2) to be interpreted broadly and includes "injury." Whether Employee gave "notice of an injury" to Stone and whether Employer therefore had actual knowledge of Employee's injury is not a complex issue requiring special or unusual evidence. *Wolfer*. Without regard to credibility, Employee raised the statutory presumption he gave "sufficient notice of the claim," *i.e.*, of his "injury," with his testimony that he promptly told Stone on site that he "hurt his back" when he moved the heavy sign made from logs. *Meek*. He did not need to tell Stone he thought his injury was work-related, though in context such was at least implied. *Kolkman*. This evidence raises the notice presumption and shifts the production burden to Employer. *Tolbert*. Employer rebuts the presumption with Stone's testimony stating Employee never told him of a work related injury, and Employee never appeared to be in pain. *Runstrom*. The presumption drops out and Employee must prove he gave notice of his injury to Employer, and Employer had actual knowledge of his injury, by a preponderance of the evidence. *Saxton*.

a) Employer, through Stone, had actual knowledge of Employee's injury the day it happened, and the next day.

This decision has determined that Employee's injury occurred on or about June 16, 2014. It is undisputed Employee did not provide formal, written notice of injury to Employer within 30 days of its occurrence, or within 30 days of the first compensable event on July 3, 2014, when Employee went to the emergency room for treatment. Whether Employer had actual knowledge

of Employee's injury can only be determined by weighing Employee's credibility versus Stone's credibility. Employee meets his burden of showing Employer had actual knowledge of his injury for the reasons set forth above given his credibility vis-à-vis Stone's lack of credibility, which are all incorporated here by reference. AS 23.30.122; *Smith*. The credible evidence demonstrates Stone knew about Employee's work injury the day happened and knew about it again the following day when he sent Employee home from work because of Employee's visible pain behavior. *Hammer*. Therefore, based on Alaska Supreme Court precedent, AS 23.30.100 does not bar Employee's claim, unless Employer can prove it was prejudiced by Employee's failure to provide formal, written notice within 30 days of the first compensable event. *Tinker*.

b) Employer was not prejudiced by Employee's failure to give formal, written notice within 30 days of the first compensable event.

Employer has the burden of proving its affirmative defense that it was prejudiced by Employee's failure to give written notice within 30 days. *Dafermo*. It relies exclusively on Tokash's testimony in which she specifically states Employer and its insurer were prejudiced for various reasons, including their ability to investigate Employee's alleged injury and their inability to provide prompt medical treatment. But, this decision has determined Stone had actual knowledge of Employee's injury the day it occurred. Actual knowledge excused Employee's requirement to provide formal written notice so long as Employer was not prejudiced. *Tinker*.

"Notice to or knowledge of the occurrence of the injury" on Employer's part is "notice or knowledge" on the insurer's part. AS 23.30.030(3). Once Employee told Stone he had just injured himself on the job, this actual knowledge was imputed to Stone. By law, Stone had an affirmative duty to file an injury report within 10 days and notify his workers' compensation insurer. AS 23.30.070(a). He did neither. As the Alaska Supreme Court has repeatedly pointed out, it would take an extraordinary set of circumstances to show prejudice to Employer where Stone had actual knowledge of Employee's injury. *Tinker*. Tokash's testimony would have been powerful in a case where the employer did not have actual knowledge of an injury and decided to do nothing about it. But those are not the facts here. *Dafermo*; *McGahuey*. Employer provided no evidence suggesting something prevented Stone from completing an injury report, or notifying his carrier of Employee's injury. *Cogger*. In fact, Stone testified, albeit incredibly,

that he told his employees to "come to me" if they ever had a work injury. Stone said his normal protocol was to immediately call his insurance carrier. Yet, in this case when Employee went to Stone and reported his injury, Stone gave Employee additional tasks and did nothing in respect to following his own purported injury reporting protocol. If Employer or Tokash were prejudiced in any way, they were prejudiced because Stone failed to act upon his actual knowledge of Employee's work injury. *Tinker*. Given these facts and circumstances, Employer had all the information it needed to file an injury report and it was not prejudiced by Employee's failure to also provide formal, written notice. Employee's claim while not be dismissed under AS 23.30.100.

CONCLUSIONS OF LAW

1) The oral order giving Employee additional argument time was correct.
2) Employer's time and payroll exhibit attached to its hearing brief will be considered.
3) Employee suffered a compensable injury while working for Employer.
4) Employee's claim is not barred for failure to give written notice.

ORDER

1) Employee's injury with Employer, which occurred on or about June 16, 2014, arose out of and in the course of his employment with Employer, and is a compensable injury.
2) Employee's May 27, 2015 claim is not barred under AS 23.30.100.
3) Employee may request a hearing on the merits of his May 27, 2015 claim if the parties do not otherwise resolve the remaining issues.

Dated in Anchorage, Alaska on November 12, 2015.

ALASKA WORKERS' COMPENSATION BOARD

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William Soule, Designated Chair

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Amy Steele, Member

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Rick Traini, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of Cameric Brady, employee / claimant v. AFS Construction, employer; Alaska National Insurance, insurer / defendants; Case No. 201508404; 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 November 12, 2015.

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Pamela Murray, Office Assistant