ALASKA WORKERS' COMPENSATION BOARD

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

JUANA CONTRERAS-MENDOZA, Employee, Claimant, v. QDOBA MEXICAN GRILL, Employer, and ARGONAUT INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 200804514 AWCB Decision No. 16-0006 Filed with AWCB Anchorage, Alaska on January 12, 2016

Juana Contreras-Mendoza's (Employee) May 17, 2012, May 21, 2012, June 17, 2012, June 27, 2012, July 25, 2012, August 10, 2012, September 24, 2012, March 25, 2014, April 3, 2014, May 7, 2014, May 21, 2014, July 6, 2014, August 6, 2014, September 29, 2014, October 6, 2014 and November 8, 2014 claims, her April 28, 2014 petition and Qdoba Mexican Grill's (Employer) September 18, 2014 petition were all heard on January 7, 2016, in Anchorage, Alaska, a date selected on October 14, 2015. Non-attorney representative Vincent Briggs appeared, testified and represented Employee, who also appeared and testified. Attorney Michelle Meshke appeared and represented Employer and its workers' compensation insurer. As a preliminary matter, Employer objected to a medical report and the panel issued an oral order excluding a report from Benhaim Prosper, M.D., resulting from an unlawful change of Employee's attending physician. This decision examines the oral order and addresses the other issues on their merits. The record closed at the hearing's conclusion on January 7, 2016.

ISSUES

Employer contended Dr. Prosper's December 28, 2014 medical report may not be considered as evidence in Employee's case because Dr. Prosper was an unauthorized change in Employee's attending physician. It contended Dr. Prosper's report cannot be considered for any purpose and Employer may not be required to pay for Dr. Prosper's examination.

Employee contended she just needed another medical opinion so she went to California to see Dr. Prosper. Employee implied Employer may have agreed to a physician change to Dr. Prosper. Ultimately, Employee conceded she hired Dr. Prosper as an expert medical witness to get an opinion in preparation for possible mediation in this case.

1) **Was the oral order excluding Dr. Prosper's December 28, 2014 medical report correct?**

Employee contends *Contreras-Mendoza v. Qdoba Mexican Grill*, AWCB Decision No. 12-0174 (October 2, 2012) (*Contreras-Mendoza II)* found she suffered a work injury on February 22, 2008, when she jammed her right thumb into a wall-mounted soap dispenser. She contends her work injury required two hand surgeries and continues to cause pain and other symptoms. Employee contends she is entitled to a medical evaluation from her attending physician to determine if further medical care or treatment to alleviate her symptoms is recommended.

Employer contends (*Contreras-Mendoza II)* already heard and decided this issue. Employer contends nothing has changed since *Contreras-Mendoza II* denied Employee's 2012 request for a similar medical examination. Therefore, Employer contends Employee is not entitled to a medical examination for her right thumb and hand.

2) **Is Employee entitled to an examination from her attending physician for her work-related right thumb and hand injury?**

Employer contends Employee's initial claim for a frivolous and unfair controversion finding should be denied because Employee filed a claim, Employer controverted it, and Employee failed to request a hearing on her controverted claim within two years. Employer contends Employee's subsequent, serial frivolous and unfair controversion claims amended each prior

claim. It contends the subsequent claims each arose out of the conduct, transaction, or occurrence set out in the original pleading. Consequently, Employer contends each subsequent serial claim relates back to the original pleading and all should therefore be dismissed.

Employee's non-attorney representative concedes he may have made a technical pleading error and implies he did not fully understand the "relate-back" doctrine. Employee contends her frivolous and unfair controversion claims should not be dismissed based on a technical mistake.

3) Should Employer's petition to dismiss Employee's serial claims for a frivolous and unfair controversion finding be granted?

Employee contends Employer frivolously and unfairly controverted her case repeatedly. She requests an order finding Employer's controversions have been frivolous and unfair.

Employer contends it has never frivolously or unfairly controverted Employee's case. It requests an order denying Employee's requests for a frivolous and unfair controversion finding.

4) Has Employer frivolously or unfairly controverted compensation due Employee?

Employee contends Leslie Dean, M.D., should be "reinstated" as her attending physician. Employee contends Employer and its agents have improperly interfered with her ability to obtain medical care and ruined her relationship with Dr. Dean.

Employer contends neither it nor its agents improperly interfered with Employee's relationship with Dr. Dean. It contends it merely controverted Employee's right to benefits and her claims based on prior physicians' reports and on *Contreras-Mendoza II.*

5) Should Employee's petition for an order "reinstating" Dr. Dean as her attending physician be granted?

Lastly, Employee's non-attorney representative contends he is entitled to $200,000 in attorney's fees from the State of Alaska. Employee's non-attorney representative also contends he is entitled to $20,000 in costs for representing Employee in this case, and seeks the cost award, in the alternative, from either Employer or from the State of Alaska.

6) Is Employee's non-attorney representative entitled to an attorney's fee award from the State of Alaska or a cost award from either Employer or from the State of Alaska?

FINDINGS OF FACT

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

1) On February 22, 2008, Employee was working for Employer as a line server. While obtaining pots from a shelf above the sink, Employee's coworker accidentally dropped several line pots onto Employee while she stood leaning over the sink to get soap from a wall-mounted dispenser onto a sponge with which to wash the walls. Employee was startled and jammed her right hand into the soap dispenser. Employee injured her right thumb, index and middle fingers, wrist, and her mid-back. (*Contreras-Mendoza II* at 6).

2) On June 13, 2008, Patrick Radecki, M.D., performed an employer's medical evaluation (EME) on Employee. Dr. Radecki concluded there was no medical evidence the February 28, 2008 injury caused a temporary aggravation to Employee's preexisting cervical condition, the work injury was not the substantial cause of Employee's ongoing symptoms, no further diagnostic studies were reasonable or necessary, prescribed medications were not related to the work injury, Employee could return to full-time work without restrictions and she incurred no permanent impairment. (Radecki report, June 13, 2008).

3) On June 20, 2008, Employer controverted Employee's right to all benefits based upon EME Radecki's report. (Controversion Notice, June 20, 2008).

4) On December 3, 2009, Employee filed a claim for various indemnity and medical benefits. (Workers' Compensation Claim, December 3, 2009).

5) On December 28, 2009, Employer controverted Employee's claim to all benefits, again based on Dr. Radecki's EME report. (Controversion Notice, December 24, 2009).

6) On February 10, 2010, Employer controverted Employee's claim to all benefits and suspended her benefits because Employee had not signed and returned proffered discovery releases. (Controversion Notice, February 9, 2010).

7) On January 19, 2011, Loren Jensen, M.D., performed an EME on Employee. He opined the February 22, 2008 work injury was not the substantial cause of her right thumb tendon rupture. Dr. Jensen said the work injury had caused a thumb sprain, which was medically stable June 7, 2010. Dr. Jensen stated Employee had a one percent permanent partial impairment rating attributable

either to the work injury or to a subsequent tendon rupture and tendon transfer surgical procedure. Dr. Jensen said no further medical treatment for the work injury was necessary including additional surgeries and Employee could return to unrestricted work. (Jensen report, January 19, 2011).

8) On February 7, 2011, Employer controverted Employee's claim to benefits for her right thumb tendon rupture including surgery, time loss as of June 7, 2010, medical treatment, reemployment benefits and permanent partial impairment, based on Dr. Jensen's report. (Controversion Notice, February 4, 2011).

9) On August 18, 2011, attorney Michael Patterson timely filed a hearing request on Employee's December 3, 2009 claim. (Affidavit of Readiness for Hearing, August 12, 2011).

10) On May 10, 2012, Employer controverted Employee's claim to all benefits based on its defense her claim was barred under "AS 23.20.110(c)." (Controversion Notice, May 9, 2012).

11) On May 15, 2012, Employer corrected a typographical error in its May 9, 2012 controversion and controverted Employee's claim to all benefits based on its defense her claim was barred under "AS 23.30.110(c)." (Amended Controversion Notice, May 14, 2012).

12) On May 21, 2012, Employee, now represented by Briggs, filed a claim alleging only an "Unfair or Frivolous Controvert (Denial))." Specifically, Employee claimed the February 4, 2011 controversion was unfair or frivolous because, in her view, Dr. Jensen's EME report did not support the denial. Employee requested no benefits. This claim said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, May 17, 2012).

13) On May 29, 2012, Employee filed a claim seeking only an unfair or frivolous controversion finding. Specifically, Employee claimed the June 20, 2008 and December 24, 2009 controversions were unfair or frivolous because, in her view, Dr. Radecki's EME report did not support the denial. This claim requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, May 21, 2012).

14) On June 12, 2012, Employer controverted Employee's May 17, 2012 claim stating it was barred under AS 23.30.110(c) and Employer continued to rely upon Dr. Jensen's EME report. (Amended Controversion Notice, June 11, 2012).

15) On June 21, 2012, Employee filed a claim requesting only an unfair or frivolous controversion finding. Employee requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, June 17, 2012).

16) On June 19, 2012, Employer controverted Employee's claim stating it was barred under AS 23.30.110(c) and Employer had appropriate evidence upon which to deny benefits on June 20, 2008 and December 24, 2009. Employer continued to rely upon Dr. Radecki's June 13, 2008 opinions. (Amended Controversion Notice, June 19, 2012).

17) On July 2, 2012, Employee filed a claim seeking only an unfair or frivolous controversion finding. Employee requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, June 27, 2012).

18) On July 11, 2012, Employer controverted Employee's claim alleging it was barred under AS 23.30.110(c) and Employer had appropriate evidence upon which to deny benefits on February 4, 2011 and again on June 11, 2012. Employer continued to rely upon Dr. Jensen's January 19, 2011 opinions. (Amended Controversion Notice, July 10, 2012).

19) On July 17, 2012, the parties and their representatives attended a prehearing conference at which affidavits of readiness and the hearing request process were discussed in detail. The prehearing conference summary expressly quoted AS 23.30.110(c) in its entirety. (Prehearing Conference Summary, July 17, 2012).

20) On July 24, 2012, Employer again controverted Employee's right to all benefits stating her claim was barred under AS 23.30.100, AS 23.30.105, AS 23.30.110(c) or otherwise barred by law or equity and it had appropriate evidence upon which to deny benefits on June 20, 2008, December 24, 2009 and on June 19, 2012. Employer continued to rely upon Dr. Radecki's June 13, 2008 opinions. (Amended Controversion Notice, July 23, 2012).

21) On July 30, 2012, Employee filed another claim requesting only an unfair or frivolous controversion finding. Employee requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, July 25, 2012).

22) On August 13, 2012, Employee filed a claim seeking only an unfair or frivolous controversion finding. Employee requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, August 10, 2012).

23) On August 21, 2012, Employer controverted Employee's July 25, 2012 claim contending it was barred under AS 23.30.110(c) and Employer had appropriate medical evidence on which to base its controversions dated February 4, 2011, June 11, 2012 and July 10, 2012. Employer continued to rely upon Dr. Jensen's January 19, 2011 EME. (Amended Controversion Notice, August 20, 2012).

24) On August 31, 2012, *Contreras-Mendoza v. Qdoba Mexican Grill*, AWCB Decision No. 12-0150 (August 31, 2012) (*Contreras-Mendoza I)* held the board's designee did not abuse his discretion by determining he previously abused his discretion when he allowed Employee to withdraw an affidavit of readiness for hearing before properly advising her of possible consequences her withdrawal may have, and then reinstating her affidavit of readiness without first providing Employer an opportunity to be heard. *Contreras-Mendoza I* also denied Employer's request to cancel the September 4, 2012 hearing. (*Id*. at 26).

25) On September 6, 2012, Employer controverted Employee's August 10, 2012 claim contending her claim was barred under AS 23.30.100, AS 23.30.105, AS 23.30.110(c) or otherwise barred by law or equity and it had appropriate evidence upon which to deny benefits on June 20, 2008, December 24, 2009, on June 19, 2012 and on July 23, 2012. Employer continued to rely upon Dr. Radecki's June 13, 2008 opinions. (Amended Controversion Notice, September 4, 2012).

26) On September 25, 2012, Employee filed a claim requesting only an unfair or frivolous controversion finding. Employee requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, September 24, 2012).

27) On October 2, 2012, *Contreras-Mendoza v. Qdoba Mexican Grill*, AWCB Decision No. 12-0174 (October 2, 2012) (*Contreras-Mendoza II)* denied Employer's petition to dismiss Employee's December 3, 2009 claim under AS 23.30.110(c), ordered Employer to pay any unpaid medical bills related to Employee's hand surgeries or reimburse Employee or Mr. Briggs for payments made, plus mandatory interest, denied without prejudice Employee's request for an order requiring Employer to pay for a follow-up visit with Dr. Meals, ordered Employer to pay Employee temporary total disability benefits and mandatory interest but not past the date the parties subsequently determined Employee returned to full-or part-time work, or April 6, 2011, whichever was latest, reserved jurisdiction to resolve any temporary total disability disputes, ordered Employer to pay Employee permanent partial impairment and mandatory interest, denied Employee's request for review of the rehabilitation benefits administrator's decision as there was nothing to review and directed Employee to consult with the rehabilitation benefits administrator. (*Id*. at 50-51).

28) On October 19, 2012, Employer controverted Employee's September 25, 2012 claim contending it was barred under AS 23.30.100, AS 23.30.105, AS 23.30.110(c) or otherwise barred by law or equity and it had appropriate evidence upon which to deny benefits on June 20, 2008,

December 24, 2009, on June 19, 2012, July 23, 2012 and on September 4, 2012. (Controversion Notice, October 17, 2012).

29) On October 31, 2012, *Contreras-Mendoza v. Qdoba Mexican Grill*, AWCB Decision No. 12-0187 (October 31, 2012) (*Contreras-Mendoza III)* modified a factual finding in *Contreras-Mendoza II* at Employee's request. (*Id*. at 9).

30) On or about April 10, 2013, Employee filed a petition to "finalize" Employer's "economic obligations" in respect to this case. (Petition, April 10, 2013).

31) On May 16, 2013, Employee filed a hearing request only on her "Petition" dated "04/10/2013." (Affidavit of Readiness for Hearing, May 13, 2013).

32) On August 14, 2013, the parties appeared for hearing on Employee's April 10, 2013 petition. Employee contended she was entitled to additional temporary total disability benefits, additional medical expenses for past bills incurred, interest and a 25 percent penalty on all benefits under AS 23.30.155(e). Employee contended Drs. Jensen's and Dr. Radecki's EME reports were inadequate to support a controversion notice. (Employee's hearing arguments, August 14, 2013).

33) On September 13, 2013, *Contreras-Mendoza v. Qdoba Mexican Grill*, AWCB Decision No. 13-0112 (September 13, 2013) (*Contreras-Mendoza IV*) concluded Employee was entitled to additional temporary total disability benefits from June 8, 2010 through April 6, 2011. It ordered Employer to pay additional medical expenses for past care rendered as well as statutory interest to medical providers, collectors, Briggs and Employee. *Contreras-Mendoza IV* denied Employee's penalty claim. Specifically in respect to the penalty request, *Contreras-Mendoza IV* stated:

> Employee's argument is misplaced. Her arguments regarding Dr. Radecki's report go to its weight, not its admissibility as evidence at hearing or Employer's ability to rely upon it to controvert her right to benefits. Dr. Radecki's report made definitive statements saying, in his opinion, Employee's work was not the substantial cause of whatever ailed her hand or the need to treat it. He also stated the injury did not aggravate a pre-existing condition, she did not need further treatment, had no impairment, and could return to work without restrictions. Similarly, Dr. Jensen's report stated Employee suffered a work-related sprain, and affirmatively stated the tendon rupture was not caused by Employee's February 20, 2008 injury; he did not believe the rupture was even present. Accordingly, had a hearing been held and only Employer appeared with Drs. Radecki's and Jensen's reports, and no other evidence was offered, Employee would have been found not entitled to additional benefits. Therefore, Employer's evidence at the time it controverted met the *Harp* criteria, was not made in bad faith, and the

> evidence cannot support Employee's claim for penalty. Therefore, Employee's penalty claim will be denied. (*Contreras-Mendoza IV* at 22-23).

34) On October 31, 2013, Employee filed a timely petition to modify *Contreras-Mendoza IV*. Employee contended *Contreras-Mendoza IV* failed to include some outstanding medical bills. (Petition, October 28, 2013).

35) On November 19, 2013, Employer answered Employee's October 28, 2013 petition for modification and asserted bills owed to medical provider Cornerstone were either already paid or had not been received. Employer also contended it had contacted Cornerstone to resolve the medical bills. (Answer to Employee's 10/28/13 Petition for Modification, November 18, 2013).

36) On January 22, 2014, Meshke wrote to Briggs stating her client was going to pay Employee an additional $200 in out-of-pocket medical expenses Employee claimed rather than go through additional litigation. (Meshke letter, January 22, 2014).

37) On January 23, 2014, Briggs sent the division an e-mail stating, among other things, he had contacted Meshke and advised her if Employer just paid Employee $200, there would be no need for a prehearing conference on January 29, 2014. (Briggs e-mail, January 23, 2014).

38) On January 29, 2014, the parties attended a prehearing conference scheduled on Employee's October 22, 2013 petition for modification. Meshke noted Employer was resolving the Cornerstone bill directly with the provider and the adjuster had recently sent Employee a $200 check. The summary states, "This issue is resolved." Briggs stated "the remaining issue is future time loss and medical treatment. He raised the possibility of PTD and PPI. He also stated EE needs further examination by her treating physician Dr. Meals." The board designee told Briggs to get a referral from Dr. Meals to Dr. Dean for treatment. Briggs "raised the possibility of a new SIME," and the board's designee "explained that EE's medical benefits are currently open and not controverted." The division served the summary for this prehearing conference on the parties on February 14, 2014. (Prehearing Conference Summary, January 29, 2014).

39) On February 24, 2014, Meshke wrote the board designee in respect to the January 29, 2014 prehearing conference. She timely objected to the notion raised by Briggs at the prehearing conference that "remaining issues" included "future time loss and medical treatment," noting there was no petition or claim currently pending seeking those benefits. Meshke also noted the prehearing conference was intended to address Employee's October 28, 2013 modification petition and not to discuss additional benefits Employee might seek. Meshke said at the prehearing

conference the parties had questioned the status of Employee's medical benefits. Meshke in her letter further told the board's designee:

> You indicated there were no controversions filed, and it appeared that medical benefits are 'open.' I was not prepared to address this issue since there are no pending petitions or claims for future medical benefits, and I was not involved with this claim until approximately March 2013. My responses to questions at the prehearing were based on your review of the Board's file confirming that medical benefits remain 'open.'
>
> We did not discuss the fact that future medical benefits have been previously litigated, and we did not discuss the Board's findings or order at the prehearing conference.
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> Ms. Contreras-Mendoza's claims on the merits were heard before the Board, and a Decision & Order was issued (AWCB No. 12-0174, October 2, 2012). At that time, the employee argued that the employee needed further examination by Dr. Meals. However, the D&O stated: 'Employee's request for an order requiring Employer to pay for a follow-up visit with Dr. Meals is denied at this time.' It further states, 'The overwhelming weight of the medical evidence, especially Dr. Lipon's opinion, supports a finding Employee needs no further medical care for her work-related injury at this time. Employee's request for an order requiring Employer to provide future medical care at this time will be denied. **She may submit further requests for treatment to Employer should any be made by her duly selected attending physician**.'
>
> Thus, the employee may submit requests for further treatment, and the employer may elect to controvert based on the evidence that exists in the record.
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> Please note these objections to the Prehearing Conference Summary. (Meshke letter, February 24, 2014; emphasis in original).

40) On February 26, 2014, attorney Meshke wrote to Briggs and explained when and where the original $200 check had been sent to Employee, as well as a replacement check, because Employee apparently never received the first check. (Meshke letter, February 26 2014; inferences).

41) On March 5, 2014, Briggs wrote to the board designee to "respond" to the January 29, 2014 prehearing conference summary, stating Employee had still not received the $200 check from Employer. Consequently, Employee still considered the modification petition "open." Briggs also stated, in respect to past board decisions in this case, that the "date of issue" for decision 12-0187 be changed from "November 8, 2012" to "October 31, 2012." Briggs listed 11 Employer controversion notices and Employee's "WCC Response." He also pointed out what he contended

were typographical errors on the January 29, 2014 prehearing conference summary. Lastly, Briggs contended the January 29, 2014 prehearing conference summary "is the first I can recall that actually mimics the hearing's content. . . ." (Briggs letter, March 5, 2014).

42) On March 6, 2014, Briggs sent the division an e-mail stating Employee had just received the $200 check from Employer's adjuster. Briggs referenced his pending October 31, 2013 modification petition and asked the division to inform the board designee that "as respects the EE's petition for Modification of Award, 'this issue is resolved.'" (Briggs e-mail, March 6, 2014).

43) On March 14, 2014, Employer filed a controversion denying Employee's right to all benefits based upon Dr. Lipon's July 16, 2011 SIME report in which he opined no further treatment would be medically reasonable or necessary to address Employee's then-current condition. Employer also relied upon *Contreras-Mendoza IV*, which had denied Employee's then-current request for an order requiring Employer to provide future medical care. "This controversion incorporates the employer's 10/17/12 Controversion and their Controversions dated 06/28/08, 12/24/09, 06/19/12, 07/23/12, and 09/04/12." (Amended Controversion Notice, March 13, 2014).

44) On March 27, 2014, Employee filed a claim requesting only an unfair or frivolous controversion finding. She requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, March 25, 2014).

45) On April 4, 2014, Employee filed a claim seeking only "Medical Costs (state amount requested). . . To Be Determined." (Workers' Compensation Claim, April 3, 2014).

46) On April 28, 2014, Employer controverted Employee's March 25, 2014 and April 3, 2014 claims. Employer said it continued to rely upon Dr. Jensen's January 19, 2011 EME report, Dr. Radecki's June 13, 2008 EME report, Dr. Lipon's July 16, 2011 SIME report and *Contreras-Mendoza IV*, all of which stated she did not need any additional medical care or treatment for her work injury. This controversion amended Employer's March 13, 2014 controversion and stated Employee's claims were barred under AS 23.30.100, AS 23.30.105 and AS 23.30.110(c) or otherwise barred by law or equity. (Amended Controversion Notice, April 28, 2014).

47) On April 30, 2014, Employer filed a petition seeking an order compelling Employee to attend a May 7, 2014 EME scheduled with Dr. Jensen. (Petition, April 30, 2014).

48) On May 1, 2014, Employee filed a petition to (1) reinstate Leslie Dean, M.D., as Employee's attending physician, and (2) to end Employer's intent to "inflict physical, mental and economic harm upon the employee. . . ." In his letter attached to the petition, Briggs noted Employer had

scheduled Employee for another EME with Dr. Jensen on May 7, 2014. Briggs contended Dr. Dean had been Employee's attending physician. Among other things, Briggs reiterated that the board designee at the January 29, 2014 prehearing conference had stated Employee's medical benefits were not controverted and were "open." (Petition, April 28, 2014).

49) On May 9, 2014, Employee filed a claim requesting no relief (*i.e.*, no blocks were checked). However, in his attached letter, Briggs said the claim was made for "unfair or frivolous controversion." This claim said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, May 7, 2014).

50) On May 12, 2014, Employer filed a controversion stating Employee had failed to appear for a properly scheduled May 7, 2014 EME with Dr. Jensen. (Amended Controversion Notice, May 9, 2014).

51) On May 14, 2014, the parties appeared at a prehearing conference. Among other things, the board's designee stated:

> As to the statements made in the 1/29/2014 prehearing conference summary, and how they may be interpreted in contradiction with the Board's decision from October 2, 2012, clearly the Board's decision is controlling and the law of the case. As explained at today's prehearing, Employee is free to seek care and ask the board to order Employer to pay for it at hearing. As discussed moving forward with the EME process and seeking care with a treating physician may allow the parties to move to a second SIME. . . .

The designee ordered Employee to attend the rescheduled EME with Dr. Jensen on June 18, 2014. (Prehearing Conference Summary, May 14, 2014).

52) On May 22, 2014, Employer answered Employee's April 28, 2014 petition to "reinstate" Dr. Dean as her attending physician. Employer expressly consented to Employee changing her attending physician from Dr. Meals to Dr. Dean. Employer noted its consent did not obligate Employer to pay for treatment with Dr. Dean and "medical benefits remain controverted." (Answer to Employee's Petition to Reinstate Dr. Dean as Employee's Attending Physician, May 20, 2014).

53) On May 23, 2014, Employee filed a claim seeking only an unfair or frivolous controversion finding. She requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, May 21, 2014).

54) On June 18, 2014, Employer controverted Employee's May 21, 2014 claim alleging an unfair or frivolous controversion and stated its controversions had been based on "substantial evidence." (Amended Controversion Notice, June 17, 2014).

55) On June 20, 2014, Briggs sent an e-mail to the division stating he had spoken to the Executive Director at Anchorage Fracture & Orthopedic Clinic who told him Dr. Dean "would not be available to conduct medical care" for Employee. When Briggs asked her why, the Executive Director told him, "This case is too complicated." Briggs says he asked the Executive Director to send him a letter explaining her decision, but she refused. (Briggs e-mail, June 20, 2014).

56) On June 30, 2014, Employee through Briggs sent a "response" to Employer's answer to Employee's April 28, 2014 petition. Among other things, Employee alleged Employer was intentionally inflicting stress and misery on her and suggested the workers' compensation system was offering her, "Tyranny in Constant Search of Corruption in the Pursuit of Physical, Mental and Economic Misery." (Briggs letter, June 25, 2014).

57) On July 8, 2014, Employee filed a claim requesting only an unfair or frivolous controversion finding. She requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, July 6, 2014).

58) On July 9, 2014, the parties attended a prehearing conference. The summary records:

> Mr. Briggs has repeatedly contacted WCO Quam since the last prehearing asking about the date he must request a hearing on certain claims. Mr. Briggs was advised both by Ms. Quam and designee that Ms. Quam is not a lawyer and cannot give legal advice. Designee has provided specific dates below in the 'Notice to Claimant' section.
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> Again designee explained to Mr. Briggs that a new claim for unfair or frivolous controversion filed in response to the controversion filed after the last claim for unfair or frivolous controversion is nothing more than a vicious circle. Designee also explained that each of these claims relates back and amends the original claim for unfair and frivolous controversion since neither the claim, nor the answer and basis for the controversion has changed.
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> Designee also explained the 4/3/2014 WCC for future medical treatment has a different date by which must file an ARH. That date is also included in the 'Notice the Claimant' section below.
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> Employee stated Dr. Dean has declined to treat her. Employer has consented to a change in physician. Employer also consented to designee noting the names of other

orthopedic hand surgeons in Anchorage. Designee provided the contact information for Dr. Michael McNamara and Dr. Christopher Manion.

Mr. Briggs stated EE will be filing an ARH on the 5/21/2012 WCC as amended for unfair or frivolous controversion. He stated he has emails to various division employees requesting a specific date by which he needed to request a hearing. This request was not made in a previous prehearing and previous summaries only included the general warning.

Employer stated it may respond to the ARH with a petition to dismiss pursuant to AS 23.30.110(c). . . .

Notice to Claimant:

AS 23.30.110(c) provides: 'If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.' In other words, when Employee files a workers' compensation claim and Employer controverts the claim, to avoid possible dismissal of Employee's claim, Employee must file with the board and serve on all opposing parties an affidavit of readiness for hearing within two years of the controversion. The board has an affidavit of readiness for hearing form Employee can complete and file. If Employee has not completed all discovery and cannot file the affidavit of readiness for hearing within two years of Employer's controversion, but still wants a hearing, Employee should provide written notice to the board and serve the notice upon all opposing parties. Employee's May 21, 2012 WCC (as amended) for unfair/frivolous controversion was controverted by the Employer on June 11, 2012, and received by the board on June 13, 2012. Employee must request a hearing on this claim (as amended) by June 13, 2014, or this claim (as amended) may be dismissed. Employee's April 3, 2014 WCC for medical benefits was controverted by the Employer on April 28, 2014, and received by the board on April 30, 2014. Employee must request a hearing on this claim by April 30, 2016, or this claim may be dismissed. (Prehearing Conference Summary, July 9, 2014).

59) On July 11, 2014, Briggs e-mailed the division and stated the following:

As per Laura de Mander's Pre-hearing Conference dated July 9, 2014, the EE, as of 6/13/2014, was in violation of the ARH's 2 year requirement; the EE must request a hearing within 2 years following the filing of the controversion notice; if not the claim is denied. The Controversion Notice in question is dated 6/11/2012, received by the Board on 6/13/2012. This accounts for the last ARH filing date of 6/13/2014 (2 years later).

Please be advised of the following:

> EEs brief presented at the AWC board hearing dated 8/14/2013 provides ample evidence EE has complied with ARH's 2 year requirement, as follows:
>
> Page 5: 2nd Par. 2nd line: 6/11/2012
> Page 5: 2nd Par. 8th line: 6/11/2012
>
> Page 6: 1st Par. 3rd line: 6/11/2012
> Page 6: 3rd Par. 3rd line: 6/11/2012
>
> Exhibit #20: amended controversion notice dated 6/11/2012
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> Simply put, Laura de Mander has been misinformed.
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> Based on the evidence presented, EE expects Laura de Mander to reinstate the 'unfair or frivolous controvert' claim. (Briggs e-mail, July 11, 2014).

60) On July 24, 2014, Briggs wrote to the division stating Employee "will not be filing an Affidavit for Readiness for Hearing (ARH) on EE's 5/21/2002 WCC," which was controverted by the ER on June 11, 2012 and received by the board on June 13, 2012. Employee implied the previous board designee had belatedly given her advice about filing a hearing request. Employee contended she had written two e-mails addressed to the division, one on July 11, 2014 and one on July 14, 2014, stating she had already complied with the requirement to request a timely hearing. Briggs' letter listed how many times various physicians' names appear in the October 2, 2012 decision. Briggs, among other things, also alleged a conspiracy against Employee with participants including Employer, its carrier, its lawyer and the board. (Briggs letter, July 24, 2014).

61) On July 25, 2014, Employer controverted Employee's July 6, 2014 claim. Employer continued to rely on Dr. Lipon's July 16, 2011 SIME report, on Dr. Jensen's January 19, 2011 and June 25, 2014 EME reports and on *Contreras-Mendoza IV*. Employer alleged its controversions were filed in good faith and based upon substantial medical evidence. (Amended Controversion Notice, July 24, 2014).

62) On August 7, 2014, Employee filed a claim seeking only an unfair or frivolous controversion finding. She claimed no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, August 6, 2014).

63) On September 4, 2014, Employer controverted Employee's August 6, 2014 claim stating its controversions had been filed in good faith based on substantial medical evidence. (Amended Controversion Notice, September 3, 2014).

64) On September 19, 2014, Employer filed a petition seeking an order dismissing Employee's May 21, 2012 claim "as amended" alleging unfair or frivolous controversions, under AS 23.30.110(c). Employer stated Employee's May 21, 2012 claim had been controverted on June 13, 2012. It averred Employee had to file a hearing request no later than June 13, 2014, and failed to do so. Employer further contended all subsequent claims for an unfair or frivolous controversion finding "related back" to and amended Employee's May 21, 2012 claim. Similarly, Employer argued all its controversions also related back and amended the initial controversion. (Petition, September 18, 2014).

65) On September 30, 2014, Employee filed a claim requesting only "Medical Costs (state amount requested) To Be Determined." (Workers' Compensation Claim, September 29, 2014).

66) On October 7, 2014, Employee filed a claim requesting only an unfair or frivolous controversion finding. Employee requested no benefits and said "Not Applicable" in the space provided for amending a prior claim. (Workers' Compensation Claim, October 6, 2014).

67) On October 14, 2014, Employer requested a hearing on Employee's March 25, 2014 claim, as amended, and on Employer's September 18, 2014 petition to dismiss under AS 23.30.110(c). (Affidavit of Readiness for Hearing, October 10, 2014).

68) On October 23, 2014, Briggs filed a letter and objected to Employer's hearing request. Among other things, Employee stated, "**THERE IS ABSOLUTELY NO NEED FOR A BOARD HEARING**; **this is a 'simple' WC claim with JCM's work related injuries needing immediate medical care/attention**." (Briggs letter, October 22, 2014; emphasis in original).

69) On November 10, 2014, the parties attended a prehearing conference. According to the summary, the conference consisted "mostly of name-calling and accusations." The parties discussed whether they were ready to set a hearing on Employee's April 3, 2014 claim requesting only medical benefits and on Employer's petition to dismiss her March 25, 2014 claim alleging unfair or frivolous controversions. The designee further stated:

> It is clear that EE and her representative (hereinafter 'EE') do not have a firm legal grasp regarding what the issues are, and what evidence needs to be presented to further their case. This is to be expected of lay persons that have not experienced WC cases in Alaska. Therefore the BD strongly recommended that EE seek out competent legal assistance to help EE navigate her case. The Board designee gave MS. CONTRERAS-MENDOZA a list of Anchorage workers' compensation attorneys that frequently practice in front of the board and informed MS. CONTRERAS-MENDOZA that

> should an attorney agree to take her case, Alaska Workers' Compensation statutes and regulations provide for the payment of her attorney's fees if she prevails. If MS. CONTRERAS-MENDOZA's attorney does not prevail in this case, her attorney is precluded by regulation from charging more than $300 total for representing her. Many attorneys on the Board's list do not charge an initial consultation fee and/or waive the fee if the client is unable to pay.
>
> If MS. CONTRERAS-MENDOZA is not able or inclined to obtain the services of an attorney, the Board designee encourages her to contact and seek the assistance of Workers' Compensation technician Brian Zematis, at (907) 269-4980, if she or her representative have any questions pertaining to her claim.
>
> BD explained to EE that if she wants to have ER pay for her surgery she needs to present a report from a medical provider that a) her injury results from a work injury and b) that her injury requires a further procedure (e.g. physical therapy, surgery, etc.). If she presents that to ER, and ER refuses to pay for such procedure, or to conduct another SIME, than the only way she will be able to get ER to pay for such procedure is through a D&O from the Board; *i.e.* another hearing or mediation will have to be conducted.
>
> In addition, at the PH, EE stated on more than one occasion that all she wanted was the surgery on her hand that her doctor recommended. If that is in fact all EE is asking for, she can offer to settle her case for that amount and ER counsel will take that offer to her client. But if EE attempts to settle her case, it is the strong suggestion of the BD that any offer be short and concise without any editorializing or disparaging remarks. BD has always ascribed to the philosophy that 'you can catch more flies with honey than with vinegar.' If the parties do not adopt this method, a hearing WILL be set at the next PH on EE's WCC filed 4/3/2014 (requesting medical benefits) and ER's Petition to Dismiss EE's WCC filed 3/25/2014 (alleging unfair and frivolous controversions). (Prehearing Conference Summary November 10, 2014; emphasis in original).

70) On November 12, 2014, Employee filed a claim, requested "other" relief and, in an attached letter, reiterated his concerns about representations made at the January 29, 2014 prehearing conference. Briggs continued to suggest Employer's controversions had all been unfair and frivolous for reasons stated in his lengthy letter. Further, Employee's non-attorney representative Briggs requested $200,000 in attorney's fees and $20,000 in costs for representing Employee in this case. (Workers' Compensation Claim, November 8, 2014).

71) On November 21, 2014, Briggs filed a letter in response to the November 10, 2014 prehearing conference summary. Briggs took umbrage at the designee's suggestion he did not have a firm legal grasp on workers' compensation law peculiar to Alaska. Briggs noted he had

40 years' experience as a property-casualty agent and broker specializing for the last 20 years in California workers' compensation law. Briggs also outlined his other experience in the workers' compensation arena. (Briggs letter, November 21, 2014).

72) Employee, through her non-attorney representative Briggs, attached a lengthy, explanatory letter to each relevant claim set forth above. In respect to her claims requesting only an unfair or frivolous finding, Employee's non-attorney's attached letters reiterated Briggs' displeasure with Employer's reliance on Drs. Radecki, Jensen, to some extent Lipon, and expressed Briggs' disagreement with Employer's controversions based on these medical opinions. However, each letter was different than the prior letter and raised new objections, alleged facts and concerns. (Briggs' letters attached to each relevant claim; observations, judgment and inferences drawn from all the above).

73) Employer timely answered Employee's claims, though not all answers are relevant to the issues decided here and not all are recorded in the factual findings, above. (Observations, judgment).

74) On December 16, 2014, the parties attended a prehearing conference. The parties tentatively agreed to mediation with an outside attorney. The summary stated:

> **Notice to Claimant:**
>
> AS 23.30.110(c) provides: 'If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.' In other words, when Employee files a workers' compensation claim and Employer controverts the claim, to avoid possible dismissal of Employee's claim, Employee must file with the board and serve on all opposing parties an affidavit of readiness for hearing within two years of the controversion. The board has an affidavit of readiness for hearing form Employee can complete and file. If Employee has not completed all discovery and cannot file the affidavit of readiness for hearing within two years of Employer's controversion, but still wants a hearing, Employee should provide written notice to the board and serve the notice upon all opposing parties.
>
> Employee's May 21, 2012 WCC (as amended) for unfair/frivolous controversion was controverted by the Employer on June 11, 2012, and received by the board on June 13, 2012. Employee must request a hearing on this claim (as amended) by June 13, 2014, or this claim (as amended) may be dismissed.

> Employee's April 3, 2014 WCC for medical benefits was controverted by the Employer on April 28, 2014, and received by the board on April 30, 2014. Employee must request a hearing on this claim by April 30, 2016, or this claim may be dismissed. (Prehearing Conference Summary, December 16, 2014).

75) On September 24, 2015, Employee filed a hearing request on unspecified claims and petitions. However, in an attached letter, Briggs made reference to Employee's claims dated: March 25, 2014, April 3, 2014, May 7, 2014, May 21, 2014, July 6, 2014, August 6, 2014, September 29, 2014 and October 6, 2014, November 8, 2014, his April 28, 2014 petition to reinstate Dr. Dean, and Employer's September 18, 2014 petition to dismiss under AS 23.30.110(c). (Affidavit of Readiness for Hearing, September 21, 2015; Briggs letter, September 21, 2015).

76) On October 14, 2015 the parties attended a prehearing conference. The designee identified the following issues for hearing:

> Medical costs
> Unfair Controvert
> Employer's Petition to Dismiss
> Employee's Petition to Reinstate Dr. Dean
> Non-Attorney Representative fees/costs

The parties stipulated to an oral hearing on January 7, 2016. (Prehearing Conference Summary, October 14, 2015).

77) At hearing on January 7, 2016, as a preliminary matter Employer objected to Dr. Prosper's December 28, 2014 report as an unlawful change in Employee's attending physician. Employee's non-attorney representative Briggs in response to the objection stated Employee "just needed another opinion" and conceded he had hired Dr. Prosper as an expert medical witness partly in preparation for a tentatively scheduled mediation. After deliberation, the panel issued an oral order excluding Dr. Prosper's report from consideration in this case because he was an unlawful change in Employee's choice of attending physician. (Employer hearing arguments; Employee's hearing arguments; record).

78) At hearing, Employee testified her right hand, which she had previously injured at work with Employer and which required two surgeries, was still bothering her. Her affected digits from the work injury would sometimes spasm causing her to have difficulty holding objects. Her thumb and the area in her hand which had been surgically repaired were "sore." Employee

conceded she had also had an automobile accident and had seen doctors at Orthopedic Physicians Alaska (OPA) for evaluation and treatment to her entire right upper extremity. Employee said she told her car insurance company and OPA physicians her hand symptoms were from a work injury but the car insurance said it would have to pay for the OPA evaluations because they arose from a car accident. There was some confusion among her physicians whether tingling and numbness in Employee's right upper extremity were caused by something in her neck or something in her arm. Employee said her right shoulder, right elbow and right wrist area were also painful and had other symptoms. On cross-examination, Employee admitted no physician said all her right upper extremity issues were related to her right thumb and hand injury incurred while working for Employer. Employee wanted to see Dr. Dean for "her arm" but Dr. Dean's office would not see her because Employer had controverted the case. Employee admitted the first time she had requested an additional medical evaluation for her work injury following *Contreras-Mendoza II* was at the January 29, 2014 prehearing conference. At that prehearing conference, Briggs had listed Employee's right hand and upper extremity symptoms and suggested she might need another medical evaluation. When asked who she would like to see for her work injury if she prevailed in her claim, Employee said she would probably go to OPA but would not be opposed to seeing Dr. Dean, who she thought was a good doctor. (Employee).

79) English is Employee's second language. Though she speaks and understands English very well, Employee has difficulty responding directly to questions. At hearing, it sometimes took Employee several minutes to respond to a direct question. However, after careful questioning, it became apparent Employee's medical claim was for an evaluation of her work injury by a physician of her choosing. (Observations; judgment and inferences drawn from all the above).

80) Briggs testified the board designee and Meshke at the January 29, 2014 prehearing conference both affirmatively stated Employee's medical benefits were "open." Employee was ready to see Dr. Dean but her office would not see Employee because Employer had controverted the case. Briggs contended if the hearing panel simply listened to a recording of the January 29, 2014 prehearing conference, it would get a taste of the way the board designee and Meshke assured Employee she could obtain medical care. Briggs testified Employer's controversion 15 days following *Contreras-Mendoza II* was a "slap in the face" to the board. Briggs asserted Employer's controversion notices are "all bogus," adjusters are supposed to adjust claims not deny them, "it's a war going on" between the adjuster and Employee, the

adjusters "are butchers" and "they are scum." As for the petition to dismiss, Briggs testified he had already gone to two hearings while representing Employee and such was adequate to satisfy the legal requirement to request a hearing. Briggs testified the controversion issue was addressed in *Contreras-Mendoza II*. In any event, if he made an error, Briggs admitted, "I didn't know any better" and contended if he failed to timely request a hearing on his unfair or frivolous claims, it was a "technicality" only and should not form the basis to deny Employee's claims. As to Employee's petition to "reinstate Dr. Dean," after careful questioning Briggs conceded he just wanted his client to see a physician so she can get "fixed up." In response to the question whether he had hired an expert medical witness, Briggs said "you could call it that." He too said Employee would probably like to see Dr. Dean for her work injury. Directing his testimony toward his request for $200,000 in attorney's fees and $20,000 in costs, Briggs said he does not want Employer or its insurer to pay him any attorney's fees. Rather, Briggs wants the State of Alaska to pay him attorney's fees because, in his view, Briggs' efforts in this case gave the state workers' compensation system "integrity." Briggs berated Employee's previous attorneys for never filing claims requesting an unfair or frivolous controversion finding. He asserted local claimant attorneys do not want to "upset" defense lawyers. Ultimately, Briggs admitted he is not entitled to attorney's fees because he is not an attorney. As for his cost request, Briggs said he did not know how to obtain costs and suggested they should be awarded against either the State of Alaska or the insurance company. Supporting his request for fees and costs, Briggs said, "Look at my results." (Briggs).

81) Each relevant Controversion Notice Employer filed in this case contained the standard two-year claim request warning language. (Observations).

82) Employee's non-attorney representative Briggs did not file an itemized cost statement for out-of-pocket expenses Employee incurred for the January 7, 2016 hearing. (Agency record).

PRINCIPLES OF LAW

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

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). That "some reasonable persons may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." (*Id*. at 534).

> **AS 23.30.005. Alaska Workers' Compensation Board.**
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> . . . .
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> (h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure under this chapter shall be as summary and simple as possible. . . .
>
> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .
>
> **AS 23.30.120. 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. . . .

A worker is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991). The presumption's application involves a three-step analysis. First, an employee must adduce "some," "minimal" relevant evidence establishing a "preliminary link" between the claim and the employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). "A mere showing that the injury occurred at work will often suffice to make the employment connection." *Resler v. Universal Services, Inc.*, 778 P.2d 1146, 1148 (Alaska 1989). Witness credibility is of no concern in this step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004).

Second, for injuries occurring after the 2005 Act amendments, if the employee establishes the link, the presumption may be overcome at the second stage when the employer presents substantial evidence rebutting the raised presumption. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150, at 7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

Third, if the board finds the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove her case by a preponderance of the evidence. The party with the burden of proving asserted facts by a preponderance of evidence must "induce a belief" in the fact finders' minds that the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71 (Alaska 1964). In the third step, evidence is weighed, inferences are drawn and credibility is considered. *Ugale*, 92 P.3d at 417.

The presumption analysis need not be applied to an issue if there is no factual dispute and applying the analysis "does not promote the goals of encouraging coverage and prompt benefit payments." *Rockney v. Boslough Construction Co.*, 115 P.3d 1240, 1244 (Alaska 2005). Medical benefits including continuing care are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991).

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

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

> **AS 23.30.145. Attorney Fees.** (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part,

> the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.
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> **AS 23.30.155. Payment of compensation**. . . .
> . . . .
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> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125. . . .

"The Workers' Compensation Act does not define the term 'claim' (footnote omitted). In the Act, however, the word 'claim' often refers to a written application for benefits which is filed with the Board." *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1122 (Alaska 1995). The Alaska Supreme Court noted a distinction between an injured worker's "right to compensation," generally referred to as a "claim," and the document filed to make a claim for benefits, referred to as a Workers' Compensation Claim. In *Tipton v. ARCO Alaska, Inc*., 922 P.2d 910, 912 n. 4 (Alaska 1996), the Alaska Supreme Court said, "the word 'claim' in section 110(c) refers only to the employee's written application for benefits, not the employee's right to compensation."

In *State of Alaska, Worker's Compensation Benefits Guaranty Fund v. West*, AWCAC Decision No. 145 (January 20, 2011), the board had held an injured worker hurt while working for an uninsured employer was entitled to, among other things, penalties. When the uninsured employer did not pay, the board ordered the benefits guaranty fund to pay the injured worker the

benefits to which he was entitled, including the penalties. The fund appealed to the commission contending attorney's fees, penalties and interest were not recoverable from the fund. On appeal, the commission determined whether attorney's fees, penalties and interest were "compensation and benefits," within the Act's meaning. The commission noted "compensation" is defined in the Act as "the money allowance payable to employee . . . as provided for in this chapter." The commission also noted "benefits" are not defined in the Act. The commission concluded penalties, even though a money allowance payable to an injured worker as provided for in the Act, are not "compensation" and thus not recoverable from the fund. It did not address whether penalties were "benefits" paid to an injured worker but concluded penalties were not recoverable from the fund because they were not intended to make the injured worker "whole." Thus, although penalties are included on the division's Workers' Compensation Claim form, the commission concluded they were not "compensation and benefits" recoverable from the fund.

In *Denny's of Alaska v. Colrud,* AWCAC Decision No. 148 (March 10, 2011), an injured worker filed a workers' compensation claim requesting only an "unfair and frivolous controversion finding." The injured worker never filed a hearing request on this claim. Employer sought to dismiss the claim as time-barred. The board held this "claim" seeking nothing but a finding that would inure no benefit to the injured worker did not constitute a "written application for benefits" requiring her to request a hearing within two years after the "claim" was controverted. The appeals commission disagreed and considered this filing "a claim" for "benefits" subject to dismissal under AS 23.30.110(c) if the employer controverted and the employee did not request a hearing within two years. The commission said it "defied logic" to say that a box checked on the division's "form" called a "Workers' Compensation Claim" did not amount to a "claim" for benefits. Thus, the commission concluded the injured worker, by checking block 24(k) on a Workers' Compensation Claim form indicating the "claim" was made for an unfair or frivolous controversion finding, was making a "claim for benefits." The commission further determined the injured worker had not substantially complied with the requirement to request a hearing on her claim. It also said there was no basis for applying equitable estoppel to excuse her failure to timely request a hearing. Furthermore, as the injured worker had subsequently amended her "claim" to add medical costs, the commission held an amended claim for medical costs "related back" to the original claim seeking an unfair or frivolous controversion finding, resulting in her

claim requesting an unfair or frivolous controversion and her subsequent claim for medical benefits both being denied and dismissed.

> **8 AAC 45.050. Pleadings**. . . .
> . . . .
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> (b) **Claims and petitions**.
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> > (1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. . . .
> > . . . .
>
> (e) **Amendments**. A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading.
> . . .
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> **8 AAC 45.082. Medical treatment**. . . .
> . . . .
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> (4) regardless of an employee's date of injury, the following is not a change of attending physician:
> . . . .
>
> > (B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians. . . .
>
> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.
> . . . .
>
> **8 AAC 45.180. Costs and attorney's fees**. . . .

> (b) A fee under AS 23.30.145(a) will only be awarded to an attorney licensed to practice law in this or another state. . . .
> . . . .
>
> (d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.
> . . . .
>
> (f) the board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. The applicant must file a statement listing each cost claimed, and must file an affidavit stating that the costs are correct and that the cost were incurred in connection with the claim. . . .

ANALYSIS

1) Was the oral order excluding Dr. Prosper's December 28, 2014 medical report correct?

At hearing, Employer objected to Dr. Prosper's December 28, 2014 medical report and contended it was an unlawful change in Employee's choice of attending physician. After explaining he just wanted his client to have another medical opinion, partly to prepare for a tentatively scheduled mediation, Briggs conceded, in response to being asked whether he hired a medical expert witness, "you could call it that." Parties are not permitted to "doctor shop" and obtain medical witnesses outside AS 23.30.095. Since Employee's representative conceded Dr. Prosper was simply a hired medical expert witness, given the evidence offered at hearing, Dr. Prosper was an unauthorized physician obtained in violation of AS 23.30.095(a). Therefore, the oral order declining to consider his December 10, 2014 medical report or to make Employer pay for his evaluation was correct. 8 AAC 45.082(c).

Employee and Briggs testified one or more physicians may have refused to provide further medical services for Employee's work injury. This raises a potential question whether Employee may be entitled to a "substitution of physicians." 8 AAC 45.082(b)(4)(B). Not raised or addressed at hearing by either party was the question whether Dr. Prosper may have been a substitution physician. Given this decision's resolution of the next issue, it is possible the question whether Dr. Prosper was a substitution physician may yet arise. However, this issue will not be addressed here as it was not properly raised. It would take another hearing to

determine whether one or more valid attending physicians refused to provide services, and whether Dr. Prosper qualifies as a substitution physician. The parties retain their full right to raise and argue this issue at a later hearing but are encouraged to amicably resolve this issue.

2) Is Employee entitled to an examination from her attending physician for her work-related right thumb and hand injury?

Employee has filed dozens of pleadings, including two claims requesting unspecified medical costs "to be determined." AS 23.30.095(a). Following lengthy hearing testimony and arguments, it became apparent all Employee wants in this regard is a medical evaluation for her work injury, including her right thumb and hand affected by two surgeries for her work injury. *Rogers & Babler*. Whether Employee is entitled to a medical examination for her work injury raises factual disputes to which the presumption of compensability must be applied. *Sokolowski*.

Employer suggests the statutory presumption cannot be raised in this case because nothing has changed since *Contreras-Mendoza II* denied Employee's claim for an examination by Dr. Meals. *Contreras-Mendoza II* determined Employee had a work injury in 2008 to her right thumb, and this injury required two surgical procedures involving a significant portion of her right hand. Her request for an evaluation by Dr. Meals was denied in 2012 because all then-current medical evidence said she needed no further evaluation or treatment. But one fact that has indisputably changed since *Contreras-Mendoza II* is "time." It has been years since Employee has seen an attending physician for her work injury. Employer provided no statute, regulation, or case law suggesting Employee is bound by an EME's opinion, and provided no convincing argument to withhold applying the presumption analysis to this medical issue.

There is a continuing presumption as to an injured worker's right to medical care. *Carter*. The fact Employee's work injury might still cause symptoms given two surgeries, is not surprising. *Rogers & Babler*. Pain in one's thumb and hand following two surgical procedures is not a medically complex concept. *Resler*. Therefore, only a "minimal" showing is necessary to raise the presumption and cause it to attach to Employee's claim. *Cheeks*. Without regard to credibility, Employee raises the statutory presumption through her testimony that her right thumb and hand are still sore. *Resler*; *Ugale*.

Without regard to credibility, Employer rebuts the presumption with Dr. Jensen's opinion stating Employee needs no further medical care for her work injury. *Ugale*; *Runstrom*. With the presumption gone, Employee must prove she is entitled to a medical evaluation for her work injury by a preponderance of the evidence. *Saxton*.

It has been many years since Employee has seen a physician of her choosing specifically for her right thumb and parts of her right hand affected by her two work-related hand surgeries. In general, injured workers have a right to a medical evaluation furnished by their employer. AS 23.30.095(a). While Employee's testimony at hearing was wordy and sometimes non-specific and wandering, her testimony that her right thumb and parts of her hand affected by her surgeries was painful and had other symptoms was sincere and credible. AS 23.30.122; *Smith*. The notion Employee may have post-surgical issues arising in her right hand, which may be causing her symptoms, is not surprising or unusual. *Rogers & Babler*. The fact Employer sent her back to Dr. Jensen for another EME tends to support Employee's request for a similar evaluation by her duly authorized attending physician. Therefore, given this evidence, Employer will be directed to pay for an evaluation to Employee's right thumb and hand to see if she needs any additional treatment attributable to her work injury. AS 23.30.095(a). If Employee's doctor says she needs more treatment for her 2008 hand injury, Employer may either authorize it or controvert it and the parties can litigate this matter further.

Employee also complains of additional upper right extremity symptoms. Some symptoms may have pre-existed her 2008 work injury. *Contreras-Mendoza II* did not address any additional right upper extremity symptoms or possible injuries Employee may have incurred on February 22, 2008, while working for Employer. At this point, she is not claiming any additional right upper extremity symptoms are caused by or otherwise related to her work injury with Employer. It is expected Employee will give a thorough history to the attending physician she will see for her hand as a result of this decision. This would necessarily include symptoms in her right upper extremity, which may or may not be related to her right thumb and hand work-related injury. But to be clear, this decision will order Employer to pay for an examination of Employee's right thumb and hand as found compensable in *Contreras-Mendoza II*. If Employee's attending physician wants to perform additional evaluation, testing, imaging or diagnostics to her thumb

and hand, or to the rest of Employee's right upper extremity, the physician may so state in his or her report. Employee will retain a right to request additional care to her right thumb and hand and to the right upper extremity in conformance with the physician's request and Employer retains its right to controvert any recommended evaluation or treatment to Employee's thumb or hand and to the balance of the right upper extremity if it so chooses.

This order raises an additional consideration. At this point, it is unclear which physician is Employee's attending physician. As this issue was not raised or argued at hearing, this decision will not decide it. At one point, Employer consented to Employee changing her attending physician. Employee wanted to see Dr. Dean and, in fact, has petitioned to reinstate her as Employee's attending physician. Employee has also had an automobile accident and has seen physicians at OPA for her right upper extremity symptoms possibly caused by the car accident. These facts create confusion and uncertainty as to who is Employee's attending physician. The parties will be directed to attend a prehearing conference to discuss and hopefully reconcile this issue. The parties may stipulate to Dr. Dean being Employee's attending physician for her work injury, since both parties appear to think highly of Dr. Dean. If the parties cannot determine who Employee's attending physician is for purposes of the examination ordered in this decision, cannot stipulate to an attending physician, or if the physician to whom they stipulate (*e.g.*, Dr. Dean) refuses to see her, either party may file a petition and request a hearing at which time the attending physician question will be decided.

3) Should Employer's petition to dismiss Employee's serial claims for a frivolous and unfair controversion finding be granted?

The parties do not dispute the dates Employee filed her claims or the dates Employer filed its controversion notices. It is further undisputed that each controversion notice contains the standard two-year warning language, and prehearing conference summaries began warning Employee about the §110(c) deadline by at least July 17, 2012. Therefore, the statutory presumption of compensability need not be applied to this issue. *Rockney*. Factual findings concerning Employee's relevant claims, Employer's relevant controversions and Employee's hearing requests, or lack thereof, can be distilled into the following graph (the chart does not include pleadings not relevant to the current issue):

[Party] Claim/Petition/ARH Filed [Dated]	Controversion Filed [Dated]	Reason Filed
[EE] May 21, 2012 [May 17, 2012]		Unfair or frivolous
[EE] May 29, 2012 [May 21, 2012]		Unfair or frivolous
	June 12, 2012 [June 11, 2012]	110(c) & Jensen
[EE] June 21, 2012 [June 17, 2012]		Unfair or frivolous
	June 19, 2012 [June 19, 2012]	110(c), Radecki
[EE] July 2, 2012 [June 27, 2012]		Unfair or frivolous
	July 11, 2012 [July 10, 2012]	110(c) & Jensen
	July 24, 2012 [July 23, 2012]	100, 105, 110(c) Radecki
[EE] July 30, 2012 [July 25, 2012]		Unfair or frivolous
[EE] August 13, 2012 [August 10, 2012]		Unfair or frivolous
	August 21, 2012 [August 20, 2012]	110(c) & Jensen
August 31, 2012	*Contreras-Mendoza I* issued	Dismiss & continuance
	September 6, 2012 [September 4, 2012]	100, 105, 100(c) Radecki
[EE] September 25, 2012 [September 24, 2012]		Unfair or frivolous
October 2, 2012	*Contreras-Mendoza II* issued	110(c), benefits awarded & doctor visit denied
	October 19, 2012 [October 17, 2012]	100, 105, 110(c)
October 31, 2012	*Contreras-Mendoza III* issued	Minor modification of *II*
[EE] April 10, 2013 [April 10, 2003]		Petition on remaining benefits in dispute
[EE] May 16, 2013 [May 13, 2013]		ARH on only April 10, 2013 petition
September 13, 2013	*Contreras-Mendoza IV* issued	TTD, interest, past medical bills, penalty resolved
[EE] October 31, 2013 [October 28, 2013]		To modify *IV*
	March 14, 2014 [March 13, 2014]	Lipon, *IV*
[EE] March 27, 2014 [March 25, 2014]		Unfair or frivolous
[EE] April 4, 2014 [April 3, 2014]		Medical costs to be determined
	April 28, 2014 [April 28, 2014]	100, 105, 110(c), Radecki, Jensen, Lipon, *IV*
[EE] May 1, 2014 [April 28, 2014]		Petition to (1) reinstate Dr. Dean (2) stop ER's bad behavior
[EE] May 9, 2014 [May 7, 2014]		Unfair or frivolous
	May 12, 2014 [May 9, 2014]	EE failed to appear for EME
[EE] May 23, 2014 [May 21, 2014]		Unfair or frivolous
	June 18, 2014 [June 17, 2014]	Substantial evidence
[EE] July 8, 2014 [July 6, 2014]		Unfair or frivolous
	July 25, 2014 [July 24, 2014]	Jensen, Lipon, *IV*
[EE] August 7, 2014 [August 6, 2014]		Unfair or frivolous
	September 4, 2014 [September 3, 2014]	Substantial evidence
[ER] September 19, 2014 [September 18, 2014]		Dismiss EE's May 21, 2012 and all similar claims under 110(c)
[EE] September 30, 2014 [September 29, 2014]		Medical costs to be determined
[EE] October 7, 2014 [October 6, 2014]		Unfair or frivolous
[ER] October 14, 2014 [October 10, 2014]		ARH on EE's March 25, 2014 claim and ER's

		September 18, 2014 petition to dismiss
[EE] November 12, 2014 [November 8, 2014]		Attorney's fees and costs, unfair or frivolous
[EE] September 24, 2015 [September 21, 2015]		ARH on EE's March 25, 2014, April 3, 2014, May 7, 2014, May 21, 2014, July 6, 2014, August 6, 2014, September 29, 2014, October 6, 2014 and November 8, 2014 claims, EE's April 28, 2014 petition and ER's September 18, 2014 petition

It is undisputed Employee, through her non-attorney representative Briggs, filed her first "claim" seeking an unfair or frivolous controversion finding on May 21, 2012. It is further undisputed Employer, on June 12, 2012, filed an amended controversion notice denying Employee's "claim" alleging it had appropriate medical evidence on which to base its February 4, 2011 controversion. Whether Employer had adequate evidence upon which to base its controversion notice for this preliminary dismissal issue, is immaterial. The analysis for this issue is limited to whether Employee filed a "claim" for benefits, Employer controverted it, and Employee failed to request a hearing within two years of the date Employer filed its controversion notice.

The Act does not define "claim." The Alaska Supreme Court has stated, specifically in respect to AS 23.30.110(c), that a "claim" refers "only to the employee's written application for benefits." *Jonathan*. Given this, it is difficult to understand how Employee's request for a finding Employer made an unfair or frivolous controversion could be construed as a "written application for benefits." It is undisputed Employee's "claim" requesting this finding arises under AS 23.30.155(o). If Employee prevailed on this request, no benefit would inure to her as a result of an unfair or frivolous finding. Rather, were such a finding to be made, the law requires the division director to "promptly notify the division of insurance," after which the division of insurance "shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125." AS 23.30.155(o).

Nevertheless, the appeals commission, whose decisions are legally binding precedent in all workers' compensation cases, has determined that a Workers' Compensation Claim form upon

which an injured worker requests a finding of nothing more than an unfair or frivolous controversion constitutes a "claim for benefits" subject to AS 23.30.110(c), even though the injured worker gleans no benefit should she prevail on her request. *Colrud*. Interestingly, the commission has also held that penalties are not "benefits" subject to reimbursement from the Alaska Workers' Compensation Benefits Guaranty Fund, even though penalties also appear on the standard Workers' Compensation Claim form as something an injured worker can "claim." *West*. Nevertheless, *Colrud* is controlling law on this principle.

Employee contends the fact she already had two hearings on other issues in this case satisfies the requirement to request a hearing on these claims. Employer disagrees. The applicable statute is clear on its face. If a claim was controverted and Employee does not request a hearing within two years following the date the controversion notice was filed, "the claim is denied." AS 23.30.110(c). Implicit in this statute is a requirement that a hearing request must be filed on the claim in question, not on some other claim. *Rogers & Babler*. Otherwise, pending claims could languish interminably.

The only relevant hearing request Employee made in this case came on September 24, 2015. In that request, though she did not specify a specific claim or petition on the affidavit form, Employee's attached letter referenced her claims beginning on March 25, 2014 as well as her April 28, 2014 petition to reinstate Dr. Dean as her attending physician and Employer's September 18, 2014 petition to dismiss her claims. As it is undisputed Employee filed a May 17, 2012 claim on May 21, 2012, seeking an unfair or frivolous controversion finding, Employer controverted the claim on June 12, 2012, and Employee did not request a hearing on her claim, the May 17, 2012 claim will be denied under AS 23.30.110(c).

Employee filed numerous other claims requesting an unfair or frivolous controversion finding. Because Employer controverted Employee's May 21, 2012 claim on June 12, 2012, her June 17, 2012 claim on June 19, 2012, her June 27, 2012 claim on July 11, 2012 and again on July 24, 2012, her July 25, 2012 claim on August 21, 2012, her August 10, 2012 claim on September 6, 2012, and her September 24, 2012 claim on October 19, 2012, and Employee never requested a hearing within two years of the dates on which these claims were controverted, all these claims

requesting an unfair or frivolous controversion finding must be denied as well. AS 23.30.110(c). This result is reached as a matter of law regardless of whether each claim relates back to the May 17, 2012 claim she filed on May 21, 2012.

This leaves Employee's claims for an unfair or frivolous controversion finding dated March 24, 2014, May 7, 2014, May 21, 2014, July 6, 2014, August 6, 2014, October 6, 2014, and November 8, 2014 to be resolved. Employer contends these should also be denied as they "relate back" to his original May 17, 2012 claim for unfair or frivolous controversion filed on May 21, 2012. 8 AAC 45.050(e). On each claim, Employee printed the words "Not Applicable" in the space intended to allow a party to "amend" a prior claim. The "relate back" language in the applicable regulation appears to apply only to claims that have been amended. Employer concedes while Employee did not expressly amend each prior claim on subsequent claim forms by placing the previous claims' dates in the spaces provided, his attached letters added different grounds on each occasion, these grounds constituted an "amendment," and each amendment arose out of the conduct, transaction or occurrence set out or attempted to be set out in the original pleading. In other words, Employee based each claim, as amended by Briggs' attached letters, on displeasure with Drs. Radecki and Jensen. In essence, each claim was the same but was amended to include additional arguments or points Employee thought were important to support her request for an unfair or frivolous controversion finding.

Employer's position has merit. Employee claimed the same "unfair or frivolous controversion" relief repeatedly and simply amended her repetitive claims as she developed more arguments gleaned from the record. Each time Employee filed a claim seeking a finding Employer had filed an unfair or frivolous controversion, Employer was obligated to respond. It chose to controvert, which gave rise to another claim from Employee alleging Employer's responsive controversion notice was also unfair or frivolous -- and the cycle went on. The Act is intended to provide a quick, fair and efficient method to resolve claims at a cost reasonable to employers. AS 23.30.001(1). The workers' compensation system is supposed to be as summary and simple as possible. AS 23.30.005(h). Employee's serial claims for the same relief were anything but quick, efficient, summary or simple. Because each subsequent unfair or frivolous controversion claim amended the prior claim, and because each claim arose out of the same conduct,

transaction or occurrence with which Employee disagreed (*i.e.*, controversions based on physicians' reports with which Employee disagreed), each claim relates back to the original, May 17, 2012 claim filed on May 21, 2012, and all will be denied because Employee failed to request a hearing timely on the original claim. AS 23.30.100(c); *Colrud*.

4) Has Employer frivolously or unfairly controverted compensation due Employee?

Alternately, even if the latter claims did not relate back to the original claim, Employee has not demonstrated how Employer's controversion notices were unfair or frivolous. As stated in *Contreras-Mendoza IV*, Employer had a right to rely upon the medical opinions from Drs. Radecki and Jensen. Employee has not explained how Employer's reliance on these physicians' reports as a basis to controvert his claims amounts to an unfair or frivolous controversion. Therefore, even if this decision addressed the unfair or frivolous controversion claims on their merits, Employee would fail to meet his burden of proof and the claims requesting an unfair or frivolous controversion finding would still be denied. *Saxton*.

5) Should Employee's petition for an order "reinstating" Dr. Dean as her attending physician be granted?

This issue is rendered moot by this decision's order requiring Employer to pay for a medical examination of Employee's right thumb and hand as they were affected by her work injury. As discussed in detail above, the parties will be directed to attend a prehearing conference to determine who Employee's attending physician is for her work injury. They may choose to stipulate to Dr. Dean as her attending physician and if they do, perhaps Dr. Dean will see Employee. If not, or if the parties cannot agree on an attending physician, either party may seek relief by filing a petition and the issue will decided at another hearing. However, Employee's petition for an order "reinstating" Dr. Dean will be denied as moot.

6) Is Employee's non-attorney representative entitled to an attorney's fee award from the State of Alaska or a cost award from either Employer or from the State of Alaska?

It is undisputed Employee's non-attorney representative Briggs is not licensed to practice law in Alaska or in any other state. There is no factual dispute on this issue and the presumption analysis need not be applied. *Rockney*. Briggs could point to no statute, regulation, or case law providing for an attorney's fee award to a non-attorney. AS 23.30.145; 8 AAC 45.180. Further, Briggs made it clear he did not want attorney's fees from Employer or its insurer. Rather, Briggs

requested $200,000 in attorney's fees from the State of Alaska. Again, he had no support for this clarified request. It will be denied.

Briggs also requested $20,000 in costs. While costs may be awarded to an injured worker or to her non-attorney representative regardless of their status as an attorney, neither Employee nor Briggs filed an affidavit setting forth any out-of-pocket expenses related to Briggs' success in obtaining a medical evaluation for Employee. The law requires a party seeking costs to file an itemized cost statement listing each cost and an affidavit stating the itemization is correct and the costs were incurred in connection with the claim. 8 AAC 45.082(f). Without the itemization and affidavit, no costs are awardable. Therefore, Employee's request for costs will be denied. 8 AAC 45.180(f).

CONCLUSIONS OF LAW

1) The oral order excluding Dr. Prosper's December 28, 2014 medical report was correct.
2) Employee is entitled to an examination from her attending physician for her work-related right thumb and hand injury.
3) Employer's petition to dismiss Employee's serial claims for frivolous and unfair controversion findings will be granted.
4) Employer has not frivolously or unfairly controverted compensation due Employee.
5) Employee's petition for an order "reinstating" Dr. Dean as her attending physician will be denied as moot.
6) Employee's non-attorney representative is not entitled to an attorney's fee award from the State of Alaska or a cost award from either Employer or from the State of Alaska.

ORDER

1) Dr. Prosper's December 28, 2014 report is excluded from evidence in this case and Employer is not responsible to pay for it unless and until it is determined at a future hearing that Dr. Prosper was an authorized "substitution of physicians."
2) Employer is ordered to pay for a medical evaluation of Employee's right thumb and hand as affected by her February 22, 2008 work injury, by her lawfully obtained attending physician.

3) The parties are directed to attend a prehearing conference, the purpose of which will be to determine who Employee's attending physician is. If the parties cannot agree on who Employee's attending physician is, and cannot stipulate to an attending physician, either party may request a hearing to address this issue and a hearing will be scheduled promptly.

4) Employee's April 28, 2014 petition to reinstate Dr. Dean as her attending physician is denied as moot.

5) Employer's September 18, 2014 petition to deny Employee's claims for an unfair or frivolous controversion finding is granted.

6) Employee's claims dated May 17, 2012, May 21, 2012, June 17, 2012, June 27, 2012, July 25, 2012, August 10, 2012, September 24, 2012, March 25, 2014, May 7, 2014, May 21, 2014, July 6, 2014, August 6, 2014, October 6, 2014 and November 8, 2014 requesting unfair or frivolous controversion findings, are all denied.

7) Employee's non-attorney representative's claim for $200,000 in attorney's fees from the State of Alaska is denied

8) Employee's request for $20,000 in costs from the State of Alaska or from Employer and insurer is denied.

Dated in Anchorage, Alaska on January 12, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____

William Soule, Designated Chair

_____

Dave Kester, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Juana Contreras-Mendoza, employee / claimant v. Qdoba Mexican Grill, Employer; Argonaut Insurance Co., insurer / defendants; Case No. 200804514; 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 January 12, 2016.

_____

Pamela Murray Office Assistant