ALASKA WORKERS' COMPENSATION BOARD

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

ALAN L. TOLMAN,	)	
	)	
Employee,	)	
Decedent,	)	
	)	
LEONA TOLMAN,	)	
	)	FINAL DECISION AND ORDER
Claimant,	)	
	)	AWCB Case No. 201208306
v.	)	
	)	AWCB Decision No. 16-0014
CHUGACH ELECTRIC ASSOCIATION,	)	
	)	Filed with AWCB Anchorage, Alaska
Employer,	)	on March 18, 2016
and	)	
	)	
LIBERTY INSURANCE CORPORATION,	)	
	)	
Insurer,	)	
Defendants.	)	
	)	

Leona Tolman's (Claimant) September 20, 2012 claim and Chugach Electric Association's (Employer) June 24, 2015 petition for Second Injury Fund reimbursement, October 22, 2015 petition to modify decision and order 15-0046, and October 29, 2015 petition to bifurcate were heard on November 18, 2015 in Anchorage, Alaska, a date selected on November 5, 2015. Claimant appeared telephonically and testified. Attorney Eric Croft appeared and represented Claimant. Attorney Rebecca Holdiman-Miller appeared and represented Employer. Assistant Attorney General Kimber Rodgers appeared and represented the Second Injury Fund (SIF). Velma Thomas appeared as SIF administrator. Mintu Turakhia, M.D., appeared telephonically and testified for Claimant. James Baisden appeared telephonically and testified for Employer.

The record closed on February 12, 2016, to give the parties an opportunity to submit briefs concerning a possible second independent medical evaluation (SIME).

ISSUES

During deliberation, the hearing panel noted the medical evidence is technically complex and contradictory, with Claimant's physician offering testimony opposing that of the Employer's Medical Examiner (EME). Therefore, the record was re-opened to allow the parties to submit briefs on a possible SIME.

Claimant opposes an SIME on either the issue of causation or the "except for" standard for SIF reimbursement. Claimant contends there is no dispute warranting an independent medical examination. Claimant contends an SIME at this stage would violate the parties' due process rights, cause delay, and prevent the parties from litigating this case in the manner they see fit.

Employer opposes an SIME on either the issue of causation or the "except for" standard for SIF reimbursement. Employer contends the issue of whether Employee died in the course and scope of employment for Employer is a purely legal, rather than medical, issue which is ripe for determination. Employer contends both Claimant's physician and the EME agree Employee's death by heart attack was caused by coronary artery disease, which was made more advanced by his diabetes. Employer contends the SIF has no standing to take a position on whether an SIME should be ordered.

The SIF confines its argument regarding an SIME to the "except for" issue for SIF reimbursement. The SIF opposes an SIME and contends no significant dispute or gap exists in the medical evidence regarding SIF reimbursement warranting an SIME. The SIF contends an SIME would cause undue delay.

1) Should an SIME be ordered?

Claimant contends she is entitled to benefits in connection with the April 5, 2012 death of her husband, Alan Tolman (Employee). Claimant contends Employee began having a heart attack while working at a remote facility for Employer at Beluga Point. Claimant contends Employee's

death was caused by inadequate first aid treatment available at Employer's remote site, combined with the delay in getting Employee adequate medical treatment. Claimant therefore contends Employee's death was attributable to his work for Employer. Claimant contents the doctrines of "remote site" as well as "general resident employee" apply, making Employee's death compensable as arising out of and in the course of employment for Employer.

Employer contends there is insufficient connection between Employee's death and work for Employer. Employer contends inquiry into whether the first aid services at Employer's facility were adequate creates an unworkable legal standard, and is not relevant in deciding whether work for Employer was the substantial cause of Employee's death. Employer contends the test to be applied is relative to the work site in question: was there an adequate emergency medical response? If so, Employer contends the analysis should end there and work for Employer should be found not the substantial cause of Employee's death. Employer seeks an order denying Claimant's claim.

The SIF takes no position on whether Employee's death arose out of and in the course of employment for Employer, because it contends it is not a party against Claimant.

2) Did Employee's death on April 5, 2012 arise out of and in the course of employment for Employer?

If work for Employer is found to be the substantial cause of Employee's death, Employer contends ample medical evidence exists entitling it to SIF reimbursement. Employer contends Employee had a qualifying permanent physical impairment – diabetes – which is documented in writing in the medical and employment records. Employer contends if Employee's April 5, 2012 death is found compensable, the SIF should be joined as a party and reimbursement from the SIF should be ordered.

The SIF contends Employer is not entitled to SIF reimbursement, because it has not satisfied the "except for" test to be applied in death cases. The SIF relies on the certificate of death as well medical opinions which state the cause of Employee's death was a heart attack. Even if the claim is found compensable, the SIF contends the medical evidence is insufficient to meet the

"except for" standard of AS 23.30.205(b) for reimbursement. The SIF opposes joinder and reimbursement.

Claimant contends both the EME report and the reports of Employee's physician support SIF reimbursement. However, Claimant offers only limited argument with respect to the SIF issue.

3) Should the SIF be joined as a party and should reimbursement from the SIF be ordered?

Claimant has filed a claim for, and affidavits and statements of, attorney's fees and costs. Claimant contends she is entitled to fees, but determination of the amount would best be done after a decision issues on the merits of her claim.

Employer contends if Claimant is successful on the present issues, the issue of the amount of attorney's fees and costs would best be resolved after issuance of this decision.

The SIF did not take a position on the issue of Claimant's attorney's fees.

4) Is Claimant entitled to attorney's fees and costs?

FINDINGS OF FACT

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

1) On April 5, 2012, Alan Tolman (Employee) suffered a heart attack while working at Employer's power plant in Beluga, Alaska. (Report of Occupational Injury or Illness, June 21, 2012).

2) On April 5, 2012, Employee was medevacked by helicopter to Providence Medical Center in Anchorage, where he died. The death certificate was signed by William Kutchera, M.D. (*Id.*). As the "immediate cause of death," Dr. Kutchera listed "acute myocardial infarction" and "coronary artery disease." (*Id.*). At the line requesting "other significant conditions contributing to death but not resulting in the underlying cause," Dr. Kutchera listed, "diabetes mellitus, hypertension." (Certificate of Death, May 1, 2012).

3) On July 12, 2012, Employer denied Claimant's right to all benefits. The notice stated:

> The decedent has failed to attach the presumption of compensability that the death arose out of and in the course and scope of the employment with the employer. Pursuant to the Certificate of Death dated April 27, 2012, issued on May 1, 2012 by the State of Alaska, myocardial infarction and coronary artery disease, with diabetes mellitus and hypertension as other significant contributing factors [sic]. (Controversion Notice, July 12, 2012).

4) On July 23, 2012, Gregory Bunting, operations supervisor for the Beluga facility, gave a recorded statement to Employer in connection with Employee's death. Bunting stated Employee's scheduled work hours that day were 7:00 A.M. to 7:00 P.M. However, Bunting stated that due to the ongoing nature of the plant operations, combined with limited staff in the remote location, Employee was technically "on duty" or on call 24 hours a day, in the event of a mechanical issue at the site. (Claimant's Hearing Exhibit 8).

5) On July 27, 2012, an investigator for Employer's insurance adjuster sent a report of his findings to the insurer. The investigation included interviews with supervisors and managers at the Beluga plant. In the report, plant manager Michael Henrich stated he "knew [Employee] suffered from diabetes . . . but appeared healthy otherwise." Mr. Henrich stated he recalled seeing a syringe in Employee's room, but "didn't know if it was related to his diabetes or not." In the report, Bunting, an operations supervisor, also stated he knew about Employee's diabetes. Henrich and Bunting both told the investigator Employee appeared in good health prior to the April 5, 2012 incident, with no complaints or signs of physical trouble. Three other employees at the plant made no mention of diabetes or of Employee appearing in distress or poor health prior to the April 5, 2012 incident. (Butcher Report, July 27, 2012).

6) On September 24, 2012, Employee's widow, Leona Tolman, filed a claim seeking death benefits for herself and a dependent child, payment or reimbursement of medical expenses, and attorney's fees and costs. (Workers' Compensation Claim, September 24, 2012).

7) On October 11, 2012, Employer denied the claim, again referencing the contributing conditions described in the death certificate. (Controversion Notice, October 11, 2012).

8) On February 26, 2013, the Alaska Occupational Safety and Health section (AKOSH) conducted an enforcement inspection at Employer's Beluga facility. AKOSH found "no apparent violations" during the inspection. (AKOSH Letter, June 24, 2013).

9) On April 30, 2013, William Breall, M.D., performed an Employer's Medical Evaluation (EME) using Employee's medical records. Dr. Breall opines:

> Cause of death: Acute ST elevation myocardial infarction due to severe atherosclerotic artery occlusive disease, leading to congestive heart failure, cardiac arrhythmias, and death.
>
> Conclusions: . . .The non-industrial atherosclerotic process within the coronary arteries of [Employee] insidiously developed over the years in association with these various and sundry non-industrial risk factors entirely independent of and irrespective of his work. . . .
>
> The most significant and substantial factor that led to the death of [Employee] on April 5, 2012, was his underlying atherosclerotic coronary artery occlusive disease which resulted in an acute ST elevation myocardial infarction, congestive heart failure, and death. The atherosclerotic coronary artery occlusive disease, as described previously in this report, was due to non-industrial risk factors. . .
>
> Another very minor factor, not even a substantial factor, was that of any type of delay in delivering [Employee] to a tertiary medical center where he could have cardiac catheterization and coronary angiographic studies performed. It is important to try and get individuals to who are having an acute ST elevation myocardial infarction to the [cath lab] within 90 minutes from onset of symptoms. This will result in a lesser degree of mortality in many individuals. I mentioned that this is a minor factor because I don't really believe it would have made any difference in this case. By the time he was seen by the power plant medic and the fire department paramedics, he was already in severe congestive heart failure. In my opinion he was undergoing a massive myocardial infarction and probably would not have survived irrespective of how fast or slow he got into the cath lab. . . . (Breall EME Report, April 30, 2013).

10) Although Dr. Breall's April 30, 2013 report describes Employee as having a history of type II insulin-dependent diabetes, Dr. Breall does not state Employee's death occurred due to or because of the pre-existing diabetes. (*Id.*).

11) On November 20, 2013, Dr. Turakhia, cardiologist, performed a review of Employee's medical records at Claimant's request. (Employer's Hearing Brief). After a discussion of efforts by first responders and emergency room personnel to save Employee, Dr. Turakhia opines:

> I believe that there are several aspects to the case that meaningfully contributed to the patient's terminal outcome. The patient clearly had evidence of a massive myocardial infarction with cardiogenic shock and died several hours into his presentation before reperfusion therapy was considered. The delays in obtaining reperfusion therapy contributed to his death. More likely than not, the patient would have survived the acute event had the patient had timely reperfusion and hemodynamic support, such as with an intra-aortic balloon pump. . . .

> For these reasons, I believe that the delays in definitive treatment of severe acute myocardial infarction that occurred as a consequence of the remote location of Mr. Tolman's workplace were the substantial cause of his death. It is my opinion that more timely intervention due to faster prehospital care and time to reperfusion would, more likely than not, allowed Mr. Tolman to survive the acute heart attack. (Turakhia Report, November 20, 2013).

12) Dr. Turakhia's November 20, 2013 report makes no mention of diabetes as a contributing or related factor in Employee's death. (*Id.*).

13) On March 27, 2014, Dr. Turakhia testified by deposition:

> A: I'm a board certified cardiologist and cardiac electrophysiologist. Cardiac electrophysiology is the treatment of heart rhythm disorders and cardiac arrests both after and during myocardial infarction, and I look for causes unrelated to it. General cardiology, as a board certified and practicing cardiologist, deals with management of coronary heart disease and myocardial infarction. . . (Turakhia Deposition, March 27, 2014, p. 5).

Regarding the type of heart attack Employee suffered on April 5, 2012:

> A: In this case he had a very large territory myocardial infarction that led him to have acute pump failure, a low blood pressure, which we call cardiogenic shock. And as long as a blood vessel remains closed he's going to positively decline. And typically with acute -- of overt pump failure you lose oxygenation in your blood, you will have poor circulation, and at some point your heart will just stop. . . He more than likely, based on the EKG, the presenting symptoms of the clinical syndrome, had a left main disease or a very proximal left angio descending artery occlusion based on the entire presentation here. . . . (*Id.* at 7).
> . . . .
>
> A: I believe mechanical reperfusion would have worked. I believe any attempt at reperfusion would have worked. And this is why the clinical syndrome here is strongly suggestive of acute plaque rupture. That means the abrupt closure and clotting of an artery. This is how these kinds of heart attacks occur. . . . I do believe that he would have very likely had the artery open with angioplasty. . . . (*Id.* at 32).

Explaining the mechanism and significance of STEMI-type heart attacks and the interaction with delay in treatment Dr. Turakhia testified:

> A: ST elevation myocardial infarctions are when a large portion of the heart, usually transmural, meaning the entire wall thickness of the heart, is affected in the territory, and you lead -- you essentially have -- and its due to complete occlusion of a major branch of the blood vessels. And those are more severe and

present with shock and are cases where there's clear and compelling evidence that early reperfusion therapy would increase survival. (*Id.* at 8).
. . . .

Q: And how important is it to get prompt treatment for a [STEMI]?

A: So it's very, very important. It's the basis and the foundation of why cath labs have basically been built all over the United States. . . . (Id. at 9).
. . . .

A: . . . And what we know, and we have very good data, which sort of founded all of the medical evidence in the current guidelines, is that in case of [STEMI] and early reperfusion, whether it's with drugs or clot busting drugs or mechanical therapy, will save lives. . . . What is not known, is are patients who have cardiogenic shock, patients this, Mr. Tolman [sic] are they too far gone, is it too late, are they going to die anyway, okay, or does early intervention meaningfully affect survival. . . . (*Id.* at 12-13).
. . . .

A: And there was a seminal study which has changed the standard of care in cardiology that was published well before this in 1999. It was called the "shock trial". . . . So what was shown is that if patients got reperfusion in the first six hours after the onset of symptoms, there was a clear and improved 30-day and in-hospital survival. That changed the game. . . . (*Id.* at 13)
. . . .

A: . . . So I don't think [Employee] was too far gone. I don't believe that he was too sick to present. And I know that that was the statement made by another expert, Dr. Breall, which I also reviewed. . . . (*Id.* at 14).
. . . .

A: So reperfusion was not -- basically by the time he lands at Providence Hospital it's 1:24 A.M. . . . By the time -- at that point he's very sick. They can't even stabilize him to get him to the cath lab. It's now 2:50 A.M. So that's a significant delay. . . . (*Id.* at 15).
. . . .

Q: So if [Employee] had this identical situation in an urban setting, in Anchorage, calls the ambulance at 11:17, and assuming it takes 15 minutes for the ambulance to get there and 15 minutes for them to get to Providence Hospital, he's at Providence before midnight, why would that make any difference in what -- his chance of survival?

A: He would have had a shorter period of time of having sustained damage to his heart. He would have been more stable at the time that he presented. I mean, this guy's heart as soon as they rolled him off the gurney, which is fairly

> traumatic. It would have not happened. He would have got right to the cath lab, and they more likely than not would have been able to open the blood vessel and administer reperfusion therapy quickly and put an intraaortic balloon pump in quickly. . . . (*Id.* at 18).
> . . . .
>
> Q: And if you look at what is the most significant cause of his death, wouldn't you always have come back to the myocardial infarction as the most significant factor in causing his death?
>
> A: Well, he died of a heart attack. But he died because the heart attack wasn't treated in time.
>
> Q: But do you know in fact that if he was treated in time, as, you say, that he would have survived?
>
> A: Yes, he more likely than not would have survived.
>
> Q: There's no way to actually know that; correct?
>
> A: There's data to extrapolate that from all the trials and all the guidelines and our understanding of the standard of care. . . . (*Id.* at 51-51).
> . . . .
>
> Q: But there's no way to say whether or not if he would have had the reperfusion at an earlier time period that he would have survived?
>
> A: More likely than not it's my opinion he would have survived. . . . (*Id.* at 66).
> . . . .
>
> Q: And you believe that, based on your report, it's the delay in treatment because of the remote location he was in?
>
> A: It's very simple. I think we're making this too complicated. I mean, if a guy is bleeding on the street because he got hit by a car, he died because he got hit by a car, but he could have survived if someone gave him blood. So this guy had a heart attack, and that's the thing that put him in danger. And he would have survived had he had his artery opened. I think it's that simple. . . . (*Id.* at 67).

Dr. Turakhia testified Employee's co-worker Timothy O'Leary did a "commendable job" as a "bystander" aiding Employee on the night of April 4, 2012, although Dr. Turakhia was concerned with the lack of clear emergency protocols and a clear chain of command. In a remote

location, medical emergency protocols can help improve the chain of command, shorten the time to receiving care, and improve conditions and survivability of cardiac events. (*Id.* at 20, 26).

> Q: So whether it's a lack of training, lack of protocols or equipment, how did the lack of ability to do what an ambulance could in an urban setting contribute to [Employee's] death?
>
> A: I think it delayed his optimal care of reperfusion as well and prevented him from getting therapy until LifeFlight came down, which is high flow oxygen nitroglycerin and other measures. . . . (*Id.* at 23).
> . . . .
>
> Q: And it's still your opinion that his employment, his remote location, the delay inherent in it, and the things we've been talking about, the lack of equipment, training or protocols, is the substantial cause of [Employee's] death?
>
> A: Yes. If he were at home with his wife or if he were in Anchorage he would have had earlier time of arrival to a 24-hour cath lab or a hospital that could give clot-busting agents. And I believe, based on the shock trial and a large body of evidence that we have in our field, it would have improved his survival. . . . (*Id.* at 27-28).

Regarding Dr. Breall's April 30, 2013 EME report, Dr. Turakhia testified:

> A: I agree with [Dr. Breall's] starting at the terminal event where [Employee] did not have any signs or symptoms of a heart condition until April 4th. I agree that he did not have any symptoms or signs of a heart attack until that period. . . . I agree with the cause of death, which is the ST elevation MI. . . . So the idea, which he is also saying, is that you want to get to the hospital within 30 minutes. That's important. And I agree that this will improve survival. I disagree that this is a minor factor. By the time he was seen by the power plant medic and fire department he was already in severe congestive heart failure. . . . [Dr. Breall's opinion Employee] probably would not have survived irrespective. That's where I disagree. . . . (*Id.* at 34-34).

Dr. Turakhia further explains the 1999 "shock study," and opines the findings from that research strongly contradict Dr. Breall's opinions on Employee's chances of survival of this type of STEMI event. Also based on this study, Dr. Turakhia opines it would be "highly unlikely" Employee would be experiencing noticeable symptoms earlier than 8:00 P.M. Dr. Turakhia believes Employee's symptoms did present for the first time that evening, and that O'Leary's account of the evening's events is "clinically compatible" with a STEMI event. (*Id.* at 35-37; 39-40). Dr. Turakhia disagrees with Dr. Breall's opinion this type of STEMI event is,

"Progressively clogged pipes like you get at home in your bathroom or bathtub where you get more and more hair going into the drain and you clog it. That's not the case here. That used to be how we thought 25 years ago." (*Id.* 42; 48-49). Rather, Dr. Turakhia opines the plaque builds in the arteries, leading to a sudden rupture of the plaque, and a clot: "So that's a very different description than the way Dr. Breall poses it, which is this patient had diabetes and risk factors and just progressively occluded until he had a heart attack. . . ." (*Id.* 43).

> A: This is why the drain analogy doesn't work because there's no plumbing analogy we have where you build up deposits in the wall of the pipe. So in the lining of the wall of the blood vessel you get cholesterol deposition over time. It can be a little. It can be a lot. . . . But that is unstable because what happens is it progressively encroaches upon the wall, the lining of the blood vessel itself. So imagine now the wall trying to hold that plaque out. It's kind of a simplified but descriptive approach. At some point the icicle falls or the roof falls and it comes into the blood vessel. . . . Because the wall was ruptured like when you tear your skin or something, any part of your body inside or out, you now have initiated a clotting cascade to form blood clot. . . . (*Id.* at 62).

Regarding the role of diabetes in Employee's April 4, 2012 heart attack:

> Q: And what role -- you mentioned Dr. Breall noted diabetes. What role does diabetes play in this kind of sudden rupture in a person like Mr. Tolman?
>
> A: Well, diabetes increases your risk factor for heart disease and a heart attack. That would be the role.
>
> Q: And does it play a role on [sic] rupture? As you describe it, the plaque buildup, and there's a sudden unpredictable rupture. And what role -- or is there any way to say the diabetes creates a more predictable circumstance?
>
> A: No. I mean, the diabetes is a clear risk factor for heart attack and diabetes is a clear risk factor for ST elevation and MI heart failure and all these other things that can happen to your heart. But that is not why, from a causation standpoint, you can say he had a heart attack today because he had diabetes. . . . (*Id.* at 44-45).
>
> . . . .
>
> Q: What's the key connection between this heart condition and diabetes?
>
> A: Diabetes accelerates atherosclerosis. . . . (Id. at 46).

> Q: Do blood sugars play any role in -- I guess, blood sugars in somebody like Mr. Tolman who was on insulin, does that play any role in artery blockage, coronary artery disease?
>
> A: Diabetes causes coronary artery disease. . . . (*Id.* at 64).

14) On August 27, 2014, Timothy O'Leary testified by deposition: On the night of April 4, 2012, he had worked for Employer for 32 years, most recently as Relief Maintenance Operator. He was at the Beluga plant on the night of Employee's death. (O'Leary Deposition, August 27, 2014, p. 5-6). O'Leary has been assigned to work at the Beluga plant since 1988. (*Id.*). O'Leary volunteers for the Seldovia fire department as a certified EMT III. (*Id.*). Because of licensing and sponsorship requirements, O'Leary volunteers with the Nikiski Fire Department only as an EMT I. (*Id.* at 9). The Beluga plant falls under the Nikiski Fire Department jurisdiction. Employer only permits O'Leary to use his EMT I skills at Beluga. (*Id.* at 15). O'Leary stated Employee's was not the first cardiac incident at Beluga, and there had been another "shortly before" Employee's; the victim survived with O'Leary's assistance. (*Id.* at 33). Referencing the plant's activity logs, O'Leary was first called to Employee's room at approximately 11:00 P.M on the night of April 4, 2012. At that time, Employee's blood pressure was 174 over 124. (*Id.* at 98). Employee's breathing was very shallow, he could not expand his chest, and O'Leary heard fluid in Employee's lungs. (*Id.* at 101). Soon after arriving, O'Leary telephoned an emergency room doctor at Providence Hospital in Anchorage. The doctor believed it was a "pulmonary incident," rather than cardiac. Therefore, the only medication O'Leary was instructed to administer was Lisinopril, which he did. No aspirin was given to Employee at Beluga. (*Id.* at 107-108). A LifeMed medevac helicopter was called, and arrived at Beluga at 12:13 A.M. (*Id.* at 109). The LifeMed staff arrived at Employee's side at 12:20 A.M. (*Id.* at 110). The helicopter carrying Employee departed Beluga for Anchorage at 12:30 A.M. (*Id.* at 116). LifeMed staff transferred care of Employee to Providence staff at 1:34 A.M. (*Id.* at 117). O'Leary states he "loves" the company he continues to work for: "I believe in Chugach Electric." (*Id.* at 129). However, throughout his deposition O'Leary frequently opined medical and emergency preparedness at Beluga were extremely inadequate, given the remote location and history of emergency medical incidents. (Observations).

15) On September 12, 2014, Dr. Breall gave an updated EME report, after reviewing the O'Leary and Turakhia depositions. Dr. Breall again disagrees with Dr. Turakhia on the significance of delay in treatment in Employee's death:

> In the case of [Employee], however, an acute STEMI with congestive heart failure is virtually a death warrant unless you can shorten the time period from hours down to minutes. That is why I indicated in my report of April 30, 2014, on page 4, that a time factor in this particular case is really totally irrelevant. By the time he was seen by Mr. O'Leary, and by the time he was seen by the fire department paramedics, he was already in severe congestive heart failure. The chances of survival at that point would be infinitesimally low. . . . The fact that he went from 11:00 P.M. until almost 3:00 A.M. before he died is almost a miracle in itself. Unfortunately, with an acute STEMI and congestive heart failure and eventual cardiogenic shock, he was doomed. . . (Breall EME Report, September 12, 2014).

Regarding the mechanism of obstruction in Employee's heart leading to the STEMI event, Dr. Breall states:

> When I indicated on the top of page 4 of my report of April 30, 2013, this condition eventually reached a critical degree of obstructive significance on April 4, 2012. It was during this time that he developed an acute ST elevation myocardial infarction, congestive heart failure, and various cardiac arrhythmias. I was being simplistic in my description of what was going on in [Employee]. I did not mean to imply or insist that there was a gradual buildup of cholesterol plaque until there was almost a total obstruction and a myocardial infarction. . . . . (*Id.*).
>
> You can talk all you want to about the timeframe and how long it took to get [Employee] to the cath lab, but the fact remains that he would be perfectly healthy and well today had it not been for the presence of some degree of atherosclerosis of his coronary arteries leading to a vulnerable atherosclerotic plaque which ruptured and caused the whole problem leading to death. (*Id.*).

16) On September 22, 2014, Employer filed a notice of possible claim against the SIF and also a petition to join the SIF. (Notice of Possible Claim, September 22, 2014; Petition, September 22, 2014). Employer's petition stated:

> Mr. Tolman's pre-existing diabetes (AS 23.30.205(b)) meets the "combined effects" test as reflected by the reports of Drs. William Breall and Mintu Turakhia, M.D. as well as the deposition testimony of Dr. Turakhia. (*Id.*).

17) Employer's September 22, 2014 petition attached a post-hire questionnaire, completed and signed by Employee on March 26, 2012, indicating a personal and family history of diabetes. (Questionnaire, March 26, 2012).

18) On October 1, 2014, the SIF answered Employer's September 22, 2014 petition to join and disputed whether Employer demonstrated a qualifying subsequent injury combined with a

preexisting condition to give rise to a claim for SIF reimbursement. The SIF's answer also asserted an untimely notice defense. (Answer, October 1, 2014).

19) On March 9, 2015, the SIF filed a petition to dismiss Employer's September 22, 2014 petition to join the SIF and a memorandum in support. (Petition, March 9, 2015).

20) On March 17, 2015, Jeremy Jones testified by deposition: He is a licensed paramedic/EMT in Anchorage. Based on his training and experience, Jones estimates it would take 30 minutes from the time a 911 call was made to transport Employee from his home in Anchorage into the Providence emergency room, with the hospital's cardiac catheter lab alerted en route and ready on arrival. (Jones Deposition, March 17, 2015, p. 32).

21) In response to a letter from Claimant's attorney, the Anchorage Fire Department conducted a test of the response time to Employee's home address in Anchorage on the day Employee suffered his heart attack, taking into account staff on duty that day, and other incidents in the area requiring a response. The response estimated an ambulance would have been dispatched from the closest fire station three minutes and 40 seconds after a call, and would arrive at Employee's home five minutes and one second later. (Anchorage Fire Department Report, September 23, 2014; Claimant's Hearing Exhibit 5).

22) On March 19, 2015, Dr. Breall executed an affidavit stating:

> . . . It is my opinion that but for [Employee's] diabetes his arteriosclerosis would not have been as severe or as advanced to cause his death on April 5, 2012.
>
> It is further my opinion that had the arteriosclerosis not been aggravated by [Employee's] diabetes, his death would not have occurred at this age. [Employee's] diabetes accelerated the arteriosclerosis that led to his death at age 55.
>
> I am of the opinion that the preexisting diabetes combined with the arteriosclerosis to cause [Employee's] death on April 5, 2012, by reason of the combined effects of the preexisting impairment and subsequent injury.
>
> Finally, I am of the opinion that regardless of any remote site/delay in treatment, [Employee's] death would not have occurred when it did but for the preexisting diabetes that caused his underlying cardiac issues. (Breall Affidavit, March 19, 2015).

23) On May 1, 2015, *Tolman v. Chugach Electric Association*, AWCB Decision No. 15-0046 (May 1, 2015) (*Tolman I*) decided Employer's September 22, 2014 petition to join the Second

Injury Fund. *Tolman I* decided Employer's petition to join the SIF was premature, finding the "except for" test under AS 23.30.205(b) was not satisfied. *Tolman I* ordered:

> (1) Employer's September 22, 2014 petition to join the Second Injury Fund is denied without prejudice.
>
> (2) The Second Injury Fund's March 9, 2015 petition to dismiss Employer's September 22, 2014 petition to join is held in abeyance. (*Tolman I* at 14).

24) On June 24, 2015, Employer filed a new petition to join the SIF as well as a notice of possible claim against the SIF. (Petition to Join Second Injury Fund and Claim for Reimbursement, June 24, 2015; Notice of Possible Claim Against Second Injury Fund, June 3, 2015). Employer also filed another affidavit executed by Dr. Breall, which states:

> I have reviewed Dr. Mintu Turakhia's deposition of March 27, 2014, and I agree with Dr. Mintu Turakhia's opinion at pages 45-48 that Mr. Tolman's diabetes accelerated his atherosclerosis. . . .
>
> It is my opinion that except for Mr. Tolman's diabetes that accelerated all of his underlying risk factors, his arteriosclerosis would not have been as severe or as advanced to cause his death on April 5, 2012, at age 55.
>
> I am of the opinion that Mr. Tolman's death would not have occurred when it did except for the preexisting diabetes that caused his underlying cardiac issues. . . . (Breall Affidavit, May 27, 2015).

25) On September 5, 2015, Dr. Turakhia provided another opinion based on recent evidence. Dr. Turakhia's letter to Claimant's attorney states:

> On May 8, [attorney Eric Croft] sent me a letter regarding developments in this case since my March 27, 2014 deposition. You included 1) a copy of a portion of the Alaska statutes, 2) the March 17, 2015 deposition of firefighter/paramedic Jeremy Jones, and 3) the undated affidavit of Timothy O'Leary. . . .
>
> Mr. Jones' deposition reaffirms my belief about the likely response times in Anchorage and reinforces my conclusion that [Employee] likely would have survived his STEMI event if he had been at home rather than at Beluga. I continue to believe the substantial cause of [Employee] dying from rather than surviving his heart attack is the delay in diagnosis and treatment at the remote work site and the lack of adequate medical training and equipment at that site. . . .

> I reviewed the Alaska law 23.30.2015 [sic] provided to me regarding preexisting conditions. . . I believe that it is likely that [Employee] would have survived his STEMI event "except for" his preexisting diabetes. (Turakhia Letter, September 5, 2015).

26) On October 22, 2015, Employer filed a petition to modify *Tolman I* based, in part, on new evidence. The petition seeks a Board order deciding the following:

> 1) Dr. Breall's May 27, 2015, affidavit satisfies the "except for" standard under AS 23.30.205(b), and the 100-week period began to run on May 27, 2015. Dr. Turakhia's September 5, 2015, opinion also satisfies the "except for" standard under AS 23.30.205(b).
>
> 2) Employer had the requisite knowledge of a possible SIF claim and satisfied the "except for" standard when it filed its June 3 and 19, 2015, notice of a possible claim for reimbursement against the SIF, petition for joinder of the SIF, and claim for reimbursement.
>
> 3) Employer's June 3 and 19, 2015, notice and petition were timely under AS 23.30.205(f).
>
> 4) Employer has paid 104 weeks of qualifying indemnity benefits.
>
> 5) Employer's petition to join the SIF as a party is granted.
>
> 6) Employer is entitled to reimbursement from the SIF. (Petition, October 22, 2015).

27) On November 2, 2015, the SIF filed an answer in opposition to Employer's October 22, 2015 petition. The SIF's two main arguments in opposition are: 1) Employer already stipulated to all the issues set for the November 18, 2015 hearing, and 2) whether the SIF must reimburse an employer cannot be decided before a determination is made whether an employee's claim against an employer is work-related. (Answer, November 2, 2015).

28) On November 3, 2015, Claimant filed an answer in opposition to Employer's October 22, 2015 petition. Claimant argues a ruling should issue on the merits of the case as agreed by the parties at a prehearing conference, and consideration of Employer's October 22, 2015 petition would cause undue delay. (Answer, November 3, 2015).

29) On November 5, 2015, a prehearing conference was attended by all parties. The prehearing conference listed the issues for the November 18, 2015 hearing as: medical costs, death benefits, attorney fees and costs, Employer's June 24, 2015 petition for SIF reimbursement, Employer's

October 22, 2015 petition to modify *Tolman I*, and Employer's October 29, 2015 petition to bifurcate. (Prehearing Conference Summary, November 5, 2015).

30) Claimant argues in her hearing brief:

> On April 4, Alan Tolman works his regular shift at Beluga. He eats dinner and retires to his room for the night. At 8:00 P.M. he calls [his wife] Leona. He indicates his chest feels tight and that he may be coming down with bronchitis. He calls her again at 8:08, 8:20, and 8:56 P.M. In the last phone call, he tells Leona that he plans on taking an early flight home the next morning to see his doctor. . . . (Claimant's Hearing Brief, November 12, 2015).

31) Telephone records filed by Claimant show calls at 8:00, 8:08, 8:20, and 8:56 P.M. (Claimant's Hearing Exhibit 3).

32) Leona Tolman testified: She was married to Employee almost 37 years at the time of his death. During the above calls, Employee told her his chest felt tight, and he thought he was probably coming down with a cold. Employee told her he planned to take a flight the following morning to back to Anchorage. She believes if Employee had received adequate treatment for his heart attack sooner, he probably would have survived. (Tolman).

33) James Baisden testified: He is fire chief at the Nikiski Fire Department. The Nikiski department's service area includes Employer's Beluga facility. Timothy O'Leary was a volunteer for the Nikiski Fire Department, who could operate only at the EMT I level at Beluga. To use an EKG machine under applicable rules and regulations, a first responder would have to be EMT III certified. (Baisden).

34) Dr. Turakhia testified: In forming his opinion on Employee's death, Dr. Turakhia reviewed Employee's medical records, the witness statements, Dr. Breall's EME reports, records from Employee's treating physician, Dr. Monroe, the medevac records, and the emergency room records. Dr. Turakhia believes Employee died of a ST-elevation myocardial infarction (STEMI). Employee had a complete occlusion of the left anterior descending heart artery. The single biggest factor in surviving a STEMI event is time to adequate treatment, including reopening the artery through drugs or angioplasty and stenting. The delay in treating Employee for the STEMI due to the remote work location was the substantial cause of his death. Based on review of the record, it is possible Employee was having early symptoms of a heart attack when he first called his wife, which may not have presented with the typical "elephant on the chest" symptoms. Patients with diabetes experiencing heart attacks may misperceive the symptoms as being

digestive in nature. In such cases, a patient may experience rapid progression of cardiogenic shock, which includes minimal blood pumping, with the lungs filling with fluid. Dr. Turakhia believes it is possible Employee was experiencing the onset of a heart attack as early as 8:00 P.M. on April 4, 2012, around the time he called his wife and complained of symptoms. By approximately 11:00 P.M., when O'Leary arrived, Employee was in severe cardiorespiratory distress and a state of pulmonary edema, with fluid filling the lungs. The training and experience of paramedic Jeremy Jones, who was on the medevac flight carrying Employee, were "quite good." Reviewing Jones' deposition testimony, Dr. Turakhia believes "with a high degree of probability" if the heart attack occurred in Anchorage, Employee would have arrived in the emergency room within 30 minutes or less with a prepared cardiac catheterization lab ready to treat him. However, due to the delay caused by the remote location, when Employee landed at Providence Hospital in Anchorage at 1:24 A.M., he was too unstable to have the artery reopened. By this time, Employee was unresponsive, and was not stabilized at Providence until 2:50 A.M. There is generally a 90-minute rule when treating a patient experiencing a heart attack, meaning no more than 30 minutes to hospital transport and no more than 60 additional minutes to catheterization where the artery can be opened. Had Employee been seen by paramedics within 30 minutes of the first symptoms, the artery would have likely been opened in time to save him. Employee died because of the delay in medical care and receiving reperfusion therapy. Had Employee received a dose of aspirin while still at Beluga, it would have mitigated the complete occlusion, and increase the chance of survival. However, there are risks to giving aspirin, because it may worsen complications or other conditions a patient may be experiencing but not obviously presenting. For example, where there is a pulmonary event or gastric bleeding, aspirin would be contraindicated. Therefore, the decision whether to administer aspirin in a situation like Employee's should be made by a medical professional, typically with reference to an on-scene EKG study. Based on his review of the record, Dr. Turakhia believes O'Leary did everything reasonable as a level III E.M.T. in responding to Employee. Dr. Turakhia bases his opinion on a reasonable degree of medical probability. (Turakhia).

35) Regarding the role of diabetes on Employee's condition, Dr. Turakhia testified: Employee had type II diabetes, which is another term for "adult onset diabetes." Type I and type II diabetes are risk factors for heart attacks because they cause patients to develop vascular disease and blood vessel deposits of cholesterol, which ultimately can rupture and cause a heart attack.

Diabetes was the single biggest risk factor for predisposing Employee to the STEMI which resulted in his death. It is not possible to tell exactly how much plaque Employee had in his vessels as a result of diabetes, nor is it generally known how much plaque must be present before a heart attack can occur in the typical patient. While diabetes was a major risk factor, Employee also had other factors predisposing him to heart attack: he was overweight and had hypertension. When a patient with known diabetes arrives in the emergency room suspected of a heart attack, medical staff may have to act more aggressively because the patient may be "sicker than they look," due to diabetes often obfuscating heart attack symptoms. (*Id.*).

36) Dr. Turakhia disagrees with Dr. Breall's opinion that Employee had longstanding atherosclerotic coronary artery occlusive disease. Dr. Turakhia believes there is no evidence of this, nor can it be empirically confirmed in any way from Employee's medical records. Dr. Breall's opinion that Employee had a critical degree of obstruction prior to April 5, 2012, and it was "clogged pipes getting worse" is factually incorrect. Dr. Turakhia believes this is a misunderstanding of how STEMI events occur. Dr. Turakhia stated STEMIs occur when there is a plaque rupture, "like an icicle falling off," and not at all like the analogy of pipes progressively clogging over time. Patients experiencing this particular type of heart attack are most likely to benefit from early opening of the artery and management in the hospital. (*Id.*).

37) Dr. Turakhia is credible. (Experience, judgment, observations, and inferences from all of the above).

38) Employer withdrew its October 29, 2015 petition to bifurcate. (Employer's Hearing Argument).

39) On November 12, 2015, Claimant's attorney filed a statement and affidavit of attorney's fees and costs. The statement itemized $21,365.84 in costs and $93,232.00 in attorneys' and paralegal fees. Claimant's billing timesheets itemize 204.5 hours by attorney Eric Croft at a rate of $400.00 per hour, 2.10 hours by attorney Chancy Croft at a rate of $400.00 per hour, and 66.70 hours of paralegal time at $100.00 per hour. Subtracting for fees previously paid, the total outstanding amount in attorney's fees and costs was $88,921.84. (Statement of Attorney's Fees and Costs, November 12, 2015; Affidavit of Eric Croft, November 12, 2015).

40) On November 18, 2015, Claimant's attorney filed a statement and affidavit of attorney's fees and costs. The statement itemized an additional $3,984.00 in attorney's fees. Claimant's billing timesheet itemizes an additional 6.4 hours by attorney Eric Croft at a rate of $400.00 per hour,

1.8 hours by attorney Chancy Croft at a rate of $400.00 per hour, and 4.4 hours of paralegal time at $100.00 per hour. The total outstanding amount in attorney's fees and costs was $92,905.84. (Statement of Attorney's Fees and Costs, November 18, 2015; Affidavit of Eric Croft, November 18, 2015).

41) Considering the nature, length, and complexity of this case, Employer's and the SIF's resistance, and the relevant legal market, Claimant's attorney's fees and costs are reasonable. (Experience, judgment).

42) Claimant's attorney argued at hearing the best way to address the issue of the amount of attorney's fees due is in a "subsequent proceeding," depending on the outcome of the November 18, 2015 hearing. (Claimant's Hearing Argument).

43) Employer's attorney argued at hearing if Claimant is successful on the present issues, the issue of attorney's fees and costs would probably best be resolved after issuance of this decision. (Employer's Hearing Argument).

44) The SIF did not take a position on the issue of Claimant's attorney's fees. (Record).

45) On December 29, 2015, the hearing panel issued a letter order concerning a possible second independent medical examination (SIME), and giving the parties an opportunity to respond. The letter states:

> Upon review of the record and in light of testimony at the November 18, 2015 hearing, it appears a significant medical dispute exists in this case, warranting an SIME under AS 23.30.095(k). Specifically, a dispute exists as to the legal cause of Mr. Tolman's death while employed with Chugach Electric. Mintu Turakhia, M.D. has opined the delay in receiving treatment was the substantial cause of Mr. Tolman's death. Dr. Turakhia disagrees with Employer's Medical Examiner, William Breall, M.D.'s opinion that Mr. Tolman had longstanding atherosclerotic coronary artery occlusive disease and that the delay in receiving treatment was a minimal or inconsequential factor in Mr. Tolman's death. . . .
>
> The purpose of this letter is to provide the parties the opportunity to brief the issue of whether an SIME is appropriate. Please provide written briefs to the Board outlining your respective positions by January 29, 2016. If either party wishes to present oral argument on the issue of whether an SIME is warranted, please notify the Board as soon as possible. Alternatively, if the parties stipulate an SIME is appropriate, please contact the Board office to schedule a prehearing conference. (Letter Order, December 29, 2015).

46) On January 13, 2016, the parties filed a stipulation jointly opposing an SIME, signed by the attorneys representing Claimant, Employer, and the SIF, respectively. (Stipulation, January 13, 2016).

47) On January 28, 2016, a prehearing conference was held. The parties were directed to file briefs on the issue of whether an SIME is appropriate no later than February 12, 2016. (Amended Prehearing Conference Summary, February 5, 2016).

48) On February 12, 2016, Employer filed a brief opposing an SIME. Employer's main arguments in opposition to an SIME are that determining whether Employee's April 5, 2012 death occurred in the course and scope of employment for Employer is a purely legal issue, to which there is no medical dispute. As to the SIF reimbursement issue, Employer contends Dr. Turakhia and Dr. Breall agree "except for" the preexisting diabetes, Employee would not have died of the heart attack. Employer contends the Board lacks authority to order an SIME at this stage, and instead must make credibility determinations with respect to the evidence. Employer contends the SIF has no statutory right to participate in determination of the SIME issue. (Employer's Brief in Opposition to SIME, February 12, 2016).

49) On February 12, 2016, the SIF filed a brief opposing an SIME. The SIF's main arguments in opposition to an SIME are the opinions of Drs. Turakhia and Breall are largely in agreement as to the "except for" issue, and so no medical dispute exists warranting an SIME. The SIF contends determination of the "except for" issue is a legal question, which will not be assisted in resolution from a third, independent medical opinion. The SIF contends an SIME ordered at this stage will result in significant delay in resolution of this case. (SIF's Brief in Opposition to SIME, February 12, 2016).

50) On February 16, 2016, Claimant filed a late brief opposing an SIME. Claimant's main arguments in opposition to an SIME are that ordering an SIME over objection of all the parties violates their due process rights. Claimant contends since a hearing on the merits has already been held, an SIME at this point would create new evidence after the fact, to which no party will have meaningful opportunity to respond. Claimant contends no significant medical dispute exists on any of the material issues, and an SIME at this stage will cause significant additional delay in resolution of this case. Claimant contends the Board is given the power to weigh evidence and credibility, and should do so on the record as presented, which is ripe for determination. (Claimant's Brief in Opposition to SIME, February 16, 2016).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
>
> > (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to this chapter
> > . . . .
> >
> > (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

A decision may be based not only on direct testimony and other tangible evidence, but also on "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). The law has long favored giving a party his "day in court." *Sandstrom & Sons, Inc. v. State of Alaska*, 843 P.2d 645, 647 (Alaska 1992).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. . . . Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

Under the "remote site" doctrine, everyday activities that are normally considered non-work-related are deemed a part of a remote site employee's job for workers' compensation purposes because the requirement of living at the remote site limits the employee's activity choices. Workers' compensation liability is to be imposed whenever employment is established as a causal factor in the disability, and a causal factor is a legal cause if it is a substantial factor in bringing about the harm at issue. *Doyon Universal Services v. Allen*, 999 P.2d 764 (Alaska 2000).

The principle behind the remote site theory is that because work at a remote site requires workers, as a condition of employment, to eat, sleep and socialize on work premises, activities

normally divorced from work become part of working conditions to which the worker is subjected. *Norcon, Inc. v. Siebert*, 880 P.2d 1051 (Alaska 1994). Under the Workers' Compensation Act, coverage is established by the "work connection" and the test of work connection is that, if accidental injury or death is connected with any of incidents of one's employment, then injury or death both would arise out of and be in the course of employment. *M-K Rivers v. Schleifman*, 599 P.2d 132 (Alaska 1979). When an employee is required by conditions of his employment to reside on employer's premises where he is constantly on call, compensation may be awarded even though an accident occurred during hours when the employee is off duty, and most activities necessary to personal comfort of the employee and most recreational activities which occur upon premises are found to be within coverage of workers' compensation statutes. *Anderson v. Employers Liability Assurance Corp.*, 498 P.2d 288 (Alaska 1972).

In *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004), Ugale worked at the employer's remote processing facility in Excursion Inlet, 35 miles west of Juneau. The decedent's family contended Ugale quit his job out of fear for his life because of threats from a co-worker. No available flights out were scheduled that day, and by the time a flight arrived, Ugale was missing. His body was found later that day in the boat harbor with his wallet and wedding ring missing. While the medical examiner determined Ugale had drowned, the manner of death was unknown. Ugale's family argued Excursion Inlet is a remote location, he was waiting on an employer-provided flight out, which was the only way out and his death arose out of his employment and therefore should be presumed compensable. The Alaska Supreme Court held in a *per curiam* decision Ugale's death was compensable, because the condition of confinement at the remote location was an incident of employment. Ugale could not leave the location until the next available flight, and regardless of the fact the death likely occurred off the employer's premises and was not directly connected to employment, there was insufficient evidence to rebut the presumption of compensability.

In *Edgar v. SBE Engineering*, AWCB Decision No. 14-0014 (October 27, 2014), the Board found the employer was well-equipped and able to provide a high level of first aid to an employee having a heart attack at a remote site. The Board relied on the testimony of the chief

medical advisor at the remote site, Bruce Packard, M.D., who stated he "would feel comfortable having a heart attack [at the remote site] if I had to." *Id.* at 28. In *Edgar*, the Board denied the decedent's family's claim, finding the case fell into an exception to the remote site doctrine because nothing about the remote site limited the employee's ability to seek medical attention. *Id.* Therefore, the employee did not die in the course and scope of his employment with the employer. *Id.*

> **AS 23.30.040. Second injury fund.** (a) There is created a second injury fund, administered by the commissioner. Money in the second injury fund may only be paid for the benefit of those persons entitled to payment of benefits from the second injury fund under this chapter. Payments from the second injury fund must be made by the commissioner in accordance with the orders and awards of the board. . . .
>
> **AS 23.30.045. Employer's liability for compensation.** (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180--23.30.215. . . . .
>
> (b) Compensation is payable irrespective of fault as a cause for the injury. . . .
>
> **AS 23.30.095. Medical treatments, services, and examinations**. . . .
> . . . .
>
> (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .
> . . . .
>
> (k) In the event of a medical dispute regarding determinations of causation, medical stability, ability to enter a reemployment plan, degree of impairment, functional capacity, the amount and efficacy of the continuance of or necessity of treatment, or compensability between the employee's attending physician and the employer's independent medical evaluation, the board may require that a second independent medical evaluation be conducted by a physician or physicians selected by the board from a list established and maintained by the board. . . .

The following general criteria are typically considered when ordering an SIME, though the statute does not expressly so require:

> 1) Is there a medical dispute between Employee's physician and Employer's EME?
>
> 2) Is the dispute "significant"?
>
> 3) Will an SIME physician's opinion assist the board in resolving the disputes?

AS 23.30.135 provides the board with wide discretion under AS 23.30.095(k) to consider any evidence available when the board decides whether to order an SIME to assist in investigating and deciding medical issues in contested claims. *Bah v. Trident Seafoods Corp.*, AWCAC Decision No. 073 (February 27, 2008) addressed the board's authority to order an SIME under AS 23.30.095(k) and AS 23.30.110(g). With regard to AS 23.30.095(k), the AWCAC stated:

> [t]he statute clearly conditions the employee's right to an SIME . . . upon the existence of a medical dispute between the physicians for the employee and the employer.

Id. at 4. *Bah* stated, before ordering an SIME, it is necessary to find the medical dispute is significant or relevant to a pending claim or petition and the SIME would assist the board in resolving the dispute. *Id.* The law gives discretion to the board to order the specialty to conduct an SIME, and to empanel one or several doctors for an SIME if necessary to ensure "the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost" to Employer. *Mazurenko v. Chugach Alutiiq JV*, AWCB Case No. 11-0064 (May 17, 2011).

> **AS 23.30.110. Procedure on claims**. . . .
> . . . .
>
> (g) An injured employee claiming or entitled to compensation shall submit to the physical examination by a duly qualified physician which the board 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;. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute, including medical benefits.

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

As for the second step of the analysis, under the new statutory causation standard, the employer may rebut the presumption by a demonstration of substantial evidence that the death or the need for medical treatment did not arise out of and in the course of the employment. To do so, the board must evaluate the relative contribution of different causes of the death or the need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 09-0186 at 6-7 (March 25, 2011). Because the board considers the employer's evidence by itself and does not weigh the employee's evidence against the employer's rebuttal evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the board finds the employer's evidence is sufficient to rebut the presumption, in the third step the presumption of compensability drops out, the employee must prove his case by a preponderance of the evidence, and must prove in relation to other causes, employment was the substantial cause of the death or need for medical treatment. *Runstrom* at 8. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are

probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn from the evidence, and credibility is considered. *Runstrom* at 8.

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

A preexisting infirmity does not disqualify a workers' compensation claim under the work-connection requirement if the employment aggravated, accelerated, or combined with the infirmity to produce the disability for which compensation is sought. *DeYonge v. NANA/Mariott*, 1 P.3d 90, 97 (Alaska 2000). The Commission further commented on the legal standard for proving "aggravation" and "combination" claims for injuries occurring after the 2005 amendments in *City of Juneau v. Olsen*, AWCAC Decision No. 185 (August 21, 2013):

> The starting point is the [S]upreme [C]ourt's statement, under former law, that "for an employee to establish an aggravation claim under workers' compensation law, the employment need only have been 'a substantial factor in bringing about the [need for medical treatment].'" Here, it follows that, for Olsen to establish an aggravation claim under the 2005 amendments to the Act, she must show that her employment was the substantial cause in bringing about the need for treatment in the form of the implantation procedure. Second, AS 23.30.010(a) requires the board to evaluate the relative contribution of different causes of the need for medical treatment. Consequently, in the present context, we hold that the board needs to evaluate the relative contribution of the two causes of Olsen's knee pain, the preexisting arthritis and the work incidents. The next step is for the board to apply the presumption of compensability analysis in these specific circumstances. Because there is consensus that Olsen attached the presumption and CBJ rebutted it, this task is made simpler. The only remaining question is whether Olsen can prove by a preponderance of the evidence that employment, that is, the work incidents, were the substantial cause in bringing about her need for the implantation procedure. . . .

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary

> conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings are "binding for any review of the board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009). The board has the sole power to determine witness credibility, and its findings about weight are conclusive even if the evidence is conflicting. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249, 1253 (Alaska 2007).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation. . . .

In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). AS 23.30.130 confers continuing jurisdiction over workers' compensation matters. (*Id.*) By comparison and contrast, a petition for reconsideration has a fifteen day time limit for the request and the board's power to reconsider "expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied." (*Id.* at n. 36).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury. . . .

> **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.

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

> **AS 23.30.155. Payment of compensation**. . . .
> . . . .
>
> (h) The board may upon its own initiative at any time in a case . . . where right to compensation is controverted . . . make the investigations, cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.
>
> **AS 23.30.205. Injury combined with preexisting impairment.** (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.

> (b) If the subsequent injury of the employee results in the death of the employee and it is determined that the death would not have occurred except for the preexisting permanent physical impairment, the employer or the insurance carrier shall in the first instance pay the compensation prescribed by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund for all compensation payable in excess of 104 weeks.
>
> (c) In order to qualify under this section for reimbursement from the second injury fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge.
>
> (d) The second injury fund may not be bound as to any question of law or fact by reason of an award or an adjudication to which it was not a party or in relation to which the director was not notified at least three weeks before the award or adjudication that the fund might be subject to liability for the injury or death.
>
> (e) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier has knowledge of the injury or death.
>
> (f) In this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. A condition may not be considered a "permanent physical impairment" unless
>
> (1) it is one of the following conditions:
> . . . .
>
> (B) diabetes. . . .

The Second Injury Fund was created to encourage employers to hire and retain partially disabled employees. *VECO, Alaska, Inc. v. State of Alaska*, 189 P.3d 983, 988 (Alaska 2008). To be eligible for reimbursement from the Fund, the employer is required to establish by written records that it had knowledge of the employee's permanent physical impairment before the subsequent injury occurred and that it retained the employee after it acquired that knowledge. *Id.*

The Alaska Supreme Court in *Second Injury Fund v. Arctic Bowl*, 928 P.2d 590, 595 (Alaska 1996) held, regarding an employer's duty to file notice of a possible claim against the Second Injury Fund in a case concerning a workplace injury:

> [A]n 'injury' does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met. Injuries subsequent to the underlying impairment, but which do not result in a greater disability than existed before, do not give rise to a claim for SIF reimbursement. . . . The mere knowledge that an injury has occurred does not suffice to trigger the 100-week notice period. Only after knowledge of the possibly SIF-compensable harm to the employee can the employer be expected to notify SIF. Otherwise the employer would be required to report every injurious event to SIF, even if that harm clearly failed to meet the 'combined effects' test.

Arctic Bowl upheld a Board decision finding the employer's attorney lacked the requisite knowledge for a possible SIF claim until the attorney spoke with the employee's doctor. *Id.* at 595. The Court held the employee's attorney could not have known the "mechanisms and response" of the injury and resulting surgery, even though the employee's attorney also happened to be a physician. *Id.*

In *North Slope Borough v. Wood, et al.*, AWCAC Decision No. 048 (July 13, 2007), the SIF contended the employee's medical record contained repeated references to prior or preexisting conditions which should have led the employer to recognize a possible claim against the SIF. Rejecting the SIF's argument, the Commission held:

> We do not consider that the mere mention of arthritis in a single vertebra of the lumbar spine, with nothing more, must, as a matter of law, inform the employer that the combined effects of that lumbar spine arthritis, which had not resulted in disability, and the employee's later, and much more severe, neck and shoulder injury would result in substantially greater disability than the later injury alone would do. *Id*. at 10.

Discussing the "combined effects" test of AS 23.30.205(a), the Commission held:

> "[I]njury" does not become an "injury" for SIF purposes until the "combined effects" test of AS 23.30.205(a) is met. The statute requires that notice be given of "any possible" claim "as soon as practicable," but in no event later than 100 weeks after knowledge of the injury – not after knowledge of the possibility of a claim. Because an 'injury' for SIF purposes occurs when the combined effects

> test is met, the 100 weeks that mark the outside limit for notice must begin after the combined effects test is met and after the employer's knowledge of the injury. *Id.* at 7.

Thus, a possible claim is the starting point of obligation to provide notice. However, it is not the date "any possible claim" came into existence that defines the outer boundary of the notice period; the defining date is the date of knowledge of an injury for SIF purposes. *Id.* at 9. Analyzing legislative intent behind AS 23.30.205, the Commission stated, "We do not believe that the legislature intended the SIF to be flooded with remotely possible, unlikely, or frivolous claims, or those without some evidentiary support." *Id.* at 8.

In death cases, borrowing from *Arctic Bowl*'s reasoning, the Board has held the 100-week notice period begins to run when the employer has knowledge that "except for" the preexisting condition, the death would not have occurred. *Tolman v. Chugach Electric Association*, AWCB Decision No. 15-0046 at 11-12 (May 1, 2015).

> **AS 23.30.395. Definitions.**
>
> . . . .
>
> (24) "injury" means any accidental injury or death arising out of and in the course of employment, and an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury. . . .

In *Seiler v. F.R. Bell & Associates*, AWCAC Decision No. 077 (May 22, 2008), the Alaska Workers' Compensation Appeals Commission held that the costs of a medevac flight out of a remote work location to Anchorage for an employee who had stomach pain due to a pre-existing condition was not compensable because no injury or aggravation was sustained which arose out of and in the course of employment for the employer. *Id.*

> **8 AAC 45.050. Pleadings**. . . .
>
> . . . .
>
> (f) Stipulations. . . .
>
> . . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or prehearing. . . .

8 AAC 45.065. Prehearings. . .
. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .

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

(g) If there exists a medical dispute under AS 23.30.095(k),
. . . .

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

(3) the board will, in its discretion, order an evaluation under AS 23.30.095(k) even if no party timely requested an evaluation under (2) of this subsection if

(A) the parties stipulate, in accordance with (1) of this subsection to the contrary and the board determines the evaluation is necessary; or

(B) the board on its own motion determines an evaluation is necessary.

8 AAC 45.186. Second Injury Fund. (a) In order to satisfy the notice provisions of AS 23.30.205(f) an employer or carrier shall, no later than 100 weeks after receipt of knowledge of the injury or death, file form 07-6110 with the board and serve a copy of the form upon all interested parties in accordance with 8 AAC 45.060.

(b) Following the filing of a petition for reimbursement in accordance with this section, and upon receipt of a statement of readiness to proceed, the chairman will schedule a prehearing under 8 AAC 45.065 for the purpose of determining whether a hearing is necessary. If the chairman determines at the prehearing that there is no dispute of fact and that the only issues for the board to decide are issues of law, the chairman may direct the parties to prepare and sign a stipulation

> of facts and may direct the parties to submit the case to the board on written legal memoranda without oral hearing.
>
> (c) For the purposes of AS 23.30.205, it is conclusively presumed that the conditions listed in AS 23.30.205(d)(1) constitute a hindrance to employment or an obstacle to obtaining employment or reemployment.
>
> (d) Notice under AS 23.30.205(e) and (f) must be sent to the administrator of the second injury fund.
>
> (e) In order to satisfy the 200-week rating requirement of AS 23.30.205(d)(2), a condition must qualify for an award of compensation under AS 23.30.190(a) that, if paid every two weeks at the employee's temporary total disability compensation rate computed under AS 23.30.185 and AS 23.30.220 instead of in a single lump sum, would be paid for 200 weeks or more. A disabling condition or impairment does not automatically satisfy AS 23.30.205(d)(2) merely because it is permanent in quality.
>
> (f) The administrator of the second injury fund may not approve lump-sum reimbursements from the second injury fund under AS 23.30.205.

When an employee works and resides at a remote site, his personal activities are governed by the limitations of that site. Because the employee is required to eat, sleep, and socialize on the work premises, activities that are not normally related to employment become an integral part of the working conditions of the job. Recreational activities, travel to and from the work site, and personal activities performed on-site that are not normally encompassed by workers' compensation are covered in these instances under the remote site doctrine. The only requirement for such coverage is that the personal activity engaged in must be a result of limited choices offered at the site, and the choice dictated by the site must play a causal role in the injury. Joseph A. Kalamarides, *The Remote Site Doctrine in Alaska*, 21 Alaska Law Review 289-304 (2004).

Related to the "remote site" doctrine, the "general resident employment" rule articulated by Professor Larson provides injuries to employees required to live on the premises are generally compensable if one of the two following features is met: 1) the claimant is continuously on call, or 2) the source of the injury was a risk distinctly associated with the conditions under which the claimant lived because of the requirement of remaining on the premises. Arthur Larson, *Larson's Workers' Compensation Law*, 24.01 (2008).

ANALYSIS

1) Should an SIME be ordered?

An SIME may be ordered when there is a significant gap in the medical evidence or a lack of understanding of the medical evidence, and the opinion of an independent medical examiner will help ascertain the parties' rights. AS 23.30.095(k); AS 23.30.110(g); *Bah*. Alaska Statute 23.30.110(g), AS 23.30.135(a), and AS 23.30.155(h) confer upon the fact-finders broad procedural discretion to make investigations, including ordering independent medical examinations. *Deal*; *Harvey*. Any available evidence may be considered when deciding whether to order an SIME to assist in investigating and deciding medical issues in contested claims. *Hanson*; *Young*; *Mazurenko*.

The parties filed a stipulation jointly agreeing no SIME is necessary, and arguing they want the case decided on the record in its present form. 8 AAC 45.050. The parties also filed extensive briefs on the issue, again opposing an SIME. The parties' main argument is there is no real dispute as to the medical facts; rather, what remains to be decided is the weight and legal significance of the medical facts. The parties also contend a post-hearing SIME will cloud the issues, present new evidence "after-the-fact," which no party anticipated, and cause significant delay in case resolution. Claimant and Employer both contend Drs. Turakhia and Breall agree on the "except for" standard for SIF reimbursement purposes. As to this last point, the SIF concedes the doctors' opinions are "largely in agreement," although it disputes whether the legal standard for SIF reimbursement is met.

Drs. Turakhia and Breall both agree the delay in Employee receiving treatment for his heart attack was *some* factor in his death. The doctors disagree on the extent and significance of that delay. However, by weighing their testimony against the remainder of the medical evidence in this case, a determination may be made on whether Employee's death on April 5, 2012 arose out of and in the course of employment for Employer. AS 23.30.122; AS 23.30.135; *Rogers & Babler*. While this decision has authority under several sections of the Act to order an independent examination, including after hearing, considering the parties' opposition and the extensive medical records presented, no SIME will be ordered. *Id.*; AS 23.30.001(1); AS 23.30.110(g); AS 23.30.155(h).

2) Did Employee's death on April 5, 2012 arise out of and in the course of employment for Employer?

Claimant contends she is entitled to benefits under the Act in connection with Employee's April 5, 2012 death. Claimant relies on medical opinions stating Employee's death was caused by inadequate first aid available at Employer's remote site, combined with the delay in getting Employee adequate medical treatment. Claimant therefore contends Employee's death arose out of and in the course of work for Employer. Employer contends there is insufficient connection between Employee's death and his work for Employer. This creates a factual dispute to which the presumption of compensability applies. AS 23.30.120.

The presumption of compensability analysis applies to claims for death benefits. *Id.*; *Norcon*. An employee's death is presumed to be compensable when there is a "preliminary link" between the death and the employment. *Burgess*. In determining whether the presumption is raised, credibility is not considered nor is the evidence weighed against competing evidence. *Tolbert*. Claimant raises the presumption Employee's death arose out of and in the course of employment with Employer through Dr. Turakhia's November 20, 2013 report, which states delay in treatment as a consequence of the remote location of Employer's Beluga site was the substantial cause of Employee's death of a heart attack. *Burgess*; *Meek*; *Tolbert*; *Wolfer*. Employer rebuts the presumption through Dr. Breall's April 30, 2013 EME report, which opines the delay in getting Employee to the cath lab in Anchorage was a "very minor factor" in Employee's death. *Runstrom*; *Wolfer*. Because Employer successfully rebutted the presumption, Claimant must prove, by a preponderance of the evidence, work for Employer was the substantial cause of Employee's April 5, 2012 death. *Saxton*.

Beginning with his November 20, 2013 report, Dr. Turakhia has consistently held the delay in treatment of Employee's heart attack as a consequence of the remote location of Employer's Beluga site was the substantial cause of Employee's death. At his March 27, 2015 deposition, Dr. Turakhia was questioned extensively regarding the bases for his opinion delay in receiving treatment caused Employee's death. Dr. Turakhia testified he believes "with a high degree of probability" if the heart attack occurred in Anchorage, Employee would have arrived in the emergency room within 30 minutes or less with a prepared cardiac catheterization lab ready to

treat him. Dr. Turakhia testified repeatedly in his deposition and at hearing on the urgency of prompt treatment for STEMI events, along with frequent mention of speed to presentation to a cath lab as being the foundation for much of modern first response practice in cardiac events. Dr. Turakhia testified due to the delay caused by the remote location, by the time Employee landed at Providence hospital in Anchorage at 1:24 A.M., he was too unstable to have the artery reopened, and so he died. At hearing, Dr. Turakhia reaffirmed his deposition opinion that Employer's remote location, the delay resulting from it, along with the lack of equipment, training, and protocols at the Beluga site, were the substantial cause of Employee's death. Dr. Turakhia's hearing and deposition testimony is credible and consistent, and he makes reference to extensive experience and academic research in forming his opinions. His opinion is therefore given considerable weight. AS 23.30.122; *Rogers & Babler*.

Supporting Dr. Turakhia's opinions as to the importance of a timely first response, paramedic Jeremy Jones estimated had the heart attack occurred while Employee was at home, it would take 30 minutes from the time a 911 call was made to get Employee into the Providence emergency room, where the cath lab would be ready on arrival. The emergency preparedness test report completed by the Anchorage Fire Department on September 23, 2014, supports Jones' opinions regarding the importance of response time.

On the other hand, Dr. Breall's April 30, 2013 EME report is contradictory at times. For example, Dr. Breall opines with a large degree of certainty that the delay in getting Employee to the cath lab in Anchorage played a "very minor factor" in his death. But later in the same paragraph Dr. Breall notes the importance of getting individuals who are suffering an acute STEMI event into a cath lab within 90 minutes of the onset of symptoms. Further, Dr. Breall's September 12, 2014 amended EME report obfuscates the issue of a causation link between Employee's death and his work for Employer. In that report, Dr. Breall opines Employee "would be perfectly healthy and well today had it not been for the presence of some degree of atherosclerosis of his coronary arteries leading to a vulnerable atherosclerotic plaque which ruptured and caused the whole problem leading to death." Dr. Breall attributes Employee's death to a prior condition of atherosclerosis of the coronary arteries, minimizing any affect the delay in treatment arguably would have played. Similarly, in his March 19, 2015 affidavit, Dr.

Breall again rejects any significant role delay in treatment had in Employee's death, placing the blame instead on Employee's preexisting arteriosclerosis and diabetes. Dr. Breall's opinion would assign almost no weight to the delay in Employee receiving treatment for his heart attack, despite credible evidence by Dr. Turakhia and also first responders to the contrary. *Rogers & Babler*; AS 23.30.122; AS 23.30.135. As Dr. Turakhia correctly analogizes: "if a guy is bleeding on the street because he got hit by a car, he died because he got hit by a car, but he could have survived if someone gave him blood." Applied to the present case, Dr. Breall's opinion attempts to insert a misleading causal link resulting in Employee's death. *Id.* Dr. Breall finds ambiguity in the medical evidence where there is none. *Id.* Therefore, Dr. Breall's April 30, 2013 and September 12, 2014 EME reports and his March 19, 2015 affidavit receive much less weight on the issue of causation. *Id.*

Employer relies on *Edgar v. SBE Engineering*, AWCB Decision No. 14-0014 (October 27, 2014) in support of its contention that deciding whether Employee died in the course and scope of employment for Employer would require speculative "what if" and "but for" analysis. However, this case is distinguishable for an important reason: *Edgar* found the first aid equipment and training available to an employee experiencing a heart attack at the remote site was of such a high level that the medical advisor for the site, himself a medical doctor, stated he would feel comfortable having a heart attack there if he had to. *Edgar* denied the decedent's family's claim, finding the case fell into an exception to the remote site doctrine because nothing about the remote site limited the employee's ability to seek medical attention. *Edgar* decided the employee did not die in the course and scope of his employment with the employer when he had a heart attack because it found the employee indeed received a very high level of first aid care. Here, had Employee received the level of first aid care as did the employee in *Edgar*, yet still died, that case would arguably apply. But the weight of the evidence supports Claimant's contentions that Employer's equipment, training, and protocol for dealing with heart attacks at the Beluga site were not adequate. While the inadequacy of first aid treatment in the present case is not the basis for finding work for Employer was the substantial cause of Employee's death (AS 23.30.045(b)), but rather the delay, *Edgar* stands for the proposition that the standard of first aid is one factor to consider.

Employer also relies on *Seiler v. F.R. Bell & Associates*, AWCAC Decision No. 077 (May 22, 2008), which held the costs of a medevac flight out of a remote work location for an employee who had stomach pain due to pre-existing gastroesophageal reflux disease was not compensable. The employee in *Seiler* experienced chest pains that began before he reported to work. He sought treatment at the local clinic, as was required by the employer's policy. A physician's assistant recommended he take a medevac flight to Anchorage, which the employee initially resisted, but eventually took. *Seiler* found no injury or aggravation was sustained which arose out of and in the course of employment for the employer because there was substantial evidence to find the employee suffered no work-related injury at all; rather, the employee took a medevac flight for treatment of a pre-existing condition, wholly unrelated to and unconnected to work for employer. *Seiler* dictates there must be some causal nexus between the work and the eventual injury or death triggering the remote site doctrine. Here, the parties agree work for Employer did not cause Employee's heart attack. Rather, Claimant's contention is the delay in treatment, due to Employer's remote work site, was the substantial cause of the death. Because this decision finds the weight of the evidence supports a finding Employee's death was caused by delay in treatment due to Employer's remote work location, thus causally linking employment to the death, *Seiler* is distinguishable.

This case is factually more like *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413 (Alaska 2004), in that employment was not a direct cause of the death, but rather the remote location and confinement, which arguably prevented the employee from "escaping" circumstances leading to his death. The employee in *Ugale* feared his life was in danger because of a co-worker's threats, and so sought to fly out of the remote work site as soon as possible. However, no flights were available that day, and soon thereafter, he was found dead in the harbor. The Alaska Supreme Court held the circumstances of the employee's confinement, combined with the work site's remote location, were an incident of employment. The employee could not leave the location until the next available flight, and regardless of the fact the death likely occurred off the employer's premises and was not directly connected to his employment, there was insufficient evidence to rebut the presumption of compensability. Similarly here, Employee was arguably "confined" to the remote Beluga site as he was having his heart attack. As in *Ugale*, the death

was not directly caused by Employee's work for Employer, but rather by Employer's remote work site, which led to a considerable and out-of-the-ordinary delay in Employee's treatment.

When, as here, an employee works and resides at a remote site, his personal activities are governed by the limitations of that site. *Doyon*; *Norcon*; *Anderson*; *Schleifman*. This includes limits on an Employee's freedom of movement, even during medical emergencies. Given the remote site doctrine, the weight of credible evidence supports the conclusion by a preponderance of the evidence that Employee's April 5, 2012 death arose out of and in the course of employment for Employer. AS 23.30.001; AS 23.30.120; AS 23.30.135; *Rogers & Babler*; *Meek*; *Tolbert*; *Runstrom*. Claimant's September 20, 2012 claim will be found compensable.

3) Should the SIF be joined as a party and should reimbursement from the SIF be ordered?

Employer contends if Employee's April 5, 2012 death is found compensable, the SIF should be joined as a party and reimbursement from the SIF should be ordered. Because the April 5, 2012 heart attack resulted in Employee's death, the "except for" test in AS 23.30.205(b) applies. In *Arctic Bowl*, the Alaska Supreme Court held an "injury does not become an 'injury' for SIF purposes until the 'combined effects' test of AS 23.30.205(a) is met." Borrowing from *Arctic Bowl*'s reasoning, *Tolman I* decided the 100-week notice period in a death case begins to run when the employer has knowledge that "except for" the preexisting condition, the death would not have occurred. AS 23.30.205(b), (e). Because a second injury fund reimbursement petition is not a claim for compensation or medical benefits under the Act, the presumption of compensability analysis will not be applied. AS 23.30.120; *Meek*; *Burke*.

The SIF contends reimbursement can only be ordered after a finding an employee's death arose out of and in the course of employment for an employer. Once this fining is made, the SIF argues there must be a "strong causal connection" linking a pre-existing impairment to the death. The SIF contends Employee's diabetes was a condition only contributing to his death, rather than causing it. The SIF points to page 45 of Dr. Turakhia's March 27, 2014 deposition, where he testifies from a causation standpoint, it may be difficult to tell whether and when ruptured plaque causing a heart attack occurred because of Employee's diabetes. The SIF also relies on Dr.

Breall's opinion Employee's death was not related to work for Employer, thereby precluding SIF reimbursement.

On March 26, 2012, Employee completed and signed a written post-hire questionnaire indicating a personal and family history of diabetes. Diabetes is a qualifying permanent physical impairment under the Act potentially entitling an employer to SIF reimbursement. AS 23.30.205(f)(B). Employer retained Employee after Employer had knowledge of the pre-existing diabetes. AS 23.30.205(c). The May 1, 2012 death certificate completed by Dr. Kutchera lists "diabetes mellitus, hypertension" as "other significant conditions contributing to death but not resulting in the underlying cause." Dr. Turakhia opines in his March 27, 2014 deposition, "diabetes causes coronary artery disease." However, for the 100-week notice period to begin, an employer or insurer must have knowledge of possible SIF-compensable harm to the employee. *Artic Bowl.* Employer obtained evidence in the form of opinions from Dr. Breall on May 27, 2015, and Dr. Turakhia on September 5, 2015, that Employee would not have died "except for" the pre-existing diabetes. AS 23.30.205(b); *Arctic Bowl*; *Tolman I.* These opinions are sufficient to satisfy the "except for" standard for SIF reimbursement under AS 23.30.205(b). AS 23.30.122; AS 23.30.135. Therefore, Employer first had notice of a possible SIF claim on May 27, 2015, the date of Dr. Breall's report. AS 23.30.205(e). Employer filed a petition to join the SIF as well as a notice of possible claim against the SIF on June 24, 2015. 8 AAC 45.186. Employer's June 3, 2015 notice was timely because it was filed only nine days after Employer received notice of a possible SIF claim in the form of Dr. Breall's May 27, 2015 report. AS 23.30.135; AS 23.30.205; *Rogers & Babler.*

The SIF did not present sufficient evidence challenging the opinions of Drs. Turakhia and Breall on the "except for" issue, or why it should not be joined as a party. AS 23.30.135; *Rogers & Babler*. The SIF will therefore be joined. 8 AAC 45.040(j). However, because the SIF may not be bound as to any question of law or fact resulting from an adjudication to which it was not a party, an order for reimbursement is premature. AS 23.30.205(d). Because this decision found Employee's death on April 5, 2012 arose out of and in the course of employment for Employer, and determined the death would not have occurred except for Employee's pre-existing diabetes,

Employer may file a petition for reimbursement for all compensation payable in excess of 104 weeks. AS 23.30.205; 8 AAC 45.186; *VECO*; *Arctic Bowl*; *Tolman I*.

Employer's October 22, 2015 petition seeks modification of *Tolman I* based on a change of facts, to wit: Employer contends it has obtained evidence relating to SIF reimbursement. AS 23.30.130(a); *Lindekugel*. The SIF objected to consideration of Employer's October 22, 2015 petition, but the petition was listed as one of the hearing issues during the November 5, 2015 prehearing conference, which the SIF attended. 8 AAC 45.065(c). This decision finds Employee's April 5, 2012 death arose out of and in the course of employment for Employer, and also that the death would not have occurred "except for" Employee's preexisting diabetes, but that SIF reimbursement is premature. Therefore, Employer's October 22, 2015 petition to modify *Tolman I* will be granted in part and denied in part. *Id.*

4) Is Claimant entitled to attorney's fees and costs?

Employer resisted paying benefits in this case, so fees and costs under AS 23.30.145(b) may be awarded. *Harnish*. Claimant filed two attorney's fee statements and affidavits, but additional attorney's fees have possibly accumulated. The primary issue for Claimant in this case was whether Employee's death on April 5, 2012 arose out of and in the course of employment for Employer. Claimant succeeded on this issue. Considering the claim's nature, length, and complexity and the services performed, Employer's resistance, and the benefits resulting to Claimant from the services obtained, Claimant is entitled to attorney's fees and costs. AS 23.30.145. Because Claimant and Employer agreed at hearing the amount of fees and costs would best be determined after a decision on the merits, the parties may request a prehearing conference to address the issue of the amount of Claimant's attorney's fees and costs.

CONCLUSIONS OF LAW

1) An SIME will not be ordered.

2) Employee's death on April 5, 2012 arose out of and in the course of employment for Employer.

3) The SIF will be joined as a party and Employer may file a petition for reimbursement from the SIF.

4) Claimant is entitled to attorney's fees and costs.

ORDER

1) Claimant's September 20, 2012 claim is compensable.

2) Employer's June 24, 2015 petition for Second Injury Fund reimbursement is denied without prejudice.

3) Employer's October 22, 2015 petition to modify *Tolman I* is granted in part and denied in part.

4) *Tolman I* is modified, adding to order as follows:

    1. Dr. Breall's May 27, 2015 affidavit satisfies the "except for" standard under AS 23.30.205(b) for purposes of SIF reimbursement.
    2. Dr. Turakhia's September 5, 2015 opinion satisfies the "except for" standard under AS 23.30.205(b) for purposes of SIF reimbursement.
    3. Employer's June 24, 2015 petition to join the SIF was timely.
    4. Employer's June 3, 2015 notice of possible claim against the SIF was timely.
    5. Employer's September 22, 2014 petition to join the SIF is granted.

5) The Second Injury Fund is joined as a party.

6) Employer may file a petition for reimbursement from the Second Injury Fund for all compensation payable in excess of 104 weeks.

7) Claimant's claim for an award of attorney's fees and costs is granted in part. Claimant may request a prehearing conference to address the issue of the amount of attorney's fees and costs owed.

Dated in Anchorage, Alaska on March 18, 2016.

ALASKA WORKERS' COMPENSATION BOARD

____

Matthew Slodowy, Designated Chair

____

Ron Nalikak, Member

____

Rick Traini, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Alan L. Tolman *et al*., employee / decedent v. Chugach Electric Association, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201208306; 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 March 18, 2016.

Sertram Harris, Office Assistant