

Employer contends Employee did not injure himself while under its employment. Rather, Employer contends Employee stated he injured his back lifting his father on Father's Day in 2014.

The fund did not take a position on the factual dispute concerning this alleged injury.

1) Did Employee's disability or need for medical treatment arise out of and in the course of his employment with Employer?

Employee contends he was disabled from June 13, 2014 through June 26, 2014, due to his work injury with Employer. He claims temporary total disability (TTD) for these dates.

Employer contends Employee's TTD claim is inconsistent with his testimony. It contends Employee was not working for Employer on or near the date he claims to have been injured.

The fund did not take a position on Employee's TTD claim.

2) Is Employee entitled to a TTD award from Employer?

Employee contends he incurred out-of-pocket medical expenses and related transportation costs obtaining medical care for his alleged work injury with Employer. He requests reimbursement. Employee also contends he incurred bills with his chiropractor for his work injury with Employer, which Employer should be ordered to pay.

Employer contends Employee is not entitled to reimbursement for his out-of-pocket expenses and transportation costs because he was not injured while working for Employer. Similarly, for the same reasons, Employer contends it is not responsible for Employee's chiropractic bills.

The fund did not take a position on Employee's medical claim. However, the fund noted Employee returned to work for additional employers after the work injury and he incurred some medical care while working for these subsequent employers.

3) Is Employee entitled to medical benefits from Employer?

FINDINGS OF FACT

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

- 1) On or around June 13, 2014, Employee contends he injured his low back while lifting up on a geodesic dome greenhouse while employed by Employer. (Employee).
- 2) Though Employer contends the alleged injury did not happen as Employee states, it agrees it was Employee's "employer" and Employee was its "employee" at times in June 2014. It is undisputed Employer was not insured for workplace injuries on or about June 13, 2014. (Freed).
- 3) June 15, 2014, was Father's Day. (Official notice).
- 4) On June 26, 2014, Patrick Collins, DC, stated Employee "recovered sufficiently" to return to light duty work effective June 26, 2014. He limited Employee to no bending, twisting or lifting more than 20 pounds due to his low back pain. (Return to Work/School form, June 26, 2014).
- 5) Return-to-work slips are commonplace notwithstanding what caused an injury. (Experience).
- 6) The June 26, 2014 Collins record is the first treatment record post-injury and the only medical record from Dr. Collins' office in the agency file. (Record).
- 7) Employee testified he saw Dr. Collins following his alleged injury with Employer once or perhaps twice and paid Dr. Collins in cash. (Employee).
- 8) On July 7, 2014, Employee filed a claim stating he hurt himself when "lifting dome with back" while working for Employer on June 13, 2014. He claimed this injury affected his lower back and left leg, which he said was "useless for 2 wks." Employee also claimed he could not bend the knee on his left leg, and had low back pain resulting from this injury. He initially claimed TTD from June 13, 2014 through June 25, 2014; \$200 in medical costs; and \$80 in transportation expenses. Employee's reason for filing this claim was, "I need help." Attached to his claim and served on the parties was the medical record from Dr. Collins stating Employee had "recovered sufficiently to be able to return to light duty at work on June 26, 2014." Dr. Collins restricted Employee to "no bending, twisting or lifting more than 20 pounds." (Workers' Compensation Claim, July 7, 2014; Collins report, June 26, 2014).
- 9) On July 22, 2014, the division received an electronic injury report. According to the report, Employee hurt himself "lifting dome with back" on June 13, 2014. The form further states Employer knew about the injury on June 13, 2014. Employee claimed to injure his lower back area and became disabled June 13, 2014. (First Report of Injury, July 22, 2014).

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10) On July 31, 2014, the fund filed an answer to Employee's claim. The fund stated it was unclear if there was an employee-employer relationship between Employee and Employer, and there had been no board order requiring Employer to pay any benefits. Therefore, the fund could not determine if Employee had a "duly authorized claim" and no benefits were due from the fund. (Answer to Employee's Claim For Benefits From The Workers' Compensation Benefits Guaranty Fund, July 29, 2014).

11) Employer did not file an answer to Employee's claim. (Agency record).

12) Neither the fund nor Employer controverted Employee's claim. (*Id.*).

13) The parties provided no medical records between Dr. Collins' June 26, 2014 report and an August 29, 2014 report from Ireland Chiropractic Clinic. (Agency record).

14) On August 29, 2014, Employee completed an intake form for Ireland Chiropractic Clinic stating he was injured on the job in June 2014, at 3:00 PM. Employee said he injured his lower back "lifting wall section" and had seen "Dr. Collins, Dr. Como" for this injury, which occurred in Indian, Alaska. Employee further stated the injury caused him to lose time from work and he had reported it to his supervisor or employer. Employee noted he had a previous injury to the same area resulting in a 2004 surgery. (Ireland Chiropractic Clinic form, August 29, 2014).

15) On August 29, 2014, Joel Ingersoll, DC, at Ireland Chiropractic Clinic saw Employee, whose chief complaints included low back pain with deep painful pressure and stabbing "at times." Employee described his pain as constant with an average 7/10 and 9/10 on this occasion. He also had occasional left leg pain. Employee stated he was "lifting a wall section in a geodesic dome and had some discomfort, but after two days, the pain was increased." The injury occurred in June 2014, though Employee could not remember the exact date. His neck was also stiff and he had mid-back pain coming up from his lower back. Dr. Ingersoll applied chiropractic treatments and planned to see Employee three times per week for two to four weeks with myofascial release one time per week. (Ingersoll report, August 29, 2014).

16) On August 29, 2014, Employee completed another Ireland Chiropractic Clinic form stating his occupation was "construction" and he was "Referred to our Clinic by" -- "old client" and Employee preferred to see David Parliament, DC. He had seen a chiropractor before and Employee had been treated for another health condition by a medical provider or chiropractor in the past year. Employee noted Davis Peterson, M.D., performed a microdisectomy on him in 2004, at the L-4 spinal level. On this form, Employee also reported his injury occurred while

“lifting wall section in geodesic dome.” His pain gradually increased over two days thereafter. The injury occurred in June 2014. (Ireland Chiropractic Clinic form, August 29, 2014).

17) On August 29, 2014, Dr. Ingersoll stated Employee had injured the same body part before and had surgery 10 years earlier. Employee said he was lifting a wall section and had low back pain. He had seen no one else for this injury and had not been hospitalized. This was his first treatment for this lumbar-sacral pain. Dr. Ingersoll diagnosed acute, severe traumatic lumbar/lumbo-sacral/sacroiliac strain/sprain associated with myalgia and vertebral subluxation complex complicated by lumbar arthritis and degenerative joint disease. He also diagnosed acute, mild recurrent cervical-thoracic strain associated with myalgia and vertebral subluxation complex complicated by arthritis. Dr. Ingersoll opined the condition was work related, Employee was not medically stable, but would not be precluded from returning to his job. He was undecided if Employee would have permanent impairment. Dr. Ingersoll released Employee to “Regular Work” effective August 29, 2014. (Physician’s Report, August 29, 2014).

18) On September 5, 2014, Dr. Ingersoll completed an “Initial Treatment Plan,” stating his frequency and duration of treatments, recommended care including modalities, and treatment objectives. Dr. Ingersoll provided a copy to Employee and to “employer/insurer.” (Initial Treatment Plan, September 5, 2014).

19) On September 2, 2014, Employee reported his low back was stiff and he could not stand straight but his pain had decreased since the prior Friday. He received chiropractic treatments. (Ingersoll report, September 2, 2014).

20) On September 4, 2014, Employee reported he was sore perhaps from his core strengthening exercises and “work bothered him” overall but his low back pain was decreasing. Dr. Ingersoll examined Employee and applied chiropractic treatments. (Ingersoll report, September 4, 2014).

21) On September 8, 2014, Dr. Ingersoll noted Employee reported his low back was feeling like he was starting to relax and his low back pain was decreasing. Employee received additional chiropractic treatments. (Ingersoll report, September 8, 2014).

22) On September 8, 2014, Dr. Ingersoll completed a physician’s report similar to his August 29, 2014 report but stating Employee would not have permanent impairment and was released to “Regular Work” effective September 8, 2014. (Physician’s Report, September 8, 2014).

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- 23) On September 10, 2014, Employee received therapeutic massage. He reported his neck and low back was tight after “heavy lifting at work” caused low back pain and leg aches. (Therapeutic Massage SOAP Note, September 10, 2014).
- 24) On September 10, 2014, Employee reported his back was sore and tight but overall better. He had increased low back pain after prolonged sitting. He received chiropractic treatments and massage therapy. (Ingersoll report, September 10, 2014).
- 25) On September 12, 2014, Employee saw Dr. Ingersoll again reporting increased low back pain after his prior treatment. Employee received additional chiropractic care. (Ingersoll report, September 12, 2014).
- 26) On September 15, 2014, Dr. Ingersoll saw and treated Employee who reported his low back “is feeling better and loosening up,” and his activities were getting easier. He was trying to do more exercise. (Ingersoll report, September 15, 2014).
- 27) On September 15, 2014, Dr. Ingersoll stated Employee was released to work. (Physician’s Report, September 15, 2014).
- 28) On September 19, 2014, Employee reported “increased low back pain with construction work.” On a 1/10 pain scale, Employee rated his pain as 4-5/10 “by the end of his work day.” Employee received continued chiropractic treatments. (Ingersoll report, September 19, 2014).
- 29) On September 22, 2014, Dr. Ingersoll continued to release Employee to work. (Physician’s Report, September 22, 2014).
- 30) On September 24, 2014, Employee reported his low back pain “increases with work at times,” and his low and mid-back were tight. Dr. Ingersoll continued his treatment at three times per week for one week and anticipated decreasing to two times per week for four additional weeks. (Ingersoll report, September 24, 2014).
- 31) On September 25 and 26, 2014, Dr. Ingersoll saw and treated Employee who reported his low back pain continued to improve and he was performing his exercises daily. Employee received additional chiropractic treatments. (Ingersoll chart notes, September 25-26, 2014).
- 32) On September 29, 2014, Employee reported his low back pain continued but was decreasing and he no longer had sharp pain. He felt 50 percent improved and perhaps more on good days. (Ingersoll report, September 29, 2014).
- 33) On September 29, 2014, Dr. Ingersoll again stated Employee was released to work. (Physicians Report, September 29, 2014).

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34) On September 29, 2014, Dr. Ingersoll also made a treatment plan update. Effective September 26, 2014, Employee's treatment frequency recommendation was twice per week for four weeks and then a reevaluation. Dr. Ingersoll planned to continue with full spinal adjustments, electrical muscle stimulation with infrared applied to the lumbar spine, myofascial release one time per week and home exercise. His goal was to stabilize the lumbar spine and reduce Employee's pain level. Dr. Ingersoll provided a copy of his updated treatment plan to Employee and "the insurer." (Treatment Plan Update, September 29, 2014).

35) October 2, 2014, Employee reported his low back was tight, stiff and sore. (Ingersoll report, October 2, 2014).

36) On October 2, 2014, Employee told his masseuse his left hip was extremely tight and he had pain in his right leg. (Therapeutic Massage SOAP Note, October 2, 2014).

37) On October 6, 2014, Dr. Ingersoll released Employee to regular work. (Physician's report, October 6, 2014).

38) On October 7, 2014, Employee reported increased low back pain after driving a car long distances without his lumbar support the day prior. (Ingersoll report, October 7, 2014).

39) On October 10, 2014, Employee reported his low back was sore and his muscles tight and knotted, though they improved following treatment. (Ingersoll report, October 10, 2014).

40) On October 13, 2014, Dr. Ingersoll released Employee to regular work. (Physician's report, October 13, 2014).

41) On October 16, 2014, Employee reported his low back continued to improve, his sleep was easier and better and his "work was getting easier" with less low back pain. (Ingersoll report, October 16, 2014).

42) On October 21, 2014, Employee reported his low back pain continued to improve and he was no longer having pain every day. "He is not working as much though and that's helping." (Ingersoll report, October 21, 2014).

43) On October 21, 2014, Employee told his masseuse his lower back pain was "feeling much better" and he had "no complaints" that day. (Therapeutic Massage SOAP Note, October 21, 2014).

44) On October 21, 2014, Dr. Ingersoll released Employee to regular work. (Physician's Report, October 21, 2014).

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- 45) On October 24, 2014, Employee reported his low back pain continued to improve and he had decreased pain “with work.” He continued his home exercises. (Ingersoll report, October 24, 2014).
- 46) On October 27, 2014, Dr. Ingersoll released Employee to regular work. (Physician’s Report, October 27, 2014).
- 47) On November 2014, Dr. Ingersoll again released Employee to regular work. (Physician’s Report, November 24, 2014).
- 48) On November 21, 2014, Employee reported he was unable to report for treatment because he had a new job working “7-12.” His low back pain was mild and “not every day.” Employee’s hips hurt every day and he continued to perform core exercises, which was allowing him “to continue to work.” He reported painful hand swelling given “his work volume at his new job.” Employee took “the day off from work” for treatment and was unsure when he might be able to return because he did not want to get fired for taking time off “from his new job.” At first, Employee noted lifting “a lot” with his new job and this bothered his back. Now, he was not lifting as much and his back was doing better. His pain was typically 2-3/10 but did not spike to 6-7/10 like it did previously. (Ingersoll report, November 21, 2014).
- 49) On December 15, 2014, Dr. Ingersoll reported Employee said “low back achy all the time with physical labor job, especially carrying his heavy tool bags at work all day.” (Ingersoll report, December 15, 2014).
- 50) On December 29, 2014, Dr. Ingersoll released Employee to regular work. (Physician’s Report, December 29, 2014).
- 51) On January 12, 2015, Employee reported cramps off and on and a sore low back every day, sometimes constantly. His low back pain increased with activity. (Ingersoll report, January 12, 2015).
- 52) On January 16, 2015, Employee reported a “flare-up of his low back pain.” His low back started “acting up Wednesday at work” and it had been aching ever since. He had been unable to report to work for the past two days and was having low back and bilateral hip pain with leg pain down the sides of his legs to his feet. Dr. Ingersoll increased Employee’s treatments to two to three times per week for one or two weeks to get him “over the flare-up” and then back to one time per month. (Ingersoll report, January 16, 2015).

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53) On January 16, 2015, Dr. Ingersoll removed Employee from work between January 15 and January 18, 2015. (Authorization for Absence, January 16, 2015).

54) By January 17, 2015, Employee reported his low back pain was decreased and he had “residual aftershocks” but was able to move better. Employee continued to receive chiropractic treatments. (Ingersoll report, January 17, 2015).

55) On January 19, 2015, Dr. Ingersoll stated Employee was released to work effective January 18, 2015. His then-current treatment plan was to see him one time per month. However, Employee “underwent a flare up” which required him to be seen three times per week from January 12 through January 17, 2015. (Physician’s Report, January 19, 2015).

56) On January 28, 2015, several parties attended a prehearing conference. Employee did not attend. The designee reviewed Employee’s July 7, 2014 claim and the attending parties agreed the injury did not happen in Tok, Alaska, as previously reported but could only have happened in Palmer, Alaska or Indian, Alaska, two places where Employee may have worked for Employer. The designee transferred venue to Anchorage and requested a prehearing conference. (Prehearing Conference Summary, January 28, 2015).

57) On February 10, 2015, Employee called the division’s Anchorage office to explain his attempt to call on January 28, 2015, for the prehearing conference, and said his call went unanswered at the Fairbanks division office. Staff member Brian Zematis advised Employee the venue had been changed from Fairbanks to Anchorage at the January 28, 2015 prehearing conference. During his discussion with Zematis, Employee stated the injury “happened in Indian . . . then came to a head in Palmer.”

58) On February 10, 2015, Employee reported increased low back pain over the last two to three days. On this morning, he had even more pain and stiffness and came in for treatment and took the day off work, “before his back went out again like it did last month.” (Ingersoll report, February 10, 2015).

59) On February 10, 2015, Dr. Ingersoll excused Employee from work on February 10, 2015, because he appeared for treatment. (Authorization for Absence, February 10, 2015).

60) On February 16, 2015, Dr. Ingersoll released Employee back to work. (Physician’s Report, February 16, 2015).

61) On February 25, 2015, the parties attended a prehearing conference in Anchorage. The designee reviewed Employee’s claim and the fund’s answer and provided Employee with a list

of workers' compensation attorneys and explained how attorney's fees may be incurred and awarded. Employee had previously been given the pamphlet "Workers' Compensation and You" and the designee referred him to the division's website where the pamphlet could be reviewed. The designee encouraged Employee to discuss this case with a workers' compensation technician if he did not retain an attorney, or if he had questions. The designee reviewed with Employee the applicable statute of limitations for requesting a hearing. The designee attached a medical record release from the fund for Employee to sign and return, or on which to seek a protective order if he believed the release was improper. Employer stated it had never received Employee's claim, and the designee attached a copy to the summary. No specific advice was provided in the summary explaining how the parties should preserve or present their claims and defenses at hearing. (Prehearing Conference Summary, February 26, 2015).

62) On March 10, 2015, Employee reported his low back "has been doing good." He was laid off previously "so that is helping with the low back." (Ingersoll report, March 10, 2015).

63) On March 13, 2015, Employee told his masseuse he was working at keeping his spine aligned and loosened and it had been feeling better every day. (Therapeutic Massage SOAP Note, March 13, 2015).

64) On March 13, 2015, Dr. Ingersoll wrote another treatment plan update. Effective March 12, 2015, the treatment frequency for Employee was one time per month for three months and then reevaluate. The recommended care included chiropractic adjustments, electrical muscle stimulation with infrared applied to the lumbar spine, myofascial release once per month and home exercises. Dr. Ingersoll's goal for Employee's treatment was to restore normal function "of the thoraco-lumbar/lumbo-sacral vertebral motor unit," normalize joint motion and increase "range of motion." (Treatment Plan Update, March 13, 2015).

65) On March 16, 2015, Dr. Ingersoll released Employee to return to regular work. (Physician's Report, March 16, 2015).

66) On April 16, 2015, Employee reported his back and neck were stiff and or worse over the past one or two weeks and especially the last two days. (Ingersoll report, April 16, 2015).

67) On April 20, 2015, Dr. Ingersoll released Employee to return to regular work. (Physician's report, April 20, 2015).

68) On June 3, 2015, Employee reported "he still feels like some of the symptoms are from his accident and injury," feels chiropractic care has helped and noted he feels 75 percent improved

and on some days even better. Employee continued to perform home exercises three to four times a week and would like to continue chiropractic care. Employee's low back pain was 5/10 at the worst, his mid-back 1/10 and his neck and upper back 3/10. Dr. Ingersoll examined Employee, found him medically stable and opined "Maximum Chiropractic Improvement" had been achieved. No further corrective care was recommended and chiropractic treatment for "this injury is therefore closed." Though Employee continued to report increased tenderness and stiffness with increased activity and work, with radiating pain into the groin at times, Dr. Ingersoll opined this may be normal for him "due to his age and past low back injury and surgical history." Dr. Ingersoll recommended Employee continue his stretching and home exercise routine. (Ingersoll report, June 3, 2015).

69) On June 8, 2015, Dr. Ingersoll opined Employee was medically stable effective June 3, 2015, had no permanent impairment and the injury would not permanently preclude him from returning to his job at the time of his injury. Employee was released to regular work. (Physician's report, June 8, 2015).

70) On February 26, 2016, Employee filed an affidavit stating he "had completed necessary discovery, obtained necessary evidence and was fully prepared for hearing" on the issue set forth in his July 7, 2014 claim. He did not expect to call any witnesses. (Affidavit of Readiness for Hearing, February 26, 2016).

71) On March 22, 2016, no parties appeared for a scheduled prehearing conference. (Prehearing Conference Summary, March 22, 2016).

72) On April 19, 2016, Employee and the fund attended a prehearing conference. Employer did not attend. The designee called Employer at its telephone number in the record and left a message but Employer did not return the call. The designee scheduled Employee's claim for hearing on June 29, 2016, and advised the parties "to file and serve witness lists, legal memoranda and evidence in accordance with the regulations." The designee advised the parties "evidence" and legal memoranda including hearing briefs and witness lists were due on or before June 22, 2016. Further, the designee told Employee his hearing brief should set out in his own words why he is entitled to the relief sought and "should cite evidence supporting" Employee's claim. All parties, including Employer, were served with the prehearing conference summary. (Prehearing Conference Summary, April 20, 2016).

73) On June 21, 2016, the fund filed its hearing brief. No other party filed a hearing brief and no party filed a witness list. (Alaska Workers' Compensation Division -- Benefits Guaranty Fund Hearing Brief For Hearing Scheduled On June 29, 2016, June 20, 2016; observations).

74) At hearing on June 29, 2016, James Freed, Employer's LLC owner, disputed Employee was working for Employer on or around June 13, 2014. Freed conceded Employee worked for Employer from early May 2014 through June 6, 2014, his last employment date. On June 6, 2014, Employee went "MIA" [missing in action] for a week and Freed "was done" with him. Freed called Employee several times to check on his whereabouts and eventually Employee returned the phone call just after Father's Day 2014, advising Freed he had injured his low back while moving his invalid father on Father's Day. Freed later said he also stopped by Employee's home, on the Wednesday or Thursday after Father's Day, knocked on the door, and Employee told him he injured his low back lifting his father on Father's Day. At that point, Freed said he "moved on" because Employee had been nonresponsive to his telephone calls and Freed had already found someone else to perform Employee's services. Freed testified another person heard the entire conversation at Employee's home. (Freed).

75) At hearing, Employee testified his injury occurred on approximately June 13, 2014, while he was working on a geodesic dome greenhouse in Indian, Alaska, for Employer. He says he returned to work for Employer the following week on a large greenhouse near Palmer, Alaska, in an area known as the Butte. Employee claims he worked for Employer again from June 20 through June 27, 2014, though he has not yet been paid for this period. Employee contends the Palmer greenhouse's owner could testify and support his account. On the injury date, Employee was told to go to the dome's center and lift it up. He preferred to use a different method to lift the dome's center, but implied Freed overruled these options. Employee was inside the dome, which was about 13 to 14 feet above ground, when he was injured. Employee had a ladder he brought from home and was standing near the top of the ladder pushing up on the dome's center. According to Employee, Freed was present. Employee re-created his estimated injury date by reviewing the days he worked for Employer. Employee disputed Freed's testimony stating Employee last worked on June 6, 2014. Employee did not file any documents with the board showing dates he worked for Employer. Employee did not have any back pain on June 13, 2014, so he said nothing to Freed about any injury on that day. His back did not begin hurting until the next morning when he woke up, and found it difficult to move. Following the injury, Employee

next saw Freed three or four days later. Employee could not recall whether or not he was scheduled to work again for Freed the day following his work injury. He later stated he was scheduled to work the day after his work injury but he could not because he was not “mobile.” He clarified this inconsistency by stating he was not sure what day of the week his injury occurred. Employee said he recuperated “a day or two” following his injury and then went back to work for Employer again. He contends he worked a full week in Palmer at the Butte following the work injury. Assuming the injury occurred on Friday the 13th; Employee believed he saw Freed on Monday or Tuesday the following week (*i.e.*, June 16 or June 17, 2014) and Employee “mentioned what happened.” When asked exactly what he told Freed on June 16 or 17, 2014, when Freed appeared at Employee’s home, Employee stated he could hardly move and was immobile but Freed wanted him to go on another job in Palmer. When again asked what he specifically told Freed about being “hurt,” Employee stated, “I can’t remember specifically only because I was in a lot of pain. I’m pretty sure I told him my lower back gave out.” Employee could not really remember even opening the door to talk to Freed. He “more or less yelled” out the door and Freed left. “I told him that I was hurt.” Employee stated Freed “knew I was injured.” Employee denied telling Freed he had injured himself lifting his father on Father’s Day. Employee denied injuring his back lifting his father on Father’s Day. When pressed further, Employee stated he did not expect Freed to appear at his home and there was “not much discussion.” He simply told Freed “he was injured,” and Freed left. There was no discussion about him injuring his back lifting his father. Employee and Freed mostly discussed through the trailer door though Employee may have opened the door before Freed left. All he can remember is being in a lot of pain and not discussing much except that he “was injured.” When pressed still further and asked whether he specifically told Freed he hurt his back pushing up on the center of the geodesic dome a few days earlier, or words to that effect, Employee said “I mentioned that I was hurt, I was injured. I didn’t mention how I got hurt but it was from lifting up the dome.” Employee said he next saw Freed a day or two later when he returned to work for Employer. Employee emphasized he was estimating the dates and they were not recorded. However, Employee agreed his date estimates were accurate within “a day or two.” When asked about telephone discussions, Employee claimed Freed was not answering his phone because Freed owed Employee money. When specifically asked whether or not “at some point” after his injury with Employer he expressly told Freed he was injured while working for Employer,

Employee said, “When James came to that trailer that day, James knew I was injured from the job.” When pressed how Freed knew he was injured on the job, Employee said, “Because when he came to my door, I told him my lower back went out.” When pressed further how Freed knew his lower back had gone out while working for Employer, Employee paused, mused out loud and said, “Because when he came to my trailer I told him so. He came to my trailer and I told him I was injured.” When the designated chair pointed out Employee’s earlier testimony stating he did not tell Freed during the trailer visit that he injured himself on the job working for Employer, Employee paused and stated, “No sir, it was told to James I was hurt on the job” on June 16 or 17, 2014, when Freed came to Employee’s trailer. (Employee).

76) Freed testified Employee was done with the Indian job on June 6, 2014. Employee never showed up for the Palmer job, which was why Freed went to Employee’s home to see “what was going on.” During this interim, Freed said Employee “butt dialed” his phone and inadvertently left a voice-mail message in which Freed could hear Employee arguing with someone about putting flashing on a roofing job Freed believed Employee was doing. Confused by this, Freed says he went to Employee’s home to inquire. Freed testified Employee never worked for him again after June 6, 2014. Freed disagreed Employee would ever need to lift a dome, because it “falls in on itself.” The fabric was not yet on site for the Indian job, so there would have been no need for the work Employee claimed he was doing when he was allegedly injured. Freed agreed Employee loaned him an eight foot ladder on site for use on lower points inside the curved dome structures where a 12 foot ladder would not fit. (Freed).

77) Employee had no cross-examination questions for Freed, but averred there were witnesses in the Butte and Palmer areas that could support his account. Employee said he assisted on four geodesic greenhouses for Employer. (Employee).

78) On cross-examination by Freed, Employee testified he installed all bolts in a 60 foot greenhouse in the Butte area. He assisted with the foundation, the layout and erecting the pony walls. Employee denied this occurred in May and stated it occurred in June. Employee admitted he had a prior lower back problem and associated surgery. Employee denied he was already receiving chiropractic care for his back when he was working for Employer, before his alleged injury. Employee claimed he was in “excellent physical shape” when he went to work for Employer and lifting up on the dome aggravated his lower back. (*Id.*).

79) On cross-examination by Thomas, Employee said he was not standing on the ladder's top step or on the next step down when he was injured lifting on the dome. Employee described raising the dome as "an erection process." He continued to work on the injury date as he had no symptoms until the next morning, though he admitted "my whole day is full of pain." It took "days" for Employee to regain his mobility after the injury. Once he regained his mobility, he "tried to see" a chiropractor. The first chiropractor Employee saw for this injury was Dr. Collins. He told Dr. Collins "what happened" but said he did not know if he told Dr. Collins it was a work-related injury. Upon further questioning, Employee said he told Dr. Collins it was a work injury as evidenced by the fact Dr. Collins gave him a work release. Dr. Collins restricted Employee from lifting over 20 pounds. Employee was uncertain if he saw Dr. Collins on more than one occasion following his alleged injury. It may have been two visits. Employee had no concurrent employment while working for Employer. He had "no idea" what Freed referred to when he allegedly recorded a "butt dialing" having something to do with roofing. Employee reiterated he returned to work for Employer for about a week after seeing Dr. Collins. According to Employee, numerous witnesses could verify this. He believed his last day working for Employer was "the last part of June." Employee returned to work with a different Employer in September 2014. Employee conceded in June 2014, his father had health issues and used a walker and Employee would occasionally assist him getting in and out of a vehicle so he would not fall. However, he did not need to pick his father up because he was able to arise by himself. Employee agreed he visited his father on Father's Day in June 2014. Dr. Collins told Employee his low back was spasming too much and Employee was in too much pain for anything to be done, so Dr. Collins could not adjust him. (*Id.*).

80) On cross-examination by Pride, Employee agreed he freely advised her he had a prior back injury and surgery from Dr. Peterson in 2004. He agreed he occasionally treated with Dr. Collins after 2004 to maintain his spine health while working over the years. He also occasionally treated with Dr. Ingersoll at Ireland Clinic during this interim. Employee reiterated after his work injury with Employer, he saw Dr. Collins only once or twice before switching to Dr. Ingersoll. Once Employee's back was sufficiently rehabilitated, he worked for a different employer for about five months after his injury with Employer. He worked approximately 84 hours per week for five months for the new employer. While working for Employer, he worked sporadically and estimated his best week working for Employer was the final week in late June

for which he claimed to have never been paid. Employee said Employer paid him \$18 per hour and he initially worked three to four days per week because it was a new business. (*Id.*).

81) On cross-examination by Pride, Freed claimed he never received any voice-mail messages or certified mail from the fund. He had changed his mailing address and the fund and board were using an incorrect address. At hearing, Freed updated his mailing address. (Freed).

82) On cross-examination by panel members, Freed said Employee had worked on the Butte job the week ending June 6, 2014, but never returned to the job thereafter. Freed said he filed a copy of the “butt dialed” call from Employee with the division’s Fairbanks office. (*Id.*).

83) Employee’s agency record contains no recording filed by Freed. (Observations).

84) On cross-examination by panel members, Employee said he had never filed a claim for unemployment. He last worked for another employer in December 2015. Employee testified his back is currently stable and he has not received medical treatment for his back since approximately November or December 2015. Employee did not track his employment with Employer. Employee had no physical evidence to support his contention he worked for Employer on the Butte job after his alleged work injury. Employee also conceded he never filed a wage and hour claim for his alleged unpaid wages, but was not sure why. Employee emphasized he only saw Dr. Collins once or twice and paid for all visits from his own pocket. When he saw Dr. Collins in June 2014, it was for a workers’ compensation injury but “the paperwork” was not filed. When specifically asked if he told Dr. Collins on his first visit post-injury with Employer if his back pain came from a work-related injury lifting up on a dome, Employee paused and stated, “Probably, I don’t know. . . .” Employer remembered “being in a lot of pain,” and consequently he was not able to “process” very well. He then stated, “I mentioned to Dr. Collins that my back was injured from work.” He was uncertain whether workers’ compensation papers were completed at Dr. Collins’ office. When pressed further about what he personally told Dr. Collins, Employee testified he said, “My back got hurt at work, and I can’t move.” He says he gave Dr. Collins no further details. This was Employee’s first visit with Dr. Collins. Previously, he would see a different chiropractor at this clinic whose name he could not recall. He did not think his post-injury visit with Dr. Collins was successful as the chiropractor was unable to adjust his back. Employee never provided income tax information from 2012 or 2013 to the board or to any party. (Employee).

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85) At hearing, the fund's Hearing Exhibit #1, a four-page Internet document describing geodesic dome greenhouses and explaining their construction from Employer's website was received without objection. (Record).

86) On cross-examination by panel members, Freed disagreed with Employee's testimony generally, and specifically denied he paid Employee \$18 per hour. Freed paid Employee piecework at first, later found out he could not, and now handles payroll differently. Freed paid Employee mostly checks and may have paid him cash on one occasion. Employee's piecework pay was based upon how many struts he was able to assemble. The dome Employee claims to have been injured on in Indian was a 30 foot radius dome with a three foot pony wall. The center is 18 feet above from the ground. (Freed).

87) The designated chair specifically asked Employee, "So my question to you is when you were on the ladder when you think you hurt yourself, were you pushing on the center of the dome at the 18 foot high point?" He responded, "Yes." Employee says he is five feet eight inches tall. Employee thinks the Indian dome may have been a 20 foot radius, but agrees it could have been "a 30-footer," and simply could not recall. (Employee).

88) The center of a 20 foot radius dome with a three foot pony wall is 13 feet high. Freed is certain the Indian dome was a 30 foot radius dome, because the owners pulled a land-use permit for the larger structure. (Freed).

89) The designated chair confirmed with Employee his claim for TTD spanned from June 13, 2014 through June 25, 2014. His out-of-pocket expenses for medical care totaled \$200. Employee's claim also included Ireland Chiropractic Clinic's outstanding \$7,405 bill. He also claimed \$80 for transportation expenses. Employee filed no travel itemization, no receipts for out-of-pocket expenses paid to Dr. Collins and no bill from Dr. Ingersoll. (Employee).

90) Freed testified he first learned Employee claimed to have suffered a work-related injury working for Employer, in July when he received a phone call from someone in the Fairbanks division office trying to clarify Freed's correct mailing address. Freed stated Employee never told him he claimed a work-related injury with Employer and Freed first learned about it when he received a phone call from division staff in Fairbanks on an unspecified date in July 2014. Freed implied he never received the June 26, 2014 work restriction slip Dr. Collins had prepared for Employee and noted the slip was dated six days after Employee claimed he had returned to work for him on June 20, 2014, a fact Freed had already disputed. (Freed).

91) In his closing argument, Employee admitted he did not present much evidence and he should have been “better prepared with witnesses.” In his view, his testimony established he worked for Employer, got injured while on the ladder pushing the dome, he saw a doctor and returned to work for about a week following the injury. (Employee).

92) In his closing argument, Freed said, “The facts speak for themselves.” (Freed).

93) In its closing argument, the fund noted the factual dispute between Employer and Employee about whether or not the injury actually occurred as Employee stated. The fund deferred to the board to weigh the evidence, make factual findings and award benefits if appropriate. The fund noted the evidence shows Employee returned to work for a different employer in August 2014, and this latter employer’s work may be responsible for medical treatment incurred thereafter. (Thomas).

94) Employee’s testimony was generally not credible. (Experience, judgment and inferences drawn from the above).

95) Freed’s testimony was generally credible. (*Id.*).

96) Employee did not strain his back on or about June 13, 2014 while working for Employer, and probably strained his back assisting his father on Father’s Day 2014. (Experience, judgment and inferences drawn from the above).

PRINCIPLES OF LAW

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

In *Richard v. Fireman’s Fund Ins. Co.*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court instructed with respect to an unrepresented claimant:

We hold to the view that a workmen’s compensation board or commission owes to every applicant for compensation that duty of fully advising him as to all the real facts which bear upon his condition and his right to compensation, so far as it may know them, and of instructing him on how to pursue that right under the law.

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. . . . When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

AS 23.30.095. Medical treatments, services, and examinations. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

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

(1) the claim comes within the provisions of this chapter. . . .

Under AS 23.30.120(a)(1), benefits sought by an injured worker are presumed to be compensable. *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). The presumption of compensability is applicable to any claim for compensation under the workers' compensation statute (*id.*; emphasis omitted). The presumption application involves a three-step analysis. To attach the presumption of compensability, an employee must first establish a "preliminary link" between his or his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). To rebut the raised presumption in cases where there is no competing cause, such as a prior injury, an employer must show either: (1) employment could not have caused the disability or need for treatment (the negative-evidence test), or (2) that something other than work caused the disability or need for treatment (the positive-evidence test). The mere possibility of another injury is not substantial evidence. *Huit v. Ashwater Burns, Inc.*, Slip Op. No. 7111 (June 17, 2016). Because the employer's evidence is considered by itself and not weighed against the employee's

evidence, credibility is not examined at the second stage. *Veco, Inc. v. Wolfer*, 693 P.2d 865, 869-70 (Alaska 1985).

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. The employee must prove that in relation to other causes, employment was "the substantial cause" of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011). 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.

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. . . .

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

AS 23.30.185. Compensation for temporary total disability. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.

ANALYSIS

1) Did Employee's disability or need for medical treatment arise out of and in the course of his employment with Employer?

Employee contends he injured his back while lifting on a geodesic dome greenhouse on or about June 13, 2014, while working for Employer. Employer contends Employee was not working for it on or about June 13, 2014, and told Freed he had injured his back lifting his father on Father's Day. This creates a factual dispute to which the statutory presumption of compensability must be applied. AS 23.30.120; *Meek*. Credibility is not considered at this first step in the presumption analysis. *Wolfer*. Employee raises the presumption through his testimony stating he exerted pressure on the geodesic dome's center with his back while standing on a ladder while

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erecting the dome in Indian, Alaska. *Tolbert*. This shifts the production burden to Employer who must rebut the raised presumption with substantial evidence to the contrary. *Huit*. Without regard to credibility, Employer rebuts the raised presumption through Freed's testimony stating Employee was not working for him on June 13, 2014, because Employee told Freed he had injured his back while lifting his father on Father's Day. *Runstrom*. The burden of production shifts back to Employee, who must prove his claim by a preponderance of the evidence. *Saxton*.

The Alaska Workers' Compensation Act only covers injuries "arising out of and in the course of the employment." AS 23.30.010(a). The only evidence Employee offered to support his claim was his testimony. All parties at a prehearing conference were expressly advised in the prehearing conference summary to submit "evidence" and witness lists well prior to hearing. At hearing, Employee admitted he was not well prepared and presented no witnesses, which he said were available to support his claim. Employee's testimony is fraught with internal inconsistencies, especially when compared to the medical records.

For example, Employee said he saw Dr. Collins once or perhaps twice for this alleged work injury. He stated Dr. Collins was unable to adjust his spine and the appointment was not satisfying. Yet Dr. Collins released Employee on June 26, 2014, stating he had "recovered sufficiently" to return to work with a 20 pound restriction. Employee fails to explain how, if he saw Dr. Collins only once or twice and received no treatment, Employee could have "recovered sufficiently" to return to work. On several occasions in the records, Employee told his medical providers he was injured while "lifting a wall section," while at hearing he testified he was injured while lifting the center of the dome greenhouse while standing on a ladder. Employee told Dr. Ingersoll he had not seen anyone else for this injury, but in fact he had seen Dr. Collins at least once or perhaps twice. Employee told Brian Zematis his injury occurred in Indian, and "came to a head" in Palmer, but at hearing Employee stated the injury occurred while on the ladder working on the dome in Indian. Employee did not have a return-to-work slip from a physician until Dr. Collins released him on June 26, 2014. Yet Employee claims TTD from June 13 through June 25, 2014, while at the same time testifying he returned to work for Employer from June 20 through June 27, 2014.

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At hearing, Employee initially stated he injured himself pushing on the geodesic dome's center when it was approximately 13 to 14 feet above the ground. However, after realizing the dome was a 30 foot radius model with the center rising to 18 feet, Employee said he was pushing on the center with his back at the dome's highest point, 18 feet above the ground, while standing on an eight foot ladder with his feet somewhere below the top two steps. Employee is five feet eight inches tall and did not explain how he could stand somewhere below the top step of an eight foot step ladder and push with his back on the dome's center, 18 feet from the ground.

Employee told his medical provider he had "some pain" on the injury date, which worsened over the following two days. At hearing, Employee said he had no back pain on June 13, 2014, and his pain started the next day when he could barely arise from his bed. At hearing, Employee first stated he was unsure if he was scheduled to work the day following his injury. He later stated he was scheduled to work but could not work because he was immobilized from his alleged injury. Employee first testified he recuperated for a day or two following his June 13, 2014 alleged injury and then immediately returned work for Employer. However, he also testified he returned to work for Employer on June 20, 2014.

Employee said he could not recall what he told Freed when Freed visited him at his trailer on June 16 or June 17, 2014, and thought he said his "back had gone out." Later in his testimony, Employee specifically admitted, "I didn't mention how I got hurt" while speaking with Freed. Later, when pressed repeatedly to reveal how Freed would have known he was injured while working for Employer, Employee said Freed knew because, "I told him so." Similarly, Employee initially testified he did not know if he told Dr. Collins he had a work-related injury. He later said he told Dr. Collins it was work-related as evidenced by Dr. Collins' return-to-work slip. The fact Dr. Collins gave Employee a return-to-work slip does not prove Dr. Collins knew Employee claimed he was injured on the job. Return-to-work slips are commonplace notwithstanding what caused an injury. *Rogers & Babler*.

Later in his hearing testimony, Employee said he returned to work for Employer for a week after he saw Dr. Collins. Yet Dr. Collins' return-to-work slip released him on June 26, 2014, while Employee said he returned to work for Employer on June 20, 2014. While Employee admitted

he could not remember specific dates, he conceded his dates were accurate within a day or two. Even accounting for a day or two error either way, Employee's dates simply do not add up.

Lastly, when asked if he told Dr. Collins he had a work related injury, Employee initially stated, "Probably, I don't know." He later testified he was in so much pain he could not process information when he sought medical care and still later said he had, in fact, told Dr. Collins he had a work-related injury. While Employee may have been in considerable pain, he failed to explain why uttering a few more words like "I hurt myself on the job" while working for Employer, and briefly describing what happened was not possible. There are simply too many inconsistencies in Employee's reports to his physicians and his testimony. AS 23.30.122; *Smith*.

Furthermore, and by contrast, Freed's testimony is credible. Freed testified when he contacted Employee at his home, Employee specifically said he had injured his back while "lifting" his father on Father's Day. Employee admitted he visited his father on Father's Day in 2014. He conceded his father had health issues and needed assistance getting in and out of the car from time to time so he would not fall. Employee denied ever "lifting" his father but admitted he assisted him. While it is not likely Employee physically "lifted" his father off the ground, it is more likely than not he assisted his father on Father's Day and injured his back while so doing. It is difficult to find Freed could conjure up such a story if Employee had not shared this information with him. Further, Father's Day fell on Sunday June 15, 2014, which coincides with what Employee told Freed. Given Employee's other inconsistent statements, discussed above, less weight is given to his contrary testimony. AS 23.30.122; *Smith*. While Employee said witnesses could corroborate his story, he produced no such witnesses or evidence even after being advised to do so in a prehearing conference summary.

Therefore, Employee failed to prove a work injury arose out of and in the course of his employment with Employer and his claim will be denied.

2) Is Employee entitled to a TTD award from Employer?

Employee requested a TTD award. AS 23.30.185. Employee failed to prove an injury arose out of and in the course of his employment with Employer. Therefore, he is entitled to no benefits and his TTD claim will be denied.

3) Is Employee entitled to medical benefits from Employer?

Employee also requested medical benefits including transportation expenses. AS 23.30.095(a). Similarly, since Employee failed to prove an injury arose out of and in the course of his employment with Employer, his claim for medical benefits and related transportation costs will also be denied. However, Employee's medical records raise the possibility his work with subsequent employers may have caused a low back injury or aggravated a pre-existing condition. Employee is encouraged to call a workers' compensation technician or an attorney to consider whether to file an injury notice or claim against any subsequent employers. *Richard*. To be clear, this decision is not suggesting Employee has a valid claim against any subsequent employers. It is simply suggesting the medical records raise the possibility and Employee is free to investigate.

CONCLUSIONS OF LAW

- 1) Employee's disability and need for medical treatment did not arise out of and in the course of his employment with Employer.
- 2) Employee is not entitled to a TTD award from Employer.
- 3) Employee is not entitled to medical benefits from Employer.

ORDER

- 1) Employee's claim for TTD is denied.
- 2) Employee's claims for medical benefits, including out-of-pocket reimbursements and payment to Ireland Chiropractic Clinic for his outstanding medical bills, and Employee's request for medical transportation expenses, are denied.

Dated in Anchorage, Alaska on June 30, 2016.

ALASKA WORKERS' COMPENSATION BOARD

_____/s/_____
William Soule, Designated Chair

_____/s/_____
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 David Eagle, employee / claimant v. Arctic Dome Greenhouses, uninsured employer; Benefits Guaranty Fund, insurer / defendants; Case No. 201412070; 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 June 30, 2016.

_____/s/_____
Pamela Murray, Office Assistant