# ALASKA WORKERS' COMPENSATION BOARD

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

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| HECTOR M. BONIFAZ,<br>Employee,<br><br>Claimant,<br><br>v.<br><br>CH2M HILL COMPANIES, LTD,<br>Self-Insured Employer,<br><br>Defendant. | ) | INTERLOCUTORY<br>DECISION AND ORDER<br><br>AWCB Case No. 201515015<br><br>AWCB Decision No. 16-0085<br><br>Filed with AWCB Fairbanks, Alaska<br>on September 26, 2016 |

Hector Bonifaz's (Employee) January 28, 2016 petition to join was heard on August 25, 2016 in Fairbanks, Alaska. This hearing date was selected on June 14, 2016. Attorney Keenan Powell appeared and represented Employee. Attorney Robert McLaughlin appeared and represented Employee's current employer, CH2M Hill Companies, Ltd. (CH2M Hill). Attorney Constance Livsey appeared and represented Employee's former employer, Five Star Insulators (Five Star). There were no witnesses. The record closed at the hearing's conclusion on August 25, 2016.

## ISSUE

Employee contends there is sufficient medical evidence to raise the presumption his 2002 work injury with Five Star is a substantial factor in his current need for medical treatment and Five Star should therefore be joined as a party.

Five Star contends there is no factual, medical, or legal basis to join Five Star to the case. CH2M Hill agrees with Five Star there is no basis to join Five Star as a party.

**Should Five Star be joined as a party?**

FINDINGS OF FACT

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

1) On August 7, 2002, Employee sustained a low back injury moving scaffolding while working for Five Star. (Report of Injury in Case No. 200213897, August 23, 2002).

2) On August 12, 2002, Employee began treating with Mark Barbee, DC. Dr. Barbee noted palpable pain and spasticity at L4 and L5 mid line. Dr. Barbee became Employee's main treating provider for his low back injury and monitored his progress throughout the course of the injury. Dr. Barbee recommended physical therapy, took Employee off of work and ordered MRI's. Dr. Barbee also referred Employee to several other specialists discussed in detail below. (Dr. Barbee Medical Records, 8/12/2012 through 4/24/2003).

3) On September 5, 2002, Employee underwent a lumbar spine MRI. The initial impression was a normal MRI of the lumbosacral spine. The addendum report found early disc degeneration, L4, with some small central herniation, probably a subligamentous herniation, which was no more than 2 mm, at most. There was a mild stenosis of the canal and a small bulge at L4-5. Radiologist Harold Cable, MD opined that it was likely Employee would respond to conservative management, but it might be worthwhile considering lumbar epidural steroids, in hopes of lessening any chemical irritation that may be present affecting the nerve roots. There was no appearance of any significant nerve root compression. (Interpretation Results, September 5, 2002; Addendum Report, October 2, 2002).

4) On September 18, 2002, Employee consulted with Edward Voke, MD on referral from Dr. Barbee. Dr. Voke reviewed the MRI and opined there was a small bulging disc at L4-5. Dr. Voke diagnosed Employee with lumbosacral strain and degenerative disc disease, L4-5. Dr. Voke did not recommend surgery and returned Employee to Dr. Barbee for further conservative care. (Dr. Voke's Report, September 18, 2002).

5) On October 2, 2002, Shawn Hadley, MD, performed an employer-sponsored medical examination (EME) on behalf of Five Star. Dr. Hadley opined the August 12, 2002 chiropractic lumbosacral spine x-rays demonstrate mild spondylosis in the upper lumbar region, with fair-quality films. The October 2, 2002 medical set of lumbar x-rays were normal, with only minimal

spondylosis identified in the upper lumbar region, without evidence of sacrolitis. The impression was low-back pain syndrome, with pronounced symptom magnification, raising the question of secondary gain issues. (Dr. Hadley's Letter, October 3, 2002).

6) On October 28, 2016, Dr. Hadley wrote a letter regarding his review of the September 5, 2002 lumbar MRI: This study demonstrates a minimal disc protrusion at the L4-L5 level. There appears to be mild lumbar canal narrowing in the lower lumbar region on a congenital basis. Thus, there is no disc herniation of significance, facet hypertrophy, etc. The impression remains low-back pain syndrome, with pronounced symptom magnification. There is evidence of early disc degeneration at the L4-L5 level, with some evidence of a mild lumbar congenital canal narrowing. (Dr. Hadley's Letter, October 8, 2016).

7) On October 2, 2002, a radiology consultation was read by John Kottra, MD. The impression lumbar vertebral body heights and intervertebral disk spaces were normal. There was no evidence of spondylolysis or spondylolisthesis. The sacroiliac joints were intact. (Radiology Consultation Medical Record, October 2, 2002).

8) On October 9, 2002, Gregory Polston, MD, performed a consultation on a referral from Dr. Barbee. Dr. Polston diagnosed discogenic low back pain, probable L4 level. Dr. Polston recommended epidural steroid injections and physical therapy. On October 21, 2002, Dr. Polston gave Employee a steroid injection. (Dr. Polston's Consultation Report, October 9, 2002; Dr. Polston's Medical Report, October 21, 2002).

9) On December 2, 2002, Employee underwent another lumbar spine MRI. Dr. Polston noted grade II disc degeneration without annular tear at the L4-5 level. (Dr. Polston's Medical Report, December 2, 2002).

10) On February 20, 2003, EME Dr. Hadley saw Employee for a follow-up. He noted mild lumbar disc degeneration at the L4-L5 level, with underlying mild congenital lumbar canal narrowing and low-back syndrome. (EME Report, February 20, 2003).

11) On April 28, 2003, Employee entered into a Compromise and Release Agreement (C&R) with Five Star, closing all indemnity benefits. Future medical benefits remained open. (Bonifaz C&R, Case No. 200213897, May 6, 2003).

12) On May 6, 2003, the board held a hearing and approved the C&R. (*Id.*).

13) On May 25, 2003, through June 12, 2003, Employee received therapeutic exercise treatment from Armstrong Rehabilitation and Strength Training. On May 5, 2003, Dr. Barbee

opined that the program was going very well and Employee's symptoms seem to be diminishing. On May 30, 2003, Dr. Barbee opined Employee may eventually make a complete recovery and perhaps even be able to return to physical work. Employee continued to receive epidural shots from Dr. Polston. (Dr. Barbee Report, May 5, 2003).

14) Employee testified in his deposition when he finished the above treatment, "I was pretty much back to normal….but it took me probably a year of being really careful what I was doing. Dr. Barbee.…taught me a lot about healthy life.…I changed my diet; I started being really active: running, swimming." (Employee's Deposition p 22, March 23, 2016).

15) Employee did not seek treatment for the next eleven years. (Record; Observations).

16) On April 29, 2014, Employee underwent chiropractic treatment at Arctic Chiropractic West Mat-Su, LLC- Dr. Folsom, DC. Under current complaints, Employee reported stiffness in upper back, low back pain, disc bulged L2-L3. (Arctic Chiropractic West Medical Record, April 29, 2014).

17) On April 25, 2014, Employee saw Charles Aarons, MD, at Medical Park Family Care for, "….maintenance, but not for any treatment or anything….Because I was going to the Slope, he prescribed me Tramadol in case I needed it." (Medical Park Family Care Records, April 25, 2014; Employee's Deposition p. 27, March 23, 2016).

18) On May 22, 2014 through June 20, 2014, Employee sought treatment at Mountain View Chiropractic, "….for getting adjustment and massage, back massage. 'I'm really active. I always try to run, swim, bike. So part of, I think, the healthy culture is always go and make sure you adjust yourself ….'" (Mountain View Chiropractic Records, May 22, 2014-June 20, 2014; Employee's Deposition p. 28, March 23, 2016).

19) Employee did not bill any of his 2014 medical treatment to his workers' compensation case with Five Star. (Record; Observations).

20) In June 2013, Employee went to work at CH2M Hill as an insulator. (Record).

21) On September 13, 2015, Employee sustained an injury while working for CH2M Hill. Employee was moving a large steel plate and had to pull and lift a magnet. Employee awakened the next day with low back pain, prompting him to seek medical treatment and was taken off of work and sent home to Anchorage. (Report of Occupational Injury, September 24, 2015; Record).

22) On September 18, 2015, Employee sought treatment with Dr. Aarons for his new work injury. Dr. Aarons ordered an MRI. (Dr. Aarons Report, September 18, 2015).

23) On October 7, 2015, Employee underwent a lumbar MRI with Harold Cable, MD. The MRI revealed disc degeneration at multiple levels. Dr. Cable performed steroid injections. (University Imaging Center Record, October 7, 2015; Medical Park Family Care Medical Records, October 16, 2015- November 16, 2016).

24) On December 7, 2015, Employee attended an EME through CH2M Hill with John Swanson, MD. Dr. Swanson concluded the substantial cause of Employee's low back pain was his pre-existing, symptomatic lumbar, spondylosis, arthritis and disc degeneration. He further opined the preexisting sympotomatic spondylosis in Employee's lumbar spine is due to his genetic inheritance and his aging changes, not his work activities. Dr. Swanson was aware of the 2002 injury. (Dr. Swanson EME Report, December 7, 2015).

25) On January 28, 2016, Employee filed a petition to join Five Star. On February 17, 2016 Five Star filed an opposition to Employee's Petition to Join. (Employee's Petition to Join, January 28, 2016; Five Star's Opposition to Petition to Join, February 17, 2016).

26) On January 28, 2016, Employee filed a Petition for an SIME. This SIME is being conducted between Employee and CH2M Hill. The medical dispute is between Drs. Erik Olson, MD and Dr. Upshur Spencer, MD and EME Dr. Swanson. (Employee's SIME Request Form, January 28, 2016).

27) On March 31, 2016, Employee attended a panel EME through Five Star with orthopedist David Bauer, MD and neurologist William Stump, MD. The panel reviewed records from the 2002 injury and the 2015 injury. The panel concluded the following:

> The 2002 work injury is not a substantial factor in Employee's current condition. The 2002 injury was a lumbar strain that recovered completely. It was determined in 2002 that Employee had mild minor degenerative changes at the L4-5 level, which were not inconsistent with his age and were neither caused by nor aggravated by that injury. Employee then did well for many years until he had a new event. Even if the 2002 work injury had not occurred, Employee would continue to have the progression of degenerative changes that were noted in his spine in 2002. The imaging studies do demonstrate progression, consistent with aging. Even without the 2002 injury, at this time Employee would still be in the same condition and have the same findings on the objective imaging…. The 2002 incident does not create a structural change to his body that makes him more susceptible to later injury or creates an environment in which the later injury occurs. The August 7, 2002, injury is not a substantial factor in the need for

> medical treatment following the September 13, 2015, magnet-moving incident with CH2M Hill. Employee made a complete recovery from the 2002 work injury. The August 7, 2002 work in jury is not a substantial factor in the need for any additional medical treatment to his lumbar spine. Employee did not require any treatment for his spine from 2003 until the current time. Therefore, the August 7, 2002, work injury cannot be a substantial factor in the need for any additional medical treatment. The August 7, 2002, work injury is not a substantial factor in the need for further medical treatment. Between 2003 and 2015, over 10 years have passed, with the injured examinee now in his fifth decade of life (over 40 years of age). In that population, degenerative changes are very common. The findings on the MRI are, at least degenerative and are neither caused by, nor aggravated by the August 7, 2002 incident. Therefore, a more substantial factor in the source of his current symptoms would be those degenerative changes. The injury in September 2015 is also an alternative and more likely cause, on a more-probable-than–not basis, that brought about the need for treatment. The symptoms occurred in a proximate fashion after the incident in question. They are located on the contralateral side to his prior injury and are most likely coming from the L5-S1 level (whereas the only abnormality noted in 2002 was at the L4-5 level). Therefore, for all those reasons, the panel has concluded that the 2002 incident is not related to the 2015 complaints and is not a substantial cause of those complaints. (Drs. Bauer and Stump EME Report, March 31, 2016).

28) On April 29, 2016, Five Star filed a Controversion Notice denying medical benefits, based on the conclusion of the EME panel. (Controversion Notice, April 29, 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 the provisions of this chapter;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute.

**AS 23.30.005. Alaska Workers' Compensation Board.**
(h) . . . Process and procedure under this chapter shall be as summary and simple as possible . . ..

**AS 23.30.135. Procedure before the board.**
(a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its

investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties ....

**8 AAC 45.040. Parties ….**

**….**

(d) Any person against whom a right to relief may exist should be joined as a party.

….

(f) Proceedings to join a person are begun by

> (1) a party filing with the board a petition to join the person and serving a copy of the petition, in accordance with 8 AAC 45.060, on the person to be joined and the other parties ….

(g) A petition or a notice to join must state the person will be joined as a party unless, within 20 days after service of the petition or notice, the person or a party files an objection with the board and serves the objection on all parties. If the petition or notice to join does not conform to this section, the person will not be joined.

(h) If the person to be joined or a party

> (1) objects to the joinder, an objection must be filed with the board and served on the parties and the person to be joined within 20 days after service of the petition or notice to join ….

(i) If a claim has not been filed against the person served with a petition or notice to join, the person may object to being joined based on a defense that would bar the employee's claim, if filed.

(j) In determining whether to join a person, the board or designee will consider

(1) whether a timely objection was filed in accordance with (h) of this section;

(2) whether the person's presence is necessary for complete relief and due process among the parties;

(3) whether the person's absence may affect the person's ability to protect an interest, or subject a party to a substantial risk of incurring inconsistent obligations;

(4) whether a claim was filed against the person by the employee; and

(5) if a claim was not filed as described in (4) of this subsection, whether a defense to a claim, if filed by the employee, would bar the claim.

**8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.

(b) Claims and petitions.

(1) A claim is a written request for benefits, including compensation, attorney's fees, costs interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.

….

(4) Within 10 days after receiving a claim that is complete in accordance with this paragraph, the board or its designee will notify the employer or other person who may be an interested party that a claim has been filed. The board will give notice by serving a copy of the claim by certified mail, return receipt requested, upon the employer or other person. The board or its designee will return to the claimant, and will not serve, an incomplete claim. A claim must

(A) state the names and addresses of all parties, the date of injury, and the general nature of the dispute between the parties; and

(B) be signed by the claimant or a representative….

"In order to join claims, the claims must be in existence…. Thus, where two distinct injuries are alleged to be the source of the disability or need for medical benefits, and the competing allegations of injury result in two potentially liable employers, the appropriate process is claim joinder…., not simply joinder of *parties* in a single claim." *Alcan Electrical v. Redi Electric, Inc. and Hope,* AWCAC Decision No. 112 (July 1, 2009) at 14 (emphasis in original).

A statement by a physician using a probability formula is not required to establish employer liability in workers' compensation. *Smith v. UAF,* 172 P.3d 782, 791 (Alaska 2007). As Larson remarks: The compensation process is not a game of "say the magic word," in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature. What counts is the real substance of what the witness intended to convey, and for this purpose there are more realistic approaches than a mere appeal to the dictionary. Larson's Workers' Compensation Law § 130.06[2][e] (2006).

## ANALYSIS

This analysis is guided by 8 AAC 45.040, which provides: "Any person against whom a right to relief may exist should be joined as a party." This broad language indicates joinder should be granted when the evidence does not clearly indicate the person or entity to be joined is protected from the claim.

The parties agree the 2003 C&R is valid and that Five Star can only be held responsible for medical benefits. The presumption of compensability applies to a claim for continuing medical care. *Olson v. AIC/Martin JV*, 818 P.2d 669, 675 (Alaska 1991). The threshold is minimal and requires the employee only produce some evidence linking his need for medical treatment to the work injury. *Id.*

The parties disagree that sufficient medical evidence exists to support a finding that the 2002 injury is a substantial factor in Employee's current need for medical treatment. Employee points to Dr. Swanson's December 7, 2015 EME report to show compensability for the 2002 injury. Dr. Swanson noted:

> Employee had received a prescription for Tramadol on April 25, 2014 for intermittent exacerbations of low back pain that had been present since 2002. Lumbar spondylosis is a chronic, progressive degenerative arthritic process. The preexisting sympotomatic spondylosis in Employee's lumbar spine is due to his genetic inheritance and his aging changes, not his work activities. Therefore, the low back symptoms that he had when he awoke on September 14, 2015, in all medical probability, represented another spontaneous exacerbation of symptoms as had been occurring spontaneously since 2002, which had led to the provision of Tramadol on April 25, 2014 by Dr. Aarons. Individuals with lumbar spondylosis often have spontaneous waxing and waning of symptoms consistent with those Employee had previously developed on September 14, 2015 when he awoke. Specifically addressing the L4-5, the high intensity zones on the October 7, 2015 MRI at L4-5 and L5-S1 were due to his preexisting symptomatic lumbar spondylosis, which includes intervertebral disc degeneration at those two levels. Further he stated Employee might be a candidate for decompression for his spinal

> stenosis due to his preexisting symptomatic lumbar spondylosis with arthritis if the facet joints and intervertebral disc degeneration causing symptomatic spinal stenosis.

A statement by a physician using a probability formula is not required to establish employer liability in workers' compensation. *Smith v. UAF*, 172 P.3d 782, 791 (Alaska 2007). As Larson remarks: The compensation process is not a game of "say the magic word," in which the rights of injured workers should depend on whether a witness happens to choose a form of words prescribed by a court or legislature. What counts is the real substance of what the witness intended to convey, and for this purpose there are more realistic approaches than a mere appeal to the dictionary. Larson's Workers' Compensation Law § 130.06[2][e] (2006).

While Employee is not required to obtain a medical opinion conveying the "magic words," the board finds that Dr. Swanson's EME report does not point to the 2002 injury as a substantial factor in the current injury and specifically opines that Employee's condition is due to his genetic inheritance and his aging changes, not his work activities.

Additionally, there is more medical evidence that the 2002 injury is not the cause of Employee's current need for medical care. Drs. Burton and Stump specifically opined the 2002 work injury is not a substantial factor in Employee's current condition, stating the 2002 injury was a lumbar strain that recovered completely. In 2002 Employee had mild minor degenerative changes at the L4-5 level, which were not inconsistent with his age and were neither caused by nor aggravated by the 2002 work injury with Five Star. Employee then did well for many years until he had the injury in 2015. The record supports a finding that even if the 2002 work injury had not occurred, Employee would continue to experience progressive degenerative changes in his spine first noted in 2002. The imaging studies demonstrate progression, consistent with aging.

Employee's own deposition testimony also supports a finding that he fully recovered from the 2002 injury and lived a healthy, active life style. Employee did not seek treatment again until 2014 and that treatment was for maintenance, preventative care, adjustments, and massages.

Employee has not produced sufficient medical evidence that the 2002 injury is a substantial factor of Employee's current need for medical treatment. While the injuries both occurred in the low back, there is no medical opinion in the record opining the 2002 injury is the cause of his

need for treatment, and there is specific medical evidence supporting a finding that the 2002 injury is not a substantial factor of Employee's current injury.

In determining whether a right to relief against Five Star exists, the five subsections in 8 AAC 45.040(j) must be considered: whether the person timely objected to joinder, whether their presence is necessary for complete relief and due process among the parties, whether their absence may affect their ability to protect an interest or subject a party to a substantial risk of incurring inconsistent obligations, whether a claim was filed against the person by the employee, and whether a defense would bar the claim if it were filed.

Five Star timely objected to joinder. Five Star's presence is not necessary for complete relief and due process among the parties and Five Star's absence will not affect Employee's ability to protect an interest or subject a party to a substantial risk of incurring inconsistent obligations. A subsequent claim against Five Star would not be barred. CH2M Hill is not claiming that Five Star is responsible; CH2M Hill is defending the claim on the merits. If a subsequent medical opinion concludes that the 2002 injury is a substantial factor in Employee's need for treatment, Employee is not without relief, and may petition to join Five Star again based on new medical evidence. Under the C&R, Five Star continues to remain responsible for medical benefits associated with the 2002 injury. Based on these factors, the board finds that joinder is therefore not appropriate at this time.

## CONCLUSION OF LAW

Five Star should not be joined as party.

## ORDER

Employee's January 28, 2016 petition to join Five Star is denied.

Dated in Fairbanks, Alaska on September 26, 2016.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kelly McNabb, Designated Chair

/s/
Jacob Howdeshell, Board Member

/s/
Sarah Lefebvre, Board Member

## PETITION FOR REVIEW

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

## RECONSIDERATION

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

## MODIFICATION

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

## CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Interlocutory Decision and Order in the matter of HECTOR M BONIFAZ, employee / claimant; v. CH2M HILL COMPANIES, LTD, self-insured employer/defendant; Case No. 201515015; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 26, 2016

/s/
Jennifer Desrosiers, Office Assistant II