ALASKA WORKERS' COMPENSATION BOARD

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

MITCHELL R. MCNAMEE, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201121428
NABORS INDUSTRIES, INC., Employer,	)	AWCB Decision No. 18-0004
and	)	Filed with AWCB Fairbanks, Alaska on January 11, 2018
AMERICAN ZURICH INSURANCE COMPANY, Insurer, Defendants.	)	

Mitchell McNamee's (Employee) August 29, 2013 claim was heard in Fairbanks, Alaska on July 20, 2017, a date selected on March 8, 2017. Attorney Michael Jensen appeared and represented Employee, who also appeared and testified on his own behalf. Other witnesses for Employee included his daughter, Christine Ferrell, and an oilfield hand, Ken Davidson. Attorney Richard Wagg appeared and represented Nabors Alaska Drilling, Inc. (Employer). Witnesses for Employer included its former Human Resources Manager, Belinda Wilson, its Driller, Mathew Turcotte, and its Area Manager, David Herbert. The record closed upon receipt of Employee's supplemental fee affidavit on July 24, 2017.

ISSUES

As a threshold issue, Employer contends Employee's claim is barred because he did not provide timely notice of his injury as required by AS 23.30.100(a). It contends Employee's injury date has been a "moving target" and he has conveniently adjusted his injury date as evidence

developed. As a result, Employer contends it has been deprived an opportunity to identify and interview witnesses before their memories faded with the passage of time, and also contends Employee's delay in reporting his injury has compromised the certainty of expert medical opinions.

Employee contends the notice requirement of AS 23.30.100(a) only applies once Employee has knowledge of a compensable event. He contends, once he had such knowledge, he timely reported his injury and his claim is not barred.

1) Was Employee's injury report timely?

As preliminary issues, Employer objected to consideration of certain reports authored by Employee's medical providers, Majid Rahimifar, M.D. and Abbas Mehdi, M.D., because it had requested an opportunity to cross-examine these physicians but Employee was not intending to produce them at hearing. In response to Employee's contentions regarding the business records exception, Employer contends, while diagnosis, treatment and prognosis are proper subjects of a medical report, under the business records exception, any opinion on causation is not, so the reports should not be considered. Employer further objected to consideration of an affidavit by Employee's neighbor, Heather Udelhoven, on the basis it had requested an opportunity to cross-examine Ms. Udelhoven as well.

Employee acknowledged Dr. Rahimifar is subject to cross-examination on his August 8, 2013 questionnaire responses so they are not admissible, but contends his progress report from that same date was prepared in the normal course of business, so it is admissible under the business records exception to the hearsay rule. Employee further contended Dr. Rahimifar's April 18, 2013 progress report, and Dr. Mehdi's April 24, 2013 and May 29, 2013 progress reports, are also admissible under the business records exception. Employee did not respond to Employer's objection to Ms. Udelhoven's affidavit, or contend Dr. Rahimifar's December 27, 2016 check-the-box answer is a business record, but it is presumed he opposes excluding these documents from consideration as well.

2) Should specific medical reports authored by Drs. Rahimifar and Mehdi, as well as Ms. Udelhoven's affidavit, be excluded from consideration?

Employee contends he has been an oilfield worker nearly his entire life and has worked for Employer for 20 years. At the time of his injury, Employee contends he was working as a roustabout on Rig 245 and "latching pipe" when he slipped and fell into the "trough."[1] Employee contends he hit his head when he fell, which aggravated his pre-existing aqueductal stenosis and resulted in the surgical placement of a shunt to reduce pressure from the build-up of cerebral spinal fluid in his brain. He contends his fall at work was the substantial cause of his need for medical treatment and seeks an award of medical and related transportation costs. Employee further contends, by controverting his claim, Employer impermissibly shifted financial responsibility for his medical costs to Medicare and the U.S. taxpayer. He seeks an order requiring Employer to pay his medical providers pursuant to the Alaska fee schedule, and his providers can then reimburse Medicare.

Employer contends there is not any evidence Employee fell except Employee's own testimony, which is suspect because he has dementia and memory problems. It also contends four people should have witnessed Employee's fall, but none did, and neither is there any documentary evidence Employee fell. Employer contends the evidence will also show Employee, physically, could not have fallen in the manner he describes. It further contends the rig on which Employee was working was not latching pipe, as Employee describes, at the time of his purported fall, and neither would there have been oil-based mud on the floor, as Employee describes. It also advances an alternative theory of Employee's need for medical treatment - Wernicke's encephalopathy, which Employer contends was not caused by Employee's employment. For these reasons, Employer contends Employee's claim seeking medical and related transportation costs should be denied.

3) Is Employee entitled to medical and related transportation costs?

[1] This decision involves many technical terms unique to oilfield operations. Many were explained, to varying degrees, during depositions and at hearing, while others were not explained not at all.

Employee contends his fall at work is also the substantial cause of a temporary total disability (TTD). He seeks TTD benefits from August 16, 2011 through August 8, 2013.

For the above-stated reasons, Employer contends work is not the substantial cause of Employee's disability, and it seeks denial of Employee's TTD claim. It alternatively contends, should Employee be found entitled to TTD, his benefit period should be limited to August 16, 2011 until December 1, 2012.

4) Is Employee entitled to TTD?

Employee contends his fall at work is the substantial cause of his inability to return to full-time, gainful employment. He seeks an award of permanent total disability (PTD) benefits.

For the above-stated reasons, Employer contends work is not the substantial cause of Employee's disability, so his PTD claim should be denied.

5) Is Employee entitled to PTD?

Employee contends his fall at work is the substantial cause of a permanent partial impairment (PPI), for which he seeks an award.

For the above stated reasons, Employer contends work is not the substantial cause of any PPI, so his claim for this benefit should be denied.

6) Is Employee entitled to PPI?

Employee contends, if he is found not to be permanently and totally disabled, he would be entitled to vocational rehabilitation benefits.

Employer did not directly address Employee's contentions regarding vocational rehabilitation benefits, but it is presumed Employer contends Employee is not entitled to a vocational rehabilitation eligibility evaluation.

7) Is Employee entitled to vocational rehabilitation eligibility evaluation?

Employee seeks interest on unpaid medical and indemnity benefits.

Employer contends, since no benefits are due Employee, neither is any interest.

8) Are Employee and his medical providers entitled to interest?

Employee seeks attorney fees and costs.

Employer contends, since no benefits are due, neither are attorney fees and costs.

9) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On August 31, 2011, Employer completed a personnel action notice for Employee that states: "245 is too much rig for Mitch. He has trouble keeping up with his job and would be better suited to a different rig." The notice was characterized as a "warning" for "working in an unsafe manner; endangering self or others." (Personnel and Payroll Action notice, August 31, 2011).

2) On January 24, 2012, Aaron Baker, a roustabout for Employer, inadvertently stepped backwards and into the trough of Rig 245. Mr. Baker cut his right knee and chin on the handrail when he fell. (Report of Incident, Injury, Illness, January 24, 2012).

3) On or about March 1, 2012, Employee applied for Social Security disability benefits based on leg weakness, hearing loss and vision problems. (DDS Development Unit letter, March 1, 2012).

4) On May 30, 2012, Employee's daughter, Christy Ferrell, contacted Employer to request a workers' compensation claim form. Following Ms. Ferrell's request, Employer's Human Resources Assistant, Joan Sato, emailed Employer's Human Resources Manager, Belinda Wilson, the following message:

> You will be getting a call from Christy, who I believe is [Employee's] daughter. She wants a workman's comp. form, as she said that [Employee] had a stroke. I told her that [Employee] hasn't worked for us for a while, but she wants the form or our workman's comp. carrier info. . . .

(Sato email, May 30, 2012). That same day, Ms. Wilson replied, as follows:

> She should contact the department of labor to obtain one. I can call her if you like Alan, unless you would rather.

(Wilson email, May 30, 2012).

5) On June 15, 2012, Emanuel Dozier, M.D., evaluated Employee for Social Security disability benefits. Dr. Dozier identified Employee as a "62-year-old African-American male," and observed Employee to have a normal gate while ambulating down a hallway. (Dozier report, June 15, 2012).

6) On July 12, 2012, Employee was evaluated for right leg pain after falling and hitting his head. (Clinica Sierra Vista chart notes, July 12, 2012).

7) On July 20, 2012, a magnetic resonance imaging study (MRI) of Employee's brain showed possible aqueductal stenosis. A neurosurgical consultation was recommended for possible shunt placement. Other MRI findings included abnormal signal intensity in the right posterior temporal lobe possibly representing an old infarct, and increased signal intensity in the periventricular white matter possibly representing edema, ischemic disease or vasculitis. (MRI report, July 20, 2012).

8) On July 21, 2012, Employee was admitted to Bakersfield Memorial Hospital, where he underwent ventriculoperotoneal shunt placement for hydrocephalus. (Wiebe report, July 21, 2012; Discharge Summary, July 26, 2012).

9) On July 26, 2012, Ms. Ferrell completed an injury report on behalf of her father. The report states Employee fell and suffered a head and back injury on October 16, 2011. (Report of Occupational Injury or Illness, July 26, 2012).

10) On August 9, 2012, Employee followed-up with Timothy Wiebe, M.D., who remarked Employee's post-surgical course was complicated by "features of Wernicke's encephalopathy, which was improving with ongoing thiamine administration." Dr. Wiebe thought Employee would require lifetime, annual follow-ups with a neurosurgeon and additional visits "at any time for decline in status." (Wiebe report, August 9, 2012).

11) On October 13, 2012, Employee presented at the emergency room complaining of chest pains. It was noted, "Patient was at a party tonight when he developed the pain and had 'a few

beers.'" An electrocardiogram (EKG) was negative for infarct or ischemia and Employee's symptoms were not thought to be cardiac in nature. (Emergency Room report, October 13, 2012).

12) On April 18, 2013, Employee presented to Majid Rahimifar, M.D., complaining of short-term memory loss. Employee's history of present illness was, "This patient per Dr. Wiebe has hydrocephalus and dementia. His daughter claims that he fell in 2011 at work and sustained a head injury. . . . Dr. Wiebe's last report was reviewed which showed evidence of shunted hydrocephalus and needs frequent annual care." Under "Physical Exam," Dr. Rahimifar noted, "Comments: From my standpoint this patient is totally disabled because of his hydrocephalus and dementia and memory loss." Dr. Rahimifar recommended Employee undergo a computed tomography (CT) study, a neurological consultation and a shunt adjustment. Dr. Rahimifar concluded stating, "[Employee] as Dr. Wiebe indicated will need lifetime care for his shunt." (Rahimifar Chart Notes, April 18, 2013).

13) Dr. Rahimifar's April 18, 2013 chart notes were also produced in the form of a "Progress Report" that same day. (Rahimifar Progress Report, April 18, 2013).

14) An April 18, 2013, brain CT showed bilateral subacute subdural hemotomas, encephalomalacia and gliosis of the bilateral parietal lobes consistent with remote infarcts, and areas of white matter with low attenuation, suggestive of ischemic changes. (CT report, April 18, 2013).

15) On April 24, 2013, Abbas Mehdi, M.D., evaluated Employee for short-term memory loss and headaches. Employee also reported sustaining a head injury in September 2011. Dr. Mehdi reviewed the April 18, 2013 CT study and diagnosed posttraumatic encephalopathy. He recommended an electroencephalogram (EEG) to rule out epilepsy, a B-12 supplement and a possible prescription for depression. Dr. Mehdi report also wrote, "Static encephalopathy phenomenon due to head trauma." (Mehdi Progress Report, April 29, 2012).

16) On May 29, 2013, Employee presented to Dr. Mehdi for a follow-up for his EEG results, which were normal. Dr. Mehdi concluded: "From a neurological perception, no further action is needed. EEG is normal. I do not think dementia medication will help. Traumatic brain injury is likely the cause of memory loss. Follow up prn." (Mehdi Progress Report, May 29, 2013).

17) A July 22, 2013 telephone message slip shows Employee's daughter called Dr. Rahimifar's office "for an appointment with Dr. Rahimifar as soon as possible please call." Dr.

Rahimifar's office responded by contacting Employee on July 25, 2013 and noted: "Need appt for med legal . . . ." An August 8, 2013 appointment was scheduled. (Telephone message slip, July 22, 2013).

18) On August 8, 2013, Dr. Rahimifar indicated hydrocephalus could develop over a period of ten months and opined Employee's hydrocephalus was likely caused by head trauma. In Dr. Rahimifar's opinion, Employee's work injury was the substantial cause of his hydrocephalus and the resulting shunt procedure, and he also thought Employee would require an EEG and follow-up appointments for his shunt. Dr. Rahimifar opined Employee had reached medical stability as of that date, and he predicted Employee's injury would result in a permanent impairment. (Rahimifar responses to questionnaire, August 8, 2013).

19) On August 8, 2013, after reviewing "extensive" medical records and a chronology of Employee's illness, as well as Employee's CT study, Dr. Rahimifar authored a Progress Report, in which he opined, Employee's hydrocephalus "is compatible with sequela of his head injury." Based on examination of Employee that day, Dr. Rahimifar opined Employee had reached "maximum medical recovery from his shunt and head injury." In addition to documenting his findings on examination, Dr. Rahimifar also explained, "Patient was examined," and noted "Request by legal counsel in regard to [Employee's] condition was reviewed. All questions were answered." (Rahimifar Progress Report, August 8, 2013).

20) Dr. Wiebe, Dr. Rahimifar and Dr. Mehdi all practice at the Bakersfield Neuroscience & Spine Institute. (Weibe report, August 9, 2012; Rahimifar Progress Report, April 18, 2013; Mehdi Progress Report, April 29, 2012; Mehdi Progress Report, May 29, 2013; Rahimifar Progress Report, August 8, 2013; observations).

21) On August 29, 2013, Employee filed a claim seeking TTD from October 16, 2011 until August 8, 2013, PPI, ongoing PTD from August 9, 2013, ongoing reemployment stipend from August 9, 2013, medical and transportation costs, interest, and attorney fees and costs. (Claim, August 28, 2013).

22) On October 7, 2013, Employer answered and controverted Employee's August 28, 2013 claim, denying all benefits sought by Employee on grounds his condition did not arise in the course and scope of his employment and because the claim was barred by AS 23.30.100. (Employer's Answer, October 7, 2013; Controversion, October 7, 2013).

23) On October 30, 2013, Employer electronically filed a First Report of Injury (FROI) stating it was notified of Employee's injury on October 16, 2011. The following day, Employer filed another FROI that also states it was notified of Employee's injury on October 16, 2011. (FROI, October 30, 2013, October 31, 2013).

24) On October 25, 2013, Employee's neighbor, Christy Limburg, averred she had spoken with Employee "several times" prior to October 16, 2011, and Employee did not complain of pain or of difficulty in getting around. Then, on October 16, 2011, about one-week earlier than Employee's scheduled return date, she received a phone call from Employee, who was at the Anchorage Airport. Employee told her he was injured at work and was sent home early. Employee was having difficulty walking and using his arm. Ms. Limburg offered to come and get Employee, but he declined her offer. When she saw Employee later that same day, he looked very weak and she encouraged Employee to go to the hospital, but Employee stated he would go to a company doctor instead. Then, between October 16, 2011 and December of 2011, when Ms. Limburg moved out of Alaska, she observed Employee's health decline. "He was not the same person I knew before September of 2011," according to Ms. Limburg. She explained, Employee would stay in his apartment and had difficulty walking and keeping his balance. (Limburg affidavit, October 25, 2013).

25) On February 19, 2014, Employee's attorney, Mr. Jensen, clarified certain dates relevant to Employee's claim. Specifically, Mr. Jensen contended Employee started working on Rig 245 on or about August 11, 2011, and he continued to work on that rig until September 23, 2011. Mr. Jensen contended Employee was off work between September 23, 2011 and October 9, 2011, and when Employee returned to work on October 9, 2011, he was transferred to Employer's "shop." According to Mr. Jensen, Employee was injured sometime between September 10, 2011 and September 23, 2011. Employee also remembered being told he must have had a strike on October 15, 2011, and was sent home the following day, according to Mr. Jensen. (Jensen letter, February 19, 2014).

26) On February 27, 2014, another of Employee's neighbors, Heather Udelhoven, averred she first met Employee in July of 2011, though she had seen him a few times prior to that date. When Employee returned home from the North Slope in October of 2011, she and other neighbors assisted in caring for Employee. Ms. Udelhoven, who was pregnant at the time, would check on Employee at 9:00 a.m. every morning. Employee was very forgetful and he continued

to ask her if she was pregnant, even though she had previously told him she was. Employee's condition, according to Ms. Udelhoven, would vary day-to-day, and he needed assistance with simple things, like doing the dishes. Employee would warm up his vehicle in the morning, forget it was running and leave it running for several hours. Employee would nap frequently and "suffered many falls" in the parking lot. (Udelhoven affidavit, February 27, 2014).

27) On May 15, 2014, Dr. Rahimifar reported Employee would require daily assistance with dressing, food preparation and normal daily tasks. Employee continued to have a wide, slightly unsteady gate and short-term memory loss, as well as daily headaches. (Rahimifar report, May 15, 2014).

28) On May 15, 2014, Employee was treated in the emergency room for headache with blurred vision and double vision after reportedly having had his shunt adjusted by Dr. Rahimifar's physician's assistant earlier that day. A head CT study was performed and Dr. Rahimifar was contacted, who requested Employee be discharged home with instructions to follow-up in his office the next morning. (Emergency Room report, May 15, 2014).

29) On May 16, 2014, Employee was admitted to the hospital after reporting dizziness and slurred speech. Employee's shunt pressure was adjusted, low-dose aspirin was administered and Employee's symptoms resolved. Employee was discharged with instructions to follow-up with Dr. Wiebe for shunt management. (Discharge Summary, May 18, 2014; Chart notes, May 16, 2014).

30) On August 5, 2014, Employer requested an opportunity to cross-examine Dr. Rahimifar on his August 8, 2013 reports. (Employer's Request for Cross-Examination, August 5, 2014).

31) On September 5, 2014, Sirinan Tazen, M.D., completed a physical capacities evaluation that indicates Employee is unable to work because of chronic imbalance and mild cognitive impairment. (Physical capacities Evaluation, September 5, 2014).

32) On October 15, 2014, Lynne Bell, M.D., PhD., conducted an employer's medical evaluation (EME), and began her report by stating her diagnoses were "provisional" at that time due to "insufficient" information. Dr. Bell would have liked to have been provided with any observations Employee's co-workers may have made at the time of injury, more recent medical information regarding Employee's shunt and additional hospital records. Dr. Bell thought Employee's head CT and brain MRI studies suggested underlying vascular disease was the cause of the large ventricles as well as Employee's dementia. A post-shunt study also showed

ischemic changes that suggested Employee suffered recent strokes, which would better explains Employee's clinical presentation, according to Dr. Bell. Employee may have also developed Wernicke's encephalopathy while he was living alone in Anchorage following the death of his wife, in Dr. Bell's opinion, which also explains Employee's dementia and gait dysfunction. Based on the information available to her, Dr. Bell was unable to attribute any of Employee's disability to the "supposed" head injury in 2011. The most likely cause of Employee's disability was, according to Dr. Bell, cerebrovascular disease. (Bell report, October 15, 2014).

33) On February 24, 2015, after reviewing additional records, Dr. Bell authored an addendum to her October 15, 2014 EME report, and opined the most likely causes of Employee's disability are a combination of small vessel cerebrovascular disease, possible degenerative idiopathic dementia, combined with a history of alcoholism and Wernicke's encephalopathy. She thought there were non-injury factors that explained his clinical presentation of dementia and gait disorder, the most notable being Wernicke's encephalopathy. Dr. Bell did not think Employee's employment was a substantial cause of his disability. She stated, "In conclusion, it is not medically probably [sic] that [Employee's] current neurological condition is related in any way to his claimed fall at work . . . . There is also an indication from the more recently reviewed records that [Employee] continues to use alcohol. Given that he likely has a history of severe alcoholism, he should be completely abstinent from alcohol." (Bell addendum, February 24, 2015).

34) Among the additional records Dr. Bell reviewed for her February 24, 2015 addendum were a September 20, 2012 chart note where Employee was instructed to avoid alcohol, an October 13, 2012 emergency room report that noted Employee was at a party when he developed pain and had a few beers, a May 15, 2014 emergency room report that stated Employee's liver function test was normal, and a May 16, 2014 chart note that states Employee has occasional alcohol a couple of times a week. Dr. Bell also reviewed Employee's July 20, 2012 brain MRI, and observed, "There is increased T2 signal in the periventricular white matter consistent with ischemic changes, although it may represent edema." (*Id.*).

35) On May 13, 2015, Employer requested an opportunity to cross-examine Dr. Mehdi on his April 24, 2013 and May 29, 2013 reports. (Employer's Request for Cross-Examination, May 13, 2015).

36) On August 8, 2015, Ms. Ferrell sent the following email message to Samuel Banse:

> Samuel,
> This message is to confirm our conversation this afternoon confirming the fall on rig 245. When we spoke you confirmed that the fall occurred. You were not there, however heard everyone talking about it when you came on shift. You confirmed that you heard he was latching the bullhorn elevator and slipped into the trough area below. If this is accurate as to our conversation, please respond in the affirmative.
>
> Thank you for your time in this matter.
>
> Sincerely,
> Christy Ferrell

That same day, Mr. Banse replied:

> Yes, that is correct.

(Ferrell email, August 8, 2015).

37) On September 14, 2015, Employee testified he moved from Anchorage to Bakersfield, California in 2012 because he was having "navigation problems." Employee explained navigation problems meant he lived on the third floor in Anchorage and was having difficulty with stairs. Employee was also having trouble driving on ice. The following exchange occurred when Employee was asked about other workers' compensation claims:

> Q. Okay. Other than this, did you ever have any workers' compensation claims?
>
> A. Yes, sir.
>
> Q. All right. You're looking at your hand.
>
> A. Yeah. I was trying to think whether that was workers' comp or not. I think it was.
>
> Q. Okay. Do you remember who you were working for?
>
> A. Schlumberger.
>
> Q. And you had an injury to your fingers, it appears.
>
> A. Yes, sir. I popped them off.

Q. And they put them back?

A. No.

Although Employee could not remember his address in Anchorage, he had lived there for 20 years. Employee worked for Employer on Rig 245 as a roustabout. His direct supervisor was the driller, Mr. Turcottee. Employee's work schedule was two weeks on, and two weeks off. After the "incident," Employee transferred to the "yard" at Employer's camp in Deadhorse, Alaska, where he did a lot of cleaning and drove a tail truck. Employee does not remember the specific date of his injury, but he knows it was wintertime. He thinks the injury occurred during the first week of his second hitch on Rig 245. Employee had gone to the rig floor to relieve other hands for breakfast. He was working with a friend, Cal Smith, latching pipe to the elevator. When asked about other witnesses to his injury, the following exchange took place:

Q. Who else was around?

A. . . . . It seemed to me when I actually fell, that there were a couple of people from ENI on the rig floor. I remember their white coveralls, which I thought was kind of silly.
. . . .

Q. Do you recall what they were doing?

A. Watching.

Q. Okay.

A. Basically they were watching.

Q. That's a good job.

A. I guess that's why they have white coveralls.

Employee described his injury as a fall. There was a lot of oil-based mud on the floor. Employee was latching pipe to pull it up to go in the hole, slipped "underneath" and fell about three or four feet. He landed on his back and knocked his hardhat off. Employee further described:

> I wrapped my left hand on the other horn - - there are two horns that stick out - - to keep it close, because I had my arm underneath it. I was afraid that I would open up and drop the pipe. I slid down a little ways . . . I walked along the edge, got my hard hat, and then [Cal Smith] helped me get out of that trough.

Later Employee described his feet slipping out from underneath him and dropping into the trough while hanging onto the elevator. Afterwards, he felt kind of dizzy and he changed his clothes because he was soaked with oil-based mud. He did not feel he was injured at that point. After changing, Employee felt all right and he continued working. He did not notice any physical problems as a result of the fall. Employee finished his hitch and then went back to Anchorage. When Employee returned to work on the following hitch, he was transferred to work in the yard, where he did not have any problems doing his job. At some point, Employee was told he had had a stroke and he was sent back to Anchorage. Employee did not feel he was having any problems at that point. Once back in Anchorage, Employee called one of his neighbors, Christy Lunsford [sic], to let her know he was back early. On the Monday after his return, Employee phoned Employer's office and spoke to either Belinda Wilson or Joan Sato, to inquire "what medical they may have wanted [him] to see." He also told either Ms. Wilson or Ms. Sato about his fall. Employee did not see a doctor in Anchorage. Within a couple of days after returning home, Employee started having balance issues. A couple of neighbors told Employee he should see a doctor, but Employee did not think he needed to see a doctor. Even though he had been laid off, Employee did not file a written injury report because he did not want to jeopardize the safety bonuses of the crew. (McNamee deposition, September 14, 2015).

38) On September 14, 2015, Employee's daughter, Christy Ferrell, testified she resides in Bakersfield, California. She travelled to Alaska in April of 2012 to check on her father because he sounded confused during their telephone conversations. Ms. Ferrell first noticed significant issues with Employee in March of 2012 because he was sleeping a lot. When Ms. Ferrell got to Alaska, she found Employee's apartment dusty and cluttered, and there was trash on the patio. Employee had not done laundry in a while. She explained, "He had a cave of clothes on his bed that he would crawl in and go to sleep." Employee first told Ms. Ferrell about his fall when she brought him back from Alaska. Ms. Ferrell explained:

> We were driving back from L.A. We had just stopped to get something to eat and we got back in the car and started driving. We were having a conversation. He

> looked out the window and looked back at me and said, "You know, if it hadn't been for that fall I'd probably still be working." I said, "What fall?" He said, "When I fell at work." I said, "When did you fall at work?" He said, "Oh, well, back before they fired me." I said, "Did they send you - - did you go see a doctor?" He said, "No. But I hit my head really hard."

Once back in Bakersfield, Ms. Ferrell noticed Employee's gait was "off," where Employee would lean to one side while walking. That is when Ms. Ferrell started to make Employee use a walker. Ms. Ferrell completed an injury report for Employee on July 26, 2012, but had contacted Employer's human resources department prior to that. On May 30, 2012, she called Employer to ask about workers' compensation forms. Ms. Ferrell left a voice mail message for Belinda Wilson. Ms. Wilson returned Ms. Ferrell's call the following day and told Ms. Ferrell "We don't do workers' compensation." Ms. Ferrell obtained a copy of Employee's file from Employer and initially selected an injury date of October 16, 2011, because that was the last day Employee worked. She later amended Employee's injury date to sometime between September 10, 2011 and September 23, 2011, based on Employee's accounts of how many shifts he had worked and where he had worked. Employee did not describe his fall to Ms. Ferrell in detail until after his shunt surgery. Then, Employee described the rig, the trough, what he was doing at the time and people who were there. This description was the same description Employee gave during his deposition testimony, according to Ms. Ferrell. Ms. Ferrell did not help Employee with his application for Social Security retirement, but she did help him with his application for Social Security disability. Employee formerly was receiving Social Security disability benefits, but is now receiving Social Security retirement benefits. Ms. Ferrell scheduled Employee's appointment with Dr. Llamas at Employee's request because he was having problems with his legs and gait. She chose Dr. Llamas as Employee's medical provider because the appointment was covered by Medi-Cal. After Ms. Ferrell obtained Employee's file, she contacted people with whom Employee had worked, such as Cal Smith and Matthew Turcotte. Mr. Smith told Ms. Ferrell he remembered Employee falling and helping Employee out of the trough. Mr. Smith also remembered directing Employee to where he could get clean coveralls. Ms. Ferrell also called Mr. Turcotte, but he "hollered" at her and hung up. Because of certain inconsistencies in Employer's records, Ms. Ferrell believes Employer is trying to "cover up" Employee's fall. As examples, Ms. Ferrell cited a change of status record that shows Employee

was working on Rig 245 until October 8, 2011, and Employee's transfer to the yard on October 9, 2011. (Ferrell deposition, September 14, 2015).

39) On September 22, 2015, Employer requested an opportunity to cross-examine Heather Udelhoven on her February 27, 2014 affidavit. (Employer's Request for Cross-Examination, September 22, 2015).

40) On October 17, 2015, Employee was purportedly deposed a second time. While the record does contain an October 9, 2015 "Notice of Taking Continuation Deposition of Mitchell McNamee," a transcript of a second deposition was not located in the record. At hearing, though, Employer acknowledged Employee's testimony concerning the fall was detailed and consistent between his first and second depositions. (Employee's Hearing Brief, July 12, 2017; Employer's Hearing Brief, July 12, 2017; Record).

41) On October 17, 2015, Dr. Llamas testified regarding her chart notes. She did not have an opinion whether Employee's 2011 fall caused his hydrocephalus in 2012. Dr. Llamas did not have an opinion on whether Employee's memory loss was a permanent condition. (Llamas deposition, October 17, 2015).

42) On November 18, 2015, Kevin Kane testified he worked on the North Slope as a rig welder for about 18 years, which included working for Employer from about 2000 to 2012. He worked with Employee on Rig 245. Mr. Kane has worked "on just about every one of [Employer's] rigs," which include "17, 19, 16, 245, DDR2, Rig 4, Rig 9, [and] Rig 7." He described how the trough and skate were different on Rig 245, compared to other rigs:

> The skate came in really low so they had to – I guess, or the floor was so big it extended out into where the skate would penetrate. The rig – the skate seems a little higher or the floor ends before the skate gets up there. The skate had to deliver the pipe at about four-foot high so they can latch onto it. And that rig floor was so big, it [the skate] kind of came up into the floor. It's hard to describe. . . . Other rig floors don't have that big hole in the floor. The skates come up right on the edge of the floor and stop there. This skate came up . . . they had a little void there for the skate to come into.

Mr. Kane does not remember Employee falling in the trough, but he was asked to put handrails around the trough. He thought it was because another employee, Aaron Baker, had fallen in the trough. Mr. Kane does not remember Aaron Baker falling into the trough, but he remembers

"the guys talking about it." Neither could he remember exactly when he put the handrails on Rig 245. Mr. Kane was also asked to do some design work, which he described as follows:

> Yeah. He wanted me to design a platform. I designed the platform to when the skate came up, it hit a counterbalance, a platform folded out of the way, the skate came up, and as soon as the skate went down, the counterbalance raised the platform back up so that the hole was never - - he designed one using all hydraulics where the driller would push a hydraulic thing and the platform would fold away. Skate would go down and push the hydraulics and raise it up. Mine was all on gravity. His was all hydraulics.

Mr. Kane does not think the work was performed before the rig shut down. (Kane deposition, November 18, 2015).

43) On March 14, 2016, Cal Smith testified he has worked for Employer for 18 years, and during that time, he worked on Rig 245 for a year and a half. He explained the "skate" is what brings the pipe from the shed. Mr. Smith knows about Employer's $300 safety bonus. He explained he works alone, and unless he has an accident himself, he gets his bonus. Mr. Smith had two telephone conversations with Employee's daughter, during which he told her "[w]hat she wanted to hear." During the first conversation, Mr. Smith was busy at work and he told Employee's daughter she could call him the next day. The next day, he told Ms. Ferrell he did not want to talk to her anymore about Employee's fall. Mr. Smith thought Employee's daughter was "harassing" him. He does not remember Employee getting hurt or falling. Mr. Smith has never heard of anyone slipping and falling into a trough, but if someone did, Mr. Smith thinks he would have heard about it. Mr. Smith also denied ever speaking to Mr. Matthew Turcotte about Employee's case. (Smith deposition, March 14, 2016).

44) For reasons that follow, Mr. Smith is not credible. (Experience, judgment, unique or peculiar facts of the case, and inferences drawn therefrom).

45) On September 2, 2016, Bruce McCormack, M.D., performed a secondary independent medical evaluation (SIME). In Dr. McCormack's opinion, Employee had a preexisting, asymptomatic, hydrocephalus that was made symptomatic by his work injury, which was the substantial cause of Employee's aqueductal stenosis, ventriculoperotoneal shunt and development of his subacute right subdural hematoma. The work injury, along with the development of hydrocephalus, was also consistent with the stroke-like symptoms others observed in October of 2011, according to Dr. McCormack. Employee did not have Wernicke's

encephalopathy, in Dr. McCormack's opinion, since he was working full time and had a reasonable diet. Dr. McCormack opined Employee's hydrocephalus was the predominant cause of his dementia and inability to work until he recovered from placement of the ventricular shunt on approximately December 1, 2012, but Employee's lingering dementia after that date was from factors other than the hydrocephalus. Dr. McCormack thought Employee was medically stable at the date of his evaluation, but added Employee's shunt should be checked once per year and Employee will also require periodic CT scans. Dr. McCormack assigned Employee a 25 percent whole person impairment, and thought 40 percent of that was due to Employee's work-related hydrocephalus and 60 percent was the result of other factors, such as dementia, depression and vascular disease with brain stroke. In Dr. McCormack's opinion, Employee is not employable, but this is now due to reasons other than the hydrocephalus, such as small and large vessel vascular disease with stroke, alcoholism and depression. (McCormack report, September 2, 2016).

46) On October 4, 2016, Mr. Jensen forwarded a copy of Dr. McCormack's September 2, 2016 SIME report to Dr. Rahimifar, along with a letter soliciting Dr. Rahimifar's medical opinions. The letter was prepared on Mr. Jensen's letterhead and contained two check-the-box type questions. On December 27, 2016, Dr. Rahimifar checked "yes" to one of the two questions, indicating he thought Employee was "permanently precluded from performing any type of full time gainful employment due to the effects of his work related hydrocephalus condition or due to any non-injury related condition." Even though the letter provided space for "comments," Dr. Rahimifer did not comment on his answer. (Jensen letter, October 4, 2016).

47) On January 11, 2017, Jess Rhinehart, testified he worked as a roustabout for Employer for two years and then he was injured on-the-job. When his doctor released him back to work, he returned to Employer working as a floor hand. After Mr. Rhinehart received his PPI rating for his work injury, Employer demoted him back to roustabout and told him "if [he] didn't like it [he] could go home." Mr. Rhinehart then asked for a plane ticket home. After he left Employer, Mr. Rhinehart continued to work for other drilling companies in Colorado and in Alaska. While working for Employer, Mr. Rhinehart worked on Rig 245 and Rig 19AC. When he was injured, Mr. Rhinehart broke his back, but nobody knew he was injured "for a long time." Right after his injury, an employee named Jason Bresser worked overtime at night putting handrails on the "beaver slide" from which Mr. Rhinehart had fallen. At some point, an injury report was

prepared and Mr. Rhinehart read the report when returned to work. Mr. Rhinehart disagreed with the report and he believes the report was falsified because when he fell "[t]here were not handrails there." Mr. Rhinehart was also present at safety meetings where Employee was mentioned and workers were told Employee had died at home. Since workers were not told of Employee's injury at that meeting, Mr. Rhinehart assumed Employee had died of natural causes. Mr. Rhinehart described what he termed "mitigating" efforts after injuries. As an example, he described an injury where an employee, Vincent Nicholson, cut off his finger:

> Everyone huddled up to find the best excuse how it happened so they wouldn't lose their safety bonus . . . . But everyone got all together and tried to figure out a way to say it didn't happen the way it happened. And then [Nicholson] got rushed off to the hospital for his finger, and pretty much everyone went back to work.

According to Mr. Rhinehart, Employer also understates its injuries, "But mine was a significant injury. When I came back to work, [Employer] had told everyone that I just separated my hip, instead of breaking my arm in two places, separating my hip, and breaking my back in three places." Mr. Rhinehart has spoken to other hands about Employee's injury, but they do not want to "go on the record" because they are afraid they would lose their jobs. Although everyone is supposed to fill out an injury report when they get hurt, only about 60 percent of the injuries are reported, according to Mr. Rhinehart. This is because of the safety bonus issue and because employees are told Employer might not get another contract if its injury ratings are high. Once, Mr. Rhinehart cut his hand and required stitches, but Employer found a different job for him so he could continue working at the same rate of pay. It was also common knowledge among the crew that injured employees could be let go or fired, although Mr. Rhinehart acknowledged he does not have firsthand knowledge of Employer's personnel policies. Mr. Rhinehart thinks two employees, Dave Williams and Josh Sands, were fired after being injured. The basis for Mr. Rhinehart's belief in this regard is information provided by Mr. Williams and Mr. Sands and not Employer. Mr. Rhinehart has not only seen roustabouts, but also floor hands, derrick hands and pit hands slip on the rig floor, which is slippery all the time. When this happens, Mr. Rhinehart then described what transpires next: "They pretty much ask us, 'Is it bad enough that we have to write this up?' And they'll just kind of discernly [sic] look at you, you

know. And you'll go, 'No, it ain't.'" Therefore, according to Mr. Rhinehart, it is not unusual for slip and falls on the rig floor to go unreported. (Rhinehart deposition, January 11, 2017).

48) On January 17, 2017, David Bounds testified he has worked in the oil fields "just about my whole life," and he has worked with, and been friends with, Employee for a long time – between 10 and 20 years. Mr. Bounds began working for Employer in 200, and last worked for Employer in 2014. He and Employee were "real good friends." Prior to 2011, Employee could perform the physical demands of his job and he did not show any signs of memory loss or dementia. In Mr. Bounds' experience, workers will usually get transferred to the yard when they get hurt. Mr. Bounds explained, "When somebody gets hurt on a rig, emails go out . . . ." Mr. Bounds learned about Employee being injured from a safety bulletin email. The safety bulletins do not disclose the name of the injured person, so Mr. Bounds inquired at Employer's Operations Center and was informed Employee had fallen and was going to be sent to the yard for a day or two. Mr. Bounds thinks he either asked Cal Smith, or an employee named Tracy Quance, about the email. Mr. Bounds explained, if an injury is just a "first-aid visit," Employee would have been sent back to work, but if the injury was something that could lead to a lost-time accident, Employee would be taken off the rig. Mr. Bounds later saw Employee in person and Employee explained he had fallen and had been sent to the yard. After Employee returned home, he and Mr. Bounds talked on the phone. Employee could not understand why he did not have a job anymore. Employee was also told that Employer thought he had had a stroke, but Employee told Mr. Bounds that was "bullshit." Mr. Bounds described an incident where a work-hand was injured, and instead of the hand taking time off, he was sent to a rig for light duty, where he could "sit on [his] butt for 12 hours and [Employer could] keep paying em." "That way, there was no lost-time accident." When a crew has a lost-time accident, Mr. Bounds explained, they would not get their safety bonus. Mr. Bounds also explained, when a rig is making connections, mud comes out of the pipe and the steel floors get slippery. Mr. Bounds jokes with Employee because they are friends. When Employee told Mr. Bounds about falling and hitting his head, Mr. Bounds said, "Well, it didn't hurt ya then." Mr. Bounds also did not think there would be any paperwork that said Rig 245 was too big of a rig for Employee to handle. He stated, "I mean, as long as he has been in the oilfield he's worked on big rigs before." When asked why a supervisor would fill out a transfer document that stated Rig 245 was too big for Employee to handle, Mr. Bounds stated he had never heard of a document like that before. (Bounds deposition, January 17, 2017).

49) On March 6, 2017, Dr. McCormack testified Employee's hydrocephalus was a preexisting condition and Employee's head injury aggravated that condition, causing it to change from compensated hydrocephalus to uncompensated hydrocephalus. If Employee did not have preexisting hydrocephalus, the head injury would not have caused Employee any significant issues. Symptoms of hydrocephalus would include confusion, gait problems and urinary incontinence, according to Dr. McCormack. He would expect hydrocephalus symptoms to develop within a month since it takes a while for the spinal fluid to build up. Opining on causation, Dr. McCormack stated:

> Well, he – he'd had this in his head for years, up to 60. It was never diagnosed, so the question is: Why did it present then? I mean, I raise the question. . . . Well, I would say, you're asking the question, in a guy who's 60, who had this in his head for a long time, I would say more likely . . . it wasn't spontaneous. Something aggravated it. Because if it was spontaneous, why didn't he have symptoms at 50 or 40, or you know, some other point in his life?

Normally, hydrocephalus presents much earlier in life, and most patients are treated by pediatric neurosurgeons. Dr. McCormack did not see anything in the medical record that would explain Employee's difficulties with walking, other than the hydrocephalus. He explained, "Wernicke's is an acute encephalopathy due to . . . poor nutritional status and drinking a lot of alcohol. [Employee] probably drank a lot, but he was never malnutritioned or anything like that." Employee's diagnosis of Wernicke's encephalopathy was "offered by neurosurgeon acutely after surgery," and Dr. McCormack "just didn't think it was relevant." Dr. McCormack found no evidence Employee was an alcoholic or had a severe drinking problem. He acknowledged there are many uncertainties in determining causation, including Employee's delay in getting treatment. According to Dr. McCormack, if Employee's head injury aggravated the hydrocephalus, "He wouldn't be the one noticing the problem. I mean, it's like the family became alarmed when they talked to him. He was confused, so when someone has . . . fluid buildup on the brain . . . they often don't notice the problem." In patients with hydrocephalus, head injury is a known, accepted aggravating factor, which led to Dr. McCormack's conclusions. Dr. McCormack thought Employee's July 20, 2012 brain MRI, which showed an increased signal intensity in the periventricular white matter, represented edema due to the blockage of spinal fluid. He explained, "when . . . fluid builds up around the brain, it starts to get absorbed

by the surrounding brain, and that causes edema." In addition to hydrocephalus, Employee's brain MRI also shows he had a large stroke, an occluded carotid artery and small vessel changes, which can cause dementia. The further out Employee's symptoms developed, the less likely they are related to the work injury. Dr. McCormack opined Employee's hydrocephalus was medically stable by December 1, 2012, and from that date forward, Employee was unemployable for reasons other than his hydrocephalus, such dementia from stroke and small vessel disease. (McCormack deposition, March 6, 2017).

50) On March 27, 2017, Jason Haas testified he has worked in the oilfields since 2006 and last worked on the Slope in 2015. Mr. Haas did not work for Employer, but rather he worked for Nordic Calista Drilling. When an accident happens on the North Slope, BP, Conoco Phillips, and ENI will send out bulletins so everyone can learn from the accident and not make the same mistake. Mr. Hass attended a safety meeting in either 2010 or 2011, where an injury was discussed: "But it was kind of rolled out that they had taken him off the Slope and he dies later on of the complications of a stroke. They kind of made it seem like he fell because of the stroke." The rigs on which Mr. Haas has worked had guardrails near the trough to keep people from falling in. Mr. Haas stated the following regarding slippery rig floors: "You fall all the time. I have fallen a lot. Just part of the job." In Mr. Haas' experience, not all injuries on rigs are reported. He explained:

> Well, its kind of rolled out to you, if you have too many injuries on your rig, that everybody loses their job by bringing another rig in that doesn't have as many injuries. So if people get hurt on rigs and its minor and they can tough it out or whatever, they will do that so everybody doesn't lose their job.

Mr. Haas explained there are "fairly large" safety bonuses in the industry. These bonuses not only incentivizes workers to not have an injury, but also incentivizes supervisors to fire employees:

> I mean, if you had bosses up there above you that had the ability to hire and fire you and you do something, don't follow a rule and get inured, and its affecting them making an extra $15,000 at the end of the year, that gives them the incentive to get rid of you if you're getting hurt or have too many injuries.

This situation is a commonly understood among North Slope oilfield workers. (Haas deposition, March 27, 2017).

51) On May 8, 2017, Christy Limburg testified she is a registered nurse and was Employee's neighbor in Anchorage. She and Employee would run into each other and talk several times per week. Prior to Employee's work injury, "he got around normal" and "didn't have any issues with walking or driving or anything." Neither did Employee have any difficulties with communicating or comprehension. In October of 2011, Ms. Limburg received a phone call from Employee, who said he had been injured at work and was sent home early. Ms. Limburg remembered Employee was very weak and was having trouble walking. Employee was "really unsteady and just completely different than what he had been prior to going back to work on that particular assignment." Ms. Limburg explained:

> I had a lot of concerns. Being a nurse, I was very concerned. I actually thought he should go at least to the emergency room to be checked out. And he, at that point, said he was supposed to follow up with the company doctor.

At first, Ms. Limburg thought Employee had a stroke, but he did not improve. She lived right across from Employee and Employee would not come out of his apartment, so Ms. Limburg would go over to check on Employee. "[H]e was different." (Limburg deposition, May 8, 2017).

52) On May 11, 2017, Wayne Hickel testified he has worked in the oilfield industry since 1999. He was currently working as a roughneck in the Cook Inlet, but he also worked on the North Slope for "numerous years." Mr. Hickel worked for Employer from 1999 until 2001, and from 2005 until 2011. He worked for 12 years as a motorman, then he was slowly promoted to a roustabout and floor hand, and he now works as a driller. Mr. Hickel explained the driller is the supervisor of the rig crew. When the driller needs a break, the motorman will relieve the driller. Roustabouts work in the pipe shed, and the floor hands work on the rig floor latching pipe. Customarily, there is just one safetyman assigned to a rig. Mr. Hickel has never been on a rig where three safetymen were assigned to the rig. Upon being asked the significance of three safetymen being assigned to a rig, Mr. Hickel stated, "I would guess if there's there assigned, then they got some issues." When asked if the rig floor is always as clean as shown in Employer's photographic exhibits, Mr. Hickel explained,

> No. There's time where you have – you know, it's pretty oily, depending on what kind of drilling mud or what's going on, if you got done tripping in or out of the hole.[2] Just depends on – what part of the operation you're in.

Mr. Hickel remembers someone fell in the "skate" in 2011.[3] Mr. Hickel added he too has fallen in the skate [sic], and then stated: "I've seen a lot of other people have fallen in there," but later clarified his testimony: the "skate" is a piece of equipment that brings pipe or casing up to the rig floor and the opening in the floor where the skate comes through is called the "trough." Mr. Hickel described, "When someone falls in the skate, it's mostly - - I'll get up out of there, laugh about it, ha, ha, ha, and go on." Mr. Hickel remembers an employee, Aaron Baker, falling in the trough and his hard hat being covered in oil-based mud. After so many years working in the oilfields, so many employees have fallen in the trough that Mr. Hickel cannot remember all their names. Mr. Hickel remembers someone falling in the trough about the same time as Employee, but he could not recall who it was. When asked about the handrails shown in Employer's photographic exhibits, Mr. Hickel explained:

> There have not always been handrails. When you are drilling, the floor is completely covered and the rails are put away. Then if we happen to need some pipe coming up from the pipe shed, we'll remove the floor covering, depending on how much pipe. We're supposed to always put the handrails up. But sometimes, hey, we're just picking up one joint real quick, forget about the handrails, let's grab it, and then cover the floor back up.

According to Mr. Hickel, the handrails have been modified many times and he remembers Kevin Kane making new floor plates and handrails for the trough. Although Employer's policy is for employees to report all injuries, in Mr. Hickel's experience, not all injuries are reported. "If it were just a fall and you got a little bit of mud on you, wipe off the mud, go back to work." There is a shovel-shaped trolley on top of the skate, which pushes pipe up the skate. When operating the skate, Mr. Hickle does not bring it up as far as shown in Employer's exhibits, because "when you slack off with the elevators, the elevators won't hit [the skate], and it makes it easier on the floor hands for latching the pipe." Mr. Hickel also thinks Employer's video exhibit is only "kind

[2] The United States Department of Labor, Occupational Safety and Health Administration's *Oil and Gas Well Drilling and Servicing eTool* defines "tripping" as the operation of hoisting the drill stem out of and returning it into the wellbore; and "trip in" as to go into the hole; and "trip out" as to come out of the hole. (December 20, 2017).

of sort of" accurate because it is "obviously a lot slower than what you would normally go." At the conclusion of his testimony, the follow exchange occurred:

> Q. You talked about tripping out of the hole – tripping pipe out of the hole. Is that different than latching up the pipe? [4]
>
> A. Yes. Tripping pipe out of the hole means we're coming from the well. So – and unless you're laying down sidewise, you wouldn't need the skate. You would be standing pipe back up, into the derrick. And that length would be three times because it's a triple pipe there. So each stand would be 90 foot plus.
>
> Q. Oh, okay. So this picture we see of the two hands here in the elevator, that would not be tripping pipe?
>
> A. No. That would be picking up pipe.[5]

(Hickel deposition, May 11, 2017).

53) On May 11, 2017, Sam Banse testified he has worked for Employer as a rig electrician for the last six years, and he worked on Rig 245 from March of 2011 until June of 2012. Mr. Banse confirmed he had spoken to Ms. Ferrell on several occasions and reviewed their August 5, 2015 email prior to testifying. Mr. Banse stated he does not recall Ms. Ferrell's email message, but does recall speaking to her just before she emailed him. He then explained, "And when we spoke, I was thinking about a separate issue, a separate incident that happened a long time ago back in the Marine Corps. . . . So I was confused and mixed up and I just responded to the email." Mr. Banse further clarified his testimony: "I was referring to a separate incident that happened a long time ago in the Marine Corps where someone fell." Mr. Banse denied he had heard of Employee or anyone else falling on the rig in 2011. (Banse deposition, May 11, 2017).

54) For reasons that follow, Mr. Banse is not credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

[4] The United States Department of Labor, Occupational Safety and Health Administration's *Oil and Gas Well Drilling and Servicing eTool* defines "latch on" (latching) as to attach elevators to a section of pipe to pull it out of or run into the hole. (December 20, 2017).

[5] The United States Department of Labor, Occupational Safety and Health Administration's *Oil and Gas Well Drilling and Servicing eTool* defines "pick up" as 1. to use the drawworks to lift the bit (or other tool) off bottom by raising the drill stem. 2. to use an air hoist to lift a tool, a joint of drill pipe, or other piece of equipment. (December 20, 2017).

55) On June 15, 2017, Employer requested an opportunity to cross-examine Dr. Rahimifar on his December 27, 2016 check-the-box type answer to Mr. Jensen's October 4, 2016 inquires. (Employer's Request for Cross-Examination, June 15, 2017).

56) On July 13, 2017, Employee filled affidavits claiming $68,152.50 in attorney fees, $32,386.50 in paralegal costs, and $4,041.86 in litigation expenses, for a grand total of $104,580.86. Attorney time was billed at a rate of $385 and $400 per hour, while paralegal time was billed at $165 and $195 per hour. (Employee's fee affidavit, July 13, 2017).

57) On July 17, 2017, Dr. Bell testified, at the time of her first EME, Employee had "considerable" memory problems, so she had to rely on information Employee's daughter provided her, as well as information Employee provided and information in the records. Employee's imaging findings may be consistent with his condition [aqueductal stenosis and hydrocephalus] but unrelated to his presentation. Instead, she thinks Employee sought medical treatment for multiple complications from his underlying conditions, such as vascular disease and alcoholism. Employee had a combination of factors affecting him, including ongoing deterioration related to alcoholism and evidence of past strokes from vascular disease. Dr. Bell stated, the "acute presentation, when he ended up being hospitalized and diagnosed with hydrocephalus, I believe was a presentation of Wernicke-Korsakoff syndrome rather than hydrocephalus." If Employee had suffered a head injury, Dr. Bell would have expected symptoms to develop within a couple of days. One of the classic features of Korsakoff syndrome, is patients "confabulate," "[t]hey make things up" to compensate for memory loss. There was "very strong evidence," according to Dr. Bell, Employee had been abusing alcohol. The improvement in Employee's gait was not the result of the shunting, but rather resulted from thiamine being administered. Dr. Bell does not "see any indication that hydrocephalus was the cause of [Employee's] deterioration and that the shunt has cured his condition." On cross-examination, Dr. Bell testified Employee did not tell her he was an alcoholic and neither did Employee's daughter volunteer Employee was an alcoholic. Cross-examination regarding page 5 of Dr. Bell's EME report, was as follows:

> Q. And he told you he denied excessive alcohol usage despite the fact that his wife was an alcoholic. What did you mean by -- first of all, is that what he told you?
>
> A. That's what he told me.

Q. What did you mean by despite the fact that his wife was an alcoholic? Did he tell you despite that, or is that something that you interjected?

A. I'm not sure why I chose that exact phrasing. Perhaps because it is pretty common that couples will both abuse.

Q. So that was an assumption on your part; is that correct?
. . . .

A. Well, I just said that I believe - - he admits to drinking, and his wife is an alcoholic. So I guess the only - - there is no assumption there. I believe all the medical evidence point to [Employee] being an alcoholic.

Q. We'll talk about that in a second. The next sentence on page 5 was, "He said he never drank more than 1 to 3 beers per week and rarely uses alcohol at this point." Is that what he told you?

A. Yes.

Q. So when you say there's medical evidence of him being an alcoholic, what are you relying upon? And wouldn't you have noted that in your report, this evidence?

A. It was my impression from all the records I reviewed. And looking at my report right now, I'm trying to find any specific reference. But it was my impression from the information, for example, from the August 9th, 2012, admission and other references in the medical records, that he was abusing alcohol.

Q. Was there any - - did you note any medical tests that confirmed he was using or abusing alcohol?

A. I'm looking. But really - - it's very difficult to test that medically, so . . .

Cross-examination on the subject of Wernicke's encephalopathy follows:

Q. Now, as far as the clinical diagnosis, there's only been one other doctor who mentioned Wernicke's encephalopathy; am I right?

A. Yes.

Q. Did Dr. Wiebe say that when he first saw [Employee] in July of 2012?

A. I did not see him make that diagnosis at that time.

Q. Did he make that diagnosis after August of 2012?

A. I'm reviewing the report. What he did was he said that his postsurgical course complicated by features of Wernicke's encephalopathy. So he was talking about it at the time of a follow-up visit as opposed to during the hospitalization.
. . . .

Q. And then he was immediately seen - - or shortly thereafter, wasn't he seen by Dr. Rahimifar, neurosurgeon?

A. I wasn't clear that Dr. Rahimifar was a neurosurgeon.

Q. But he was seen by Dr. Rahimifar after Dr. Wiebe?

A. He was.

Q. And Dr. Rahimifar has never made that diagnosis, has he, of Wernicke's encephalopathy?

A. He did not make that diagnosis.

Q. In fact, no doctor other than - - no treating doctor has made that diagnosis other than this one report dated August 9, 2012 by Dr. Wiebe?

A. He was the one who took care of him during the acute illness and the hospitalization. So he would have been the one who had the most information to make a diagnosis. Dr. Rahimifar appears to have obtained the majority of his history from [Employee's] daughter.

Q. But Dr. Rahimifar, he would be able to make a clinical diagnosis, if it existed, for Wernicke's encephalopathy, wouldn't he?

A. Not post hoc, not after its been treated.
. . . .

Q. Now, the Wernicke's encephalopathy is caused by the B1 deficiency; am I right?

A. Actually, it's probably multiple factors. It's doubtful that it's only one vitamin deficiency. . . .

Q. Was there any blood testing to confirm he had such a deficiency?

A. I didn't see - - I doubt they tested it. Because, again, its more important to treat the condition than to prove that it existed. That's why anyone coming in

> with a presentation that is suspicious for this is given a very high dose thiamine to hopefully improve it.

Next, the following exchange occurred regarding short-term versus long-term memory loss:

> Q. And, when you say short-term memory loss, like things you had for breakfast, would that include events that happened in your life months earlier?
>
> A. Well, if you were forming the memory at the time you had the memory loss - - so the point is if you don't form the memory in the short-term, then it's not there in the long term. So it would depend on when the condition happened.
>
> Q. So he would have a memory of a fall, wouldn't he, if he didn't develop the Wernicke's encephalopathy that you are attributing as the cause of his problems?
>
> A. I'm not saying Wernicke's only causes short-term memory loss. It also can cause long-term memory loss. What I said was it doesn't distinguish between the different dementias. They're all associated with short-term memory loss.
>
> Q. But there's no evidence here that he has long-term memory loss; am I correct?
>
> A. No, you're not correct.
>
> Q. Okay. Which doctor says he has long-term memory loss?
>
> A. He . . .
>
> Q. Is there any medical evidence he has long-term memory loss that you put in your report, documented in your report?
>
> A. No, there is not.

Cross-examination regarding Employee's improvement following his shunting surgery follows:

> Q. Okay. There was a report dated May 15 of 2014 where it says that he's had a 30 percent improvement since surgery. Would that be consistent with him having a progressive worsening of dementing disorder that you've diagnosed?
> . . . .
>
> A. You know, you're looking at one isolated comment. . . .

Employee's hydrocephalus, according to Dr. Bell, resolved with his shunting procedure. Even if Employee did fall, Dr. Bell thinks "there's no indication that [Employee] experienced an acute neurological deterioration." Although Dr. Bell thinks a fall on top of aqueductal stenosis could

cause hydrocephalus, she does not think Employee's fall contributed to it in his case. (Bell deposition, July 17, 2017).

58) On July 19, 2017, Employee supplemented his fee affidavits and claimed an additional $4,600 in attorney fees, $487.50 in paralegal costs and $2,330.62 in litigation expenses for a new grand total of $111,998.98. (Employee's supplemental affidavit, July 19, 2017).

59) In his opening statement at hearing, Employee acknowledged, outside of his own testimony, much of his case is "circumstantial," since many of his witnesses either testified he told them about his fall, or someone else told them about his fall, or they heard about his fall in a safety meeting. (Record).

60) At hearing, Employer contended the evidence shows Employee, physically, could not have fallen in the manner he describes. Specifically, it contended Employee could not have been holding onto the elevator horn with his right hand, while reaching for the other elevator horn with his left, as he fell. Employer also contended there would not have been space in the trough where Employee could have fallen because, when the skate is in its upmost position, it occupies the trough. (Record).

61) At hearing, Employer offered a videotape and still photographs as exhibits, which purportedly show pipe latching operations on Rig 245. Employee also offered still photographs as exhibits, which purportedly show portions of Rig 245. Employee pointed out inconsistencies in physical features of the rig(s) shown in Employer's exhibits, and he disputed the accuracy those exhibits. (Record; Employee's Hearing Brief, July 12, 2017).

62) At hearing, Ken Davidson testified he began working for Peak Oilfield Services and then worked for Employer until he was laid off in 2015. He worked as a roustabout and then had a "career as a pit watcher." Mr. Davidson worked on Rig 245 for five years and described relevant portions of the rig, such as the trough. The floor on the rig can be wet, slick and oily, and it is not uncommon for workers to fall into the trough, according to Mr. Davidson. Employer has tried to modify the pipe skate and the trough "a few times" to make them safer, including the installation of handrails, flashing lights and floor plates. Mr. Davidson has worked with Employee a few times and stated it was very common for roustabouts to fill-in for other hands. Mr. Davidson heard about Employee falling into the trough through "boiler room scuttlebutt," and it may have also been discussed at one of the safety meetings. Jokes were being made about Employee, such as "the goofy old guy fell down the hole there." When asked about the "safety

culture" on the Slope, Mr. Davidson stated all injuries are most definitely not reported. It used to be that no injuries were ever reported, then a "corporate creep" came into the safety world and Employer wanted you to report everything. Next, when employees began reporting every little thing, you would get a reputation for reporting a bunch of little "boo-boos" and then people would not get hired back, so people stopped reporting injuries. Mr. Davidson recalls one incident where a worker fell onto the ramp and slide down it while it was in the down position. That incident may have precipitated installation of the handrails around the trough. (Davidson).

63) Mr. Davidson is credible. (Experience, judgment, unique or peculiar facts of the case, and inferences drawn therefrom).

64) At hearing, Employee testified regarding places he has lived and different jobs he has held. In 2011, his wife, who had an alcohol problem, passed away from cancer. Employee took care of his wife during her illness. He acknowledged telling Dr. Bell he drinks. On the day of his injury, Employee brought 15 meals to the rig and he relieved floor hands between 5 a.m. and 6 a.m. so they could eat. Hands would take turns eating in the breakroom while work continued. When Employee relieves another employee, he is supposed to notify the driller, but on this day, the driller was in the breakroom. Employee was latching pipe and there was oil-based mud on the floor. When the elevator did not "set" on a pipe, Employee was wrestling with it, when he slipped and fell and hit his head. He fell into the trough, which is about chest high. Employee had to walk further down the trough to retrieve his hard hat. Then, Employee used his shoulders and arms to get out of the trough. Cal Smith helped him out of the trough and asked him if he was okay. Employee felt the back of his head and it was wet and sticky. Employee determined his head was not wet with blood, but rather oil-based mud, so he continued to work and finished his hitch. Employee recalls workers were getting ready to move the rig because they were done with that well. There were no handrails around the trough when Employee fell. Employee thought he was latching pipe when he fell and the skate was not extended. When asked how he could have fallen when the skate was not extended, Employee indicated the flooring shown in the photographic exhibits was not present. After his two-weeks off, Employee returned and was assigned to the yard. He does not recall having any problems performing his duties and he re-certified for the man lift and took a driving test. Employee does not recall having any problems with his memory or experiencing any confusion or problems with his balance, although he was having problems coordinating his hands while handling bolts. An employee named Jimmy Frisk

notified him Employer thought he had had a stroke and was done for the day. Employee packed his belongings and left the next day. When Employee arrived in Anchorage, he called his neighbor for a ride, but she was on her way to work, so he had to take a cab home. At that point, Employee knew "something wasn't quite right," but he did not see a doctor because it was the weekend. While at home, Employee called Employer and spoke to either Belinda or Joan, and was told he had been laid-off for "lack of work." He was 62 years-old and he applied to Social Security for early retirement. At this point, his daughter thought something was wrong, but Employee did not think so himself. Employee's daughter took him back to her home in Bakersfield. Since Employee received his shunt, his memory has improved, though he still has problems with his balance. Employee confirmed David Bounds had joked with him about hitting his head. On cross-examination, Employee confirmed he was latching pipe and not casing. He also confirmed, at the time of his fall, he was pushing in the horn with his right hand and reaching for the horn with his left. When queried about the skate being lifted at the time of his fall, Employee stated the photographic exhibits do not "look the same," "something has been added," and the "kick plate wasn't there." Employee explained the difference between pipe, tubing and casing: pipe is used for drilling, tubing is used for production, and casing is used to protect the well bore. Employer's photographic exhibits are not an accurate depiction of Rig 245 at the time of his injury. There were no handrails and the removable floor plates covering the trough were not present. Employee explained the trough extends about three feet beyond the end of the skate, and further explained the skate does not have to move "all the way up" because the shoe is also pushing the pipe up, as well. (McNamee).

65) For reasons that follow, Employee is credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

66) At hearing, Employee's daughter, Christy Ferrell testified she lives in Bakersfield, California and Employee would visit her once or twice a year. Prior to Employee's injury, Ms. Ferrell had never been to Alaska. Employee's wife, who had cancer, was her stepmother. Employee's role as a caregiver for his wife involved handling a lot of medication, grocery shopping, doing laundry, running to the pharmacy and attending doctors' appointments. When Employee's wife died, Employee flew her ashes back to Wisconsin. After Employee returned from Wisconsin, he told her he thought it was time for him to go back to work because he did not think he could sit around his apartment. Employee would typically call Ms. Ferrell before

leaving for his hitches and again upon his return home. Employee would typically send Ms. Ferrell $500 for her three children at Christmas. At the end of November 2011, Employee called her because he did not think he could send the money that year. Ms. Ferrell received another call from Employee because he had received a three-day eviction notice and did not think he could pay rent, so Ms. Ferrell and her brother paid Employee's rent. This struck Ms. Ferrell as very unusual because Employee paid his bills one month in advance in case of a lay-off. On April 30, 2012, Ms. Ferrell's brother called her because he had just gotten off the phone with Employee and was concerned because he thought Employee sounded very confused. Ms. Ferrell then called Employee and she "got the same thing." Therefore, Ms. Ferrell travelled to Anchorage, and when she arrived at the airport, Employee was walking sideways with his arms out. In the parking lot, Ms. Ferrell observed Employee had parked in the opposite direction of other cars. Employee was very confused, according to Ms. Ferrell. When Ms. Ferrell arrived at Employee's apartment, she found there was no food in the refrigerator, there was "stuff" piled up on the kitchen counters and there was a path through dirty laundry in the apartment. Ms. Ferrell boxed up Employee's belongings and took Employee back to Bakersfield. Once back in California, on a trip to Los Angeles, Employee was "rambling," and when they came upon the San Diego overpass, Employee remarked, "If it wasn't for that fall, I'd still be working." Ms. Ferrell attended Employee's appointment with Dr. Dozier for Social Security benefits. Employee used a walker at that appointment and she observed Employee falling into the hallway wall. Ms. Ferrell urged Employee to see another doctor, but Employee was "adamant" he did not need to go to another doctor. Regarding the May 30, 2012 email, Ms. Ferrell had called Employer to speak to Belinda, but Belinda was not in the office, so Ms. Ferrell left a message for Belinda that her dad had fallen at work and she was requesting information about workers' compensation. Ms. Ferrell received a return call from Belinda the next day, and was told, "Nabors doesn't do workers' comp." Ms. Ferrell explained, Employer did not provide her with a claim form, but rather "workers' comp. did." After Ms. Ferrell obtained the TOUR reports, she called Mr. Turcotte, who wanted to know how Ms. Ferrell got his telephone number and told Ms. Ferrell he was not going to answer any of her "god-damned questions." Ms. Ferrell also recounted her telephone conversations with other employees who were not deposed, and who purportedly confirmed Employee's fall. (Ferrell).

67) Ms. Ferrell's deposition and hearing testimony were both detailed and consistent, and she testified spontaneously at hearing. Ms. Ferrell is credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

68) At hearing, Belinda Wilson testified she was employed by Employer between 1977 and 2015. In 2011, she was Employer's Human Resources Manager and is familiar with Employee's workers' compensation claim history. Ms. Wilson first heard Employee might make a claim when Ms. Ferrell contacted the Anchorage office. Ms. Wilson confirmed she had spoken to Ms. Ferrell, who explained she wanted to file a claim because Employee had been injured in the workplace. When Ms. Wilson received Employee's report of injury, she had no knowledge of the incident mentioned in Employee's report. Ms. Wilson subsequently participated in Employer's investigation and she never found any evidence there had been an injury. If there had been, she would have reported it and "go through all the mechanisms" of Employer's workers comp adjuster, Northern Adjusters. Ms. Wilson denies she told Ms. Ferrell, "Nabors doesn't do comp." In 2011, Employee worked on Rig 245, but the rig requested Employee be sent to the yard because they thought the yard would be a good fit for Employee versus working on the rig. Employee was eventually laid-off due to lack of work. Ms. Wilson saw Employee in-person a short time later when Employee was checking on unemployment and health insurance benefits. She did not notice any change in Employee's demeanor or cognitive abilities and Employee did not inform her of an injury at that time. Ms. Wilson is not aware of any reason to believe Employee had an injury and she expects injuries to be reported. No fall was reported in Employee's case. Ms. Wilson has handled other workers' compensation "reports" in the past. On cross-examination, Ms. Wilson stated she knows what the "number of days since the last recordable incident" means on the TOUR reports, and explained this number represents the number of days since the rig encountered a recordable "accident." Then, when asked about the August 28, 2011 TOUR report, which shows the number of days since the last recordable incident was 39, Ms. Wilson denied knowing what that number meant and referred Employee's attorney to the "HSC rep" to determine the number's significance. Ms. Wilson testified she "would have no idea why the August 29, 2011 TOUR report would indicate zero days since the last recordable incident. When Employee came to Employer's office, Ms. Wilson acknowledged she only talked with him for about 15 minutes, and Employee was seated at the time, so she would have been unable to observe if Employee was having a problem with his balance. Ms.

Wilson was asked whether she was "on notice" at the time of Ms. Sato's May 30, 2012 email, informing her that Ms. Ferrell was requesting a workers' compensation form, that there was a possible injury. Ms. Wilson was not "really sure" because she did not know Ms. Ferrell's relationship to Employee. Next, when Ms. Wilson was reminded that Ms. Sato's email identified Ms. Ferrell as Employee's daughter, and Ms. Wilson was asked if she "must have known" Ms. Ferrell was Employee's daughter, Ms. Wilson answered "yea, I did" and then stated she recognized Ms. Ferrell's name from Employee's paperwork. Then, Ms. Wilson was asked, since Ms. Sato's email informed her Ms. Ferrell was requesting a workers' comp form, whether she was "on notice" that Ms. Ferrell and Employee suspected a work injury, Ms. Wilson stated, "yea, I don't know, for sure." When Ms. Wilson was asked how she investigated Employee's injury, Ms. Wilson explained, when Ms. Ferrell called, she called Employer's corporate office and it "took over." Thereafter, Employer's corporate office and Northern Adjusters "directed" Ms. Wilson regarding further contact with Ms. Ferrell. Ms. Wilson acknowledged she did not investigate Employee's injury, but rather just wrote down the "statement of record." Ms. Wilson believes the Health & Safety Committee investigated Employee's reported injury, but she repeatedly stated she does not know, "for sure," whether Employee's injury was investigated. Ms. Wilson denied slip-and-falls and other minor injuries are not reported and stated, "as far as she knows," all injuries are reported. If an injury is not reported, Employer "makes [employees] report everything we're aware of," but Ms. Wilson later acknowledged she would first have to be aware of an injury before she could instruct the employee to report it. According to Ms. Wilson, Joan Sato no longer works for Employer, but Ms. Wilson does not know why, "for sure." She also stated Employer requires employees to report everything Employer knows about. Ms. Wilson does not know, "for sure," why Employee was transferred to the yard, and she denied speaking to numerous specific employees regarding Employee. Ms. Wilson did assist Northern Adjusters by providing documentation for workers' compensation claims, but denied any knowledge of why Employer's October 30, 2013 and October 31, 2013 FROIs state Employer was notified of Employee's injury on October 16, 2011. (Wilson).

69) For reasons that follow, Ms. Wilson is not credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

70) At hearing, Matthew Turcotte testified he has worked as a driller for Employer for 30 years and has worked on Rig 245. His duties as a driller are overseeing operations, which includes

running the rig, drilling the hole, running the crew and checking the pipe tally. Employee was on Mr. Turcotte's crew on Rig 245. Mr. Turcotte explained the purpose of the TOUR reports is to track pay, the type of pipe being used and the type of mud encountered while drilling. One can tell who was on the rig from the TOUR reports, according to Mr. Turcotte, and accidents are also tracked in the reports. Mr. Turcotte explained ENI Petroleum was the operator of Rig 245 and it pays Employer to operate the rig. During the hitch in question, Employee was filling in for someone else as a roustabout and "mainly" worked in the pipe shed because he was having difficulty getting up and down the stairs and was out of breath all the time. Mr. Turcotte stated Employee never worked on the rig's floor and Employee would not be on the rig's floor without him assigning Employee to the rig's floor. He further explained that the crew was aware Employee was not to work on the rig's floor and only he had authority to assign Employee to the rig's floor. According to Mr. Turcotte, drill pipe is distinct from casing and tubing and it is easy to distinguish. Mr. Turcotte had reviewed the TOUR reports for the relevant time-period and Employee is incorrect - the rig was not latching pipe at the time of Employee's injury. If Rig 245 had been latching drill pipe, it would be described in the TOUR report as "picking up drill pipe," under the "Details of Operation in Sequence and Remarks." An "incident" can occur where no one is injured, according to Mr. Turcotte. In such a case, Mr. Turcotte would make note of it and inform the toolpusher, who would then send the employee to the medic and fill out an incident report. Mr. Turcotte stated it is Employer's policy to "report all incidents," and "report all injuries," and these policies are followed and enforced. There is no "down-side" for an employee, or himself, to report an injury, but there is a downside for not reporting - "If you don't report it there is a good chance you'd lose your job if they found out and you got hurt." If an employee had a stroke, the medic would be called and that employee would be medically evacuated. Mr. Turcotte described Employer's safety bonus program and stated employees have to report injuries to get the bonus, and if they do not report injuries, they do not receive the bonus. He also described the process of latching drill pipe in conjunction with Employer's videotape and photographic exhibits. Mr. Turcotte explained if he was having breakfast and someone was injured, the rig would stop and he would feel the rig had been stopped. There have been no changes to Rig 245 since 2011, according to Mr. Turcotte, and Employer's exhibits were accurate representations of what Rig 245 would have looked like at that time. He was "pretty sure" the handrails depicted in the photographic exhibits were present in 2011. Mr. Turcotte

explained oily mud does not get on the floor during latching, but rather only when making a connection and drilling, and when the pipe comes out of the hole. He explained picking up drill pipe is different than laying down drill pipe. When laying down drill pipe, the pipe is picked-up out of the hole, the joint is unscrewed, then pushed onto the skate with the elevator's assistance, and once the end of the pipe is on the skate, the driller will "slack off," and after the pipe is on the skate, the elevator is unlatched from the pipe. According to Mr. Turcotte, laying down pipe is the reverse operation of what is shown in Employer's video exhibit. Mr. Turcotte did not think it would have made sense for Employee to have been reaching for the left horn with his left hand, as Employee described, and he does not think it is possible for Employee to have fallen in the manner Employee described. When asked about the absorbent mat in Employer's video exhibit, Mr. Turcotte was initially caught off-guard and stated he did not know. He then speculated it may have been raining at the time the video was recorded. Next, he explained, "normally, when you have . . . mud in the hole, a lot of times they put that down." If someone did fall in the trough, Mr. Turcotte thinks at least four other people would see the fall, and the toolpusher would write-up an incident report. The fall would also be discussed in safety meetings. Mr. Turcotte would have heard about Employee's fall at the time, but he did not. He also talked to his crew personally, including Cal Smith, but they denied any knowledge of Employee's fall. Mr. Turcotte was involved in moving Employee to the yard and did so because Employee "was not fit for duty on that big of rig." On cross-examination, Mr. Turcotte denied he was getting ready for a rig move. He testified, it was possible for the crew to have been latching pipe while Mr. Turcotte was on a break, and he confirmed it is common practice for roustabouts to fill-in for floor hands to afford the floor hands a break. Mr. Turcotte believes all slip-and-falls are reported. Mr. Turcotte explained, in 2011, employees would get a safety bonus if they reported all injuries. He then explained, if no injuries were reported, employees would still get a bonus, at which point, Mr. Jensen remarked he does not understand the bonus. Mr. Turcotte explained TOUR reports are type-written by the driller from the driller's handwritten tally book. The TOUR report entries for August 24, 2011 and August 25, 2011, which indicate "completion trip tubing," would have involved latching tubing to pick it up. Regarding his conversations with Ms. Ferrell, the first time Ms. Ferrell called, Mr. Turcotte "got rid of it." A few months later, Ms. Ferrell called Mr. Turcotte as he was sitting down for dinner with his family. Mr. Turcotte initially denied knowing about Employee's fall, but Ms. Ferrell insisted he

had witnessed the fall. Mr. Turcotte became annoyed while testifying about his conversations with Ms. Ferrell and he stated "She's done this to a lot of people." He also explained absorbent pads are used when drilling and making a connection because you get oil-based mud on the floor. When a rig is moved, normally pipe is taken out of the hole days before. When it was pointed out to Mr. Turcotte that the August 27, 2011 TOUR report references a rig move, Mr. Turcotte denied any pipe would have been picked-up leading up to that date. He also confirmed the flooring shown in Employer's exhibits is removable. Mr. Turcotte is aware of a hand falling in the trough once when he was a "tour pushing," but was not aware how it happened. He sent that hand to the medic at the time. Mr. Turcotte also explained the number of days since last recordable incident on the TOUR reports is changed to zero when the rig is moved to a new well. (Turcotte; record, experience, observations).

71) For reasons that follow, Mr. Turcotte is not credible. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

72) At hearing, David Herbert testified he has been Employer's Area Manager since 2003. Employer's safety incentive program was to reward employees for following policies and did not punish them for reporting a recordable injury. Employer's policy is for employees to report all incidents and injuries. At the time in question, Rig 245 was 50-60 miles from Employer's operation center and it would not have been practical to send Employee to the yard to get breakfast. According to Mr. Herbert, the TOUR reports are a legal document, since they are used to bill the rig operator. Mr. Herbert worked on a rig from 1978 to 1994 and, like Mr. Turcotte, he has reviewed the TOUR reports and he did not find any record of latching drill pipe. An experienced hand would know the difference between pipe, casing and tubing. If a hand did fall in the trough, Mr. Herbert would expect the employees to stop operations, have the employee seen by the medic and ascertain the reason for the fall to prevent it from happening again. Mr. Herbert would expect employees to come forward if there were a fall. Although he is aware of one fall in January or February of 2012, he was not aware of anyone falling at the time of Employee's injury. Neither is Mr. Herbert aware of any changes made to Rig 245 since August of 2011. Mr. Herbert asked the HSC Manager and the Superintendent to investigate Employee's reported injury, but they could not find any evidence Employee fell. Employer's videotape exhibit is a fair and accurate representation of Rig 245, according to Mr. Herbert, and the trough is not visible when the skate is up while latching pipe. On cross-examination, Mr. Herbert stated

injured personnel are transferred to the yard until they are capable of returning to full duty. He also explained pipe is used to drill the well, casing is used to line the well, and tubing is used to transport oil from the bottom of the well. Mr. Herbert confirmed clients do look at Employer's safety record. (Herbert).

73) Employer's TOUR reports document Employee working on Rig 245 from August 17, 2011 through August 26, 2011, along with Mr. Turcotte, Sam Banse and Cal Smith.[6] During this period of time, some of the activities Rig 245 performed during the day tour included:

> August 17, 2011: "ROTARY DRILLING," "CIRCULATE AND CONDITION" and "BACK REAMING."
>
> August 18, 2011: "ROTARY DRILLING."
>
> August 19, 2011: "ROTARY DRILLING," and "CIRCULATE AND CONDITION."
>
> August 20, 2011: "BACKREAMING"
>
> August 21, 2011: "LAY DOWN BHA, BREAK BIT L/D PERICOPE & EXCEED," "LAY DOWN 3RD PARTY TOOLS," "RUN CASING," and "RUN LINER."
>
> August 22, 2011: "RUN LINER," "PULL LINER," "CUT DRILLING LINE," "SERVICE TOP DRIVE."
>
> August 23, 2011: "LAY DOWN DRILL PIPE." [7]
>
> August 24, 2011: "RIG UP/DOWN TO RUN CASING," and "COMPLETION-RUN."
>
> August 25, 2011: "COMPLETION-RUN."
>
> August 26, 2011: "COMPLETION-RUN"

The reports also document one safety person working the day tour during this period of time, except for August 25 and August 26, 2011, when no safety person worked on the rig. On August

[6] The United States Department of Labor, Occupational Safety and Health Administration's *Oil and Gas Well Drilling and Servicing eTool* defines "tour" (pronounced "tower") as a working shift for drilling crew or other oil field workers. (November 28, 2017).

[7] The United States Department of Labor, Occupational Safety and Health Administration's *Oil and Gas Well Drilling and Servicing eTool* defines "lay down pipe" as to pull drill pipe or tubing from the hole and place it in a horizontal position on a pipe rack. (December 20, 2017).

27, 2011, a new crew began their hitch on Rig 245, and the evening TOUR reports states, "RIG UP. PREP FOR RIG MOVE." On August 28, 2011, the following events took place:

> DEMOBILIZATION RIG RELEASED @ 0600 HOURS. RIG ACCEPTED TO OP-17-02 @ 0601. DEMOBILIZATION DISCONNECT INNER CONNECT THROUGHOUT RIG. FOLD UP WALKWAYS. JACK RIG MODULES UP ON CRIB BLOCKS. MOBILIZATION MOVE DRILL SIDE RIG MODULE OVER HOLE CENTER. MATE UP UTILITY MODULE. JACK DOWN MODULES ON RIG MATS. LEVEL UP. MOBILIZATION R/U FLOW LINES AND DE-GASSER LINES. HOOK UP INTERCONNECTS. SET CELLAR BOX DOWN. SWAP POWER TO 399 GEN SETS.

The September 17, 2011 report documents the following event: "SERVICE RIG JT FELL BETWEEN ELEVATOR AND SKATE, HAD TO RU COME ALONGS AND GET IT OUT." From September 15, 2011 through September 20, 2011, the reports show three safety persons worked on Rig 245 during the day tour. The reports then show, on September 21, 2011, safety personnel on Rig 245 was reduced to two, and on September 22, 2011, safety personnel on Rig 245 was reduced back to one. Other reports document Employee's work at the Nabors Operations Center (NOC), or "the yard," from September 15, 2011 until October 15, 2011. (International Association of Drilling Contractors (IADC) Tour Reports, August 1, 2011 to October 21, 2011; Pre-Tour Health Safety and Environment Office (HSEO) Meeting Minutes and Pre-Job Checklists, September 15, 2011 to October 15, 2011).

74) The parties agree Employee worked in the yard from September 10, 2011, through September 23, 2011, and from October 9, 2011, through October 15, 2011. On October 16, 2011, Employee was flown back to Anchorage. (Employer's Hearing Brief, July 12, 2017; Employee's Hearing Brief, July 12, 2017; Airline receipt, October 15, 2011).

75) On July 24, 2017, Employee supplemented his fee affidavits and claimed an additional $8,200.00 in attorney fees, $214.50 in paralegal costs and $390 in litigation expenses, for a new grand total of $120,803.48. Overall, Employee's claimed totals were $114,041 in attorney fees, $33,088.50 in paralegal costs and $6,762.50 in litigation expenses. (Employee's supplemental affidavit, July 24, 2017).

76) Employer did not object to Employee's claimed attorney fees, costs or his affidavits. (Record).

PRINCIPLES OF LAW

The board may base its decisions 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).

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

> **AS 23.30.010. Coverage**. Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an Employee if the disability . . . or the Employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the Employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (c) . . . . If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve

> the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted.
>
> **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 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
> . . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
> . . . .
>
> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
> . . . .

The 30-day period in AS 23.30.100 can begin no earlier than when a compensable event first occurs. *Cogger v. Anchor House*, 936 P.2d 157; 160 (Alaska 1997). In *Ashwater-Burns v. Huit*, AWCAC Decision No. 13-0080 (March 18, 2014), an employee sustained a scratch to his abdomen while working on November 5, 2010. His condition worsened, and on December 9, 2010, the employee was taken to the emergency room, where he was diagnosed with a potentially fatal infection and endocarditis. At hearing, the employer sought dismissal of the employee's claim on grounds the employee did not report his injury until December 21, 2010, in violation AS 23.30.100. The employee successfully argued against dismissal by contending he was not seeking benefits for the scratch, but rather for the subsequent infection and endocarditis that resulted from the scratch. The board held the December 9, 2010 diagnosis was the first compensable event and the Commission agreed, noting the board' decision was supported by the

evidence and applicable law. *Id*. at 12; *aff'd on other grounds*, *Huit v. Ashwater-Burns, Inc.*, 372 P.2d 904 (Alaska 2016).

> **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 . . . .
>
> (c) The presumption of compensability established in (a) of this section does not apply to a mental injury resulting from work-related stress.

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id.* An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a

substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services*, 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **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 and weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009). If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial

evidence, it may rely on one opinion and not the other. *DeRosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013).

> **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 . . . .
>
> **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. . . .
>
> (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 a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

> Although the supreme court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (citation omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (citation omitted). Subsection (b) may apply to fee awards in controverted claims (citation omitted), in cases which the employer

> does not controvert but otherwise resists (citation omitted), and in other circumstances (citation omitted).

Uresco Construction Materials, Inc. v. Porteleki, AWCAC Decision No. 09-0179 (May 11, 2011).

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney's fees awarded by the board should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on the merits of a claim, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney's fees for the successful prosecution of a claim. *Id*. at 973, 975. Since a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs where the claims on which the claimant did not prevail were worth as much money as those on which he did prevail. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222; 242 (Alaska 1997).

> **AS 23.30.155. Payment of Compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it. . . .
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

In *Cannady v. Temptel*, AWCB Decision No. 17-0060 (May 25, 2017), the compensability of the claimant's medical benefits was not at issue, but rather whom the employer should pay. Medicaid had paid for the claimant's compensable medical care and the claimant contended his employer should pay his medical providers directly under the Act pursuant to the Alaska fee schedule, and his providers should then reimburse Medicaid. The employer contended Medicaid is the "person entitled to" payment, not the claimant's providers, so it should simply reimburse Medicaid.

Cannady found the issue raised important public policy and legal concerns and it analyzed each separately. Its policy analysis was based on the premise that the workers' compensation fee schedule provides greater remuneration to medical providers than does Medicaid, and the claimant's argument that employers should not profit from controverting claims by having to repay Medicaid at significantly reduced rates. *Cannady* concluded ordering the employer to reimburse Medicaid would be contrary to the Act's intent because doing so would create inappropriate incentive for employers to controvert claims, lengthen litigation and hope for taxpayer-funded Medicaid to provide payment for work-related medical services that should otherwise be paid for under the state's workers' compensation system. (Citing AS 23.30.001(1)).

Cannady's legal analysis examined numerous statutory and regulatory provisions, including the statutory definitions of "medical and related benefits," and "physician," and concluded, under AS 23.30.155(a), where a medical provider has unpaid bills for services rendered in a work-related injury, the insurer should pay the provider directly. (Citing AS 23.30.395(26), (32)). The more difficult question, according to *Cannady*, was whom should the employer pay when a third party has already paid the provider's bills?

To answer this question, *Cannady* consulted regulatory authority and found an employer's obligation to provide medical treatment extends only to those services furnished by medical providers, which are also defined by regulation. (Citing 8 AAC 45.082(a); 8 AAC 45.900(15)(A), (B)). *Cannady* concluded, "Given this statutory and regulatory background, the law favors requiring employers to pay medical bills for work-related injuries directly to the providers, even though a third party may have already paid the bills." As with its policy analysis, *Cannady* thought its legal conclusion was most consistent with the Act's intent, and "prevents [employers] from obtaining a windfall at the providers' expense, and requires the liable insurer rather than the taxpayer to pay for [the employee's] work-related medical needs." (Citing AS 23.30.001(1); AS 23.30.097(a); AS 23.30.095(a)).

Regarding the statute's interest provision, the Alaska Supreme Court has consistently instructed the board to award interest for the time-value of money, as a matter of course. *See Land and Marine*

Rental Co. v. Rawls, 686 P.2d 1187, 1192 (Alaska 1984); *Childs v. Copper Valley Electric Assoc.*, 860 P.2d 1184, 1191 (Alaska 1993). Given that Medicaid paid some of the claimant's medical bills in *Cannady*, that decision concluded the employer owed interest to Medicaid to compensate it for the loss of use of its money. It also concluded, since Medicaid pays medical providers less than the workers' compensation fee schedule, interest was also owed to the claimant's medical providers on the difference between what Medicaid paid them and what the employer was then obligated to pay.

> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. If a permanent partial disability award has been made before a permanent total disability determination, permanent total disability benefits must be reduced by the amount of the permanent partial disability award, adjusted for inflation, in a manner determined by the board. . . .
>
> **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.
>
> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
>
> **8 AAC 45.052. Medical summary.** (a) A medical summary on form 07-6103, listing each medical report in the claimant's or petitioner's possession which is or may be relevant to the claim of petition, must be filed with a claim or petition. . . . .
>
> (b) The party receiving a medical summary and claim or petition shall file with the board an amended summary on form 07-6103 within the time allowed under AS 23.30.095(h), listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's medical summary form. . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-

> 6103, if any new medical reports have been obtained since the last medical summary was filed.
> . . . .
>
> > (2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days after service of the affidavit of readiness for hearing.
> > . . . .

Alaska's worker's compensation system favors the production of medical evidence in the form of written reports, and this preference serves a legitimate purpose. *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819; 822 (Alaska 1974). However, "the statutory right to cross-examination is absolute and applicable to the Board." *Id.* at 824. The medical summary and request for cross-examination process set out in 8 AAC 45.052 was developed in response to the Alaska Supreme Court's decision in *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976) (holding the employer did not waive its right to cross-examine the employee's treating physicians). This decision is so firmly entrenched in Alaska's workers' compensation system that the objection to the admission of medical reports based on the unavailability of the author for cross-examination is commonly referred to as a "*Smallwood* objection." AAC 45.900(11).

Medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule. *Dobos v. Ingersoll*, 9 P.3d 1020; 1027 (Alaska 2000); *Loncar v. Gray*, 28 P.3d 928; 934-35 (Alaska 2001). However, letter's written by a physician to a party or a party's representative to express an expert medical opinion on an issue before the tribunal are not admissible as a business record unless the requisite foundation is established showing it is the physician's regular practice to prepare and send such letters. *Liimatta v. West*, 45 P.3d 310; 318 (Alaska 2002); *Geister v. Kid's Corps, Inc.*, AWCAC Decision No. 045 (June 6, 2007).

> **8 AAC 45.120. Evidence.** (a) Witnesses at a hearing shall testify under oath or affirmation. . . .

(c) Each party has the following rights at hearing:

(1) to call and examine witnesses;

. . . .

(3) to cross-examine opposing witnesses on any matter relevant to the issues even though the matter was not covered in the direct examination;

(4) to impeach any witness regardless of which party first called the witness to testify; and

(5) to rebut contrary evidence.

. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. . . .

(f) Any document . . . that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board . . . . The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

. . . .

(h) If a request is filed in accordance with (f) of this section, an opportunity for cross-examination will be provided unless the request is withdrawn or the board determines that

(1) under a hearsay exception of the Alaska Rules of Evidence, the document is admissible;

(2) the document is not hearsay under the Alaska Rules of Evidence; or

(3) the document is a report of an examination performed by a physician chosen by the board under AS 23.30.095(k) or AS 23.30.110(g).

. . . .

8 AAC 45.180. Costs and attorney's fees

. . . .

(d) The board will award a fee under AS 23.30.145(b) only to an attorney licensed to practice law under the laws of this or another state.

(1) A request for a fee under AS 23.30.145(b) must be verified by an affidavit itemizing the hours expended as well as the extent and character of the work performed . . . .

(2) In awarding a reasonable fee under AS 23.30.145(b) the board will award a fee reasonably commensurate with the actual work performed and will consider the attorney's affidavit filed under (1) of this subsection, the nature, length, and complexity of the services performed, the benefits resulting to the compensation beneficiaries from the services, and the amount of benefits involved.

. . . .

(f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

(Emphasis added).

Rule 801. Definitions.

. . . .

(c) Hearsay. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Rule 802. Hearsay Rule. Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Alaska Supreme Court, or by enactment of the Alaska Legislature.

Rule 803. Hearsay Exceptions – Availability of Declarant Immaterial.

. . . .

(4) **Statements for Purposes of Medical Diagnosis or Treatment.** Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

> . . . .
>
> (6) **Business Records.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method or circumstances of preparation indicate lack of trustworthiness. . . .

ANALYSIS

1) Was Employee's injury report timely?

Compensation for an injury may be barred unless notice of that injury is provided within 30 days. AS 23.30.100(a). Employer's TOUR reports document Employee worked on Rig 245 from August 17, 2011 through August 26, 2011. This is the hitch during which Employee contends he was injured. Employee's daughter did not complete an injury report on behalf of her father until July 26, 2012. As a result, Employer contends it has been deprived an opportunity to identify and interview witnesses before their memories faded with the passage of time, and also contends Employee's delay in reporting his injury has compromised the certainty of expert medical opinions. It contends Employee's untimely injury report bars his claim for benefits.

The 30-day period in AS 23.30.100 can begin no earlier than the occurrence of the first "compensable event." *Cogger*. In *Huit*, the first compensable event was determined to be when the claimant was first diagnosed with a potentially fatal infection and endocarditis and not when the claimant first sustained the scratch that eventually caused his infection and endocarditis. The facts in this case are analogous to *Huit*.

Employee contends he was injured between August 17, 2011 and August 26, 2011, when he fell and hit his head. Employee did not think he was injured at the time and he returned to work. Employee's daughter next travelled to Alaska in April of 2012, because Employee sounded confused during telephone conversations. Upon arriving in Alaska, and seeing the condition of Employee's apartment, she immediately packed his belongings and accompanied him back to her

home in Bakersfield, California. Once there, an MRI was conducted on July 20, 2012, which showed possible aqueductal stenosis. A neurosurgical consultation was ordered. The next day, Employee underwent surgery to place a shunt in order to relieve the build-up of cerebral spinal fluid in his brain.

Here, the first compensable event occurred on July 21, 2012, when Employee underwent shunt-placement surgery for hydrocephalus. Prior to this date, Employee did not think he needed medical attention at all, and Employee's daughter thought he had perhaps suffered a stroke. Employee's daughter filed a claim for benefits five days following the shunt surgery. Employee's injury report was timely. *Id*.

2) Should specific medical reports authored by Employee's providers, Drs. Rahimifar and Mehdi, as well as an affidavit by Employee's neighbor, Ms. Udelhoven, be excluded from consideration?

As preliminary issues, Employer objected to numerous documents on the basis it had requested an opportunity to cross-examine the documents' authors, but Employee was not intending on producing them at hearing.

A. Dr. Rahimifar's August 8, 2013 Questionnaire Responses and Progress Report.

Generally, doctors' chart notes, opinions and diagnosis fall under the business records exception to the hearsay rule. *Dobos*; *Loncar*. However, letter's written by a physician to a party's representative to express an expert medical opinion on an issue before the tribunal are not admissible as a business record unless the requisite foundation is established showing it is the physician's regular practice to prepare and send such letters. *Liimatta*; *Geister*.

Employee acknowledges Dr. Rahimifar's August 8, 2013 questionnaire responses fall into the latter category and are inadmissible absent Employer's opportunity for cross-examination, but he contends Dr. Rahimifar's progress report from the same date is admissible under the business records exception to the hearsay rule. Significantly, Dr. Rahimifar's July 22, 2013 telephone message slip demonstrates Employee's daughter wanted to schedule an appointment "as soon as possible" for a "med legal" consultation, and an August 8, 2013 appointment was scheduled.

Not only did Dr. Rahimifar complete his questionnaire responses at that August 8, 2013 appointment, but he also authored a progress report on Employee's behalf, which sets forth opinions identical to those expressed in his questionnaire responses, including such issues as causation and medical stability.

In addition to the telephone message slip that sets forth the true purpose of Employee's August 8, 2013 appointment, Dr. Rahimifar's report contains additional indicia such that it should be subject to *Liimatta* and *Geister*. For examples, Dr. Rahimifar conspicuously documented his review of "extensive" medical records, as well as a chronology of Employee's illness, prior to authoring his report. *Rogers & Babler*. Not only does Dr. Rahimifar record his findings on examination, but he also thought it necessary to also explain to a lay reader, "Patient was examined." *Id*. Most telling of all, however, Dr. Rahimifar noted, "Request by legal counsel in regard to [Employee's] condition was reviewed. All questions were answered."

Here, Dr. Rahimifar is responding to "med legal" inquires, be it through his questionnaire responses or his progress report. Employee cannot simply re-package Dr. Rahimifar's questionnaire response in the form of a medical "progress report" in an effort to evade his *Smallwood* obligation. The Alaska Supreme Court recognized this distinction in *Liimatta*, where it contrasted a traditional medical report, otherwise admissible as a reliable "business record," with a medical expert's "evaluation report," authored to advance an opinion on an ultimate issue before the tribunal, on the other. *Id*. at 318.

Commentary to the Alaska Evidence Rules provides additional clarity. It reminds, both legal practitioner and jurist alike, "Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify." Commentary to Evid. R. 803(4). Additional commentary for the business records exception provides the following example:

> Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman,* 318 U.S. 109 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," [sic] not a record of the

> systematic conduct of the business as a business, said the Court. *The report was prepared for use in litigating, not railroading.* While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate.

Commentary to Evid. R. 803(6) (emphasis added). To be sure, there is tension between competing interests: liberally receiving probative evidence on one hand, and not relying on potentially unreliable out of court statements, on the other. However, as recognized in *Geister*, "If the business record exception becomes so large that it includes expert medical opinion on the core issues litigated before the board, such as the relationship of the employment to the injury, the absolute right to cross-examination becomes an illusion. . . . It may be that the Supreme Court is ready to abandon *Smallwood*, but until it does, we are compelled to uphold the *Smallwood* rule." *Id*. at n.6.

Dr. Rahimifar's August 8, 2013 progress report was written to forward expert medical opinions on disputed issues such that Employer should be afforded an opportunity for cross-examination. *Smallwood*. A party's right to cross-examination should not rest on the form or title of a document, but rather on the document's contents and its "circumstances of preparation." Evid. R. 803(6). For these reasons, Dr. Rahimifar's progress report should be excluded along with his questionnaire responses. *Id*.; *Liimatta*; *Geister*.

B. Dr. Rahimifar's April 18, 2013 Chart Notes and Progress Report

Employer also seeks exclusion of Dr. Rahimifar's August 18, 2013 chart notes and progress report. Careful study of these documents reveals nothing to suggest they are anything other than documentation of a routine follow-up visit. Although Dr. Rahimifar does offer an opinion on Employee's disability in this report, he makes repeated references to Dr. Weibe's diagnosis and opinions and then merely adopts them as his own. These documents have every indicia they were prepared in the normal course of business, and they should not be excluded. *Dobos*; *Loncar*.

C. Dr. Mehdi's April 24, 2013 and May 29, 2013 Progress Reports

Employer also seeks exclusion of Dr. Mehdi's April 24, 2013 and May 29, 2013 progress reports. Dr. Mehdi saw Employee on April 24, 2013 because he was experiencing memory loss, headaches and dizziness following head surgery. Employee reported he had sustained a head injury in September of 2011. At the report's conclusion, Dr. Mehdi stated, "Static encephalopathy phenomenon due to head trauma." This report evidences Dr. Mehdi utilized information Employee provided to him to form a medical impression. Evid. R. 803(4), (6). It should not be excluded. *Dobos*; *Loncar*.

Similarly, Dr. Mehdi saw Employee on May 29, 2013, a follow-up for his EEG results. At the report's conclusion, Dr. Mehdi stated, "I do not think dementia medication will help. Traumatic brain injury is likely the cause of memory loss. Follow up prn." Here, Dr. Mehdi's causation reference is nothing more than an explanation of his opinion of why dementia medication would not be effective for Employee. This document also has every indicia it was prepared in the normal course of business and should not be excluded. Evid. R. 803(6); *Dobos*; *Loncar*.

D. Dr. Rahimifar's December 27, 2016 "Check-the-Box" Answer

On October 4, 2016, Mr. Jensen forwarded a copy of Dr. McCormack's September 2, 2016 SIME report to Dr. Rahimifar, along with a letter soliciting Dr. Rahimifar's medical opinions. The letter was prepared on Mr. Jensen's letterhead and contained two check-the-box questions. On December 27, 2016, Dr. Rahimifar checked "yes," indicating he thought Employee was "permanently precluded from performing any type of full time gainful employment due to the effects of his work related hydrocephalus condition or due to any non-injury related condition." Even though the letter provided space for "comments," Dr. Rahimifer provided none.

Like his August 8, 2013 progress report, here Dr. Rahimifar is responding to an inquiry from Mr. Jensen on an issue the parties' dispute, which places it squarely under *Liimatta* and *Geister*. Therefore, it should be excluded. *Id.;* Evid. R. 803(6). Moreover, even if it were not, given the question's composition, and Dr. Rahimifar's lack of comment, the response would of little help to Employee given it is entirely unclear whether Dr. Rahimifar thinks Employee id disabled "due to the effects of his work related hydrocephalus condition *or* due to any non-injury related condition."

E. Ms. Udelhoven's February 27, 2014 Affidavit.

Employer seeks exclusion of an affidavit by Employee's neighbor, Heather Udelhoven, which primarily documents Ms. Udelhoven's observations of Employee's memory loss and disability following his injury. Employer properly requested an opportunity to cross-examine Ms. Udelhoven, yet she was not produced at hearing. Although a sworn statement, Ms. Udelohoven's affidavit is nevertheless hearsay, and since it does not fall under any of the recognized exceptions, it should be excluded. 8 AAC 45.120(e).

3) Is Employee entitled to medical and related transportation costs?

Employee contends he fell while latching pipe on Rig 245 and hit his head during the fall, which aggravated his pre-existing aqueductal stenosis and resulted in surgical placement of a shunt to reduce pressure from the build-up of cerebral spinal fluid in his brain. He contends his fall at work was the substantial cause of his need for medical treatment and seeks an award of medical and related transportation costs. For medical benefits to be compensable, Employee's employment must be "the substantial cause" of his need for medical treatment. AS 23.30.110(a).

Employer presents a two-pronged defense. First, it contends Employee did not fall at work, or in the manner he described. Second, Employer also advances an alternative theory of Employee's need for medical treatment, which it contends is unrelated to Employee's employment. Whether Employee's fall at work is the substantial cause of his need for medical treatment raises factual disputes to which the statutory presumption of compensability applies. *Meek.* Since both Employer's defenses involve Employee's potential entitlement to benefits, Employee is afforded the presumption on each evidentiary question. *Sokolowski*. Therefore, as a threshold matter, this decision will first address whether Employee sustained an injurious event, *i.e.* whether he fell at work, then it will address whether work is the legal cause of Employee's need for medical treatment.

A. Did Employee fall at work?

Employee attaches the presumption with his own testimony describing the fall. *Cheeks*. Employer rebuts the presumption with Mr. Turcotte's testimony he would not have assigned Employee to the rig floor, where Employee purportedly fell; the TOUR reports, which do not show Rig 245 was picking up pipe, as Employee describes, and its videotape exhibit, which shows the skate being run to its upmost position, leaving no space into which a person could fall. *Miller*. Employee must now prove, by a preponderance of the evidence, he fell while working on Rig 245. *Koons.*

In his opening statement at hearing, Employee acknowledged, outside of his own testimony, much of his case is "circumstantial," since many of his witnesses testified, either he told them about his fall, or someone else told them about his fall, or they heard about his fall in a safety meeting. However, Employee's difficulty here is not so much circumstantial evidence, but rather the numerous depositions in this case being chock-full of hearsay. Employee did not explain why any hearsay exception would apply in any of these instances. Accordingly, the abundant hearsay in deposition testimony, especially those instances where a deponent testified hearing about Employee's fall, will not be relied upon as evidence Employee fell. 8 AAC 45.120(e).

Meanwhile, the challenge for Employer is its defenses based on the absence of evidence. For example, it contends Employee's fall should have been observed by at least four other hands on the rig floor, but no one can recall seeing Employee fall. It also contends the TOUR reports do not document any injury during Employee's hitch. However, neither of these facts establish a fall did not occur. Messrs. Rhinehard, Bounds, Haas, Hickel and Davidson all testified rig floors are slippery, and all but Mr. Bounds testified falls are commonplace. As Mr. Haas put it, "Just part of the job." Given this, it is likely potential witnesses might not remember Employee's fall because people tend not to remember common, ordinary, everyday events. *Rogers & Babler*.

Moreover, Employee did not think he was injured at the time, and it is a common experience to sustain some negligible injury at work that only results in minor, short-lived discomfort, and then return to work. *Rogers & Babler*. As a practical matter, people tend not to report "boo-boos," as Mr. Davidson described. *Id*. Mr. Hickel also explained, "If it were just a fall and you got a little bit of mud on you, wipe off the mud, go back to work." *Id*. Messrs. Haas and Rhinehart also

testified similarly. Additionally, considerable testimony in this case, including that from Messrs. Rhinehard, Bounds, Haas, and Davidson, shows safety bonuses and fear of job loss, whether that fear is real or perceived, are also compelling reasons to not report a minor injury, let alone a mere slip-and-fall that was not thought to have resulted in any injury whatsoever. *Id.*

Employer further contends the evidence shows Employee, physically, could not have fallen in the manner he describes. Specifically, it contends Employee could not have been holding onto the elevator horn with his right hand, while reaching for the other elevator horn with his left, as he fell; and there would have been no space into which Employee could fall while latching pipe, since the pipe skate occupies the trough. Unfortunately, this is a case where many potential questions cannot be conclusively resolved. For example, none of the witnesses could testify with any degree of certainty when Mr. Kane installed the handrails on Rig 245, not even Mr. Kane himself. In addition to installing handrails, Mr. Kane was also asked to design a platform that would cover the trough while the pipe skate was down, and folded out of the way when the pipe skate was up, but the platform was never built because the rig was shut down a short time later. Mr. Hickel recalls Mr. Kane making new floor plates and handrails for the trough and added the handrails have been modified many times. According to Mr. Davidson, Employer has attempted to modify the pipe skate and trough a few times in order to make them safer, and these modifications have included the installation of handrails, flashing lights and floor plates. Employee also credibly testified the handrails, flooring and "kick plates" shown in the exhibits were not present at the time of his injury.

Given this considerable testimony concerning numerous safety modifications, and given Aaron Baker's fall into the trough occurred a short time after Employee's fall into the trough, it was prudent for Employer to have undertaken modifications to Rig 245 following these incidents. *Rogers & Babler*. Moreover, the assignment of three safety hands to Rig 245 starting on September 15, 2011, is hardly an insignificant development. As Mr. Hickel put it, "if there's three assigned, then they got some issues." *Id.* One or more incidents clearly precipitated the

assignment of additional safety personnel to Rig 245, and more likely than not, also caused Employer to undertake safety modifications to the rig.[8] *Id.*

In addition to safety modifications, there are also questions about how the pipe skate and elevator were being operated on the date of injury. Mr. Hickel does not run the skate as high as shown in Employer's video exhibit and latching pipe during normal operations would be performed much faster than shown in Employer's video exhibit. He explained, "slacking off" on the elevator prevents the elevator from hitting the skate and makes it easier for the floor hands to latch the pipe. Furthermore, Employee explained the skate does not have to move to its upmost position because, in addition to the skate, the shoe, or what Mr. Hickel calls the trolley, pushes the pipe up, as well. Mr. Hickel's diagram also clearly shows an open trough area between the skate and the mouse hole while latching pipe. Although his diagram is not evidence, it likely serves as an illustration of how he operates the skate, which leaves a space between the skate and the end of the trough, as he described in his deposition testimony. Employer's exhibits do not necessarily preclude Employee falling in the manner he described. Such a fall could have been possible in any number of circumstances, including where the trough, skate or rig floor have been modified, where the pipe skate was not being run as high as shown in the exhibits, or where the pipe skate was being prematurely retracted, to name a few. *Rogers & Babler*.

Employer also contends Rig 245 was not latching pipe, and neither would there have been oil-based mud on the floor, at the time of Employee's injury as he describes. According to Mr. Turcotte, if Rig 245 were latching pipe, it would be described in the TOUR report as "picking up drill pipe." Mr. Turcotte and Mr. Herbert have each reviewed the TOUR reports for the relevant time-period and neither found any evidence Rig 245 was latching pipe. However, Employee joined Rig 245's crew on August 17, 2011, and the TOUR reports clearly show Rig 245 was drilling on that date, and continued to drill through August 19, 2011. According to Messrs. Turcotte, Bounds and Hickel, the floor would have been covered in oil-based mud, as Employee describes. *Id.* Moreover, Mr. Hickel described a situation where a small quantity of pipe might

[8] Additionally, the September 17, 2011 TOUR report documents: "SERVICE RIG JT FELL BETWEEN ELEVATOR AND SKATE, HAD TO RU COME ALONGS AND GET IT OUT." Although it is unknown what the "SERVICE RIG JT" was, or how large or heavy it was, it was large enough and heavy enough to require the use of come-alongs, and take an hour of the crew's time, to extricate it; thus, demonstrating it was hardly impossible for a sizeable object to fall between the skate and the elevator near the time of Employee's injury.

be needed from the pipe shed while drilling, and they will just "grab it" "real quick" and not even bother to put up the handrails around the trough. Thus, if Mr. Hickel does not bother to put up the handrails while performing such an impromptu activity, neither might the driller record "picking up drill pipe" in the TOUR report, as it was only incidental to principle activity of drilling. *Rogers & Babler*. Yet, another possibility, which Mr. Turcotte also acknowledged, is the crew might have been picking up pipe while he was on break, in which case, the activity would not have been recorded in the TOUR report.

Given the nature and extent of factual disputes, such as those discussed above, this case, more than most, will turn on witness credibility. Mr. Turcotte was the driller on Rig 245 during the hitch in question and considerable portions of his testimony are not credible. AS 23.30.122. He was caught off-guard when asked about the absorbent mat in Employer's video exhibit and he struggled to provide an answer. *Id.* Mr. Turcotte initially testified he did not know why it was being used in the exhibit, then he speculated it might have been raining the day the video was made, and he finally explained they are used when drilling because oil-based mud gets on the floor. However, the operation depicted in Employer's video exhibit was not drilling, but rather picking up pipe, and an absorbent mat was still being utilized. *Id.*

Mr. Turcotte's testimony concerning Employee's transfer to the yard did not ring true, either. AS 23.30.122. For example, Mr. Turcotte emphatically testified Employee never worked on the rig's floor and Employee would not be on the rig's floor without him assigning Employee to the rig's floor. He further explained that the crew was aware Employee was not to work on the rig's floor and only he had authority to assign Employee to the rig's floor. Mr. Turcotte described Employee as having trouble getting up and down the stairs on the rig and being out of breath all the time. He was not even "fit for duty on that big of rig," according to Mr. Turcotte. However, if Employee's presence on the rig was as dire as Mr. Turcotte portrays, he should have immediately, either sent Employee to the medic, or requested Employee be transferred to the yard. *Rogers & Babler*. Instead, Employer did not prepare its personnel action notice transferring Employee to the yard until five days after the hitch had ended. AS 23.30.122.

Additionally, Mr. Turcotte attempted to describe Employer's safety bonus on cross-examination and testified employees would receive the safety bonus if they reported all injuries. He then stated if employees reported no injuries, they would still receive the bonus. *Id*. His explanation is unfathomable and even prompted a quizzical remark from Mr. Jensen, who confessed he did not understand the bonus. AS 23.30.122.

Mr. Turcotte's testimony concerning picking up pipe prior to a rig move was also disingenuous. He first stated pipe is normally taken *out of the hole* days before a rig move. Then, when Mr. Jensen reminded him the August 27, 2011 TOUR report references a rig move, Mr. Turcotte denied any pipe would have been *picked-up* leading up to that date. *Id.* Here Mr. Turcotte is employing semantics to leverage his superior familiarity with terms unique to the oil and gas industry. His own TOUR report from August 23, 2011 clearly states Rig 245 was *laying down* drill pipe on August 23, 2011, just four days prior to preparing the rig for a move as Employee describes. Mr. Turcotte explained, the process of picking up pipe and laying down pipe are essentially the same operation in reverse order, and both involve latching and unlatching the pipe. The difference: the rig picks up pipe to send it *into the hole*, and lays down pipe as it comes *out of the hole*, so of course Rig 245 would not have been picking up pipe on August 23, 2011, since it was about ready to complete the well and be moved. *Rogers & Babler*. However, by simply substituting "picking up" for "laying down," Mr. Turcotte's testimony was technically accurate, if not entirely sincere, since the rig would have still been latching pipe, and its floor covered in oil-based mud, as Employee describes. AS 23.30.122.

Meanwhile, Employer's former Human Resource Manager, Ms. Wilson, fared even worse than Mr. Turcotte, and her testimony was patently not credible. AS 23.30.122. She initially testified she participated in investigating Employee's injury then, on cross-examination, acknowledged she had not. *Id*. Ms. Wilson confidently testified she knew what the "number of days since the last recordable incident" means on the TOUR reports and provided a cogent explanation of this number. However, when asked why this number went from 39 on August 28, 2011, to zero on August 29, 2011, she suddenly became evasive and stated she would "have no idea" and referred all Employee's follow-up questions on this issue to Employer's "HSC rep." *Id.* Furthermore, on cross-examination, Ms. Wilson repeatedly qualified her "no" answers by stating she did not

know, "*for sure*," including why Employee was transferred to the yard, even though she had already testified on direct examination that Employee was transferred because the rig thought such work would be a better fit for him. *Id*. Ms. Wilson also distanced herself from any knowledge whatsoever of unreported incidents when she added an evasive qualifier to her answer and testified all injures are reported, "*as far as [she] knows*." *Id.*

However, Ms. Wilson's most tortured testimony involved Employee's attempts to ascertain whether Ms. Wilson knew Employee might have sustained an injury at the point when Ms. Ferrell contacted Employer to request a workers' compensation form. AS 23.30.122. Ms. Wilson initially evaded the question entirely and stated she was not "really sure" because she *did not know* Ms. Ferrell's relationship to Employee, a perplexing answer given Mr. Jensen was asking Ms. Wilson about her knowledge of a possible injury and not Ms. Ferrell's relationship to Employee. *Id*. Next, Mr. Jensen reminded Ms. Wilson that Ms. Sato's email to her had identified Ms. Ferrell as Employee's daughter, and he again asked Ms. Wilson about her knowledge of a possible injury. Ms. Wilson evaded answering a second time, and instead, puzzlingly acknowledged she *did know* Ms. Ferrell was Employee's daughter because she recognized Ms. Ferrell's name from Employee's paperwork. *Id*. Mr. Jensen inquired once more about Ms. Wilson's knowledge of a possible injury, but Ms. Wilson dismissively answered, "yea, I don't know, *for sure*," even though she had already testified on direct examination she first became aware Employee might make a claim when Ms. Ferrell contacted Employer's Anchorage office. *Id*.

The testimony of Cal Smith and Sam Banse is also significant because each worked on Rig 245 during the same hitch as Employee. According to Employee, Mr. Smith was the hand who helped him out of the trough after his fall. Mr. Smith has worked for Employer for 18 years, and not only did he deny any knowledge of Employee falling into the trough, he also denied he had ever heard of anyone slipping and falling into the trough. Mr. Smith thought he would have at least heard about any such fall. However, Mr. Smith's testimony in this regard is not only directly contradicted by Employee's own testimony, but is also highly unlikely based on the testimony of Messrs. Kane, Hickel and Davidson, who collectively acknowledged many instances of employees falling into the trough, as well as Employer's own documentation of

Aaron Baker's fall into the trough. AS 23.30.122. Furthermore, Mr. Smith's testimony he never spoke to Mr. Turcotte about Employee's case is directly contradicted by Mr. Turcotte, who testified he spoke with his entire crew, including Mr. Smith, about Employee's case after receiving a call from Employer's drilling superintendent. *Id*.

Mr. Smith's and Mr. Turcotte's reactions to Ms. Ferrell's inquiries about her father are also peculiar and lack credibility. *Rogers & Babler*; AS 23.30.122. Ms. Ferrell first called Mr. Smith while he was busy at work and he told her to call him the next day. When they spoke the next day, Mr. Smith told Ms. Ferrell he did not want to talk to her any further regarding Employee's fall. Yet, he now characterizes Ms. Ferrell as "harassing" him. It is unknown how Ms. Ferrell calling Mr. Smith back at a time he had requested can be fairly characterized as harassing behavior. AS 23.30.122. Furthermore, Mr. Smith explained he only told Ms. Ferrell "what she wanted to hear," which begs the question, was he then being truthful while testifying at his deposition. *Id*. Similarly, Mr. Turcotte was also annoyed by Ms. Ferrell's inquiries regarding her father. According to Mr. Turcotte, he simply "got rid of" Ms. Ferrell's first phone call, but her second phone call came while he was sitting down for dinner with his family. However, it is unknown why Mr. Turcotte could not have "got rid of" Ms. Ferrell's second call as readily as he did her first, without becoming as annoyed as he did. *Id*. Mr. Smith's and Mr. Turcotte's level of annoyance to Ms. Ferrell's inquiries suggest they are harboring additional information regarding Employee's fall. *Id*.; *Rogers & Babler*.

Meanwhile, Sam Banse's testimony, like that of Ms. Wilson, is also patently not credible. AS 23.30.122. On August 8, 2015, Mr. Banse replied to an email from Ms. Ferrell, acknowledging their conversation earlier that same day, during which Mr. Banse had told Ms. Ferrell he remembered everyone talking about Employee's fall when he reported to work. He later disavowed that email at deposition, where he testified he had confused his conversation with Ms. Ferrell about Employee's fall on Rig 245, with a separate incident that happened "along time ago in the Marine Corps where someone fell." His explanation is absurd and an affront to this tribunal. AS 23.30.122.

Mr. Turcotte, Mr. Smith, Mr. Banse and Ms. Williams are central to this inquiry. The first three were on Rig 245 with Employee during the hitch in question, while Ms. Wilson was Employer's Human Resources Manager, privy to information unique to that position. Each, to varying degrees, are not credible, and all are thought to possess more knowledge of Employee's fall than they acknowledged during sworn testimony. AS 23.30.122.

On the other hand, it is said there is truth in humor, and whether Employee is joking about "popping" off his amputated fingers, or describing his difficulties in climbing stairs as "navigation problems," or ENI personnel wearing their white coveralls on the oilrig, he certainly has a sense of humor. He is also immensely credible. AS 23.30.122. Employee's testimony at hearing was natural and spontaneous. *Rogers & Babler*. Notwithstanding his diagnosed dementia, Employee demonstrated above-average recall and he effortlessly provided numerous work locations and specific rigs on which he has worked during his career. *Id*. He described events leading up to his fall, and the fall itself, in considerable detail, including delivering breakfast for other hands and Rig 245's eminent move. Many details Employee provided were either corroborated or bolstered by other testimony and Employer's own documentation. AS 23.30.122. His description of events at hearing were also consistent with his first deposition. *Id*. Although a transcript from Employee's second deposition could not be located, Employer acknowledged Employee's testimony between his two depositions was detailed and consistent. *Id*.

Employer's defenses suffer two, additional, critical infirmities. While Employee provided an explanation of why he left the Slope early on his last hitch, Employer never did, even though it had purchased Employee's airline ticket. AS 23.30.122. This is a glaring omission, given the facts of this case and the relevance of Employee's premature departure from his hitch. *Rogers & Babler*. Most revealing of all, however, Employer's October 30, 2013 and October 31, 2013 initial injury reports indicate it was notified of Employee's injury on October 16, 2011 - the very day Employee was flown off the Slope, not on July 26, 2012, as it now contends. AS 23.30.122. Employee has met his burden and demonstrated by a preponderance of evidence he sustained an injurious event at work when he fell as described. *Miller*.

B. Was Employee's fall at work the substantial cause of his need for medical treatment?

The presumption attaches with Ms. Limburg's observations of Employee's difficulties with his mobility and comprehension upon returning from his last hitch on the Slope, with Ms. Ferrell's testimony of her observations, both before and after arriving in Alaska, and with Dr. Mehdi's April 24, 2013 and May 29, 2013 reports connecting Employee's encephalopathy and memory loss to head trauma. *Cheeks*. Employer rebuts the presumption with Dr. Bell's opinions that Employee's need for medical treatment was caused by factors unrelated to work, such as Wernicke's encephalopathy. *Miller*. Employee must now prove, by a preponderance of the evidence, his fall was the substantial cause of his need for medical treatment. *Koons.*

The record quite clearly demonstrates Employee's health deteriorated in the fall of 2011. According to his own testimony, he was having difficulty negotiating the stairs at his apartment. Employer noticed problems, as well, as evidenced by its August 31, 2011 notice of personnel action and Mr. Turcotte's testimony that Employee was having difficulty getting up and down the stairs on Rig 245. Employee's neighbor, Ms. Limburg, noticed Employee had become very weak and was having trouble walking. Finally, Employee's daughter, Ms. Ferrell, became concerned because Employee was sleeping so much she travelled to Alaska to check on him. Upon seeing the condition of Employee's apartment, she packed up his belongings and brought Employee back with her to Bakersfield, California. Ms. Ferrell, too, noticed problems with Employee's gait and made him use a walker. Employee obviously required medical attention, because a mere day after an MRI showed possible aqueductal stenosis, he underwent shunt placement surgery. At issue here, though, is the substantial cause of that need for medical attention.

Dr. Bell evaluated Employee on behalf of Employer and she qualified the opinions in her report as being "provisional" due to "insufficient" information. At that time, Dr. Bell wanted more recent medical information concerning Employee's shunt, as well as additional hospital records. Nevertheless, Dr. Bell thought Employee's need for medical treatment was caused by underlying vascular disease, recent strokes and Wernicke's encephalopathy, rather than a fall at work.

Four months later, Dr. Bell reviewed additional records and authored an addendum report, wherein she opined the most likely explanation for Employee's clinical presentation of dementia and gait disorder was Wernicke's encephalopathy. She also wrote, "There is also an indication from the more recently reviewed records that [Employee] continues to use alcohol. Given that he likely has a history of severe alcoholism, he should be completely abstinent from alcohol." Among the additional records Dr. Bell reviewed for her addendum report were a September 20, 2012 chart note that instructed Employee to avoid alcohol, an October 13, 2012 emergency room report that noted Employee was at a party and had a few beers when he developed pain, a May 15, 2014 emergency room report that stated Employee's liver function test was normal, and a May 16, 2014 chart note that stated Employee used "occasional alcohol a couple of times a week."

The conclusions Dr. Bell draws from the additional records are curious. Physicians commonly recommend patients avoid alcohol for a variety of reasons, and many, if not most, adults do consume adult beverages while attending parties. *Rogers & Babler*. Dr. Bell failed to explain how either of these two facts, or a normal liver function test, or how using "occasional alcohol a couple of times a week" evidences a "history of severe alcoholism." *Id*. To whatever extent Dr. Bell appeared to be overreaching in her opinions was conclusively resolved when she was deposed.

Dr. Bell testified Employee presented for medical treatment because of complications from underlying vascular disease and alcoholism. She did not see any indication hydrocephalus caused the deterioration in Employee's health, or that the shunting procedure improved his gait. Instead, Dr. Bell saw "very strong evidence" of alcohol abuse and thought Employee's presented with Wernicke-Korsakoff syndrome. Employee's condition only improved, according to Dr. Bell, because he was administered thiamine.

However, on cross-examination, Dr. Bell acknowledged Employee did not tell her he was an alcoholic, and neither did Employee's daughter volunteer he was an alcoholic. Instead, and notwithstanding Employee reporting he never drank more than one to three beers per week, Dr. Bell explained her "very strong evidence" of a "history of severe alcoholism" was Employee's

wife was an alcoholic, and "it is pretty common that couples will both abuse." Moreover, Dr. Bell expressly denied she was making any kind of an assumption in arriving at her conclusion in this regard. AS 23.30.122.

Dr. Bell's causation opinion seems to rest almost exclusively on Dr. Wiebe's August 9, 2012 report, where he wrote, Employee's post-surgical course was complicated by "*features of* Wernicke's encephalopathy." (Emphasis added). When Dr. Bell was asked whether any testing was performed to detect the vitamin deficiencies that cause Wernicke's encephalopathy, Dr. Bell provided the following answer:

> I didn't see - - I doubt they tested it. Because, again, *its more important to treat the condition than to prove that it existed.* That's why *anyone* coming in with a presentation that is *suspicious* for this is given a very high dose thiamine to *hopefully* improve it.

(Emphasis added). Dr. Bell's answer in this instance illustrates the utterly tenuous nature of her causation opinion. AS 23.30.122. Moreover, Dr. Bell also disagreed with Mr. Jensen and testified there was medical evidence Employee suffered from both long-term, as well as short term, memory loss. However, when pressed for medical evidence of long-term memory loss, Dr. Bell was forced to concede there was none. *Id*. Dr. Bell's testimony was contrary to the factual record and her causation opinion is unsubstantiated, even under the terms of her own testimony. Her opinions are afforded very little weight. *Id*.

Employee's treating physicians also authored a few opinions that were not excluded as hearsay. Dr. Mehdi's April 24, 2013 and May 29, 2013 reports connect Employee's encephalopathy and memory loss to head trauma, and Dr. Rahimifar's April 18, 2013 report connects Employee's disability to his hydrocephalus. Their opinions are consistent with Dr. McCormack's and are given greater weight than Dr. Bell's. AS 23.30.122.

SIME physician, Dr. McCormack, also evaluated Employee and pointedly concluded Employee had preexisting, asymptomatic, hydrocephalus that was made symptomatic by his work injury, which was the substantial cause of Employee's aqueductal stenosis, ventriculoperotoneal shunt and development of his subacute right subdural hematoma. He also explained the work injury,

along with the development of hydrocephalus, was consistent with the stroke-like symptoms observed in October of 2011. Dr. McCormack further explained, once Employee's hydrocephalus became aggravated, "He wouldn't be the one noticing the problem. I mean, it's like the family became alarmed when they talked to him. He was confused, so when someone has . . . fluid buildup on the brain . . . they often don't notice the problem." Here, Dr. McCormack's explanations parallel Employee's own testimony and the combined observations of Ms. Limburg, Mr. Ferrell and even Employer, following Employee's injury.

Significantly, Dr. McCormack did not find any evidence Employee was an alcoholic or had a severe drinking problem. Instead, he explained, hydrocephalus normally presents much earlier in life than in Employee's case, and most patients are treated by *pediatric* neurosurgeons. Although Dr. McCormack acknowledged Employee's delay in getting treatment created uncertainties in determining causation, his reasoning is most persuasive. He explained, in patients with hydrocephalus, head injury is a known aggravating factor, and in Employee's case:

> Well, he – he'd had this in his head for years, up to 60. It was never diagnosed, so the question is: Why did it present then? I mean, I raise the question. . . . Well, I would say, you're asking the question, in a guy who's 60, who had this in his head for a long time, I would say more likely . . . it wasn't spontaneous. Something aggravated it. Because if it was spontaneous, why didn't he have symptoms at 50 or 40, or you know, some other point in his life?

So, even though Employee's hydrocephalus was a preexisting condition, Dr. McCormack concluded Employee's head injury aggravated that condition, causing it to change from compensated hydrocephalus to uncompensated hydrocephalus.

Dr. McCormack would expect symptoms of hydrocephalus to develop within one month of an aggravation, since it takes a while for the spinal fluid to build up. Employee worked on Rig 245 from August 17, 2011 until August 26, 2011, then, he was transferred to the yard, where he worked hitches from September 10, 2011 until September 23, 2011, and from October 9, 2011 until October 15, 2011, when Employer sent him home. Here, Dr. McCormack's timeframe for symptom development dovetails quite well with Employee's transfer to the yard, his premature departure from the Slope and Ms. Limburg's observations of his symptoms. Because Dr. McCormack rationally explains why Employee developed hydrocephalus when he did, and

because Dr. McCormack's opinions correlate with contemporaneous witnesses observations, and the timeframe of Employee's work activities, his opinions are afforded substantial weight. AS 23.30.122.

In consideration of the medical opinions on the substantial cause of Employee's need for medical treatment, the opinions of Dr. McCormack far outweigh those of Dr. Bell. *Id.* Employee has proven by a preponderance of the evidence his fall on Rig 245 was the substantial cause of his need for medical treatment for uncompensated hydrocephalus. *Miller*. Consequently, medical and related transportation costs will be awarded, including ongoing, periodic and annual care for Employee's shunted hydrocephalus as recommended by Drs. Wiebe and McCormack. AS 23.30.095(a).

Employee contends, by controverting his claim, Employer also impermissibly shifted financial responsibility for his medical costs to Medicare and the U.S. taxpayer. He cites *Cannady*, and seeks an order requiring Employer to pay his medical providers pursuant to the Alaska fee schedule, so his providers can then reimburse Medicare. However, Employee overlooks Ms. Ferrell's testimony, who stated, in addition to Medicare, Medi-Cal also provided at least a portion of Employee's medical care, such as his evaluation with Dr. Llamas. The public policy analysis in *Cannady* is particularly persuasive, and it will be adopted and applied here. As in that case, Employee will ensure he provides Employer with properly coded bills for his work-related medical care if he has not already done so, and Employer shall pay medical costs directly to Employee's providers, who can then reimburse Medicaid and Medi-Cal, as appropriate under federal law. *Id.*

4) Is Employee entitled to TTD?

Dr. McCormack opined Employee's hydrocephalus was the predominant cause of his dementia and inability to work until he recovered from placement of the ventricular shunt. Based on the medical benefits analysis set forth above, Employee is also entitled to TTD. However, the parties dispute the time-period for which TTD is owed. Employee contends he is entitled to TTD from August 16, 2011 until August 8, 2013, a period based on Dr. Rahimifar's date of

medical stability, while Employer contends any period of TTD should be from August 16, 2011 until December 1, 2012, based on Dr. McCormack's date of medical stability.

Dr. Rahimifar's August 8, 2013, date of medical stability was set forth in his progress report authored that same day. Since that document were excluded above, the sole remaining opinion on Employee's date of medical stability is from Dr. McCormack, who thought Employee was medically stable by December 1, 2012, and from that date forward, Employee was unemployable for reasons other than his hydrocephalus. Moreover, even if Dr. Rahimifer's August 8, 2012 report were not excluded, Dr. McCormack's opinions are afforded more weight than any other physician who has opined in this case, so Employee's date of medical stability would still be determined to be December 1, 2013. Employee will be awarded TTD from August 16, 2011 until December 1, 2012. AS 23.30.185.

5) Is Employee entitled to PTD?

Benefits are payable if, in relation to other causes, the work injury remains the substantial cause of Employee's disability. AS 23.30.010(a). As in the medical benefits and medical stability analysis, Dr. McCormack's opinions are afforded the most weight, and he opines Employee is unemployable for reasons other than his work-related hydrocephalus, such as dementia caused by vascular disease, stroke and depression. Employee, therefore, is not entitled to PTD benefits. AS 23.30.010(a).

6) Is Employee entitled to PPI?

Dr. McCormack assigned Employee a 25 percent whole person impairment and thought 40 percent of that was due to Employee's work-related hydrocephalus and 60 percent was the result of other factors, such as dementia, depression and vascular disease with brain stroke. Based on the medical benefits analysis set forth above, Employee is entitled to PPI, and he will be awarded $17,700 ($177,000 x 0.25 x 0.40).

7) Is Employee entitled to a vocational rehabilitation eligibility evaluation?

Benefits are payable if, in relation to other causes, the work injury remains the substantial cause of Employee's disability. AS 23.30.010(a). Employee's eligibility for vocational rehabilitation eligibility evaluation is further, expressly, conditioned upon him being unable to return to work "as a result of the injury." AS 23.30.041(c). As with Employee's claim for PTD benefits, he is presently unemployable for reasons other than his work-related hydrocephalus, such as dementia caused by vascular disease, stroke and depression. Based on medical benefits analysis set forth above, Employee is not entitled to a reemployment eligibility evaluation. *Id*.; AS 23.30.010(a).

8) Are Employee, his medical providers, Medicare and Medi-Cal entitled to interest?

The Act provides for mandatory interest awards to compensate for the time value of money. AS 23.30.155(p). Employee is entitled to interest on unpaid compensation, while Medi-Cal and Medicare are entitled to interest from Employer for the work-related medical benefits they paid on Employee's behalf. *Cannady*. Employee's medical providers are also entitled to interest on the difference between what Medi-Cal or Medicare paid them, and their fees under the Alaska workers' compensation fee schedule. *Id*.

9) Is Employee entitled to attorney fees and costs?

Employee seeks an award of attorney's fees and costs. Here, Employer resisted paying compensation by controverting and litigating benefits. Employee retained counsel, who has successfully litigated the compensability of Employee's claim and made valuable medical and indemnity benefits available to him. Thus, Employee is entitled to reasonable attorney fees and costs under AS 23.30.145(b).

In making attorney's fee awards, the law requires consideration of the nature, length and complexity of the professional services performed on the employee's behalf, and the benefits resulting from those services. An award of attorney fees and costs must reflect the contingent nature of workers' compensation proceedings, and fully but reasonably compensate attorneys, commensurate with their experience, for services performed on issues for which the employee prevails. *Bignell*.

Employer has, neither objected to Employee's claimed fees and costs, nor how his time is described in his affidavits. Mr. Jensen is an experienced litigator and has represented injured employees in workers' compensation cases for many years. Employer controverted benefits and continued to deny them throughout four years' of litigation, which necessitated a hearing on the merits of Employee's case. Litigation in this case has involved complex factual issues, which necessitated the taking of no less than 13 depositions, and conducting an SIME. Additionally, given the conflicting medical opinions, as well as the number of highly disputed facts, the outcome of litigation was far from certain. For these reasons, Employee will be awarded attorney fees and costs in an amount to $120,803.48.

CONCLUSIONS OF LAW

1) Employee's injury report was timely.
2) Specific documents by Dr. Rahimifar and Ms. Udelhoven's affidavit should be excluded. Other documents by Drs. Rahimifar and Mehdi should not be excluded.
3) Employee sustained an injurious event at work when he fell.
4) Employee's fall at work was the substantial cause of his need for medical treatment.
5) Employee and his providers are entitled to medical costs.
6) Employee is entitled to TTD.
7) Employee is not entitled to PTD.
8) Employee is entitled to PPI.
9) Employee is not entitled to a vocational rehabilitation eligibility evaluation.
10) Employee, his medical providers, Medicaid and Medi-Cal are entitled to interest.
11) Employee is entitled to attorney fees and costs.

ORDERS

1) Dr. Rahimifar's August 8, 2013 questionnaire responses and progress report, his December 27, 2016 "check-the-box" answer, and Ms. Udelhoven's February 27, 2014 affidavit are excluded in accordance with this decision.
2) Employee's claim for medical and related transportation costs is granted. Employer shall pay Employee's medical providers directly for all medical services incurred in treating Employee's hydrocephalus, including continuing care as recommended by Drs. Wiebe and McCormack.

3) Employee's claim for TTD is granted. Employer shall pay Employee's TTD from August 16, 2011 until December 1, 2012, plus interest, in accordance with this decision.

4) Employee's claim for PTD is denied.

5) Employee's claim for PPI is granted. Employer shall pay Employee's PPI in an amount of $17,700, plus interest, in accordance with this decision.

6) Employee's claim for a vocational rehabilitation eligibility evaluation is denied.

7) Employee's claim for interest is granted. Employer shall pay Medicaid and Medi-Cal interest on all amounts they paid on Employee's behalf for treatment of his hydrocephalus.

8) Employer shall pay Employee's providers interest on the difference between all amounts Medicaid and Medi-Cal paid those providers on Employee's behalf for treatment of his hydrocephalus, and the amount Employer must now pay those same providers under the workers' compensation fee schedule, in accordance with this decision.

9) Employee's claim for attorney fees and costs is granted. Employer shall pay Employee's attorney fees and costs in an amount of $120,803.48.

Dated in Fairbanks, Alaska on January 11, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Chair

/s/
Lake Williams, Member

/s/
Togi Letuligasenoa, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission. If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127. An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of MITCHELL R. MCNAMEE, employee / claimant; v. NABORS INDUSTRIES, INC., employer; AMERICAN ZURICH INSURANCE COMPANY, insurer / defendants; Case No. 201121428; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on January 11, 2017.

/s/
Ronald C. Heselton, Administrative Assistant II