ALASKA WORKERS' COMPENSATION BOARD

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

CHARLIE A. HAYS, Employee, Claimant,	)	FINAL DECISION AND ORDER
v.	)	AWCB Case No. 201203775
ARCTEC ALASKA, Employer, and	)	AWCB Decision No. 18-0068 Filed with AWCB Fairbanks, Alaska on July 11, 2018
ARCTIC SLOPE REGIONAL CORP., Insurer, Defendants.	)	

Charlie Hays' (Employee) January 30, 2015, March 19, 2015, January 26, 2016, and March 9, 2016 claims were heard in Fairbanks, Alaska on April 12, 2018, a date selected on October 20, 2017. Also heard was ARCTEC Alaska's (Employer) November 29, 2017 petition seeking Secondary Injury Fund reimbursement. Attorney Michael Jensen appeared and represented Employee, who also appeared and testified on his own behalf. Attorney Robert Bredesen appeared and represented Employer. Secondary Injury Fund (Fund) Administrator, Velma Thomas, appeared telephonically and represented the Fund. Other witnesses included Employee's co-worker, Neil Mehand, who testified telephonically on Employee's behalf, and Employer's medical evaluator, Dennis Chong, M.D., who appeared and testified on Employer's behalf. The record closed upon receipt of Employer's objections to Employee's attorney fees on April 20, 2018.

ISSUES

Employee contends he injured his right shoulder and neck while lifting a heavy bucket at work, and these injuries necessitated his participation in a work hardening program and physical therapy, which resulted in further injuries to his lumbar spine and left shoulder. He contends his initial right shoulder and neck work injuries are the substantial cause of his need for right shoulder, left shoulder, cervical spine and lumbar spine medical treatment. He seeks an award of medical and related transportation benefits. Employee further seeks a prospective award of medical benefits for treatment as recommended by his treating physicians and the second independent medical evaluator (SIME), though he does not identify specific treatment recommendations from his treating physicians. Additionally, Employee seeks an order for payment, pursuant to the Workers' Compensation Act's fee schedule, and for his providers to reimburse Medicaid and Medicare for treatment they have provided.

Employer relies on its medical evaluator, who opines work was the substantial cause of only Employee's need for right shoulder medical treatment, but an accumulation of factors in addition to work activity, such as leisure activity, smoking, genetic predisposition, congenital factors, and previous injuries are the substantial causes of Employee's need for left shoulder, cervical spine and lumbar spine treatment. Moreover, Employer's medical evaluator initially thought Employee's work related right shoulder injury was medically stable by September 2012, and any need for right shoulder medical treatment after that date was due to a non-work related trip-and-fall over a log that same month. Employer requests, therefore, that Employee's claim for left shoulder and cervical spine and lumbar spine treatment be denied, and any right shoulder treatment past September 2012 be denied, as well. However, in the event such treatment is awarded, Employer does not oppose reimbursing Employee's providers for Medicaid and Medicare provided treatment.

1) Is Employee entitled to medical and related transportation costs for his right shoulder, left shoulder, cervical spine and lumbar spine?

Employee contends his work injury is the substantial cause of his disability and he seeks temporary total disability (TTD) from March 8, 2012 and continuing. He also seeks

reclassification of previously paid vocational rehabilitation stipend and permanent partial impairment (PPI) benefits to TTD.

Employer relies on its medical evaluator, who opines Employee's right shoulder was medically stable from the work injury long ago, and any subsequent periods of disability were due to factors other than work. Therefore, it contends no additional TTD is due.

2) Is Employee entitled to TTD?

Employee contends his work injury permanently precludes his participation in the work force and contends permanent total disability (PTD) benefits should be awarded.

Employer relies on its medical evaluator, who opines Employee was capable of performing medium duty work after his initial right shoulder injury, but now can only perform sedentary to light duty work on account of his multiple musculoskeletal subjective pain complaints. Therefore, it contends Employee's claim for PTD should be denied.

3) Is Employee entitled to PTD?

Employee alternatively contends, in the event he is not determined PTD, he is entitled to PPI in excess of two percent, once his injuries become medically stable.

Employer's current position on PPI is unclear, but based on a previous controversion, it is presumed it opposes a PPI award in excess of two percent.

4) Is Employee entitled to PPI?

Employee alternatively contends if he is not determined PTD, vocational rehabilitation benefits should be awarded, and he seeks review of the RBA designee's ineligibility determination on several basis. He contends he did not work at an equivalent job in terms of physical demands of the job he held at the time of his 1984 injury, as required by the statute. Employee also contends he did not complete the original plan, which was to attend some school to learn to install

canopies. He further contends the subsection relied upon by the RBA designee to deny benefits does not apply to injuries prior to its enactment in 2005.

Employer contends, since Employee was previously retrained under another claim, he is ineligible for additional vocational rehabilitation benefits, so they should be denied.

5) Is Employee entitled to vocational rehabilitation benefits?

Employee seeks interest on past-due benefits.

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

6) Is Employee entitled to interest?

Employee contends his attorney was instrumental in securing benefits on his behalf and he seeks an award of reasonable attorney fees paid as an advance on statutory minimum attorney fees based on all past and continuing benefits awarded, including medical and related transportation costs.

Employer contends, since no additional benefits are due, neither are attorney fees and costs. However, it alternately contends, if attorney fees and costs are awarded, they should be reduced by the amount awarded in an earlier decision in this case, and it objects to 13.2 hours Employee's attorney billed "for merely staying in Honolulu" after a deposition.

7) Is Employee entitled to attorney fees and costs?

Employer seeks reimbursement from the Fund for all compensation payable to Employee in excess of 104 weeks, since it contends the statutory criteria for such reimbursement have been met. It contends Employee's cervical and lumbar spine treating physician, as well as the SIME physician, both agree the March 8, 2012 injury and its subsequent treatment, aggravated Employee's preexisting lumbar problems such that he required lumbar surgery. It also contends Employee's work related, right shoulder, injury combined with his preexisting lumbar spine

condition to produce disability substantially greater than that which would have resulted from his right shoulder injury alone.

The Fund contends this is a "very different case," and agrees Employer has met statutory requirements, such as establishing Employee had a qualifying preexisting condition and giving adequate notice; however, it contends it was unable to establish the "combined effects" or "aggravation" criteria under the statute, and defers that determination to this panel.

8) Is Employer entitled to Secondary Injury Fund reimbursement?

FINDINGS OF FACT

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

1) Two previous interlocutory decisions have issued in this case. *Charlie Hays v. ARCTEC Alaska*, AWCB Decision No. 15-0095 (August 5, 2015) (*Hays I*), denied Employee's petition seeking an SIME, and *Charlie Hays v. ARCTEC Alaska*, AWCB Decision No. 15-0131 (October 5, 2015) (*Hays II*), approved statutory minimum fees based on Employer's voluntary, provisional, reemployment stipend payments. (Record).

2) The medical record in this case is voluminous, containing approximately 3,000 pages. (Record). The Secondary Independent Medical Evaluation (SIME) record alone consists of 29 .pdf files. (*Id*.). So too is the litigation record, which consists of nearly 400 event entries. (Incident Claims Expense and Reporting System (ICERS) event entries). Employer has vigorously litigated Employee's claims and filed seven controversion notices contesting Employee's entitlement to benefits. (Record, experience).

3) Employee has reported at least 33 injuries with 12 different employers, dating back to 1982. These injuries include: AWCB Case No. 198417628 (back); AWCB Case No. 199025753 (right shoulder); AWCB Case No. 199824566 (back); AWCB Case No. 200012692 (left hand); AWCB Case No. 200026447 (left shoulder); AWCB Case No. 200026448 (left elbow) and AWCB Case No. 200601618 (neck). (Incident Claims and Expense Reporting System (ICERS), Case Information).

4) Employee has reported seven injuries with Employer, dating back to 2009. These include: AWCB Case No. 200914198 (lower back strain); AWCB Case No. 200918157 (lower back

strain); AWCB Case No. 201001297 (right index finger); AWCB Case No. 201004236 (left wrist); AWCB Case No. 201009399 (lower back strain); AWCB Case No. 201109725 (back strain) and AWCB Case No. 201203775 (right shoulder strain). (ICERS, Case Information).

5) On October 29, 1984, Employee was injured while working as a Loader Operator when frozen material fell on him, crushing both of his legs. (AWCB Case No. 198426336, Report of Occupational Injury or Illness, October 30, 1884). On June 26, 1986, the parties to that case agreed to retrain Employee as a small engine mechanic. (Parties' agreement, June 26, 1986). They subsequently developed a three-month on-the-job training plan with Alaska Auto Preservation in Anchorage to retrain Employee as a Rustproofer and Car Detailer, instead. (Vocational Rehabilitation Services Plan, February 2, 1987). Employee successfully completed the program with Alaska Auto Preservation, who provided Employee with permanent employment. (Closure Report, June 5, 1987). Employee continued to work for Alaska Auto Preservation through, at least, May 3, 1989. (Report of Occupational Injury or Illness, AWCB Case. No. 198908867, May 3, 1989). Later, Employee returned to work as an Equipment Operator. (Report of Occupational Injury or Illness, AWCB Case No. 199015869, June 10, 1990; Report of Occupational Injury or Illness, AWCB Case No. 199125753, October 18, 1990).

6) Around 1990, Employer underwent a right shoulder Mumford procedure and rotator cuff repair surgery. (Gootee report, March 14, 2012).

7) On July 1, 2008, Employee completed a health questionnaire for Employer, indicating he had previously suffered joint injury or joint pain, a back injury, and had been hospitalized for knee and back treatment. (Health Questionnaire, July 1, 2008).

8) On March 8, 2012, Employee reported injuring his right shoulder while lifting a heavy bucket at work. (Report of Occupational Injury or Illness, March 12, 2012).

9) On March 15, 2012, a right shoulder magnetic resonance imaging (MRI) study showed multiple abnormalities, including a high-grade supraspinatus tendon tear with retraction. (MRI report, March 15, 2012).

10) On March 19, 2012, Employee was determined to be totally disabled from work. (Disability Status report, March 19, 2012).

11) On March 21, 2012, Employer retained Tracy Davis, R.N., and Suzan Del Rosso, R.N., to provide medical case management services. (Del Rosso report, April 3, 2012).

12) On March 22, 2012, Christopher Manion, M.D., performed right shoulder rotator cuff repair surgery. (Operative Report, March 22, 2012).

13) On April 17, 2012, Employee began over nine months of physical therapy at First Choice Physical Therapy. (First Choice report, April 17, 2012 to February 1, 2013).

14) On May 2, 2012, Dr. Manion released Employee to light duty work with the restriction of not using his right arm. (Disability Status report, May 2, 2012).

15) On June 20, 2012, Dr. Manion changed Employee's work restrictions to sedentary work with a lifting restriction of five pounds, and no climbing, pushing or pulling. (Disability Status report, June 20, 2012).

16) On August 8, 2012, R.N. Davis documented Employee had complained to Dr. Manion about collarbone area pain, some numbness in his right fingers and "catching" in his neck. Dr. Manion stated, "that's not from my surgery," and he did not examine the area. (Davis report, August 8, 2012). Afterward, Employee told R.N. Davis he did not think Dr. Manion listened to him and thought Dr. Manion dismissed his symptoms abruptly. (*Id*.). Employee's work restrictions were changed to light duty work with limited right shoulder use, no prolonged overhead work and a lifting restriction of less than two pounds. (Disability Status report, August 8, 2012).

17) On September 18, 2012, the Reemployment Benefits Administrator assigned Loretta Curtis to serve as Employee's vocational rehabilitation specialist. (Charles letter, September 18, 2012).

18) On September 19, 2012, Employee reported to Dr. Manion he had tripped over a log about a week earlier and landed on his right, outstretched hand, which increased his shoulder discomfort. (Manion report, September 19, 2012).

19) On December 31, 2012, Employee reported he was performing physical therapy about two-and-a-half to three weeks previous, when he felt a "pop" in his right shoulder, which had caused him significant pain since. (Heald report, December 31, 2012).

20) On January 2, 2013, a computed tomography (CT) study showed a possible superior labrum, anterior to posterior (SLAP) tear, and a partial thickness tear of the supraspinatus tendon. Dr. Manion's physician's assistant, Duane Heald, recommended a subacromial steroid injection and an intraarticular glenohumeral injection under fluoroscopy. (CT report, January 2, 2013; Heald report, January 4, 2013).

21) On January 15, 2013, a designee for the Reemployment Benefits Administrator (RBA) found Employee ineligible for reemployment benefits based on his treating physician's prediction he would have the physical capacities to return to his job at the time of injury. (RBA letter, January 15, 2013).

22) On February 6, 2013, Employee reported continued right shoulder pain along with significant neck stiffness. Dr. Manion was "really concerned" about Employee's cervical spine and ordered an MRI, which showed severe bilateral foraminal stenosis at C4-5 and mild annular bulges at C3-7. (Manion report, February 6, 2013; MRI report, February 6, 2013).

23) On February 15, 2013, James Eule, M.D., evaluated Employee's cervical condition on referral from Dr. Manion. Dr. Eule ordered a CT myelogram to further evaluate surgical options. (Eule report, February 15, 2013).

24) A February 27, 2013 CT myelogram showed multilevel degenerative disease throughout Employee's cervical spine, which was most pronounced at C3-7. (CT report, February 27, 2013).

25) On March 13, 2013, Dennis Chong, M.D., performed an employer's medical evaluation (EME). He diagnosed: 1) right shoulder labral tear with chronic impingement, status post historical previous rotator cuff repair, related to the March 8, 2012 injury; 2) status post right shoulder reconstructive surgery, related to the March 8, 2012 injury; 3) learned voluntary chronic contraction of right shoulder girdle musculature; and 4) chronic preexisting multilevel cervical spine degenerative disease with presumptive diagnosis of spinal stenosis, unrelated to the March 8, 2012 work injury. Dr. Chong did not think Employee's right shoulder was medically stable and cautioned against a third arthroscopic shoulder procedure since Employee's recovery from his March 22, 2012 surgery was unsuccessful. He also opined Employee's work injury aggravated a preexisting right shoulder rotator cuff condition and produced a permanent change, which necessitated Employee's need for treatment. The work injury was the substantial cause of Employee's right shoulder "condition," according to Dr. Chong. (Chong report, March 13, 2013).

26) On March 20, 2013, Employer controverted benefits related to Employee's cervical spine based on Dr. Chong's March 13, 2013 report. (ICERS legacy event entry, March 20, 2013).

27) On March 21, 2013, Dr. Eule recommended Employee undergo a four-level cervical decompression and fusion. During the visit, Employee told Dr. Eule he had reported neck pain

to Dr. Manion at the time of the March 8, 2012 work injury and asked Dr. Eule for his opinion on whether his cervical treatment was work related. Dr. Eule wrote,

> There is no question or debate that [Employee] had some preexisting significant degenerative changes in his neck, however many patients live with significant degenerative changes in their neck and it was not until they have some type of accident or trauma does it become significant enough that they require treatment, whether it be conservative or surgical and one could hypothesize that the injury maybe caused him to develop instability in those very degenerative levels and that is what has tipped him over the edge. Either way, from the day of his accident he has had a significant change in his function, which has never gotten back to normal and therefore, by the State's definition, is the substantial factor in where he is today and his need for treatment. I am definitely recommending a four-level anterior cervical discectomy and fusion.

(Eule report, March 21, 2013).

28) On March 22, 2013, Employer controverted benefits related to Employee's cervical condition based on Dr. Chong's March 13, 2013, EME report. (Controversion Notice, March 22, 2013).

29) On March 25, 2013, R.N. Del Rosso recommended Employer consider a "care conference" with Dr. Eule to obtain his concurrence with Dr. Chong's cervical spine causation opinion. (Del Rosso report, March 25, 2013). On March 28, 2013, R.N. Davis met with Dr. Eule, outside of Employee's presence, and pointed out Employee's cervical symptoms did not develop until several months after the work injury, as well as documentation of a fall and "some other incidences where [Employee] developed neck pain . . . ." (Eule report, March 28, 2013; inferences drawn therefrom). Following the conference, Dr. Eule wrote, "With this data, I would have to conclude it is not likely from this work accident that this occurred and with that they will probably controvert his cervical claim." (*Id*.). On April 1, 2013, R.N. Davis reported Dr. Eule's concurrence with Dr. Chong's opinion the work injury was not the substantial cause of Employee's need for a four-level cervical fusion. (Davis report, April 1, 2013). She also wrote, "I estimate that the above actions have resulted in a cost savings in excess of $250,000 for medical costs combined with time loss compensation and likely vocational rehabilitation costs." (*Id*.).

30) On March 26, 2013, in response to an inquiry from Employer's adjuster, Dr. Eule opined the March 8, 2012 work injury was not the substantial cause of Employee's need for cervical spine treatment. (Eule responses, March 26, 2013).

31) On April 11, 2013, Dr. Chong issued an addendum to his March 13, 2013 EME report clarifying that, despite likely preexisting rotator cuff pathology, the March 8, 2012 injury resulted in the "final tear," which resulted in Employee's disability and need for treatment. (Chong addendum, April 11, 2013).

32) On April 24, 2013, R.N. Del Rosso met with Dr. Manion without Employee present, and pointed out medical evidence that showed Employee was doing "very well" following his shoulder surgery until he tripped and fell over a log. She then asked Dr. Manion his opinion on causation. Dr. Manion opined the March 8, 2012 work injury was not the substantial cause of Employee's disability or current need for shoulder treatment, but rather the September 2012 trip and fall was. Dr. Manion also thought Employee's right shoulder condition was medically stable "[b]y definition of law," though he was considering diagnostic arthroscopic surgery and possible biceps tenotomy. That same day, R.N. Del Rosso wrote Employer, touting the impact of her medical case management, "I was able to obtain [Dr. Manion's] opinion that the injury of 03/08/2012 was NOT the substantial cause of [Employee's] need for his current medical treatment and future surgery for his right shoulder. I was also able to obtain documentation of medical stability regarding [Employee's] right shoulder in jury of 03/08/2012." R.N. Del Rosso planned to obtain Dr. Chong's concurrence with Dr. Manion's opinion and she anticipated medical case management file closure. On May 1, 2013, Nurse Del Rosso wrote Dr. Chong soliciting his concurrence with Dr. Manion's causation opinion. (Del Rosso letter, April 23, 2013; Manion responses, April 24, 2013; Del Rosso report, April 24, 2013 (emphasis in original); inferences drawn therefrom).

33) On May 17, 2013, Employee saw Dr. Eule for a preoperative visit in advance of a four-level cervical fusion. Dr. Eule discussed potentially using Infuse, a bone grafting agent, during Employee's surgery as well as potential swallowing problems associated with its use. (Eule report, May 17, 2013).

34) On May 20, 2013, Dr. Eule performed anterior cervical decompressions and fusions at C3-7 and bone grafts using Infuse. Dr. Eule again discussed potential complications with using

Infuse, including severe swelling of the throat and difficulty swallowing and breathing, with Employee prior to surgery. (Operative report, May 20, 2013).

35) On May 30, 2013, in response to Nurse Del Rosso's solicitation, Dr. Chong indicated he was in "complete concurrence with Dr. Manion's [April 24, 2013] opinion and opined Employee's need for further shoulder treatment was likely a result of the September 2012 trip and fall. Dr. Chong also thought Employee's right shoulder was medically stable as a result of the March 8, 2012 work injury and rated Employee's right shoulder permanent impairment as a two percent whole person impairment. Nurse Del Rosso was still anticipating medical case management file closure. (Del Rosso letter, May 1, 2013; Chong addendum, May 30, 2013; Del Rosso report, June 3, 2013).

36) On June 4, 2013, Employee was seen at Dr. Eule's office for a post-operative visit. He was "still having some difficulty swallowing," but appeared "to be doing well." At this point, Employee was totally disabled. (Moates-Atkins report, June 4, 2013; Disability Status form, June 4, 2013).

37) On July 9, 2013, Employee saw Dr. Eule for a post-operative visit. Employee reported he felt "dramatically better." He still has "a little bit" of pain in his shoulder, "but it feels like it is actually in his shoulder now." Dr. Eule thought Employee was doing "reasonably well." (Eule report, July 9, 2013).

38) On August 20, 2013, Employee saw Dr. Eule for a follow-up visit and reported stepping backwards into a hole, which "really jarred his neck and he was pretty sore for a couple of days, but that got better." Employee's trachea moved well during swallowing and Dr. Eule hoped Employee's swallowing would continue to improve. Dr. Eule was also "a little bit concerned" about apparent "toggling" around the screws at C6-7 that appeared on x-rays that day. Dr. Eule thought it would now be safe for Employee to see Dr. Manion for his shoulder complaints. Employee remained totally disabled. (Eule report, August 20, 2013; Disability Status form, August 20, 2018).

39) On August 26, 2013, Employee saw Dr. Manion for further right shoulder evaluation. Employee reported he was having some difficulty swallowing, as well as breathing difficulty when he tilts his head back. Dr. Manion discussed a possible diagnostic arthroscopy and biceps tenotomy, but did not want to proceed while Employee was still healing from his neck surgery. Employee continued to have a five-pound, occasional lifting, and a two-pound frequent lifting

restriction's as a result of his right shoulder. (Manion report, August 26, 2013; Disability Status form, August 26, 2013).

40) On October 22, 2013, Employee saw Dr. Eule for a follow-up visit, complained of swallowing difficulties and reported choking "pretty regularly." Employee appeared grossly intact neurologically, and his balance and coordination seemed to be improved. X-rays that day showed a "good solid fusion" at all levels with no loss of instrumentation fixation. Dr. Eule thought Employee should begin physical therapy to improve his range of motion and referred Employee to a speech therapist for a swallowing evaluation. He also encouraged Employee to speak to his ear, nose and throat (ENT) doctor about his swallowing problems. (Eule report, October 22, 2013).

41) On November 9, 2013, Employee was treated at the emergency room after slipping on steps, hitting his head and losing consciousness. (Emergency Department Note, November 9, 2013).

42) On November 21, 2013, Employee was diagnosed with dysphagia at the Mat-Su Regional Medical Center. (Hays report, March 26, 2014).

43) On December 6, 2013, Employee was seen at Dr. Eule's office for a follow-up. He reported falling and landing on the back of his head about two or three weeks previously. Employee sought treatment at the local emergency room, but was still concerned about having problems with his balance and coordination. Employee also reported falling two or three more times since the initial fall. He felt a little bit clumsy in general. Dr. Eule decided to monitor Employee's gait and balance abnormalities, and contemplated ordering an MRI and a neurological referral if these abnormalities trended downward. (Eule report, December 6, 2013).

44) On January 29, 2014, Employee saw Dr. Eule for increasing neck pain after his early December fall, and reported worsening right shoulder pain, as well. Dr. Eule noted there might be "a little bit" of motion at C5-6 on the flexion and extension films taken that day and decided to order a CT myelogram to evaluate whether there was any fracture or pseudoarthrosis that was "adding to the problem." (Eule report, January 29, 2014).

45) A February 4, 2014 cervical CT myelogram showed lucencies around fixation screws at and lucency in the center aspect of the fusion hardware at C7. The report states: "Please correlate for interval injury that may account for these findings." There was no evidence of vertebral body fracture. (CT report, February 4, 2014).

46) On February 18, 2014, Employee saw Dr. Eule for a follow-up after the cervical CT myelogram. Dr. Eule had "some concern" for psuedoarthrosis at C6-7 and he did not see "any good bridging bone there." He also had "some concern" that C5-6 may not be healed as well. Dr. Eule thought C3-4 and C4-5 appeared to be "somewhat healed, not robustly, but at least reasonably." He opined Employee might have "just stirred things up" after his fall and contemplated adding posterior cervical instrumentation to get Employee's fusion to heal the rest of the way. (Eule report, February 18, 2014).

47) On March 27, 2014, Dr. Manion performed a right shoulder diagnostic arthroscopy along with extensive debridement of the glenohumeral joint and subacromial space. (Operative report, March 27, 2014).

48) On April 8, 2014, Employee resumed physical therapy sessions for his right shoulder. Physical therapy sessions were conducted two and three times per week. (First Choice reports, April 8, 2014 to September 16, 2014).

49) On April 15, 2014, Employee followed-up with Dr. Eule for continuing neck pain. Dr. Eule ordered a left-sided intralaminar injection at C7-T1, which was administered On April 22, 2014. Employee remained totally disabled from his cervical condition. (Eule report, April 15, 2014; Levine report, April 22, 2014; Disability Status form, April 15, 2014).

50) On May 7, 2014, Employee saw Dr. Manion for a follow-up visit on his right shoulder and reported continued trapezial discomfort and neck pain. Dr. Manion thought there was nothing further he could do for Employee's right shoulder from a surgical standpoint, and thought some of Employee's complaints were related to his cervical pathology. (Manion report, May 7, 2014).

51) On May 30, 2014, Dr. Eule spent "a lot of time" reviewing x-rays and the CT myelogram with Employee. He thought Employee had "a very difficult problem," and he "hate[d]" to think about considering surgery again," but thought Employee was running out of options since he had failed to improve with conservative treatment. Dr. Eule considered performing a posterior fusion and ordered an MRI "to look for soft tissue things" he may have missed. (Eule report, May 30, 2014).

52) On June 13, 2014, a cervical MRI showed improved alignment and significantly improved canal diameter compared to a prior study. Previously noted C3-4 and C4-5 stenosis was no longer present. However, neural foraminal stenosis was noted at C3-4. (MRI report, June 13, 2014).

53) On July 3, 2014, Employee followed-up with Dr. Eule after his most recent cervical MRI. After reviewing the films with Employee, Dr. Eule thought the "good new [was] there [was] nothing dramatically wrong with [Employee's] neck, but the bad news [was] that he is still having pain." Dr. Eule decided to order a C3-4 transforaminal epidural steroid injection, which was administered on July 10, 2014. (Eule report, July 3, 2014; Gevaert report, July 10, 2014).

54) On September 10, 2014, Dr. Manion ordered a work hardening program for Employee's right shoulder, which Employee commenced on September 18, 2014. (Manion order, September 10, 2014; First Choice reports, September 18, 2014 to October 9, 2014).

55) On October 2, 2014, Employee followed-up with Dr. Eule for neck pain and reported the last injection had provided him with dramatic relief on his left side but he was still having pain in his right shoulder and behind the shoulder blade on the right side. Employee also reported "tweaking his back" while doing work hardening. Dr. Eule thought Employee's neck was "reasonably stable" at that point and did not think Employee's symptoms were coming from his neck. He also doubted Employee's ability to return to work and questioned whether work hardening was going to be a "valid" effort for him. (Eule report, October 2, 2014).

56) On October 10, 2014, Employee saw James Glenn PA-C, who evaluated Employee for low back pain. Employee reported he was performing work hardening about a week-and-a-half previous, when he had an immediate onset of pain "in the small of [his] back and bilateral butt cheeks." He also reported left foot numbness and tingling pain into his right posterior thigh and knee. After reviewing x-rays taken that day, P.A. Glenn thought Employee might have a wedge compression fracture at his L1 vertebra. He ordered an MRI and a discontinuation of Employee's work hardening. (Glenn report, October 10, 2014).

57) An October 17, 2014 lumbar MRI showed an anterior compression fracture of the superior end plate of L1, which was likely chronic, and a small diffuse disc bulge at L5-S1, without significant canal stenosis, but moderately severe bilateral neural foraminal stenosis. (MRI report, October 17, 2014).

58) On October 17, 2014, Employee saw Dr. Manion for a follow-up visit. Dr. Manion noted Employee was "a very sickly gentleman," was "still deconditioned," and had "multiple other issues going on." He thought nothing further could be done for Employee's right shoulder from a surgical standpoint and planned to refer Employee to a pain management program, "once he gets his back sorted out." Dr. Manion did not think Employee's "constellation of problems" was

still related to the work injury, and Employee may need job retraining or require permanent disability benefits. (Manion report, October 17, 2014).

59) On October 21, 2014, P.A. Glenn, after reviewing the MRI and consulting with a radiologist, also thought Employee's fracture was old and ordered resumption of Employee's work hardening program. (Glenn report, October 21, 2014).

60) On November 10, 2014, while attending work hardening, Employee reported his left shoulder was "was hurting quite a bit . . . . my left arm is really starting to talk." The therapist noted palpable crepitus in the top of Employee's left shoulder, around the AC joint, when Employee moved his arm. The following day, Employee's left shoulder was "really bugging" him. The therapist noted Employee's left AC joint was hypertrophied, enlarged and painful to palpation. (First Choice reports, November 10, 2014; November 11, 2014).

61) On November 20, 2014, P.A. Glenn ordered an epidural steroid injection for Employee's lower back pain, which was administered on December 3, 2014. (Glenn report, November 20, 2014; Johnson report, December 3, 2014).

62) On January 12, 2015, Employee saw Duane Heald, PA-C, for a "Medicaid Established Patient New Condition" evaluation. Employee reported increased pain and grinding in his left shoulder after starting his work hardening program. "He [was] also complaining of left wrist pain from a work injury." P.A. Heald noted Employee's appointment was listed under Medicaid, but Employee contended it should be through workers' compensation. During that same visit, Dr. Manion advised Employee to file a claim "to make sure that happens." X-rays taken that day showed significant AC joint arthrosis. P.A. Heald reminded Employee to make sure he gets his left wrist "worked up through Workmen's Compensation and as far as the shoulder is concerned, to make sure that is Workmen's Compensation as well." (Heald report, January 12, 2015; inferences drawn therefrom). P.A. Heald also answered questions and opined Employee's May 18, 2012 [sic] work injury was the substantial cause of Employee's right shoulder, left shoulder and lower back "conditions." He thought Employee's right shoulder was medically stable by October 17, 2014 and Employee would have a permanent right shoulder impairment. Dr. Manion agreed with P.A. Heald's right shoulder opinions and thought Employee's "total body condition makes it unlikely he will return to gainful employment." (Heald responses, January 12, 2015).

63) On January 13, 2015, Employer controverted benefits related to Employee's lower back condition on the basis his work injury involved his right shoulder. Employer later withdrew this controversion. (Controversion Notice, January 13, 2015; ICERS event entry, January 20, 2015).

64) On January 20, 2015, Employee's physical therapy provider wrote a "To Whom It May Concern" letter contending Employee aggravated a pre-existing back condition while participating in work hardening for his right shoulder injury. (First Choice Physical Therapy letter, January 20, 2015).

65) On January 21, 2015, a left shoulder MRI showed a near circumferential labral tear and nearly a full thickness tear of the supraspinatus muscle. (MRI report, January 21, 2015).

66) On January 22, 2015, Dr. Chong evaluated Employee on Employer's behalf and diagnosed: 1) status post right shoulder rotator cuff repair, related to the March 8, 2012 work injury; 2) status post right shoulder reconstructive surgery, related to the March 8, 2012 work injury; 3) aggravation of right shoulder subsequent to trip and fall over log in September 2012, unrelated to the March 8, 2012 work injury, 4) chronic, preexisting multilevel cervical spine degenerative disease, unrelated to the March 8, 2012 work injury; 5) status post anterior cervical discectomy and fusion C3-7 with plating, unrelated to the March 8, 2012 work injury; 6) dysphagia with massive weight loss as a complication of anterior cervical discectomy and fusion, unrelated to the March 8, 2012 work injury; 7) likely preexisting multilevel lumbar spine degenerative disease with spondylosis, unrelated to the March 8, 2012 work injury; and 8) chronic low back subsequent to fall in mud with twisting injury while fishing in August 2014, unrelated to the March 8, 2012 work injury. He opined Employee had recovered from his work related, right shoulder injury by September 2012, or six months after the surgical repair in March of 2012. Dr. Chong thought Employee's severe emaciation as a result of his dysphagia substantially affected his right shoulder function, but the March 2014 surgery resulted from physical therapy to address his neck pain and severe deconditioning, not the March 8, 2012 work injury. Although Employee's right shoulder impairment had substantially increased since 2013, Dr. Chong attributed any increase in impairment to severe deconditioning and emaciation resulting from dysphagia. He also thought the reasonableness of Employee's physical therapy was "questionable" given his severely emaciated state. The only work restriction Dr. Chong attributed to the March 8, 2012 work injury was light-duty work with a 35-pound lifting restriction and "rare overhead shoulder activities." Employee's back condition, according to Dr.

Chong was not work related, but rather related to Employee's "anorexic, emaciated, and deconditioned condition." (Chong report, January 22, 2015). Dr. Chong's report does not indicate he undertook any laboratory tests or metabolic measurements. (*Id.*; observations).

67) On February 2, 2015, Employee claimed ongoing temporary total disability benefits (TTD) from March 8, 2012 for injuries to his right shoulder, left shoulder, left wrist, low back and neck. (Claim, undated; ICERS event entry, February 2, 2015). That same day, Employer also controverted benefits for right shoulder "personal injury," as well as cervical spine, lumbar spine, chronic low back pain and dysphagia based on Dr. Chong's January 22, 2015 EME report. Employee's case file shows Employer later withdrew this controversion. (Controversion Notice, February 2, 2015; ICERS event entry, February 4, 2015).

68) On February 12, 2015, Dr. Eule considered Employee totally disabled as a result of his lumbar spine and recommended L5-S1 decompression surgery. (Eule report, February 12, 2015; Disability Status form, February 12, 2015)

69) On February 26, 2015, Employer controverted TTD from March 8, 2012 and continuing on the bases of causation, medical stability and statutory defenses. (Controversion Notice, February 26, 2015).

70) On March 18, 2015, Employee underwent a bilateral L5-S1 microdecompression. (Operative report, March 18, 2015).

71) On March 19, 2015, Employee, now represented by an attorney, served a claim seeking TTD from April 25, 2013 to March 26, 2014, and from September 11, 2014 continuing, PPI beyond two percent, medical and related transportation costs, interest, reemployment benefits and attorney's fees and costs for "cumulative trauma" to his left shoulder, left arm and low back. (Claim, March 19, 2015).

72) On April 14, 2015, Employer controverted benefits sought in Employee's March 19, 2015 claim on the bases Employee's claim is barred by statutes of limitations, there were no unpaid medical bills for Employee's low back, Employer was not aware of any PPI rating greater than two percent and Employee had never reported a left shoulder or left arm injury while working for it. (Controversion Notice, April 14, 2015).

73) On April 15, 2015, Employee underwent irrigation and debridement surgery after having developed a post-operative lumbar wound infection. (Operative Report, April 15, 2015; Alaska Regional Hospital History and Physical; April 6, 2015; Glenn report, April 14, 2015).

74) On April 24, 2015, Employee reported decreasing pain following surgery. He remained totally disabled, according to Dr. Eule. (Eule report, April 24, 2015).

75) On May 11, 2015, Shawn Johnson, M.D., rated Employee's right shoulder as a seven percent whole person impairment. (Johnson report, May 11, 2015).

76) On May 26, 2015, Employer controverted right shoulder PPI greater than two percent. (Controversion Notice, May 26, 2015).

77) On June 17, 2015, Employee testified he had no problems with his neck or shoulders prior to working for Employer. (Employee depo., June 17, 2015 at 30). He answered questions regarding his general medical history, *id*. at 27-65, including a significant number of work injuries he had sustained over the years with Employer, *id*. at 68-85, including several back injuries, as well as injuries with other employers, *id*. at 53-65.

78) On June 22, 2015, Dr. Eule opined Employee's May 18, 2012 [sic] work injury was the substantial cause of his need for four-level cervical fusion and his current neck symptoms. He also thought Employee's neck condition would result in a whole person impairment rating greater than zero percent. Dr. Eule referred Employee for a physical capacities evaluation to determine his work restrictions. (Eule responses, June 22, 2015).

79) On August 3, 2015, in light of new medical evidence, the parties stipulated to remanding Employee's ineligibility determination back to the RBA. (Stipulation, August 3, 2015).

80) On August 26, 2015, P.A. Heald opined Employee's May 18, 2012 [sic] work injury was the substantial cause of Employee's right shoulder, left shoulder and low back symptoms and thought Employee would require chronic pain management. (Heald responses, August 26, 2015).

81) On October 28, 2015, Employer wrote the RBA designee and contended Employee should be found ineligible for vocational rehabilitation benefits because he previously retrained as a Rustproofer and Car Detailer in 1987 under another claim, then later returned to his former occupation as an Equipment Operator. (Bredesen letter, October 28, 2015).

82) On January 4, 2016, Employee's current vocational rehabilitation counsellor submitted her final report, recommending Employee be found ineligible for benefits because he had been previously retrained in another workers' compensation case and had returned to work in the same or similar occupation in terms of physical demands required of him at the time of the previous injury. Specifically, she determined Employee's position as a "Loader Operator," at the time of

his October 29, 1984 injury corresponded to the SCODRDOT job description of Operating Engineer 859.683-010, and his position as an "Equipment Operator" in 1990 was also fell under that same SCODRDOT job description. Both were medium capacity jobs. (Eligibility Assessment, January 4, 2016).

83) On January 20, 2016, the RBA designee relied upon the vocational rehabilitation counsellor's report and found Employee ineligible for vocational rehabilitation benefits. (Torgeson letter, January 20, 2016).

84) On January 26, 2016, Employee sought review of the RBA determination finding him ineligible for vocational rehabilitation benefits. (Claim, January 26, 2016).

85) On January 29, 2016, Dr. Eule reviewed multiple job descriptions and determined Employee could not work as a Maintenance Mechanic Helper, Construction or Leak Gang Laborer, Commercial or Institutional Cleaner, Operating Engineer, Building Maintenance Repairer, Cleaner II, Automobile Detailer, Industrial Garage Servicer, Dipper, or Maintenance Mechanic Helper. (Eule responses, January 29, 2016). Dr. Manion also disapproved of the same job descriptions. (Manion responses, February 3, 2016).

86) On February 3, 2016, Dr. Manion testified a right shoulder computed tomography (CT) study and physical therapy notes showed Employee did not reinjure his right shoulder when he tripped and fell over a log in September 2012. (Manion depo., February 3, 2016 at 33, 35, 39, 85, 87-88, 90, 91, 93). The CT study also showed Employee did not have an arthritic right shoulder, which "looked pretty reasonable from an arthritis standpoint." (*Id*. at 92-93). Employee continued to experience pectoralis discomfort after receiving right shoulder treatment, so Dr. Manion referred Employee to Dr. Eule because "if people don't get better after having some identified shoulder pathology or condition, then we have to worry about maybe there's something going on with their necks." (*Id*. at 36-37). Dr. Manion confirmed his April 24, 2013 opinion that work was no longer the substantial cause of Employee's need for medical treatment following his September 2012 trip and fall over a log. (*Id*. at 39-40). Between work and the trip and fall incident, the trip and fall incident was the larger of the two causes of Employee's need for the second right shoulder surgery. However, between Employee's prior Mumford procedure, his first work related right shoulder surgery, the trip and fall, and the injury in physical therapy, Dr. Manion "can't really answer" which of these incidents was the substantial cause for Employee's second right shoulder surgery. Dr. Manion can rule out the work injury as the cause

of Employee's need for a second right shoulder surgery because the biceps tendon and its attachment appeared normal during Employee's first right shoulder surgery. (*Id*. at 114). It is also "highly unlikely" physical therapy damaged Employee's right shoulder, (*Id*. at 99), or contributed to right shoulder pain, (*Id*. at 112). Dr. Manion cannot opine on the cause of Employee's chronic right shoulder pain. (*Id*. at 111). Additionally, "it is very difficult" to opine on the cause of Employee's need for work hardening. (*Id*. at 54-55). Dr. Manion does not have an opinion on whether Employee's left shoulder complaints are related to his right shoulder problems. (*Id*. at 62). Neither does he have an opinion on left shoulder causation, (*Id*. at 67, 124). Work hardening, however, did not increase Employee's left shoulder symptoms. (*Id*. at 119). The reason Dr. Manion disapproved numerous job descriptions for Employee was rotator cuff reconstructions have a 25 percent failure rate and the job descriptions presented called for activities such as climbing, crouching, reaching, and exerting forces of 50 to 100 pounds. (*Id*. at 69-74). Employee's right shoulder work injury and the resulting surgery are the substantial cause of Employee's inability to perform the disapproved jobs. (*Id*. at 126-27). Dr. Manion agrees with Dr. Johnson's seven percent right shoulder PPI rating. (*Id*. at 100).

87) On February 25, 2016, Dr. Chong again evaluated Employee on Employer's behalf and opined medical treatment for Employee's low back and cervical spine conditions was unrelated to the work injury. He thought the work injury was the substantial cause of Employee's right shoulder treatment and Employee's right shoulder was medically stable by April 2013. Employee's neck, lower back or bilateral shoulder conditions did not require any further treatment, either curative or palliative, nor did Employee have any work restrictions associated with them, according to Dr. Chong. He now rated Employee's right shoulder as a three percent whole person impairment. Dr. Chong thought Employee's right shoulder injury alone did not preclude Employee from performing other jobs previously held, but Employee's multiple musculoskeletal complaints, as a whole, made it "questionable" whether he could perform them. (Chong report, February 25, 2016).

88) On March 8, 2016, Dr. Eule testified Employee suffered from myelopathy, which is considered a slow strangulation of the spinal cord and causes problems with balance and coordination. (Eule depo., March 8, 2016 at 10). He explained lifting a bucket can cause a neck injury since "all your trap muscles pull on your neck." (*Id*. at 51). Based on Employee's history, Dr. Eule thinks Employee's need for cervical surgery was work related. (*Id*. at 16, 61, 63). Dr.

Eule initially agreed with Dr. Chong's causation opinion because, at the time, he did not know whether Employee's work injury was, or was not, the substantial cause of his need for cervical surgery. (*Id*. at 18). He later indicated the work injury was the substantial cause of Employee's need for surgery because there seemed to be a triggering event and his neck and shoulder symptoms occurred at the same time. (*Id*. at 49-50). He also thought the original MRI report was "pretty unimpressive" and "significantly flawed," since it concluded Employee had no acute problems. (*Id*. at 51). Dr. Eule explained,

> So people do, not that uncommonly, injure their neck and shoulders and we often go back and forth between the shoulder guy and the neck guy. Is this coming from the shoulder? Is this coming from the neck? Is the shoulder pain because of the neck?

(*Id*. at 50-51). He further explained,

> As I've already alluded to, I mean, its very common sometimes – I mean, certainly the shoulder pain can be coming from the neck, and the neck and shoulder pain makes the neck worse, and they often go back and forth. But yes, I mean, you can be thinking that you are - you are having continued significant shoulder pain and you think it's coming from your shoulder and it could be coming in your neck, or vice versa.

(*Id*. at 56). Employee's neck was medically stable by October 10, 2014. (*Id*. at 37). Employee's lumbar spine MRI showed degeneration at L5-S1, which can be caused by wear-and-tear or an acute injury. (*Id*. at 40). Dr. Eule alternatively stated he thinks Employee's need for lumbar spine treatment is also work-related based on Employee's history and Employee's participation in work hardening at the time of the flare-up, (*id*. at 43), but he later stated he does not have an opinion whether Employee's need for lumbar surgery is related to his employment. (*Id*. at 53). Employee's participation in work hardening did worsen his symptoms, though. (*Id*. at 74, 75, 76, 77-78). "There is no question that it exacerbated the problem or made it worse and may have caused him to have to have the surgery." (*Id*. at 77). Additionally, if Employee was not experiencing low back pain symptoms, Dr. Eule would not have undertaken surgery. (*Id*. at 80). Employee's lumbar spine was medically stable at the time of Dr. Eule's deposition. (*Id*. at 80). Since Employee has never fully recovered from his right shoulder and cervical spine surgeries, and since his left shoulder is now an issue, it is unlikely Employee will ever be "significantly gainfully employed." (*Id*. at 54, 83). Employee's medical conditions are all additive, according

to Dr. Eule, and "all of them put together make it difficult for him to do much of anything." (*Id*.). Dr. Eule can rule out Employee working 40 hours per week, 50 weeks per year, even at a sedentary job, because of his low back condition, (*id*. at 84), and also would not recommend Employee working a job where he is required to drive on account of his medications, (*id*. at 86).

89) On March 11, 2016, Employee claimed various periods of TTD, vocational rehabilitation benefits, PPI greater than two percent, PTD, reclassification of PPI and reemployment stipend previously paid, medical and related transportation costs for his neck, low back and left shoulder, interest and attorney fees and costs. (Claim, March 9, 2016).

90) On August 16, 2016, Dr. Chong issued an addendum report indicating additional records, including Dr. Eule's deposition transcript, did not change his previously expressed opinions. Employer also asked Dr. Chong to opine on specific work restrictions for each of Employee's conditions and determine which was the "most disabling." Dr. Chong thought Employee's right shoulder warranted a 50-pound lifting restriction and limited Employee to occasional overhead work. Employee's cervical fusion limited him to rare overhead work. Dr. Chong opined "there was no objective basis to accord restrictions" to either Employee's left shoulder or his lumbar spine. Dr. Chong wrote the following concerning Employee's "most disabling" limitation: "It is the constellation of the multitude of musculoskeletal subjective pain complaints, which include the axial spine, as well as four limbs which would likely result in volitional self-limitation. . . . This level of activity is one of functioning at a light physical demand capacity level." (Chong addendum, August 16, 2016).

91) On November 17, 2016, Employer noticed the Fund of a possible claim for reimbursement. (ICERS event entry, November 17, 2016).

92) On November 29, 2016, Jon Scarpino, M.D., performed a secondary independent medical evaluation (SIME) and set forth his findings, diagnosis and opinions in a 144-page report. He diagnosed: 1) Lumbar degenerative disc disease predating subject incident, with chronic, intermittent back pain; 2) Cervical degenerative disc disease, with multilevel spinal stenosis, predating subject incident, asymptomatic; 3) Status post right shoulder rotator cuff repair and acromioplasty, predating subject incident, asymptomatic; 4) Status post left shoulder subacromial decompression, predating subject incident, asymptomatic; 5) Status post contusion and strain/sprain, left wrist, predating subject incident, asymptomatic; 6) Status post right and left knee reconstruction predating subject incident, asymptomatic; 7) Chronic lateral ligament

instability, right ankle, predating subject incident; 8) Diagnosis carpal tunnel syndrome, verified by electrodiagnostic studies, predating subject incident; 9) Diagnosis of sensory polyneuropathy, lower extremity, by electrodiagnostic studies, predating subject incident; 10) L1 burst fracture, predating subject incident, asymptomatic; 11) History of seizure disorder predating subject incident, quiescent; 12) History of kidney stones predating subject incident, quiescent; 13) Chest pain with coronary artery spasm predating subject incident, quiescent; 14) Work-related injury, March 8, 2012, with acute right rotator cuff tear; 15) Status post rotator cuff repair; 16) Status post diagnostic arthroscopy and tenodesis, long head of biceps tendon, for chronic pain, post March 8, 2012 injury; 17) Neck pain with radicular component, post March 8, 2012 injury, probably related; 18) Status post multilevel cervical decompression with anterior interbody fusion and plate fixation; 19) Recurrent low back pain with radicular component related to Work Hardening activity; 20) Status post L5-S1 surgical decompression; 21) Postop wound infection, superficial, resolved; 22) Left shoulder strain/sprain, with evidence of minimal rotator cuff tear related to work hardening activities; 23) Development of left wrist pain secondary to work hardening activity; 24) Swallowing disorder, post anterior cervical fusion, probably related to vagus nerve injury; 25) Malnutrition secondary to #24; 26) Chronic pain syndrome with multiple musculoskeletal pain generators and mood disorder. Dr. Scarpino thought this was "an extremely complicated case, given the multiple pre-existing injuries and comorbidities," and Employee's initial injury led to a "cascade" of other problems. He concluded Employee's March 8, 2012 work injury caused a rotator cuff tear in the right shoulder, as well as the subsequent development of cervical pain with radicular and myelopathic findings, and lower back pain, left shoulder pain, and left wrist pain, all requiring medical treatment. The mechanism of injury was consistent with the initial right shoulder rotator cuff tear and Employee's "very significant" preexisting cervical spinal stenosis left him vulnerable to injury with "minor insults" that would normally not cause any problems. The subsequent development of Employee's neurologic symptoms, requiring cervical surgery, was due to increased activity levels in physical therapy since Employee's spinal cord and nerve roots had no room to stretch as they would in a person without this problem. Employee's laryngeal and vagus nerves were later damaged when they were retracted during his cervical surgery, which in turn caused Employee's swallowing problems and led to significant weight loss. Employee was next placed in physical therapy and his malnourished state left him at risk to

further injury. Employee's left shoulder, low back, and left wrist symptoms all arose as a result of his participation in physical therapy while in a malnourished state, and each of these conditions were aggravations to preexisting conditions. His chronic pain syndrome and mood disorder resulted from the original work injury, as well. Employee was not medically stable, and additional evaluations and treatment were still required. Dr. Scarpino recommended a "full assessment" of Employee's swallowing problems by an ear, nose and throat (ENT) physician, electrodiagnostic studies to determine whether carpel tunnel syndrome is negatively impacting Employee's recovery, and to evaluate Employee's lower extremity pain, plain film images to assess Employee's left wrist symptoms, medical management of Employee's chronic pain, a full psychiatric assessment to assist in treating Employee's chronic pain syndrome, and a nutritional assessment to improve Employee's nutritional status. Employee was totally disabled from work and it was "unlikely" Employee would ever return to gainful employment. (Scarpino report, November 29, 2016).

93) Dr. Scarpino's November 29, 2016 SIME report is one of the most comprehensive and comprehensible this panel has ever seen. (Experience).

94) On December 6, 2016, the Fund denied Employer's November 17, 2016 request for reimbursement. It contended all but one of the elements set forth at AS 23.30.205 had been met, but it was without sufficient information to determine whether the statute's "combined effects" or "aggravation" requirement had been met. (Fund's Answer, December 6, 2016).

95) On January 24, 2017, Employer wrote Dr. Eule, requesting his opinions. Dr. Eule indicated treatment for Employee's March 8, 2012 work injury aggravated or accelerated his pre-existing lumbar "problems," including a displaced disk at L5-S1. He also opined the work injury, and treatment for it, combined with the displaced disk, and the combined effects of both the work injury and Employee's preexisting condition produced a substantially greater disability than would have resulted from the work injury alone. (Bredesen letter, January 24, 2017).

96) On April 14, 2017, Dr. Scarpino testified, initially his specialty was trauma, but he performed "all kinds" of orthopedic surgery, including "[l]ots of arthroscopic surgery." (Scarpino depo., April 14, 2017 at 7-9). He was "back at the beginning of total joint replacements," but sports medicine has always been his favorite practice area. (*Id*.). Ninety percent of his practice was later devoted to spinal surgeries. (*Id*.). According to Dr. Scarpino, it is always difficult to differentiate what symptoms are coming from the neck and what symptoms

are coming from the shoulder because the areas overlap. (*Id*. at 11, 17-18, 74). He also explained why Employee's spinal stenosis placed him at "high risk." A spinal canal is normally 18 millimeters in diameter between C3 and C7. (*Id*. at 12). A spinal canal less than 10 millimeters is high risk because the spinal cord is 8 millimeters and the dura membrane that surrounds the cord is 1 millimeter, for a total diameter of 10 millimeters. (*Id*.). Employee's spinal canal was 8 millimeters. (*Id*.). Dr. Scarpino did not calculate an impairment rating for Employee because he is not medically stable. When asked if Employee will have an impairment, Dr. Scarpino replied, "He will have a big impairment. . . . If you just look at malnutrition with a 20 percent weight loss, that's up to 60 percent whole body just for that." (*Id*. at 42). Dr. Scarpino brought numerous exhibits with him to his deposition to illustrate his opinions' bases. (*Id*. at 46-57). The exhibits included a chapter from a text book on cervical angina to show Employee's symptoms during physical therapy were of a cervical origin and that condition was never diagnosed; a description of the laryngeal nerve and its functions, as well as a description of the vagus nerve and its functions, to illustrate the origin of Employee's swallowing problems; a table of nerve roots that show correlations to Employee's symptoms; the criteria for malnutrition in adults and an article showing the connection between malnutrition and wound infections; an article showing higher infection rates in patients with low albumin; and an article studying complications associated with shoulder surgeries performed while the patient is lying down versus in the "beach chair" position. (*Id*.). Dr. Scarpino read Employee's deposition transcript and personally reviewed all imaging studies in detail. (*Id*. at 59-60). He disagreed with Dr. Chong's opinion that Employee had a degenerative left shoulder and the work injury "finished off" a preexisting rotator cuff tear. If Employee had a preexisting rotator cuff tear, according to Dr. Scarpino, fatty infiltration would be seen on Employee's MRI study, but since Employee's MRI did not show fatty infiltration, his rotator cuff tear was a new tear. (*Id*. at 72). He also explained the bases of his opinion relating Employee's need for cervical surgery to his participation in physical therapy:

> It's related to the history provided by Mr. Hays, plus going through all the physical therapy notes and seeing the symptoms start out consistent with either the shoulder problem or the neck problem.

> The failure to improve with normal treatment for the shoulder, the frustration on Dr. Manion's part indicating that he doesn't know why Mr. Hays isn't getting better, and this isn't part of his shoulder problem.
>
> And the therapist's delineation of the progression from there to cervical angina to radicular complaints. And there is a progression over the months up to the point where he ends up like this (indicating).
>
> So you have that progression that's consistent with injury in his neck that's progressive with his therapy over several months until he gets to the point where the problem is so severe that he finally gets sent to Dr. Eule.
> . . . .
>
> There is just a very definite progression. And he has this really severe chest pain, and everybody just kind of blew it off. Nobody related it to his neck.

(*Id*. at 82-83).

97) On November 9, 2017, Employer petitioned the Fund for reimbursement. (Employer's Petition, November 9, 2017).

98) Around March 29, 2018, Employer retained Employee's former vocational rehabilitation specialist, Ms. Curtis, to opine whether Employee was employable. Ms. Curtis reviewed Drs. Manion's, Eule's and Scarpino's deposition transcripts and observed Employee's employment history consisted of jobs that had medium duty physical capacities. Based upon her review of Employee's file, including Drs. Eule's and Scarpino's opinions that Employee is unable to return to gainful employment, Ms. Curtis concluded Employee could not return to either full-time or part-time work and would not be competitive in the labor market. (Curtis letter, March 29, 2018).

99) On April 6, 2018, Employee filed his initial affidavit of attorney fees and costs. (Employee affidavit, April 6, 2018). He later supplemented them on April 11, 2018, and again on April 13, 2018, ultimately claiming $78,240 in attorney fees, $27,124.50 in paralegal costs and $13,389.51 in other litigation costs. (Employee supplemental affidavits, April 11, 2018; April 13, 2018). Employer filed a limited objection to Employee's claimed attorney fees and costs one week later. (Employer objection, April 20, 2018). It requested any fees awarded be reduced by the amount of fees previously approved in *Hays II*. It also objected to a single line item entry for 13.2 hours of attorney time "for merely staying in Honolulu, including eight hours for one day after [Dr. Scarpino's] deposition concluded." (*Id*.). Employer thought the 20.8

hours Employee billed for travel, preparation and attendance at the deposition was reasonable, but requested an attorney fee award be reduced by the 13.2 hours it found objectionable. *(Id.*).

100) At hearing, Neil Mehand testified he worked for Employer for 10 years. He started as an equipment operator, but is now a generator mechanic at Joint Base Elmendorf-Richardson (JBER). Mr. Mehand worked at remote radar sites "all over the state" as a station mechanic until 2008. He met Employee at work in 2008 or 2009. The last job he worked with Employee was at Indian Mountain crushing gravel. The job involved re-building the crusher, which required heavy lifting. Employee had not yet been injured and had no difficulties performing this work. Mr. Mehand next saw Employee last summer, when Employee needed help moving a small cabin. Employee did not look very healthy and appeared disabled. Employee looked different than he did at work, where he would "go and go and go." Mr. Mehand was not aware of Employee's other reported work injuries, but was aware Employee's back would sometimes get sore. (Mehand).

101) At hearing, Employee testified his work experience included plumbing and electrical work. At a former job, his knees were crushed by falling permafrost and he was in a wheelchair and had to learn to walk again. He was off work for three or four years. His time off work included vocational rehabilitation, where the plan was for him to be retrained in small engine mechanics, but his instructor went bankrupt. He then was trained to build canopies and worked at that for three years. In 1982, Employee hurt his neck while operating a loader and later went to work as an equipment operator. He was then laid off and went to work for Employer as a station mechanic in 2008, where he worked at radar sites around the state. His most recent duties included crushing gravel and installing flooring. Employee had no difficulty performing this work. He never had any difficulty passing fit-for-duty examinations. Employee had prior right shoulder surgery after slipping and falling on a piece of equipment. He recovered and his shoulder "worked fine." Employee also previously fell in a hole in a floor and had arthroscopic shoulder surgery and then returned to work. He also hurt his back before, but it never gave him any "great problems." Employee's fit-for-duty examinations for Employer included discussions of previous injuries. The instant work injury occurred at the end of a 3-month tour while he was working at Fort Yukon. Employee grabbed a full, five-gallon bucket he thought was empty. He instantly felt right shoulder pain and was medically evacuated to Fairbanks, then to Anchorage. Employee underwent surgery to repair a "massive tear" a couple days later. His recovery was

"miserable" and "painful." Employee told Dr. Manion his pain was going into his neck and confirmed Nurse Del Rosso's report, where he is quoted as saying Dr. Manion "doesn't listen to me." Employee also confirmed telling his therapist, Jeff Lepage about a "crick in his neck." Eventually, he consulted Dr. Eule for his neck pain, and told Dr. Eule the pain was so bad he wanted to kill himself. Dr. Eule recommended immediate surgery and then performed a C3-C7 fusion. Surgery provided Employee "a lot of relief," but he had swallowing problems where food would get stuck in his throat and he would choke it up. He lost weight and went from 199 pounds to 136 pounds. Employee was participating in work hardening, which is to "build you up" to work eight-hour days, versus physical therapy, which is to increase your range of motion. He told P.A. Heald in 2012 about feeling a "pop" and increasing shoulder pain. Employee also injured his back while working with the ball in work hardening, then had back surgery. Since then, his right thigh and the bottoms of both feet are numb "all the time." He continues to have back pain, neck and shoulder stiffness and right hand numbness. His left shoulder problem began after back surgery, where he was using his "good arm" to get up and down. Now his day-to-day life is "pretty boring." Employee watches television, his friends visit and he lays down three to four times per day. He needed Mr. Mehand's help moving the cabin because he "couldn't do it." Employee feels depressed because he cannot fish and because he is so skinny. He cannot stay outside for very long because he gets so cold and he cannot walk very far. Employee thinks physical therapy worsened his left shoulder because he "wouldn't have done it any other way." Medicaid paid for his medical care, now he receives Social Security disability and Medicare benefits. Employee does not think he could give "an honest day's work" at this point. He also testified regarding his numerous other work injuries and experiencing right leg numbness in 2006. At times, Employee talked to his supervisors regarding decreasing his work activities due to back pain, and other employees would occasionally help him at work for the same reason. Employee described his most strenuous work hardening activity was picking up 10-pound boxes and putting them on a shelf for 20 minutes at a time. Presently, Employee needs pain management for "everything." (Employee).

102) Employee testimony was natural and spontaneous. He is generally credible, but his recollections concerning his previous vocational rehabilitation are not entirely supported by the record. (Experience, judgment, observations and inferences drawn therefrom).

103) Employee appeared emaciated and presented as sickly at hearing. (Observations).

104) At hearing, Dr. Chong testified he specializes in Physical and Rehabilitation medicine and thinks Employee's work activities resulted in a "final" tear of Employee's rotator cuff. He also thinks the prior degenerative condition of Employee's right shoulder played a role in his need for surgery, as well. All of life's activities, including work activity and leisure activity, contribute to shoulder degeneration. Dr. Chong likened Employee's rotator cuff to frayed stitches on an old shirtsleeve as an example, and Employee's work injury was "the straw that broke the camel's back." It was, in Dr. Chong's opinion, the substantial cause of Employee's need for right shoulder surgery. Employee's work restrictions arising from his right shoulder injury include no lifting over 50 pounds and no overhead work. Employee was capable of doing medium capacity work, but now, the "totality" of Employee's "constellation" of problems, which include his neck, weight loss, and his back, he is only capable of sedentary to light duty work. Dr. Chong does not think physical therapy played any role in Employee's right shoulder condition. He explained, at some length, the differences between physical therapy, work conditioning and work hardening. In late 2014, Employee was "definitely" not doing work hardening, but rather work conditioning. Employee's participation in physical therapy played no role in his current work restrictions. Dr. Chong disagrees with Dr. Scarpino's "malnourishment theory," since it is unproven with respect to Employee. Malnourishment should be scientifically demonstrated with lab work and metabolic measurements. Malnourishment did not contribute to Employee's right shoulder condition, although many other factors did, such as "life in general," previous injuries, as well as the instant work injury. Employee is also a smoker and it is well-known smokers get poor results with rotator cuff repair surgery. Although Employee's 50-pound lifting restriction was a result of the right shoulder work injury, presently Employee can only lift 10 to 15 pounds "globally" now. Other current restrictions would prevent Employee from reaching, crawling and climbing. Employee's cervical stenosis resulted from degeneration or "just getting old." Additionally, some patients have congenitally narrow spinal canals. Aging, work activity and non-work activity all contributed to the degeneration of Employee's neck. Since Employee's physical therapy was not directed toward his neck, it played no role in his need for cervical surgery. Work was not the substantial cause of Employee's need for cervical fusion surgery, but rather "many life factors," such as work activity, leisure activity, smoking, genetic predisposition and congenital factors. Work restrictions arising from Employee's neck condition include not looking up, no sideways turning of the head and seldom to occasional overheard work. Work

was also not the substantial cause of Employee's need for back surgery. Decades of work, as well as life's activities over time, smoking and Employee's numerous other back injuries were factors that contributed to his need for surgery. Since Employee's back surgery was a curative procedure, it is not responsible for any work restrictions. Employee's right shoulder, combined with all his other conditions, limit him to sedentary work. "All of life's activities" also caused Employee's need for left shoulder surgery. Work, work conditioning and malnourishment played no roles. Dr. Chong testified regarding his curriculum vitae. He does not perform surgery and has been performing medical evaluations for 10 years. Dr. Chong spends one and one-half days per week in his clinical practice. He underwent training with CIGNA insurance company since he works as an Insurance Medical Director. Dr. Chong also participated in leadership training offered by a health insurance company. He served as a reviewer for the publication *Workplace Disability Guidelines*, which was written as a guide for workers' compensation case managers and instructs them on the ordinary types and lengths of treatment. On cross-examination, Dr. Chong alternatively testified Employee's work injury could have been a "dramatic" injury that involved his cervical spine, and could not have contributed to Employee's need for cervical spine treatment, even though he has had patients with an injured neck from lifting something heavy. Employee had long had a degenerative lumbar spine and his back surgery was "a long time coming." (Chong).

105) Dr. Chong's testimony was natural, spontaneous and displayed his professional knowledge. He is generally credible, but his opinions are viewed with some skepticism on account of his unusually close relationships with the insurance industry. (Experience, judgment, particular facts of the case and inferences drawn therefrom).

106) At hearing, Employee suggested a PTD date of January 29, 2016, the date Dr. Eule disapproved the ten job descriptions, for administrative convenience, should the panel find he is entitled to that benefit. Employer did not contend otherwise. (Record).

107) Employee's benefit payment history is confusing, and his benefits have been reclassified many times. (Experience; record). An April 16, 2015 compensation report shows Employee's compensation rate is $1,085 per week and he was paid TTD from March 10, 2012 through April 19, 2013; PPI from April 20, 2013 through May 31, 2013; TTD from March 27, 2014 through September 10, 2014 and vocational rehabilitation stipend benefits from September 11, 2014 and continuing. (Compensation report, April 16, 2015). The parties agree Employer continues to

pay vocational rehabilitation stipend benefits pursuant to their stipulation in *Hays II*. (Record; Parties' Hearing Briefs).

108) Employee is currently 55-years old. (Record). According to the most recent data from the Center for Disease Control and Prevention, Employee's life expectancy, based on chronological age alone, is 76 years. (*Mortality in the United States, 2016*, United States Center for Disease Control and Prevention, https://www.cdc.gov/nchs/products/databriefs/db293.htm, accessed on June 30, 2018).

109) Employer does not have sedentary or light duty work available for its Station Mechanics. (Experience).

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 23.30.010. 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.**
> . . . .
>
> (f) An employee is not eligible for reemployment benefits if

> (1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the employee to be employable in other jobs that exist in the labor market;
>
> (2) the employee previously declined the development of a reemployment benefits plan under (g) of this section, received a job dislocation benefit under (g)(2) of this section, and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury;
>
> (3) the employee has been previously rehabilitated in a former worker's compensation claim and returned to work in the same or similar occupation in terms of physical demands required of the employee at the time of the previous injury; or
>
> (4) at the time of medical stability, no permanent impairment is identified or expected.
> . . . .
>
> (k) . . . . An employee may not be considered permanently totally disabled so long as the employee is involved in the rehabilitation process under this chapter. . . .

The vocational rehabilitation statute at the time of Employee's 1984 work injury bears little resemblance to the present statute. *Alaska Workers' Compensation Act* (The Mitchie Company 1983). Editorial notes state, "The 1998 amendment, effective July 1, 1988, rewrote this section to the extent that a detailed comparison is impractical." *Alaska Workers' Compensation Act* (The Mitchie Company 1989). The ineligibility criteria presently appearing under (f)(1) and (f)(3) were added by the 1988 amendment. *Id*. A 2005 amendment, effective November 7, 2005, added paragraph (2) in subsection (f) and redesignated subsequent paragraphs accordingly. *Alaska Workers' Compensation Laws and Regulations Annotated 2005-2006 Edition* (Mathew Bender & Company, Inc. 2005).

> **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. . . .

Injured workers must weigh many variables when deciding whether to pursue a certain course of medical or related treatment. An important treatment consideration in many cases is whether a physician's recommended treatment is compensable under the Act. *Summers v. Korobkin*, 814 P.2d 1369, 1372 (Alaska 1991). Therefore, an injured worker is entitled to a hearing and a prospective determination on whether medical treatment for his injury is compensable. *Id.* at 1373-74.

> **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).

> **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 Alaska Supreme 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 claim's merits, 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, employer's resistance, 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, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (h) The board may, upon its own initiative and at any time in a case in which payments are being made with or without an award, where right to compensation is controverted, or where payments of compensation have been . . . changed . . ., upon receipt of notice from a person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been . . . changed . . ., make the investigations . . ., or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.
>
> (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 workers' compensation 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 employers should not profit from controverting claims by having to repay Medicaid at significantly reduced rates. *Cannady* concluded ordering the employer to reimburse Medicaid is 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)). *McNamee v. Nabors Alaska Drilling*, AWCB Decision No. 18-0004 (January 11, 2018) found *Cannady* persuasive and ordered Medicare and Medicaid reimbursements.

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. . . . [P]ermanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
> (2) area of last employment;
> (3) the state of residence; and
> (4) the State of Alaska.
> . . . .

For workers' compensation purposes permanent total disability does not necessarily mean a state of abject helplessness. It means the inability because of injuries to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *J. B. Warrack Co. v. Roan*, 418 P.2d 986, 988 (Alaska 1966). For an employer to rebut the presumption of compensability, it must produce substantial evidence that shows work within an employee's abilities is regular and continuously available in the relevant

labor markets described in (a) of the statute. *Leigh v. Seekins Ford*, 136 P.3d 214, 219 (Alaska 2006). This burden may be satisfied with labor market surveys of the specific and relevant markets. *Id*. at 220.

> **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. . . .

Under the current version of §190, adopted in 1988, the PPI calculation is based on the whole person and is arrived at under the American Medical Association Guides to the Evaluation of Permanent Impairment. This represents a marked departure from the former version of the statute, which calculated permanent partial disability (PPD) based on a schedule of values for arms, fingers and legs. *Sumner v. Eagle's Nest Hotel*, 894 P.2d 628; 631 (Alaska 1995); *Lowe's HIW, Inc. v. Anderson*, AWCAC Decision No. 130 at 10-11 (March 17, 2010). In *Alaska Airlines v. Darrow*, 403 P.3d 1116 (Alaska 2017), the Court concluded the terms "impairment" and "disability" have distinct meanings under the Act and the two terms are not interchangeable. *Id*. at 1128. "Compensation for impairment is awarded independent of earning capacity and for a different type of loss than . . . permanent disability compensation, which depends on a worker's inability to earn wages." *Id*. at 1130.

> **AS 23.30.205. Injury combined with preexisting impairment.**
>
> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury or by reason of the aggravation of the preexisting impairment than that which would have resulted from the subsequent injury alone, the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the

> insurance carrier shall be reimbursed from the second injury fund for all compensation payments subsequent to those payable for the first 104 weeks of disability.
> . . . .

The presumption that an employee's claim is compensable in AS 23.30.120(a)(1) does not apply to an employer's request for reimbursement from the Secondary Injury Fund. *Kennecott Greens Creek Mining Co. v. Clark*, AWCAC Decision No. 080 (June 9, 2008) at 13. *Kennecott* also set forth the requirements for reimbursement:

> In order to decide that the Fund is liable for reimbursement to an employer, AS 23.30.205(a) requires that the following facts be established: (1) the employee had "a permanent physical impairment" within the meaning of AS 23.30.205(c); (2) the employee incurred "a subsequent disability by injury arising out of and in the course of the employment;" and (3), the employer's liability for compensation for disability is substantially greater
>
> (a) "by reason of the combined effects of the preexisting impairment and subsequent injury" or,
>
> (b) "by reason of the aggravation of the preexisting impairment" than the liability that would have resulted from the subsequent injury alone.

Id. at 13-15. It next explained how to analyze the statute's "combined effects" or "aggravation" criteria:

> In order to make the findings required by (3) above, the board must establish the value of the employer's liability for compensation for disability from the subsequent injury alone and the value of the liability for compensation for disability from the "combined effects" of the injury and preexisting impairment or "aggravation" of the preexisting impairment. Once both values are established, the board may compare them and determine if the employer's liability is "substantially greater" than would result from the second (or subsequent) injury alone. It is not enough that the liability be simply greater, it must be *substantially* greater.

Id. at 15 (emphasis in original). The employer has the burden to produce evidence sufficient to demonstrate the relative values of its liability for disability compensation, and the substantiality of any greater liability; and must persuade the board, by a preponderance of the evidence, either the "combined effects," or "aggravation" requirement has been met. *Id*. at 16.

"Substantial" is defined as, material. (Merriam-Webster Dictionary 490 (New ed. 2005). "Material" means, of such a nature that knowledge of the item would affect a person's decision-making. (Black's Law Dictionary, 1066 (Ninth ed. 2009).

> **8 AAC 45.900. Definitions.**
> . . . .
>
> (j) For an injury occurring after December 22, 2011, "previously rehabilitated" under AS 23.30.041(f)(3) means having
>
> > (1) completed a reemployment benefits plan under AS 23.30.041 or a substantially similar law in another jurisdiction . . . .

ANALYSIS

1) Is Employee entitled to medical and related transportation costs for his right shoulder, left shoulder, cervical spine and lumbar spine?

Employee seeks an award of medical and related transportation benefits for his right shoulder, left shoulder, lumbar spine and cervical spine. For medical benefits to be compensable, Employee's employment must be "the substantial cause" of his need for medical treatment. *Runstrom*. Compensability raises a factual dispute to which the statutory presumption of compensability applies. *Meek.* Given Employee only initially reported a right shoulder injury, and considering the disparate and seemingly unrelated body parts for which he now seeks treatment, this is a medically complex case, as is also evidenced by the medical record itself and the multitude of differing medical opinions on causation issues. As such, expert medical evidence is necessary to establish the "preliminary link" between employment and Employee's need for left shoulder, lower back and cervical spine treatment. *Wolfer*; *Smallwood*.

Employee attaches the presumption with P.A. Heald's opinions relating not only Employee's need for right shoulder treatment, but also his need for left shoulder and low back treatment to his employment. *Cheeks*. He also attaches the presumption with Dr. Eule's initial and most recent opinions, relating his need for cervical spine treatment to his employment. *Id*. Employer rebuts the presumption, as to Employee's right shoulder, with Dr. Chong's opinions, which concluded Employee's right shoulder was medically stable by either September 2012 or April

2013, and any right shoulder treatment after that date was the result of a non-work related trip-and-fall. *Miller*. It also rebuts the presumption as to Employee's left shoulder, lower back and cervical spine with Dr. Chong's alternative explanations, which attribute Employee's need for medical treatment to "many life factors," such as leisure activity, and well as work activity, smoking, genetic predisposition, congenital factors and "just getting old." *Id.* Employee must now prove, by a preponderance of the evidence, that his injury with Employer is the substantial cause of his need for continuing right shoulder, left shoulder, lumbar spine and cervical spine medical treatment. *Koons.*

Dr. Manion's initial opinion on right shoulder causation emerged following a "care conference" with Employer's medical case manager, R.N. Davis, which ironically did not include Employee. During that conference, Employer's medical case manager pointed out medical evidence she thought showed Employee was doing "very well" following his shoulder surgery until he tripped and fell over a log. She then asked Dr. Manion his opinion on causation. Not surprisingly, when presented with R.N. Davis's choice evidence, Dr. Manion opined the March 8, 2012 work injury was not the substantial cause of Employee's disability or current need for right shoulder treatment, but rather the September 2012 trip and fall over the log was.

However, at his deposition, Dr. Manion later, repeatedly, denied Employee re-injured his right shoulder when he tripped and fell over the log. In fact, Dr. Manion issued this denial no less and eight separate times. Then, in the midst of these denials, Dr. Manion inexplicably stated, between work and the trip and fall accident, he thought the trip and fall was the larger of the two causes of Employee's need for a second right shoulder surgery. Then, amongst this dizzying array of contradictions, Dr. Manion managed to add yet another. Perhaps in exasperation, Dr. Manion ultimately conceded he could not opine on either right or left shoulder causation. Nevertheless, even though Dr. Manion ultimately admitted he did not know what the cause of Employee's need for right and left shoulder treatment was, he was quite certain it was not Employee's participation in physical therapy or work hardening - entirely understandable opinions for him to hold, since he had ordered both. There are other problems with affording any significant weight to Dr. Manion's opinions, as well. For example, even Employer's medical case manager, in her August 8, 2012 report, documented Dr. Manion becoming

unnecessarily defensive of his surgical results when dismissing Employee's reported collarbone area pain, right fingers numbness and neck symptoms. For these reasons, Dr. Manion's opinions are afforded very little weight. AS 23.30.122.

Dr. Eule's opinions, like Dr. Manion's, fluctuated over time. On March 21, 2013, Dr. Eule found Employee's work injury to be "the substantial factor" for Employee's four-level cervical fusion, but he reversed that opinion less than a week later while responding to Employer's adjuster. Employer's medical case managers had swayed him too during another "care conference," which also occurred outside Employee's presence. Then, on June 22, 2015, Dr. Eule returned to his first-stated opinion, only to later offer multiple contradictory causation opinions during the latter portion of his deposition testimony. For these reasons, Dr. Eule's causation opinions are afforded little weight. AS 23.30.122.

On a few occasions, P.A. Heald offered favorable causation opinions for Employee, and so too did Employee's physical therapy provider on one occasion. However, given the complexities of causation issues involving disparate body parts, and given these providers' extremely limited contact with Employee in the context of the overall medical record, as well as their limited knowledge of that record, their opinions are afforded very little weight. AS 23.30.122.

The weightiest causation opinions in the record come from Employer's medical evaluator, Dr. Chong, and the SIME physician, Dr. Scarpino. AS 23.30.122. In contrast to Drs. Manion and Eule, Dr. Chong's opinions remained fairly consistent throughout this case's long pendency, at least with respect to right shoulder causation. He thinks the March 8, 2012 work injury did aggravate a preexisting right shoulder rotator cuff tear, which he likened to frayed stitches on an old shirtsleeve, to produce the "final tear" requiring treatment. However, there is some vacillation in Dr. Chong's right shoulder medical stability opinion. In his January 22, 2015 report, Dr. Chong initially found Employee's right shoulder to have been medically stable by September 2012, but he later revised this date to April 2013.

Meanwhile, Dr. Chong did not find work to be the substantial cause of Employee's cervical spine, lumbar spine and left shoulder treatment. Instead, Dr. Chong thinks Employee required

cervical fusion surgery because of "many life factors," such as work activity, leisure activity, smoking, genetic predisposition and congenital factors. Similarly, Dr. Chong opines "[a]ll of life's activities," including work, caused Employee's need for left shoulder medical treatment, and Employee's need for low back surgery was caused by decades of work activity, smoking and Employee's other back injuries. It is interesting to note, though Dr. Chong provides alternative explanations for Employee's need for treatment, each includes work as a partial, causative factor even though, in his opinion, it alone does not rise to being "the substantial factor."

On the other hand, Dr. Scarpino sets forth no less than 26 different diagnosis in his 144-page report, wherein he opines Employee's initial injury led to a "cascade" of other problems. He concluded Employee's March 8, 2012, work injury caused a rotator cuff tear in the right shoulder, as well as the subsequent development of cervical pain with radicular and myelopathic findings, and lower back pain, left shoulder pain, and left wrist pain, all requiring medical treatment. He thought the mechanism of injury was consistent with the initial right shoulder rotator cuff tear, and Employee's "very significant" preexisting cervical spinal stenosis left him vulnerable to injury with "minor insults" that would normally not cause any problems. According to Dr. Scarpino, the subsequent development of Employee's neurologic symptoms requiring cervical surgery was due to increased activity levels in physical therapy since Employee's spinal cord and nerve roots had no room to stretch as they would in a person without stenosis. Dr. Scarpino then opined Employee's laryngeal and vagus nerves were damaged when they were retracted during his cervical fusion surgery, which in turn caused Employee's swallowing problems, that led to significant weight loss. Employee was next placed in physical therapy and his malnourished state left him at risk to further injury. Dr. Scarpino thought Employee's left shoulder, low back, and left wrist symptoms all arose as a result of his participation in physical therapy while in a malnourished state, and each of these conditions were aggravations to preexisting conditions.

Between Dr. Ching and Dr. Scarpino, Dr. Scarpino's opinions are afforded the most weight. AS 23.30.122. Dr. Chong's credibility suffers a bit from his unusually close relationships with the insurance industry. *Id*. Even though it is not unusual for independent medical evaluators to

perform a majority of their evaluations for the defense, Dr. Chong's background includes quite a bit more than merely performing these evaluations. Dr. Chong underwent training provided by CIGNA insurance company and works as an Insurance Medical Director. He also participated in leadership training provided by a health insurance company and served as a reviewer for the publication *Workplace Disability Guidelines*, which was written as a guide for workers' compensation case managers to instruct them on the ordinary types and lengths of treatment. Therefore, while Dr. Chong is generally credible, his opinions are viewed with some skepticism since an inordinate amount of the achievements on his curriculum vitae have been provided by the insurance industry. *Id*.

Additionally, Dr. Chong's hearing testimony contradicts certain opinions expressed in his written reports. AS 23.30.122. For example, on January 22, 2015, Dr. Chong diagnosed Employee with dysphagia and massive weight loss as a complication of his anterior cervical fusion. He also discussed Employee's severe emaciation in that report. Yet, at hearing, Dr. Chong disagreed with Dr. Scarpino's "malnourishment theory," since it is unproven with respect to Employee. Malnourishment should be scientifically demonstrated, according to Dr. Chong, with lab work and metabolic measurements. However, Dr. Chong's January 22, 2015 report fails to mention he had undertaken any lab work or metabolic measurements to support his own diagnosis of severe emaciation. At hearing, Dr. Chong also testified malnourishment did not contribute to Employee's right shoulder problems even though his January 22, 2015 report states severe emaciation substantially increased Employee's right shoulder impairment.

Perhaps most significantly, however, Dr. Chong practices physical and rehabilitation medicine. He performs no surgery and only spends one and a half days per week in his clinical practice. Meanwhile, Dr. Scarpino has spent a lengthy career as an orthopedic surgeon and has performed "all kinds" of orthopedic surgery, including the very procedures Employee underwent. Dr. Scarpino also brought numerous scholarly exhibits to his deposition to illustrate the bases of his opinions, and he identified key events in the medical record to support those opinions.

Dr. Scarpino's 144-page report, one of the most comprehensive and comprehensible this panel has ever seen, and his opinions just make sense in explaining Employee's "constellation" of

problems. *Saxton*. Thus, when identifying and weighing all the potential causes of Employee's need for right shoulder, left shoulder cervical spine and lower back medical treatment, including "life factors," such as work activity, leisure activity, smoking, genetic predisposition, congenital factors, previous back injuries on one hand, and the work injury along with its subsequent treatment on the other, the greater weight of Dr. Scarpino's opinion supports the latter as the substantial cause. *Id*. Consequently, Employee is entitled to medical and related transportation costs for right shoulder, left shoulder cervical spine and lumbar spine medical treatment. AS 23.30.095(a).

Employee specifically requests Employer make Medicare and Medicaid reimbursements to his providers pursuant to the workers' compensation fee schedule. Such reimbursements were first ordered in *Cannady* and other decisions have found its analysis persuasive. *McNamee*. Medicaid paid for much of Employee's care to date, and he is currently a Medicare beneficiary. Therefore, Medicare and Medicaid reimbursements, paid to Employee's providers pursuant to the workers' compensation fee schedule, will also be ordered. AS 23.30.095(a); AS 23.30.155(a), (h).

Employee further seeks a prospective award of medical benefits consisting of treatments recommended by his treating physicians and the SIME physician, though he did not identify specific treatment recommendations from his treating physicians for which he now seeks approval. While the SIME physician's treatment recommendations are readily identifiable in the record, given the record's size and the passage of time, specific treatment recommendations from his treating physicians are not. Nevertheless, having proven by a preponderance of the evidence that work was the substantial cause of his need for right shoulder, left shoulder, cervical spine and lumbar spine medical treatment, Employee is entitled, at least, to the diagnostic and treatment recommendations set forth in Dr. Scarpino's November 29, 2016 report, should he choose to pursue them, including diagnostic studies for his left wrist. Consequently, those studies and treatments will be prospectively awarded. *Sumners*. Employee is also entitled to reasonable and necessary treatment for his right shoulder, left shoulder, cervical spine and lumbar spine. AS 23.30.095.

2) Is Employee entitled to TTD?

Employee seeks an additional period of TTD and reclassification of other previously paid benefits. Employee's benefit payment history is confusing and his benefits have been reclassified many times. An April 16, 2015 compensation report shows Employee was paid TTD from March 10, 2012 through April 19, 2013; PPI from April 20, 2013 through May 31, 2013; TTD from March 27, 2014 through September 10, 2014 and vocational rehabilitation stipend benefits from September 11, 2014 and continuing. Thus, Employee seeks TTD for a gap period from June 1, 2013 through March 26, 2014.

Employee attaches the presumption with numerous disability status forms from Dr. Eule that show Employee remained totally disabled throughout this gap period while undergoing cervical spine treatment. *Cheeks*. He also attaches the presumption with a five-pound occasional lifting restriction and a two-pound frequent lifting restriction throughout this same period from Dr. Manion for his right shoulder, which further precluded him from work since Employer does not have sedentary or light duty work available for its Station Mechanics. *Id*. Employer rebuts the presumption with Dr. Chong's same medical stability and causation opinions set forth above. *Miller*. Employee must now prove, by a preponderance of the evidence, that his injury with Employer is the substantial cause of his temporary total disability during the gap period. *Koons*.

Although this decision affords little weight to Drs. Manion and Eule's causation opinions, as Employee's treating physician's, they were better positioned than Employer's medical evaluator, Dr. Chong, to assess Employee's ability to work during his many treatments and recoveries. AS 23.30.122. This conclusion, along with the very significant weight afforded Dr. Scarpino's opinions in the presumption analysis above, allow Employee to easily carry his burden. *Koons*. Therefore, he is entitled to TTD for the period he seeks. AS 23.30.185. Employee also seeks reclassification of previously paid PPI and vocational rehabilitation stipend to TTD. Given Drs. Eule's and Manions work restrictions, as well as Dr. Scarpino's opinion that Employee is not yet medical stable to this very day, the reclassifications Employee seeks is warranted and shall be ordered. *Id*.; AS 23.30.155(h).

3) Is Employee entitled to PTD?

Employee contends his work injury permanently precludes his participation in the work force and PTD benefits should be awarded. For workers' compensation purposes, total disability does not necessarily mean a state of abject helplessness. It means the inability to because of injuries to perform services other than those that are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *Roan.* Accordingly, the PTD statute sets forth criteria that require specific evidence for an employer to rebut the presumption of compensability. *Leigh*. It must produce substantial evidence that shows work within an employee's abilities is regularly and continuously available in the relevant labor markets described at AS 23.30.180(a). *Id*.

Employee establishes the presumption he is permanently disabled from work with Dr. Eule's March 8, 2016 deposition testimony, where he opined, it is unlikely Employee will ever be "significantly gainfully employed." *Cheeks*. On the other hand, while Employer attempted to obtain the necessary rebuttal evidence by commissioning Employee's former vocational rehabilitation counselor, Ms. Curtis, the results were not what Employer had presumably hoped. Instead, Ms. Curtis concluded Employee cannot return to either full time or part time work and would not be competitive in the labor market. Therefore, Employer has failed to rebut the presumption and Employee is entitled to the benefit he seeks. *Miller*; AS 23.30.010.

In the alternative, had Employer rebutted the presumption, Dr. Manion disapproved no less than ten different job descriptions submitted for his consideration, and thought Employee's "total body condition makes it unlikely he will return to gainful employment." Dr. Eule also disapproved the same ten job descriptions and thought it unlikely Employee will ever be "significantly gainfully employed." According to Dr. Eule, Employee's medical conditions are all additive and "all of them put together make it difficult for him to do much of anything." Dr. Eule ruled out Employee working 40 hours per week, 50 weeks per year, even at a sedentary job, because of his low back condition, and also would not recommend Employee working a job where he is required to drive on account of his medications. Dr. Scarpino thinks Employee remains totally disabled from work to this very day and it is unlikely he can ever return to gainful

employment. Additionally, Employee appeared emaciated and presented as sickly at hearing. His testimony regarding his do-to-day activities was credible and cast further doubts on his ability to perform any kind of work on a regular basis. Meanwhile, Dr. Chong's theory of "volitional self-limitation" and his opinion Employee can now perform, at least sedentary to light duty work, if not even medium duty work, following what he opines was a singular right shoulder injury, are far removed from every other in the record. Therefore, Dr. Chong's opinion regarding Employee's ability to work and his permanent total disability status is entitled to no weight. AS 23.30.122. Thus, even if Employer were able to rebut the presumption, the overwhelming medical consensus, as well as this panel's own observations, show Employee is permanently precluded from participating in the work force and is entitled to PTD. AS 23.30.180; *Roan*.

At hearing, for administrative convenience, Employee suggested a PTD date of January 29, 2016, the date Dr. Eule disapproved the ten job descriptions. Employer did not contend otherwise. It is agreed, this date is as appropriate as any other in the record and will be utilized.

4) Is Employee entitled to PPI?

Employee contends, in the event he is not determined PTD, he is entitled to PPI in excess of two percent, once all of his conditions become medically stable. His position is curious and not well understood. Even though AS 23.30.180 prescribes permanent total *disability* benefits be reduced by the amount of a permanent partial *disability* award previously paid, in wake of the Court's holding in *Darrow*, both PTD, as well as PPI, are now available to injured workers, since they are distinct benefits under the Act, and such an award would no longer result in a "double recovery." Nevertheless, as Employee acknowledges, his numerous injuries are not yet medically stable, according to Dr. Scarpino, on whom this decision heavily relies, so any PPI award is premature.

Employee will certainly become entitled to additional PPI. Dr. Scarpino thinks, "[Employee] will have a big impairment. . . . If you just look at malnutrition with a 20 percent weight loss, that's up to 60 percent whole body just for that." So that this decision will issue as a final

decision, from which the parties may take their appeals, Employee's claim for PPI will be denied without prejudice. Employee is encouraged to claim additional PPI for his work-related injuries, as they become medically stable, in the event forthcoming impairment ratings are not voluntarily paid.

5) Is Employee entitled to vocational rehabilitation benefits?

Employee alternatively contends if he is not determined PTD, vocational rehabilitation benefits should be awarded. Since Employee is entitled to PTD benefits, his alternative theory need not be addressed. AS 23.30.041(k).

6) Is Employee entitled to interest?

The Alaska Supreme Court has consistently instructed the board to award interest for the time-value of money, as a matter of course. *Rawls*; *Childs.* Employee is entitled to interest on unpaid compensation, while Medicaid 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 Medicaid or Medicare paid them, and their fees under Alaska Workers' Compensation Fee Schedule. *Id*.

7) Is Employee entitled to attorney fees and costs?

Employee seeks an award of reasonable attorney fees paid as an advance on statutory minimum attorney fees based on all past and continuing benefits awarded, including medical and related transportation costs. He claims $78,240 in attorney fees, $27,124.50 in paralegal costs and $13,389.51 in other litigation 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 attorney fees under either AS 23.30.145(a) or (b). *Porteleki*.

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*.

Employee's attorney is an experienced litigator and has represented injured employees in workers' compensation cases for many years. Employer controverted benefits on March 20, 2013, and continued to deny them throughout five years' of litigation, which necessitated two prior hearings, in addition to a hearing on the merits of Employee's case. Litigation in this case has involved unusually complex causation issues, which necessitated the taking of four depositions and conducting an SIME. The medical record in this case is voluminous, containing approximately 3,000 pages; the SIME record alone consists of 29 separate .pdf files. So too is the litigation record, which consists of nearly 400 event entries. Employer has vigorously litigated Employee's claims and filed seven controversion notices contesting Employee's entitlement to benefits. Additionally, given the wavering and conflicting medical opinions, the seemingly disparate body parts and conditions for which Employee sought benefits, as well as Employee's extensive record of prior work injuries and a prior right shoulder Mumford surgery, the outcome of litigation was far from certain. For these reasons, Employee will be awarded most the attorney fees, and all the costs, he seeks. *Bignell*.

Employer filed a limited objection to Employee's claimed attorney fees and requests any fees awarded be reduced by the amount of fees previously approved in *Hays II*. It also objected to certain line item entries for 13.2 hours of attorney time "for merely staying in Honolulu, including eight hours for one day after [Dr. Scarpino's] deposition concluded," and requests any attorney fee award be reduced by the 13.2 hours it finds objectionable. Both of Employer's objections are well-taken. Reducing Employee's attorney fees by the amount previously awarded in *Hays II* will avoid a duplicate fee award. Additionally, Employer has not unfairly characterized the time to which it objects, since review of Employee's fee affidavit shows Employee himself described the activity for this time as "stay[s]" in Honolulu. Therefore,

Employee will be awarded $78,240 in attorney fees, less the amount previously ordered on *Hays II*, and less 5,280 ($400 per hour x 13.2 hours), as well as all his paralegal and other litigation costs, as an advance on statutory minimum attorney fees based on all past and continuing benefits awarded, including medical and related transportation costs. *Porteleki*.

8) Is Employer entitled to Secondary Injury Fund reimbursement?

Employer seeks reimbursement from the Fund for all compensation payable to Employee in excess of 104 weeks, since it contends statutory criteria for such reimbursement have been met. Meanwhile, the Fund is correct. This is "a very different case," in terms of its extreme complexity. Every physician who has opined agree, Employee's disability is multifactorial and arises from the totality of his medical condition. Consequently, the "combined effects" and "aggravation" criteria of AS 23.30.205(a) may be established through any number of different analyses, including the two presented by Employer here.

The record is replete with evidence of Employee's preexisting degenerative lumbar spine and no physician in the record disagrees that Employee carried a significant, preexisting, degenerative spine into the March 8, 2012 work injury. Employer contends Employee's cervical and lumbar spine treating physician, Dr. Eule, as well as the SIME physician, Dr. Scarpino, both agree the March 8, 2012 injury and its subsequent treatment, aggravated Employee's preexisting lumbar problems such that he required lumbar surgery and produced a substantially greater disability than would have resulted from Employee's work-related right shoulder injury alone. Dr. Scarpino's and Dr. Eule's opinions are enetitled to significant weight in determining the combined effects of Employee's preexisting lumbar condition, which was aggrevated by his work injury. AS 23.30.122. Employer's medical evaluator, Dr. Chong, has endorsed compensability of Employee's right shoulder medical treatment from this case's beginning, and in his January 22, 2015 report, opined Employee would have been medically stable six months after his surgical repair. This represents a $27,993 liability for disability compensation (6 months x 4.3 weeks per month x $1,085 per week compensation rate) for the work injury alone.

However, since Employee injured his lumbar spine during the course of physical therapy for the work-related right shoulder injury, he was required to undergo additional surgery on March 18,

2015. At his February 25, 2016 evaluation, Dr. Chong opined Employee's lumbar spine was medically stable, and during his March 8, 2016 deposition, Dr. Eule also opined Employee's lumbar spine was medically stable. Therefore, during this course of these events, Employer become liable for, at least, an additional $51,321 of disability compensation (11 months x 4.3 weeks per month x $1,085 per week compensation rate), nearly twice the liability for the original work injury alone.

The Merriam-Webster Dictionary defines "substantial" as, material. Meanwhile, according the Blacks' Law Dictionary, "material" means, of such a nature that knowledge of the item would affect a person's decision-making. A nearly twofold increase in liability for disability compensation is "substantial." *Rogers & Babler*. Therefore, Employer is entitled to Fund reimbursement for all disability compensation in excess of 104 weeks. *Kennecott*.

Similarly, Employer also contends Employee's work related, right shoulder, injury combined with his preexisting lumbar spine condition to produce disability substantially greater than that which would have resulted from his right shoulder injury alone. As was shown above, Employer's liability for disability compensation arising from the original, right shoulder, work injury was $27,993. Employee is currently 55-years old and PTD. According to Dr. Eule, he is permanently precluded from even performing sedentary work on account of his chronic lumbar spine pain. Unless Employee were to be successfully, vocationally rehabilitated, Employer will liable for disability compensation for the rest of Employee's life, presently an undetermined amount of time. However, according to the most recent data from the Center for Disease Control and Prevention, Employee's life expectancy, based on chronological age alone, is 76 years, a difference of 21 years. Therefore, Employer is now liable for approximately $1,175,706 in disability compensation (21 years x 12 months per year x 4.3 weeks per month x $1,085 per week compensation rate) versus $27,993 for the right shoulder work injury alone. The "substantiality" of the difference between these two figures is self-apparent. *Rogers & Babler*. Therefore, because Employer has established it has incurred substantially greater liability for disability compensation because an "aggravation" of a preexisting condition, and the "combined effects" of a preexisting condition, it is entitled to Fund reimbursement for all disability compensation in excess of 104 weeks. *Kennecott*.

CONCLUSIONS OF LAW

1) Employee is entitled to medical and related transportation benefits for his right shoulder, left shoulder, cervical spine and lumbar spine.
2) Employee is entitled to an additional period of TTD.
3) Employee is entitled to PTD, commencing January 29, 2016.
4) Employee will be entitled to additional PPI, but is not yet medically stable.
5) After January 29, 2016, Employee is not entitled to vocational rehabilitation benefits.
6) Employee is entitled to interest on all past benefits.
7) Employee is entitled to attorney fees and costs.
8) Employer is entitled to Fund reimbursement.

ORDERS

1) 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 right shoulder, left shoulder, cervical spine, lumbar spine, dysphagia and chronic pain, including the diagnostic and treatment recommendations set forth in Dr. Scarpino's November 29, 2016 SIME report, should Employee wish to pursue them.
2) Employee is entitled to reasonable and necessary medical treatment for his right shoulder, left shoulder, cervical spine, lumbar spine, dysphagia and chronic pain.
3) Employee's claim for TTD is granted. Employer shall pay Employee TTD from June 1, 2013 through March 26, 2014, plus interest, and previously paid PPI and vocational rehabilitation stipend shall be reclassified as TTD in accordance with this decision.
4) Employee's claim for PTD is granted. Employer shall pay Employee PTD, commencing January 29, 2016, plus interest, in accordance with this decision.
5) Employee's claim for PPI is denied without prejudice in accordance with this decision.
6) Employee's potential entitlement to vocational rehabilitation benefits terminated on January 29, 2016.
7) Employee's claim for interest is granted. Employer shall pay Medicaid and Medicare interest on all amounts they paid on Employee's behalf for treatment of Employee's right shoulder, left shoulder, cervical spine, lumbar spine, dysphagia and chronic pain.

8) Employer shall pay Employee's providers interest on the difference between all amounts Medicaid and Medicare paid those providers on Employee's behalf for treatment of his right shoulder, left shoulder, cervical spine, lumbar spine, dysphagia and chronic pain, 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 accordance with this decision.

10) Employer's petition seeking Fund reimbursement is granted. The Fund shall reimburse Employer for all compensation payable to Employee in excess of 104 weeks.

Dated in Fairbanks, Alaska on July 11, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated 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 CHARLIE A HAYS, employee / claimant; v. ARCTEC ALASKA, employer; ARCTIC SLOPE REGIONAL CORP., insurer / defendants; Case No. 201203775; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties on July 11, 2018.

/s/
Ronald C. Heselton, Office Assistant II