

# ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

DANIEL SCHWAB, )  
)  
Employee, )  
Claimant, )  
) FINAL DECISION AND ORDER  
v. )  
) AWCB Case No. 201506048  
COSTCO WHOLESALE, )  
) AWCB Decision No. 18-0072  
Employer, )  
) Filed with AWCB Anchorage, Alaska  
and ) on July 25, 2018  
)  
LIBERTY MUTUAL INSURANCE )  
CORPORATION, )  
)  
Insurer, )  
Defendants. )  
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Daniel Schwab's (Employee) April 8, 2016 and January 12, 2018 claims were heard on June 28, 2018 in Anchorage, Alaska, a date selected on March 19, 2018. Employee appeared and testified. Attorney Michelle Meshke appeared and represented Costco Wholesale (Employer). There were no witnesses. As a preliminary issue, Employee requested a hearing continuance, which was denied. The hearing concluded on June 28, 2018 and the record was held open until July 18, 2018, providing Employee ten days to submit a hearing brief and Employer ten days to file a response. On July 12, 2018, Employee requested additional time to file a hearing brief, which was denied. This decision examines the oral order denying the requested continuance, the denial of Employee's July 12, 2018 petition requesting additional time to file a hearing brief, and Employee's claims on their merits. The record closed on July 18, 2018.

ISSUES

Employee contended the hearing should be continued to allow him to hire an attorney. Employee contended he has been looking for an attorney to represent him and he needs additional time to retain an attorney. Employee requested a continuance for one to two months.

Employer objected to a continuance. Employer contended Employee failed to demonstrate good cause to grant a continuance. Employer contended Employee has had sufficient time to find an attorney. An oral order issued denying Employee's request for a continuance.

**1) Was the oral order denying Employee's request for a continuance correct?**

Employee contended he needed additional time to file a hearing brief. Employer's position is unknown, as a response to Employee's petition was not filed before the record closed. An order issued denying Employee's request for additional time to file a hearing brief.

**2) Was the denial of Employee's request for additional time to file a hearing brief correct?**

Employee contends the April 14, 2015 work injury is the substantial cause of his disability and need for medical treatment of his lumbar spine after July 6, 2015. Employee seeks temporary total disability (TTD), temporary partial disability (TPD), and medical costs for treatment of his lumbar spine after July 6, 2015.

Employer contends Employee's non-work related degenerative cervical and lumbar spine diseases are the substantial cause of his disability and need for medical treatment after July 6, 2015. Employer seeks an order denying Employee's claims.

**3) Is Employee entitled to disability and medical benefits for his lumbar spine after July 6, 2015?**

Employee contends the April 14, 2015 work injury caused him pain and suffering as it affected his sleep and adversely affected his daily life. Employee contends he lost employment benefits while he was unable to work for Employer due to the April 14, 2015 work injury. Employee requests an award for pain and suffering, reinstatement of his medical, dental, and life insurance benefits, and back payment into his 401(k) retirement account.

Employer contends the benefits Employee is seeking are not allowed under the Alaska Workers' Compensation Act (Act). Employer requests an order denying Employee's claim for pain and suffering, medical and dental benefits, life insurance and back payment into his 401(k) retirement account.

**4) Is Employee entitled to pain and suffering and lost employment benefits, including medical, dental, retirement pay, and life insurance?**

FINDINGS OF FACT

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

- 1) On February 9, 2001, x-rays of Employee's bilateral knees and low back were taken for "severe pain in knees and low back." The x-rays of Employee's lumbar spine revealed his lumbar vertebral body heights and intervertebral disc spaces were within normal limits. (X-Ray Report, February 9, 2001).
- 2) On September 8, 2006, an MRI of Employee's cervical spine demonstrated mild central canal narrowing from C2-3 through C5-6, multilevel bony neural foraminal narrowing mainly related to posterolateral osteophyte formation on the right at C3-4, bilaterally at C4-5 and C5-6, and on the left at C6-7, and mild scoliosis. (MRI Report, September 8, 2006).
- 3) On December 27, 2006, Employee saw Dwight W. Smith, M.D., for low back pain and chest pain. Employee reported waking up about two weeks ago with a kink in his neck which developed into pain in his low back and into his right shoulder and pectoralis major area. Dr. Smith diagnosed acute, moderate low back pain and prescribed Flexeril. (Smith, December 27, 2006).
- 4) On June 17, 2007, Employee visited Bret Benally Thomson, M.D., for low back pain. Employee stated he thought he pulled a muscle playing with his son three days ago. He reported he picked up son his and felt pain under his left shoulder blade and left chest. Dr. Thomson diagnosed acute, minor muscle spasm and prescribed Diazepam. (Thomson, June 17, 2007).
- 5) On February 27, 2008, Employee saw Dr. Smith for low back pain. Employee reported three weeks of low back pain and tightness. He stated it just developed and did not relate it to any particular injury. Dr. Smith prescribed Flexeril. (Smith, February 27, 2008).
- 6) On April 14, 2015, Employee visited Kathleen Nuttle, PA-C, for low back pain that began 30-45 minutes after he lifted a double sink vanity while working for Employer. Employee reported

discomfort in the paravertebral space to the right of the spine. X-rays of Employee's low back did not reveal any pathology. PA-C Nuttle diagnosed Employee with a low back sprain and prescribed him Flexeril and Norco. She took Employee off work until April 20, 2015. (Nuttle, April 14, 2015).

7) On April 17, 2015, Employer filed a first report of occupational injury (FROI) which stated Employee injured his low back on April 14, 2015 while assisting with lifting a double vanity into a customer's vehicle while working for Employer. (First Report of Occupational Injury or Illness, April 17, 2015).

8) On May 14, 2015, Employee followed up with Gregory Gootee, PA-C, for a lumbar sprain/strain. Employee missed an April 20, 2018 appointment and had been working light duty. Employee reported continuing low back pain giving him pain in his right shoulder and neck area. X-rays of Employee's cervical spine showed degenerative disc disease at C5-6. PA-C Gootee recommended physical therapy for Employee's lumbar and cervical spine and directed Employee to follow up in six weeks. He released Employee to light duty until his next appointment and he expected Employee to return to full duty at his next appointment. (Gootee, May 14, 2015).

9) On May 19, 2015, Bryan Kirkpatrick, PT, evaluated Employee's cervical and lumbar spine for physical therapy. Employee reported he developed significant neck and low back pain 45 minutes after helping a customer lift a vanity while at work. Since the work injury, he has been getting better but still experienced pain with active neck and back movement and difficulty tolerating standing for longer than 60 minutes. PT Kirkpatrick recommended physical therapy two to three times per week for the next six weeks. (Kirkpatrick, May 19, 2015).

10) On May 21, 27 and 29 and June 2, 4, 9, and 11, 2015, Employee participated in physical therapy. Many of these records are illegible. (Kirkpatrick, May 21, 27 and 29 and June 2, 4, 9, and 11, 2015; Observations).

11) On June 18, 2015, PT Kirkpatrick discharged Employee from physical therapy to a home program to improve spinal mobility and increase his tolerance of weight bearing activity. Employee reported he continued to have back pain that limits his ability to accomplish work duties with Employer. (Kirkpatrick, June 15, 2018).

12) On July 6, 2015, Employee followed up with PA-C Nuttle for his low back pain. Employee completed four weeks of physical therapy and stated "he is feeling significantly better" and the physical therapy "helped him greatly." Upon physical examination, PA-C Nuttle noted Employee

had no pain with range of motion of the cervical and thoracic spine. She released him from care and released him to full duty as of July 7, 2015. PA-C Nuttle recommended Employee continue the home exercise program from physical therapy. (Nuttle, July 6, 2015; Disability Work Status Report, July 6, 2015).

13) On September 18, 2015, Employee visited the emergency room and reported one week of back pain, shoulder pain, and neck pain. Employee reported no specific trauma but his pain has been increasing over the last week. Employee was diagnosed with musculoskeletal pain and prescribed Flexeril and Naprosyn. (Emergency Room Report, September 18, 2015).

14) On September 24, 2015, Employee saw James Glenn, PA-C, for lower back and cervical spine pain. Employee experienced similar symptoms which improved dramatically with physical therapy. Employee reported his back pain significantly worsened approximately three weeks ago. Employee stated his back and neck pain usually increased after eight hours of standing and it now increased after two hours of standing. X-rays of Employee's cervical and lumbar spine showed a little disc degeneration at L5-S1, some cervical disc degeneration, and minimal loss of disc height at C4-5 and C5-6. PA-C Glenn diagnosed chronic cervical spine and lower back pain and "slight degenerative changes with spondylosis at L5-S1, as well as C4-5 and C5-6." He recommended an MRI of Employee's lumbar and cervical spine. (Glenn, September 24, 2015).

15) On September 30, 2015, an MRI of Employee's lumbar spine demonstrated moderately severe foraminal stenosis on the right and moderate foraminal stenosis on the left at L5-S1, normal alignment of the lumbar spine with disc desiccation and mild disc space narrowing at L3-4, and scattered facet arthropathy in the lumbar spine, most pronounced at L4-5. (MRI Report, September 30, 2015).

16) On October 5, 2015, Employee visited PA-C Glenn to review the MRIs. PA-C Glenn diagnosed ongoing cervical and lumbar spine pain, L3-4 slight degenerative changes with a small L5-S1 left sided disc protrusion, and significant motion artifact on cervical spine MRI with history of tremors. He took Employee off work for the next three days due to increased pain and then placed him on light duty. (Glenn, Chart Note, October 5, 2015, Glenn Disability Status Report, October 5, 2015).

17) On October 19, 2015, Employee underwent a lumbar myelogram and cervical CT myelogram. The cervical CT myelogram revealed C5-6 moderate disc narrowing and degenerative changes resulting in greater left than right moderately severe bilateral neural foraminal stenosis and less

pronounced neural foraminal narrowing at C3-4. The lumbar myelogram at L3-4 was unsuccessful as there was an inability to advance the needle into the interlaminar space, presumed secondary to calcifications along the ligamentum flavum. (Cervical CT Myelogram, October 19, 2015; Lumbar Myelogram Report, October 19, 2015).

18) On October 20, 2015, Employee saw PA-C Glenn to review his cervical CT scan. Employee reported his back is bothering him. PA-C Glenn recommended a midline L5-S1 inter-laminar epidural steroid injection and took Employee off work until October 29, 2015. (Glenn, October 20, 2015).

19) On October 26, 2015, Employee underwent a right L5-S1 inter-laminar epidural steroid injection. (Mark Beck, M.D., Operative Report, October 26, 2015).

20) On November 6, 2015, Employee underwent a right C5-6 and left C5-6 transforaminal epidural steroid injection. (Larry A. Levine, M.D., Operative Report, November 6, 2015).

21) On November 11, 2015, Employee was released to light duty work, limited to four to six hours per day. (Glenn, Return to Work & Activities Form, November 11, 2015).

22) On November 15, 2015, PA-C Glenn released Employee to part-time work, limited to two to four hours per day beginning on November 4, 2015. (Glenn, November 15, 2015).

23) On November 24, 2015, PT Kirkpatrick evaluated Employee's low back for physical therapy. Employee stated he developed low back pain while checking receipts working for Employer. He tolerated one to two hours before symptoms increased to an uncomfortable level. Employee takes medication and receives Botox injections every three months for benign tremors that mainly affect his cervical spine. PT Kirkpatrick recommended two physical therapy appointments a week for the next six weeks. (Kirkpatrick, November 24, 2015).

24) On December 18, 2015, Employee participated in physical therapy for his lower back. (Kirkpatrick, December 18, 2015).

25) On December 18, 2015, Employee followed up with PA-C Glenn for neck and lower back pain. Employee stated the cervical epidural steroid injection helped a lot for the first two weeks, significantly relieving his symptoms. However, the symptoms have slowly started to return. Employee reported his ongoing lower back pain was better but he still experienced difficulty standing for long periods of time. PA-C Glenn reviewed Employee's MRI and noted a small disc protrusion at L5-S1. He did not believe Employee was a good surgical candidate because he had not fully explored conservative care. PA-C Glenn recommended Employee continue with physical

therapy and a home exercise program and return in six to eight weeks. He released Employee to work December 21, 2015. (Glenn, December 18, 2015).

26) On January 7, 2016, Employee participated in physical therapy for his lower back. (Kirkpatrick, January 7, 2016).

27) On January 14, 2016, David Bauer, M.D., an orthopedic surgeon, evaluated Employee for an Employer's Medical Evaluation (EME). Dr. Bauer diagnosed:

1. Strain of the lumbar spine, the result of the incident of April 14, 2015.
2. Subsequent complaints of cervical pain.
3. Complete resolution of the incident of April 14, 2015.
4. Degenerative changes at the cervical and lumbar spine neither aggravated by nor accelerated by the incident in question.

He opined the work injury was the substantial cause of Employee's initial need for medical treatment through July 6, 2015 and the degenerative diseases were the substantial cause for Employee need for medical treatment after that point. Dr. Bauer recommended physical therapy for Employee's degenerative changes. He opined Employee reached medical stability on July 6, 2015. (Bauer, January 14, 2016).

28) On January 21, 2016 and February 4, 2016, Employee participated in physical therapy for his lower back. (Kirkpatrick, January 21, 2016 and February 4, 2016).

29) On February 5, 2016, Employee followed up with PA-C Glenn for lower back pain and cervical spine pain. Employee reported difficulty working more than six hours per day because standing for long periods of time is difficult for his back and neck. PA-C Glenn recommended a work hardening program and referred him for a surgical consultation with James Eule, M.D., for his neck. (Glenn, February 5, 2016).

30) On February 12, 2016, Employee visited PA-C Glenn for lower back pain. Employee reported intermittent flares of back symptoms and that he tweaked his back while walking up the stairs of the hot tub in his gym. Employee experienced a sharp pain in his lower back and left side going down his buttocks and posterior thigh. Employee felt like the lumbar epidural steroid injection had worn off and requested another. PA-C Glenn referred Employee for another lumbar epidural

steroid injection, a work hardening plan, and a surgical consultation with Dr. Eule in March and released Employee to work February 13, 2016. (Glenn, February 12, 2016).

31) On February 17, 2016, John DeCarlo, MSOT/L, evaluated Employee for a work hardening program. Employee reported his pain level is eight out of ten and he has been unable to work more than six hours per day since the injury. (DeCarlo, Initial Evaluation, February 17, 2016).

32) On February 25, 2016, Employee underwent a midline L5-S1 inter-laminar epidural steroid injection. (Kirkham, February 25, 2016).

33) On March 4, 2016, Lora Randy, RN, wrote a “Whom It May Concern” letter stating Employee was seen and treated in the emergency department on March 4, 2016 and he was excused from work March 1 through March 7, 2018. (Randy, March 4, 2016).

34) On March 29, 2016, Employee visited with PA-C Glenn and Dr. Eule. Dr. Eule did not believe any surgical intervention was needed because Employee did not have any clear cut radiculopathy or any big disc herniation that could be surgically corrected. He recommended Employee try Mobic as a longer lasting anti-inflammatory for six to eight weeks and physical therapy. (Glenn and Eule, March 29, 2016).

35) On April 1, 2016, Employer denied medical costs, transportation costs, TTD, TPD, permanent partial impairment (PPI), and reemployment benefits based upon Dr. Bauer’s EME report. (Controversion Notice, April 1, 2016).

36) On April 8, 2016, Employee claimed ongoing medical costs and unfair and frivolous controversion. The claim states Employee was injured when helping co-workers load a sink into a customer’s car, when Employee suddenly experienced severe pain in his lower back and spine. The claim lists the date of injury as April 14, 2015. (Workers’ Compensation Claim, April 8, 2016).

37) On April 26, 2016, Employee was released back to normal work activities on April 27, 2016. (Unknown Author, Providence Family Medicine Center, April 26, 2017).

38) On May 5, 2016, Employer answered Employee’s April 14, 2016 claim and denied medical benefits, transportation costs, and unfair or frivolous controversion. Employer relied on Dr. Bauer’s EME report. (Answer, May 5, 2016).

39) On May 8, 2016, Jessica Lee Sieling, D.O., wrote a “Whom It May Concern” letter stating Employee was seen and treated in the emergency department on May 8, 2016 and he may return to work on May 10, 2016. (Sieling, March 4, 2016).



40) On May 11, 2016, Employee attended a prehearing conference. The Board designee informed Employee how attorney fees and costs are handled under the Act and provided him a copy of the attorney list and the “Workers’ Compensation and You” pamphlet. (Prehearing Conference Summary, May 11, 2016).

41) On May 20, 2016, PA-C Glenn answered questions asked by Employee, and indicated he considered Employee’s work injury the substantial cause of his current medical conditions and need for treatment. He diagnosed Employee with left L5-S1 disc protrusion and opined Employee is medically stable. PA-C Glenn indicated he would release Employee to medium duty work at the present. He opined Employee is permanently partially impaired and Employee can call “Dr. Taylor” at his office if he would like to get a PPI rating. (Glenn, May 20, 2016).

42) On June 14, 2016, the parties attended a prehearing conference. The prehearing conference summary stated:

**LEGAL COUNSEL:** The board designee has attached a list of Anchorage workers’ compensation attorneys that frequently practice in front of the board and should an attorney agree to take his case, Alaska Workers’ Compensation statutes and regulations provide for the payment of his attorney’s fee if he prevails. If EE’s attorney does not prevail at hearing, the attorney is precluded by regulation from charging more than \$300 (plus necessary costs, such as postage, copies and deposition expenses) total in attorney’s fees for representation. . . . (Prehearing Conference Summary, June 14, 2016).

43) On June 20 and 21, 2016, Employee visited Dr. Vito for chiropractic care for low back, neck and mid back pain. (Vito, June 20 and 21, 2016).

44) On June 27, 2016, Employee was discharged from physical therapy for his low back pain because he was able to complete 45 minutes of high intensity exercise without developing low back pain. (Kirkpatrick, June 27, 2016).

45) On June 29, 30, July 6, 7, 8, 11, 12, 13, 14, 18, 19, 20, 21, 25, 28, August 1, 2, 3, 4, 8, 9, 11 and 17, 2016, Employee saw Dr. Vito for chiropractic care for low back, neck and mid-back pain. (Vito, Chart Note, June 29, 30, July 6, 7, 8, 11, 12, 13, 14, 18, 19, 20, 21, 25, 28, August 1, 2, 3, 4, 8, 9, 11 and 17, 2016).

46) On August 17, 2016, Employee saw Raymond Farrell, PA-C, for right flank and hip pain. Employee reported developing increasing hip pain yesterday while doing his rounds. X-rays of Employee’s pelvis and right hip were normal. After examination, PA-C Farrell diagnosed

exacerbation of low back pain. He recommended an MRI, continuing physical therapy, and sedentary desk work until his follow up appointment. (Farrell, August 17, 2016; X-ray report, August 17, 2016).

47) On August 18, 2016, Employee saw Dr. Vito for chiropractic care for low back, neck, and mid-back pain. Dr. Vito took Employee off work through August 21, 2016. (Vito, August 18, 2016).

48) On August 23 and 24, 2016, Employee saw Dr. Vito for chiropractic care for low back, neck and mid-back pain. (Vito, August 23 and 24, 2016).

49) On August 24, 2016, an MRI of Employee's lumbar spine demonstrated mild lower lumbar spondylosis resulting in mild right L4-5 neural foraminal stenosis with a small right foraminal disc protrusion. The disc protrusion may affect the exiting right L4 nerve root. (MRI Report, August 24, 2016).

50) On August 25, 29, September 1 and 7, 2016, Employee saw Dr. Vito for chiropractic care for low back, neck, and mid-back pain. (Vito, August 25, 29, September 1 and 7, 2016)

51) On September 7, 2016, Employee followed up with PA-C Glenn on the lumbar spine MRI. PA-C Glenn noted a L4-5 mild disc protrusion was new as it was not present on the 2015 MRI. Employee reported increased right lower back pain, stating it went down the right side of his leg, lateral thigh, down to his knee. After discussing options of care, Employee concluded he would like to continue physical therapy and chiropractic care and see how it went over the next few weeks. If Employee's symptoms did not continue improving, he would follow up for a possible epidural steroid injection. (Glenn, September 7, 2016).

52) On September 8, 9, 12, 13, 15 16 and October 17, 2016, Employee saw Dr. Vito for chiropractic care for low back, neck and mid-back pain. (Vito, September 8, 9, 12, 13, 15 16 and October 17, 2016).

53) On November 2, 2016, *Schwab v. Costco Wholesale*, AWCB Decision No. 16-0091 (November 2, 2016) (*Schwab I*) granted in part and denied in part Employee's petition for a protective order. Employee's petition contended he should not be required to sign medical, employment, insurance, pharmacy, Division of Workers' Compensation, or Social Security Administration records releases for any period before the date of the work injury. *Schwab I* directed Employee to sign and return to Employer the medical, pharmacy, insurance, and Division of Workers' Compensation releases at issue within ten days of receipt of the decision. *Schwab I* issued

a protective order on the employment history and Social Security Administration records releases. (*Schwab I*).

54) On November 22, 2016, Employee visited Dr. Vito for low back pain, neck pain, and mid-back pain. Employee stated his neck seems to be getting worse and his low back is about the same. He reported doing a lot of walking while on vacation the last ten days. (Vito, November 22, 2016).

55) On December 6, 2016, Employee visited Marius Maxwell, M.D., for severe neck pain, shoulder pain, grinding and popping when he turns his head and headaches, right scapula pain and spasm, and lower back pain. Under “History of Present Illness,” Dr. Maxwell noted:

[Employee] is a 42-year old who injured his back during a lifting injury on 04/14/15. His neck pain started about two months after that. His neck pain is the worst problem. He has grinding and popping when he turns his head with severe neck spasm and headaches. The pain is intractable and lasts the whole day. He has had epidural steroid injections, chiropractic treatment, physical therapy and massage therapy with no real benefit. His activities of daily living have been significantly affected by this problem. He has some right arm numbness and weakness and the lower back is minimal in comparison.

Dr. Maxwell stated the lumbar MRI scan showed multilevel degenerative disc disease, particularly at L3-4. He assessed mild lumbar spine degeneration and C3-4, C4-5, and C5-6 disc osteophyte complexes with right C6 radiculopathy. Dr. Maxwell recommended new a new cervical MRI and lumbar x-rays. (Maxwell, December 6, 2016).

56) On December 9, 2016, x-rays of Employee’s lumbar spine revealed degenerative changes at L4-5 and L5-S1. X-rays of Employee’s cervical spine revealed multilevel degenerative disc and joint changes with osseous foraminal narrowing greatest at C3-4 and C4-5 and disc space narrowing and endplate spondylosis most significantly at C5-6. (Lumbar Spine X-Ray Report, December 9, 2016; Cervical Spine X-Ray Report, December 9, 2016).

57) On December 9, 2016, an MRI of Employee’s cervical spine demonstrated significant worsening of degenerative and disc joint changes at multiple levels, from C3-4 through C5-6. Significant uncovertebral and facet joint arthrosis with disc bulge and endplate spondylosis contributed to severe neural foraminal and central spine canal stenosis at those levels. (MRI Report, December 9, 2016).

58) On December 13, 2016, Dr. Maxwell reviewed Employee’s MRI and diagnosed C4, 5 and 6 radiculopathies. He recommended Employee try more physical therapy and stated he believed

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Employee will need a C3-4, C4-5, and C5-6 anterior cervical fusion. (Maxwell, December 13, 2016).

59) On December 15, 2016, Employee visited Dr. Vito for low back pain, neck pain, and mid-back pain. (Vito, December 15, 2016).

60) On December 16, 2016, Employee underwent a right L4-5 transforaminal epidural steroid injection. (Levine, December 16, 2016).

61) On December 21, 22, 26, 29, January 2, 3, 5 and 9, 2016, Employee visited Dr. Vito for low back pain, neck pain, and mid-back pain. (Vito, December 21, 22, 26, 29, January 2, 3, 5 and 9, 2016).

62) On January 10, 2017, Employee saw Dr. Maxwell and reported his severe neck and arm pain has improved slight after a month of physical therapy. However, his lower back pain had not improved. Dr. Maxwell recommended a left L3-4 diagnostic anesthetic discogram. (Maxwell, January 10, 2017).

63) On January 11 and 12, 2017, Employee visited Dr. Vito for low back pain, neck pain, and mid-back pain. (Vito, January 11 and 12, 2017).

64) On February 2, 2017, Employee returned to Dr. Maxwell after a L3-4 anesthetic discogram and stated he experienced great relief of his low back pain. Employee reported severe neck and bilateral shoulder and arm pain. Dr. Maxwell stated Employee has failed conservative therapy and he recommended a C3-4, C4-5, and C5-6 anterior cervical fusion. (Maxwell, February 2, 2017).

65) On February 3, 2017, PA-C Glenn responded to a letter dated January 17, 2017 from Employer's attorney which asked him to review an enclosed copy of Dr. Bauer's EME report and provide his opinion. PA-C Glenn concurred with Dr. Bauer's opinions regarding the substantial cause of Employee's current treatment and that the April 14, 2015 work injury is not the substantial cause of Employee's need for future medical treatment. He also agreed with Dr. Bauer's recommendation for further treatment. PA-C Glenn also indicated Employee reached medical stability and did not incur a ratable PPI. (Glenn, February 3, 2017).

66) On February 6, 7 and 9, 2017, Employee visited Dr. Vito for low back pain, neck pain, and mid-back pain. (Vito, February 6, 7 and 9, 2017).

67) On February 16, 2017, at a prehearing conference, Employee amended his claim to add TTD and TPD benefits. (Prehearing Conference Summary, February 16, 2017).

68) On March 20, 2017, Employee filed a document titled, "OMAC Report 1-4-16." Employee contended PA-C Glenn's opinions in the February 3, 2017 response to Employer's questions contradicted PA-C Glenn's opinions on May 20, 2016 without any explanation for his change of opinion. Employee contended the cause of his medical treatment was the April 14, 2015 work injury because it caused a disc protrusion. Employee contended he has been in pain from the protruding disc in his lower back since the work injury and he has tried steroid injections, massages and chiropractic care but nothing resolved his pain. Employee contended he has not reached medical stability. Employee contended Dr. Bauer's January 14, 2016 EME report was not completely factual and his x-rays, MRIs, doctor visits, and input from treating doctors and therapists need to be evaluated and considered "in order to see the whole picture." (Employee, March 20, 2017).

69) On March 21, 2017, Employer took Employee's deposition. Employee testified he started feeling a shooting pain in his lower back area within a couple minutes after he assisted with loading the vanity for a customer. (Deposition of Daniel Schwab, March 21, 2017, at 15-17). He took a vacation in November 2016 to go to the Philippines through his church and after he got back he asked for a leave of absence to take care of his back. (*Id.* at 20). Prior to the April 14, 2015 work injury, Employee did not have any problems related to his back. (*Id.* at 26). Employee also testified:

Q: You recently handed me -- or -- you recently -- I don't know where it came from, to tell you the truth; I assume it -- you delivered it or had it mailed to me -- but a document that you said says OMAC Report 1-4-16, and it had a couple of attachments, including this that I'll make an exhibit.

A: Yes.

Q: What is that document, Exhibit 1?

A: So this was in May, when I was looking for a lawyer.

Q: May of 2016?

A: Yes.

Q: Okay.

A: They gave me this paper to bring to Dr. James Glenn to be filled out. And I did, but they weren't able to take my case, so I just kept this --

Q: Okay.

A: -- for my own information. (*Id.* at 29).

Employee stated the "OMAC Report 1-4-16" contains his explanation of the discrepancies in PA-C Glenn's February 3, 2017 response to Employer's questions and his arguments. (*Id.* at 30). When asked to describe which symptoms are related to the April 14, 2015 work injury, Employee testified he gets headaches, neck pain when he tries to sleep, and lower middle back pain which goes into his hips. (*Id.* at 42-44). Employee stated his prior lower back issues were different as he got a protruding disc in his lower back on April 14, 2015 and he had not hurt that part of his back before. (*Id.* at 51-53).

70) On June 21, 2017, Dr. Maxwell wrote a "To Whom it May Concern" letter, stating:

[Employee] is a patient of mine who I first saw in December 2016. I have examined him and read his radiological images. It is of my opinion that his neck condition was not related to the cause of his back condition. His cervical condition was mainly degenerative with osteophyte complexes, while his lumbar condition which causes him axial mechanical back pain, seems to be mainly derived from his L3-L4 disc herniation. (Maxwell, June 21, 2017).

71) On August 3, 2017, *Daniel Schwab v. Costco Wholesale*, AWCB Decision No. 17-0091 (*Schwab II*) granted in part and denied in part Employee's petition to strike second independent medical evaluation (SIME) documents. Employee contended medical records relating to treatment of his cervical spine and neck are not relevant to his work injury. Employee testified he is only claiming injury to his lower back, and so any records related to the neck or cervical spine or other parts of the body are not relevant. *Schwab II* stated there is often a connection between back injuries throughout the spine and extremities and permitted submission of medical records to the SIME evaluator as of February 9, 1999 because there is evidence of Employee having low back complaints on February 9, 2001. Employee also contended medical records concerning anxiety and panic attacks are not relevant to his work injury. *Schwab II* excluded records dealing with anxiety and panic attacks from the records sent to the SIME evaluator. (*Schwab II*).

72) On November 1, 2017, Bruce McCormack, M.D., a neurosurgeon, evaluated Employee for an SIME. Dr. McCormack diagnosed lumbar strain due to the April 14, 2015 incident, cervical

stenosis with axial neck pain, lumbar spondylosis with axial low back pain, and depression and anxiety, pre-existing conditions that are comorbidities for chronic pain. He opined all medical care for Employee's low back from April 14, 2015 to July 7, 2015 was due to the work injury and medical care beyond July 7, 2015 was for Employee's spondylosis. Dr. McCormack stated there is no disc rupture and he could not identify a disc herniation caused by the work injury. He opined Employee reached medical stability on July 7, 2015 and was no longer disabled from the work injury on July 7, 2015. Dr. McCormack noted Employee's neck complaints were not documented until May 14, 2015 and opined Employee's cervical spine surgery was unrelated to the April 14, 2015 work injury. He limited Employee to light work with no overhead work, no lifting overhead, no repeated bending or stooping, and limited standing to two hours at a time with breaks for sitting and lifting to 20 pounds. Dr. McCormack opined the work injury is not the substantial cause of Employee's work limitations; rather he attributes the limitations to the non-work related cervical fusion and cervical and lumbar spondylosis. He concluded Employee is capable of completing the job tasks outlined in his job description, with the exception of prolonged standing. (McCormack, November 1, 2017).

73) On January 12, 2018 Employee claimed TTD, medical costs, lost wages, medical and dental benefits, 401(k) retirement pay, life insurance, and pain and suffering. (Workers' Compensation Claim, January 12, 2018).

74) On January 18, 2018, Dr. Maxwell wrote a "To Whom It May Concern" letter stating Employee was released to return to work on January 22, 2018 with light restrictions, limiting lifting to 30 pounds. (Maxwell, January 18, 2018).

75) On March 14, 2018, PA-C Farrell stated Employee needs to be limited to sedentary desk work for the next four weeks due to an orthopedic injury. (Farrell, March 14, 2018).

76) On March 19, 2018, the parties attended a prehearing conference. The Board designee scheduled an oral hearing on June 28, 2018 on the merits of Employee's claims and set TTD, TPD, medical costs, retirement pay, dental, life insurance, and pain and suffering as issues. The parties stipulated to serve and file hearing briefs on or before June 21, 2018. (Prehearing Conference Summary, March 19, 2018).

77) On April 27, 2018, Dr. Maxwell wrote on a prescription pad, "Please allow [Employee] to do light duty. Due to his lower back problems, [Employee] will need access to a chair or stool during work as needed." (Maxwell, April 27, 2018).

78) On May 28, 2018, the Division served Employee at his address of record with the June 28, 2018 hearing notice by first-class mail and certified mail with return receipt requested. (Hearing Notice, May 28, 2018; copy of certified mail envelope).

79) On June 20, 2018, Employer took Dr. Bauer's deposition; Employee cross-examined Dr. Bauer. (Bauer Deposition, June 20, 2018).

80) Employee requested a continuance for one to two months to seek an attorney. Employee stated he has been looking for an attorney and has not been successful in retaining an attorney. (Record).

81) Employer opposed a continuance. Employer contended Employee has been looking for an attorney to represent him since May 2016 and he would not be likely to retain an attorney in one to two months. (Record).

82) Employee testified he is only claiming injury to his lower back and is not claiming cervical or neck injury. Employee seeks reinstatement or back payment of employment benefits, including medical, dental, life insurance and 401(k) retirement benefits. Employee seeks an award of pain and suffering because April 14, 2015 work injury affected his sleep and adversely affected his daily life. Employee is still working for Employer but cannot stand for more than a half hour straight and uses a wheel chair. (Employee).

83) The panel held the record open to provide Employee ten days to file a hearing brief and to provide Employer ten days to file a response. (Record).

84) On July 12, 2018, Employee requested additional time to file his hearing brief. He did not provide a reason for his request. (Petition, July 12, 2018; Observation).

85) On July 18, 2018, the panel served a letter denying Employee's July 12, 2018 petition. (Letter, July 18, 2018).



PRINCIPLES OF LAW

**AS 23.30.001. Legislative intent.** It is the intent of the legislature that

(1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;

....

**AS 23.30.005. Alaska Workers' Compensation Board.**

...

(h) The department shall adopt rules . . . and shall adopt regulations to carry out the provisions of this chapter. . . . Process and procedure shall be as summary and simple as possible. . . .

The board may base its decision not only on direct testimony, medical findings, 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.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death 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 death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or 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 death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment. . . .

**AS 23.30.045. Employer's liability for compensation.** (a) An employer is liable for and shall secure the payment to employees of the compensation payable under AS 23.30.041, 23.30.050, 23.30.095, 23.30.145, and 23.30.180-23.30.215 . . . .

**AS 23.30.055. Exclusiveness of liability.** The liability of an employer prescribed in AS 23.30.045 is exclusive and in place of all other liability of the employer and any fellow employee to the employee, the employee's legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from the employer or fellow employee at law or in admiralty on account of the injury or death. . . .

The board derives its authority and jurisdiction from the Alaska Workers' Compensation Act at AS 23.30.001, et seq. The board does not have authority to adjudicate civil, criminal, or constitutional claims. *Dougan v. Aurora Electric, Inc.*, 50 P.3d 789, 793 (Alaska 2002).

**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. However, if the condition requiring treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

**AS. 23.30.110. Procedure on claims.**

. . . .

(c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. . . .

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

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

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286, 292 (Alaska 1991). The Alaska Supreme Court held the presumption of compensability applies to any claim for compensation under the Act. *Meek v.*

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*Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a claim. At the first step, the claimant need only adduce some minimal relevant evidence establishing a “preliminary link” between the injury claimed and employment. *McGahuey v. Whitestone Logging, Inc.*, 262 P.3d 613, 620 (Alaska 2011); *Smith v. Univ. of Alaska, Fairbanks*, 172 P.3d 782, 788 (Alaska 2007); *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987). The evidence necessary to attach the presumption of compensability varies, depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471, 473-74 (Alaska 1991) (*quoting Smallwood* at 316). To rebut the presumption, an employer must present substantial evidence that either 1) something other than work was the substantial cause of the disability or need for medical treatment or 2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). “Substantial evidence” is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611-12 (Alaska 1999). At the second step of the analysis, the employer’s evidence is viewed in isolation, without regard to the claimant’s evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers’ Comp. Bd.*, 880 P.2d 1051, 1054 (Alaska 1994); *Wolfer* at 869-870.

If the employer successfully rebuts the presumption, it drops out, and the employee must prove all elements of his case by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). At this last step of the analysis, evidence is weighed and credibility

considered. To prevail, the claimant must “induce a belief” in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

**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.

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

**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 23.30.200. Temporary partial disability.** (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee’s spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.

**8 AAC 45.060. Service.**

. . . .

(b) . . . Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party’s representative. Service must be done, either personally, by facsimile, electronically, or by mail, in accordance with due process. Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party’s last known address.

**8 AAC 45.063. Computation of time.**

. . . .

(b) Upon petition by a party and for good cause, the board will, in its discretion, extend any time period prescribed by this chapter.

**8 AAC 45.114. Legal memoranda.** Except when the board or its designee determines that unusual and extenuating circumstances exist, legal memoranda must

(1) be filed and served at least five working days before the hearing, or timely filed and served in accordance with the prehearing ruling if an earlier date was established

**8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

**AS 09.17.010. Noneconomic Damages.** (a) In an action to recover damages for personal injury or wrongful death, all damage claims for noneconomic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life, loss of consortium, and other nonpecuniary damage.

**AS 22.10.020. Jurisdiction of the superior court.** (a) The superior court is the trial court of general jurisdiction, with original jurisdiction in all civil and criminal matters, including probate and guardianship of minors and incompetents.

### ANALYSIS

#### **1) Was the oral order denying Employee's request for a continuance correct?**

Continuance are not favored and will not be routinely granted. 8 AAC 45.074(b). Continuances are granted for good cause. 8 AAC 45.074(b)(1)(A)-(N). Employee did not demonstrate his situation fit into any of the limited grounds for good cause. The grounds for good cause related to an absent legal representative do not apply because Employee never retained an attorney. 8 AAC 45.074(b)(1)(B)-(D). Employee did not demonstrate how irreparable harm may come from proceeding with the June 28, 2018 hearing without legal representation; nor did Employee demonstrate due diligence in attempting to secure representation. 8 AAC 45.074(b)(1)(N). Employee was informed of his right to seek an attorney and was provided a list of attorneys over two years prior to the June 28, 2018 hearing at the May 11, 2016 prehearing conference. The June

28, 2018 hearing was scheduled during the March 19, 2018 prehearing conference and Employee had three months to secure legal representation. Employee received notice of the hearing more than ten days before the June 28, 2018 hearing date. AS 23.30.110(c); 8 AAC 45.060(b). It was Employee's responsibility to secure legal representation and he should have exercised greater diligence to find an attorney in timely manner. His failure to do so does not constitute good cause to continue the hearing under 8 AAC 45.074. Allowing a continuance when good cause does not exist under 8 AAC 45.074 would frustrate the legislature's intent for quick efficient, fair and predicable delivery of benefits to Employee at a reasonable cost to Employer. AS 23.30.001(1).

Employee did not demonstrate how irreparable harm may come from representing himself. 8 AAC 45.074(b)(1)(N). Employee requested a continuance and provided arguments supporting his request. Employee filed two claims, attended prehearing conferences, and attended his deposition and Dr. Bauer's deposition without legal representation, all facts tending to show Employee is able to understand the proceedings and prepare his case. *Rogers & Babler*. The oral order denying Employee's request for a continuance was correct. AS 23.30.135.

**2) Was the denial of Employee's request for additional time to file a hearing brief correct?**

Employee requested additional time to file a hearing brief. Hearing briefs must be filed and served at least five working days prior to hearing. 8 AAC 45.114(1). A time period prescribed by regulation under the Act may be extended upon petition for good cause. 8 AAC 45.063(b). While a procedural requirement may be waived if manifest injustice would result from strict application of the regulation, waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law. *Id.*

Employee stipulated to filing and serving hearing briefs by June 21, 2018 at the March 19, 2018 prehearing conference and he failed to do so. At hearing, the panel provided Employee an additional ten days after the June 28, 2018 hearing to file a hearing brief. On July 12, 2018, after the additional ten days passed, Employee requested additional time to file the hearing brief. However, Employee provided no reason to for his request for additional time. Employee failed to provide good cause to extend the time to file a hearing brief and did not produce evidence

establishing manifest injustice. 8 AAC 45.063(b); 8 AAC 45.195; AS 23.30.135. Providing Employee additional time to file a hearing brief once more without good cause would frustrate the legislature's intent for quick, efficient, fair and predictable delivery of benefits to Employee as a reasonable cost to Employer. AS 23.30.001(1). The July 18, 2018 denial of Employee's July 12, 2018 petition for a continuance was correct.

**3) Is Employee entitled to disability and medical benefits for his lumbar spine after July 6, 2015?**

Employee contends the April 14, 2015 work injury is the substantial cause of his disability and need for medical treatment after July 6, 2015. Employer contends Employee's non-work related degenerative cervical and lumbar spine diseases are the substantial cause of his disability and need for medical treatment after July 6, 2015. This creates a factual dispute to which the presumption of compensability applies. AS 23.30.010(a); AS 23.30.120(a); AS 23.30.095(a); AS 23.30.185; AS 23.30.200(a); *Sokolowski; Meek*.

A claimant's injury is presumed compensable when he demonstrates a "preliminary link" between the disability and his employment. *McGahuey*. In determining whether the presumption is raised, credibility is not considered nor is evidence weight against competing evidence. *Resler*. Employee raises the presumption on his claims for his lower back condition with his testimony work for Employer produced a back and spine injury, for which he continued to need medical treatment. *Burgess; Meek; Wolfer*. Without addressing issues of credibility and evidentiary weight, Employer rebuts the presumption with Dr. Bauer's January 14, 2016 EME report in which he opined the substantial cause of Employee's disability and need for medical treatment for his lumbar spine after July 6, 2015 was Employee's non-work related degenerative cervical and lumbar spine conditions. *Kramer; Huit; Tolbert; Norcon*.

Because Employer rebutted the presumption, Employee must prove, by a preponderance of the evidence, the April 14, 2015 work injury was the substantial cause of his disability and need for medical treatment for his lumbar spine after July 6, 2015. *Koons; Saxton*. Employee's testimony is credible and entitled to some weight. AS 23.30.122; *Rogers & Babler*. Dr. Bauer, an orthopedic surgeon, opined Employee's pre-existing, non-work related degenerative cervical and lumbar

spine diseases are the substantial cause of Employee's disability and need for medical treatment for his lumbar spine after July 6, 2015. Dr. McCormack, a neurosurgeon, opined Employee's pre-existing, non-work related degenerative cervical and lumbar spine diseases are the substantial cause of Employee's disability and need for medical treatment for his lumbar spine after July 7, 2015. The only medical evidence linking the April 14, 2015 work injury to Employee's disability and need for medical treatment for his lumbar spine after July 6, 2015 is PA-C Glenn's May 20, 2016 opinion.

PA-C Glenn's opinion is given less weight than the opinions of Drs. Bauer and McCormick because they are medical doctors and experts in spinal injuries and PA-C Glenn is not. *Rogers & Babler*. PA-C Glenn also changed his opinion on February 3, 2017 and agreed with Dr. Bauer's opinions after reviewing his EME report. Because PA-C Glenn changed his opinion, his prior May 20, 2016 opinions are given less weight. Employee has not adequately shown why Dr. Bauer's opinions and Dr. McCormack's opinions lack credibility or are based on an incomplete record or misunderstanding of the law. Dr. McCormack's SIME report was issued more recently than the medical opinion relied on by Employee and his opinions are based on a review of the most complete record. Dr. McCormick evaluated and considered Employee's x-rays, MRIs, doctors' visits, physical therapy records, and chiropractic care records. Dr. McCormack's SIME report is given the most weight on whether the April 14, 2015 work injury was the substantial cause of Employee's disability and need for medical treatment for his lumbar spine after July 6, 2015. AS 23.30.122; AS 23.30.135(a); *Rogers & Babler*. Employee has not shown by a preponderance of the evidence the April 14, 2015 work injury is the substantial cause of his disability and need for medical treatment for his lumbar spine after July 6, 2015. AS 23.30.010; AS 23.30.120; *Koons; Saxton*. Employee's April 8, 2016 and January 12, 2018 claims will be denied. *Id.*



**4) Is Employee entitled to pain and suffering and lost employment benefits, including medical, dental, 401(k) retirement pay, and life insurance?**

Employee requested an award for pain and suffering, reinstatement of his employment benefits, including medical, dental and life insurance benefits, and back payment into his 401(k) retirement account. This decision finds Employee has not shown by a preponderance of the evidence the April 14, 2015 work injury is the substantial cause of his disability and need for medical treatment for his lumbar spine after July 6, 2015. Therefore, he is not entitled to benefits under the Act.

But even assuming the April 14, 2015 work injury was the substantial cause of Employee's disability and need for medical treatment for his lumbar spine after July 6, 2015, this decision does not have authority to decide and order benefits not included under the Act. AS 23.30.005; AS 23.30.045; AS 23.30.055. The employment benefits Employee is seeking, including medical, dental, 401(k) retirement pay, and life insurance benefits, are not included under the Act. AS 23.30.001 *et. seq.*

Finally, a claim for pain and suffering is a civil claim. AS 09.17.010; AS 22.10.020. The exclusive remedy of the Act in AS 23.30.055 prevents an employee from bringing civil actions arising out of work-related injuries. This decision is without jurisdiction to decide civil claims. *Dougan*; AS 22.10.020. Employee's claim for pain and suffering, reinstatement of his medical, dental and life insurance benefits and back payment into his 401(k) retirement account is denied.

CONCLUSIONS OF LAW

- 1) The oral order denying Employee's request for a continuance was correct.
- 2) The denial of Employee's July 12, 2018 petition for an extension of the deadline to file a hearing brief was correct.
- 3) Employee is not entitled to disability and medical benefits for his lumbar spine after July 6, 2015.
- 4) This decision is without authority to award Employee damages for pain and suffering or lost employment benefits, including medical, dental, 401(k) retirement pay, and life insurance.

ORDER

DANIEL SCHWAB v. COSTCO WHOLESALE

Employee’s April 8, 2016 and January 12, 2018 claims are denied.

Dated in Anchorage, Alaska on July 25, 2018.

ALASKA WORKERS’ COMPENSATION BOARD

        /s/          
Matthew Slodowy, Designated Chair

        /s/          
Amy Steele, Member

        /s/          
Pamela Cline, Member

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of DANIEL SCHWAB, employee / claimant; v. COSTCO WHOLESALE, employer; LIBERTY MUTUAL INSURANCE CORPORATION, insurer / defendants; Case No. 201506048; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 25, 2018.

/s/

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Charlotte Corriveau, Office Assistant