ALASKA WORKERS' COMPENSATION BOARD

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

WILLIAM PHARR, Employee, Claimant, v. ROBERT HALL d/b/a GORILLA FIREWORKS, Employer, and ALASKA NATIONAL INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201410772 AWCB Decision No. 18-0130 Filed with AWCB Anchorage, Alaska on December 27, 2018

William Pharr's February 26, 2016 claim was heard on November 29, 2018 in Anchorage, Alaska, a date selected on September 11, 2018. An August 16, 2016 affidavit of readiness for hearing gave rise to this hearing. Attorney Robert Mason appeared and represented Mr. Pharr (Employee), who appeared and testified. Attorney Cheryl Graves appeared and represented Robert Hall and Alaska National Insurance (Employer). The record closed at the hearing's conclusion on November 29, 2018.

ISSUES

Employee contends a series of lumbar spine injuries while working for Employer are the substantial cause of his disability and need for medical treatment. Employer concedes Employee was injured while working for Employer, but it contends all benefits due because of recent

injuries have been paid and any continuing disability or need for medical treatment is due to a 2009 injury which was settled.

1. Are Employee's lumbar spine injuries while working for Employer the substantial cause of his disability or need for medical treatment?

Employee contends he is entitled to temporary total disability (TTD) or temporary partial disability (TPD) from June 10, 2014. Employer contends any injuries after the 2009 injury are no longer the substantial cause of Employee's disability?

2. Is Employee entitled to additional disability benefits, and, if so, in what amount?

Employee contends he is entitled to additional medical and transportation costs. Employer contends any work injuries after 2009 are no longer the substantial cause of Employee's need for medical treatment.

3. Is Employee entitled to additional medical and transportation costs?

Employee contends he is entitled to permanent partial impairment (PPI) benefits when rated. Employer contends Employee is not entitled to PPI benefits because he has not produced a rating.

4. Is Employee entitled to PPI benefits?

Employee contends he is entitled to interest on benefits not paid when due. Employer contends Employee is not entitled to interest because he was paid all benefits when due.t

5. Is Employee entitled to interest?

Employee contends his attorney provided valuable services that will result in him obtaining benefits and he should be awarded attorney fees and costs. Employer contends Employee should not be awarded attorney fees and costs because he will not prevail.

6. Is Employee entitled to attorney fees and costs, and, if so, in what amount?

FINDINGS OF FACT

A preponderance of the evidences establishes the following facts and factual conclusions:

1. Employee began working for Employer in 1993 at Employer's fireworks stands. Employee helps with stocking and sales, and does maintenance work such as mechanical, electrical, painting, and snowplowing or, as Employee stated, he "fixes things." (Employee).
2. On August 14, 2009, Employee injured his low back while lifting boxes for Employer. An MRI revealed degenerative conditions and a central disc protrusion at L5-S1. (Compromise and Release Agreement, Case Numbers 200911988 and 200919162, July 28, 2010 (2010 C&R)).
3. Employee's treating physician and Employer's medical evaluator (EME) disagreed as to whether Employee was medically stable, but they agreed Employee could return to work with restrictions. The EME rated Employee with a one percent PPI. Employee returned to work in late December 2009, and reported he had reinjured his back on December 31, 2009. (2010 C&R).
4. Employee's doctor administered facet and epidural injections and recommended a spinal cord stimulator or disc decompression. (2010 C&R).
5. On April 6, 2010, Employee was examined by a different EME doctor, who stated that absent a specific injury, Employee's preexisting degenerative condition was the substantial cause of his disability and need for medical treatment. (2010 C&R).
6. On July 28, 2010, the parties filed the 2010 C&R. In exchange for $40,000.00, Employee waived all benefits other than medical benefits. (2010 C&R).
7. On July 28, 2010, Employee's doctor stated Employee's back pain was primarily discogenic, and he again recommended a spinal cord stimulator or a discectomy. (Compromise and Release Agreement, Case Numbers 200911988 and 200919162, December 14, 2011 (2011 C&R)).
8. On April 14, 2011, Employee was again seen for an EME. Employer's doctor opined the substantial cause of Employee's need for medical treatment was his degenerative spinal disease. (2011 C&R).

9. On December 14, 2011, the Board approved a C&R in which Employee waived past and future medical benefits arising from the August 14, 2009 and December 31, 2009 in exchange for $130,000.00. (2011 C&R).
10. Employee reported that on April 6, 2013 he had slipped and fallen injuring his back while working for Employer. No medical records were filed relating to this injury, and there is no record Employee was paid any benefits related to this injury. (ICERS Database, Case Number 201304787).
11. On August 17, 2013, Employee reported an allergic reaction while working for Employer. No medical records were filed relating to this injury, and there is no record Employee was paid any benefits related to this injury. (ICERS Database, Case Number 201321220).
12. On June 21, 2014, Employee reported the injury that is the foundation of this claim. He reported that on June 19, 2014 he had injured his low back and left side when a ladder had fallen. (Report of Injury, June 21, 2014).
13. On November 7, 2014, Employer filed a report of injury stating Employee had injured his back in a slip and fall on October 25, 2014. Although there are no medical records, Employer reported it paid $2,554.44 in medical costs for this injury. (ICERS Database, Case Number 201418167).
14. On December 21, 2014, Employee reported he had lower back pain as a result of lifting or bending while working for Employer. Employer reported it paid $1,917.66 in medical costs and $1,115, 71 in TTD. No medical records have been filed in this case. (ICERS Database, Case Number 201500293).
15. On February 27, 2018, Employee reported he was plowing snow for Employer when the plow truck got stuck. He had to shovel snow from under the truck, which resulted in low back and neck pain. (Report of Injury, Case Number 201803921). Employee filed a claim in this case on August 13, 2018. (Claim, Case Number 201803921).
16. On August 13, 2018, Employee rolled a vehicle off the road, injuring his back, neck, chest, arms, and legs. (First Report of Injury, Case Number 201810664). Employee filed a claim in this case on August 13, 2018. (Claim, Case Number 201810664).
17. On August 17, 2018, Employee petitioned to join the February 27 and August 13, 2018 claims, and at the September 27, 2018 prehearing conference the parties agreed the cases

would be joined for administrative purposes, but would not be joined for hearing. (Case No. 201803921, Prehearing Conference Summary, September 27, 2018).

18. Neither party has petitioned to join any of the other cases with this case. (Record; Observation).
19. Employee's back began bothering him in 2009, but he kept working until Employer insisted he see a doctor in August 2009. After he reinjured his back in 2010, Employer hired someone to help him with lifting and other heavy tasks. On June 19, 2014, Employee was setting up and repainting signs at Employer's fireworks stand in North Pole in preparation for the Fourth of July holiday. He was on a ladder leaning against a flap that closed the sales window. A hinge on the flap broke and he fell hitting the sales counter. Although the pain kept getting worse, he finished his work for the day and drove to his home in Houston. (Employee).
20. On June 21, 2014, Employee went to the emergency room because of difficulty breathing, pain in his ribs, and low back pain. An x-ray revealed a fractured rib. (Mat-Su Regional Medical Center, Physician Documentation, June 21, 2014).
21. On June 26, 2014, Employee was seen by Bruck Clift, M.D., who continued to treat him for the broken rib and back pain. She noted Employee "has chronic pain (L3-4 and L4-5 annular tearing and degen. disc disease) from a previous injury." (Solstice Family Care, Chart Note, June 26, 2014). On July 17, 2014, Dr. Clift noted Employee's "[b]ack is still painful for 5-6 years and is a little more burning than usual . . .." (Solstice Family Care, Chart Note, July 17, 2014).
22. On August 18, 2014, Dr. Clift signed a return to work authorization releasing Employee to work as of July 30, 2014 without restrictions. (Dr. Clift, Return to Work Recommendations, August 18, 2018).
23. A July 22, 2014 MRI of Employee's lumbar spine showed mild degenerative changes with mild bilateral neural foraminal stenosis at L4-5 and L5-S1. The MRI was compared to one done in September 2009 and no significant changes were noted. (Solstice Family Care, Chart Note, July 22, 2014).
24. On November 24, 2014, Dr. Clift responded to questions from Employer opining Employee had reached medical stability that day and predicting Employee would not suffer any permanent partial impairment as a result of his October 21, 2013 claim. (Dr. Clift, Response

to Employer Questions, November 24, 2014). There is no reported injury for Employee dated October 21, 2013, nor is there any claim with that date. (Record; Observation).

25. On December 3, 2014, Employee told Dr. Clift he had reinjured his back on November 29, 2014. Because of Employee's continued back pain, Dr. Clift referred Employee to Orthopedic Physicians Anchorage (OPA) for a surgical evaluation. She also limited employee to lifting no more than 15 pounds. (Dr. Clift, Referral Order and Chart Note, December 3, 2014).
26. On January 6, 2015, Employee was seen by PA-C James Glenn at OPA. PA Glenn noted Employee had ongoing low back pain since 2009, but the symptoms dramatically worsened on December 21, 2014. After reviewing Employee's MRI, PA Glenn found no significant disc protrusions or herniations, but he did find age-related degenerative changes. The changes were not significant when compared to the 2009 MRI. (OPA, Letter to Dr. Clift, January 6, 2015).
27. On January 23, 2015, Larry Levine, M.D., performed a caudal epidural steroid injection on Employee. (Alaska Spine Institute, Procedure Note, January 23, 2015).
28. On April 10, 2015, Employee was seen by James Eule, M.D. Dr. Eule noted an MRI of Employee's neck showed significant stenosis, but the MRI of his lumbar spine was "pretty unremarkable", although it showed a little facet hypertrophy and synovial disc narrowing. Dr. Eule stated Employee's neck problems could be making his back problem worse, and he recommended a cervical fusion. (Dr. Eule, Chart Note, April 10, 2015).
29. On April 17, 2015, Employee was seen by Scot Youngblood, M.D., for an employer's medical evaluation (EME). Dr. Youngblood reviewed medical records from the June 21, 2014 emergency room note through Dr. Levine's January 23, 2015 note as well as records related to the 2009 and 2010 injuries. Dr. Youngblood also reviewed x-ray and MRI images from 2009 as well as an MRI from July 2014. Employee told Dr. Youngblood that while he had increased pain on October 29, and December 21 2014, there had not been any injurious event on either day. Dr. Youngblood found the June 19, 2014 injury was the substantial cause of a rib fracture and a lumbar sprain/strain, both of which had resolved. He also diagnosed lumbar degenerative disc disease that was not substantially caused by the June 19, October 29, or December 21, 2014 injuries. Dr. Youngblood stated the July 2014 MRI showed little change from the September 2009 MRI, and Employee would have reached

medical stability within three months of the June 19, 2014 injury, and Employee did not need any additional treatment. (Dr. Youngblood, EME Report, April 17, 2015).

30. On April 29, 2014, Employer controverted further TTD and medical benefits on the grounds Employee was medically stable and needed no further medical treatment. (Subsequent Report of Injury, April 29, 2015).
31. Dr. Eule responded to May 20, 2016 questions from Employee's attorney. He stated it was somewhat probable Employee's low back pain since the June 2014 injury was caused by an injury to Employee's cervical spine. (Dr. Eule, Response to Employee Questions, May 20, 2016).
32. On May 17, 2017, Employee was seen by Floyd Pohlman, M.D., for a Board-ordered second independent medical evaluation (SIME). Dr. Pohlman examined Employee and reviewed his medical records beginning with the 2009 injury. Dr. Pohlman found the June 19, 2014 injury was the cause of Employee's broken rib and an aggravation of his preexisting chronic low back pain. Dr. Pohlman agreed with Dr. Clift that Employee had reached medical stability on November 24, 2014 when he returned to his preexisting condition. While Employee had some aggravation of his low back pain, it was likely due to a subsequent injury. Dr. Pohlman stated Employee did not currently need further medical treatment, but recommended physical therapy on an as-needed basis, however the physical therapy would not prevent the deterioration of Employee's low back problem, nor would it make it any better. (Dr. Pohlman, SIME Report, May 17, 2017).
33. In response to questions, on July 27, 2017, Dr. Pohlman clarified the physical therapy he had recommended was for acute flare-ups, and the June 19, 2014 injury was "a substantial cause" of the need for physical therapy. (Dr. Pohlman, Supplemental SIME Report, July 27, 2017).
34. Employer explained Employee was a jack-of-all-trades; as examples he is the only person Employer knows who can run and repair the World War II search lights Employer runs at the fireworks stands, and he is the only one who can reprogram the security system. He operated the snowplow and painted. His work was neat and meticulous, and anytime there was an oddball job, Employer would ask Employee to do it. Between 2009 and 2014, Employee physical capabilities declined; he wasn't the same after 2009. From 2009 through 2017, Employee would get a little better so he could work, and then he would get hurt again. After the 2014 injury, Employer became even more insistent Employee have someone with him to

help, but with his physical limitations there is only so much he could do. (Employer, Deposition, October 9, 2018).

35. Employee explained he had not gone to the doctor after the October and December 2014 injuries. He had an increase in pain after working on a forklift, and Employer told him to file the reports of injury. (Employee).
36. At the beginning of the November 29, 2018 hearing, Employee clarified the injury to his neck was not an issue. (Hearing Representation).
37. On November 21, 2018, Employee's attorney filed an affidavit detailing $44,840.00 in fees and costs of $1,026.23. At hearing Employee's attorney represented he had incurred an additional 13.7 hours at $400.00 per hour, or $5,480.00 in fees. (Employee Attorney Fee Affidavit, November 21, 2018; Hearing Representation).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter.**
> It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
> . . . .

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.

Under the Alaska Workers' Compensation Act, coverage is established by a work connection, meaning the injury must have "arisen out of" and "in the course of" employment. If an accidental injury is connected with any of the incidents of one's employment, then the injury both would "arise out of" and be "in the course of" employment. The "arising out of" and the "in the course of" tests should not be kept in separate compartments but should be merged into a single concept of "work connection." *Northern Corp. v. Saari*, 409 P.2d 845, 846 (Alaska 1966).

> **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 the 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 23.30.120. 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 . . . .
>
> (b) If delay in giving notice is excused by the board under AS 23.30.100(d)(2), the burden of proof of the validity of the claim shifts to the employee notwithstanding the provisions of (a) of this section.

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. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996); *Carter* at 665. 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 worker's 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. *Kramer* at 473-74, 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 presumption is raised but not rebutted, the claimant prevails and need not produce further evidence. *Williams v. State*, 938 P.2d 1065, 1075 (Alaska 1997). 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. 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). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (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 reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146, 150-51 (Alaska 2007), the Supreme Court explained fee awards under AS 23.30.145(a) and (b):

> Subsection (a) authorizes the Board to award attorney's fees as a percentage of the amount of benefits awarded to an employee when an employer controverts a claim. . . . In contrast, subsection (b) requires an employer to pay reasonable attorney's fees when the employer "otherwise resists" payment of compensation and the employee's attorney successfully prosecutes his claim.

Subsections (a) and (b) are not mutually exclusive, however.

> Subsection (a) fees may be awarded only when claims are controverted in actuality or fact. Subsection (b) may apply to fee awards in controverted claims, in cases in which the employer does not controvert but otherwise resists, and in other circumstances. *Uresco Construction Materials, Inc. v. Porteleki*, AWCAC Decision No. 152, at 15 (May 11, 2011) (Citations omitted).

Attorney fees in workers' compensation cases should be fully compensatory and reasonable so injured workers have competent counsel available to them. *Cortay v. Silver Bay Logging*, 787 P.2d 103, 108 (Alaska 1990). An employee is entitled to attorney fees when the attorney is instrumental in inducing an employer to voluntarily but belatedly pay benefits. *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993).

> **23.30.155. Payment of compensation.**
> . . . .
>
> (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.

> **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.

> **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. The percentage of permanent impairment of the whole person is the percentage of impairment to the particular body part, system, or function converted to the percentage of impairment to the whole person as provided under (b) of this section. The compensation is payable in a single lump sum, except as otherwise provided in AS 23.30.041, but the compensation may not be discounted for any present value considerations.
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides.

In *Stonebridge Hospitality Associates, LLC v. Settje*, AWCAC decision No. 153 (June 14, 2011), a pro se claimant brought a PPI claim to hearing before the board. However, she did not have a PPI rating from her doctor. The board held the PPI claim was not ripe. On appeal, the commission reversed stating the injured worker's PPI claim was ripe for adjudication. *Settje* held the injured worker is required to obtain a PPI rating and presented at hearing if she wants a PPI award.

> **AS 23.30.395. Definitions.**
> In this chapter,
> . . . .
>
> (16) 'disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;

ANALYSIS

1. Are Employee's lumbar spine injuries while working for Employer the substantial cause of his disability or need for medical treatment?

Because Employee contends his disability or need for medical treatment arose from cumulative injuries, it is first necessary to determine which injuries can be considered in this decision. In the July 10, 2011 and December 14, 2011 C&Rs, Employee waived all future benefits arising from the August 14, 2009 and December 31, 2009 low back injuries. Consequently, those injuries cannot serve as the basis for the award of additional benefits. Employee filed claims in both the February 27, 2018 and August 13, 2018 injuries, and, while he petitioned to join those two cases, they have not been joined to any other injuries. Those two injuries, which included Employee's low back, neck, chest, arms, and legs, will be considered in separate proceedings. Five reported injuries remain: the April 6, 2013 low back injury, the August 17, 2013 allergic reaction injury, the June 19, 2014 low back and rib injury, the November 7, 2014 back injury, and the December 21, 2014 low back injury. Employer paid Employee benefits until April 29, 2015, when it controverted further benefits. The question becomes whether the five injuries, separately or together, were the substantial cause of Employee's disability or need for medical treatment after April 29, 2015.

The presumption of compensability applies to the issue of causation. Without regard to conflicting evidence, and without considering credibility, Employee raised the presumption that the June 19, 2014 injury was the substantial cause of his disability and need for medical treatment; both Dr. Youngblood and Dr. Pohlman opined the injury was the substantial cause of Employee's broken rib and was the cause of either a sprain/strain, or an aggravation of Employee's preexisting low back pain. Because Employee raised the presumption, Employer was required to rebut it. It did so through Dr. Youngblood's opinion that Employee had reached medical stability and needed no further treatment. Because Employer rebutted the presumption, Employee was required to prove he is entitled to benefits after April 29, 2015.

There is no evidence Employee needed medical treatment for or was disabled by the April 6, 2013 and August 17, 2013 injuries, and no doctor opined those injuries combined with or were aggravated by Employee's later injuries.

Although she does not offer a specific opinion on causation, Dr. Clift's records are given substantial weight. Her chart notes from June and July 2014 document Employee's continued chronic back pain after the 2009 injuries, noting his symptoms might have worsened due to the June 19, 2014 injury. She found Employee to be medically stable as of November 24, 2014, and although she continued to treat Employee and referred him to other doctors for treatment of low back pain after November 24, 2014, it is unclear whether she attributed the need for treatment to preexisting back pain or the June 2014 injury.

Dr. Pohlman's opinions regarding the June 19, 2014 injury are given somewhat less weight. Because he examined Employee and reviewed Employee's medical records since the 2009 injuries, including Dr. Clift's chart notes and Dr. Youngblood's EME report, his examination was the most thorough. In his May 2017 report, Dr. Pohlman agreed with Dr. Clift that Employee was medically stable as of November 24, 2014 and opined Employee needed no further treatment due to the June 19, 2014 injury. The weight given to Dr. Pohlman's opinions is reduced because he does not explain the conclusion in in his July 27, 2017 supplemental report that the June 19, 2014 injury was "a substantial cause" of Employee's need for physical therapy, given his earlier statement that no additional treatment was necessary. Also, to the extent Dr. Pohlman refers to injuries subsequent to June 19, 2014, his report is given less weight because it is based on inaccurate information. In relating his history to Dr. Pohlman, Employee stated he had another back injury in November 2014 and possibly an additional one in October 2014. There is no record of an injury in November 2014, and Employee reported to Dr. Youngblood and testified at hearing, that although he had increased pain on October 29, and December 21, 2014, there had not been any injurious event on either day.

The most weight is given to Dr. Youngblood's opinions. He reviewed Employee's medical records going back to 2009. As did other doctors, Dr. Youngblood noted the 2014 MRI showed little change from the one in 2009. Although he agreed with Dr. Pohlman that Employee had aggravated his preexisting back condition, he found Employee was medically stable somewhat earlier, by September 19, 2014. His conclusions regarding the October and December 2014 reported injuries are based on statements consistent with Employee's hearing testimony.

Drs. Youngblood and Pohlman agree Employee temporarily aggravated his preexisting low back in the June 19, 2014 fall, and all doctors agree he was medically stable by November 24, 2014 at the latest. No doctor has opined his need for medical treatment after that date was due to the injury rather than the preexisting condition. Employee did not prove by a preponderance of the evidence the June 19, 2014 injury was the substantial cause of his disability or need for medical treatment after April 29, 2015.

Although Employee reported pain on November 7, 2014 and December 21, 2014, he testified there was no identifiable injury or event and he had reported the "injuries" because Employer required him to do so. Both Dr. Clift and Dr. Pohlman stated Employee had reinjured his back on those dates; whether Employee provided them inaccurate information or whether they simply misunderstood him, their opinions are based on incorrect information and are given no weight. Employee told PA Glenn and Dr. Youngblood his symptoms had worsened on those dates. Both diagnosed degenerative changes, and neither attributed Employee's disability or need for medical treatment to the reported injuries rather than the preexisting degenerative changes. The preponderance of the evidence is that the November 7 and December 21, 2014 injuries were not the substantial cause of Employee's disability or need for medical treatment, either alone or combined with Employee's other injuries.

The April 6, 2013, August 17, 2013, June 19, 2014, November 7, 2014, and December 21, 2014 injuries, either alone or in combination, are not the substantial cause of Employee's disability or need for medical treatment after April 29, 2015.

2. Is Employee entitled to additional disability benefits, and, if so, in what amount?

Employee seeks additional TTD or TPD after April 29, 2015. This decision has determined Employee's injuries are not the substantial cause of his disability after April 29, 2015. Consequently, Employee is not entitled to additional disability benefits.

3. Is Employee entitled to additional medical and transportation costs?

Employee seeks additional medical and transportation costs after April 29, 2015. This decision has determined Employee's injuries are not the substantial cause of his disability after April 29, 2015. Consequently, Employee is not entitled to additional medical or transportation costs.

4. Is Employee entitled to PPI benefits?

The fact this decision has determined the work injuries are not the substantial cause of Employee's disability or need for medical treatment after April 29, 2015, does preclude the award of PPI benefits. However, *Settje* requires an employee who is medically stable to produce a permanent impairment rating at hearing. Employee was medically stable by November 24, 2014, and he did not produce an impairment rating. His claim for PPI benefits must be denied.

5. Is Employee entitled to interest?

AS 23.30.155(p) mandates interest be paid on any benefits not paid when due. Employee has not established he is entitled to any benefits that were not timely paid. Employee's claim for interest is denied.

6. Is Employee entitled to attorney fees and costs, and, if so, in what amount?

Under AS 23.30.145(a), attorney fees may be awarded based on the amount of compensation awarded. Under AS 23.30.145(b), fees may be awarded when a claimant successfully prosecutes a claim. Here, Employee was not awarded any additional compensation nor was he successful in prosecuting his claim. There is no basis upon which attorney fees and costs may be awarded.

CONCLUSIONS OF LAW

1. Employee's lumbar spine injuries while working for Employer are not the substantial cause of his disability or need for medical treatment.

2. Employee is not entitled to additional disability benefits.

3. Employee is not entitled to additional medical and transportation costs.

4. Employee is not entitled to PPI benefits.

5. Employee is not entitled to interest.

6. Employee is not entitled to attorney fees and costs.

ORDER

1. Employee's February 26, 2016 claim is denied.

Dated in Anchorage, Alaska on December 27, 2018.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Ronald P. Ringel, Designated Chair

/s/
Amy Steele, Member

/s/
Justin Mack, 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 WILLIAM PHARR, employee / claimant v. ROBERT HALL, employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201410772; 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 December 27, 2018.

/s/
Charlotte Corriveau, Office Assistant