# ALASKA WORKERS' COMPENSATION BOARD

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

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| MATTHEW RIFE,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>B.C. EXCAVATING, LLC,<br><br>Employer,<br>and<br><br>ALASKA NATIONAL INSURANCE,<br><br>Insurer,<br>Defendants. | ) | FINAL DECISION AND ORDER<br><br>AWCB Case No. 201601856<br><br>AWCB Decision No. 19-0001<br><br>Filed with AWCB Anchorage, Alaska<br>on January 2, 2019 |

Matthew Rife's (Employee) January 19, 2016 and September 3, 2018 claims were heard on November 7, 2018, in Anchorage, Alaska, a date selected on October 11, 2018. A July 31, 2018 hearing request gave rise to this hearing. Employee appeared, represented himself and testified. Attorney Michelle Meshke appeared and represented B.C. Excavating, LLC and Alaska National Insurance Company (Employer). *Rife v. B.C. Excavating, LLC*, AWCB Decision No. 18-0061 (June 26, 2018) (*Rife I*) denied Employee's petition for a protective order and his petition for a declaration Ms. Meshke is Employer's representative and agent. Witnesses included Kymberly LaRose, who appeared in person; and Scot Youngblood, M.D., who appeared by deposition, both on Employer's behalf. The record remained open at the hearing's conclusion for Dr. Youngblood's deposition. The record closed on December 12, 2018.

## ISSUES

Employee contends his two injuries while working for Employer are the substantial cause of his disability and need for medical treatment. Employee contends he is entitled to permanent total disability (PTD) benefits.

Employer contends Employee's work injury is not the substantial cause of disability or his need for medical treatment. Employer contends Employee is not permanently totally disabled, there is no evidence he missed work or was taken off work and he has continued to work full time. Employer seeks an order denying Employee's claims.

**1) Are Employee's injuries while working for Employer the substantial cause of disability or need for medical treatment?**

Employee contends his two work injuries while working for Employer entitle him to permanent partial impairment (PPI) benefits. Employer contends Employee is not entitled to PPI benefits because he has not produced a PPI rating.

**2) Is Employee entitled to PPI benefits?**

Employee contends he is entitled to a higher weekly compensation rate. He seeks an unspecified compensation rate adjustment.

Employer contends Employee's compensation rate was never formally set because Employee never provided a medical record evidencing his physician restricted him from work. Employer contends Employee is not entitled and never has been to disability benefits, either permanent total disability (PTD), temporary total disability (TTD) or temporary partial disability (TPD), and his compensation rate need not be formally set.

**3) Is Employee entitled to a compensation rate adjustment?**

Employee contends he is entitled to a "70 percent weekly stipend." Employer contends Employee misunderstands the purpose of a stipend and is not entitled to one because there is no medical evidence documenting he has a disability, he was cleared to return to the work he

performed for Employer, has continued to work full time and is thus not eligible for reemployment benefits or a stipend.

**4) Is Employee entitled to a weekly stipend?**

Employee contends he is entitled to unspecified penalties and $10,000,000 in interest on benefits not paid when due. He seeks a penalty and interest award.

Employer contends Employee is entitled to no additional benefits and all benefits were paid when due. Therefore, Employer contends there is no basis to award penalties or interest and Employee's claim should be denied.

**5) Is Employee entitled to penalty and interest?**

Employee contends Employer unfairly or frivolously denied his claim. He seeks an order finding an unfair or frivolous controversion.

Employer contends all its controversions were in good faith and that it did not unfairly or frivolously deny Employee's right to benefits. It seeks an order rejecting Employee's request.

**6) Did Employer unfairly or frivolously controvert Employee's claim?**

FINDINGS OF FACT

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

1) On April 3, 2012, Employee was evaluated by Alexander Baskous, M.D., as part of a medical surveillance program required under 29 CFR 1910.120(f). Medical surveillance is required for all employees who may be exposed to hazardous substances at or above permissible exposure limits; who wear a respirator for 30 or more days per year; who are injured or develop symptoms due to overexposure involving hazardous substances from an emergency response or hazardous waste operation; or are members of a HAZMAT team. Employee's completed evaluation form asks, "Do you currently have any of the following musculoskeletal problems?" On April 3, 2012, Employee did not have back pain, pain or stiffness when he leaned forward or backward at

the waist or any other muscle or skeletal problem that would interfere with using a respirator. (Physician's Written Opinion, Dr. Baskous, April 3, 2012.)

2) On January 29, 2016, Employee reported two injuries occurred while working for Employer. His first occurred on September 5, 2013, when he fell off a trench box onto an eight foot dip water line, which was approximately 10 feet deep. Employee's second injury occurred on January 23, 2014, when he was welding a flange onto a lift station in an open evacuation. (First Report of Injury, February 4, 2016.)

3) On September 11, 2013, Employee reported to Upshur Spencer, M.D., that he fell about nine or 10 feet off a trench box and landed on his right hip and right lower back onto compacted dirt. Employee had no extremity symptoms and 48-72 hours after the fall his low back symptoms had increased. Employee complained of right-sided low back pain radiating into the posterior and anterior proximal half of his thigh. Employee had no weakness or numbness. Employee only missed work to attend his appointment with Dr. Spencer and was not taking pain medication. X-rays were "fairly unremarkable." Dr. Spencer diagnosed lumbago with axial mechanical back pain. Dr. Spencer's examination revealed no evidence of a neurologic deficit. He noted Employee may have a slight leg length discrepancy and spina bifida occulta. Dr. Spencer expected Employee's symptoms to improve spontaneously with time and did not limit Employee in any activity. Employee weighed 240 pounds. (Chart Note, Dr. Spencer, September 11, 2013.)

4) Dr. Spencer did not restrict Employee from working. (*Id.*)

5) January 21, 2014 was the next time Employee sought care for low back pain. Employee said his lower back was "not feeling good" and had not been for two months. Employee believed his pain's initial cause was a "torn muscle." Digital palpation of Employee's spine and extremities revealed the following dysfunctional areas: Occiput, C1, C2, T4, T5, T6, T7, L5, and sacrum. Robert Lewis, DC, treated Employee on January 21 and 28, 2014, and diagnosed lumbar subluxation, lumbosacral segmental dysfunction, muscle spasm, and lumbar sprain or strain. (Chart Note, Dr. Lewis, January 21, 2014; Chart Note, Dr. Lewis, January 28, 2014.)

6) Dr. Lewis did not restrict Employee from working. (*Id.*)

7) On January 27, 2014 Employee's pain onset was noted to be one week prior. Employee said he was "not sure if related to fall one year ago or what." Employee's back started hurting "one day" and got worse and worse over the next few days and he was "not sure what brought on such

severe pain." (Sports & Spinal Injury Clinic, Exam Form / New Injury, January 27, 2014; Sports & Spinal Injury Clinic, History / New Injury, Matthew Rife, January 22, 2014.)

8) Sports & Spinal Injury Clinic did not restrict Employee from working. (*Id.*)

9) On November 2, 2015, Employee presented to Rocky Mountain Chiropractic to receive "acute care" for left lumbar, left sacroiliac and left buttocks dull and aching discomfort. He also complained of cervical, thoracic, pelvis and sacral pain. Employee reported he had pain "for about the last three months but has gotten much worse within the last week or so." Kristin Grote, DC, diagnosed segmental and somatic dysfunction of lumbar region. (Chart Note, Dr. Grote, November 2, 2015.)

10) Dr. Grote did not restrict Employee from working. (*Id.*)

11) On November 2, 2015, Employee also treated for low back pain with Express Care. Employee reported he injured his back "a couple of years ago" and "recently he was picking up a 5 gallon bucket of water and felt his back pop." Kirwan Webb, M.D., diagnosed low back strain and prescribed Norco for seven days. (Chart Note, Dr. Webb, November 2, 2015.)

12) On January 12, 2016, Employee returned to Dr. Webb and reported he has had pain off and on but now his pain is not "going away." Employee had no radiation symptoms into his lower extremities. Dr. Webb diagnosed sprain of ligaments of lumbar spine, sequela, prescribed Ultracet for seven days and referred Employee to physical therapy. (Chart Note, Dr. Webb, January 12, 2016.)

13) On January 18, 2016, Employee returned to Dr. Webb and reported he "never followed up with physical therapy because he didn't know if he could afford the cost and was waiting for workmen's comp. to see if they would pay for it." Employee had no symptoms in his lower extremities. Ultracet was not relieving Employee's pain and Norco, a narcotic was refilled. Dr. Webb educated Employee on narcotic addiction and advised he would prescribe no additional narcotics. (Chart Note, Dr. Webb, January 18, 2016.)

14) Dr. Webb did not restrict Employee from working. (*Id.*; Chart Note, Dr. Webb, January 12, 2016; Chart Note, Dr. Webb, November 2, 2015.)

15) On January 25, 2016, Employee requested PPI benefits and a compensation rate adjustment. (Workers' Compensation Claim, January 19, 2016.)

16) On January 25, 2016, Employee began physical therapy for lumbar spine strain due to postural dysfunction. With education and implementation of necessary postural changes,

Employee's symptoms were reduced. Employee was diagnosed with generalized muscle weakness, low back pain, strain of muscle and tendon of back wall of thorax, sequela and the onset date was November 1, 2015. (Physical Therapy Initial Examination, Lone Peak Physical Therapy – Butte, January 25, 2016.)

17) While attending physical therapy, Employee was not working because he was attending school to be a civil engineer. He reported the first week of November 2015, he injured his back "again" and was diagnosed with low back strain. (Physical Therapy Initial Examination – Visit No.: 1, Lone Peak Physical Therapy – Butte, January 25, 2016.)

18) On February 25, 2016 claims adjuster Kymberly LaRose took Employee's recorded statement. Employee weighed 250 pounds. His lower back hurt. After the September 5, 2013 injury, Employee went to a physician "to get it looked at because it happened at work." Employee went to a doctor and had an x-ray who told him, "there was nothing, no bones were broken, nothing." Employee continued to work for Employer. On January 23, 2014, it took Employee three hours to weld a pipe to a lift station. He knew this because he recorded it on his timecard. The next day, or the day after that, he was in bed for three days. It was the most painful thing he'd ever experienced. He couldn't bend over to put his socks on and laid in bed on his back for three days. Prior to leaving Alaska on April 22, 2014, Employee worked in Employer's Anchorage office. Employee treated with chiropractors in Healy and Anchorage. After leaving Alaska, Employee did not seek treatment until the end of fall 2015. In 2014, when Employee was in Montana, his back "still kinda bothered me, would kinda come and kinda go, and, uh, it sure as heck wasn't as bad as it was the second time I got hurt when I was in bed for like, three days. It never hurt as much as bad as that, it was just enough to let you know it was there." Employee was working in North Dakota in the summer and fall 2015, and he said he, "was unloading some stuff and I went down to move a deal of water, about 5 gallon thing of water, it was probably about half full I think, went down to pick it up and move it, and I picked it up, and I turned and felt the big wrenching pain go off my back." After his two work injuries, Employee's back never hurt him again until lifting water. Employee later stated, "I was not working for any employer when I was moving a half empty 5 gallon bucket of water. That was on my own, own deal. I was moving to Butte for school." After Employee's two work-related injuries, in the summer of 2014, the severity of his pain subsided and no longer necessitated medical treatment. Ms. LaRose advised Employee that Employer had not denied any workers'

compensation benefits, had paid all medical bills it had received, and had no basis to deny his claim. Ms. LaRose notified Employee she had questions about the gap in his treatment from April 2014 to November 2015. (Recorded Statement, Matthew Rife, February 25, 2016.)

19) On March 14, 2016, Employer denied Employee retraining benefits, effective February 22, 2016. Employer asserted Employee had not met the criteria to be eligible for a retraining evaluation. Employer had not received any medical documentation removing Employee from work and asserted he effectively removed himself from the workforce when he left his employment with Employer in April 2014, for other occupational opportunities. Employer said it has light duty available for their employees with work injuries. (Controversion Notice, March 1, 2016.)

20) On March 17, 2016, Employee sought care from an emergency department for low back pain. He reported no recent injury, pain did not radiate to his lower extremities, and "a history of chronic recurrent back for the last couple years." Examination revealed full range of motion in all Employee's major joints and no tenderness to palpation or major deformities. Employee was prescribed tramadol and Norflex. (SJB Emergency Department, Todd Mohr, PA-C, March 17, 2016.)

21) PA-C Mohr did not restrict Employee from working. (*Id.*)

22) On March 17, 2016, Kymberly LaRose, claim manager for Employer, notified Edward Curry, M.D.'s office that Employee's claim was open and billable. (Chart Note, Dr. Curry, March 17, 2016.)

23) On April 4, 2016, Employee requested a reemployment benefits eligibility evaluation. Employee was unable to check either of the boxes on the form confirming he had been totally unable to return to his employment for 60 consecutive days or 90 consecutive days. Employee's marginalia stated, "From 1-16-16 to 3-3-16 I missed 49 days of work due to previous injury." (Employee's Request for an Eligibility Evaluation, March 29, 2016.)

24) On April 22, 2016, diagnostic imaging of Employee's lumbar and thoracic spine revealed normal alignment of his thoracic vertebral bodies and intact intervertebral disc spaces. He had no spinal stenosis or disc herniations. At L4-5, Employee has mild disc space narrowing with a central disc herniation; however, there was no impingement on the right or left lateral recess. He also had a tiny central disc herniation with slight subligamentous extension at L5-S1. Alignment

of his lumbar vertebral bodies was otherwise normal; his remaining disc spaces were intact. (MRI Report, Jesse Cole, M.D. April 22, 2016.)

25) On April 25, 2016, Employee again sought treatment in the SJB emergency department. He had been sitting at a desk quite a bit for school, was able to ambulate without difficulty, had no weakness, numbness or tingling, and had lumbar pain "mostly" on the right side. The diagnosis given was chronic low back pain without sciatica. (SJB Emergency Department, Debra Lewis, M.D., April 25, 2016.)

26) Dr. Lewis did not restrict Employee from working. (*Id*.)

27) On May 4, 2016, Dr. Curry reviewed Employee's MRI and determined he was not appropriate for surgical intervention and recommended he be seen by a primary care physician or a non-operative spinal provider. (Chart Note, Dr. Curry, May 4, 2016.)

28) Dr. Curry did not restrict Employee from working. (*Id*.)

29) On June 8, 2016, Employer requested two orders. The first, compelling Employee to attend his deposition and, the second, directing Employee to attend the August 27, 2016 employer's medical evaluation (EME). The board designee granted Employer's petition:

> This prehearing was scheduled to address the 06/08/2016 Petition filed by the ER. Mr. Rife did not attend this properly noticed prehearing. Board designee called the EE at [XXX-XXX-XXXX] and left a message. The records were left open for the next 15 minutes. Ms. Meshke and Ms. LaRose stated that the EE is not fully cooperating with the process and is impeding the process. Mr. Rife apparently sent a letter to Ms. Meshke asking that the prehearing for today be delayed for four months. In addition, during this prehearing, Ms. Meshke provided copy of email conversations between parties; Mr. Rife's response was that he would like the deposition and the 2nd prehearing be scheduled for October because he is busy at work. All these emails were also attached in the Petition filed by the ER as exhibits. Ms. Meshke stated she tried to give the EE options to pick a day in June or July for deposition but did not get a response other than he will be in touch. Ms. Meshke stated that the EE was given about three (3) weeks' notice for the deposition and was also informed about the IME that's forthcoming in August 27, 2016. Ms. Meshke stated they are willing and is flexible about re-scheduling the IME however; the only reply the EE gave her was that he would like to schedule it in October because it is the time that is convenient for him. Ms. Meshke also mentioned that Mr. Rife's medical is not controverted and he is welcome to see medical providers however, Ms. LaRose affirmed that the EE has not been able to schedule visits/appointments with any medical providers.
>
> The board designee has reviewed the Petition, considered the information received during this prehearing and its supporting documents and found that the

> deposition and IME are both standard, relevant and normal practice in the discovery process. The board designee does not see any obvious reasons or incomprehensible situations or any practical reason(s) that would create a hardship towards the EE to attend the deposition and the IME.
>
> Therefore, the petition to compel is granted. In accordance with AS 23.30.108(c) . . . . If a party refuses to comply with an order by the board designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense.

Employee was ordered to attend a June 22, 2016 deposition and directed to attend the August 27, 2016 EME. (Prehearing Conference Summary, June 20, 2016.)

30) On August 8, 2016, Employee again sought treatment from an emergency department and wanted pain medication. Employee reported, "[H]e is here for some pain meds and muscle relaxers. He injured his back three years ago in a work related accident and now he can't get the help he needs because the Alaska state insurance won't pay for his injuries." Employee said he "can't go to the clinic because the insurance won't pay for it." Employee said there was pain to palpation but was observed getting off the bed without any difficulty in walking throughout the facility without any obvious signs of pain. Employee was informed he would not be prescribed medication out of the emergency room, but was given a pain tab prior to discharge. (Roundup Memorial Hospital, Valeri Russell, PA, August 8, 2016.)

31) PA Russell did not restrict Employee from working. (*Id*.)

32) As of August 8, 2016, Employer had denied only reemployment benefits. Employe had not filed a controversion denying Employee any other benefits; medical and indemnity benefits both remained open. Employee's report to PA Russell that Alaska National Insurance Company would not pay for his injuries is not credible. (Experience, judgment, observations, and inferences drawn therefrom.)

33) On August 26, 2016, Employee sought care with James Girolami, M.D., for chronic low back pain. Employee reported he quit working for Employer shortly after reporting his January 2014 injury and moved back to Montana in April 2014. Employee said he had chronic back pain ever since, with flare-ups that "come and go off and on." In November 2015, Employee said he moved to Butte, Montana to attend school, was lifting some water bottles and his back pain flared up. After the water bottle lifting incident an MRI was done. Employee reported the MRI showed he had an L3 herniated disc. He also complained "in the last several months, he has also

noticed pain that seems to shoot at times to his lower thoracic area up into the right shoulder, and the abdomen area." Employee believed the shooting pains were tied to his back pain. Employee was working as a civil engineering technician. Dr. Girolami explained, given Employee's complaints, his chronic back pain issue was not something appropriately treated in "same day care." Although further workup was necessary, Dr. Girolami's initial impressions were: chronic low back pain with patient history of herniated L3 disc; right upper quadrant pain and thoracic pain of unclear etiology; and abnormal liver function studies of unclear etiology. Dr. Girolami noted Employee was obese. Employee was given a few Ultram tablets and advised "this is not something we would continue to refill in same day care." Dr. Girolami also "made it very clear" to Employee "that we are not going to manage or treat his chronic pain in same day care and this was a one-time prescription for the tramadol, but will not be refilling." (Progress Report, Dr. Girolami, August 26, 2016.)

34) Dr. Girolani did not restrict Employee from working. (*Id*.)

35) On August 27, 2016, Employee was scheduled to attend an employer's medical evaluation (EME) with Scot Youngblood, M.D. Because Employee did not appear, Dr. Youngblood reviewed the medical record. He diagnosed:

1. Lumbar sprain/strain, without evidence of fracture, dislocation, radiculopathy, myelopathy, or internal derangement, substantially caused by the industrial injury of September 5, 2013, long-ago resolved a medically stable.

2. Lumbar strain, without evidence of radiculopathy, myelopathy, or internal derangement, substantially caused by the industrial injury on or about December 10, 2013, long-ago resolved and medically stable.

3. Intermittent mechanical low back pain, substantially caused by the claimant's exaggerated obesity, physical deconditioning, and intermittent activities, and not substantially caused or permanently aggravated by any industrial injury.

4. Mild lumbar degenerative disc disease, without evidence of significant nerve root impingement, radiculopathy, or myelopathy, substantially caused by the claimant age, genetics, and exogenous obesity, and not substantially caused or permanently aggravated by any industrial injury, medically stable.

5. Exogenous obesity with a body mass index of 37.7, not substantially caused by any industrial injury, but giving rise to an potentiating any chronic low back symptomatic condition.

> 6. Concern for drug seeking behavior expressed in the medical record by multiple providers, not substantially caused or aggravated by any industrial injury.

Dr. Youngblood said all causes of Employee's "disability or need for medical treatment" include his age, genetics, physical deconditioning, exogenous obesity, and the alleged work injuries of September 5, 2013, January 24, 2014." Employee's work injuries were not the substantial cause of his "alleged" disability and need for any medical treatment. Employee's September 5, 2013 lumbar sprain / strain was medically stable on December 5, 2013; his January 24, 2014 lumbar sprain / strain on April 24, 2014. Dr. Youngblood said, "It should be noted in the medical record that the claimant has sustained multiple injuries of his lower back that are clearly not related to either of the industrial injuries in question." Employee's medical record contained no objective findings that warranted a permanent partial impairment rating; he had no radiating pain, radiculopathy or myelopathy. Treatment Employee received after the first three months of each injury was reasonable and necessary; however, any treatment beyond that was not reasonable or necessary for his work related sprain / strain injuries. Dr. Youngblood said Employee has chronic mechanical lower back pain aggravated by intermittent activities. Because Employee is "clearly deconditioned and has exogenous obesity" no formal treatment other than aerobic conditioning, a self-directed home exercise program, and weight loss was recommended. Neither narcotics nor invasive treatment were reasonable or necessary. Dr. Youngblood recommended no physical restrictions and no work restrictions. He addressed Employee's lower right abdominal pain complaints as follows:

> It is noted in the medical record the claim intermittently complaints of right lower abdominal pain. This complaint would not be deemed related to or substantially caused by any industrial injury. Close review of the medical records do not reveal that this is a prominent symptom, it would not be considered related to any industrial injury.

(EME Report, Dr. Youngblood, August 27, 2016.)

36) On September 6, 2016 and September 13, 2016, Employer denied all benefits pursuant to AS 23.30.095(e) and 8 AAC 45.090(c) for Employee's failure to attend a properly noticed August 27, 2016 EME. (Controversion Notice, September 2, 2016; Controversion Notice, September 8, 2016.)

37) On September 13, 2018 and September 14, 2018, Employer denied all benefits with identical controversion notices. Employer relied on Dr. Youngblood's August 27, 2016 EME opinion work was not the substantial cause of Employee's alleged disability and need for medical treatment, Employee was medically stable, did not have a PPI rating, did not have work restrictions and medical treatment after April 24, 2014 was not reasonable, necessary or related to Employee's work injury. (Controversion Notice, September 12, 2016.)

38) On September 28, 2016, Craig Ward, M.D., diagnosed straight back syndrome and physical deconditioning. He assured Employee surgery was not reasonable or necessary, provided low back exercises and prescribed meloxicam. (Chart Note, Dr. Ward, September 28, 2016.)

39) Dr. Ward did not restrict Employee from working. (*Id*.)

40) On December 1, 2016, Employer denied all treatment for Employee's abdominal issues and hemochromatosis. Employer relied upon the August 27, 2016 EME report, in which Dr. Youngblood opined, "it is noted in the medical record that the claimant intermittently complaints of right lower abdominal pain. This complaint would not be deemed related to or substantially caused by any industrial injury." (Controversion Notice, December 1, 2016.)

41) Hemochromatosis an iron disorder in which the body absorbs excess iron. It is caused by a genetic mutation. Its common symptoms include joint pain, fatigue and liver failure. (*Stedman's Medical Dictionary*, 28th Edition.)

42) On December 7, 2016, Employee sought treatment from a naturopath. He reported:

> September of 2013 Matt reports had a fall where he was knocked into a ditch at work 10-12 feet and landed on a metal pipe on the right side of his mid-low back. X-rays were performed at that time at AFOC. Went to the chiropractor and felt like that helped slightly. In January of 2014 he was working at 40-50 below zero welding in a ditch and was inverted laying in the ditch X3 hours and then could not move the following day to get out of the bed. Was bedridden X3-4 days. Took some muscle relaxants but had never been in that much pain. Went to the chiropractor again. Moved to northeastern Montana -- continued to have a high level of pain and low mobility. November 2015, 13 months ago -- moved down to Butte for school and went to p/u a 1/2 full·- 5 gallon bucket of water and his back 'went out.' Went to Rocky Mountain Chiropractic and she tried to help. Went to the walk-in clinic and x-rays were performed and pain killers were given. Referred to PT and did as much as he could -- seemed like exercises were making it worse. Finished school and moved to Round-up for work. Went into Billings Clinic August 2016 -- wanted to get set up with a PCP -- 8-9 times higher ferritin

> levels than normal; went through 3-4 blood panels. He reports being a carrier for hemochromatosis. Saw a gastroenterologist -- he wanted to perform a liver biopsy. Saw Dr. Ward the spine doctor and discussed the MRI -- the 2 lower discs are gone and the other is severely herniated -- was prescribed meloxicam. . . . Working in Lewistown for the past 2 months. Saw Dr. Ward's assistant this week and no plan was given according to Matthew. . . . Symptoms: 1st symptoms lower to mid back was painful w/ muscle spasms up to below the right shoulder blade and radiates down to his stomach. Since the summer and early fall having radiation down the left lateral thigh and down right lateral thigh to the ball of the foot. A few times when he can walk normal; then he can fall to his knees d/t pain, no loss of bowel or bladder function. Feels good at 220#. He has gained 40# since the accident.

Employee's past medical history was low back pain due to bulging discs, osteoarthritis and loss of disc height. (Office Visit Note, Yellowstone Naturopathic Clinic, Rachel Day, N.D., December 7, 2016.)

43) Dr. Day did not restrict Employee from working. (*Id*.)

44) On December 14, 2016, Employer again denied all benefits related to abdominal issues and hemochromatosis. In addition to relying on Dr. Youngblood's August 27, 2016 EME report, Employer asserted there is substantial evidence the disability or need for medical treatment did not arise out of or in the course of Employee's employment with Employer. (Controversion Notice, December 5, 2016.)

45) On December 27, 2016, Employee sought treatment with a chiropractor. He reported:

> [I]n September of 2013 he fell putting a water line in at work. He landed on a metal pipe after falling 12-13 feet. He got up, finished working that day and went to the orthopedic clinic in Anchorage and had x-rays taken and was told nothing was broken. He was sore but kept working and saw a chiropractor a few times. In January of 2014 he was welding while inverted in temps of 40-50 below. He woke the next day and couldn't move. He stayed in bed for 3 days. He subsequently moved back to Montana in 2014 and re-injured his back last winter. He reports he's been 'dismissed' after seeing numerous doctors. In January of 2016 he filed a worker's comp case. In April he saw a doctor in Butte who had an MRI of the lumbar spine, which revealed a disc herniation. In August of 2016 the case was dismissed. He saw a Same Day Care doctor and got pain meds and muscle relaxants. Since August until now, he's been to Billings Clinic about a dozen times and only gets medications, no treatment. He decided to see Dr. Day for weight loss. He is currently experiencing low back pain with associated radicular symptoms down both legs. Pain radiates to the right side of his ribs and up to his shoulder blades. Last Saturday his pain was so bad he went to the ER

> and got a prescription for hydroocodone and steroid dose pack. He reports he spent the past two days in bed.

Patricia Holl, D.C., found Employee overweight and diagnosed "other intervertebral disc displacement, lumbar region"; low back pain; and other muscle spasm. (Office Visit Note, Yellowstone Naturopathic Clinic, Dr. Holl, December 27, 2016.)

46) Dr. Holl did not restrict Employee from work. (*Id*.)

47) On December 27, 2016, Robert Renjel, IMR, evaluated Employee's acute chronic low back pain exacerbation. His back pain was "likely mechanical." Weight loss was encouraged and Employee was referred to anesthesiology for an epidural steroid injection. At Employee's request, a referral to neurosurgery would also be made. (Internal Medicine Progress Note, IMR Renjel, December 27, 2016.)

48) IMR Renjel did not restrict Employee from working. (*Id*.)

49) On February 27, 2018, Employer suspended all benefits because employee failed to sign and return releases he'd been ordered to sign and return pursuant to a January 8, 2018 prehearing conference summary order. A February 15, 2018 prehearing, Employee was again ordered to sign and return releases within 10 days of the prehearing conference summary order served on February 16, 2018. When Employer did not receive the signed releases from Employee, it suspended benefits. (Controversion Notice, February 27, 2018.)

50) On March 2, 2018, Employer denied all benefits because employee failed to sign and return releases and did not request a protective order. (Controversion Notice, March 2, 2018.)

51) On March 31, 2018, Employee attended an EME with James Swartz, M.D. Employee said he moved to Alturas, California, from Billings, Montana in November 2017, began working full-time for the National Forest Service and remained in his position doing office work. Employee was 5'11" tall and weighed 260 pounds. Dr. Swartz reviewed the April 22, 2016 thoracic and lumbar spine MRIs. He said the thoracic MRI shows degenerative disc disease, T8-T9 disk space dehydration and posterior protrusions. The lumbar MRI, which Dr. Swartz said was "a quite abbreviated study" shows L4-5 and L5-S1 dehydration with a central disc protrusion at L4-5, midline protrusion, no significant amount of stenosis and no neural foraminal stenosis. Dr. Swartz diagnosed chronic lumbar degenerative disc disease and acute traumatic injuries in September 2013 and January 2014, which were soft tissue lumbosacral strains, resolved. Dr. Schwartz concluded:

> Acute traumatic injuries in September of 2013 and January of 2014 appear to be essentially soft tissue lumbosacral strains. The history as he relates it is one of chronic low back pain, unrelated to a specific anatomic injury. Certainly, treatment is appropriate, but given the rather patchy history and patchy medical treatment, I would not relate this to any structural injury sustained in the September 2013 incident. I would call this a lumbosacral strain with resolution over the following several months, as at the visit with the chiropractor at that time, the examinee related that his back pain had started several weeks before without an inciting incident.
>
> I do not see that the present symptoms are related to an injury. His present symptoms are related to chronic low back pain. There is some mild to moderate nonphysiologic pain behavior. He fills out a Pain Disability Questionnaire, scoring which is 136. This is a score that essentially means that he is totally physically disabled and in dire need of significant pain medication. This alone is significant nonphysiologic pain symptomatology.

Dr. Schwartz recommended a treatment regimen, which "should consist of therapy, hamstring stretch, physical conditioning, nonsteroidal anti-inflammatories, and perhaps a mild muscle relaxant. All of this treatment needs to be on a consistent basis." He attributed the substantial cause of Employee's need for medical treatment to his chronic lumbar degenerative disk disease, which is not posttraumatic. Dr. Swartz said the work trauma Employee described was a soft tissue injury, which resolved over several months. After three months post injury, work was no longer the substantial cause of Employee's need for medical treatment. Dr. Swartz "determined this by the fact that [Employee] continued to work for several days after the injury and after being seen and treated without significant amount of pain medication he continued to work." Dr. Schwartz said this is indicative of a soft tissue injury and acknowledged employee's work was relatively strenuous and appeared to be uninterrupted by Employee's back pain complaints. Dr. Schwartz found Employee's 2013 work related soft tissue injury medically stable by January 2014, with no permanent partial impairment. Employee can do medium category work, "has no physical restrictions imposed on him at the present time, nor are there any self-imposed" and the injuries of September 5, 2013, or January 24, 2014, are not a substantial cause of any physical restrictions. (EME Report, Dr. Schwartz, March 31, 2018.)

52) On June 7, 2018, Carla Cordova-Eduave, PA-C, wrote a letter on Employee's behalf. She said, "When he does not have flareups, he is okay to drive and operate machinery." (Letter To Whom It May Concern from PA-C Cordova-Eduave, June 7, 2018.)

53) On June 8, 2018, Employer amended and supplemented its September 12, 2016 and December 1, 2016 controversions. Employer denied all benefits in reliance on Dr. Schwartz's March 31, 2018 EME report in which he opined Employee sustained lumbar strains in September 2013 and January 2014, both resolved within months of the injuries, the substantial cause of any disability or need for medical treatment thereafter is Employee's pre-existing lumbar degenerative disc disease, and Employee's work injuries are medically stable with no ratable impairment and no physical restrictions. (Controversion Notice, June 8, 2018.)

54) On June 26, 2018, *Rife I* was issued. Its factual findings are adopted here by reference. (*Rife I*.)

55) On September 4, 2018, Employee requested PTD and PPI benefits, a compensation rate adjustment, an order Employer unfairly or frivolously denied his claim, a 70 percent weekly stipend, and penalty and interest. Employee said, "Actions of operator (Aaron Bartel 9-5-13) caused myself to fall into trench box. I fell about 10', lower back hit iron pipe. On 1-23-14 I was welding in ditch (Glitter Gulch, AK). Next days couldn't move in bed." Employee said he filed the claim because, "Injuries sustained while working for BC Excavating and BC Leasing are life long, my condition has gotten worse and severely negatively effects my current job at Forest Service to a point of possibly losing job due to medical issues with previous injuries at BC Ex." (Worker's Compensation Claim, September 3, 2018.)

56) On September 5, 2018, PA-C Cordova-Eduave confirmed Employee had been a patient at Spine Nevada since May 9, 2018, and his diagnoses are low back pain, radiculopathy lumbar region, skin paresthesia, sacrococcygeal disorders, and pain in thoracic spine. PA-C Cordova-Eduave said, "This patient is able to perform all of his job duties, however, he has increased symptoms once the weather changes to cold temperatures. It would be beneficial for him to work in a warm climate in order to perform all daily functions of living without increased pain." (Letter to Whom This May Concern from PA-C Cordova-Eduave, September 5, 2018.)

57) PA-C Cordova-Eduave did not restrict Employee from work. (*Id.*; Letter To Whom it May Concern from PA-C Cordova-Eduave, June 7, 2018.)

58) An exhibit to Employee's hearing brief is only page two of a multiple page, undated form, which does not identify the form was completed on Employee's behalf; however, it is assumed to have been. It states, "Approximate date condition commenced" was 2013. "Probable duration of condition" states, "intermittent, life long." The record does not identify the "condition," who

has the condition or the individual authoring responses to the form's questions. The form's paragraph three states, "Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions." It then asks, "Is the employee unable to perform any of his/her job functions due to the condition." The check-marked response is "No." The form does not identify the employer or the employee. The author completing the form notes, "Difficulty bending, lifting, climbing in/out truck." Paragraph four requests, "Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave," to which the response is, "patient reports intermittent episodes of 'back going out' which makes basic ADLs difficult and painful. Episodes last 2 hours – 1 week making time off specifications hard to gauge." (Form WH-380-E Revised May 2015, Undated, Author Unknown.)

59) Kymberly LaRose, claims adjuster for Employer, testified at hearing. She recorded an interview with Employee on February 25, 2016, and asked him if he had any injuries other than those on September 5, 2013 and January 23, 2014. Employee told Ms. LaRose he was working in North Dakota in the summer and fall of 2015, he had to move a five gallon water bottle and reinjured himself. (LaRose.)

60) Employee testified at hearing. It has been five years since his injuries and his condition continues to get worse. In April 2014, he left Employer and moved from Alaska to Montana where he had a job as an excavator. From January 16, 2016 until March 3, 2016, he lived in Butte, Montana and was off work while attending college to obtain his civil engineering degree. He did not miss any work after his September 5, 2013 injury and only three days after the January 23, 2014 injury. After completing school, he lived in Roundup, Montana and worked as a civil engineer tech for National Resources Conservation. He also works as a civil engineer tech for the National Forest Service and has held this position since November 25, 2017. He seeks PTD benefits because "to him, it is PTD." He had to submit a letter to his current employer to get a position in a warmer climate because when the weather is cold, his back pain increases and he misses work. Based upon Yellowstone Naturopathic Clinic's records, he believes "arthritis can be caused by massive amounts of inflammation caused by an injury." (Rife.)

61) On November 20, 2018, Dr. Youngblood's deposition was taken pursuant to Employee's request for cross-examination. The purpose of the deposition was to give Employee an opportunity to cross examine Dr. Youngblood. Employee did not appear or participate telephonically in the deposition. Dr. Youngblood did not have an opportunity to examine Employee on August 27, 2016, because he did not present for his evaluation. Employer requested Dr. Youngblood review all Employee's medical records up to August 27, 2016. Since then, Dr. Youngblood was provided additional medical records, including Dr. Schwartz's EME report. Dr. Youngblood diagnosed Employee with a lumbar sprain/strain without evidence of fracture, dislocation, radiculopathy or myelopathy or internal derangement. Employee's April 22, 2016 thoracic MRI was completely normal. The lumbar MRI showed Employee had lower lumbar spine, L5-S1, degenerative changes. The L5-S1 disc at a central posterior disc protrusion with some disk water content loss; it also had a central posterior protrusion. There was no impingement or compression or even contact with any of Employee's nerve elements. There is no way to tell from the April 22, 2016 MRI how or when the disc protrusions came about; however, there was no fracture or dislocation. There was no severe injury and "common things being common, on a more probable than not basis, this is just from the natural aging process." Employee's body mass index range from 33 up to 40, which is either obese or extremely obese according to the Centers for Disease Control. Degenerative disc disease is associated with aging, "especially in the setting of obesity." Employee's first work injury was a sprain/strain because Employee fell; and his second one is a strain because Employee was welding pipe on his back for a prolonged time, which caused no trauma. Soft tissue injuries resolve, heal and are medically stable three months post injury. It can happen before that but generally, it takes three months for soft tissue injuries to completely heal. Dr. Youngblood found no evidence Employee was disabled from working during the first three months after either work injury. Employee continued to work full-time on a regular basis without any restrictions and no medical provider placed him on any work restrictions. No lasting effect from strains or sprains is expected, nor is a permanent partial impairment. Dr. Youngblood reviewed Employee's medical records after August 27, 2016, which did not change his August 27, 2016 opinions.

> And I should also say that Dr. Schwartz, in my mind, after reading his report, he essentially agrees that these were soft tissue sprains and strains and should have resolved within a few months after the injury. . . .

> If you look throughout the medical record, it's not just the two independent medical evaluations, but if you look at Dr. Upshur Spencer's evaluation just six days after his first injury, or even Dr. Craig Ward on September 28, 2016, who is -- a physical medicine and rehabilitation specialist. He saw Mr. Rife and essentially said the same thing that we all were saying, which is that this is -- he had a low back strain. He has mechanical back pain, and he recommended physical conditioning and therapy and exercises, but no surgery.
>
> So I think that if you look across the continuum of the medical record and history, most experts in orthopedics or in physical rehabilitation are saying the same thing. . . . That these were soft tissue sprains and strains, they should have gotten better and resolved, quite frankly, within a few months after the injury, and he's otherwise deconditioned, obese and -- and the way it was going forward should be to address those problems and not – and certainly no one at any point has found any indication for either injections or surgery.

Dr. Youngblood did not doubt Employee has pain symptoms; however, he noted Employee's low back complaints over the years since his first injury have had a "waxing and waning nature," which "actually goes along with the natural history of low back pain." Low back pain is the second leading cause for primary care appointments after the common cold. It is very common for people to aggravate their low back, especially if they are deconditioned and also obese. Low back pain aggravated by weather changes would be surprising. Dr. Youngblood "actually never heard that." There is a cold-weather and weather changes relation to the onset of more symptoms in arthritic joints, but typically in peripheral joints, the hands, knees or ankles. Increased symptoms in the back or hip would not be expected at decreased temperatures. (Deposition, Dr. Youngblood, November 20, 2018.)

## PRINCIPLES OF LAW

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

**AS 23.30.041. Rehabilitation and reemployment of injured workers**.

. . . .

(c) An employee and an employer may stipulate to the employee's eligibility for reemployment benefits at any time. If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, order an eligibility evaluation unless a stipulation of eligibility was submitted. If the administrator approves a request or orders an evaluation, the administrator shall, on a rotating and geographic basis, select a rehabilitation specialist from the list maintained under (b)(6) of this section to perform the eligibility evaluation. If the person that employs a rehabilitation specialist selected by the administrator to perform an eligibility evaluation under this subsection is performing any other work on the same workers' compensation claim involving the injured employee, the administrator shall select a different rehabilitation specialist.

. . . .

(e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of

Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles' for:

(1) the employee's job at the time of injury; or

(2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's 'Selected Characteristics of Occupations Defined in the Dictionary of Occupational Titles.'

(f) An employee is not eligible for reemployment benefits if

(1) the employer offers employment within the employee's predicted post-injury physical capacities at a wage equivalent to at least the state minimum wage under AS 23.10.065 or 75 percent of the worker's gross hourly wages at the time of injury, whichever is greater, and the employment prepares the employee to be employable in other jobs that exist in the labor market;

. . . .

(4) at the time of medical stability, no permanent impairment is identified or expected.

. . . .

(k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages, but not to exceed 105 percent of the average weekly wage, until the completion or termination of the process, except that any compensation paid under this subsection is reduced by wages earned by the employee while participating in the process to the extent that the wages earned, when combined with the compensation paid under this subsection, exceed the employee's temporary total disability rate. . . .

**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.
. . . .

(e) The employee shall, after an injury, at reasonable times during the continuance of the disability, if requested by the employer or when ordered by the board, submit to an examination by a physician or surgeon of the employer's choice authorized to practice medicine under the laws of the jurisdiction in which the examination occurs, furnished and paid for by the employer. . . . An examination requested by the employer not less than 14 days after injury, and every 60 days thereafter, shall be presumed to be reasonable, and the employee shall submit to the examination without further request or order by the board. . . . If an employee refuses to submit to an examination provided for in this section, the employee's rights to compensation shall be suspended until the obstruction or refusal ceases, and the employee's compensation during the period of suspension may, in the discretion of the board . . . be forfeited. . . .

**AS 23.30.108. Prehearings on Discovery Matters; Objections to Requests for Release of Information; Sanctions for Noncompliance.** (a) If an employee objects to a request for written authority under AS 23.30.107, the employee must file a petition with the board seeking a protective order within 14 days after service of the request. If the employee fails to file a petition and fails to deliver the written authority as required by AS 23.30.107 within 14 days after service of the request, the employee's rights to benefits under this chapter are suspended until the written authority is delivered.

(b) If a petition seeking a protective order is filed, the board shall set a prehearing within 21 days after the filing date of the petition. At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.

**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.

Benefits sought by an injured worker are presumptively compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between her injury and the employment. *Tolbert v. Alascom, Inc*., 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). At this stage, credibility is not weighed. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

If the employer's evidence rebuts the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 at 8 (March 25, 2011) (reversed on other grounds, *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016)). This means the employee must "induce a belief" in the fact-finders' minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences drawn and credibility considered. *Wolfer*.

When there is no factual dispute on an issue, the statutory presumption analysis does not apply. *Rockney v. Boslough Construction, Inc*., 115 P.3d 1240 (Alaska 2005).

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **23.30.155. Payment of compensation.**
> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125. . . .
>
> (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.

A controversion notice must be filed in good faith to protect an employer from a penalty for nonpayment of benefits. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "In circumstances where there is reliance by the insurer on responsible medical opinion or conflicting medical testimony, invocation of penalty provisions is improper. However, when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, the penalty is imposed." *Id.* at 358.

The employer must possess sufficient evidence in support of the controversion that, if the employee does not introduce evidence in opposition to the controversion, the employee would be found not entitled to benefits. *Id.* The controversion and the evidence on which it is based must be examined in isolation, without assessing credibility and drawing all reasonable inferences in favor of the controversion. *State of Alaska v. Ford*, AWCAC Decision No. 133 at 21 (April 9, 2010). When an employer has insufficient evidence an

employee's disability is not work-related, the controversion was in bad faith, invalid and a penalty is imposed. *Harp* at 359.

> **AS 23.30.180. Permanent total disability.** (a) In case of total disability adjudged to be permanent 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the total disability. . . . [P]ermanent total disability is determined in accordance with the facts. In making this determination the market for the employee's services shall be
>
> (1) area of residence;
>
> (2) area of last employment;
>
> (3) the state of residence; and
>
> (4) the State of Alaska.
>
> (b) Failure to achieve remunerative employability as defined in AS 23.30.041(r) does not, by itself, constitute permanent total disability.

"Total disability" does not necessarily mean a state of abject helplessness. It means the inability because of injuries to perform services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist. *J.B. Warrnack v. Roan*, 418 P.2d 986 (Alaska 1966). An employee is not permanently disabled unless a physician states that the condition will not improve during the claimant's lifetime. *Alaska International Constructors v. Kinter*, 755 P.2d 1103 (Alaska 1988).

> **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 that because Settje had not obtained a PPI rating, her 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 present it at hearing if she wants a PPI award.

> **AS 23.30.220. Determination of spendable weekly wage**. (a) Computation of compensation under this chapter shall be on the basis of an employee's spendable weekly wage at the time of injury. An employee's spendable weekly wage is the employee's gross weekly earnings minus payroll tax deductions. An employee's gross weekly earnings shall be calculated as follows:
> . . . .
>
> (4) if at the time of injury the employee's earnings are calculated by the day, by the hour, or by the output of the employee, then the employee's gross weekly earnings are 1/50 of the total wages that the employee earned from all occupations during either of the two calendar years immediately preceding the injury, whichever is most favorable to the employee;
> . . . .
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> **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;
> . . . .

"The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment." *Vetter v. Alaska Workmen's Compensation Board*, 524 P.2d 264, 266 (Alaska 1974). An award of compensation must be supported by a finding the claimant suffered a decrease in earning capacity due to a work-connected injury or illness. *Id.*

> **8 AAC 45.182. Controversion**. (a) To controvert a claim the employer shall file form 07-6105 in accordance with AS 23.30.155(a) and shall serve a copy of the notice of controversion upon all parties in accordance with 8 AAC 45.060.
> . . . .
>
> (d) After hearing a party's claim alleging an insurer or self-insured employer frivolously or unfairly controverted compensation due, the board will file a decision and order determining whether an insurer or self-insured employer frivolously or unfairly controverted compensation due. Under this subsection,
>
> > (1) if the board determines an insurer frivolously or unfairly controverted compensation due, the board will provide a copy of the decision and order at the time of filing to the director for action under AS 23.30.155(o); or
> > . . . .
>
> (e) For purposes of this section, the term 'compensation due,' and for purposes of AS 23.30.155(o), the term 'compensation due under this chapter,' are terms that mean the benefits sought by the employee, including but not limited to disability, medical, and reemployment benefits, and whether paid or unpaid at the time the controversion was filed.

## ANALYSIS

### 1) Are Employee's injuries while working for Employer the substantial cause of disability or need for medical treatment?

This case is about Employee's lumbar spine and if his September 5, 2013 or January 23, 2014 work injuries are the substantial cause of disability or his need for medical treatment. Employee contends he never had back pain prior to his injuries while working for Employer and is entitled to further benefits. Employer contends Employee's work injuries were low back strains, which resolved and for which no further medical treatment is reasonable or necessary. These contentions create factual disputes to which the presumption of compensability applies. AS 23.30.120(a)(1); *Meek*.

Without regard to credibility, Employee raises the presumption through his own testimony. Employee recounted having no prior low back pain and feeling the worst pain he's ever felt after his second injury on January 23, 2014, and continuing. *Wolfer*; *Tolbert*. Without regard to credibility, Employer rebuts the raised presumption with opinions from Drs. Youngblood and

Schwartz, both of whom opined Employee's work injuries, sprain and strain, are not the substantial cause of Employee's continued need for lumbar spine treatment beyond three months post injury and any related disability. *Wolfer*; *Huit*. Because Employer rebutted the presumption, Employee must prove his lumbar spine claim by a preponderance of the evidence. *Runstrom*; *Saxton*.

To prevail on his lumbar spine claim, Employee must show his work with Employer, in relation to all other possible causes, was "the substantial cause" of his need for lumbar spine treatment and any related disability. AS 23.30.010(a).

Employee initially went to Dr. Spencer to get evaluated because he had a work injury and low back pain. Dr. Spencer confirmed Employee had no neurologic deficits; his back pain was mechanical and diagnosed low back muscle pain. Dr. Spencer recommended no further treatment and did not restrict Employee's work activities. Employee's September 5, 2013 work injury was not the substantial cause of any disability or need for medical treatment other than that provided by Dr. Spencer on September 11, 2013. Employee continued to work with no restrictions or interruption in his ability to earn wages. AS 23.30.395(16); *Vetter*.

Employee did not treat for low back pain again until January 21, 2014. On January 27, 2014, Employee complained that one day his back started hurting and continued to get worse over the next few days. Employee, two years later, reported his second low back injury occurred on January 23, 2014, after spending three hours welding a flange onto a lift station in cold temperatures. Employee said, in his recorded statement, he recalled his second injury's specific date because he wrote "flange onto a lift station" on his timecard. Employee's reports' and testimony's veracity are suspect and not credible. AS 23.30.122; *Smith*. He returned for treatment on January 21, 2014, over four months after his September 11, 2013 evaluation with Dr. Spencer, and claimed his back had not felt good for two months. His next treatment was on January 27, 2014, but he did not mention a work injury. In fact, Employee said he was "not sure what brought on such severe pain."

Drs. Youngblood and Schwartz offer the only opinions on causation. Dr. Schwartz said Employee's September 2013 and January 2014 injures are soft tissue lumbosacral strains, with resolution over the following several months. The substantial cause of Employee's need for continuing medical treatment is degenerative disk disease, which is not posttraumatic. Although asked questions regarding both injuries, Dr. Schwartz's responses to inquiries regarding PPI and medical stability addressed only the initial September 2013 injury. Therefore, his opinion is given slightly less weight than Dr. Youngblood's. AS 23.30.122. Dr. Youngblood reviewed all available medical records and accurately identified that the medical provider continuum's opinions, including orthopedic surgeon Dr. Spencer and physical medicine and rehabilitation specialist Dr. Ward, are the same as Drs. Youngblood and Schwartz. Specifically, Employee had a low back soft tissue sprain and strains. Dr. Youngblood is credible. He displayed a thorough and comprehensive understanding of Employee's medical record. Drs. Schwartz and Youngblood's opinions are both credible; however, Dr. Youngblood's is given the greatest weight. *Id*. Dr. Youngblood does not doubt Employee has pain symptoms that wax and wane, which reinforces Dr. Youngblood's opinion Employee's low back pain is aggravated by deconditioning and obesity, which are the substantial cause of Employee's need for lumbar spine medical treatment and any related disability.

Beyond Employee's lay testimony, he has no medical evidence stating his work injuries with Employer are the substantial cause of the need to treat his lumbar spine and any related disability. Employee offered a medical surveillance report from April 2012 completed prior to his work with Employer, which indicates he did not "currently" have musculoskeletal problems. He also produced two medical records from PA-C Cordova-Eduave, which Employee contends support his claims for continued medical and PTD benefits. The first says that even when Employee has flare ups, there are no restrictions on his ability to drive or operate machinery. The second, written to support Employee's request with the National Forest Service for a duty station change to warmer climes, says Employee is able to perform all his job duties but has increased low back and thoracic spine pain when weather turns cold. Neither of these medical records address causation and preclude a finding Employee is permanently and totally disabled. AS 23.30.180; *Roan; Kinter*.

Absent medical evidence and given his non-credible reports and testimony, Employee cannot meet his burden of proof or persuasion. *Saxton*. Employee's continued need for lumbar treatment and any related disability are not work-related. Therefore, he is not entitled to continuing medical or PTD benefits for his September 5, 2013 or his January 23, 2014 work injuries.

**2) Is Employee entitled to PPI benefits?**

Employee requests PPI benefits. AS 23.30.190. Despite this determination Employee's work injuries are not the substantial cause of his need for lumbar spine treatment or any related disability, this does not preclude a PPI benefits award. However, Employee provided no evidence suggesting he has a PPI rating. There is no conflicting medical evidence on this point. Therefore, Employee did not raise the presumption of compensability on this issue and the presumption analysis need not be applied. *Rockney*. Employee has the burden to produce evidence of a work-related PPI rating. Employee was medically stable three months after each reported work injury and never obtained a PPI rating. Since Employee provided no evidence of a PPI rating, he cannot meet this burden. *Saxton*; *Settje*. Furthermore, SIME physicians Drs. Youngblood and Schwartz, the only physicians who offered PPI opinions, both agree and explicitly stated Employee had no PPI related to his September 5, 2013 and January 23, 2104 work injuries. Their opinions are given great weight. AS 23.30.122; *Smith*. Employee's claim for PPI benefits must be denied. *Settje*.

**3) Is Employee entitled to a compensation rate adjustment?**

Employee presented no evidence or argument supporting a compensation rate adjustment claim. AS 23.30.220. Employer acknowledged a formal compensation rate was never established because Employee's medical providers never restricted him from work. Therefore, he did not attach the presumption of compensability and the analysis does not apply. *Rockney*. Employee has the burden of demonstrating that he was paid at an incorrect compensation rate. He has failed in his burden for lack of proof and his compensation rate adjustment claim will be denied. *Saxton*.

**4) Is Employee entitled to a weekly stipend?**

Employee presented no evidence or argument supporting entitlement to a weekly stipend under AS 23.30.041(k). Therefore, he did not attach the presumption of compensability and the analysis does not apply. *Rockney*. To qualify for an eligibility evaluation, an employee can request one after having been out of work for 60 consecutive days. AS 23.30.041(c). If, as a result of a work injury, an employee is totally unable to return to work for 90 consecutive days, an eligibility evaluation is automatically ordered by the reemployment benefits administrator. *Id*. Employee requested an eligibility evaluation after claiming to have been out of work for only 49 consecutive days. Employer did not stipulate to an evaluation because Employee voluntarily left his position with Employer, no medical provider had imposed work restrictions and Employer had light duty work available if employee's physical capacities restricted him in any fashion. *Id.*; AS 23.30.041(f)(1). To receive stipend benefits, Employee must first have been found eligible for reemployment benefits. AS 23.30.041(k). Employee did not satisfy the criteria to receive an eligibility evaluation; however, if he had, he would have been found in eligible. Employee produced no evidence a physician predicted he would have a permanent physical capacities less than the physical demands of his job with employer or jobs he held 10 years before his injury, nor did he produce evidence of a permanent impairment. AS 23.30.041(e), (f). Employee's claim for stipend benefits will be denied.

**5) Is Employee entitled to penalty and interest?**

A penalty must be paid if any compensation installment payable without an order is not timely paid. AS 23.30.155(e). Employee has not established he is entitled to any benefits that were not timely paid. Employee's claim for penalty will be denied.

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

**6) Did Employer unfairly or frivolously controvert Employee's claim?**

Employee seeks a finding Employer's benefit denials were unfair or frivolous. AS 23.30.155(o); 8 AAC 45.182. An unfair or frivolous controversion may be found if Employer controverted benefits without sufficient evidence. *Harp.* Conversely, a controversion is considered to be in "good faith" where there is sufficient evidence to support a finding a claimant is not entitled to the benefits. *Id.* Once the presumption attaches, an employer must produce substantial evidence to show work is not the substantial cause of an employee's disability or need for medical treatment.

Employer must have specific evidence on which to base its controversion, which it had in Employee's case. *Harp*. Employer denied benefits on eight occasions and suspended them once. Employer first controverted reemployment benefits on March 1, 2016, asserting there was no medical evidence Employee had not been restricted from work, Employee resigned his position with Employer and worked for another Employer and attended school, and Employer provides light duty for injured workers when they do not have the physical capacity to perform their job. Had Employee's claim gone to hearing on March 1, 2016, and had Employer's evidence been the only evidence presented, Employee would not be entitled to even a reemployment benefits eligibility evaluation, nor would he have been entitled to stipend benefits. AS 23.30.041; *Harp*. Employer's denial of reemployment benefits was not unfair or frivolous.

Twice benefits were appropriately denied because Employee did not attend a properly noticed EME. AS 23.30.095(e). Benefits were suspended in one controversion and denied in a second when Employee did not sign and return releases to Employer after a designee ordered him to do so. Denial of benefits is permitted when, as here, requested releases are not signed and returned. AS 23.30.108(a) and (b). Employer's controversions were not unfair or frivolous.

Employer denied all medical treatment of Employee's abdominal pain and hemochromatosis. Dr. Youngblood's opinion Employee's right lower abdominal pain was not related to or substantially caused by any work injury is sufficient evidence to support the controversion. Employee's hemochromatosis did not arise out of or in the course of Employee's employment; it

is a genetic disorder. Employee presented no evidence to the contrary. Employer's controversion was not unfair or frivolous. *Harp*.

Employer controverted all benefits on September 13, 2016. It relied on Dr. Youngblood's August 27, 2016 opinions that Employee's work injury is not the substantial cause of any disability or need for medical treatment, he was medically stable three months after each injury, had no PPI and no work restrictions. Had Employee's claims gone to hearing on September 13, 2016, and had this been the only evidence presented, Employee would not have been entitled to benefits. *Harp*. Dr. Youngblood's report is responsible evidence when viewed without assessing credibility. *Ford*. Employer's controversion was not unfair or frivolous. *Harp.*

Employer's June 8, 2018 controversion, the ninth, amended and supplemented the September 12, 2016 and December 1, 2016 controversions. September 12, 2016 is its effective date, which refers to the controversion filed on September 13, 2016. Specific benefits controverted were additional diagnostic testing and treatment. Employer's September 12, 2016 controversion served to controvert all benefits, including additional diagnostic testing and treatment. Employer relied on Dr. Schwartz's opinion to reassert its controversion of specific benefits. Dr. Schwartz stated Employee's work injuries were lumbar strains, which both resolved months after the injuries and work was then no longer the substantial cause of Employee's need for lumbar spine treatment or any disability benefits. Dr. Schwartz provided an alternative explanation; degenerative disk disease is the substantial cause for Employee's need for ongoing medical treatment or any ongoing disability. His opinion was consistent with Dr. Youngblood's. Had this issue gone to hearing on June 8, 2018, and had this been the only evidence presented, Employee would not have been entitled to benefits. *Harp*. Dr. Schwartz's opinion is responsible when considered without assessing credibility and supports Employer's controversion. *Ford*. Employer's controversion was not unfair or frivolous. *Harp*.

Employer's controversions are based on valid and responsible medical opinions and statutes. They are not frivolous or unfair. Employee's request for an order finding Employer made a frivolous or unfair controversion will be denied.

## CONCLUSIONS OF LAW

1) Employee's injuries while working for Employer are not the substantial cause of disability or need for medical treatment.
2) Employee is not entitled to PPI benefits.
3) Employee is not entitled to a compensation rate adjustment.
4) Employee is not entitled to a weekly stipend.
5) Employee is not entitled to penalty and interest.
6) Employer did not unfairly or frivolously controvert Employee's claim.

## ORDER

Employee's January 19, 2016 and September 3, 2018 claims are dismissed.

Dated in Anchorage, Alaska on January 2, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, 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 MATTHEW RIFE, employee / claimant v. B.C. EXCAVATING, LLC, employer; ALASKA NATIONAL INSURANCE, insurer / defendants; Case No. 201601856; 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 January 2, 2019.

**/s/**_____
Charlotte Corriveau, Office Assistant