# ALASKA WORKERS' COMPENSATION BOARD

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

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| TIMMY W. DAVIS,<br><br>Employee,<br>Claimant,<br><br>v.<br><br>STATE OF ALASKA,<br><br>Self-Insured Employer,<br>Defendant. | FINAL DECISION AND ORDER<br><br>AWCB Case No. 201614364<br><br>AWCB Decision No. 19-0032<br><br>Filed with AWCB Juneau, Alaska<br>on March 7, 2019 |

Timmy W. Davis' (Employee) August 16, 2017 claim was heard on February 5, 2019 in Juneau, Alaska, a date selected on December 10, 2018. An August 24, 2018 affidavit of readiness for hearing (ARH) gave rise to this hearing. Employee appeared, represented himself and testified. Attorney Adam Franklin appeared and represented State of Alaska (Employer). The record closed at the hearing's conclusion on February 5, 2019.

## ISSUES

Employee contends he is entitled to temporary total disability benefits (TTD) from June 4, 2017 to the present. Employee contends Employer forced him to resign from his job with Employer because supervisors treated him badly after his work injury.

Employer contends Employee is not entitled to additional TTD from June 4, 2017 to the present. It contends he reached medical stability in April 2017 and voluntarily removed himself from the labor market when he terminated his job in May 2017. Employer contends it overpaid benefits

because it paid TTD through June 3, 2017. It seeks an order denying Employee's claim for additional TTD benefits.

**1) Is Employee entitled to additional TTD?**

Employee contends he is entitled to additional medical benefits, including past medical costs, incurred after Employer's controversion, and continuing medical treatment. He seeks an order awarding past medical costs and continuing medical treatment.

Employer contends Employee's medical treatment after it's controversion was not reasonable or necessary. It seeks on order denying Employee's claim for medical benefits.

**2) Is Employee entitled to past medical costs and continuing medical benefits?**

Employee contends Employer's controversion was unfair and frivolous. He seeks an order finding an unfair or frivolous controversion.

Employer contends its controversion was in good faith and based on a valid medical opinion, and is not unfair and frivolous. It seeks an order denying Employee's request.

**3) Was Employer's controversion unfair or frivolous?**

## FINDINGS OF FACT

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

1) On November 20, 2014, Employee visited Thomas Gundelfinger, DC, for neck, upper back, mid-back and low back pain or stiffness. Employee had difficulty with standing and sitting. Dr. Gundelfinger noted left leg sciatica. He provided Employee manipulative chiropractic treatment. (Gundelfinger, Chart Note, November 20, 2014).

2) On November 26, 2014, Employee reported the same neck, upper back, mid-back and low back pain or stiffness. Dr. Gundelfinger provided Employee manipulative treatment. (Gundelfinger, Chart Note, November 26, 2014).

3) On September 22, 2016, Employee injured his back while working as an IT Specialist for Employer when he moved and installed a lift desk for a coworker. (Employee First Report of Occupational Injury, September 23, 2016).

4) On September 23, 2016, Employee reported he injured his back when he attempted to move a heavy piece of computer furniture by himself. Employee felt a popping sensation, localized sharp pain and sharp shooting pain when he lifted the furniture and twisted to the left. Dr. Gundelfinger noted Employee had "1/5" muscle function in his left leg and "2/5" muscle function in his deltoids and biceps. He also noted Employee had left sided foot drop and splinted gait. Dr. Gundelfinger read thoracic spine x-rays and stated Employee's spinal alignment demonstrated a moderate decrease in kyphotic curvature, a moderate costotransverse sclerosis at the left T10, asymmetrical ribs, T7 listed right, superior and anterior, and T10 was misaligned to the left, anterior and superior. Employee could not use his right arm or left leg, had increased fatigability and was unable to lift more than 50 pounds. Walking, lifting, and sitting exacerbated his condition. Dr. Gundelfinger diagnosed lumbago with left side sciatica, thoracic spine and low back pain, and segmental and somatic dysfunction of thoracic region, lumbar region, pelvic region and upper extremity. Dr. Gundelfinger provided manipulation, therapeutic exercises, manual traction, trigger point therapy, massage therapy, and neuromuscular reeducation. He restricted Employee from work. (Gundelfinger, Medical Report, September 23, 2016).

5) On September 28, 2016, Dr. Gundelfinger released Employee back to light duty work. (Gundelfinger Chart Note, September 28, 2016).

6) On September 29, 2016, Chad Brown, a Human Resources Manager for Employer, emailed several supervisors, including Brian Duncan stating:

> Just FYI [Employee] is currently working on light duty.
>
> Until further notice please CC Brian on all IT Requests you send to [Employee]. Normal IT issues should be fine, however, if there is any moving, lifting of any kind definitely work with Brian so he can reassign to someone else on his team. (Email, September 26, 2016).

7) On October 1, 2016, Dr. Gundelfinger released Employee to light duty work. (Gundelfinger Chart Note, October 1, 2016).

8) On October 25, 2016, Employee reported a slight worsening of lower back pain and slight decrease of pain in his mid-back. He rated the improvement of his lower and mid-back pain and sciatica at 50 percent. (Gundelfinger Chart Note, October 25, 2016).

9) On December 6, 2016, Employee reported experiencing constant moderately severe spasms, cramps, restricted movement and stiffness. He estimated his low and mid-back pain and sciatica improved 70 percent. Dr. Gundelfinger noted spasms with lifting at work. (Gundelfinger Chart Note, December 6, 2016).

10) On December 10, 13, 17, 20, 27, 29, and 31, 2018 and January 3, 2017, Employee reported his low and mid-back pain and sciatica improved 70 percent. (Gundelfinger Chart Notes, December 10, 2018 through January 3, 2017).

11) On January 7, 2017, Employee reported improvement of his lower and mid-back pain and sciatica at 75 percent. Employee continued on modified work duties through February 4, 2017. (Gundelfinger Chart Note, January 7, 2017).

12) On January 17, 2017, Robin Mason, Employee's co-worker, emailed Brown and cc'd Employee stating:

> Can you please give clear steps moving forward on [Employee]'s light duty stance?
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> I am not HR literate and have asked [Employee] to do work he should probably not. Given that, he is to ask his IT Team for support.
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> I think [Employee], myself and the entire IT Team need to know what [Employee's] light duty stance looks like moving forward.
>
> This begin [sp] in Sept or Oct and Brian never gave clear information to [Employee] or IT. Just want to make sure the IT Team is on the same page and has correct info. (Mason Email, January 17, 2017).

13) On January 17, 2017, Brown emailed Robin Mason and cc'd Employee stating,

> Thanks for your note seeking clarification. [Employee] has not been released back to full duty and until he is we need to continue being conscientious of his light duty status. If there is any work that we need him to do but is outside his current physical ability, we will need to continue to make accommodations until I circle back to you and give you the OK. . . . (Brown Email, January 17, 2017).

14) On February 11, 2017, Employee reported improvement of his lower and mid-back pain and sciatica at 80 percent. (Gundelfinger Chart Note, February 11, 2017)

15) On March 18, 2017, Employee reported improvement of his lower back and mid-back pain and sciatica at 90 percent. (Gundelfinger Chart Note, March 18, 2017)

16) On March 25, 2017, Employee reported improvement of his lower back and mid-back pain and sciatica at 90 percent. (Gundelfinger Chart Note, March 25 2017).

17) On April 12, 2017, Dr. Gundelfinger responded to an April 10, 2017 letter from the claims administrator. He opined Employee was not medically stable and was 90 percent improved on April 1, 2017. Dr. Gundelfinger expected Employee's range of motion, posture, and work activities of daily life, including lifting, bending and twisting, to improve. He stated Employee was able to return to his job on a regular basis and Employee did not suffer any permanent partial impairment (PPI) as a result of the injury. (Gundelfinger response, April 12, 2017).

18) On April 29, 2017, Employee reported an acute exacerbation on the job when he moved a "heavy UPS under workstations." His gait was splinted and he had muscle spasms. Dr. Gundelfinger stated the acute phase of Employee's condition passed and it entered an intermediate stage. His work restrictions included no repeated lifting or bending through May 29, 2017, and "At that time he may return back to his normal work duties." (Gundelfinger Chart Note, April 29, 2017).

19) On April 30, 2017, Richard Rivera, DC, a chiropractic orthopedist, reviewed Employee's medical records for a records-review employer medical evaluation (EME). He diagnosed Employee with a thoracic and lumbosacral strain or sprain. Dr. Rivera opined the September 2016 work injury was the substantial cause of Employee's disability and need for medical treatment. The mechanism of injury, lifting a heavy piece of office furniture, was consistent with the diagnosis of sprain or strain. Employee became medically stable as of January 22, 2016 and "no further treatment is reasonable or necessary for the purpose of recovery given the particular facts." Employee underwent an excessive amount of multimodality chiropractic treatment as the record described approximately 43 chiropractic dates of service where multimodality treatment was rendered on each service date. Dr. Rivera stated further chiropractic treatment "is not an acceptable medical option" because Employee had been "rendered an excessive amount of treatment through March 11, 2017" and because "there are no published treatment guidelines or parameters of care which recommend or support further treatment." He predicted Employee would not have any physical restrictions as a direct result of the September 2016 work injury and

he was capable and able to perform his usual and customary employment activities as an IT Specialist. (Rivera EME Report, April 30, 2017).

20) On May 1, 2017, Employee resigned from his job with Employer. His resignation letter stated:

> Please accept this letter as official notification of my intent to resign from my position as a Network Specialist . . . effective two weeks from today. This will have May 15, 2017 be my last day of employment.
>
> Due to new changes in management, work environment and statements made toward me, I have found the mental stress created from this has caused a poor working environment. Unfortunately, these changes in management tactics directly oppose my personal business philosophy and integrity, which advocates a more sensitive and honest approach. Not only is it unconscionable for me to work in such a hostile environment, it is also physically and mentally debilitating to work under such stressful circumstances.
>
> Resigning for these reasons is extremely disconcerting but, given the circumstances, I don't feel I have much choice. There is [sic] no plans for management's behavior towards me to change in positive directive, therefore, doubt any positive changes are imminent. These present difficulties do not negate the fact that I have derived much enjoyment in years past from my employment. . . . (Resignation Letter, May 1, 2017)

21) On May 4, 2017, Employee reported improvement of his low and mid-back pain at 90 percent and sciatica at 95 percent. Employee showed some progress but was in a subacute phase. He experienced a mild flare up after moving a heavy "UPS" underneath a workstation. Employee was scheduled for another treatment in one month. (Gundelfinger Chart Note, May 4, 2017).

22) Dr. Gundelfinger provided chiropractic treatments to Employee, including chiropractic manipulation, therapeutic exercises, manual traction, trigger point therapy, massage therapy, and neuromuscular reeducation, on 54 dates: September 24, 26, 28, October 1, 4, 6, 11, 13, 15, 18, 20, 22, 25, 27, 29, 31, November 3, 7, 11, 14, 17, 21, 25, 28, December 3, 6, 10, 13, 17, 20, 27, 29, 31, 2016, January 3, 7, 10, 12, 14, 21, 24, 28, 31, February 4, 7, 11, 18, 25, March 4, 11, 18, 25, April 1, 29, and May 4, 2017. (Gundelfinger Chart Notes, September 24, 2016 through May 4, 2017).

23) On May 10, 2017, James Schwartz, MD, an orthopedic surgeon, examined Employee for an EME. He found Employee was "tender at the right paraspinals from about T7 to the

thoracolumbar junction" and found reduced range of motion in Employee's hips. After reviewing the medical records, Dr. Schwartz was suspicious of Dr. Gundelfinger's physical examination because it would be unlikely Employee would be able to walk without crutches with Dr. Gundelfinger's grade "1/5" in knee extension and it would be unlikely he would be able to use crutches with upper extremity strength "2/5." Employee filled out a pain disability questionnaire which Dr. Schwartz scored at 97, a moderate disability rating close to severe disability. Dr. Schwartz noted the disability score was not reasonable because Employee was working up until the last few weeks. He diagnosed Employee with a thoracolumbar strain related to the September 2016 work injury and degenerative bilateral hip joint disease unrelated to the September 2016 work injury. Dr. Schwartz opined the substantial cause of Employee's need for treatment initially was the September 2016 work injury. He stated,

> Treatment of soft tissue injures about the spine with chiropractic and massage is appropriate for 8 to 12 weeks. Beyond that, further evaluation and change of appropriate treatment is indicated. Chiropractic guidelines do not indicate treatment beyond 12 weeks. Therefore, any treatment beyond mid-December 2016 would be unnecessary and not indicated.

When asked whether the treatment Employee received was reasonably effective and necessary for the purpose of recovery, whether the treatment was an acceptable medical option under the particular facts of the case, and whether the work injury is the substantial cause of Employee's need for treatment, Dr. Schwartz stated:

> Twelve weeks of chiropractic treatment would be the maximum of this kind of treatment of this type of injury that would be reasonable and necessary. Anything beyond that is not within guidelines, nor, in my opinion, effective.

After twelve weeks, the substantial cause of Employee's need for medical treatment was the underlying degenerative process. Dr. Schwartz recommended no further treatment for the work injury but recommended x-rays of Employee's hip for his unrelated degenerative bilateral joint disease and nonsteroidal anti-inflammatories for Employee's underlying degenerative disc disease, unrelated to the work injury. Employee was medically stable as of May 10, 2017, the date of the physical examination, and had no ratable PPI for the work injury. Employee had no physical restrictions because of the September 2016 work injury and had the capacity to perform as an IT Specialist. Dr. Schwartz suspected heavy work was inappropriate for Employee's future

employment due to his underlying degenerative hip joint disease. (Schwartz EME Report, May 10, 2017).

24) On May 15, 2017, Dr. Gundelfinger responded to a letter from the claims administrator asking whether Employee was released to return to work by stating, "Patient was seen 05/04/2017. [Employee] had reaggravated his neck moving heavy 'UPS' under his work station. Light duty on 05/04/2017." Employee's next scheduled visit will be on or about June 5, 2017. (Gundelfinger Response, May 15, 2017).

25) On May 19, 2017, Employer denied Employee's right to all benefits based upon Drs. Schwartz's and Rivera's EME reports. (Controversion Notice, May 19, 2017).

26) On August 14, 2017, Employee visited John Bursell, MD, at Juneau Bone & Joint, for upper back pain. Employee reported it began in September 2016 when he lifted a desk and felt a snap across his upper back. Employee treated with chiropractic interventions which resulted in partial pain relief. Employee took the summer off from work and was being very careful using his back. Thoracic x-rays revealed normal vertebral alignment and well maintained intervertebral disc spaces. Dr. Bursell assessed "persistent upper back/right periscapular pain secondary to Employee's September 2016 work injury." He recommended a combination of physical therapy and massage therapy for a directed rehabilitation program and noted trigger point injections may have a role if Employee's pain persisted. (Bursell, Medical Report, August 14, 2017).

27) On August 16, 2017, Employee filed a claim seeking TTD, medical costs and claiming unfair or frivolous controversion. (Claim for Workers' Compensation Benefits, August 16, 2017).

28) On September 14, 2017, Employer answered Employee's August 16, 2017 claim. Employer contended it initially paid two days of time loss benefits and provided light-duty work within Employee's physical restrictions from September 29, 2016 through May 26, 2017, and paid medical benefits related to the injury. Employer contended Employee voluntarily terminated his employment. Employer contended Employee is not entitled to additional TTD or medical benefits based upon Dr. Schwartz's EME report. (Answer, September 14, 2017).

29) On November 13, 2017, Employer denied Employee's claim for benefits based upon Drs. Schwartz's and Rivera's EME reports. (Controversion Notice, November 17, 2013).

30) On April 2, 2018, Dale Charrette, DC, examined Employee for a second independent medical evaluation (SIME). He found normal ranges of motion in Employee's head, neck and cervical region. In Employee's thoracic spine, Dr. Charrette found a trigger point in the right

surpascapular area but no significant clinical findings, such as muscle spasms, muscle guarding, signs of chronic inflammation or loss of range of motion. Employee reported localized pain in the left tensor facia lata but Dr. Charrette found no affect in range of motion, muscle guarding or muscle spasms. He stated Employee's movements in the thoracic and lumbar regions do not demonstrate any significant clinical findings showing any objective findings necessitating a need for ongoing treatment. Under Diagnostic Impression, he listed: (1) a September 2016 work-related injury after lifting a desk and injuring Employee's upper back and secondarily his lateral thigh or more specifically the left tensor fascia lata (TFL); (2) a clinically resolved upper thoracic strain and sprain; (3) a clinically resolved lumbosacral strain and sprain; (4) no clinical presence of lumbar radiculopathy at any time in treatment of the September 2016 work injury; (5) no clinical findings in the right or left shoulder; (6) Employee appeared to clinically have minimal soft tissues in the right upper scapular area as well as in the left TFL consistent with lack of any physical activity or a more sedentary lifestyle; (7) exaggeration of subjective complaints which appear mild to slight and are stated as moderate to severe; and (8) no clinical evidence of any underlying pathological process in the upper thoracic spine or hip area. When asked what specific additional treatment, if any, did he recommend to address the September 2016 work injury or its consequences, he responded:

> It is the opinion of this examiner that the patient has reached a level of maximum medical improvement, or permanent and stationary level relative to the injuries of 09/22/2016. This type of injury is typically what is called a sprain/strain type injury and typical [sp] will heal in 3 months on the minimum range and in 6 months, if an applicant is a slow healer. This type of injury is usually consist [sp] of soft tissue components such as muscles, ligaments, and tendons, and typically heal in 3-6 months. So, it is this examiners opinion that from 09/22/2016-3/31/2016, treatment was within this guideline. There was some additional treatment in April, and May of 2016, much less frequent and so those injuries should be allowed also. Anything beyond the 06/04/2017 visit was beyond what would be considered reasonable and necessary for this type of injury.

When asked whether the continuing and multiple treatments in the course of care Employee received will help Employee recover from the injury, Dr. Charrette responded:

> [Employee] received ongoing Chiropractic care, in the number of 45 visits, over a 8 month period. Typically, this type of injury will heal between 3-6 months, and if it has not been showing significant improvement and progressing toward a maximum medical improvement, or a permanent and stationary level, it would typically be referred out.

> Once it was referred out, they would typically be looking for underlying causes of the problems. These referrals were never made of [sp] considered. It appears from the medical records that the chiropractic care was going on continuously until the first IME was done and stated that it appeared to have to [sic] objective framework and as of 06/04/2017 was stopped. After that there was no treatment done on this case.

Dr. Charrette concluded Employee does not have chronic debilitating pain:

> The findings of examination do not support the level of subjective complaints exhibited in this case. This is not to say that the patient cannot experience soft tissue issues that he explains, I just cannot objectively or clinically find data to back up the claims. The subjective complaints appear to not be consistent with what is revealed clinically, meaning that movements, range of motion, gait, etc. do not exhibit or appear in line with what I would categorize as chronic debilitating pain. What I am observing is a mild subjective muscle complaint after 6-8 months of ongoing repetitive treatment.

When asked whether additional treatment would promote recovery from individual episodes of pain caused by a chronic condition, Dr. Charrette stated,

> At this point, as of the date of SIME, 04/02/2018, the patient is medically stable and there appears to be no need for additional medical treatment for individual episodes of pain caused by a chronic condition. I would consider this condition at a permanent and stationary level, or maximum medical improvement as of 04/02/2018, and there is no further need for treatment. . . .

He opined any additional treatment would not have "any direct impact" as to Employee's permanent impairment. Dr. Charrette opined Employee was able to work as an IT Specialist as of June 4, 2017. He cleared Employee to return to work without restrictions and stated he may participate in an approved reemployment plan on a full-time basis without restrictions. Dr. Charrette assessed a one percent whole person impairment for Employee's upper lumbar spine. (Charrette SIME Report, April 2, 2018).

31) On April 3, 2018, Sidney Levine, MD, an orthopedist, examined Employee for a SIME. Dr. Levine noted a "1+ tenderness" over Employee's right rhomboids, no palpable muscle spasms in Employee's thoracic and lumbar areas, and full range of motion in Employee's hips. After reviewing Employee's medical record, he assessed a history of mid-back strain and a right shoulder girdle strain. Dr. Levine recommended no additional treatment for the September 2016 work injury. He opined Employee was able to return to work as a Network Specialist without

any limitations or restrictions. Dr. Levine concluded Employee had no ratable impairment and stated,

> From the history provided, with a reasonable amount of certainty, [Employee] did sustain a straining injury to his midback and right shoulder girdle. He underwent a course of chiropractic treatment in an area that was previously treated and for which he underwent chiropractic care as noted in the medical records. Although he does have objective complaints, there are no objective findings of disability. In my opinion, he does not require any additional active treatment. It is reasonable to assume that within 3 months of the injury following his treatment, his condition would have stabilized and he no longer required active treatment.
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> If the patient does chose to have continued chiropractic treatment, in my opinion, this is not required as it relates to the industrial injury of September 22, 2016. (Levine SIME Report, April 3, 2018).

32) On April 11, 2018, Employee reported his upper back pain symptoms continued and were the same as when he was seen on August 14, 2017. He stated he was approved for treatment Dr. Bursell recommended after the SIME. Dr. Bursell referred Employee to physical therapy and massage therapy to treat his upper back pain symptoms. (Bursell, Chart Note, April 11, 2018).

33) On May 9, 2018, Employee reported he had been improving with physical and massage therapy. He also stated his mobility improved by 60 percent but the painful area in his back was more centralized and still at about the same level. Dr. Bursell recommended Employee continue with the current rehabilitation plan as he was doing well. (Bursell, Chart Note, May 9, 2018).

34) On May 15, 2018, Employer wrote a letter to Dr. Charrette requesting clarification of the date when the September 2016 work injury reached medical stability, the date when the work injury was no longer the substantial cause of Employee's need for medical treatment and the date when Employee was able to return back to work as an IT Network Specialist. (Letter, May 15, 2018).

35) On June 6, 2018, Employee followed up with Dr. Bursell for upper back pain. He reported progressing with physical therapy and responding to massage therapy. Overall Employee felt he made major improvements. Dr. Bursell recommended continuing with the current treatment program and Employee's home exercise plan. (Bursell, Chart Note, June 6, 2018).

36) On July 6, 2018, Dr. Charrette responded to Employer's letter and stated, "In my SIME report dated, April 2, 2018, I simply made an error on the date and it should be June 4, 2017, the

date that the work injury of September 22, 2016 where it was not medically reasonable or necessary for treatment of the injury." (Charrette Response, July 6, 2018).

37) Employee received massage therapy and physical therapy from Juneau Bone & Joint on 16 dates: April 13, 20, 27, May 1, 3, 4, 8, 10, 11, 15, 17, 22, 23, 24, 29 and June 5, 2018. (Juneau Bone & Joint, Chart Notes, April 13 through June 5, 2018).

38) On July 20, 2018, Employee visited Marco Wen, MD, for ongoing right neck and periscapular pain. Employee aggravated his pain when his dog abruptly pulled on his leash. Dr. Wen assessed chronic right periscapular/shoulder pain. Due to the lack of consistent progress with physical therapy, Dr. Wen recommended a magnetic resonance imaging (MRI). (Wen Medical Report, July 20, 2018).

39) On August 24, 2018, Employer again denied Employee's claim for benefits based upon Drs. Charrette's and Levine's SIME reports and Drs. Schwartz's and Rivera's EME reports. (Controversion Notice, August 24, 2018).

40) On October 10, 2018, Employer requested a hearing on Employee's August 16, 2017 claim. (ARH, October 10, 2018).

41) On October 24, 2018, the board designee scheduled an oral hearing on December 18, 2018 on Employee's claim. (Prehearing Conference Summary, October 24, 2018).

42) On November 1, 2018, Employee followed up with Dr. Bursell for his upper-back pain. Employee stated he was lifting a lift desk weighing 100 – 150 pounds when his back symptoms began. Dr. Bursell assessed right-sided thoracic back pain clearly related to the work injury he described. He recommended a thoracic spine MRI. (Bursell, Chart Note, November 1, 2018).

43) On November 2, 2018, an MRI of Employee's thoracic spine revealed a T9-10 small central disc protrusion with mild thecal sac effacement. (MRI Report, November 2, 2018).

44) On November 7, 2018, Dr. Bursell reviewed the thoracic spine MRI findings with Employee who felt pain at the T5-6 level and under his right shoulder blade. Dr. Bursell recommended a cervical spine MRI. (Bursell Chart Note, November 7, 2018).

45) On November 9, 2018, an MRI of Employee's cervical spine revealed minimal right foraminal narrowing at C3-4, small broad-based central disc protrusion and mild bilateral uncovertebral spurring at C4-5, uncovertebral spurring with mild to moderate right and mild left foraminal stenosis at C5-6 and uncovertebral spurring leading to moderate right and minimal left foraminal stenosis at C6-7. (MRI Report, November 9, 2018).

46) On November 13, 2018, Dr. Bursell reviewed the cervical spine MRI findings with Employee. The MRI showed relatively mild multilevel degenerative changes in the cervical spine and a small broad based central disc protrusion at C4-5. Dr. Bursell doubted Employee's persistent myofascial upper back pain was disc-related. Employee reported he responded to treatment combining physical therapy and massage therapy. Dr. Bursell referred Employee to physical therapy and massage therapy to address his upper-back pain symptoms. (Bursell, Chart Note, November 13, 2018).

47) On November 21 and 30, 2018, Employee received massage therapy at Juneau Bone & Joint. (Juneau Bone & Joint, Chart Notes, November 21 and 30, 2018).

48) On December 10, 2018, the division served a letter on the parties informing them the December 18, 2018 hearing was rescheduled to February 5, 2019. It also served a February 5, 2019 hearing notice. (Letter, December 10, 2018; Hearing Notice Served, December 10, 2018).

49) On January 16, 2019, Employee filed billing statements from Juneau Bone & Joint Center for medical treatment from August 2017 through December 2018. (Medical Summary Form, January 16, 2019).

50) On January 29, 2019, Employer said it paid Employee the one percent PPI rating in accordance with Dr. Charrette's report and all medical costs until the May 19, 2017 controversion notice. Employer paid TTD from September 23, 2016 to September 28, 2016 and May 16, 2017 to June 3, 2017. (Employer's Hearing Brief, January 29, 2019).

51) Employee testified he injured his back when he helped a coworker pick up a lift desk. Half way up, he felt a ping across his back and that is when his back pain began. Chiropractic care resolved his spinal issue but did not resolve the muscle and tissue damage. Employer initially followed Employee's light duty restriction but it did not take long for Employer to direct him to do work activities beyond his work restrictions. He was directed to get assistance from other people to complete work activities beyond his work restrictions. The assistance was not provided quickly and Employee was informed he was not completing his work timely. Employee was told he would be fired if he did not accomplish his work. He cannot stand for more than 10 minutes without causing his back to hurt and his supervisor scheduled meetings requiring him to stand for longer than 10 minutes. Employee would have to stretch immediately after the meetings to relieve the pain and tightness in his back. The director told Employee she could not trust him because she did not think he should be on workers' compensation. The

human resources representative told Employee he had five days to "get the director to like him." Employee did not want to quit but the constant threat of being fired and harassment due to his light duty restriction caused him to quit his job in his view. Employee took the summer off after quitting his job and rested his back at home. His back did not get better and he filed a claim. Employee stopped getting any medical treatment until the SIME examinations were completed. His back still hurts and he hopes to receive continuing medical treatment. Activities of daily life aggravate his back. For example, simply picking up and carrying a dog food bag, which Employee can do, causes an increase in pain taking several days to go away. Employee has been seeking work. He applied for full-time work but was not hired. He started a business in December 2018 but he only worked a few hours for his business. Employee is not afraid to work. (Employee).

52) Employee contends the medical documents from Juneau Bone & Joint support his claim. He contended Dr. Rivera's EME report was very poor as he just reviewed Dr. Gundelfinger's reports and there was no physical examination of Employee. Employee contends the SIME reports are very biased. He contends the SIME reports were just a copy of the EME reports. Employee contends it is illogical for the SIME physicians to examine him and even acknowledge he had back pain but make the same conclusions as the EME reports. He requests TTD from June 4, 2017 to the present and past and continuing medical benefits. (Employee hearing arguments).

53) Employer contends no physician stated Employee was unable to work. Employer contends Employee became medically stable in April 2017 based on Dr. Gundelfinger's report that Employee's pain resolved 90 percent. (Employer hearing arguments).

## PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .
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> . . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment . . . if the disability . . . or . . . 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 . . . need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .
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> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical . . . treatment . . . medicine . . . for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.
> . . . .
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> (c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. The board shall, however, excuse the failure to furnish notice within 14 days when it finds it to be in the interest of justice to do so, and it may, upon application by a party in interest, make an award for the reasonable value of the medical or surgical treatment so obtained by the employee. When a claim is made for a course of treatment requiring continuing and multiple treatments of a similar nature, in addition to the notice, the physician or health

> care provider shall furnish a written treatment plan if the course of treatment will require more frequent outpatient visits than the standard treatment frequency for the nature and degree of the injury and the type of treatments. The treatment plan shall be furnished to the employee and the employer within 14 days after treatment begins. The treatment plan must include objectives, modalities, frequency of treatments, and reasons for the frequency of treatments. If the treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for treatments that exceed the frequency standard. The board shall adopt regulations establishing standards for frequency of treatment.
> . . . .
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> (o) Notwithstanding (a) of this section, an employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection. . . .

When the board reviews a claim for medical treatment made within two years of an undisputed work-related injury, its review is limited to whether the treatment sought is reasonable and necessary. *Philip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727 (Alaska 1999). *Hibdon* addressed the issues of reasonable of medical treatment:

> The question of reasonableness is 'a complex fact judgment involving a multitude of variables.' However, where the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable. (Citations omitted). (Id. at 732).

When reviewing a claim for continued treatment beyond two years from the date of injury, the Board has discretion to authorize "indicated" medical treatment "as the process of recovery may require." *Id*. With this discretion, the Board has latitude to choose from reasonable alternatives rather than limited review of the treatment sought. *Id*.

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

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

Under AS 23.30.120(a), benefits sought by an injured worker are presumed to be compensable, and the burden of producing evidence is placed on the employer. *Sokolowski v. Best Western Golden Lion Hotel*, 813 P.2d 286 (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 (Alaska 1996). An employee is entitled to the presumption of compensability as to each evidentiary question. *Sokolowski* at 292.

A three-step analysis is used to determine the compensability of a 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). The evidence necessary to attach the presumption of compensability varies depending on the claim. In claims based on highly technical medical considerations, medical evidence is often necessary to make that connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). In less complex cases, lay evidence may be sufficiently probative to establish causation. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Witness credibility is not weighed at this step in the analysis. *Resler v. Universal Services Inc.*, 778 P.2d 1146, 1148-49 (Alaska 1989).

At the second step, once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991) (quoting *Smallwood* at 316). To rebut the presumption, an employer must present substantial evidence that either (1) something other than work was the substantial cause of the disability or need for medical treatment or (2) that work could not have caused the disability or need for medical treatment. *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc*., 973 P.2d 603 (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 (Alaska 1994).

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 (Alaska 1991). At this last step of the analysis, evidence is weighed and credibility considered. To prevail, the claimant must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). The presumption does not apply if there is no factual dispute. *Rockney v. Boslough Construction Co.*, 115 P.3d 1240 (Alaska 2005).

> **AS 23.30.122. 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). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 (August 25, 2008).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director, stating
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> (1) that the right of the employee to compensation is controverted;
>
> (2) the name of the employee;
>
> (3) the name of the employer;
>
> (4) the date of the alleged injury or death; and

> (5) the type of compensation and all grounds upon which the right to compensation is controverted.
> . . . .
>
> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due.
>
> (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.

Employers must either pay or controvert benefits without an award but may controvert any time after payments are made. AS 23.30.155(a). A controversion notice must, however, be filed and it 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 (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 board would find the employee 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 23.30.185. 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.
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> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
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> (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;
>
> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;
> . . . .

*Lowe's v. Anderson*, AWCAC Decision No. 130 (March 17, 2010), explained to obtain TTD benefits, assuming the presumption has been rebutted, an injured worker must establish: (1) she is disabled as defined by the Act; (2) her disability is total; (3) her disability is temporary; and (4) she has not reached the date of medical stability as defined in the Act. (*Id*. at 13-14).

"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.*

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) said, "'Once an employee is disabled, the law presumes that the employee's disability

continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption." (*Id*. at 573).

An employer may rebut the continuing presumption of compensability and disability, and gain a "counter-presumption," by producing substantial evidence that the date of medical stability has been reached. *Lowe's* at 8. Once an employer produces substantial evidence to overcome the presumption in favor of TTD, the employee must prove all elements of the TTD claim by a preponderance of the evidence. However, if the employer raised the medical stability counter-presumption, "the claimant must first produce clear and convincing evidence" that he has not reached medical stability. *Id.* at 9. One way an Employee rebuts the counter-presumption with clear and convincing evidence is by asking his treating physician to offer an opinion on "whether or not further objectively measurable improvement is expected." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992). The 45 day provision in AS 23.30.395(28) merely signals "when that proof is necessary." *Id*.

In *Vetter*, the Alaska Supreme Court stated:

> 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. An award for compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness. (*Id*. at 266.)

*Vetter* further held where a claimant, through voluntary conduct unconnected with his or her injury, leaves the labor market, there is no compensable disability. Expanding on its ruling in *Vetter*, however, the Court, in *Cortay v. Silver Bay Logging,* 787 P.2d 103, 106 (Alaska 1990) noted the definition of "disability" in AS 23.30.395 says nothing about an employee's reasons for leaving work. The issue is whether the claimant is able to work despite his injury, not why he is no longer working.

Interpreting both *Vetter* and *Cortay*, the Alaska Workers' Compensation Appeals Commission, in *Strong v. Chugach Electric Assoc. Inc*., AWCAC Decision No. 128 (February 12, 2010), held where an employee's unemployment is because of his work injury, and his earning capacity is

impaired, he is entitled to compensation. *Strong* set the legal standard as "unemployed but willing to work and making reasonable efforts to return to work" when deciding if an unemployed injured worker's loss of earnings is due to a compensable disability or an otherwise non-compensable voluntary withdrawal from the work force. (*Id.* at 20).

> **8 AAC 45.082 Medical treatment.**
> . . . .
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> (f) If an injury occurs on or after July 1, 1988, and requires continuing and multiple treatments of a similar nature, the standards for payment for frequency of outpatient treatment for the injury will be as follows. Except as provided in (h) of this section, payment for a course of treatment for the injury may not exceed more than three treatments per week for the first month, two treatments per week for the second and third months, one treatment per week for the fourth and fifth months, and one treatment per month for the sixth through twelfth months. Upon request, and in accordance with AS 23.30.095(c), the board will, in its discretion, approve payment for more frequent treatments.
>
> (g) The board will, in its discretion, require the employer to pay for treatments that exceed the frequency standards in (f) of this section only if the board finds that
>
> (1) the written treatment plan was given to the employer and employee within 14 days after treatments began;
>
> (2) the treatments improved or are likely to improve the employee's conditions; and
>
> (3) a preponderance of the medical evidence supports a conclusion that the board's frequency standards are unreasonable considering the nature of the employee's injury. . . .

## ANALYSIS

### 1) Is Employee entitled to additional TTD?

Employer paid TTD benefits from May 16, 2017 to June 3, 2017. Employee contends he quit his job in May 2017 because Employer did not follow his work restrictions. Employee requests TTD benefits from June 4, 2017 and continuing. Employer contends Employee is not entitled to TTD from June 4, 2017 to the present because Employee reached medical stability in April 2017 and voluntarily removed himself from the job market.

The presumption of compensability applies to this issue. AS 23.30.120; *Meek*. Without regard to credibility, Employee attaches the presumption of compensability he is not medically stable with Dr. Bursell's recommendation of medical treatment and his testimony he continues to experience back pain and he is now pursuing full-time work. *Tolbert*; *Wolfer*.

Without regard to credibility, Employer rebuts the presumption of compensability with Dr. Schwartz's opinion stating Employee was medically stable as of May 10, 2017, had no physical restrictions because of the work injury and was able to return to work as an IT Specialist, and with Dr. Rivera's opinion stating Employee was medically stable January 22, 2017, has no physical restrictions and was able to return to work. *Wolfer*; *Runstrom*.

Because Employer rebutted the presumption of continuing TTD by raising the counter-presumption of medical stability, Employee must present clear and convincing evidence he was not medically stable from June 4, 2017 to the present. AS 23.30.395(28); *Lowe's*. Neither of Employee's physicians addressed medical stability after June 4, 2017. Dr. Gundelfinger last addressed medical stability on April 12, 2017 when he opined Employee was not medically stable. His records are not helpful in determining if Employee reached medical stability after June 3, 2014. AS 23.30.122; *Smith*. Dr. Bursell's medical reports do not contain an opinion regarding Employee's medical stability; in other words he did not address whether or not further objectively measureable improvement was expected. However, Dr. Bursell opined Employee needed more medical treatment on August 14, 2017 and again on April 11, 2018. His recommendation for more medical treatment implied he believed Employee was not yet medically stable. Dr. Bursell did not review Employee's medical record which included medical reports stating Employee's pain symptoms had improved 90 to 95 percent by May 4, 2017. Dr. Bursell relied on Employee's account of his past medical history and pain symptoms. There is no evidence Dr. Bursell was aware of Employee's past upper back pain in 2014 or the extensive nature of the chiropractic treatment Employee received from Dr. Gundelfinger from September 24, 2016 through May 4, 2017. Dr. Bursell's recommendation for additional medical treatment is not clear and convincing evidence Employee was not medically stable from June 4, 2017 to the present. *Id*. Therefore, Employee has not rebutted the presumption of medical stability.

Employer paid TTD May 16, 2017 through June 3, 2017. Employee contends he has been disabled since June 4, 2017 due to his work injury and is entitled to TTD. AS 23.30.185; AS 23.30.395(16). Employee last sought chiropractic treatment with Dr. Gundelfinger on May 4, 2017 and Employee's work restrictions included no repeat lifting or bending through May 29, 2017 and then Dr. Gundelfinger released Employee to his normal work duties after May 29, 2017. On May 15, 2017, Dr. Gundelfinger referenced his May 4, 2017 light duty restrictions when asked about Employee's work restrictions and stated Employee would follow up on or about June 5, 2017. Employer never followed up with Dr. Gundelfinger but sought treatment with Dr. Bursell. Employee cited Dr. Bursell's opinions to support his claim. However, Dr. Bursell's medical reports do not provide any physical restrictions and do not include an opinion as to whether Employee was able to return to work. There is no medical record restricting Employee from his normal work activities after Dr. Gundelfinger's May 4, 2017 restriction that ended on May 29, 2017 and the two SIME physicians and two EME physicians all released Employee to work with no restrictions. Employee failed to prove by a preponderance of the evidence he was disabled since June 4, 2017. *Saxton*.

Employee testified he terminated his employment in May 2017 because Employer was not following his work restrictions and was treating him badly because of his work restrictions. Employee must prove his reduction of earning capacity is impaired because of his work injury. *Strong*. Disability under the Act does not consider Employee's reasons for leaving work. *Cortray*. The issue is whether Employee was able to work despite his injury. *Id*. Employee testified his is looking for work. He is able to work despite his injury. While Employee testified he took the summer off to rest his back, he was released to work without restrictions on May 29, 2017 and there is no medical record recommending he take the summer off from work. Employee's claim for additional TTD will be denied.

**2) Is Employee entitled to past medical costs and continuing medical benefits?**

Employee requests medical benefits, including past medical costs incurred after Employer's May 19, 2017 controversion, and continuing medical treatment. AS 23.30.095(a). Employer

contends medical treatment after May 19, 2017 was not reasonable or necessary. The presumption of compensability applies to this issue. AS 23.30.120; *Meek*; *Sokolowski*.

Without regard to credibility, Employee raises the presumption with Dr. Bursell's August 14, 2017 opinion his upper back pain was secondary to his September 2016 work injury and he would likely benefit from a combination of physical and massage therapy and Dr. Bursell's November 1, 2018 statement linking his continued need for medical treatment to the September 2016 work injury. *McGahuey*; *Smallwood*; *Wolfer*; *Resler.*

Employer rebuts the presumption of compensability with Drs. Schwartz's and Rivera's opinions stating Employee's work injury resolved and additional treatment was unreasonable and unnecessary and Employee became medically stable as of May 10, 2017 and January 22, 2017, respectively, and continuing treatment would not relieve chronic debilitating pain. *Kramer*; *Huit*; *Tolbert*; *Norcon.*

Because Employer rebutted the presumption, Employee must prove all elements of his claim by a preponderance of the evidence. *Koons*. Employee must prove the medical treatment he received after May 19, 2017 was reasonable and necessary and continuing medical treatment is reasonable and necessary and indicated as the process of recovery may require. AS 23.30.095(a); *Hibdon*. At this stage, evidence is weighted, inferences are drawn from the evidence and credibility is determined. *Saxton.* Dr. Bursell is the only physician recommending additional medical treatment for Employee's work injury. He recommended additional medical treatment on August 14, 2017 and again on April 11, 2018. Four other physicians, including two EMEs and two SIMEs, opined Employee's work injury resolved and additional treatment was not reasonable nor necessary. Dr. Bursell is the only physician that did not review Employee's 2014 medical records documenting past upper back pain. He is also the only physician that did not review Dr. Gundelfinger's extensive chiropractic care from September 2016 through May 2017. Dr. Bursell relied on Employee's account of his past medical history and pain symptoms. There is no indication Dr. Bursell was aware Employee reported to Dr. Gundelfinger that his pain had resolved 90 to 95 percent by May 2017 after extensive chiropractic treatment. Dr. Bursell's medical opinion is given less weight. AS 23.30.122; *Smith*. Because Dr. Rivera

performed a records-review EME and did not examine Employee, his opinion is given less weight as well. *Id*.

The remaining medical opinions are from EME Dr. Schwartz and SIME physicians Drs. Levine and Charrette. All the physicians in the record diagnosed upper back pain. Both Drs. Schwartz and Levine opined Employee did not need medical treatment three months after the injury. However, Employee reported continuing improvement since the work injury in his low back and mid-back pain and sciatica December 2016 through May 2017 with continuing chiropractic care which contradicts both physician's opinions. On May 4, 2017, Dr. Gundelfinger stated Employee was in a subacute phase and Employee reported improvement of his low- and mid-back pain at 90 percent and sciatica at 95 percent. Employee received no additional medical treatment until his visit with Dr. Bursell on August 14, 2017, where he reported partial pain relief after chiropractic care. This report differs from the 90 and 95 percent improvement in his pain symptoms reported on May 4, 2017. Dr. Schwartz was not able to review Dr. Bursell's August 14, 2017 medical report medical evidence because his EME report occurred earlier. However, Dr. Charrette reviewed Dr. Bursell's August 14, 2017 medical report along with Dr. Gundelfinger's records. He opined Employee needed no further treatment for the work injury as of June 4, 2017, based upon Dr. Gundelfinger's last medical report. Dr. Charrette's report is given the most weight. AS 23.30.122; *Smith*; *Moore*.

On April 22, 2018, Employee reported his pain was the same as it was on August 14, 2017. Employee underwent physical and massage therapy on 16 dates from April 13, 2018 through June 5, 2018. Dr. Wen's July 2018 statement that Employee experienced no consistent progress in his upper back despite the therapy clearly supports the conclusion further physical and massage therapy was not reasonable nor necessary. The preponderance of the medical evidence shows additional medical treatment was not reasonable or necessary as of June 4, 2017, and no continuing medical treatment for the September 2016 work injury is indicated for the process of recovery.

Dr. Bursell recommended Employee continue with physical and massage therapy in November 2018 despite no progress in Employee's upper back pain in July 2018 and despite his own

opinion that Employee's small disc central disc protrusion at T9-10 was not related to Employee's upper back pain. No other physician recommended continuing medical treatment and no physician stated the continuing medical treatment fell within the realm of medically accepted options. *Hibdon*. The medical evidence establishes further objectively measurable improvement from the September 2016 work injury was not reasonably expected to result from additional medical care or treatment as of June 4, 2017. AS 23.30.395(28). Employee became medically stable on June 4, 2017. A claim for palliative medical care after medical stability requires a specific medical certification under AS 23.30.095(o). No physician has opined Employee has chronic debilitating pain, nor has a physician said Employee needs continuing treatment to enable him to return to work. The preponderance of the evidence shows palliative care is not reasonable or necessary.

Employee obtained massage therapy and physical therapy obtained on 18 dates from April 13 through November 30, 2018, over 12 months after Employee's September 2016 work injury. This exceeds the frequency standards under the Act which permits continuing and multiple treatments of a similar nature up to 12 months after the date of injury. AS 23.30.095(c); 8 AAC 45.082(f). An employer can be required to pay for treatments exceeding the frequency standards only if the written treatment plan was given to the employer and employee within 14 days after treatments began, the treatments improved or are likely to improve the employee's condition, and a preponderance of the medical evidence supports a conclusion that the frequency standards are unreasonable considering the nature of the employee's injury. 8 AAC 45.082(g). The treatment plan must include the objectives, modalities, frequency of treatments and reasons for the frequency of treatments. AS 23.30.095(c). None of the medical records from Dr. Bursell or Juneau Bone & Joint contain all four required objectives, modalities, frequency of treatments and reasons for the frequency of treatments. AS 23.30.095(c). There is no evidence Dr. Bursell ever gave Employee or Employer conforming treatment plans within 14 days after the treatments began. 8 AAC 45.082(g)(1). Finally, a preponderance of the medical evidence supports a conclusion that the frequency standards are reasonable considering the nature of Employee's injury, as no further treatment was reasonable or necessary as of June 4, 2017. Employee's request for past and continuing medical benefits will be denied.

**3) Was Employer's controversion unfair or frivolous?**

Employee seeks a finding that Employer unfairly or frivolously denied his right to benefits or his claim. AS 23.30.155(o). An unfair or frivolous controversion may be found if Employer controverted benefits without sufficient evidence. *Harp.* 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 filed three controversion notices. Employee did not specify which controversion notice unfairly or frivolously denied his right to benefits or his claim. On May 19, 2017 and November 13, 2017, Employer controverted Employee's right to continuing benefits and claim for benefits based upon Drs. Schwartz's and Rivera's EME reports. AS 23.30.155(a), (d). Dr. Rivera stated Employee became medically stable as of January 22, 2016 and no further treatment was reasonable or necessary and Employee had no physical restrictions as a direct result of September 2016 the work injury and was able to return to work. Dr. Schwartz stated Employee was medically stable as of May 10, 2017, the substantial cause of Employee's need for medical treatment was the underlying degenerative process, and Employee had no physical restrictions because of the September 2016 work injury and was able to return to work. Both physician's opinions are sufficient evidence to support the controversion. Had this issue gone to hearing on May 19, 2017 and November 13, 2017, and had this been the only evidence presented, Employee would not have been entitled to benefits. *Harp*. Drs. Schwartz's and Rivera's reports are responsible evidence when viewed without assessing credibility and are substantial evidence. *Ford*. Employer's May 19, 2017 and November 13, 2017 controversions were based on valid medial opinions and were not frivolous or unfair.

On August 24, 2018, Employer controverted Employee's right to continuing benefits based upon Drs. Schwartz's and Rivera's EME reports and Drs. Levine's and Charrette's SIME reports. AS 23.30.155(a), (d). Dr. Levine opined Employee was medically stable within three months after the work injury and additional medical treatment was not reasonable or necessary. Dr. Charrette opined Employee was medically stable as of June 4, 2018 and additional medical treatment was

not reasonable or necessary. Had this issue gone to hearing on August 24, 2018, and had this been the only evidence presented, Employee would not have been entitled to benefits. *Harp*. Drs. Levine's and Charrette's reports are responsible evidence when viewed without assessing credibility and are substantial evidence. *Ford*. Employer's August 24, 2018 controversion was based on valid medical opinions and were 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 is not entitled to additional TTD.
2) Employee is not entitled to past and continuing medical benefits.
3) Employer's controversion was not unfair or frivolous.

## ORDER

1) Employee's August 16, 2017 claim is denied.

Dated in Juneau, Alaska on March 7, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Charles Collins, Member

/s/
Bradley Austin, 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 Timmy W. Davis, employee / claimant v. State of Alaska, employer; and insurer / defendants; Case No. 201614364; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on March 7, 2019.

/s/
Dani Byers, Technician