ALASKA WORKERS' COMPENSATION BOARD

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

ELIZABETH RENO, Employee, Respondent, v. CITY OF KETCHIKAN, Employer, and ALASKA NATIONAL INSURANCE COMPANY, Insurer, Petitioners.	FINAL DECISION AND ORDER AWCB Case No. 201204450 AWCB Decision No. 19-0037 Filed with AWCB Juneau, Alaska On March 18, 2019

City of Ketchikan and Alaska National Insurance Company's (Employer) November 16, 2018 petition for an order determining whether Employee can return to her job at the time of injury and January 22, 2019 petition to strike medical records, opinions and testimony for an excessive change of physician were heard on February 5, 2019 in Juneau, Alaska, a date selected on December 12, 2018. A December 12, 2018 affidavit of readiness for hearing (ARH) gave rise to this hearing. Employee appeared telephonically, represented herself and testified. Attorney Martha Tansik appeared and represented Employer. Witness Mark Adams testified telephonically for Employer. The record closed at the hearing's conclusion on February 5, 2019. Oral orders were issued on several preliminary matters. This decision examines the oral orders issued on the preliminary matters and addresses Employer's petition on its merits. The record closed at the hearing's conclusion on February 5, 2019.

ISSUES

As a preliminary matter, Employee objects to Employer's physician flow chart supporting its arguments regarding Employee's physician was excessive. She contends Employer's flow chart is inaccurate and requests the flow chart be stricken from the record.

Employer contends the physician flow chart is helpful to understand Employer's arguments Employee excessively changed of physicians. It contends the flow chart accurately illustrates its arguments. An oral order issued overruling Employee's objection.

1) Was the oral order overruling Employee's objection to Employer's physician flow chart correct?

As a preliminary matter, Employer objected to consideration of PA-C Schlecht's January 15, 2019 letter. It contends the January 15, 2019 letter is hearsay and was prepared in anticipation of litigation.

Employee contends PA-C Schlecht's January 15, 2019 letter is a referral. She requests an order allowing the letter to be considered.

2) Was the oral order sustaining Employer's objection to PA-C Schlecht's January 15, 2019 letter correct?

As a preliminary matter, Employer contended the messages between Employee and Dr. Oskouian's office, an October 22, 2018 chart note, and an October 23 2018 letter are not admissible as a business record over its objection because Employee failed to lay a foundation as required by Evidence Rule 803(6). It contended the messages were not an actual medical visit or patient examination, but rather was solely made for litigation purposes at Employee's request.

Employee contended messages between her and Dr. Oskouian's office and a chart note from dated October 22, 2018 from Dr. Oskouian are admissible over Employer's objection and request for cross-examination. She contended the messages were admissible as a "business record" exception to the hearsay rule under Alaska Rule of Evidence 803(6).

3) Was the oral order excluding messages between Employee and Dr. Oskouian's office and a chart note and letter from Dr. Oskouian from consideration correct?

As a preliminary matter, Employer contends Employee's change of treating physician to Tammy Earnest, FNP-C, constitutes an excessive physician change. It contends FNP-C Earnest's medical records, opinions and testimony cannot be considered for any purpose under AS 23.30.095(a) and 8 AAC 45.082(c).

Employee contends her change physician to FNP-C Earnest does not constitute an excessive change in physician because her treating physician, Dr. Brown, refused to treat her work injury. She requests an order allowing consideration of FNP-C Earnest's medical records, opinions and testimony.

4) Was the oral order excluding FNP-C Earnest's medical records, opinions and testimony from consideration for Employee's excessive change of physician correct?

Employer contends FNP-C Earnest's subpoena should be quashed and her testimony must be excluded from consideration because Employee excessively changed physicians.

Employee contends FNP-C Earnest's testimony should not be excluded from consideration because she did not make an excessive physician change. She contends Employer's request should be denied.

5) Was the oral order granting Employer's request to quash FNP-C Earnest's subpoena correct?

Employer contends Employee is disabled. It contends it is reasonable for Employer to rely on Dr. McCormack's physical restrictions. Employer contends Employee cannot safely return to work because it cannot accommodate the work restrictions placed by Dr. McCormack. It contends Employee is disabled from her job and is entitled to a reemployment eligibility evaluation. Employer requests an order determining Employee cannot return to her job because of her physical restrictions. Alternatively, it requests an order that it is reasonable for Employer to rely on Dr. McCormack's opinion for Employee's physical restrictions.

Employee contends she is not disabled. She contends she can safely return to work for Employer. Employee contends Employer accommodated her work restrictions before she was placed on temporary total disability (TTD) and she was physically able to perform her work. She requests an order determining she can return to her job.

6) Should Employer's November 16, 2018 petition requesting an order determining whether Employee can return to her job be granted?

FINDINGS OF FACT

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

1) On June 14, 2007, John Bursell, M.D., evaluated Employee's right shoulder pain which began on May 18, 2007 when she lifted many signs, delineators and stands while working for Employer. The next day she woke up with significant right shoulder pain and right hand numbness. Dr. Bursell referred Employee to physical therapy. (Bursell, Medical Report, June 14, 2007).

2) On August 2, 2007, Employee followed up with Dr. Bursell for her right shoulder. She reported her right shoulder pain resolved and she had full shoulder function after treatment with physical therapy. (Bursell, Chart Note, August 2, 2007).

3) On March 17, 2011, Employee was evaluated for left knee and right shoulder pain which began on March 20, 2011 at work. She was standing on the back of a truck lifting lane delineators with a 16 pound base from the truck to the road while doing traffic control. Employee had sudden right shoulder pain while lifting but was able to continue using her arm. She has had continuing pain since. X-rays revealed mild degenerative changes at the acromioclavicular joint, interpreted as normal for Employee's age. Employee was assessed with right shoulder arthralgia. She elected to try an initial course of limited activities and conservative care and requested a light duty work restriction. (Craig Hankins, M.D., Medical Report, March 17, 2011).

4) On May 4, 2011, Employee followed up on her right shoulder. She had been going back to work at full duty and taking minimal time off. After heavy lifting at work, her shoulder started hurting severely. Employee took off work for two days but was back at work and reported it was getting better. She reported some numbness in the fingers of her right hand. Employee was

diagnosed with right shoulder subacromial space bursitis/early rotator cuff tendinitis. She was restricted to light duty work. (Daniel McCallum, M.D., Medical Report, May 4, 2011).

5) On May 12, 2011, Employee reported her right shoulder was getting better and physical therapy was helpful. She was still working on "somewhat light duty." Ibuprofen helped her get through the day. Employee was released to work and discharged from care. (McCallum Chart Note, May 12, 2011).

6) On March 27, 2012, Employee injured her right shoulder, arm and hand handling traffic control equipment while working as a warehouse worker. (Report of Occupational Injury or Illness, March 29, 2012).

7) On April 9, 2012, Employee visited David Brown, M.D., at PeaceHealth in Ketchikan, Alaska, and reported right shoulder and neck pain. Employee described,

> a history of recurrent pain at the right trapezius region of her shoulder, which recurs with repetitive manual labor and weightbearing [sp] such as required with holding a flag during road crew work, and with repetitive lifting during the activities required of her job.

Dr. Brown noted her most recent date of injury was March 29, 2012. He recommended Employee follow up with a cervical spine specialist because he believed her symptoms were due to cervical spine and brachial nexus irritation rather than shoulder difficulties. (Brown Medical Report, April 9, 2012).

8) On April 18, 2012, Dr. Brown discussed referring Employee to a spine surgeon after x-rays of Employee's cervical spine revealed moderate to significant degenerative changes primarily at the C4, C5 and C6 levels. Employee was referred for an MRI of her cervical spine. (Brown Progress Report, April 18, 2012; X-Ray Report, April 18, 2012).

9) On April 25, 2012, an MRI of Employee's cervical spine showed moderately severe degenerative disc disease primarily from C4-6 and to a lesser extent at C6-7, a C4-5 disc protrusion resulting in a severe central canal stenosis with marked cord deformation, and a C6-7 disc protrusion resulting in moderate – severe asymmetric central canal stenosis. (MRI Report, April 25, 2012).

10) On May 29, 2012, upon referral from Dr. Brown, Dr. Bursell evaluated Employee's neck pain. Employee reported she has problems with neck pain since 2007 when she was lifting and carrying heavy objects while doing traffic control at work. She reinjured her neck on March 27, 2012 again at work doing traffic control. Employee felt right-sided neck pain that radiated down

her arm and right arm numbness at night. Dr. Bursell found no neurological deficits on physical examination. He recommended Employee obtain a neurosurgical consultation to determine whether a discectomy at the C4-5 level is indicated to for cord decompression. He recommended Employee receive a surgical consult with Charles Nussbaum, M.D. (Bursell Medical Report, May 29, 2012).

11) On June 11, 2012, Dr. Bursell wrote a letter "To Whom It May Concern" referring Employee to the Swedish Neuroscience Institute for a neurosurgical neck consultation. (Bursell letter, June 11, 2012).

12) On June 19, 2012, Dr. Brown referred Employee to John Hsiang, M.D., for cervical spine consultation and treatment. (Brown Patient Evaluation Request Form, June 19, 2012).

13) On June 21, 2012, Employee designated Dr. Brown as her attending physician for the March 27, 2012 work injury. (Designate Attending Physician, June 21, 2012).

14) On June 29, 2012, Employer controverted TTD and temporary partial disability because it received no medical evidence to support disability beyond the statutory three day waiting period. (Controversion Notice, June 29, 2012).

15) On July 5, 2012, Employee saw Dr. Hsiang at the Swedish Medical Center. Dr. Hsiang noted a referral from Dr. Bursell. He recommended a C5 corpectomy and C4-6 fusion because Employee had one level of cord compression and another with severe foraminal stenosis. (Hsiang Medical Report, July 5, 2012).

16) On July 23, 2012, Employee saw Karl Goler, M.D., for an employer's medical evaluation (EME). He concluded work was not the substantial cause of Employee's preexisting cervical degenerative disc disease, preexisting C4-5 osteophyte causing significant central narrowing, preexisting C5-6 right sided small disc osteophyte complex causing mild spinal canal narrowing, mild right neural foraminal stenosis, or preexisting C6-7 degenerative change without compression. He opined the non-work related C4-5 compression is the substantial cause of Employee's diffuse hyperreflexia. Dr. Goler did not believe the March 27, 2012 work injury was the most likely cause of Employee's diagnosed conditions. He noted, "This condition has been going on and gradually getting worse since 2007. . . ." Dr. Goler stated Employee was not medially stable and the anterior cervical discectomy and fusion at C4-5 and C5-6 is reasonable and necessary. (Goler EME Report, July 23, 2012).

17) On August 8, 2012, R. Clark Davis, D.C., examined Employee's neck and bilateral shoulders. On the patient information paperwork she filled out, she indicated Dr. Kindred referred her and her C4, 5 and 6 spinal compression occurred on March 27, 2012. Employee stated pain radiated down her right upper extremity and to her right lateral shoulder and her right arm sometimes felt numb or tingly. It started on March 27, 2012 after picking up heavy traffic control equipment. She reported prior occupational onsets of similar symptoms with the same employer performing the same activities in May 2007, October 2010, March 2011, and May 2011 for Employer. Employee continued to work in light duty status. She did not want spine surgery and opted for a trial of chiropractic care with physiotherapy and home rehabilitative exercises. Dr. Davis treated Employee with a chiropractic adjustment and brief manual cervical traction. (Davis Progress Report, August 8, 2012).

18) On August 8, 2012, Employee signed a document stating she changed physicians to Dr. Davis. (Employee Change Physician Document, August 8, 2012).

19) Employee treated with Dr. Davis on August 6, 8, 9, 13, 15, 16, 20, 22, and 27, 2012. (Davis Handwritten Chart Notes, August 6 through 27, 2012).

20) On September 4, 2012, Dr. Davis referred Employee for surgical consultation due to insufficient progress. Conservative chiropractic and physiotherapy had not improved her cervical spine condition. Employee was likely to opt for rescheduling a surgery appointment at Swedish Medical Center. (Davis Progress Report, September 4, 2012).

21) On October 8, 2012, Employee saw Dr. Hsiang to discuss the cervical fusion surgery scheduled for the next day. Dr. Hsiang noted Dr. Bursell was the referring physician. Dr. Hsiang explained the surgery to Employee and its risks. (Hsiang Chart Note, October 8, 2012).

22) On October 9, 2012, Employee underwent cervical fusion surgery. Dr. Hsiang performed a C4-6 anterior cervical discectomy and fusion and C5 corpectomy. (Hsiang Operative Report, October 9, 2012).

23) On November 16, 2012 Employee saw Linda Lai, PA-C, at Swedish Medical Center for a post-operation visit. She reported her symptoms are better than they were before the surgery but her neck was very stiff. PA-C Lai recommended physical therapy and massage. Employee was released to light duty work for two months, then full duty after. PA-C Lai noted she will see Employee on an as needed basis. (Lai PA-C Chart Note, November 16, 2012).

24) Employee underwent physical therapy at Optimum Health and Wellness Physical Therapy on November 28, 30, December 4, 11, 13, 18, 21, 22, 2012 and January 3, 8, and 18, 2013. (Optimum Health and Wellness Physical Therapy Progress Notes, November 28, 2012 through January 18, 2013).

25) On June 5, 2013, Employee underwent a physical capacity evaluation (PCE) at Virginia Mason Medical Center upon referral by Dr. Hsiang to determine if she can perform the physical requirements for her job. Employee demonstrated light-medium to medium physical capacity, meeting the demands of her job. (Ester Sarantopoulos OT, Virginia Mason Medical Center, PCE Report, June 5, 2013).

26) On February 17, 2014, Dr. Brown wrote a letter addressed "To Whom it May Concern" stating,

> [Employee] was evaluated in our office for a work related injury to the neck and right shoulder. Following our evaluation for her shoulder complaints, [Employee] was referred for her cervical spine maladies. She has since undergone a surgical procedure for her neck complaints – performed in Seattle, Washington.
>
> In reference to her current condition and disability – she should be referred for formal evaluation as requested by her insurance company. Although such evaluations are not performed in our office in Ketchikan, we can suggest referral to Dr. John Bursell in Juneau, Alaska. (Brown Letter, February 17, 2014).

27) On March 18, 2014, Dr. Bursell assessed Employee with a five percent impairment of the whole person. (Bursell Chart Note, March 18, 2014).

28) On October 26, 2016, Employee's cervical spine MRI showed mild canal narrowing at C4-6, C6-7 and C7-T11, moderate to severe foraminal stenosis on the left at C4-7, and moderate foraminal narrowing on the right at C4-5 and C6-7. (MRI Report, October 26, 2017).

29) On October 19, 2016, Employee reported to FNP-C Earnest worsening constant right upper extremity numbness, tingling, fingertip sensation and neck pain for the last three months. Employee also noticed decreased strength in her right upper extremity as well as decreased grip strength. She was unable to hold a traffic sign with her right upper extremity because she experienced numbness and tingling down her arm and to her fingertips when her arm was extended. FNP-C Earnest ordered a cervical spine MRI. Employee was restricted to sedentary work until released pending results of MRI. (Earnest Medical Report, October 19, 2016). FNP-C Earnest released Employee to return to work with the following restrictions: limit standing

and walking, sitting and driving 4-8 hours; no traffic control; avoid activates with right arm that aggravate pain or paresthesia; limit climbing and no reaching overhead or crawling. (Earnest Return to Work Recommendation, October 19, 2016).

30) On November 30, 2016, FNP-C Earnest referred Employee to Dr. Oskouian. (Earnest Referral, November 30, 2016).

31) On December 19, 2016, a CT of Employee's cervical spine revealed an unremarkable fusion C4-6, moderate degenerative disc disease most pronounced at C6-7, and mild bilateral facet degenerative joint disease. (CT Report, December 19, 2016).

32) On February 2, 2017, Michele Arnold, M.D., at Swedish performed an electrodiagnostic study. She thanked Dr. Oskouian for referring Employee to her. Dr. Arnold diagnosed Employee with right hemihypesthesia and recurrent cervical myelopathy. She stated, "Given her clinical exam, I am most concerned about recurrent cervical myelopathy with resultant right hemibody sensory complaints. . . . I suspect there may be some component of adjacent level disease contributing to recurrent myelopathy." Dr. Arnold released Employee to full duty work with no restrictions. (Arnold Examination Report, February 2, 2017).

33) On February 2, 2017, Employee was released to work with no restrictions on a return to work form and the address listed on the signature portion of the form is for the Swedish Neuroscience Institute. (Andrea C. Pertuso Attending Physician's Return to Work Recommendations, February 2, 2017; Observation).

34) On February 2, 2017, Employee saw Dr. Oskouian, at Swedish Medical Center. Dr. Oskouian thanked FNP-C Earnest for the consultation request. After reviewing the MRI and examining Employee, he diagnosed adjacent level collapse. Dr. Oskouian explained, "wear and tear occurring above and below a fusion is likely to happen given the active lifestyle she leads." He concluded the adjacent level collapse caused foraminal stenosis and nerve irritation. Dr. Oskouian referred Employee to physical therapy with cervical traction and recommended she follow up in one year for a cervical CT. (Oskouian Medical Report, February 2, 2017).

35) On February 16, 2017, Employee underwent physical therapy at Optimum Health and Wellness Physical Therapy on February 16, 22, 24, 28, March 14, 16, 21, 23, 28, 30, April 18, 20, 25, May 2, 16, and 23, 2017. (Optimum Health and Wellness Physical Therapy Progress Notes, February 16, through May 23, 2017).

36) On March 13, 2017, Employee designated Dr. Oskouian as her attending physician for the March 27, 2017 work injury. (Employee Designation, March 13, 2017).

37) On April 19, 2017, Dr. Goler examined Employee for a second EME. Employee described constant neck pain going into the right trapezius muscle and upper arm pain and proximal forearm pain similar to the pain in her neck which decreased down the arm until her hand, where it felt as if she was wearing a glove. She reported heavy lifting makes her pain worse as does holding her arm in a flexed position. Employer accommodated her self-imposed weight lifting limit. Dr. Goler diagnosed degenerative cervical disc disease, unrelated to any work activity, neck and right arm pain, administratively accepted as being related to work activity and anterior cervical corpectomy and fusion from C4-6 administratively accepted as related to work activity. After reviewing the post- and pre-operative films, Dr. Goler opined adjacent segment syndrome was not present but if it were, it would be work-related because Employer administratively accepted the cervical fusion. He opined Employee reached medical stability and needs no further treatment other than continuing exercises and traction at home. Dr. Goler concurred with Dr. Bursell's five percent PPI rating. Dr. Goler stated,

> There is no objective basis for limitations on [Employee]'s work activities, related to the conditions accepted as related to the work injury.
>
> [Employee] seems to be functioning well with her self-imposed work limitation, but there is no objective reason to impose work restrictions related to the conditions administratively accepted as related to the March 27, 2017 work injury. (Goler EME Report, April 19, 2017).

38) Employee sought physical therapy at Optimum Health and Wellness Physical Therapy on April 20, 25, May 2, 16, and May 23, 2017. (Optimum Health and Wellness Physical Therapy, Progress Notes, April 20 through May 23, 2017).

39) On May 22, 2017, Bobbi Holsman, a claims adjuster, informed Employee, "We will cover the temporary physical therapy up until the 4/19/17 IME but nothing after. . . ." (Holsman Email, May 22, 2017).

40) On May 24, 2017, Ms. Holsman informed Employee, "Physical therapy sought for this injury will be covered up until 5/19 when we received the IME report and sent a copy to you. Any beyond that date will not be covered . . . . We did not receive his report until 5/19 and believe it's fair to cover physical therapy up until the date you had a copy of the report. . . ." (Holsman Email, May 24, 2017).

41) On May 24, 2017, Employee emailed Ms. Holsman asking to change a few things in the EME report, including (1) I have not had any increased discomfort in 2000; (2) It was my first time seeing Dr. Oskouian; (3) Physical therapy and traction was recommended for 20 sessions. A follow-up appointment was recommended in one year. (Employee Email, May 24, 2017).

42) On May 26, 2017, Employer denied further medical treatment as of May 19, 2017 based upon Dr. Goler's April 17, 2017 EME report. (Controversion Notice, May 26, 2017).

43) On December 21, 2017, Employee complained of right elbow pain which began on December 15, 2017 with repetitive lifting and load of heavy trash and tires while working. Daniel P. Schlecht, PA-C at Peace Health, recommended the following limitations for Employee's December 15, 2017 right elbow overuse injury: light work and Employee may occasionally climb, reach overhead and crawl. (Schlecht Medical Report, December 21, 2017; Schlecht Return to Work Recommendation, December 21, 2017).

44) On January 4, 2018, PA-C Schlecht released Employee to return to work with no restrictions for her December 15, 2017 right elbow injury. (Schlecht Return to Work Recommendation, January 4, 2018).

45) On February 15, 2018, Employee filed a claim for workers' compensation benefits seeking medical costs, transportation costs and claiming unfair or frivolous controversion for "adjacent level collapse stemming from anterior cervical fusion surgery" for the March 27, 2012 work injury. (Claim for Workers' Compensation Benefits, February 15, 2018).

46) On February 21, 2018, a claims assistant from Alaska National Insurance Company faxed Dr. Oskouian a letter asking him to review Dr. Goler's attached April 19, 2017 EME report. (Fax, April 21, 2018).

47) On February 23, 2018, Dr. Oskouian faxed an "Injury & Claims Policy" back to Alaska National Insurance Company. The policy states,

> Please note the primary function of the physicians at this practice is to see patients for neurosurgical evaluations of spinal conditions that may or may not require surgical intervention. This includes conditions that might possibly be work-related as well as other injures or accidents related to the same.
>
> The surgeons do not have an opinion on a more probable than not basis as it relates to any of the conditions under your claim. Specifically, they do not have an opinion about the cause and effect of the injury made under this claim. Please defer these questions and request for statements to the physician managing your claim. (Fax, February 23, 2018).

48) On March 6, 2018, Employer answered and denied Employee's claim. (Answer, March 6, 2018).

49) On March 15, 2018, Employer denied medical costs, transportation costs, and unfair and frivolous controversion based upon Dr. Goler's EME report. (Controversion Notice, March 15, 2018).

50) On June 11, 2018, Bruce McCormack, M.D., a neurosurgeon, examined Employee for a Second Independent Medical Evaluation (SIME). Employee told Dr. McCormack she was injured setting up and taking down traffic control stops for three work days in a row and estimated there was cumulative lifting up to 20,000 pounds. She was disinclined towards surgery but she got worse. In 2013, the city purchased a new flatbed truck and modified the bed to make a custom flagger vehicle because of her and other coworkers' injuries. In May 2016, Employee began to have more right-hand numbness and neck and right shoulder discomfort. It felt like a plastic glove was on the right hand since surgery and it seemed to get worse in 2016. Employee stopped doing traffic control September 2016 through September 2017. She went back to traffic control from "June/July 2017" until three months ago. Employee told coworkers she was not going to do traffic control anymore; it was too painful. The city purchased two automatic flagger units in 2016 which weigh 70 pounds and must be removed from the trailer and set up. Employee was working and doing all aspects of her job except traffic control setup and breakdown. She also is not doing on-call for power outages on weekends and at night because they are all typically high wind situations. Employee can lift and carry heavy objects but gets extra discomfort. The most strenuous activity she can do is very heavy labor but questions whether it is good for her. Employee has no difficulty lifting at chest level or reaching overhead. She can push and pull heavy objects but has some difficult with gripping, grasping, holding and manipulating and repetitive motions such as "working on the computer that involves prolonged sitting." Dr. McCormack reviewed photos showing, a woman with a stop/slow sign, a warehouse with several white utility trucks parked in front, racks of equipment, including pipes, fittings, electrical wire coils, an office with cabinets, heavy wire spools and corridors of boxes with instruments, boxes of bolts, and traffic control equipment. When asked to list all of the causes of Employee's disability or need for treatment, Dr. McCormack listed:

> Symptomatic cervical stenosis dating probably back to 2007 when she saw Dr. Burcell [sic] and treated with physical therapy in August 2010. Aging and genetics are factors in initial development.

> Aggravation of pre-existing cervical stenosis condition with work activities on 3/27/12. Myelopathic symptoms. This led to MRI and C4-C6 anterior fusion.
>
> Adjacent segment breakdown at C6-7 with recurrent symptoms in 2016 - current. Adjacent segment breakdown is due to index fusion surgery, cumulative wear and tear due to duration of time from index surgery to present and physical activities.

He opined the March 27, 2012 work injury is the substantial cause of Employee's disability and need for medical treatment. Employee's fusion surgery "fundamentally and irreversibly altered the biomechanics of her neck" which "beget wear and tear at the adjacent C6-7 level for which she is currently symptomatic." Employee reached medical stability in July 2017. Employee's current symptoms do not warrant surgery but do warrant activity restrictions. Dr. McCormick opined Employee is not able to return to work as a warehouse worker without any limitations or restrictions at this time because she has problems with setting up and manning a traffic control stop. He recommended no high wind conditions, no overhead lifting and no lifting greater than 25 pounds. Dr. McCormack assessed a 13 percent PPI rating. Employee listed job duties not listed in detail in her job description, including: lifting, carrying and moving 55 to 63 pounds of bolts and washers, coils of wire and boxes of galvanized steel power-line materials averaging 35 to 57 pounds, thousands of feet of heavy, awkward ten foot sticks of PVC conduit two to six inches in diameter, 50 pounds of ice melt, and six foot by six foot galvanized steel snow flake decorations; traffic control which entails holding 24 foot by 24 foot STOP/SLOW sign in high winds for hours; sweeping and vacuuming warehouse floors; shoveling snow, dirt, and gravel; driving dump trucks and other vehicles with "hard springs" for heavy loads; and operating older forklifts with post design blocking front views requiring her to lean and crane her neck and upper body. She asked if any of those job duties contributed to her adjacent level collapse and Dr. McCormack answered, "Yes." When Employee asked, "What is the standard medical treatment for adjacent level collapse" Dr. McCormack responded, "Activity modification. When and if this fails, therapy, shots and surgery in that order." (McCormack SIME Report, June 11, 2018).

51) On August 6, 2018, Dr. McCormack issued an addendum SIME report in response to a July 17, 2018 letter from a workers' compensation officer. He opined the causes for Employee's medical treatment included underlying cervical disc disease, spondylosis and stenosis; the March 27, 2012 work injury; and symptomatic adjacent segment disease which presented in May 2016. Dr. McCormack apportioned 60 percent of causation to the job tasks and 40 percent to

underlying degenerative changes, "Absent the arduous nature of her work, I cannot say when and if she would have had cervical spine surgery." While there is "a pretty substantial stenosis" on her April 19, 2012 MRI scan,

> [W]ith persons who are sedentary, this may be asymptomatic for years. Spontaneous fusion can occur with disc disease and stenotic symptoms completely resolve. There is a concept of dynamic compression, i.e. her anatomy in combination with neck movement or heavy labor aggravated nerve symptoms. . . . The work injury caused her to have neck surgery at the time she did. With regard to new onset symptoms in 2016, this is apportioned 100 percent as a sequelae of the prior work injury.

Dr. McCormack saw evidence of adjacent level collapse in Employee's October 26, 2016 MRI which showed progression of adjacent level collapse compared to the earlier study on April 19, 2012. When asked whether a cervical fusion at additional levels is reasonable and necessary for the process of recovery from the March 27, 2012 injury and within the realm of medically accepted medical practice to treat it, Dr. McCormack responded,

> She may well require surgery for adjacent segment disease. The incidence is about 25 percent of ten years. She is not six years post fusion and has symptoms that limit work capacity. If she does have additional fusion for adjacent segment disease, it would likely help her pain but cause additional functional limitations.

He stated,

> [Employee] is able to perform the vast majority of her job duties, but some are problematic. Almost all of the tasks in the warehouse are doable. She has a lot of symptoms with traffic control stops[,] as do other employees. There have been attempts to ameliorate this by having automatic flagger units in 2016. I believe she should have restrictions on the setting up and bringing down the traffic control stops or assistance with this. (McCormack Addendum SIME Report, August 6, 2018).

52) On August 27, 2018, Marie Miller, Employer's Human Resources Manager, wrote Employee a letter stating:

> Although Dr. McCormack stated that you are able to perform the vast majority of your job duties, he clearly states in his June 30, 2018 report that you cannot lift over 25 pounds and that you cannot lift over your head and that you should self-limit activities at traffic control stops, particularly no high wind situations.
>
> A meeting was held with Andrew Donato, Electric Division Manager, Marie Miller, Human Resources Manager, and Jason Alderson, Safety Coordinator to discuss the limitations that were placed on you by Dr. McCormack. It was

> determined that the Electric Division could not accommodate the lifting restrictions of no more than 25 pounds and no lifting overhead.
>
> [Employer] will be placing you on workers compensation effective immediately. . . . (Miller Letter, August 27, 2018).

53) On September 7, 2018, Employer withdrew its controversion notices dated May 26, 2017 and May 30, 2017, partially withdrew its controversion notice dated March 6, 2018 and it continued to deny unfair or frivolous controversion. (Withdrawal of Controversion Notice, September 7, 2018)

54) On October 12, 2018, a CT of Employee's cervical spine showed progressive foraminal narrowing at C4-5 and C5-6, stable lack of osseous fusion between C4 and C5 anteriorly, and unchanged mild bilateral foraminal narrowing and marginal spondylosis at C6-7 when compared to the December 19, 2016 CT. Dr. Oskouian ordered the CT scan. (CT Report, October 12, 2018).

55) On October 16, 2018, Employee contacted Dr. Oskouian through a message on MyChart, a website patients may use to contact their participating provider. The message stated,

> Dear Dr. Oskouian -
>
> I am hoping that we can correspond via MyChart if possible. This is a follow-up cervical CT to see how the fusion in my neck is doing since our last appointment back in February 2017. Living in Alaska it's more time & money to come to Seattle. If this isn't a possibly [sic], please let me know as soon as possible so that I can make all the arrangements needed to travel to your office. There is an appointment scheduled for November 1st in case this is required.
>
> I am feeling good & have been doing the daily exercises the physical therapist taught me last year during our sessions. There's been no change in the sensations reported in the past. I'm glad for this follow-up appointment because I've been cautious of some activities. Choosing not to do them out of concern that they might be too much. I'd like to as you [sic] professional recommendation on the short list below.
> Can I walk for exercise in my neighborhood while using 5-10 pound to tone my arms?
> Can I ride on my Husband's motorcycle that has tremendous vibration?
> Can I start jogging or running? Riding a bicycle?
> Can I hike with a top of the line suspension pack? What would be the maximum weight limit?

> I've wanted to participate in self-defense classes. But that means getting tossed around, grabbed by you [sic] neck & forced down onto the floor mat as part of the training. Can I do something like this?
> Can I go out in the boat on rough seas? How about calm seas?
>
> Christmas is coming up. Can I start putting up the lights along the house eaves? Or is my Husband going to need to grumble every year?
>
> Can I shovel snow, gravel, etc?
>
> My Husband is a construction contractor. Can I at times help him with his jobs/projects? This might be lifting, carrying & handling heavy material. Using hand tools & saws. Or just driving dump truck or a forklift.
>
> Can I lift my 70 pound dog up on the vet's examination table?
>
> Can I start playing tennis, basketball or volleyball?
>
> I just got the report & copy of the CT. Looks like not much has changed above & below the fusion. But there might be slight changes at the fusion site. Please could you tell me what might be happening & if it needs to be monitored? My place of employment has a return to work form that's required. Please could you fill it out & sign it? (Employee Message, October 16, 2018).

56) On October 17, 2018, Angie Glenn, RN, at Dr. Oskouian's office replied by message that she would print out Employee's message for Dr. Oskouian to review and request a copy of Employee's CT for him to review. (Glenn Message, October 17, 2018).

57) On October 22, 2018, RN Glenn messaged Employee on MyChart stating,

> We received your cervical CT scan and Dr. Oskouian took a look and he says your spine looks good. I also gave him a copy of the questions you sent on MyChart. He says you can do any activity that you want to and that there are no restrictions. . . . We can provide you with a letter stating that you have no activity restrictions, but paperwork for return to work this far out from surgery should be completed by your primary care provider or attending on your L&I claim. . . . (Glenn Message, October 22, 2018).

58) On October 22, 2018, RN Glenn stated Dr. Oskouian reviewed Employee's cervical CT scan and, "The imaging looks good and she does not have any restrictions at this time." (Glenn Chart Note, October 22, 2018).

59) On October 23, 2018, RN Glenn and Dr. Oskouian wrote a letter "To Whom It May Concern" stating, "This letter is on behalf of [Employee] who has been under the care of Dr. Rod Oskouian of Swedish Neuroscience Specialists. Based on review of recent imaging, the patient

is cleared to return to work and daily activities without restrictions." (Glenn letter, October 23, 2018).

60) On October 25, 2018, Employee had not current neck or upper extremity complaints. "Per the recommendation of Dr. Oskouian, spine specialist, she is released without restrictions. (Earnest Chart Note, October 25, 2018). FNP-C Earnest recommended Employee return to work with no limitations on October 25, 2018. (Earnest Return to Work Recommendation, October 25, 2018).

61) On October 29, 2018, Employer filed a medical summary listing and attaching FNP-C Earnest's October 25, 2018 return to work recommendation as a chart note and the October 17 and 22, 2018 messages between Employee and Dr. Oskouian's office as an October 24, 2018 chart note. (Medical Summary, October 29, 2018).

62) On October 29, 2018, Employer requested cross-examination of FNP-C Earnest for an October 25, 2018 medical report and Dr. Oskouian for an October 24, 2018 medical report, both filed on the October 29, 2018 medical summary. (Request for Cross-Examination, October 29, 2018).

63) On November 30, 2016, FNP-C Earnest referred Employee to Swedish Neuroscience, Dr. Oskouian for increasing chronic neck pain and increasing right upper extremity paresthesias, initial neck injury in 2008, and 2012 C4-6 fusion. (Earnest Request for Consultation, November 30, 2016).

64) On November 16, 2018, Employer requested "a determination about whether Employee can return to the job at the time of injury." Employer stated the SIME report indicates Employee cannot return to her job at the time of injury but Employee believes she can. Employer relied on the SIME report and placed Employee on TTD. It did "not wish to place Employee in a position where she will be injured." (Petition, November 16, 2018).

65) On December 4, 2018, Employee answered Employer's November 16, 2018 petition. Employee contended Drs. Bursell, Hsiang, Goler, Arnold, and Oskouian and FNP-C Earnest concluded she could return to work without restrictions. (Answer, December 4, 2018).

66) On December 12, 2018, Employer requested a hearing on its November 16, 2018 petition. (ARH, December 12, 2018).

67) On December 12, 2018, the parties agreed to an oral hearing on February 5, 2019 on Employer's November 16, 2018 petition. The board designee set the deadline to submit

evidence for hearing on January 16, 2019. (Prehearing Conference Summary, December 12, 2018).

68) On January 7, 2019, Employee filed a medical summary. It listed and attached Dr. Oskouian's October 22, 2018 chart note. (Medical Summary, January 7, 2019).

69) On January 10, 2019, Employer requested cross-examination of Dr. Oskouian for an October 22, 2018 medical report filed on the January 7, 2019 medical summary. (Request for Cross-Examination, January 10, 2019).

70) On January 11, 2019, Employee filed a blank "Attending Physician's Return to Work Recommendations" form with the claim administrators name, address and telephone number at the top, the August 27, 2018 letter from Employer placing her on workers' compensation, and an August 29, 2017 letter informing Employee she was placed on leave under the Family Medical Leave Act (FMLA). (Notice of Intent to Rely, January 11, 2019).

71) On January 14, 2014, Employee filed several pictures and documents and described them as follows on one Notice of Intent to Rely:

> Picture of truck that was purchased in 2014 & modified to accommodate traffic control equipment
> Picture of myself holding a 24" x 24" STOP/SLOW paddle
> Copy of 2018-2019 State of Alaska traffic control permit
> Picture of automated flagged units purchased in 2016 to be used in high winds & State permit
> 2 pictures of racks purchased 2018 for easy handling & proper storage of Christmas decoration
> Picture of my 30 years of service with [Employer] presented July 1, 2018. (January 14, 2019, Notice of Intent to Rely, January 14, 2014).

72) On January 14, 2019, Employee filed two pictures on a second Notice of Intent to Rely form described as: "Picture of custom built PVC conduit rack made for easy loading & storage" and "Picture of payout reel on service truck." (Notice of Intent to Rely, January 14, 2019).

73) On January 14, 2019, Employee filed an appreciation letter from City Manager, performance evaluations, and a memorandum on her job performance. (Notice of Intent to Rely, January 14, 2019).

74) On January 14, 2019, Employee filed a photocopy of page 36 of the *Guides to the Evaluation of Permanent Impairment, Sixth Edition, Clarifications and Corrections*, a document titled Warehouse/Laborer Position Description, and a document titled Warehouse Workers Position Description/Approval. (Notice of Intent to Rely, January 14, 2019).

75) On January 14, 2019, Employee filed a January 3, 2013 medical record, report of injury for a different employee and work evaluation for a different employee. (Notice of Intent to Rely, January 14, 2019).

76) On January 14, 2019, Employer opposed Employee's notices of intent to rely and requested a determination that FNP-C Earnest is an excessive physician change, an order quashing the subpoena of FNP-C Earnest, and an order excluding FNP-C Earnest's medical records and opinions. (Opposition, January 14, 2019).

77) On January 15, 2019, PA-C Schlecht at PeaceHealth, wrote a letter addressed "To Whom It May Concern" stating:

> [Employee] was originally seen in our office in 4/2012 for an injury to her right shoulder which after further diagnostic testing was actually pain coming from her neck. She was referred elsewhere since we do not treat necks or backs here in our Orthopedic clinic. She called in 2016 to try and get an appointment with Dr. Brown but was told by our staff that she needed to follow-up with her operating physician. (PA-C Schlecht letter, January 15, 2019).

78) On January 16, 2019, Employee filed a letter from PA-C Schlecht dated January 15, 2019. (Notice of Intent to Rely, January 16, 2019).

79) On January 16, 2019, Employee filed chart notes from Dr. Du Kindred from May 10, 2012 through October 31, 2012. (Notice of Intent to Rely, January 16, 2019).

80) On January 16, 2019, Employer filed its hearing evidence, including a position description for warehouse worker. Under "Physical Demands and Working Environment" it states, "Primary functions require sufficient physical ability and mobility to . . . push, pull, lift and/or carry moderate to heavy amounts of weights; operate assigned equipment and vehicles. . . ." Employer also included a "Treatment Provider Flow" chart. Dr. Brown, Bursell, Hsiang, Optimum Health and Wellness, Virginia Masson Medical Center, Dr. Oskouian and Dr. Arnold are depicted in green. FNP-C Earnest is depicted in red. Peacehealth/Schlect is depicted in purple. Employer included 20 reports of occupational injury or illness, including the following:

- On September 28, 1992, Employee reported she injured her back muscles when she slipped while walking on a wooden porch. (Report of Occupational Injury or Illness, September 28, 1992).
- On December 9, 1996, Employee injured her left knees and back when she slipped on a piece of plywood covered with snow. (Report of Occupational Injury or Illness, December 9, 1996).
- On September 24, 1998, Employee injured her knees when she walked on uneven ground. (Report of Occupational Injury or Illness, September 24, 1998).

- On May 23, 2002, Employee cut her ring finger on the broken rain guard when she exited her work van. (Report of Occupational Injury or Illness, May 23, 2002).
- On April 20, 2005, Employee injured her lower back with continuing lifting of heavy stock materials. (Report of Occupational Injury or Illness, April 20, 2005).
- On August 22, 2006, Employee injured her left shoulder when she continuously handled large freight. (Report of Occupational Injury or Illness, August 22, 2006).
- On May 18, 2007, Employee injured her right shoulder, arm and hand from erecting, collapsing, and transporting traffic control devises for seven days straight. (Report of Occupational Injury or Illness, May 18, 2007).
- On October 17, 2010, Employee injured her right shoulder while holding a STOP/SLOW paddle in high winds for a long period of time. (Report of Occupational Injury or Illness, October 17, 2010).
- On December 27, 2011, Employee injured the bridge of her nose when a bag of ice melt slipped from hand onto the spreader and the spreader handle came up and hit her nose. (Report of Occupational Injury or Illness, December 27, 2011).
- On December 2, 2013, Employee injured her spine, legs, arms, shoulders and right ankle when she slipped on icy patches in a parking lot while spreading ice melt and clearing snow off company vehicles and when she pushed the 50 pound cart over uneven icy surfaces and up hills. (Report of Occupational Injury or Illness, December 2, 2013). (Employer Hearing Evidence, January 16, 2019).

81) On January 22, 2019, Employer requested cross-examination of FNP-C Earnest for an October 19, 2016 medical report and of PA-C Schlecht for a December 15, 2017 medical report filed on the January 14, 2019 medical summary. (Request for Cross-Examination, January 22, 2019).

82) On January 22, 2019, Employer renewed its request for a determination that FNP-C Earnest is an excessive physician change and an order excluding her medical reports, opinions, and testimony from consideration. (Petition, January 22, 2019).

83) On January 22, 2019, Employer opposed Employee's evidence filings. Employer contended FNP-C Earnests medical reports, opinions and testimony should be excluded because Employee unlawfully changed physician. Employer reaffirmed its requests for cross-examination for PA-C Schlecht and Dr. Oskouian. It also objected to a number of documents filed by Employee and attached a chart detailing its objections:

Evidence Employee Filed	Employer's Objection
Blank Return to Work Form	Relevance
August 29, 2017 FMLA Letter	Relevance

Picture of truck with signs	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
Photograph of female with sign	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
2018 Annual Lane Closure Permit	Relevance
Two pages of traffic control flow charts	Relevance
Photograph of orange equipment	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
Traffic Control Chart	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
Intellistrobe print out	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
Photograph of mental triangular shaped object	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
Photograph of lightbulbs on white piping	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
30 year service award	Relevance
Photograph of white or silver pipes	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
Photograph of coil of wire on truck	Unauthenticated. Relevance. Unclear for what purposes this is in evidence.
Employee evaluations	Relevance
Appreciation Letter	Relevance
Memorandum on Job Performance	Relevance
PPI Guide	Relevance
Warehouse/Laborer Position Description	Employer's evidence contains different Warehouse job description more current
Warehouse Worker Position Description/Approval	This is the more accurate job description
Attending Physician's Return to Work Recommendation dated February 2, 2017 by Andrea C. Pertuso	Hearsay. Author unknown.
January 3, 2013 medical report	Relevance - record is 5 years old and does not address current physical abilities
Report of injury for a different employee	Relevance - this is another workers' report of injury. Violation of privacy. No bearing on current physical restrictions of Employee
Work evaluation for a different employee	Relevance - this is another worker's report of injury. Violation of privacy/HIPAA. No bearing on current physician restrictions of Employee
PA-Schlecht January 15, 2019 Letter	Hearsay. Created for litigation. No corresponding documentation.

(Opposition, January 22, 2019).

84) On January 22, 2019, Employee's answer to Employer's January 14, 2018 opposition contended FNP-C Earnest was not an excessive physician change. Employee contended Dr. Brown's office refused to schedule an appointment for her cervical spine leading to Employee treating with FNP-C Earnest. Employee contended Employer paid for FNP-C Earnest's medical treatment and did not refute her treatment and is estopped form asserting an excessive change. (Answer, January 22, 2019).

85) On January 23, 2019, Employee answered Employer's January 22, 2019 opposition. She was not sure what she would be needing or reference in her brief and agreed some of the evidence she filed is redundant or will not be used. (Answer, January 23, 2019).

86) On January 23, 2019, Employee opposed Employer's hearing evidence. Employee contended 10 occupational injury reports for nine injuries with Employer are irrelevant. Employee contended Employer's Treatment Provider Flow chart is inaccurate and requested it be excluded. (Opposition, January 23, 2019).

87) Employer acknowledged the emails between Employee and Ms. Holsman should be allowed in under the business records exceptions. (Employer).

88) Employer and Employee agreed PA-Schlecht's December 21, 2017 medical report and return to work recommendation are not relevant to Employee's March 27, 2012 work injury. They also agreed Dr. Kindred's referral to Dr. Davis is relevant to Employee's March 27, 2012 work injury. The parties agreed Dr. Kindred's treatment of Employee's non-work related medical issues is not relevant. (Employer and Employee stipulations).

89) Employee contended Employer's physician flow chart is inaccurate because it includes physicians she treated with for medical issues unrelated to her March 27, 2012 work injury. Employee contends she never saw Dr. Nussbaum nor PA-C Schlecht for her March 27, 2012 work injury. Employee contends Dr. Oskouian directed her to go to FNP-C Earnest for a return to work form. (Employee hearing arguments).

90) Employer contends the physician flow chart is an accurate depiction of its arguments regarding Employee's excessive physician change and is helpful to understand its arguments. Employer contends Dr. Brown was Employee's first treating physician. It contends Employee was referred to Drs. Bursell and Hsiang and to physical therapy at Optimum Health and Wellness and to Virginia Mason Medical Center for a functional capacity evaluation (FCE). Employer

contends Employee changed physician to Dr. Davis in 2012. It contends Employee changed physician a second time on October 19, 2016, when she treated with FNP-C Earnest. Employer contended FNP-C Earnest is depicted in red in the flow chart because she is the only physician it is contending should be excluded for an excessive physician change. (Employer hearing arguments).

91) Employee contends FNP-C Earnest is Employee's primary medical provider for all of her medical issues. Employee contends she sought treatment with FNP-C Earnest because Dr. Brown refused to treat her. She contends Dr. Oskouian referred her to her primary care physician for a return to work slip. (Employee hearing arguments).

92) Employer contends the reports of injury demonstrate exacerbation or aggravation of her March 27, 2012 work injury. Employee's job is a physically demanding job and Employer is concerned about Employee's safety in performing her job duties with the permanent restrictions Dr. McCormack recommended. Employer contends administrative notice of Employee's injury reports can be taken. (Employer hearing arguments).

93) Employee contends 10 occupational injury reports submitted by Employer are not relevant. She contends she did not seek medical attention for those 10 reported injuries and Employer required her to report any injury. (Employee hearing arguments).

94) Employer contends it is willing to stipulate that Employee is a wonderful, valued employee, she is a hard worker, her performance reviews are excellent, she tries very hard at her job and she is well respected. (Employer hearing arguments).

95) Employee contends the various pictures she filed and the lane closure permits and traffic control charts are relevant because they show Employer made accommodations to her job by purchasing and modifying equipment to address how she was injured. She contends many of the photographs were provided to Dr. McCormick. Employee contends the other employee's injury report and work evaluation are relevant because that employee is another warehouse worker who sustained a work injury the same way Employee did. (Employee hearing arguments).

96) Employer contends Employee is disabled from her job and is entitled to go through the reemployment eligibility determination process. Employer contends it is reasonable for it to rely on Dr. McCormick's opinion regarding Employee's work restrictions. Employer contends the restrictions recommended by Dr. McCormack cannot be accommodated based upon the job description for Employee's job. Employer contends Employer attached the presumption of

compensability for TTD with Dr. McCormick's SIME report. Employer contends Employee must rebut the presumption of compensability. Employer contends Employee failed to rebut the presumption. Alternatively, Employer contends the preponderance of the evidence proves Employee is temporarily and totally disabled. (Employer hearing arguments).

97) Employee contends she is not disabled and is able to return to her job with her self-imposed restrictions. She contends Dr. McCormack is the only physician that discussed further surgery as a possibility. Employee contends Dr. McCormack never reviewed her 2018 CT scan. Employee contends the 2018 CT scan shows her cervical spine improved. She contends McCormack's SIME opinion regarding her work restrictions is less credible because he based it upon a 25 percent probability of future adjacent segment surgery. Employee contends she should not be on TTD; she should be working. (Employee hearing arguments).

98) Employee testified she loves her job and tries to do her best every day. She appreciates Employer's willingness to stipulate to the fact that she is a wonderful, valued employee, she is a hard worker, her performance reviews are excellent, and she is well respected. Employee tries very hard at her job. She experienced difficulties performing her job duties before Employer purchased and modified traffic control vehicles and equipment. Employee does not have difficulties setting up and taking traffic control stops anymore because Employer purchased an appropriate vehicle that houses the equipment. She has not had difficulties holding the STOP/SLOW sign since Employer purchased the automatic flagger units. Employee had been lifting overhead and lifting 25 pounds until Employer removed her from work. The woman depicted in the photograph holding the STOP/SLOW sign is Employee. Employee was truthful in describing her work activities to Dr. McCormick but is concerned Dr. McCormick ignored the new vehicle and modified equipment Employer provided. Dr. Brown's office refused to schedule an appointment in 2016 when she called to schedule an appointment because they do not treat spine conditions. (Employee).

99) Mark Adams testified he is Employer's Operations Manager and has been Employee's immediate supervisor for the last eight to nine years. He handles the day to day comings and goings and administrative tasks for the Electric Division. Mr. Adams is familiar with Employee's position, warehouse worker. Employee's job requires overhead lifting from time to time and driving a forklift. He does not believe that someone restricted from overhead lifting and lifting more than 25 pounds can perform the warehouse worker's job duties. Employee

never stopped doing her work; she continued to fulfill her job requirements until she was sent home. Mr. Adams witnessed Employee lifting materials during the last six to eight months she worked. (Adams).

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).

Andrews v. McGrath Light & Power, Inc., AWCB Decision No. 05-0236 (September 10, 2005), at 11, stated, "The Board . . . lacks authority to render declaratory judgments or provide advisory opinions on matters for which there is no existing controversy (footnote omitted)."

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. . . .

In *Miller v. Nana Regional Corp.*, AWCB Decision No. 13-0169 (December 26, 2013), the board addressed "extraordinary unique facts" and the majority held that even where the employer could not rebut the raised presumption on a change-of-physician issue, the employer's otherwise unlawful "change" would be "excused through the waiver process." In *Miller*, the employer's supervisory employee told the injured employee shortly after her injury that she had a medical appointment, which she attended. But no one knew for sure who chose the medical provider at issue, or why he was even examining the employee, and there was no resultant medical record other than a referral form for diagnostic imaging. Further, the employer had already expended considerable sums on additional EME evidence and the *Miller* majority determined it would be "extremely unfair and unreasonable" to strike these EME reports given this "confounded evidence." *Miller* held the initial, supervisory direction for medical care, though technically the employer's first "selection," would be excused and the normal EME selection process waived, making this first medical provider not an EME. *Miller* at 18-22.

> **AS 23.30.105. Time for filing of claims.** (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed.s . . .

In *Alcan Electric v. Hope*, AWCAC Decision No. 112 (July 1, 2009), the Commission held the board exceeded its authority by ordering a later employer to pay compensation under AS 23.30.155(d) when no claim had been filed against the later employer by the injured worker or by an earlier employer because compensation for disability is barred unless a claim is filed under AS 23.30.105(a).

> **AS 23.30.110. Procedure on claims.**
> . . . .
>
> (c) . . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the filing of the controversion notice, the claim is denied.
> . . . .
>
> (e) The order rejecting the claim or making the award, referred to in this chapter as a compensation order, shall be filed in the office of the board, and a copy of it shall be sent by registered mail to the claimant and to the employer at the last known address of each.

"The Workers' Compensation Act does not define the term 'claim' (footnote omitted). In the Act, however, the word 'claim' often refers to a written application for benefits which is filed with the Board." *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1122 (Alaska 1995). The Alaska Supreme Court noted a distinction between an injured worker's "right to compensation," generally referred to as a "claim," and the document filed to make a claim for benefits, referred to here as a Workers' Compensation Claim. As stated by the Court, "claim" typically refers to a request for benefits. Statutory construction principles state there "is a presumption that the same words used twice in the same act have the same meaning." *Kulawik v. ERA Jet Alaska,* 820 P.2d 627, 634 (Alaska 1991) (*quoting* 2A Norman J. Singer, *Sutherland Statutory Construction,* §46.06, at 104 (4th ed. 1984)).

> **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).

In *Summers v. Korobkin Construction*, 814 P.2d 1369 (Alaska 1991), an injured worker filed a claim seeking a decision from the Board on whether his work injury was "compensable" because the employer refused to acknowledge the employee had a compensable claim while still paying for the employee's medical bills. His doctor said he might need neck surgery and a major factor in the worker's decision whether to pursue surgery was whether the employer would pay for it. The Board declined to hear the case noting there was no actual "controversy," since the injured worker had not received any medical care for over a year, and there were no unpaid work-related medical bills or other claims. The superior court agreed. Reversing, the Alaska Supreme Court stated:

> Here, Korobkin disputed many aspects of Summers' application for adjustment of claim. Korobkin's answer advanced numerous defenses to Summer's claim, including that Summers' injury was not work-related . . . Summers is entitled to a hearing on Korobkin's defenses. If Summers prevails, Korobkin will still be able to controvert Summers' claim at a future hearing, if the grounds for controversion arise after the initial hearing. AS 23.30.130. However, a worker in Summers' position, who has been receiving treatment for an injury which he or she claims occurred in the course of employment, is entitled to a hearing and prospective determination on whether his or her injury is compensable.

In *Alaska Pulp Corp. v. United Paperworks Intern. Union*, 791 P.2d 1008 (Alaska 1990), the Alaska Supreme Court held the presumption of compensability does not apply to inter-employer disputes on the question of whether an employment relationship existed between the worker and the subsequent party. The use of the presumption risks thrusting upon a worker an employee status to which he never consented, and could deprive him of valuable rights and the presumption was never intended to adversely affect workers' rights in this manner.

In *Wausau Insurance Companies v. Van Biene*, 847 P.2d 584, 588 (Alaska 1993), the Alaska Supreme Court held the Alaska Workers' Compensation Board possesses authority to invoke equitable principles to prevent an employer from asserting statutory rights. It said equitable estoppel elements include "assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice." *Id*. The court concluded, "a finder of fact could not reasonably find that a person in the position of Van Biene could reasonably interpret Wausau's conduct as amounting to an implied communication that no social security offset would be required. At best, such conduct subsequent to Gerke's conversation and letter indicates only neglect or an internal mistake." The court relied significantly on the fact Wausau apprised Van Biene both orally and in writing that workers' compensation benefits would be offset in the event she received social security survivor's benefits, and no representations were made by Wausau to Van Biene that it would not seek to offset social security survivor's benefits in the event that she received such payments. *Id*. at 589.

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

The board has broad statutory authority in conducting its investigations and hearings. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008); *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). The board may use relaxed evidentiary standards while conducting its hearings. *Thoeni v. Consumer Electronic Services*, 151 P.3d 1249; 1257 (Alaska 2007). AS 23.30.135 gives the workers' compensation board wide latitude

in making its investigations and in conducting its hearings, and authorizes it to receive and consider, not only hearsay testimony, but any kind of evidence that may throw light on a claim pending before it. *Cook v. Alaska Workmen's Compensation Board*, 476 P.2d 29 (Alaska 1970).

The Alaska Supreme Court has held, as quasi-judicial agencies granted limited authority under statute, neither the Alaska Workers' Compensation Appeals Commission nor the Alaska Workers' Compensation Board has jurisdiction to hear any action outside of a workers' compensation claim. *Alaska Public Interest Research Group v. State*, 167 P.3d 27, 40 (Alaska 2007).

> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.
>
> **AS 23.30.395(16). 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;
> . . . .
>
> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.
>
> (b) Claims and petitions.
>
> (1) A claim is a written request for benefits, including compensation, attorney's fees, costs, interest, reemployment or rehabilitation benefits, rehabilitation specialist or provider fees, or medical benefits under the Act, that meets the requirements of (4) of this subsection. The board has a form that may be used to file a claim. In this chapter, an application is a written claim.
>
> (2) A request for action by the board other than by a claim must be by a petition that meets the requirements of (8) of this subsection. The board has a form that may be used to file a petition.

(3) Parties must be designated in accordance with 8 AAC 45.170.

8 AAC 45.052. Medical summary. . . .

. . . .

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

. . . .

(B) If a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and served upon all parties within 10 days after service of the updated medical summary.

(4) If an updated medical summary is filed and served less than 20 days before hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

(5) A request for cross-examination must specifically identify the document by date and author, generally describe the type of document, state the name of the person to be cross-examined, state a specific reason why cross-examination is requested, be timely filed under (2) of this subsection, and be served upon all parties.

(A) If a request for cross-examination is not in accordance with this section, the party waives the right to request cross-examination regarding a medical report listed on the updated medical summary.

(B) If a party waived the right to request cross-examination of an author of a medical report listed on a medical summary that was filed in accordance with this section, at the hearing the party may present as the party's witness the testimony of the author of a medical report listed on a medical summary filed under this section.

"Letters written by a physician to a party or party representative to express an expert medical opinion on an issue before the Board are not admissible as business records unless the requisite foundation is established." *Bass v. Veterinary Specialists of Alaska*, AWCB Decision No. 08-0093 (May 16, 2008). A party has a right to cross-examine the authors of a medical record, if the right is not waived. *Commercial Union Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976).

8 AAC 45.082. Medical treatment.

. . . .

(b) A physician may be changed as follows:

. . . .

(2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service

(A) at a hospital or an emergency care facility;

(B) from a physician

(i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;

(ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or

(iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;

. . . .

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

(A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians;

(C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides

services to the employee, and the employee does not designate in writing that physician as the attending physician;

(D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

(c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

. . . .

(e) A written treatment plan under AS 23.30.095 is required for payment of services provided on an outpatient basis for an injury that occurs on or after July 1, 1988. A written treatment plan is not required before providing services while the employee is hospitalized.

. . . .

8 AAC 45.120. Evidence.

. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports

filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

8 AAC 45.170. Listing of injuries.
(a) Each injury will be listed in the board's files under the name of the employee claimed to have been injured, regardless of whether or not that person is the claimant. Reference to the injury will be by the name of the injured employee and the board's injury number.

(b) Parties to an injury are designated as follows:

(1) A person filing a claim for compensation benefits under the Act is a claimant.

(2) The employer and its insurance carrier, if any, are defendants.

(3) A party filing a petition is a petitioner.

(4) A party responding to a petition is a respondent.

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

8 AAC 45.900. Definitions. (a) In this chapter
. . . .

(11) "Smallwood objection" means an objection to the introduction into evidence of written medical reports in place of direct testimony by a physician. . . .

In *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976), the Alaska Supreme Court found "the statutory right to cross-examine is absolute and applicable to the board." *Id*. at 1265. In a previous case, the court suggested procedures the board could adopt to ensure parties have the right to cross-examination. In response, the board amended 8 AAC 45.052(c) and 8 AAC 45.120 to provide for notice and an opportunity for cross examination.

Alaska Rules of Evidence. . . .
. . . .

> **Rule 801. Definitions.**
> The following definitions apply under this article:
>
> (a) **Statement.** A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
>
> (b) **Declarant.** A declarant is a person who makes a statement.
>
> (c) **Hearsay.** Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
> . . . .
>
> **Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial**.
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . . .
>
> (4) **Statements for purposes of medical diagnosis or treatment**. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.
> . . . .
>
> (6) **Business Records**. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term 'business' as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In *Dobos v. Ingersoll*, 9 P.3d 1020 (Alaska 2000), a personal injury case, the Alaska Supreme Court held "medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule," unless there is some reason to doubt the records' authenticity. *Id.* at 1027. Ingersoll asked Dobos to admit that Ingersoll's medical records were genuine under the Alaska Civil Rules. Dobos refused, arguing the evidence was hearsay. He wanted Ingersoll to put the witnesses on the stand at her expense so

he could question them. During trial, Ingersoll called her doctors to testify and lay a foundation for the records. On appeal, the Alaska Supreme Court noted medical records are exceptions to the hearsay rule under Evidence Rule 803(6) and imposed sanctions against Dobos for failing to admit the genuineness of Ingersoll's medical records. The court reasoned, "Requiring testimony that medical records were made and kept in the regular course of business is a waste of time unless there is some reason to believe that the records are not genuine or trustworthy." *Id*. at 1028. Further, the Court said Dobos could have called Ingersoll's doctors to the stand himself after he denied Ingersoll's request to admit their records. *Dobos*, 9 P.3d at 1028.

In *Noffke v. Perez*, 178 P.3d 1141 (Alaska 2008), another personal injury case, the Alaska Supreme Court said evidence of the plaintiff's medical treatment and diagnosis, even in the form of a doctor's letter to the Social Security Disability Determination Unit, could be admissible under *Dobos* provided litigants established "it was the regular practice" of the doctor to prepare and send such reports. *Id*. at 1146. *Parker v. Power Constructors*, AWCB Decision No. 91-0150 (May, 17, 1991), addressing the "trustworthiness" requirement under Alaska Rule of Evidence 803(6), noted:

> Statements by professionals, such as doctors, expressing their opinion on a relevant matter, should be excluded only in rare circumstances, particularly if the expert is independent of any party, and especially if the reports have been made available to the other side through discovery so that rebuttal evidence can be prepared. (*Id*. at 7, *citing* 4 Weinstein's Evidence Rule 803 at 803-211 (1990)).

In *Parker*, an insurer petitioned the board to admit three documents, contending they fell within exceptions to the hearsay rule. The employee contended the documents should not be admitted over his cross-examination request. The three documents pertaining to the employee included: (1) a discharge summary from a nursing home; (2) a physical examination report prepared during the employee's residence at the nursing home; and (3) a letter written to the employee's attorney from the employee's attending physician giving an opinion on compensability. After discussing the history of the *Smallwood* objection, the board reviewed relevant Alaska Supreme Court cases and relied heavily upon *Frazier*. *Parker* noted Alaska Supreme Court precedent, including *Frazier*, represented an "extension rather than a limitation of our regulation permitting admission of certain documents over *Smallwood* objections." *Parker* determined the three documents in question had long been in the employee's possession and were trustworthy enough to permit

admission under exceptions to the hearsay rule. *Parker* also noted while *Frazier* did not agree to "re-examine *Smallwood*," it also did not overrule or refuse to apply the board's regulations permitting certain documents to be admitted over *Smallwood* objections. (*Id*. at 11).

Demonstrative evidence is physical evidence that one can see and inspect (i.e. an explanatory aid, such as a chart, map, and some computer simulations) and that, while of probative value and usually offered to clarify testimony, does not play a direct part in the incident in question. *Black's Law Dictionary* 675 (Tenth Edition 2014).

ANALYSIS

1) Was the oral order overruling Employee's objection to Employer's physician flow chart correct?

AS 23.30.135 gives wide latitude in receiving and considering any kind of evidence that may throw light on a claim pending before it. *Cook.* Employer's physician flow chart is demonstrative evidence because it is offered to clarify Employer's contention that Employee excessively changed physicians. *Black's.* It is helpful in understanding Employer's contentions that Employee's first physician change was from Dr. Brown to Dr. Davis in 2012 and her second and excessive physician change was to FNP-C Earnest in 2016. AS 23.30.135(a); *Cook*; *Rogers & Babler*. The oral order overruling Employee's objection to Employer's physician flow chart was correct.

2) Was the oral order sustaining Employer's objection to PA-C Schlecht's January 15, 2019 letter correct?

Workers' compensation hearings are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as otherwise provided under the Act. AS 23.30.135(a). Investigations and hearings may be conducted in the manner by which the parties' rights may be best ascertained. *Id*. Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided under the board's regulations. 8 AAC 45.120(e).

Employee filed PA-C Schlecht's January 15, 2019 letter by the hearing evidence deadline on January 16, 2019 on a notice of intent to rely form. On January 22, 2019 Employer objected to PA-C Schlecht's letter contending it was hearsay and created for litigation purposes. If a request for cross-examination is not in accordance with 8 AAC 45.052 a party waives the right to request cross-examination. A document served on the parties and filed 20 or more days before the hearing will be relied upon unless a written request for cross-examine the document's author is filed and served upon all parties at least 10 days before the hearing. 8 AAC 45.120(f). Employer did not file a request for cross-examination for PA-C Schlecht for his January 15, 2019 letter under 8 AAC 45.052(c)(3)(B) or 8 AAC 45.120(f).

Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. 8 AAC 45.120(e). There is no question PA-C Schlecht's January 15, 2019 letter is relevant. *Rogers & Babler*. Hearsay is defined as a statement, other than on made by the declarant while testifying at hearing, offered in evidence to prove the truth of the matter asserted. Evidence Rule 801(c). Employee seeks to use PA-C Schlecht's letter to prove PeaceHealth does not treat spine and back issues and to prove Dr. Brown at PeaceHealth refused to provide Employee services in 2016 to refute Employer's contention she excessively changed physicians to FNP-C Earnest in 2016. PA-C Schlecht's January 15, 2019 letter includes statements not made by PA-C Schlecht while testifying at a hearing in this case, offered in evidence to prove the truth of the matters asserted. Those statements are hearsay. *Id.*

PA-C Schlecht's January 15, 2019 letter is not a routine medical record, it was made precisely for, and during, litigation. It was not written until Employer contended there was an excessive physician change and there is no evidence it was the regular practice of PA-C Schlecht to write similar letters so it is less trustworthy. *Noffke*; *Parker*. His letter is not sufficient to support a factual finding unless it is admissible over objection in a civil action. 8 AAC 45.120(e). It does not contain a doctor's opinion or diagnosis and was not made for the purpose of medical diagnosis or treatment. Evidence Rule 803(4) and (6). However, hearsay evidence may be used to supplement or explain any direct evidence, but it is not sufficient in itself to support a finding

of fact unless it would be admissible over objection in civil actions. 8 AAC 45.120(e). There is other evidence in the record regarding Employee's physician change to FNP-C Earnest; it is Employee's testimony that Dr. Brown's office at PeaceHealth refused to schedule an appointment for her work injury. The oral order sustaining Employer's objection to PA-C Schlecht's January 15, 2019 letter was incorrect.

3) Was the oral order excluding messages between Employee and Dr. Oskouian's office and a chart note and letter from Dr. Oskouian from consideration correct?

On October 29, 2018 and January 10, 2019, Employer timely filed a *Smallwood* objection and demanded a right to cross-examine Dr. Oskouian on the messages between Employee and Dr. Oskouian's office, an October 22, 2018 chart note, and an October 23, 2018 letter.

At hearing, Employer expressly declined to withdraw its right to cross-examine Dr. Oskouian and contended Employee failed to lay a proper foundation proving the documents were a business record. 8 AAC 45.052(c)(4). Employee filed no witness list offering Dr. Oskouian for cross-examination. Employer contended Dr. Oskouian created the messages, the October 22, 2018 chart note, and October 23, 2019 letter in a usual setting and solely for litigation purposes at Employee's request and, consequently it was not admissible as a business record over Employee's objection. Employee contended the messages and October 22, 2018 chart note was a business record and admissible under Alaska Rule of Evidence 803(6).

Letters written by a physician to a party to express an expert medical opinion on an issue before the board are not admissible as business records unless the requisite foundation is established. *Bass*. Employee did not establish it was Dr. Oskouian's regular practice to prepare and send messages and letters giving an opinion about physical restrictions using MyChart and then create a chart note. This is the only instance in the record where Employee and Dr. Oskouian communicated by messages which led to creation of a chart note and letter. These documents lack the normal trustworthiness associated with an ordinary medical record. Employee last saw Dr. Oskouian in February 2017 and she informed him in her messages there had "been no change in sensation reported in the past." Dr. Oskouian's messages, chart note and letter were produced based on information provided by Employee for the purpose of litigation, and at the request of

Employee, to obtain Dr. Oskouian's expert medical opinion. Dr. Oskouian's messages, chart note and letter were not medical reports. The oral order excluding Dr. Oskouian's messages, chart note and letter was correct.

4) Was the oral order excluding FNP-C Earnest's medical records, opinions and testimony from consideration for Employee's excessive change of physician correct?

Employer contends Earnest is an excessive physician change. It contends Employee first changed physician from Dr. Brown to Dr. Davis in 2012 and then Employee self-referred to FNP-C Earnest which is her second physician change. It contends Employee's self-referral to FNP-C does not fit under any of the exceptions under 8 AAC 45.082(b)(4).

Employee contends her change to FNP-C Earnest is not an excessive physician change under 8 AAC 45.082(b)(4)(B) because Dr. Brown's office at PeaceHealth refused to schedule an appointment. Employee testified FNP-C Earnest is her primary provider for all of her medical issues and Dr. Oskouian directed her to go to FNP-C Earnest. This raises factual questions to which the statutory presumption applies. AS 23.30.120; *Meek*; *Sokolowski*.

Without weighing credibility, Employee's testimony raises the presumption. *McGahuey*; *Veco*; *Resler*. Employer rebuts the presumption with substantial evidence, specifically the medical records showing Employee first got treatment from Dr. Brown, Employee's August 8, 2012 designation of Dr. Davis as her treating physician, Dr. Davis' September 4, 2012 referral to Dr. Hsiang at Swedish Medical Center, and PA-C Lai's November 16, 2012 chart note showing she expected to see Employee on an as needed basis. *Kramer*; *Tolbert*; *Norcon*.

The presumption drops out and Employee must prove this issue by a preponderance of the evidence. *Koons*. Employee first sought treatment from Dr. Brown, who referred her to Dr. Bursell. Dr. Bursell referred Employee to Dr. Hsiang. Then, Employee changed physicians to Dr. Davis, who also referred Employee to Swedish Medical Center. Employee's change of physician to Dr. Davis is her first physician change. Dr. Hsiang at Swedish Medical Center performed Employee's cervical fusion surgery. After Employee's cervical fusion, PA-C Lai at Swedish Medical Center noted Employee would follow up as needed on November 16, 2012.

Employee first saw FNP-C Earnest on October 19, 2016. Employee contends Dr. Brown refused to treat her so she followed up with FNP-C Earnest. She contends PA-C Schlecht's January 15, 2019 letter supports her contention. Employee's testimony and PA-C Schlecht's January 15, 2019 letter are irrelevant because Dr. Brown was not her treating physician. Dr. Hsiang was her last treating physician and there is no evidence to suggest Dr. Hsiang refused to treat her in 2016 or referred her to FNP-C Earnest. Employee contends Dr. Oskouian directed her back to FNP-C Earnest. However, there is no referral in the record from Dr. Oskouian or any physician in the medical record to FNP-C Earnest in 2016. In fact, FNP-C Earnest referred Employee to Dr. Oskouian on November 30, 2016. Employee first sought treatment with Dr. Oskouian on February 2, 2017, after FNP-C Earnest's referral. Employer has proven Employee excessively changed physician in October 2016 when she got treatment from FNP-C Earnest.

Employee contends Employer paid for medical bills incurred in 2016 for FNP-C Earnest without raising the issue and should be precluded from raising the issue now. However, there is no time limit in 8 AAC 45.082(c) for a party to object to an excessive change of physician, it simply states the panel may not consider the unlawfully obtained opinions. Neither the statute nor regulation provides a waiver of a party's right to object to an unlawful physician change. Employer made no representations to Employee that it would not assert an excessive change of physician defense. *Rogers & Babler*. Employer's conduct does not support a finding of waiver or equitable estoppel. *Van Biene*.

Regulatory requirements may be waived or modified in some circumstances under 8 AAC 45.195 to prevent manifest injustice. However, a waiver may not be employed merely to excuse a party from failing to comply with legal requirements or to permit a party to disregard such requirements. Unlike *Miller*, where no one knew for sure who chose the provider at issue and there was no resultant medical record other than a referral form, the medical records here clearly show Employee first selected Dr. Brown, then Dr. Davis who referred Employee to Dr. Hsiang, and then FNP-C Earnest as her treating physician for her work injury. These facts show no manifest injustice and this decision declines to waive the requirements of 8 AAC 45.082. *Rogers & Babler*.

Under 8 AAC 45.082(e), if a party makes an excessive physician change in violation of AS 23.30.095(a) or 8 AAC 45.082, the panel "will not consider the reports, opinions, testimony of the physician in any form, in any proceeding, or for any purpose." Accordingly, the panel will not consider any reports, opinions or testimony from FNP-C Earnest from October 19, 2016 forward in any form, proceeding or for any purpose in this case. The oral order excluding FNP-C Earnest's medical records, opinions and testimony was correct. Employer's January 22, 2019 petition to exclude FNP-C Earnest's medical records, opinions and testimony is granted

5) Was the oral order granting Employer's petition to quash FNP-C Earnest's subpoena correct?

Because FNP's Earnest was an excessive physician change as determined above and her testimony cannot be considered. Therefore, the order granting Employer's request to quash FNP-C Earnest's subpoena was correct. Employer's January 22, 2019 petition to exclude FNP-C Earnest's medical records, opinions and testimony is granted.

6) Should Employer's November 16, 2018 petition requesting an order determining whether Employee can return to her job be granted?

Employer's November 16, 2018 petition is an unusual petition of first impression requesting an order determining whether Employee can return to her job at the time of injury. Employer contends Employee cannot safely return to work because it cannot accommodate the work restrictions recommended by Dr. McCormack. Employer also contends Employee is disabled from her job and is entitled to a reemployment eligibility determination. Employer requests an order determining Employee cannot return to her job due to permanent physical restrictions provided by Dr. McCormack. Alternatively, it requests an order that it is reasonable for Employer to rely on Dr. McCormack's opinion for Employee's physical restrictions. Employee is receiving TTD benefits but contends she has no physical restrictions and can perform her job duties. Employee requests an order denying Employer's petition.

Parties begin proceedings by filing a claim or petition. 8 AAC 45.050; 8 AAC 45.170. Employer contends Employee is entitled to TTD because she is disabled and analyzed

Employee's entitlement to TTD with Employer attaching the presumption of compensability based on Dr. McCormick's SIME report. AS 23.30.120(a)(1) provides it is presumed the "claim" comes within the provisions of this chapter. Employer is essentially seeking TTD benefits for Employee and seems to be contending the statutory presumption of compensability applies because its petition is a "written application" for TTD under *Jonathan*. However, there is a distinction between an employee's right to compensation and the pleading which must be filed if benefits are controverted. *Id.* *Jonathan* held the use of "claim" in AS 23.30.110(c) was intended to mean the written application for benefits. Both AS 23.30.110(c) and AS 23.30.120(a)(1) use the word "claim." There is a presumption that the same words used twice in the same act have the same meaning. *Kulawik*. Additionally, Employee contends she is not disabled. Employer seeks an employee status contrary to that asserted by Employee and the presumption was never intended to adversely affect an injured worker's right in this manner. *Alaska Pulp Corp*. Therefore, the presumption does not apply to Employer's petition. AS 23.30.110(c); AS 23.30.120(a)(1); *Kulawik*; *Alaska Pulp Corp*.

Employee's February 15, 2018 claim sought medical costs, transportation costs, and claimed unfair or frivolous controversion. Unlike *Summers*, Employee never filed a claim seeking a decision on whether she was entitled to TTD. AS 23.30.105(a) bars the right to TTD unless a claim for it is filed and AS 23.30.110(e) provides only the authority to decide whether or not to award TTD when a claim is filed. Like *Hope*, Employer's petition seeks an order awarding a claim for TTD when Employee has not filed a claim for TTD. Furthermore, Employer has not controverted a claim for TTD. Therefore, Employer is requesting an advisory opinion awarding an un-filed claim. This decision will not issue an advisory opinion. *Andrews*. This decision will not determine whether Employee is entitled to TTD. Employer's request for an order determining whether Employee can return to her job is denied. Employer's November 16, 2018 petition is denied.

Employer's and Employee's remaining objections to hearing evidence were not reached because Employer's November 16, 2018 petition is denied.

CONCLUSIONS OF LAW

1) The oral order overruling Employee's objection to Employer's physician flow chart was correct.
2) The oral order sustaining Employer's objection to PA-C Schlecht's January 15, 2019 letter was incorrect.
3) The oral order excluding Dr. Oskouian's message, chart note and letter was correct.
4) The oral order excluding FNP-C Earnest's medical records, opinions and testimony was correct.
5) The oral order granting Employer's petition to quash FNP-C Earnest's subpoena was correct.
6) Employer's request for an order determining whether Employee can return to her job is denied.

ORDER

1) Employer's January 22, 2019 petition is granted.
2) Employer's November 16, 2018 petition is denied.

Dated in Juneau, Alaska on March 18, 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 Elizabeth Reno, employee / claimant v. City of Ketchikan, employer; Alaska National Insurance, insurer / defendants; Case No. 201204450; 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 18, 2019.

/s/
Dani Byers, Technician