ALASKA WORKERS' COMPENSATION BOARD

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

JAVIER J. SERNAS, Employee, Claimant, v. JUNEAU SCHOOL DISTRICT, Employer, and CITY/BOROUGH OF JUNEAU, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201706798 AWCB Decision No. 19-0040 Filed with AWCB Juneau, Alaska On March 28, 2019

Javier J. Sernas' (Employee) January 23, 2019 amended claim and February 19, 2019 petition for a hearing continuance were heard on March 5, 2019 in Juneau, Alaska, a date selected on January 23, 2019. A December 13, 2018 affidavit of readiness for hearing (ARH) request gave rise to this hearing. Employee represents himself but did not appear. Attorney Michelle Meshke appeared and represented Juneau School District and City/Borough of Juneau (Employer). Witnesses included Linda Brace, Cherish Hansen, and James Schwartz, M.D., who testified on behalf of Employer. Oral orders issued granting Employer's request to proceed with the hearing in Employee's absence and denying Employee's request for a hearing continuance. This decision examines the oral orders issued on the preliminary matters and addresses Employee's claim. The record closed at the hearing's conclusion on March 5, 2019.

ISSUES

When Employee failed to appear at hearing, Employer contended the hearing should proceed in his absence. It contended he had been properly served at his address of record. Employee's position on going forward with the hearing is presumed in opposition since he filed a petition to continue the hearing. An oral order issued electing to proceed with the hearing.

1) **Was the oral order to proceed in Employee's absence correct?**

Employee's petition contended the hearing should be continued to provide him time to hire an attorney. He contended he needs additional time to retain an attorney. Employee requested a continuance for an unknown length of time.

Employer objected to a continuance. It contended Employee failed to demonstrate good cause to grant a continuance. Employer contends Employee has had sufficient time to find an attorney. It contended continuing the hearing would not be quick, efficient or fair. An oral order issued denying Employee's request for a continuance.

2) **Was the oral order denying Employee's petition for a hearing continuance correct?**

Employer contends Employee's claim for bilateral knee injuries is time barred under AS 23.30.100 because Employee did not timely give written notice of the injuries. It contends Employee did not provide a satisfactory reason for failing to report his injury within 30 days.

Employee contends he informed the claim adjuster, Linda Brace, of his work injury. He contends he did not initially report his bilateral knees were injured because he believed the injuries would go away.

3) **Should Employee's bilateral knee claim be barred under AS 23.30.100?**

Employee contends the May 17, 2017 work injury is the substantial cause of his need for medical treatment and disability for his bilateral knees and left foot and ankle. He seeks an order awarding past and continuing medical costs and temporary total disability (TTD).

Employer contends Employee's work injury is not the substantial cause of his need for treatment and disability for his bilateral knees. It contends the substantial cause for his knee injuries is pre-existing degenerative changes. Employer contends the substantial cause of Employee's need for left foot and ankle medical treatment and disability after April 20, 2018 was not the work injury. It contends the substantial cause for this injury was a pre-existing mid-foot injury. It seeks an order denying Employee's claim for medical and TTD benefits.

4) Is Employee's May 17, 2017 work injury the substantial cause of his disability and need for medical treatment for his bilateral knees and left ankle and foot?

FINDINGS OF FACT

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

1) On December 1, 1993, Jon Reiswig, M.D., evaluated Employee's left foot. Employee reported pain in his left foot since October 1993 when he had "a weight strike his left foot on the dorsum." His foot did not bruise but it did swell and his pain was in the metatarsal area. Dr. Reiswig noted Employee's left foot had more fullness in the metatarsal area dorsally than his right and palpitation revealed mild tenderness over the mid-metatarsal area. X-rays revealed widening of the second metatarsal at the junction of the metaphysis with the diaphysis proximally; it had the appearance of an old healed fracture. Employee denied any previous injury. Dr. Reiswig concluded Employee sustained a fracture to the second metatarsal on his left foot. He released Employee to full time work. (Reiswig, Medical Report, December 1, 1993).

2) On March 7, 1994, Employee followed up with Dr. Reiswig and reported continued discomfort in the metatarsal area of his left foot. He appeared to be using the foot functionally well while still being somewhat tender and stiff. Dr. Reiswig stated, "There is not a whole lot more that can be done for this residual discomfort. I will however, try a Lynco orthotic with a metatarsal pad in his show to see if this would give him some benefit." (Reiswig, Chart Note, March 7, 1994).

3) On April 11, 1994, Employee continued to have pain in his left foot. It went away for quite some time but it returned. He thought it returned because he bumped his foot against a door at work. Employee told Dr. Reiswig it was tender while he touched his second, third and fourth metatarsals and Dr. Reiswig could detect no difference when compared to his right foot. X-rays revealed essentially no change from December 1993. Dr. Reiswig stated the explanation for

Employee's pain was not clear by x-ray or exam. He referred Employee to Len Ceder, M.D., for a second opinion. (Reiswig, April 11, 1994).

4) On July 18, 1994, Dr. Ceder examined Employee's left foot. Employee reported his foot felt better for about a month after conservative treatment with Dr. Reiswig but the pain returned and he found himself limping. Weather changes also increased Employee's symptoms. His lower left calf showed mild atrophy. Palpations about the mid and fore-foot elicited discomfort primarily at the first, second and third metatarsal bases. Dr. Ceder reviewed Employee's April 1994 left foot x-ray and stated it appeared to show factures of the base of the second and third metatarsals. He recommended Employee use orthotics for one month and return in two months. Dr. Ceder emphasized it may take as long as 18 months for his symptoms to resolve and Employee was likely to have weather-related changes for the first winter or two. (Ceder Medical Report, July 18, 1994).

5) On September 26, 1994, Employee reported left foot pain symptoms if he ran. Examination revealed normal appearance with good range-of-motion of his feet and ankles. A mild callus was palpable along the dorsum of the second and third metatarsals but he denied discomfort. (Ceder Chart Note, September 26, 1994).

6) On April 10, 1995, Employee stated if he ran on successive days he experienced irritation in the areas of his left foot fractures. He had minor tenderness to palpitation over the middle metatarsals proximal portion. X-rays revealed consolidated fractures with a dorsal hump on the second metatarsal and no arthritic change in the Lisfranc joint. (Ceder, Chart Note, April 10, 1995).

7) On October 26, 1998, Employee saw Dr. Reiswig for left knee pain. He reported he picked up a container of potato salad at work and slipped and fell on his left knee primarily but also on his right knee. Initially Employee's left knee was quite swollen. He felt something in his left knee and "he has to kind of work it" and then it felt better. Palpation of Employee's knee revealed mild tenderness along the medial joint line but he had mild discomfort in both medial compartments. Dr. Reiswig recommended x-rays and released Employee to full time work. (Reiswig Medical Report, October 26, 1998).

8) On November 17, 1998, Employee reported continuing but lessening left knee pain. He described his knee locked at times. Employee thought his left foot injury caused his knee to be injured. Dr. Reiswig did not see a relationship between his left foot and knee. He diagnosed

chronic left foot pain secondary to a previous injury and left knee pain due to a more recent work injury, possibly a torn medial meniscus. Dr. Reiswig recommended a left knee magnetic resonance imaging scan (MRI). (Reiswig, Chart Note, November 17, 1998).

9) On November 20, 1998, an MRI of Employee's left knee showed subtle apparent cleft of the mi- lateral meniscus suggesting a small radial tear. (MRI Report, November 20, 1998).

10) On December 23, 1998, Employee followed up with Dr. Reiswig for continued left knee pain. Employee consistently pointed to the anteromedial aspect of his left knee but his MRI showed no tear of the medial meniscus, only a fold in the lateral meniscus. He never reported symptoms laterally. Dr. Reiswig recommended an arthroscopy to make sure he did not have a torn medial meniscus. (Reiswig Chart Note, December 23, 1998).

11) On January 18, 1999, Employee reported his left knee locked up and he had to manipulate it to straighten it out and his left foot still ached, especially with weather changes and cold. Upon examination, Dr. Ceder found Employee was sensitive along both joint lines in his left knee but primarily to mid- and lateral-joint-line with an episodic mild snap and his left foot was sensitive over the tarsametatarsal joints mid tarsus. Employee elected conservative care for a few more months before an arthroscopy. (Ceder Medical Report, January 18, 1999).

12) On April 14, 1999, Dr. Ceder performed a left knee arthroscopic partial left lateral menisectomy. (Ceder Operative Report, April 14, 1999).

13) On May 11, 1999, Employee followed up with Dr. Ceder. His left knee was doing much better one month after surgery. However, Employee was still having discomfort, especially with attempted jogging. His left foot pain was exacerbated moderately since the surgery. Employee's left foot was particularly sensitive in the second to third and third to fourth interspace and somewhat proximally as well. Dr. Ceder injected his left foot for a Morton's neuroma. (Ceder Medical Report, May 11, 1999).

14) On June 15, 1999, Employee's left knee was still "clunking" two to three times a day. He worked part-time and did not feel he could do more. Dr. Ceder diagnosed mildly hypertrophic scars anteromedial and anterolateral portals and probable left foot second to third and third to fourth Morton's neuromas. He injected Employee's left foot. Dr. Ceder discussed surgical excision of the Morton's neuromas. (Ceder Chart Note, June 15, 1999).

15) On August 16, 1999, Employee followed up with Dr. Ceder. His left knee was doing well overall, with an occasional "clunk." Employee was able to work a full eight-hour shift. His

primary concern was his left foot. Employee's pain improved with the last injections but the pain recurred. His left foot pain was chronic and did not allow him to run, jump or return to his normal abilities. Employee's left knee was still somewhat sensitive in the anterolateral joint line and his left foot was hypersensitive over the proximal second and third metatarsals, extending down to mid metatarsals and the metatarsal heads. Dr. Ceder stated it was not specific for Morton's neuroma type manifestation at that point. He referred Employee to John Bursell, M.D., for a neurologic evaluation. (Ceder Chart Note, August 16, 1999).

16) On August 23, 1999, Dr. Bursell evaluated Employee's chronic left foot pain. Employee reported he was unable to drive his car with a standard transmission, was unable to work two jobs as he had before, and was unable to run after the 1993 injury. He fell at work in April of 1999 because left foot pain caused his left leg to give out and sustained an injury to his left knee. Employee reported pain primarily on the top of his left foot that radiated out to the second and third toes. Dr. Bursell diagnosed posttraumatic left foot pain with unclear etiology after examining's Employee's left foot and reviewing x-rays taken that day. He recommended a left foot bone scan. (Bursell Medical Report, August 23, 1999).

17) On September 3, 1999, Employee followed up with Dr. Bursell after an August 30, 1999 bone scan which was normal. His left foot was tender primarily at the dorsum of the fore-foot and into the mid-foot. Dr. Bursell recommended a reflexology program and fitted him with an orthotic to improve his gait and reduce foot pain and prescribed Celebrex. (Bursell Chart Note, September 3, 1999).

18) On October 1, 1999, Employee's foot pain was unchanged. Dr. Bursell stated there did not appear to be a neuropathic component. He increased Employee's Celebrex. (Bursell Chart Note, October 1, 1999).

19) On October 15, 1999, Dr. Bursell noted Employee's left foot had not shown an improvement symptomatically with rehabilitative efforts. He could not see anything on the bone scan or x-ray studies to correlate with Employee's ongoing left foot pain. Employee would follow up with Dr. Ceder. (Bursell Chart Note, October 15, 1999).

20) On December 21, 1999, Dr. Bursell rated a one percent permanent partial impairment (PPI) for Employee's left knee. (Bursell, Medical Report, December 21, 1999).

21) On April 19, 2000, Employee had not noticed any improvement in his left foot pain symptoms with the orthotics. He still had intermittently sharp and severe pain limiting his

activities. Employee was concerned about his left knee because it was still bothering him. Dr. Bursell referred him to Alan Gross, M.D., for an orthopedic evaluation of his left knee. (Bursell Chart Note, April 19, 2000).

22) On April 27, 2000, Dr. Gross evaluated Employee's left knee. Employee reported pain in his left knee and intermittent painful clunking and catching approximately two times per week, which was sometimes very debilitating. A left knee MRI revealed an abnormal signal on the anterior cruciate ligament but it otherwise appeared normal except for some blunting of the lateral meniscus consistent with the previous menisectomy. Dr. Gross recommended a diagnostic arthroscopy to see if there was a fragment getting caught. (Gross Medical Report, April 27, 2000).

23) On May 5, 2000, Employee visited Dr. Bursell and reported he was still having quite a few problems with his left foot pain. He wanted to have his left foot addressed before proceeding with treating his left knee. Employee was tender over the dorsum of the second and third metatarsophalangeal joint with no palpable abnormalities. Dr. Bursell assessed metatarsalgia and stated Employee may have a Morton's neuroma. (Bursell Medical Report, May 5, 2000).

24) On August 21, 2000, Dennis Rice, D.P.M., evaluated Employee's left foot. Dr. Rice diagnosed Morton's neuroma, neuralgia in the second inter-metatarsal space of the left foot secondary to trauma and capsulitis or tendinitis to the plantar aspect of the third metatarsal phalangeal joint due to elevation of the second metatarsal. He recommended wider shoes and more rigid orthotics with an accommodative fore-foot extension. (Rice Medical Report, August 21, 2000).

25) On January 10, 2001, Employee visited Dr. Bursell for left foot pain. His foot was tender to palpation over the second and third metatarsals distally but Dr. Bursell could not feel any abnormalities. Dr. Bursell diagnosed chronic left foot pain following metatarsal fracture. He recommended an orthotic fitting as recommended by Dr. Rice and increased Employee's Celebrex. (Bursell Chart Note, January 10, 2001).

26) On April 25, 2001, Dr. Bursell opined Employee's left foot was stable and his left fore-foot pain with no obvious deformity was most likely soft-tissue related. He assessed a zero percent PPI rating for Employee's left foot. (Bursell Chart Note, April 25, 2001).

27) On May 15, 2002 and June 2, 2002, Employee saw Ahn Lam, D.P.M., for left foot pain in the second metatarsophalangeal joint. (Lam Chart Notes, May 15, 2002).

28) On August 9, 2002, Dr. Lam diagnosed a painful left second metatarsal deformity with dorsal nerve entrapment and exostosis secondary to trauma. Employee's dorsal cutaneous nerve was entrapped in increased fibrous scar tissue and his second metatarsal dorsal head was deformed with excess dorsal exostosis. Dr. Lam excised an entrapped nerve in the dorsal left second metatarsal and re-sectioned an exostosis from the dorsal left second metatarsal. (Lam Operative Report, August 9, 2002).

29) On March 12, 2003, Dr. Bursell noted Employee's left foot was doing better after surgery but he still had bilateral knee pain. (Bursell Chart Note, March 12, 2003).

30) On June 12, 2006, a compromise and release settlement agreement was approved which settled all benefits for Employee's October 27, 1993 left foot work injury, October 6, 1998 bilateral knee injury, and a December 11, 1999 back work injury. (Compromise and Release Settlement Agreement, June 12, 2006).

31) On March 3, 2014, Employee visited the emergency room for burning right and left foot pain, worse to the left. He reported he slipped on a wet floor at work and landed with all of his weight on the balls of the feet two days prior. X-rays of his right foot revealed no fracture but showed degenerative joint disease. Employee was diagnosed with a right foot sprain, right and left foot contusions, and bone spurs and was restricted from working for two days. (Alex Malter, M.D., Emergency Room Report, March 3, 2014).

32) On April 4, 2017, Employee visited Wendy Smith, PA-C and reported bilateral foot pain making it difficult for him to do his job. He was concerned he had something wrong with his feet and denied any injury to the area. Employee's pain symptoms were present for the past month and he described the pain as burning. PA-C Smith diagnosed diabetic neuropathy and prescribed Lyrica. (Smith Chart Note, April 4, 2017).

33) On May 18, 2017, Employee reported he injured his left ankle at work on May 17, 2017 while vacuuming stairs when he missed a step and rolled his ankle. (Report of Occupational Injury, May 18, 2017).

34) On May 18, 2017, Employee saw Robert Haight, M.D., at Juneau Urgent and Family Care, for constant left foot pain after slipping on stairs last night at work and inverting his ankle. After reviewing x-rays of Employee's left ankle, Dr. Haight diagnosed an acute left ankle sprain as the result of a work injury on May 17, 2017. He restricted Employee from work until May 22, 2017 and recommended avoiding kneeling, squatting, jumping, running and climbing ladders entirely,

and prolonged standing. Dr. Haight also recommended Employee wear a splint until May 29, 2017. (Haight Medical Report, May 18, 2017).

35) On May 22, 2017, Employee followed up with Dr. Haight for continuing left foot pain. He went back to work but had a hard time walking around; Naproxen 500 mg helped. Employee's supervisor advised him to go home and see his doctor. Dr. Haight took Employee off work until May 29, 2017 when he released Employee to work without restrictions. (Haight Chart Note, May 22, 2017).

36) On May 31, 2017, Dr. Bursell evaluated Employee's left ankle pain upon referral by Dr. Haight. Employee filled out a health history form indicating he had left knee surgery in the 1980s. He told Dr. Bursell he twisted his left ankle while vacuuming chairs at work on May 17, 2017. His left ankle had quite a bit of initial swelling but the ankle pain was not decreasing. Dr. Bursell diagnosed a grade 2 left ankle sprain. He recommended Employee wear a cam walker for two weeks and took him off work for two weeks. (Bursell Medical Report, May 31, 2017).

37) On June 14, 2017, Employee followed up with Dr. Bursell regarding his left foot and ankle injury. He stated he wore the cam walker and his ankle felt better. Employee also reported increased pain in his left fore-foot over the past week. He informed Dr. Bursell he had prior left foot pain issues and had some kind of foot surgery but he was unable to describe the surgery. Dr. Bursell noted a longitudinal scar across the dorsum of Employee's left foot and that Employee had significant tenderness to palpitation of the dorsal second, third and fourth metatarsophalangeal joints. X-rays showed no evidence of fracture, no significant degenerative changes and no evidence of acute pathology. Dr. Bursell stated Employee's left ankle was doing well and resolved as expected. However, he was not sure what was causing Employee's severe left foot pain. He referred Employee to William Martin, M.D., a foot and ankle specialist. (Bursell Chart Note, June 14, 2017).

38) On June 27, 2017, Dr. Martin evaluated Employee's left mid- and fore-foot. Employee reported a previous foot surgery many years ago but was not able to tell Dr. Martin the nature of the surgery, who performed it, or when it occurred. He had a full recovery from that and was able to carry on with his normal activities of daily life. About a month ago, Employee sustained an inversion-type left ankle injury when he was vacuuming some chairs. The pain was in his mid-foot, not in his ankle. After reviewing Employee's May 31, 2017 and June 14, 2017 x-rays, Dr. Martin diagnosed moderate mid-foot arthritis, especially at the third and to a lesser extent at

the second tarsometatarsal articulations. He recommended Employee continue using his cam walker, suggested an MRI of Employee's mid-foot and fore-foot. (Martin Medical Report, June 27, 2017).

39) On July 11, 2017, Dr. Martin reviewed Employee's July 5, 2017 left foot MRI and stated it revealed continued mid-foot arthritis, primarily in the proximal naviculomedial cuneiform articulations and some diffuse dorsal subcutaneous edema from his mid-foot and extending into his fore-foot. When asked to pinpoint with one finger where his foot hurt, Employee pointed to his third metatarsal phalangeal joint. Dr. Martin reviewed the MRI again and was not able to see any specific pathology in that area. He recommended a corticosteroid injection into Employee's third metatarsal phalangeal joint and surrounding tissues. Employee reported immediate pain relief after the injection. He asked to be restricted from work for two more weeks. Dr. Martin did not feel that he could do that based upon the MRI and released Employee to work full duty as of July 17, 2017. He encouraged Employee to wean himself from wearing the cam walker over the next three or four days. (Martin Chart Note, July 11, 2017; Martin Return to Work Recommendation, July 11, 2017).

40) On August 17, 2017, Employee followed up with Dr. Martin for left foot pain. He stated his symptoms completely alleviated after the injection and he tried to go back to work but was still having problems. Employee requested an injection in his mid-foot and for Dr. Martin to prescribe continued use of the cam walker. Dr. Martin examined Employee's left foot and was not able to provoke a pain response with percussion, range of motion or stressing of his mid-foot joints but noted arthrosis. He recommended physical therapy, deep tissue massage and gait training and offered another injection in three months. (Martin Chart Note, August 17, 2017).

41) On August 30, 2017, Employee saw Wendy Smith, PA-C, for bilateral foot pain. PA-C Smith diagnosed diabetic neuropathy and depression. She recommended Employee discontinue Lexapro and start Cymbalta and restart Lyrica. (Smith Medical Report, August 30, 2017).

42) On September 6, 2017, Employee followed up with PA-C Smith for bilateral foot pain. Employee had been on gabapentin and Cymbalta. PA-C Smith diagnosed diabetic neuropathy. She recommended he continue to take Cymbalta and gabapentin for pain on the bottoms of his feet. (Smith Chart Note, September 6, 2017).

43) On September 7, 2017, Kelley Kluender, PT, assessed Employee for physical therapy for his left foot pain. Employee stated the cam walker and injection helped but his pain had returned.

His left foot pain was intermittent but he had more pain in the past week. Employee reported difficulty walking and with stairs and increased activity, making his job duties more difficult to complete. (Kluender Physical Therapy Note, September 7, 2017).

44) Employee underwent physical therapy on September 12, 14, 17, 19, 25, 28 and October 3, 2017. (Physical Therapy Notes, September 12 through October 3, 2017).

45) On October 5, 2017, Employee underwent physical therapy. He reported left knee pain he thinks began to worsen about a month ago. Employee felt his left knee pain was from his May 2017 work injury. He was more concerned about his left foot and ankle at the time of the injury. Employee's left foot and knees were hurting and he had more trouble walking due to the pain. PT Kluender noted worsened antalgic gait. (Kluender Physical Therapy Note, October 5, 2017).

46) On October 6, 2017, Employee reported continuing bilateral foot pain despite taking gabapentin to PA-C Smith. (Smith, Chart Note, October 6, 2017).

47) On October 17, 2017, Employee visited Dr. Bursell for bilateral knee pain. He reported it began after a fall on stairs at work on May 17, 2017. Employee had no problems with knee pain prior to the work injury. His left knee pain was worse than his right, it was severe at times, and his right knee locked intermittently at night. Upon examination, Dr. Bursell noted a positive McMurray test right knee only. He reviewed x-rays of Employee's knees which revealed advanced left and moderate right medial joint space narrowing, degenerative changes, and advanced patellofemoral arthrosis with lateralization of the patella. Dr. Bursell recommended a right knee MRI to assess for medial meniscus tear and a left knee replacement. (Bursell Medical Report, October 17, 2017).

48) The above is the first medical treatment for Employee's knees connected to work for Employer in the medical records. (Observations).

49) On October 19, 2017, Employee requested Dr. Martin give him a corticosteroid injection in his left foot. He reported a lot of pain and swelling in his left foot. Dr. Martin thought it was reasonable to give him another mid-foot injection. Employee had immediate pain relief after the left foot injection. Dr. Martin talked to Employee about using a stiff-soled shoe or getting a metal plank in his shoe. (Martin Medical Report, October 19, 2017).

50) On October 24, 2017, Dr. Bursell evaluated Employee's right knee after his October 20, 2014 MRI which showed an oblique tear with flap component along the mid-posterior horn of the

lateral meniscus and tri-compartmental degenerative change. He referred Employee to Dr. Martin for an orthopedic surgical consolation. (Bursell Chart Note, October 24, 2017).

51) On October 31, 2017, Dr. Martin evaluated Employee's bilateral knee pain. Employee reported more left knee pain than right knee pain and stated he wanted to deal with his left knee first. Dr. Martin noted Employee recently complained of more right knee pain than the left to Dr. Bursell. He reviewed Employee's October 20, 2017 right knee MRI which revealed an oblique tear involving his lateral meniscus, marked attenuation and irregularity involving the medial meniscus in addition to the tri-compartmental arthritis. After looking at Employee's plain films, Dr. Martin noted he had bone on bone arthritis involving his left medial compartment and near bone on bone arthritis involving his right medial compartment. Dr. Martin discussed various treatment options including non-operative treatment and surgical treatment. He recommended a total left knee replacement because he doubted an arthroscopy would give Employee sustained relief. Employee elected to proceed with the total knee replacement. (Martin Chart Note, October 31, 2017).

52) On November 28, 2017, Employee requested Dr. Martin place him on a "no work status" prior to his surgery. There were questions as to whether Employee's primary insurance or workers' compensation would cover his left knee replacement. Employee stated he wanted it covered by his private insurance. Dr. Martin was not willing to recommend a "no work status" but was willing to recommend light duty with sedentary work only. (Martin Chart Note, November 28, 2017).

53) On December 6, 2017, Dr. Martin cancelled Employee's scheduled left knee replacement surgery because Employee fell the day before and sustained contusions and scrapes to his knees. (Martin Progress Note, December 6, 2017).

54) On December 22, 2017, Employer denied all compensation and medical benefits related to Employee's bilateral knees contending a report for injuries to the bilateral knees was not timely under AS 23.30.100 and there was no medical evidence the work injury is the substantial cause of Employee's disability or need for treatment for his bilateral knees. (Controversion Notice, December 22, 2017).

55) On January 3, 2018, Employee underwent a left knee total arthroplasty for arthritis. (Operative Note, January 3, 2018).

56) On February 5, 2018, Employer denied all benefits as of January 5, 2018 contending Employee failed to attend a properly noticed employer's medical evaluation (EME). (Controversion Notice, February 5, 2018).

57) On March 3, 2018, Dr. Schwartz evaluated Employee for an Employer's Medical Evaluation (EME). He opined the May 2017 work injury was the substantial cause of Employee need for medical treatment for his left ankle but was not the substantial cause of his need for medical treatment for his bilateral knees. Dr. Schwartz diagnosed a left ankle sprain related to the work injury, left subtalar joint arthrosis aggravated by the work injury and degenerative bilateral knee disease unrelated to the work injury. Employee denied any prior knee injury. Dr. Schwartz concluded the pain in his knees is not related to the work injury based on there being no documentation he fell onto his knees at the time of the work injury and the delay in Employee reporting knee pain on October 5, 2017, when he told the physical therapist his knee pain began to worsen a month prior. Employee's left ankle was medically stable in October 2017 because his complaints changed from foot and ankle pain to knee pain and he returned to work. No further medical treatment was recommended for the left ankle. Dr. Schwartz was unable to give a PPI rating because Employee had a recent total knee replacement and needed to recover. He placed no restrictions because, "Any related ankle restrictions will be overshadowed by restrictions on his knees." (Schwartz EME Report, March 3, 2018).

58) On April 19, 2018, Employee followed up with Dr. Martin after a left total knee replacement on January 3, 2018. He wanted another month off from work. Dr. Martin was "stern" with Employee regarding his work readiness and inability to return to work. Employee was stable and improving. He questioned Employee's motivations regarding his work status and increased his work status from two hours a day to four hours a day for the next month. In one month's time, Dr. Martin recommended Employee return to full duty. He stated, "From my standpoint, the patient is taking longer to get back to full duty in [sic] other patients who have had similar operations and other similar circumstances." Dr. Martin recommended Employee follow up in one month. (Martin Chart Note, April 19, 2018).

59) On April 20, 2018, Employer denied all compensation and medical benefits related to Employee's bilateral knees and TTD, temporary partial disability (TPD), medical benefits and transportation costs related to Employee's left ankle as of April 20, 2018, relying on AS 23.30.100 and Dr. Schwartz's EME report. (Controversion Notice, April 20, 2018).

60) On April 23, 2018, Employee filed a claim seeking TTD and medical costs for injuries he sustained to his ankle and knees while vacuuming after missing a step and falling. (Claim for Workers' Compensation Benefits, April 23, 2018).

61) On May 14, 2018, Employer answered Employee's claim. It denied TTD and medical benefits and transportation costs unnecessary, unreasonable or unrelated to Employee's May 17, 2017 work injury. Employer contended Employee's claim was barred under AS 23.30.100. It contended Employee's work was not the substantial cause of his disability or need for medical treatment for his bilateral knees. Employer relied on Dr. Schwartz's March 3, 2018 EME report to conclude Employee's bilateral knee pain was substantially caused by pre-existing degenerative change, Employee's left ankle was medically stable as of October 2017 and no further treatment was recommended. (Answer, May 14, 2018).

62) On May 15, 2018, Employee saw Dr. Martin for left knee pain. He requested he go back to full duty work with no restrictions. Dr. Martin released him to full duty work with no restrictions and recommended he follow up in six months. (Martin Chart Note, May 15, 2018; Martin Return to Work Form, May 15, 2018).

63) On May 17, 2018, Employer denied all benefits relying on AS 23.30.100 and Dr. Schwartz's EME report. (Controversion Notice, May 17, 2018).

64) On May 22, 2018, Employee contended his bilateral knee injuries are related to his May 2017 work injury. He was out of work from May 17, 2017 to July 16, 2017 and from November 22, 2017 to May 15, 2018. Employer said it paid TTD from May 17, 2017 to July 16, 2017. The board designee informed Employee of his right to seek an attorney, explained attorneys for injured workers cannot collect a fee of more than $300 and costs without approval and Employer can be ordered to pay for all or part of his attorney's fees and legal costs if he prevailed on his claim, and provided Employee a list of attorneys that had represented injured workers in the past. (Prehearing Conference Summary, May 22, 2018).

65) On June 14, 2018, Dr. Martin responded to a letter from Employer's attorney indicating he disagreed with Dr. Schwartz's March 3, 2018 EME report because of Dr. Bursell's October 17, 2017 chart note. (Martin response, June 14, 2018).

66) On September 7, 2018, Employee visited Dr. Martin for left foot pain. He requested a left mid-foot corticosteroid injection. Dr. Martin diagnosed mid-foot arthrosis and injected a

corticosteroid in Employee's left mid-foot region in the area of maximal tenderness near the tarsometatarsal articulations. (Martin Medical Report, September 7, 2018).

67) On September 24, 2018, Dr. Martin was deposed. (Martin Deposition, September 24, 2018). Employee did not appear. (*Id*. at 3). Dr. Martin testified he is a board-certified orthopedic surgeon. (*Id*. at 5). He did not know what the substantial cause of Employee's current left foot pain. (*Id*. at 17). When asked if he knew the potential causes of Employee's left knee arthritis, Dr. Martin stated,

> I know that he has arthritis, but I can't tell you why he has arthritis. I can't -- again, it's the same thing as we talked about earlier. It can come from inflammatory arthropathy. It can come from wear and tear. It came come from some type of trauma. It can come from any number of causes. Sometimes God just says it's your turn. I don't know why he has it. (*Id*. at 21-22).

He does not agree with Dr. Schwartz's opinion that the work injury is not the substantial cause of Employee's need for bilateral knee treatment because Dr. Bursell's October 17, 2017 note mentioned Employee had a fall and had pain in both knees and "there is no proof one way or another." (*Id*. at 24-25). Dr. Martin stated he "can't tell you what the cause is or is not of the patient's arthritis. I can only tell you that he has arthritis, and that the patient states that he had no pain in his knees prior to the fall, and after the fall that he does." (*Id*. at 25). He cannot give an opinion one way or another on whether or not the fall from May 2017 is a substantial cause of Employee's need for total knee replacement surgeries or whether the May 2017 work injury is the substantial cause for Employee's need for left foot treatment. (*Id*. at 25-27). Dr. Martin thinks there will be a time when Employee needs a total right knee replacement but he does not have plans to do the knee replacement. (*Id*. at 36).

68) On September 24, 2018, Employee was deposed. (Employee Deposition, September 24, 2018). He testified he was vacuuming the stairs with a backpack vacuum cleaner when he missed a step and fell down. (*Id*. 16-17). Employee twisted his left ankle and his knees were bleeding. (*Id*. at 17). He thought his knee injuries were "blood only" and "no big deal." (*Id*.). Employee's knees started bothering him a little bit later. (*Id*.). He tore holes in both knees of the jeans he was wearing. (*Id*. at 18). Employee went home and cleaned his knees and he called his boss. (*Id*.). Employee cannot read English so someone at "central office" helped him fill out the occupational injury report on May 18, 2017. (*Id*. at 19-20). The form did not report his knees were hurt. (*Id*. at 20-21). He did not include his knee injuries because his knees were only

bleeding. (*Id*.). A week later Employee went to central office and told them he made a mistake not reporting his knee injuries. (*Id*. at 19). He did not tell urgent care about his bilateral knee injuries. (*Id*. at 21). When Employee worked for another employer in 1993, he broke his left foot when cans of chili fell on it. (*Id*. at 22). Dr. Lam performed the foot surgery and he saw Dr. Bursell for therapy and pain. (*Id*.). The foot pain went away but it took time. (*Id*. at 23). Employee sustained a left knee injury while working for another Employer when he slipped on potato salad and Dr. Schwarting performed surgery with a small hole. (*Id*. at 24). Employee had difficulties remembering his prior left knee surgery:

> Q. . . . Do you remember what year this was?
> A. Maybe ’95, ’94.
> Q. Maybe 1998?
> A. 1998? I can’t remember, really.
> Q. Okay. And you were - -
> A. Yeah, like maybe 1998. Yeah, ’98 or ’97.
> Q. Okay.
> A. No, 1987 or something like that - - 997 - - 1997 is when happened, I think.
> Q. Okay. And you had a surgery for that left knee at that time?
> A. Exactly. Just like I told you. Let a - - let a small hole. Dr. - - work with Dr. Martin and Dr. Bursell. And he’s a tall man, Dr. Schwartz - - something like that.
> Q. Schwarting?
> A. Schwarting, that one. Yeah. He’s very nice man. He - - he did that to me. He’s beautiful man.
> Q. Okay. And you were taken off work for that, weren’t you?
> A. Maybe two day or one day, something like that, but not too long. Not too long. I work - - not like this time. This time was - - this Dr. Martin was really long time.
> Q. You know, I have records for that workers’ compensation injury, and you were taken off work for more than one day.
> A. Okay. I don’t remember, like I told you. (*Id*. at 27)

Employee recalled settling the prior work injuries. (*Id*. at 28). He did not remember telling Dr. Schwartz he never had any knee problems before but Dr. Schwartz is an old man, maybe he didn’t hear Employee or understand him or maybe he started losing his memory. (*Id*. at 30). Employee told Dr. Schwartz the same things he stated during his deposition. (*Id*.). His left ankle still hurts. (*Id*. at 31). Employee thinks it is “like you glue a glass together,” after it breaks and is glued back together it is “not 100 percent better.” (*Id*.). If anything taps it, it is “super easy to go back to damage again.” (*Id*. at 31-32). Employee’s right knee is still painful, last night he

had a lot of pain. (*Id*. at 32). He first told a teacher about his work injury and then his work team. (*Id*. at 36). After the injury, Employee was asked to check for garbage in a class room. (*Id*. at 38). He could not check for garbage because he could not walk and he asked the room teacher to look for garbage. (*Id*. at 38-39). The teacher said there was garbage and asked Employee to come and get it. (*Id*. at 39). He told him he could not because of his knee and ankle. (*Id*.). Employee acknowledged there is no medical record of his knees hurting until October because he thought it would go away; but it never went away so he went to Dr. Martin. (*Id*. at 40). He only told central office and Linda Brace his knees hurt:

> Q. Okay. So you never told anybody that your knees - -
> A. No.
> Q. -- were hurting?
> A. No.
> Q. Okay.
> A. Only -- only -- only central office, and Linda.
> Q. And Linda, the teacher?
> A. No, Linda, the --
> Q. The adjuster at Northern?
> A. Yeah. Linda Brace.
> Q. Brace?
> A. That one. Only her. So I went to central office. I said, "Look. That's what happened." So we called Linda, and Linda say, "Let's just leave it that." Then I left. I --
> Q. Who did you talk to at central office?
> A. I forget what is name. She's working there. She call payroll, where you do your paycheck.
> Q. Payroll?
> A. Yeah. Then I say, "What we have to do here?" She said, "Let me call Linda. Let me call workers' comp." They call Linda, and Linda -- because I didn't report it. So Linda said -- I said to Linda, "What we have to do now?" Linda say, "Don't worry." So, to me, I said, "Maybe this go away." I want to wait. So I wait, but it never went away. So I went to Dr. Martin. . . . (*Id*. at 40-41).

After Employee's left knee heals, he wants a right knee replacement because it will get worse. (*Id*. at 44). When asked if there was any other treatment for his left ankle that Employee thought he needed, he said no, only his knees. (*Id*. at 45). Employee never lies; he made a mistake not reporting his knee injuries right away. (*Id*. at 46). He was told he had arthritis but it never bothered him until after the accident. (*Id*.). Employee wants his knees fixed. (*Id*. at 47). Dr. Martin told him he could not perform the left knee surgery in December because his knee was cut. (*Id*. at 48). Employee's private health insurance paid for his left knee replacement and

afterwards he took sick and annual leave. (*Id*. at 49-50). When Employer did not want to pay, he went to the board to tell Employer it has to pay for it. (*Id*. at 50).

69) On December 10, 2018, Dr. Schwartz provided an addendum EME report. After reviewing additional medical records from 1993 through 2014 and from 2017 and 2018, Dr. Schwartz stated his prior opinions in March 3, 2018 EME report regarding the substantial cause of Employee's need for medical treatment for his left foot and ankle and bilateral knees had not changed. He opined the substantial cause of Employee's need for treatment for mid-foot arthritis is a pre-existing mid-foot injury and subsequent pathology and surgery. The work injury was a soft tissue injury which would have resolved by three months. Dr. Schwartz opined Employee's left knee is medically stable since he returned to work and no further interventional treatment was proposed. Employee's need for a right knee replacement is unrelated to the work injury. Because there was no structural injury identified in Employee's left foot other than soft tissue and the left ankle, Employee has no ratable impairment for the left foot. Employee needed no further medical treatment for his left knee and left ankle and foot but Employee's right knee needed further treatment, including physical therapy, a steroid injection, anti-inflammatories, and a possible knee replacement. However, the work injury was not the substantial cause of his need for right knee medical treatment. Occasional palliative care for Employee's left foot and ankle was reasonable and necessary but treatment was actually for the preexisting condition from the 1993 work injury and would include injections in his foot and repair, replacement of orthotics and physical therapy. (Schwartz Addendum EME Report, December 10, 2018).

70) On December 13, 2018, Employee requested a hearing on his claim. (ARH, December 13, 2018).

71) On December 20, 2018, Employee saw Dr. Martin for left ankle pain. He reported an increase in pain and swelling in his left ankle aggravated by activities and relieved somewhat by rest. Employee denied any history of trauma. He also reported continued pain in his knee although he stated it improved. An x-ray of Employee's left ankle demonstrated some mild to moderate joint space narrowing in the front portion of his ankle. Dr. Martin observed mild synovitis in his left foot and ankle. Employee's left knee x-ray demonstrated the implants were intact with some settling of the tibial tray. Dr. Martin talked with Employee about having arthritis in his ankle and using compression stockings to control the synovitis and recommended observing his knee and increasing his activity levels. (Martin Chart Note, December 20, 2018).

72) On January 4, 2019, Employer controverted TTD, TPD, PPI, all medical benefits as of April 20, 2018, all benefits related to Employee's bilateral knees, and all benefits related to his left foot. (Controversion Notice, January 4, 2019).

73) On January 23, 2019, Employee orally amended his claim to add his left foot as an injured body part from the May 17, 2017 work injury. The parties agreed to schedule an oral hearing on March 5, 2019 to hear Employee's April 23, 2018 claim. The board designee set the hearing evidence deadline for February 13, 2019 and the witness list and hearing brief deadline for February 26, 2019. (Prehearing Conference Summary, January 23, 2019).

74) On January 24, 2019, the division mailed a summary of the January 23, 2019 prehearing conference and a notice advising the date, time and place for a hearing to the parties. The proof of service on the prehearing conference summary indicates it was served on Employee at his address of record. The proof of service on the March 5, 2019 hearing notice indicates service on Employee at his address of record. The division mailed the copy of the January 23, 2019 prehearing conference summary and March 5, 2019 hearing notice in the same envelope. The envelope was addressed to Employee at his address of record by certified mail with return receipt requested. (Prehearing Conference Summary, June 23, 2019; Hearing Notice, January 24, 2019; Copy of Certified Envelope, January 24, 2019 with United States Postal Service (USPS) Tracking Number 9171082133393768817526).

75) On January 25, 2019, Employee reported left knee pain and swelling. His pain was greatest when he first stands up after sitting. Dr. Bursell recommended Employee follow up with Daniel Harrah, M.D., to determine whether there was a problem with his prosthesis. (Bursell Medical Report, January 25, 2019).

76) On January 26, 2019, the USPS indicated the envelope containing the January 23, 2019 prehearing conference summary and March 5, 2019 hearing notice was picked up. (USPS Website Tracking 9171082133393768817526; Observations).

77) On February 5, 2019, Dr. Harrah evaluated Employee's left knee. His knee had moderate effusion and had good extension strength and about a 10 degree extensor lag with no appreciable patellar instability. X-rays of Employee's knee on January 25, 2019 show the lateral tibial component is overlapping the fibula and appeared to be facing the proximal tibiofibular joint and the patella was off of the trochlea and inferiorly displaced. Dr. Harrah inserted a needle in Employee's left knee and obtained 44 cc. of slightly cloudy fluid. If the workup for infection

was negative, Dr. Harrah thought the most likely diagnosis was at least a partial quadriceps rupture. (Harrah Medical Report, February 5, 2019).

78) On February 7, 2019, Employer answered Employee's January 23, 2019 amended claim. Employer contended Employee's May 17, 2017 work injury was not the legal cause of Employee's current disability related to his bilateral knees or left foot. It contends Employee's injury stemmed from a long-standing, pre-existing condition related to his bilateral knees and left foot. Employer contends Employee's work was not the legal cause of Employee's current disability. It relied on Dr. Schwartz's March 3, 2018 EME report and December 10, 2018 addendum which opined the substantial cause Employee's need for treatment three months after his work injury for his left foot was a pre-existing mid-foot injury. (Answer, February 7, 2019).

79) On February 14, 2019, Employee's left knee MRI revealed thickening with moderately advanced tendinopathy of the distal quadriceps tendon, interstitial degeneration and longitudinal interstitial tearing of the distal tendon, borderline patella baja, scarring within Hoffa's fat pad, chronic tendinopathy of the infrapatellar tendon and moderate-sized joint effusion with synovial thickening along the suprapatellar bursa. (MRI Report, February 14, 2019).

80) On February 19, 2019, Employee spoke with a workers' compensation technician. He reported he was having knee surgery the next day. Employee was worried he was going to lose his job because he did not have any leave left and wanted to know who was going to pay him during his recovery from surgery. The technician explained the March 5, 2019 hearing was scheduled to address Employee's claim and suggested he speak to Employer's human resource office about his upcoming surgery and leave. Employee requested assistance to file his pre-surgery instructions which the technician provided. He told the technician he will get an attorney if he loses at hearing. The technician explained Employee can seek an attorney "at any time, including now" and provided him a list of attorneys. Employee stated he needed more time to get an attorney. The technician explained he can file a petition to request a hearing continuance and assisted Employee with the petition form. (ICERS Event Entry, Walk-In, February 19, 2019).

81) On February 19, 2019, Employee requested a hearing continuance stating, "Need to find someone to represent me. Requesting more time to find an attorney." (Petition, February 19, 2019).

82) Employee did not file a hearing brief or witness list. (Record; Observation).

83) At hearing on March 5, 2019, the designated chair attempted to contact Employee at his telephone number of record and received a message stating the number was not in service with no option to leave a message. Employee failed to appear in person or telephonically. (Record).

84) Employer contended the hearing should proceed in Employee's absence. It contended Employee did not have surgery on February 20, 2019 and worked the day before the March 5, 2019 hearing. (Employer hearing arguments).

85) Cherish Hansen, the Human Resources Manager for Employer, testified she spoke with Employee on February 19, 2019 and he told her needed left knee surgery the next day and needed to be off work. He did not know how long he was going to be off work and was concerned about his leave. Employee worked on March 4, 2019 and his 7.5 hour shift begins at approximately 2:45 p.m. The first time Employee told her he injured his knees was in December 2017 when he came in to talk to her about his knee surgery. Employee told her that he had fallen in the shower after taking a "chemical" for pre-op care and he hit his knees and they were bleeding. The next day the doctor looked at his knees and told him he could not do the surgery and cancelled it. Employee returned to full duty work on May 18, 2018 with no restrictions. (Ms. Hansen).

86) Dr. Schwartz testified Employee denied any prior left knee injury or surgery during his examination. When he performs an examination, Dr. Schwartz dictates his interpretation of what the injured workers tell him in front of the injured worker while he is speaking to him. He tells each injured worker to listen to what he dictates because it goes into the report and to not let him make any mistakes. Employee was sitting with Dr. Schwartz when he dictated that Employee denied any prior left knee injury or surgery and he did not correct Dr. Schwartz. When he examined Employee's left foot and asked him about the incision scar, Employee told him the scar was from a snake bite 30 years prior. Employee's left ankle and foot fully reached medical stability in October 2017 when his complaints changed from his left foot to his knee. The aggravation of Employee's left foot injury resolved in July 2017 when he returned to work. He noted Employee's knee injuries were not significant enough for Employee to report them when he first sought medical treatment. The amount of arthritis Employee has in his knees would not have been caused by the work injury, even as Employee described it. When someone injuries a knee, whether it is arthritic or not, the complaints of pain should start at the time of the injury, there is no delay in the onset of pain after an injury. In 1993 x-rays seemed to indicate old

healed fractures in his left foot but you don't get that appearance at five or six weeks post injury. (Dr. Schwartz).

87) Linda Brace, a claims adjuster, testified Employee initially told her he rolled his left while vacuuming stairs. He first told her about his knee injuries on October 9, 2017. During their conversations on May 26, 2017, June 15, 2017, and July 12, 2017, he denied any prior injury to his left ankle and foot and did not tell her he injured his knees. On October 9, 2017, Employee told her he had increased pain in his knees approximately six to seven weeks ago and at the time of injury his knees were bleeding. Employee did not tell her that he had any problems with diabetic neuropathy in his feet. (Ms. Brace).

88) Employer contended Employee's past representations to Ms. Brace, Ms. Hansen and Dr. Schwartz should be taken into consideration. It contends Dr. Bursell's failure to mention Employee's past medical history in his 2018 medical reports is disingenuous. Employer contended Employee complained of bilateral foot pain one month prior to the work injury. It contended Employee's claim for bilateral knee injuries is barred because he failed to provide notice of his bilateral knee injuries within 30 days without a satisfactory reason. Employer contends Employee's claim is not compensable. It contends Employee is not entitled to additional benefits for his left foot and ankle. (Employer hearing arguments).

89) . Employee is a poor historian and is not credible due to his lapses in memory concerning his work and medical history. (Experience, judgment, observations, and inferences from all of the above).

PRINCIPLES OF LAW

> **AS 23.30.001. Legislative intent.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> . . . .

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

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require.
>
> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the employer.
>
> (b) The notice must be in a format prescribed by the director and contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury or death, and authority to release records of medical treatment for the injury or death, and be signed by the employee or by a person on behalf of the employee, or, in case of death, by a person claiming to be entitled to compensation for the death or by a person on behalf of that person.
> . . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> > (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
> >
> > (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
> >
> > (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury or death.

In *Cogger v. Anchor House*, 936 P.2d 157, 160 (Alaska 1997), the Supreme Court again addressed the 30-day notice period of AS 23.20.100:

> For reasons of fairness and based on the general excuse in AS 23.30.100(d)(2), this court has read a "reasonableness" standard, analogous to the "discovery rule" for statutes of limitations, into the statute. *Alaska State Hous. Auth. v. Sullivan*,

> 518 P.2d 759, 761 (Alaska 1974). Under this standard, the thirty-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Id*. at 761 (quoting 3 Arthur Larson, Workmen's Compensation § 78.41, at 60 (1971)).
> . . . .
>
> Under *Sullivan*, the thirty-day period begins to run when the worker could reasonably discover an injury's compensability. 518 P.2d at 761. The exact date when an employee could reasonably discover compensability is often difficult to determine, and missing the short thirty-day limitation period bars a claim absolutely. For reasons of clarity and fairness, we hold that the thirty-day period can begin no earlier than when a compensable event first occurs. However, it is not necessary that a claimant fully diagnose his or her injury for the thirty-day period to begin.

Timely written notice of a worker's injury is required because it lets an employer provide immediate medical diagnosis and treatment to minimize the seriousness of an injury, and because it facilitates the earliest possible investigation of facts surrounding injury. Thus, failure to provide timely notice that impedes either of these objectives prejudices employer. *Tinker v. Veco, Inc.*, 913 P.2d 488 (Alaska 1996). The first step of analyzing whether an employer has been prejudiced by failure to submit written notice of an injury is to determine whether the written notification would have informed the employer of anything about which the injured worker had not already told his supervisor or manager. If a legally sufficient written notification would have only duplicated the same information an injured worker already had communicated verbally to the employer through its in-charge agents, it would require an exceptional set of circumstances for this difference in the form by which the information was conveyed to prejudice the employer. *Id*. at 492.

> **AS 23.30.110. Procedure on claims.**
> . . . .
>
> (c) . . . The board shall give each party at least 10 days' notice of the hearing, either personally or by certified mail. . . .

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter;

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

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

The Alaska Supreme Court has repeatedly held the fact symptoms arose after an event is insufficient to establish causation in workers' compensation cases. *Lindhag v. State*¸123 P.3d 948 (Alaska 2005); *Rivera v. Wal-Mart Stores, Inc.*, 247 P.3d 957 (Alaska 2011); *Buchinsky v. The Arc of Anchorage*, Slip Op. S-15547 (Alaska 2016).

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

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors' opinions disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 (August 25, 2008).

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect to which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and are, if corroborated by other evidence, sufficient to establish the injury.
>
> **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. Definitions.** In this chapter,
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;
>
> (29) "palliative care" means medical care or treatment rendered to reduce or moderate temporarily the intensity of pain caused by an otherwise stable medical condition, but does not include those medical services rendered to diagnose, heal, or permanently alleviate or eliminate a medical condition;
> . . . .

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

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

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) said, "'Once an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption." (*Id*. at 573).

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

> **8 AAC 45.060. Service.**
> . . . .
>
> (b) . . . Service by mail is complete at the time of deposit in the mail if mailed with sufficient postage and properly addressed to the party at the party's last known address. . . .
>
> (f) Immediately upon a change of address for service, a party or a party's representative must file with the board and serve on the opposing party a written notice of the change. Until a party or the board receives written notice of a change of address, documents must be served upon a party at the party's last known address.

8 AAC 45.070. Hearings.

. . . .

(f) If the board finds that a party was served with notice of hearing and is not present at the hearing, the board will, in its discretion, and in the following order of priority,

(1) proceed with the hearing in the party's absence and, after taking evidence, decide the issues in the application or petition;

(2) dismiss the case without prejudice; or

(3) adjourn, postpone, or continue the hearing.

8 AAC 45.074. Continuances and cancellations.

. . . .

(b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,

(1) good cause exists only when

(A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;

(B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;

(C) a party, a representative of a party, or a material witness becomes ill or dies;

(D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;

(E) the hearing was set under 8 AAC 45.160(d);

(F) a second independent medical evaluation is required under AS 23.30.095(k);

(G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had

> adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;
>
> (H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
>
> (I) the parties have agreed to and scheduled mediation;
>
> (J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);
>
> (K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
>
> (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
>
> (M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
>
> (N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing; . . . .

ANALYSIS

1) Was the oral order to proceed in Employee's absence correct?

Parties must be given at least 10 days' notice of hearing by certified mail. AS 23.30.110(c). On January 24, 2019, the division served Employee at his address of record with the March 5, 2019 hearing notice by certified mail, return receipt requested. AS 23.30.110(c); 8 AAC 45.060(b),

(f). It was picked up on January 26, 2019. Therefore, the record shows Employee was properly served and had adequate hearing notice. AS 23.30.110(c); 8 AAC 45.070(f).

Employee did not appear for the March 5, 2019 hearing and Employer requested the hearing proceed. When a party has notice of a hearing and does not appear, the law prioritizes proceeding with the hearing and deciding the issues after taking evidence, dismissing the case without prejudice, or adjourning, postponing or continuing the hearing. 8 AAC 45.070(f). The hearing on Employee's April 23, 2018 claim proceeded in Employee's absence. 8 AAC 45.070(f)(1). Based on these facts, the decision to proceed with the July 26, 2018 hearing in Employee's absence was correct. *Rogers & Babler*.

2) Was the oral order denying Employee's petition for a hearing continuance correct?

Continuances are not favored and will not be routinely granted. 8 AAC 45.074(b). Continuances are granted for good cause. 8 AAC 45.074(b)(1)(A)-(N). Employee did not demonstrate his situation fit into any of the limited grounds for good cause. The grounds for good cause related to an absent legal representative do not apply because Employee never retained an attorney. 8 AAC 45.074(b)(1)(B)-(D). Employee did not demonstrate how irreparable harm may come from proceeding with the March 5, 2019 hearing without legal representation; nor did Employee demonstrate due diligence in attempting to secure representation. 8 AAC 45.074(b)(1)(N). Employee was informed of his right to seek an attorney and was provided a list of attorneys on May 22, 2018, over nine months prior to the March 5, 2019 hearing at the May 22, 2018 prehearing conference. Employee attended the January 23, 2019 prehearing conference when the March 5, 2019 hearing was scheduled and he had over one month to seek legal representation. Employee received notice of the hearing more than ten days before the March 5, 2019 hearing date. AS 23.30.110(c); 8 AAC 45.060(b). It was Employee's responsibility to secure legal representation and he should have exercised greater diligence to find an attorney in a timely manner. His failure to do so does not constitute good cause to continue the hearing under 8 AAC 45.074. Employer incurred costs for its attorney and claims adjuster to appear for the hearing and costs to ensure Dr. Schwartz's availability to testify at hearing. Allowing a continuance when good cause does not exist under 8 AAC 45.074 would

frustrate the legislature's intent for quick, efficient, fair and predictable delivery of benefits to Employee at a reasonable cost to Employer. AS 23.30.001(1).

Employee did not demonstrate how irreparable harm may come from representing himself. 8 AAC 45.074(b)(1)(N). Employee filed a claim, attended prehearing conferences, attended his deposition, and filed an ARH on his claim without legal representation, all facts tending to show Employee is able to understand the proceedings and prepare his case. *Rogers & Babler*. Employee filed the February 15, 2019 medical report recommending the left knee replacement revision and he did not undergo the left knee replacement revision. There is no evidence the medical record is incomplete. Had Employee cited ongoing treatment for his left knee and the need for additional time to prepare evidence and arguments for hearing, those reasons are also not sufficient "good cause" to support a continuance. The oral order denying Employee's request for a continuance was correct. AS 23.30.135; *Rogers & Babler*. Employee's February 19, 2019 petition is denied.

3) Should Employee's bilateral knee claim be barred under AS 23.30.100?

An employee must give notice to his employer within 30 days of an injury in order to be eligible for workers' compensation benefits. AS 23.30.100; *Cogger*. Employee alleges he missed a step while vacuuming stairs, rolled his ankle, and fell on his knees on May 17, 2017. Employer contends Employee failed to report his knee injuries until October 2017. The presumption of compensability does not apply if there is no factual dispute. AS 23.30.120(a)(2); *Rockney*. Employee admits he never gave Employer formal written notice of his bilateral knee injuries; the occupational injury report substantiates Employee's testimony as it lists only Employee's left ankle as an injured body part and does not mention his bilateral knees. Employee failed to provide timely written notice of his bilateral knee injuries. *Id*.

Failure to give timely written notice is an absolute bar to benefits with several exceptions. AS 23.30.100; *Cogger*. Failure to give timely written notice does not bar a claim if the employer or its agent in charge in the place where the injury occurred "had knowledge of the injury" and the employer or carrier has not been prejudiced by the employee's failure to give notice, if the

failure is excused on the ground for some satisfactory reason notice could not be given or if an objection to the failure is not raised at the first hearing. AS 23.30.100(d). The 30 day period in which a claimant must bring notice of his injury to be eligible for workers' compensation begins when, by reasonable care and diligence, it is discoverable and apparent to the claimant that a compensable injury has been sustained. *Cogger*; *Sullivan*.

Employee testified he thought his knee injuries were minor until the pain would not go away so he sought treatment. The first evidence of knee pain in the record occurred on October 5, 2017 when Employee underwent physical therapy of his left ankle and he stated he was more concerned about his left foot and ankle at the time of the injury, which is consistent with his testimony. He first sought treatment for his knees on October 17, 2017; it is the first compensable event. *Cogger*. Employer was aware of the injury before Employee first sought treatment for his knees on October 9, 2017, when Employee informed Ms. Brace, the claims adjuster, he sustained scrapes to his knees on May 17, 2017, and his bilateral knee pain increased over the last six to eight weeks. Furthermore, there is no evidence the delay from May 17, 2017 to October 9, 2017 would have had any significant impact on Employer's ability to investigate the injury, secure a diagnosis or provide treatment. Consequently, Employer had knowledge of Employee's knee injuries within 30 days of the first compensable event. AS 23.30.100(d)(1). Employer contends Employee knew he sustained compensable bilateral knee injuries on May 17, 2017 when he sustained knee scrapes and his knees hurt. Employee sustained a left ankle sprain and aggravated his left subtalar joint arthrosis which was so painful he told co-workers he could not walk on May 17, 2017 and he sought medical treatment the next day. It was reasonable for Employee to overlook seemingly minor knee injuries as his left ankle and foot injury was more bothersome. AS 23.30.100(d)(2); *Cogger*; *Sullivan*; *Rogers & Babler*. Employee's bilateral knee claim will not be barred for failure to provide timely written notice. *Id*.

4) Is Employee's May 17, 2017 work injury the substantial cause of his disability and need for medical treatment for his bilateral knees and left ankle and foot?

a) Bilateral knees

Employee requests medical benefits, including past and continuing medical treatment for his bilateral knees. AS 23.30.095(a). He also requests TTD from November 22, 2017 to May 15,

2018 and continuing TTD. AS 23.30.185. Employer contends Employee's pre-existing degenerative bilateral knee disease is the substantial cause of his need for bilateral knee medical care and disability. The presumption of compensability applies to this issue. AS 23.30.120; *Meek*; *Sokolowski*. Without regard to credibility and conflicting evidence, Employee raises the presumption with his testimony he fell and injured both knees on May 17, 2017, his arthritis never bothered him until after the work injury and he continues to experience bilateral knee pain. *McGahuey*; *Wolfer*; *Resler*.

Employer rebuts the presumption with Dr. Schwartz's opinion stating Employee's pre-existing degenerative bilateral knee disease is the substantial cause of his need for bilateral knee medical care and disability. *Kramer*; *Huit*; *Tolbert*; *Norcon.* Because Employer rebutted the presumption, Employee must prove all elements of his claim by a preponderance of the evidence. *Koons*.

Employee must prove the May 2017 work injury was the substantial cause of the bilateral knee medical treatment and his disability from November 22, 2017 to May 15, 2018 and continuing. It is possible Employee fell on to his knees when he missed a step and twisted his ankle and sustained scraped knees. AS 23.30.122; *Smith*. However, Employee testified his knee injuries were initially minor and his knees starting bothering him "a little bit later." The record contradicts his testimony. The record demonstrates there was a significant delay, not a little delay, in onset of increasing knee pain when Employee reported increased pain in the six to seven weeks prior to October 9, 2017 to Ms. Brace and left knee pain he thinks began to worsen about a month earlier on October 5, 2017, during physical therapy. Employee is a poor historian and is not credible due to his lapses in memory concerning his work and medical history. AS 23.30.122; *Smith*; *Rogers & Babler*. Employee's testimony is given little weight when weighed against competing evidence. *Id*.

Employee provided no medical opinion stating the work injury was the substantial cause of his need for bilateral knee medical treatment and disability. Dr. Schwartz is the only physician that reviewed Employee's entire medical record and compared the contribution of various causes to credibly opine Employee's pre-existing degenerative bilateral knee disease is the substantial

cause of his need for bilateral knee medical care and disability. AS 23.30.122; *Smith*. Dr. Bursell's October 17, 2017 medical report simply documented Employee's account of his May 17, 2017 work injury; he did not provide an opinion as to whether Employee's work was the substantial cause of his need for bilateral knee medical treatment or disability. Dr. Martin refused to provide an opinion but disagreed with Dr. Schwartz's EME report based upon Dr. Bursell's October 17, 2017 medical report. Dr. Martin's dispute with Dr. Schwartz's EME report is given little weight because the fact Employee's knee pain symptoms arose after his work injury is insufficient to establish causation. *Moore*; *Lindhag*. Employee's and Dr. Martin's argument regarding causation is purely speculative because it infers a causal connection based solely on his knee pain increasing and need for medical treatment arising after the work injury. Employee failed to meet his burden of proving the May 2017 work injury is the substantial cause of his need for bilateral knees medical treatment and disability. *Koons*; *Saxton*. Employee's claim for bilateral knee medical costs and disability will be denied.

b) Left foot and ankle

Employer paid TTD from May 17, 2017 to July 16, 2017. Employee requests TTD from November 22, 2017 to May 15, 2018 and continuing TTD. AS 23.30.185. He also requests medical benefits for his left foot and ankle after Employer's April 20, 2018 controversion. AS 23.30.095(a). Employer contends Employee's left ankle and foot was medically stable as of October 2017 and no further treatment is recommended for the work injury. It contends any additional left foot and ankle medical care is palliative care for Employee's pre-existing mid-foot injury. The presumption of compensability applies to this issue. AS 23.30.120; *Meek*; *Sokolowski*. Employee did not provide any medical opinion addressing whether his work injury was the substantial cause of his need for left foot medical treatment and disability after April 20, 2018 and he testified there was no additional left foot and ankle medical treatment needed. Employee failed to attach the presumption. *McGahuey*; *Wolfer*; *Resler*.

Even if Employee established the presumption of compensability, Employer rebutted the presumption with Dr. Schwartz's opinion stating Employee's left ankle and foot was medically stable as of October 2017, no further treatment is recommended for the work injury and any additional left foot and ankle medical care was palliative care for Employee's pre-existing mid-

foot injury. *Kramer*; *Huit*; *Tolbert*; *Norcon.* Because Employer rebutted the presumption, Employee must prove all elements of his claim by a preponderance of the evidence. *Koons*.

Employee provided no medical opinion his work injury was the substantial cause of his need for left foot and ankle medical treatment and disability after April 20, 2018. Employee last received medical treatment for his left foot and ankle on October 19, 2017, and Dr. Martin recommended stiff-soled shoes or a mental plank in Employee's shoes. However, Dr. Martin refused to provide an opinion regarding Employee's need for left foot and ankle medical treatment and disability. The only recommendation for additional medical treatment for Employee's left foot and ankle is from Dr. Schwartz and he attributed it solely to Employee's pre-existing mid-foot injury after comparing the contribution of various causes. Therefore, Employee failed to prove by a preponderance of the evidence his work injury is the substantial cause of his need for left foot and ankle medical treatment after April 20, 2019. *Koons*; *Saxton*.

Employee contends he was disabled from November 22, 2017 to May 15, 2018, his disability continues and he is entitled to TTD. AS 23.30.185; AS 23.30.395(16). Employee was released to full duty work by Dr. Martin on July 17, 2017 and he last sought treatment for his left foot on October 19, 2017. There is no medical record restricting Employee from his normal work activities due to his left foot and ankle work injury after October 19, 2017. Therefore, there is no evidence he suffered a decrease in earning capacity due to his work-related left foot and ankle injury after April 20, 2018. *Vetter*. Employee failed to prove by a preponderance of the evidence he was disabled on or after April 20, 2018 due to his left foot and ankle work injury. *Saxton*.

Because Employer rebutted the presumption of compensability of TTD by raising the counter-presumption of medical stability, Employee must present clear and convincing evidence he was not medically stable from April 20, 2018 to the present. AS 23.30.395(28); *Lowe's*. None of Employee's physicians gave an opinion regarding medical stability or stated whether further objectively measurable improvement was expected from additional left foot and ankle medical treatment. *Leigh*. Dr. Schwartz opined Employee's left foot and ankle were medically stable as of October 2017. Employee last received medical treatment for his left foot and ankle on

October 19, 2017, and Dr. Martin recommended stiff-soled shoes or a mental plank in Employee's shoes. However, Dr. Martin refused to provide an opinion regarding Employee's left foot and ankle. The only recommendation for additional medical treatment for Employee's left foot and ankle is from Dr. Schwartz and he attributed it solely to Employee's pre-existing mid-foot injury after comparing the contribution of various causes. Therefore, Employee has not rebutted the presumption of medical stability. Employee failed to prove the May 2017 work injury is the substantial cause of his need for left foot and ankle medical treatment and disability. Employee's claim for left ankle and foot medical costs and TTD will be denied.

CONCLUSIONS OF LAW

1) The oral order to proceed with the March 5, 2019 hearing in Employee's absence was correct.
2) The oral order denying Employee's request for a hearing continuance was correct.
3) Employee's bilateral knee claim is not barred under AS 23.30.100.
4) Employee's May 17, 2017 work injury is not the substantial cause of his disability and need for medical treatment for his left foot and ankle and bilateral knees.

ORDER

1) Employee's February 19, 2019 petition for a hearing continuance is denied.
2) Employee's January 23, 2019 amended claim is denied.

Dated in Juneau, Alaska on March 28, 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 Javier J. Sernas, employee / claimant v. Juneau School District, employer; City/Borough of Juneau, insurer / defendants; Case No. 201706798; 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 28, 2019.

/s/
Dani Byers, Technician