ALASKA WORKERS' COMPENSATION BOARD

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

BRIAN W. DONNELLY, Employee, Claimant, v. HARNISH GROUP, INC., Self-Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 200720420 AWCB Decision No. 19-0076 Filed with AWCB Fairbanks, Alaska on July 16, 2019

Brian Donnelly's July 25, 2016 amended claim was heard on February 7, 2019 in Fairbanks, Alaska, a date selected on December 31, 2018. A December 31, 2018 stipulation of the parties gave rise to this hearing. Attorney Andrew Wilson appeared and represented Brian Donnelly (Employee). Attorney Robert McLaughlin appeared and represented Harnish Group, Inc. (Employer). A previous decision, *Brian W. Donnelly v. Harnish Group, Inc.*, AWCB Decision No. 17-0149 (January 2, 2018) (*Donnelly I*), ordered a second independent medical evaluation (SIME). Witnesses included Employee, who testified on his own behalf; Greg Wyatt, who also testified on Employee's behalf; and Brian Reimers, who testified on Employer's behalf. The record closed on February 21, 2019 to allow for the filing of a supplemental attorney fee affidavit and objections. Post-hearing litigation, involving supplementation of the hearing record, ensued. At a May 1, 2019 prehearing conference, the parties stipulated to rulings concerning whether psot0hearing record supplementation should be considered in this decision. The hearing record was re-opened to receive additional documents, and closed again on May 1, 2019.

ISSUES

Post-hearing litigation ensued when the parties filed additional documents after the hearing and disputed whether they should be considered. These disputes are more fully set forth in this decision's factual findings. At a May 1, 2019 prehearing conference, the parties stipulated to rulings on those issues being included in this decision.

1) Should the parties' post-hearing filings be included in the hearing record?

Employee contends his work for Employer is the substantial cause of his need for medical treatment so he is entitled to medical and related transportation costs. He submits two theories in support of his claims. Employee contends his need for medical treatment was either caused by a 2007 work injury while working for Employer or, alternatively, the "cumulative trauma" of working for Employer following that injury. In response to Employer's contentions regarding his alternative case theory, Employee contends his radicular symptoms manifested themselves a year and a half earlier than Employer acknowledges. He further contends Employer is liable because he worked more cumulative hours for it than he did for another employer, and because his work for it was more physically demanding than the other employer. Therefore, Employee contends Employer is the party who is properly liable for his cumulative trauma.

Regarding Employee's first case theory, Employer contends its medical evaluator, as well as the SIME physicians, have all ruled out the 2007 work injury as causing Employee's need for medical treatment beginning in 2015. Instead, it contends the 2007 work injury merely resulted in back strain from which Employee quickly and fully recovered. Regarding Employee's alternative case theory, Employer contends Employee did not develop the radicular symptoms for which he was treated until years after having last worked for it. Instead, according to Employer, Employee's radicular symptoms manifested themselves while Employee was working for a different employer, so it should not be found liable for the benefits Employee seeks.

2) Is Employee entitled to medical and related transportation costs?

Employee also seeks two periods of TTD. His contentions on the cause of his disability are the same as those set forth above for his need for medical treatment.

Employer also relies on its above contentions and denies it is liable for TTD.

3) Is Employee entitled to TTD?

Employee seeks a PPI rating to be paid for by Employer. His contentions on the cause of his permanent partial impairment are the same as those set forth above for his medical treatment.

Employer also relies on its above contentions and denies it is liable for PPI.

4) Is Employee entitled to a PPI rating?

Employee seeks legal interest on past due benefits.

Employer contends, since no benefits are due, neither is Employee entitled to interest.

5) Is Employee entitled to interest?

Employee seeks attorney fees and costs for the successful prosecution of his claims.

Employer contends, since no benefits are due, neither is Employee entitled to attorney fees and costs.

6) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) Employee has been diagnosed with a neurological condition, essential tremor, which occasionally causes him back pain in his lower thoracic region, particularly when he gets excited. He treats this condition with a neurologist, Wayne Downs, M.D., and it is not a subject of his workers' compensation claim. (Employee; Employee Dep., September 27, 2016; SIME report, April 12, 2018; Downs. Dep., May 11, 2017; Bauer Dep., November 13, 2017).

2) On December 26, 2007, Employee reported working for Employer as a heavy equipment mechanic when he injured his low back while pushing a service truck into a shop. He described, while he was pushing on the truck's bumper with his hands, his feet slipped on ice, which caused his back to go into a "flex position." The injury was assigned a case number of AWCB 200720420. (First Report of Occupational Injury or Illness, December 26, 2007; Claim, July 25, 2016; Employee). Lumbar spine x-rays showed no kyphosis, scoliosis, spondylolysis or listhesis. The vertebral bodies were in good alignment, disc spaces were preserved and the impression was a normal lumbar spine. (X-ray report, December 26, 2007). Employee was taken off work until January 2, 2018 and undertook a short course of physical therapy. (Return to Work form, December 26, 2007; Physical therapy chart notes, December 27, 2007 to January 9, 2008).

3) On January 2, 2008, Employee returned to work, which involved lots of lifting and climbing, and he reported, "No pain, no problems." (Physical therapy chart notes, January 2, 2008).

4) By January 9, 2008, Employee was feeling a lot better and back to full duty work. (Independence Park Medical chart notes, January 9, 2008; Physician's Report, January 9, 2008).

5) Subsequent to his 2007 injury, Employee worked for two employers as a heavy equipment mechanic until March 2016. He continued to work for Employer from January 1, 2008 through February 3, 2013. He also worked for Teck Resources Limited (Teck) from January 16, 2011 through June 20, 2012, and again from February 28, 2013 through March 16, 2016. (Payroll Reports, July 23, 2018; July 26, 2018; August 6, 2018).

6) On March 31, 2011, Employee underwent right knee x-rays. (X-ray report, March 31, 2011).

7) On July 31, 2014, Employee followed-up with Dr. Downs for his essential tremor, who reported the following concerning Employee's knee:

> . . . . He has [sic] his knees x-rayed several years ago and is unclear if they found anything. A friend of his loaned him braces to wear. This friend has had knee surgeries and no longer needs to [use] braces. They started with when he squatted down and he started getting burning down the posterior aspect of the legs. Now the pain is behind the knees and radiates down the legs and is less dependent on position. . . .

(Downs chart notes, July 31, 2014).

8) On February 5, 2015, Employee sought treatment from Ray Kelley, M.D., for worsening back pain, which had become "much more severe" over the last few weeks, to the point where he had to leave work at the Red Dog mine early. Employee also reported intermittent radicular symptoms

into his right leg. Dr. Kelley recommended physical therapy and considered an epidural steroid injection. (Kelley chart notes, February 5, 2015).

9) A February 11, 2015 MRI showed moderate severe right neural foraminal stenosis at L4-5 and mild degenerative change elsewhere. Disc desiccation was present at all lumbar levels. (MRI report, February 11, 2015).

10) On February 13, 2015, Employee saw Michael Gevaert, M.D., and reported sustaining a work related injury "five to seven years ago," with episodic low back pain since, worsening over the last couple of years. He also reported episodic pain referral in his right lower extremity over the last 18 months. During the previous week, his pain became so severe and nauseating that he was sent back from the Red Dog mine. Dr. Gevaert ordered Employee off work for six weeks and recommended an epidural steroid injection and a course of physical therapy. (Gevaert chart notes, February 13, 2015). An epidural steroid injection was administered on February 19, 2015. (Operative report, February 19, 2015).

11) On February 23, 2015, Employee reported his back pain had improved and his radicular symptoms had resolved. (Kelley chart notes, February 23, 2015).

12) On March 12, 2015, Employee reported a 90 percent improvement of low back and right leg pain to Dr. Gevaert, who released Employee to full-duty work after completing physical therapy. Dr. Gevaert noted Employee's work as a heavy mechanic could cause him future symptoms. (Gevaert chart notes, March 12, 2015). Employee also saw Dr. Kelley that same day and reported he was "doing great" and was "[e]ssentially pain free." Dr. Kelley also released Employee back to work, effective April 1, 2015, and recommended Employee transition from physical therapy to a home exercise program and. (Kelley chart notes, March 12, 2015).

13) On July 1, 2015, Employee reported injuring his lower back while working for Teck when he was installing pins on a truck with a sledgehammer in an awkward position. (Report of Occupational Injury or Illness, July 4, 2015). The injury was assigned a case number of AWCB 201510353. (Notice of Case File, July 9, 2015). He "took it easy" at work for a few days and then reported his pain was "trending better," although he was experiencing "some radicular symptoms." Dr. Kelley suspected a "muscular soft tissue injury and that of a recurrent pinched nerve," and ordered the continued use of non-steroidal anti-inflammatories. (Kelley chart notes, July 9, 2015).

14) On October 23, 2015, Employee reported his "back went out about 10 days ago," and was experiencing pain in the lower back radiating into the right thigh and groin. "This [was] the first

time that the pain radiates into the groin." Dr. Gevaert prescribed an oral steroid taper, but if symptoms persisted, he would proceed with an epidural steroid injection. (Gevaert chart notes, October 23, 2015).

15) On November 16, 2015, Employee followed-up with Dr. Downs, who wrote reported the following concerning Employee's low back pain:

> His neck has been feeling pretty good . . . . The low back pain is another matter. Since I last saw him he seems to have had a bit of a herniated disc, although from what he says I am not entirely certain. At any rate, the pain changed in character, he went in and saw Dr. Gevaert, he had some sort of injection, and then more recently got five days of oral steroids. Apparently from what he says, surgery is the next option but it could easily be delayed possibly up to five years.

(Downs chart notes, November 16, 2015).

16) On March 28, 2016, Employee sought a surgical referral from Dr. Kelley after he slipped and fell on ice on his porch and experienced an "[i]nstantaneous return of right-sided radicular symptoms." Dr. Kelly referred Employee to Curtis Mina, M.D. (Kelley chart notes, March 28, 2016).

17) On April 6, 2016, Employee told Dr. Mina his right leg symptoms had resolved and he was doing "quite well" until he slipped several weeks ago and landed on his right side and, since then, many of his symptoms had returned. Dr. Mina prescribed gabapentin to "calm down [Employee's] symptoms." He also noted Employee's MRI was over a year old and ordered another. (Mina chart notes, April 6, 2016).

18) An April 15, 2016 MRI showed moderate degenerative disc changes in the lower lumbar spine. Annular bulging contributes to borderline central canal stenosis at L4-5. Hypertrophic facet changes on the right result in moderate to marked neuroforaminal stenosis, which had advanced slightly from the previous study. A small intraforaminal disc protrusion at L5-S1 remained stable in size. (MRI report, April 15, 2016).

19) On April 18, 2016, Dr. Gevaert thought Employee might benefit from another epidural steroid injection. He also had a "fairly lengthy discussion with the patient with regard to changing his career as this certainly contributes to his chronic back pain." (Gevaert chart notes, April 18, 2016).

20) On April 22, 2016, after reviewing Employee's MRI results, Dr. Mina thought Employee's back and right leg pain was related to the foraminal stenosis at L4-5 and thought a repeat epidural

steroid injection would be reasonable. Dr. Mina also discussed two surgical options with Employee: an anterior lumbar interbody fusion and a right foraminotomy. Given Employee's age and activity level, Dr. Mina thought the latter was the better surgical approach. (Mina chart notes, April 22, 2016).

21) On April 25, 2016, Dr. Gevaert concurred with Dr. Mina's surgical recommendation. (Gevaert chart notes, April 25, 2016).

22) On May 6, 2016, Dr. Gevaert administered an epidural steroid injection. (Operative report, May 6, 2016.

23) On May 12, 2016, Dr. Mina performed a right L4-5 foraminotomy. (Operative report, May 12, 2016).

24) On May 25, 2016, Employee reported his pain and paresthesias in his right leg had resolved. He had been riding his motorcycle and had returned to work and was doing quite well. (Mina chart notes May 25, 2016).

25) On June 8, 2016, Employee continued to report his right lower extremity symptoms had resolved and he was continuing to ride his motorcycle. (Mina chart notes, June 8, 2016; July 6, 2016).

26) On July 26, 2016, Employee claimed, on his own behalf, temporary total disability (TTD), temporary partial disability (TPD) and permanent partial impairment (PPI) benefits based on his 2007 injury with Employer. (Workers' Compensation Claim, July 25, 2016).

27) On July 27, 2016, Employee was "doing fine until he returned to weightlifting last Sunday" and developed worsening low back pain. Dr. Mina found this "surprising" and referred Employee to physical therapy for core strengthening. There was no recurrence of leg symptoms. (Mina chart notes, July 27, 2015).

28) On August 1, 2016, Dr. Kelley authored a letter "To Whom It May Concern," stating Employee presented to him on February 5, 2015 with acute on chronic low back pain, which Employee related to an "aggravation of an old injury that was a workman's comp case about 7 years prior." Dr. Kelley thought it was "highly likely that [Employee's] original injury 7 years ago precipitated the above." (Kelley letter, August 1, 2016).

29) On August 16, 2016, Dr. Mina authored a letter "To Whom It May Concern," stating Employee had initially sustained a work related injury and reports his symptoms had been present

since that time. Dr. Mina was in agreement that Employee's back and leg pain stemmed from a work-related injury. (Mina letter, August 16, 2016).

30) On August 24, 2016, Employee continued to do quite well and still experienced a complete resolution of his lower extremity symptoms. He returned to full weightlifting and wanted to return to work in several weeks, after completing physical therapy. Dr. Mina thought this was reasonable. (Mina chart notes, August 24, 2016).

31) On August 31, 2016, Employee filed a claim against Teck based on the 2007 work injury while he was working for Employer, contending Dr. Mina's August 16, 2016 letter sufficiently raised the presumption of compensability with respect to Teck. (Claim, August 31, 2016).

32) On September 2, 2016, Employee amended his July 25, 2016 claim through counsel, adding additional benefits for medical related transportation, interest and attorney fees and costs. The amended claim against Employer was also based on the 2007 work injury. (Amended Claim, August 31, 2016).

33) On September 7, 2016, Employee "tweaked" his back "weed wacking." (Physical therapy chart notes, September 7, 2016).

34) On September 13, 2016, although Employee's lower extremity symptoms remained resolved, he was experiencing some intermittent back pain symptoms. He was scheduled for a functional capacities test and was likely to return to work on October 4, 2016. (Mina chart notes, September 13, 2016). That same day, Employee had a minor set-back after replacing a water filter at home. He "felt something in the same spot" and woke up the next day with pain. (Kelley chart notes, September 13, 2016).

35) On September 27, 2016, Employee testified he resided in Alaska for over 20 years and worked as a mechanic that whole time. He had difficulty remembering places he had lived, timeframes, and the dates of his marriage. Employee also had difficulty remembering what his upcoming physical capacities evaluation was called and where it would occur. He described the 2007 work injury involving pushing the truck, the 2015 work injury involving the sledgehammer, as well as the slip and fall on ice earlier that year, and his injury changing the water filter, both of which he thought were setbacks to his recovery. Employee thought Dr. Gevaert's October 23, 2015 chart notes documenting the onset of his radicular symptoms were "abnormal the way [Dr. Gevaert] wrote it down," and he stated there was a "slow increase into [his radicular symptoms]." He was then asked whether Dr. Gevaert's chart notes would be a better reflection of history than

his memory, and Employee stated, "I doubt it." He then explained, "Because when you look at some of Dr. Gevaert's writings down there, there are some very wrong way he writes stuff. I think he's called . . . . miscalling [sic] different things, different things." When asked for an example of Dr. Gevaert's mistakes, Employee replied, ". . . I wonder what he wrote that down for, thinking he must have been thinking of something else at the time. But, you know what, he's not far off there. I'll tell you that. There was no incident that I can remember ten days prior, I will say that." In 2015, Employee's back pain symptoms progressively worsened and he knew something was permanently wrong with his back. At different points, he also alternatively described Dr. Downs and Dr. Kelley as his "regular doctor." (Employee's deposition, September 27, 2016).

36) On October 4, 2016, a physical capacities evaluation indicted Employee could not return to a medium-heavy work level. (Physical Capacities Evaluation, October 4, 2016). That same day, Employee began long-term disability paperwork. (Telephone Message, October 4, 2016). Due to the results of the physical capacities evaluation, Teck terminated Employee's employment in December 2016. (Physical therapy chart notes, October 7, 2016; Oda/Gupta report, April 12, 2018).

37) On October 11, 2016, Employee went for a hike and could "feel that same spot on [his] back," while climbing an incline on his hands. (Physical therapy chart notes, October 11, 2016).

38) On October 18, 2016, Employee was cleaning out his garage and "must have done something." (Physical therapy chart notes, October 18, 2016).

39) On November 30, 2016, David Bauer, M.D., evaluated Employee on Employer's behalf and diagnosed 1) lumbar strain, resolved, substantially caused by the December 12, 2007 work injury; 2) progressive lumbar spine degenerative disease, not substantially caused or aggravated by the December 12, 2007 work injury; and 3) status post lumbar foraminotomy, not substantially caused by the December 12, 2007 work injury. He provided copious citations from medical literature in support of his opinions. Dr. Bauer opined Employee was medically stable from the December 12, 2007 work injury and had no permanent impairment resulting from it. (Bauer report, November 30, 2016).

40) On December 6, 2016, Employee continued to experience "activity-related back pain" and Dr. Mina thought Employee could pursue all activities as tolerated. (Mina chart notes, December 6, 2016).

41) On March 8, 2017, Dr. Mina concurred with Dr. Bauer's conclusions that Employee's need for treatment in 2015 was not related to his 2007 work injury. (Mina responses, March 8, 2017).

42) On April 19, 2017, Dr. Mina reviewed records from Dr. Downs for a period from January 26, 2005 to January 16, 2017, which did not change his previously expressed opinions. (Mina response, April 19, 2017).

43) On April 25, 2017, Dr. Mina testified he initially thought Employee's radicular symptoms presented in 2015, but agreed Dr. Downs' July 31, 2014 chart notes were consistent with the early signs of radiculopathy, even though he found the notes' reference to the onset of pain upon squatting "a little bit confusing." He also agreed Employee's 2007 work injury could have been the "instigator" of Employee's symptoms. Because Employee just had a problem at one disc level, Dr. Mina thought this pointed "a little bit more" at a specific injury versus natural age-related degeneration. Dr. Mina's responses to Employer's August 16, 2016 letter were not based on his review of Dr. Downs' chart notes, but were based on Employee's descriptions of his symptoms and the patient history Employee presented. Although Dr. Mina initially concurred with Dr. Bauer's EME report, Dr. Mina now thinks it more likely than not Employee's symptoms persisted after his 2007 work injury, an opinion he bases on Dr. Down's chart notes. Dr. Mina repeatedly questioned whether he understood the legal certainty standard upon which his medical opinions should be based. (Mina deposition, April 25, 2017).

44) On May 4, 2017, a Compromise and Release (C&R) Agreement was approved, settling Employee's claim against Teck in AWCB No. 201510353. (C&R Agreement, May 4, 2017).

45) On May 11, 2017, Dr. Downs testified he treats Employee for his essential tremor, which is a condition Employee has had since 1989. Employee has complained of pressure at the back of his neck when his tremor is active. Dr. Down's first reference to Employee experiencing low back pain is in his June 19, 2006 chart notes. In his chart notes from September 14, 2012, Employee related his back pain to his tremor because both complaints arose about the same time. Dr. Downs interprets this to mean Employee's back pain symptoms documented in his chart notes likely date back to 1989 when Employee started treating his tremor. None of his chart notes in the record document radicular symptoms, including his chart notes from July 31, 2014, which likely documents knee pain given the positional nature of the pain. (Downs deposition, May 11, 2017).

46) On November 13, 2017, Dr. Bauer testified he had reviewed Dr. Downs' chart notes and agreed the condition for which Dr. Downs was treating Employee is unrelated to Employee's

workers' compensation claim. He also had reviewed the depositions of Drs. Downs and Mina, as well as interim medical records since his initial report. Dr. Bauer's diagnosis of lumbar sprain or strain following the 2007 work injury was based on Employee's limited period of pain and his limited duration of care following the injury, as well as Employee's patient history, and a review of the medical records available to him at that time. Imaging studies showed Employee also had progressive lumbar spine degenerative disease, which was neither caused, nor aggravated, by the 2007 work injury. Employee's need for surgery was not caused by the 2007 work injury. Instead, the substantial cause of his need for surgery was the progression of his age-related degenerative disease. Dr. Bauer cited medical literature in support of his conclusions and he spontaneously discussed numerous medical studies at length that show heavy labor does not affect degenerative progression. He was also familiar with the Alaska workers' compensation causation standard and the legal certainty standard for his medical opinions. Throughout his testimony, Dr. Bauer repeatedly likened the natural progression of Employee's age-related degenerative disease to graying hair as one ages. The most probable cause of Employee's need for treatment in 2015 was the degenerative disease. (Bauer deposition, November 13, 2017).

47) On April 12, 2018, Marjorie Oda, M.D., and Pramila Gupta, M.D., undertook a secondary independent medical evaluation (SIME), where they repeatedly ruled out the 2007 work injury, which they thought was a soft tissue injury, as the cause of Employee's need for medical treatment beginning in 2015. They also ruled out aggravation of a preexisting condition. Instead, they thought Employee's need for treatment was caused by cumulative trauma from work, namely "employment exposure over many years (over 20 years) of strenuous work, including lifting and working in awkward positions." Among the potential causes Drs. Oda and Gupta considered were: 1) the 2007 work injury; 2) cumulative trauma through January 20, 2015; 3) the 2015 "sledgehammer" incident; 4) cumulative trauma through October 23, 2015; 5) slip and fall on porch in March of 2016; and 6) nonindustrial activities. They did not expressly consider age and genetics, though they wrote:

> As has been noted by NIOSH data, summarizing multiple scientific articles on back pathology and symptoms, the symptom complex is multifactorial. Dr. Bauer has cited the Battie Twin Study from Finland. Suffice it to say at the present time, with respect to the clinical practice of medicine, there are several knowns.

Drs. Oda and Gupta then went on to specify the cause of Employee's lower extremity symptoms was the narrowing of Employee's neuroforaminal opening at L4-5 on his right side, then stated,

> We do not know the cause of the foraminal stenosis, but we do know the effect . . ., which is worsened particularly by [Employee's] work activities. . . . I would note that the work did not cause the degenerative joint disease. . . . The effect of work, however, was that it led to inflammatory process around the nerve root[,] which was compromised by the foraminal stenosis.

They also repeatedly cited the onset of radicular symptoms in 2015 as a significant basis for their opinions. Drs. Oda and Gupta thought the porch slip and fall incident was significant as well, and repeatedly referred to it, including on the following occasion:

> The [slip and fall] nonindustrial episode made [Employee] interested in pursuing more definitive care . . . . It was the slip and fall on the porch that eventually led to the surgical consult . . . . I would apportion . . . 15 percent to the slip on the porch from which [Employee] never completely recovered and which led to consideration of the surgery. . . . While it would appear that the substantial cause for the need for treatment was the 3/22/16 episode, and while I would leave it to the legal experts to determine, it is my opinion that the real substantial cause is the cumulative trauma to February 2015 . . . . The March 2016 slip on the porch made him . . . decide to undergo more definitive treatment . . . .

Drs. Oda and Gupta did not cite any medical literature in support of their cumulative trauma opinion. (Oda & Gupta report, April 12, 2018).

48) On July 19, 2018, Dr. Gupta testified Employee 2007 work injury was a strain and not the cause of his 2016 surgery. Instead, she thought cumulative trauma from work was the cause of Employee's need for treatment starting in 2015. She explained degenerative changes in Employee's facets caused his foramen to narrow, and although cumulative trauma did not cause the degenerative changes, work activities such as repeated lifting, bending and crawling, irritated Employee's nerve, which caused him to become symptomatic. As Employee's spine degenerated, latter work activities had a more significant impact on his back than earlier work activities. However, she would apportion causation between Employer and Tech according to the number of hours he worked for each company, as long as the duties at were "exactly [the] same." Employee's radicular symptoms "possibly" began in 2014, but Dr. Gupta also agreed Dr. Gevaert's February 13, 2015 chart notes show radicular symptoms developed in 2013. She then clarified, Employee's

lower extremity symptoms in 2014 were "vague" and "very non-descriptive," and the "clear documented radicular symptoms are in February 2015." She also pointed out, during this same period, Employee was seeing Dr. Downs, who did not report radicular symptoms until February 2015. Employee's cumulative trauma began in 2009, upon his return to full duty work. (Gupta deposition, July 19, 2018).

49) On June 29, 2018, Employee's attorney filed an injury report and another claim based on Dr. Oda's cumulative trauma opinion. The injury reports states, "Counsel signing on behalf of employee, in the absence of an ER ROI." Employee's attorney's filing of the injury report caused another case number, AWCB No. 20180105, to be generated.

50) On October 29, 2018, Employer filed timesheet data for Employee's work at both Employer's and Teck. (Notices of Intent to Rely, July 31, 2018)

51) On November 2, 2018, Dr. Gupta replied to follow-up inquiries from the parties' attorneys, who had provided her with additional documentation, including timesheet calculations for Employee's work at both Employer and Teck. Employee's attorney submitted two different calculations of Employee's work hours at each employer, and Employer's attorney objected to Employee's attorney "limiting cumulative trauma" hours at Teck in his calculations. Relying on the calculations submitted by Employee's attorney, Dr. Gupta wrote, "If I assume the accuracy of the hours indicated in my both [sic] correspondences, and assuming job duties were the same with both employers, then it appeared that [Employer] caused [Employee] to accrue more cumulative trauma and would be the substantial cause of [Employee's] disability." (Gupta addendum, November 2, 2018).

52) On January 18, 2019, Dr. Gupta testified a second time and reiterated Employee's work did not cause his foraminal stenosis, but rather caused inflammation of the nerve because his foramen was stenotic. Given Employee's differing reporting on the onset of his radicular symptoms in Dr. Kelley's February 5, 2015 chart notes and Dr. Geveart's February 13, 2015 chart notes, Dr. Gupta was unable to opine whether Employee's work for Employer had any impact on his radicular symptoms. She answered: "It - - there may have. We don't know how gradually it came. It may have started inflammation earlier, but we do not know. We can relate only to the time he became symptomatic." Dr. Gupta thought Employee became symptomatic 18 months prior to Dr. Gevaert's February 13, 2015 chart notes, or in August 2013. Dr. Gupta agrees that radiculopathy is associated with contemporaneous activities, and the onset of Employee's radiculopathy was

likely caused by his work activities at the time. Employee led Dr. Gupta to believe his work at Teck was more demanding than his work with Employer because it required more standing on hard surfaces. Employee "was not the best historian," according to Dr. Gupta. In order to establish which Employer was more responsible for Employee's cumulative trauma, the focus would be on the number of hours he worked for each employer from January 1, 2008 through October 23, 2015. However, periods where Employee was provided with assistance at work should be "taken away" in calculating which employer was more responsible for Employee's cumulative trauma. (Gupta deposition, January 18, 2019).

53) On February 4, 2019, Employee claimed $75,677.34 in attorney fees and costs. (Fee affidavits, February 4, 2019).

54) At hearing, the parties continued to dispute the other's cumulative work hour calculations for each of Employee's employers. (Employer's hearing arguments).

55) At hearing, Greg Wyatt testified he works as a mechanic supervisor for the Alaska Railroad. He met Employee at the flying field for a remote control airplane club. Mr. Wyatt has known Employee for 12 years. He and Employee flew remote control airplanes together about 12 times, the last time being in 2008. He took a picture of Employee flying while laying down on the ground on his back with his knees up. Mr. Wyatt took the photo because they had a discussion at the time about back pain. Employee could not stand for long periods because of back pain. He remembers thinking at the time that Employee "really loves flying." Mr. Wyatt does not know the exact date of photo was taken, but it was early to mid-summer of 2008. Later, Employee also began working for the Alaska Railroad, so Mr. Wyatt would see him at the morning safety meetings. In November 2017 was the first time he had seen Employee since 2009. Mr. Wyatt no longer flies remote control airplanes much, because the club lost their flying field in 2012 and because he flies remote control helicopters now. (Wyatt).

56) Employer moved to strike the photograph showing Employee flying his remote control airplane on the basis it is undated, so it cannot be ascertained when it was taken. (Record).

57) At hearing, Employee testified, describing the 2007 work injury. He remembers flying remote control airplanes with Mr. Wyatt until the airfield closed. Upon seeking medical treatment, x-rays were undertaken and he was told he had degeneration at the "tail of his spine." Back strain or sprain was diagnosed and he participated in physical therapy, which did not last very long, because it "really helped, really quick." He then returned to work. His back problems would wax

and wane, but progressed over time. Following his 2007 work injury, Employee continued to work for Employer from 2008 until 2013, but he also worked for Teck during that period for one year. At Employer's, he worked in the shop a "great deal," and on "big stuff," such as D9s and D10s. Although he would occasionally work in the field, he mostly worked in the shop until his divorce in 2009 or 2010. Working in the field is "a lot tougher." Employee would have to carry his tools to the airport. He might have five, or six or seven toolboxes, weighing 50 pounds each. Employee uses many come-alongs in the field, which he carries with him. He also uses whatever else is available in the field. He has used an excavator as a crane, and rebuilt an engine on a swing set. Working in the field is also more dangerous. Working for Teck was tough too, but he did not have to work in the field. Its shop is rough because it is old and has many cracks in the concrete floor. Employee had apprentices available to him at Teck, but not with Employer. He did office and supervisor work for Teck 'not quite half the time," but did not do office or supervisor work for Employer. Employee did not get a higher rate of pay at Tech for performing supervisory work because "it was kind of considered a privilege because it was a move into management." Regarding his visit to Dr. Gevaert on February 13, 2015, Employee explained is back pain "arose slowly." He also had knee problems at the time, so it is difficult for him to ascertain when his back related pain started. His back pain was a slow progression. Employee filed a claim against Employer because he did not have a specific injury at Teck and because he feels Employer is the responsible party. Following his surgery, Employee had a full release from Dr. Mina, but he participated in a functional capacities evaluation, and "she failed me." Employee then lost his job. He retrained as a truck driver, but still wanted to work as a mechanic. He came to be employed by the Alaska Railroad, where he mostly works on track equipment. Employee worked with an apprentice at Employer's for six months beginning in January 2008, so he did have assistance performing heavier work. When asked about Employer's "work codes," Employee agrees that non-mechanic work should be subtracted from his cumulative work hours as a heavy mechanic, though he thinks time spent hauling heavy toolboxes while travelling should not be subtracted. Employee's low back pain that is the subject of his claims is not the same as the back pain for which he sees Dr. Downs. He can "definitely" tell the difference between the two types of back pain. Work activity made Employee's pain worse. He knows the wear and tear of working at Teck increased his pain level, but never blamed Teck for his back condition. Instead, Employee thinks Employer is the responsible party. (Employee).

58) At hearing, Brian Reimers testified he works for Employer and explained Employer's payroll codes for time off without pay, travel time, standby time, training time, Holiday time, sick time and vacation time do not reflect time working as a mechanic. Mechanics either take a service truck or take an airplane to the jobsite, and they need to bring their tools with them into the field. (Reimers).

59) On February 14, 2019, Employee supplemented his claimed fees and costs, claiming an additional $7,188.35 in attorney fees, and an additional $644.60 in costs, for a total of $83,765.69 in attorney fees and a total of $6,466.94 on costs. (Fee affidavits, February 14, 2019).

60) On February 21, 2019, Employer objected to Employee's attorney fees. (Objections, February 21, 2019).

61) Other post-hearing litigation also ensued. At the request of the hearing chair, Employee filed graphic representations of timelines of his employment periods at both Teck and Employer, which were more legible than those shown in his hearing exhibit. (Record; Notice of Intent to Rely, February 12, 2019). He also filed a clearer picture of one he had presented as an exhibit at hearing, which shows Employee flying his remote control airplane. (Observations; Notice of Intent to Rely, February 11, 2019). Employer objected to the timelines, contending they are not accurate representations of the time Employee worked for each employer, or the type of work performed, and to the photograph, contending the photo is undated, so it has an "inadequate foundation." (Objection to Notice of Intent to Rely, February 19, 2019). Employer also petitioned to reopen and supplement with record with a "legal conference" chart note from Dr. Gevaert that was not previously in the record, which documents a discussion between him and Employee's attorney on the "etiology of [Employee's] present condition." (Employer's petition, March 14, 2019; Medical Summary, March 14, 2019). Employee opposed Dr. Gevaert's chart note being made part of the record on the grounds it was untimely filed and not relevant, though he did not articulate how the chart note would not be relevant to his claim. (Employee's answer, March 15, 2019). Thereafter, ancillary disputes developed concerning whether Employee had offered a stipulation to depose Dr. Gevaert, or had merely suggested one, and which party was most responsible for delays in case progress. (*Id*.; Employer's letter, March 18, 2019). Employer contended supplementing the record would minimize the likelihood a party would seek "post decision relief" or modification. Employee also petitioned for "interim fees" based on his opposition to Employer's petition to reopen the record. (Employee's petition, March 15, 2019). Employer then petitioned to reopen

and supplement the record with additional employment documents, which it contended contradicts Employee's hearing testimony. (Employer's petition April 9, 2019). The documents appear to be Employee's entire personnel file from Teck, and include hiring and termination documents, records documenting Employee's personal time off work, and documentation of changes to Employee's employment status, including times when he was assigned as an acting supervisor, along with his rates of pay. (*Id*.; observations). Employee did not object to these documents being included in the hearing record. (Record). At a May 1, 2019 prehearing conference, the parties agreed not to set their post hearing litigation issues for hearing and instead "requested that the board review the petitions and make a ruling on them prior to issuing the D&O." (Prehearing Conference Summary, May 1, 2019). On June 26, 2019, a workers' compensation office sought clarification of the parties' intent with respect to the requested rulings. (Incident Claims and Expense Reporting (ICERS) event entry, June 26, 2019). The parties confirmed they desired the rulings be included in this decision. (*Id*.). Neither party objected to the documents on the basis they wished to cross-examine an author. (Record).

PRINCIPLES OF LAW

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

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) This chapter be interpreted . . . to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to . . . employers . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.
>
> **AS 23.30.005. Alaska Workers' Compensation Board.**
> . . . .

> (h) . . . . Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute.
>
> **AS 23.30.010. Coverage**. (a) . . . [C]ompensation or benefits are payable under this chapter . . . if the disability . . . or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.

For injuries occurring on or after November 7, 2005, the relative contribution of all causes of disability and need for medical treatment must be evaluated, and if employment is, in relation to all other causes, the "substantial cause" of the disability or need for medical treatment, benefits are awardable. *City of Seward v. Hanson,* AWCAC Decision No. 146 at 10 (January 21, 2011). The statute's language, the "substantial cause," does not mean the "major contributing cause," or a "51 percent or greater cause," or even a primary cause. *Morrison v. Alaska Interstate Construction, Inc.*, 440 P.3d 224; 238 (Alaska 2019). By adopting this standard, the legislature gave the board discretion to choose, in its judgment, the most important or material cause among those identified. *Morrison v. Alaska Interstate Construction, Inc.*, 440 P.3d 224; 238; 240 (Alaska 2019).

The Alaska Supreme Court has repeatedly rejected apportionment schemes for liability determination under a variety of circumstances, including those where a work injury combined with a preexisting condition, and injuries with successive employers. *Morrison* at 235, 238, 239; *Ketchikan Gateway Borough v. Saling,* 604 P.2d 590, 598 (Alaska 1979); *Laborers and Hod Carriers Union, Local No. 341 v. Groothius,* 494 P.2d 808, 813 (Alaska 1972); *Wells v. Swalling*

Const. Co., Inc., 944 P.2d 34, 37 (Alaska 1997); *Alyeska Pipeline Service Co. v. DeShong*, 77 P.3d 1227, 1241 (Alaska 2003); *Moretz v. O'Neill Investigations*, 783 P.2d 764, fn1 (Alaska 1989). The Alaska Workers' Compensation Appeals Commission has also recognized the inapplicability of liability apportionment. *State of Alaska v. Dennis*, AWCAC Decision No. 036 at 11-13 (March 27, 2007).

> **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 . . . .
>
> **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 . . . .

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp.*, 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Alaska Supreme Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id.* An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.*, 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first

step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004). Previous board panels have found carpel tunnel syndrome to be a complex medical issue requiring an expert medical opinion to determine its cause. *Linke v. Wasser & Winters Co.*, AWCB Decision No. 09-0202 (December 23, 2009); *Grady v. Tester Drilling Services, Inc.*, AWCB Decision No. 98-0225 (August 31, 1998).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services*, 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **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 finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009). Weighing the evidence is not the Commission's role. *Morrison* at 239. "The Commission ha[s] previously decided it will 'not consider whether the board relied on the weightiest or most persuasive evidence, because the determination of weight to be accorded evidence is a task assigned to the board, not the commission.'" *Id*. (quoting *McGahuey v. Whitestone Logging, Inc.*, AWCAC Decision No. 054 at 6 (August 28, 2007)). "Nor will the Commission 'reweigh the evidence or choose between competing inferences, as the board's assessment of the weight to be accorded conflicting evidence is conclusive.'" *Id*.

> **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. . . .

The board has broad statutory authority in conducting its investigations and hearings. *Tolson v. City of Petersburg*, AWCB Decision No. 08-0149 (August 22, 2008); *De Rosario v. Chenenga Lodging*, AWCB Decision No. 10-0123 (July 16, 2010). The statute gives panels "free rein in making its investigations and in conducting its hearings, and authorizes it to receive and consider . . . any kind of evidence that may throw light on a claim pending before it." *Cook v. Alaska Workmen's Compensation Board*, 476 P.2d 29, 32 (Alaska 1970) (quoting with approval *Carroll v. Knickerbocker Ice Company*, 218 N.Y. 435, 113 N.E. 507 (1916)).

> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .

> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Alaska Supreme Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

> **AS 23.30.155. Payment of compensation.**
> . . . .
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> (h) The board may upon its own initiative at any time in a case . . . cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

The Alaska Supreme Court has consistently instructed interest for the time-value of money must be awarded, as a matter of course. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

> **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.

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 Bd.*, 524 P.2d 264; 266 (Alaska 1974) (cited with approval in *Hewing v. Peter Kiewit & Sons*, 586 P.2d 182 (Alaska 1978)).

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

> **8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on
> . . . .
>
> (2) amending the papers filed or the filing of additional papers;
> . . . .

> **8 AAC 45.070. Hearings.** (a) Hearings will be held at the time and place fixed . . . the board . . . . A hearing may be adjourned, postponed, or continued from time to time and from place to place at the discretion of the board or its designee, and in accordance with this chapter.

> **8 AAC 45.120. Evidence.**
> . . . .
>
> (e) . . . . Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . .
>
> (f) Any document . . . that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .
> . . . .
>
> (m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the

> hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

The Alaska Supreme Court has held that a medical expert's opinion must be within a "reasonable degree of medical certainty," or the equivalent "reasonable medical probability" to be admissible. *Maddocks v. Bennett*, 456 P.2d 453, 457-58 (Alaska 1969).

ANALYSIS

1) Should the parties' post-hearing filings be included in the hearing record?

Post-hearing litigation ensued when the parties filed additional documents after the hearing. Specific documents at issue include, Employee's timelines of his employment periods at both Teck and Employer, Mr. Wyatt's photograph of Employee flying his remote control airplane, Employer's "legal conference" chart notes from Dr. Gevaert and Employer's employment records from Teck. At the May 1, 2019 prehearing conference, the parties stipulated to rulings on whether those documents should be included in this decision.

Procedure in workers' compensation cases is especially liberal. AS 23.30.135(a); AS 23.30.155(h). Panels may receive "any kind of evidence that may throw light on a claim." *Cook*. "Any relevant evidence" is admissible, 8 AAC 45.120(e), and a panel my rely on "[a]ny document" appropriately served and filed, 8 AAC 45.120(f). Generally, documents are required to be filed 20 days in advance of a hearing, *id*., but a panel has the authority to reopen the hearing record to receive additional evidence, 8 AAC 45.070(a); 8 AAC 45.120(m).

Considerations, such as those set forth above, as well as the parties' right to have their evidence fairly considered, AS 23.30.001(4), and the Act's prescriptions for summary and simply procedure, AS 23.30.005(h), and quick and efficient administration, AS 23.30.001(1), all indicate the hearing record should be reopened to receive the parties' documents. Moreover, doing so will lessen the likelihood of a party seeking "post hearing relief" or decision modification, as Employer contends.

Rogers & Babler. Neither party objected to the documents on the basis they wished to cross-examine an author. Rather, they objected on other grounds. Their objections are recognized.

Employer objects to Employee's timeline exhibit, contending they are not accurate representations of the time Employee worked for each employer or the type of work he performed. This panel has the original timesheet data Employer filed on October 29, 2018, and is able to judge for itself the accuracy of Employee's exhibit. AS 23.30.122. Employer also objects to Mr. Wyatt's photograph, which shows Employee flying his remote control airplane, on the basis the photo is undated. This panel itself noted the absence of a date on the photograph at hearing, as well as Employee's testimony concerning flying remote control airplanes with Mr. Wyatt until field closure in 2012, which indicates the photograph could have been taken much later in time than Mr. Wyatt thought. However, once again, the remedy for addressing the undated photograph is not to exclude the photograph, 8 AAC 45.120(e), but to accord it an appropriate evidentiary weight, AS 23.30.122. Employee objects the addition of Dr. Gevaert's "legal conference" chart notes to the hearing record on the grounds it was untimely filed and not relevant. The timely filing of evidence is addressed above; and, as noted in this decision's factual findings, Employee did not articulate how the "etiology of [his] present condition" would not be relevant to his claims. Thus, the hearing record should be re-opened to include the parties' post-hearing filings. AS 23.30.135(a); AS 23.30.155(h); 8 AAC 45.070(a); 8 AAC 45.120(e), (f), (m).

2) Is Employee entitled to medical and related transportation costs?

Employee seeks an award of medical and related transportation benefits for his lower back. For benefits to be compensable, Employee's employment must be "the substantial cause" of his need for medical treatment. *Runstrom*. Compensability raises a factual dispute to which the statutory presumption of compensability applies. *Meek.*

Employee presents alternative case theories involving causation. He contends, either the 2007 work injury caused his need for medical treatment, or the cumulative trauma of working for Employer caused it. Employee attaches the presumption with respect to the former case theory with Dr. Mina's April 25, 2017 deposition testimony, where he opined Employee's symptoms

continued to persist after the 2007 work injury. *Cheeks*. He also attaches the presumption with respect to the latter case theory with Dr. Gupta's SIME opinion that his need for medical treatment resulted from the cumulative trauma of working for Employer. *Id*. Employer rebuts the former theory with Drs. Bauer and Gupta's opinions that the 2007 work injury resulted in a sprain, from which Employee quickly and fully recovered. *Miller*. It rebuts the latter case theory with Dr. Bauer's opinion that the substantial cause of Employee's need for surgery was the natural progression of his age-related degenerative disease. *Id*. Employee must now prove, by a preponderance of the evidence, that one of the injuries while working for Employer was the substantial cause of his need for low back medical treatment. *Koons.*

Dr. Mina's most recent opinion that the 2007 work injury caused Employee's need for medical treatment beginning in 2015 may be readily disposed. Dr. Mina twice concurred with Dr. Bauer's EME report, which attributed Employee's need for medical treatment to the natural progression of age-related degeneration, and not work; then, in complete reversals, he stated the 2007 work injury was to blame in his August 16, 2016 letter and at his deposition. His vacillating causation opinions are of no help in determining the substantial cause of Employee's need for medical treatment, so they are afforded no weight on that basis alone. AS 23.30.122; *Morrison*. Moreover, Dr. Mina bases his most recent opinion on the chart notes of Employee's neurologist, Dr. Downs, which document back pain following the 2007 work injury. However, Employee, Dr. Bauer and Dr. Downs himself have all established that the back pains documented in these chart notes is related to Employee's essential tremor, not a work injury. Furthermore, at his deposition, Dr. Mina interpreted Dr. Down's July 31, 2014, chart notes as documenting a radicular symptom, but even a lay reading of these chart notes shows Dr. Downs is clearly describing knee pain - a conclusion reinforced, again, by Dr. Down's himself at his deposition. *Rogers & Babler*. Additionally, the absence of treatment records between early January 2008 and February 5, 2015, as well as Employee's hearing testimony that physical therapy following the 2007 work injury "really helped, really quick," support Drs. Bauer's and Gupta's opinions that Employee fully recovered from the 2007 work injury, and not Dr. Mina's opinion that Employee's symptoms continued following it. *Id*. Finally, Dr. Mina repeatedly questioned his understanding of the legal certainty standard upon which his medical opinions should be based, which calls into question whether his opinions are legally sufficient to be considered "evidence" at all. *Maddocks*. Again, his opinions are afforded

no weight. AS 23.30.122; *Morrison*. Thus, the competing causation opinions that remain are now between the SIME physician, Dr. Gupta, and Employer's medical evaluator, Dr. Bauer.

Dr. Gupta attributes Employee's need for medical treatment to the cumulative trauma of working for Employer. Her opinion is as readily disposed as Dr. Mina's. First, given Dr. Gupta's description in her SIME report of the importance of Employee's slip and fall on his porch, where she wrote that event would "appear" to be the substantial cause of Employee's need for medical treatment, it is entirely puzzling how she could then conclude, in the very same sentence, that his work for employer was the "real" substantial cause. In her two depositions, Dr. Gupta also repeatedly vacillated in her opinion on when Employee's radicular symptoms began. Since it is undisputed Employee underwent surgery for his radicular symptoms, Dr. Gupta's inability to identify the onset of those symptoms make any reliance on her opinions problematic. AS 23.30.122; *Morrison*.

Given Employee last worked for Employer on February 3, 2013, and given he did not seek lower back treatment until February 5, 2015, Employee understandably went to great lengths during litigation to stretch the onset of his radicular symptoms as far back in time as possible. However, as Dr. Gupta pointed out at one point, and even a lay reading of the medical record confirms, the first "clear documented radicular symptoms are in February 2015." *Rogers & Babler*. At his deposition, Dr. Down's eliminated any possibility he had documented earlier radicular symptoms in his chart notes, so Employee's best evidence of radicular symptoms prior to February 2015 is Dr. Gevaert's February 13, 2015 chart notes, where Employee reported episodic pain referral into his right lower extremity over the last 18 months. However, as Employee acknowledged at hearing, he was also experiencing knee pain at the time, so it was difficult for him to discern when his radicular symptoms began. Additionally, not only did Dr. Gupta find Employee to be a poor historian, but Employee's deposition testimony, where he had difficulty remembering places he had lived, the dates of his marriage, what his upcoming physical capacities evaluation was called, and where it would take place, shows him to be. Consequently, no reliance is placed on the history Employee provided Dr. Gevaert on February 13, 2015. AS 23.30.122; *Morrison*.

Returning, then, to Dr. Gupta, she thought Employee's later work activities had a more significant impact on his back condition than earlier work activities. She also thought radiculopathy is associated with contemporaneous activities and that Employee's radiculopathy was likely caused by his work activities at the time. Given each of her opinions in these regards, it is entirely unknown how Dr. Gupta can then attribute causation of Employee's need for medical treatment to the work he performed for Employer, since Employee had not worked for Employer for two, full, years prior to any documentation of the radicular symptoms for which he sought treatment. AS 23.30.122; *Morrison*; *contra Rogers & Babler*; *contra Saxton*.

Finally, Dr. Gupta's method of attributing causation, by counting cumulative work hours, is riddled with problems. First, it is overly simplistic. This oversimplification is best illustrated in Dr. Gupta's own words from her November 2, 2018, SIME addendum:

> *If* I *assume* the accuracy of the hours indicated in my both [sic] correspondences, *and assuming* job duties were the same with both employers, then it *appeared* that [Employer] caused [Employee] to accrue more cumulative trauma and would be the substantial cause of [Employee's] disability.

(Emphasis added). One of the problems here is the parties cannot agree on cumulative work hour totals for each employer even though they are working off the same payroll records, so assuming the calculations they presented are accurate is an untenable proposition in the first place. Then there is the problem with the payroll codes. Even Employee agreed at hearing that non-mechanic work should be subtracted from his cumulative work hour totals, but the parties again disagree whether or not travel time, where Employee was required to carry toolboxes weighing up to 50 pounds, should be included. Then, there is the problem of apportionment. Dr. Gupta's method for determining causation is an apportionment scheme and the Alaska Supreme Court has repeatedly rejected apportionment as a method of deciding workers' compensation claims. *Eg. Morrison*. For each of the above stated reasons, Dr. Gupta's opinions are afforded no weight. *Id*.; AS 23.30.122.

Meanwhile, Dr. Bauer's causation opinion rings true. *Saxton*. Not only did Employee not seek treatment until two years after he *last* worked for Employer, but Employee's own descriptions of a progressive worsening of symptoms comports with Dr. Bauer's opinion that the substantial cause

of Employee's need for treatment was natural progression of his age-related degenerative disease, which Dr. Bauer repeatedly likened to graying hair as one ages. Dr. Bauer's report employed copious citations in support of his conclusions, while Dr. Gupta's report was devoid of them; and, unlike Dr. Mina, Dr. Bauer is familiar with the legal standard in Alaska for stating his medical opinions. His report and, his deposition testimony in particular, are the best evidence on the issue of causation and are afforded great weight. AS 23.30.122; *Morrison*; *Saxton*. Thus, when identifying and evaluating all the potential causes of Employee's need for lower back treatment, including the natural progression of age-related degenerative disease, the 2007 work injury and the cumulative trauma of working for Employer, the greater weight of Dr. Bauer's opinion supports the natural progression of age-related degenerative disease as the substantial cause. *Id.* Consequently, Employee's lower back medical treatment is not compensable and his claim will be denied. AS 23.30.010(a).

3) Is Employee entitled to TTD?

The law provides for TTD to compensation an injured worker for the loss of earning capacity resulting from the injury. AS 23.30.185; *Vetter*. For the reasons set forth above, Employee is not entitled to TTD and his claim will be denied. AS 23.30.010(a).

4) Is Employee entitled to a PPI rating?

The law provides for PPI to compensate in injured worker for suffering a permanent partial impairment. AS 23.30.190. For the reasons set forth above, Employee is not entitled to a PPI rating and his claim will be denied. AS 23.30.010(a).

5) Is Employee entitled to interest?

The law provides for a mandatory award of interest to compensate a person entitled to compensation for the time value of money. AS 23.30.155(p); *Rawls*. For the reasons set forth above, since Employee is not entitled to compensation, AS 23.30.010(a), neither is he entitled to interest on compensation, so his claim will be denied. AS 23.30.155(p).

6) Is Employee entitled to attorney fees and costs?

The law provides attorney fees and costs to compensate an injured worker who enlists the assistance of counsel in the successful prosecution of a claim. AS 23.30.145; *Moore*. Since Employee has not been successful in the prosecution of his claim, AS 23.30.010(a), neither is he entitled to attorney fees and costs, so his claim will be denied. AS 23.30.145.

CONCLUSIONS OF LAW

1) The hearing record should be re-opened to include the parties' post-hearing filings.
2) Employee is not entitled to medical and related transportation costs.
3) Employee is not entitled to TTD.
4) Employee is not entitled to a PPI rating.
5) Employee is not entitled to interest.
6) Employee is not entitled to attorney fees and costs.

ORDER

Employee's July 25, 2016 amended claim is denied.

Dated in Fairbanks, Alaska on July 16, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

Term expired 2/28/2019
Togi Letuligasenoa, Member

/s/
Lake Williams, 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 BRIAN W. DONNELLY, employee / claimant v. HARNISH GROUP, INC., self-insured employer / defendant; Case No. 200720420M, 201810105J; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on July 16, 2019.

/s/
Ronald C. Heselton, Office Assistant II