ALASKA WORKERS' COMPENSATION BOARD

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

CHARLES MCKEE, Employee, Claimant, v. ALASKA FUNCTIONAL FITNESS, LLC, Employer, and OHIO CASUALTY INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201501065 AWCB Decision No. 19-0094 Filed with AWCB Anchorage, Alaska on September 16, 2019

Charles McKee's (Employee) June 26, 2017 claim and Alaska Functional Fitness' (Employer) June 26, 2019 petition to dismiss were heard on September 10, 2019, in Anchorage, Alaska, a date selected on July 11, 2019. A July 11, 2019 stipulation gave rise to this hearing. Employee appeared, represented himself and testified. Attorney Rebecca Holdiman-Miller appeared and represented Employer. There were no other witnesses. The record closed at the hearing's conclusion on September 10, 2019.

ISSUES

Employee claims additional medical benefits arising from his December 30, 2014 injury with Employer. He did not clearly express the medical benefits he seeks.

Employer contends Employee's claim for medical benefits is not supported by any evidence. It seeks an order denying his claim.

1) Is Employee entitled to medical benefits at this time?

Employee contends Employer's June 23, 2017 Controversion Notice was unfair or frivolous. He seeks a factual finding and legal conclusion so stating.

Employer contends the facts and law support its June 23, 2017 Controversion Notice. It seeks a factual finding and legal conclusion stating the controversion was not unfair or frivolous

2) Was Employer's June 23, 2017 controversion notice unfair or frivolous?

Employer contends Employee's June 26, 2017 claim should be dismissed because he failed to comply with a 2015 settlement agreement, and his claim is untimely.

Employee did not express his position on this issue clearly. However, it is assumed Employee contends his claim should not be dismissed.

3) Should Employee's June 26, 2017 claim be dismissed for his alleged failure to comply with terms of the settlement agreement, or under AS 23.30.100 or AS 23.30.105(a)?

FINDINGS OF FACT

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

1) On December 31, 2014, Employee was cleaning a shower stall at work for Employer when he fell backwards, hitting his head and injuring his right hand. (Employer Report of Occupational Injury or Illness to Division of Workers' Compensation, January 20, 2015).

2) In 2015, Employee filed claims for various benefits under the Act. (Workers' Compensation Claim, March 4, 2015; March 31, 2015).

3) On or about June 12, 2015, Employer deposed Employee. He was at that time represented by an experienced workers' compensation attorney. (Notice of Taking Deposition, May 21, 2015; Entry of Appearance, March 31, 2015).

4) On October 21, 2015, the parties mediated their differences before a hearing officer and partially resolved his claims. (ICERS).

5) On October 22, 2015, the parties filed their fully executed agreement for board review and approval. (Settlement Agreement, October 21, 2015).

6) On October 27, 2015, the board approved the parties' settlement. The approved agreement waived Employee's right to all benefits under the Act in exchange for $19,000, with exception of "future medical and related transportation benefits," which were not waived. The settlement agreement was to resolve any and all "non-medical disputes" and stated:

> The employee does not intend to pursue additional surgical treatment relative to his injuries under this claim. He will meet with his treating physician and obtain further conservative treatment recommendations, after which he will supply to the employer who in turn agrees to obtain a Medicare Set-Aside proposal so a medical settlement can be pursued. . . . (Settlement Agreement, October 21, 2015, at 15).

7) On November 3, 2015, Employee visited his orthopedic surgeon Michael McNamara, M.D., to request "a letter that tells he is doing conservative treatment for his injury." On history and examination, Employee was taking nothing for pain relief and had increased pain with overhead use for his shoulder and some aching with his wrist. Employee endorsed a clicking sensation in his right wrist and shoulder but no tingling or numbness. Dr. McNamara recorded:

> **DATA**: . . . He sounds like he has been finalized with Workman's [sic] Comp. on that and he is also working on finalization or cash out on his shoulder and neck injury. His shoulder is doing better as well. Today's exam is for his right wrist. . . . **ASSESSMEN**T**: Doing better with his right wrist. PLAN**: we will go ahead and discharge him from clinic at this point and see him back on a PRN basis. It sounds like he's going to pursue some type of T-cell supplement with Symtech. (McNamara report, November 3, 2015) (emphasis in original).

8) On November 6, 2015, Employee filed and served on Employer a summary to which he attached Dr. McNamara's November 3, 2015 record. Employee listed Dr. McNamara's report and described it as his "conservative treatment plan." (Medical Summary, November 6, 2015).

9) On November 9, 2015, Employer's attorney received Employee's November 6, 2015 medical summary and Dr. McNamara's attached report. (Holdiman-Miller statement on September 10, 2019 hearing record).

10) With this visit to his treating physician Dr. McNamara, and his November 6, 2015 medical summary, which he served on Employer with the record attached, Employee fulfilled his obligation under the approved settlement agreement to "meet with his treating physician and obtain further conservative treatment recommendations, after which he will supply to the employer." (Judgment, observations and inferences drawn from all the above).

11) On November 9, 2015, Employee said he was "mistaken" in signing the settlement agreement and was coerced into signing it without having "full disclosure." He "rescinded" his signature on the settlement document and requested a hearing. (Letter, November 9, 2015).

12) The board treated Employee's letter as a request to set aside the settlement. (*McKee v. Alaska Functional Fitness, LLC*, AWCB Decision No. 16-0124 (December 20, 2016) (*McKee I*).

13) Beginning January 21, 2016, Employee served on Employer and filed with the board various documents purporting to create a new settlement agreement between the parties regarding medical care. (ICERS).

14) On February 11, 2016, Employer said it was prohibited by law from settling medical benefits prior to the completion of a Medicare Set-Aside Agreement as discussed in the settlement agreement. It contended Employee's filings stating the parties had entered into a medical settlement were invalid as no agreement to settle medical benefits had been made. (Letter, February 11, 2016; Exhibit 11 to Employer's Hearing Brief, November 15, 2016).

15) On August 29, 2016, Employer sought an order dismissing Employee's claim for failure to sign and return discovery releases. (Petition, August 29, 2016).

16) On October 20, 2016, Employer sought an order dismissing Employee's claim pursuant to "AS 23.30.0091 [sic], 23.30.108(c), 8 AAC 45.065, and Rule 12(b)(6) of the Alaska Rules of Civil Procedure." (Petition, October 20, 2016).

17) On November 22, 2016, the board heard Employee's November 9, 2015 petition to set aside the settlement, his June 6, 2016 petition to enforce a purported settlement agreement regarding medical care, his May 13, 2016 petition for an order finding the division's tortious interference with his settlement, Employer's August 29, 2016 petition to compel or dismiss and its October 20, 2016 petition to dismiss. At hearing, Employer referenced the settlement agreement's requirement for Employee to visit his doctor and obtain a conservative treatment plan and said it wanted that term in the settlement agreement "enforced." Employer also requested dismissal with prejudice on the Medicare Set-Aside Agreement issue. It contended there was no law or requirement for it

to settle medical care in a lump-sum. The hearing record includes no mention of Dr. McNamara's November 3, 2015 report or the November 6, 2015 Medical Summary with it attached, which Employer received on November 9, 2015. Employee's position at hearing on the issues was difficult to discern. (Employer's Hearing Brief, November 15, 2016; record; judgment).

18) On December 20, 2016, *McKee I* denied Employee's November 9, 2015 petition to set aside the settlement, June 6, 2016 petition to enforce a settlement agreement, May 13, 2016 petition for finding tortious interference with settlement, Employer's October 20, 2016 petition to dismiss and in part its August 29, 2016 petition to compel or dismiss. *McKee I* granted the August 29, 2016 petition in part and gave Employee 10 days to return signed releases. It also directed him to "**comply with the language of the October 27, 2015 C&R concerning a Medicare set-aside, which requires him to cooperate in meeting with his treating physician to obtain future treatment recommendations. Once obtained, Employee is directed to provide these recommendations to Employer.**" (*McKee I* at 23) (emphasis in original).

19) On February 24, 2017, Employee appealed *McKee I* to the Alaska Workers' Compensation Appeals Commission. (Notice of Appeal, February 24, 2017).

20) On June 12, 2017, Employee told Robert Thomas, PA-C, he had a "new injury to his right wrist." He told PA-C Thomas he was throwing a ball about five days prior and "felt a pop in his right wrist." He had immediate pain and swelling. (Thomas report, June 12, 2017).

21) On June 23, 2017, Employer denied Employee's right to all benefits related to what it called his "non-industrial injury that occurred on June 7, 2016." (Controversion Notice, June 23, 2017).

22) On June 26, 2017, Employee claimed medical costs and requested a finding that Employer filed an unfair or frivolous Controversion Notice. (Workers' Compensation Claim, June 26, 2017).

23) On October 24, 2017, the commission affirmed *McKee I* in all regards. The commission stated, "His entitlement to future medical treatment remains open under the settlement." It also said Employee was required to consult with his physician to obtain information about future medical treatment for Employer's use in obtaining a Medicare Set-Aside proposal "in consideration of a possible future settlement" of his right to medical benefits. In this regard, the commission noted the settlement agreement "only asks for information for a possible future Medicare Set-Aside Trust." It further stated even if Employee's misunderstanding of the law were correct, "the request for information in itself would not be inappropriate since future medical treatment remains open" under the settlement agreement. The commission further stated:

> However, if Mr. McKee should want to settle out his right to future medical treatment under the [Act], Alaska Functional Fitness is required by federal law to take Medicare's interests into account through a Medicare Set-Aside Trust. . . . The board must approve any C&R closing future medical benefits and in doing so must first ascertain that the settlement is in the employee's best interests. Thus, the request for information that would be useful should the parties in the future attempt to reach a settlement closing future medical benefits is not a basis for setting aside the C&R. (*McKee v. Alaska Functional Fitness, LLC*, AWCAC Decision Number 241 (October 24, 2017) at 1, 13-17.

24) On December 19, 2017, the commission denied Employee's motion for reconsideration. (Order on Motion for Reconsideration, December 19, 2017).

25) On January 18, 2018, Employee appealed the commission's decisions to the Alaska Supreme Court. (Notice of Appeal, January 18, 2018).

26) On February 13, 2019, the Alaska Supreme Court affirmed the commission's decision. The court stated to the extent Employee was asking the settlement agreement to be modified or amended, the court's prior construction of the Act "forecloses this possibility." It also noted the settlement agreement "did not settle medical benefits." (*McKee v. Alaska Functional Fitness, LLC*, Memorandum Opinion and Judgment, February 13, 2019).

27) On June 18, 2019, Employer sought an order dismissing Employee's June 26, 2017 claim for failure to comply with the settlement agreement. (Petition, June 18, 2019).

28) Employer contends the board should dismiss Employee's June 26, 2017 claim because he failed to comply with the settlement agreement, his claim is untimely and no evidence supports a claim for additional medical benefits. It relies on the agreement's language stating he did not intend to pursue additional surgical treatment and would meet with his treating physician to obtain conservative treatment recommendations. It concedes Employee met with his medical provider nearly four years ago and his physician told him his wrist did not require additional treatment and his shoulder was normal. Employer contends Employee has not provided it with treatment recommendations and therefore Employer did not pursue a Medicare Set-Aside Agreement. It also relies on *McKee I*, which ordered Employee to comply with the settlement agreement and talk to his treating physician. Employer contends he failed to comply with the settlement agreement and *McKee I*'s order to comply with it, and "any additional claims for benefits" should therefore be dismissed. (Employer's Hearing Brief, September 3, 2009).

29) Employer further contends Employee has received no additional medical treatment for his work injury and is presumed medically stable. It contends absent "clear and convincing evidence to the contrary," his claim for medical benefits should be denied. (*Id*.).

30) Employer also contends any possible claim Employee could make for medical benefits should be dismissed as untimely under AS 23.30.100 and AS 23.30.105. It cites §100 but did not fully explain how it applies to this his pending claim. Employer cites §105 and notes Employee has not requested additional medical benefits for over two years. (*Id*.).

31) As for Employee's request for an unfair or frivolous controversion finding, Employer contends its controversion is supported by a June 12, 2017 medical record stating Employee had a new wrist injury. Since there is no evidence the alleged June 12, 2017 injury relates to the work injury, Employer contends its controversion is based on fact and is neither unfair nor frivolous. Employer also invokes the *res judicata* doctrine and contends it precludes Employee's claim for additional benefits. It seeks an order dismissing "this case in its entirety." (*Id*.).

32) At hearing on September 10, 2019, Employee filed approximately 30 pages of documents upon which he relied. After a break during the hearing, and after Employee was seen in the hallway speaking to a hearing observer, his testimony and demeanor changed; he became calmer and focused on the head injury part of his work accident. Employee said when he fell on the job and hit his head he sustained a concussion. He stated the concussion thereafter made him confused and affected his ability to think and express himself. He endorsed his deposition date, on or about June 12, 2015, as the date he first became his concussion affected him. Upon further inquiry, Employee said he has an eighth grade education and never obtained a high school diploma. His work throughout life has mostly been janitorial. He stated his work-related concussion was "a big part" of his decision to recant his signature on the settlement agreement. Employee said he went to Project Health and saw a "head person" in 2016. He has never had treatment for head trauma or psychological issues. While maintaining he was never confused before the work injury, Employee admitted he sued Barack Obama in 2012 for copyright infringement. Throughout his life, Employee negotiated and entered into financial agreements with landlords, car dealerships and others. (Observations, experience, judgment; Employee).

33) Though he had diagnostic imaging for his head after his work injury, there is no evidence Employee had a neuropsychological evaluation. While diagnostic imaging may disclose organic brain damage, which could cause cognitive impairment, it does not necessarily disclose the effects,

if any, such damage has on a person's cognition. Such cognitive deficits are normally diagnosed through neuropsychological evaluations. (Employee; agency file; experience and judgment).

34) The panel members reviewed documents Employee filed at hearing and they have no relevance. Employee was fluent but lacked focus. His positions on the issues for hearing were not easily discernible and some were never discerned. (Experience, judgment, observations).

35) Employee has no known, unpaid, work-related medical bills and no current recommendation for medical treatment he has not already had. (Employee).

36) Employer seeks an order requiring Employee to see his physician to obtain a conservative treatment plan so the parties can settle Employee's remaining medical benefits, according to the settlement agreement, which was in essence a "pre-settlement settlement agreement." (Record).

37) Lawyers do not charge a fee for representing injured workers in workers' compensation cases and the division does not charge a fee for assistance its technicians provide. (Experience).

PRINCIPLES OF LAW

> **AS 23.30.012. Agreements in regard to claims**. (a) At any time . . . after 30 days subsequent to the date of the injury, the employer and the employee . . . have the right to reach an agreement in regard to a claim. . . .
>
> (b) The agreement shall be reviewed by a panel of the board if the claimant . . . is not represented by an attorney licensed to practice in this state . . . or the claimant is waiving future medical benefits. . . .

The Alaska Supreme Court in *Bohlmann v. Alaska Construction & Engineering*, 205 P.2d 316 (Alaska 2009) considered the board's duty to advise unrepresented claimants in workers' compensation cases:

> The board, as an adjudicative body with a duty to assist claimants, has a duty similar to that of courts to assist unrepresented litigants.

Bohlmann concluded "the board at a minimum should have informed Bohlmann how to preserve his claim. . . ." *Id*. at 320. The board may base its decision not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987). If there are no disputed facts in the case,

the statutory presumption of compensability analysis need not be applied. *Rockney v. Boslough Construction Co*., 115 P.3d 1240 (Alaska 2005).

> **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 . . . 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 . . . 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 . . . in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury . . . to the board and to the employer.
> . . . .
>
> (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.

> **AS 23.30.105. Time for filing of claims.** (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. . . .

Egemo v. Egemo Construction Co., 998 P.2d 434 (Alaska 2000), determined a claim was not ripe for filing until the injury caused wage loss. Medical claims are revived when there is new treatment. AS 23.30.105(a) allows for more than one disablement for a given injury. Each disability period "is characterized by a conjunction of a work-related injury or illness and wage-loss. If these two factors are present, the clock begins anew." If both factors are not present the clock does not begin to run. Both injury knowledge and disablement must be conjoined before an

employee is required to file a claim. Therefore, because the injured worker in *Egemo* was not disabled by his work injury until he had surgery for it, his pre-surgery claim, though not filed within two years of the injury date, was timely. *Id*. at 439-40. *Egemo* also stated:

> In our view, when a claim for benefits is premature, it should be held in abeyance until it is timely, or it should be dismissed with notice that it may be refiled when it becomes timely (footnote omitted). In the present case, it would have been appropriate for the Board either to hold Egemo's claim in abeyance until the surgery took place or to notify him that his claim was premature so that he would know to refile it after the surgery. (*Id*. at 441).

Summers v. Korobkin Construction, 814P.2d 1369 (Alaska 1991), said an injured worker has a right to a prospective determination on whether his injury is compensable.

> **AS 23.30.155. Payment of compensation**. . . .
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125. . . .

Harp v. ARCO Alaska, Inc., 831 P.2d 352 (Alaska 1992), said, "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012), applied *Harp* to an unfair or frivolous claim brought under AS 23.30.155(o) and said the employer's controversion was not unfair or frivolous because if the injured worker had introduced no evidence opposing the controversion, the board could have found she was not entitled to benefits based on the medical report subject of the controversion.

ANALYSIS

1) Is Employee entitled to medical benefits at this time?

Employer is responsible to furnish medical care for Employee's work injury, subject to applicable defenses. AS 23.30.095(a). The parties do not dispute the fact Employee left his medical benefits

"open," or in other words not waived, in his settlement agreement. *McKee I*, the commission and the Alaska Supreme Court all stated Employee's right to make medical claims remains intact. Employer retains its right to challenge any medical claims he may make. There is no factual dispute on this issue and the presumption analysis need not be applied. *Rockney*. Employee's June 26, 2017 claim requests unspecified medical benefits. At hearing, under close and repeated questioning, Employee stated he is not aware of any unpaid, past medical bills related to his December 30, 2014 work injury with Employer. There is no medical treatment recommended for his work injury that he has not had and Employee did not say he wanted to seek treatment currently. This too is not in dispute. *Id*. He did not explain exactly what he was claiming regarding medical benefits. Since he has no outstanding medical bills, no medical treatment is recommended and Employee does not want to see a doctor, his June 26, 2017 claim is premature. Consequently, this decision will dismiss his claim without prejudice. *Egemo*.

"Without prejudice" means, pursuant to the settlement agreement and the Act, he can always file another claim for medical benefits. Employee retains his right to obtain medical treatment and related transportation costs for his work injury. For example, Employer controverted his right to all benefits for an alleged "new injury" it contends he sustained on June 7, 2017, when throwing a ball. If he contends the June 7, 2017 ball-throwing incident was simply an aggravation of his work injury, and a physician recommends additional treatment for his right wrist, Employee retains his right to file a claim for medical benefits potentially related to the ball-throwing event. Employer may defend against such claim. A hearing will then decide the matter. If, for example, he obtains medical treatment and Employer does not promptly pay properly submitted medical bills, or controverts Employee's right to the requested medical benefits, Employee may file a claim at that time for medical benefits. Or, if Employer declines to authorize treatment for the work injury, Employee may file a claim requesting medical benefits and related transportation costs and ask for an order requiring Employer to authorize the treatment. *Summers*. In each instance, Employer retains its right to defend against his claim and any such claim will be resolved at a fair hearing.

During the September 10, 2019 hearing, after speaking privately with a hearing observer during a break, Employee contended a concussion he says he received when he hit his head has caused him mental confusion since the work injury. He contends he first became aware of this around June

2015 during his deposition, when he was represented by an attorney. Cognitive impairment, if any, from a closed head injury or any source is often best diagnosed through a neuropsychological evaluation. *Rogers & Babler*. Since his medical benefits remain open, Employee may see his attending physician for the work injury and ask for a referral for a neuropsychological evaluation. He should be careful to not inadvertently change attending physicians in violation of the law. Employee is encouraged to contact either an attorney familiar with workers' compensation cases, or speak to a Workers' Compensation Technician at 269-4980. Lawyers do not charge a fee for representing injured workers in these cases; the division does not charge injured workers for assistance from its technicians. *Id*. An attorney or technician can review Employee's medical records and identify his attending physician for this injury, which he should then contact about receiving a referral to a neuropsychologist or other specialist. *Bohlmann*.

2) Was Employer's June 23, 2017 Controversion Notice unfair or frivolous?

Employee requests a finding and conclusion stating Employer's June 23, 2017 Controversion Notice was unfair or frivolous. AS 23.30.155(o). On June 12, 2017, Employee told PA-C Thomas he had a new right wrist injury while throwing a ball on or about June 7, 2017. On June 23, 2017, Employer in reliance on this medical report controverted Employee's right to all benefits based on an alleged non-industrial injury Employer contends occurred on June 7, 2017. Under the *Harp* analysis, had a hearing been held on this issue and the only evidence presented was PA-C Thomas' June 12, 2017 report, Employee would not have been entitled to benefits for his right wrist because the history he gave to his examiner referenced a popping sound and his provider said he had a "new injury." *Harp*; *Runstrom*. Therefore, Employer's June 23, 2017 Controversion Notice was not unfair or frivolous and his request for such finding and conclusion will be denied. That does not, however, mean Employee cannot file a claim for medical benefits related to that event.

3) Should Employee's June 26, 2017 claim be dismissed for his alleged failure to comply with terms of the settlement agreement, or under AS 23.30.100 or AS 23.30.105(a)?

As discussed above, this decision will dismiss Employee's June 26, 2017 claim without prejudice because he currently has no justiciable issue and his claim is premature. *Egemo*. Employer also wants his claim dismissed for several other reasons: (a) for late notice under AS 23.30.100; (b) for untimely filing under AS 23.30.105(a); and (c) for failure to comply with the settlement agreement

and *McKee I*'s requirement to visit his doctor to obtain a conservative treatment plan for possible settlement purposes. Since there is now no pending claim, this decision need not address these other defenses. Employer can raise its defenses to any future claim Employee may file.

The parties have a right to settle their remaining disputes. AS 23.30.012(a), (b). It is worth noting Employee promptly fulfilled his duty under the approved settlement agreement and met with his treating physician Dr. McNamara and solicited a conservative treatment plan. However, the resultant report was unhelpful because Dr. McNamara suggested he needed no further treatment at least for his wrist and told him to return on an as-needed basis. At hearing, Employee first said he wants to be "cashed out" for his medical benefits, then said he "can't answer" whether he wants to settle and finally said he indeed wants to settle. If Employee wants to settle his retained right to medical benefits, which includes related transportation costs, he will have to obtain adequate information from his treating physician from which Employer through a contractor can obtain a recommended Medicare Set-Aside amount. Employee may have to go to more than one treating physician to obtain this information, because he claims head, right shoulder and right wrist injuries. This decision will not order him to do so but will advise Employee that if he wants to settle his retained rights to medical benefits, the only way he will be able to accomplish this is to get the medical information necessary for the Medicare Set-Aside agreement. Employee does not *have* to settle his retained medical rights for this injury; he is free to litigate them further if necessary as discussed above or simply reserve them in case he needs future care. *Bohlmann*. As *McKee I*, the commission and the Alaska Supreme Court have already ruled on Employee's prior claims, this decision need not discuss them any further. *Rogers & Babler*.

CONCLUSIONS OF LAW

1) Employee is not entitled to medical benefits at this time.
2) Employer's June 23, 2017 Controversion Notice was not unfair or frivolous.
3) Employee's June 26, 2017 claim will not be dismissed for his alleged failure to comply with terms of the settlement agreement, or under AS 23.30.100 or AS 23.30.105(a).

ORDER

1) Employee's June 26, 2017 claim for medical benefits is denied without prejudice, solely because it is premature and there is no justiciable medical benefit issue at this time.

2) Employee retains his right to file claims for medical care and related transportation expenses in respect to his December 30, 2014 work injury with Employer.

3) Employee's June 26, 2017 claim requesting a finding and conclusion stating Employer's June 23, 2017 Controversion Notice was unfair or frivolous is denied.

4) Given the above orders, this decision need not reach or decide Employer's June 18, 2019 petition to dismiss the June 26, 2017 claim, for Employee's alleged failure to comply with terms of the settlement agreement, or under AS 23.30.100 or AS 23.30.105(a).

Dated in Anchorage, Alaska on September 16, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

/s/
Donna Phillips, 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 Charles Mckee, employee / claimant v. Alaska Functional Fitness, LLC, employer; Ohio Casualty Insurance Company, insurer / defendants; Case No. 201501065; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by First-Class U.S. Mail, postage prepaid, on September 16, 2019.

/s/
Charlotte Corriveau, Office Assistant