ALASKA WORKERS' COMPENSATION BOARD

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

PETER C. SCHRANZ, Employee, Claimant, v. TC CONSTRUCTION, INC., Employer, and AMERICAN INTERSTATE INSURANCE COMPANY, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201814970 AWCB Decision No. 19-0097 Filed with AWCB Anchorage, Alaska On September 26, 2019.

Peter Schranz' (Employee) March 22, 2019 claim was heard on August 27, 2019, in Anchorage, Alaska, a date selected on June 18, 2019. Employee's May 16, 2019 hearing request gave rise to this hearing. Employee appeared telephonically and represented himself. Attorney Colby Smith appeared and represented TC Construction, Inc., and American Interstate Insurance Company (Employer). Stacy Hardon appeared telephonically and testified for Employer. The record remained open for additional evidence and closed on August 30, 2019.

ISSUES

Employer contends pursuant to AS 23.30.022, Employee's workers' compensation claim should be dismissed because it relied upon his false representations on the post-hire health questionnaire form. It contends had it known about Employee's prior back surgery and physical limitations, it would have not hired him for the construction worker position.

Employee contends he had no physical limitation at the time he applied for a job with Employer. He also contends he did not knowingly make false statements about his health history as he completed Employer's post-hire health questionnaire form without reading it.

1) Are Employee's rights to benefits barred under AS 23.30.022?

Employee contends his work injury remains the substantial cause of his disability and need for medical treatment, and he is entitled to additional temporary total disability (TTD) benefits.

Employer contends as of December 19, 2018, the work injury is no longer the substantial cause of Employee's disability or need for medical treatment, so no further benefits are owed.

2) Is Employee entitled to additional TTD benefits?

Employee did not request interest in his March 6, 2019 claim. As Employee is unrepresented, he probably did not know he would be entitled to interest if he prevailed on his TTD claim. This decision examines and resolves the interest issue.

3) Is Employee entitled to interest?

FINDINGS OF FACT

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

1) On August 5, 2017, Employee saw Heather Martin, N.P., for his preexisting sciatic condition. (Martin report, Medical Summary, June 13, 2019).

2) On October 4, 2017, Mark Flanum, M.D., diagnosed Employee with chronic back pain with right-sided sciatica. (Flanum report, Medical Summary, June 13, 2019).

3) On March 1, 2018, Dr. Flanum performed a right L4-5 posterior microdecompression on Employee. (Flanum report, Medical Summary, April 17, 2019).

4) On June 11, 2018, Michael Dyches, P.A., saw Employee and noted he was "very happy with his results" and "has no active back or leg pain." However, Employee reported he was having difficulty doing outside work and lifting heavy objects. P.A. Dyches concluded Employee may return to work and advised him to "gradually return to usual activities and let pain be his guide." (Dyches report, Medical Summary, June 13, 2019).

5) There is no record Employee obtained a full-duty work release between March 1, 2018, and October 10, 2018. (Bauer report, July 11, 2019; ICERS; observation).

6) On October 10, 2018, Employer gave Employee a conditional job offer and asked him to complete a post-hire health questionnaire. Employee answered "no" to all of the questions in the form. He stated he had never had or been treated for any condition listed in the form, which included "neck or back injury" and "ruptured intervertebral disc (herniated disc in spine)," conditions Employee had and for which he had previously been treated. Also, he incorrectly answered he had no prior work restriction. Employee dated and signed after the following paragraph in the form: "I hereby certify that I have answered the above questions to the best of my knowledge and the answers are true and complete. I understand that misrepresentation or omission of facts is cause for dismissal and may result in denial of worker's compensation benefits." (Employee; Deposition of Peter Schranz, Amended Notice of Filing, August 27, 2019, at 54-57; Employer's Hearing Brief, August 21, 2019, Exhibit A).

7) Employee testified he completed the post-hire health questionnaire without reading it. He said he "just answered no to everything" as he normally does. He also testified he knew he "had a surgery for a back injury" but did not know whether it was a "crushed disk" or "herniated disk." He did not know whether "mild disk bulging" meant herniated or not. (Employee; Deposition of Peter Schranz, Amended Notice of Filing, August 27, 2019, at 55-58)

8) After graduating from high school, Employee spent about four or five years majoring in economics at the University of Wisconsin Madison. He was close to getting a degree. Employee is capable of reading and understanding Employer's post-hire health questionnaire. (Employee; Deposition of Peter Schranz, Amended Notice of Filing, August 27, 2019, at 20; inference).

9) Hardon testified Employer gives the post-hire health questionnaire to job applicants to fill out at Employer's office. She specifically remembers Employee because he took an unusually long time to complete it. Hardon relied on Employee's incorrect answers in the form and recommended him to James Christianson, Employer's owner, to be hired as a construction worker in Scammon Bay, Alaska. She would have not recommended Employee to be hired for the job if he had disclosed in the form that he had a prior back injury, back limitations, or back surgery in the last six months. Hardon's reliance on the representations Employee made on the health questionnaire was a substantial factor in hiring him. (Hardon; Employer's Hearing Brief, August 21, 2019, Exhibit B).

10) Employee is not credible; his answers are evasive. He read Employer's post-hire health questionnaire and intentionally provided false statements regarding his physical condition in it to obtain employment with Employer. (Observation; inference; judgment).

11) On October 12, 2018, Employee arrived at the work site, but did not work that date. He worked on October 13 and 14, 2018, and did not work on October 15, 2018. (Employee; Hardon).

12) On October 16, 2018, Employee injured his head and back while working for Employer when the scaffolding he was standing on collapsed. He fell approximately 10 feet, landed on his feet and hit his head against the scaffolding. Employee worked for two more days after the injury, but as his pain got worse, he left Scammon Bay. (Employee; Employer's Hearing Brief, August 21, 2019; Deposition of Peter Schranz, Amended Notice of Filing, August 27, 2019, at 26-35).

13) There is no causal connection between Employee's false statements regarding his physical condition in the post-hire health questionnaire and his October 16, 2018 work injury. Employee fell 10 feet from a collapsing scaffold. His preexisting back condition did not cause the scaffolding to collapse, his fall, or the subsequent work injury. (Observation; inference; judgment).

14) On October 30, 2018, magnetic resonance imaging (MRI) showed Employee's injury: a very large left lateral recess inferior disc extrusion arising from the L4-5 level, and disk space narrowing at L4-5 level, disk desiccation to a lesser extent at L3-4 and L5-S1, and a small central bulge at L5-S1. (Mark Beck, M.D., report, Medical Summary, June 13, 2019).

15) On October 31, 2018, Dr. Flanum saw Employee and diagnosed him with a left hip and left lower extremity contusion, and a lumbar disc herniation with radiculopathy. (Flanum report, Medical Summary, April 17, 2019).

16) On November 6, 2018, Dr. Flanum performed a left L4-5 microdecompression on Employee. (Operative Report, Medical Summary, April 17, 2019).

17) On November 12, 2018, Brandy Atkins, D.N.P., saw Employee and reported (1) he is unable to work through November 20, 2018; (2) he may return to sedentary work on November 21, 2018; and (3) he may resume regular work after four weeks. Atkins further noted Employee may resume full duty on December 19, 2018. (Atkins report, Medical Summary, April 17, 2019).

18) On November 16, 2018, D.N.P. Atkins reported Employee was doing well. Employee said his pain decreased by "400%" in his left leg. She placed the following restrictions: no lifting greater than 10 pounds; no bending, twisting, and stooping of the lumbar spine until the six-week

mark, after which Employee would likely be referred for physical therapy. (Atkins report, Medical Summary, June 13, 2019).

19) On December 19, 2018, Employer suspended Employee's TTD benefits based on Atkins' November 12, 2018 report indicating Employee may resume full-duty work on December 19, 2018. From October 19, 2018, through December 18, 2018, Employer paid $2,310.00, in TTD benefits, based on a weekly rate of $266.00. The last TTD payment was due on December 21, 2018. Thus, Employer had to file a controversion notice by December 21, 2018. (ICERS; Employee; Employer; observation).

20) On March 6, 2019, Employee reported he had left-sided radicular symptoms. Dr. Flanum noted Employee had normal strength in all myotomes, but some subjectively decreased light touch on the dorsum of the left foot. Dr. Flanum ordered an MRI to see whether he had a recurrent disc herniation. (Flanum report, Medical Summary, April 17, 2019).

21) On March 7, 2019, MRI showed no appreciable recurrent disk herniation at the microdecompression site at L4-5 to explain Employee's symptoms. The lumbar spine appeared stable. (Jared Nelson, M.D., report, Medical Summary, June 13, 2019).

22) On March 11, 2019, Employee reported his pain was getting steadily worse; he was having difficulty sleeping and felt unable to work. Dr. Flanum opined decompression surgery would not be useful because there was only minimal scar tissue around his nerve roots. Employee was reluctant to follow Dr. Flanum's recommendation for physical therapy and epidural steroid injections as he had not benefited from those treatments in the past. Dr. Flanum suggested the only surgical option left would be a fusion, but Employee would need to be tobacco free. (Flanum report, Medical Summary, April 17, 2019).

23) There is no evidence indicating Employee is tobacco free. (ICERS; observation).

24) There is no evidence indicating Employee sought treatment for his work injury after his March 11, 2019 visit with Dr. Flanum. (ICERS; observation).

25) On March 22, 2019, Employee claimed TTD benefits. (Workers' Compensation Claim, March 22, 2019).

26) On April 10, 2019, Employer denied TTD benefits based on Dr. Flanum's opinion Employee could resume to full duty work on December 19, 2018. There is no record indicating Dr. Flanum issued such an opinion. Most likely, Employer was referring to Atkins' November 12, 2018 report.

(Answer, April 10, 2019; Deposition of Peter Schranz, Amended Notice of Filing, August 27, 2019, at 16; observation).

27) On July 11, 2019, David Bauer, M.D., saw Employee for an employer medical evaluation (EME) and diagnosed him with disk herniation at left L4-5 which was substantially caused by the October 16, 2018 injury and was surgically repaired. He opined the October 16, 2018 injury was the substantial cause of the need for medical treatment and the disability Employee had between his surgery and his release to full duty on December 19, 2018. Dr. Bauer did not elaborate why he determined Employee's disability ended on December 19, 2018; it is assumed he repeated Atkins' November 12, 2018 report. Dr. Bauer further opined the October 16, 2018 injury was an acute condition, which did not aggravate the preexisting condition. However, in his view, it is not the substantial cause of Employee's current need for treatment and disability. Employee was medically stable as of March 7, 2019, with a four percent whole person impairment resulting from the October 16, 2018 injury. (Bauer report, Medical Summary, July 30, 2019).

28) On July 29, 2019, Employer controverted TTD benefits based on Dr. Bauer's EME and Employee's false statements in the post-hire health questionnaire. This is the first and only controversion notice filed with the division in this case. Employer should have filed a controversion notice with the division and sent it to Employee within seven days after Employee's TTD payment was due in December 2018; thus, it failed to timely file the controversion notice. (Controversion Notice, July 29, 2019; ICERS; observation; judgment).

29) Generally medical providers do not refer a spinal injury patient to physical therapy and release him or her to full-duty construction work at the same time. (Observation; experience).

30) After a lumbar decompression surgery, most patients are released to work after 4 to 6 weeks, if their job is not too strenuous. However, if the job involves strenuous activities, the patient may need to be off work for several months. (Observation; experience).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the legislature and construction of chapter**. It is the intent of the legislature that
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> > (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost . . . employers. . . .
> > . . . .

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

> **AS 23.30.022. False statements by employee.** An employee who knowingly makes a false statement in writing as to the employee's physical condition in response to a medical inquiry, or in a medical examination, after a conditional offer of employment may not receive benefits under this chapter if
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> (1) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
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> (2) there was a causal connection between the false representation and the injury to the employee.

The Alaska Supreme Court in *Robinett v. Enserch Alaska Constr*., 804 P.2d 725 (Alaska 1990), explained that AS 23.30.022 codifies the "Larson test" for analyzing employee responses to employer questionnaires. Professor Larson's workers' compensation treatise states:

> [I]t has been held that employment which has been obtained by the making of false statements – even criminally false statements – whether by a minor or an adult, is still employment; that is, the technical illegality will not of itself destroy compensation coverage. What seems to be emerging, in place of a conceptual approach relying on purely contractual tests, is a common-sense rule made up of a mix of contract, causation, and estoppel ingredients.
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> Note that with the passage of the American with Disabilities Act, employers may no longer inquire into an individual's medical history or require a physical examination until after an offer of employment has been made. This does not change the analysis here regarding false statements other than to note that such questions cannot be asked before the conditional hiring of the individual. Once a conditional offer of employment is made the employer may then inquire into the individual's physical status.
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> The following factors must be present before a false statement at the time of hiring will bar benefits: (1) The employee must have knowingly and willfully made a false representation as to his or her physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury. 5 Larson, *Larson's Workers' Compensation* §66.04, at 66-30, 31 (2017).

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

Benefits sought by an injured worker are presumed compensable. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption applies to any claim for compensation under the workers' compensation statute. *Id.* The presumption involves a three-step analysis. To attach the presumption, an employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Credibility is not examined at the first step. *Veco, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985).

Once the preliminary link is established, the employer has the burden to overcome the presumption with substantial evidence. *Wien Air Alaska v. Kramer*, 807 P.2d 471 (Alaska 1991). "Substantial evidence" is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Tolbert v. Alascom, Inc*., 973 P.2d 603 (Alaska 1999). At the second step of the analysis, the employer's evidence is viewed in isolation, without regard to the claimant's evidence. Issues of credibility and evidentiary weight are deferred until after a determination whether the employer has produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Comp. Bd.*, 880 P.2d 1051 (Alaska 1994).

If the employer's evidence is sufficient to rebut the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. This means the employee must "induce a belief" in the minds of the fact finders the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, the evidence is weighed, inferences are drawn and credibility is considered. *Steffey v. Municipality of Anchorage*, 1 P.3d 685 (Alaska 2000).

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

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.155. Payment of compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. To controvert a claim, the employer must file a notice, on a form prescribed by the director. . . .
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> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days, except where the board determines that payment in installments should be made monthly or at some other period.
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> (d) If the employer controverts the right to compensation, the employer shall file with the division and send to the employee a notice of controversion on or before the 21st day after the employer has knowledge of the alleged injury or death. If the employer controverts the right to compensation after payments have begun, the employer shall file with the division and send to the employee a notice of controversion within seven days after an installment of compensation payable without an award is due.
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> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
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> (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. . . .

Land and Marine Rental Co. v. Rawls, 686 P.2d 1187 (Alaska 1984), the Supreme Court held a workers' compensation award, or any part thereof, shall accrue lawful interest from the date it

should have been paid. Interest and penalty are mandatory. AS 23.30.155(a), (e), (p). In *Richard v. Fireman's Fund Insurance Co.*, 384 P.2d 445, 449 (Alaska 1963), the Alaska Supreme Court held the board must assist claimants by advising them of the important facts of their case and instructing them how to pursue their right to compensation.

> **AS 23.30.185. Compensation for temporary total disability**. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.
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> **AS 23.30.395. Definitions.** In this chapter,
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
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> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) said, "'[o]nce an employee is disabled, the law presumes that the employee's disability continues until the employer produces substantial evidence to the contrary.' We therefore examine whether the employer rebutted the presumption." *Id*. *Lowe's v. Anderson*, AWCAC Decision No. 130 (March 17, 2010), held an employer may rebut the continuing presumption of compensability and disability, and gain a "counter-presumption," by producing substantial evidence that the date of medical stability has been reached. Substantial evidence is that which "a reasonable mind might accept as adequate to support the board's conclusion" in light of the record as a whole. *Delaney v. Alaska Airlines*, 693 P.2d 859, 863 (Alaska 1985).

In *Baker v. Reed-Dowd Co.*, 836 P.2d 916 (1992), the Alaska Supreme Court held the board's conclusion that the employee's disability had ended was not supported by substantial evidence

where one doctor testified he did not believe the employee had physically recovered from the effects of the work injury, and another testified he could not estimate the employee's physical capacities upon recovery. The board determined the employee was not credible and did not believe his claims of ongoing physical impairment. *Id*. However, this determination alone did not support the board's ruling that the employee's disability ended. *Id*.

Once an employer produces substantial evidence to overcome the presumption in favor of TTD, the employee must prove all elements of the TTD claim by a preponderance of the evidence. However, if the employer raised the medical stability counter-presumption, "the claimant must first produce clear and convincing evidence" that he has not reached medical stability. *Id*. One way an employee rebuts the counter-presumption is by asking his treating physician to offer an opinion on "whether or not further objectively measurable improvement is expected." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992).

> **8 AAC 45.142. Interest.** (a) If compensation is not paid when due, interest must be paid at the rate established in AS 45.45.010 for an injury that occurred before July 1, 2000, and at the rate established in AS 09.30.070(a) for an injury that occurred on or after July 1, 2000. . . .

ANALYSIS

1) Are Employee's rights to benefits barred under AS 23.30.022?

Employer contends Employee's claim should be dismissed because he made a false representation about his physical condition in the post-hire health questionnaire, Employer relied upon the false representation, and its reliance was a substantial factor in hiring Employee.

Nevertheless, employment obtained by making of false statements is still employment. The technical illegality alone will not destroy Employee's claim. *Larson*. Under the "Larson test," which was codified in AS 23.30.022, all the following elements must be met for Employee's claim to be barred: (1) Employee made a false representation about his physical condition in the post-hire health questionnaire; (2) he knowingly made the false representation; (3) Employer relied upon the false representation; (4) its reliance was a substantial factor in hiring Employee; and (5)

there was a causal connection between the false representation and his work injury. AS 23.30.022; *Robinett.*

(1) Did Employee make a false representation about his physical condition in the post-hire health questionnaire?

Employee stated he had never had or been treated for any listed condition in the post-hire health questionnaire, which included "neck or back injury" and "ruptured intervertebral disc (herniated disc in spine)." He also stated he had not had a prior work restriction. These representations are false as he had been treated for his preexisting back pain, had undergone a microdecompression to repair a herniated lumbar disc in March 2018, and had been placed on work restriction after the March 2018 surgery. AS 23.30.022.

(2) Did Employee knowingly make the false representation?

Employee answered "no" to all questions in the post-hire health questionnaire. He contends he completed and signed the form without reading it; he "just answered no to everything" because that is what he normally does. Employee also knew he "had a surgery for a back injury" but said he did not know whether it was a "crushed disk" or "herniated disk." He did not know whether "mild disk bulging" meant herniated or not. Employee certified his answers in the form were true and complete. Employee is not credible; his answers are evasive. AS 23.30.122; *Smith*. He graduated from high school and had four to five years of college education. He is capable of reading and understanding the form. *Rogers & Babler*. Hardon specifically remembered Employee because he took an unusually long time to complete the form. It does not take long to answer "no" to every question on the form without reading it. *Id*. The fact he took long time proves Employee carefully read the questions in the form and knowingly made false representations. AS 23.30.122; *Rogers & Babler; Smith.*

(3) Did Employer rely upon Employee's false representation?

Employee falsely certified his answers in the post-hire health questionnaire form were true and complete. AS 23.30.122; *Smith*. Based on Employee's answers, Hardon recommended him to Christianson, and Christianson hired Employee as a construction worker in Scammon Bay, Alaska. *Id*. Employer relied upon Employee's false statements. *Id.*

(4) Was Employer's reliance a substantial factor in hiring Employee?

Hardon would have not recommended Employee to be hired as a construction worker in Scammon Bay if he had disclosed in the post-hire health questionnaire that he had a prior back injury, back limitations, or back surgery in the last six months. AS 23.30.122; *Smith*. Her reliance on the false representations Employee made in the health questionnaire was a substantial factor in hiring Employee. *Id*.

(5) Is there a causal connection between Employee's false representation and his work injury?

The final question raised under §22 is whether there was a causal connection between Employee's false representations and his October 16, 2018 work injury. On March 1, 2018, Employee underwent a right L4-5 posterior microdecompression. On June 11, 2018, although he reported to P.A. Dyches having no active back or leg pain, he was still having difficulty doing outside work and lifting heavy objects. P.A. Dyches concluded Employee may return to work and advised him to "gradually return to usual activities and let pain be his guide." There is no record Employee was released to full-duty between March 1, 2018, and October 16, 2018. It is arguable whether Employee was physically capable to work as a construction worker at the time he completed the post-hire health questionnaire. *Rogers & Babler*. However, this is irrelevant. *Id*.

The fact Employee injured his back at work is not sufficient to establish a causal connection between his work injury and his false representations in the post-hire health questionnaire. Additionally, a causal connection cannot be established merely because Employee's preexisting condition and his work injury involved the same body part. His work injury is, at minimum, a very large left lateral recess inferior disc extrusion at the L4-5 level. There is no medical opinion establishing Employee's preexisting condition is related to his work injury. In fact, EME Dr. Bauer opined the October 16, 2018 injury was an acute condition, which did not aggravate the preexisting condition. No evidence indicates a medical relationship between Employee's preexisting condition and his work injury. Similarly, there is no evidence Employee's undisclosed preexisting back condition or any related symptoms caused the scaffolding to fall.

Employee fell ten feet when the scaffolding he was standing on collapsed. His work injury was caused by a collapsing scaffolding, not by his undisclosed preexisting lumbar condition. *Rogers & Babler*. Therefore, there is no causal connection between Employee's false representation and his work injury, and Employee's claim is not barred under AS 23.30.022.

2) Is Employee entitled to additional TTD benefits?

Employer paid TTD benefits from October 16, 2018, through December 18, 2018. Employee seeks TTD benefits from December 19, 2018, and continuing. AS 23.30.185. TTD benefits may not be paid if Employee was no longer disabled or reached medical stability. *Id*. The presumption of compensability applies as to whether Employee is entitled to TTD benefits. AS 23.30.120; *Meek*. Employee established a "preliminary link" between his October 16, 2018 injury and disability with Dr. Flanum's opinion; Employer does not dispute this. *Tolbert*; *Wolfer*.

Without regard to credibility, Employer has the burden to overcome the presumption of compensability with substantial evidence. *Kramer*. Employer relied on Atkins' November 12, 2018 report, which states Employee may resume "full duty" on December 19, 2018, to rebut the presumption. *Id*. However, Atkins did not appreciate the physical nature of Employee's work when she stated Employee "may resume full duty on December 19, 2018" – about six weeks from Employee's lumbar decompression surgery. Releasing a patient to full-duty work in four to six weeks after a lumbar decompression surgery may be reasonable for a non-strenuous job; but it is not for a construction job. *Rogers & Babler*. Also, on November 16, 2018, Atkins placed Employee under the following restrictions: "no lifting greater than 10 pounds; no bending, twisting, and stooping of the lumbar spine up until the six-week mark, after which Employee would likely be referred for physical therapy." It is rare for a medical provider to release a patient to full-duty construction work and refer him to physical therapy for his spinal injury at the same time. *Id*.

Therefore, Employer's contention Employee's disability had ended on December 19, 2018, is not supported by substantial evidence because Atkins did not estimate Employee's physical capacities upon release, and no reasonable person might accept her release as adequate to support he was no longer disabled on December 19, 2018. AS 23.30.395(16); *Baker*; *Tolbert*. Dr. Bauer's opinion regarding Employee's disability is equally deficient to overcome the presumption as he did not

elaborate on his conclusion, and it is assumed he reiterated Atkins' report. Thus, Employee's disability is presumed to continue as Employer did not produce substantial evidence to the contrary. *Runstrom*; *Anderson*.

Nevertheless, Employer provided substantial evidence to rebut the presumption with Dr. Bauer opinion Employee was medical stable as of March 7, 2019, with a four percent whole person impairment resulting from the work injury. *Delaney*; *Steffey*. Because Employer rebutted the presumption of continuing TTD by raising the counter-presumption of medical stability, Employee must present clear and convincing evidence showing he was not medically stable from March 7, 2019. AS 23.30.395(28); *Koons; Norcon*. However, there is no record indicating Employee sought medical treatment since his March 11, 2019 visit with Dr. Flanum. He did not produce clear and convincing evidence that he did not reach medical stability as of March 7, 2019. *Baker*. Dr. Flanum opined another decompression surgery would not be useful because there is only a small amount of scar tissue around Employee's nerve roots. He recommended physical therapy and epidural steroid injections. However, when Employee showed reluctance to follow his recommendation, Dr. Flanum suggested the only surgical option left would be a fusion, but Employee would need to be tobacco free. Employee has not yet proved to be tobacco free, and it is unclear when Employee would qualify for a fusion. *Rogers & Babler*. In other words, Employee is deemed to be medically stable until he becomes tobacco free and is ready for a fusion. *Saxton*; AS 23.30.395(28). Employee could have rebutted Employer's counter-presumption by asking Dr. Flanum to offer an opinion on "whether or not further objectively measurable improvement is expected." *Leigh*. But he did not do so. Therefore, Employee was medically stable as of March 7, 2019, is entitled to TTD benefits from December 19, 2018, through March 6, 2019, and is not entitled to TTD benefits effective March 7, 2019. AS 23.30.185.

Lastly, Employer must either pay or controvert benefits but may controvert any time after payments are made. AS 23.30.155(a). After it suspended TTD payments on December 19, 2018, based on Atkins' release, it should have filed with the division and sent to Employee a controversion notice no later than December 21, 2018, the date Employee's next TTD payment was due. AS 23.30.155(b); (d). Employer failed to do so. *Rogers & Babler*. Moreover, since it disputed his right to benefits and declined to pay him continuing TTD benefits, Employer had to

file a controversion notice to controvert Employee's March 22, 2019 claim. AS 23.30.155(a). Employer did not file one until July 29, 2019. *Rogers & Babler*. The July 29, 2019 controversion notice is the only one filed in this case. *Id*. This untimely controversion notice may entitle Employee to a penalty on any TTD benefits awarded in this decision. AS 23.30.155(e). However, as a self-represented litigant, Employee may not be familiar with the penalty provisions and did not claim a penalty. Since he did not raise this issue and Employer may have a valid defense, this decision will not address it. However, if he prevails on his TTD benefit claim, Employee may file a new claim requesting penalty. *Richard*.

3) Is Employee entitled to interest?

Employee is entitled to mandatory interest. AS 23.30.155(p); *Rawls*. However, Employee did not check the boxes to request interest in his March 6, 2019 claim form. As Employee is unrepresented, he probably did not know if he prevailed on his TTD claim, he would also be entitled to interest. *Richard.* He partly prevails on his TTD claim. Not granting interest at this time would only delay fair and predictable delivery of indemnity to Employee and create unnecessary costs to Employer if the division requires Employee to file another claim and pursue his right to interest, which will undoubtedly be granted once requested. AS 23.30.001(1); *Richard.* In short, as Employee prevails on his TTD claim from December 19, 2018, through March 7, 2019, and he is entitled to interest for that period. AS 23.30.155(p); 8 AAC 45.142(a); *Richard*; *Rawls.*

CONCLUSIONS OF LAW

1) Employee's rights to benefits are not barred under AS 23.30.022.
2) Employee is entitled to TTD benefits from October 16, 2018, through March 7, 2019, but he is not entitled to TTD benefits after March 7, 2019.
3) Employee is entitled to interest on unpaid TTD benefits.

ORDER

1) Employee's claim is not barred under AS 23.30.022.
2) Employer shall pay TTD benefits from December 19, 2018, through March 7, 2019.

3) Employer shall pay interest on unpaid TTD benefits from December 19, 2018, through March 7, 2019, pursuant to 8 AAC 45.142(a).

Dated in Anchorage, Alaska on September 26, 2019.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M Yeo, Designated Chair

/s/
Nancy Shaw, Member

/s/
Kimberly Ziegler, Member

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 PETER C. SCHRANZ, employee / claimant v. TC CONSTRUCTION, INC., employer; AMERICAN INTERSTATE INSURANCE COMPANY, insurer / defendants; Case No. 201814970; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties on September 26, 2019.

/s/
Charlotte Corriveau, Office Assistant