ALASKA WORKERS' COMPENSATION BOARD

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

ROBERT J. WOOD, Employee, Claimant, v. GRANT AVIATION, Employer, and NORTHERN ADJUSTERS, Adjuster, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201804879 AWCB Decision No.20-0075 Filed with AWCB Anchorage, Alaska on August 31, 2020.

Robert Wood's (Employee) May 16, 2018 claim was heard on July 22, 2020, in Anchorage, Alaska, a date selected on March 18, 2020. A February 12, 2020 hearing request gave rise to this hearing. Attorney J.C. Croft appeared and represented Employee, who appeared and testified. Larry Miggins, DC, appeared telephonically and testified for Employee. Attorney Colby Smith appeared and represented Grant Aviation (Employer). The record remained open for additional responses and closed on July 30, 2020.

ISSUES

Employee contends Dr. Jesse Foster, DC's July 22, 2020 retroactive referral should be valid because "the Act and regulations contain no time limit on obtaining referral, nor do they require that such referral be contemporaneous."

Employer contends Dr. Foster's referral should be excluded because it was not timely filed, Employee unilaterally chose to attend the Alaska Veterans Affairs Healthcare System (VA) and Northwest Pain Relief Center (Northwest), and Employer did not have an opportunity to cross-examine Dr. Foster.

1) Should Dr. Foster's July 22, 2020 retroactive referral be excluded?

Employee contends he did not make an unlawful change of physician because he obtained Dr. Foster's July 22, 2020 referral, the VA was not his attending physician, and the regulation pertaining to Employee's change of physician is unreasonable.

Employer contends it objected to Employee's unlawful change of physician; thus, all medical records and bills from Northwest should be excluded.

2) Did Employee make an unlawful change of physician?

Employee contends he sustained a compensable injury on March 28, 2018, while working for Employer, and is entitled to temporary total disability (TTD) benefits, medical and transportation costs, attorney fees and costs, interest and a penalty.

Employer contends the work injury is not the substantial cause of Employee's disability or need for medical treatment; any symptom was due to progression of a preexisting condition.

3) Did Employee sustain a compensable work injury?

FINDINGS OF FACT

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

1) In 1994, Employee underwent a meniscectomy that removed 30 percent of his right knee medial meniscus. (Matthew Peterson, M.D, report, April 9, 2018). Employee said from 1994 through January 2018, he did not have any knee problem. (Employee).

2) In January 2018, Employee began working for Employer. (Employee).

3) On February 20, 2018, Employee started his chiropractic treatment with Dr. Foster at Mullholland Chiropractic (Mulholland). (Mullholland reports, Medical Summary, January 11, 2019; Supplemental Brief of Mr. Robert Wood, July 27, 2020).

4) On March 28, 2018, Employee reported he injured his right knee on February 18, 2018, while working for Employer. (Employee Report of Occupational Injury or Illness to Employer, April 2, 2018). He could not "pinpoint an acute event"; however, after research, he believed going up and down an airplane ladder forced his right knee to be deeply flexed and repetitively twisted causing the injury. (Employee). His symptoms included swelling and reduced range of motion without any pain; he does not remember when he first noticed the symptoms. (Employee; Transcript of Recorded Statement of Robert James Wood, Employer's Hearing Brief, July 17, 2020, Exhibit A). Employee did not work from March 30, 2018, through October 27, 2018. (Deposition of Robert Wood, at 52). Employee returned to work on October 27, 2018. (Employee).

5) On April 4, 2018, a chiropractor at Mullholland referred Employee to Algone Pain Clinic (Algone) to receive stem cell treatment. (Mullholland report, April, 2018).

6) On April 9, 2018, Dr. Peterson at Algone saw Employee and diagnosed (1) right knee pain, (2) instability of right knee joint, and (3) primary osteoarthritis of right knee. Employee reported "the pain started after taking a large step out of a plane. Pain constant dull/aching, throbbing, tightness. Associated symptoms include joint swelling/stiffness, clicking." (Peterson report, April 9, 2018). Employee could not obtain stem cell treatment from Algone due to costs. (Employee).

7) On April 10, 2018, a right knee magnetic resonance imaging (MRI) showed (1) horizontal cleavage tear of the posterior horn of the medial meniscus, (2) mild medial and patellofemoral compartment osteoarthritis, and (3) large joint effusion and synovitis. (Scott Naspinsky, M.D., report, April 9, 2018).

8) On April 17, 2018, Employer denied Employee's benefits because he (1) did not give notice of his February 18, 2018 injury until March 28, 2018, (2) did not report a traumatic injury, and (3) worked only 68 hours. (Controversion Notice, April 17, 2018).

9) On April 20, 2018, Dr. Peterson saw Employee and diagnosed (1) tear of medial meniscus of right knee, (2) instability of right knee joint, and (3) right knee pain. (Peterson report, April 20, 2018). He wrote a "To Whom It Concern" letter stating, "Robert Wood is currently a patient at

Algone Regenerative Medicine. Based on patient's physical, ultrasound, and MRI exam, it is my medical opinion that the substantial cause and need for treatment is directly related to the patient's work." (Peterson letter, April 20, 2018).

10) On April 25, 2018, Employee sought right knee treatment and an orthopedic referral at the VA. (Patricia Madison-Bell, R.N., report, April 25, 2018). He did not have a referral or Employer's authorization to go to the VA but did so at his friend's "forceful" insistence; the VA referred Employee to Lawrence Wickler, M.D. (Employee).

11) On May 2, 2018, Dr. Wickler saw Employee and diagnosed complex horizontal tear of the medial meniscus of the right knee. (Wickler report, May 2, 2018). He opined Employee's right knee injury was work-related, permanently aggravated a preexisting condition, and was the substantial cause of his need for medical treatment or disability. Dr. Wickler said Employee was not medically stable and unable to return to work. He recommended arthroscopy partial meniscectomy. (Wickler response, May 2, 2018).

12) Employee "did not like what Dr. Wickler proposed" because he was not going to have "the meniscus shaved again." He preferred stem cell treatment, not arthroscopic surgery, based on his own research about his condition. (Employee).

13) On May 16, 2018, Employee claimed TTD benefits, medical and transportation costs, attorney fees and costs, interest and a penalty. (Claim for Workers' Compensation Benefits, May 16, 2018).

14) On May 22, 2018, Employee sought treatment with Dr. Miggins at Northwest. He diagnosed "a mild tear of the lateral aspect of his meniscus, and joint effusion, mild [degenerative joint disease] in his right knee," and recommended adipose derived stem cell injections. (Miggins report, May 22, 2018). Employee did not have a referral or Employer's authorization to see Dr. Miggins. (Employee).

15) On June 6, 2018, Employee received adipose stem cell injections on his bilateral knees and left wrist at Seattle Stem Cell Center. (Employee; Laura Nestell, APRN, report, June 6, 2018). He had two more rounds of injections; Employee did not have Employer's authorization for this treatment. (Employee).

16) On June 8, 2018, Employer denied Employee's May 16, 2018 claim in its entirety. (Answer, June 8, 2018).

17) On August 21, 2018, David Bauer, M.D., saw Employee for an employer medical evaluation (EME) and diagnosed "degenerative arthrosis of the right knee without relation to current employment" and "status post prior medical meniscectomy 25 years ago, the substantial cause of the progressive arthritis in his knee." He opined Employee had right knee progressive osteoarthrosis substantially caused by his 1994 meniscectomy as the "removal of a substantial portion of the meniscus will tend to create accelerated degenerative changes." Dr. Bauer said "repetitively getting in and out of the aircraft may make something symptomatic, but does not cause the arthritis or meniscal tear." He opined the only diagnosis was "arthritic change within the right knee, manifested by the horizontal tear or the medial meniscus and the meniscal extrusion," and there was "no evidence of any aggravation or acceleration of the degenerative condition," and Employee would be "symptomatic at the current time whether he had a sedentary job or an active job." Dr. Bauer concluded Employee's "knee was symptomatic because of the progression of arthritis, not because of any injurious change, and his employment with Employer was not the substantial cause of his need for medical treatment or disability. (Bauer report, August 21, 2018).

18) On September 4, 2018, Employer denied all benefits based on EME Dr. Bauer's August 21, 2018 EME report. (Controversion Notice, September 4, 2018).

19) On October 18, 2018, Employee returned to work full-time without any restrictions. (SIME, January 6, 2020).

20) On November 15, 2018, Employee testified:

> **Q**: [. . .] Did you have a specific injury while you were working for Grant Aviation with your right knee, that you can recollect?
>
> **A**: I tore my meniscus, if that's what you're asking.
>
> **Q**: So the doctors have told you that you have a torn meniscus?
>
> **A**: Yes.
>
> **Q**: Do you recall having some sort of incident at work where you twisted or where you felt a pop or anything of that nature?
>
> **A**: From my study, you will not know a torn meniscus immediately. I believe it was at the bottom of the ladder where the knee is in deep flexion and twisted,

where the condyle will dig into the meniscus, is where it happened when I was doing it on a repetitive basis. That's what I believe.
. . . .

Q: [. . .] Did you have a time where you were going down a ladder and you -- or climbing up into the pane or walking around where you felt a pop in your knee?

A: No.

Q: Did you have a time where you felt a twist that you felt a sudden onset of pain with your knee?

A: No.

Q: [. . .] What was the issue that you had with your right knee? Was it just swelling?

A: It swole (sic) up bigger and bigger and got stiffer and stiffer and stiffer.

Q: When did the swelling start?

A: Best of my recollection, looking back, the actual swelling started late February. I'm guessing now with the time. And it progressed to where I woke up one morning, said I couldn't do it, and called my boss. And that was late March.

Q: So the symptoms that you've had with your right knee, if I'm clear on this, is basically it started to swell up and it got stiff?

A: Because of the swelling, yes.

Q: But as far as you know, there wasn't any kind of specific traumatic event?

A: No, sir.

Q: So was it one morning you woke up and noticed your knee was swollen, or what happened?

A: I noticed it was slowly swelling, and I thought I could work through it and it would -- it just started swelling, I'd take it easy for a little, and it seemed to go down a little, but never go away. And then it just continued to have less range of motion.
(Deposition of Robert Wood, November 15, 2018, at 30-33).

21) On April 15, 2019, a right knee MRI showed (1) vertical tear through the body of the posterior third of the medial meniscus -- additional undersurface tear versus degenerative change

was noted for the middle third of the medial meniscus, and (2) mild scuffing of articular surfaces of the medial femoral condyle and lateral patellar facet. (Robert Bridges, M.D., report, April 15, 2019).

22) On January 6, 2020, Peter Diamond, M.D., saw Employee for a second independent medical evaluation (SIME) and diagnosed "history of prior medial meniscectomy, right knee, and subsequent development of degenerative joint disease" and "work-related stress, right knee, causing symptomatic aggravation underlying degenerative joint disease and horizontal cleavage plane tear, medial meniscus." Dr. Diamond said there was a permanent aggravation, "specifically, quadriceps atrophy – not previously documented." He said he would like an opportunity to further review Employee's previous records. Dr. Diamond opined the substantial cause of Employee's disability or need for medical treatment was "the pre-existent degenerative joint disease and degenerative-type horizontal cleavage plane tear of the medial meniscus." He said although it was possible that the activities Employee described, ascending and descending an aircraft ladder, would cause further tearing of the right knee meniscus, the April 10, 2018 MRI showed chronic degenerative tearing and was most consistent with post-surgical change rather than an acute injury. Dr. Diamond said Employee became medically stable on February 18, 2019, and is able to work without any restrictions. He gave a one percent permanent partial impairment (PPI) rating. (SIME report, January 6, 2020).

23) On March 18, 2020, the parties agreed to an oral hearing on July 22, 2020, and stipulated to serve and file evidence by July 2, 2020. (Prehearing Conference Summary, March 18, 2020).

24) On July 9, 2020, SIME Dr. Diamond testified:

> **Q:** And looking at your two diagnosis, at least in part one you're indicating he had a prior meniscus surgery; is that correct?
>
> **A:** Yes.
>
> **Q:** And in part two, it's kind of a two-part diagnosis. One is dealing with the actual condition that he has, and the other is possibly a causation prong. Is that a fair statement?
>
> **A**: Yes.
>
> **Q**: And what is the condition of the knee? What is it that he had wrong with the knee?

A: He had a synovitis. He had a degenerative joint disease with an associated synovitis.

Q: What is a synovitis?

A: It's an inflammation of the lining of the joint.

Q: And did he also have any tears in his meniscus?

A: He had an MRI scan that he indicated that he had a tear. Although, I have to say MRI scans are notoriously inaccurate and difficult to analyze in patients who have had a prior meniscectomy. So the quick answer to your question is, I would be hesitant to say exactly what the condition of his meniscus is without looking at it directly with an arthroscope.

Q: Okay. There is one opinion that that MRI from at least April 10th of 2018 showed a horizontal cleavage tear?

A: Yes.

Q: What does that mean?

A: That's a degenerative tear. A horizontal cleavage tear is a tear that occurs parallel to the joint line in the meniscus so that you have, in essence, a flap that doesn't move around, but the meniscus is no longer one solid piece.

Q: And how do you know that that's degenerative and not caused from a trauma?

A: That's just the typical morphology of a degenerative tear. Whereas, a traumatic tear typically is vertical and results in a mobile fragment. Again, it's not a hundred percent. But horizontal cleavage plane tears are considered almost universally degenerative tears. . . .
. . . .

Q: [. . .] is this horizontal tear something that can happen from someone who had the meniscus surgery back in the '90s?

A: Yeah. It's a degenerative tear. It's a wear-and-tear phenomenon. It's not usually an acute traumatic injury.

Q: You also mentioned the diagnosis of synovitis; is that correct?

A: Yes.

Q: And what is that?

A: That's just an inflammation in the knee. That's what causes pain in the knee. And I have to say that, at the time I examined him, he no longer had fluid in the knee, which is the usual objective sign of a synovitis. And when I say that he had a synovitis, that was based on his history of pain and swelling following the injury.

Q: Okay. And so when you evaluated him, that synovitis was no longer present?

A: Well, when I evaluated him, he no longer had an effusion. Now, it is possible to have a synovitis, a low-grade synovitis, that does not produce an effusion but still produces pain. Do you follow? In other words, if the synovitis -- synovitis can be severe enough to cause pain and not produce enough fluid to be determined by examining patient. And I would say that was the case with this patient when I examined him.

. . . .

Q: [. . .] it appears as though Dr. Bauer's conclusion concerning causation is different than yours in regards to whether or not work was the substantial cause of an aggravation; is that correct?

A: I don't think it is correct. I agree with him, and I believe I started, that I did not feel that the arthritis was a substantial -- let me think of how to phrase this. I did not feel that the preexisting arthritis was -- I did feel, rather, that the preexisting arthritis was a substantial cause of his symptoms. And I think I said that at one point in my report. I did feel that the work activities had produced a symptomatic aggravation of that underlying arthritis.

Q: Okay. And then looking at a part of what Dr. Bauer also -- his conclusion that work was not the substantial cause of any aggravation to a preexisting condition, it looks like it was premised upon the concept that Mr. Wood indicated to him, as you put in your report, that there was no one event or any one time where he felt that he had a problem with his knee from doing anything at work?

A: Correct. There was no history of a specific injury.

Q: Okay. And that factually -- in reading your report, it appears factually that's a different fact than what you were told; is that correct?

A: Let me -- yes. He did say that, specifically on 2-18-18, as he was exiting the aircraft, he felt a sensation, a swelling in the posterior knee, but then he qualified it and said it was not a sudden onset but he had gradual onset of a sensation of swelling behind the knee with repetitive climbs. So there was a little bit of self-contradiction there.

. . . .

Q: So in now discussing more of Mr. Wood's testimony that was under oath in terms of the mechanism of injury, is your opinion that Mr. Wood's right knee -- that is, his right knee -- was his work with Grant Aviation the substantial cause in creating symptoms or the need for medical treatment?

A: I did not feel it was the substantial cause of him symptoms, no.

Q: [. . .] So what would cause the need for treatment, then?

A: Well, that's two different questions. The need for treatment is based on the patient's symptoms. The symptoms were aggravated by the patient's work activities. That was my opinion. The underlying problem which produced the symptoms was the preexisting degenerative horizontal – degenerative condition of the knee. Am I making that clear or am I obfuscating?

Q: Let me ask this another way. Can you tell me all of the causes of Mr. Wood's right knee condition?

A: Okay. Causes include the previous medial meniscectomy and advanced -- not advanced -- and the subsequent development of degenerative joint disease in the right knee. The other cause is repetitive loading, axial loading, which I think you referred to earlier, along with rotational stress and flexion of the knee on a repetitive basis 20 to 40 times a day going up and down that ladder. That produced a symptomatic aggravation of the underlying condition. Had there not been an underlying condition, it is unlikely, to a reasonable degree of medical probability, the patient would have developed symptoms and required treatment. However, because of the combination of the underlying condition and the repetitive loading described to me by the patient, he developed symptoms and required treatment. I think that's as clear as I can make it.

Q: Okay. And did this symptomatic aggravation get to a point where it resolved?

A: Bear with me because I want to see exactly what he said on his clinical. The answer is no. He still had intermittent discomfort at the knee. Although he -- really it was difficult to pin him down in terms of what exactly his symptoms were. He was unable to localize it, but he did say he still had intermittent discomfort, he said in the muscle, but there are no muscle of the knee. I'm not sure what he referred to that way. And he still had a sensation of swelling, but not as grossly swollen as it had been earlier. So I think the quick answer to your question is that it had improved significantly but had not returned to a nonsymptomatic state.

. . . .

Q: So as far as you can tell and as far as what Mr. Wood told you, he went back to full-duty work on October 18 of 2018 and didn't -- there's no indication that additional symptoms arose after that?

A: Correct.
. . . .

Q: [. . .] Based on what we know from the MRI study, which is that Mr. Wood had osteoarthritis of the knee and he also had a horizontal tear, correct?

A: Yes.
. . . .

Q: And in this case, Mr. Wood, he never indicated he actually had pain; he just had swelling, correct?

A: I think so. And I'm hesitating because, as you pointed out, his -- it's difficult to really get a specific answer from him regarding pain. I would certainly admit or agree with the statement that pain was not the primary symptom in this patient. I'm not entirely sure that what he describes as a sensation of swelling in the back of the knee was not pain at some degree. I don't know.

Q: Okay. Assuming we take what he testified to under oath, which is that he just had swelling --

A: Okay.

Q: -- and we talked about what can cause that to get better. Can time cause that to get better?

A: Yes.

Q: And so if he has this swelling occurring in February without any intervention, could he -- this swelling go away and he feel better and back to work by October of the same year?

A: Yes. (Teleconference Deposition of Peter Diamond, M.D., July 9, 2020, at 12-38).

25) On July 22, 2020, Employee filed and served a referral with the following questions and answers and signed by "Dr. Jesse Foster" on the same date:

1. In April 2018, Mr. Wood sought treatment at the Veterans Administration for the purposes of obtaining a referral to an orthopedic physician to consult with regarding his right knee.

   Was it reasonable for Mr. Wood to seek an orthopedic evaluation of his knee? Yes.

> Would you refer Mr. Wood to the Veterans' Administration for the purpose of obtaining a referral to an orthopedic physician? Yes.
>
> Do you agree with the Veterans' Administration's referral of Mr. Wood to Dr. Wickler for a consultation? Yes.

2. In May 2018, Mr. Wood sought adipose stem cell treatment for his right knee with NW Pain Relief Center.

   > Was it reasonable for Mr. Wood to pursue adipose stem cell treatment for his right knee? Yes.
   >
   > Do you provide adipose stem cell treatment? No.
   >
   > Would you refer Mr. Wood to NW Pain Relief Center for adipose stem cell treatment? Yes.

Employee contends this is a valid referral because "the Act and regulations contain no time limit on obtaining referral, nor do they require that such referral be contemporaneous." Employee did not provide any evidence that he could not have timely obtained Dr. Foster's referral before he saw the subject providers. (Foster referral, Supplemental Brief of Mr. Robert Wood, July 27, 2020).

26) A referral is the act of directing to another for service; it is always created for the future, not the past. (Observation; knowledge).

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

> **AS 23.30.010(a). Coverage**. (a) . . . compensation or benefits are payable under this chapter for . . . the need for medical treatment of an employee if . . . the employee's need for medical treatment arose out of and in the course of the employment. When determining whether or not the . . . 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 need for medical treatment. Compensation or benefits under this chapter are payable for . . . the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the . . . need for medical treatment.

DeYonge v. NANA/Marriott, 1 P.3d 90, 97 (Alaska 2000), held "a temporary increase in symptoms aggravating the disability" constitutes an injury under the Act. In *Morrison v. Alaska Interstate Construction, Inc*., 440 P.3d 224 (Alaska 2019), the Alaska Supreme Court found the legislature did not abrogate *DeYonge* when it amended the coverage statute in 2005. Interpreting §010(a), *Morrison* held the board decides whether "the employment" was "the legal cause," *i.e*., "a cause important enough to bear legal responsibility for the medical treatment needed for the injury," by looking at the "*causes* of the injury or symptoms" rather than considering the injury type. (*Id*. at 233-34; emphasis in original). It held §010(a) is not complex but requires the board to consider different causes "of the benefits sought" and the extent to which each contributed to the need for the specific benefit. The board must identify one cause as "the substantial cause," meaning, which "is the most important or material cause related to that benefit." Based on legislative history, *Morrison* found the legislature did not intend to require that the substantial cause be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The comparison made is "among the causes identified, not in isolation or in comparison to an abstract idea." It is a "flexible" and "fact dependent" determination. (*Id*. at 237-38). *Morrison* held the board has the right and duty to interpret evidence and draw its own inferences. (*Id*. at 239).

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

> being treated. Notice of a change in the attending physician shall be given before the change.
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> **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; . . . .

Benefits sought by an injured worker are presumptively compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp*., 914 P.2d 1276 (Alaska 1996). The presumption's application involves a three-step analysis. To attach the presumption, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, the employer must rebut the raised presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc*., 372 P.3d 904 (Alaska 2016). The fact-finders do not weigh credibility at this stage. *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.

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, 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). When doctors disagree, the board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Decision. No. 087 (August 25, 2008).

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

> **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. . . . In determining the amount of fees, the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries. . . .

Wise Mechanical Contractors v. Bignell, 718 P.2d 971 (Alaska 1986), held attorney fees should be reasonable and fully compensatory, considering the contingency nature of representing injured workers, in order to ensure adequate representation. In *Bignell*, the court required consideration of a "contingency factor" in awarding fees to employees' attorneys in workers' compensation cases, recognizing attorneys only receive fee awards when they prevail on a claim. *Id*. at 973. The court instructed the board to consider the nature, length, and complexity of services performed, the resistance of the employer, and the benefits resulting from the services obtained, when determining reasonable attorney fees for the successful prosecution of a claim. *Id*.

> **AS 23.30.395. Definitions.** In this chapter,

. . . .

(3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):

(A) a licensed medical doctor;

(B) a licensed doctor of osteopathy;

(C) a licensed dentist or dental surgeon;

(D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;

(E) a licensed advanced practice registered nurse; or

(F) a licensed chiropractor;

. . . .

8 AAC 45.065. Prehearings.

. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing.

(d) Within 10 days after service of a prehearing summary issued under (c) of this section, a party may ask in writing that a prehearing summary be modified or amended by the designee to correct a misstatement of fact or to change a prehearing determination. The party making a request to modify or amend a prehearing summary shall serve all parties with a copy of the written request. If a party's request to modify or amend is not timely filed or lacks proof of service upon all parties, the designee may not act upon the request. . . .

8 AAC 45.070. Hearings.

. . . .

(g) Except when the board or its designee determines that unusual and extenuating circumstances exist, the prehearing summary, if a prehearing was conducted and if applicable, governs the issues and the course of the hearing. . . .

8 AAC 45.082. Medical treatment

. . . .

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

In *Hudak v. Pirate Airworks, Inc.*, AWCAC Decision No. 222 (January 19, 2016), the Commission affirmed the Board's finding the employee made an excessive change in physicians and the subsequent exclusion of the resulting medical records under 8 AAC 45.082(c).

> **8 AAC 45.120. Evidence**
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> (f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. The right to request cross-examination specified in this subsection does not apply to medical reports filed in accordance with 8 AAC 45.052; a cross-examination request for the author of a medical report must be made in accordance with 8 AAC 45.052.

"Referral" is the act or an instance of sending or directing to another for information, service, consideration, or decision. *Black's Law Dictionary* 592 (2nd pocket ed. 2001).

ANALYSIS

1) Should Dr. Foster's July 22, 2020 retroactive referral be excluded?

Employee filed and served Dr. Foster's referral on July 22, 2020, after the hearing was held. However, at the March 18, 2020 prehearing conference, the parties stipulated to file and serve evidence by July 2, 2020. 8 AAC 45.120(f). Neither party sought to have the March 18, 2020 prehearing conference summary amended or modified. 8 AAC 45.065(c), (d). Thus, absent any unusual and extenuating circumstances, this decision may not consider changing the hearing evidence deadline. 8 AAC 45.070(g).

Employee contends Dr. Foster's retroactive referral should be valid because "the Act and regulations contain no time limit on obtaining referral, nor do they require that such referral be contemporaneous." This is incorrect. A referral is the act of directing to another for service; it is always created for the future, not the past. *Black's Law Dictionary* 592 (2nd pocket ed. 2001); *Rogers & Babler*. Also, an employee is entitled to only one physician change without a referral or the employer's authorization; a subsequent change requires either a referral or authorization, and notice of change must "be given *before* the change." (emphasis added). AS 23.30.095(a). Further, 8 AAC 45.082(c) states, the reports, opinions, or testimony of a physician in any form will not be considered if "a party *made* an unlawful change of physician." (emphasis added). With no referral deadline, doctor shopping would become rampant, and the workers' compensation process would not be quick, efficient, fair, and predictable at a reasonable cost to employers. AS 23.30.001(1). Thus, based on these reasons, Dr. Foster's July 22, 2020 retroactive referral is not a valid referral and will be excluded. AS 23.30.095(a); AS 23.30.135(a); 8 AAC 45.065(c); (d); 8 AAC 45.070(g).

2) Did Employee make an unlawful change of physician?

Employee contends he did not make an unlawful change of physician because he obtained a referral from Dr. Foster, the VA was not his attending physician, and the regulation pertaining Employee's change of physician is unreasonable. As discussed above, Dr. Foster's referral is invalid. Further, Employee admitted he "procured the services of a physician," Dr. Wickler, at the VA without a referral or Employer's authorization; this was the only allowed physician change without referral or authorization. AS 23.30.095(a); AS 23.30.395(3). Employee also admitted he saw Dr. Miggins without a referral or Employer's authorization; having already exercised the only allowed change to the VA, this was an unlawful physician change. AS 23.30.095(a); 8 AAC 45.070(g). Consequently, his Northwest treatment, which was referred by Dr. Miggins, himself an unlawful change, was also unlawful. *Id*. Thus, Dr. Miggins' and Northwest's reports, opinions, or testimony in any form will not be considered. 8 AAC 45.082(c).

3) Did Employee sustain a compensable work injury?

Employee contends he sustained a compensable injury on March 28, 2018, while working for Employer, and is entitled to TTD benefits, medical and transportation costs, attorney fees and costs, interest and a penalty. Employer contends the work injury is not the substantial cause of Employee's disability or need for medical treatment, and any symptom was due to the progression of a preexisting condition.

There is conflicting medical evidence addressing compensability, which raises factual questions to which the presumption analysis applies. AS 23.30.120; *Meek*. Without regard to weight or credibility, Employee raised the presumption on his claim with medical opinions from Drs. Peterson, Wickler and Diamond. *Tolbert*; *Wolfer*. Each provided a medical opinion stating Employee sustained a work-related injury, which caused his need for medical treatment or disability. Disregarding weight or credibility, Employer rebutted the presumption with Dr. Bauer's opinion stating Employee's March 28, 2018 injury was not the substantial cause of his need for medical treatment or disability. *Kramer*; *Tolbert*. Therefore, Employee must prove his claim by a preponderance of the evidence. *Saxton*; *Steffey*.

It is undisputed Employee had a preexisting right knee condition and did not sustain a specific injury. Drs. Bauer, Peterson and Diamond reviewed the April 10, 2018 MRI and agreed Employee had a preexisting right knee degenerative arthritis and horizontal cleavage tear in the medial meniscus due to the 1994 right knee meniscectomy. They also agreed a horizontal tear is considered to be degenerative.

In his report, Dr. Diamond opined the substantial cause of Employee's disability or need for medical treatment was "the pre-existent degenerative joint disease and degenerative-type horizontal cleavage plane tear of the medial meniscus." He said although it was possible that the activities Employee described, ascending and descending an aircraft ladder, would cause further tearing of the right knee meniscus, the April 10, 2018 MRI showed chronic degenerative tearing and was the most consistent with post-surgical change rather than an acute injury.

Dr. Diamond said Employee had "work-related stress, right knee, causing symptomatic aggravation underlying degenerative joint disease and horizontal cleavage plane tear, medial meniscus." He "did not feel [Employee's work with Employer] was the substantial cause of his symptoms"; but going up and down the ladder "produced a symptomatic aggravation of the underlying condition. Had there not been an underlying condition, it is unlikely, to a reasonable degree of medical probability, [Employee] would have developed symptoms and required treatment." Dr. Diamond misinterpreted the definition of "the substantial cause" because if Employee had "a temporary increase in symptoms aggravating" his disability, that would constitute an injury under the Act. *DeYonge*. Under *Morrison*, the substantial cause need not be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." The comparison made is "among the causes identified, not in isolation or in comparison to an abstract idea." *Id*.

Dr. Diamond said Employee told him that on February 18, 2018, he felt a swelling sensation as he was exiting the aircraft, which would be an acute event; but later, Employee said it was not a sudden onset but he had gradual onset of a sensation of swelling behind the knee with repetitive climbs. Further, Dr. Diamond said Employee never said he actually had pain. However, he said, "[synovitis is] just an inflammation in the knee. That's what causes pain in the knee. And I have to say that, at the time I examined him, he no longer had fluid in the knee, which is the usual objective sign of a synovitis. And when I say that he had a synovitis that was based on his history of pain and swelling following the injury." It is unclear whether Employee reported pain or not to Dr. Diamond and his diagnosis was based on that. Further, Dr. Diamond said, "it's difficult to really get a specific answer from [Employee] regarding pain. I would certainly admit or agree with the statement that pain was not the primary symptom in this patient. I'm not entirely sure that what he describes as a sensation of swelling in the back of the knee was not pain at some degree. I don't know."

Employee reported to Dr. Peterson that "the pain started after taking a large step out of a plane. Pain constant dull/aching, throbbing, tightness. Associated symptoms include joint swelling/stiffness, clicking." This is inconsistent to Employee's testimony and what he had told Drs. Bauer and Diamond. Dr. Peterson wrote a letter, "Based on patient's physical, ultrasound,

and MRI exam, it is my medical opinion that the substantial cause and need for treatment is directly related to the patient's work."

Though Dr. Diamond opined Employee's work activities -- going up and down the airplane ladder -- caused symptomatic aggravation of the underlying degenerative condition, he was uncertain what the actual symptoms were. *Morrison*. Drs. Peterson and Wickler stated Employee's disability or need for medical treatment was work-related, yet failed to provide an in-depth analysis of how Employee's symptoms were work-related. *Id*. By contrast, Dr. Bauer said the only diagnosis was "arthritic change within the right knee, manifested by the horizontal tear or the medial meniscus and the meniscal extrusion." He said there was "no evidence of any aggravation or acceleration of the degenerative condition," yet Employee would have been symptomatic regardless work activities due to his preexisting degenerative conditions. *Id*. In other words, Employee's arthritis was the most important or material cause of his disability and need for medical treatment. *Id*. Dr. Bauer opined "repetitively getting in and out of the aircraft may make something symptomatic, but does not cause the arthritis or meniscal tear." He concluded Employee's "knee was symptomatic because of the progression of arthritis, not because of any injurious change, and his employment with Employer was not the substantial cause of his need for medical treatment or disability." Dr. Bauer's opinion that Employee's arthritic right knee became symptomatic and caused his disability or need for medical treatment is given the greater weight; Drs. Diamond, Peterson and Wickler's opinions are given lesser weight. AS 23.30.122; *Smith*; *Morrison*. Based on Dr. Bauer's opinion, Employee's disability or need for medical treatment was not work-related. *Steffey*; *Moore*. Thus, Employee did not prove by a preponderance of evidence that he sustained a compensable injury. *Saxton*. Because he did not sustain a compensable injury, Employee's claim is denied in its entirety, and he is not entitled to any benefits. AS 23.30.010(a); AS 23.30.145(a); *Bignell*.

CONCLUSIONS OF LAW

1) Dr. Foster's July 22, 2020 retroactive referral should be excluded.
2) Employee made an unlawful change of physician.
3) Employee did not sustain a compensable work injury.

ORDER

1) Employee's May 16, 2018 claim is denied.

2) Employee is not entitled to TTD benefits, medical costs, transportation costs, interest, a penalty, attorney fees or costs.

Dated in Anchorage, Alaska on August 31, 2020.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Randy Beltz, Member

/s/
Nancy Shaw, Member

MEMBER NANCY SHAW, CONCURRING IN PART, DISSENTING IN PART

Issue No. 1 should not be included in this decision because it has to do with whether the after-the-fact referral should be excluded from evidence; the referral should not be excluded from evidence. That is not the right question. The question that the parties argued, and the one that we addressed, is whether Dr. Foster's referral is valid as a means by which an injured employee can get an "authorized" change of physician. If it is valid, then the records of Northwest come in and its bills are paid. If the referral is improper, then Employee's seeking treatment from Northwest, after seeing Dr. Foster and the VA, is an unauthorized change of physician, then medical records are inadmissible, and the bills are not paid.

In Issue No. 2, the after-the-fact "referral" from Dr. Foster is relevant and admissible. But there was an unauthorized change of physician because Dr. Foster's referral did not amount to a direction that Employee get treatment from Northwest. This decision should find that there is no evidence that Dr. Foster ever discussed Northwest with Employee or proposed, in advance of his visit, that he should seek treatment there. Rather, Dr. Foster's practice made a referral to Algone, and Employee did go there. This is another reason why the 2020 referral is not valid. Dr. Foster did not in fact refer Employee to Northwest. Employee testified that he conducted

independent research on his own, identified Dr. Miggins in Seattle as a provider that might be able to offer appropriate treatment, saw Dr. Miggins, and was then referred to Northwest by Dr. Miggins. This is an explanation of how Mr. Wood came to be treated at Northwest and it is inconsistent with his going to Northwest by way of a referral from Dr. Foster. Thus, a clearer statement of Issue No. 2 would be: "Employee sought payment for treatment he received in May 2018 from Northwest in Seattle. Employer objected on grounds that Employee's obtaining treatment at Northwest was an unauthorized change of physicians in violation of AS 23.30.095(a). On July 22, 2020, a few days before the hearing before the Board, Employee submitted a note dated July 22, 2020 from the chiropractor he had seen for knee complaints in March 2018. This note purports to be a 'referral' from Dr. Foster to Northwest." Lastly, Paragraph 25 of "Findings of Fact" is a statement about what Employee argues and should not be a finding.

/s/
Nancy Shaw, 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 Robert J. Wood, employee / claimant v. Grant Aviation, employer; Northern Adjusters, adjuster / defendants; Case No. 201804879; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on August 31, 2020.

/s/
Kimberly Weaver, Office Assistant II