ALASKA WORKERS' COMPENSATION BOARD

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

AHMAD ALTAHIR, Employee, Claimant, v. TRIDENT SEAFOODS CORPORATION, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201709914 AWCB Decision No. 21-0018 Filed with AWCB Anchorage, Alaska on March 1, 2021.

Ahmad Altahir's (Employee) September 17, 2018 claim was heard on January 28, 2021, in Anchorage, Alaska, a date selected on November 5, 2020. A December 13, 2018 hearing request gave rise to this hearing. Employee appeared telephonically, testified and represented himself. English is Employee's second language; Anwar Alrakh appeared telephonically and interpreted Arabic into Employee. Attorney Jeffrey Holloway appeared telephonically and represented Trident Seafoods Corporation and Liberty Insurance Corporation (collectively, Employer). The record closed at the hearing's conclusion on January 28, 2021.

ISSUES

Employer contends Employee's cervical and lumbar spines, right ankle, and left shoulder claims are barred because he failed to give timely notice of his injuries. Employee did not address this issue; therefore, his position is unknown. It is assumed he opposes.

1) **Are Employee's cervical and lumbar spine, right ankle, and left shoulder claims barred for failure to give notice?**

Employer contends Employee made unauthorized changes of physicians; thus, all medical records from June 19, 2018, should be excluded. Employee did not address this issue; therefore, his position is unknown. It is assumed he opposes.

2) **Did Employee make unlawful changes of physicians?**

Employer contends it had timely filed a request for cross-examination on Gaurav Rajput, D.O., and Employee did not produce him for hearing. It contends Dr. Rajput's November 14, 2019 letter should be excluded. Employee did not address this issue; therefore, his position is unknown. It is assumed he opposes.

3) **Should Dr. Rajput's November 14, 2019 letter be excluded?**

Employee contends he sustained a compensable injury on July 15, 2017, while working for Employer, he has been disabled since, and is entitled to temporary total disability (TTD) benefits.

Employer disagrees; it contends his disability ended on February 12, 2018. Therefore, it contends Employee is not entitled to TTD benefits.

4) **Is Employee entitled to a TTD benefit award?**

Employee contends he is entitled to permanent partial impairment (PPI) benefits.

Employer disagrees; it contends Employee's PPI rating is zero and he is not entitled to PPI benefits.

5) **Is Employee entitled to PPI benefits?**

Employee contends he needs medical care and treatment for his work injury. He seeks an order requiring Employer to pay for all medical and transportation costs necessitated by his work injury.

Employer contends Employee's cervical and lumbar spine, right ankle, and left shoulder injuries are not work-related. It contends he is medically stable, is no longer disabled, and needs no further medical treatment for his left hand work injury. Thus, it contends Employee is not entitled to related medical care and transportation costs.

6) Is Employee entitled to medical care and related transportation costs?

Employee contends because Employer should have never stopped paying benefits, he is entitled to a late-payment penalty.

Employer contends Employee is not entitled to penalties because he is not entitled to any benefit, and the evidence and law support its controversion notices.

7) Is Employee entitled to a late-payment penalty?

Employee contends he is entitled to interest on unpaid benefits.

Employer contends Employee is not entitled to interest as it timely controverted his claims, and he is not entitled to any benefit in this case.

8) Is Employee entitled to interest?

Employee seeks attorney fees and costs.

Employer contends he is entitled to no benefits so attorney fees and costs should be denied.

9) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On July 16, 2017, Employee reported he injured his left hand on July 15, 2017, when it was "crushed between rack and pole" while working for Employer. (Employer Report of Occupational Injury or Illness, July 16, 2017).

2) On July 16, 2017, Vickie Glover, PA-C, saw Employee and noted: "swelling and tenderness of left hand. Spoke with safety officer last night who splinted patient and gave ice and ibuprofen. Came in this morning for Xray. Denies numbness, tingling, weakness in left hand." (Glover report, July 16, 2017). Rachel Goldberg, PA-C, released him to light duty work wearing a splint beginning July 17, 2017. (Goldberg report, July 16, 2017). An x-ray showed a "soft tissue swelling on the dorsum of the [left] hand" without "acute osseous abnormality of the wrist." (Dirk Bringhurst, M.D., report, July 16, 2017).

3) On July 19, 2017, PA-C Goldberg saw Employee and noted: "significant swelling, tenderness and pain of left hand between 3rd and 4th metacarpals from MCP joints to wrist. Decreased ROM of 3rd and 4th fingers due to pain. No neurovascular compromise. No fracture on Xray." She restricted use of his hand and prescribed Naproxen and a splint. (Goldberg report, July 19, 2017).

4) On July 29, 2017, PA-C Goldberg released Employee to light duty work wearing a splint. (Goldberg report, July 29, 2017).

5) On August 1, 2017, Employee saw Mathew Neddo, PA-C, in Utah, and said he injured his left hand, left shoulder, and right ankle while working for Employer. PA-C Neddo noted, "He doesn't speak English but is here with a translator, his brother." He released Employee to modified duty with occasional pushing or pulling with 15 lbs. of arm lifting limit, and minimal use of left hand, not limited by a splint. (Neddo report, August 1, 2017). Another x-ray revealed "mild soft tissue swelling with no definite acute fracture or dislocations." (James Webber, M.D., report, August 1, 2017). There is no evidence Employee communicated with Employer about his left shoulder and right ankle injuries or it had reason to know about them. (Agency file, record).

6) On August 8, 2017, PA-C Neddo saw Employee and diagnosed (1) acute ankle pain, (2) left hand contusion, and (3) left anterior shoulder pain. (Neddo report, August 8, 2017).

7) On September 14, 2017, Jeffrey Randle, M.D., saw Employee and diagnosed "left shoulder impingement syndrome, question rotator cuff tear." Dr. Randle noted, "We will try to get an

interpreter for his next visit. We may need to do an MRI of the shoulder." (Randle report, September 14, 2017).

8) On November 9, 2017, Employee saw Joon-Whee Kim, M.D., in Georgia and said he injured his left shoulder, low back and left hand on July 11, 2017, while working for Employer. Dr. Kim diagnosed (1) left shoulder contusion with differential diagnoses of fracture, dislocation and internal derangement, (2) cervicothoracic contusion/strain with myalgia and myositis, (3) lumbosacral/ pelvic contusion/strain with myalgia and myositis, and (4) motor and sensory deficits, left upper and lower extremities, etiology undetermined. Dr. Kim noted: "because of language barrier and unavailable medical records, this evaluation is incomplete and it is unable to formulate diagnosis treatment plan." (Kim report, November 9, 2017). There is no evidence Employee communicated with Employer about his cervical and lumbar spine, right ankle or left shoulder injuries or it had reason to know about them. (Agency file, record).

9) On January 30, 2018, Stephen McCollam, M.D., saw Employee and stated, "the patient reports persistent pain of the left hand and left shoulder as well as left lower extremity. He also reports global left upper extremity numbness and tingling. Physical exam demonstrates global tenderness about the left shoulder with what might be some atrophy of the supraspinatus insertion. His physical exam was very nonlocalizing. . . . This is partially due to a cultural and language barrier. . . . X-rays of his left shoulder [was] unremarkable. I think he should get an MRI of the left shoulder, the left hand and the left thumb. I also recommend EMG nerve conductions of left upper extremity. His symptoms are confusing and nonlocalizing […] difficult clinical assessment given the language and cultural barriers." This was the first time Employee changed physician without a referral or Employer's authorization. (McCollam report, January 30, 2018; observation).

10) On February 12, 2018, a left shoulder magnetic resonance imaging (MRI) showed (1) global degenerative changes of the labrum with tearing of the anteriosuperior labrum at the one o' clock position of indeterminate age, and (2) a chronic mild tendinosis of the left supraspinatus, infraspinatus, and subscapular tendons without evidence tearing. (Luke Scalcione, M.D., report, February 12, 2018).

11) On February 20, 2018, a left hand MRI showed an osteochondral injury of the metacarpal head and osteoarthritis of the metacarpophalangeal joint of the thumb. There was no acute internal derangement of the remainder of the left hand. (Scalcione report, February 20, 2018).

12) On March 5, 2018, Dr. McCollam saw Employee, opined his left thumb, hand and shoulder MRIs did not show any structural damage, and released him "full duty work." Dr. McCollam noted, "[Employee] limits his ability to fully flex his left elbow although he has smooth motion and no apparent instability or synovitis." (McCollam report, March 5, 2018).

13) On April 24, 2018, Dr. McCollam saw Employee, opined he reached medical stability with a zero percent PPI rating, and released him to regular work. (McCollam report, April 24, 2018).

14) On June 19, 2018, Dr. Kim saw Employee and ordered cervical and lumbar spine MRIs. (Kim report, June 2018). This was the second time Employee changed physician without a referral or Employer's authorization. (Observation).

15) On July 12, 2018, a cervical spine MRI showed "degenerative changes in the cervical spine that appear chronic rather than acute." It did not show evidence of "acute fracture, severe central spinal stenosis, or cord compression." (Mark Parson, M.D., report, July 13, 2018). A lumbar spine MRI was normal. (Jay Cinnamon, M.D., report, July 13, 2018). An EMG of the upper extremity showed findings consistent with C5-6 radiculopathy. (Kim report, July 12, 2018).

16) On August 28, 2018, Dr. Kim saw Employee and diagnosed (1) moderate neural foraminal narrowing at C3-4, (2) bilateral neural foraminal narrowing at C4-5, and (3) disc/osteophyte complex causing moderate spinal stenosis and moderately severe bilateral neural foraminal narrowing at C5-6 and C6-7. (Kim report, August 28, 2018).

17) On August 31, 2018, Employer denied Employee's benefits contending he did not attend an employer medical evaluation (EME). (Controversion Notice, August 31, 2018).

18) On September 4, 2018, Dr. Kim opined Employee was not medically stable and was not ready to return to work as a fish processor. (Kim response, September 4, 2018).

19) On September 17, 2018, attorney Lee Goodman began representing Employee. (Entry of Appearance, September 17, 2018).

20) On September 17, 2018, Employee claimed TTD, PPI, medical and transportation costs, interest, attorney fees and costs, and a penalty. (Claim for Workers' Compensation Benefits; September 17, 2018).

21) On October 2, 2018, Employer denied Employee's September 17, 2018 claim in its entirety contending he did not attend an EME and based on Dr. McCollam's zero percent PPI rating. (Answer; Controversion Notice, October 2, 2018).

22) On October 30, 2018, Dr. Kim wrote, "[Employee] is a 49 year old male who sustained crushing injuries to the upper body on July 11, 2017. He has had persistent pain in the neck and left shoulder causing functional limitation. He is unable to drive or travel long distance, from Georgia to Texas. I advise him travel by airplane." (Kim letter, October 30, 2018).

23) On November 13, 2018, David Bauer, M.D., saw Employee for an EME and diagnosed: "(1) crush injury, to the left side of his body, substantially caused by the incident in question. Crush to the hand, without any permanent structural injury; (2) degenerative changes in the cervical and lumbar spine, documented on MRI, neither caused by nor aggravated by the incident in question; and (3) degenerative changes within the left shoulder, neither caused by nor aggravated by the incident in question." Dr. Bauer explained:

> The weight of the cart struck [Employee] and forced him up against a rigid object. This type of incident can create injury, usually fractures or contusions. The medical records do not indicate any fractures that are direct result of the incident in question. The objective imaging, with MRIs of his spine, shoulder, and hand do not demonstrate any finding that physiologically could be caused by the incident in question. In specific, there is tendinosis of the shoulder, without any evidence of full-thickness rotator cuff tear. The mechanism of injury, that is a broad contusion, does not create nor aggravate these conditions. The MRI of the left thumb shows an osteochondral injury to the central aspect of the left thumb metacarpal head, but on a more-probable-than-not basis this was not caused by the incident in question. The notes at the Camai Health Center do not document any specific tenderness or finding related to the thumb at the time of injury. There was more tenderness along the ulnar aspect of the hand. Therefore, it is my diagnostic impression that at the time of the injury, there were contusions, but no permanent harm or change to the structure of the body.

Dr. Bauer opined there was no disability or need for medical treatment beyond six weeks after the work injury, Employee reached medical stability on February 12, 2018, and the work injury did not result in a permanent partial impairment. (Bauer report, November 13, 2018).

24) On November 30, 2018, Employer denied TTD, PPI, medical and transportation costs beyond July 12, 2018, interest, attorney fees and costs, and a penalty, based on Dr. Bauer's November 13, 2018 EME report. (Controversion Notice, November 30, 2018).

25) On December 13, 2018, Employee filed an Affidavit of Readiness for Hearing on his September 17, 2018 claim. (Affidavit of Readiness for Hearing, December 13, 2018).

26) On December 19, 2018, Employer denied Employee's September 17, 2018 claim in its entirety because he did not provide a medical release. (Controversion Notice, December 19, 2018).

27) On June 10, 2019, George Chovanes, M.D., saw Employee for a second independent medical evaluation (SIME) and opined he sustained a left hand contusion as a result of his July 11, 2017 work injury, which substantially caused his disability and need for medical treatment, and there was no relevant preexisting condition. Dr. Chovanes disagreed with Dr. Kim and opined Employee reached medical stability, has a zero percent impairment rating, and his "work-related disability ended on February 12, 2018, when the MRIs of the shoulder, hand, and thumb did not demonstrate any injuries caused by the work-related accident on July 11, 2017." Dr. Chovanes further opined that "[t]he cervical spine MRI scan showed degenerative arthritic conditions, but no acute relationship or injury from the work-related accident." He stated Employee's "primary complaint in the contemporaneous medical records from July 16, 2017, through August 1, 2017, were of left hand pain and contusions of which there is no indication at present of any residual or further difficulties." Dr. Chovanes further stated:

> The fact that on anonymous observation he uses his left hand to hold his no doubt valuable phone even when getting into a taxi cab indicates that he has minimal functional problems with the left hand. He had no apparent difficulties getting into the car with his left arm or left shoulder or neck. Certainly, the bending, twisting, and moving required to get into the rear seat of a car stresses those areas.
>
> Also indicative of a minimal pain situation is [Employee's] sparse use of pain medication, which he indicated was from one pill one to three times a week.
>
> In addition in the early contemporaneous medical records there were no complaints of back pain and the lumbar MRI scan was pristine without any indication of injury.
> . . . .
>
> Other important factors in my assessment of [Employee's] symptoms include the fact that on July 16, 2017, the clinic report mentioned no numbness, tingling, or weakness in the left hand and normal sensation was indicated in the clinic on July 19, 2017. No low back pain was mentioned as a result of the accident in the initial contemporaneous medical records.
>
> Another factor was [Employee's] breakaway weakness diffusely in the left arm and leg, which indicate true attempts at volitional movement were marginal at best. (Chovanes report, June 10, 2019).

28) On August 9, 2019, Dr. Rajput saw Employee, diagnosed cervical and lumbar radiculopathy, and ordered cervical and lumbar x-rays and MRIs. (Rajput report, August 9, 2019). This was the third time Employee changed physician without a referral or Employer's authorization. (Observation).

29) On August 21, 2019, a lumbar spine x-ray showed (1) slight levoconvex curvature at L3-4; (2) normal lordotic curvature of the lumbar spine; (3) negative for subluxation; (4) negative for instability; (5) negative for compression fracture; (6) slight disc space narrowing at L3-4 on the right; and (7) mild L4-5 and L5-6 facer hypertrophy. A cervical spine x-ray showed (1) multilevel cervical spondylosis with disc height loss greatest at C5-6; (2) mild retrolisthesis of C5 on C6 due to disc spacing without instability; and (3) multilevel bony encroachment of the foramina on the left at C6-7. (Royden Daniels, M.D., report, August 21, 2019).

30) On September 24, 2019, Dr. Rajput saw Employee and diagnosed (1) lumbar radiculopathy; (2) shoulder pain; (3) degeneration of lumbar intervertebral disc; (4) degeneration of cervical intervertebral disc; and (5) cervical radiculopathy. He opined Employee has "significant C/L spondylosis disease and left shoulder pathology resulting in severe pain following work incident." (Rajput report, September 24, 2019). A shoulder MRI showed (1) minimal tendinosis of the supraspinatus and infraspinatus; (2) mild acromioclavicular arthrosis; and (3) small amount of fluid in the subacromial subdeltoid bursa. (Zahirabbas Momin, M.D., report, September 24, 2019).

31) On November 14, 2019, in his response to Employee's letter, Dr. Rajput disagreed with Dr. Chovanes' opinion that Employee's remaining disabilities and need for treatment resulting from his work injury were limited to the left and contusion. He responded, "Patient reported that he also suffered neck, low back and left shoulder injuries and has dealt with pain and limitations in function since." (Rajput letter, November 14, 2019).

32) On November 22, 2019, Employer asked for cross-examination of Dr. Rajput. (Request for Cross-Examination, November 22, 2019).

33) On January 30, 2020, Goodman withdrew as Employee's attorney. (Notice of Withdrawal of Counsel, January 30, 2020).

34) On February 10, 2020, an EMG ordered by Dr. Rajput showed a bilateral median neuropathy at the wrist (carpal tunnel syndrome), a bilateral suprascapular neuropathy, and a left

axillary neuropathy, but there was no evidence of a cervical radiculopathy. (Ralph D'Auria, M.D., report, February 10, 2020).

35) On December 3, 2020, Employer denied (1) all benefits related to Employee's cervical and lumbar spines, right ankle, and left shoulder, contending Employee "only reported a hand contusion in relation to the work injury"; (2) all benefits from April 23, 2018, through November 12, 2018, contending Employee did not attend an EME until November 13, 2018; (3) all benefits from September 21, 2018 through December 22, 2018, and from December 25, 2019, through January 30, 2020, contending Employer requested a medical release on September 7, 2018, but Employee returned it on December 22, 2018, and it requested another one on December 11, 2019, but he returned the release on January 30, 2020; (4) TTD benefits based on Dr. Bauer's EME report; (5) PPI benefits based on Drs. Bauer, Chovanes, and McCollam's opinions; (6) medical and transportation costs beyond July 12, 2018, based on Dr. Bauer's EME report; (7) reemployment benefits; (8) interest; (9) a penalty for late paid benefits; and (10) attorney fees and costs. (Controversion Notice, December 3, 2020).

36) Employee has not reported injuries to his cervical and lumbar spine, right ankle or left shoulder. (Agency file).

37) Employer does not dispute Employee sustained a work injury on July 15, 2017. (Hearing Brief of Trident Seafoods Corporation, January 20, 2021).

38) Employer paid Employee TTD benefits from August 1, 2017, through April 24, 2018. (Hearing Brief of Trident Seafoods Corporation, January 20, 2021, Exhibit 29).

39) At hearing, Employer raised objection to Employee's failure to give notice of injury under AS 23.30.100. (Record).

PRINCIPLES OF LAW

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 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the

> nature of the injury or the process of recovery requires. . . . 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.
>
> **AS 23.30.100. Notice of injury or death.** (a) Notice of an injury or death in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury or death to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury . . . and authority to release records of medical treatment for the injury . . . and be signed by the employee or by a person on behalf of the employee. . . .
>
> (c) Notice shall be given to the board by delivering it or sending it by mail addressed to the board's office, and to the employer by delivering it to the employer or by sending it by mail addressed to the employer at the employer's last known place of business. . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury or death and the board determines that the employer or carrier has not been prejudiced by failure to give notice;
>
> (2) if the board excuses the failure on the ground that for some satisfactory reason notice could not be given;
>
> (3) unless objection to the failure is raised before the board at the first hearing of a claim for compensation in respect to the injury. . . .

In *Tinker v. Veco, Inc.*, 913 P.2d 488, 492 (Alaska 1996), the Supreme Court held timely written notice of an injury is required because it lets the employer provide immediate medical diagnosis and treatment to minimize the seriousness of the injury and facilitates the earliest possible investigation of the facts surrounding the injury. A failure to provide timely notice that impedes either of these two objectives prejudices the employer. *Id*. However, where an employer has knowledge equivalent to a legally sufficient formal written claim, "it would require an

exceptional set of circumstances for this difference in the form by which the information was conveyed to prejudice the employer." *Id*.

To determine whether a failure to provide timely written notice should be excused under AS 23.30.100(d)(2), the Court held the 30-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." *Alaska State Housing Authority v. Sullivan*, 518 P.2d 759, 761 (Alaska 1974).

Support for the application of a "reasonableness" standard by means of subsection (d)(2) is found in AS 23.30.105(a), which provides that the time for filing claims, as distinguished from giving notice of injury, is "within two years after the employee has knowledge of the nature of his disability and its relation to his employment and after disablement." *Id*. As the exact date when an employee could reasonably discover compensability is often difficult to determine and missing the short 30-day limitation period bars a claim absolutely, for reasons of clarity and fairness, the 30-day period can begin no earlier than when a compensable event first occurs; yet it is not necessary that a claimant fully diagnose his injury for the 30-day period to begin. *Cogger v. Anchor House*, 936 P.2d 157, 160 (Alaska 1997).

> **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 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.

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).

> **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. . . .

In *Childs v. Copper Valley Elec. Ass'n*, 860 P.2d 1184, 1190 (Alaska 1993), the Alaska Supreme Court held "attorney's fees in workers' compensation cases should be fully compensatory and reasonable," so injured workers have "competent counsel available to them." Nonetheless, when

an employee does not prevail on all issues, attorney fees should be based on the issues on which the employee prevailed.

> **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. . . .
> . . . .
>
> (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.
> . . . .
>
> (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. . . .

AS 23.30.155(e) provides penalties when employers fail to pay compensation when due. *Haile v. Pan Am. World Airways*, 505 P.2d 838 (Alaska 1973). To avoid a penalty, a controversion must be filed in good faith. *Harp v. ARCO Alaska, Inc*., 831 P.2d 352 (Alaska 1992). For it to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find that the claimant is not entitled to benefits. *Id*.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.**
> . . . .
>
> (b) All determinations of the existence and degree of permanent impairment shall be made strictly and solely under the whole person determination as set out in the American Medical Association Guides to the Evaluation of Permanent Impairment, except that an impairment rating may not be rounded to the next five percent. The board shall adopt a supplementary recognized schedule for injuries that cannot be rated by use of the American Medical Association Guides. . . .

> **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;
>
> . . . .

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*.

> **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 45.142. 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. . . .
>
> **8 AAC 45.180. Costs and attorney's fees**. . . .

. . . .

(b) A fee under AS 23.30.145 (a) will only be awarded to an attorney licensed to practice law in this or another state. An attorney seeking a fee from an employer for services performed on behalf of an applicant must apply to the board for approval of the fee; the attorney may submit an application for adjustment of claim or a petition. An attorney requesting a fee in excess of the statutory minimum in AS 23.30.145 (a) must (1) file an affidavit itemizing the hours expended, as well as the extent and character of the work performed, and (2) if a hearing is scheduled, file the affidavit at least three working days before the hearing on the claim for which the services were rendered; at the hearing, the attorney may supplement the affidavit by testifying about the hours expended and the extent and character of the work performed after the affidavit was filed. If the request and affidavit are not in accordance with this subsection, the board will deny the request for a fee in excess of the statutory minimum fee, and will award the minimum statutory fee.

. . . .

8 AAC 45.052. Medical summary.

. . . .

(c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary, on form 07-6103, if any new medical reports have been obtained since the last medical summary was filed.

. . . .

(2) If a party served with an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries filed as of the date of service of the affidavit of readiness for hearing, a request for cross-examination must be filed with the board, and served upon all parties, within 10 days after service of the affidavit of readiness for hearing.

(3) After an affidavit of readiness for hearing has been filed, and until the claim is heard or otherwise resolved,

(A) all updated medical summaries must be accompanied by a request for cross-examination if the party filing the updated medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary; and

(B) if a party served with an updated medical summary and copies of the medical reports listed on the medical summary wants the opportunity to cross-examine the author of a medical report listed on the updated medical summary, a request for cross-examination must be filed with the board and

> served upon all parties within 10 days after service of the updated medical summary.
>
> . . . .

The worker's compensation system in Alaska favors the production of medical evidence in the form of written reports, and this preference serves a legitimate purpose. *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819; 822 (Alaska 1974). However, "the statutory right to cross-examination is absolute and applicable to the Board." *Id*. at 824. The medical summary and request for cross-examination process set out in 8 AAC 45.052 was developed in response to the Alaska Supreme Court's decision in *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976) (holding the employer did not waive its right to cross-examine the employee's treating physicians). This decision is so firmly entrenched in the Alaska's workers' compensation system that the objection to the admission of medical reports based on the unavailability of the author for cross-examination is commonly referred to as a "Smallwood objection." AAC 45.900(11).

Medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule. *Dobos v. Ingersoll*, 9 P.3d 1020; 1027 (Alaska 2000). However, letters written by a physician to a party or a party's representative to express an expert medical opinion on an issue before the tribunal are not admissible as a business record unless the requisite foundation is established showing it is the physician's regular practice to prepare and send such letters. *Liimatta v. West*, 45 P.3d 310; 318 (Alaska 2002).

> **Rule 803. Hearsay Exceptions -- Availability of Declarant Immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (6) Business records. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge acquired of a regularly conducted business activity, and if it was the regular practice of that business activity to make and keep the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of the preparation indicate lack of trustworthiness. The term "business" as used in this

> paragraph includes . . . profession, occupation, and calling of every kind, whether or not conducted for profit. . . .

ANALYSIS

1) Are Employee's cervical and lumbar spine, right ankle, and left shoulder claims barred for failure to give notice?

An employee must provide written notice of an injury to his employer within 30 days of the injury; failure to do so may bar a claim for the injury. AS 23.30.100(a), (b). It is undisputed Employee sustained a left hand contusion on July 15, 2017, while working for Employer, and this was reported on July 16, 2017. However, on August 1, 2017, he revealed for the first time that he had injured left shoulder and right ankle while working for Employer; these injuries have not been reported. Also, on November 9, 2017, Employee revealed for the first time that he had injured his cervical and lumbar spine while working for Employer; this injury has not been reported. In short, it is undisputed Employee never gave notice of his cervical and lumbar spine, left shoulder and right ankle injuries, within 30-days of the injuries.

Timely written notice of these injuries was required because it would have allowed Employer to provide immediate medical diagnosis and treatment to minimize the seriousness of Employee's injuries and facilitates the earliest possible investigation of the facts surrounding them. *Tinker*. Employee's failure to provide timely notice impeded these two objectives and prejudiced Employer. AS 23.30.100(c); *Id*. However, regardless of when written notice was given, failure to give it does not always bar a claim. AS 23.30.100(d) provides three exceptions to the 30-day notice requirement. First, under subsection (d)(1), failure to provide written notice does not bar a claim if the employer had actual knowledge of the injury and was not prejudiced by the lack of written notice. Second, under subsection (d)(2), failure to give written notice may be excused if the employee had a satisfactory reason for not giving it. And third, under subsection (d)(3), failure to give written notice does not bar a claim if the employer does not object to the failure at the first hearing. AS 23.30.100(d).

Here, the exception under subsection (d)(1) does not apply as there is no evidence Employer had actual knowledge of Employee's cervical and lumbar spine, right ankle and shoulder injuries.

AS 23.30.100(d)(1); *Tinker*. It is undisputed Employee did not report these injuries when he reported his left hand injury, and they have never been reported to the division or Employer. *Rogers & Babler*. On August 1, 2017, Employee saw PA-C Neddo and mentioned for the first time that he injured his left shoulder and right ankle while working for Employer. There is no evidence Employee communicated with Employer about these injuries or it had reason to know about them. *Id*. On November 9, 2017, Employee saw Dr. Kim in Georgia and mentioned for the first time that he injured his cervical and lumbar spine while working for Employer. There is no evidence Employee communicated with Employer about these injuries or it had reason to know about them. *Id*. Employer did not have knowledge equivalent to a legally sufficient formal written claim. *Tinker*.

Also, the exception under subsection (d)(2) does not apply. To determine whether a failure to provide timely written notice should be excused under this subsection, the 30-day period begins when "by reasonable care and diligence it is discoverable and apparent that a compensable injury has been sustained." Under the "reasonableness" test, the running of the limitation period for notice was suspended until Employee could reasonably be expected to realize the cause and nature of his injuries. *Sullivan*. It can be concluded Employee knew about his left shoulder and right ankle injuries on August 1, 2017, when he saw PA-C Neddo; thus, the 30-day period began for these injuries on August 1, 2017. AS 23.30.100(d)(2). It can also be concluded he knew about his cervical and lumbar spine injury on November 9, 2017, when he saw Dr. Kim; thus, the 30-day period began for his cervical and lumbar spine injury on November 9, 2017. *Id*. Although English is Employee's second language and language barrier may have prevented his communication with Employer, he was represented by attorney Goodman from September 17, 2018, to January 30, 2020, and this defect should have been addressed and cured by October 17, 2018 at the latest. Employee did not do so.

Lastly, the exception under subsection (d)(3) does not apply because Employer raised objection to Employee's failure to give notice of injury at hearing.

Absent Employer's actual knowledge of his alleged injuries, Employee should have reported his alleged left shoulder and right ankle injuries within 30 days of August 1, 2017, and his alleged

cervical and lumbar spine injuries within 30 days of November 9, 2017. *Tinker*; *Cogger*. Therefore, as none of the exceptions under AS 23.30.100(d) applies, any delay in providing a 30-day notice was not justified, Employee's cervical and lumbar spine, right ankle, and left shoulder claims are barred for failure to give notice of injury. AS 23.30.100(d).

2) Did Employee make unlawful changes of physicians?

From November 9, 2017, through January 29, 2018, Dr. Kim was Employee's attending physician. AS 23.30.395(3). On January 30, 2018, Employee saw Dr. McCollam 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). Then, on June 19, 2018, he saw Dr. Kim without a referral or Employer's authorization; having already exercised the only allowed change to see Dr. McCollam, this was an unlawful physician change. AS 23.30.095(a); 8 AAC 45.070(g). In addition, on August 9, 2019, Employee saw Dr. Rajput without a referral or Employer's authorization; having already exercised the only allowed change, this was also an unlawful physician change. *Id*.

Thus, Dr. Kim's reports, opinions, or testimony in any form, from June 19, 2018, forward, will not be considered; also, Dr. Rajput's reports, opinions, or testimony in any form, will not be considered. 8 AAC 45.082(c); *Hudak*.

3) Should Dr. Rajput's November 14, 2019 letter be excluded?

Dr. Rajput's November 14, 2019 letter should be excluded because it is a product of unlawful change of physician as analyzed above. However, Employer contends there is another reason for its exclusion: it had timely filed a request for cross-examination on Dr. Rajput, Employee did not produce him for hearing.

Medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule. *Dobos*. However, Dr. Rajput's letter was created in response to attorney Goodman's questions seeking expert medical opinions on Employee's workers' compensation issues with litigation purposes. This letter lacks the normal

trustworthiness associated with an ordinary medical record; Employer would be particularly interested in cross-examining Dr. Rajput on his expressed opinions in the letter. *Liimatta*. In short, this letter is inadmissible as a business record under Alaska Rule of Evidence 803(6).

Employee filed and served an Affidavit of Readiness for Hearing on December 13, 2018, and an updated medical summary containing Dr. Rajput's November 14, 2019 letter on November 20, 2019. On November 22, 2019, Employer timely filed and served a *Smallwood* objection. 8 AAC 45.052(c)(3)(B). Thus, Employer had an absolute statutory right to cross-examine Dr. Rajput, and his November 14, 2019 letter should be excluded. *Shoen*.

4) Is Employee entitled to a TTD benefit award?

It is undisputed Employee sustained a compensable injury on his left hand while working for Employer. He received medical care for his work-related left hand contusion. Employer paid Employee TTD benefits from August 1, 2017, through April 24, 2018. It has not paid TTD benefits since; Employer contends Employee has not been disabled and has been medically stable since February 12, 2018. Employee contends in addition to his left hand, he sustained work-related injuries to his cervical and lumbar spine, right ankle, and left shoulder; he contends he is disabled and entitled to ongoing TTD benefits.

a) Left hand injury

This issue raises factual questions to which the presumption analysis applies. AS 23.30.120; *Meek*. Without regard to credibility, Employee raises the presumption that he is entitled to TTD benefits for his left hand injury through his lay testimony and Dr. Kim's November 9, 2017 opinions. *Tolbert*; *Wolfer*.

Employer must rebut the raised presumption with substantial evidence to the contrary. *Runstrom*; *Tolbert*. Credibility is not weighed at this stage. *Saxton*. Employer contends Employee is not entitled to TTD benefits because (1) on March 5, 2018, his attending physician, Dr. McCollam opined the February 12 and 20, 2018 left thumb, hand and shoulder MRIs did not show any structural damage, and released him to "full duty work"; (2) EME Dr. Bauer opined Employee was not disabled and needed no medical treatment beyond six weeks after the work

injury, he reached medical stability on February 12, 2018; and (3) SIME Dr. Chovanes opined Employee sustained a left hand contusion as a result of his July 11, 2017 work injury, which substantially caused his disability and need for medical treatment, but he reached medical stability and his "work-related disability ended on February 12, 2018, when the MRIs of the shoulder, hand, and thumb did not demonstrate any injuries caused by the work-related accident on July 11, 2017." Therefore, Drs. McCollam, Bauer and Chovanes' opinions provide substantial evidence to overcome the presumption. *Tolbert*.

Next, Employee has to prove his claim by a preponderance of the evidence. *Runstrom*; *Saxton*. Because this decision finds Dr. Kim's reports and opinions from June 19, 2018, forward, and Dr. Rajput's reports and opinions must be excluded, Employee lacks evidence to meet his burden of proof. However, even if Drs. Kim and Rajput's opinions were considered, Drs. McCollam, Bauer and Chovanes' opinions would be given greater weight because (1) Dr. Kim opined Employee was not medically stable and was not ready to return to work as a fish processor without any elaboration, and (2) Dr. Rajput did not provide any meaningful opinion regarding his left hand injury. AS 23.30.122; *Steffey*. Therefore, Employee is not entitled to TTD benefits for his left hand injury.

b) Cervical and lumbar spine, right ankle, and left shoulder

As analyzed above, Employee's cervical and lumbar spine, right ankle, and left shoulder claims are barred for failure to give notice under AS 23.30.100, and Dr. Kim's reports and opinions from June 19, 2018, forward, and Dr. Rajput's reports and opinions are excluded. However, even if those claims were not barred and Drs. Kim and Rajput's opinions were considered, the presumption analysis would show Employee is not be entitled to TTD benefits for his alleged cervical and lumbar spine, right ankle, and left shoulder injuries. AS 23.30.120; *Meek*.

First, without regard to credibility, Employee would raise the presumption that his cervical and lumbar spine, right ankle, and left shoulder claims are compensable through Drs. Kim and Rajput's opinions. *Tolbert*; *Wolfer*.

Employer would have to rebut the raised presumption with Drs. McCollam, Bauer and Chovanes' opinions. *Runstrom*; *Tolbert*. Dr. McCollam, Employee's attending physician, opined left thumb, hand and shoulder MRIs did not show any structural damage and released him "full duty work." EME Dr. Bauer opined spine, shoulder, and hand MRIs "do not demonstrate any finding that physiologically could be caused by the incident in question," and specifically, "there is tendinosis of the shoulder, without any evidence of full-thickness rotator cuff tear" and "the mechanism of injury . . . does not create nor aggravate these conditions." SIME Dr. Chovanes opined Employee only sustained a left hand contusion as a result of his work injury, and his "work-related disability ended on February 12, 2018, when the MRIs of the shoulder, hand, and thumb did not demonstrate any injuries caused by the work-related accident on July 11, 2017." Consequently, Drs. McCollam, Bauer and Chovanes' opinions provide substantial evidence to overcome the presumption. *Tolbert*.

Next, Employee would have to prove his claims by a preponderance of the evidence. *Saxton*. If Dr. Rajput's November 14, 2019 letter, which is inadmissible evidence, were considered, it would provide conflicting medical opinion against Drs. McCollam, Bauer and Chovanes' opinions. He specifically disagreed with Dr. Chovanes' opinion that Employee's remaining disabilities and need for treatment resulting from his work injury were limited to the left and contusion. He said, "Patient reported that he also suffered neck, low back and left shoulder injuries and has dealt with pain and limitations in function since." Dr. Rajput did not elaborate how Employee could have injured cervical and lumbar spine, right ankle, and left shoulder; but instead, he solely relied on Employee's account of his injury. *Steffey*. Therefore, Drs. McCollam, Bauer and Chovanes' opinions would be given a greater weight. AS 23.30.122; *Smith*.

5) Is Employee entitled to PPI benefits?

Drs. Bauer and Chovanes opined Employee's left hand work injury did not result in a permanent partial impairment. AS 23.30.190(b). There is no evidence supporting he has or will have a partial impairment due to his work injury. Thus, Employee is not entitled to PPI benefits.

6) Is Employee entitled to medical care and related transportation costs?

Based on the above analyses, Employee is entitled to reasonable and necessary medical care and related transportation costs for his left hand work injury. AS 23.30.095. However, he is not entitled to medical care or transportation costs for his alleged cervical and lumbar spine, right ankle, and left shoulder injuries.

7) Is Employee entitled to a late-payment penalty?

Penalties are imposed when employers fail to pay compensation when due. AS 23.30.155(a); (e); *Haile*. There is no evidence suggesting Employer failed to timely pay compensation or benefits when due. Thus, Employee is not entitled to a late-payment penalty. AS 23.30.155(e).

8) Is Employee entitled to interest?

Interest is mandatory. AS 23.30.155(p). But because no benefit is owed, Employee is not entitled to interest.

9) Is Employee entitled to attorney fees and costs?

Employee requests attorney fees and costs. AS 23.30.145(a); 8 AAC 45.180(b). Attorney fees may be awarded when an employer controverts payment of compensation, and an attorney is successful in prosecuting the employee's claim. AS 23.30.145(a); *Childs*. Employee did not prevail on his claims. Thus, he is not entitled to attorney fees or costs.

CONCLUSIONS OF LAW

1) Employee's cervical and lumbar spine, right ankle, and left shoulder claims are barred for failure to give notice.
2) Employee made unlawful changes of physicians.
3) Dr. Rajput's November 14, 2019 letter should be excluded.
4) Employee is not entitled to a TTD benefit award.
5) Employee is not entitled to PPI benefits.

6) Employee is entitled to medical care and related transportation costs for his left hand work injury. He is not entitled to medical care and related transportation for his alleged cervical and lumbar spine, right ankle, and left shoulder injuries.
7) Employee is not entitled to a late-payment penalty.
8) Employee is not entitled to interest.
9) Employee is not entitled to attorney fees or costs.

ORDER

1) Employee's cervical and lumbar spine, right ankle, and left shoulder claims are barred for failure to give notice of injury under AS 23.30.100.
2) Because Employee made unlawful changes of physicians, Dr. Kim's reports, opinions, or testimony in any form, from June 19, 2018, forward, and Dr. Rajput's reports, opinions, or testimony in any form, will not be considered.
3) Because Employee failed to produce Dr. Rajput for cross-examination, Dr. Rajput's November 14, 2019 letter will be excluded.
4) Employee is not entitled to TTD benefits. He is not entitled to PPI benefits.
5) Employee is entitled to reasonable and necessary medical care and related transportation costs for his left hand work injury.
6) Employee is not entitled to medical care or transportation costs for his alleged cervical and lumbar spine, right ankle, and left shoulder injuries.
7) Employee is not entitled to a late-payment penalty.
8) Employee is not entitled to interest.
9) Employee is not entitled to attorney fees or costs.

Dated in Anchorage, Alaska on March 1, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Jung M. Yeo, Designated Chair

/s/
Randy Beltz, Member

NANCY SHAW, CONCURRING IN PART AND DISSENTING:

1. The employer asks the Board to bar Mr. Altahir's claims to benefits for injuries other than his left hand under the provisions of AS 23.30.100. It argues that Mr. Altahir gave notice of a hand injury but it did not have notice that Mr. Altahir injured his left shoulder, his spine or other body parts.

Mr. Altahir did not file a notice of injury under 23.30.100. The employer filed a report of injury under 23.30.070 [Employer's Exhibit 1] signed by its safety manager in which he identified "hand" as the part of body affected. Mr. Altahir, then, did not make a statement in a report of injury about the extent of his injuries upon which the employer could have relied. The safety manager's statement that a hand was injured cannot be regarded as a statement of the employee that he had exclusively injured his hand.

Two weeks after the accident, a physician examining Mr. Altahir described his injuries as a crush injury to the left hand, a left shoulder strain, and acute right ankle pain. By November 9, about three months after the accident, Mr. Altahir reported back pain to Dr. Kim. The employer reports that it was providing medical benefits during this time period. The employer had these reports and submitted them to its IME physician, Dr. Bauer, who referenced them in his report dated November 13, 2018. [Employer's Exhibit 19, pp. 3-5] I would find that the employer was not prejudiced by Mr. Altahir's failure to give specific notice that body parts other than his hand were affected by his accident.

The employee is from Somalia. He does not speak English, as documented by several of his medical care providers. He was unrepresented until September 2018. I would find these facts, taken together, sufficient to excuse his not notifying the employer specifically that, subsequent to his accident, body parts other than his left hand, became symptomatic. I conclude that the claim – including medical care and benefits for all body parts injured or requiring treatment attributable to the work injury – should not be barred.

2. I would not exclude any of the records of Dr. Kim. The employer agrees that Mr. Altahir was authorized to see Dr. Kim. He then saw Dr. McCollum and returned to Dr. Kim. If his seeing

Dr. McCollum was unauthorized, then Mr. Altahir's returning to Dr. Kim can be seen as a course correction, returning to the doctor that the employer had agreed he could see.

3. I would not exclude the employer's letter to Dr. Rajput from the record on grounds that the employer was not afforded its rights to cross-examine under Smallwood. The employer itself sent questions to this physician, generating the document to which it now objects. If anything, the employer's asking questions of the physician was a form of cross-examination.

4. Generally, the medical evidence falls along two lines. One acknowledges Mr. Altahir's current complaints but finds that there is no objective evidence of residual injury or need for further treatment. The other, primarily offered by Dr. Kim, has it that Mr. Altahir has real, continuing, pain and disability attributable to the accident at Trident, that he is not medically stable and cannot return to work in his present condition. I find the latter view more persuasive and I would conclude that Mr. Altahir is entitled to medical benefits, past and future, and temporary total disability benefits. I would award penalties for late payment.

/s/
Nancy Shaw, Member

APPEAL PROCEDURES

This compensation order is a final decision. It becomes effective when filed in the office of the board unless proceedings to appeal it are instituted. Effective November 7, 2005 proceedings to appeal must be instituted in the Alaska Workers' Compensation Appeals Commission within 30 days of the filing of this decision and be brought by a party in interest against the boards and all other parties to the proceedings before the board. If a request for reconsideration of this final decision is timely filed with the board, any proceedings to appeal must be instituted within 30 days after the reconsideration decision is mailed to the parties or within 30 days after the date the reconsideration request is considered denied due to the absence of any action on the reconsideration request, whichever is earlier. AS 23.30.127.

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which the appeal is taken. A cross-appeal may be initiated by filing with the office of the Appeals Commission a signed notice of cross-appeal within 30 days after the board decision is filed or within 15 days after service of a notice of appeal, whichever is later. The notice of cross-appeal shall specify the board order appealed from and the ground upon which the cross-appeal is taken. AS 23.30.128.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accord with 8 AAC 45.050. The petition requesting reconsideration must be filed with the board within 15 days after delivery or mailing of this decision.

MODIFICATION

Within one year after the rejection of a claim, or within one year after the last payment of benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, a party may ask the board to modify this decision under AS 23.30.130 by filing a petition in accord with 8 AAC 45.150 and 8 AAC 45.050.

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Ahmad Altahir, employee / claimant v. Trident Seafoods Corporation, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201709914; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on March 1, 2021.

/s/
Nenita Farmer, Office Assistant