ALASKA WORKERS' COMPENSATION BOARD

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

KEVIN FINCH, Employee, Claimant, v. STATE OF ALASKA, Self Insured Employer, Defendant.	)	FINAL DECISION AND ORDER AWCB Case No. 201204381 AWCB Decision No. 21-0087 Filed with AWCB Anchorage, Alaska on September 17, 2021

The State of Alaska's (Employer) May 5, 2021 petition to dismiss Employee's claim for temporary total disability (TTD) benefits was heard on the written record in Anchorage, Alaska on September 9, 2021, a date selected on July 15, 2021. A June 11, 2021 hearing request gave rise to this hearing. Attorney Andrew Wilson appeared and represented Kevin Finch (Employee). Attorney Kim Stone appeared and represented Employer. The record closed at the hearing's conclusion on September 9, 2021.

ISSUES

Employer contends Employee's claim for TTD benefits should be dismissed in its entirety because he was injured in 2012, has since retired and did not assert a claim for TTD benefits until 2019. It contends it has been denied its opportunity to timely investigate and defend against Employee's claim for disability benefits and his claim should be dismissed.

Employee contends Employer clarified its petition and is only seeking to dismiss his claim for past TTD benefits before two years prior to his claim. He contends Employer's petition should be

denied because the partial benefit bar is not ripe and his claim is not time-barred because it violates neither time-bar in the Act; further, by statute and equity the time bar can be waived. Employee contends his retirement was involuntary and his right to disability benefits is revived by new treatment recommendations. He contends he was not aware of the nature of his disability until his appointment with John Andreshak, M.D., on October 15, 2018.

1) **Should Employer's petition to dismiss Employee's claim for disability benefits be granted?**

Employee contends he is entitled to interim attorney fees and costs. Employer did not assert a position; however, it is presumed it objects.

2) **Is Employee entitled to attorney fees and costs?**

FINDINGS OF FACT

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

1) On March 19, 2012, Employee reported he slipped and fell down six icy steps and injured his left arm, right hip, right shoulder and neck when leaving work. He was hired by Employer on September 13, 1993, and worked as a correctional officer when injured. He was house sergeant and on-scene commander and a supervisor. He was earning $41.95 per hour when injured. (Report of Occupational Injury or Illness, March 19, 2012; Kevin Finch, October 7, 2020.)

2) On May 16, 2012, Employee first sought treatment for his work injury and was cleared to return to work with no restrictions. He has never been paid disability benefits. (Physician's Report and Return to Work Release, Brent Ursel, PA-C, May 16, 2021; ICERS Database, Payments Screen.)

3) On July 9, 2013, cervical magnetic resonance imaging (MRI) showed decreased marrow signal intensity in all visualized vertebral bodies. Clinical correlation was recommended to rule out systemic illness such as renal insufficiency, anemia, or marrow infiltrating process. Employee had a small disc protrusion at C5-6, which caused mild central canal stenosis with slight left ventral cord effacement; mild disc bulge and small left C6-7 disc osteophyte complex, which caused mild central canal stenosis and mild left neural foraminal stenosis without impingement; and small right paracentral disc protrusion at C7-T1 causing no impingement. All findings were consistent with degenerative disc disease. (MRI Cervical Spine, July 9, 2013.)

4) On April 11, 2014, Employee continued to have some numbness in his hands, particularly the right hand. Richard Garner, M.D., noted a June 4, 2012 electrodiagnostic study indicated Employee had moderately severe right carpal tunnel syndrome. Employee said it was bothering him less, he was not dropping objects and was still able to fire a weapon successfully. Dr. Garner diagnosed right carpal tunnel syndrome and cervical degenerative disc disease and found Employee continued to be employable. Dr. Garner said:

> At this point in time, it does not appear likely that he's going to come to carpal tunnel surgery, but it remains to be seen if a recommendation will be made for cervical disc surgery. He was unaccompanied today. I wrote no medication prescriptions, and he continues employable as has been the case in the recent past. If in fact, further cervical workup and/or cervical surgery are not recommended by Dr. Peterson or Dr. Spencer, I believe this gentleman would be approaching maximum medical improvement. He has not reached that point based on today's visit.

(Chart note, Dr. Garner, April 11, 2014.)

5) On April 30, 2014, Employee continued to have weakness and numbness in his hand, but it was not as bad as it had been in the past. He was not interested in having surgery. The physical therapist said Employee demonstrated excellent response to conservative therapeutic intervention, was making good progress towards his goals and recommended continued physical therapy two times per month for eight to 12 weeks. (Progress report, Mark Ifflander, PT, April 30, 2014.)

6) On May 1, 2014, Dr. Garner authorized physical therapy but said it was to terminate on May 31, 2014, unless Employee was evaluated by Upshur Spencer, M.D. or Davis Peterson, M.D. He documented multiple recommendations Employee be seen and evaluated for cervical disc disease. "I cannot see that any effort has been made on the patient's part, or by his insurance carrier to carry out this directive." Hence, he terminated authorization for physical therapy as of May 31, 2014. For Dr. Garner to continue care for Employee's condition and authorize treatment, an opinion from Dr. Spencer or Dr. Peterson needed to occur promptly. (Physical therapy referral, Dr. Garner, May 1, 2014; Chart note, Dr. Garner, May 1, 2014.)

7) On May 18, 2014, Dr. Garner suggested Employee continue working and assessed rotator cuff sprain or possible labral right shoulder injury; right hip osteoarthritis preexisting with injury-related aggravation; probable right carpal tunnel syndrome; and chronic right L5-S1 radiculopathy with possible acute component. Imaging revealed trace degenerative disc disease at C5-C6 and

C6-C7; lumbar scoliosis with multilevel lumbar degenerative disc disease most pronounced at L4-L5 on the right; and bilateral hip degenerative joint disease, with the right hip more advanced but no acute change in either hip. (Chart Note, Dr. Garner, May 18, 2014.)

8) On August 5, 2014, Employee was able to continue with a "full" work schedule with skills to manage pain. (Progress note, Mark Ifflander, PT, August 5, 2014.)

9) On August 6, 2014, PA-C Ursel released Employee to regular work with no restrictions and said his injury would not result in permanent impairment. He referred Employee to Alaska Spine to obtain a second opinion regarding his neck and wrist pain symptoms' cause. (Chart note, PA-C Ursel, August 6, 2014; Physician's Report, PA-C Ursel, August 6, 2014.)

10) On August 14, 2014, physiatrist Erik Olson, D.O., evaluated Employee's neck and bilateral upper extremity pain. Employee reported intermittent numbness and weakness in his arms aggravated with overhead work. He frequently awoke with his hands and arms feeling numb and frequently had numbness in his hands with driving and fine motor activities. He experienced these "flare-ups" two to three times a week while working. He expressed an interest in DRS chiropractic treatment to simulate traction. Employee told Dr. Olson he worked for the Alaska Department of Corrections as a correctional officer and had been doing so for the past 20 years. His job duties included patrolling the prison; he was on his feet for 10 to 12 hours a day on concrete floors and he had been working full-time. Dr. Olson reviewed Employee's July 2013 thoracic and cervical spine MRIs and noted imaging showed disc protrusions and degeneration at multiple levels of the cervical and thoracic spine. He did not find any area of severe central or foraminal stenosis at any level. Employee was referred to Kanady Chiropractic Center for cervical traction. (Letter to PA-C Ursel from Dr. Olson, August 14, 2014.)

11) Employee did not receive cervical spine treatment from a provider from September 19, 2014 until June 14, 2018. (Observations.)

12) On February 12, 2018, Employee submitted notice he was retiring from his position as a sergeant with Employer and his last work day would be February 28, 2018. He said:

> I have enjoyed working for Spring creek over the 24 years I have been here and I sincerely appreciate the opportunity provided to me during my years as part of the Department.
>
> While I look forward to enjoying my retirement, I will miss being part of our team at Spring creek.

> If I can be of any assistance prior to my departure and afterwards, please let me know. I'd be glad to provide whatever assistance I can to provide a smooth transition.

Employee did not notify Employer he was resigning because he lacked the physical capacity to perform his job duties. (Memorandum to Mr. Lapinskas, Superintendent thru Lt. Torrey, Shift Commander from SSgt Kevin Finch, February 12, 2018; Observation.)

13) On September 6, 2018, a cervical MRI showed significant degeneration and stenosis at C5-6 secondary to a disc herniation with bilateral severe foramen compression, spinal cord impingement with compression bilaterally but more so on the left. (Chart Note, Dr. Andreshak, October 15, 2018.)

14) On October 15, 2018, Dr. Andreshak reported Employee "had difficulty with Workers' Compensation and the describing this as carpal tunnel syndrome." Imaging demonstrated normal cervical alignment, C5-6 and C6-7 spondylosis, and congenital stenosis. Dr. Andreshak found evidence of myelopathy and spinal cord compression. He recommended arthroplasty. Employee asked many questions and Dr. Andreshak said he would be happy to review any prior studies Employee could obtain and compare them to his current study. (Chart Note, Dr. Andreshak, October 15, 2019.)

15) On November 17, 2018, David Glassman, M.D., evaluated Employee at Employer's request. Employee said he had neck pain, and pain between his shoulder blades, with tingling, burning and numbness running down both arms into both hands, which is worse with sitting, standing, driving, working, and fishing and relieved to some degree with medication. Dr. Glassman noted Employee's pain disability questionnaire indicated "an extreme level of perceived disability with similar proportion of both functional status and psychosocial components." He diagnosed a right shoulder and right hip "sprain/strain" caused by the March 19, 2012 work injury. He said strains and sprains heal in six to eight weeks, and both Employee's right shoulder and right hip were medically stable and needed no further treatment. Dr. Glassman said Employee's right shoulder osteoarthritis, revealed on imaging, was not related to his work injury but rather was a pre-existing degenerative condition related to his dislocated clavicle prior to his work injury. Employee's right hip osteoarthritis was also, in Dr. Glassman's opinion, not related to his work injury. It was a pre-existing degenerative condition shown on right hip and pelvis imaging. Dr. Glassman found cervical spondylosis without impingement or cervical radiculopathy. He said these are age-related

degenerative changes evident on cervical imaging and MRI and not related to the work injury. Likewise, he said Employee's right wrist carpal tunnel syndrome was not related to the work injury because the mechanism of injury described by Employee did not support the diagnosis and there was nothing in the record to suggest occupational risk factors such as forceful and repetitive motion. No additional medical treatment was recommended and Employee was given a zero percent permanent partial impairment rating for his right shoulder and right hip. Dr. Glassman said the two month delay between the work injury and Employee's first medical treatment reduces causality of his symptoms' work-relatedness. No work restrictions for Employee's correctional officer position were recommended. (EME Report, Dr. Glassman, November 17, 2018.)

16) On December 19, 2018, Employer controverted all benefits based upon Dr. Glassman's report. (Controversion Notice, December 19, 2018.)

17) On September 3, 2019, Dr. Andreshak, in response to questions from Employee, said the substantial cause of his post-injury symptoms and need for medical treatment was C5-6 stenosis and that the 2012 work injury advanced the degeneration. He recommended surgery after new imaging but was unable to determine if Employee would obtain measurable improvement from it. Dr. Andreshak was also unable to determine if he would release Employee to return to work at the Department of Corrections; it was "unknown" if he would have a permanent partial impairment. (Responses to Employee's Questions, Dr. Andreshak, September 3, 2019.)

18) On September 20, 2019 Employee filed a claim for TTD and permanent partial impairment benefits, medical and transportation costs, penalty, interest and attorney fees and costs. Employee's claim does not specify the periods he seeks TTD benefits. (Entry of Appearance, September 20, 2019; Workers' Compensation Claim, September 20, 2019; Observation.)

19) On November 27, 2019, Employer denied all benefits in Employee's claim. (Controversion Notice, November 27, 2021.)

20) On January 22, 2020, Employee answered several interrogatories and requests for production with: "Information already provided please refer to work comp claim documents #201206887." Alaska Workers' Compensation Board case number 201206887 is not Employee's. In response to an interrogatory asking if he ever previously received workers' compensation benefits and, if so, when benefits began and concluded for the workplace injury, body parts affected and case numbers, Employee objected asserting the question was vague, unanswerable, not formulated in a coherent sentence and he was unable to ascertain what information Employer

wanted. Notwithstanding the objection, Employee answered, "No." (Claimant's Response to Employer's Request for Admission, Interrogatory and Production, January 22, 2020; Observations.)

21) Employee received workers' compensation benefits for a 1998 injury to his left knee, a 2000 injury to his low back, and a 2017 injury to his toes. (ICERS Database, Kevin Finch; Observations.)

22) On October 7, 2020, Employee said in his deposition he retired on March 10, 2018. He said he has not been able to ride his motorcycle since 2014 due to the work injury, and other hobbies such as riding snow machines and four wheelers have been put on hold. He said, "I can't run. That's one of the reasons I retired, is because I screwed my foot up at the prison, I had to have surgery on that. I can walk a lot better than I used to, but I haven't been able to run." Employee could not remember if he was prescribed any medication between 2014 and 2016 for pain caused by the work injury. He said traction stopped working in 2016, and he believed the pain "started acting up a little more than what it had been from the prior year or two" and, besides an occasional "Jack and Coke," he tolerated it. Employee said before his injury he attempted to average 24 to 36 hours overtime on his weeks off because it affected his retirement. His normal schedule was working Thursday to Thursday; 84 hours; 12 hour shifts. Then he would have the next Thursday until Thursday off and during those weeks off, he worked 24 to 36 hours overtime. After his 2012 injury, he "dropped it down to 6 to 18, mainly because I was hurting. . . ." After the 2012 injury, he cut his overtime hours because he was "trying to let things heal up." Despite his pain and because he was a supervisor, after the 2012 injury he continued to work six to 18 overtime hours on his off weeks so his staff members would not need to travel from Anchorage to work six hours overtime. In 2017, his foot injury "acted up" and he reduced his overtime to only six hours a week. Employee did not turn down much overtime until after his injury. He said everybody knew if he was not taking overtime something was wrong. After the injury, when Employee was not taking overtime, he said he other rotation sergeants asked, "Kevin, what's going on?" He reportedly told them, "I'm hurting this week, I can't come in." Employee did not think he ever told his supervisor he could not take overtime because of his work injury. He contended had he told his supervisor in he was declining overtime due to his work injury, it would have done no good because it would then have been mandatory overtime. Employee said there was an unwritten policy that shift supervisors followed:

> The shift supervisors knew if they would call me, I would be saying, 'Hey, could I work Post 2 or Post 3?' We did that to accommodate staff with everything from knee replacement or other surgeries that were going on. All we had to do was tell them. Even me. If I called somebody up for overtime and they said, Hey, I got this issue, I would work whatever I could because that is a body that I need. I could put him on Post 2 or 3, control room. Post 9. It didn't matter as long as I could get that body [to] come in. I would customize putting that staff where I needed them.

He said this practice would never be put in writing. Employee testified once administration heard somebody was hurt, the employee would automatically be put on a 40-hour work week. What that meant for Employee was instead of getting a week off, he would be working every week, Monday through Friday, and only get weekends off. Employee admitted he never applied for any sort of temporary total disability for missing overtime or asked for workers' compensation benefits for missed wages due to the injury. He said he did not know he could. Employee testified he planned on working 30 years for Employer but between his foot injury and his 2012 injury, "it was an eye-opener." He said, "Well, when you can't run for your staff, and I know how long a foot surgery takes to recover, I had no choice. The best way we call it is tap out." (Deposition, Kevin Finch, October 7, 2020.)

23) On May 10, 2021, Employer filed its petition to dismiss Employee's claim for TTD benefits. (Petition, May 10, 2021.)

24) On July 15, 2021, at the first prehearing conference held after Employee's October 7, 2020 deposition, Employer objected to Employee's failure to timely file his claim; both parties confirm Employer's petition was discussed. Although not summarized in the prehearing conference summary's discussions, both parties' briefs addressed Employer's position. Employee asserts Employer clarified its petition was to dismiss only his claim for past TTD benefits prior to September 20, 2017, two years before September 20, 2019, the date his claim was filed. Employer's brief clarifies its position; it acknowledges new medical treatment may "restart" the statute of limitations but contends because Employee's treatment in 2018 occurred after he retired, it cannot revive his expired TTD claim. It contends, however, if the "new medical treatment" theory restarts the statute of limitations, Employee's disability claim can only be calculated from June 18, 2018 forward. (Prehearing Conference Summary July 15, 2021; Employee's Hearing Brief, September 2, 2021; Employer's Hearing Brief, September 1, 2021.)

25)

26) On August 10, 2021, the parties stipulated to a second independent medical evaluation (SIME). (Amended Second Independent Medical Evaluation (SIME) Form, August 10, 2021.)

27) Work-related injuries are commonplace for Alaska's Department of Corrections' employees and many involve periods of disability for which injured workers are entitled to benefits, including TTD and temporary partial disability (TPD) benefits. (Experience, observations, judgment.)

28) Report of Occupational Injury of Illness forms contain information regarding disability benefits on page two. Additionally, the form mentions how to access "Workers' Compensation and You." (Experience, observations.)

29) Employee claims $8,874.95 in attorney and paralegal costs for services rendered through September 3, 2021, to provide him a defense to Employer's petition to dismiss. He claims $8.05 in other costs. (Affidavit of Attorney Fees and Costs, Andrew Wilson, September 3, 2021.)

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 so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
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> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
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> . . . .
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> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-534 (Alaska 1987).

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

> the employment and after disablement. However, . . . if payment of compensation has been made without an award on account of the injury . . . a claim may be filed within two years after the date of the last payment of benefits under AS 23.30.041, 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215. It is additionally provided that, in the case of latent defects pertinent to and causing compensable disability, the injured employee has full right to claim as shall be determined by the board, time limitations notwithstanding.
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> (b) Failure to file a claim within the period prescribed in (a) of this section is not a bar to compensation unless objection to the failure is made at the first hearing of the claim in which all parties in interest are given reasonable notice and opportunity to be heard. . . .

The statute of limitations under AS 23.30.105(a) is an affirmative defense which must be raised in response to a claim. *Horton v. Nome Native Community Ent.,* AWCB Decision No. 94-0139 (June 16, 1994). The employer bears the burden to provide the time-bar affirmative defense. *Egemo v. Egemo Construction Co*., 998 P. 2d 434, 438 (Alaska 2000). *Egemo* further held AS 23.30.105 intends "that two years after disablement is the latest an employee would be allowed to file," to protect the employer "against claims too old to be successfully investigated and defended." *Id*. However, an employee must have "actual or chargeable knowledge of his disability and its relation to his employment" to start the two-year period under AS 23.30.105(a) running. *Collins v. Arctic Builders, Inc.,* 31 P.3d 1286, 1290 (Alaska 2001).

The two-year limit in AS 23.30.105(a) for filing a disability claim commences from the time of the injury, the time of disablement, or the time of manifestation of latent defects, whichever comes last. The limitations statute begins to run only when the injured worker (1) knows of the disability, (2) knows of its relationship to the employment, and (3) is actually disabled, which is defined as "incapacity because of injury to earn the wages the employee was earning at the time of injury in the same or any other employment." *Egemo* at 441. A claim is not "ripe," requiring filing under AS 23.30.105(a) until the work injury causes wage loss. *Id.* at 438-439. When an employee knew of his disability is a factual question reviewed under the substantial evidence standard. *Id.* Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Alaska Housing Authority v. Sullivan*, 518 P.2d 759, 760-761 (Alaska 1964).

The purpose of AS 23.30.105(a) is to protect the employer against claims too old to be successfully investigated and defended. In *Morrison-Knudsen Company v. Vereen*, 414 P.2d 536, 538, the employee was a 25-year-old-laborer with little education or medical knowledge. He was injured on July 14, 1960, and treated with Dr. Haggland who, on October 15, 1960, released him for work. Subsequent to his discharge, the employee experienced further back difficulty in January 1961, which resulted in hospitalization and treatment by Dr. Serena. It was not until Dr. Serena made his report on June 22, 1961, that the employee learned his then disabling back trouble was attributable to the July 14, 1960 injury. Employee timely complied with AS 23.30.105(a) on two separate grounds:

> First, on the basis of several letters which had been introduced into evidence before the Board, the superior court determined that claimant had filed a claim for compensation within two years of the date of the employer's last payment of compensation to claimant. (Note: The evidence is undisputed that claimant sustained an accidental injury on July 14, 1960, and that subsequent thereto his employer voluntarily paid compensation until October 15, 1960.) Secondly, the superior court further concluded that claimant had filed a claim for compensation within two years after the first acquired 'knowledge of the nature of his disability and its relation to his employment.'

Id. at 538. As noted by *Morrison-Knudsen*:

> Failure to file a claim for compensation within the statutory period cannot be excused by an argument that the employer was not harmed by the lateness of filing. Like any statute of limitation, this one carries a conclusive presumption that the defendant is prejudiced by reason of the enhanced difficulty of preparing a defense.

Id. note 3 quoting A. Larson, *The Law of Workers' Compensation*, §78.26 at 251 (1964).

> The time period for notice of claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of his injury or disease.

7 Arthur Larson & Lex Larson, *Larson's Worker's Compensation Law* §126.05[1] at 126-18 (2007).

If a claimant does not know, and in the exercise of reasonable diligence, given his education, intelligence and experience, would not have come to know, the nature of his disability and its

relation to his employment, AS 23.30.105(a)'s two-year limitations statute does not begin to run. *W.R. Grasle Co. v. Alaska Workmen's Compensation Board*, 517 P.2d 999, 1002 (Alaska 1974).

> **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.
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> **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. . . .
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> **AS 23.30.145. Attorney fees**.
> . . . .
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> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee.
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> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;
> . . . .

Cortay v. Silver Bay Logging, 787 P.2d 103 (Alaska 1990), held disability depends upon a claimant's earning capacity; the concept of disability compensation rests on the premise the primary consideration is not medical impairment but rather loss of earning capacity related to it.

If a claimant voluntarily removes himself from the labor market, he can be disqualified from indemnity benefits. *Humphrey v. Lowe's Home Improvement Warehouse, Inc.*, 337 P.3d 1174 (Alaska 214). Withdrawal from the labor market via retirement need not be "purely personal" to

be voluntary, but neither does it bar compensation when the claimant's work injury is the substantial cause of claimant's disability that results in retirement. *Strong v. Chugach Electric Association, Inc.*, AWCAC Decision No. 128 (February 12, 2010).

ANALYSIS

1) Should Employer's petition to dismiss Employee's claim for disability benefits be granted?

"Disability" is incapacity to earn the wages in the same or any other employment an employee was receiving when injured. AS 23.30.395(16); *Cortay*. Only the "right to compensation for disability" is expressly barred under AS 23.30.105. Therefore, under the statute's plain language, only Employee's claim, if any, for disability compensation may be barred.

Employee's right to compensation for disability is barred unless his claim was filed within two years after he had knowledge of the nature of his disability and its relation to his employment after disablement. AS 23.30.105(a). Employer has the burden to prove Employee failed to file his claim timely. *Egemo*.

Before the defense can be considered, it must be raised and all parties given an opportunity to respond at the first hearing on Employee's claim. AS 23.30.105(b). This requirement is met. Upon taking Employee's deposition, Employer learned he was asserting his TTD benefits claim not only for disability after his appointment with Dr. Andreshak, but also for TTD from the time of his retirement on March 10, 2018, and for disability benefits related to Employee's reduction in overtime hours immediately after his 2012 injury and continuing until he retired. Employer filed its petition to dismiss on May 10, 2021. The September 9, 2021 hearing was the first in Employee's case and the only hearing at which both parties were given an opportunity to be heard. AS 23.30.105(b); *Horton*. Once this first hurdle is passed, several additional questions must be answered to determine if Employer has produced substantial evidence to prove its defense.

The next question is whether a claim was filed within two years of the last compensation payment within AS 23.30.105(a)'s meaning. Employee was injured on March 19, 2012, while working for Employer. Employer paid medical benefits until it controverted on December 19, 2018. However,

while employed by Employer, Employee's work injury did not restrict him from work because his medical providers released him to work with no limitations. The parties agree Employer has never paid him disability compensation. Therefore, the question becomes whether Employee filed his claim within two years after he had knowledge of "the nature of his disability" and its r"elation to the employment." AS 23.30.105(a). This is a question of fact. Employee's education, intelligence and experience must be considered when deciding when he knew or should have known his disability's nature and its relation to his employment. *W.R. Grasle Co.*

Employee worked for Employer for 24 years and nearly seven months before he retired. Prior to his March 19, 2012 injury, Employee worked 24 to 36 overtime hours on his "week off." He did not turn down overtime until after his injury. Following his injury and because he was hurting, Employee reduced his week off overtime to between six and 18 hours. When injured, Employee earned $41.95 per hour. Time and a half would have been $62.93 per hour. Considering only the overtime hours Employee worked on his "weeks off" prior to his injury, he would have earned, in addition to his wages for the normal 84-hour work week, an additional $1,510.32 to $2,265.46 on each pay check. After his injury, and working six to 18 hours overtime on his "weeks off," compensation for overtime hours was reduced to between $373.80 and $1,132.74 each pay period. Prior to his injury, Employee accepted considerable overtime because it enhanced his retirement. Employee recognized the "nature of his disability" and its relationship to his job in 2012 when he reduced his overtime hours. He had knowledge working significant overtime hours as he had done prior to March 19, 2012 caused pain related to his work injury, including numbness running down his arms into his fingers. When asked if he ever applied for disability benefits for missing overtime or if he ever asked for workers' compensation benefits for missed wages due to the injury, Employee testified he did not know he could. He is not credible. AS 23.30.122. Employee worked for Employer for close to 25 years and for a significant period was a shift commander responsible for staff members. Work injuries are commonplace for employees working for Employer and many involve disability for which injured workers are entitled to indemnity benefits, including TTD and TPD benefits. *Rogers & Babler*. Employee did not ask for time loss benefits because he did not want to lose the opportunity to work a week on and have a week off during which he could continue to work between six to 18 hours overtime each pay period during his "week off."

Employee supervised corrections officers for Employer as a house sergeant and on-scene commander. He is intelligent and experienced. *W.R. Grasle Co.* He remains well versed in Employer's policies and protocols, both formal and unwritten. In fact, he shared once administration learned an employee was hurt, the employee was automatically put on a 40-hour work week. Instead of getting a week off, they are required to work every week, Monday through Friday, and only got weekends off with no opportunity to work overtime. As a shift supervisor, Employee placed employees on the overtime schedule so that they would not have to admit they were "hurt" and lose their week on, week off schedule and the opportunity to work overtime. In other words, he would "customize" putting staff where he needed them.

Employee currently runs his own business and home schools his grandson. He has the education, intelligence and experience to read and complete injury reports all of which contain information regarding entitlement to indemnity benefits; he reported seven injuries during his career with Employer. *Rogers & Babler*; *W.R. Grasle Co.*

Taking into account his education, intelligence and experience, Employee knew the nature of his disability, knew his inability to work the same overtime hours he worked prior to his injury was related to his March 19, 2012 work injury and knew his earning capacity was diminished in 2012. *W.R. Grasle Co.* He reduced his overtime hours post-injury because he "was trying to let things heal up." AS 23.30.105(a)'s two-year limitation began to run in 2012. *Collins*. Nevertheless, he did not file his claim until September 20, 2019, after he retired and more than seven years after he knew his work injury was causing incapacity to earn the wages he was receiving at the time of his injury. AS 23.30.105(a).

The two-year limitation is to protect employers from old claims they will not have a reasonable or timely opportunity to investigate or defend against. *Morrison-Knudsen*. By the time a stale indemnity claim is litigated, employers may have lost evidence necessary to disprove the claim, which could include witnesses whose memories have faded and witnesses who are no longer available. *Rogers & Babler*. Failure to file a claim within two years from the time Employee knew or should have known the nature of his disability and its relation to his employment carries a conclusive presumption Employer was prejudiced by the filing delay. *Larson*. Employee has

received benefits in at least three of his seven claims. When asked if he had previously received workers' compensation benefits, his interrogatory response, "No," lacks truth and candor and is not credible. AS 23.30.122. Giving Employee the benefit of the doubt, if his inaccurate response was because his memory faded, this highlights AS 23.30.105(a)'s purpose and importance.

Employee commenced medical care two months after his injury 2012 injury. No provider restricted him from performing his corrections officer sergeant duties. He submitted his retirement notice on February 12, 2018; his last day of work was to be February 28, 2018. His notice provided no indication he was retiring because his work injuries rendered him unable to perform his job duties. He worked until March 10, 2018. Yet, Employer still had no notice Employee may be entitled to disability compensation or that is should initiate an investigation. After receiving Employee's 2019 claim, Employer initiated its investigation and took Employee's deposition on October 7, 2020. It was not until then that Employer learned Employee retired because he could not "run for his staff" and between his foot injury and his 2012 injury he "had no choice" but to retire.

Employer has never paid disability compensation to Employee for his 2012 work injury. It was not aware of or able to investigate Employee's potential claim for indemnity benefits until he filed his September 20, 2019 claim for TTD benefits for his March 19, 2012 injury. *Morrison-Knudsen*. Employer is prejudiced by its inability to investigate Employee's claim and the difficulty of preparing its defense is enhanced because the claim was filed late. *Id*.

Employer has established with substantial evidence its defense Employee failed to timely file his claim for disability compensation within two years of the date he knew the nature of his disability and its relation of his employment. *Egemo*; *Sullivan*. Employer's petition will be granted in part. Employee's claim for disability compensation, whether it be TTD, TPD or PTD, shall be dismissed under AS 23.30.105(a) from the time he first reduced his overtime hours in 2012 until his appointment with Dr. Andreshak on October 15, 2018. AS 23.30.105(a).

The July 15, 2021 prehearing conference summary did not summarize or even mention the parties' discussions regarding Employer's petition to dismiss. Both parties acknowledged the discussion

occurred and covered their respective understandings of Employer's position in their briefs. Employee believes Employer clarified its petition and was only seeking dismissal of Employee's claim for past TTD before two years from his September 20, 2019 claim. Employer is seeking dismissal of Employee's claim for disability compensation in its entirety. However, it acknowledges new medical treatment may "restart" the statute of limitations but contends because Employee's treatment in 2018 occurred after he retired, a new treatment recommendation cannot revive his expired TTD claim. It contends, however, if the "new medical treatment" theory restarts the statute of limitations, Employee's disability can only be calculated from June 18, 2018 forward.

New medical treatment recommendations may restart the AS 23.30.105(a) statute of limitations for indemnity benefits. *Egemo*. However, a claimant's voluntary removal from the labor market can also bar a claim for indemnity benefits. *Humphrey*; *Strong.*

Employer's petition to dismiss Employee's claim for disability benefits is denied in part without prejudice. This decision shall not make a determination on whether Dr. Andreshak's new treatment recommendation reignites the AS 23.30.105(a) limitations period, nor shall it decide if Employee voluntarily removed himself from the labor market. Jurisdiction shall be maintained over these issues to avoid denial of due process since the prehearing conference summary did not clearly articulate the issue as clarified by Employer at the prehearing conference. AS 23.30.001; AS 23.30.135.

2) Is Employee entitled to attorney fees and costs?

Employee seeks an attorney fee and costs award. Employee failed in his defense against Employer's petition to dismiss under AS 23.30.105(a) and has obtained no benefits. Consequently, no attorney fees and costs will be awarded. AS 23.30.145(b).

CONCLUSIONS OF LAW

1) Employer's petition to dismiss Employee's claim for disability benefits should be granted in part and denied in part.
2) Employee's is not entitled to attorney fees or costs.

ORDER

1) Employer's petition to dismiss is granted, in part. Employee's claim for disability benefits from March 19, 2012, until October 15, 2018, is dismissed.

2) Employer's petition to dismiss Employee's claim for disability benefits from October 15, 2018 and continuing is denied without prejudice.

3) Employee's claim for attorney fees and costs is denied.

4) A SIME shall take place. Employer's petition to dismiss Employee's claim for disability benefits from October 15, 2018 and continuing shall be scheduled for hearing after the SIME report is received.

Dated in Anchorage, Alaska on September 17, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Janel Wright, Designated Chair

/s/
Robert Weel, Member

/s/
Bronson Frye, 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 KEVIN FINCH, employee / claimant v. STATE OF ALASKA, self-insured employer / defendant; Case No. 201204381; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on September 17, 2021.

/s/
Nenita Farmer, Office Assistant