ALASKA WORKERS' COMPENSATION BOARD

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

ELIZAR QUIMIGING, Employee, Claimant, v. OCEAN BEAUTY SEAFOODS, INC., Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	FINAL DECISION AND ORDER ON RECONSIDERATION & MODIFICATION AWCB Case No. 201711244 AWCB Decision No. 21-0093 Filed with AWCB Juneau, Alaska on September 30, 2021

Ocean Beauty Seafoods, Inc. and Liberty Insurance Corporation's (Employer) July 9, 2021 motion for reconsideration and modification and September 1, 2021 petition to strike was heard on September 7, 2021, in Juneau, Alaska, a date selected on August 9, 2021. An order in *Elizar Quimiging v. Ocean Beauty Seafoods, Inc.*, AWCB Decision No. 20-0066 (July 23, 2021) (*Quimiging II*) gave rise to this hearing. Attorney Elliot Dennis represented Elizar Quimiging (Employee). Attorney Rebecca Holdiman Miller represented Employer. Tagalog interpreter "Jovy" translated for Employee. All participants appeared telephonically. There were no witnesses. The record closed at the hearing's conclusion on September 7, 2021.

ISSUES

Employer contends Employee's evidence should be stricken because it was untimely filed and he provided no reason for failing to file the evidence timely.

Employee contends the evidence is relevant to Employer's petition for reconsideration and modification.

1) Should Employer's petition to strike Employee's evidence be granted?

Employee requests the record be reopened to receive documents from Madelaine Aquino, M.D., regarding her qualifications to provide pain management treatment. He contends the documents are relevant to the petitions.

Employer contends the documents are unnecessary or irrelevant. It also contends the records cannot be considered because they address medical stability and were untimely submitted.

2) Should Employee's request to reopen the record and consider statements from Dr. Aquino be granted?

Employer contends *Elizar Quimiging v. Ocean Beauty Seafoods, Inc.*, AWCB Decision No. 21-0054 (June 25, 2021) (*Quimiging I*) incorrectly analyzed the January 2019 stipulation language regarding nurse case management services, which will lead to abuse of *ex parte* contacts with medical providers. It contends the decision allows Employer to locate and push medical treatment by using a nurse case manager (NCM) in a litigated case, creates a duty for an employer to find medical providers and fails to place boundaries on the NCM.

Employer contends *Quimiging I* incorrectly analyzed the medical stability definition, which will lead to unrestricted continuing pain care without improvement. It contends finding an employee is not medically stable if pain management increases function when there is no improvement in the physical condition is contrary to statute and case law. Employer contends such a finding will have widespread impact because an employee could be entitled to benefits for years if a decrease in pain allowed better function or made the employee more willing to use an injured limb.

Employer contends interest, a second surgeon, work-hardening and permanent partial impairment (PPI) rating, an unfair and frivolous controversion and a referral to the Division of Insurance were not an issue for hearing. Alternatively, it contends its reliance on Jason Gray,

M.D., deposition testimony did not constitute a bad faith controversion and it never denied a NCM when requested by Employee.

Employer contends *Quimiging I* erred by ignoring relevant evidence it presented, such as Employer's timeline of events, its preauthorization of medical care, Employee's seven month delay in requesting assistance in finding pain management in California, and its ongoing use of a NCM.

Employer contends *Quimiging I* erred by ordering temporary total disability (TTD) benefits rather than the difference between reemployment stipend benefits.

Employee did not address this contention but agrees he did not seek a second surgical opinion and does not oppose reconsideration of *Quimiging I* on that basis. He contends *Quimiging I* properly decided the other issues Employer raised, above, and opposes reconsideration or modification.

Employer contends *Quimiging I* erred by failing to order treatment in Alaska only if Employee could not get an appointment with Dr. Aquino in California. It contends *Quimiging I* relied on evidence not in the record by citing Employee's counsel statements as evidence and failed to support its finding of inadequate California medical care.

Employee contends *Quimiging I* properly ordered treatment in Alaska. However, he agrees to find Dr. Aquino qualified to provide pain management because he accepted her as his pain management physician in California. Employee also contends modification of the order to consider the possibly of medical treatment in California is appropriate but treatment in Alaska should be ordered if treatment is difficult to find or unavailable in California.

3) **Should *Quimiging I* be reconsidered or modified**?

FINDINGS OF FACT

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

1) On August 3, 2017, Employee's left hand was caught in a drum winch while working for Employer. Ted Schwarting, M.D., provided medical treatment. (*Quimiging I*).

2) On September 7, 2017, Dr. Schwarting removed pins from Employee's left hand. (*Id.*).

3) On September 22, 2017, Employee said he was about to travel to the Philippines for a vacation, which he takes annually. Michael Lin, M.D., recommended occupational therapy for aggressive range of motion exercises for Employee's fingers. He advised Employee to defer travel to the Philippines to concentrate on rehabilitating his hand; if he did not, his hand would be permanently stiff and minimally functional. Dr. Lin showed Employee how to perform passive assisted range of motion exercises. (*Id.*).

4) On January 2, 2018, Dr. Lin stated Employee had been noncompliant with treatment as he declined aggressive therapy and went to the Philippines. He ordered occupational therapy for aggressive motion exercises and predicted Employee would be "permanent and stationary" in two months and will have significant permanent impairment due to finger stiffness. (*Id.*).

5) On May 9, 2018, Ralph Purcell, M.D., an orthopedic surgeon, examined Employee for an Employer's Medical Evaluation (EME) and diagnosed several finger and hand injuries. He opined the work injury was the only cause of Employee's present disability and need for medical treatment. Dr. Purcell recommended manipulation under anesthesia of the involved left hand joints, and possible surgeries. Employee had dramatically sub-optimal treatment and would potentially benefit from occupational therapy post-operatively. Dr. Purcell stated Employee was not medically stable if he had further surgical treatment. He opined Employee did not have the physical ability to return to full-duty work in the job held at the time of injury and restricted him from lifting more than 10 pounds with his right hand only. (*Id.*).

6) On November 28, 2018, an oral hearing was scheduled on Employee's pending claim for January 8, 2019. (*Id.*).

7) On January 8, 2019, a stipulation cancelling the January 8, 2019 hearing was approved, stating:

> The employer agrees to pay sixty-eight (68) weeks of past temporary total disability (TTD) benefits at the rate of $285.58, for a total sum of $19,419.00. The employer further agrees to payment of ongoing TTD benefits at the weekly rate of $285.58 until the employee is medically stable.

> The employer agrees to pay reasonable and necessary future medical and transportation benefits to include the employment of a nurse case manager who will work with the employee and his attorney in an effort to locate a hand surgeon and occupational therapist for the purpose of providing the employee with rehabilitative treatment of the employee's injured left hand. (*Id.*).

8) On January 17, 2019, a partial compromise and release (C&R) was approved. It stated:

> The parties have reached a stipulation with respect to the employee's September 18, 2018, workers' compensation claim for benefits. The terms of the parties' Stipulation which has been approved by the board, are incorporated herein by reference and that Stipulation survives this agreement. Going forward, the employer agrees to pay reasonable and necessary future medical and transportation benefits to include the employment of a nurse case manager who will work with the employee and his attorney in an effort to locate a hand surgeon and occupational therapist for the purpose of providing the employee with rehabilitative treatment for the employee's injured left hand.
>
> To resolve interim disputes among the parties with respect to temporary total disability, penalties, interest, and claims for unfair or frivolous controversion, the employer will pay the employee the sum of $19,419.00 for 68 weeks of past temporary total disability benefits at a weekly rate of $285.58. The employer will continue TTD benefits at the weekly rate of $285.58 until the employee's condition reaches medical stability. Except as provided herein, the employee agrees to accept this amount in full and final settlement and discharge of all obligations, payments, benefits, and compensation which might be presently due under the Alaska Workers' Compensation Act.
>
> The parties agree that the employee's entitlement, to future medical and related transportation benefits under the Alaska Workers' Compensation Act is not waived by the terms of this Agreement and that the right of the employer to contest liability for medical and related transportation benefits is also not waived by the terms of this Agreement. (*Id*.).

9) On July 26, 2019, the reemployment benefit administrator (RBA) designee found Employee eligible for reemployment benefits. (*Id.*).

10) On August 2, 2019, Employer requested review of the RBA-designee's decision. (*Id.*).

11) From April 8, 2019 through August 15, 2019, Employee underwent occupational therapy at St. Joseph's Medical Center. (*Id.*).

12) On August 27, 2019, an October 22, 2019 oral hearing was scheduled on Employer's August 2, 2019 petition. (*Id.*).

13) On October 21, 2019, a stipulation cancelling the October 22, 2019 hearing and withdrawing Employer's August 2, 2019 petition was approved. Employer agreed to pay travel costs and per diem for Employee to travel to Anchorage for Employee to obtain a second opinion regarding additional treatment, and to meet with Loretta Cortis for plan development and with his attorney, and to attend his deposition. It would pay for an independent interpreter for all appointments and provide transportation to his appointments with a transport provider with the ability to accommodate Employee's language barriers. (*Id.*).

14) On January 14, 2020, Employee stated he was unable to make many hand therapy visits in California and then traveled to the Philippines between November and December 2017 to care for his family member. He did home therapy and range of motion exercises while in the Philippines. Employee reported no significant improvement in range of motion and function, and progressively worsening pain. He did not use his left hand for any activity. Dr. Gray observed skin contracture with loss of flexion and extension creases to Employee's ring long and small finger, especially over the proximal interphalangeal joints; thumb and index finger full range of motion; slight red shiny discoloration of the affected digits; cold and clammy forearm and hand skin; and hypersensitivity. Employee was unable to actively extend all fingers. Dr. Gray diagnosed chronic regional pain syndrome (CRPS) and prescribed gabapentin and occupational hand therapy specializing in CRPS. He advised against surgical intervention as Employee was at risk of worsening symptoms due to CRPS. Dr. Gray believed Employee has capacity for "improved sensory disturbances as well as range of motion of the affected digits" with intensive therapy for several months to a year but he would never regain full functional status and motion. He prescribed hand and wrist therapy three times per week for six months. (*Id.*).

15) On January 30, 2020, Dennis asked Holdiman-Miller to ask the adjuster to contact Genex, the company which provided a NCM, and ensure one was assigned to help him commence treatment recommended by Dr. Gray. (*Id.*).

16) On January 31, 2020, Dennis wrote to Genex asking for another Tagalog speaking NCM to be assigned. The then-current NCM's last day was the next day and Employee needed language assistance in arranging treatment to complete Dr. Gray's treatment plan. (*Id.*).

17) On February 13, 2020, Dennis emailed Holdiman-Miller asking her to arrange for a NCM to assist with Employee's treatment as agreed to in the stipulation. (*Id.*).

18) On March 3, 2020, Dennis again wrote a letter to Holdiman-Miller and asked for a response to the request for a NCM. (*Id.*).

19) On March 18, 2020, SharonaHlavinka emailed Millie Tuccillo, a NCM from Essential Medical Management, LLC, and asked if she would be willing to take on Employee's case. (*Id.*).

20) On April 6, 2020, Cortis stated a reemployment plan could not be developed due to COVID-19. Employee spoke Tagalog, did not speak English and had a sixth grade education; he required remedial schooling to learn English and become employable. The Stockton School for Adults was selected but was unable to test Employee as it was closed due to COVID-19. (*Id.*).

21) On July 12, 2020, Tuccillo was not available for the July 14, 2021 appointment with Dr. Gray. (*Id.*).

22) On July 14, 2020, Dr. Gray saw Employee by Telemedicine with a Tagalog translator. His findings and diagnoses were similar to those he found on January 14, 2020. Dr. Gray suggested amputation at or below the level of the traumatic injuries to potentially eliminate the pain source. He referred Employee to a pain management specialist for neuropathic pain medications or specific or regional nerve blocks. Dr. Gray asked Dennis to assist Employee with finding a pain management specialist near his home. (*Id.*).

23) On July 20, 2020, Dennis wrote to Michael Ali, M.D., at Trinity Occupational Health asking him to review attached medical records and assist Employee with obtaining Dr. Gray's recommended pain management treatment. (*Id.*).

24) On July 21, 2020, Dr. Gray again referred Employee for pain management due to his limited range of motion and CRPS. (*Id.*).

25) From February 19, 2020 through August 31, 2020, Employee completed occupational therapy at St. Joseph's Medical Center. (*Id.*).

26) On September 2, 2020, Dennis wrote to "Co Occupational Medical Partners" asking it to review attached medical records and assist Employee with obtaining Dr. Gray's recommended pain management treatment. (*Id.*).

27) On January 8, 2021, Employee sought permanent total disability (PTD) benefits, medical and transportation costs, interest and attorney's fees and costs. (*Id.*).

28) On January 29, 2021, Employer denied PTD benefits; medical costs which are not reasonable, necessary, related to the work injury, not performed in accordance with a treatment

plan or do not comply with the usual or customary fee scheduled; transportation expenses for treatment which is not reasonable, necessary or related to the work injury or supported by proper documentation; and attorney fees and costs. It contended PTD benefits should be assessed following completion of the reemployment plan process, which had stalled due to COVID-19. (Controversion Notice, January 29, 2021; Answer, January 29, 2021).

29) On February 4, 2021, Dr. Gray explained why he diagnosed Employee with CRPS. (Gray Deposition at 6). He referred Employee to pain management in July 2020, because he was struggling to improve with occupational therapy. (*Id*. at 6-7). Dr. Gray would prefer Employee receive pain management near his home in California over traveling to Alaska as it will ensure better compliance and travel is complex as he needs a translator. (*Id*. at 9 and 41). He expected regional and local nerve blocks to be considered by the pain specialist. (*Id*.). Employee needed multi-modal treatment, involving pain management, to help him accelerate and improve his progress with therapy. (*Id*. at 13). Dr. Gray did not see any substantial change in Employee's range of motion in July 2020 during the telemedicine appointment. (*Id*. at 20). Manipulation under anesthesia is a treatment option but after two and a half years of significant stiffness, there is low probability of substantial improvement. (*Id*. at 21). Employee's three fingers are basically nonfunctional; he avoids letting things touch them and cannot use them due to hypersensitivity, which causes significant pain. (*Id*. at 37-38). If Employee sees a pain management specialist and makes no improvement, then he probably stabilized a year to a year and a half ago. (*Id*. at 42-43). Dr. Gray did not know if Employee was going to improve and he was probably medically stable in the past, but he should be provided an opportunity for additional treatment. (*Id*. at 43). Employee's function may improve with pain management because it may eliminate the pain causing him to avoid use of the hand. (*Id*.). Dr. Gray explained Employee "may become unstable" as he may improve with other treatment modalities. (*Id*. at 44). He became medically stable on January 14, 2020, which did not make any sense to Dr. Gray because he is "not medically stable by definition if there is capacity for instability." (*Id*.). There will not be any improvement until a pain management specialist provides treatment. (*Id*. at 45). Employee has the potential to be gainfully employed as a janitor with one functioning single upper extremity and his left thumb and index finger and he recommended a PPI and work-hardening evaluation to assess his functional capacity to answer whether he could return to work as a janitor. (*Id*. at 26-27). After the work-hardening program, Dr. Gray would

be willing to review the job titles and specific tasks and opine if Employee has the physical capacity to perform the job titles. (*Id*. at 46). He typically sends patients to Eric Olson, M.D., and Shawn Johnston, M.D., for pain management evaluation, treatment and impairment ratings. (*Id*. at 42).

30) On February 24, 2021, Employer requested modification of the RBA-designee eligibility determination based upon Dr. Gray's deposition testimony that Employee could return to work as a janitor, a position held by Employee within 10 years of the injury. (*Quimiging I*).

31) On February 24, 2021, Employer denied TTD, PTD and reemployment benefits, contending Employee was not entitled to TTD benefits because Dr. Gray stated he reached medical stability and he is not entitled to reemployment and PTD benefits as Dr. Gray stated he would be able to return to work as a janitor. (Controversion Notice, February 24, 2021).

32) On March 1, 2021, Employee requested an order enforcing the stipulation and C&R:

> Employer has violated a Board approved Stipulation and C&R terms for requiring payment of reasonable medical and transportation expenses including employment of a nurse case manager to work with employee and his counsel to find a hand surgeon and patient therapist so employee could obtain rehabilitative treatment for his severely injured left hand. (Petition, March 1, 2021).

33) On March 1, 2021, Employee requested informal discovery, including:

> 1) A complete copy of the payment ledger . . . showing all payments made, except for legal fees, from the beginning of the case.
> 2) All adjuster notes from the beginning of the case to the present.
> 3) All nurse case management notes, including emails, which have been obtained in this case from any source.
> 4) Copies of all written communication, including letters, memorandum, emails, between the adjuster and the assigned nurse case manager and her employer, Genex.
> 5) Copies of all correspondence between the claims manager and adjuster in this file and the employee's employer.
> . . . . (*Quimiging I*).

34) On March 8, 2021, Holdiman-Miller emailed Dennis:

> My office called ASI and learned how we get him in for a PPl rating and pain management per Dr. Gray. Attached is a letter to send if you agree. My client agrees to ASI and will pay for the travel I assume is needed for the rating appt.

> Let me know if you are ok with the letter and we will get the apt made. Thank you. (Email, March 8, 2021).

35) On March 9, 2021, Holdiman-Miller emailed Deb Hanson, RN, CCM and stated:

> Also, I received authority yesterday to use you on a Liberty file I have with Dennis Elliott. Quimiging is the case name. He resides in California but is coming to AK for pain management and a PPI rating under the direction of Dr. Gray. We need someone to attend the apt at ASI (not yet scheduled) and then help find a place in California where the recommended course of pain management can continue per Dr. Johnston or Olsen's direction. Would you be interested? (Email, March 9, 2021).

36) In an undated email, Ms. Hanson replied to Employer's attorney:

> . . . .
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> As for the new file, I could certainly assist with that. I will be out of town 4/1-4/11/21. Just let me know when you are ready to move forward. Thanks. (Undated email).

37) On March 16, 2021, Employee requested orders directing Employer to continue to provide benefits as stipulated, awarding penalties for its late payments and "imposing penalties on [E]mployer for bad faith wrongful termination of benefits without obtaining an order." (Petition, May 16, 2021). His accompanying memorandum requested orders:

> 1) compelling employer to resume paying TTD and catch up on past unpaid TTD;
> 2) compelling employer to pay the transportation costs and medical expenses related to transporting [Employee] to Alaska for an evaluation by a pain specialist, Dr. Erik Olson, for diagnostic and treatment purposes and possibly a PPI rating;
> 3) imposing penalties on employer for late payment of benefits; and
> 4) imposing penalties on employer for bad faith wrongful termination of benefits without obtaining an order from this Board. (Memoranda, May 16, 2021).

38) On March 21, 2021, Employer opposed Employee's petitions contending it was in legal compliance with the parties' stipulation. It contended the NCM ceased work after treatment at St. Joseph's Medical Center commenced. Employer contended Dennis failed to find a pain management specialist after Dr. Gray requested he assist Employee. It contended it was following the approved stipulation's terms when it stopped paying TTD benefits and ceased NCM services. Employer contended there was no current dispute regarding Employee's medical

stability. It contended it is not reasonable or necessary for Employee to frequently travel to Alaska for medical treatment. Employer contended no penalties were due because Employee was not entitled to TTD benefits after medical stability, and stopping TTD benefits after medical stability pursuant to the stipulation cannot be considered bad faith. It also contended there is no provision in the Act authorizing penalties for bad faith conduct. Employer requested an order denying continuing TTD benefits, penalties and medical and transportation benefits. (Opposition to Employee's Petition to Enforce Stipulation, March 21, 2021).

39) On March 24, 2021, Employer reported it stopped paying TTD benefits on February 23, 2021, and began paying AS 23.30.041(k) benefits on February 24, 2021, at the weekly rate of $249.88. (*Quimiging I*).

40) On March 25, 2021, Holdiman-Miller emailed Dennis a proposed stipulation including provisions for: Employer to continue paying AS 23.30.041(k) benefits, Employee agreeing to be seen by Shawn Johnston, M.D., for an "evaluation of [PPI] and pain management only," Employer to pay travel costs and per diem for the evaluation and a NCM to assist only with the evaluation by Dr. Johnston. (Email, March 9, 2021).

41) On April 6, 2021, the designee set an oral hearing on May 18, 2021, "to address both of Employee's petitions to enforce the parties' [January 8, 2019] stipulation." Under "Issues for Hearing," it listed Employee's petitions and included, **"**Penalty**,** Back TTD**,** Order requiring Employee be brought to Anchorage for main management**,** Transportation Costs**,** Medical Costs**,** Nurse case manager to locate providers and help coordinate medical care using an employer-provided interpreter." (Prehearing Conference Summary, April 6, 2021).

42) On April 1, 2021, Dr. Gray answered questions from Dennis: (1) Employee would not have the permanent physical capacities equal to or greater than the physical demands of the SCODRDOT job description for janitor, (2) His participation in a work-hardening program is reasonable and necessary for him to "participate in a reemployment program and/or reenter the workforce," and (3) it was appropriate for Employee to participate in a work-hardening program if he went to Anchorage to see Dr. Olson for pain management. (Gray response, April 1, 2021).

43) On April 7, 2021, Cortis issued a reemployment plan status report and said the Stockton School for Adults was anticipating accepting new students by summer. She also noted Dr. Gray recommended Employee participate in a work-hardening program after evaluation by Dr. Olson.

Ms. Cortis anticipated a reemployment plan may be developed after Employee completed a work-hardening program and the school reopens. (*Quimiging I*).

44) On April 16, 2021, Employee requested an order compelling Employer to provide discovery requested informally in the March 1, 2021 letter. (*Id*.).

45) On April 27, 2021, Dennis emailed Holdiman-Miller a second proposed stipulation including the following provisions: Employee agreed to be seen by Dr. Olson for pain management evaluation and a PPI rating and to participate in work-hardening while in Alaska; Employer agreed to pay travel costs and per diem for Employee to travel to Alaska for the listed treatment and the parties agreed to cancel the May 18, 2021 hearing. (Email, April 27, 2021).

46) On May 7, 2021, Employer faxed a letter to Dr. Aquino, in California, asking if she would evaluate Employee for pain management and if she would bill Liberty Mutual. (*Quimiging I*).

47) On May 10, 2021, Megann Mascardo at Dr. Aquino's office confirmed the ability to evaluate Employee for pain management and bill Liberty Mutual. (Response, May 10, 2021).

48) On May 11, 2021, Employer's brief contained the same arguments regarding bad faith and penalties it made in its March 21, 2021 Opposition to Employee's Petition to Enforce Stipulation. The hearing brief did not include the email from Holdiman-Miller to Hanson or Hanson's undated reply. Employer contended medical treatment in Alaska and related transportation costs were not reasonable or necessary. (Employer's Hearing Brief, May 11, 2021).

49) On May 11, 2021, Employee's brief requested penalties and referral to the Division of Insurance for bad faith and wrongful termination of benefits. (Employee's Hearing Brief, May 11, 2021).

50) On May 11, 2021, Employee requested an order stating:

> Dr. Olson is authorized to develop a plan for treatment of [Employee's] chronic pain condition which Dr. Gray has diagnosed as Complex Regional Pain Syndrome. If the treatment plan developed by Dr. Olson can be carried out by a medical provider near [Employee's] home in Stockton, California and a qualified provider in California can be identified who will accept [Employee] as a patient and will accept payment for services under the Alaska Workers' Compensation Act, [Employee's] treatment shall be performed in California.
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> If the treatment plan prepared by Dr. Olson cannot be carried out by a provider near [Employee's] or a provider cannot be located in California who will perform the treatment plan and accept Alaska Workers' Compensation, then treatment by

> Dr. Olson or some other Alaska provider will be performed in the most cost-effective manner possible, even if that requires [Employee] to fly to Alaska.
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> The employer shall pay travel costs and per diem for [Employee] to travel to and from Anchorage, Alaska from his home in Stockton, California for the evaluation by Dr. Olson and to participate in the work hardening evaluation as described above. It will also pay for ground transportation so he can attend appointments in Anchorage. If it is necessary for [Employee] to travel to Alaska for treatment with Dr. Olson or another Alaska provider because treatment cannot be obtained in California, the employer shall pay travel costs and per diem as provided above.
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> The employer shall employ a nurse case manager to assist [Employee] with locating, communicating with and establishing care with a suitable pain management treatment provider near his home in Stockton, California and to facilitate the process of acceptance of [Employee] as a patient for treatment with Alaska Workers' Compensation as the payment source. The NCM used will report to employee's counsel and employer's counsel in order to facilitate communications and with all interested parties. (*Quimiging I*).

51) On May 17, 2021, Employee submitted a notice of intent to rely with Employer's May 14, 2021 response to Employee's March 1, 2021 discovery request. It did not include the email from Holdiman-Miller to Hanson or Hanson's undated reply. (Notice of Intent to Rely, May 17, 2021).

52) At hearing on May 18, 2021, Employee said he speaks Tagalog and has limited ability to speak and understand English. His daughter helps with going to doctors, making appointments and his bank account. None of the California doctors he and his daughter spoke with would agree to treat his work injury; and his personal physician would not provide a referral. (*Quimiging I*).

53) At hearing, Holdiman-Miller read the timeline Employer submitted with its July 9, 2021 motion for reconsideration and modification into the hearing record. (Record).

54) On June 25, 2021, *Quimiging I* granted Employee's petitions and ordered Employer to pay TTD benefits from February 24, 2021, and continuing, interest on past due TTD benefits from February 24, 2021, until paid and current, penalties under AS 23.30.155(e) on TTD benefits, reasonable and necessary medical and transportation benefits, including nurse case management services, a second evaluation by an orthopedic surgeon, pain management evaluation and treatment, a work-hardening program, a PPI evaluation by a hand surgeon at medical stability,

transportation costs, and to provide treatment and related transportation costs, in Alaska. It also granted Employee's request for a finding and referral under AS 23.30.155(o). (*Quimiging I*).

55) On July 9, 2021, Employer timely requested reconsideration and modification and contended *Quimiging I* decided issues not set for hearing, considered evidence not in the record, ignored relevant evidence and incorrectly analyzed the stipulation language and medical stability. It submitted new evidence it contended should be considered and requested an oral hearing on its requests. The new evidence included emails between Holdiman-Miller and Hanson. Employer also included a copy of the timeline it read into the record at the May 18, 2021 hearing. (Employer, Motion for Reconsideration and Modification, July 9, 2021; Employer, Request for Oral Argument, July 8, 2021).

56) On July 23, 2021, *Elizar Quimiging v. Ocean Beauty Seafoods, Inc.*, AWCB Decision No. 21-0066 (July 23, 2021) (*Quimiging II*) granted Employer's petition for reconsideration and modification to toll the appeal time and for additional oral argument and briefing. *Quimiging II.*

57) On July 29, 2021, Employee filed and served an affidavit and exhibit. Dennis' affidavit stated:

> Attached to this affidavit as Exhibit A is a screenshot of a note from my practice management system which was written by me on October 26, 2020 following my discussion with defense counsel regarding how to obtain pain treatment for [Employee] in light of the fact I had not been able to locate a pain physician in California to treat him and employer had ceased providing nurse case management services. The information set forth in Exhibit A was true and accurate to the best of my knowledge and belief when it was written, it was written on the same day of my October 26, 2020 telephone conversation with defense counsel and the contents of this note have not been changed since that date.

Exhibit A contained a "Note" stating:

> October 26, 2020 conversation with [Employer's attorney]. We kicked around various ideas related to this case. I pointed out that they had not continued paying for a nurse case manager notwithstanding my requests. I pointed out that I had been unable to find a pain doctor in California who would treat him and I had not been able to even find an industrial position/clinic who would provide treatment. She wondered if Dr. Gray would be willing to make a referral to a local pain doctor for treatment of his pain. I suggested that would be a good idea and that I will give him a call and see if I can find out if that is reasonable suggestion. . . . (Affidavit, Exhibit A, July 29, 2021).

58) On August 31, 2021, Employer's supplemental brief and exhibit contended Dennis' July 29, 2021 affidavit and exhibit were irrelevant. It also contended Employee's evidence supported its position that he did not request or approve further nurse case management and instead took it upon himself to find treatment for seven months. Employer contended due to limitations on *ex parte* communications in litigated cases, any authorization for a NCM had to be in writing. It requested an order allowing a NCM *ex parte* communication with Employee's treating physicians for the life of the claim and all future medical care. Employer's exhibit contained a fee entry for Employer's attorney on October 26, 2020, for a telephone call with Employee's attorney regarding the "status of claim, medical care delay and resolution of issues." (Supplemental Briefing on Motion for Reconsideration, and Exhibit 1, August 31, 2021).

59) On August 31, 2021, Employee agreed language regarding a "second evaluation by an orthopedic surgeon" should be removed from *Quimiging I* because he did not request it. He also proposed modifying *Quimiging I* to allow for medical treatment in California if available. In all other regards, he opposed Employer's request for modification and reconsideration. (Opposition to Employer's Motion for Reconsideration and Modification, August 31, 2021).

60) On September 1, 2021, Employer requested Employee's July 29, 2021 affidavit and exhibit be stricken because the hearing record had closed and he provided no reason why it was not produced at the time of hearing. (Petition, September 1, 2021).

61) At hearing, Employee agreed to find Dr. Aquino qualified to provide the services he needs for pain management. He accepted Dr. Aquino as his pain management physician in California and authorized her to evaluate and treat his work injury. (Record).

62) Pain is subjective in that it is individually experienced and is self-reported by an injured worker; a reduction or increase in subjective pain levels may be quantitatively measured by measuring reductions or increases in functionality. (Experience, observations, judgment).

PRINCIPLES OF LAW

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, 533-34 (Alaska 1987).

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
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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 crux of due process is the opportunity to be heard and the right to adequately represent one's interest. *Matanuska Maid, Inc. v. State*, 620 P.2d 182 (Alaska 1980). The board's authority to hear and determine questions with respect to a claim is limited to the questions raised by the parties or the agency upon notice given to the parties. *Simon v. Alaska Wood Products*, 633 P.2d 252 (Alaska 1981). While the content of the notice is not dispositive in administrative proceedings, the parties must have adequate notice so they can prepare their cases: "[t]he question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings." *Groom v. State, Department of Transportation*, 169 P.3d 626, 635 (Alaska 2007).

> **AS 23.30.030. Required policy provisions.** . . .
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> (1) The insurer assumes in full all the obligations to pay . . . transportation charges to the nearest point where adequate medical facilities are available . . . imposed upon the insured under the provisions of this chapter. . . .

> **AS 23.30.095. Medical treatments, services, and examinations.** . . .
>
> (b) If the employee is unable to designate a physician and the emergency nature of the injury requires immediate medical care, or if the employee does not desire to designate a physician and so advises the employer, the employer shall designate the physician. Designation under this subsection, however, does not prevent the employee from subsequently designating a physician for continuance of required medical care. . . .

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative . . . on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits . . . whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. . . .

In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" from the last compensation payment or rejection of a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). While examination of all evidence is not mandatory with a mistake allegation, AS 23.30.130(a) confers continuing jurisdiction over workers' compensation matters to the board. *Id.* A "change in condition" for purposes of modification, necessarily implies a change from something previously existing. It must refer to a change from the condition at the time of the award from which modification is sought. *Fischback & Moore of Alaska, Inc*. v. *Lynn,* 453 P.2d 478 (Alaska 1969).

> **AS 23.30.155. Payment of compensation.** . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment. This additional amount shall be paid at the same time as, and in addition to, the installment, unless notice is filed under (d) of this section or unless the nonpayment is excused by the board after a showing by the employer that owing to conditions over which the employer had no control the installment could not be paid within the period prescribed for the payment. The additional amount shall be paid directly to the recipient to whom the unpaid installment was to be paid.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (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.

A controversion notice must be filed "in good faith" to protect an employer from a penalty under AS 23.30.155(e) or to avoid referral to the Division of Insurance under AS 23.30.155(o). *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352, 358 (Alaska 1992). "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would

find that the claimant is not entitled to benefits." *Harp* at 358. And in *Stafford v. Westchester Fire Ins. Co. of New York*, 526 P.2d 37 (Alaska 1974), the Court held that when nonpayment results from bad faith reliance on counsel's advice, or mistake of law, imposition of a penalty is appropriate. In *Harris*, the Supreme Court declined to decide whether a controversion that is not made in good faith under *Harp* is always frivolous or unfair under AS 23.30.155(o). In *Vue v. Walmart Associates Inc.*, 425 P.3d 270 (Alaska 2020), the Supreme Court applied *Harp* and held the controversion of medical benefits was frivolous when it lacked a factual basis because the employer's medical evaluator's opinion (1) was not based upon knowledge and experience with the treatments at issue, (2) indicated a treatment option was a "judgment call" as the choice of treatment is left with the employee and his treating physician in such situation, (3) doubted the source of pain but had no basis to dispute the treating physician's diagnosis and (4) acknowledged some treatment was effective in some cases but contained no information on why he thought it would not be useful to the employee.

The Alaska Supreme Court has taken a broad reading of the term "controverted," and has held a "controversion in fact" can occur when an employer did not file a formal controversion. *Alaska Interstate v. Houston*, 586 P.2d 618 (Alaska 1978). A controversion-in-fact can occur when an employer does not "unqualifiedly accept" an employee's claim for compensation, *Shirley* at 159, or when an employer consistently denies and litigates its obligation to pay an increase in benefits. *Wien Air Alaska v. Arant*, 592 P.2d 352 (Alaska 1979). A controversion-in-fact also occurs when an employer does not file a controversion notice but denies liability for benefits in its answer to a claim. *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007).

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
>
> (26) "medical and related benefits" includes but is not limited to . . . transportation charges to the nearest point where adequate medical facilities are available;
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment, notwithstanding the possible need for additional medical care or the possibility of improvement or deterioration resulting from the passage of time; medical stability shall be

> presumed in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence;

The Alaska Supreme Court in *Runstrom v. Alaska Native Medical Center*, 280 P.3d 567 (Alaska 2012) said, "'Once 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*. at 573).

An employer may rebut the continuing presumption of compensability and disability and gain a "counter-presumption" by producing substantial evidence that the date of medical stability has been reached. *Lowe's HIW, Inc. v. Anderson*, AWCAC Decision No. 130 (March 17, 2010) at 8. Once an employer produces substantial evidence to overcome the presumption in favor of TTD, the employee must prove all elements of the TTD claim by a preponderance of the evidence. However, if the employer raised the medical stability counter presumption, "the claimant must first produce clear and convincing evidence" he has not reached medical stability. *Id*. at 9. One way an employee rebuts the counter presumption with clear and convincing evidence is by asking his treating physician to offer an opinion on "whether or not further objectively measurable improvement is expected." *Municipality of Anchorage v. Leigh*, 823 P.2d 1241, 1246 (Alaska 1992). The 45 day provision in AS 23.30.395(28) signals "when that proof is necessary." *Id.*

> **AS 44.62.540. Reconsideration**. (a) The agency may order a reconsideration of all or part of the case. . . . To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision. The power to order a reconsideration expires 30 days after the delivery or mailing of a decision to the respondent. . . .
>
> (b) The case may be reconsidered by the agency on all the pertinent parts of the record and the additional evidence and arguments that are permitted. . . .

"The appropriate recourse for allegations of legal error is a direct appeal or petition to the board for reconsideration of the decision within the time limits set by AS 44.62.540(a)." *Lindekugel* at 743. A petition for reconsideration has a 15-day time limit for the request, and power to reconsider "expires thirty days after the decision has been mailed . . . and if the board takes no action on a petition, it is considered denied." (*Id.* at 743 n. 36). Due consideration must be given

to any argument or evidence presented with a petition for reconsideration, but the panel is not required to give conclusive weight to new evidence and has power to consider new evidence against the backdrop of evidence presented at prior hearings. *Whaley v. Alaska Workers' Compensation Board*, 648 P.2d 955, 957 (July 30, 1982).

8 AAC 45.050. Pleadings. . . .

(f) Stipulations.

. . . .

(2) Stipulations between the parties may be made at any time in writing before the close of the record, or may be made orally in the course of a hearing or a prehearing.

. . . .

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.

. . . .

(4) If an updated medical summary is filed and served less than 20 days before a hearing, the board will rely upon a medical report listed in the updated medical summary only if the parties expressly waive the right to cross-examination, or if the board determines that the medical report listed on the updated summary is admissible under a hearsay exception of the Alaska Rules of Evidence.

. . . .

8 AAC 45.065. Prehearings. (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. Even if a claim, petition, or request for prehearing has not been filed, the board or its designee will exercise discretion directing the parties or their representatives to appear for a prehearing. At the prehearing, the board or designee will exercise discretion in making determinations on

(1) identifying and simplifying the issues;

. . . .

(c) After a prehearing the board or designee will issue a summary of the actions taken at the prehearing, the amendments to the pleadings, and the agreements

made by the parties or their representatives. The summary will limit the issues for hearing to those that are in dispute at the end of the prehearing. Unless modified, the summary governs the issues and the course of the hearing. . . .

8 AAC 45.070. Hearings. . . .

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

8 AAC 45.082. Medical treatment. . . .

(b) A physician may be changed as follows:

(2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury; if an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician; an employee does not designate a physician as an attending physician if the employee gets service

. . . .

(B) from a physician

(i) whose name was given to the employee by the employer and the employee does not designate that physician as the attending physician;

(ii) whom the employer directed the employee to see and the employee does not designate that physician as the attending physician; or

(iii) whose appointment was set, scheduled, or arranged by the employer, and the employee does not designate that physician as the attending physician;

. . . .

(4) regardless of an employee's date of injury, the following is not a change of an attending physician:

(A) the employee moves a distance of 50 miles or more from the attending physician and the employee does not get services from the attending physician after moving; the first physician providing services to the employee after the employee moves is a substitution of physicians and not a change of attending physicians;

(B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employee thereafter is a substitution of physicians and not a change of attending physicians;

(C) the employer suggests, directs, or schedules an appointment with a physician other than the attending physician, the other physician provides services to the employee, and the employee does not designate in writing that physician as the attending physician;

(D) the employee requests in writing that the employer consent to a change of attending physicians, the employer does not give written consent or denial to the employee within 14 days after receiving the request, and thereafter the employee gets services from another physician.

8 AAC 45.120. Evidence. . . .

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing.
. . . .

(m) The board will not consider evidence or legal memoranda filed after the board closes the hearing record, unless the board, upon its motion, determines that the hearing was not completed and reopens the hearing record for additional evidence or legal memoranda. The board will give the parties written notice of reopening the hearing record, will specify what additional documents are to be filed, and the deadline for filing the documents.

8 AAC 45.150. Rehearings and modification of board orders. (a) The board will, in its discretion, grant a rehearing to consider modification of an award only upon the grounds stated in AS 23.30.130.
. . . .

(c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects

> which a finding of the alleged change of conditions would have upon the existing board order or award.
>
> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
>
> (1) the facts upon which the original award was based;
>
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
>
> . . . .
>
> (f) In reviewing a petition for a rehearing or modification the board will give due consideration to any argument and evidence presented in the petition. The board, in its discretion, will decide whether to examine previously submitted evidence.

In *Harrold-Jones v. Drury*, 422 P.3d 568 (Alaska 2018), the plaintiff sued a physician for medical malpractice in Superior Court. The defendants requested a release authorizing *ex parte* contact with the plaintiff's new doctor. She refused to sign the release and sought a protective order prohibiting the defendants from having *ex parte* contact with her physician. The superior court denied her motion relying on existing case law. The Alaska Supreme Court decided:

> But we also conclude that we should overrule our case law because its foundations have been eroded by a cultural shift in views on medical privacy and new federal procedural requirements undermining the use of *ex parte* contact as an informal discovery measure. We therefore hold that -- absent voluntary agreement -- a defendant may not make *ex parte* contact with the plaintiff's treating physicians without a court order, which generally should not be issued absent extraordinary circumstances. We believe that formal discovery methods are more likely to comply with the federal law and promote justice and that such court orders rarely, if ever, will be necessary. (*Id*. at 569).

In *Home Depot, Inc. v. Holt*, AWCAC Decision No. 261 (May 28, 2019) (*Decision No. 261*), the Board had reviewed the Supreme Court's rationale in *Harrold-Jones* for precluding *ex-parte* contacts with treating doctors and held employers were not entitled to *ex parte* contact with an employee's attending physician without the employee's consent. *Holt* does not state whether any

benefits had been controverted. The Commission reversed in part and explained that most workers' compensation cases do not involve litigation, and because the Act requires employers to timely pay medical benefits, the insurer or adjuster need quick unfettered access to the treating doctor. However, the Commission explained that when a controversion of benefits has been filed, the case becomes litigious. After that point, if an employer wishes *ex parte* contact with a treating doctor, it should be with notice to the employee. As a result, *Holt* reversed the Board's decision to the extent it precluded *ex parte* contact prior to a controversion.

Alcan Electric v. Bringmann, 829 P.2d 1187 (Alaska 1992), dealt with an injured worker's request for transportation out of Alaska for several medical procedures offered individually in Anchorage by at least one physician. The parties agreed "an employee is entitled to out of state medical treatment when equally beneficial treatment is not available in the employee's home state." *Id.* at 1189. *See* A. Larson, *The Law of Workmen's Compensation* §61.13(b)(2) (1989). *Bringmann* cited *Braewood Convalescent Hospital v. Worker's Compensation Appeals Board*, 666 P.2d 14, 20 (Cal. 1983), which held "the employer must present evidence demonstrating the availability of a similar, or equally effective program in a more limited geographic area closer to [the injured worker's] domicile" to avoid paying additional transportation expenses out of state. Noting a 1988 amendment to the Act deleted the requirement an injured worker designate a licensed physician "in the state" meant the legislature intended to drop the "parochial view" that adequate medical treatment is always available in Alaska. *Bringmann* held: "If a doctor does not provide an option to the patient, regardless of the doctor's skill level, the option is unavailable to that patient." Since the employer failed to show any local surgeon offered all six surgical procedures to the employee, as did the outside surgeon, it "failed to demonstrate that 'adequate medical facilities' were available within the state." *Id.* at 1189.

Bermel v. Banner Health Systems, AWCB Decision No. 08-0239 (December 5, 2008) awarded medical transportation expenses to an injured worker who flew from Fairbanks to Anchorage for back surgery. The Anchorage surgeon was selected to perform an interbody fusion surgery, and this procedure was not available in Fairbanks. Although the surgeon decided to abort the interbody fusion based on the employee's condition discovered during surgery, *Bermel* held that

based on the planned surgery, adequate or similar and equally effective medical facilities were not available in Fairbanks.

ANALYSIS

1) Should Employer's petition to strike Employee's evidence be granted?

Quimiging II reopened the record for oral argument and briefing, not for additional evidence. Employee's "practice note" exhibit from October 26, 2020, and the information in Dennis' July 29, 2021 affidavit could have been offered at the May 18, 2021 hearing. He provided no reason it could not have been produced at the hearing. Therefore, it is not admissible. 8 AAC 45.120(m). Employer's petition to strike Employee's July 29, 2021 evidence will be granted.

2) Should Employee's request to reopen the record and consider statements from Dr. Aquino be granted?

Quimiging II reopened the record for oral argument and briefing, not for additional evidence. Employee requested the record be reopened to receive statements from Dr. Aquino regarding her qualifications to provide pain management. Employee failed to file the documentation prior to this hearing as required under 8 AAC 45.052(c)(4) and 8 AAC 45.120(f); Employer objected to its consideration. He also failed to explain why it could not have been discovered and produced at the May 18, 2021 hearing. 8 AAC 45.150(d).

Evidence filed after the record closes will not be considered unless it is determined that the hearing was not completed. 8 AAC 45.120(m). Stipulations to facts between the parties may be made orally in the course of a hearing. 8 AAC 45.050(f)(2). Employee agreed to find Dr. Aquino qualified to provide medical services he needs for pain management. Employer contended Dr. Aquino was qualified to provide pain management at issue in *Quimiging I*. By all accounts, Dr. Aquino is qualified to provide Employee with pain management; thus the hearing record is complete. 8 AAC 45.120(m). Employee's request to reopen the record will be denied.

3) Should *Quimiging I* be reconsidered or modified?

Employer contends *Quimiging I* ignored relevant evidence, such as Employer's timeline it read into the record at the May 18, 2021 hearing, preauthorization of medical treatment with Drs. Olson and Johnston, Employee's seven-month delay in seeking Employer's assistance with scheduling pain management and Employer's ongoing use of a NCM. Employer read its timeline into the record and the panel heard and considered it. While Employer may have preauthorized treatment with Drs. Olson and Johnston and offered to stipulate to treatment, it also contended medical treatment in Alaska, where Drs. Olson and Johnston are located, and the related transportation costs were not reasonable or necessary, in its March 21, 2020 answer and May 11, 2021 brief. Employer's contention regarding ongoing use of a NCM is addressed below. Thus, the evidence was considered; it was not ignored. Nonetheless, the panel examined all previously submitted evidence for this decision. 8 AAC 45.150(f).

Prehearing conferences are held so hearing issues can be identified and simplified. 8 AAC 45.065(a)(1). At completion of the prehearing conference, the designated chair issues a prehearing conference summary. Unless modified, the summary limits the issues for hearing and controls the course of the hearing. 8 AAC 45.065(c); 8 AAC 45.070(g); *Simon*. The April 6, 2021 prehearing conference summary did not set interest under AS 23.30.155(p) as an issue. Absent any unusual and extenuating circumstances, this decision may not consider any other issues. 8 AAC 45.070(g). Employee did not raise interest at the prehearing conference, nor did he request an amendment of the prehearing conference summary to include interest. He did not request interest in his March 1, 2021 or March 16, 2021 petitions and it was not listed in the April 6, 2021 summary. Therefore, Employer did not have sufficient notice regarding interest. *Rogers & Babler*. *Quimiging I* erred when it considered and awarded interest. This decision does not address whether Employee waived his right to seek interest.

Workers' compensation proceedings must be fair and parties must be afforded due process, which includes an opportunity to be heard. AS 23.30.001(4); *Matanuska Maid*. Accordingly, parties must have adequate notice so they can prepare their cases. *Groom*. The purpose of the prehearing conference summary is to put parties on notice of issues for hearing so they can prepare their cases. *Id*. Prehearing conference summaries provide a summary of issues for hearing -- they need not, and cannot, list every possible contention a party may make either in

support or in opposition to an issue at hearing. The question is whether the complaining party had sufficient notice and information to understand the nature of the proceedings. *Groom*; *North State Tel. Co.*

Employee sought two separate "penalties," one for "late payment" under AS 23.30.155(e) and a separate penalty for "bad faith controversion" in his March 16, 2021 petition. *Harp* and *Vue* provide for two penalties or punishments for bad faith controversion; a monetary penalty under AS 23.30.155(e) and a referral to the division of insurance under AS 23.30.155(o). It is clear Employee sought the two possible punishments for a bad faith controversion, which may only be a monetary penalty and a referral to the Division of Insurance. *Rogers & Babler*. Employer's March 21, 2021 opposition included contentions regarding penalties and a finding of bad faith and its May 11, 2021 hearing brief contained the same arguments regarding penalties and a finding of bad faith. Furthermore, the evidence and arguments presented and considered for both possible consequences are the same. Employer had sufficient notice and information to understand the nature of the proceedings regarding penalties under AS 23.30.155(e) and AS 23.30.155(o). *Id*. *Quimiging I* will not be reconsidered on this basis.

Employer contended work-hardening and a PPI evaluation were also not at issue for the May 18, 2021 hearing. Its January 29, 2021 controversion denied medical costs and related transportation expenses that are not reasonable and necessary. At his February 4, 2021 deposition, Dr. Gray recommended pain management, work-hardening and a PPI rating and referred Employee to Drs. Olson or Johnston. Employee's March 1, 2021 petition sought "rehabilitative treatment" and his March 16, 2021 memorandum and petition requested an order "compelling employer to pay the transportation costs and medical expenses related to transporting [Employee] to Alaska for an evaluation by a pain specialist, Dr. Erik Olson, for diagnostic and treatment purposes and possibly a PPI rating." In its March 21, 2021 opposition to Employee's petition and its May 11, 2021 brief, Employer contended it is not reasonable or necessary for Employee to frequently travel to Alaska for medical treatment. The April 6, 2021 prehearing conference included "Transportation Costs" and **"**Medical Costs" at issue. Employer's second proposed stipulation included performing a PPI evaluation and work-hardening while Employee was in Alaska to obtain pain management evaluation from Dr. Olson. Based on the parties' pleadings and

evidence, Employer had sufficient notice and information to understand the nature of the proceedings regarding a PPI evaluation and work-hardening as the parties raised questions about whether such treatment in Alaska was reasonable and necessary. *Groom*; *Simon*; *Matanuska Maid*; *Rogers & Babler*. *Quimiging I* will not be reconsidered on this basis.

Employer seeks reconsideration of *Quimiging I* contending it incorrectly analyzed the January 2019 stipulation language. *Quimiging I* held the January 2019 stipulation and C&R entitled Employee to TTD benefits and a NCM until terminated by an order. Employer contended Dennis' efforts to attempt to locate a pain management physician demonstrated he agreed he was no longer entitled to a NCM. The January 2019 stipulation language regarding nurse case management did not relieve Employee of his duty to seek and obtain medical care. His efforts to locate a pain management specialist is not evidence of his agreement with Employer's interpretation. *Quimiging I* did not err in analyzing the January 2019 stipulation language regarding NCM and TTD benefits and it will not be reconsidered on this basis.

Employer contends penalties under AS 23.30.155(e) and AS 23.30.155(o) should be reconsidered because it satisfied the stipulation's terms when it paid TTD until Employee reached medical stability, arranged a NCM for Employee to be evaluated by Dr. Gray and for therapy at St. Joseph's Medical Center, contacted Hanson for NCM services in March 2021, and never denied a NCM when requested by Employee. Employer first produced the emails with Hanson in its July 9, 2021 motion for reconsideration and modification and failed to provide an affidavit stating the reason why it was not discovered and produced for the May 18, 2021 hearing. 8 AAC 45.150(d)(2). Thus, the emails with Hanson cannot be considered. *Id*. Employer stopped providing a NCM after Tuccillo arranged for Employee to be evaluated by Dr. Gray and for therapy at St. Joseph's Medical Center and it stopped paying TTD benefits on February 24, 2021, without an order. It is appropriate to order a penalty based upon Employer's mistake of law. *Stafford*. It is also appropriate to order a referral because Employer controverted-in-fact when it denied NCM services in its March 21, 2021 opposition, without a legal basis. *Houston*; *Shirley*; *Arant*; *Moore*.

Employer contends penalties under AS 23.30.155(e) and AS 23.30.155(o) should be reconsidered because it properly relied upon Dr. Gray's deposition testimony to contend Employee was medically stable. This decision reaffirms the analysis from *Quimiging I*; Dr. Gray's deposition testimony was not substantial evidence Employee reached medical stability. Dr. Gray stated at deposition that it did not make sense for him to find Employee medically stable on January 14, 2020, because after receiving the additional medical treatment he recommended, he expected Employee's left hand function to improve with reduction in pain symptoms, even if his range of motion did not improve. While pain may be subjective in that it is individually experienced and is self-reported by an injured worker, a reduction or increase in subjective pain levels may be quantitatively measured by measuring reductions or increases in functionality. *Rogers & Babler*.

Therefore, Employee's left hand functionality was properly considered when determining medical stability. *Quimiging I* did not err in finding Dr. Gray's deposition testimony was not substantial evidence Employee reached medical stability. AS 23.30.395(28); *Lowe's*; *Leigh*; *Rogers & Babler.* Employer's February 24, 2021 controversion of TTD benefits without evidence and stopping of NCM services was in bad faith; it unfairly or frivolously controverted benefits. *Harp*; *Stafford*; *Vue*; *Rogers & Babler*. Employer's request to reconsider under AS 23.30.155(e) and 155(o) will be denied.

Employer contends *Quimiging I* should be reconsidered because it creates a duty for an employer to find medical providers. It requests an order allowing a NCM *ex parte* communication with Employee's treating physicians for the life of the claim and all future medical care. This case involved a unique situation where Employer agreed in a stipulation to provide NCM services to help Employee with rehabilitative treatment for his left hand. The Act provides for situations where an employer may locate and designate a physician. AS 23.30.095(b). Therefore, *Quimiging I* does not create a duty for employers to find medical providers for injured workers. It will not be reconsidered on this basis.

Employer contends *Quimiging I* should be reconsidered because it will lead to abuse of *ex parte* communications in a litigated case as it fails to place boundaries on the NCM. As previously

decided in *Quimiging I*, Employer is not prohibited from locating, contacting and suggesting a physician under *Millar* and *Holt* because the physician is not Employee's treating physician at the time of the contact. AS 23.30.095(b); 8 AAC 45.082(b)(2), (4). There are limits on Employer's *ex parte* contact with Employee's designated physician because *Millar* and *Holt* still apply in litigated cases. If Employee designates the physician located by Employer, it may seek a release from Employee authorizing NCMs to communicate *ex parte* with Employee's treating physicians or it may include Employee in all of it's the NCM communications with his physicians. Thus, *Quimiging I* will not lead to an employer abusing *ex parte* communications in a litigated case by using a NCM. An order allowing a NCM *ex parte* communication with Employee's treating physicians for the life of the claim and all future medical care will not be issued. *Quimiging I* will not be reconsidered on this basis.

Employer contends *Quimiging I* erred by failing to order Employer to pay the difference between TTD benefits and AS 23.30.041(k) benefits. Employer began paying AS 23.30.041(k) benefits on February 24, 2021, and continued to pay it until the May 18, 2021 hearing. *Quimiging I* ordered Employer to pay TTD benefits from February 24, 2021, and continuing. Employee is not entitled to both TTD benefits and AS 23.30.041(k) benefits from February 24, 2021 and continuing. *Quimiging I* erred by failing to order Employer to pay the difference between TTD benefits and AS 23.30.041(k) benefits. It will be reconsidered on this basis.

Employer contended *Quimiging I* erred by failing to order medical treatment in Alaska only if Employee could not get an appointment with Dr. Aquino in California. Since *Quimiging I* was issued, Employee began medical treatment with Dr. Aquino. Employee agreed Dr. Aquino was qualified to provide pain management. He accepted Dr. Aquino as his pain management physician in California and authorized her to evaluate and treat his work injury. Based upon Employee's treatment with Dr. Aquino since *Quimiging I* issued, *Quimiging I* will be modified to order Employer to pay for reasonable and necessary medical and transportation benefits, including NCM services to provide Employee with rehabilitative treatment, pain management evaluation and treatment by Dr. Aquino.

Employer also contended *Quimiging I* erred by ordering medical treatment and related transportation costs in Alaska because it relied on evidence not in the record by citing Dennis' statements as evidence, and failed to support its finding of inadequate California medical care. However, Employee provided evidence he unsuccessfully attempted to locate treatment in California through his testimony and Dennis' letters seeking treatment and he was able to locate Dr. Olson in Alaska for pain management and PPI rating. An employee is entitled to out-of-state treatment when equally beneficial treatment is not available at home. AS 23.30.030; AS 23.30.395(26); *Bringmann*; *Bermel*. Employer only located a pain management specialist for treatment in California; at hearing, it failed to show a nearer medical provider offered all recommended treatment. Thus, *Quimiging I* did not err. Yet, Employee agreed work-hardening and a PPI evaluation may be performed in California by Dr. Aquino or another physician acceptable to Employee and trained on the correct rating guide and proposed modifying the order to consider the possibility of medical treatment in Alaska if such a provider is unavailable in California. Therefore, *Quimiging I* will be modified to order Employer to pay reasonable and necessary medical and transportation benefits, including a PPI evaluation when Employee reaches medical stability, and work-hardening by Dr. Aquino, if she is qualified, or another qualified medical provider in California, or by a qualified medical provider in Alaska if a qualified provider is unavailable in California.

Employer contended a second surgical opinion was not an issue for the May 18, 2021 hearing and *Quimiging I* erred by ordering it. Employee's March 1, 2021 petition sought a "hand surgeon" and the April 6, 2021 prehearing conference summary listed "medical costs" as an issue. Nonetheless, Employee agreed a second surgical opinion was not at issue for the May 18, 2021 hearing. Because the parties agreed a second surgical opinion was not at issue, *Quimiging I* will be modified based upon their stipulation it was not at issue.

CONCLUSIONS OF LAW

1) Employer's petition to strike should be granted.
2) Employee's request to reopen the record and consider statements from Dr. Aquino should be denied.
3) *Quimiging I* should be reconsidered and modified.

ORDER

1) Employer's September 1, 2021 petition is granted.

2) Employer's July 9, 2021 motion for reconsideration and modification is granted in part and denied in part.

3) Employee's July 9, 2021 motion for reconsideration and modification is denied as relating to medical stability, penalties under AS 23.30.155(e) and referral under AS 23.30.155(o).

4) The interest ordered in *Quimiging I* is reconsidered. Employer is not ordered to pay interest on past due TTD benefits from February 24, 2021, until paid and current.

5) The TTD benefits awarded in *Quimiging I* are reconsidered to account for benefits already paid for the same period under AS 23.30.041(k). Employer is ordered to pay the difference between TTD benefits and AS 23.30.041(k) benefits on past due TTD benefits from February 24, 2021, until paid and current.

6) The medical and transportation benefits ordered in *Quimiging I* are modified and reconsidered. Employer is ordered to pay for reasonable and necessary medical and transportation benefits, including NCM services to provide Employee with rehabilitative treatment, pain management evaluation and treatment by Dr. Aquino, and a PPI evaluation at medical stability and work-hardening by Dr. Aquino, if she is qualified, or another qualified medical provider in California, or if a qualified provider is unavailable in California, by a qualified medical provider in Alaska.

Dated in Juneau, Alaska on September 30, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Bradley Austin, Member

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

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

APPEAL PROCEDURES

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Elizar Quimiging, employee / claimant v. Ocean Beauty Seafoods, Inc., employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201711244; dated and filed in the Alaska Workers' Compensation Board's office in Juneau, Alaska, and served on the parties by certified US Mail on September 30, 2021.

/s/

Dani Byers, WC Officer II