ALASKA WORKERS' COMPENSATION BOARD

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

PAUL ROOF, Employee, Claimant, v. WESTMARK HOTELS, INC., Employer, and TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Insurer, Defendants.	)	INTERLOCUTORY DECISION AND ORDER AWCB Case No. 201700011 AWCB Decision No. 21-0103 Filed with AWCB Fairbanks, Alaska on November 12, 2021

Westmark Hotels, Inc.'s September 4, 2020 claim seeking Secondary Injury Fund reimbursement was heard in Fairbanks, Alaska on October 7, 2021, a date selected on August 3, 2021. A June 17, 2021 hearing request gave rise to this hearing. Attorney Colby Smith appeared and represented Westmark Hotels, Inc. and Travelers Property Casualty Company of America (Employer). Administrator Velma Thomas appeared telephonically and represented the Alaska Workers' Compensation Second Injury Fund (Fund). Attorney John Franich appeared and represented Paul Roof (Employee). There were no witnesses. The record closed at the hearing's conclusion on October 7, 2021.

ISSUE

Employer contends the Fund has admitted it has met all the statutory criteria for reimbursement save for the "combined effects" requirement. It contends, when Employee applied for his job in

1988, he disclosed he was deaf and blind in one eye, which are conclusively presumed to be permanent physical impairments. Employer further contends Employee subsequently suffered additional disability resulting from his left arm injury at work such that it is now liable for substantially greater compensation than would have otherwise resulted from the work injury alone. It relies on its medical evaluator's report, and the affidavits of Employee and his treating physician's assistant, to establish the combined effects requirement has been met and contends reimbursement should be ordered.

The Fund contends it originally denied Employer's reimbursement claim because Employer had not demonstrated the combined effects requirement had been met. When Employer later submitted affidavits as evidence in support of its claim, the Administrator thought the Fund was "closed to new claims" and it was unclear whether the Administrator had authority to approve reimbursement after the Fund's "closure date." It neither advocates against nor in favor of Employer's claim, but rather seeks an appropriate order from this panel.

Employee agrees with Employer and contends the combined effects of his preexisting impairments and his work injury will result in substantially greater compensation liability so Employer's claim should be granted.

Should compensation liability reimbursement be ordered?

FINDINGS OF FACT

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

1) On March 21, 1988, Employee completed an employment application for a position as a dishwasher with Employer. In response to the question, "Do you have any sensory, mental or physical handicap which may affect work performance?" Employee wrote, "I am Deaf. Blind in Right eye." (Application for Employment, March 21, 1988).

2) On December 27, 2016, Employee slipped and fell while working as a kitchen assistant for Employer. (First Report of Injury (FROI), December 27, 2016). He sought treatment for left wrist pain and X-rays showed a distal radius fracture. (U.S. Health Works chart notes, December 27, 2016). Employee was referred to Duane Frampton, PA-C for evaluation and treatment. (*Id*.).

Employee's left arm was placed in a cast and he was taken off work. (Frampton chart notes, December 27, 2016).

3) On March 30, 2017, Employee was complaining of pain, numbness and tingling along the ulnar nerve distribution of his left hand. X-rays showed Employee's fracture had healed and he was referred for an electromyography (EMG) study. (Frampton chart notes, March 30, 2017).

4) On April 14, 2017, James Froelsch, M.D., conducted an EMG study that showed severe left ulnar neuropathy at the elbow and left median neuropathy at the wrist. Dr. Froelsch also noted,

> Due to Mr. Roof's severe difficulty with communicating, I was not able to get an accurate or detailed history. He has significant hearing impairment, as well as dysarthric speech. I attempted to communicate with him in writing, but his literacy level must be quite low. He was able to read questions that I wrote but was not able to answer in writing and due to his severe dysarthria, I was not able to understand his answers verbally.

(Froelsch chart notes, April 14, 2017).

5) On April 21, 2017, Employee followed-up with PA-C Frampton, who was planning on reviewing Employee's case with Cary Keller, M.D. PA-C Frampton remarked, "it was really difficult for [Employee] to communicate, and [Employee] has difficulty recalling medical history." (Frampton chart notes, April 21, 2017).

6) On May 17, 2017, Dr. Keller evaluated Employee, and after a long-handwritten conversation, it was decided Employee would undergo carpal tunnel release and cubital tunnel release surgeries. (Keller chart notes, May 17, 2017; Handwritten notes, May 17, 2017).

7) On June 1, 2017, Employee underwent left carpal tunnel release and left cubital tunnel release surgeries. (Operative Report, June 12, 2017).

8) On October 27, 2017, Employee reported doing much better and being happy with his progress. PA-C Frampton declared Employee medically sable and referred him to a functional capacity evaluation. (Frampton chart notes, October 27, 2017).

9) On November 8, 2017, Employee participated in a physical capacity evaluation. The therapist found him to have a 15-pound limitation in lifting or carrying and stated Employee had significant difficulty grasping larger objects such as a box, as well as smaller objects. Employee was also found to be significantly limited in overall strength and endurance. The therapist concluded Employee was at high risk for reinjury if he were to return to work full time as a dishwasher in a busy environment. (Physical Capacity Evaluation, November 8, 2017).

10) On November 13, 2017, PA-C Frampton released Employee to modified work consistent with the physical capacity evaluation and discharged Employee from his care. (Frampton chart notes, November 13, 2017; Physician's Report, November 13, 2017).

11) On February 13, 2018, Employee was referred to Dan Labrosse for a reemployment benefits eligibility evaluation. (Referral Letter, February 13, 2018).

12) On September 13, 2018, Employer filed a Notice of a Possible Claim Against the Second Injury Fund. (Employer's Notice, September 13, 2018).

13) On October 5, 2018, PA-C Frampton responded to a letter from Mr. Labrosse predicting Employee would have a permanent partial impairment greater than zero percent. PA-C Frampton also predicted Employee would not have the physical capacities to perform the jobs of kitchen helper and cook helper. (Frampton responses, October 5, 2018).

14) On January 10, 2019, Employee was found eligible for reemployment benefits. (Torgerson letter, January 10, 2019).

15) On August 6, 2020, Amit Sahasrabudhe, M.D., reviewed records for an employer's medical evaluation (EME). He opined Employee's blindness in one eye and his deafness each combined with the December 27, 2017 work injury and its sequelae, including surgery and impairment, to have resulted in a disability that was substantially greater by reason of the combined effect than that which would have resulted from the work injury alone. With respect to the combined effects of the work injury with Employee's blindness, Dr. Sahasrabudhe expounded, "Consider that an individual who does have some permanent functional defects with respect to the left arm, would have greater difficulty performing any task, by virtue of being blind in one eye." Dr. Sahasrabudhe did not expound on his opinion regarding the combined effects of the work injury with Employee's deafness, but rather stated he had arrived at his opinion "for similar reasons as outlined [for Employee's blindness]." Finally, Dr. Sahasrabudhe further opined both Employee's blindness in one eye and his deafness combined with the December 27, 2017 work injury and its sequelae, including surgery and impairment, to have resulted in a disability that was substantially greater by reason of the combined effect than that which would have resulted from the work injury alone. He wrote, "The combined condition results in a far substantially greater disability than either of the individual disabilities would cause or contribute to." (Sahasrabudhe report, August 6, 2020).

16) On September 4, 2020, Employer petitioned to join the Fund and claimed compensation liability reimbursement, citing Dr. Sahasrabudhe's report. Its claim reported a combined total of

104 weeks of temporary total disability (TTD), permanent partial impairment (PPI) and reemployment stipend payments to Employee. (Employer's Claim, September 4, 2020; observations).

17) On September 18, 2020, Employee claimed permanent total disability benefits. (Workers' Compensation Claim, September 18, 2020).

18) On October 23, 2020, the Fund answered Employer's September 4, 2020 petition and indicated it did not dispute Employee suffered a subsequent injury on December 27, 2016; Employee had a preexisting conditions, blindness and deafness, that satisfied AS 23.30.205(g)(1)(F) and (g)(2); Employer provided a written record indicating its knowledge of a qualifying preexisting conditions prior to the subsequent injury; Employer submitted a notice of a possible claim within 100 weeks of its knowledge of the possible Second Injury Fund injury; and Employer had paid Employee more than 104 weeks of disability benefits. The sole issue the Fund disputed was whether Employer had demonstrated its liability was substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury than that which would have resulted from the subsequent injury alone, and it denied reimbursement. (Fund's Answer, October 23, 2020).

19) On March 10, 2021, PA-C Frampton averred he had treated Employee's distal radius fracture with casting and Employee subsequently developed severe left ulnar neuropathy and left median neuropathy, which were treated with carpal tunnel and cubital tunnel release surgeries. Electrodiagnostic studies and the physical capacity evaluation documented that Employee had sustained objective permanent disability as a result of the December 27, 2016 injury. Because of documented weakness and difficulty with grasping, strength and endurance, he restricted Employee to modified work consistent with the limitations established in the physical capacity evaluation. Because of Employee's work injury and related permanent limitations, PA-C Frampton did not approve the job descriptions for kitchen helper and cook helper. He responded to a letter from Employee's vocational counselor indicating Employee would sustain a permanent impairment related to the injury. PA-C Frampton stated, it is "clear" Employee's deafness and blindness combined with the objective disability caused by the December 27, 2016 injury to create substantially greater disability than would have been caused by the injury alone. "In Mr. Roof's case, one plus one created a much greater impact than 2," according to PA-C Frampton. Employee's hindrance in communication due to being deaf and his difficulty reading due to his

blindness, combined with his work injury related limitations in grasping, lifting, and using his left arm, substantially impeded his ability to be retrained in a new occupation as well as his retraining and vocational options. He felt it was reasonable to expect that Employee's limitations would result in significantly lengthening the time needed to complete any retraining program. PA-C Frampton believed "there is no question" the combination of Employee's preexisting impairment with the disability from the injury created substantially greater disability, including workers' compensation liability for disability related benefits, than the December 27, 2016 injury would have caused alone. (Frampton affidavit, March 10, 2021).

20) On March 12, 2021, Employer filed PA-C Frampton's March 10, 2021 affidavit as evidence and served the Fund via email. (*Id*.; Osborne email, March 12, 2021).

21) On March 18, 2021, Employer submitted a letter to the Fund's Administrator requesting the Fund reconsider its reimbursement denial. It based its request on PA-C Frampton's affidavit as well as Dr. Saharabudhe's EME report. (Niemann letter, March 18, 2021).

22) On March 19, 2021, the Fund's Administrator replied to Employer's March 18, 2021 letter, stating:

> On May 11, 2018, the State of Alaska Legislature provided for closure of the Second Injury Fund under workers' compensation reforms (SCS CSHB 79(FIN)). Under AS 23.30.205(f), the employer or employer's insurance carrier must satisfy all requirements and submit *all documentation* by September 30, 2020. The fund reviewed documentation and denied the petition for joinder on October 23, 2020.

"Since there is a dispute of fact," she encouraged Employer to seek a hearing on its claim. (Thomas email, March 19, 2021) (emphasis added).

23) On June 3, 2021, Employee averred he was totally deaf and blind in one eye before the work injury. He did not speak, he could read, but did not write very well. Employee communicated only by writing single words or very short, simple sentences. Before his injury, he was not totally disabled and was able to work at the kitchen in Employer's hotel as a kitchen helper and cook helper. After his injury, Employee still had pain in his wrist and elbow and did not have the ability to grasp things with his left hand. He did not believe he had enough strength or endurance to work. If Employee did not have the work injury, he could still work as a kitchen helper and cook helper. If he only had the injury, and was not deaf and blind in one eye, and was able to speak, he might be able to find some other work or be retrained to work in a new job. However, because of the

combination of his preexisting condition with his worked injury, Employee believed he would never work again. (Roof affidavit, June 3, 2021).

24) On June 17, 2021, Employer filed Employee's June 3, 2021 affidavit as evidence and served it on the Fund via email. (*Id*.; Osborne email, June17, 2021). It also requested a hearing on its September 4, 2020 petition. (Affidavit of Readiness for Hearing, June 17, 2021).

25) On September 27, 2021, the Fund reiterated the following in its hearing brief:

> On May 11, 2018, the State of Alaska Legislature provided for closure of the Second Injury Fund under workers' compensation reforms (SCS CSHB 79(FIN)). Under AS 23.30.205(f), the employer or employer's insurance carrier must satisfy all requirements and submit *all documentation* by September 30, 2020. The fund reviewed documentation and denied the petition for joinder on October 23, 2020.

It also referenced the Alaska Workers' Compensation Division's Bulletin 18-04, which provides:

> AS 23.30.205(e) and (g) were amended, effective August 25, 2018.
>
> - A claim for second injury fund reimbursement may not be submitted for an injury or death that occurs after August 31, 2018. An employer or the employer's insurance carrier must submit a claim for reimbursement and *all required information* for consideration before October 1, 2020. Claims filed after the required dates will be denied.
> - The fund will not accept any material needed to make a decision on the acceptance of a claim after September 20, 2020. If we do not have the *required material* by September 30, 2020, the claim will be denied.
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> . . . .

The Fund further contended, neither Employer nor Dr. Sahasrabudhe provided compensation liability measures for the preexisting disability alone, the injury alone, or the combination of the two to show that the "combined effects" requirement of the statute had been met. (Fund Hearing Brief, September 27, 2021) (emphasis added).

26) On September 30, 2021, Employer addressed the statutory "combined effects" requirement. From its perspective, "[a] key issue related to the employer's compensation liability was Mr. Roof's ability to be vocationally retrained versus whether he is permanently and totally disabled." It contended, because of the combined effects of Employee's preexisting physical impairments and his work injury disability, his vocational rehabilitation plan was going to cost substantially more than it would have cost with the work injury alone. Employer provided financial calculations showing liability for a six-month vocational retraining program could be $23,013.86 because of

the work injury alone, and calculations showing liability for a two-year vocational retraining program might be $51,855.44 because of the combined effects of both the work injury and Employee's preexisting physical impairments. It contended the $29,141.58 liability difference would be "substantial." Employer alternatively contended, if Employee could not be successfully retrained, it then might be liable for PTD compensation in an amount of $399,653.28 resulting from the combined effects of Employee's preexisting physical impairments and his work injury disability, whereas PTD liability would have unlikely arisen from the work injury alone. (Employer's Hearing Brief, September 30, 2021).

27) Employer also addressed the Fund's contentions concerning the timing of its evidentiary affidavits. It contended, "While [AS 23.30.205(f)] indicates that an employer shall timely satisfy all requirements for reimbursement under this section, there is no provision that an employer may not submit additional evidence." (*Id*.).

28) At hearing, the Fund repeatedly clarified it was not objecting to PA-C Frampton's March 10, 2021 and Employee's June 3, 2021 affidavits on the basis they were filed after September 30, 2020. (Record).

29) Even with a sign language interpreter's assistance at hearing, Employee struggled to understand the proceedings. (Experience, observations).

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 23.30.205. Injury combined with preexisting impairment.**
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> (a) If an employee who has a permanent physical impairment from any cause or origin incurs a subsequent disability by injury arising out of and in the course of the employment resulting in compensation liability for disability that is substantially greater by reason of the combined effects of the preexisting impairment and subsequent injury . . . the employer or the insurance carrier shall in the first instance pay all awards of compensation provided by this chapter, but the employer or the insurance carrier shall be reimbursed from the second injury fund

> for all compensation payments subsequent to those payable for the first 104 weeks of disability.
> . . . .
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> (c) In order to qualify under this section for reimbursement from the second injury fund, the employer must establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was retained in employment after the employer acquired that knowledge.
> . . . .
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> (e) An employer or the employer's carrier shall notify the commissioner of labor and workforce development of any possible claim against the second injury fund as soon as practicable, but in no event later than 100 weeks after the employer or the employer's carrier has knowledge of the injury or death or after the deadline for submitting a claim for reimbursement under (f) of this section.
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> (f) An employer or the employer's insurance carrier shall satisfy all requirements for reimbursement under this section, including notice of any possible claim and payment of compensation in excess of 104 weeks, before submitting a claim for reimbursement to the second injury fund. Notwithstanding (a) and (b) of this section, a claim for reimbursement may not be submitted for an injury or death that occurs after August 31, 2018, and must be submitted before October 1, 2020. An employer that qualifies for reimbursement under this section shall continue to receive reimbursement payments on claims accepted by the fund, or ordered by the board, until the fund's liabilities for the claim are extinguished.
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> (g) In this section, "permanent physical impairment" means any permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining reemployment if the employee should become unemployed. A condition may not be considered a "permanent physical impairment" unless
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> (1) it is one of the following conditions:
> . . . .
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> (F) loss of sight in one or both eyes or a partial loss of uncorrected vision of more than 75 percent bilaterally,
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> (2) it would support a rating of disability of 200 weeks or more if evaluated according to standards applied in compensation claims.

When the Second Injury Fund was enacted in 1959, AS 23.30.190(12) provided 200 weeks' compensation for the loss of hearing in both ears.

In enacting the statute, the legislature decided an employer should not be liable for, or pay premiums for, certain pre-existing disabilities. *Employers Commercial Union Ins. Group v. Christ*, 513 P.2d 1090; 1093 (Alaska 1973). The fundamental purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Seward Marine Services, Inc. v. Anderson*, 643 P.2d 493, 495 (Alaska 1982). The Court will give statutory language a "reasonable or common sense construction, consonant with the objectives of the legislature." *Mechanical Contractors of Alaska, Inc. v. State*, 91 P.3d 240, 248 (Alaska 2004).

In *Kennecott Greens Creek Mining Co. v. Clark*, AWCAC Decision No. 080 (June 9, 2008) at 13, the Alaska Workers' Compensation Appeals Commission explained the presumption that an employee's claim is compensable in AS 23.30.120(a)(1) does not apply to an employer's request for reimbursement from the Secondary Injury Fund. *Clark* also set forth the requirements for reimbursement:

> In order to decide that the Fund is liable for reimbursement to an employer, AS 23.30.205(a) requires that the following facts be established: (1) the employee had "a permanent physical impairment" within the meaning of [the statute]; (2) the employee incurred "a subsequent disability by injury arising out of and in the course of the employment;" and (3), the employer's liability for compensation for disability is substantially greater
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> (a) "by reason of the combined effects of the preexisting impairment and subsequent injury" or,
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> (b) "by reason of the aggravation of the preexisting impairment" than the liability that would have resulted from the subsequent injury alone.

Id. at 13-15. It next explained how to analyze the statute's "combined effects" or "aggravation" criteria:

> In order to make the findings required by (3) above, the board must establish the value of the employer's liability for compensation for disability from the subsequent injury alone and the value of the liability for compensation for disability from the "combined effects" of the injury and preexisting impairment or "aggravation" of the preexisting impairment. Once both values are established, the board may compare them and determine if the employer's liability is "substantially greater" than would result from the second (or

> subsequent) injury alone. It is not enough that the liability be simply greater, it must be *substantially* greater.

Id. at 15 (emphasis in original). The employer has the burden to produce evidence sufficient to demonstrate the relative values of its liability for disability compensation, and the substantiality of any greater liability; and must persuade the board, by a preponderance of the evidence, either the "combined effects," or "aggravation" requirement has been met. *Id*. at 16.

"Substantial" is defined as material. Merriam-Webster Dictionary 490 (New ed. 2005). "Material" means of such a nature that knowledge of the item would affect a person's decision-making. Black's Law Dictionary, 1066 (Ninth ed. 2009).

> **AS 44.62.020. Authority to adopt, administer, or enforce regulations**. Except for the authority conferred upon the lieutenant governor in AS 44.62.130 - 44.62.170, AS 44.62.010 - 44.62.320 do not confer authority upon or augment the authority of a state agency to adopt, administer, or enforce a regulation. To be effective, each regulation adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.
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> **AS 44.62.030. Consistency between regulation and statute.** If, by express or implied terms of a statute, a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, a regulation adopted is not valid or effective unless consistent with the statute and reasonably necessary to carry out the purpose of the statute.
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> **AS 44.62.300. Judicial review of validity.** An interested person may get a judicial declaration on the validity of a regulation by bringing an action for declaratory relief in the superior court. In addition to any other ground the court may declare the regulation invalid
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> (1) for a substantial failure to comply with AS 44.62.010 - 44.62.320;
> . . . .

Obvious, commonsense interpretations of statutes do not require formal agency rulemaking. *Chevron v. State Dept. of Revenue*, 387 P.3d 25; 37 (Alaska 2016) (citation omitted). However, agency action may not be commonsense interpretations of existing laws (1) when the agency adds "requirements of substance" and does more than just interpret the statute according to its own terms; (2) when the agency interprets a statute in a way that is "expansive or unenforceable"; or (3) when the agency "alters its previous interpretation of a statute." *Id*.

ANALYSIS

Should compensation liability reimbursement be ordered?

The Administrator's stated concerns at hearing regarding the Fund's "closure date" create a threshold issue that should be addressed prior to evaluating Employer's claim. The relevant statutory subsection only specifies two dates in relation to the Fund's closure: (1) reimbursement claims may not be submitted for an injury or death that occurs after August 31, 2018; and (2) reimbursement claims must be submitted before October 1, 2020. AS 23.30.205(f). Given that Employee was injured on December 27, 2016; and Employer filed its reimbursement claim on September 4, 2020; neither statutorily prescribed date presents a bar here. *Rogers & Babler*.

Notably absent in the statute is any date by which the Administrator must either approve or deny reimbursement claims. *Anderson*. Neither did the legislature specify a date certain for Fund closure. *Id*. The legislature could have specified such dates but did not. *Id*. Instead, it chose to establish a cut-off date for injuries and imposed a deadline for filing claims. Consequently, the dates the legislature provided will naturally result in Fund "closure" through attrition as its liabilities for claims are extinguished. *Mechanical Contractors*; AS 23.30.205(f). In the meantime, it is not apparent on the statute's face how the Administrator would be restricted from continuing to approve and deny reimbursement claims in accordance with the law.

Meanwhile, as Employer contends, Bulletin 18-04 does appear to impose additional requirements on employers than those required by statute. *Chevron*. However, given the Fund's clarifications at hearing that it is not objecting to PA-C Frampton's and Employee's affidavits on the basis they were filed after September 30, 2020, it is not now necessary to address whether those additional requirements are "reasonably necessary to carry out the purpose of the statute," AS 44.62.030, or whether the bulletin is effectively a regulation subject to formal agency rulemaking process, AS 44.62.020. Moreover, this panel would not have the authority to even undertake such inquiries since the legislature has conferred that authority on the Superior Court. AS 44.62.300.

Moving to Employer's September 4, 2020 claim, in order to find the Fund liable for reimbursement, AS 23.30.205(a) requires that the following facts be established: (1) Employee

had "a permanent physical impairment" within the meaning of the statute; (2) Employee incurred "a subsequent disability by injury arising out of and in the course of the employment;" and (3), Employer's liability for compensation that is substantially greater by reason of the combined effects of the preexisting impairment and the subsequent injury. *Clark.* Here, the Fund's October 23, 2020 answer removes the first two criteria from contention, leaving only the third. Employer now has the burden of establishing, by a preponderance of the evidence, the "combined effects" requirement has been met. *Id*.

This showing requires a calculation of the value of Employer's liability for compensation from the subsequent injury alone, and a calculation of the value of liability for compensation from the combined effects of both the injury *and* the pre-existing impairment. *Clark.* Once both values are established, they may then be compared, and a determination made, whether Employer's liability is substantially greater than that which would have resulted from the injury alone. *Id*. Employer has submitted the requisite calculations, which it contends are supported by Dr. Sahasrabudhe's EME report, and PA-C Frampton's and Employee's affidavits.

Employer understandably sought out PA-C Frampton's affidavit following Dr. Sahasrabudhe's EME report, because the latter is not helpful to Employer's claim. In his report, Dr. Sahasrabudhe summarily opines, without explanation, that the combined effects of Employee's preexisting physical impairments and the work injury resulted in substantially greater disability than that which would have resulted from the work injury alone. However, the statute requires that Employer's *liability* for disability compensation be substantially greater, not that Employee be more "disabled."

Initially, PA-C Frampton makes the same mistake as Dr. Sahasrabudhe and opines Employee suffered a substantially greater disability because of his preexisting physical impairments and the work injury. However, PA-C Frampton later related the combined effects of Employee's physical impairments and his work injury to a significant lengthening of Employee's vocational retraining. It is this linking of the "combined effects" to vocational retraining that Employer's financial calculation are based upon.

Employee's objective physical deficits resulting from his work injury are documented in his November 8, 2017 physical capacity evaluation. Meanwhile, difficulties presented by Employee's preexisting physical impairments are also well documented in the record and were apparent at hearing, where Employee struggled to understand the proceedings, even with a sign language interpreter's assistance. Based on experience, as well as common sense, it is entirely reasonable to expect that, because of the combined effects of Employee's preexisting physical impairments and the lasting effects of his work injury, Employee's vocational retraining would take longer, and cost more, than otherwise would have been required with the work injury alone. *Rogers & Babler*. Employer contends a $29,141.58 increase in its liability for vocational retraining would be "substantial." Given that it might have only been liable for $23,013.86 in total vocational retraining costs resulting from the work injury alone, this panel agrees. Moreover, in the event Employee cannot be successfully retrained, which is entirely plausible in this case, Employer's potential PTD liability of $399,653.28 is not only "substantial," but most compelling. *Id.*

The statute's purpose is for employers to not be liable for certain preexisting physical impairments that can increase compensation owed an employee. *Christ*. Employer has convincingly shown its liability for compensation will be substantially increased because of the combined effects of Employee's preexisting physical impairments and the work injury. Employer has met its burden and compensation liability reimbursement will be ordered. *Clark*.

CONCLUSION OF LAW

Compensation liability reimbursement should be ordered.

ORDERS

1) Employer's September 4, 2020 claim for compensation liability reimbursement is granted.
2) The Fund shall reimburse Employer for all compensation payments subsequent to those payable for the first 104 weeks of disability.

Dated in Fairbanks, Alaska on November 12, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Robert Weel, Member

PETITION FOR REVIEW

A party may seek review of an interlocutory or other non-final Board decision and order by filing a petition for review with the Alaska Workers' Compensation Appeals Commission. Unless a petition for reconsideration of a Board decision or order is timely filed with the board under AS 44.62.540, a petition for review must be filed with the commission within 15 days after service of the board's decision and order. If a petition for reconsideration is timely filed with the board, a petition for review must be filed within 15 days after the board serves the reconsideration decision, or within 15 days from date the petition for reconsideration is considered denied absent Board action, whichever is earlier.

RECONSIDERATION

A party may ask the board to reconsider this decision by filing a petition for reconsideration under AS 44.62.540 and in accordance 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 accordance 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 Interlocutory Decision and Order in the matter of Paul Roof, employee / claimant v. Westmark Hotels, Inc., employer; Travelers Property Casualty Compnay of America, insurer / defendants; Case No. 201700011; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on November 12, 2021.

/s/
Kimberly Weaver, Office Assistant