ALASKA WORKERS' COMPENSATION BOARD

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

CLEMENT RICHARDS, Employee, Claimant, v. TECK RESOURCES LIMITED, Employer, and ZURICH AMERICAN INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 201510206 AWCB Decision No. 21-0104 Filed with AWCB Fairbanks, Alaska on November 12, 2021

Employee Clement Richard's May 5, 2020 amended claim was heard on September 16, 2021 in Fairbanks, Alaska, a date selected on July 23, 2021. April 10, 2018 and April 21, 2021 affidavits of readiness for hearing gave rise to this hearing. Employee appeared, represented himself, and testified. Attorney Jeffrey Holloway appeared and represented Teck Resources Limited and Zurich American Insurance Company (Employer). Cole Schaeffer, Employer's Superintendent of Human Resources, testified for Employer. The record closed at the hearing's conclusion on September 16, 2021.

ISSUES

Employee contends he is entitled to temporary total disability (TTD) benefits from the date of injury through the date a functional capacities evaluation (FCE) is completed. He also requests temporary partial disability benefits.

Employer contends Employee was only entitled to TTD benefits from the date he was found temporarily totally disabled and taken off work until the date of medical stability. Employer contends the work injury resolved and is no longer the substantial cause of Employee's disability.

1) **Is Employee entitled to temporary disability benefits?**

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

Employer contends Employee is not entitled to PPI benefits as he has not received a PPI rating greater than zero percent.

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

Employee contends he is entitled to past unpaid medical benefits and future medical benefits relating to the work injury.

Employer contends the work injury resolved and is no longer the substantial cause of any need for treatment. Employer contends no further medical benefits are due and that all past medical bills received have been paid.

3) **Is Employee entitled to medical benefits?**

Employee contends he is entitled to transportation costs.

Employer contends Employee failed to produce a log or other evidence proving transportation costs and accordingly is not entitled to transportation costs.

4) **Is Employee entitled to transportation costs?**

Employee contends Employer's controversions were unfair or frivolous.

Employer contends all controversions were reasonably based upon law or fact and were supported by medical evidence.

5) Is Employee entitled to a penalty for unfair or frivolous controversion?

Employee contends the Rehabilitation Benefits Administrator's (RBA) finding that he was not eligible for reemployment benefits was in error.

Employer contends the RBA did not abuse her discretion in finding Employee not eligible for reemployment benefits as her determination was based on substantial evidence.

6) Did the RBA abuse her discretion when she found Employee not eligible for reemployment benefits?

Employee contends Employer is not entitled to dismiss his claim under AS 23.30.110(c) as he was told a hearing would be scheduled after the SIME was completed but the docket was full.

Employer contends Employee is barred from pursuing benefits and Employer is entitled to dismiss his claim under AS 23.30.110(c) based on Employee's failure to request a hearing within two years following the filing of a post-claim controversion notice.

7) Is Employer entitled to dismiss Employee's claim under AS 23.30.110(c)?

FINDINGS OF FACT

Factual findings from *Richards I*, *Richards II,* and *Richards III* are incorporated by reference. A preponderance of the evidence establishes the following facts and factual conclusions:

1) On June 21, 2015, Employee reported a work injury from being struck by a heavy swinging bag of chemicals and pinched between the bag and a railing while working at a remote site. (First Report of Injury, July 1, 2015). Employee was examined by the onsite medical provider and diagnosed with a mild contusion of the right hip. Advil was recommended if soreness developed. (PA-C Duchanin record, June 21, 2015).

2) On June 24, 2015, Employee reported to the emergency room. No acute changes were noted on lower spine x-rays. A back contusion was diagnosed, pain medicine prescribed, and instructions given to rest and return on June 30, 2015 to assess return to work. (Emergency Room record, June 24, 2015; McGee Radiology Report, June 24, 2015).

3) On July 1, 2015, Employee was examined by Isaac Henry, PA-C. The age of an L1 wedge fracture was undetermined; Employee had pain at that level and a mechanism of injury that matched the injury. PA-C Henry put Employee on "TTD for now which will probably extend for 4-5 weeks . . . ." Employee received a 10-lb. lifting restriction and prohibitions for bending, fishing, riding a 4-wheeler, running, and jumping. (Henry record, July 1, 2015).

4) On July 14, 2015, Employee admitted "to attempting to lift [a] heavy object." (Wayne progress notes, July 14, 2015). Employee was examined by PA-C Henry the same day who indicated Employee was "following instructions given as far as daily walking, not lifting, etc." He was progressing as expected and anticipated to return to full duty on August 12, 2015. (Henry record, July 14, 2015).

5) On August 11, 2015, PA-C Henry examined Employee, who had regressed due to activity. He was to start physical therapy and remain off work until he was seen again September 3 or 4. (Henry record, August 11, 2015).

6) On September 11, 2015, Employee presented to physical therapy with severe to moderate lumbar spine range of motion limitations and pain with lumbar extension. Records noted "Pt continues to report non-compliance with his HEP. PT currently making little gains between appointments . . . Pt unable to progress in return to work activities . . . ." Activities included being at hunting camp, shooting, long-distance snowmobiling, butchering caribou, and lifting something "really heavy." The physical therapist drew up a patient participation contract for Employee after several weeks of treatment and noted frequent attendance while hung over. Employee "has demonstrated pain catastrophizing, fearful avoidance of movement, and a passive coping style. I believe this has all contributed to his current state which is consistent with a central sensitization or chronic pain that greatly limits his functional ability and is impeding his ability to return to work." On November 30, 2015, Employee advised he "stopped taking the new medication and does not want to take it any more" and "he does not know 'at this point' if he will return to work at Red Dog Mine but he 'isn't worried about it.'" On January 15, 2016, therapeutic activities included "[p]racticing lifting of construction materials on site at pt's home x15 min"; "heard pt talk with excitement about something he is doing (working on fixing up a house with his brother)"; "[he] recently has made the decision to not return to work at Red Dog Mine, states he will start work for his dad later this year." Employee continued physical therapy until March 17, 2016. (Maniilaq physical therapy records, assorted dates).

7) On October 15, 2015, Employee underwent an orthopedic Employer's independent medical examination (EME) with Charles Craven, M.D. Employee reported pain at "1 out of 10" localized to his back and denied prior injury to his lower back. Dr. Craven reviewed June 24, 2015 imaging and diagnosed:

a. Right hip contusion, substantially caused by the described industrial event of June 21, 2015, resolved; and
b. Lumbar wedge type vertebral fracture (estimated at less than 5% of vertebral body height), substantially caused by the June 21, 2015 work injury.

Dr. Craven found Employee was "still in the recovery phase" and recommended continued physical therapy three times per week for six to eight additional weeks and magnetic resonance imaging (MRI) of the lumbar spine. Employee was not medically stable and was not released to work. Dr. Craven recommended a functional capacity evaluation (FCE) after completing physical therapy; a work hardening program would be reasonable. A PPI rating was premature. (Craven report, October 15, 2015).

8) On November 2 and 6, 2015, Employee was examined by Ruth Ann Zent, M.D. Her assessment included likelihood of some level of chronic pain. Employee did not have an acute lumbar compression fracture. A lidocaine patch was prescribed. Continued physical therapy was recommended and a work release provided with a five-pound lifting restriction. (Zent records, November 2 and 6, 2015).

9) On February 1, 2016, Employee was examined by Michael Dyches, PA-C. Employee rated his mid back pain at "2/10" minimum and "5/10" at its worst. He had a full active range of motion in his lumbar spine. X-rays of lumbar spine were obtained and reviewed, indicating a slight anterior wedge deformity of L1 vertebral body of questionable age, with no other compression deformities or spondylolisthesis. An MRI was arranged including "STIR" imaging to assess the age of the apparent compression fracture and evaluate for any possible disc displacement. (Dyches record, February 1, 2016). The MRI was reviewed on February 8, 2016 and had "no evidence of acute or subacute fracture." Given the normal MRI and chronic low back pain complaints, Employee was referred to Alaska Spine Institute. (Dyches record, February 8, 2016).

10) On February 25, 2016, Employee underwent a second EME with Dr. Craven. Employee was doing physical therapy-directed exercise and was helping his father build a home. Snow

machining and caribou butchering caused back pain. Employee's history and contemporaneous medical records indicated a mechanism of injury consistent with an acute fracture of the L1 vertebral body; imaging demonstrated an age-indeterminate wedge-type L1 deformity. Dr. Craven now opined the June 21, 2015 work event did not cause a lumbar fracture. It was possible this was an old fracture which was temporarily aggravated by the work injury, or that Employee's L1 vertebral body shape was "simply an anatomic variant." The June 21, 2015 work injury had resolved and was no longer the substantial cause of Employee's current condition and need for treatment. Symptomatology was out of proportion to the MRI findings. Employee's pain disability questionnaire score had increased from 36 on October 16, 2015 to 71 on February 25, 2016, which "in combination with his presentation at today's IME [was] concerning for the development of a disability conviction." No further treatment was medically necessary. Employee was released to work with no restrictions. He was medically stable as of February 25, 2016. No PPI was identified. (Craven report, February 25, 2016).

11) On March 14, 2016, Employer denied TTD and TPD benefits beginning February 25, 2016, ongoing medical treatment and transportation costs, PPI, and rehabilitation benefits, relying on Dr. Craven's February 25, 2016 EME report. (Controversion Notice, March 14, 2016).

12) On April 1, 2016, reemployment eligibility specialist Tommie Hutto issued a reemployment benefits eligibility evaluation. His prior employment history included position descriptions of Mill Operator SCODRDOT# 599.685-058, House Repairer # 869.381-010, User Support Analyst # 032.262-010, Network Control Operator # 031.262-014, and Computer Security Specialist # 033.362-010. Job descriptions and a request for predictions regarding Employee's future physical capacities and PPI rating were sent to PA-C Henry. The reemployment specialist attempted to contact PA-C Henry dozens of times, including messages left with the Maniilaq complaint department. The reemployment specialist was unable to make an eligibility recommendation due to the lack of response from PA-C Henry. (Eligibility Evaluation, April 1, 2016). EME Dr. Craven predicted Employee would be able to meet the physical demands for all SCODRDOT's presented and that Employee did not incur a ratable permanent impairment. Employee presented as Not Eligible for reemployment benefits under AS 23.30.041(e)(1)(2) and .041(f)(2)(3). (Eligibility Evaluation, April 12, 2016).

13) On April 4, 2016, PA-C Dyches concurred with Dr. Craven's February 25, 2016 EME report. (Dyches concurrence, April 4, 2016).

14) On April 19, 2016, PA-C Henry noted Employee had residual chronic pain complicated by a lackadaisical effort at rehabilitation. He was medically stable with a 20-pound lifting restriction. Employee was candidate for a nonphysical job that would let him work within his restrictions. (Henry record, April 19, 2016).

15) On May 5, 2016, the RBA-designee found Employee not eligible for reemployment benefits. She said "[i]f you disagree with my decision that you are not eligible for reemployment benefits then you must complete and return the attached Workers' Compensation Claim . . . within 10 days of receipt of this letter. . . ." (RBA determination letter, May 5, 2016). The evaluation did not consider the opinions of PA-C Henry or Dr. Zent, both providers at Maniilaq. (Record; observation).

16) On May 5, 2016, Employee filed a claim for unfair or frivolous controversion. The first page of the claim noted the reason for filing was negligence by the Employer and improper medical care from Maniilaq Association for failing to properly diagnose his back in a timely manner. (Workers' Compensation Claim, May 5, 2016).

17) On May 16, 2016, PA-C Henry predicted Employee would incur a PPI greater than zero and would have permanent physical capacities to perform the jobs of Computer Security Specialist, SCODRDOT # 033.362-101, Network Control Operator, # 031.262-014, and User Support Analyst, # 032.262-101 (jobs held within the ten years preceding the work injury), but not those of # 599.685-058, Mill Operator (his job at the time of injury). (Henry response to reemployment specialist, May 16, 2016).

18) Employee's attending physician was unclear in *Richards I.* At hearing Employee testified he believed Maniilaq providers were his attending or treating physicians. (Record).

19) On May 19, 2016, Employee contacted the workers' compensation office and indicated he wanted to add reemployment benefits to his claim; he would amend his claim and email it in. (ICERs note, May 19, 2016).

20) On May 19, 2016, Employee filed an amended claim; it was rejected for filing as the first page was missing. (Workers' Compensation Claim, May 19, 2016). After a telephone conversation with Employee on May 20, 2016, the Division re-processed the claim filing using the same first page as his original claim. (ICERs Note, May 20, 2016). Employee's amended

claim requested TTD, PPI, medical costs, transportation costs, a review of the reemployment benefit eligibility decision, unfair or frivolous controversion, and "other" (not otherwise defined). (Amended May 5, 2016 Workers' Compensation Claim, May 20, 2016).

21) On May 26, 2016, Employer answered Employee's amended claim and denied benefits and unfair and frivolous controversion. Employer relied on Dr. Craven's February 25, 2016 EME report and the subsequent concurrence of PA-C Dyches on April 4, 2016. (Answer and Controversion Notice, May 26, 2016). Employer again denied specific benefits on June 14, 2016, of TTD dated 5/19/16, medical costs, transportation costs, reemployment benefits, PPI, negligence against Employer, improper care against Maniilaq, and unfair and frivolous controversion based on the Craven EME report, the concurrence of PA-C Dyches, and applicable provisions of the Alaska Workers' Compensation Act. (Controversion Notice, June 14, 2016).

22) On July 7, 2016, Employee was evaluated by Joscelyn VanDuren, ANP, on referral from Jeff Stubblefield PA-C. She diagnosed chronic back pain and a wedge compression fracture of first lumbar vertebra with delayed healing. Exam was consistent with facet and possibly interspinous ligament pain; Employee was to receive a facet injection and might benefit from an interspinous ligament injection in the future. (VanDuren Record, July 7, 2016). On July 8, 2016, Employee underwent a facet joint block. (Alaska Native Medical Center (ANMC) record, July 8, 2016).

23) On November 17, 2016, ANP VanDuren found Employee's pain was constant and achy but better with injection. (VanDuren record, November 17, 2016). Employee received a lumbar intraspinous injection with steroid at T12/L1 the next day. (Weidner record, November 18, 2016).

24) On June 1, 2017, Employee underwent a left partial nephrectomy. (ANMC record, June 1, 2017). Employee expressed concern that his kidney issues might be related to his work with chemicals to his health care providers in 2017, and indicated he had an issue with a chemical exposure at work approximately four years earlier. (ICERs database).

25) On February 5, 2018, Employee filed a Petition for a second independent medical evaluation (SIME) signed and dated February 2, 2018. (Petition, February 5, 2018). On March 12, 2018, the designee "encouraged EE to file an Affidavit of Readiness for Hearing [ARH] on his Petition for SIME in order to move this case forward. After the ARH is filed then the board

will schedule another PHC in order to set the SIME matter for hearing." (Prehearing Conference Summary, March 12, 2018).

26) On March 21, 2018, Employee was examined by Steven Maher, M.D. Employee requested an "IME evaluation" and noted he had two in the past. His pain was over the L1-L2 region and was described as "a little pain" and "annoying pain or ache" and was rated as a "2/10" at its worst. Employee denied taking any pain medication or anti-inflammatories and did not want any. He was unhappy with his prior physical therapist and PA-C Henry. Dr. Maher discussed the need for adequate rehab exercises concentrating on core strengthening and combining this with an adequate trial of anti-inflammatories. Employee did not want to return to the pain clinic or have an ANMC referral. He refused the plan of care and left "obviously unhappy." (Maher record, March 21, 2018).

27) On April 10, 2018, Employee filed an ARH listing both the May 5, 2016 workers' compensation claim and the February 2, 2018 petition for SIME. (ARH, April 10, 2018). Attached to the ARH was a two-page document titled "Requested Hearing 4/6" providing a number of allegations which are either unclear or for which the Alaska Workers' Compensation Board (AWCB) does not have jurisdiction, including medical malpractice, deliberate suffering, discrimination, racist comments, fraud or misleading acts, failure to follow litigation process, failure to follow federal regulations, unorganized/illegitimate actions, emotional distress, availability of treating physician, IME being double jeopardy, reputation damages, loss of legal representation, and ethics complaints. (Requested Hearing 4/6 document, April 9, 2018).

28) On April 26, 2018, Division staff noted "EE called to ask about the 110 c (*sic*) notice on his last PHG (*sic*) summary, and specifically if he had filed his ARH late. Post-WCC contros were filed in 5/2016, and his ARH was filed 4/2018, so told him ARH was not filed late." (ICERs communication phone call note, April 26, 2018).

29) On June 28, 2018, *Richards v. Teck Resources Limited*, AWCB Dec. No. 18-0064 issued, ordering an SIME. (*Richards I*, June 28, 2018).

30) On October 30, 2018, *Richards v. Teck Resources Limited*, AWCB Dec. No. 18-0114 issued, granting Employer's petition for modification of *Richards I* in part, omitting or modifying two prior findings of fact regarding gaps in medical treatment. (*Richards II*).

31) On November 7, 2018, Dr. Maher completed a questionnaire from Employer's attorney regarding Employee's treatment. Dr. Maher agreed with the February 25, 2016 Craven EME

report and opined Employee did not have a ratable PPI caused by the June 21, 2015 work injury. No further treatment was needed. (Maher response to October 1, 2018 questionnaire, November 7, 2018).

32) On December 3, 2018, the designee "noted that once the SIME report issued, this would trigger the scheduling of another prehearing, in which a hearing could be scheduled on the merits of Employee's claim." (Prehearing Conference Summary, December 3, 2018).

33) On August 13, 2019, Employee underwent a SIME with Jon Scarpino, M.D. Dr. Scarpino reviewed approximately 1,567 pages of medical records and examined him. Employee's chief complaint was back pain in the middle portion of his low back. He had intermittent thigh numbness in association with back pain and prolonged sitting. Pain was worse with heavy lifting and averaged "1-2" on a scale of "0 to 10" in the prior month. To Employee's knowledge, he had not been released to return to work and had never received a FCE. He was a stay-at-home dad and would "consider [a] return to work when his kids are school age and out of the house." He had no plans of going back to heavy work and had prior significant computer skills. Dr. Scarpino found a June 21, 2015 work-related injury: 1) contusion, thoraculumbar spine; and 2) costovertebral syndrome. Employee was "long past the point where [mild wedge deformity of the L1 vertebral body of undetermined etiology] would have been expected to heal." Arthritic changes in the costovertebral joints at T12 were noted and identified as a possible cause of ongoing pain complaints at that level; treatment by a chiropractor or osteopath skilled in mobilization of costovertebral problems might be beneficial. If not, fluoroscopic injection could be helpful, both diagnostically and therapeutically. "The medical literature reports that with this syndrome, there is an occasional patient who could require surgical intervention with resection of the head of the rib." Answers to the board's SIME questions included:

> *1. Please list all causes of [Employee]'s disability, or need for medical treatment.*
>
> [Employee]'s disability and need for medical treatment were caused by the 6/21/15 incident when he was impacted by a heavy swinging bag of chemicals and crushed against a railing behind him, extending the spine.
>
> . . . .
>
> *6. If, in your opinion, the 06/21/15 injury was "the substantial cause" of [Employee]'s disability, does the work-related disability continue?*

[Employee] still reports T12-L2 area pain in the midline, and has finding on clinical exam today consistent with posttraumatic arthritis and costovertebral syndrome affecting the left side of the back more than the right side.

His work-related disability continues, but he would be capable of returning to work at a lighter status at this point in time and has the computer skills to do so. However, he chooses to be a home husband and to nurture his 2 children, with no plans to return to work until they have reached school age. This is a choice by the examinee and not necessarily in relation to the work injury.

7. *If, in your opinion, [Employee] is no longer disabled from the work injury, when did the disability end?*

I would agree with Dr. Craven's second [EME] of 2/15/16 indicating that the examinee was capable of returning to work at that point in time.

I would not think that he would have been capable of returning to his previous job, but would have been capable of returning to a lighter, more administrative position.

A Functional Capacity Evaluation has never been obtained to assess objectively [Employee]'s safe level for work return.

8. *The Alaska Workers' Compensation Act defines "medical stability: as:*

[T]he 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 presume in the absence of objectively measurable improvement for a period of 45 days; this presumption may be rebutted by clear and convincing evidence. Please answer the following questions based upon this definition:

a) *Is [Employee] medically stable?*

By definition, [Employee] would be considered medically stable, as there has been no objective measurable improvement in his condition for 45 days and he has not recently sought any active care.

. . . .

9. *What specific additional treatment, if any, do you recommend to address the 06/21/2015 injury or its consequences?*

> [Employee] has findings consistent with costovertebral syndrome at the T12-L1 level. If he wished to consider further treatment for this (he has refused previous treatment suggested), he might benefit from osteopathic or chiropractic manipulations by a physician skilled in the manipulative treatment of costovertebral syndrome.
>
> He might also benefit from fluoroscopically guided injection of the costovertebral joint both for diagnostic and therapeutic purposes, and if such injection identified the costovertebral joint as the cause of the persistent pain and the injection did not successfully eliminate the symptoms on a long-term basis, then he could be considered for resection arthroplasty of the costovertebral joint.
>
> . . . .
>
> 11. *If [Employee] is medically stable, please perform a permanent partial impairment rating using the American Medical Association Guides to the Evaluation of Permanent Impairment, 6th Edition (Guides). An impairment rating may not be rounded to the next five percent.*
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> . . . .
>
> Using the net adjustment formula on page 582 of the Guides results in a score of -2, which would indicate an adjustment to grade A, which would reduce the impairment rating from 2% to 0%.

Dr. Scarpino would not agree to a lifetime work limitation at a light functional level without a FCE. Employee was not considered disabled from work as of the date of the SIME. Previously prescribed medical treatment was reasonable and necessary. (Scarpino SIME report, August 29, 2019).

34) On October 2, 2019, the parties had received the SIME report. The designee explained the mediation process to the Employee. Based on the hearing docket, a hearing could not be scheduled until April or May 2020. The parties agreed to mediation on Thursday, December 5, 2019. No hearing was scheduled. (Prehearing Conference Summary, October 2, 2019). On December 5, 2019, Employee notified the Division that mediation had failed and wanted to know what would happen next. (ICERs communication note, December 5, 2019). The Division representative "[e]xplained to the EE that it is up to the parties . . . [t]hey might either go back to the table and try to settle or they could file an ARH where both sides would be heard by the board . . . [h]e said he guessed he should just wait for a hearing notice and I explained . . . if the

officer has not set a hearing it would be up to the parties to submit and *(sic)* ARH. He said he understood and didn't have any more questions at this point . . . ." (*Id.)*

35) On January 22, 2020, Dr. Scarpino testified Employee was mainly complaining of mid back pain at the time of the SIME; he "had positive provocative testing over his last ribs over the 12th rib. When I would stress that anteriorly that would cause him pain posteriorly where the rib articulates with the spine." Prior examiners said Employee had tenderness in the area from T12 or T11 down to L2. The abdominal examination corresponded with back pain; he could load up the rib where Employee was painful and reproduce his back pain. There was tenderness at the thoracolumbar junction where the costovertebral angle is located. Further questioning revealed

> Q. *Now, is it fair to say that in the records there was disagreement as to whether there was this fracture to begin with and then whether it was caused by the work injury?*
>
> A. Number one, there was disagreement. Number two, the reason that the disagreement persisted was because nobody did the proper evaluation . . . if you see somebody that you think has a spine fracture and you can't tell whether it's new or old, which you often can't with minor compression fractures, you get an MRI of the spine at that point in time.
>
> And if it is acute there will be bone marrow edema. If it is not acute there won't be.
>
> Q. *There was an MRI that was done the following February?*
>
> A. Yes, 7 or 8 months later.
>
> Q. *Is that too late?*
>
> A. Way too late. Bone marrow edema usually persists for about three months. If we see it longer than that, it raises the issue of whether the fracture is pathological, whether there is a tumor in the vertebral body or something like that. But normally it will be gone in three months.
>
> However, a bone scan will still stay positive for up to two years. They could have done either one and determined if it was a new fracture or not. . . . .

Compression fractures are normally caused by axial loading bending forward; the mechanism of injury described was opposite of what you would expect with a compression fracture. At the time of the SIME, Employee had pain that slightly limited activity but he had an adequate range

of motion; Employee had no weakness or other significant findings that would limit him. Once you have a compression fracture, the deformity will stay. Employee's L1 wedge deformity was "so minimal that a lot of people if they are just reading through the x-rays and they are not specifically looking they won't even notice it. . . ." Regarding the wedge deformity "there really isn't any treatment you could do for that surgically . . . you could do . . . general strengthening type exercises if you felt that he still had significant weakness that was responsible for some of his pain." Employee could have residual weakness because he was never compliant with a rehabilitation program. Employee had fear/avoidance behavior - people with that are difficult to rehab because they are afraid to do anything they think might hurt. Employee had a normal neurological exam and symmetrical strength; he hadn't undergone a FCE to see how much he could lift and assess his endurance. Dr. Scarpino diagnosed a contusion of the thoracolumbar spine (bruise of the soft tissues) and costovertebral syndrome. Ninety percent of people with a contusion or sprain type of injury will be better in 12 weeks. Costovertebral syndrome was clarified as

> Q. . . . *can you explain what you mean by costovertebral syndrome?*
>
> A. Well, I think he has a pain generator in that area. If you look at his x-rays he has post-traumatic degenerative change in the joint, arthritic change in the joint. I think the joint itself is painful.
>
> Q. . . . *How did the work injury cause the post-traumatic arthritis? Where exactly is the arthritis?*
>
> A. It's right in the joint between the head of the rib and where it articulates with the vertebral body.
>
> Q. *How, can you explain how that mechanism of injury would have caused any pathology at that joint?*
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> A. . . . he was essentially crushed . . . hit by a very heavy weight that pushed him back against the fence . . . and jammed the head of the rib into the joint and hurt the articular surface of the joint, hurt the cartilaginous surface of the joint. And then that deteriorates over time and you get arthritic change.
>
> . . . .
>
> Q. . . . *so you mentioned that there was injury as a result of the work incident to the costovertebral joint.*

> . . . .
>
> *What kind of diagnostic study would show that, like an MRI or CT scan?*
>
> A. . . . you can see the arthritic change on the plain films. And that would be my diagnosis. And then if you wanted to verify that you would probably proceed with treatment. If you have a[n] osteopath, a manipulative physical therapist or chiropractor that's experienced in treating that kind of problem and the patients will be better almost instantly. . . . The other way to verify it would be under fluoroscopy to do an injection into the joint of local anesthetic and see if it got better.
>
> . . . .
>
> Q. *And then, finally, you said that if there was no relief from the injection that there could be a possible resection of the - -*
>
> A. What I was saying was that if you injected him and you proved that was the pain generator but you didn't get sustained relief . . . the medical literature demonstrates that if you have that problem and it persists a resection of the head of the rib can alleviate the symptoms.
>
> . . . .
>
> I would try the manipulation and see where I got with that. If he didn't . . . get better then I would consider the injection. And then if he wasn't happy with that and he wanted to consider the surgery you have to have a really long discussion with him about that before proceeding as to if what he was going to get was going be worth the risk he was going to take.
>
> In that case, as well, I would get a psychiatric evaluation before I operated on him. . . . . That's a real last resort kind of thing.

Surgery was not warranted at Employee's pain levels as documented in the SIME report. Employee received one facet injection and then an injection into the intraspinous ligament. It was reasonable to do the injection to see if it would demonstrate that was the pain generator. Employee probably would have been significantly better within 12 weeks if he had been compliant with his therapy. At 12 weeks, Dr. Scarpino would have gotten an FCE and looked to see if there were specific deficits interfering with Employee's ability to get better and aim therapy specifically at those things. Alcohol abuse could negatively impact Employee's recovery

including generally increasing inflammation. Employee had no continued need for prescription medications for his back injury.

Employee developed a cyst and then carcinoma on the left kidney unrelated to the work injury. The costovertebral joint would not have been impacted or displaced as a result of a kidney cancer or cyst pressing against it.

Dr. Scarpino revised his earlier opinion to find that Employee would have reached "maximum medical improvement" or been medically stable on February 25, 2016, the date Employee first saw Dr. Craven. He was capable of working as of that date but chose to be a stay-home parent. Dr. Scarpino thought Employee could probably do his job at the time of injury, Mill Operator SCODRDOT # 599.685-058, though he would get an FCE to see what Employee could safely do. Employee should be able to do all three computer services related jobs (SCODRDOT # 033.362-010 Computer Security Specialist; # 032.262-010 User Support Analyst; and # 031.262.014 Network Control Operator) though he might need an accommodation to get up periodically and stand or stretch. He would have been capable of performing the three computer jobs since February 2016 without an FCE. (Scarpino Deposition, January 22, 2020).

36) On April 27, 2020, Employee inquired about a hearing date during a prehearing conference. The designee explained how to request a hearing by filing an ARH; Employee indicated he knew how to request a hearing because he had done it previously. (Prehearing Conference Summary, April 27, 2020). The summary did not notify Employee of the deadline to file an ARH. (*Id.)*

37) On December 31, 2020, *Richards III* issued. *Richards III* addressed Employee's repeated failure to return required releases to Employer and potential dismissal of his claim. *Richards III* found evidence of Employee's flagrant misconduct and "conscious intent to impede discovery." (*Richards III*).

38) On April 14, 2021, Employee called the Division to find out when he could submit an ARH on his claim. The representative noted that she read *Richards III* and following information and believed his claim could be dismissed; she "encouraged him to discuss any questions or concerns at the upcoming prehearing." (ICERs communications note, April 14, 2021).

39) On April 20, 2021, Employee attended a prehearing conference, the summary of which reflected:

> [Employee] confirmed his address of record and . . . wanted to know what is 'going on' with his case.
>
> The designee inquired whether Employee had signed and returned releases as ordered in the D&O. [Employer] contended [It] received Employee's signed releases on February 18, 2021.
>
> [Employee] inquired whether he needed to file an ARH to request a hearing. The designee informed Employee a hearing is requested by filing an ARH.

(Prehearing Conference Summary, April 20, 2021). The designee did not provide a deadline to file the ARH. (*Id.*) Employee did not request a revision or correction of the prehearing conference summary. (Agency file).

40) On April 21, 2021, Employee filed an ARH on his Workers' Compensation Claim. (Affidavit of Readiness for Hearing, April 21, 2021).

41) On September 16, 2021, Employee testified at hearing. Employee had recently undergone treatment for his back with PA-C Henry in May or June of 2021, but did not file records on a medical summary, stating he was not aware of this requirement. His last previous chiropractic treatment was with Arctic Chiropractic in Kotzebue in 2019; to his recollection he had not provided those records to the Employer or filed them with AWCB. He saw PA-C Henry at Maniilaq a few months before the hearing. Employee had not received any other treatment for his back since October 2019. His back condition has been the same since the SIME. He considered PA-C to be his primary treating or attending physician. His current pain level was 1 out of 10. He had undergone physical therapy but was discharged March 20, 2016 because there was nothing he could do with his back rehab. His kidney was an unrelated medical condition; Employee was not asserting that his kidney cancer was related to the June 21, 2015 work injury.

Employee chose to be a stay home parent in March of 2017 when the mother of his children chose to work; he was unsure of the exact date. He was the primary caregiver for his young children. As of the August 2019 SIME he had continued to choose not to work. Employee was not a stay home parent as of the hearing date, he did that perhaps half time since November of

2020, approximately every other month. He had not worked since 2016. His prior technical jobs require certifications or degrees. He is still limited to light duty and has not had a FCE. Employee had applied to be a clinical applications coordinator at Maniilaq and a computer specialist with Interpol. He also applied to be a computer tech at ANMC in Anchorage. His last job application was approximately nine months earlier. Employer did not offer him a different job after his work injury. Employee did not seek or apply for other jobs with Employer because he felt they would not hire him because of his workers' compensation injury. He knew of Employer's jobs website and had recently looked at it; the only other place Employee had looked for jobs was at the hospital and occasionally on LinkedIn. He had helped his father renovate a house off and on as a volunteer; his father is disabled and no one else was helping.

Employee moved to Anchorage from June 2020 to February 2021. He had not received unemployment benefits since February 2016. Employee had applied for long term disability benefits in 2016 but was found not eligible. He had applied for Social Security Disability (SSD) benefits but was denied. He currently has health benefits and had Medicaid for a few years. Employee had not been referred for a FCE.

Employee had worked from approximately 2001-2011 as a computer specialist at Maniilaq. His experience included solving computer problems, managing and updating servers, managing and updating email accounts, updating security software, and writing IT policies and procedures. Employee was in jail for approximately two weeks and was unavailable to work. In 2019, Employee broke his leg stepping out of his vehicle and was laid up for approximately three to four months; he had surgery and was restricted from work during that time. The leg injury did not affect his back. (Employee).

42) Cole Schaeffer testified at hearing. He is the Superintendent of Human Resources at Red Dog Mine (part of Teck), where he has worked for 18 years. Employee had been kept on as an employee for six months after the work injury following their sick leave policy. No alternative employment offer had been provided. Employee had not applied for any new positions with Employer. Employment preference is given to NANA shareholders; Employee is a NANA shareholder. Employer hires for minimum qualifications and provides training. Schaeffer was a credible witness. (Schaeffer; observations).

43) Employee was generally credible but had difficulty recalling his treatment history and the dates of specific events. (Experience, observations, inferences drawn therefrom). Employee's testimony that he was unaware he needed to file medical records on a medical summary was not credible; a review of the record shows Employee filed records on medical summary on at least five occasions between July 2016 and June 2019. (ICERS database).

44) A "couple" is regularly considered to be two of something. (Experience; observation).

45) Financial filings contained in the Division's ICERs database show Employer paid Employee TTD benefits from July 1, 2015 through March 8, 2016. (ICERs database).

46) Employer "does not dispute that [E]mployee was injured during the course and scope of his employment on or about June 21, 2015"; Employer disputes whether any additional benefits are due. (Employer's Hearing Brief, September 9, 2021).

47) Employee's name appears with and without the suffix "Jr." throughout the record. (Record).

48) *Richardson III* ordered that Employee's benefits were forfeited 10 days after the designee's April 27, 2020 order that Employee sign releases until the date signed releases were provided. (*Richardson III*). Ten days after April 27, 2020 is May 7, 2020. (Observation; experience). Employee returned the signed releases on February 18, 2021. (Prehearing Conference Summary, April 20, 2021). Employee's benefits were forfeited from May 7, 2020 through February 17, 2021. (*Richards III*).

49) Employee inquired at hearing about how to get a state-appointed doctor to look at his records to get a determination of whether his kidney infection and later cancer was related to his work with Employer. He stated he had briefly filed petitions on it before and had prehearings but did not recall specifics. The hearing officer advised Employee that the present hearing was limited to the June 21, 2015 impact injury and Employee should contact any Alaska workers' compensation office to speak with a technician or workers' compensation officer for assistance with that issue. (Record). Claims may be time-barred if they are not filed within certain specified timeframes. AS 23.30.105(a).

PRINCIPLES OF LAW

> **AS 23.30.001. Intent of the Legislature and construction of chapter.** It is the intent of the legislature that

> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
>
> (2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;
>
> . . . .

The Board may base its decision not only on direct testimony, medical findings, and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." That some persons "may disagree with a subjective conclusion does not necessarily make that conclusion unreasonable." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987) (further citations omitted).

> **AS 23.30.010. Coverage.** (a) Except as provided in (b) of this section, compensation and benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> . . . .
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> **AS 23.30.041. Rehabilitation and reemployment of injured worker**s. . . . .
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> (c) . . . If an employee suffers a compensable injury and, as a result of the injury, the employee is totally unable, for 45 consecutive days, to return to the employee's employment at the time of injury, the administrator shall notify the employee of the employee's rights under this section within 14 days after the 45th

> day. If the employee is totally unable to return to the employee's employment for 60 consecutive days as a result of the injury, the employee or employer may request an eligibility evaluation. The administrator may approve the request if the employee's injury may permanently preclude the employee's return to the employee's occupation at the time of the injury. If the employee is totally unable to return to the employee's employment at the time of the injury for 90 consecutive days as a result of the injury, the administrator shall, without a request, or an eligibility evaluation unless a stipulation of eligibility was submitted . . . .
>
> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days of the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. . . . The board shall uphold the decision of the administrator except for an abuse of discretion on the administrator's part.
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles" for
>
> > (1) the employee's job at the time of injury; or
> >
> > (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury or that the employee has held following the injury for a period long enough to obtain the skills to compete in the labor market, according to the specific vocational preparation codes as described in the 1993 edition of the United States Department of Labor's "Selected Characteristics of Occupations Defined in the Revised Dictionary of Occupational Titles."
>
> . . . .

The RBA's designee's decision regarding eligibility for reemployment benefits must be upheld absent an abuse of discretion. Abuse of discretion exists when a decision has been issued "which is arbitrary, capricious, manifestly unreasonable, or which stems from an improper motive." *Sheehan v. Univ. of Alaska*, 700 P.2d 1295, 1297 (Alaska 1985); *Manthey v. Collier,* 367 P.2d 884, 889 (Alaska 1962). Failure to apply controlling law or to exercise sound legal judgment

may equate to an abuse of discretion. *Manthey; Corbell v. Gen'l Teamsters Local 959,* AWCB No. 01-0175 at 3 (September 10, 2001). Failure to consider statutory mandates is an abuse of discretion. In determining eligibility for reemployment benefits, the RBA must consider the opinion of Employee's treating physician. *Irvine v. Glacier Gen'l Const.,* 984 P.2d 1109 (Alaska 1999). Failure to do so would "deprive [Employee] of a choice that AS 23.30.041(e) apparently meant to give him." *Id*. at 1107.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires, not exceeding two years from and after the date of injury to the employee. However, if the condition requiring the treatment, apparatus, or medicine is a latent one, the two-year period runs from the time the employee has the knowledge of the nature of the employee's disability and its relationship to the employment and after disablement. It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has the right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
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> . . . .
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> **AS 23.30.110. Procedure on Claims**. . . . .
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> (c) Before a hearing is scheduled, the party seeking a hearing shall file a request for a hearing together with an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for hearing. . . . If the employer controverts a claim on a board-prescribed controversion notice and the employee does not request a hearing within two years following the controversion notice, the claim is denied.
>
> . . . .

> (h) The filing of a hearing request under (c) of this section suspends the running of the two-year period

The .110(c) time limit is only triggered by a controversion after an employee has filed a claim for benefits. *Jonathan v. Doyon Drilling, Inc*., 890 P.2d 1121, 1124 (Alaska 1995). A claim for AS 23.30.110(c) purposes is a "written claim for compensation." *Id*. at 1123-24. Notice of the two-year statutory deadline to request a hearing as provided on the board-supplied controversion form is sufficient notice of the deadline to a reasonable person. *Providence Health System v. Hessel,* AWCAC Dec. No. 131 at 12 (March 23, 2010).

The Division must assist claimants by advising them of important facts of their case and instructing them how to pursue their right to compensation. *Richard v. Fireman's Fund Ins. Co.,* 384 P.2d (Alaska 1963). A designee has a duty to advise a pro-se litigant of the deadline to file an ARH, or how to determine the deadline, to avoid having their claim denied under AS 23.30.110(c). *Bohlmann v. Alaska Const. & Engineering, Inc*., 205 P.3d 316, 319-320 (Alaska 2009). The law favors giving a party their day in court and unless otherwise provided for by statute, workers' compensation cases are to be decided on their merits. *Sandstrom & Sons, Inc. v. State of Alaska*, 843 P.2d 645, 647 (Alaska 1992); AS 23.30.001(2).

The language of .110(c) is directory and not mandatory; the claimant may not simply ignore the requirement and must be actively moving the claim forward. *Kim v. Alyeska Seafoods, Inc.,* 197 P.3d 193 (Alaska 2008). Substantial compliance may excuse technical noncompliance with the statute. *Id.* "[S]ubstantial compliance does not mean noncompliance, or late compliance. Although substantial compliance does not require the filing of a formal affidavit, it nevertheless still requires a claimant to file, within two years of a controversion, either a request for hearing, or a request for additional time to prepare for a hearing . . ." *Whiley v. Alaskacorp. Inc.,* AWCB Dec. No 16-0064 at 10 (July 30, 2016) (citations omitted).

AS 23.30.110(c) has been compared to a "statute of limitations." *Suh v. Pingo Corp*., 736 P.3d 342, 346 (Alaska 1987). The statute of limitations defense is generally disfavored and neither "the law [n]or the facts should be strained in aid of it." *Narcisse v. Trident Seafoods Corp.*, AWCB Dec. No. 16-0071 at 17 (Aug. 18, 2016) (further citation omitted). The filing of a

Petition for SIME is insufficient to toll the running of the two-year request for hearing requirement under .110(c), *Roberge v. ASRC*, AWCAC Dec. No. 269 (September 23, 2019). The order for SIME in *Richards I* was sufficient to begin tolling under .110(c). *Aune v. Eastwind, Inc.,* AWCB Dec. No. 01-0259 (December 19, 2001); *Narcisse.* The .110(c) filing deadline is tolled until the SIME process is completed including any discovery or deposition taken after the report is issued. *McKitrick v. Municipality of Anchorage*, AWCB Dec. No. 10-0081 (May 4, 2010).

The plain language of the statute demands only that the employee request a hearing within two years of the controversion; "the board may require no more from the employee . . . failure to timely request a hearing supports dismissal of the claim to which the controversion applied, but does not bar future claims even for the same medical treatment which may occur in the future." *Davis v. Wrangell Forest Products*, AWCAC Dec. No. 256 (January 2, 2019). Where a pro se employee's deadline to file an ARH under AS 23.30.110(c) has been tolled during the SIME process, the board must clearly communicate the new filing deadline to the employee. *Id.*

> **AS 23.30.120. Presumptions.** (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter . . . .

The application of the presumption involves a three-step analysis; for injuries occurring after 2005, if an employee establishes a preliminary link between the injury and the employment, the presumption "may be overcome at the second stage when the employer presents substantial evidence, which demonstrates a cause other than employment played a greater role in causing the disability or need for medical treatment." *Runstrom v. Alaska Native Med. Ctr.*, AWCAC Dec. No. 150 at 7 (March 25, 2011). The employee need only provide minimal relevant evidence to establish the preliminary link between the injury and employment. *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V.,* 742 P.2d 339, 244 (Alaska 1987). Credibility is not weighed at this stage. *Resler v. Universal Services, Inc.,* 778 P.2d 1146 (Alaska 1989). In claims arising after November 5, 2005, employment must be the substantial cause of the disability or need for medical treatment. AS 23.30.010(a). If the employer's evidence is sufficient to rebut the

presumption, the employee must then prove his case by a preponderance of the evidence. *Runstrom* at 8. Credibility is not weighed at the second step. *Resler.* An employer can rebut the presumption by showing that the injury did not arise out of the employment. *Huit v. Ashwater Burns, Inc.,* 372 P.3d 904 (Alaska 2016). To do so, the employer needs to show the work injury could not have caused the condition requiring treatment or causing disability (the negative-evidence test) or that another, non-work-related event or condition caused it (the affirmative-evidence test). *Id.*; *Corona v. State of Alaska,* AWCB Dec. No. 20-0032 (May 21, 2020). Simply pointing to other factors that may have aggravated a preexisting condition is not a sufficient alternative explanation, *DeYonge*; however, *"*[t]he mere possibility of another injury is not 'substantial' evidence sufficient to overcome the presumption." *Huit.* Similarly, an unknown cause is not substantial evidence to rebut the presumption.

Credibility questions and the weight accorded evidence is deferred until after it is decided if Employer produced sufficient evidence to rebut the presumption that Employee's injury entitled him to benefits. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994) (further citation omitted).

In the third step, if the employer has successfully rebutted the presumption, it drops out and the employee must prove their claim by a preponderance of the evidence. *Runstrom* at 8. When determining whether the disability or need for treatment arose out of and in the course of employment, the factfinders in step three of the analysis must evaluate the relative contribution of different causes of the disability or need for treatment. *Huit*. They must review the different causes of the benefits sought and identify one cause as "the substantial cause." *Morrison v. Alaska Interstate Constr., Inc*., 440 P.2d 224 (Alaska 2019). In construing AS 23.30.010(a), the board must consider different causes of the "benefits sought" and the extent to which each cause contributed to the need for benefits. *Id.* The statute does not require the substantial cause to be a "51% or greater cause, or even the primary cause, of the disability or need for medical treatment." *Id.* at 238. The board need only find, which of all causes "in its judgment is the most important or material cause to that benefit." *Id.*

"Inconclusive or doubtful medical testimony must be resolved in the Employee's favor. Less weight may be given to a physician who appears to be advocating for a party." *Hanson v. Municipality of Anchorage*, AWCB Dec. No. 12-0031 (February 21, 2012) (further citations omitted). The Alaska workers' compensation system favors the production of medical evidence in the form of written reports. *Wise v. Wolverine Supply, Inc.,* AWCB Dec. No. 20-0095 (October 13, 2020).

> **AS 23.30.122. Credibility of witnesses.** The board has the sole power to determine the credibility of a witness . . . .
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> **AS 23.30.155. Payment of Compensation**. (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
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> . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due, as provided in (b) of this section, there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
>
> . . . .
>
> (p) An employer shall pay interest on compensation that is not paid when due. Interest required under this subsection accrues at the rate specified in AS 09.30.070(a) that is in effect on the date the compensation is due. . . .

Where an employer neither controverts employee's right to compensation, nor pays compensation due, subsection .155 imposes a penalty. *Harp v. ARCO Alaska, Inc.*, 831 P.2d 352 (Alaska 1992). To avoid a penalty, a controversion must be filed in good faith. *Id.* For it to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the board would find that the claimant is not entitled to benefits. *Id.*

The division of insurance will be notified if the board finds that Employer's insurer has frivolously or unfairly controverted compensation. "Frivolous" is not defined in the Act. Black's Law Dictionary defines "frivolous" as "[l]acking a legal basis or legal merit; not serious;

not reasonably purposeful." BLACK'S LAW DICTIONARY, 10TH ED., at 783 (2009). The Alaska Supreme Court adopted a definition of frivolous used by the Alaska Workers' Compensation Appeals Commission where the parties did not otherwise ask for a review of its meaning: "a 'frivolous' controversion is one 'completely lacking a plausible legal defense or evidence to support a fact-based controversion.'" *Vue v. Walmart Assoc., Inc.,* 475 P.3d 270, 288 (Alaska 2020) (further citation omitted). Cases reviewing the standard for Rule 11 civil sanctions on frivolous pleadings have found the determining factor to be whether there was a reasonable basis, *Alaska Fed. S & L v. Bernhardt*, 794 P.2d 579 (Alaska 1990), and being "both baseless and made without a reasonable and competent inquiry," *Garcia v. Gallo*, 2018 WL 3414324 (D. Alaska, 2018).

> **AS 23.30.185. Compensation for temporary total disability**. In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for a period of disability occurring after the date of medical stability.

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment per se, but rather the loss of earning capacity related to that impairment. *Vetter v. Alaska Workmen's Compensation Bd*., 524 P.2d 264 (Alaska 1974). Where the Employee voluntarily leaves the labor market, there is no compensable disability. *Id.* The statutory definition of "disability" says nothing about the reasons for leaving work; the issue is whether the claimant was able to work despite the injury, not why she is no longer working. *Cortay v. Silver Bay Logging*, 787 P.2d 103 (Alaska 1990).

> **AS 23.30.190. Compensation for permanent partial impairment: rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is $177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .

Where a claim for PPI is contested, the employee has the duty to obtain a PPI rating either if he does not agree with a rating by the employer's physician, or where a PPI rating has not already

been obtained. *Stonebridge Hospitality Associates, LLC v. Settje,* AWCAC Dec. No. 153 (June 14, 2011).

> **AS 23.30.200. Temporary Partial Disability.** (a) In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be 80 percent of the difference between the injured employee's spendable weekly wages before the injury and the wage-earning capacity of the employee after the injury in the same or another employment, to be paid during the continuance of the disability, but not to be paid for more than five years. Temporary partial disability benefits may not be paid for a period of disability occurring after the date of medical stability.
>
> (b) The wage-earning capacity is determined by the actual spendable weekly wage of the employee if the actual spendable weekly wage fairly and reasonably represents the wage-earning capacity of the employee . . . .

TPD is determined by comparing an Employee's actual weekly earnings with his spendable weekly wage. *Lubov v. McDougall Lodge, LLC*, AWCAC Dec. No 257 (March 7, 2019). The burden is on employee to provide evidence to support the benefits he seeks; where the employee fails to provide evidence of his actual earnings, there is no evidence to determine at TPD calculation. *Id.* Employees have a duty to mitigate damages. *Hays v. Boart Longyear,* AWCB Dec. No. 03-0011 (January 15, 2003).

> **AS 23.30.395. Definitions.** In this chapter . . . .
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> (3) "attending physician" means one of the following designated by the employee under AS 23.30.095(a) or (b):
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> (A) a licensed medical doctor;
> (B) a licensed doctor of osteopathy;
> (C) a licensed dentist or dental surgeon;
> (D) a licensed physician assistant acting under supervision of a licensed medical doctor or doctor of osteopathy;
> (E) a licensed advanced practice registered nurse; or
> (F) a licensed chiropractor;
>
> . . . .
>
> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment;

. . . .

(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 employer "may be liable for TTD benefits while the employee was not medically stable and for any time period when he was temporarily . . . incapable because of injury to earn wages from work." *Johnson v. Municipality of Anchorage*, AWCB Dec. NO. 09-0120 at 10 (June 24, 2009). An employee may have multiple periods of disability. *Johnson*.

8 AAC 45.082. Medical treatment. . . .

(b) . . . .

(1) 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; . . . .

8 AAC 45.084. Medical travel expenses. (a) This section applies to expenses to be paid by the employer to an employee who is receiving or has received medical treatment.

(b) Transportation expenses include

(1) a mileage rate, for the use of a private automobile, equal to the rate the state reimburses its statutory employees for travel on the given date if the usage is reasonably related to the medical examination or treatment;

. . . .

(d) Transportation expenses, in the form of reimbursement for mileage, which are incurred in the course of treatment or examination are payable when 100 miles or

> more have accumulated, or upon completion of medical care, whichever occurs first. . . .

ANALYSIS

1) Is Employee entitled to temporary disability benefits?

Employee suffered a compensable injury and is entitled to TTD benefits until he is medically stable where his disability is total in character but temporary in quality. AS 23.30.185. Employee has attached the presumption of disability total in character but temporary in quality via the medical records of PA-C Henry, who excused Employee from work on July 1, 2015. AS 23.30.120.

Without regard to credibility, Employer rebutted the presumption when EME Dr. Craven found Employee's work-related injuries had resolved, he was released to work without restriction, and was medically stable as of February 25, 2016. *Huit; Corona.*

The burden shifts back to Employee to provide a preponderance of evidence that he remained disabled after the last date Employer paid TTD benefits, and clear and convincing evidence that he was not medically stable. AS 23.30.395(16), (28). Employer last paid TTD benefits on March 8, 2016.

EME physician Dr. Craven opined Employee was capable of returning to work without restriction on February 25, 2016. Dr. Craven is credible but his opinion is given less weight as he examined Employee on two occasions, was not actively involved in his treatment, and as Employer's physician, seemed be advocating on behalf of Employer to a limited degree when he changed some of his opinions, for example, his opinion about the fracture. *Hanson*.

Dr. Zent released Employee to work with a five-pound lifting restriction on November 6, 2015. Dr. Zent treated Employee periodically, works at Maniilaq, and is considered one of Employee's attending physicians. AS 23.30.395(3); 8 AAC 45.084. Dr. Zent's opinion is credible and is given full weight.

PA-C Henry, considered to be Employee's main attending physician, found Employee able to return to work with a 20-pound lifting restriction on April 19, 2016. PA-C Henry treated Employee regularly, works at Maniilaq, and is considered one of Employee's attending physicians. AS 23.30.395(3); 8 AAC 45.084. PA-C Henry's opinion is credible and given full weight.

PA-C Dyches found Employee was able to return without restriction as of February 25, 2016. While credible, his opinion is given less weight as he had limited interaction with Employee.

Dr. Mayer agreed with Dr. Craven's February 25, 2016 report and finding that Employee was able to return to work without restriction as of February 25, 2016. Dr. Mayer's opinion is credible but is also given less weight due to his limited interaction with Employee.

Greatest weight is given to the opinion of SIME physician Jon Scarpino, M.D. He had the benefit of reviewing all of Employee's medical records and was not an advocate for either party. Dr. Scarpino opined Employee was able to return to work on February 25, 2016; a FCE would have been necessary to determine whether he could safely return to his job at the time of injury. He opined Employee had the physical capacities to perform computer services job descriptions representing work he had performed within the 10 years prior to the work injury, without requiring an FCE. However, Dr. Scarpino would not provide a lifetime light duty limitation for Employee without an FCE. He noted that Employee had chosen not to return to work, but when he did, he would look for a job using his computer skills and not heavy physical activity.

Employee testified that he made the decision to be a stay-home parent in March of 2017. This testimony is not credible when viewed with the contemporaneous medical records. Greatest weight is given to the written medical records. *Wise.* Physical therapy records indicate Employee had recently decided not to return to work for Employer as of January 15, 2016. Those records also indicate that Employee was working on fixing up a house with his brother; and that he anticipated he would start work for his father later that year.

Given the medical records, Employee's testimony, and opinions of the above physicians, Employee was medically stable on February 25, 2016. He has not provided clear and convincing evidence that he was not medically stable as of March 8, 2016, the last date Employer paid TTD benefits. This medical stability date alone defeats Employee's TTD benefit claim because no TTD benefits may be paid after the date of medical stability. AS 23.30.185.

Notwithstanding the above analysis, Employee would also have to provide a preponderance of evidence that he remained totally disabled during the rest of the period for which he sought TTD benefits. AS 23.30.395(16). The primary consideration in determining disability is loss of earning capacity. *Vetter.* The only issue is whether he was able to work despite the work injury, not the reason he stopped working. *Cortay*.

Employee testified he decided not to return to work until approximately one year prior to hearing, could perform computer-related job duties, had looked at a limited number of sources for job openings, and had applied for few positions. Employee has a duty to mitigate his damages, *Hays*, and by his own testimony did not remain totally disabled.

Most medical records in this case show Employee was able to work as of February 25, 2016, either at the job of injury or at a lighter, computer services position. The latest date provided for a return to work was PA-C Henry's April 19, 2016 work release with a 20-pound lifting restriction. Employee's regular treating physicians disagreed regarding his ability to return to work; Dr. Zent found Employee could return to work with a 5-pound lifting restriction as early as November 6, 2015. SIME physician Dr. Scarpino's opinion, given the greatest weight, found that Employee could return to work on February 25, 2016.

Employee failed to meet his burden to show by a preponderance of evidence that he remained disabled after March 8, 2016, the last date Employer paid TTD benefits. An employee may have multiple periods of disability. *Johnson*.

Employee is not currently entitled to TTD benefits. His present claim for TTD benefits will be denied. Should Employee's work-related condition worsen, he may be entitled to TTD benefits in the future. *Johnson*.

Employee also requested TPD benefits though they were not listed in his claim. Employer acknowledged both TTD and TPD benefits might be an issue. Employee testified he had chosen to be a stay-at-home parent. He provided no evidence of actual income earned. TPD benefits are determined by comparing Employee's actual weekly earnings with his spendable weekly wage. AS 23.30.200(b); *Lubov*. The burden is on Employee to provide evidence to support his request for TPD benefits. Since he provided no evidence on this issue, Employee is not entitled to TPD benefits and his request will be denied.

2) Is Employee entitled to PPI benefits?

Employee was found to have a compensable work injury and is entitled to PPI benefits where there has been a PPI rating of more than zero percent. AS 23.30.190. Dr. Craven did not identify any PPI relating to the June 21, 2015 work injury. PA-C Dyches agreed with Dr. Craven. Dr. Maher also agreed that Employee did not have a ratable permanent impairment from the work injury. PA-C Henry predicted Employee would have a PPI rating greater than zero percent, but failed to either provide a PPI rating or refer Employee to obtain one. SIME Dr. Scarpino performed a permanent impairment rating for Employee and found it to be zero. No evidence was provided that Employee obtained a PPI rating higher than zero percent under AS 23.30.190 and 8 AAC 45.122.

Employee requested PPI benefits in his claim, and that claim was ripe as of the hearing date. If Employee wanted to pursue an award of PPI benefits and disagreed with Drs. Craven, Dyches, Maher, and Scarpino, Employee was required to obtain a PPI rating and present it at hearing. *Settje*. Since he did not, Employee's current claim for PPI benefits will be denied.

3) Is Employee entitled to medical benefits?

Employee is entitled to medical benefits if his work injury is the substantial cause of his need for treatment. AS 23.30.010(a); AS 23.30.095. Employer asserted all submitted medical bills had

been paid. Employee did not file medical bills or statements, provide an index or summary, or otherwise provide detailed testimony regarding unpaid medical billings. Employee had a compensable work-related injury and treatment supported by medical records filed at the time of hearing was reasonable and necessary. Employee is entitled to medical benefits from Employer in accordance with the Act.

No evidence was received that Employee will require any additional medical treatment for his work-related injury other than in the report and testimony of Dr. Scarpino, the SIME physician. Dr. Scarpino diagnosed Employee with costovertebral syndrome and opined that reasonable treatment would include a limited number (a "couple of sessions") of chiropractic or osteopathic manipulations; if the problem did not get better, a fluoroscopic injection of a local anesthetic would be helpful. If the injection did not provide sustained relief, medical literature indicates a surgical rib resection could be considered, though it was not warranted at Employee's reported pain levels.

Employee testified he had received limited chiropractic treatments in 2019. Medical records for those treatments were not filed and at this time it is unknown whether they were the specific types of manipulation identified by Dr. Scarpino or whether they provided Employee with the relief anticipated by the SIME physician.

Employee is entitled to limited medical benefits as set out by Dr. Scarpino for costovertebral syndrome: a "couple" of chiropractic or osteopathic manipulations (no more than three). Only if those treatments were unsuccessful, fluoroscopic injection could be attempted. No additional medical treatment is warranted based on the hearing record. Should Employee's work-related conditions worsen, he retains his right to seek additional medical care and Employer retains all defenses.

4) Is Employee entitled to transportation costs?

Employee is entitled to transportation costs for medical treatment related to the work injury. 8 AAC 45.084. Mileage reimbursement is payable when 100 miles or more have accumulated, or upon completion of medical treatment. 8 AAC 45.084(d). No evidence was filed to support an

award of transportation costs incurred by Employee. Employee's claim for past transportation expenses incurred before the hearing date will be denied.

5) Is Employee entitled to a penalty for unfair or frivolous controversion?

Employee seeks a finding of unfair or frivolous controversion and associated penalty, and read most broadly, a referral to the Division of Insurance regarding the denied benefits. AS 23.30.155(e), (o); *Harp*. Employer denied benefits on March 14, 2016, May 26, 2016, and June 14, 2016, based on the EME report of Dr. Craven and by operation of law. Employer's denial of benefits not provided for in the Act is supported by a plain reading of the Act. AS 23.30.001 *et seq*. Standing alone, Dr. Craven's opinions would result in a finding that Employee was not entitled to benefits for the work-related back injury; Employer's controversions based on Dr. Craven's report were neither frivolous nor unfair. *Harp*; *Vue*; *Bernhardt*; *Gallo*.

Employer also denied benefits on March 8, 2019, April 2, 2019, and March 23, 2020 based on Employee's failure to sign required releases without filing a petition for protective order. The record indicates Employee had failed to provide required releases for each of these denials and failed to seek a protective order. His ongoing refusal to provide valid releases to Employer and intent to impede the discovery process was documented in *Richards III*. Employer's controversions for failure to supply medical releases were neither frivolous nor unfair. AS 23.30.107.

As none of Employer's controversions were frivolous or unfair, Employee is not entitled to a penalty. A referral to the Division of Insurance is not applicable.

6) Did the RBA abuse her discretion when she found Employee not eligible for reemployment benefits?

The RBA-designee's finding of ineligibility for reemployment benefits must be upheld absent an abuse of discretion. *Sheehan*; *Manthey*. Abuse of discretion may apply where the decision was arbitrary, capricious, manifestly unreasonable, or stemmed from an improper motive. *Sheehan.* Not applying controlling law or following statutory mandates is an abuse of discretion. *Irvine*; *Manthey; Corbell.*

The RBA-designee's ineligibility finding is based upon the specialist's eligibility recommendation and opinions of Dr. Craven, including his predictions of Employee's physical capacity to perform the demands of specified job descriptions. Based on this alone, the RBA-designee's determination that Employee was not eligible for reemployment benefits is not arbitrary, capricious, or manifestly unreasonable, nor does it appear to stem from an improper motive.

The RBA-designee is required, however, to consider the predictions of Employee's attending physician. *Irvine*. Employee testified at hearing that he believed Maniilaq clinic providers were his attending physician(s).

Employee sought treatment with Maniilaq, and specifically PA-C Henry, approximately 10 days after the work injury, thus designating Maniilaq as his attending physician. 8 AAC 45.082(b)(2). No evidence was provided or argued that Employee transferred his care to any other provider or received care elsewhere (other than by referral); nor was written approval of any change of physician provided.

The RBA-designee did not consider the opinion of Employee's anticipated attending physician prior to making her eligibility determination; however, the reemployment specialist noted that he had attempted to obtain predictions from PA-C Henry "dozens" of times prior to issuing his report. PA-C Henry's predictions were not received until 11 days after the RBA-designee's finding of no eligibility was issued, and stated Employee could meet the physical requirements of jobs held in the 10 years prior to the work injury. Employee would not be eligible for reemployment benefits where he had the physical capacity to perform any job held within the 10 years prior to the work injury. AS 23.30.041(e)(2). Therefore, since PA-C Henry agreed with Dr. Craven's prediction on this issue, any error or abuse of discretion that may have occurred via the RBA-designee's determination of non-eligibility was harmless. Given the Act's mandate of ensuring quick, efficient, fair, and predictable delivery of benefits to injured workers at a reasonable cost to Employer, this matter will not be remanded to the RBA-designee for consideration of PA-C Henry's opinion where it would not change the ultimate outcome. Employee is not entitled to reemployment benefits and his request will be denied.

7) Is Employer entitled to dismissal of Employee's claim under AS 23.30.110(c)?

Employee amended his May 5, 2016 claim for benefits on May 20, 2016. Employer subsequently controverted the claim on May 26, 2016. Employee had two years from the controversion, or until May 26, 2018, to file an affidavit of readiness or otherwise request a hearing. AS 23.30.110(c), (h); *Jonathan*; *Kim*; *Whiley*; *Narcisse*. Employee filed an ARH on April 10, 2018, listing the workers' compensation claim and a February 2, 2018 petition. Sixteen days after Employee filed the ARH, a Division staff member advised Employee that his ARH was not late under .110(c).

Employer argued at hearing that Employee could not have been ready for hearing at the time the April 10, 2018 ARH was filed as he was still actively seeking an SIME, and the designee had subsequently notified him at a prehearing conference he would need to file an ARH on his workers' compensation claim after the SIME report had been received. Under Employer's analysis, the April 10, 2018 ARH is invalid relating to the claim for benefits, and the two-year time limit to file Employee's ARH would be tolled from February 2, 2018 through January 22, 2020 during the SIME process. Employer's calculation provided a deadline of April 21, 2020 for Employee to file a request for hearing.

Assuming Employer's assertions were correct, the Division still had a duty to advise unrepresented claimants of important facts of their case and how to pursue their right to compensation, including the deadline for filing an ARH or how to determine the deadline for filing one. *Richard*; *Bohlmann*; *Davis*. The provisions of AS 23.30.110(c) have been compared to a "statute of limitations" and a defense relying on .110(c) is generally disfavored. *Suh*; *Narcisse*. Dismissal under .110(c) is inapplicable where a *pro se* claimant has not been advised of the actual date by which he needs to request a hearing. *Davis.* The record reveals no Division staff member advised Employee of the actual date he would need to file an ARH following the SIME process.

Employee requested a hearing on April 10, 2018, less than two years after Employer's controversion, thus meeting the statutory requirement. AS 23.30.110(c)(h); *Davis*. Even if

Employee's April 10, 2018 ARH were not timely, the Division did not provide Employee with the actual date by which he would need to file an ARH in order to preserve his claim. Following the mandate that workers' compensation cases are to be decided on their merits, *Sandstrom & Sons*, and the analysis as noted above, Employee's case will not be dismissed.

CONCLUSIONS OF LAW

1) Employee is entitled to TTD benefits from July 1, 2015 to February 25, 2016.
2) Employee is not entitled to PPI benefits.
3) Employee is entitled to future medical benefits limited at this time to those set out by Dr. Scarpino as clarified in this decision.
4) Employee is not entitled to past transportation costs.
5) Employee is not entitled to a penalty for unfair or frivolous controversion or a referral to the Division of Insurance.
6) Employee is not eligible for reemployment benefits.
7) Employer is not entitled to dismissal of Employee's case under AS 23.30.110(c).

ORDER

1) Employee's benefits were forfeited from May 7, 2020 through February 17, 2021.
2) Employee's claim is denied in part and granted in part. His claim for past TTD benefits is denied. He retains his right to seek future disability benefits should his work-related injury worsen. Employer retains its defenses.
3) Employee's current claim for PPI benefits is denied.
4) Employee at this time is entitled to limited future medical benefits as set out by Dr. Scarpino and clarified in this decision. He retains his right to seek future medical care should his work-related injury worsen. Employer retains its defenses.
5) Employer's request to dismiss under AS 23.30.110(c) is denied.

Dated in Fairbanks, Alaska on November ____, 2021.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Cassandra Tilly, Designated Chair

/s/
Lake Williams, 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 CLEMENT RICHARDS, employee / claimant v. TECK RESOURCES LIMITED, employer; ZURICH AMERICAN INSURANCE COMPANY, insurer / defendants; Case No. 201510206; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified US Mail on November 15, 2021.

/s/ _____
Kimberly Weaver, Office Assistant II