

ALASKA WORKERS' COMPENSATION BOARD



P.O. Box 115512

Juneau, Alaska 99811-5512

JOSE RIVAS,)
)
Employee,)
Claimant,)
)
v.)
)
PACIFIC STEVEDORING,)
)
Employer,)
and)
)
SEABRIGHT INS. CO.,)
)
Insurer,)
Defendants.)
)
_____)

FINAL DECISION AND ORDER
AWCB Case No. 200704126
AWCB Decision No. 22-0028
Filed with AWCB Anchorage, Alaska
on April 26, 2022

Employee José Rivas' May 29, 2019 and February 1, 2021 claims were heard on April 5, 2022 in Anchorage, Alaska, a date selected on February 17, 2022. A September 9, 2021 hearing request gave rise to this hearing. Employee appeared by telephone, testified and represented himself. Attorney Nora Barlow appeared by Zoom and represented Pacific Stevedoring and its insurer. (Employer). The record closed at the hearing's conclusion on April 5, 2022.

ISSUES

Employee contends he is entitled to temporary total disability (TTD) benefits arising from his work injury with Employer, beginning April 3, 2019; Employer contends he is not.

1) Is Employee entitled to TTD benefits from Employer?

Employee contends he is entitled to medical care for his work injury with Employer; Employer contends he is not.

2) Is Employee entitled to medical benefits from Employer?

FINDINGS OF FACT

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

- 1) On March 24, 2007, Employee was bent over straightening up the floor when a co-worker threw a box of frozen fish, which struck Employee in the back of his head. (Report of Occupational Injury or Illness, March 27, 2007).
- 2) On March 26, 2007, Employee went to the local Iliuliuk Family & Health Services clinic for treatment for this injury. Jessica Ambrose, PA-C recorded, "PT WAS HIT IN THE BACK OF HEAD WITH BOX," his complaint included "HEAD," and they diagnosed a "HEAD CONTUSION." No x-rays were taken; PA-C Ambrose prescribed ibuprofen and released Employee to regular work with no restrictions effective March 27, 2007. (Physician's Report, April 5, 2007; emphasis in original; Work Release Form, date illegible).
- 3) On July 24, 2014, Employee reported left shoulder and back pain that began on July 21, 2014, "insidiously." The symptoms worsened when "tilting head back." (Aleutian Chiropractic Health Center, July 24, 2014).
- 4) On December 6, 2016, Employee presented for an examination for his commercial driver's license. He had "no complaints" or concerns other than running low on diabetes medications. (Paul Spencer PA-C report, December 6, 2016).
- 5) On September 9, 2017, James Morris, D.C., found Employee had chronic neck, mid-back, upper-thoracic spine and neck complaints "of unknown origin since 9/7/2017." All movement aggravated the pain, but nothing relieved it. When asked about his past health history, and in particular "Accidents," Employee said, "no previous trauma reported." When asked if this was a work injury, he checked "Other" with no further explanation. (Morris report, September 9, 2017).
- 6) On November 6, 2018, radiologist Bryan Winn, M.D., reviewed Employee's cervical spine magnetic resonance imaging (MRI) and listed as history, "Neck pain, muscle spasm of back. Numbness and weakness in right arm." Dr. Winn diagnosed "fairly advanced multilevel disc degeneration," and "degenerative subluxations" and "disc osteophytes." Employee had stenosis

from C3 through C6. Dr. Winn found bilateral stenoses and spurring “(fairly severe) at C4-5 and C5-6.” (MRI report, November 7, 2018).

7) On April 3, 2019, Ann Ehret, D.O., saw Employee, then age 59, for right shoulder pain. He was working as a driver for Matson Navigation Co. of Alaska (Matson) and was cranking a landing gear when he felt a “pull and a pop in his right shoulder.” His pain was in the front near his chest. Employee said he had chronic numbness and tingling in his right arm and intermittent weakness. Dr. Ehret referred him to a neurosurgeon for his neck. The active insurance was Matson’s workers’ compensation insurer. Dr. Ehret released Employee to light-duty with no right arm use for two weeks. (Ehret reports, April 3, 2019).

8) On April 3, 2019, Employee’s right shoulder x-rays disclosed mild to moderate osteoarthritis and rotator cuff tendinopathy. (Scott Naspinsky, M.D. report, April 3, 2019).

9) On April 4, 2019, Zachary Byrne, D.C., saw Employee for his “work related injury that occurred on or about 4/3/2019.” He was turning a chassis crank when he had right shoulder and neck symptoms. He “[denied] past episodes.” Employee said the right shoulder injury happened “yesterday,” but the clinic should know about his “old” neck injury. (Byrne reports, April 4, 2019).

10) On April 17, 2019, Dr. Ehret referred Employee to an orthopedic surgeon for his right shoulder and cervical disc disease. His shoulder injury was “subacute and work related” while the underlying cervical disc disease was “severe and chronic.” The primary insurance for this was Matson’s workers’ compensation carrier. (Ehret report, April 17, 2019).

11) On May 8, 2019, Eli Powell, M.D., orthopedic surgeon, saw Employee for his April 3, 2019 right shoulder injury and charted a history “of some underlying cervical disc disease.” The medical and surgical history included meniscus surgery but not the work injury with Employer. Employee’s symptom review was positive for “back pain.” (Powell report, May 8, 2019).

12) On May 9, 2019, Dr. Powell ordered a right shoulder MRI. Employee’s history again included meniscus surgery in 1980 but not his work injury with Employer. Dr. Powell restricted him from work for eight weeks. (Powell reports, May 9, 2019).

13) On May 9, 2019, radiologist Matthew Cronin, M.D., reviewed Employee’s cervical x-rays and found moderate to severe multilevel degenerative disc disease from C4 through C7 with no instability. (Cronin report, May 9, 2019).

14) On May 9, 2019, radiologist Marc Beck, M.D., reviewed Employee’s right shoulder MRI and found a degenerative “SLAP” tear in the right shoulder. (Beck report, May 9, 2019).

15) On May 9, 2019, Jennifer Hermanson, PA-C, who works with Benjamin Rosenbaum, M.D., neurosurgeon, saw Employee for his neck. He reported chronic neck pain with symptom onset “March 2007.” He reported he was hit “in the back of the neck with a 40-pound ice block” and lost consciousness. Employee said x-rays at the clinic were unremarkable. He said he stayed home for five days with pain medications and then returned to work on light-duty driving trucks. PA-C Hermanson reported, “He noticed gradual progression of symptoms to include neck pain and stiffness, which were managed by chiropractic adjustments.” However, in October 2018, Employee said his “symptoms became severe.” A November 2018 MRI demonstrated advanced, multilevel disc degeneration. He had right arm pain and tingling into digits one, three, four and five. Before his April 3, 2019 right shoulder injury, he claimed right neck pain with symptoms going to only digits four and five. His right arm and shoulder bothered him the most. PA-C Hermanson’s assessment included uncertainty regarding his diagnosis because Employee had significant right shoulder pathology. She and Dr. Rosenbaum recommended conservative treatment before considering neck surgery. (Hermanson; Rosenbaum report, May 9, 2019).

16) On May 15, 2019, Employee on referral from the orthopedic surgeon for his right shoulder, reported to physical therapy that his neck was also a problem. This was a “Longshore” claim from an April 3, 2019 right shoulder injury. (Sports & Orthopedic Physical Therapy, Inc. reports, May 15, 2019; June 28, 2019).

17) On May 28, 2019, Employee completed a claim and described his March 24, 2007 injury with Employer: “[A] co-worker launch[ed] a block of frozen fish on the back of my head knocking me out completely.” Implicitly requesting unspecified benefits, Employee gave as the reason for filing his claim, “[I]njury is getting worse. Neck hurts numbness on shoulder and arm and in the middle of my back it star[ting] to feel numb (arm tingles).” Attached to the claim was a “Notice of Controversion of Right to Compensation” from the U.S. Department of Labor regarding a Longshore and Harbor Workers’ Compensation Act (Longshore) matter arising from the April 3, 2019 “right shoulder/arm area” work injury while Employee worked for Matson. Matson denied the cervical issues were related to the April 3, 2019 injury. (Claim for Workers’ Compensation Benefits, May 23, 2019; Notice of Controversion of Right to Compensation, May 16, 2019).

18) On May 30, 2019, a Division staff member called Employee to clarify what benefits he was claiming because his claim did not specify. Employee stated he was claiming medical costs. (Agency file; Communications tab, May 30 2019).

- 19) On July 8, 2019, Dr. Powell recommended right shoulder surgery, which Employee initially elected to have in California. (Powell report, July 8, 2019).
- 20) On July 22, 2019, Aleutian Chiropractic Health Center provided a Longshore “Request for Examination and/or Treatment” form requesting payment for treatment related to a July 24, 2014 injury. (Email, July 22, 2019).
- 21) On August 16, 2019, Dr. Powell performed Employee’s right shoulder surgery. (Powell Operative Report, August 14, 2019).
- 22) Following his right shoulder surgery, Employee had extensive physical therapy. There is little if any mention of neck issues in the physical therapy notes. (Orthopedic Physicians Alaska Therapy South, August 19, 2019 through August 17, 2020).
- 23) On September 20, 2019, Dr. Ehret saw Employee for shoulder follow up and requested a document “for work-related injury to cervical spine,” but Dr. Ehret declined. She advised him to have his primary provider re-examine him as she was “not able to determine if his preexisting cervical disease was worsened by his right shoulder injury.” (Ehret report, September 20, 2019).
- 24) On November 4, 2019, Employee while working for Matson reported he had another injury the prior Friday when he was working out and a “bar fell on his back.” His shoulder was already in a splint from his shoulder injury. Employee had recently undergone a right shoulder rotator cuff repair in August 2019. “Has been having an increase in pain mostly to right trapezius and neck muscles.” (Ehret report, November 4, 2019). Employee also reported having been at the gym for a workout when a “bar fell on his back.” This incident increased his right shoulder pain and produced back pain. (Beatrice Dietrich, NP report, November 4, 2019).
- 25) On February 27, 2020, Employee said his chronic neck pain had increased over the last 18 months. (Providence Imaging information form, February 27, 2020).
- 26) On March 5, 2020, Employee returned to Dr. Ehret for his right shoulder workers’ compensation claim; he also had a “pending neck pain WC [workers’ compensation] case.” Employee hoped to link his shoulder injury to his “cervical spine DJD [degenerative joint disease]” but was doing it “unsuccessfully thus far.” (Ehret report, March 5, 2020).
- 27) On March 12, 2020, John Ritter, M.D., reviewed a cervical MRI and compared it with the November 6, 2018 MRI. Employee had extensive, multilevel degenerative changes throughout the cervical spine with “interval worsening compared to the prior exam from 2018.” The foraminal narrowing had also worsened. (Ritter report, March 12, 2020).

28) From March 17, 2020 through May 30, 2020, Employee treated extensively with Aleutian Chiropractic Health Center, solely for his right shoulder condition from his April 3, 2019 injury. (Aleutian Chiropractic Health Center reports, March 17, 2020 through May 30, 2020).

29) On March 18, 2020, Employee filed medical reports and a drawing depicting a person driving a forklift on a wooden ramp. Handwritten annotations said this process was bad on drivers' backs and the author at some point could not tolerate the pain and reported it to his supervisor and saw the local chiropractor. (Medical Summary, March 14, 2020).

30) On June 16, 2020, Dr. Winn reviewed neck x-rays and found multilevel degeneration throughout the cervical spine, narrowing and spurring. (Winn report, June 16, 2020).

31) On June 18, 2020, Ben Rosenbaum, MD, neurologist, examined Employee who had right-sided neck pain which radiated to the shoulder and palm. This paresthesia had been present for "about a year." Dr. Rosenbaum referred Employee to Eric Kussro, D.O., for electrodiagnostic testing. The active insurance was Blue Cross. (Rosenbaum report, June 18, 2020).

32) On July 30, 2020, Dr. Kussro examined Employee electrodiagnostically for bilateral arm numbness and tingling. Employee reported "chronic neck pain dating back to an event in March 2007 when he was hit with a large block of ice." He reportedly developed progressive neck pain and stiffness "but over this last year or so" he had right-sided neck pain radiating into the shoulder and arm with symptoms into most fingers in his right hand. Dr. Kussro diagnosed generalized peripheral polyneuropathy; skin paresthesia; muscle weakness; bilateral carpal tunnel syndrome; and cervical radiculopathy. He recommended additional testing of the lower extremities. (Kussro report, July 30, 2020).

33) On October 1, 2020, Dr. Kussro performed additional electrodiagnostic testing and found polyneuropathy and confirmed cervical radiculopathy. (Kussro report, October 1, 2020).

34) October 2, 2020, Employee reported having numbness in his feet for about three years. His diagnosis was still unclear. (Hermanson report, October 2, 2020).

35) On October 16, 2020, Employee was symptomatic. William Buttner, M.D., recommended carpal and ulnar tunnel releases, which he opined would be lower risk than neck surgery. Employee mentioned a neck trauma "in a work injury March 2007," and said he had worsening symptoms "x years." (Buttner report, October 16, 2020).

36) On October 23, 2020, Matson's employer's medical evaluator (EME) Amit Sahasrabudhe, M.D., evaluated Employee for his April 3, 2019 right shoulder injury. There is passing mention

of Employee's cervical issues. Dr. Sahasrabudhe made no diagnosis regarding Employee's neck but said he could not return to full duty as a truck driver based solely on motion loss in his right shoulder and poorly controlled diabetes. (Sahasrabudhe report, October 23, 2020).

37) On February 1, 2021, Employee claimed TTD benefits arising from the March 24, 2007 injury. He was on a hatch on "B" deck just about to finish the floor when a co-worker "launched a box on the back of [his] head-neck." Employee said the boxes weighed about 38-40 pounds and he wanted compensation for his "neck injury." (Claim for Workers' Compensation Benefits, January 27, 2021).

38) On April 1, 2021, Dr. Buttner wrote a "To Whom It May Concern" letter stating Employee "has a history of occupational trauma to his neck in 2007." He said Employee has "ongoing symptoms related to this injury" including chronic neck pain and right arm radiculopathy. Dr. Buttner said Employee had lower extremity sensory abnormalities and other symptoms "that could be related to his neck injury" and has "a complex polyneuropathy." He opined this was a "medically and legally complex" case and recommended an independent medical examination as was done for his more recent shoulder injury. (Buttner letter, April 1, 2021).

39) On April 28, 2021, Jared Kirkham, M.D., saw Employee and performed an EME for Employee's March 24, 2007 work injury. Employee told Dr. Kirkham he was hit in the head by a box of fish, and lost consciousness. He did not seek treatment for his neck until July 24, 2014, when he reported left-shoulder and back pain. Dr. Kirkham reviewed various gaps in the medical evidence in which Employee made no complaints regarding neck pain for several years. Employee reported his right-shoulder pain did not improve post-surgery and his cervical symptoms were getting worse. Dr. Kirkham said, "[Employee] confirms on today's date that his neck pain did not start until three months after the injury, which would significantly weaken any link between the injury and development of neck pain." After examining Employee and reviewing his medical records, Dr. Kirkham diagnosed: (1) mild concussion and head contusion substantially caused by the March 24, 2007 work injury; any loss of consciousness and mild concussion had long since resolved; (2) no evidence the March 24, 2007 work injury caused a spinal injury; (3) right shoulder "sprain/strain" injury substantially caused by the April 3, 2019 Matson injury, which is unrelated to the March 24, 2007 work injury with Employer; (4) chronic neck pain substantially caused by degenerative changes in the cervical spine, not related substantially to the March 27, 2007 work injury with Employer; (5) chronic right shoulder pain caused by non-injury factors; (6) chronic

numbness in the right third through fifth fingers unrelated to the injury with Employer; (7) bilateral carpal tunnel syndrome not substantially caused by any injury; (8) peripheral polyneuropathy substantially caused by age and diabetes; and (9) poorly controlled diabetes. (Kirkham report, April 28, 2021).

40) Dr. Kirkham opined Employee's 2019 right shoulder injury is not related to his March 24, 2007 work injury and his March 24, 2007 work injury does not disable him. The work injury did not aggravate a preexisting cervical condition. Employee did not need additional medical care after five days post-injury. Any medical care he needed thereafter was necessitated by his age, genetics, diabetes, deconditioning and psychosocial factors. Employee reached medical stability for his work injury with Employer by March 29, 2007. There is no permanent partial impairment for the March 24, 2007 work injury. (Kirkham report April 28, 2021).

41) On May 6, 2021, Dr. Buttner addressed Dr. Kirkham's EME report. He agreed the March 24, 2007 work injury caused a mild head contusion and concussion; it did not injure Employee's cervical spine; and Employee's cervical spine pain and right arm radicular symptoms are caused by chronic degenerative changes unrelated to the work injury. Employee's non-work-related cervical spine pain and right arm radicular symptoms are the substantial cause of any disability or need for medical treatment he has currently. (Buttner response, May 17, 2021).

42) At hearing on April 5, 2022, Employee testified that on the injury date he was on a cargo ship fixing the floor when coworkers were moving around frozen fish boxes weighing 40 pounds or more. His partner threw a frozen fish box and Employee bent over to rearrange it when a coworker through threw another frozen fish box that hit him in the head and neck, which he said, "knocked [him] out." Employee told his supervisor he had pain and was dizzy; his supervisor took him to the local clinic. Employee said his x-rays were normal. The clinic gave him painkillers and sent him to the bunkhouse for three days, after which he returned to work. He wanted to return to work and was "a little bit dizzy." His neck and shoulder started to get painful and stiff, and he had headaches. In April 2019, Employee hurt his shoulder while working for a different company, Matson. His medical provider at that time, Dr. Ehret, allegedly told him his neck and shoulder symptoms were all related. Employee concedes Dr. Ehret did not give him a written report to that effect. His claim for TTD benefits began April 3, 2019, when he injured his right shoulder, "because that's when everything just happened." Employee claims he had pain in his neck and shoulder before the April 2019 Matson injury. His TTD claim continues because he has not

worked anywhere since. Employee has an open Longshore claim with Matson and is claiming TTD benefits from that one as well; he has a hearing in his Matson case with his attorney in June. Employee contends Employer owes him neck treatment to see if he can improve his grip, dizziness, blurred vision, sleeping difficulties, and concentration problems, which Employee contends are all getting worse. Employee agreed he had a fair opportunity to present his case and be heard at hearing. (Employee).

PRINCIPLES OF LAW

AS 23.30.010. Coverage. (a) . . . compensation or benefits are payable under this chapter for disability . . . or the need for medical treatment of an employee if the disability . . . or the employee’s need for medical treatment arose out of and in the course of the employment. When determining whether or not the . . . 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 the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment.

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. . . . It shall be additionally provided that, if continued treatment or care or both beyond the two-year period is indicated, the injured employee has a right of review by the board. The board may authorize continued treatment or care or both as the process of recovery may require. . . .

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

(1) the claim comes within the provisions of this chapter. . . .

Benefits sought by an injured worker are presumptively compensable and the presumption is applicable to any claim for compensation under the Act. *Meek v. Unocal Corp.*, 914 P.2d 1276 (Alaska 1996). The presumption’s application involves a three-step analysis. To attach the presumption, an injured employee must first establish a “preliminary link” between his injury and

the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). Once the presumption attaches, the employer must rebut the raised presumption with “substantial evidence.” *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). The factfinders do not weigh credibility at this stage. *VECO, Inc. v. Wolfer*, 693 P.2d 865 (Alaska 1985). If the employer’s evidence rebuts the presumption, it drops out and the employee must prove his case by a preponderance of the evidence. *Huit*. This means the employee must “induce a belief” in the factfinders’ minds that the facts being asserted are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964). In the third step, evidence is weighed, inferences drawn, and credibility considered. *Wolfer*.

AS 23.30.122. Credibility of witnesses. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness’s testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury’s finding in a civil action.

The Board’s credibility findings and weight accorded evidence are “binding for any review of the Board’s factual findings.” *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009). When doctors’ opinions disagree, the Board determines which has greater credibility. *Moore v. Afognak Native Corp.*, AWCAC Dec. No. 087 at 11 (August 25, 2008).

AS 23.30.150. Commencement of compensation. Compensation may not be allowed for the first three days of the disability, except the benefits provided for in AS 23.30.095; if, however, the injury results in disability of more than 28 days, compensation shall be allowed from the date of the disability.

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 any period of disability occurring after the date of medical stability.

ANALYSIS

1) Is Employee entitled to TTD benefits from Employer?

Employee contends he is entitled to TTD benefits from Employer beginning April 3, 2019 when he hurt his right shoulder while working for Matson. AS 23.30.010; AS 23.30.185. Employer

contends he is entitled to no TTD benefits because there is no connection between his April 3, 2019 right shoulder Matson injury and his March 24, 2007 head injury with Employer. This creates a factual dispute to which the statutory presumption analysis applies. AS 23.30.120; *Meek*.

Without regard to credibility, Employee attaches the presumption that his TTD benefits claim arose out of and in the course of his employment with Employer through his own testimony. *Tolbert*. He testified his co-worker threw a 40-pound frozen fish box, which hit him in the back of his head and neck causing neck pain that developed about three months later. Employee contends his neck pain got worse over time, coincided with his April 3, 2019 right shoulder injury with Matson and contributed to his inability to work. *Wolfer*. Without regard to credibility, Employer rebutted the raised presumption with Dr. Kirkham's EME report. *Wolfer; Huit*. Dr. Kirkham stated the March 24, 2007 work injury with Employer did not cause or aggravate a cervical spine condition or injury and was not the substantial cause of any disability after five days post-injury. He said non-work factors such as age, degenerative changes, and uncontrolled diabetes are the substantial cause of any disability Employee had subsequently. The statutory presumption dropped out and Employee must prove his claim for TTD benefits by a preponderance of the evidence. *Saxton*.

Dr. Buttner wrote a "To Whom It May Concern" letter in which he stated, referring to the March 24, 2007 work injury, Employee had "ongoing symptoms related to this injury" including chronic neck pain and right arm symptoms. He said Employee had lower extremity sensory issues and other problems "that could be related to his neck injury." While this letter supports Employee's position, Dr. Buttner reviewed Dr. Kirkham's report and agreed with it, reversing his original opinion. No medical provider gave a causation opinion stating the March 24, 2007 work injury was the substantial cause of any disability Employee had beginning April 3, 2019. Employee has no medical evidence supporting his position; only his lay opinion supports his claim.

Employee's testimony at hearing and histories given to his providers in more recent medical records are inconsistent with the medical evidence available from March 24, 2007. Employee testified he was knocked unconscious after he was hit in the head with the frozen fish box. But the contemporaneous clinic record does not mention consciousness loss. He also said x-rays taken

that day were normal, but the clinic record says no x-rays were taken. More weight and credibility are given to Employee's March 24, 2007 medical record than to his subsequent histories to medical providers and his hearing testimony. AS 23.30.122; *Smith*.

Similarly, more weight and credibility are given to Drs. Buttner and Kirkham's medical opinions than to Employee's lay opinion. AS 23.30.122; *Smith*; *Moore*. The identified potential causes for Employee's disability beginning on April 3, 2019, are his March 24, 2007 work injury with Employer, his April 3, 2019 work injury with Matson, and his age, genetics, diabetes, deconditioning and psychosocial factors. AS 23.30.010. Assuming Employee began feeling neck pain three months post-injury, Dr. Kirkham said this factor cut against the work injury being the substantial cause of his ongoing symptoms. Employee has no medical evidence stating the March 24, 2007 work injury was the substantial cause of any disability he experienced beginning April 3, 2019. By contrast, Dr. Kirkham ruled out the March 24, 2007 work injury and gave non-injury-related alternative causes as being more likely the cause for any disability Employee experienced beginning April 3, 2019 and continuing. Dr. Buttner agreed with that assessment.

Employee testified he was off work for three days post-injury. However, he cannot receive temporary disability for the first three days following an injury unless his disability extends beyond 28 days. AS 23.30.150. Since he cannot demonstrate continuing disability arising from his work injury with Employer, Employee is not entitled to TTD benefits for those three days. Employee is not entitled to TTD benefits after the date of medical stability. AS 23.30.185. Dr. Kirkham provided the only medical stability date, March 29, 2007, which rules out Employee's entitlement to additional TTD benefits after that date. Employee failed to prove by a preponderance of the evidence that his March 24, 2007 work injury with Employer was the substantial cause of any temporary total disability he had beginning April 3, 2019, or that he was medically unstable after March 29, 2007, and his claim for TTD benefits from Employer will be denied. *Saxton*.

2) Is Employee entitled to medical benefits from Employer?

Employee claims he is entitled to medical benefits from Employer beginning April 3, 2019 and continuing; Employer contends he is not. AS 23.30.095. This creates a factual dispute, to which the statutory presumption analysis applies. AS 23.30.120; *Meek*. That analysis, above, is

incorporated here by reference. Based on the same medical evidence, the presumption is raised and rebutted. *Tolbert; Wolfer; Huit*. The same factual analysis applies to this issue and is incorporated here by reference. Employee cannot prove by preponderance of the evidence that his need for medical care beginning April 3, 2019 arose out of and in the course of his employment with Employer from a March 27, 2007 work injury. AS 23.30.010; *Saxton*. His claim for medical benefits from Employer will be denied. Employee has a Longshore claim hearing in June for his April 3, 2019 injury with Matson for which he claims the same benefits. This decision has no jurisdiction over Longshore claims and Employee can present his evidence and arguments against Matson at that hearing.

CONCLUSIONS OF LAW

- 1) Employee is not entitled to TTD benefits from Employer.
- 2) Employee is not entitled to medical benefits from Employer.

ORDER

Employee's May 28, 2019 and February 1, 2021 claims for medical and TTD benefits from Employer are denied in accordance with this decision.

Dated in Anchorage, Alaska on April 26, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Nancy Shaw, 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 Jose Rivas, employee / claimant v. Pacific Stevedoring, employer; Seabright Ins. Co., insurer / defendants; Case No. 200704126; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on April 26, 2022.

/s/
Kimberly Weaver, Office Assistant