ALASKA WORKERS' COMPENSATION BOARD

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

IMHOTEP M. NARCISSE, Employee, Claimant, v. TRIDENT SEAFOODS CORPORATION, Employer, and LIBERTY INSURANCE CORPORATION, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 201212049 AWCB Decision No. 22-0049 Filed with AWCB Anchorage, Alaska on July 12, 2022

Imhotep Narcisse's (Employee) December 10, 2021 claim was heard on June 15, 2022, in Anchorage, Alaska, a date selected on April 6, 2022. A March 8, 2022 hearing request gave rise to this hearing. Employee represented himself and testified as the only witness. Attorney Jeffrey Holloway represented Trident Seafoods Corporation and its insurer (Employer). All participants at hearing appeared by telephone. As preliminary matters, Employee requested a hearing continuance, which was denied. He also wanted his primary care physician to testify, which was also denied. The record closed at the hearing's conclusion on June 15, 2022. This decision examines the oral orders declining to continue the hearing and disallowing Employee's physician to testify and decides Employee's claim on its merits.

ISSUES

Employee contended he was not ready for hearing. He stated he was missing discovery.

Employer contended Employee did not provide "good cause" for continuing the hearing because he could have obtained any missing discovery at any time in the last 10 years but failed to do so. It contended it provided all available discovery and any missing material was irrelevant.

1) Was the decision to not continue the hearing, correct?

Employee wanted to call his current attending physician as a witness to address an employer medical evaluation (EME) report, which he called "bogus." He denied he had changed doctors but had only gone to one physician for evaluation and treatment at his prior attorney's direction.

Employer contended the current treating physician should not be allowed to testify because his opinions were irrelevant given the prior decisions in this case, it had no records from that physician and had never heard of him, written reports are preferred, it was too late for a new physician to attack the EME report, and Employee had made an unlawful change in his physician, resulting in that physician's testimony being inadmissible for any purpose.

2) Was the decision to not allow Employee's current physician to testify, correct?

Employee contends he is entitled to permanent partial impairment (PPI) benefits for his work injury. He concedes he does not have a PPI rating greater than zero percent.

Employer contends Employee is not entitled to PPI benefits because they are barred by the applicable statute of limitations and *res judicata*, he could have but did not bring this issue up at the 2016 hearing, all medical evidence says he has a zero percent PPI rating and Employee failed to present evidence of a higher rating at hearing.

3) Is Employee entitled to PPI benefits?

Employee contends Employer's January 10, 2014 and March 6, 2014 Controversion Notices were unfair or frivolous. He contends the January 10, 2014 controversion was unfair or frivolous because the referenced physician in that notice did not release him to return to work as the notice states. He contends the March 6, 2014 controversion was unfair or frivolous because he disagrees with the EME physician's opinions upon which that controversion relied.

Employer contends its January 10, 2014 and March 6, 2014 controversions were neither unfair nor frivolous. It contends both Controversion Notices pass muster under the applicable test set forth in an Alaska Supreme Court opinion.

4) Were Employer's January 10, 2014 or March 6, 2014 Controversion Notices unfair or frivolous?

FINDINGS OF FACT

The following facts and factual conclusions are established by a preponderance of the evidence:

1) On August 8, 2012, Employee stated he had neck pain while working for Employer as a processor in Kodiak while standing on an elevated platform with his head and neck bent forward. (Report of Occupational Injury or Illness, August 13, 2012).

2) On October 5, 2012, Employer paid Employee $126 in temporary total disability (TTD) benefits covering September 24, 2012 through October 1, 2012. This was its last TTD benefit payment and its last payment of any indemnity benefits to Employee post-injury. (Agency file, Payments tab, October 5, 2012).

3) Two years from October 5, 2012 is October 5, 2014. (Observations).

4) On November 12, 2013, Robert Wagner, MD, who had been treating Employee for his work injury at US HealthWorks in California released him to return to work effective November 12, 2013. Employee's limitations upon return to work included no overhead work and no lifting, pulling or pushing more than five pounds. (Work Status Report, November 12, 2013; second independent medical evaluation (SIME) record #55).

5) On December 2, 2013, Employee filed a claim for benefits for his neck, shoulders and back seeking temporary partial disability (TPD) and a compensation rate adjustment. He also mentioned symptoms in his arms, hand and lower back. Employee said he wanted compensation for the "days [he] was not working," implying he also sought TTD benefits, and "expenses" while he awaited a flight home from Kodiak. Attached to his claim, among other documents, were Employer's September 17, 2012 letter to North Pacific Medical Center in Kodiak, Alaska, signed by Human Resources and Safety Manager Ernie Cadabes explaining its "Return To Work" program to give Employee modified duty and a request for his physician to complete a work release and physical capacities form so it could assign Employee to applicable jobs; a healthcare provider's September 17, 2012 "Work Release/Physical Capacity Form" releasing Employee to

modified, full-time duty effective September 18, 2012, for two weeks, without prolonged bending or stooping; Employer's September 18, 2012 "Offer of Transitional Employment" assigning Employee temporary, alternative work as a "Processor" effective September 18, 2012, in the production department for two weeks, 12 hours a day at the "Same Wage as currently receiving," signed by Cadabes and Employee; and a September 26, 2012 "Separation Notice" stating Employee was terminated or laid off for "Medical-Work Related" and stating he "Needs full medical release to RTN [return] to work" signed by Cadabes but not Employee. (Workers' Compensation Claim, November 26, 2013, and attachments).

6) On January 10, 2014, Employer controverted Employee's right to TTD benefits from August 8, 2012 through November 3, 2013, and from November 12, 2013 "forward," and his claim for TPD and a rate adjustment. The notice stated:

> The employee was paid wages from August 8-September 23, 2012. No TTD is owed when wages are received. No TTD is due from September 24, 2012 through September 27, 2012, as per AS 23.30.150. Finally, on September 27, 2012, the employee was incarcerated, and he was not released for over a year. No TTD is due during a period of incarceration. TTD was paid upon his release and upon an off work note from November 4-11, 2013. On November 12, 2013, the employee's physician, Dr. Robert Wagner, released employee to work. No further time loss is due.
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> The employee has presented no wage documentation showing a decrease in earning capacity or wages to justify temporary partial disability benefits.
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> The compensation rate has been accurately calculated based upon existing information or lack thereof. The employee has not provided wage information justifying a change.
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> The employer reserves the right to raise further defenses disclosed during the discovery process. (Controversion Notice, January 10, 2014).

7) On February 11, 2014, physiatrist Yung Chen, MD, saw and treated Employee on referral from the adjuster. He recommended additional referrals and care. (Chen report, February 11, 2014).

8) On February 21, 2014, orthopedist Joseph Lynch, MD, saw Employee for an EME. Dr. Lynch opined the substantial cause of Employee's diagnosed medical conditions was age, and tobacco use, which predisposed him to degenerative joint problems. In his opinion, prolonged postural positions at work as described by Employee were not a substantial factor in any diagnosed medical condition. In Dr. Lynch's view, Employee needed no further medical care for his work injury, as

he identified no work-related condition arising from the injury and opined while he had symptoms while working, his arthritis and age caused Employee's ongoing symptoms. Dr. Lynch approved Employee to return to work as a Crab Meat Processor and found no objective reason why he could not return to employment. (Lynch EME report, February 21, 2014).

9) On February 24, 2014, Employer controverted Employee's right to per diem expenses related to his stay in Kodiak in October 2013. (Controversion Notice, February 20, 2014).

10) On March 10, 2014, Employer controverted Employee's right to "all benefits" based on Dr. Lynch's report. The notice explained:

> In his IME report dated February 21, 2014, Dr. Joseph Lynch states that the substantial factors of diagnosed conditions are age-related and tobacco use-related. Claimant's employment with Trident Seafoods is not the substantial factor in any of claimant's conditions, symptoms, disability or need for treatment. No benefits are due as per AS 23.30.010. (Controversion Notice, March 6, 2014; emphasis in original).

11) On March 17, 2014, Employee sought TTD benefits, medical costs and related transportation expenses, a compensation rate adjustment, an unspecified penalty, interest, an "unfair or frivolous" controversion finding and "other" referring to an unspecified, "Amount withheld 2-21-14 to present." (Workers' Compensation Claim, March 12, 2014).

12) On April 10, 2014, Employer controverted Employee's March 12, 2014 claims based on grounds provided in prior controversions. (Controversion Notice, April 10, 2014).

13) On May 23, 2014, Employer controverted Employee's right to attorney fees and costs. (Controversion Notice, May 20, 2014).

14) By October 5, 2014, two years after the last indemnity benefit payment from Employer to Employee, Employee had not filed a claim for PPI benefits. (Agency file).

15) On October 20, 2014, Employer petitioned for an SIME; the parties later stipulated to one. PPI benefits were not included as an issue for the SIME to address. (Petition, October 20, 2014; agency file; SIME Form, October 16, 2014).

16) In or around August 2015, prior to his SIME visit Employee moved from California to Burien, Washington. There, Employee saw physicians at Neighbor Care Pike Market Medical and Neighbor Care Health in Seattle, Washington for his work injury. (Thomas Gritzka, MD, SIME report at 7-8, October 2, 2015). Employee testified at the June 15, 2022 hearing he saw William Anderson, MD, at Swedish Spine, Sports & Musculoskeletal Medicine, also in the Seattle area, for

his work injury at his former attorney's direction. He testified he moved to a different part of town, less than 15-20 miles away, and for convenience changed physicians to Dennis Haack, MD, who is his current primary care provider. Employee denies Dr. Anderson was ever his attending physician, though he admits receiving treatment from him for his work injury. (Employee).

17) On October 2, 2015, Dr. Gritzka evaluated Employee for an SIME. In Dr. Gritzka's opinion, the substantial cause of Employee's disability and need for medical treatment from August 8, 2012 until December 8, 2012, were his work activities for Employer. These activities, in Dr. Gritzka's opinion, aggravated Employee's preexistent, mild cervical degenerative spondylosis. However, Employee's work with Employer was not consistent with an aggravation of a preexisting right shoulder condition or a new left shoulder condition. Dr. Gritzka opined Employee's brief work for Employer probably did not affect his low back pain. In his view, Employee's work for Employer temporarily exacerbated a preexisting neck condition, which resolved by December 8, 2012, and Employee could return to work on that date. Dr. Gritzka recommended no further treatment for Employee's work injury. (Gritzka report, October 2, 2015).

18) On June 28, 2016, Employer deposed Dr. Lynch. Based upon his record review and examination, Dr. Lynch concluded the work injury with Employer was the substantial cause of Employee's symptoms, disability and need for treatment to only his neck up to November 19, 2012. (Lynch deposition at 34). His work injury would not have prohibited Employee from working after November 19, 2012. Dr. Lynch agreed with Dr. Gritzka's opinion that Employee's neck strain had resolved but believed it resolved by November 19, 2012, rather than by December 8, 2012, as Dr. Gritzka opined. (*Id*. at 35). In Dr. Lynch's opinion, Employee's shoulders and low back issues were not work-related. In his view, Employee's work-related neck strain was medically stable by November 19, 2012. Any recommended medical treatment would not be causally connected to Employee's work injury. (*Id*. at 37). He addressed PPI benefits for each claimed injury and opined Employee had no PPI rating attributable to any work injury with Employer under the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*Guides*). In other words, Dr. Lynch opined Employee had a zero percent PPI rating for his work injury with Employer. (*Id*. at 43-46).

19) At the first hearing on July 19, 2016, Employee testified he eventually moved to Seattle and saw physicians at Harborview Medical Center, who provided a left shoulder injection, which improved his symptoms. (Employee, hearing transcript, July 19, 2016).

20) On cross-examination on July 19, 2016, Employee admitted his functional capacity evaluation showed he could work lifting 50 pounds, but he never got a "full medical release" and never returned to work for Employer. He maintained he had never received a "termination notice" from Employer. Employee had been seen throughout 2014 and 2015 at Harborview Medical Center and was not sure why Employer did not have related records. (*Id*.).

21) Employee had previously attached his "Separation Notice," which states the "specific reason(s) for termination/layoff" to his November 26, 2013 claim he filed on December 2, 2013. (Workers' Compensation Claim, November 26, 2013, and attachments).

22) At the July 19, 2016 hearing, Employee's former counsel dropped his "unfair or frivolous controversion" claim. (Employee's hearing arguments, transcript, July 19, 2016).

23) In its July 19, 2016 closing argument, Employer relied on Dr. Lynch's EME report, which stated the left shoulder was never a work injury. As to compensability issues, Employer relied on Drs. Lynch and Gritzka, who said Employee's work-related injury was medically stable by November 19, 2012, and December 8, 2012, respectively. Both said the shoulders and back were not work-related injuries and opined Employee suffered only a cervical strain, which subsequently resolved. Further, as for disability, Employer contended it paid Employee TTD benefits from September 27, 2012 through October 1, 2012, and again from October 19, 2013 through February 21, 2014, thus resulting in an overpayment. Since Employee never filed evidence of any outstanding medical bills or transportation expenses, Employer contended these claims should be denied. As for future medical care, Drs. Lynch and Gritzka both agreed Employee needed no further care or treatment for his work injury with Employer. Addressing a compensation rate adjustment, Employer contended Employee never provided evidence to support any compensation rate, so Employer paid the minimum weekly rate. Employee never provided any evidence supporting a penalty, and as no benefits were unpaid when due, no interest was awardable. Lastly, as Employee should not prevail on any issues, Employer contended his claim for attorney's fees and costs should be denied. (Employer's closing argument, transcript, July 19, 2019).

24) On August 18, 2016, *Narcisse v. Trident Seafoods Corp*., AWCB Dec. No. 16-0070 (August 18, 2016) (*Narcisse I*), denied Employee's November 26, 2013 claim (for his neck, shoulders and back seeking TPD and a compensation rate adjustment) for failure to timely request a hearing under AS 23.30.110(c). It also denied his March 12, 2014 claim for a compensation rate adjustment but heard the remaining issues from that claim. *Narcisse I* denied his claims for:

additional TTD benefits, medical and related transportation expenses, a compensation rate adjustment, a penalty, interest, and attorney fees and costs, and affirmed the panel's oral order denying Employee's offer to supplement the agency record post-hearing. (*Narcisse I*).

25) *Narcisse I* was a final decision, issued by a board with proper jurisdiction, and it addressed the same injury involving the same parties as in Employee's current claim. (Observations).

26) On September 14, 2016, *Narcisse v. Trident Seafoods Corp*., AWCB Dec. No. 16-0083 (September 14, 2016) (*Narcisse II*), declined to reconsider or modify *Narcisse I*. (*Narcisse II*).

27) On January 11, 2018, the Alaska Workers' Compensation Appeals Commission decided Employee's appeal from *Narcisse I* and *II* and reversed *Narcisse I* on denying parts of Employee's November 26, 2013 claim under AS 23.30.110(c). However, the Commission alternately found evidence in the record did not support an award for the benefits sought in Employee's November 26, 2013 or March 12, 2014 claims and affirmed *Narcisse I* in denying his claim for TTD and medical benefits for his neck, shoulder and low back, a compensation rate adjustment, interest, penalty and attorney fees and costs. (*Narcisse v. Trident Seafoods Corp*., AWCAC Dec. No. 242 (January 11, 2018) (*Narcisse III*).

28) On December 14, 2021, Employee sought PPI benefits and resurrected his claim that Employer had made an unfair or frivolous controversion. He described his work injury as, "Left shoulder, neck and back pain due to repetitive use injuries at the fish processing center," and contended his "pain and spinal symptoms" continued to get worse and his spinal cord was "being compressed" and he was becoming progressively weaker. Employee contended these symptoms "occurred while working at Trident Seafoods on Kodiak Island" on August 8, 2012. (Claim for Workers' Compensation Benefits, December 10, 2021).

29) On January 4, 2022, Employer controverted "all benefits" including PPI and medical benefits, and an unfair or frivolous controversion finding. It based this denial on AS 23.30.105(a) and on *res judicata* grounds. (Controversion Notice, January 4, 2022).

30) On April 6, 2022, the parties attended a prehearing conference; issues identified for a June 15, 2022 hearing over Employee's objection that he was "not ready" included PPI benefits and an unfair or frivolous controversion. (Prehearing Conference Summary, April 6, 2022).

31) On May 17, 2022, the parties attended another prehearing conference at which the same two issues were identified for the June 15, 2022 hearing. Employee again objected to the hearing and stated discovery was not complete because he lacked a pre-hire physical and Employer's return-

to-work policies. Employer contended it produced and filed all discovery; the designee decided the hearing would go forward as scheduled. (Prehearing Conference Summary, May 17, 2022).

32) On May 27, 2022, Employee filed and served various medical records including:

- A December 6, 2013 cervical spine magnetic resonance imaging (MRI) showing disc disease at various levels.
- A December 6, 2013 left shoulder MRI showing mild rotator cuff tendinosis and degenerative changes.
- A December 6, 2013 right shoulder MRI showing postoperative changes.
- A January 6, 2014 lumbar spine MRI showing minimal to mild degenerative changes.
- A February 11, 2014 letter from Dr. Chen to the adjuster on referral for physical medicine spine intervention. Dr. Chen charted Employee suffers from chronic neck back and shoulder pain after a work injury since 2012. He is interested in surgery. Dr. Chen referred him to an orthopedic specialist for his shoulder and suggested therapeutic facet blocks in the cervical spine. He allowed Employee to return to work with no lifting more than five pounds.
- A February 11, 2014 "Work Status Report" stating Employee could return to work effective February 11, 2014, with lifting, pushing and pulling up to five pounds and no reaching overhead, signed by Dr. Chen.
- A February 18, 2014 report from Dr. Chen stating Employee required "formally to be off work" and requested Tramadol. Dr. Chen said Employee would remain off work for three weeks and would be transferred to a pain program since he was looking for pharmaceutical pain management. Employee also wanted "spine intervention," which Dr. Chen said he would be happy to provide.
- A February 18, 2014 California workers' compensation form completed by Dr. Chen requesting treatment for cervical, lumbar and shoulder pain including a consult with an orthopedic surgeon and a cervical facet block.
- A February 18, 2014 "Work Status Report" form stating Employee was unable to return to any work from February 18, 2014 to March 11, 2014, signed by Dr. Chen.
- A March 4, 2014 report from Dr. Chen stating Employee complained of chronic neck, lower back and shoulder pain. He was referred to physical therapy and off work for three weeks.
- A March 4, 2014 "Work Status Report" form stating Employee was unable to perform any work from March 4, 2014 to March 25, 2014, signed by Dr. Chen.
- A March 25, 2014 report from Dr. Chen charting Employee said he had a preexisting condition, which never bothered him prior to his work injury and had a hearing coming in April 2014. Dr. Chen recommended "workers' compensation to finalize the etiology of this injury," and recommended Employee see a specialist for his left shoulder injury.

These medical records were all in the agency file prior to the July 19, 2016 hearing, had been sent to SIME Dr. Gritzka and were mentioned in his report. (Employee email, May 27, 2022; SIME records; SIME report, October 2, 2015).

33) In its June 7, 2022 brief, Employer contended: (1) Employee's claim for an unfair or frivolous controversion finding should be dismissed under *res judicata*, because *Narcisse I*, *II* and *III* all relied on the evidence upon which the Controversion Notices were based and therefore, it

contended this issue had already been resolved; (2) Employee's claim for PPI benefits should similarly be denied under *res judicata* because the July 2016 hearing addressed "issues pertaining to PPI benefits, and which impact PPI benefits," such as the "minimal at best" nature of his work injury, which had "resolved" and *Narcisse I* had decided causation issues against Employee; (3) Employee's PPI benefit claim was barred under AS 23.30.105(a) made applicable by Alaska Supreme Court precedent because he failed to file a claim for PPI benefits within two years of his last TTD benefit payment in February 2014; and (4) medical evidence does not support Employee's PPI benefit claim. (Hearing Brief of Trident Seafoods Corporation, June 7, 2022).

34) At hearing on June 15, 2022, Employee stated he was not ready for a hearing because he was missing a pre-hire physical done for Employer at Swedish Hospital, and unspecified Employer return-to-work policy materials. The panel treated his objection to the hearing as a request for a continuance. Employee wanted to call his current primary care provider Dr. Haack as a witness and contended Dr. Haack would say Dr. Lynch's EME report was "bogus." He did not know if Dr. Haack had provided a PPI rating or had an opinion about PPI. (Employee).

35) At hearing, Employer objected to a continuance and contended Employee failed to provide "good cause" and could have obtained the allegedly missing medical record from Swedish Hospital at any time in the last 10 years but did not. It contended he already had its modified-duty procedures and had accepted a modified-duty job post-injury. Employer also contended these documents were not relevant to the issues at hearing. As to Dr. Haack testifying, Employer contended it had no records from him, had never heard of him, and if Employee wanted to challenge Dr. Lynch's opinion, he should have done so at the 2016 hearing. It contended *Narcisse I*, *II* and *III* and evidence relied upon therein, were the "law of the case" and not subject to later attacks by a new physician. Lastly, Employer contended Dr. Haack was an unlawful change in Employee's choice of a physician. (Employer's hearing arguments, June 15, 2022).

36) An oral order on June 15, 2022 denied Employee's request for a hearing continuance finding he did not present "good cause." The panel determined Employee had Employer's return-to-work policies and procedures that he described because he attached them to his November 26, 2013 claim, and upon the panel's review the documents appeared complete as Employee had described them. These documents verified Employer's return-to-work policy and Employee's return-to-work post-injury. An oral order also declined Employee's request to call Dr. Haack as a witness on grounds he was an unlawful change in Employee's attending physician. (Record).

37) On the merit issues, Employee testified he had no evidence of a PPI rating higher than zero but thought he may have gotten one from Social Security, but he was not certain. Addressing his request for an unfair or frivolous controversion finding, Employee said it was "not true" he was released to return to work and Dr. Lynch was "a liar." Given several controversions in this file, Employee identified two controversions that resulted in his benefits being stopped, dated January 10, 2014 and March 6, 2014, as the ones he contended were unfair or frivolous. He contended the January 10, 2014 controversion was unfair or frivolous because Dr. Wagner never released him to work; he contended the March 6, 2014 controversion was unfair or frivolous because Employee disagreed with Dr. Lynch's opinions, given other evidence. (Employee).

38) Employer contended it was stuck in a "Groundhog Day" scenario where Employee made the same arguments made in *Narcisse I*. It contended *Narcisse I* had already rejected Employee's arguments and had given more weight and credibility to Drs. Lynch and Gritzka than to other physicians. Further, Employer contended Employee appealed to the Commission, which affirmed *Narcisse I*'s findings and conclusions and held Employee's work injury had resolved by no later than December 8, 2012. It contended Employee could have but never did provide a PPI rating or request PPI benefits at the 2016 hearing, even though he had an attorney at that time. Consequently, it contended since Employee was medically stable and had no PPI rating, the statute of limitations for requesting PPI benefits made applicable to PPI benefits by Alaska Supreme Court precedent began to run under AS 23.30.105(a) on the date Employer last paid TTD benefits and contended his PPI benefit claim was therefore untimely and barred because he did not request PPI within two years of that date. Further, it contended notwithstanding the above, Employee years later still did not have a PPI rating greater than zero and it was his duty to provide one as evidence at the hearing under Commission precedent. As to the unfair and frivolous controversion issue, Employer contended the controversions to which Employee objected were neither unfair nor frivolous under applicable Alaska Supreme Court precedent.

PRINCIPLES OF LAW

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." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 531 (Alaska 1987). *Robertson v. American Mechanical, Inc.*, 54 P.3d

777 (Alaska 2002), held *res judicata* applies in workers' compensation cases and set forth the three-part test to determine when it applies:

> (1) The prior judgment was a final judgment on the merits;
> (2) A court of competent jurisdiction rendered the prior judgment, and
> (3) The same cause of action and same parties or their privies were involved in both suits.

> **AS 23.30.095. Medical treatments, services, and examinations.** (a) . . . 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. . . ..

> **AS 23.30.105. Time for filing of claims.** (a) The right to compensation for disability under this chapter is barred unless a claim for it is filed within two years after the employee has knowledge of the nature of the employee's disability and its relation to the employment and after disablement. However, the maximum time for filing the claim in any event . . . shall be four years from the date of injury . . . except that, if payment of compensation has been made without an award on account of the injury . . . a claim may be filed within two years after the date of the last payment of benefits under . . . 23.30.185. . . .

Murphy v, Fairbanks North Star Borough, 494 P.3d 556 (Alaska 2021), held claims for PPI benefits are subject to the two-year statute of limitations under AS 23.30.105(a), and barred an injured worker's claim for an increased PPI benefit, a claim he brought more than two years after the date of the employer's last benefit payment to him.

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

Benefits sought by an injured worker are presumptively compensable and the presumption applies 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, and without regard to credibility, an injured employee must establish a "preliminary link" between his injury or benefits sought and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska

1999). Once the presumption attaches, and without regard to credibility, the employer must rebut the presumption with "substantial evidence." *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904 (Alaska 2016). If the employer's evidence rebuts the presumption, it drops out and the employee must prove his claim by a preponderance of the evidence. *Id.* This means the employee must "induce a belief" in the fact-finders' 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 are drawn, and credibility is considered. *Huit*.

> **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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> (o) The director shall promptly notify the division of insurance if the board determines that the employee's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.

Harp v. ARCO Alaska, Inc. 831 P.2d 352, 358 (Alaska 1992) said, "For a controversion notice to be filed in good faith, the employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, the Board would find that the claimant is not entitled to benefits." *Vue v. Walmart Associates, Inc.*, 475 P.3d 270 (Alaska 2020), stated valid Controversion Notices must give notice of disputed issues, which an employee can then use to pursue a claim. *Vue* also adopted *Harp*'s standard to evaluate unfair and frivolous controversion claims.

> **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.

Although Board decisions are split on this issue, case law going back to 1978 supports the defense that TTD benefits are not payable to an injured worker during periods of incarceration. *Hinkle v. Cornerstone Remodel & Design*, AWCB Dec. No. 14-0023 (February 28, 2014) contains a summary of these case through February 2014.

> **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. . . .

Stonebridge Hospitality Associates, LLC v. Settje, AWCAC Decision No. 153 (June 14, 2011), held when a PPI claim is ripe for adjudication, and not merely hypothetical, the claimant is required to obtain a rating and present it at hearing if she wants a PPI benefits award.

> **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. . . . .

> **8 AAC 45.074. Continuances and cancellations**. . . .
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> (b) Continuances or cancellations are not favored by the board and will not be routinely granted. A hearing may be continued or cancelled only for good cause and in accordance with this section. For purposes of this subsection,
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> (1) good cause exists only when
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> (A) a material witness is unavailable on the scheduled date and deposing the witness is not feasible;
> (B) a party or representative of a party is unavailable because of an unintended and unavoidable court appearance;
> (C) a party, a representative of a party, or a material witness becomes ill or dies;
> (D) a party, a representative of a party, or a material witness becomes unexpectedly absent from the hearing venue and cannot participate telephonically;
> (E) the hearing was set under 8 AAC 45.160(d);
> (F) a second independent medical evaluation is required under AS 23.30.095(k);
> (G) the hearing was requested for a review of an administrator's decision under AS 23.30.041(d), the party requesting the hearing has not had adequate time to prepare for the hearing, and all parties waive the right to a hearing within 30 days;
> (H) the board is not able to complete the hearing on the scheduled hearing date due to the length of time required to hear the case or other cases

> scheduled on that same day, the lack of a quorum of the board, or malfunctioning of equipment required for recording the hearing or taking evidence;
> (I) the parties have agreed to and scheduled mediation;
> (J) the parties agree that the issue set for hearing has been resolved without settlement and the parties file a stipulation agreeing to dismissal of the claim or petition under 8 AAC 45.050(f)(1);
> (K) the board determines that despite a party's due diligence in completing discovery before requesting a hearing and despite a party's good faith belief that the party was fully prepared for the hearing, evidence was obtained by the opposing party after the request for hearing was filed which is or will be offered at the hearing, and due process required the party requesting the hearing be given an opportunity to obtain rebuttal evidence;
> (L) the board determines at a scheduled hearing that, due to surprise, excusable neglect, or the board's inquiry at the hearing, additional evidence or arguments are necessary to complete the hearing;
> (M) an agreed settlement has been reached by the parties less than 14 days before a scheduled hearing, the agreed settlement has not been put into writing, signed by the parties, and filed with the board in accordance with 8 AAC 45.070(d)(1), the proposed settlement resolves all disputed issues set to be heard, and the parties appear at the scheduled hearing to state the terms of the settlement on the record; or
> (N) the board determines that despite a party's due diligence, irreparable harm may result from a failure to grant the requested continuance or cancel the hearing;

8 AAC 45.082. Medical treatment. . . .

(b) A physician may be changed as follows:

. . . .

(2) except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury. . . .

. . . .

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

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

. . . .

> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) . . . or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. . . .

ANALYSIS

1) Was the decision to not continue the hearing, correct?

At two prehearing conferences and at hearing, Employee contended he was not ready because he had requested a pre-hire physical report from Employer who had sent him to Swedish Hospital in Seattle prior to his work in Alaska, and Employer had yet to provide it. Employee contended he was missing documents setting forth Employer's post-injury return-to-work policies, which he felt were relevant to his claim. The panel treated Employee's contentions as a request for a hearing continuance. Employer contended the hearing should not be continued because Employee failed to present "good cause" for a continuance, he had lost his case at the agency level and on appeal to the Commission, he could have driven to Swedish Hospital and obtained the record or otherwise obtained it in the 10 years prior to the hearing date, and the record was not relevant given the decisions in *Narcisse I*, *II* and *III*. It similarly contended the post-injury return-to-work material was also not relevant to issues set for hearing, and in any event, had already been provided.

At hearing, the panel addressed each basis for a hearing request under 8 AAC 45.074(b)(1)(A)-(N) and determined none expressly applied. Under 8 AAC 45.074(b)(1)(L) and (N), the "catchall" sections, Employee failed to demonstrate he was surprised or understandably neglected to obtain the documents he claimed were missing within the past 10 years. Those documents would have better served him in the hearing giving rise to *Narcisse I*. He failed to explain why he took no action to compel Employer to provide these documents prior to the instant hearing. Moreover, even assuming Employee passed his pre-hire physical at Swedish Hospital, at this point continuing compensability of his claim had already been decided against him in *Narcisse I* and affirmed in *Narcisse III*, making his pre-hire physical exam results and Employer's return-to-work policies and procedures irrelevant to his current claims. Further, upon reviewing the file at hearing, the panel found Employer's post-injury return-to-work policy letters and its offer of transitional employment signed by Employee, which matched his description of these allegedly missing

documents, were attached to Employee's original November 26, 2013 claim. In other words, Employee had the return-to-work policy documents all along.

Continuances are not favored, not routinely granted and require "good cause." 8 AAC 45.074(b). Given the above analysis, Employee failed to provide "good cause" for a hearing continuance and the oral order declining to continue the June 15, 2022 hearing was correct.

2) Was the decision to not allow Employee's current physician to testify, correct?

Employee wanted to call Dr. Haack, his current primary care physician, to testify at hearing. Employer objected on several grounds including its contention that Dr. Haack was an unlawful change in Employee's physician choice. At hearing, the panel determined Dr. Haack was an unlawful change of physician under AS 23.30.095(a) and 8 AAC 45.082(b)(2), (4) and declined to allow his testimony on that basis in accordance with 8 AAC 45.082(c).

At hearing on July 19, 2016, Employee testified he eventually moved to Seattle and saw physicians at Harborview Medical Center, who provided a left shoulder injection, which improved his symptoms. Employee told Dr. Gritzka he relocated from California to Burien, Washington sometime around August 2015, prior to seeing Dr. Gritzka for his SIME. He told Dr. Gritzka he saw physicians for his work injury in the Burien area at Neighbor Care Pike Market Medical, and Neighbor Care Health. Employee testified at the June 15, 2022 hearing that at his former attorney's direction, he then saw Dr. Anderson at Swedish Spine, Sports & Musculoskeletal Medicine, also in the Seattle area, for his work injury. Employee testified thereafter he moved to a different part of town, less than 15-20 miles away, and for his convenience changed physicians to Dr. Haack, who is his current primary care provider. Moving less than 50 miles fails to constitute "not a change of attending physician." 8 AAC 45.082(b)(4)(A). Employee adamantly denied Dr. Anderson was ever his physician, though he admits he received treatment from him for his work injury. It is unclear from the medical records if Dr. Anderson was the same physician from which Employee received an injection at Harborview Medical Center.

In any event, it is undisputed Dr. Anderson treated him and once Employee went to Dr. Anderson and received "treatment, advice, and opinion, or any type of service" from him Employee

designated Dr. Anderson as an attending physician under 8 AAC 45.082(b)(2), whether he intended to or not. Previously, someone at either Harborview Medical Center, Neighborhood Care Pike Market Medical, or Neighbor Care Health had become Employee's "substitution" physician as that term is used in the applicable regulations when he moved to Burien. Thereafter, at his attorney's urging, Employee went to Dr. Anderson who became an "attending physician" and constituted his one allowable change in his choice of attending physician. AS 23.30.095(a). When Employee later for his convenience changed to Dr. Haack, this change became an unlawful, excessive change in his attending physician. Consequently, the panel could "not consider the reports, opinions, or testimony of the physician in any form, any proceeding, or for any purpose." 8 AAC 45.082(c). The oral order declining to allow Dr. Haack's testimony was correct.

Moreover, Dr. Haack never provided any reports or opinions. Employee did not know if he had ever given him a PPI rating or even had an opinion about one. Therefore, there was no evidence Dr. Haack's opinions were relevant to the PPI issue. If, on the other hand, Dr. Haack's sole purpose was to criticize Dr. Lynch's opinion, it was too late for that because continuing compensability had already been resolved in *Narcisse I*, *II*, and *III*. Similarly, if Dr. Haack had something to say about the unfair or frivolous controversion issue, his testimony could have only been directed toward his disagreement with Dr. Lynch's opinion, which was already resolved in the prior *Narcisse* decisions finding Employee's minor work injury strain had resolved.

Alternately, Dr. Haack's testimony could have been excluded on grounds Employee failed to claim PPI benefits for his work injury in a timely manner under AS 23.30.105(a), made applicable to PPI benefits by *Murphy*, which said an injured worker had to bring a claim for increased PPI benefits within two years after the date of last payment of benefits. Here, there was no PPI benefit payment because Employee presented no PPI rating and Dr. Lynch eventually gave him a zero percent PPI rating under the *Guides* resulting in no payable benefits. By statute, made applicable by *Murphy*, Employee should have filed a claim for PPI benefits within two years of Employer's October 5, 2012 TTD benefit payment to him. AS 23.30.105(a); AS 23.30.185; *Murphy*. Two years from October 5, 2012 was October 5, 2014. *Rogers & Babler*. It is undisputed Employee never filed a claim for PPI benefits until December 14, 2021, more than seven years too late. Because Employee's PPI benefit claim was too late, even if Dr. Haack had intended to testify about a PPI

rating, his testimony was irrelevant. Therefore, for the numerous reasons deduced from this record and analysis, the oral decision to not allow Dr. Haack's testimony was correct.

3) Is Employee entitled to PPI benefits?

Employee's main claim is for PPI benefits. AS 23.30.190(a). The above analysis holding Employee's PPI benefit claim barred under AS 23.30.105(a) is incorporated here by reference. Additionally, Employee raised the PPI benefit issue for the first time on December 14, 2021, when he filed his December 10, 2021 claim. On December 14, 2021 his PPI benefit claim was ripe for adjudication and not just hypothetical. Therefore, he had the affirmative duty to present a valid, admissible PPI rating greater than zero at hearing. *Settje*. He failed to do so.

Ordinarily, the statutory presumption of compensability would apply to a claim for PPI benefits. *Meek*. AS 23.30.120(a)(1). However, without a medical record or opinion stating he had a PPI rating under the applicable *Guides* for his work injury greater than zero percent, he could not attach the presumption and Employee had the burden of proving his PPI benefit claim by a preponderance of the evidence. *Tolbert*; *Huit*. Without a rating, he failed on this basis as well. *Saxton*. Therefore, even if Employee's PPI benefit claim was not barred under AS 23.30.105(a) and *Murphy*, he would still lose because he failed to present a valid PPI rating greater than zero at hearing. *Settje*. For all these reasons, Employee's claim for PPI benefits will be denied.

4) Were Employer's January 10, 2014 or March 6, 2014 Controversion Notices unfair or frivolous?

Employee seeks a finding that Employer's Controversion Notices were unfair or frivolous. The only basis for this request is AS 23.30.155(o), which would require the Division Director to promptly notify the Division of Insurance if this decision determined Employer had frivolously or unfairly controverted compensation due under the Act. *Narcisse I* has already determined Employee is not entitled to a penalty, and *Narcisse I* is *res judicata. Robertson*. So, Employee's unfair or frivolous claim could not relate to a penalty. Employee may be under the mistaken impression that if this decision found an unfair or frivolous controversion that finding would result in him obtaining additional benefits from Employer; it would not, as the statute states.

Employer filed several controversions; at the June 15, 2022 hearing Employee clarified that he objected only to notices filed on January 10, 2014 and March 6, 2014. For a Controversion Notice to be filed in "good faith," Employer must possess sufficient evidence in support of the controversion that, if the claimant does not introduce evidence in opposition to the controversion, it would be found the claimant is not entitled to benefits. *Harp*. The Court later adopted *Harp*'s penalty analysis to resolve frivolous and unfair controversion issues. *Vue*.

A) The January 10, 2014 controversion was not unfair or frivolous.

AS 23.30.155(o), *Harp a*nd *Huit* determine if denials were "good faith" controversions. They state a good faith Controversion Notice is one that demonstrates with "substantial evidence that the disability . . . or need for medical treatment did not arise out of and in the course of the employment." An employer may also validly controvert based on applicable law. *Harp*; *Vue*.

Employer's January 10, 2014 Controversion Notice denied TTD benefits from August 8, 2012 through November 3, 2013, and from November 12, 2013 continuing; TPD benefits; and a rate adjustment. AS 23.30.155(a). Thus, Employee knew exactly what benefits were denied. The controversion also explained it denied some TTD benefits because Employee received full wages during that time and stated disability benefits are not payable concurrent with full wages, which is true. AS 23.30.185; AS 23.30.200. It further explained it denied TTD benefits from September 27, 2012, through his period of incarceration and stated benefits are not payable while an injured worker is in jail. There is split case law on this issue, but agency decisions existing on the date Employer controverted supported this legal defense. *Hinkle*. The notice further stated Dr. Wagner released Employee to return to work, ending his entitlement to time-loss benefits. It also advised Employee he had presented no part-time or reduced-wage documentation post-injury justifying TPD benefits and had provided no evidentiary basis for adjusting his compensation rate. AS 23.30.200. Thus, Employee also knew exactly why specific benefits were denied. *Vue*.

The only part of this controversion Employee disputed was its statement that Dr. Wagner had released him to work, which he adamantly denied. But the record shows Dr. Wagner released him to work with restrictions on November 12, 2013. Employer attached his related medical records to its controversion. By this time, Employee had returned home to California. Given this analysis

if the only evidence a panel could have considered were the controversion and the attached records, Employee would not have been entitled to benefits because statutes, regulations and decisional law support the legal bases for Employer's controversion, and Dr. Wagner's November 12, 2013 medical report and the absence of any earnings information support the factual bases for it. *Harp*. Employer's January 10, 2014 Controversion Notice was not unfair or frivolous.

B) The March 6, 2014 controversion was not unfair or frivolous.

The same legal analysis above is applied to the March 6, 2014 Controversion Notice. Dr. Lynch's February 21, 2014 EME report found no work-related condition and opined the alleged work event was not the substantial cause of Employee's disability or need for treatment and the substantial cause of his symptoms were preexisting, age-related arthritic changes aggravated by chronic tobacco use, which predisposed him to degenerative joint problems. Dr. Lynch is an orthopedic surgeon; he reviewed Employee's medical records and diagnostic imaging reports and conducted a physical examination before giving his opinions. Dr. Lynch's February 21, 2014 opinions were substantial evidence that work was not, and non-work-related causes were, the substantial cause for the disability or need for medical treatment for all conditions and symptoms Employee attributed to his work with Employer.

Based on Dr. Lynch's February 21, 2014 report, the March 6, 2014 Controversion Notice controverting "all benefits" informed Employee about the types of compensation being controverted, *i.e*., all types, the bases for the controversion and gave notice of all disputed issues. AS 23.30.155(a); *Vue*. Under the applicable legal standard, Employer's March 6, 2014 Controversion Notice was supported by substantial evidence in Dr. Lynch's report, provided required information and was not unfair or frivolous. If the only evidence that could be considered on the March 6, 2014 Controversion was Dr. Lynch's report, Employee would not have been entitled to benefits because his opinions were legally adequate to support a denial. *Harp*; *Vue*.

Therefore, since Employer had good faith legal and factual bases for controverting benefits, its subject Controversion Notices were not unfair or frivolous. *Harp*. There is no basis for a related finding and consequently there is no basis for a referral under AS 23.30.155(o).

CONCLUSIONS OF LAW

1) The decision to not continue the hearing was correct.

2) The decision to not allow Employee's current physician to testify was correct.

3) Employee is not entitled to PPI benefits.

4) Employer's January 10, 2014 and March 6, 2014 Controversion Notices were not unfair or frivolous.

ORDER

1) Employee's December 10, 2021claim for PPI benefits is denied.

2) Employee's December 10, 2021 request for an order finding Employer's January 10, 2014 and March 6, 2014 Controversion Notices were unfair or frivolous is denied.

Dated in Anchorage, Alaska on July 12, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, Member

/s/
Bronson Frye, Member

APPEAL PROCEDURES

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

An appeal may be initiated by filing with the office of the Appeals Commission: 1) a signed notice of appeal specifying the board order appealed from and 2) a statement of the grounds upon which

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Imhotep M. Narcisse, employee / claimant v. Trident Seafoods Corporation, employer; Liberty Insurance Corporation, insurer / defendants; Case No. 201212049; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on July 12, 2022.

/s/
Kimberly Weaver, Office Assistant