ALASKA WORKERS' COMPENSATION BOARD

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

TRAYVON JOHNSON, Employee, Claimant, v. SWICK MINING SERVICES, Employer, and CAROLINA CASUALTY INSURANCE COMPANY, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 202208697 AWCB Decision No. 22-0074 Filed with AWCB Fairbanks, Alaska on December 8, 2022

Trayvon Johnson's June 14, 2022 claim was heard in Fairbanks, Alaska on October 20, 2022, a date selected on August 16, 2022. A July 19, 2022 affidavit of readiness for hearing gave rise to this hearing. The hearing continued and was concluded on October 21, 2022. Trayvon Johnson (Employee) represented himself and testified on his own behalf. Attorney Aaron Sandone appeared and represented Swick Mining Services and Carolina Casualty Insurance Company (Employer). Additional witnesses included Stefanie Stewart and Jimmy Hogner, who testified on Employer's behalf. The record closed at the hearing's conclusion on October 21, 2022.

ISSUES

Employee contends Employer's *ex parte* conversation with one of his medical providers violated his rights under the Health Insurance Portability and Accountability Act (HIPAA), so the light-duty work release Employer obtained from that provider is an "invalid" document. He instead

relies on an earlier work release slip he received from the same provider and contends he is entitled to disability compensation based on that slip.

Employer contends HIPAA protections do not apply for workers' compensation purposes, so the light duty work release it obtained from Employee's medical provider is valid. It contends Employee refused to perform modified duty work and no disability compensation is owed because Employee's inability to earn wages was not the result of the work injury.

1) Is Employee entitled to TTD benefits?

Employee contends his right hand is "not suitable for employment" and he has "medical proof to back-up [his] claim." He further contends his right hand "probably won't be the same ever again because he was mistreated throughout this whole thing." Employee does not cite any medical record in support of his contentions.

Employer contends Employee has medical issues requiring attention, but those are not related to the work injury.

2) Is Employee entitled to medical benefits?

FINDINGS OF FACT

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

1) Pogo Mine is a remote worksite in Interior Alaska. (Experience).

2) On May 21, 2022, Employee worked as a driller's assistant at the Pogo Mine and was injured when a metal rod fell off a piece of mining equipment and struck his right wrist and hand. (Claim for Workers' Compensation, undated; Incident Report, May 21, 2022; Employee Report of Occupational Injury or Illness, May 31, 2022; First Report of Injury, June 10, 2022).

3) On May 22, 2022, Employee was evaluated by the camp medic, Theresa Ungar, PA-C, who ordered modified duty work until Employee was reassessed. Employee was instructed to follow-up in 48 hours. (Medical Aid Station Visit Notification, May 22, 2022).

4) Witnesses at hearing included Employee, Stefanie Stewart, Employer's Human Resources Manager, and Jimmie Hogner, Employer's Health, Safety and Environmental Coordinator.

(Record). Scott Watkins, Employer's Operation Manager, Ms. Stewart and Mr. Hogner provided written statements. (Watkins statement, undated; Stewart statement August 30, 2022; Hogner statement, undated).

5) On May 23, 2022, Employee was assigned modified duty work in the machine shop, such as sweeping the shop, cleaning the office, and filing, which he initially performed, but he later returned to his room at camp prior to the end of his shift. (Employee; Hogner; Hogner statement, undated; Watkins statement, undated). Employee also followed-up with the camp medic that same day. (Employee; Hogner). His swelling was worse, and the medic recommended Employee be evaluated "in town" to rule out fracture. (Hogner; Watkins statement, undated).

6) On May 24, 2022, Mr. Hogner, drove Employee from the Pogo Mine site to North Pole to be evaluated at McKinley Orthopedics, a trip that takes five or six hours to complete both ways. (Hogner; Watkins statement, undated). Employee asked for a couple of days off work to rest. (Employee). X-rays showed no fractures or obvious abnormalities. (Employee; Watkins statement, undated). Findings included marked edema in Employee's fingers and around his right hand. Robert Wood, PA-C diagnosed right hand contusion, prescribed Ketorolac, and released Employee to modified duty work with no use of the right hand. (Physician's Report, May 24, 2022; Return to Work Program form, May 24, 2022; Work Excuse form, May 24, 2022). Employee and Mr. Hogner returned to camp. (Employee; Hogner).

7) On May 25, 2022, Employee requested he be seen for a second opinion. (Hogner; Employee; Johnson text message, May 25, 2022; Steward statement, August 30, 2022; Watkins statement, undated). Mr. Hogner drove Employee to the Fairbanks Memorial Hospital, a trip that takes two and one-half to three hours to complete each way. (Hogner). Employee reported he wanted a second opinion because he was still having a lot of pain and swelling. He also wanted to be excused from work so he could go back to his home in California. No fractures were shown on x-rays although soft tissue swelling was noted. An acute hand contusion was assessed, and Employee was prescribed Norco and Naproxen for pain. (Emergency Department Record, May 25, 2022). Tom Dale, PA, gave Employee a slip releasing him from work until June 2, 2022. (Work Excuse slip, May 25, 2022). Employee and Mr. Hogner then ran some errands while in Fairbanks. They went to Walmart to have Employee's prescriptions filled, to McDonalds and to the airport of check on some luggage. (Employee; Hogner). Mr. Hogner was surprised by Employee's off work slip given the modified duty work release from McKinley Orthopedics a day

earlier, and after speaking to Employer's insurance adjuster, he returned to the hospital to ask PA Dale if there was any reason why Employee could not perform modified duty work. (Hogner). Mr. Hogner explained modified duty work was available at the work site. PA Dale agreed Employee could perform those duties and changed Employee's work capacity to left hand use only. (Hogner; Watkins statement, undated; Work Excuse slip, May 25, 2022). While Mr. Hogner was in the hospital, Employee called his cousin, who told Employee Mr. Hogner cannot talk to his provider and urged Employee to call the hospital. Employee called the front desk at the hospital and asked if the hospital can give out his health information. The front desk informed Employee they could not give out his health information without his permission. (Employee).

8) As Employee and Mr. Hogner travelled back to camp, two arguments ensued between Employee and his supervisors. (Employee; Hogner; Stewart; Stewart statement, August 30, 2022; Watkins statement, undated). The first one occurred between Employee and Mr. Hogner after they had stopped in front of a store and concerned Employee performing light duty work when he returned to the work site. During this argument, Employee exited the truck and made a phone call. (Employee; Hogner). He again called his cousin. (Employee). Employee and Mr. Hogner also had a confrontation about Employee getting back in the truck. (Employee; Hogner). Employee refused Mr. Hogner's instructions to return to the truck. (*Id*.). During this argument, Mr. Hogner was also communicating with Employer's Human Resources Manager, Stefanie Stewart, by telephone. Ms. Stewart was driving to the Fairbanks airport with Employer's Operations Manager, Scott Watkins, in a separate vehicle. (Employee; Hogner; Stewart; Stewart statement, August 30, 2022; Watkins statement, undated). Employee and Mr. Hogner got underway again, but another argument ensued over Employee performing modified duty work when he returned to the work site. (*Id*.). Mr. Hogner telephoned Ms. Stewart and Mr. Watkins and informed them Employee wanted to get a lawyer. Ms. Stewart instructed Mr. Hogner and Employee to meet-up with her and Mr. Watkins. (Hogner). She and Mr. Watkins pulled over to the side of the road so that Mr. Hogner and Employee could meet-up with them. (Stewart; Hogner; Stewart statement, August 30, 2022). When Mr. Hogner and Employee met-up with Ms. Stewart on the side of the highway, Employee exited the truck and made another phone call. (Employee; Hogner). He again called his cousin and spoke to an attorney during a three-way phone call. (Employee). Ms. Stewart and Employee then had a confrontation about Employee getting back in the truck. (Hogner). Ms. Stewart instructed Employee numerous times to get back in the truck. (Hogner; Stewart). She

gave Employee the option of returning to the work site and performing modified duty work or being taken to the airport so he could go home. (Stewart; Stewart statement, August 30, 2022). Employee chose to get back in the truck and return to the work site. (Employee; Hogner; Stewart; Stewart statement, August 30, 2022; Watkins statement, undated).

9) On May 26, 2022, Employee reported to work and was offered modified duty work in the mechanic's room, including sweeping, and taking inventory. (Hogner). Mr. Hogner asked Employee to complete a workplace inspection sheet, which is meant to identify hazards, since it was Employee's first time working in the shop. (*Id.*). Employee refused to complete it, (*id.*), and asked to go back to his room. (Employee). Employee was terminated from his employment for failing to follow direction and refusing modified duty work. (Hogner; Stewart; Stewart statement, August 30, 2022; Watkins statement, undated). Mr. Hogner took Employee back to his room, told Employee to get his belongings, informed Employee a bus would be leaving in one and one-half to two hours, and instructed Employee to be on the bus. (Hogner).

10) On May 28, 2022, Employee was evaluated in California at the Emergency Department of Loma Linda University Health System for right hand pain. He reported constant, unimproved, right-hand pain that worsens with movement and is not improved with the pain medications he was given in Alaska. X-rays were ordered and the diagnosis provided was right hand pain. (Emergency Department report, May 28, 2022).

11) On June 11, 2022, a right-hand magnetic resonance imaging (MRI) study showed no evidence of fracture or acute osseous abnormality; intact collateral ligaments; intact flexor and extensor ligaments; and no significant joint effusion. The impression provided was, 1) mild edema within the dorsal interosseous muscle at the radial margin of the second metacarpal consistent with muscle strain or contusion; 2) mild edema and soft tissue swelling at the dorsal aspect of the hand, most pronounced adjacent to the second metacarpal consistent with soft tissue contusion; and 3) intact tendons and ligaments with no evidence of internal derangement. (MRI report, June 11, 2022).

12) On June 14, 2022, Employee filed an undated claim seeking temporary total disability (TTD) benefits. He wrote, "Employer denied TTD benefits because of an inaccuarte [sic] medical note. I have attached the correct medical Note [sic]." (Claim for Workers' Compensation Benefits, undated). No note was attached to Employee's claim. (Observations).

13) On June 28, 2022, Employer answered Employee's claim, admitting its responsibility for reasonable and necessary medical benefits related to Employee's right-hand injury, but denying liability for TTD due to a lack of medical evidence and Employee's refusal of modified duty work. (Employer's Answer, June 28, 2022).

14) On July 18, 2022, Employee saw Emade Njie, PA-C, for lab test results and medication refills. Diagnosis included, 1) Body Mass Index of 26.0-26.9; 2) encounter for issue of repeat prescription; 3) exercise counselling; 4) dietary counseling and surveillance; 5) Vitamin D deficiency; 6) hyperlipidemia; 7) contusion of the right hand; and 8) cough. (Njie chart notes, July 18, 2022).

15) On July 19, 2022, Employee requested a hearing on his June 14, 2022 claim. (Affidavit of Readiness for Hearing, July 19, 2022).

16) On July 22, 2022, the Fairbanks Memorial Hospital's Privacy Officer wrote Employee:

> This letter is to notify you that on May 26, 2022, [the hospital] was notified you had reported a concern to the Fairbanks Fire Department Emergency Call Line believing your protected health information was improperly disclosed by a provider in the Emergency Department (ED). Specifically, it was brought to my attention that you believed an ED Provider had spoken to your employer without your authorization.
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> This report has been investigated thoroughly. It was confirmed that the ED Provider did speak to your employer representative, without your authorization, and provided them a different 'return to work' note than had been provided to you at discharge. The Provider misunderstood the communication; believing the employer representative was with you and involved in your healthcare. The Provider made a good faith mistake, based on his understanding. . . .
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> Please be assured that we have investigated this breach and we will provide additional HIPAA training to providers and staff to ensure that safeguards are in place to prevent breaches of this nature from happening again. . . .

(Sheets letter, July 22, 2022).

17) At an August 16, 2022 prehearing conference, Employee's June 14, 2022 claim was amended to include medical benefits. The summary did not identify a dispute over medical benefits. Employee's claim was also scheduled for hearing. (Prehearing Conference Summary, August 16, 2022; observations).

18) On September 9, 2022, Employee filed a written statement setting forth his positions along with his witness list. He wrote:

> I deserve to be compensated for the time I reached back to California til now. I've been going non-stop to get medicine and treatments such as steroid shots to help cope with the pain. . . . Very limited but as time went on it got better but I wasn't out of the woods and currently still am not. . . . I couldn't sleep and I called Bobby grant [sic] and he helped me form the text so get I can get a 2nd opinion . . . . They granted it and the rest happened with *the breaking of the hippa* [sic] *law* an [sic] the threatening. . . . Jimmy grabbed the mechanic guy and was telling me what I was going to do with him in the shop . . . so I asked to if [sic] I can go back to my room cuz [sic] I'm hurt an [sic] maybe we can try it again tomorrow . . . an [sic] after I confronted him how I was supposed to be there with my official doctors [sic] note an [sic] accused him of forging the 2nd note is when I got a ride back to my room an [sic] fired . . . .

Employee also listed his cousin, Bobby Grant, as a witness and explained:

> I also called him as Jimmy was walking into the hospital the 2nd time. I also called him 2 [sic] more times after we left the hospital in [sic] regarding the news I heard that Jimmy had claimed he changed the doctors mind . . . and the other was shortly after when I called him and family lawyer MR [sic] Hierst [sic] on 3 [sic] way as I was being threatened and yelled at by Stephanie the recruiter to make a decision on the side of the road to either go back to light duty work or get dropped off at the airport right now. Which [sic] he advised to get in the truck an [sic] go back even though it *was wrong* what they were doing.

Employee also listed Albert Hirst as a witness and explained:

> Mr. Hirst was on the 3 [sic] way call when Stephanie the recruiter was threatening an [sic] yelling at me which [sic] he advised me to get in the truck and go to work even what [sic] they were pushing me to do *was wrong* after the recruiter gave me 5 [sic] mins [sic] to make a decision to either be left at the airport right now or go back to light duty work[.]

(Employee email, September 9, 2022 (emphasis added)).

19) Mr. Hirst's address is in California. (*Id*.).

20) On September 14, 2022, Employee followed-up with Samantha Baltazar, PA-C, for right-sided weakness. He complained of numbness in his right hand mostly around the thumb and numbness in his right calf. Employee stated he cannot play basketball like he used to. He recently had walking pneumonia and complained of having blackouts lasting for a few seconds several

times a day. Recent lab work showed borderline kidney function and mildly elevated creatine phosphokinase (CPK). Upon a musculoskeletal examination, he was unable to heel walk with his right foot and had some difficulty with toe walking on his right foot. There was mild decreased strength deficit against resistance to Employee's right deltoid, biceps and triceps; moderate strength deficit against resistance to right hip flexion, knee flexion and extension; significant strength deficit with ankle dorsiflexion and eversion; and moderate strength deficit with eversion and plantar flexion. An electromyography (EMG), nerve conduction study (NCS) and brain MRI were negative. PA-C Baltazar assessed right side weakness with unclear etiology and planned to order cervical and lumbar MRIs to rule out radiculopathy or myelopathy. (Baltazar chart notes, September 14, 2022).

21) On October 12, 2022, Employer controverted Employee's entitlement to disability benefits based on his refusal of modified duty work. (Controversion Notice, October 12, 2022).

22) On October 13, 2022, Employer wrote, "it appears that based on the medical records supplied by the employee after his return to California at the end of May 2022, that he has other unrelated medical issues that are requiring attention." (Employer's Hearing Brief, October 13, 2022). It made no further contentions regarding medical benefits, either in its hearing brief, or at hearing. (*Id*.; Record).

23) Witnesses at hearing included Employee, Ms. Stewart, and Mr. Hogner. (Record).

24) Ms. Stewart testified about Employer's return to work program and the availability of modified work. Her testimony included specific instances of modified work duties for other injured employees. (Stewart). In addition to Ms. Stewart's testimony, the record contains considerable documentary evidence of Employer's return to work program and the availability of modified work. (Watkins statement, undated; Hogner Statement, undated, Stewart statement, undated; Watkins statement, dated; Hogner letter, May 24, 2022; Swick Return to Work Program form, May 24, 2022; list of available options for light duty work at the shop, undated).

25) Employee's, Mr. Hogner's, and Ms. Stewart's testimony are consistent with one another. Their testimony is also well-supported by the written record. Employee, Mr. Hogner and Ms. Stewart are credible with respect to facts relevant to this decision. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

26) At hearing, Employee repeatedly denied he refused modified duty work. He emphasized he "showed-up for work" on both May 22 and May 26, 2022, and never said he "quit." There's a

difference between not going to work; and going to work hurt and asking for some time off, according to Employee. (Employee; record).

27) During his closing argument at hearing, Employee contended his right hand is "not suitable for employment," and he had "medical proof to back-up my claim." He also contended his right hand "probably won't be the same ever again because he was mistreated throughout this whole thing." Employee did not reference any medical record in support of his contentions. (Record).

28) At hearing, Employee contended, when Mr. Hogner called Employer's adjuster, the adjuster instructed Mr. Hogner to violate the HIPAA law. (Record). He also testified he later "confirmed" a HIPAA violation had occurred and the hospital apologized. (Johnson). Employee contended the second work release note from the hospital is invalid, because the hospital "took responsibility" for the HIPAA violation. (Record). He characterized the second work release slip as a "fake note." (Johnson).

PRINCIPLES OF LAW

The board may base its decisions not only on direct testimony and other tangible evidence, but also on the board's "experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn from all of the above." *Fairbanks North Star Borough v. Rogers & Babler*, 747 P.2d 528, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage**. Except as provided in (b) of this section, 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. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the Employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . 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 . . . 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 . . . .
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> (i) Interference by a person with the selection by an injured employee of an authorized physician to treat the employee, or the improper influencing or attempt by a person to influence a medical opinion of a physician who has treated or examined an injured employee, is a misdemeanor.

In *Bockness v. Brown Jug, Inc.*, 980 P.2d 462 (Alaska 1999), the Alaska Supreme Court rejected an injured employee's theory that employers are obligated to pay for any and all medical treatment chosen by the employee, no matter how experimental, medically questionable, or expensive it might be. *Id*. at 466-67. Instead, it held the statute's provision requiring employers to provide only that medical care "which the nature of the injury and the process of recovery requires," indicates the board's proper function includes determining whether the care paid for by employers is reasonable and necessary. *Id*. at 466.

> **AS 23.30.097. Fees for medical treatment and services.**
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> (d) An employer shall pay an employee's bills for medical treatment under this chapter, excluding prescription charges or transportation for medical treatment, within 30 days after the date that the employer receives the provider's bill or a completed report as required by AS 23.30.095(c), whichever is later.
> . . . .
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> **AS 23.30.107. Release of information.** (a) Upon written request, an employee shall provide written authority to the employer . . . to obtain medical and rehabilitation information relative to the employee's injury. . . . This subsection may not be construed to authorize an employer . . . to request medical or other information that is not applicable to the employee's injury.

It has long been recognized that it is important for employers to thoroughly investigate workers' compensation claims to verify information provided, properly administer claims, effectively litigate disputed claims, and detect fraud. *Cooper v. Boatel, Inc.,* AWCB Decision No. 87-0108 (May 4, 1987).

In *The Home Depot, Inc. v. Holt*, AWCAC Decision No. 261 (May 28, 2019), the Alaska Workers' Compensation Appeals Commission examined the extent to which the Health Insurance Portability and Accountability Act's (HIPAA) privacy protections applied to *ex parte* contacts between an employer and an employee's medical provider in workers' compensation cases under the Act. It found, prior to a controversion, such *ex parte* contacts should remain "unimpaired." *Id*. at 16. However, the Commission reasoned, once a controversion is filed, the matter becomes litigious, such that prior notice should be given to an employee of an employer's intent to have *ex parte* contact with a treating doctor so that the employee may have time to object and seek a protective order from the board. *Id*. at 16-17.

> **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 . . . .

"The text of AS 23.30.120(a)(1) indicates that the presumption of compensability is applicable to *any* claim for compensation under the workers' compensation statute." *Meek v. Unocal Corp*., 914 P.2d 1276, 1279 (Alaska 1996) (emphasis in original). Medical benefits, including continuing care, are covered by the AS 23.30.120(a) presumption of compensability. *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664-65 (Alaska 1991). The Court in *Sokolowski v. Best Western Golden Lion*, 813 P.2d 286, 292 (Alaska 1991) held a claimant "is entitled to the presumption of compensability as to each evidentiary question."

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). Whether or not medical evidence is required depends on the probative value of available lay evidence and the complexity of the medical facts involved. *Id*. An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the claim and the employment, *Burgess Construction Co. v. Smallwood*,

623 P.2d 312, 316 (Alaska 1981). Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion in light of the record as a whole. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). The mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Big K Grocery v. Gibson*, 836 P.2d 941 (Alaska 1992).

For claims arising after November 7, 2005, employment must be the substantial cause of the disability or need for medical treatment. *Runstrom v. Alaska Native Medical Center*, AWCAC Decision No. 150 (March 25, 2011) (reversed on other grounds by *Huit*). If an employer produces substantial evidence work is not the substantial cause, the presumption drops out and the employee must prove all elements of the "claim" by a preponderance of the evidence. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1381 (*citing Miller v. ITT Services,* 577 P 2d. 1044, 1046). The party with the burden of proving asserted facts by a preponderance of the evidence must "induce a belief" in the fact-finders' minds the asserted facts are probably true. *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

> **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 finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009).

> **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. . . .

"Compensation" under the statute includes medical benefits for purposes of interest and penalty on late payments. *Moretz v. O'Neill Investigations*, 783 P.3d 764 (Alaska 1989); *Childs v. Copper Valley Elec. Ass'n.*, 860 P.2d 1184 (Alaska 1993).

> **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.

> **AS 23.30.395. Definitions.** In this chapter,
> . . . .
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> (16) "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury . . . .

The concept of disability compensation rests on the premise that the primary consideration is not medical impairment as such, but rather loss of earning capacity related to that impairment. *Vetter v. Alaska Workmen's Compensation Bd.*, 524 P.2d 264; 266 (Alaska 1974). An award for compensation must be supported by a finding that the claimant suffered a compensable disability, or more precisely, a decrease in earning capacity due to a work-connected injury or illness. *Id*. If, however, through voluntary conduct unconnected with his injury, an employee takes himself out of the labor market, there is no compensable disability. *Id.* If a determination that an employee is no longer employed, not because of the work injury, but because of her own personal desires, and there is no actual impairment to her earning capacity, her claim for compensation is correctly denied. *Id*. at 267.

When an employee's medical providers release him to light duty work, and his employer provides it, the employee is not totally disabled. *Humphries v. Lowe's HIW, Inc.*, AWCAC Decision No. 179 (March 28, 2013), *aff'd* 337 P.3d 1174 (Alaska 2014). A claimant is not entitled to disability compensation following his termination for cause when work was available within his physical restrictions. *Fitzgerald v. Home Depot*, AWCB Decision No. 05-0242 (September 23, 2005). When a claimant is offered light duty work but is later terminated for cause for failing to come to work, he is not entitled to compensation. *Dillard v. Dick Pacific Ghemm, J.V.*, AWCB Decision No. 07-0086 (April 13, 2007). Once an employer overcomes the presumption of compensability, an employee is required to prove his loss of earnings was due to a work-related injury and resultant disability, not to a voluntary retirement. *Strong v. Chugach Electric Assoc., Inc.*, AWCAC Decision No. 09-0075 (February 12, 2010) at 9.

> **45 CFR § 164.512. Uses and disclosures for which an authorization or opportunity to agree or object is not required.** A covered entity may use or disclose protected health information without the written authorization of the individual . . . or the opportunity for the individual to agree or object . . . in the situations covered by this section . . . .
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> > **(l) *Standard: Disclosures for workers' compensation.*** A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

The workers' compensation exception to HIPAA broadly provides for the disclosure of protected health information "to the extent necessary to comply with laws relating to workers' compensation," thus deferring to state law on the subject. *Holt*.

ANALYSIS

(1) Is Employee entitled to TTD benefits?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the disability compensation he seeks. *Meek*. Employee attaches the presumption with the original, May 25, 2022, off-work slip from PA Dale. *Wolfer*. Employer rebuts the presumption with the later May 25, 2022, modified duty work release from PA Dale; Ms. Stewart's testimony that light

duty work was available to Employee; and Mr. Hogner's testimony that Employee refused light duty work. *Vetter*; *Miller*. Employee must now prove, by a preponderance of the evidence, that his May 21, 2022 work injury is the substantial cause of his disability. *Koons.*

Employee's candid testimony and documentary filings paint a vivid picture of his mindset towards performing modified duty work on May 26, 2022 - the day Employer terminated his employment. A day earlier, following his evaluation at the Fairbanks Memorial Hospital, Employee was given an off work slip by PA Dale. Later that same day, Employer's Health, Safety and Environmental Coordinator, Mr. Hogner, returned to the hospital, spoke with Employee's provider, and explained modified duty work was available at the worksite. PA Dale agreed Employee could perform modified duty work and provided Mr. Hogner with a work release slip restricting Employee's work activities to using his left hand only.

It has long been recognized that it is important for employers to thoroughly investigate workers' compensation claims to verify information provided, properly administer claims, effectively litigate disputed claims, and detect fraud. *Cooper*. Although Employee does not expressly allege Mr. Hogner's conversation with his provider was an improper attempt to influence the provider's opinion under AS 23.30.095(i), his testimony makes clear that he feels it was. It is unknown what Employee may have told PA Dale about his working conditions during his May 25, 2022 evaluation, but it is extremely unlikely Employee informed PA Dale of the availability of modified duty work. *Rogers & Babler*. Given this, and especially considering the modified duty work release from McKinley Orthopedics a day earlier, it was not inappropriate for Mr. Hogner to follow-up with PA Dale to seek clarification of Employee's specific work capacities. *Cooper*.

Meanwhile, the evidence makes clear, after Employee spoke with his cousin while Mr. Hogner was in the hospital, he became convinced that the hospital had violated his HIPAA privacy rights, a conclusion seemingly reinforced by an out-of-state attorney, the front desk of the hospital, and during two subsequent conversations with his cousin. *Rogers & Babler*. Moreover, the evidence is equally clear, Employee believes this perceived HIPAA violation rendered the work release slip Mr. Hogner obtained invalid, though he cites no legal authority in support of this conclusion. In fact, Employee was so confident in his position it led to two major confrontations with his

supervisors on the way back to the worksite over him performing modified duty work upon his return. Unfortunately for Employee, he received faulty legal advice from his cousin.

HIPAA does not prohibit the disclosure of protected health information for workers' compensation purposes and disclosures are permitted to the extent necessary to comply with state law. 45 CFR § 164.512(l). Understanding Employee's specific work capacities was necessary for Employer to comply with state law. *E.g.* AS 23.30.185; AS 23.30.155(a). The Commission's decision in *Holt* is also directly applicable to the facts presented here. Under *Holt*, until an employer controverts its liability for benefits, its ability to seek out *ex parte* contact with an employee's medical provider is "unimpaired." Here, Employer did not file its controversion until four months after Mr. Hogner's conversation with PA Dale. Additionally, even if an answer denying benefits causes a case to become "litigious" in the Commission's view, Employer's answer here was filed weeks after Mr. Hogner's conversation with PA Dale. Since Employee's work injury had not yet become litigious, his privacy rights were not violated under HIPAA or the Alaska Workers' Compensation Act. 45 CFR § 164.512(l); *Holt*.

It is fundamental that for an employee to receive TTD, he must be disabled. AS 23.30.185. Disability is an incapacity *because of injury* to earn the wages which the employee was receiving at the time of injury. AS 23.30.395(16) (emphasis added). When an employee takes himself out of the labor market, there is no compensable disability. *Vetter*. Refusal of modified duty work has long been held as a basis for denying compensation claims. *Humphries*; *Fitzgerald*; *Dillard*. Since Employer has rebutted the compensability presumption, the onus is on Employee to prove his loss of earnings was due to a work-related injury and resultant disability, not a refusal of modified duty work. *Strong*.

At hearing, Employee repeatedly denied he refused light duty work. He emphasized he "showed-up" for work on both May 23, 2022 and May 26, 2022, and never said he "quit." There is a difference between not going to work; and going to work hurt and asking for some time off, according to Employee. Notwithstanding Employee's peculiar understanding of work refusal, he candidly testified he returned to his room prior to the end of his shift on May 23, 2022; and asked to go back to his room on May 26, 2022, before being fired. Merely showing up for work is not

the same as performing work, and Employee does not contend he performed the modified duty work assigned to him on May 26, 2022. Instead, Mr. Hogner's unrebutted testimony is Employee refused to complete the workplace inspection sheet so he could perform modified duty work in the mechanic's shop that day. Since Employee's inability to earn wages was not the result of the work injury, but rather his refusal of modified duty work, his TTD claim will be denied. *Vetter*.

(2) Is Employee entitled to medical benefits?

The hearing issue of medical benefits is not understood. Employee's June 14, 2022 claim was amended at an August 16, 2022 prehearing conference to include medical benefits, but the summary does not identify a specific dispute over medical benefits. Employee only tangentially mentions medical treatment in his September 9, 2022 written statement and his contentions made during his closing arguments at hearing, such as his right hand not being "suitable for employment," and "probably won't be the same ever again," seem to pertain more to his claim for disability compensation than a claim for medical benefits. *Rogers & Babler*. Meanwhile, Employer only vaguely mentions Employee's "other unrelated medical issues that are requiring attention" in its hearing brief; and it made no contentions regarding medical benefits at hearing. Although several potential medical benefit disputes could exist or arise under the facts presented here, none have been clearly identified for adjudication.

An employer shall furnish medical care for the period which the nature of the injury or the process of recovery requires. AS 23.30.095(a). In its June 28, 2022 answer to Employee's claim, Employer admitted its responsibility for reasonable and necessary medical benefits related to Employee's right-hand injury. Similarly, its October 12, 2022 controversion only disputed Employee's entitlement to disability benefits, not medical benefits. Employee, therefore, remains entitled to reasonable and necessary medical benefits for his right-hand work injury, which Employer has never controverted. AS 23.30.097(d); AS 23.30.155(a); *Bockness*.

CONCLUSIONS OF LAW

1) Employee is not entitled to TTD.
2) Employee remains entitled to medical benefits for his right-hand work injury.

ORDER

Employee's June 14, 2022 claim for TTD is denied. He remains entitled to medical benefits for his right-hand work injury.

Dated in Fairbanks, Alaska on December 8, 2022.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Robert Vollmer, Designated Chair

/s/
Lake Williams, 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 Trayvon Johnson, employee / claimant v. Swick Mining Services, employer; Carolina Casualty Insurance Company, insurer / defendants; Case No. 202208697; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on December 9, 2022.

/s/ Lorvin Uddipa
Workers' Compensation Technician