ALASKA WORKERS' COMPENSATION BOARD

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

JUAN MARTINEZ GONZALEZ, Employee, Claimant, v. COPPER RIVER SEAFOODS, INC., Employer, and EMPLOYERS INSURANCE OF WAUSAU, Insurer, Defendants.	)	FINAL DECISION AND ORDER AWCB Case No. 202127108 AWCB Decision No. 23-0021 Filed with AWCB Anchorage, Alaska on April 25, 2023

Juan Martinez Gonzalez's (Employee) October 19, 2021 claim was heard on April 19, 2023, in Anchorage, Alaska, a date selected on March 7, 2023. A January 30, 2023 hearing request gave rise to this hearing. Employee appeared, testified through Spanish language interpreters and represented himself. Attorney Stacy Stone appeared telephonically and represented Copper River Seafoods, Inc. and its insurer (Employer). The record closed at the hearing's conclusion on April 19, 2023.

ISSUES

Employer contends Employee's claim is barred because he failed to give Employer written notice that he had an injury within 30 days after the injury occurred.

Employee contends he reported to his supervisor while at work that his left leg hurt, on August 15, 2021, and that person suggested he go to the doctor, which he did.

1) Is Employee's claim barred for failure to give timely notice?

Employer contends Employee's alleged injury is not covered under the Alaska Workers' Compensation Act (Act), because his disability and need for medical treatment did not arise out of and in the course of his employment with Employer. It contends he cannot raise the statutory presumption of compensability because he cannot establish a causal link between his employment and any disability or need for treatment. Alternately, Employer contends even if Employee can raise the statutory presumption, medical evidence rebuts it, and he cannot prove his claim by a preponderance of the evidence.

Employee contends he developed left thigh pain while at work for Employer. Consequently, he contends Employer is responsible for his workers' compensation benefits.

2) Did Employee's disability or need for medical treatment for his left thigh arise out of and in the course of his employment with Employer?

Employee contends he is entitled to temporary total disability (TTD) benefits. He did not specify the periods for which he requested TTD benefits, but August 15, 2021 was the last day he worked for any employer until he returned to work at a restaurant some time in 2022.

Employer contends Employee is not entitled to TTD benefits because his alleged injury did not arise out of and in the course of his employment.

3) Is Employee entitled to TTD benefits?

Employee contends he is entitled to temporary partial disability (TPD) benefits.

Employer contends Employee is not entitled to TPD benefits because his alleged injury did not arise out of and in the course of his employment.

4) Is Employee entitled to TPD benefits?

Employee contends he is entitled to past and ongoing medical care for his left thigh.

Employer contends Employee is not entitled to medical care because his alleged injury did not arise out of and in the course of his employment, and his medical findings and diagnoses are therefore not work-related.

5) Is Employee entitled to medical treatment and related travel costs for his left thigh?

Employee contends he is entitled to an unspecified penalty. He contends he developed an infection while on the job and Employer did nothing to assist him, making it liable for a penalty.

Employer contends Employee is not entitled to a penalty because his alleged injury did not arise out of and in the course of his employment, no benefits were due and there is no basis for a penalty.

6) Is Employee entitled to a penalty?

Employee contends he is entitled to interest on all benefits owed.

Employer contends Employee is not entitled to interest because no benefits are awardable because his alleged injury did not arise out of and in the course of his employment.

7) Is Employee entitled to interest?

FINDINGS OF FACT

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

1) On August 15, 2021, Employee went to the emergency room without a translator available initially and complained he had left thigh pain for the previous seven days, which he said was "atraumatic." In other words, he denied "any history of trauma." The evaluator who had "limited ability" to speak Spanish, used "Google translate" to assist in communicating with him until an interpreter was available later in the examination. Diagnostic testing resulted in a diagnosis most consistent with myositis and cellulitis, also described as "superficial phlebitis of left leg" with "possible early abscess." (Vincent Imbriani, MD, report, August 15, 2021).

2) Employee had to give written notice of his injury to Employer within 30 days, or by September 14, 2021. (Observations).

3) On August 25, 2021, Employee returned to the emergency room as directed for a follow-up visit. He had nearly completed his antibiotics, but his left leg discomfort was unchanged, and he had periodic fevers and a knot-like sensation in his thigh. The examiner used a telephonic Spanish interpreter to communicate with him. A computer tomography (CT) scan found diffuse swelling in Employee's thigh, which the physician said was most consistent with myositis and a developing intramuscular abscess. Employee reported his "leg pain and swelling is related to working nonstop without any days off for an extended time." His examiner gave Employee a "new diagnosis" of uncontrolled diabetes; he was hospitalized. Upon further examination, Employee did not have an abscess and the diagnosis was myositis. (Providence Hospital reports, August 25, 2021).

4) On August 26, 2021, Employee had exploratory surgery to examine the possible left thigh abscess. (Providence Hospital records, August 26, 2021).

5) On August 29, 2021, Employee saw another physician while hospitalized and denied "pre-existing injury contusion or cut" to his left thigh area. During the surgery to culture the suspected abscess, some "dead or very inflamed muscle was found," and removed. Employee reported substantial improvement. Fluid removed from Employee's thigh grew no cultures. His examiner said this was a "unusual case," and suspected Employee may have had a strep infection "common with diabetes." Employee did "not appear interested" in learning about how to address his diabetes and continued watching television while the doctor explained what he should do to curb his un-controlled diabetes. (Providence Hospital reports, August 29, 2021).

6) Employee's Providence Hospital records contain no medical opinions from a physician or other medical provider linking the above-referenced symptoms, findings and treatment to Employee's employment with Employer. (Observations).

7) On September 9, 2021, Employee completed an intake form at Rhyneer Caylor Clinic. He did not mention a particular injury date or accident giving rise to his symptoms, which he described as "swelling," and said the symptoms had been present for three weeks. Mark Caylor, MD, recounted performing surgery on Employee while he was hospitalized and noted he found no abscess but found "a lot of very compromise muscle" in Employee's left thigh. At this visit, Dr.

Caylor removed the stitches and encouraged Employee to follow-up with his primary physician to treat his new-onset diabetes diagnosis. (Caylor report, September 9, 2021).

8) On September 17, 2021, Employee returned to the emergency room, having concerns over an "open wound" at the site of his previous left thigh surgery. He was unclear if he was taking his diabetes medication as directed. The diagnosis was "draining postoperative wound." (Providence Hospital reports, September 17, 2021).

9) On September 24, 2021, Employee with his interpreter called the Workers' Compensation Division (Division) about his case. The Division on the same date emailed Employee information, some written in Spanish. Included in the email, written in English, was a list showing the "General Steps" Employee should follow in pursuing a claim against Employer. Among these steps was for him to file a claim "w/Medical proof or other documentation, if needed." (Agency file: Phone Call; Email tabs, September 24, 2021).

10) On September 28, 2021, Dr. Rhyneer observed Employee's two- by three-inch open wound from his August 26, 2021 surgery and noted Employee had diabetes but does not check or control it. He scraped dead muscle tissue from the wound and advised Employee he had to get his diabetes under control "for this to heal." (Dr. Rhyneer report, September 28, 2021).

11) On October 19, 2021, Employee filed with the Division an injury report with August 15, 2021, as the injury date. He described his injury as "Left Leg Swelling -16 Hrs + on Feet." He attributed his left thigh swelling with working on his feet for Employer. Employee stated he reported this to his supervisor and co-workers, but did not say the date on which he did so. (Employee Report of Occupational Injury or Illness to Employer, September 30, 2021).

12) On October 20, 2021, Employee through his interpreter called the Division for advice on how to proceed. A Division technician advised he "needs to show Medical record proof of his injuries caused by work." (Agency file: Communications; Phone Call tabs, October 20, 2021).

13) On October 20, 2021, Employee claimed TTD, TPD and medical benefits and related transportation expenses, a penalty for late-paid compensation, and interest. He contended his leg started swelling on August 15, 2021, after standing 14-16 hours per day every day nonstop Monday through Monday. Employee contended this swelling later proceeded to surgery in September 2021. (Claim for Workers' Compensation Benefits, October 19, 2021).

14) On November 16, 2021, Employer denied Employee's claim for all benefits. It contended the claim was barred by untimely notice; the injury did not arise out of or in the course of his

employment; all benefits due had been timely paid or controverted and thus no interest was due; Employee failed to attach the statutory presumption of compensability because he had no medical evidence connecting his left thigh medical care to his work with Employer; because this case involved "highly complex medical issues" Employee needed medical evidence supporting his position to raise the presumption; and all its controversions were reasonably based upon fact or law. (Controversion Notice, November 16, 2021).

15) On December 2, 2021, a Spanish-speaking Division staff member provided Employee with an "Employee's Guide to Workers' Compensation." (Prehearing Conference Summary, December 2, 2021).

16) On December 10, 2021, Employee through his interpreter called the Division again. A staff member "advised (again) that there has to be Medical Records evidence that show his injuries were caused by a 'work injury/incident.'" The interpreter told the staff member, "She understood." Employee's interpreter also mentioned Employee "is stubborn and won't go to the doctor." (Agency file: Communications; Phone Call tabs, December 10, 2021).

17) On March 4, 2022, Employee responded to Employer's interrogatories, under oath. He stated, among other things, how he contends his injury occurred:

> I was working trimming the fish for about 12 hrs. when I did feel pain in my left leg. It was increasing until I could not handle it. That's why I make [sic] an appointment with my doctor, and I had several kinds of tests (x-ray, MRI).
>
> After three days of visit [sic] with my doctor I came back to work. My left leg was still hurting and I came back to my doctor and he took the decision to have me on surgery because I [sic] edema in my left leg. 5 days after then [sic] hospitalized I went home.
>
> Because of excess of work standing all day for 12 hours caused me that my tendon got damage. (First Set of Discovery Requests to Employee, March 4, 2022).

18) On June 29, 2022, Madeleine Grant, MD, at Anchorage Neighborhood Health Center saw Employee with his interpreter on referral from Providence Hospital. She noted Employee had diabetes when seen at her clinic in 2020 but he had not returned since then. Dr. Grant charted his left thigh scar but opined there was no contraindication for him to return to work. She reviewed a letter from an attorney asking her if Employee had been disabled since his initial injury. Dr.

Grant completed the paperwork by stating she was unable to state his condition prior because she had not seen him until that day for his left thigh. (Grant report, June 29, 2022).

19) On July 27, 2022, Employee visited Dr. Grant, again with paperwork from an attorney for her to complete. Dr. Grant stated, "I could not make statements about his health prior to 6/22 when he was seen for initial appointment." He wanted to return to work and needed a note stating he could. Dr. Grant stated when she saw him in June 2022, though he still had some leg pain, Employee at that time "was able to return to work." She provided another note so stating. (Grant report; release to return to work, July 27, 2022).

20) On October 19, 2022, Employee filed with the Division, with no proof of service on Employer, what is purported to be text messages in Spanish between "his boss" and Employee, and included a photograph of Employee's work identification card. As neither panel member speaks Spanish, the contents of these text messages is unknown, and they were not considered in rendering this decision and order. (Agency file: Party Actions; Evidence Filed tabs, October 19, 2022; observations).

21) On December 30, 2022, Employee returned to Dr. Grant who diagnosed, "Leg pain unexplained, he had a muscle infection, presumed element of nerve pain particularly with his long uncontrolled diabetes." He was not adhering to his medication regimen for diabetes. Employee had recently had a urinary tract infection caused by extremely high blood sugar ("455"). (Grant report, December 30, 2022).

22) On January 26, 2023, the parties participated in mediation with an experienced Hearing Officer, and a Spanish interpreter, unsuccessfully. (Agency file: Judicial tab, January 26, 2023).

23) On March 7, 2023, the parties appeared at a prehearing conference with a Spanish-speaking Workers' Compensation Officer conducting. The parties agreed to an April 19, 2023 hearing on Employee's October 20, 2021 claim and identified the above-referenced issues. The summary noted the parties had participated in mediation, unsuccessfully. The Designee directed the parties to file evidence on or before March 30, 2023, and hearing briefs and witness lists on or before April 12, 2023, and directed Employee to serve all documents he filed with the Division on Employer. (Prehearing Conference Summary, March 7, 2023).

24) On March 29, 2023, Employee filed with the Division, without proof of service on Employer, a letter, which was not considered in rendering this decision, stating:

> This letter is to explain my requested compensation amount.
>
> First. - Since my accident, on 08-15-2021 I lost my job with the company (Copper River Seafood Inc.). I did not work since then, that means I did not receive any income, not pay, rise of salary or bonuses. Also, I did not receive any work's [sic] compensation at all, that put me way behind my bills, payments and all my debts. Not even to have money to buy food or pay my rent.
>
> Second.-Because [sic] the accident I spend a lot [sic] time going to the doctor and be [sic] in hospitals, that means suffering a lot [sic] physical pain and incapacitation, unable to work.
>
> Third.-A lot [sic] emotional stress. After the accident I fall in a lot of depression. Not been able to work, a lot of pain in my body, not having money to pay my bills or buy food, Put me so depressed. At some point the electricity company cut my services and lost heat in my house, not lights, all that together put me in a lot of depression that at one point I thought to kill myself.
>
> For all those reasons I consider that at least I have to be compensated with the amount of money I'm requesting.
>
> I appreciate your help in this matter. (Employee letter, undated but filed March 29, 2023).

25) On March 29, 2023, Employee also filed with the Division, without proof of service on Employer, a compact disc (CD) labeled "Chart." This CD contains various medical records and other documents, not relied on in rendering this decision and order, including:

- February 21, 2023 referral from Jonathan Metzger, PA-C, to Alaska Orthopedic Specialists, Luke Liu, MD, to evaluate Employee for peripheral nerve pain in his left leg
- February 21, 2023 PA-C Metzger chart note with subjective, objective, assessment and plan for Employee's left thigh
- A March 10, 2023 "amendment" by Sone Rasavongsy to the February 21, 2023 PA-C Metzger report; the amended portion in a different typeface states: "48 yr old male here for left lower extremity. Patient is non English speaking. Spanish interpreter online. Washout done 8/25/2021, - due to standing too long had pain in knee, ?'d if bacteria, still not feeling 100%, swelling in the knee, pain, was w/c claim - SR"
- Miscellaneous medical records and releases related to the February 21, 2023 visit
- February 28, 2023 report from Jonathan Metzger, PA-C, for Employee's left thigh stating, "These symptoms appear to be neurogenic in nature"
- A medical record request from Holmes Weddle & Barcott, PC
- Dr. Grant's records previously filed on medical summaries by Employer

- A letter from an attorney for a physician to complete with a purported history of Employee's work with Employer and his subsequent medical treatment, with exhibits; the physician did not complete the letter
- Exhibits to the attorney's letter include a picture of an unidentified person handling what appears to be a halibut, and a photograph of what appears to be an open wound
- An uncompleted Physical Capacities Evaluation form
- Other medical records previously filed on medical summaries by Employer
- A photocopy of Employee's driver's license (CD, undated but filed March 29, 2023).

26) On April 6, 2023, Division staff called Employee's non-attorney representative who advised she did not want to participate in his case. Nevertheless, the Division re-served the April 19, 2023 hearing notice on Employee's non-attorney representative because she had entered an appearance, but had not withdrawn it. (Agency file: Prehearings and Hearings; Hearing Notice Served tabs, April 6, 2023).

27) On April 12, 2023, Employer contended Employee did not report his August 15, 2021 injury to Employer until September 30, 2021, so his claim should be barred under AS 23.30.100. For this defense, Employer relied on Employee's filings, which it contended show he gave no written notice of his alleged injury until well after the 30-day deadline had passed. In response to Employee's contention that he reported his injury to his supervisor, it stated "no paper notes or other records have been located that confirm the employee's assertion that he informed anyone at work about an injury around the time that the employee asserts he was injured." Employer further contended when he finally reported it, Employee said he was working 14 to 16 hours per day and as a result his leg swelled with fluid. Employer made the following defenses: (1) Employee's claim was barred by untimely notice; (2) his injury did not arise out of or in the course of his employment; (3) he did not attach the presumption of compensability and needed expert medical opinions to do so; (4) all benefits due were timely paid so no interest or penalty was owed. (Employer's Hearing Brief of Copper River Seafoods and Liberty Mutual, August 12, 2023).

28) At hearing on April 19, 2023, through Spanish language interpreters Employee testified Spanish is his first language. He speaks minimal English. Employee was born in the Dominican Republic and completed school through the eighth grade there. He came to the United States in 1995. On August 5, 2021, Employee was working for Employer in Anchorage and noticed left thigh pain. By August 15, 2021, the last day he worked for Employer, Employee said his left thigh pain had gotten so bad he could no longer stand it. Employee told "Aeris" his supervisor

on August 15, 2021, that his leg hurt, and she told him to see a doctor. He went to the doctor and got treatment. Under careful and repeated questioning at hearing, Employee stated he had done nothing to his left thigh that he could recall causing pain; there was no hitting, bumping or any other injury to it, which is consistent with what he told his physician. The pain just started on the job and gradually got worse. When Employee went to the hospital, doctors determined he had a "thigh infection" and did surgery to clean it out. When asked why he thought Employer was responsible to pay him benefits under the Act, Employee explained he "got sick" while working for Employer and therefore, they should "support him." Employee said he was a good worker, but Employer did not take care of him. When asked if there was a specific thing he did at work that he believed caused his left thigh infection, Employee was vague but said there was "no one thing" that made his leg hurt; the pain just "started." He conceded no doctor ever told him why his leg got "infected"; Employee thought it may have had something to do with working from 3:00 AM to 3:00 PM every day. Although he was uncertain if Employer "injured" him, Employee reasoned that because his left thigh pain began at work, he was "injured" at work. His leg still hurts, and he wants treatment for it. Although he worked only for Employer in 2021, since then Employee has worked for a restaurant, cleaning company and now works at a hotel. He realizes Dr. Grant released him to return to work, but does not understand why she did, because in his opinion he was not able to work when she released him. When asked why Employer owed him a penalty under the Act, he said it was because he was injured, and Employer "did nothing" and did not treat him well. Employee agreed the Board had given him a fair hearing. (Employee).

29) At hearing, Employer reiterated arguments from its hearing brief; it did not present evidence or argument that Employee's failure to give written notice within 30 days of his alleged work injury prejudiced it in any way. Employer contended Employee's claim should be denied because his left thigh symptoms, condition, need for treatment and any related disability did not arise out of and in the course of his employment. It also objected to the Board considering the documents Employee filed on the CD without serving on Employer. It reserved the right to re-open the record in the event discovery was needed on documents included in the un-served CD. The Board proceeded with the hearing with Employer's caveat in place. (Record).

30) Division Hearing Officers routinely conduct mediations between parties and use interpreters when the claimant is not well-versed in speaking English. When they do, Hearing

Officers advise parties about strengths and weaknesses of their respective positions, including lack of evidence. (Experience; judgment; and observations).

31) Employee's alleged work injury, including interplay among un-controlled diabetes, thigh swelling, a possible diabetes-caused strep infection, dead muscle tissue, and a large open wound post-surgery, all allegedly caused only by extended standing while at work, is not an injury with which this panel is familiar. Employee's claim is based on complex and highly technical medical considerations. (Experience; judgment; and inferences drawn from all the above).

32) Medical providers' reports routinely begin with an injured worker's "history." (Experience; judgment; observations).

PRINCIPLES OF LAW

The Board may base its decision on not only 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, 533-34 (Alaska 1987).

> **AS 23.30.010. Coverage.** (a). . . [C]ompensation 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. . . .

> **AS 23.30.100. Notice of injury or death**. (a) Notice of an injury . . . in respect to which compensation is payable under this chapter shall be given within 30 days after the date of such injury . . . to the board and to the employer.
>
> (b) The notice must be in writing, contain the name and address of the employee, a statement of the time, place, nature, and cause of the injury or death . . . and be signed by the employee or by a person on behalf of the employee. . . .
> . . . .
>
> (d) Failure to give notice does not bar a claim under this chapter
>
> (1) if the employer, an agent of the employer in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury . . .

> and the board determines that the employer or carrier has not been prejudiced by failure to give notice;

Hammer v. City of Fairbanks, 953 P.2d 500, 505 (Alaska 1998) held "knowledge" as used in §100 does not appear to be a "term of art." In context, it means no more than "awareness, information, or notice (footnote omitted) of the injury. . . ." In *Kolkman v. Greens Creek Mining Co*., 936 P.2d 150 (Alaska 1997), the Board denied an injured worker's claim because his employer, though it had actual knowledge of his injury, did not have notice the worker claimed his injury was "work-related." *Kolkman* acknowledged the short 30-day period in which an injured worker must report an injury, and highlighted the distinction between AS 23.30.100, and AS 23.30.105, which requires both knowledge of an injury and knowledge of its work-relatedness. *Kolkman* held the employer provided no evidence to support a conclusion it was prejudiced by late notice.

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

To attach the presumption, and without regard to credibility, an injured employee must first establish a "preliminary link" between his injury and the employment. *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 610 (Alaska 1999). In claims based on highly technical medical considerations, medical evidence is often needed to establish the link. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312 (Alaska 1981). Without a presumption of compensability, 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).

> **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 . . . is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. . . .

The Board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.,* 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.395. Definitions**. In this chapter,

. . . .

(24) "injury" means accidental injury . . . arising out of and in the course of employment, and an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury. . . .

8 AAC 45.060. Service. . . .

(b) A party may file a document with the board, . . . personally, by mail, or by electronic filing through facsimile transmission or electronic mail in compliance with 8 AAC 45.020(d). Except for a claim, a party shall serve a copy of a document filed with the board upon all parties or, if a party is represented, upon the party's representative. Service must be done personally, by facsimile, by electronic mail, or by mail, in accordance with due process. . . .

(c) A party shall file proof of service with the board. Proof of service may be made by (1) affidavit of service; if service was electronic or by facsimile, the affidavit must verify successfully sending the document to the party; (2) written statement, signed by the person making the statement upon the document served, together with proof of successfully sending the document to the party if served by facsimile or electronically; or (3) letter of transmittal if served by mail.

(d) A proof of service must set out the names of the persons served, method and date of service, place of personal service or the address to which it was mailed or sent by facsimile or electronically, and verification of successful sending if required. The board will, in its discretion, refuse to consider a document when proof of its service does not conform to the requirements of this subsection.

ANALYSIS

1) Is Employee's claim barred for failure to give timely notice?

Employer contends Employee's claim is barred under AS 23.30.100(a) and (b), which required him to give written notice of his injury to Employer within 30 days of injury. Employee had until September 14, 2021, to give written notice. *Rogers & Babler*. There is no factual dispute on this point because Employee did not dispute this contention and there is no evidence that he gave written notice to Employer within 30 days of August 15, 2021. Therefore, Employee did not give Employer timely written notice of his alleged injury, and did not meet his duty under §100(a).

However, his failure to give timely written notice does not bar his claim if Employer, its agent in charge of the business in the place where the injury occurred, or the carrier had knowledge of the injury, and this decision determines Employer is not prejudiced by his failure to give timely written notice. AS 23.30.100(d)(1). There is no factual dispute on this point either. Employee credibly testified he told his supervisor at work on August 15, 2021, that his left thigh hurt. AS 23.30.122; *Smith*. Though its brief stated "no paper notes or other records" were located to confirm Employee's assertion, Employer presented no argument or evidence disputing Employee's assertion either. It could have called his supervisor to state Employee never reported left thigh pain at work, but it did not. All Employee had to do was tell his supervisor his leg hurt; he did not have to say it was work-related or explain why his leg hurt. *Kolkman*. For §100(d)(1)'s purposes, all he had to do was report pain in his leg at work to "the employer," or to "an agent of the employer in charge of the business in the place where the injury occurred." He did so. Employee also credibly testified his supervisor suggested he go to a doctor; so, he did. AS 23.30.122; *Smith*. Employer had knowledge of his alleged injury. *Hammer*. If Employer wanted to inquire further at that time, it could have interviewed him carefully and sent him to its own physician. Moreover, Employer neither argued nor presented evidence it was prejudiced by Employee's failure to give written notice within 30 days. Under these facts, Employer was not prejudiced by Employee's failure to give formal, written notice of his alleged injury within 30 days. His claim will not be barred under AS 23.30.100(a).

2) Did Employee's disability or need for medical treatment for his left thigh arise out of and in the course of his employment with Employer?

This is a preliminary, "coverage" question. Employee's left leg condition is only "covered" under the Act if his need for medical treatment and related disability "arose out of and in the course of the employment." AS 23.30.010(a). That does not mean the Act covers Employee's thigh simply because he felt pain in it while at work. However, Employee may be entitled to a presumption that his alleged injury is compensable, or in other words, "covered" under the Act. AS 23.30.120(a)(1). To establish a presumption, Employee must "establish a causal link," also called a "preliminary link" between his work and his need for medical care or disability. AS 23.30.010(a); *Tolbert*.

In some cases, an injured worker's lay testimony is adequate to establish the link and raise the presumption. *Smallwood*. Employer contends because Employee's alleged injury is based on highly technical medical considerations, he cannot raise the statutory presumption of compensability because he did not present medical opinions in this highly technical case. In other words, it contends he failed to provide the required "causal link." Employer's position has merit.

Employee contends his injury was work-related solely because his pain "started at work." At hearing he admitted no physician explained how his left leg became infected. The presumed infection, and resultant swelling, are what led to the exploratory surgery. In his layman's view, Employee speculated perhaps standing at work 12 hours a day is what caused the pain or infection to begin. However, he also testified he did nothing to injure his left leg; there was no bumping or hitting that he could recall. This is consistent with what he told his physician.

Prior to hearing, Division staff through interpreters repeatedly advised Employee he needed medical evidence to support his claim. A Division hearing officer mediated this case; mediations are confidential, but experience shows Division mediators tell parties the strengths and weaknesses of their cases, including deficient evidence. *Rogers & Babler*. Still, there is no medical opinion stating or implying that standing at work 12 hours per day somehow caused Employee to develop a strep infection inside his left thigh muscle, which caused swelling and required exploratory surgery. It appears an attorney on Employee's behalf attempted to obtain evidence from Dr. Grant, unsuccessfully. Further, Division staff repeatedly told Employee he had to serve on Employer any documents he filed with the Division on which he wanted this panel to rely.

On March 29, 2023, Employee timely filed, but without proof he served a copy on Employer, a CD with at least one new medical record included. Sone Rasavongsy amended PA-C Metzger's February 21, 2023 report. Though it is unclear what was amended, the panel presumes it was a portion of this report, which in a different typeface states: "48 yr old male here for left lower extremity. Patient is non English speaking. Spanish interpreter online. Washout done 8/25/2021, - due to standing too long had pain in knee, ?'d if bacteria, still not feeling 100%, swelling in the knee, pain, was w/c claim - SR." Employer objected on lack-of-service grounds.

Because Employee failed to serve this CD on Employer, this decision will not consider its contents. 8 AAC 45.060(b), (c), (d). Even were the panel to consider Rasavongsy's amended document, Rasavongsy did not offer the "amendment" as a medical opinion, but as Employee's history, which usually prefaces a medical report, as does this amendment. *Rogers & Babler*. Moreover, the amended report references Employee's left "knee," not his left thigh at issue here.

Employee's physician stated this was an "unusual case"; the panel agrees. There is no evidence Employee punctured his left thigh to explain how his muscle tissue became infected and died. His statements to doctors and his hearing testimony were to the contrary; there was no external force applied to Employee's left thigh, other than extended standing. Although a work "injury" may include "an occupational disease or infection that arises naturally out of the employment or that naturally or unavoidably results from an accidental injury," (AS 23.30.395(24)), there still must be some medical evidence in a highly technical case like this to create a causal link between an inner-thigh infection with no evidence of entry, and Employee's work. If his situation is "unusual" to a physician, it befuddles this panel that has no experience with an alleged injury including un-controlled diabetes, thigh swelling, a diabetes-related strep infection, dead muscle tissue, and a large open wound post-surgery, all allegedly caused only by extended standing while at work. This is not an "injury" or injury process with which this panel is familiar. *Rogers & Babler*. Therefore, his lay testimony is not enough, and Employee did not present any medical evidence to make a causal link between his work and his need for left thigh medical care, and related disability. *Smallwood*. Employee's left thigh condition is not covered under the Act, and he is not entitled to the statutory presumption of compensability. AS 23.30.010(a); AS 23.30.120(a); *Smallwood*. In other words, whatever is wrong with Employee's left thigh, it is not a work-related "injury" as defined in AS 23.30.395(24). Therefore, his claims against Employer will be denied.

Alternatively, even if Employee's alleged injury was "covered" under the Act, without the statutory presumption, Employee had to prove his need for medical treatment to his left thigh and related disability, arose out of and in the course of his employment with Employer. *Saxton*. For the same reasons he cannot make a preliminary link and raise the statutory presumption, Employee cannot prove his claim for benefits by a preponderance of the evidence -- he has no

medical evidence in an "unusual" and highly medically technical case. *Saxton*. His claims will be denied.

3) Is Employee entitled to TTD benefits?
4) Is Employee entitled to TPD benefits?
5) Is Employee entitled to medical treatment and related travel costs for his left thigh?
6) Is Employee entitled to a penalty?
7) Is Employee entitled to interest?

Section (2)'s analysis is incorporated here by reference to save time and space. Because Employee's left thigh condition is not covered under the Act, he is entitled to no past or future benefits under the Act. Because he is entitled to no past benefits under the Act, no benefits were due, and he is not entitled to a penalty or interest. Thus, Employee's claims for TTD, TPD, medical and related travel costs benefits and his claims for a penalty and interest, will be denied.

CONCLUSIONS OF LAW

1) Employee's claim is not barred for failure to give timely notice.
2) Employee's disability or need for medical treatment for his left thigh did not arise out of and in the course of his employment with Employer.
3) Employee is not entitled to TTD benefits.
4) Employee is not entitled to TPD benefits.
5) Employee is not entitled to medical treatment and related travel costs for his left thigh.
6) Employee is not entitled to a penalty.
7) Employee is not entitled to interest.

ORDER

1) Employee's October 19, 2021 claim is not barred for failure to give timely notice.
2) Employee's disability or need for medical treatment for his left thigh did not arise out of or in the course of his employment with Employer.
3) Employee's October 19, 2021 claim for past and future TTD, TPD, medical treatment and related travel costs, a penalty and interest is denied.

Dated in Anchorage, Alaska on April 25, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
William Soule, Designated Chair

/s/
Sara Faulkner, 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 Juan Martinez Gonzalez, employee / claimant v. Copper River Seafoods, Inc., employer; Employers Insurance Of Wausau, insurer / defendants; Case No. 202127108; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified US Mail on April 25, 2023.

/s/
Kimberly Weaver, Office Assistant