ALASKA WORKERS' COMPENSATION BOARD

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

KEN DORMADY,	)	
	)	
Employee,	)	
Claimant,	)	
	)	FINAL DECISION AND ORDER
v.	)	
	)	AWCB Case No. 202005238
CHOSEN CONSTRUCTION, INC.,	)	
	)	AWCB Decision No. 23-0036
Employer,	)	
and	)	Filed with AWCB Fairbanks, Alaska
	)	on June 27, 2023
AMERICAN INTERSTATE INSURANCE COMPANY,	)	
	)	
Insurer,	)	
Defendants.	)	

Ken Dormady's (Employee) January 28, 2022 workers' compensation claim was heard in Fairbanks, Alaska on January 19, 2023, a date selected on January 12, 2023. A January 12, 2023 stipulation of the parties gave rise to this hearing. Attorney Patricia Huna appeared and represented Employee. Attorney Aaron Sandone appeared and represented Chosen Construction and its insurer (Employer). Witnesses included Employee and Brian Larson, D.C., who testified on Employee's behalf, and John Ballard, M.D., who testified on Employer's behalf. Deliberations were undertaken on January 19, March 2, March 17, April 19, and May 5, 2023. *Dormady v. Chosen Construction, Inc.*, AWCB Decision No. 23-0030 (May 23, 2023), re-opened the hearing record for supplemental briefing on the issue of modification of the Reemployment Benefits Administrator's (RBA) finding that Employee was not eligible for reemployment benefits. The parties' supplemental briefs were received on June 9, 2023, and the record closed at the conclusions of deliberations on June 23, 2023.

ISSUES

Employee contends his May 3, 2020 work injury is the substantial cause of his need for additional left shoulder medical treatment and he seeks an award of medical and related transportation costs.

Employer contends it paid for Employee's rotator cuff repair surgery and the preponderance of medical evidence shows Employee does not require any further medical treatment. Therefore, it contends Employee's claim for additional left shoulder medical treatment and related transportation costs should be denied.

1) **Is Employee entitled to additional left shoulder medical treatment and related transportation costs?**

Employee contends his May 3, 2020 injury is the substantial cause of his need for cervical spine medical treatment and he seeks an award of medical and related transportation costs.

Employer contends the medical records show an absence of cervical spine symptom reporting after the injury and contends Employee's delay in reporting symptoms shows the May 3, 2020 injury is not the substantial cause of his need for cervical spine medical treatment. It contends its medical evaluator considered the medical records that show delayed symptom reporting when forming his causation opinion, so his opinion should be given more weight than the second independent medical evaluator's (SIME) causation opinion, as he relied solely on Employee's representations of experiencing cervical spine symptoms immediately after the injury. For these reasons, Employer contends Employee's claim for cervical spine medical treatment and related transportation costs should be denied.

2) **Is Employee entitled to cervical spine medical treatment and related transportation costs?**

Employee contends Employer's initial controversion prevented him for getting needed medical care and he remains disabled from both his left shoulder and cervical spine work injuries. He

contends he is not medically stable and seeks continuing temporary total disability (TTD) benefits from October 18, 2021, the date on which Employer stopped paying TTD.

Employer contends it paid Employee TTD through October 17, 2021 pursuant to its medical evaluator's left shoulder medical stability opinion; and points out the SIME physician's opinion on left shoulder medical stability is an even earlier date, so Employee's claim for additional TTD should be denied.

3) Is Employee entitled to additional TTD?

Employee contends he is entitled to interest on all benefits not timely paid.

Employer contends, since all benefits were timely paid, no interest is due.

4) Is Employee entitled to interest?

Employee contends both Employer's medical evaluator (EME) and the SIME physician agree he cannot return to work at previously held occupations, so he seeks modification of the determination that found him not eligible for reemployment benefits.

Employer contends Employee failed to seek timely review of the initial determination that he was not eligible for benefits; and failed to timely file the requisite petition seeking modification, so his request for modification should be denied.

5) Should the reemployment benefits eligibility determination be modified?

Employee contends he was aided by his attorney's services and seeks an award of attorney fees and costs.

Employer contends, since no additional benefits are due, neither are attorney fees and costs.

6) Is Employee entitled to attorney fees and costs?

FINDINGS OF FACT

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

1) On May 3, 2020, Employee was working as a pipefitter and bolting up a flange using a "line-up bar." He was pushing upward on the line-up bar when he felt a "give" in his left shoulder followed by pain. (Fayette chart notes, May 6, 2020; Workers' Compensation Claim, undated).

2) On May 6, 2020, Jennifer Fayette, PA-C, evaluated Employee's left shoulder. Employee denied numbness and tingling or decrease grip strength but reported decreased overall shoulder strength and stated his neck muscle looked "slumped." (Fayette chart notes, May 6, 2020). Left shoulder x-rays showed no acute fractures, dislocations or bony abnormalities and joint spaces were preserved. (X-ray report, May 6, 2020). PA-C Fayette assessed left shoulder acromioclavicular (AC) joint injury and possible labral tear She released Employee back to work with restrictions and planned for Employee to follow-up with her after a left shoulder magnetic resonance imaging (MRI) study. (Fayette chart notes, May 6, 2020). A left shoulder MRI study performed that same day showed mild chronic degenerative changes at the AC joint and mild fraying of the infraspinatus tendon. Other rotator cuff components, the labrum, and the long head of the biceps tendon were normal and there was no adhesive capsulitis. (MRI report, May 6, 2020).

3) That same day, Employee completed an Orthopedic Questionnaire, indicating he was seeking treatment that day for his left shoulder, and an MRI Patient Screening Form, indicating left shoulder pain had prompted his visit that day. (Orthopedic Questionnaire, May 6, 2020; MRI Screening Form, May 6, 2020).

4) On May 18, 2020, Employee followed-up with PA-C Fayette to review the May 6, 2020 MRI, which PA-C Fayette thought showed supraspinatus fraying versus partial tear and a superior labral tear. She referred Employee to physical therapy and planned for Employee to follow-up with her in four weeks. (Fayette chart notes, May 18, 2020).

5) On May 26, 2020, Employee began physical therapy and completed a questionnaire, denying recently experiencing numbness and tingling. He also completed a pain diagram indicating pain throughout his left shoulder, but not involving his neck. (Outpatient Rehabilitation Questionnaire, May 26, 2020).

6) On June 15, 2020, Employee saw PA-C Fayette for a recheck and reported he was progressing. He had noticed an increase in his range of motion and decreased inflammation.

Employee had been attending physical therapy twice per week and reported feeling 60 percent better, although he still had a dull achy pain at the front of his shoulder that would occasionally wake him up at night. PA-C Fayette ordered another six weeks' physical therapy. (Fayette chart notes, June 15, 2020).

7) On June 25, 2020, Employee's physical therapist thought he was less motivated that day, and Employee acknowledged having "personal stressors" in his life. (Physical therapy notes, June 25, 2020).

8) On July 14, 2020, Employee expressed "some frustration" about scheduling errors to his physical therapist and hoped "there will be no more of those." He also shared he was experiencing "a lot of stress" in his homelife over the past week and started smoking again, which his physical therapist thought could have been contributing to his pain. (Physical therapy notes, July 14, 2020).

9) On July 16, 2020, Employee continued to report "significant stress" in life and was "[v]ery fearful of injuring his shoulder again." (Physical therapy notes, July 16, 2020).

10) On July 27, 2020, Employee followed-up with PA-C Fayette and reported his left shoulder pain was "constant, worsening, and radiating, and associated with arm pain, weakness, difficulty sleeping, limited range of motion, neck pain, and stiffness." PA-C Fayette began surgical planning. (Fayette chart notes, July 27, 2020).

11) On August 27, 2020, Employee was discharged from physical therapy due to his condition worsening and his failure to make progress. His physical therapist noted Employee had participated in physical therapy for 12 weeks but had "worsening objective measures, particularly over the last three weeks." Employee was instructed to follow-up with his referring provider to discuss other treatment options. (Physical therapy notes, August 27, 2020). Employee also completed a pain diagram indicating pain throughout his left shoulder, but not involving his neck. (Outpatient Rehabilitation Questionnaire, August 27, 2020).

12) On September 10, 2020, Employee underwent arthroscopic surgery with Kevin Paisley, M.D., who performed left shoulder rotator cuff repair of the supraspinatus and subscapularis tendons, long head of the biceps tenodesis, extensive debridement, subacromial decompression and distal clavicle resection. Dr. Paisley's operative findings were:

> There was a total of two rotator cuff moderate grade tears just over 50% which had a very grim chance of healing with conservative measures only, not to

> mention there was a longitudinal splitting of the long head of the biceps tendon as well as a type II SLAP [superior labral tear from anterior to posterior] tear. These things in conjunction with the severity of the impingement ultimately resulted in the patient having the extent of pain and dysfunction which ultimately necessitated surgery.

(Operative Report, September 10, 2020).

13) On September 14, 2020, Employee completed a questionnaire and described his chief complaint as "Left Shoulder." He denoted he had recently experienced numbness and tingling, and completed a pain diagram, indicating pain throughout his left shoulder, but not involving his neck. (Outpatient Rehabilitation Questionnaire, September 14, 2020).

14) On September 23, 2020, Employee attended a post-operative follow-up with PA-C Fayette. He was continuing to have pain and was taking pain medications regularly. Employee noted occasional numbness and tingling in his third, fourth and fifth digits. (Fayette chart notes, September 23, 2020).

15) On October 30, 2020, Employee again followed up with PA-C Fayette and reported he was doing well and had not required pain medication for several weeks. He continued to sleep in a recliner and was wanting to switch back to a bed. (Fayette chart notes, October 30, 2020).

16) On November 4, 2020, Employee reported his pain continued to gradually diminish. (Physical therapy notes, November 4, 2020).

17) On November 16, 2020, Employee reported sleeping in his bed for the first time, but his shoulder was very sore in the morning. His pain had "really only been 2-3 at most [the] last several days," and he felt his shoulder was getting better. Employee was still fearful of damaging his shoulder and his physical therapist thought Employee needs "further education about [the] healing of his shoulder." (Physical therapy notes, November 16, 2020).

18) On November 18, 2020, Employee had been sleeping in his bed the past few nights with minimal increased shoulder ache. (Physical therapy notes, November 18, 2020).

19) On December 10, 2020, Employee was sleeping better and reported occasional electrical jolts from his anterior shoulder into his fingers when he changed shoulder positions. (Physical therapy notes, December 10, 2020).

20) On December 21, 2020, Employee followed-up with Dr. Paisley and reported he was having difficulty with sleeping and waking up with soreness,_but he was pleased with his physical therapy progress and his range of motion. Dr. Paisley reduced Employee's work

restrictions and planned on seeing him again in three months. (Paisley chart notes, December 21, 2020).

21) On December 22, 2020, Employee was happy with his progress and his physical therapist thought he was progressing very well with therapy. (Physical therapy notes, December 22, 2020).

22) On December 29, 2020, Employee had a near full active range of motion (AROM). (Physical therapy notes, December 29, 2020).

23) On January 4, 2021, Employee reported he was making good progress with muscle hypertrophy and shoulder strength, although sleeping on his side was still not well tolerated. (Physical therapy notes, January 4, 2021).

24) On January 7, 2021, Employee began reporting persistent anterior shoulder pain with sleeping and overhead activity. (Physical therapy notes, January 7, 2021; January 11, 2021; January 14, 2021; January 18, 2021; January 21, 2021; January 25, 2021; January 28, 2021; March 2, 2021; March 4, 2021).

25) On February 22, 2021, Employee followed up with Christopher Albert, PA-C, who noted Employee's range of motion was "blunted" and his ability to use his arms against resistance was "poor." Consequently, Employee could not move, push, or pull heavy objects. PA-C Albert thought Employee's physical therapy notes showed he had not progressed "as we would hope." PA-C Albert did not think Employee could return to work and made no changes to Employee's post-op plan. (Albert chart notes, February 22, 2021). On that same day, PA-C Albert opined Employee would have the permanent physical capacities to return to occupations he had previously held in the last 10 years, including Pipe Fitter, Rigger, Flagger and Roustabout. (Albert responses, February 22, 2021).

26) The job description for Flagger includes recording license numbers of traffic control violators for police, occasional climbing and using sign, hand, and flag signals. (Flagger Job Description, undated).

27) On March 4, 2021, Employee reported that his left hand and fingers were numb for five minutes after getting out of bed the day previous. (Physical therapy notes, March 4, 20021).

28) On March 8, 2021, Employee's physical therapist noted Employee had "a significant amount of stress" and "significant external stressors" in his life. He also thought Employee feared whether his shoulder was structurally sound because of continuing pain, so he assured

Employee that everything was intact and working well. (Plan of Care, March 8, 2021). That same day, Employee reported the recent deaths of his father and his aunt. (Physical therapy notes, March 8, 2021).

29) On March 15, 2021, the RBA's designee found Employee not eligible for reemployment benefits based on PA-C Albert's predictions Employee would have the permanent physical capacities to return to his previously held occupations. (Torgerson letter, March 15, 2021). Employee did not petition for a review of this determination. (Observations).

30) On March 23, 2021, Dr. Paisley referred Employee for a chiropractic evaluation and treatment. (Paisley prescription, March 23, 2021).

31) On March 25, 2021, Employee reported "stress in his life with family." It was also noted he had severe atrophy in his surgical arm and an "aversion to using [his] arm functionally." (Physical therapy notes, March 25, 2021)

32) On April 1, 2021, Employee's physical therapist wrote:

> Employee's therapy has been somewhat stagnant for the past several weeks and seems to be regressing. He continues to festinate about his anterior shoulder, and today about inferior clavicular pain and neck pain. 'Points to [c]ervical thoracic junction and says it feels like it needs to pop and ill [sic] get some blood flow, states its [sic] been like this since he had to sleep in a recliner.' Did some palpation and mobilization in the area and patient was highly tender to palpation along the whole spine down to the lumbar spine. He has moderate left sided neck pain and hypertonicity. . . . His rehab has been complicated by a high burden of uncontrollable family stressors the past several months which I feel is driving his pain up due to reduced sleep, and increased stress hormones. . . . Patient has another follow up with his surgeon next week which I feel is very necessary as the patient seems to be regressing significantly from where he was about a month ago.

(Physical therapy notes, April 1, 2021).

33) On April 6, 2021, Employee was very distraught regarding his lack of shoulder AROM and his persistent shoulder pain. His left-sided neck pain had moderated. (Physical therapy notes, April 6, 2021).

34) On April 7, 2021, Employee followed up with Dr. Paisley and reported:

> . . . continued pain and discomfort in his shoulder. Has difficulty with certain exercises at PT, focusing on theraband exercises. Neck is still bothering him daily, posterior muscles very tight and he feels something is pinching him in his

> shoulder that occasionally radiates down his arm. Symptoms at this time affect sleep and it [sic] gets very tired.

Based on his physical exam, Dr. Paisley decided to order an MRI to evaluate the subscapularis tendon and the overall condition of the rotator cuff. He also discussed the benefits of continuing skilled physical therapy and chiropractic visits to treat Employee's neck pain. (Paisley chart notes, April 7, 2021).

35) An April 20, 2021 left shoulder MRI showed: 1) supraspinatus and infraspinatus tendinopathy; 2) low grade partial-thickness tearing of the subscapularis, supraspinatus and infraspinatus tendons; 3) acromioclavicular joint osteoarthritis; 4) postsurgical sequelae; and 5) glenoid labral tearing. (MRI report, April 20, 2021).

36) On April 21, 2021, Employee reported that he went to see his old boss and his old boss did not want to talk to him about the [workers' compensation] case, and likely would not have a job for him if he returned to full strength. He was also having difficulty getting in touch with a workers' compensation "case worker." Employee was "very disgruntled" and stressed over possible litigation while he was also dealing with "other personal matters." (Physical therapy notes, April 21, 2021).

37) On April 27, 2021, Employee expressed "much frustration and anxiety" regarding his upcoming MRI results. (Physical therapy notes, April 27, 2021).

38) On April 28, 2021, Employee saw Brian Larson, D.C., for postsurgical left shoulder evaluation and treatment. He reported having four deaths in his family "with trauma" so he was not sleeping due to PTSD (post-traumatic stress disorder). Employee also shared that he was not making progress in physical therapy due to left-sided neck and upper back pain. Dr. Larson recorded the following results on physical examination:

> **Ortho**-*Compression* performed bilaterally. Patient indicated pain that was on the back of neck without radiation.
> **Ortho**-*Maximum Foramina Compression* performed bilaterally. Patient indicated pain was on the right side neck at [sic] without radiation.
> **Ortho**-*Shoulder Depression* performed bilaterally. Patient indicated pain that was on the left and right, greater on left – really stiff on the left side neck/upper back at [sic] without radiation.

Dr. Larson's findings included a moderately reduced range of motion along Employee's entire cervical spine with pain noted, and his diagnosis included cervical ligaments sprains, cervalgia, cervical radiculopathy and cervical somatic dysfunction. (Larson chart notes, April 28, 2021).

39) On April 30, 2021, Employee returned to Dr. Larson and reported his neck pain relief lasted about a day and he felt a lot better. He also reported to Dr. Larson that he started feeling pain and grinding in his neck after his shoulder surgery. (Larson chart notes, April 30, 2021).

40) On May 5, 2021, Employee stated he noticed his mood improves when he gets his neck and upper back adjusted. (Physical therapy notes, May 5, 2021). In addition to chiropractic care, Employee also started receiving medical message therapy at Dr. Larson's office. (Christofferson chart notes, May 5, 2021).

41) Employee continued to report short-term relief after receiving chiropractic care. (*E.g.* Physical therapy notes, May 4, 2021 (significant reduction in neck pain for three days); Larson chart notes, May 10, 2021 (mid-back and neck "went out" after four days); Larson chart notes, May 17, 2021 (relief lasted two days)).

42) On May 7, 2021, Employee followed-up with Dr. Paisley to review the April 20, 2021 MRI results. Employee reported recent passive range of motion (PROM) improvement but back and neck problems were inhibiting his overall improvement. Dr. Paisley wrote: "We discussed the findings of the MRI that reveal tendinopathy and a small tear of the subscapularis. I do not feel as though surgical revision is necessary at this time." Since chiropractic adjustments, in conjunction with massage therapy, had begun to provide Employee with relief and improved range of motion, Employee and Dr. Paisley decided to continue with rehabilitation therapy. (Paisley chart notes, May 7, 2021).

43) On May 10, 2021, Employee was "starting to make good progress again with his shoulder rehab." He was able to achieve 140 degrees AROM flexion and his anterior shoulder pain was improving. (Physical therapy chart notes, May 10, 2021).

44) On May 20, 2021, Employee continued "to have a lot of hesitation using his shoulder functionally." (Physical therapy notes, May 20, 2021).

45) On June 10, 2021, Employee reported having "a lot of new life stressors" and increasing left anterior shoulder pain with overhead lifting movements. (Physical therapy notes, June 10, 2021). He also completed a pain diagram indicating pain throughout his left shoulder, but not involving his neck. (Outpatient Rehabilitation Questionnaire June 10, 2021).

46) On July 7, 2021, Employee reported having had nine deaths in his family and "a constant amount of stress on top of the surgery." He also reported, "They want to do another surgery in August if he doesn't increase his left shoulder ROM." (Larson chart Notes, July 7, 2021). Consideration of an August 2021 shoulder surgery is not reflected elsewhere in the medical record. (Observations).

47) On July 8, 2021, Employee was discharged from physical therapy due to having made minimal progress and was referred to Dr. Paisley. (Physical therapy notes, July 8, 2021).

48) On July 13, 2021, Employee reported his neck "feels out," which limited his rotation to the right, and he can always "feel the blood flow restored" after an adjustment. Dr. Larson decided to order cervical x-rays, which he interpreted to show moderate to severe foraminal stenosis, worst at C5-6 and C6-7. He thought a cervical spine MRI without contrast was now "essential to resolving" Employee's pain, left upper extremity numbness and left shoulder dysfunction. (Larson chart notes, July 8, 2021).

49) On July 19, 2021, Employee saw PA-C Fayette and reported his neck pain was his "greatest limiting factor." PA-C Fayette thought Employee should continue with massage and chiropractic therapy and she referred Employee to Larry Levine, M.D., for neck pain.

50) On August 13, 2021, Dr. Paisley voluntarily suspended his medical license while the State of Alaska investigated an alleged drug addiction which impaired his ability to safely practice medicine. (Voluntary Suspension of License, August 13, 2021).

51) On August 20, 2021, a cervical spine MRI was limited by involuntary motion but showed premature spine degeneration, which was worst at C6-7. (MRI report, August 20, 2021).

52) On August 24, 2021, Employee reported neck pain and occasional numbness and tingling in his left hand. Dr. Larson reviewed the August 20, 2021 cervical MRI, which he thought "easily addresses" why Employee was still struggling with his left upper extremity and planned to refer Employee to the surgical team in Newport Beach, California. (Larson chart notes, August 24, 2021).

53) On September 29, 2021, Dr. Levine evaluated Employee, who reported that any movement of his cervical spine produces a severe increase in his overall pain level. Employee also stated that chiropractic care makes a "tremendous difference" but only lasts for a day. Dr. Levine thought Employee's MRI, showing foraminal encroachment at C6-7, corresponded with Employee's radicular symptoms and the pain diagram he filled out that day. He prescribed anti-

inflammatory and pain medications and planned on making a referral to a spine surgeon for consideration of left C6-7 foraminotomies or decompression. (Levine chart notes, September 29, 2021).

54) On October 8, 2021, Employee followed-up with PA-C Fayette, who agreed to continuing physical therapy and chiropractic care. (Fayette chart notes, October 8, 2021).

55) On October 18, 2021, John Ballard, M.D., an orthopedic surgeon, evaluated Employee on Employer's behalf and noted tenderness over the left anterior clavicle, anterior pec, anterior shoulder, posterolateral, anterior and lateral acromion, upon physical examination. Employee also had pain on the left with muscle testing, particularly with supraspinatus and internal and external rotation. Dr. Ballard diagnosed Employee with 1) Cervical spondylosis at C5-6 and C6-7 with moderate to severe C6-7 left foraminal narrowing and moderate right foraminal narrowing and moderate C5-6 right foraminal narrowing; 2) left shoulder acromioclavicular arthritis; and 3) partial left shoulder subscapularis, supraspinatus and biceps tendon tears, which were surgically repaired as a result of the work injury. He opined the mechanism of the work injury was consistent with Employee's need for left shoulder medical treatment but did not think it was consistent with Employee's need for cervical spine treatment, which he attributed instead to degenerative changes brought about by Employee's age and genetics. Dr. Ballard pointed out the onset of numbness and tingling was not noted until "some time" after the work injury. He thought further chiropractic treatment and physical therapy were not necessary and opined Employee's shoulder was medically stable at the time of his evaluation. Dr. Ballard opined Employee had incurred a seven percent whole person permanent physical impairment and did not think Employee could return to his previously held occupations because they required too much repetitive reaching. (Ballard report, October 18, 2021).

56) On October 21, 2021, Employer controverted ongoing medical treatment and disability benefits after October 18, 2021 based on Dr. Ballard's October 18, 2021 report. (Controversion Notice, October 21, 2021).

57) On October 22, 2021, Employee continued to complain of left sided neck pain that radiated down his arm with numbness and tingling in the fourth and fifth digits. (Larson chart notes, October 22, 2021).

58) On October 28, 2021, Employer issued its final TTD payment to Employee. (Secondary Report of Injury (SROI), November 11, 2021).

59) On November 2, 2021, Employee filed an undated claim for benefits arising from an injury to his left shoulder. He sought TTD, temporary partial disability (TPD), medical and transportation costs and a finding of unfair or frivolous controversion. (Workers' Compensation Claim, undated).

60) On November 23, 2021, Employer controverted ongoing medical treatment and disability benefits after October 18, 2021. (Controversion Notice, November 23, 2021).

61) On December 1, 2021, Dr. Larson opined Employee's pre-existing degenerative cervical conditions that were asymptomatic prior to the work injury could "absolutely" become symptomatic with the mechanism of injury. (Larson letter, December 1, 2021).

62) On January 10, 2022, PA-C Fayette recommended arthroscopic repair of Employee's supraspinatus, infraspinatus, and subscapularis tendons and opined Employee was medically stable if he was not interested in surgery. She thought the work injury was the substantial cause of Employee's need for medical treatment and did not think Employee could return to his previously held occupations without additional medical treatment. (Fayette responses, January 10, 2022).

63) On January 28, 2022, Employee's attorney sought benefits arising from an injury to Employee's right [sic] shoulder and neck, including TTD, permanent partial impairment (PPI), medical and transportation costs, interest, a compensation rate adjustment, a reemployment benefits eligibility evaluation and attorney fees and costs. (Workers' Compensation Claim, January 28, 2022).

64) On February 1, 2022, Employer controverted ongoing medical treatment, PPI greater than seven percent, disability benefits after October 18, 2021, and reemployment benefits on the basis Employee was already found not eligible for reemployment benefits and did not seek timely review of the determination. (Controversion Notice, February 1, 2022).

65) On May 23, 2022, George Chovanes, M.D., a neurosurgeon, performed an SIME. While giving his history of present illness, Employee informed Dr. Chovanes he felt pain in his shoulder and neck at the time of injury. He further told Dr. Chovanes that he informed his doctors about left neck pain "right after the accident," and noticed numbness in his third through fifth fingers of his left hand. Dr. Chovanes reviewed and summarized 487 pages of SIME medical records in his report. He concluded the work injury was the substantial cause of Employee's need for left shoulder medical treatment and aggravated Employee's preexisting

degenerative changes in his cervical spine to cause numbness and pain in the neck and down the arm. He thought Employee's neck and shoulder both required additional medical treatment and opined that Employee remained disabled from work. Dr. Chovanes recommended further orthopedic evaluation and potential surgical treatment for his left shoulder, as well as possible cervical nerve root decompression at C6-C7. Employee was not medically stable "over the long-term," but without further treatment Employee was medically stable on May 1, 2021, when the decision was made to pursue conservative care instead of additional surgery. Dr. Chovanes did not think Employee could return to his previously held occupations "in his present condition" because of continuing shoulder pain and weakness and because of likely cervical radiculopathy. (Chovanes report, May 23, 2022;).

66) Employee's medical records do not include a document dated May 1, 2021. (Observations).

67) On November 14, 2022, Dr. Chovanes testified consistent with his May 23, 2022 report. He repeatedly confirmed Employee told him of having numbness and tingling in his left arm and hand since the injury. Dr. Chovanes also acknowledged he was a neurosurgeon and not an orthopedist, so he is not an expert on treatment recommendations for Employee's shoulder. He nevertheless thinks it would be reasonable for Employee to get a second opinion on additional shoulder treatment because of continuing shoulder pain and the second MRI, which indicated more pathology than the first MRI. When asked if he was stating Employee needs another shoulder surgery, Dr. Chovanes replied: "No, not at all. I'm simply saying that in my humble opinion as a neurosurgeon, I see that [Employee] continues symptomatic with left shoulder pain and I think, if it were me, I would want another opinion as far as further orthopedic evaluation." Regarding Employee's cervical diagnosis, Dr. Chovanes testified:

> Q. And if someone has an injury, when would you expect to - - and this condition you've diagnosed become symptomatic with the neck when would he start to feel those symptoms?
>
> A. Do you mean after an accident?
>
> Q. Yeah.
>
> A. He could - - usually it occurs right afterward.
>
> Q. And so if symptoms don't arise for over a year, is that significant?

> A. Sure. In your hypothetical case, that would be - - then those symptoms would unlikely be related to the accident.

In response to questions concerning the cause of Employee's cervical diagnosis, Dr. Chovanes testified:

> Q. Can the type of diagnosis that [Employee] has to his neck become symptomatic without a work injury?
>
> A. Yes.
>
> Q. And what type of activities would one need to be doing to have this diagnosis become symptomatic?
>
> A. That's very unpredictable. It could be nothing or it could be any sort of activity.
>
> Q. Okay. Does it take a jolting or a jerking or anything of that nature?
>
> A. Not necessarily.

The lack of numbness and tingling, or pain radiating down the arm in contemporaneous medical records did not cause Dr. Chovanes to change his causation opinion for Employee's cervical spine. Instead, he thought it was possible that Employee's shoulder injury masked his other symptoms. Dr. Chovanes's causation opinion for Employee's cervical spine is premised on Employee's report numbness and tingling from the date of injury. (Chovanes dep., November 14, 2022).

68) On September 28, 2022, Employee testified he had never sought medical treatment for his left shoulder or for neck problems prior to the work injury. He described his symptoms as having neck pain, shoulder pain and numbness and tingling going down his left arm since the date of injury. Employee described the work injury, his shoulder surgery, his rehabilitation efforts, and his physical capacities, which he stated were limited. He also testified about being in pain. (Employee dep., September 28, 2022).

69) Employer's attorney's efforts to elicit confirmation of Employee's contention that he had experienced numbness and tingling going down his left arm since the date of injury span over eight pages of the deposition transcript. (*Id*. at 36-44).

70) On December 8, 2022, Employer petitioned for an orthopedic SIME to further evaluate Employee's shoulder based on Dr. Chovanes's deposition testimony. (Employer's Petition, December 8, 2022).

71) On January 9, 2023, Employee clarified hearing issues arising from his January 28, 2022 claim. He was seeking TTD from October 18, 2021 and he withdrew his claims for a compensation rate adjustment and PPI. (Employee's Notice of Claims Withdrawal, January 9, 2023).

72) In his January 12, 2023 hearing brief, and again at hearing on January 19, 2023, Employee clarified he is seeking modification of the RBA's designee's determination that he was not eligible for reemployment benefits. (Employee's Hearing Brief, January 12, 2023; record). Employee has not filed a petition seeking modification of the RBA's designee's determination. (Observations).

73) On January 17, 2023, Employee submitted an affidavit claiming $46,356.50 in attorney fees and $1,942.14 in costs. His attorney billed her time at $390, $400, and $415 per hour. (Employee's fee affidavit, January 17, 2023).

74) At hearing on January 19, 2023, Employer withdrew its December 8, 2022 petition for an orthopedic SIME. (Record).

75) At hearing on January 19, 2023, Dr. Larson testified he began treating Employee's left shoulder on April 28, 2021, following a referral from Dr. Paisley. His initial impression was that Employee had a reasonable opportunity to recover and return to work. Dr. Larson's initial evaluation focused on Employee's shoulder but he also evaluated Employee's neck. During that initial evaluation, Dr. Larson's did not record any specific findings that would have indicated a cervical problem. It is not unusual for patients to report they have shoulder pain, then they report they have neck pain. Employee only experienced temporary improvement with treatment in the summer of 2021. Dr. Larson decided to proceed with neck imaging when Employee was not progressing as expected. He took a cervical spine x-ray in his office, which he interpreted to show moderate to severe neuroforaminal stenosis. A later MRI showed a disc herniation resulting in occlusion of the left C-7 neuroforamen, which directly affects the neck, shoulders, arm, and hands. Cervical spine findings were significant in preventing Employee's improvement that should have been taking place. With proper health care, Dr. Larson believes that Employee can regain a vast majority of pre-injury status and be "a functional human being." He also

explained the process of evaluating a patient. For example, if someone has an elbow injury, he has an obligation to make sure the circulation and neurology downstream into the hand are intact, but he also has an obligation to stretch all the way up the nervous system as possible to look for factors that would improve the effected body part. Every shoulder examination he performs, not only does he evaluate the shoulder for injury, but also all the way up the "neurological chain" to evaluate the cervical spine for any additional injury that would be complicating the recovery. When evaluating a patient, it is very easy to focus on the primary injury site and to overlook and not perform these other examinations that are taught as the standard of care. If a patient came into a chiropractor's office complaining of numbness and tingling down their arm and neck pain, and the first thing the chiropractor does is adjust the neck, then he would refer the chiropractor for an investigation and would consider taking license action against the chiropractor because its grossly inappropriate behavior. Prior to performing an adjustment, a chiropractor is required to perform complete examination. The inappropriate thing to do is to cause additional damage by treating with a high velocity, low amplitude, or any other type of adjustment or manipulation until after one makes sure it is safe for the patient and is appropriate care that would have a reasonable opportunity to help improve or resolve the symptoms. Employee did not complain of numbness and tingling running down his arm during his initial visit. When asked if he adjusted Employee's neck between the time of Employee's initial visit and the August 20, 2021 MRI, Dr. Larson replied, "Oh yes - several times." With regards to Employee's cervical symptoms, Dr. Larson explained symptoms do not always manifest themselves at the time a patient first presents. Sometimes, when he alleviates symptoms that are so overwhelming that the brain can only focus on problem, it is very common for other problems that existed to crop-up. Provocative testing such as cervical compression and brachial plexus traction are strong diagnostic tools to identify cervical problems. Employee's responses during these tests were a strong indication there was a problem in the neuroforamen. Dr. Larson thinks the mechanism of injury is very consistent with either causing damage to the nerve root, or compressing the disc, causing it to herniate, as well as "tearing-up" the shoulder. His opinions on cervical causation are based on what Employee told him about the injury. (Larson).

76) The only medical records Dr. Larson has prior to his treating Employee are PA-C Fayette's July 27, 2020 chart notes, and Dr. Paisley's March 23, 2021 referral. (*Id*.).

77) Dr. Larson's testimony was laborious and rambling. When his attention was directed to chart notes of a certain date, he would begin reading the chart notes aloud before a question was asked. When asked for information contained in chart notes, instead of scanning the relevant chart notes and providing an answer, Dr. Larson would read entire portions of the chart notes aloud without directly providing an answer. When asked if Employee complained of numbness and tingling going down his arm when he first presented for treatment, Dr. Larson read an entire chart note aloud three times before providing an incorrect answer. He formulated anticipated questions aloud, and volunteered answers to those questions, even though such questions would not be asked. Dr. Larson's inability to focus on singular, specific inquiries casts doubt on the validity of his examination findings and his opinions. (Record, experience, observations, and inferences drawn therefrom).

78) At hearing on January 19, 2023, Employee testified consistent with his deposition and stated he had numbness and tingling in his arm but did not mention it to doctors because he did not know what it meant. (Employee).

79) At hearing on January 19, 2023, Dr. Ballard testified, since his October 18, 2021 employer's medical evaluation (EME), he received and reviewed additional medical records, including Dr. Chovanes's SIME report, Dr. Chovanes's deposition transcript and chiropractic notes. Employee's medical records amount to approximately 480 pages. He diagnosed Employee with C5-6 and C6-7 spondylosis, and a supraspinatus and biceps tendons rotator cuff tear, and some preexisting achy arthritis. Spondylosis means arthritis that narrows the opening where the nerve exits the spinal cord, which is called stenosis. If someone with stenosis pinches a nerve, they would experience symptoms where that nerve goes. Regarding the causes of stenosis, genetics are usually the biggest factor. Other causes include idiopathic and age. Employee's work injury was not the substantial cause of Employee's spondylosis because the condition takes years to develop. Symptoms arising from this condition can be caused by nothing, where one wakes up with symptoms, or lifting something heavy, or sleeping on the neck for a long time. There are a wide variety of causes that can make the condition become symptomatic. An injury can make such a condition become symptomatic, but he would expect symptoms to develop shortly after the injury, meaning one or two weeks afterwards. The work injury was not the substantial cause of Employee becoming symptomatic because there was no mention of symptoms in the medical records for months. Regarding Employee's left shoulder,

Employee had surgery and therapy, and the MRI taken after surgery shows the repair is still intact, so there is no other treatment available other than doing home exercises he learned in physical therapy. Employee would also have left arm restrictions, like no repetitive reaching forward or repetitive reaching above shoulder level. When he initially reviewed descriptions of jobs Employee had held in the past ten years, he thought almost all of them were to heavy given Employee's restrictions. But when he looked at them again, he thinks Employee could perform the job of Flagger if he was able to use his right arm, because Flagger was a light duty job. Dr. Ballard clarified; Employee could perform the job of flagger only if he used his right arm with occasional left arm use. If Employee had to use his left arm above shoulder level, he could not work as a Flagger. If a post-surgical MRI showed full thickness rotator cuff tears, that would mean the surgery failed. Low grade partial tears are frequently seen after rotator cuff surgery. "There's no surgery that will fix that. . . . there's no magical cure for that." Employee has already received treatment for his shoulder injury. A future injection might be appropriate, but he did not think a steroid shot would work because the MRI did not show a lot of tendinopathy. In response to being asked, why he did not recommend further evaluation for Employee, Dr. Ballard replied: "We do procedures, and everybody reacts differently, and there's just maybe nothing to do to make [Employee] any better." (Ballard).

80) On January 20, 2023, Employee supplemented his attorney fees and costs, claiming an additional $7,677.50 in fees and $3,240.63 in costs for grand totals of $54,034 in fees and $5,182.77 in costs. (Employee's fee affidavit, January 20, 2023).

81) Most of Employee's line-item billing entries on his fee affidavits, such as "reviewed docs," "talked to client," "talked to Board," "legal research," and "worked on documentary evidence," are vague and do not describe specific issues for which the work was undertaken. (*Id.*; Employee's fee affidavit, January 17, 2023).

82) On February 7, 2023, Employer responded to Employee's attorney fee and costs affidavits. It did not object to his fees and costs but requested the panel be mindful that Employee was seeking benefits for both his shoulder and cervical conditions, and if benefits are not awarded for both conditions, then an appropriate reduction in the fee award be made. (Employer's Answer, February 7, 2023).

83) To date, Employer has paid $70,546 in medical and transportation costs, $48,752 in disability benefits, and $12,390 in PPI benefits. (SROI, February 17, 2023).

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.** (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment.
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> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
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> (d) Within 30 days after the referral by the administrator, the rehabilitation specialist shall perform the eligibility evaluation and issue a report of findings. . . . Within 14 days after receipt of the report from the rehabilitation specialist, the administrator shall notify the parties of the employee's eligibility for reemployment preparation benefits. Within 10 days after the decision, either party may seek review of the decision by requesting a hearing under AS 23.30.110. The hearing shall be held within 30 days after it is requested. The board shall uphold the decision of the administrator except for abuse of discretion on the administrator's part.
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job . . . for

> (1) the employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury . . . .
>
> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate. If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages . . . .

> **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 . . . .

In *Bockness v. Brown Jug, Inc.*, 980 P.2d 462 (Alaska 1999), the 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 23.30.120. Presumptions**. (a) In a proceeding for the enforcement of a claim for compensation under this chapter it is presumed, in the absence of substantial evidence to the contrary, that
>
> (1) the claim comes within the provisions of this chapter . . . .

"The 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 Alaska Supreme 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). If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *DeRosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013). The board alone is charged with determining the weight it will give to medical reports. *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

In *Rockstad v. Chugach Eareckson Support Services*, AWCAC Decision No. 140 (November 5, 2010), the Appeals Commission upheld the board's denial of the employee's claim, finding the board had properly discounted the weight of the employee's treating physicians' reports, as they were based on the employee's inaccurately reported history and symptoms. The board panel had noted, "While [the employee's] treating physicians are all fine doctors in their fields and well-meaning in this case, their opinions are no more reliable than the false or exaggerated information provided them by an untruthful reporter." (*Rockstad v. Chugach Eareckson Support Services*, AWCB Decision No. 09-0195 (December 16, 2009).

> **AS 23.30.130. Modification of awards.** (a) Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions . . . or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.
> . . . .

In the case of a factual mistake or a change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). The modification statute has been applied to changes in conditions affecting reemployment benefits and vocational status. *See, e.g.*, *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007); *Imhof v. Eagle River Refuse*, AWCB Decision 94-0330 (December 29, 1994); *McAlpine v. Fairbanks Memorial Hospital*, AWCB Decision 12-0200 (November 16, 2012). The board may decide, based on evidence in the record upon conclusion of a hearing on modification, whether an employee is entitled to reemployment benefits. *See, e.g.*, *Griffiths*, 165 P.3d at 624.

However, in the case of a hearing reviewing an RBA designee's determination, the provision of AS 23.30.041(d), stating the board "shall uphold the decision of the administrator except for abuse of discretion on the administrator's part" "controls" over the modification provisions of AS 23.30.130. Therefore, unless the board finds that the RBA-designee abused her discretion in finding an employee eligible or ineligible, the board cannot modify the RBA-designee's decision, but must remand the issue to the RBA-designee. *Interior Towing and Salvage, Inc. v. Gracik*, AWCAC Decision No. 239 (September 5, 2017) at 9.

In *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960 (Alaska 1998), the Court rejected the employer's contention that an application for adjustment of claim was not the functional equivalent of a petition for modification, noting that the board had discretion to review an award of compensation "upon its own initiative or upon the application of a party in interest."

Similarly, in *Hulsey v. Johnson & Holen*, 814 P.2d 327, 328 (Alaska 1991), the Court found the board correctly treated the employee's petition to "re-open" her claim as a petition for modification under AS 23.30.130.

> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

In *Harnish Group, Inc. v. Moore*, 160 P.3d 146 (Alaska 2007), the Court discussed how and under which statute attorney's fees may be awarded in workers' compensation cases. A controversion, actual or in-fact, is required for the board to award fees under AS 23.30.145(a). "In order for an employer to be liable for attorney's fees under AS 23.30.145(a), it must take some action in opposition to the employee's claim after the claim is filed." *Id*. at 152. Fees may be awarded under AS 23.30.145(b) when an employer "resists" payment of compensation and an attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney fees awarded should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on a claim's merits, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the employer's resistance, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney fees for a claim's successful prosecution. *Id*. at 973, 975. Since

a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs where the claims on which the claimant did not prevail were worth as much money as those on which he did prevail. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222; 242 (Alaska 1997).

In *Rusch v. Southeast Alaska Regional Health Consortium*, 453 P.3d 784 (Alaska 2019), the Court clarified its holding in *Bignell*, and held "the Board must consider of the factors set out in Alaska Rules for Professional Conduct 1.5(a) when determining a reasonable attorney fee." *Id*. at 798-99. It emphasized, ". . . the Board must consider each factor and either make findings related to that factor or explain why that factor is not relevant." *Id*. at 799. The Court simultaneously noted:

> Alaska Rule of Professional Conduct 1.5(a) sets out eight non-exclusive 'factors to be considered in determining the reasonableness of a fee,' specifically:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly;
>
> (2) the likelihood, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily shared in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
>
> (8) whether the fee is fixed or contingent.

Id. at n. 51. An attorney fee award will only be reversed if it is "manifestly unreasonable" – this differs from the "substantial evidence" test used for review of factual determinations. *Id*. at 803.

> **AS 23.30.155. Payment of compensation.**
>
> . . . .

(p) An employer shall pay interest on compensation that is not paid when due. . . .

A workers' compensation award accrues legal interest from the date it should have been paid. *Land and Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1192 (Alaska 1984).

> **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.

> **8 AAC 45.120. Evidence.**
> . . . .
>
> (e) . . . . Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . .

The Alaska Supreme Court has held that a medical expert's opinion must be within a "reasonable degree of medical certainty," or the equivalent "reasonable medical probability" to be admissible. *Maddocks v. Bennett*, 456 P.2d 453, 457-58 (Alaska 1969).

> **8 AAC 45.150. Rehearings and modification of board orders.**
> . . . .
>
> (b) A party may request a rehearing or modification of a board order by filing a petition for a rehearing or modification and serving the petition on all parties . . . .
>
> (c) A petition for a rehearing or modification based upon change of conditions must set out specifically and in detail the history of the claim from the date of the injury to the date of filing of the petition and the nature of the change of conditions. The petition must be accompanied by all relevant medical reports, signed by the preparing physicians, and must include a summary of the effects which a finding of the alleged change of conditions would have upon the existing board order or award.
>
> (d) A petition for a rehearing or modification based on an alleged mistake of fact by the board must set out specifically and in detail
>
> (1) the facts upon which the original award was based;
>
> (2) the facts alleged to be erroneous, the evidence in support of the allegations of mistake, and, if a party has newly discovered evidence, an affidavit from

> the party or the party's representative stating the reason why, with due diligence, the newly discovered evidence supporting the allegation could not have been discovered and produced at the time of the hearing; and
>
> (3) the effect that a finding of the alleged mistake would have upon the existing board order or award.
>
> (e) A bare allegation of change of conditions or mistake of fact without specification of details sufficient to permit the board to identify the facts challenged will not support a request for a rehearing or a modification.

> **8 AAC 45.195. Waiver of procedures.** A procedural requirement in this chapter may be waived or modified by order of the board if manifest injustice to a party would result from a strict application of the regulation. However, a waiver may not be employed merely to excuse a party from failing to comply with the requirements of law or to permit a party to disregard the requirements of law.

ANALYSIS

(1) Is Employee entitled to additional left shoulder medical treatment and related transportation benefits?

There is no dispute that Employee's May 3, 2020 work injury caused his initial need for left shoulder medical treatment, which included rotator cuff repair surgery and physical therapy. Even though the parties do not frame it as such, the present dispute essentially involves the reasonableness and necessity of additional left shoulder medical treatment under *Bockness*. In the absence of substantial evidence to the contrary, Employee is presumed entitled to the medical treatment he seeks. *Carter*. He attaches the presumption with PA-C Fayette's January 10, 2022 recommendation for additional arthroscopic surgery to repair partial tears shown on the April 20, 2021 MRI. *Cheeks*. Employer rebuts the presumption with opinion of its medical evaluator, Dr. Ballard, who explained low grade partial tears are frequently seen on MRIs following rotator cuff repair surgery, and these are not something additional surgery will fix. *Miller*. Employee is now required to prove he is entitled to additional left shoulder medical treatment by a preponderance of the evidence. *Koons*.

PA-C Fayette's recommendation for additional surgery stands alone in the medical record. Employee's surgeon, Dr. Paisley, reviewed the April 20, 2021 MRI and concluded no additional surgery was necessary. The EME physician, Dr. Ballard, also concluded a second surgery was

not necessary. Meanwhile, the SIME physician, Dr. Chovanes, did not opine a second surgery was necessary, but rather thought it would be reasonable for Employee to have another orthopedic opinion on additional shoulder treatment because that is what he would want if he were Employee.

An evaluation of these competing opinions finds that PA-C Fayette has not reviewed Employee's entire medical record, and neither is she an orthopedic surgeon. Nevertheless, as one of Employee's medical providers, her opinion is accorded some weight. AS 23.30.122. Similarly, because of the voluntary surrender of his medical license, and the circumstances that prompted it, Dr. Paisley's opinion is approached with some caution. He too has not reviewed the entire medical record. Yet, since he was Employee's orthopedic surgeon, his opinion is also accorded some weight. *Id*.

Only two physicians who opined on the issue have reviewed the entire medical record – Drs. Chovanes and Ballard. However, Dr. Chovanes's shoulder opinion is problematic since its basis does not comport with Alaska law. As set forth in *Bockness*, injured workers are not entitled to all the medical care they want, but rather only that care which the nature of the injury or the process of recovery requires. AS 23.30.095(a). Wanting an additional medical opinion is not a basis for awarding one. *Bockness*. Furthermore, the Alaska Workers' Compensation Act does not provide injured workers second and third opinions. *Bloom*. That is why they are required to designate a physician, who then makes referrals to other physicians. *Collette*.

On the other hand, Dr. Ballard pointed out that Employee has already had surgery and therapy, and the MRI taken after surgery shows the rotator cuff repair is still intact, so there is no other treatment available other than Employee doing home exercises he learned in physical therapy. He explained, low grade partial tears are frequently seen after rotator cuff surgery, and he assertively testified, "There's no surgery that will fix that. . . . there's no magical cure for that." Dr. Ballard also explained why more conservative treatment, like a steroid injection, would not be efficacious. His explanations seem intuitive to this panel, and his hearing testimony was confident and compelling. *Rogers & Babler*. Dr. Ballard's opinion is accorded the most weight on this issue. AS 23.30.122. Even though Dr. Chovanes thinks Employee should be offered yet

another orthopedic opinion, two orthopedic surgeons have already weighed in on this issue, and both, including Employee's own surgeon, concluded additional surgery is not indicated. Since Employee has already been provided all the medical treatment that can be offered, his claim seeking additional left shoulder medical treatment and related transportation benefits will be denied. *Bockness*.

(2) Is Employee entitled to cervical spine medical treatment and related transportation benefits?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the medical treatment he seeks. *Carter*. Employee attaches the presumption with Dr. Larson's December 1, 2021 opinion that Employee's pre-existing degenerative cervical conditions, which were asymptomatic prior to the work injury, could "absolutely" become symptomatic with the mechanism of injury. *Cheeks*. Employer rebuts the presumption with Dr. Ballard's October 18, 2021 opinions that Employee's need for cervical spine treatment was due to degenerative changes brought about by Employee's age and genetics rather than work, and that the delays in cervical spine symptom reporting shows work was not the substantial cause of Employee's need for treatment. *Miller*. Employee is now required to prove he is entitled to cervical spine medical treatment by a preponderance of the evidence. *Koons*.

Employee's chiropractor, Dr. Larson, testified on Employee's behalf at hearing and his opinions are plagued with concerns. He testified he did not record any specific findings during his initial evaluation that would have indicated a cervical problem, yet even a lay reading of his April 28, 2021, chart notes show this testimony to be most suspect. AS 23.30.122. He testified at length on the inappropriateness of a chiropractor initially performing neck adjustments on a patient complaining of numbness and tingling running down the arm, and even though Employee did not present to Dr. Larson with this complaint at the time, Employee had complained of this symptom previously, and yet Dr. Larson readily acknowledged adjusting Employee's neck several times before he identified a cervical problem. *Id*. Perhaps coincidentally, it is also curious to note that it was only after Employee started treating with Dr. Larson that his neck pain became his "greatest limiting factor."

For reasons set forth in this decision's factual findings, Dr. Larson's laborious, rambling testimony is another cause for concern. His apparent inability to focus on singular, specific inquiries casts doubt on the validity of his examination findings and his opinions. AS 23.30.122. Moreover, the only medical records Dr. Larson had prior to his treating Employee is PA-C Fayette's July 27, 2020 chart notes and Dr. Paisley's March 23, 2021 referral. Had he had Employee's complete medical record, his opinions would have been far better informed, and perhaps different. *Id*. Perhaps, too, he would have been aware of Employee's previous complaints of numbness and tingling running down his arm before administering adjustments to Employee's neck. *Rogers & Babler*. Dr. Larson's opinions are accorded very little weight. AS 23.30.122.

In his May 23, 2022 report, and again during his deposition, Dr. Chovanes opined in favor of Employee on the issues of cervical spine causation and the need for treatment, but his opinions are also troublesome. He repeatedly confirmed at his deposition that his cervical spine causation opinion was based on Employee's report of having numbness and tingling down his arm since the date of injury. The medical record belies that. Employee did not mention neck pain for nearly three months after the injury, and even then, it was but one complaint among a laundry list of symptoms reported that day. He did not report the telling symptoms of numbness and tingling until nearly five months after the date of injury, and 11 months would pass before Employee's neck pain became seriously problematic for him.

There are also concerns with Employee's credibility. AS 23.30.122. As just discussed, the medical record does not support his contentions of having numbness and tingling down his arm since the date of injury. Moreover, Employee told Dr. Chovanes that he informed his doctors about numbness and tingling right after the injury, but at hearing he testified he did not tell his doctors about numbness and tingling because he did not know what the symptoms meant. *Id*. Another concern arose at Employee's deposition, where Employer's attorney's efforts to elicit confirmation of his contention that he had experienced numbness and tingling down his arm since the date of injury, span over eight pages of the deposition transcript. In addition to being a poor historian, Employee's lack of candor is also bothersome. AS 23.30.122. Workers' compensation panels have discounted the opinions of doctors when they are based on an

employee's inaccurately reported symptom history. *Rockstad*. Since Dr. Chovanes's cervical spine causation opinion relies on Employee's representations that he experienced numbness and tingling down his arm since the date of injury, it is given very little weight. AS 23.30.122.

Dr. Ballard is the only physician who took Employee's delay in symptom reporting, which is evident in the medical record, into consideration when forming his opinion. This enhances the weight accorded his opinion. AS 23.30.122. Meanwhile, when Dr. Chovanes was later confronted with the delay in symptom reporting at his deposition, he speculated it was *possible* Employee's shoulder symptoms masked his cervical symptoms. When the delay in symptom reporting was pointed out to Dr. Larson at hearing, he postulated, *sometimes*, when he alleviates symptoms that are so overwhelming that the brain can only focus on problem, it is *very common* for other problems that existed to crop-up. Not only is Dr. Larson's explanation internally inconsistent, neither is it well understood. Regardless, neither Dr. Chovanes's nor Dr. Larson's suppositions meet the requisite standard of "reasonable medical probability" to be accorded any weight. *Maddocks*; AS 23.30.122.

Dr. Chovanes and Dr. Ballard do agree on a couple of key points, however. Both agree that Employee's symptoms would have developed immediately after the injury, or within a short time of the injury. Both also agree that any activity, or no particular activity at all, can cause spinal stenosis to become symptomatic. In this case, not only does the delay in symptom onset make it less likely that Employee's work was the substantial cause of his need for cervical spine treatment, but it also makes it more likely that some activity other than work caused his stenosis to become symptomatic. *Miller*. Dr. Ballard's opinions provide both alternative explanations for Employee's need for cervical spine treatment, specifically age and genetics, and rule out work as the substantial cause of his need for cervical spine treatment because of delayed symptom reporting. *Huit*. Employee's statement to Dr. Larson, that he started feeling pain and grinding in his neck after his shoulder surgery, is both borne out by the medical record and revealing. Dr. Ballard's opinions are best supported by the medical record, and they are given the most weight. AS 23.30.122. Accordingly, Employee's claim for cervical spine medical treatment and related transportation benefits will be denied.

(3) Is Employee entitled to additional TTD?

In the absence of substantial evidence to the contrary, Employee is presumed entitled to the disability benefits he seeks. *Meek*. Employee attaches the presumption with Dr. Chovanes's May 23, 2022 opinions that Employee's neck and shoulder both required additional medical treatment and that Employee remains disabled from work. *Wolfer*. Employer rebuts the presumption with Dr. Ballard's October 18, 2021 opinion that Employee's shoulder is medically stable, as well as his October 18, 2021 opinions that provide both alternative explanations for Employee's need for cervical spine treatment, and that rule out work as the substantial cause of his need for cervical spine treatment. *Miller*. Employee is now required to prove he is entitled to additional TTD by a preponderance of the evidence. *Koons*.

TTD may not be paid for any period of disability occurring after the date of medical stability. AS 23.30.185. Dr. Chovanes opined, without further treatment, Employee's shoulder was medically stable on May 1, 2021, when the decision was made to pursue conservative care instead of additional surgery. However, Employee's medical records do not include a document dated May 1, 2021. Instead, Dr. Chovanes was likely basing his opinion on Dr. Paisley's review of the post-surgical MRI with Employee on May 7, 2021, which was when the decision was made not to pursue additional surgery. *Rogers & Babler*. Dr. Ballard also opined on Employee's medical stability and arrived at a date of October 18, 2021, the date of his evaluation. Employer then controverted ongoing medical treatment and disability benefits after October 18, 2021 based on Dr. Ballard's EME report. Given the conclusions reached above, regardless of which physician's opinion on medical stability is accepted, no additional TTD is due, and Employee's claim seeking it will be denied. *Runstrom*.

(4) Is Employee entitled to interest?

Since no late paid benefits are due, Employee's claim seeking interest will be denied. *Rawls*.

(5) Should the reemployment benefits eligibility determination be modified?

A party may seek modification of compensation arising from a change in conditions or a mistaken factual determination. AS 23.30.130(a). Regulations specify that a party seeking

modification do so by petition. 8 AAC 45.150(b). Moreover, such a petition must specifically set forth the changed conditions or the alleged factual mistake. 8 AAC 45.150(c), (d). Authority to modify compensation awards expires one year after the date of the last benefit payment. *Lindekugel*.

The RBA's designee found Employee not eligible for reemployment benefits based on PA-C Albert's predictions that Employee would have the permanent physical capacities to return to his previously held occupations. Employee did not seek a review of this determination under AS 23.30.041(d). Neither did he subsequently file the prescribed petition seeking modification. Instead, Employee's modification request appears to originate from his January 28, 2022 claim, which seeks a reemployment eligibility evaluation, notwithstanding him already having had one. Nevertheless, Employee's hearing arguments made sufficiently clear the basis on which he seeks modification. 8 AAC 45.150(e). Eight months after PA-C Albert's predictions that Employee could return to previously held occupations, Dr. Ballard concluded that Employee could not return to those jobs. Dr. Chovanes also concluded that Employee could not return to his previously held occupations due to continuing shoulder pain and weakness. New and evolving medical opinions on this issue are the change in conditions for which Employee seeks modification. *Rogers & Babler*.

Employee's failure to set forth his modification request on a petition form is not fatal to his cause on this issue. The Alaska Supreme Court has previously approved of treating an application for adjustment of claim, and a petition to "re-open" a case, as petitions for modification. *Hodges*; *Hulsey*. Employee's January 28, 2022 claim will be so treated here. Additionally, regulations also provide for a waiver of procedures to avoid manifest injustice. 8 AAC 45.195. At hearing, Dr. Ballard changed his previously expressed opinion on Employee's physical capacities. He testified, when he reviewed Employee's job descriptions another time, he thought Employee could perform the job of Flagger if Employee was able to use his right arm with only occasional left arm use. Although Dr. Ballard's hearing testimony was confident and compelling on the issues of causation and treatment, his revised notion of Employee essentially working as a one-armed Flagger, a job that requires writing, occasional climbing, and using sign, hand, and flag signals, is not a very convincing opinion. AS 23.20.122; *Rogers & Babler*. Since it would be

manifestly unjust to deny Employee job retraining for which he might otherwise qualify because he sought modification on a claim form instead of a petition form, procedure prescribing a petition filing is also waived. 8 AAC 45.195.

Unlike a review of the RBA's determination, as in *Gracik*, where a panel is limited to upholding the RBA's decision absent an abuse of discretion, a panel may apply the modification statute to changes in conditions affecting reemployment benefits and vocational status. *Griffiths*; *Imhof*; *McApline*. Dr. Chovanes's opinion, and Dr. Ballard's original opinion, that Employee cannot return to work at his previously held occupations, were not available at the time the RBA's designee made her determination. They are now the most convincing opinions in the record. AS 23.30.122. Employee has shown, with more recent evidence, a change in conditions that warrant modification of the RBA's designee's original determination. Consistent with AS 23.30.130(a), Employee's January 28, 2022 claim was filed within one year of Employer's last compensation payment on October 28, 2021. *Lindekugel*. Given that Employee has a seven percent whole person PPI; and given that he cannot return to his previously held occupations, he now meets the requirements set forth at AS 23.30.041(e) and is eligible for reemployment benefits. His claim seeking modification will be granted. *Griffiths*.

(6) Is Employee entitled to attorney fees and costs?

Since Employer resisted providing reemployment benefits by defending against Employee's claim seeking modification of the RBA's designee's original determination, an award of reasonable attorney fees is appropriate. *Moore*. Pursuant to the Alaska Supreme Court's prescription in *Rusch*, the factors set forth under Rule 1.5(a) of the Alaska Rules of Professional Conduct are consulted to arrive at a reasonable, fully compensatory attorney fee award. *Bignell*. Because the parties did not present evidence or argument concerning two of those factors, and because the relevance of those factors is not self-evident, they will not be used to either support or lessen Employee's claimed fees. Included in this group are any unique time limitations imposed by Employee as a client, Rule 1.5(a)(5), and how the nature or length of the professional relationship with Employee should affect the fee, Rule 1.5(a)(6). However, other factors under Rule 1.5(a) are relevant and discussed below.

Employee has billed his attorney time at $390, $400, and $415 per hour and Employer did not object to those hourly rates. Employee's attorney is well-known among both the workers' compensation bar and workers' compensation hearing officers. She is an experienced attorney who has successfully represented injured workers for many years. Rule 1.5(a)(7). Employee's hourly billing rate is within the range of billing rates customarily awarded to experienced attorneys in workers' compensation cases. Rule 1.5(a)(3). Virtually all fees in workers' compensation cases are contingent. Employee's hourly billing rates, though lofty, are appropriate given the contingent nature of representation. Rule 1.5(a)(8).

The merits of workers' compensation claims are often litigated. Controlling law and relevant decisional authorities for the issues presented here are well known among workers' compensation practitioners and can be readily ascertained by other attorneys. The parties deposed just two witnesses, and the SIME medical record spans a relatively modest 487 pages. Though Employee sought benefits related to injuries to two body parts, the complexity of litigation, including the time and skills required for prosecution of Employee's claim was nevertheless average. Additionally, Employee's pursuit of reemployment benefits, where he repeatedly sought a reemployment benefits eligibility evaluation instead of modification of the RBA's designee's original determination, was not deftly handled. His imprecise approach to this issue resulted in confusion and necessitated additional briefing from the parties. Rule 1.5(a)(1). Claimants' attorneys are rarely, if ever, precluded from other employment due to conflicts of interest; and neither was Employee's attorney precluded from other employment due to the complexity of the issues presented here. Rule 1.5(a)(2).

Employee prevailed on the single issue of modification, which now entitles Employee to reemployment benefits. These benefits include vocational counselling, retraining costs and stipend. Along with medical and indemnity benefits, reemployment benefits are significant benefits under the Act. However, TTD is paid at a higher rate than reemployment stipend, and medical costs nearly always far exceed job retraining costs, which are statutorily capped at a very modest amount, so total value of benefits obtained is sizably less than if Employee would have prevailed on either his shoulder claim or his cervical spine claim alone. Rule 1.5(a)(4).

Most of Employee's line-item billing entries on his fee affidavits, such as "reviewed docs," "talked to client," "talked to Board," "legal research," and "worked on documentary evidence," are vague and do not describe specific issues for which the work was undertaken. Therefore, the time Employee's attorney spent working on the modification issue alone is impossible at ascertain. As pointed out above, the value of benefits obtained are considerably less than one third those sought, so on a purely proportional basis, Employee should receive considerably less than one-third his claimed attorney fees. *Bouse*. However, remaining mindful of the policy of ensuring that competent attorneys are available to represent injured workers, Employee will be awarded one-half his attorney fees and all his costs. *Bignell*. This result is further supported by the above analysis of factors set forth under Rule 1.5(a) of the Alaska Rules of Professional Conduct, where the conclusions reached were, on balance, rather pedestrian. *Rusch*.

CONCLUSIONS OF LAW

1) Employee is not entitled to additional left shoulder medical treatment and related transportation costs.
2) Employee is not entitled to cervical spine medical treatment and related transportation costs.
3) Employee is not entitled to additional TTD.
4) Employee is not entitled to interest.
5) The reemployment eligibility determination should be modified due to a change of conditions.
6) Employee is entitled to one-half his attorney fees and all his costs.

ORDERS

1) Employee's January 28, 2022 workers compensation claim is granted in part and denied in part.

2) The March 15, 2021 reemployment benefits eligibility determination, finding Employee not eligible, is modified. Employee is eligible for reemployment benefits is referred to the RBA for benefits election and plan development.

3) Employer shall pay Employee $27,017 in attorney fees and $5,182.77 in litigation costs.

4) Employee's other January 28, 2022 claims are denied.

Dated in Fairbanks, Alaska on June 27, 2023.

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 Ken Dormady, employee / claimant v. Chosen Construction, Inc., employer; and American Interstate Insurance Company, insurer / defendants; Case No. 202005238; 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 June 27, 2023.

/s/
Whitney Murphy, Office Assistant