ALASKA WORKERS' COMPENSATION BOARD

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

EMMANUEL BONILLA, Employee, Claimant, v. GOLDEN NORTH VAN LINES, INC., Employer, and VANLINER INSURANCE, Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202008019 AWCB Decision No. 23-0041 Filed with AWCB Anchorage, Alaska on July 27, 2023

Golden North Van Lines, Inc.'s, and Northern Adjusters Inc.'s, (Employer) November 14, 2022 petition requesting denial of benefits under AS 23.30.022 and AS 23.30.250 and December 29, 2022 petition for sanctions or dismissal under AS 23.30.108, and Emmanuel Bonilla's (Employee) December 27, 2022 cross-petition requesting sanctions and exclusion of evidence was heard in Anchorage, Alaska on June 7, 2023, a date selected on March 16, 2023. December 5, 2022 and January 19 and 23, 2023 hearing requests gave rise to this hearing. Attorney Andrew Wilson appeared and represented Employee, who appeared and testified. Attorney Vicki Paddock appeared and represented Employer. Witnesses included Rob Mitchell who testified for Employer. The record remained open to receive Employee's supplemental attorney fees and costs affidavit, Employer's response to it, and Michael Rush's deposition transcript. The record closed when deliberation was completed on June 18, 2023.

ISSUES

Employee contended Employer refused to produce evidence pursuant to 8 AAC 45.054(d). He contended he made two discovery requests on March 1, 2021 and April 5, 2021 and Employer failed to provide an "Application for Additional Payments" until December 7, 2022, after Employer requested benefits be denied for false or misleading statements. Employee contended Employer failed to follow the discovery order granting Employee's request for a protective order regarding a request for his bank statements because Employer made a subsequent request for his bank records. He requested exclusion of the "Application for Additional Payments" and sanctions.

Employer contended it complied with all discovery procedures because its attorney provided Employee with the "Application for Additional Payments" soon after she received it. It contended there was no discovery order compelling Employer to produce the evidence, it did not refuse to provide or willfully withhold the document and it did not assert that it did not have it. Employer contended there was no prejudice because Employee was aware of the document's existence because he filled it out and signed it. It requested an order denying Employee's cross-petition. An oral order denied Employee's request to exclude the "Application for Additional Payments."

1) **Was the oral order denying Employee's cross-petition to exclude evidence correct?**

Employer contends Employee failed to comply with a discovery order because he failed to timely provide an affidavit specifying when he received unemployment. It requests an order dismissing his claim.

Employee contends he provided the ordered affidavit; he did not refuse to provide it or willfully withhold it. He requests an order denying Employer's petition.

2) **Should Employer's petition for discovery sanctions be granted?**

Employer contends the Act does not require its petition to bar benefits for false statements to specifically identify the false statements. It contends Employee knowingly made false statements about his physical condition on post-hire health questionnaires, and on the "Application for Additional Benefits" for the purpose of obtaining benefits, which resulted in him obtaining about

a month of disability benefits. Employer requests orders barring benefits under AS 23.30.022 and AS 23.30.250 and directing Employee to pay Employer's reasonable costs and attorney fees in obtaining the order.

Employee contends Employer's petition failed to state false or misleading statements he allegedly made. He contends he did not make false statements about his physical condition on a post-hire health questionnaire because he did not fill them out and could not read English. Employee contends a violation of AS 23.30.022 does not constitute fraud *de jure*. He contends he did not knowingly make false statements on the "Application for Benefits" and did not remember filling it out because he was taking medications. Alternatively, he contends the alleged statements did not result in obtaining benefits. Employer requests Employer's petition be denied.

3) **Should Employer's petition to deny benefits under AS 23.30.022 be granted?**

4) **Should Employer's petition to deny benefits under AS 23.30.250 be granted?**

Employee contends he is entitled to interim attorney fees and costs should he prevail against Employer's petitions.

Employer contends Employee is not entitled to interim attorney fees and costs as his claim should be barred. Alternatively, it objected to specific entries for varied reasons.

5) **Is Employee entitled to interim attorney fees and costs?**

FINDINGS OF FACT

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

1) On September 14, 2009, Employee reported a coworker and he were moving a concrete form when the coworker guided it into a post and the form came back and struck Employee in the left thigh. He felt immediate pain and since then, the paid radiated into his lumbar back and his back hurt a great deal. Employee had a "past history of lumbar back on-the-job injury with strain" but no records were available. He said he had magnetic resonance imaging (MRI) in the past and was diagnosed with degenerative lumbar spine disease and the current back problem was an exacerbation of the 2004 injury. (Clyde Williams, M.D. chart note, September 14, 2009).

2) On September 24, 2009, an MRI showed a very large left-sided disc herniation at L4-5 causing severe deformity of the thecal sac and severe left-sided neural foraminal narrowing. (MRI report, September 24, 2009).

3) On September 28, 2009, Employee said his thigh no longer was a problem, but he was still experienced aching, sharp and shooting pain in his lumbar back, midline. Dr. Williams restricted Employee from lifting, pushing or pulling over 20 pounds and was going to send him to a neurosurgeon, but Employee requested to see a physiatrist, Dr. Becker Byrd. (Williams chart note, September 28, 2009).

4) On October 21, 2009, Employee had "intractable pain down his left leg." He said he developed sudden severe lower back pain and pain down his left leg when lifting a concrete beam and I-bar when the I-bar hit his leg and he fell to the ground. Neil Veggeberg, M.D., restricted Employee from bending or squatting and lifting greater than 30 pounds, recommended a tapering dose of Prednisone and referred him to "Dr. LaGrone to see if he feels" Employee was a surgical candidate. (Veggeberg chart note, October 21, 2009).

5) On November 25, 2009, Norberto Poquiz, M.D., examined Employee and found he reached maximum medical improvement on that date. He released Employee to return to work without restrictions and provided a five percent whole person impairment rating under the AMA Guides, 4th Edition. (Poquiz report, November 25, 2009).

6) On February 15, 2010, Employee followed up regarding back pain. Dr. Veggeberg said he had "fairly classic" symptoms of left L5 radiculopathy and a large disc injury at L4-5. Employee was afraid of having a series of injections and wanted a surgical approach if possible. He was referred to "Dr. LaGrone." (Veggeberg chart note, February 15, 2010).

7) On April 20, 2010, Michael LaGrone, M.D., examined Employee, reviewed his imaging and recommended a left microdiscectomy at L4-5 based upon the large, extruded disc herniation, persistent symptoms and neurologic deficits. (LaGrone chart note, April 20, 2010).

8) On February 4, 2011, Employee went to the emergency room and complained of experiencing back pain for the last two years. He was to have surgery but did not have it because he moved. Employee reported an increase in back three days ago after lifting a large bottle. A computerized tomography (CT) scan showed annular disc bulging and flattening of the thecal sac at L4-5 and L5-S1 with mild central canal stenosis, limbus at the anterior/inferior L5 vertebral body and mild bilateral neural foraminal narrowing. (Emergency room chart note; CT report, February 4, 2011).

9) On June 27, 2011, Employee complained of back, leg and testicular pain due to a June 16, 2011 work injury. He jerked hard on the lid of a tote that was stuck and when it gave way suddenly, he fell onto his lower back on the floor. A left sided inguinal hernia was suspected. Employee reported no "past med/surg/psych history." A lumbosacral spine x-ray showed decreased disc space L5-S1 with mild degenerative changes to the posterior surface of L5. He was diagnosed with lumbar radiculopathy and a herniated nucleus pulposus was suspected; an MRI was recommended but Employee did not want to go to Anchorage. (Karen Lee Morrissette chart note, June 27, 2011).

10) On July 6, 2011, Employee was diagnosed with a small reducible left-sided inguinal hernia. (Michelle Young-Thomas, M.D. chart note, July 6, 2011).

11) On July 6, 2011, Employee was diagnosed with an L4 lumbar spine endplate fracture. (Richard Miller, PA-C report, July 6, 2011).

12) On July 7, 2011, an MRI showed a large central to left paracentral disc extrusion at L5-S1 impinging on the traversing S1 nerve roots, left greater than right. It noted a transitional S1 vertebral body and careful attention to numbering was "recommended on subsequent examinations to ensure consistency." (MRI report, July 7, 2011).

13) On July 8, 2011, Employee underwent herniorrhaphy for a left inguinal hernia. (Young-Thomas operative note, July 8, 2011).

14) On July 14, 2011, an MRI showed a large central to left paracentral disc extrusion at L5-S1 impinging on the traversing S1 nerve roots, left greater than right. (MRI report, July 14, 2011).

15) On July 15, 2011, Employee was diagnosed with a left L5-S1 herniated nucleus pulposus with radiculopathy. Upshur Spencer, M.D., discussed treatment options with Employee including conservative treatment, an epidural steroid injection and a microscope-assisted discectomy. Employee elected to pursue the discectomy. (Spencer chart note, July 15, 2011).

16) On July 20, 2011, Employee underwent a left L5-S1 microscope assisted discectomy with hemilaminectomy. (Spencer Operative Report, July 20, 2011).

17) On January 9, 2012, Employee completed a functional capacity evaluation (FCE). He was assessed a five percent permanent partial impairment (PPI) rating and was found capable of returning to work in a light/medium physical demand level. (Joseph Helak, D.O., FCE report, January 9, 2012).

18) On February 14, 2012, Employee said he returned to work and was working on a crabbing ship stocking boxes of frozen crab. He felt comfortable with the 60-pound boxes, but the 77-pound boxes were a little too much for him. Dr. Spencer released Employee to fully-duty work but recommended he avoid lifting more than 60 pounds. (Spencer chart note, February 14, 2012).

19) On February 28, 2012, Employee completed forms at Kremer Chiropractic Clinic. The "Medical History" form asked, "Do you have or have you experienced the following?" and provided five columns of medical issues. Employee circled "Y" for "Fatigue" and "Headaches" and wrote "N/A" over three columns of medical issues. It also asked, "Have you had any impacts, falls, or jolts, that you feel specifically may have injured your spine?" and Employee checked "Yes." The "Symptom/Pain Information" form asked, "How long have you had this episode of symptoms?" and Employee answered, "old day long." When asked, "How many times have you had a problem similar to or the same as this in the past?" he wrote, "Not." It asked, "Are you restricted/limited in any work, home, or recreational activities because of your discomfort?" and Employee checked, "Yes" and wrote, "No lifting heavy. . . ." (Forms, February 28, 2012).

20) On April 25, 2012, Dennis Chong, M.D., examined Employee for an employer's medical evaluation (EME). Employee denied "any prior motor vehicle collisions, any other work injuries, or any prior back complaints." Dr. Chong diagnosed Employee with "status post left L5-S1 hemilaminectomy and diskectomy, status post left inguinal herniorrhaphy with mesh repair, overweight and deconditioned and pain behavior with non-anatomical and non-physiological findings on physical examination." He opined the June 14, 2011 work injury was the substantial factor leading to the hernia surgery and back surgery. Dr. Chong stated the treatment provided until the physical capacity evaluation and PPI rating was reasonable and necessary, but the chiropractic care afterwards was not. He recommended a work hardening program, which would allow Employee to perform at a medium duty work level, rather than the light to medium category determined at his FCE. (Chong EME report, April 25, 2012).

21) On July 30, 2012, John P. Shannon, Jr. D.C., assessed a 13 percent whole person impairment. (Shannon chart note, July 30, 2012).

22) On August 10, 2012, Dr. Spencer assessed a facet fracture at L4 with widening of facet joint and postoperative enhancing scar. He opined Employee's current situation related to the 2011 work injury and recommended a fusion. (Spencer chart note, August 10, 2012).

23) On April 10, 2013, the board approved a compromise and release (C&R) settlement agreement for Employee's June 14, 2011 work injury. The "Introduction" portion of the C&R included the following:

> . . . the employee began seeing Dr. John Duddy on September 19, 2012, for orthopedic treatment and possible surgical consultation with respect to an elbow dislocation that reportedly occurred approximately two weeks prior (September 2, 2012), when he fell while taking his trash out. Another account provided by the employee indicates he was intoxicated when he fell of[sic] the roof of his home. Dr. Duddy diagnosed an elbow fracture dislocation with radial shaft fracture and performed an open reduction, internal fixation procedure the following date. Subsequent post-surgical appointments were not kept and on November 12, 2012, Dr. Duddy stated he "cannot believe anything this gentleman says," as his statements were inconsistent and unbelievable. . . .

Employee waived all benefits under the Act in exchange for $65,000. (C&R settlement agreement, April 10, 2013).

24) On June 14, 2014, Employee completed an "Employment General Health Questionnaire" for Employer for his first segment of employment. Under the "Personal Medical History" section, he checked "No" when asked if he "had ever had" or "had ever been treated for" "Hernia," "Neck or back injury," "Ruptured intervertebral disc" and "Spondylolisthesis (slippage of vertebrae from normal alignment)." The second page of the form states, "If any of your answers to the above questions are marked 'yes', please provide a full explanation of the condition and any past or ongoing treatment on additional pages and attach." Employee also indicated "No" when asked, "Have you ever been advised by a physician or other medical care provider to restrict your physical activities in any way?" and "Have you ever refused a recommended surgical procedure?". He indicated "No" when asked "Have you ever been hospitalized?". The form also contained the following statement:

> I UNDERSTAND THE IMPORTANCE OF ANSWERING THIS QUESTIONNAIRE COMPLETELY AND ACCURATELY. I UNDERSTAND THAT ANY MISREPRESENTATION OR OMISSION OF FACTS MAY RESULT IN DENIAL OF WORKERS' COMPENSATION BENEFITS. I FURTHER UNDERSTAND THAT THE EMPLOYER WILL RELY ON MY ANSWERS, AND THAT ANY MISREPRESENTATION OR OMISSION OF FACTS WILL BE CONSIDERED BY THE EMPLOYER TO BE A SERIONS [SIC] MATTER JUSTIFYING TERMINATION OR OTHER ADVERSE

> ACTION, CONSISTENT WITH THE LAW. (Employment General Health Questionnaire, June 14, 2014).

25) On April 20, 2015, Employee sought a "health maintenance exam" and reported past hernia and discectomy with worker's compensation insurance in Texas, hernia repair, and right arm and scalp repair from a 2014 motor vehicle accident. He also reported new onset anxiety disorder since anesthesia and right arm repair. Employee said he was seeing a local chiropractor for his low back pain and was referred to diagnostic imaging for steroid injections, but insurance would not pay for the case in Alaska because it was a Texas workers' compensation case. He stated he needed a spinal fusion but was unable to obtain it in Alaska. (Wendy Sanders, M.D., chart note, April 20, 2015).

26) On September 26, 2015, Employee reported he injured his left foot, knee and back five days prior while working in Alaska when he fell into a ditch and landed on his left foot carrying a 25-pound pack and 50 pounds on his shoulders. His left knee pain had not gotten any worse, but his lower back pain had increased and he had the feeling of pressure in his left testicle and pain down the back of his left leg. Employee reported increased frequency of urination but no pain with urination or loss of bladder or bowel control. He admitted back surgery several years earlier with an "L4-5 fusion." Employee was referred to orthopedics. (Jessica Alexander, PA-C, chart notes, September 26, 2015).

27) On September 28, 2015, an MRI showed an approximate seven-millimeter L5-S1 retrolisthesis with mild disc bulge and other small broad based central/left paracentral caudal extrusion versus granulation tissue and very mild central canal and bilateral foraminal stenosis without neural compression. (MRI report, September 28, 2015).

28) On September 29, 2015, Employee said he was jumping into a creek while at work when his left leg broke through the ice, and he landed falling forward. Initially he felt a sharp pain in the left knee and about 45 minutes later left-sided low back pain. Later that night Employee began experiencing left testicular pain. The past surgical history included an open reduction internal fixation on his right radius fracture, left-sided microdiscectomy at L5-S1 and hernia repair. Dr. Spencer diagnosed status post left L5-S1 microscope-assisted discectomy, acute flare-up of low back pain with radiation into the testes region, left knee pain, and MRI evidence of degenerative changes at L5-S1 with no recurrent disc herniation. Employee said he had an epidural steroid injection in the past and did not like it, so he was not interested in considering injections. Dr.

Spencer released Employee to light-duty work and restricted him from bending, twisting, and lifting over 20 pounds and repetitive lifting over 10 pounds. (Spencer, chart note, September 29, 2015).

29) On October 13, 2015, Dr. Spencer recommended physical and massage therapy. Employee continued to decline an epidural steroid injection. Dr. Spencer did not see anything on the MRI to account for urinary difficulties. (Spencer chart note, October 13, 2015).

30) Employee completed physical therapy and massage from October 13, 2015 to November 2, 2015. (Physical and massage therapy notes, October 13, 2015 - November 2, 2015).

31) On November 3, 2015, Employee reported physical therapy helped his lower back pain. Dr. Spencer recommended continuing physical therapy with progressive lifting exercises for three weeks to enable him to return to full-duty work. He did not feel surgical intervention was necessary because MRI changes were essentially degenerative at L5-S1. (Spencer, chart note, November 3, 2015).

32) On November 11, 2015, Dr. Spencer recommended a work-hardening program for four weeks and restricted Employee from working until he finished work-hardening. (Spencer, chart note, November 11, 2015).

33) On November 13, 2015, Employee began the work-hardening program and completed a "Medical History Form." The form asked, "Have you ever, or are you presently being treated for any of the following conditions?" and Employee checked "No" for all conditions, including "Back injury" and "Hernia" and "Surgeries" while writing "Herniation And Arm" in the space provided for listing past surgeries. (Plan of Care report and Medical History Form, November 13, 2015).

34) On January 29, 2016, Employee underwent a FCE and demonstrated ability to perform light work, including occasionally lifting up to 19.5 pounds floor to waist and waist to shoulder, carrying up to 17.5 pounds, pushing 53.4 pounds and pulling 43 pounds. (Rebecca Tamaki, FCE report, January 29, 2016).

35) On February 19, 2016, Dr. Spencer released Employee to return to light-duty work on February 22, 2016. (Spencer letter, February 19, 2016).

36) On February 23, 2016, H. Donald Lambe, M.D., examined Employee for an EME. Employee stated he was injured on September 22, 2015, when he tried to jump across a small, iced over creek with an 80-pound pack on his back. He landed on the ice with his left foot, and it went through. Employee fell forward and stretched his whole body. Employee extracted himself and continued

working for another hour and a half until he was picked up and taken back to camp. His back pain was initially minor but by the time he was back at camp, it was getting worse. Employee said he had therapy in three different places and work-hardening which made him worse. He reported a back injury in 2011 that was not a work injury and a discectomy, which solved the problem. Employee said he was married with five dependent children. He reported continuing low back pain radiating into both posterior hips and down both legs and calves; associated testicular pain, left greater than right; numbness and tingling in both feet; and continuing urinary leakage. Dr. Lambe opined Employee sustained a left knee contusion and lumbar sprain from the September 22, 2015 work injury both of which resolved and were no longer the substantial cause of his symptoms or need for treatment. He released Employee to work without any restrictions and opined he reached medical stability as of November 8, 2015, with no permanent partial impairment. (Lambe EME report, February 23, 2016).

37) On August 10, 2016, Dr. Spencer opined Employee was "maximally medically improved at this point given the amount of treatment he has had to date." He recommended Employee get an epidural steroid injection (ESI) to improve left and right leg symptoms and for diagnostic purposes to consider a possible spinal fusion. Employee agreed to try the ESI, and Dr. Spencer referred him to "Dr. Kirkham" for the ESI, and a PPI rating. (Spencer chart note, August 10, 2016).

38) On September 14, 2016, Employee followed up with Dr. Spencer after bilateral L5-S1 ESIs were performed on August 19, 2016. He said he felt worse after the injections and two weeks later he found the symptoms to be no better than before the ESIs. Employee complained of pain radiating up and down his back and across his low back and then in the left knee, and left posterior calf pulses or spasms. He stated if he lifted more than 20 pounds, he had increased pain for the rest of the day. Employee asked about spinal cord stimulators because he tried a transcutaneous electrical nerve stimulation (TENS) unit and it may have helped. Dr. Spencer prescribed a TENS unit but did not think a spinal cord stimulator was going to be "the way he goes in the future, although I guess it is an option." He did not recommend a spinal fusion because Employee got no benefit from the injection. (Spencer chart note, September 14, 2016).

39) On December 21, 2016, the board approved a C&R settlement agreement for Employee's September 22, 2015 work injury. Employee waived all benefits under the Act in exchange for $15,000 and stated:

> The parties also agree that reemployment benefits, including but not limited to temporary total, temporary partial, AS 23.30.041(g) job dislocation, or AS 23.30.041(k) benefits are waived under this Settlement Agreement. Waiver of reemployment benefits is justified because he was found not eligible for retraining, and although he challenges that decision he wants to pursue retraining on his own without the constraints and constrictions imposed by the Act.
>
> The employee understands that he will be deemed to have been previously rehabilitated upon approval of this agreement under AS 23.30.012(b) as defined under 8 AAC 45.900(j). The ramifications of this have been fully explained to the employee by his attorney. (C&R settlement agreement, December 21, 2016).

40) On January 10, 2017, Employee reported back surgery he had two year earlier did not resolve his problems. He recently quit his job as a housekeeper due to back pain and was unemployed. (Kelton Oliver, M.D., chart note, January 10, 2017).

41) On February 21, 2017, Employee reported a history of back pain since 2011 when he was diagnosed with degenerative disc disease and underwent a microscopic discectomy. He complained of continuing back pain and left leg numbness. Employee reported another injury in 2015 with an increase in back pain, progressing until he could not bend over and was unable to work light duty. The pain radiated down one or both legs when he lifted or twisted. Employee stopped working in December and the pain suddenly increased in January for no reason. (Kelton Oliver, M.D., chart note, February 21, 2017).

42) On May 2, 2017, Employee filled out and signed an "Employment General Health Questionnaire" for Employer. He checked, "No" when asked if he "had ever had" or "had ever been treated for" "Hernia," "Neck or back injury," "Ruptured intervertebral disc," and "Spondylolisthesis (slippage of vertebrae from normal alignment)." The form states, "If any of your answers to the above question are marked 'yes', please provide a full explanation of the condition and any past or ongoing treatment on additional pages and attach." Employee also indicated, "No" when asked, "Have you ever been advised by a physician or other medical care provider to restrict your physical activities in any way?" and "Have you ever refused a recommended surgical procedure?" He indicated, "Yes" when asked, "Have you ever been hospitalized? If so please state the date and place of hospitalization and the reason for hospitalization," and he wrote, "Broken Right Arm (2012)." The form contained the following:

> I UNDERSTAND THE IMPORTANCE OF ANSWERING THIS QUESTIONNAIRE COMPLETELY AND ACCURATELY. I UNDERSTAND

> THAT ANY MISREPRESENTATION OR OMISSION OF FACTS MAY RESULT IN DENIAL OF WORKERS' COMPENSATION BENEFITS. I FURTHER UNDERSTAND THAT THE EMPLOYER WILL RELY ON MY ANSWERS, AND THAT ANY MISREPRESENTATION OR OMISSION OF FACTS WILL BE CONSIDERED BY THE EMPLOYER TO BE A SERIONS [SIC] MATTER JUSTIFYING TERMINATION OR OTHER ADVERSE ACTION, CONSISTENT WITH THE LAW. (Employment General Health Questionnaire, May 2, 2017).

43) On June 8, 2017, Employee complained of midline lower back pain which became worse with movement. (Oliver chart note, June 8, 2017).

44) On December 17, 2018, Dimond Chiropractic Care "certified" Employee "has been under my care and is/was" off work from December 17, 2018 to December 26, 2018, and under "Remarks" stated, "Pt has a sprain/strain of his neck and low back from an MVA (motor vehicle accident) which will be aggravated by work description given." (Dimond Chiropractic Care chart note, December 17, 2018).

45) On December 22, 2018, Dimond Chiropractic Care "certified" Employee "has been under my care and is/was," and circled, "May return to work" on December 23, 2018, without restriction. (Dimond Chiropractic Care chart note, December 22, 2018).

46) On October 1, 2019, Employee reported he was in an automobile accident that day; he was rear-ended, and his head hit the side window. He complained of sharp tightness and stiffness to the left and back side of his neck and left and right posterior and anterior shoulders and aching, sharp and stabbing discomfort to the left and right mid-thoracic; and aching, sharp, stiffness discomfort in his left and right lumbar spine. He did not report his past back surgery or his previous back injuries. Employee underwent chiropractic manipulative treatment to C2 and C7, T3-7, L2-5, and sacroiliac spine levels. (Jordan Olsan, D.C., chart notes, October 1, 2019).

47) Employee underwent eight additional chiropractic treatments for injuries sustained in the automobile accident. (Olsan chart notes, October 2, 4, 8, 10, 15, 18, 21, 24, 2019).

48) On November 18, 2019, Employee saw Dr. Spencer after returning from Mexico and Texas. He reported central low back pain but it was quieting down, with pulsations going down his left leg and trouble with sudden movements. Dr. Spencer recommended very aggressive physical therapy. (Spencer chart note, November 18, 2019).

49) On July 15, 2020, Employee reported the injury subject of the instant decision, when moving a pallet while working as a truck driver for Employer. The injury was reportedly a hernia. (First Report of Injury, July 20, 2020).

50) On July 20, 2020, Employer reported Employee was injured on July 15, 2020, while moving pallets. (Employer First Report of Injury, July 20, 2020).

51) On July 20, 2020, an MRI showed disc desiccation and postoperative changes at L4-5 and at L5-S1 and defects in the annulus at L5-S1 with small protrusions to the left of midline and into the right lateral recess. (MRI report, July 20, 2020).

52) On August 18, 2020, Employee complained of low back pain. MaryBeth Scott-Calor, D.O., noted, "Pt has history of possible left microdiscectomy L4-5 and postoperative changes at L4-5, L5-S1 surgery date reported by patient 07.2011 Dr. Spencer in Texas. Pt reports he was previously in pain management in Texas before moving to Alaska and his back pain was stable until his new injury 7.15.2020." She referred Employee to neurosurgeon Samuel Waller, M.D., for L5-S1 annular tear and prescribed Norco 5-325, up to one tab three times per day as needed. (Scott-Calor chart note, August 18, 2020).

53) On August 28, 2020, Madhu Prasad, M.D., discussed in detail with Employee the likelihood of bilateral inguinal hernia repair. He prescribed one 300 milligram capsule of Gabapentin to take the morning of surgery. (Prasad, chart note, August 28, 2020).

54) On September 1, 2020, Dr. Prasad performed a laparoscopic bilateral inguinal hernia repair with mesh and ilioinguinal nerve block. (Prasad operative note, September 1, 2020).

55) On September 10, 2020, Dr. Scott-Calor prescribed Employee 90 tablets of hydrocodone 5 mg and 325 mg acetaminophen to be taken one tablet every 8 hours for 30 days. No refill was provided. (Scott-Calor Approved Prescription, September 10, 2020).

56) On September 14, 2020, Employee described a work injury, stating the pallet moving device malfunctioned and he attempted to strain and push against it to get it to move again several times and began to experience pain in his scrotum and low back. Employee stated he had undergone an L5-S1 discectomy and that low back injections and physical therapy did not help in the past and he would not consider injections. Under "Medication," it listed "Norco 5/325 mg 1-2/day." Dr. Waller reviewed the July 20, 2020 MRI report and stated Employee "lost what appears to be greater than 50% of his disc height" at L5-S1, "the L4-5 disc measures approximately 13 mm in height and what is left of the L5-S1 disc measures approximately 5 mm in height." He diagnosed

lumbar spondylosis with neural foraminal stenosis, radiculopathy and intractable pain, unresponsive to nonoperative interventions. Dr. Waller discussed surgical options with Employee, including surgical approaches and said often patients with his disease get significant benefit with an interbody fusion. (Waller chart note, September 14, 2020).

57) On September 15, 2020, Employee said he hurt his back on July 15, 2020 when he was given a pallet jack that did not work, and he tried to lift something that was 2,500 pounds several times and hurt his back. He had significantly increased back and bilateral leg pain ever since. Employee was sent for physical therapy, but did not want to go and did not want an injection; he "just apparently wanted to get it fixed." An EMG did not show any acute radiculopathy. He was taking "gabapentin 100 mg capsule" and "Norco 5 mg-325 mg tablet." Pedro Perez, M.D., diagnosed L5-S1 degenerative disc disease with lateral recess and foraminal stenosis with significant low back and leg pain and positive Waddell signs. He recommended trying conservative treatment before considering surgery. (Perez, M.D., chart note, September 15, 2020).

58) On October 7, 2020, Dr. Prasad restricted Employee from returning to work until October 23, 2020 when he planned to evaluate Employee again and anticipated he "will be able to return to work." (Prasad Medical Release from Work or School, October 7, 2020).

59) On November 9, 2020, Dr. Scott-Calor prescribed gabapentin 300 mg capsule "1 tablet(s) 4 times a day by oral route as needed for 30 days" for spasms and hydrocodone 5 mg-acetaminophen 325 mg tablet "take 1 tablet(s) 3 times a day by oral route as needed for 30 days" for degeneration of intervertebral disc. (Scott-Calor, chart note, November 9, 2020).

60) On November 19, 2020, Employee continued to have bowel and bladder dysfunction that frustrated him, as did "the clear temporal association of his symptoms and never having these symptoms before his injury is clear yet he feels he is getting 'the run around' from getting approval for interventions." "Norco 5/325mg 1-2/day" was listed under "Medications." Employee's 2011 surgery and 2020 inguinal hernia repair were noted under "Surgical History" but "no PmHx" was noted under "Medical History." (Waller chart note, November 19, 2020).

61) On November 20, 2020, Employee answered questions on an "Application for Additional Payment" from Northern Adjusters. The document stated, "**IMPORTANT: <u>All questions must be answered fully.</u>** Complete this form and mail at once to Northern Adjusters, Inc. Payment of further compensation or benefits will be determined according to the information provided." Employee marked, "No" when asked the following questions: "Have you earned any wages

besides previously reported from Golden Van Lines since your injury?"; "Have you returned to regular work or full time [sic] work?"; "Have you returned to light or modified work?"; "Are you self-employed?"; "Have you earned any other income?"; "Have you applied for unemployment since your injury?" When asked, "What date did you return to work or become self-employed?" and, "What type of work are you doing now?" Employee wrote "N/A." (Employee response to Application for Additional Payment, November 20, 2020).

62) On November 20, 2020, Michael Rush, from Katmai Investigations, Inc., wrote the claims adjuster about surveillance on Employee "to determine his activity level and injury status" on October 24, 30, November 3, 10 and 11, 2020:

> • October 24, 2020, the claimant was observed returning to his residence. The claimant proceeded into the garage. The claimant then grabbed trash and carried it to a trash can; before proceeding inside the house. No further activity was observed.
> • October 30, 2020, the claimant was observed exiting the area of his residence and proceeding to Costco. The claimant was observed exiting the store a short time later and loading groceries into his vehicle. The claimant then exited the area and pulled out in front of traffic. The investigator lost sight of the claimant and was unable to relocate him. No further activity was observed.
> • November 3, 2020, no activity was observed from the claimant.
> • November 10, 2020, the claimant was observed exiting the area of his residence and proceeding to Costco. The claimant was then observed inside the store shopping for groceries. He was observed using an app on his phone to shop. The claimant was observed speaking with other subjects inside the store who were shopping with a similar app. The investigator briefly spoke with one of the subjects, who stated they were an Instacart shopper. The investigator then continued to follow the claimant throughout the store while he shopped. The claimant was then observed throughout the day delivering groceries to different places. After several pick-ups and deliveries, the investigator lost sight of the claimant and was unable to relocate him. No further activity was observed.
> • November 11, 2020, the claimant was observed arriving in the Costco area. The claimant remained in his vehicle and then suddenly departed. He proceeded to Fred Meyer's, where he was observed using the same app and shopping for groceries. The claimant then exited the area and proceeded up the hillside to deliver the items. The claimant was then observed throughout the day delivering groceries to different places from Fred Meyer's. He stopped at Costco several times and could be observed looking at his phone. He appeared to be waiting for Instacart orders to come in. After several pick-ups and deliveries, the claimant made a last second turn. The investigator lost sight of him and was unable to relocate him. No further activity was observed.

The letter included pictures taken during surveillance along with surveillance field notes. Employee appeared to be wearing the same hooded sweatshirt and orange shoes in the October 24, November 10 and 11, 2020 photos taken during surveillance. (Rush letter, November 20, 2020).

63) On December 9, 2020, Eric Hofmeister, M.D., orthopedic surgeon, performed a records review EME of records from October 1, 2019 to October 28, 2020, with surveillance footage. He opined work was not the substantial cause of Employee's current disability or need for orthopedic treatment. Dr. Hofmeister stated the left inguinal hernia was outside his scope of practice. He opined the work injury caused a lumbar spinal sprain, which resolved and required no further medical treatment. Employee's multilevel lumbar spondylosis preexisted the work injury and was not caused or aggravated by it. Dr. Hofmeister found Employee medically stable and able to return to his usual and customary employment as a truck driver without any restrictions "for any orthopedic work injury." (Hofmeister EME report, December 9, 2020).

64) On December 21, 2020, Dr. Hofmeister stated Employee's work-related lumbar sprain reached medical stability on September 1, 2020. He opined the treatment recommended by Dr. Waller, including a course of injection therapy, a possible arthrosis and a possible discectomy and interbody fusions, was acceptable for the condition he diagnosed, multilevel lumbar spondylosis. Dr. Hofmeister said the work injury resolved and no longer required treatment. After reviewing surveillance videos, he concluded Employee was no longer having any symptomology related to his lumbar spine so the treatment recommended by Dr. Waller was no longer necessary for the process of recovery from any spinal condition. The surveillance video showed Employee carrying a trash can, driving his vehicle, loading groceries into a vehicle, delivering groceries and lifting heavy cases of water and garbage. Dr. Hofmeister stated surgical treatment is not indicated based on surveillance. He opined Employee has no ratable permanent impairment for the work injury and Employee was able to perform his usual and customary employment as a truck driver on a full-time basis without any restrictions. (Hofmeister EME addendum report, December 21, 2020).

65) On December 28, 2020, Rush wrote the claims adjuster about surveillance on Employee on December 4 and 7, 2020:

> • December 4, 2020, the claimant was observed arriving at Costco. The claimant was then
> observed inside the store shopping for groceries. He was observed using an app on his phone to shop. The claimant then proceeded to a residence in the area of 76th Avenue and Rovenna Street. The investigator was unable to follow the claimant

> into the area without compromising the surveillance. The claimant then exited the area and returned to his residence. No further activity was observed.
> • December 7, 2020, no activity was observed from the claimant.

The letter included surveillance pictures with field notes. Employee appeared to be wearing the same hooded sweatshirt he wore in the October 24, November 10 and 11, 2020 photos taken from surveillance footage. (Rush letter, December 28, 2020).

66) On December 29, 2020, Employee went to his preoperative appointment and elected to proceed with surgery after discussing risks and benefits, perioperative and postoperative expectations and long-term expectations. (Waller chart notes, December 29, 2020).

67) On December 29, 2020, Employer reported it paid Employee temporary total disability (TTD) benefits from July 18, 2020 through December 22, 2020. (SROI, December 29, 2020).

68) On December 30, 2020, Dr. Prasad answered questions in a letter and stated Employee needed no further treatment for his inguinal hernia; he reached medical stability on October 30, 2020 and did not incur a PPI. He released Employee to full duty. (Prasad response, December 30, 2020).

69) On December 30, 2020, Employer controverted all benefits based upon Dr. Hofmeister's EME reports. (Controversion Notice, December 30, 2020).

70) On January 27, 2021, the rehabilitation specialist submitted a final eligibility evaluation report and found Employee not eligible for reemployment benefits. Employee did not report his work with Instacart in his employment history. (Eligibility Final Evaluation Report, January 27, 2021).

71) On February 9, 2021, the Rehabilitation Benefits Administrator (RBA) designee found Employee not eligible for reemployment benefits because Dr. Prasad predicted he would have permanent physical capacities to perform physical demands of his job at time of injury for Sales Route Driver, Stores Laborer and Material Handler. He also predicted Employee would have permanent physical capacities to perform other jobs Employee held during the 10-year period prior to the date of his injury. Dr. Prasad opined he would not incur a PPI rating greater than zero as a result of his injury. Because the rehabilitation specialist's report did not provide enough information to determine if Employee was previously rehabilitated through a settlement agreement and then returned to work in the same or similar occupation, the RBA designee did not address that issue. (RBA designee letter, February 9, 2021).

72) On February 12, 2021, Dr. Waller answered questions and checked, "Yes" when asked if the work injury probably caused Employee's post-injury symptoms." Dr. Waller answered "unclear

but patient's reported work injury is consistent" when asked what he considered to be the substantial cause of Employee's need for treatment. He recommended imaging, physical therapy, pain control and surgery. When asked if he would release Employee to work as a freight truck driver and if there were any limitations, Dr. Waller wrote, "Yes, at ~ 8 weeks post op. No heavy lifting or strenuous activity, no driving or operating machinery on pain medications." He expected Employee to be permanently impaired by the injury. (Waller response, February 21, 2021).

73) On February 19, 2021, Employee sought TTD, temporary partial disability (TPD) and PPI benefits, medical and transportation costs, "review of reemployment benefit decision" – "eligibility," interest and attorney's fees and costs for a "left inguinal hernia and L5-S1 degeneration." He stated he was attempting to move a heavy pallet and while pushing it, felt a pop in his stomach and back. (Workers' Compensation Claim, February 19, 2021).

74) On February 19, 2021, Employee requested review of the RBA designee's decision. (Petition, February 19, 2021).

75) On March 1, 2021, Employee mailed Employer a request for "a complete copy of your workers' compensation file, including, but limited to: . . . adjuster log notes . . . any and all recorded statements of the claimant and/or other witnesses." (Employee letter, March 1, 2021).

76) On March 3, 2021, Employer contended the RBA designee did not abuse her discretion in her decision finding Employee was not eligible for reemployment benefits. (Answer to Employee's Petition for Review of Reemployment Benefit Administrator's Decision March 3, 2021).

77) On March 8, 2021, Employer denied Employee's claim, contending the work injury was not the substantial cause of his disability or need for medical treatment based upon Dr. Hofmeister's EME reports. It also contended the RBA designee's decision should be upheld because there was no abuse of discretion. (Answer to Employee's Workers' Compensation Claim, March 8, 2021). Employer controverted TTD, TPD and PPI benefits, medical and transportation costs, "review of reemployment benefit decision - eligibility," interest and attorney's fees based on Dr. Hofmeister's EME reports. (Controversion Notice, March 8, 2021).

78) On April 5, 2021, Employee mailed Employer a request for "any and all recorded statements of the claimant and/or other witnesses." He also stated, "Please treat this as an ongoing request and provide updated and/or supplemental documentation as you receive it." (Employee letter, April 5, 2021).

79) On December 13, 2021, Paul M. Puziss, M.D., examined Employee for a second independent medical evaluation (SIME). Employee said he worked for Employer on two occasions and had been hired four years before he was injured. He had been working in the warehouse, "although he drives trucks somewhat." Employee pushed a heavy pallet of 2,500 pounds of paint cans and developed a sudden, sharp lower back pain which radiated from his midline lower back into his testicles. Employee said he spent the next three years after August 2012 in Lubbock, Texas, with intermittent travel to Mexico, and he moved back to Alaska in 2015. The next time he developed back pain was from a car accident in 2019, but he healed two months after and continued working until the accident. Employee stated, "If he lifts up garbage can it puts him up for three days, can barely walk. In terms of the video, the patient states that was his brother that lifted the garbage can, not him. He cannot lift garbage cans full of garbage. He can lift a bag of garbage, however, not a garbage can." Dr. Puziss found Employee's symptoms consistent with his images and diagnosed history of L5-S1 herniated disc injured June 16, 2011, left L5-S1 microscope assisted discectomy and laminotomy; inferior left L4 articular facet fracture, eventually asymptomatic; lumbar strain on July 15, 2020; July 20, 2020 MRI and clinical evidence for mild discogenic pain at L5-S1 due to annular tears; spinal stenosis at L5-S1, historical evidence for mild neurogenic claudication; two left inguinal hernia and one right inguinal hernia repair, work related and healed; and rear end collision on October 1, 2019, causing temporarily increased lower back pain, healed in two months after chiropractic care. Dr. Puziss wrote:

> The patient has essentially had two major injuries to his lumbar spine, the first back in 2011 which required lumbar discectomy left L5-S1 which did not heal totally and ultimately, he had a 13% permanent partial disability rating. He had some ongoing pain after that but eventually after living in Texas for three years he states that his pain resolved. He then reinjured his back on 07/15/2020. This caused, clearly, at least a sprain of his lower back. He has had increased pain ever since with pain down the legs. He has annular fissures and tears which are probably the cause of his radiculopathy, and he does have evidence today of discogenic pain on this examination. . . . Clearly his spine was more susceptible to reinjury because of his prior injury of 2011.

He said the current cause of Employee's disability and need for treatment includes the effects of his two lower back injuries, but mainly the July 15, 2020 injury. Dr. Puziss noted Employee has discogenic pain at this time causing radiculopathy bilaterally and spinal stenosis, "There is some abutment of bilateral S1 nerve roots in part the cause of the radiculopathy, worse on the left. This

is where he has the spinal stenosis, and this is where he had his post-laminectomy syndrome." He opined the July 15, 2020 work injury aggravated, accelerated and combined with the preexisting condition to cause the disability and need for treatment. The aggravation caused "a permanent impairment change" in Employee's preexisting condition because he now has annular fissures and tears causing discogenic pain and radiculopathy and likely worsening of his post-laminectomy syndrome on the left which preexisted the injury. Dr. Puziss stated,

> The patient was doing actually fairly well once he healed when living in Texas and then returned to work and worked around 3 years until he had this accident. The patient's spine was not normal. He had previous surgery. There may be a subtle instability of L5-S1 and/or L4-5. There is a subtle instability at L4-5 and L5-S1. The L4-5 instability is probably the cause of his tiny fracture of the left L4-5 facet. I cannot prove that he has instability because his last lumber flexion/extension films were negative. However, with laminectomy there sometimes can be a little instability which he probably does have. In any event, the primary cause of his ongoing disability and need for treatment is the injury of [July 15, 2020].

Dr. Puziss said:

> The substantial cause of the patient's current disability and need for treatment is the injury of [July 15, 2020]. The reasons are as follows: The patient had essentially a normally functioning back until this accident. His back was more susceptible to injury, again, because of his prior conditions. Indeed, he injured his back in this accident and he is not healed, whereas he did heal essentially from the first injury of 2011.

He recommended anterior spine fusion and decompression at L5-S1 recommended by Dr. Waller and stated Employee would reach medical stability one year after surgery. Employee will have the ability to perform sedentary and light and medium work but not heavy or very heavy work for the foreseeable future. Dr. Puziss noted, "[Employee] is currently working as of November 2020 in grocery delivery. He does not lift too much. This is well within his current capacities." (Puziss SIME report, December 13, 2021).

80) On April 11, 2022, Employee requested a protective order from Employer's request for bank account statements. (Petition, April 11, 2022).

81) On April 19, 2022, Employer answered Employee's April 11, 2022 petition for a protective order and contended it sought relevant information because he sought disability benefits and

Employer had surveillance records of Employee's activities as an Instacart shopper. (Answer to Employee's Petition for Protective Order and Employer's Request for Prehearing, April 19, 2022).

82) On April 21, 2022, Dr. Waller testified he was aware Employee had a discectomy at L5-S1 in 2011. (Waller Deposition at 31). He was not provided any medical records or imaging prior to 2020. (*Id*. at 35). The only prior injury he recalled was the discectomy in 2011; he was "not sure if there was other things in conversation that we talked about. I can dig through my notes some more, but that's what I call[sic]. Obviously I tend to focus on the salient features." (*Id*. at 36). Dr. Waller was not aware surgery had been recommended to Employee prior to his involvement in his care. (*Id*. at 50). When asked if Employee reported a 2015 injury to his back, Dr. Waller answered, "Not that I'm aware of." (*Id*. at 53). He did not know when Employee attended physical therapy for his back. (*Id*. at 56). Dr. Waller stated he expected Employee to be able to lift multiple cases of bottled water and 50-pound bags of ice melt and place them on a flatbed cart at Costco, but Employee should not be doing that. (*Id*. at 61-62). When asked if the July 15, 2020 work injury was the substantial cause of Employee's need for treatment, he answered "Yeah. That's the only thing I know of that brought him to my attention." (*Id*. at 64).

83) On April 29, 2022, Employer filed and served Employee with the November 20, 2020 and December 28, 2020 surveillance reports. (Affidavit of Service, April 29, 2020).

84) On May 12, 2022, Employee returned for a preoperative appointment. He continued to have bowel and bladder dysfunction, lower right extremity numbness, weakness and pain which limited his activity level and function. Employee elected to proceed with a combined anterior and posterior decompression and fusion for lumbar spondylosis with neural foraminal stenosis, radiculopathy and intractable pain unresponsive to nonoperative interventions. Dr. Waller noted Employee's bowel and bladder issues did not appear to be clinically or radiographically due to central neurologic compression so he referred him to urology. (Waller, chart note, May 12, 2022).

85) On May 17, 2022, the parties attended a prehearing conference:

> The EE is not in agreement with providing bank statements and proposed that the board can have an in-camera review with EE to show the board what the EE proposes to strike that is irrelevant to his disability. The EE believes the ER is being excessive in requesting bank statement. The EE does not object to provide any unemployment records even though the EE does not believe his client is receiving unemployment. The EE is willing to provide the InstaCart records or any other apps he may be using to make money, but not the bank statements nor deposits only due to excessive information.

> ER believes it is relevant to request bank statements, due to TTD and Mr. Bonilla claims that he has been disabled due to work injury and ER has documented evidence that he has been working as InstaCart shopper. The issue with unemployment benefits is that the unemployment division is not accepting releases from ER even with EE's release so the ER is asking for wage information from any aps on phone, as well as unemployment. In addition the ER stated willing to redact the account to show only deposits. The ER would like to see any deposits from apps and unemployment. . . .

The designee found the informal request for discovery for Employee's bank statements "to be too broad and not standard" and ordered, "The EE does not need to provide bank statements from checking and/or savings." (Prehearing Conference Summary, May 17, 2022).

86) On June 7, 2022, Employee filed a notice of intent to rely on Instacart earnings from January 4, 2021 to December 26, 2021, totaling $38,052.08; of that total, Employee earned $2,342.02 from February 15, 2021 to May 30, 2021. (Notice of Intent to Rely, June 7, 2022).

87) On July 5, 2022, Employee filed a notice of intent to rely on Instacart earnings for December 27, 2021 to March 27, 2022, totaling $12,978.43. (Notice of Intent to Rely, July 5, 2022).

88) On August 4, 2022, Employee filed a notice of intent to rely with an undated "Client 1099 Summary" for unemployment income stating, "In 2021, you were paid $16,379.00." He also filed Instacart earnings for April 6, 2020 to December 20, 2020, totaling $28,694.90 and for March 28, 2022 to the current week, totaling $18,517.95. (Notice of Intent to Rely, August 4, 2022).

89) On August 19, 2022, Employee reported increasing low back pain. Dr. Waller prescribed Flexeril and Celebrex. (Waller chart note, August 19, 2022).

90) On September 8, 2022, Employee filed a notice of intent to rely with an August 31, 2022 1099-G form stating Employee received $16,379.00 in unemployment compensation for calendar year 2021. (Notice of Intent to Rely, September 8, 2022).

91) On September 14, 2022, Dr. Puziss testified at deposition and described his evaluation process:

> They arrive and fill out some forms, and then they go back into an exam room where I then introduce myself and we get started, and I try to get the best history I can of the original injury in question, and then go through the medical file with the patient. Usually it takes a couple of hours. And then I can ask a patient a question at the time and clarify something, or the patient can interject if he needs to.
>
> And then we go into the past history. We do a detailed physical examination, review with the patient the imaging – images of their studies as needed. I then make conclusions. The patient goes home. (Puziss Deposition at 8).

He specifically remembered Employee's evaluation because of his significant history and the disc problems he had. When asked what stuck out in his mind, Dr. Puziss stated, "Well, he had a history dating back to 2011 and had a good deal of treatment back then. Ended up with lumbar disc surgery and had some post-laminectomy syndrome. Had an ultimate impairment of 13 percent based on AMA guides. And I remember he had an awful lot of treatment." (*Id*. at 9). Employee said he was unable to work after the work injury and Dr. Puziss was not aware of any other employment after the work injury. (*Id*. at 10). Later in the deposition, he remembered Employee told him he worked for Instacart in November 2020. (*Id*. at 11-12). Dr. Puziss remembered Employee did not have back symptoms between 2012 and 2019 based on the medical history Employee provided as Employee stated his back pain disappeared during the three years after August 2012 and he began experiencing back pain again after a motor vehicle accident. (*Id*. at 14-15, 33). He was not aware of the 2004 and 2009 injuries at the time of his report. (*Id*. at 40). Employee did not relate his pain going back to 2004 in his history. (*Id*. at 41). Dr. Puziss was not aware of the spinal fusion recommendation reported by Employee in the April 20, 2015 medical report. (*Id*. at 53). He was not aware of the September 2015 injury when he completed his report. (*Id*. at 57).

92) On September 26, 2022, Cyndy Imboden, Custodian of Records, for Alaska Unemployment Insurance, wrote a letter to Employee stating:

> Alaska Unemployment Insurance (UI) is unable to provide you with the records you requested.
>
> Alaska Statute (AS) 23.20.110 prohibits disclosure of UI records except for purposes of presenting or protesting a claim or determination issued by the Department. Otherwise disclosures of UI records allowed by this statute and the Social Security Act are to specific government agencies and programs for purposes of obtaining eligibility for the benefits administered by those agencies and programs.
>
> Pursuant to AS 23.20.110(g) and AS 23.20.115, disclosure of UI records, not authorized by AS 23.20.110, is a Class B Misdemeanor. (Letter, September 26, 2022).

93) On October 19, 2022, Employee requested "sanctions and enforcement of prior order." (Petition, October 19, 2022). He sought enforcement of the previous protective order, issuance of a new protective order and sanctions against Employer for refusing to comply with the previous

order. Employee contended the bank statements are not relevant because he may receive TTD benefits if he paid back unemployment benefits received during the same time. He contended complying with the request would be an undue burden and expense and Employer sought to delay his hearing. (Addendum to Petition for Protective Order and Sanctions, October 19, 2022).

94) On October 18, 2022, Dr. Hofmeister reviewed imaging and nearly 700 additional pages of medical records, including pre-injury records from September 14, 2009 to December 1, 2017. He opined Employee sustained a lumbar spinal sprain from the July 15, 2020 work injury. Dr. Hofmeister also identified Employee's ongoing multi-level degenerative spondylosis, his previous injury to his L5-S1 area and his previous work-related injury necessitating the need for lumbar spine surgery as causes that led to his ongoing symptomology and pathology and the need for medical treatment. He opined Employee's work injury symptoms resolved within six weeks "but certainly by September 1, 2020." Dr. Hofmeister attributed any ongoing symptomology and treatment since September 1, 2020 to Employee's previous 2011 work incident "and would be due to his ongoing long history of lumbago, multilevel lower lumbar spondylosis and his previous surgical treatment to his lumbar spine." He stated future medical treatment for Employee's ongoing symptoms include a possible L5-S1 decompression and fusion with normal postoperative physical therapy twice per week for up to three months. Dr. Hofmeister stated there are not work restrictions for Employee's July 15, 2020 work injury but light to medium lifting for his previous industrial injury. He stated, "If [Employee] had pursued a lumbar spine fusion of L5-S1 in 2012, as had been discussed with Dr. Spencer, there would obviously be no need for any type of fusion at L5-S1 currently being recommended at this point by Dr. Waller." (Hofmeister EME addendum report, October 18, 2022).

95) On November 7, 2022, Employer answered Employee's October 19, 2022 petition, and contended dates Employee received unemployment benefits were relevant to his claim for disability benefits, and Employee on August 4, 2022 stated he received unemployment benefits but failed to identify the dates for which he received them. (Answer to Employee's Petition for Protective Order, Sanctions and Enforcement of Prior Order, November 7, 2022).

96) On November 14, 2022, Employer sought "denial of benefits under AS 23.30.022 and a finding of fraud under AS 23.30.250" alleging Employee "knowingly made false statements in writing as to [his] physical condition on post-hire health questionnaires" and "knowingly made false or misleading statements for the purpose of obtaining benefits." (Petition, November 14, 2022).

97) On November 14, 2022, Employer filed correspondence from Kelly Levine, Northern Adjusters claims adjuster, to Employer on July 23, 2020 asking if there was evidence of an injury similar to the work injury or similar body part that had been identified in any post-hire questionnaire, and an August 3, 2020 response stating, "We have no knowledge of any preexisting conditions." Also included were Employee's answers to June 14, 2014 and May 2, 2017 "Employment General Health Questionnaire." Employer included "Employment Application Part II" which Employee signed on June 14, 2014 and May 2 2017 stating, "To perform your job in a professional manner you will need to meet the following job requirement, related to the position you are applying for" under heading "Job Requirements" and "Be able to lift 70 to 100 pounds" under heading "Drivers, crew, warehouse." It also filed Employee's W-4 signed May 12, 2017 with "Single" checked and two allowances and Employee's W-4 signed April 10, 2018 with "Single" checked and once allowance. (Affidavit of Service, November 14, 2022).

98) On November 15, 2022, the parties attended a prehearing conference. The designee ordered him to file a sworn notarized affidavit of service with the dates he received unemployment benefits, by December 16, 2022. (Prehearing Conference Summary, November 15, 2022).

99) On November 17, 2022, the Division served the parties with the November 15, 2022 prehearing conference summary. (Prehearing Conference Summary, November 15, 2022).

100) On December 5, 2022, Employee contended Employer failed to state "what false or misleading statements the Employee is alleged to have made" and its request to find fraud should be waived and dismissed as it was not properly raised. He contended violation of AS 23.30.022 does not constitute "fraud *de jure*" and said the facts do not constitute fraud because they do not meet the legal standard, and did not proximately cause receipt of benefits. Employee requested Employer's November 14, 2022 petition be denied. (Answer in Opposition to Petition for Denial of Benefits and Finding of Fraud Dated – 11/14/2022, December 5, 2022).

101) On December 7, 2022, Employer filed Employee's November 20, 2020 answers to the "Application for Additional Payment." (Affidavit of Service, December 7, 2022).

102) On December 27, 2022, Employee requested "exclusion of evidence and sanctions." He sought an order excluding evidence not produced pursuant to 8 AAC 45.054(d) and Civil Procedure Rule 37 due to Employer's failure to produce relevant discovery. (Cross-Petition, December 27, 2022; Addendum to Cross-Petition for Exclusion of Evidence and Sanctions, December 27, 2022).

103) On December 29, 2022, Employer requested "sanctions or dismissal under AS 23.30.108(a)" for Employee's failure to provide an affidavit with the dates he received unemployment by December 16, 2022, as ordered in the November 17, 2022 prehearing conference summary. (Petition, December 29, 2022).

104) On January 17, 2023, Employer answered Employee's December 27, 2022 petition for exclusion of evidence and sanctions. It contended it complied with all statutory and regulatory rules regarding the discovery process and requested denial of Employee's December 27, 2022 petition. (Answer to Cross-Petition for Exclusion of Evidence and Sanctions, January 17, 2023).

105) On January 19, 2023, Employee filed an affidavit signed January 17, 2023, stating his first unemployment check was dated February 18, 2021, and his last was dated June 16, 2021. (Affidavit of Emmanuel Bonilla, January 17, 2023).

106) On January 19, 2023, R. David Bauer, M.D., performed a records review EME. He opined Employee sustained an overexertion strain of his lumbar spine on July 15, 2020, and a left inguinal hernia. Dr. Bauer opined Employee's preexisting conditions are the substantial cause of the symptomatology, disability and need for medical treatment and the July 15, 2020 was not the substantial cause of his ongoing subjective complaints or need for ongoing treatment. He noted the August 28, 2020 electrodiagnostic testing failed to show any acute findings, the July 20, 2020 MRI showed degenerative changes and Dr. Waller's September 14, 2020 evaluation failed to show any acute findings and Employee's physical examination had not changed since. Dr. Bauer concluded the July 15, 2020 work injury was no longer the substantial cause of his need for medical treatment after September 14, 2020, when Employee reached medical stability. He noted there was no active radiculopathy, instability, fracture or other diagnosis which would incur additional "disability" under the AMA Guides for Employee's preexisting 13 percent PPI rating. Dr. Bauer concluded no further treatment was necessary for the July 15, 2020 work injury and there was no indication for epidural injections or spinal fusion surgery. He recommended continuing restrictions of light to medium duty was a result of the previous industrial injury but said no restrictions were necessary from the July 15, 2020 work injury. Dr. Bauer stated had Employee pursued fusion surgery in 2012 the "fusion would have solidified the level" and "there would be nothing to do at this time." (Bauer EME report, January 19, 2023).

107) On February 7, 2023, Employee emailed the Workers' Compensation Division (Division), Employer's attorney and Employee's attorney's paralegal with excerpts from Alaska Workers'

Compensation Board (Board) decisions and orders regarding "Dr Bauer" and the following statement, "Wow this it's [sic] I [sic] doctor very unprofessional guy I been read about this guy." (Email, February 7, 2023).

108) On March 16, 2023, the parties agreed to schedule a June 7, 2023 hearing on Employer's November 14 and December 29, 2022 petitions, Employee's December 27, 2022 petition and his interim attorney fees and costs. (Prehearing Conference Summary, March 16, 2023).

109) On April 25, 2023, Employee reported he is overall recovering very well from his recent anterior/posterior lumbar fusion on March 22, 2023 with Dr. Waller. He had some discomfort attributable to using a brace. Employee was directed to stop wearing the brace and slowly increase activity levels; he was referred for physical therapy. (Waller chart note, April 25, 2023).

110) On May 18, 2023, Employee filed a notice of intent to rely with printed side effects for hydrocodone, acetaminophen and gabapentin. Under "Other Adverse Reactions" for hydrocodone and acetaminophen it states, "Central Nervous System: Lethargy, mental clouding, impairment of the physical and mental performance. . . ." Under "Common Side Effects" for gabapentin, it states, "Memory Problems" and "If you're having problems with your memory, speak to your doctor. They may want you to try a different medicine." (Notice of Intent to Rely, May 18, 2023).

111) On May 25, 2023, Michael Rush testified he is the owner and investigator at Katmai Investigations. (Rush Deposition at 4). He produced two reports in his investigation of Employee. (*Id*. at 5). Rush took video of Employee and stills from the video to generate pictures. (*Id*. at 7). He submitted two videos to Northern Adjusters, Inc. (*Id*.). Rush identified Employee by observing him at his residence and his vehicle registration. (*Id*. 10). He did not see Employee with "another man who looked similar to him." (*Id*. at 10-11). The adjuster gave him a description of Employee. (*Id*. at 14). Employee wore a mask while shopping. (*Id*. at 15). Rush was not aware Employee has a brother. (*Id*. at 16-17). He observed Employee's face a few times when he took his mask off, and Employee wore the same hoodie on multiple occasions. (*Id*. at 17).

112) At hearing on June 7, 2023, Employee testified he is 40 years old and originally from Mexico. He moved to the United States when he was 17 years old. Employee moved to Anchorage after his divorce. He is not currently married but lives with his girlfriend. He has eight kids; five live in Texas and one in Mexico. Employee financially supports all his children plus his granddaughter. He traveled to Mexico in December 2022 and returned in January 2023. Employee worked for Employer twice, beginning in 2014 and then again in 2016. He cannot read "so much

English" and "cannot write so much." Employee can read some English but not perfectly. Jim Steffens hired him but did not read the 2014 form to him. He was hired to drive a forklift at the warehouse, and he became a delivery driver after a driver got injured. Employee moved pallets weighing between three and five thousand pounds with a pallet jack when unloading trucks. When he was injured, he was moving pallets with paint cans, but the pallet jack was not working. Employee called dispatch and asked for help because it was broken but was told everybody went home and to move it himself. He tried moving it again and felt pain in his testicle and then in his back. After Employee was injured, he asked for and got help to move the pallet. Employee went to the doctor the next day and his testicle was half the size of his fist. The "Indian doctor" repaired his right and left side hernia. Dr. Waller recommended fusion surgery and Employee used public assistance to have the surgery two and half months ago. He was prescribed gabapentin and hydrocodone for the work injury. Employee worked for Instacart and Employer at the same time to support his family; he began working for Instacart in January 2020 during the pandemic. He continued working for Instacart after the work injury because he needed the money. Employee believed the workers' compensation payments were for his work injury with Employer but not for his work for Instacart. The workers' compensation payments were lower than his salary and he continued working for Instacart because the payments were not enough to support his family. Employee did not remember the "Application for Additional Payments" and he does not remember talking to the claims adjuster about it. He fills out the paperwork in his household. Employee's girlfriend makes out checks for utilities but does not fill out paperwork for him. He declares one dependent on his income tax returns. The signature on the "Application for Additional Payments" looks like his signature but Employee does not remember the form because he was on medication for his work injury, so he did not fill it out. Steffens completed the employment forms for him when Employer hired him. When asked if someone read the questions on the employment forms for him when completing it, Employee said Steffens told him, "If you want to start tomorrow, I want to do this for you and you sign it over here." Employee cannot read and he needs someone to interpret. His handwriting is on the employment forms, but he did not complete the check box section, and no one read him the questions or translated them to him; he does not know what "N/A" means. Employee worked for another company on the slope after his first employment with Employer and injured his back and did not injure any other body part. He applied to work for Employer again in 2016; he did not fill out the past health history section of the employment forms;

again, he only signed them after Steffens filled it out. The signatures on the employment forms are his signature. No one read the questions on the employment form to him. Employee read a portion of the post-hire application form stating, "If any of your answers to the above questions are marked 'yes,'" but stated he did not know what it meant. Steffens helped him with the form again "Kevin" asked him if he was ever hospitalized. No one read the questions to him, but they asked him if he was ever in the hospital and Employee said, "yes." Employee said he has been hospitalized "so many times" and when asked if he could read the written answer on the form to the hospitalization question, he physically pointed to his right arm and said they could see his surgery scar, asked him what happened and told him to put it on the form. He did not have the scar the first time he was hired, and he could not remember when he broke his arm. Employee wrote the hospitalization answer on the form, it was in his handwriting. He worked for Instacart because his wages from Employer were not sufficient to support his family and he needed the money. Employee lifted no more than 50 pounds while shopping and it was difficult because he was injured but he had a family to feed, and he needed to work no matter what. He did not want to work because the pain increased but he did not have a choice as he had to feed his family. Employee said the person in the surveillance videos was him. He could shop for up to three customers at Fred Meyers but only one at Costco and he did multiple trips per day. Employee did not remember how much his weekly unemployment benefit payments were and he deposited the checks in his girlfriend's bank account. When asked if he received unemployment benefits while he worked for Instacart, Employee said, "No." He injured his back when he worked in Texas, but could not remember the dates. Employee knew he sustained work injuries in Texas and Alaska but could not initially remember when his first work injury in Alaska occurred but then recalled he got a hernia and injured his back in 2011. When asked whether he had another injury, he said he did not remember; there were so many injuries, dates and doctors he could not remember. Employee said all his hernia injuries were work injuries. He broke his arm in Alaska when he fell while walking. When asked if a doctor ever recommended surgery for his low back that he did not pursue, Employee stated, "No." Before he worked for Employer, his doctor restricted him from lifting more than 100 pounds after his surgery. Employee told his doctors he was working for Instacart; none of them told him not to work for Instacart. He has a class A CDL driver's license. Steffens pushed him to get it; he took the test every day for one month before he was able to pass it. A proxy read him the questions on the exam. Employee's nephew researched employer

doctors with him, and he sent the February email; he can read the internet research in English if he has enough time. He uses the Instagram app in Spanish. Steffens and another person working for Employer laughed at the immigrant workers and said they were the "best donkey we have in the company." (Employee).

113) At hearing, Rob Mitchell testified he is the director of operations for Employer. No one assists non-English speakers with employment forms by reading the questions to them and the forms are only in English. It is also not their policy to fill out paperwork for employees. The purpose of the health questionnaire is to ensure the employee is physically capable of performing the work after a conditional employment offer is made. Responses on the questionnaire are relied upon to determine whether the employee is physically capable of performing the work. There are safety concerns because Employer is a household, goods and freight moving company and they move heavy things; if someone is not physically capable it will put the employee and co-workers in danger of injury. It is a safety screen. If Mitchell had known Employee had a prior hernia, back injury or ruptured or needed disc, or that a fusion was previously recommended which was not pursued, Employee would not been placed in the driver's position. He acknowledged if a doctor had released Employee to lift 75 pounds, he would have placed Employee in the driver position. Mitchell completed the response to the claim adjuster's letter on August 3, 2020. He did not recall if he interviewed Employee when Employer; hired him; Mitchell tries to interview perspective employees, but he is not always available. Steffens is operations manager for Employer's freight division and he performs interviews as well. Employee was required to complete paperwork as part his job with Employer and he never indicated he was unable to write or read English. Mitchell was not aware of any statements made by other staff persons calling immigrants "donkeys." Most employees working for Employer are immigrants; most are Filipino. (Mitchell).

114) On June 12, 2023, Employee filed supplemental affidavits of fees and costs. (Supplemental Affidavits of Fees and Costs, June 12, 2023).

115) On July 5, 2023, Employer objected to Employee's requested attorney fees and costs. (Employer Objections to Employee Submission for Attorney Fees and Costs, July 5, 2023).

116) On July 6, 2023, Employer filed and served Rush's deposition transcript. (Affidavit of Service, July 6, 2023).

PRINCIPLES OF LAW

AS 23.30.001. Legislative intent. It is the intent of the legislature that

> (1) this chapter be interpreted . . . to ensure . . . quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cos to . . . employers who are subject to the provisions of this chapter;
> . . . .
>
> (4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

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

> **AS 23.30.022. False statements by employee.** An employee who knowingly makes a false statement in writing as to the employee's physical condition in response to a medical inquiry, or in a medical examination, after a conditional offer of employment may not receive benefits under this chapter if
>
> (1) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
>
> (2) there was a causal connection between the false representation and the injury to the employee.

The Alaska Supreme Court in *Robinett v. Enserch Alaska Constr.*, 804 P.2d 725 (Alaska 1990), explained that AS 23.30.022 codifies the "Larson test" for analyzing employee responses to employer questionnaires. Professor Larson's workers' compensation treatise states:

> The following factors must be present before a false statement at the time of hiring will bar benefits: (1) The employee must have knowingly and willfully made a false representation as to his or her physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury. 5 Larson, *Larson's Workers' Compensation* §66.04, at 66-30, 31 (2017).

> **AS 23.30.108. Prehearings on discovery matters; objections to requests for release of information; sanctions for noncompliance**. . . .
>
> (b) . . . At a prehearing conducted by the board's designee, the board's designee has the authority to resolve disputes concerning the written authority. If the board or the board's designee orders delivery of the written authority and if the employee refuses to deliver it within 10 days after being ordered to do so, the employee's rights to benefits under this chapter are suspended until the written authority is delivered. During any period of suspension under this subsection, the employee's benefits under this chapter are forfeited unless the board, or the court determining an action brought for the recovery of damages under this chapter, determines that good cause existed for the refusal to provide the written authority.
>
> (c) At a prehearing on discovery matters conducted by the board's designee, the board's designee shall direct parties to sign releases or produce documents, or both, if the parties present releases or documents that are likely to lead to admissible evidence relative to an employee's injury. If a party refuses to comply with an order by the board's designee or the board concerning discovery matters, the board may impose appropriate sanctions in addition to any forfeiture of benefits, including dismissing the party's claim, petition, or defense. . . .

Where a party unreasonably refuses to provide information, AS 23.30.108(c) grants the Board "broad discretionary authority" to make orders assuring parties obtain relevant evidence necessary to litigate or resolve their claims. *Bathony v. State of Alaska DEC*, AWCB Dec. No. 98-0053 (March 18, 1998). Claim dismissal is provided for under AS 23.30.108(c) and AS 23.30.135 where an employee willfully obstructs discovery, although this sanction "is disfavored in all but the most egregious circumstances." *McKenzie v. Assets, Inc.*, AWCB Dec. No. 08-0109 (June 11, 2008). Willfulness is defined as "the conscious intent to impede discovery, and not mere delay, inability or good faith resistance." *Hughes v. Bobich,* 875 P.2d 749, 752 (Alaska 1994). Repeated noncompliance with Board orders is willful. *Brown v. Gakona Volunteer Fire Dep't*, AWCB Dec. No. 15-0143, (October 24, 2015). An employee willfully failed to comply with discovery where she "failed or refused to provide the releases [she was previously ordered to sign], without any legal justification or compelling excuse. . . ." *Vildosola v. Sitka Sound Seafoods,* AWCB Dec. No. 11-0005 (January 20, 2011).

The sanction of dismissal of an employee's claim cannot be upheld absent a reasonable exploration of "possible and meaningful alternatives to dismissal." *Hughes*, 875 P.2d at 753. Since a workers' compensation claim dismissal is "analogous to a dismissal of a civil action under Civil Rule

37(b)(3), the factors set forth in that subsection when deciding petitions to dismiss have occasionally been applied." *Mahon v. Newman*, AWCB Dec. No 13-0160 (December 5, 2013). Giving a party his day in court has long been favored. *Sandstrom & Sons, Inc. v. State of Alaska*, 843 P.2d 645, 647 (Alaska 1992).

> **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 finding "is binding for any review of the Board's factual findings." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2009).

> **AS 23.30.145. 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. When the board advises that a claim has not been controverted, but further advises that bona fide legal services have been rendered in respect to the claim, then the board shall direct the payment of the fees out of the compensation awarded. In determining the amount of fees the board shall take into consideration the nature, length, and complexity of the services performed, transportation charges, and the benefits resulting from the services to the compensation beneficiaries.
>
> (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 reasonable attorney fees. The award is in addition to the compensation or medical and related benefits ordered.

> **AS 23.30.250. Penalties for fraudulent or misleading acts; damages in civil actions.** (a) A person who (1) knowingly makes a false or misleading statement, representation, or submission related to a benefit under this chapter . . . is civilly liable to a person adversely affected by the conduct, is guilty of theft by deception

> as defined in AS 11.46.180, and may be punished as provided by AS 11.46.120 - 11.46.150.
>
> (b) If the board, after a hearing, finds that a person has obtained compensation, medical treatment, or another benefit provided under this chapter, or that a provider has received a payment, by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit, the board shall order that person to make full reimbursement of the cost of all benefits obtained. Upon entry of an order authorized under this subsection, the board shall also order that person to pay all reasonable costs and attorney fees incurred by the employer and the employer's carrier in obtaining an order under this section and in defending any claim made for benefits under this chapter.

Unocal v. DeNuptiis, 63 P.3d 272, 277 (Alaska 2003), affirmed the Superior Court's holding the appropriate standard of proof required to bar an employee's claim under AS 23.30.250 and to order benefits forfeiture is the "preponderance of the evidence" standard. *Municipality of Anchorage v. Devon*, 124 P.3d 424 (Alaska 2005), adopted the Board's test for fraud under AS 23.30.250(b). To prevail on a fraud claim an employer must show (1) the employee made statements or representations; (2) that were false or misleading; (3) that were made knowingly; and (4) that resulted in the employee obtaining benefits. *Devon*, 124 P.3d at 429.

Shehata v. Salvation Army, 225 P.3d 1106, 1114 (Alaska 2010) held employers are not required to prove all elements of fraud in pursuing reimbursement under AS 23.30.250(b). However, *Shehata* required "a causal link between a false statement or representation and benefits obtained by the employee. Subsection .250(b) states the board 'shall order reimbursement' when it finds a person has 'obtained compensation . . . by knowingly making a false or misleading statement or representation for the purpose of obtaining that benefit.' The plain language of the statute requires causation." *Shehata*, 225 P.3d at 1113. *Shehata* went on to say, "Read as a whole, the statute requires the false statement or representation be a causal factor in the employer's payment of workers' compensation benefits." *Id*. at 1115. When determining whether the false statement was a causal factor in the payment of benefits, *Shehata* required consideration of whether the false statement influenced the adjuster in paying benefits after the statement was made, whether the adjuster was deceived and, if not, whether the adjuster acted reasonably to investigate the false statement. *Id*. at 1118.

Concerning when a failure to disclose information constitutes a misrepresentation under 23.30.250(b), *Shehata* noted:

> The plain language of the statute does not authorize the board to order reimbursement based on silence, nondisclosure, or omissions: it requires a finding that a person made a "false or misleading statement or representation." The first element of the test in *Devon* is that the employee "made statements or representations." . . . The legislature's failure to include omissions or nondisclosure in the statutory language suggests that ordinarily an omission or nondisclosure could not serve as a basis for a reimbursement order under subsection .250(b). Nonetheless, we recognize that in the common law, silence can be a misrepresentation when a person has a duty to speak. We have also held that silence in the face of a statutory duty to disclose can "amount[ ] to the concealment of a material fact" for purposes of estoppel. . . .
>
> The parties agreed that no statute or regulation explicitly imposes on an employee the duty to inform the employer, the adjuster, or the board that he is working. The commission cited none. Neither the commission nor the Salvation Army pointed to anything in the record imposing such a duty. Nevertheless, at oral argument before us, the Salvation Army advocated finding an implicit, narrow duty to disclose employment when an employee is receiving TTD benefits. In the absence of a statute or regulation requiring an employee to tell the board, the adjuster, or his employer that he is working, we are reluctant to find a specific affirmative duty to disclose employment, even when an employee is receiving TTD benefits. . . . *(Id.* at 1116-17)(citations omitted).

> **8 AAC 45.050. Pleadings.** (a) A person may start a proceeding before the board by filing a written claim or petition.
>
> (b) Claims and petitions.
>
> . . . .
>
> (2) A request for action by the board other than by a claim must be by a petition that meets the requirements of (8) of this subsection. The board has a form that may be used to file a petition.
>
> . . . .
>
> (8) Except for a petition for a self-insurance certificate or an executive officer waiver, a petition must be signed by the petitioner or representative and state the names and addresses of all parties, the date of injury, and the general nature of the dispute between the parties. The petitioner must provide proof of service of the petition upon all parties. The board or its designee will return to the petitioner a petition which is not in accordance with this paragraph, and the board will not act on the petition. . . .

8 AAC 45.054. Discovery.

. . . .

(d) A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request.

8 AAC 45.120. Evidence.

. . . .

(e) Technical rules relating to evidence and witnesses do not apply in board proceedings, except as provided in this chapter. 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, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence, but it is not sufficient in itself to support a finding of fact unless it would be admissible over objection in civil actions. The rules of privilege apply to the same extent as in civil actions. Irrelevant or unduly repetitious evidence may be excluded on those grounds.

(f) Any document, including a compensation report, controversion notice, claim, application for adjustment of claim, request for a conference, affidavit of readiness for hearing, petition, answer, or a prehearing summary, that is served upon the parties, accompanied by proof of service, and that is in the board's possession 20 or more days before hearing, will, in the board's discretion, be relied upon by the board in reaching a decision unless a written request for an opportunity to cross-examine the document's author is filed with the board and served upon all parties at least 10 days before the hearing. . . .

Alaska Rules of Civil Procedure. Rule 37. Failure to Make Disclosures or Cooperate in Discovery: Sanctions.

. . .

(b) Failure to Comply With Order. . . .

(2) Sanctions by Court in which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regarding to the failure as are just, and among others the following:

. . . .

(3) Standard for Imposition of Sanctions. Prior to making an order . . . the court shall consider

> (A) the nature of the violation, including the willfulness of the conduct and the materiality of the information that the party failed to disclose;
>
> (B) the prejudice to the opposing party;
>
> (C) the relationship between the information the party failed to disclose and the proposed sanction;
>
> (D) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and
>
> (E) other factors deemed appropriate by the court or required by law . . . .

Dismissal as a sanction may be reversed for abuse of discretion where the Board fails to consider or explain why a sanction other than the end of litigation would not be adequate to protect the parties' interests. *McKenna v. Wintergreen, LLC*, AWCB Dec. No. 15-0125 (September 28, 2015). "While we have recognized that the trial court need not make detailed findings or examine every alternative remedy, we have held that litigation ending sanctions will not be upheld unless 'the record clearly indicate[s] a reasonable exploration of possible and meaningful alternatives to dismissal.'" *Hughes* 875 P.2d at 753.

Wausau Insurance Companies v. Van Biene, 847 P.2d 584, 588 (Alaska 1993), held the Board possesses authority to invoke equitable principles to prevent an employer from asserting statutory rights. It said equitable estoppel elements include "assertion of a position by word or conduct, reasonable reliance thereon by another party, and resulting prejudice." *Id*. *Van Biene* concluded, "A finder of fact could not reasonably find that a person in the position of Van Biene could reasonably interpret Wausau's conduct as amounting to an implied communication that no social security offset would be required. At best, such conduct subsequent to Gerke's conversation and letter indicates only neglect or an internal mistake." *Van Biene* relied significantly on the fact Wausau apprised Van Biene both orally and in writing that workers' compensation benefits would be offset in the event she received Social Security survivor's benefits, and no representations were made by Wausau to Van Biene that it would not seek to offset social security survivor's benefits in the event that she received such payments. *Id*. at 589.

If an employer asserts an affirmative defense to a claim, it has the burden to prove its defense. *Anchorage Roofing Co., Inc. v. Gonzales*, 507 P.2d 501 (Alaska 1973). A reply to an affirmative defense, also known as an "avoidance," will "entitle the plaintiff to, in effect, prove an affirmative defense to an affirmative defense." *Reno, M.D. v. Adventist Health Systems/Sun Belt, Inc*., 516 So. 2d 63, 64 (Fla. App. 1987). An "avoidance" is "characterized as an affirmative defense." *University of Alaska v. Simpson Building Supply Co*., 530 P.2d 1317, 1323 (Alaska 1975). One bearing the burden of proof must induce a belief in the factfinders' minds "that the asserted facts are probably true." *Saxton v. Harris*, 395 P.2d 71, 72 (Alaska 1964).

ANALYSIS

1) Was the oral order denying Employee's cross-petition to exclude evidence correct?

Employee contended Employer refused to provide him the November 20, 2020 "Application for Additional Payments." He contended he made two discovery requests on March 1, 2021 and April 5, 2021, and Employer failed to produce it until December 7, 2022, after Employer requested benefits be denied for false or misleading statements based upon the requested document, on November 14, 2022. He relies upon 8 AAC 45.054(d), AS 23.30.108(c) and Alaska Rule of Civil Procedure 37(b) to support his request for exclusion of the evidence, and sanctions. An oral order issued denying his cross-petition to exclude the "Application for Additional Payments."

8 AAC 45.054(d) states, "A party who refuses to release information after having been properly served with a request for discovery may not introduce at a hearing the evidence which is the subject of the discovery request." AS 23.30.108(c) grants authority to issue a discovery order and then to impose sanctions, including dismissing a petition or defense; and harsher sanctions than evidence exclusion, if a party "refuses" to comply with an order. *Bathony*. Dismissal is provided where a party willfully obstructs discovery, although this sanction "is disfavored in all but the most egregious circumstances." *McKenzie*. Willfulness is defined as "the conscious intent to impede discovery, and not mere delay, inability or good faith resistance." *Hughes*. Repeated noncompliance with orders is willful. *Brown*.

No order issued compelling Employer to provide the "Application for Additional Payments." *Vildosola*. Therefore, there is no basis for dismissing a petition or defense for willful refusal to comply with an order. Employee twice informally requested a complete copy of Employer's workers' compensation file and all claimant statements. However, he never asked for the "Application for Additional Benefits," and never petitioned to compel Employer to produce it. Employer did not deny having the document nor did it reject Employee's discovery requests or imply it would not rely upon the document. *Wausau*. Employer's attorney's office served Employee with the document soon after receipt. Thus, there is no evidence Employer willfully refused to comply with a discovery order, refused to release the document, consciously intended to impede Employee's discovery or represented that it would not rely upon the documents.

Furthermore, giving a party his day in court has long been favored. *Sandstrom.* The factors set forth under Civil Rule 37(b)(3) have occasionally been applied when deciding petitions to dismiss. *Mahon*. Employer did not provide the "Application for Additional Payments" until after it requested dismissal of Employee's claim under AS 23.30.250 in its November 14, 2022 petition, based upon his responses on it. The "Application for Additional Payments" is material because it provides one of the bases for Employer's request to dismiss Employee's claim. The "Application for Additional Payments" was served upon Employee and in the agency file more than 20 days before the hearing. 8 AAC 45.120(f). Employee had an opportunity to introduce evidence and provide argument, testify and cross-examine Employer's witnesses regarding the "Application for Additional Payments." 8 AAC 45.120(c). Employee testified the signature on the document was his but could not remember it because he was taking prescriptions for his work injury which affected his memory and mental abilities. Nonetheless, there is no evidence Employer's delay in providing the document affected his ability to provide evidence and argument that his inability to remember was not based on passage of time, but rather was based on another factor. Employee was not prejudiced by Employer's mere delay in providing it. *Wausau*. The oral order denying Employee's cross-petition to exclude the "Application for Additional Payments" was correct.

2) Should Employer's petition for discovery sanctions be granted?

Employer requested an order dismissing Employee's claim for his failure to timely provide an affidavit specifying when he received unemployment benefits. AS 23.30.108(c) grants authority

to impose sanctions, including dismissal of a claim, if an employee refuses to comply with an order. Dismissal is provided where a party willfully obstructs discovery, although this sanction "is disfavored in all but the most egregious circumstances." *McKenzie*. Willfulness is defined as "the conscious intent to impede discovery, and not mere delay, inability or good faith resistance." *Hughes*. Repeated noncompliance with orders is willful. *Brown*. At the November 15, 2022 prehearing conference, the designee ordered Employee to provide the affidavit by December 16, 2022. Employee testified he was in Mexico from December 2022 to January 2023. He provided the affidavit on January 19, 2023. One discovery order directed Employee to provide the affidavit; he did so about a month past the date he was ordered to do so, when he returned from Mexico. Therefore, Employee merely delayed in providing the affidavit; he did not willfully refuse to comply with the order. Employer's petition for claim dismissal or sanctions will be denied.

3) Should Employer's petition to deny benefits under AS 23.30.022 be granted?

Employee contended Employer's November 14, 2022 petition failed to state which false or misleading statements he was alleged to have made sufficient to bar benefits under AS 23.30.022 and AS 23.30.250. Employer contends the Act does not require its petition to specifically identify the false statements. The Act requires a petition to state "the general nature of the dispute between the parties." 8 AAC 45.050(a), (b)(2), (8). There is no requirement that the petition state with specificity the false statements Employer alleged were made. On April 29, 2022, November 14, 2022 and December 7, 2022, Employer filed and served the documents it intended to rely upon to prove the alleged false statements were made. Employee was provided the opportunity to introduce evidence and provide argument, testify and cross-examine Employer's witnesses regarding the arguments and evidence Employer relied upon for its petition. His due process rights were protected and he was provided an opportunity to be heard and for his arguments and evidence to be fairly considered. AS 23.30.001(4).

Post-Hire Health Questionnaires

Employer contends Employee knowingly and willfully made false representations on the post-hire health questionnaires. It contends he checked boxes indicating he had never had or been treated for a hernia, neck or back injury and ruptured intervertebral disc; he had never been advised to restrict his physical activities by a physician or medical care provider; and had never refused a

recommended surgical procedure. Employer contends he failed to disclose his prior hospitalizations for hernias and his back when asked.

False representations made in writing by an injured worker about the injured worker's physical condition in response to questions from an employer after a conditional offer of employment may bar benefits if (1) the injured worker knowingly and willfully made the false representations, (2) the employer relied upon them and the reliance was a substantial factor in hiring, and (3) there was a causal connection between the false representation and the injury. AS 23.30.022; *Robinett; Larson's*.

Employee contended he did not knowingly or willfully make any false representations on the post-health questionnaires. He testified Jim Steffens, the manager who interviewed him, filled out the health questionnaires for him both times and he signed them. Employee contended he did not make a false statement because the answers on the questionnaire were not his. Employee also testified he cannot read or write English, implying his level of understanding the forms was so lacking he did not know or understand what he signed. However, Employee also testified he takes care of his own paperwork and that he can read uncomplicated English. He also testified he wrote the answer on the May 2, 2017 post-hire health questionnaire to the hospitalization question where he only included his right arm non-work-related injury. Mitchell testified it is not their policy to fill out paperwork for employees. His testimony is consistent with Employee's testimony that he wrote the answer on the May 2, 2017 post-hire health questionnaire to the hospitalization question. Mitchell's testimony is more credible than Employee's testimony because Employee contradicted his testimony that Steffens filled out the form for him when he testified that he wrote the answer on the May 2, 2017 post-hire health questionnaire to the hospitalization question. AS 23.30.122; *Smith*; *Rogers & Babler*.

Employee demonstrated he could read and understand his written response when he was asked if he could read his written answer to the hospitalization question, and he physically pointed to his right arm and said they could see his surgery scar and they told him to put it on the form. He was also able to read a portion of the second page of the form slowly during his testimony. Therefore, Employee demonstrated during his testimony that he can read and write English sufficient to fill out a general health questionnaire. Employee filled out a similar medical history forms on

February 28, 2012 and on November 13, 2015, where he wrote "Herniation And Arm" under the section provided to list past surgeries. Employee's testimony that he cannot read English is not credible and his testimony stating he did not fill out the May 2, 2017 post-hire health questionnaire is not credible based upon his conflicting testimony. AS 23.30.122; *Smith*.

Employee testified he did not know what he was signing and that he did not understand the post-hire health questions. But there are additional instances of untruthful statements and inaccurate accounts in the record and Employee's testimony which, in addition to his own conflicting testimony, leads this decision to find him not credible.

For example, Employee testified he did not receive unemployment benefits while he worked for Instacart while the Instacart earnings statements he provided prove he did. He told Dr. Puziss the man in the surveillance video carrying a garbage can was not him but was his brother, while he testified he was the person in the surveillance videos. Employee failed to include his Texas back injuries and his 2015 work injury in his medical history to Dr. Puziss and his own treating physician, Dr. Waller. At hearing he denied he failed to pursue a low back surgery that a physician recommended while the medical record clearly shows Dr. Spencer recommended a fusion on August 10, 2012, which Employee did not pursue.

There are more inconsistent statements. On April 20, 2015, Employee attributed his need for a back fusion surgery to his Texas injuries and failed to inform the physician about his 2011 work injury. He testified he did not know what "N/A" meant on the Application for Additional Benefits. However, on February 28, 2012, Employee wrote "N/A" over three columns of medical issues on a medical history form he filled out to obtain chiropractic care. On April 25, 2012, during an EME with Dr. Chong for the 2011 work injury, Employee denied other back or work injuries. On February 21, 2017, he complained of continuing back pain and left leg numbness and told his physician he had to quit a housekeeper job due to back pain, but failed to inform his physician about the 2004 and 2009 work-related back injuries in Texas. Employee failed to report his back pain a short time later, on the May 2, 2017 post-hire health questionnaire.

His medical records show on December 29, 2020 and May 12, 2022, Employee represented he brought his wife to his appointments but at hearing he said he was divorced and lived with his girlfriend. Employee inaccurately testified he did not have the scar on his right arm when he signed the first post-hire health questionnaire on June 14, 2014, but the April 10, 2013 C&R settlement agreement shows it happened on September 2, 2012. He also failed to report his work with Instacart in his employment history to the reemployment specialist on January 21, 2021. Only two statements have remanded consistent throughout the medical record and in his testimony, (1) Employee's description of how the injured happened, and (2) that he would do what he needed to do no matter what to support his family as he testified to and showed by working more than one job at a time while experiencing back pain.

If this decision found Employee's testimony about how the post-hire health questionnaire was filled out credible, such finding would show he clearly understood the purpose of the form, especially the hospitalization question. Employee testified Steffens told him if he wanted to start work the next day, Steffens wanted to fill out the form for him and the forms were filled with "No" answers. He further testified he was asked whether he was hospitalized by Steffens and Kevin and his written answer to the question included only his right arm surgery and left out his back surgery and hernia surgeries. But Employee testified he had been hospitalized "so many times." He clearly understood the question was asking about past hospitalizations and that if he included the hospitalization for his back surgery and hernias on the form, as there were "so many" of them, he would likely not "start work tomorrow." Thus, even if the panel believed his testimony about Steffens, the panel would still find Employee clearly understood the purpose of the form, especially the hospitalization question, and he intentionally left out important facts about his back and hernia medical history so Employer would hire him to enable him to support his family. *Reno*. Therefore, Employer has proven Employee knowingly and willfully provided false representations on the post-hire questionnaire about his past back injuries and hernias. *Gonzales*; *Saxton*; *Rogers & Babler*.

Mitchell credibly testified that Employer relies on the answers provided on the post-hire health questionnaire to determine whether a worker is able to perform the job duties, to ensure safety of that worker and others, and had Employer known Employee's hernia and back medical history, it

would not have hired him. AS 23.30.122; *Smith*. Therefore, Employer as proven by a preponderance of the evidence it relied upon Employee's false representations on the post-hire health questionnaire and its reliance was a substantial factor in hiring him. AS 23.30.022; *Gonzales*; *Saxton*; *Robinett*; *Rogers & Babler*.

Employee made false representations on the post-hire health questionnaire about his prior hernias and back injuries, and he sustained bilateral hernias and a back injury on July 15, 2020, while moving a pallet loaded with paint while working for Employer. Employer has proven there was a causal connection between Employee's false representations on the post-hire health questionnaire and the work injury. AS 23.30.022; *Gonzales*; *Saxton*; *Robinett*; *Rogers & Babler*. Employer's petition to deny benefits under AS 23.30.022 will be granted and his February 19, 2021 claim will be barred.

4) Should Employer's petition to deny benefits under AS 23.30.250 be granted?

Post-Hire Health Questionnaires

To establish Employee's false statements on the post-hire health question constituted fraud under AS 23.30.250, Employer must prove Employee knowingly made those false statements for the purpose of obtaining workers' compensation benefits. *Shehata*. As determined above, Employee knowingly and intentionally made false statements on the post-hire health questionnaire by leaving out important facts about his back and hernia medical history so Employer would hire him, not so he could obtain workers' compensation benefits.. Employer presented no evidence Employee made false statements on the post-hire health questionnaire to obtain workers' compensation benefits. *Rogers & Babler.* Employer's petition under AS 23.30.250 will be denied.

Application for Additional Benefits

Employer contended Employee knowingly made false statements on his November 20, 2020 responses to the "Application for Additional Benefits" for the purpose of obtaining benefits which resulted in him obtaining benefits. While Employee had no affirmative duty to disclose Instacart employment or earnings, he was required to provide truthful statements to Employer in the November 20, 2020 responses on the "Application for Additional Benefits." *Shehata.*

Employee contended there is no evidence he filled out the "Application for Additional Benefits." He testified he did not remember the application because medications he took for the work injury affected his memory and mental ability. The medical records prove he was taking gabapentin and hydrocodone with acetaminophen. A listed common side effect of gabapentin is memory problems and a listed adverse reaction to hydrocodone with acetaminophen is mental clouding and mental performance impairment. However, there is no medical record showing Employee reported such issues to his physicians. During the time Employee was taking those prescribed medications, he was able to read Instacart orders on his device in Spanish, drive to stores, find and collect the items in Instacart orders, load them into his vehicle and drive to unfamiliar locations to deliver them. It is implausible that Employee was capable of successfully completing such complicated and prolonged activities but be unable to fill out a straightforward form. As determined above, Employee's testimony that he cannot read English is not credible. AS 23.30.122; *Smith*. Employee acknowledged the signature on the form looked like his and testified he fills out his own paperwork. Employer has proven Employee filled out the "Application for Additional Benefits." *Gonzales*; *Saxton*; *Rogers & Babler*.

On the "Application for Additional Benefits," Employee answered he had no other wages or income, he was not working and was not self-employed. Employee's Instacart earnings and Rush's investigative reports prove he was working for Instacart and made earnings. He also testified he worked for Instacart before the July 15, 2020 work injury and continued to do so afterward. Therefore, the information Employee provide don the "Application for Additional Benefits" was not true. Based upon his testimony, Employee knew the information he provided was untrue; he knowingly made a false representation. Employer has proven Employee knowingly made false statements on the "Application for Additional Benefits." AS 23.30.250; *Devon*; *Gonzales*; *Saxton*; *Rogers & Babler*.

Employer must also prove Employee made the November 20, 2020 false statement on the "Application for Additional Benefits" for the purpose of obtaining that benefit, and there is causal link between the false statement and the benefits obtained. AS 23.30.250; *Shehata*. Employer reported it paid Employee TTD benefits from July 18, 2020 through December 22, 2020. The

name of the document, "Application for Additional Benefits" and the explanation at the top of the form proves Employee knew the information sought on the form would be used to determine "payment of further compensation or benefits." Therefore, Employee made the false statements for the purpose of obtaining continuing TTD benefits. AS 23.30.250; *Shehata*; *Gonzales*; *Saxton*; *Rogers & Babler*.

Employer continued to pay disability benefits from November 20, 2020, the date Employee signed the "Application for Additional Benefits" through December 22, 2020. However, Employer also received the first investigative report from Michael Rush on November 20, 2020, which clearly showed Employee worked for Instacart on multiple dates. Employer acted reasonably when it continued surveillance of Employee and obtained a second investigative report on December 28, 2020, which again showed Employee working for Instacart. Therefore, Employer did not rely upon on Employee's November 20, 2020 statements which it knew were not true; instead, it properly investigated his statements. *Shehata*. Employer's continued TTD benefit payments until the controversion on December 30, 2020, based on Dr. Hofmeister's EME reports rather than Employee's work for Instacart, does not prove Employer relied upon Employee's November 20, 2020 false statements. Employer failed to prove Employee's November 20, 2020 false statement resulted in obtaining benefits. AS 23.30.250; *Shehata*; *Gonzales*; *Saxton*; *Rogers & Babler*. Its petition to bar benefits and request for reimbursement of costs and reasonable costs and attorney fees will be denied.

5) Is Employee entitled to interim attorney fees and costs?

This decision bars Employee's claim for false representations under AS 23.30.022. Therefore, Employee is not entitled to interim attorney fees and costs. AS 23.30.145.

CONCLUSIONS OF LAW

1) The oral order denying Employee's cross-petition to exclude evidence was correct.
2) Employer's petition for discovery sanctions will not be granted.
3) Employer's petition to deny benefits under AS 23.30.022 will be granted.
4) Employer's petition to deny benefits under AS 23.30.250 will be denied.

5) Employee is not entitled to interim attorney fees and costs.

ORDER

1) Employee's December 27, 2022 cross-petition requesting sanctions and exclusion of evidence is denied.

2) Employer's December 29, 2022 petition for discovery sanctions is denied.

3) Employer' November 14, 2022 petition to deny benefits under AS 23.30.022 is granted. Employee's February 19, 2021 claim is barred under AS 23.30.022 and he is entitled to no further benefits for his July 15, 2020 injury with Employer.

4) Employer's November 14, 2022 petition to deny benefits under AS 23.30.250 is denied.

5) Employee's request for interim attorney fees and costs is denied.

Dated in Anchorage, Alaska on July 27, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Kathryn Setzer, Designated Chair

/s/
Sara Faulkner, Member

/s/
Bronson Frye, Member

APPEAL PROCEDURES

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

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

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

RECONSIDERATION

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

MODIFICATION

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

CERTIFICATION

I hereby certify the foregoing is a full, true and correct copy of the Final Decision and Order in the matter of Emmanuel Bonilla, employee / claimant v. Golden North Van Lines, Inc., employer; Vanliner Insurance, insurer / defendants; Case No. 202008019; dated and filed in the Alaska Workers' Compensation Board's office in Anchorage, Alaska, and served on the parties by certified U.S. Mail, postage prepaid, on July 27, 2023.

/s/
Rachel Story, Office Assistant I