ALASKA WORKERS' COMPENSATION BOARD

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

RICHARD RANDOLPH SIERER, Employee, Claimant, v. TRI STAR, INC., Employer, and UMIALIK INSURANCE CO., Insurer, Defendants.	FINAL DECISION AND ORDER AWCB Case No. 202000418 AWCB Decision No. 23-0063 Filed with AWCB Fairbanks, Alaska on November 6, 2023

Richard Sierer's (Employee) January 2, 2020, May 20, 2020, and September 21, 2022 claims, September 1, 2022 petition seeking modification, and September 6, 2022 petition seeking a referral to the Division of Insurance, were heard in Fairbanks, Alaska on March 2, 2023, a date selected on January 26, 2023. A hearing request on September 26, 2022 gave rise to this hearing. Attorney Robert Bredesen appeared and represented Employee. Attorney Michael Budzinski appeared and represented Tri Star, Inc. and Umialik Insurance Co. (Employer). Witnesses included Employee and his friend, Michelle Cortez, who testified on Employee's behalf, and Jared Kirkham, M.D., who testified for Employer. The record closed at the conclusion of deliberations on April 12, 2023.

ISSUES

As a preliminary matter at hearing, Employee contended a medical document attached as an exhibit to Employer's hearing brief was subject to his request for cross-examination and he was not provided with an opportunity to cross-examine the document's author. He requested this decision and order address his *Smallwood* objection to the document, though he did not specifically request that the document be excluded from consideration by the panel.

Employer contends the physician who authored the document has retired and is no longer available for cross-examination, and further contends the document is "relatively secondary" to Employee's claim because the opinions expressed in the document were just a reiteration of the physician's previously expressed opinions, which were not the subject of a *Smallwood* objection, so it does not think consideration of the document is particularly significant.

1) **Should the document to which Employee objects be excluded from consideration by the panel?**

Employee expressly seeks an order on the compensability of his rib, low back, and left elbow injuries.

Employer contends it has only controverted Employee's left ulnar neuropathy and it has already paid benefits for his rib and low back injuries, which require no further medical treatment.

2) **Are Employee's rib, low back, and left elbow injuries compensable?**

Employee contends injections only provided temporary relief of his low back pain and his symptoms returned after Employer controverted disability compensation. He seeks payment of past medical bills and authorization for non-narcotic pain management treatment.

Employer contends the physical aspects of Employee's back injury have resolved and the second independent medical evaluator (SIME) and its medical evaluator have both opined the cause of Employee's persistent back pain are psychosocial factors, not the work injury, so his claim seeking additional back treatment should be denied.

3) **Is Employee entitled to medical and related transportation benefits for his low back?**

Employee contends the SIME physician found him medically stable one year after the work injury, so additional TTD should be awarded.

Employer contends its controversion was based on a release to work by Employee's own doctor, so no additional temporary total disability (TTD) should be awarded.

4) **Is Employee entitled to additional TTD for his low back injury?**

Employee contends the SIME physician assessed a seven percent permanent partial impairment (PPI) for his low back injury and he seeks an order for payment of this benefit.

Employer relies on the opinion of its medical evaluator, who opined Employee did not incur a low back PPI because of the work injury and it contends Employee's claim for this benefit should be denied.

5) **Is Employee entitled to a PPI benefit for his low back?**

Employee contends he fell off a ladder from a considerable height and landed on his left side. He urges the panel to use its common sense and rely on the SIME physician's causation opinion to find that the fall was the substantial cause of his need for left elbow medical treatment.

Employer acknowledges Employee fell from a considerable height and contends many different injuries could possibly have been caused by such a fall; however, the issue here is what injuries were probably caused by the fall. It contends an elbow contusion is different than ulnar neuropathy, and three months passed before Employee complained of elbow pain, and six months passed before he developed symptoms of ulnar neuropathy. Employer contends the panel should rely on the employer's medical evaluator (EME), who explains the difference between traumatic and non-traumatic ulnar neuropathy, and who explains why Employee's ulnar neuropathy was not caused by his fall.

6) **Is Employee entitled to medical and related transportation benefits for his left elbow?**

Employee contends he was initially found not eligible for reemployment benefits because of an erroneous medical opinion and the determination that he was not eligible for benefits should be modified because the SIME physician now opines that he has permanent work restrictions from his low back injury. He further contends that his petition is not time-barred because if this decision awards a low back PPI benefit, the time to seek modification will begin to run again.

Employer opposes modifying the determination because the EME opined that Employee does not have any permanent work restrictions that would prevent him from returning to work at his previously held occupations. It further contends that Employee's modification petition was untimely so it should be denied on that basis as well.

7) **Should the Reemployment Benefits Administrator (RBA) designee's determination that Employee is not eligible for reemployment benefits be modified?**

Employee explains he did not seek review of the RBA's determination because the EME's opinions were substantial evidence on which the RBA could base her decision, so he decided to pursue reemployment benefits through the SIME process, which was severely delayed due to the COVID-19 pandemic and the original SIME physician's repeated cancellations. He contends an injured worker should not bear the loss caused by a doctor's incorrect opinion and he seeks reemployment stipend for any week he was not entitled to TTD or periodic PPI payments.

Employer again relies on the EME's opinion that Employee does not have any permanent work restrictions that would prevent him from returning to work at his previously held occupations so Employee's claim for reemployment stipend should be denied.

8) **Is Employee entitled to reemployment stipend for any week he is not eligible for disability benefits or periodic PPI payments?**

Employee seeks an interest award on all late-paid benefits.

Employer contends no interest is due because no benefits were untimely paid.

9) Is Employee entitled to interest?

Employee seeks a late payment penalty for TTD on a couple of bases. He contends he is owed a penalty because Employer required him to produce evidence of his disability contrary to the compensability presumption. He also contends a penalty should be awarded based on Employer's "legally baseless" controversion while he was in the reemployment eligibility evaluation process. Employee cites a portion of AS 23.30.041(k) and contends it stands for the proposition that TTD can only be controverted on medical stability grounds when an employee is in the reemployment process, so he seeks a penalty on this basis as well.

Employer contends it paid TTD withing the statutory timelines, so no penalty is owed.

10) Is Employee entitled to late payment penalties?

At hearing, Employer requested a decision on Employee's September 6, 2022 request that it be referred to the Division of Insurance because of Dr. Silver's late-paid SIME records review invoice. It contends, following Dr. Silver's repeated COVID-19 cancellations, the parties agreed to seek an SIME with another physician. Employer contends the Division of Workers' Compensation (Division) sent Dr. Silver's invoice to its attorney's personal email address. Employer acknowledges the Division sent Dr. Silver's bill to its attorney more than once but contends the bill was never properly served on its Insurer through the "service portal." It contends no one monitors its attorney's personal email except its attorney and further contends the Division has modified its procedure because of this incident and now serves parties at their formal email service addresses, where there are people who "take care of those things." Employer contends, due to the significant email volume received by its attorney, there was a significant chance the Division's email would "get buried," which is what happened. It contends a late-payment penalty was paid to Dr. Silver and contends no referral to the Division of Insurance should be made because the invoice was not properly served. Employer contends the error was, in part, the Division's error, and absent formal service of the invoice, a referral should not be made.

Employee clarified he was seeking a 20 percent penalty under AS 23.30.070, instead of a late-payment penalty, for Dr. Silver's late-paid invoice; and he contended he thought the parties and the panel "already have enough on our plate" to pursue a referral to the Division of Insurance.

11) Should Employer be referred to the Division of Insurance for unfairly or frivolously controverting Dr. Silver's SIME records review fee?

Employee seeks a late injury reporting penalty on an SIME physician's late-paid invoice.

Employer acknowledges its delay in reporting Employee's injury but contends the bases of any such penalties would be of limited duration and could not be based on events following its reporting.

12) Should a penalty be assessed for Employer's failure to timely report the injury?

Employer contends an injured worker has an obligation to mitigate his disability and Employee failed to do so by not taking the property manager job with his stepfather in Anchorage. It contends, since Employee did not accept high paying work within his physical abilities, he should not be awarded TTD or vocational rehabilitation benefits.

Employee contends he tried to mitigate his disability by pursuing reemployment benefits so there should be no reduction in benefits to which he is otherwise entitled.

13) Did Employee fail to mitigate his disability?

Employer contends Employee exercised his one allowed change of physician when he began receiving pain management treatment from a new doctor in June 2020, so it should not be liable for treatment at any provider following this change, including Employee's later return to his original clinic and any fees associated with his surgeon.

Employee's position on this issue is unknown, but he is presumed to oppose an order relieving Employer of its liability for his medical costs.

14) **Should Employer be relieved of its obligation to provide Employee continuing medical care because he unlawfully changed physicians?**

Employer contends Employee received unemployment benefits, commencing with the benefit week ending on June 6, 2020 through the end of that year, and received benefits for 22 weeks in 2021, starting with the benefits week ending on January 2, 2021 through the week ending June 5, 2021, and contends it should not be ordered to pay TTD during any week in which Employee received benefits.

Employee contends he can receive TTD benefits if he pays back the unemployment benefits.

15) **Should Employee's TTD award be reduced for weeks in which he received unemployment benefits?**

Employee contends he was aided by the services of his attorney, and he seeks an award of both reasonable attorney fees and costs for work already performed and statutory minimum fees on future benefits.

Employer acknowledges that attorney fees may be awarded but it objects to numerous line-item entries on Employee's fee invoice and seeks reductions of any award on these bases.

16) **Is Employee entitled to attorney fees and costs?**

FINDINGS OF FACT

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

1) Employee's work history has primarily involved laborer and construction work, as well as some restaurant work. Occasionally, he worked undocumented jobs on a "cash basis," such as his instant job with Employer, Tri Star. Tri Star is the business name of the former restaurant "The Diner" on Illinois Street in Fairbanks, owned by George Stone. At the time of his injury, Employee was being paid $25 per hour, cash, for work being done at Stone's home and at the building housing The Diner. (Employee's Hearing Brief, February 24, 2023; Employer's Hearing Brief, February 24, 2023; Employee's dep., March 24, 2022; Employee).

2) On November 17, 2019, Employee was performing handyman work, installing lights outside The Diner. He was standing on a ladder, about 20 feet off the ground, drilling through the wall, when the ladder collapsed. Employee fell, landing on his left side. (Employee Report of Occupational Injury or Illness, December 12, 2019; Emergency Department Record, November 17, 2019).

3) At the hospital, Employee complained of left rib and left leg pain. Emergency Department (ED) records also noted a right upper extremity contusion and swelling and depict right elbow swelling. (Trauma Flow Sheet, November 17, 2019). Employee was diagnosed with acute left rib fracture, even though it was not visualized on x-rays, and an acute left femur contusion. He was prescribed Percocet and Flexeril and discharged. (ED Record, November 17, 2019). Employee's records also note a prior history of substance abuse disorder. (ED notes, November 17, 2019).

4) On November 23, 2019, Employee followed-up at the Tanana Valley Clinic (TVC), where x-rays confirmed a minimally displaced fracture of the 11th rib. Employee's complaints also included left lower back pain, left upper thigh numbness, headache, dizziness, nausea and vomiting. (Sheridan chart notes, November 23, 2019).

5) On December 12, 2019, Employee completed an injury report. (Employee Report of Occupational Injury or Illness, December 12, 2019).

6) On January 2, 2020, Employee claimed TTD and temporary partial disability (TPD) benefits, medical and related transportation costs, penalty for late paid compensation, penalty for late injury reporting, interest and attorney fees and costs. (Workers' Compensation Claim, January 2, 2020).

7) On January 9, 2020, Employee returned to TVC with complaints of intermittent left low back pain with no radiation. A muscle relaxer and Gabapentin were prescribed, and Employee was referred to physical therapy, which began the next day. (Ranft chart notes, January 9, 2020; physical therapy notes, January 10, 2020).

8) On January 10, 2020, Employer filed an electronic injury report. (First Report of Injury (FROI), January 10, 2020).

9) On January 28, 2020, Employee presented to TVC, complaining of low back pain and pain into his left leg, which was interpreted as sciatica. A lumbar spine magnetic resonance imaging (MRI) study was ordered, and osteopathic manipulative treatment (OMT) was given. (Capistrant

chart notes, January 28, 2020). That same day, Employer answered Employee's January 2, 2020 claim, denying liability for TTD benefits on the basis it had not been presented with any evidence Employee was disabled from work. (Employer's Answer, January 28, 2020).

10) On February 3, 2020, Employee returned to TVC with complaints of lower back pain and left leg numbness. OMT was provided. (Capistrant chart notes, February 3, 2020).

11) On February 5, 2020, Employee saw Eric Schneider, D.O., at TVC and described his work injuries. He indicated he suffered hematoma on his left thigh and left arm, broke three ribs, got a concussion and herniated a disc in his back. Dr. Schneider's chart notes state a "referral placed for primary care," and "Referrals Allopathic & Osteopathic Physicians: Family Medicine. Muramoto, Matt. Assume care." (Physician's Report, February 5, 2020).

12) On February 7, 2020, TVC referred Employee to David Witham, M.D., for evaluation and treatment of Employee's chronic left-sided low back pain. That same day, a lumbar spine MRI showed L4-5 left extraforaminal disc protrusion and annular fissure with possible L4 nerve impingement. (MRI report, February 7, 2020). Employee also reported that his left elbow was "really painful" while attending physical therapy. (Physical therapy notes, February 7, 2020).

13) On February 12, 2020, Employee saw David Witham, M.D., for an orthopedic evaluation. His complaints were left-sided low back pain and left leg paresthesia and weakness. Because Employee had not improved with physical therapy, Dr. Witham referred him for a trial epidural steroid injection. (Witham chart notes, February 12, 2020).

14) On February 13, 2020, Employee filed a medical summary containing records from the Fairbanks Memorial Hospital and TVC, evidencing his disability from the work injury. (Medical Summary, February 13, 2020).

15) On February 19, 2020, Peter Jiang, M.D., administered a left L4-L5 transforaminal epidural steroid injection. Dr. Jiang's physical examination included the cervical spine, where Employee's upper extremity reflexes and strength were normal. (Jiang chart notes, February 19, 2020). Employee also wrote about the origins of his back pain:

> I was working and a ladder collapsed under me. I fell. I broke a couple ribs, got a hematoma on my left leg and left arm and a concussion. After a couple of days[,] I noticed my back was hurting. Everything else has pretty much healed. But my back isn't getting better at all.

Employee's pain complaints included numbness; he completed a pain diagram and marked the left lumbar area, left leg, left shoulder blade, and left elbow. (Initial Patient Assessment, February 19, 2020).

16) On March 6, 2020, Employer paid Employee TTD benefits from November 17, 2019, through March 7, 2020. (Subsequent Report of Injury (SROI), March 11, 2020).

17) On March 10, 2020, Employee followed-up with Dr. Witham and reported his back, left thigh, and left hip pain had markedly improved since the epidural steroid injection with Dr. Jiang. Dr. Witham's wrote, "With his current symptoms, he believes he can return to his work as a cement installer. Typically, his work begins in April or May of the year." (Witham chart notes, March 10, 2020). That same day, Employer filed another electronic injury report. (FROI, March 10, 2020).

18) On March 11, 2020, the RBA designee found Employee met the criteria for a reemployment benefits eligibility evaluation and assigned a rehabilitation specialist to conduct the evaluation. (Charles letter, March 11, 2020).

19) On April 15, 2020, Employee's rehabilitation specialist identified job titles according to Employee's 10-year work history, including Construction Worker I, Cement Mason, Roofer, Construction Worker II, and a combination job at Friar Tuck's Hoagie House that included work as a Manager, Cook and Cleaner. (LaBrosse report, April 15, 2020).

20) On April 16, 2020, Employer controverted all benefits based on Employee's failure to sign and return releases. It also controverted TTD after March 10, 2020, based on Dr. Witham's March 10, 2020, release to work. (Controversion Notice, April 16, 2020).

21) On April 17, 2020, Employee returned to TVC complaining of continuing back pain. He reported the office administering his spinal injections and his physical therapy office had closed. Employee was sent home because he was suffering from viral symptoms that had only resolved 12 hours previous. However, a physical examination was completed. Employee's left elbow inspection and his left elbow range of motion were normal. (Stuart chart notes, April 17, 2020).

22) On April 23, 2020, Employee returned to Dr. Witham and reported his symptoms had markedly improved following the epidural steroid injection from Dr. Jiang, but they returned approximately one month after the injection, "although not as severe." A repeat injection was recommended, and additional physical therapy was prescribed. (Witham chart notes, April 23, 2020). On that same date, Employee's attorney wrote to Employee's rehabilitation specialist,

questioning the selection of the Roofer job description, which is listed as a medium duty job and requiring lifting of no more than 50 pounds. Instead, he urged the rehabilitation specialist to adopt the Roofer Helper job description instead because shingles can weigh up to 80 pounds. (Bredesen letter, April 23, 2020).

23) On April 27, 2020, Dr. Schneider predicted Employee would incur a ratable impairment greater than zero percent because of the work injury. He also predicted Employee would not have the permanent physical capacities to return to work at previously held jobs, including Construction Worker I, Cook, Roofer, Construction Worker II, Industrial Cleaner, and Cement Mason. (Schneider responses, April 27, 2020). Dr. Schneider also noted Employee was "starting to establish care with PA Stuart," and Employee "will keep his follow-up with PA Stuart as scheduled." (Schneider chart notes, April 27, 2020).

24) On May 7, 2020, Dr. Jiang administered another epidural steroid injection. He also completed a physical examination and Employee's upper extremity reflexes and strength were normal. (Jiang chart notes, February 19, 2020). Employee completed a pain diagram and indicated symptoms in his left lumbar spine, left leg, and from his left elbow down into his left hand. (Follow-Up Patient Assessment, May 7, 2020).

25) On May 11, 2020, Employer partially withdrew its April 16, 2020, controversion because it had received Employee's signed releases. (Partial Withdrawal of Controversion, May 11, 2020).

26) On May 13, 2020, the RBA's designee wrote Employee's rehabilitation specialist, urging him to consider job descriptions for Fast-Food Cook or Short Order Cook instead of Cook, and Kitchen Helper, instead of Industrial Cleaner, for Employee's combination job at Friar Tuck's Hoagie House. She also asked him to ascertain whether Employee's designated physician was Dr. Schneider or Dr. Witham. (Helgeson letter, May 13, 2020).

27) On May 15, 2020, in response to Employer's questions referencing his March 10, 2020 and April 23, 2020 chart notes, Dr. Witham clarified Employee was physically able to work as a cement installer as of March 10, 2020, and was released to work based on his April 23, 2020 examination findings. (Witham responses, May 15, 2020).

28) On May 19, 2020, Employee requested an opportunity to cross-examine Dr. Witham on his May 15, 2020 responses. (Employee's Request for Cross-Examination, May 19, 2020). On that same date, Employer also controverted TTD and reemployment benefits after March 10,

2020, based on Dr. Witham's March 10, 2020 release to work. (Controversion Notice, May 19, 2020).

29) On May 20, 2020, Employee amended his January 2, 2020 claim to include a finding of unfair or frivolous controversion. (Workers' Compensation Claim, May 20, 2020). His attorney also wrote to his rehabilitation specialist, clarifying that Dr. Schneider at TVC was Employee's designated physician, not Dr. Witham. (Bredesen letter, May 20, 2020). On that same date, Employer filed Dr. Witham's May 15, 2020 responses on a medical summary. (Medical Summary, May 19, 2020).

30) On May 21, 2020, Employee returned to Dr. Jiang for another epidural steroid injection and stated his low back pain was preventing him from lifting. He also requested a note for time off from work. Employee completed a pain diagram indicating symptoms in the left lumbar spine and from his left elbow down into his left hand. Dr. Jiang administered the injection and provided Employee with a note taking him off work until June 18, 2022. (Jiang chart notes, May 21, 2020; Jiang prescription note, May 21, 2020).

31) On June 6, 2020, Employee resumed physical therapy. (Physical therapy notes, June 6, 2020). He did not think his back was improving and it remained painful and sore. (Physical therapy notes, June 15, 2020). Employee was discharged from physical therapy on July 8, 2020 for non-compliance. (Discharge Summary, July 8, 2020).

32) On June 9, 2020, Employer controverted TTD and reemployment benefits after March 10, 2020, based on Dr. Witham's March 10, 2020 release to work. It also wrote, "All medical bills which have been received by the insurer for treatment related to the 11/17/19 work injury have been processed and paid under the terms of the Alaska Workers' Compensation Act." (Controversion Notice, June 9, 2020).

33) In June 2020, Employee began treating with Raymond Andreassen, D.O., in Delta Junction, Alaska. (Andreassen chart notes, June 16, 2020).

34) On June 16, 2020, Dr. Andreassen referred Employee to Algone Interventional Pain Clinic in Wasilla, Alaska. (Referral form, June 16, 2020; Andreassen chart notes, June 16, 2020).

35) On June 23, 2020, Employee returned to TVC with complaints of bilateral low back pain, sciatica, and elbow pain with numbness and tingling into his medial forearm and his fifth finger. OMT was provided for Employee's back pain and an MRI was ordered to evaluate his elbow pain. Tenderness in the left lumbar region was out of proportion for what Employee's provider

would have expected and Employee had some pain related anxiety. (Ribar chart notes, June 23, 2020).

36) On June 29, 2020, Employee's rehabilitation specialist completed his eligibility evaluation and changed the selected job descriptions for Employee's combination job at Friar Tuck's Hoagie House to include Short Order Cook and Kitchen Helper, as the RBA's designee had urged him to consider. He recommended Employee be found eligible based on Dr. Schneider's April 27, 2020 predictions. (Labrosse report, June 29, 2020).

37) On July 8, 2020, Jared Kirkham, M.D., a physiatrist, evaluated Employee on Employer's behalf. Employee's chief complaints that day were left elbow pain, left small finger numbness, low back pain, and left leg numbness. He also reported a history of opioid dependance in remission. Dr. Kirkham diagnosed: 1) lumbar sprain/strain injury with non-verifiable radicular complaints in the left leg, substantially caused by the November 17, 2019 work injury; 2) left 11th rib fracture, substantially caused by the work injury; 3) left thigh contusion, substantially caused by the work injury; 4) left elbow contusion, substantially related to the work injury; 5) possible left ulnar neuropathy based on left medial forearm and left fifth finger numbness, not substantially caused by the work injury because of the delay in symptom onset; 6) history of opioid dependance in remission, unrelated to the work injury; and 7) chronic pain syndrome with hyperalgesia, disability behavior, and pain catastrophizing, caused by psychosocial factors and not substantially caused by the work injury. He opined Employee's lumbar spine injury had reached medical stability by March 10, 2020, when Employee reported to Dr. Witham that he was markedly improved and able to return to work as a cement installer. Dr. Kirkham further explained that Employee's lumbar spine symptoms were much more diffuse than what he would expect from a disc protrusion affecting a single nerve root and there were no neurological deficits on examination that clearly correlated with the MRI findings. Instead, he thought "a significant component of chronic pain syndrome" was exacerbating and perpetuating Employee's pain symptomology and disability. Dr. Kirkham opined Employee had not incurred any lumbar spine PPI, and he also thought Employee's rib fracture, thigh contusion and elbow contusion were all medically stable with no residual PPI. He opined a left elbow MRI would be reasonable to assess the integrity of the left triceps tendon and to provide Employee reassurance and reduce his anxiety. He also recommended electromyography (EMG) studies to evaluate Employee's possible left ulnar neuropathy. Dr. Kirkham thought Employee should explore psychosocial

treatments to reduce his anxiety, fear of movement, and his self-imposed disability. He opined Employee was physically capable of returning to his previously held occupations, including heavy manual labor jobs, and wrote: "[Employee] is limited by subjective pain as well as multiple psychosocial factors, including anxiety and fear of reinjury. However, these factors are related to tolerance and not physical capacity." Dr. Kirkham opined Employee's preexisting chronic pain syndrome and psychosocial factors were exacerbating and enhancing Employee's pain symptomology. He concluded:

> [Employee] would benefit from a multidisciplinary pain management program to address the psychosocial aspects of his pain and disability, which are the most impairing aspects of his presentation. The substantial cause of his need for treatment is not the work injury from November 17, 2019. If these issues were addressed and he remained with symptoms that more specifically correlates with the left L4-5 extraforaminal disc protrusion, then it may be possible in the future that he would benefit from further evaluation with an orthopedic spine surgeon. At the current time, however, his psychosocial factors are overwhelmingly obscuring his presentation, and I am concerned that further interventional procedures or interventional treatments, including the potential surgery, would actually worsen his condition rather than improve his condition.

If Employee were Dr. Kirkham's patient, he would discuss potential treatment at the Rehabilitation Institute of Washington or an online pain management program such as the Reboot Online program. (Kirkham report, July 8, 2020) (underscore in original).

38) A July 13, 2020 left elbow MRI showed a mildly increased signal in the ulnar nerve immediately proximal to the cubital tunnel, as may be seen with cubital tunnel syndrome. (MRI report, July 13, 2020).

39) On July 17, 2020, Employee returned to TVC for chronic left-sided low back pain with left-sided sciatica and was referred to John Lopez, M.D., a neurosurgeon, for evaluation and treatment. Employee also had left elbow pain with some pinky numbness, but no tingling, which he related to his work injury. (Capistrant chart notes, July 17, 2020). He was provided with a note taking him off work until he was seen and cleared to work by Dr. Lopez. (Capistrant note, July 17, 2020).

40) On August 5, 2020, the RBA's designee found Employee not eligible for reemployment benefits based on Dr. Kirkham's July 8, 2020 opinions. (Helgeson letter, August 5, 2020).

41) On August 12, 2020, Employer controverted TTD, PPI and reemployment benefits based on Dr. Kirkham's July 8, 2020 report. (Controversion Notice, August 12, 2020).

42) On August 18, 2020, Employee had a telephone consultation with Dr. Lopez's office. His chief complaints were left lower back pain and left small and ring finger numbness, which he related to his work injury. A left arm nerve conduction study and a low back vertebral motion analysis were ordered. (Priebe chart notes, August 18, 2020). On that same date, Employee also underwent a trigger point injection. (Priebe chart notes, August 18, 2020).

43) On August 21, 2020, an electrodiagnostic study showed Employee's left ulnar nerve had a mild conduction deficit across the elbow for the motor test, and a moderate conduction deficit across the elbow for the sensory test. The results were interpreted to show left cubital tunnel syndrome. (Electrodiagnostic study report, August 21, 2020).

44) On October 20, 2020, Employee returned to Dr. Andreassen, seeking treatment for left elbow, and left lower back pain that he related to the work injury. He reported taking non-prescribed oxycodone "off the street," which decreased his pain to "3 out of 10," and allowed him to "run errands and do things." Employee had an upcoming appointment at Algone Pain Clinic on December 2, 2022 but wanted "help with his pain for the time being." Dr. Andreassen prescribed amitriptyline, duloxetine, oxycodone and Narcan. (Andreassen chart notes, October 20, 2020). He completed a Physician's Report indicating Employee was not medically stable, not released to work and his condition was work related "By Hx." (Physician's Report, October 20, 2020).

45) On October 26, 2020, Employee petitioned for an SIME. (Petition, October 26, 2020).

46) On November 19, 2020, Employee had a telemedicine appointment with Dr. Andreassen, who renewed Employee's Oxycodone prescription for his "workman's comp back injury," and prescribed promethazine cough syrup with codeine for nightly cough. (Andreassen chart notes, November 19, 2020).

47) On November 30, 2020, the parties stipulated to undertake an SIME. (Prehearing Conference Summary, November 30, 2020).

48) On January 5, 2021, Employee had a telemedicine appointment with Dr. Andreassen and requested refill of his Oxycodone prescription for pain management. Dr. Andreassen renewed Employee's prescriptions for Oxycodone and promethazine cough syrup with codeine. He also

instructed Employee that he "needs to be moving on for chronic pain [management]." (Andreassen chart notes, January 5, 2021).

49) On January 14, 2021, Employee returned to Dr. Lopez's office and reported the lumbar trigger points injection had "actually helped quite a bit." On examination, Employee had a tender, palpable knot on the distal end of the left paraspinal muscle. Palpation reproduced Employee's pain. Another trigger point injection was administered. (Priebe chart notes, January 14, 2021).

50) On January 26, 2021, Employee had a telemedicine appointment with Dr. Andreassen because he was requesting early refills of Oxycodone and promethazine cough syrup with codeine. Dr. Andreassen noted:

> Patient has used almost twice the amount of medicine per day that he was authorized. He has been snow machine [sic] and doing other things with his granddaughter that he has never seen before who is [sic] come to Alaska from Virginia. He has a ticket to go to Virginia to visit for 2 weeks and then come back. His back is hurting too much and he cannot do anything with his granddaughters. This is the story he gives.

Although Dr. Andreassen thought Employee's behavior was "not acceptable," he prescribed additional medication to last until Employee's next appointment, when he would "readdress how this is working." (Andreassen chart notes, January 26, 2021).

51) On February 4, 2021, Employee had a telemedicine appointment with Dr. Andreassen and stated he was going on a three-week vacation with family to Virginia and needed a refill on his cough and pain medications. Dr. Andreassen adjusted Employee's doses and renewed the prescriptions for Oxycodone and promethazine cough syrup with codeine. (Andreassen chart notes, February 4, 2021).

52) On March 8, 2021, Dr. Andreassen notified Employee he would not be prescribing any form of controlled medication, and he referred Employee to a pain management clinic. (Andreassen chart notes, March 8, 2021; Physician's Report, March 8, 2021).

53) On March 25, 2021, Employee was seen at AA Pain Clinic for left lower back, left hip and left elbow pain complaints, and signed a pain contract. A left sacroiliac injection joint injection was recommended, and a 30-day supply of Oxycodone prescribed. (Lonser chart notes, March 25, 2021).

54) On April 26, 2021, Employee had a follow-up appointment with AA Pain Clinic via telemedicine. It was noted Employee had been contacted to schedule the left sacroiliac joint injection but declined to schedule it. Employee was notified that declining to schedule the injection was contrary to the agreed upon treatment plan and "he will receive a strike" for failure to complete the procedure prior to that appointment. Employee was prescribed a 30-day supply of Oxycodone. (Lonser chart notes, April 26, 2021).

55) On May 18, 2021, Employee underwent a left sacroiliac joint injection and was prescribed a 30-day supply of Oxycodone. (Lonser chart notes, May 18, 2021).

56) On June 16, 2021, Employee was seen at AA Pain Clinic via telemedicine. His urine analysis (UA) was positive for buprenorphine, methamphetamine, and fentanyl. Employee denied using these drugs and was advised, if this happened again, he would not be prescribed opioids. He was prescribed a 30-day supply of Oxycodone. (Lonser chart notes, June 16, 2021).

57) On July 8, 2021, an SIME was scheduled with David Silver, M.D. (Kokrine letter, July 8, 2021). The evaluation was subsequently rescheduled three times due to Dr. Silver's COVID-19 concerns, then the parties agreed to an SIME with either George Chovanes, M.D., or Bruce McCormick, M.D., even though Dr. Silver had completed his records review. (Byers, Kokrine, Bredesen, Budzinski emails, November 17, 2021). An SIME was ultimately scheduled with Dr. McCormick. (Kokrine letter, January 20, 2022).

58) On July 20, 2021, Employee underwent a urine drug screen (UDS) and was later advised AA Pain Clinic would no longer provide him with controlled medication due to illicit substance use. Employee initially denied using illicit substances, but then admitted to buying Oxycodone off the street. (Lonser chart notes, July 20, 2021; Smith chart notes, August 18, 2021).

59) On September 30, 2021, Employee was evaluated at the Medical Group of Alaska for lower back pain on referral from Dr. Andreassen. A controlled substances agreement was signed, and it was noted that Employee's records from AA Spine and Pain showed he had been discharged from that practice "due to multiple abberrancies [sic]." (Grissom chart notes, September 30, 2021). Employee returned to the Medical Group of Alaska at least two more times, but the chart notes appear incomplete, and it is not clear what treatment was administered. (*Id*.; Perino chart notes, October 28, 2021; December 9, 2021; observations).

60) Following his discharge from AA Spine and Pain, Employee treated for a period with Algone Pain Clinic. (Employee).

61) On January 26, 2022, Dr. Silver prepared an invoice for reviewing records prior to the change of SIME physician. (Invoice for Professional Services, January 26, 2022).

62) On March 24, 2022, Employer deposed Employee, who testified regarding his work history, earnings, collecting unemployment benefits, his current symptoms, and his subjective capacity to perform work at his previously held occupations. He also described his fall from the ladder. Mr. Stone had agreed to hold the bottom of the ladder but then went inside The Diner at some point prior to Employee falling. Subsequently, Mr. Stone texted and called Employee. Employee described Mr. Stone's texts:

> I was, like - - I broke my ribs, so I was, like, in bed and stuff, but he kept sending me texts saying he was going to give me money to take care of it. . . . He said he was going to give me money to take of all my bills and stuff. But he sent me texts like that afterwards.

Employee saw Mr. Stone at the grocery store, and they discussed $1,600 in wages that Mr. Stone still owed him. Mr. Stone sent Employee $400 via Western Union, but never paid Employee his wages. Employee's stepdad owns buildings in Anchorage and Juneau, and he told Employee he could move to Anchorage to work as a property manager. Employee thinks he collected unemployment benefits during the summer of 2020, but could not remember for how long. Medicaid has also paid for some of his prescription costs. Employee identified Dr. Schneider at Tanana Valley Clinic as his "main" doctor. He has been seeing Dr. Schneider for 10-15 years. (Employee dep., March 24, 2022).

63) In a response to an informal discovery request from Employer inquiring whether Employee collected unemployment insurance benefits after the work injury, Employee wrote: "Yes, after you controverted my benefits, I applied and was awarded benefits. I am receiving $698.00 per week, with $279.20 withheld for child support." (Employee's Informal Discovery Response, undated). He also provided documents showing he received unemployment benefits for the weeks ending June 6, 2020, June 13, 2020 and December 26, 2020, as well as May 31, 2021 determination showing he had been paid 22 weeks of benefits, the maximum potential benefits for which he was eligible. The determination also states, "Starting with the week ending on Jan. 2, 2021, if you are eligible for at least $1 of your underlying unemployment benefit amount for any week of unemployment, you will also receive a $300 supplemental payment from the Federal Pandemic Unemployment Compensation (FPUC) program." (Unemployment Insurance

notices, June 9, 2020; June 15, 2020; December 30, 2020; Monetary Determination, May 31, 2021).

64) On March 28, 2022, Bruce McCormick, M.D., performed an SIME. He diagnosed 1) left T11 rib fracture due to the fall at work; 2) lumbar contusion and aggravation of lumbar disc disease with axial low back pain and no radiculopathy due to the fall at work; 3) ulnar neuropathy, possibly, but not probably, related to the fall at work due to a six month delay in symptom onset and the lack of contemporaneous documentation of an elbow injury; and 4) preexisting chronic pain and narcotic dependance. Dr. McCormick opined Employee likely had preexisting degenerative changes in his lower back and the fall at work caused a permanent aggravation of those changes. He thought Employee was still disabled from heavy labor and was limited to medium and light duty work. Employee could only lift 30 pounds occasionally with no repeated bending or stooping. Dr. McCormick observed Employee was on 68 morphine mg equivalents, which was contributing to Employee being "non-workable," and recommended Employee wean off narcotics. He opined Employee could do many, if not the majority, of handyman tasks, and could work as a Kitchen Helper when off narcotics. On physical examination, Dr. McCormick also observed Employee could walk on his toes, heels, tandem walk, and reverse tandem. He could hop on his right and left legs, squat all the way down and stand up, get on and off the exam table, flip supine to prone on the exam table with fluid movements. Dr. McCormick later commented, "Employee moves well on examination and his pain and disability far exceed the objective findings of injury on [the] MRI," and remarked, "There are disc protrusions[,] but they are not severe and commonly seen in middle aged adults capable of doing labor." He also thought psychosocial factors may be impeding Employee's recovery and pointed out, "His daughter has cancer[,] and his wife has been away [for] 9 months." Dr. McCormick concluded Employee was medically stable in November 2020 because that is the length of time to heal a disc protrusion not treated with surgery, and Employee could have resumed moderate labor by January 2021. Employee also incurred a seven percent whole person PPI with aggravation of his lumbar disc disease, according to Dr. McCormick. Regarding treatment recommendations for any diagnosed condition, his sole recommendation was, "Stop the narcotics." Dr. McCormick opined all medical treatment for Employee's injuries had been reasonable and necessary except the use of narcotics. (McCormick report, March 28, 2022).

65) On August 1, 2022, Employee deposed Dr. McCormick, who changed his left elbow causation opinion when he was shown the February 7, 2020, physical therapy notes, which documented Employee complaining of a "really painful" elbow. He stated, "I would accept the left-elbow injury as part of it" because the notes put Employee's elbow complaints closer in time to the injury. Treatment options would include ulnar nerve decompression surgery, which is not as successful as carpal tunnel surgery, so Dr. McCormick would expect Employee to have some residual atrophy and some residual loss of grip strength in his left hand, but if a doctor wanted to perform ulnar nerve surgery, Dr. McCormick saw no reason why the surgery was not related to work. He later clarified, because Employee's ulnar neuropathy was not getting any worse, and because Employee already had atrophy in the ulnar nerve distribution, he thought Employee had "plateaued" from the work injury and stated, "I'm not so sure surgery would help [Employee] anyways." Possible treatment for Employee's back could include a six-to-eight-week "functional restoration program," but Dr. McCormick did not think Employee was a candidate for standard surgery like a discectomy or fusion, which he thought would "set [Employee] on a very bad path." In the Bay Area of California, functional restoration programs include trying different modalities, such as stretching, acupuncture, chiropractic, and cognitive behavioral therapy. They include working with physical therapists and psychologists. When asked to weigh Employee's low back injury and his narcotic use in terms of the need for the functional restoration program, Dr. McCormick explained, "Well, low back injury was the cause. I mean, it's why he ended up on narcotics." He then explained, "The functional restoration program is to get him off narcotics and, you know, improve his function. [Employee will] probably always have back pain, but he could be more - - a more functional individual." Dr. McCormick knows a physiatrist in the East Bay Area, named Dr. Feinberg, who runs a functional restoration program. His work restrictions for Employee's low back were consistent with his SIME report, and work restrictions for Employee's ulnar neuropathy would include no repetitive gripping or "power grasp" with the left hand. Dr. McCormick opined Employee's narcotics use suppressed his ability to work and Employee was totally disabled for that reason. If Employee weaned off narcotics, he could perform light sedentary work. Dr. McCormick also modified his opinion from his report on Employee's physical capacities. He now thought Employee's ability to perform medium duty work was "questionable" due to strength level classifications and lifting requirements for jobs Employee previously held. However, Dr. McCormick did think Employee

could probably perform his job at Friar Tuck's Hoagie House, which involved 20 percent Restaurant Manager work, 40 percent Short Order Cook work, and 40 percent Kitchen Helper work. He arrived at the November 2020 medical stability date for Employee's back injury because most back injuries that do not require surgery are medically stable within one year, then added, "It's only after that point at a later date that he started the narcotic treatment." Dr. McCormick did not think Employee's radiograph findings were severe enough to warrant surgery. He did not think Employee could perform the jobs of Cement Mason, Industrial Cleaner, Construction Worker, Cook, Roofer, Handyman and Kitchen Helper, but Employee "probably" could perform the job of Short Order Cook, explaining that "ulnar neuropathy is more of a nuisance than completely disabling and it's in his nondominant arm." (McCormick dep., August 1, 2022).

66) On August 22, 2022, Dr. McCormick issued an addendum SIME report that assigned Employee a three percent whole person impairment for his ulnar neuropathy. (McCormick addendum, August 22, 2022).

67) On September 1, 2022, Employee sought modification of the RBA designee's determination he was not eligible for reemployment benefits. (Employee's Petition, September 1, 2022).

68) On September 2, 2022, Dr. Silver filed a workers' compensation claim seeking payment for reviewing medical records prior to the change of SIME physician. His representative contended she sent Employer Dr. Silver's invoice, and contacted it eight times subsequently to request payment, but the invoice went unpaid. (Workers' Compensation Claim, September 2, 2022).

69) On September 6, 2022, Employee purported to "join" Dr. Silver's September 2, 2022 claim and requested a late payment penalty, a finding of unfair or frivolous controversion, and a referral to the Division of Insurance. (Employee's Petition, September 6, 2022).

70) On September 13, 2022, in response to Employer's inquiries regarding Employee's treating physician, Employee's attorney stated TVC referred Employee "several months ago" to Alaska Health Advocates, who in turn referred him to Dr. Tamai for an elbow consultation. (Bredesen email, September 13, 2022).

71) At a September 16, 2022, prehearing conference, Employer's attorney said his client had paid Dr. Silver's bill and a late payment penalty. Dr. Silver's representative agreed to withdraw

his claim upon confirming the payment. (Prehearing Conference Summary, September 16, 2022).

72) On September 20, 2022, after reviewing additional medical records, including Employee's left elbow MRI and electrodiagnostic findings, Dr. Kirkham issued an addendum EME report. References to left elbow pain in the February 7, 2020, physical therapy notes did not cause him to change his previous opinion on left elbow causation because he would expect mention of elbow pain and left ulnar paresthesia "sometime before the three-month mark post injury." He wrote:

> Overall, considering there is no mention of left elbow pain or left ulnar nerve paresthesias [sic] until nearly three months post-injury, considering the rather subtle findings on electrodiagnostic testing, and considering the psychosocial factors mentioned in my [July 8, 2020 EME report], I think it unlikely that [Employee] injured his left ulnar nerve from the injury on November 17, 2019.

Dr. Kirkham, citing medical literature, then explained cubital tunnel syndrome is a relatively common condition present in five percent of the general population. Again, citing medical literature, he opined the causes of Employee's ulnar neuropathy is probably a combination of age and idiopathic factors. (Kirkham addendum, September 20, 2022).

73) On September 21, 2022, Employee amended his January 2, 2020 claim to include PPI "in light of the SIME ratings." (Workers' Compensation Claim, September 21, 2022). On that same date, Employer answered Employee's September 1, 2022 petition seeking modification of the RBA designee's determination, contending his petition was untimely filed. (Employer's Answer, September 21, 2022).

74) On September 26, 2022, Employer answered Dr. Silver's September 2, 2022 claim, contending it had paid the bill, so his claim was moot. (Employer's Answer, September 26, 2022).

75) On September 29, 2022, Employer controverted all benefits related to left elbow ulnar neuropathy based on Dr. Kirkham's September 20, 2022 addendum report. (Controversion Notice, September 29, 2022).

76) On October 6, 2022, Employee sought to compel additional discovery regarding payment of Dr. Silver's invoice. (Employee's Petition, October 6, 2022).

77) On October 11, 2022, Employer again controverted all benefits related to left elbow ulnar neuropathy based on Dr. Kirkham's September 20, 2022 addendum report. (Controversion Notice, October 11, 2022).

78) On October 17, 2022, Dr. Silver withdrew his claim seeking his SIME records review fee. (Byer email, October 17, 2022).

79) On October 25, 2022, after reviewing updated medical records, including Dr. McCormick's March 28, 2022 SIME report, and his August 1, 2022 deposition transcript, Dr. Kirkham again evaluated Employee on Employer's behalf. Dr. Kirkham noted, although the records show a surgical referral to Dr. Lopez, they did not show Employee ever saw Dr. Lopez. However, Employee reported he did see Dr. Lopez, and was offered surgery, but stated, "I didn't want to do back surgery." Employee's current complaints included ongoing left posterior elbow pain. He also reported left medial forearm paresthesia and left small finger numbness, as well as a "sharp, shooting pain" at his posterior elbow when he rests his left elbow on a hard surface. Employee described left-sided low back pain but denied any radicular complaints. Overall, Employee thought his left elbow pain and his left forearm and hand paresthesia were worsening over time. He also reported no improvement in his low back pain since the November 17, 2019 work injury. Dr. Kirkham opined Employee's left L4-5 foraminal disc protrusion had resolved because Employee no longer had any radicular complaints in his left leg. He pointed out Employee never had consistent radicular complaints in an L4 distribution and there were no neurological defects on exam in the medical records or during either of his evaluations. Instead, since Employee's chronic low back pain was "out of proportion to objective findings," Dr. Kirkham opined Employee's chronic low back pain complaints were substantially caused by psychosocial factors. Citing medical literature, he wrote:

> According to the medical literature, persistent pain after [a] traumatic event such as a fall has very little to do with any residual tissue damage and instead is primarily due to psychosocial factors, including the individual's emotional reaction to the event, expectation of harm, anxiety, perseveration on their symptoms, fear avoidance, catastrophizing, and passive coping style. (Citation omitted).
>
> The physiologic structure of [Employee's] low back is essentially normal for age, and the very small disc protrusion seen on the MRI is not only no longer causing radicular symptoms but is also commonly found in asymptomatic individuals without any pain or disability. (Citation omitted). The presence of disc

> degeneration and other chronic findings does not predict pain, disability, or clinical symptoms. (Citation omitted).
>
> I agree with Dr. McCormick that [Employee's] degree of pain and disability "far exceed the objective findings of injury on MRI." I also agree with Dr. McCormick that, "There are disc protrusions . . . but they are not severe and commonly seen in middle-aged adults capable of doing labor." Finally, I agree with Dr. McCormick that, "There may be psychosocial factors impeding recovery."

Dr. Kirkham did not see any objective reason why Employee would not be able to work a heavy manual labor job and opined, "He is primarily self-limited." Dr. Kirkham did not think Employee's left ulnar neuropathy was caused by the work injury because the medical records do not mention elbow pain until nearly three months after the work injury, and because numbness and tingling along the medial forearm and fifth finger were not mentioned until more than six months after the work injury. If Employee had injured his ulnar nerve, he would have expected the symptoms to manifest "nearly immediately after the injury and certainly no greater than several days after the injury." Dr. Kirkham explained the cause of ulnar neuropathy is typically idiopathic, meaning its exact cause is unknown, and according to medical literature, the risk increases with age, so the cause of Employee's ulnar neuropathy is a combination of age and idiopathic factors. He also thought there was a "[p]rofound psychosocial influence on Employee's degree of pain and his subjective disability." He opined Employee "perseverates on his pain" and pointed out there were several Waddell's signs on exam, including sensitivity to light superficial palpation, "ratchety" breakaway-type weakness in the left upper and left lower extremities, and pain with *en bloc* rotation. Dr. Kirkham saw evidence of disability behavior with Employee not attempting to return to work or enjoyable activities. He also thought Employee was dealing with many stressful events in his life and pointed to Dr. McCormick's March 28, 2022 SIME report, which noted Employee's "daughter has cancer, and his wife has been away for nine months." Dr. Kirkham further diagnosed documented aberrant behavior surrounding opioid use and a history of opioid dependance in remission, as well as a possible history of chronic pain from a chart note. Dr. Kirkham opined Employee had incurred no PPI for his lumbar spine injury and stated that Employee could perform all jobs identified in Employee's eligibility evaluation, including Kitchen Helper, Short Order Cook, Fast Food Cook, Cement Mason, Industrial Cleaner, Construction Worker I, Construction Worker II, and Roofer. He concluded, all injuries from November 17, 2019 had resolved with no further need for medical

treatment. However, without regard to causation, Dr. Kirkham recommended that Employee's care be managed by a physical medicine and rehabilitation specialist as well as an addiction medicine specialist. Specifically, he thought Employee would need a multidisciplinary pain management program, as well as a multidisciplinary addiction medicine program. (Kirkham addendum, October 25, 2022; Kirkham responses, October 21, 2022).

80) On October 27, 2022, Jimmy Tamai, M.D., evaluated Employee's left elbow. Due to the duration of Employee's symptoms, Dr. Tamai thought further diagnostic workup, including an EMG examination and a neurology consultation, was medically necessary. (Tamai chart notes, October 27, 2022).

81) At a November 2, 2022 prehearing conference, Employee identified some of his issues for hearing. Since he was still undergoing further evaluation for left elbow surgery, his attorney observed that the claim for left elbow PPI was ripe but may become "unripe" in the event surgery is recommended. (Prehearing Conference Summary, November 22, 2022).

82) On November 13, 2022, Employer deposed Dr. Kirkham, who testified his diagnosis for Employee included a small disc protrusion from the work injury that had resolved when he saw Employee in October 2022, and no work injury to Employee's elbow but symptoms of mild left ulnar neuropathy. He thinks the small disc protrusion resolved because Employee no longer had any leg symptoms on October 25, 2022, and Employee's strength, sensation and reflexes were also normal. During Dr. Kirkham's initial examination on July 8, 2020, there were several inconsistencies, and he was not sure whether Employee's small disc protrusion was causing Employee's symptoms, but since Employee's leg symptoms went away, there is a better relationship now between the disc protrusion and the leg symptoms. Employee's leg symptoms were regional, or encompassing the entire leg, and not in the nerve distribution he would expect. Dr. Kirkham modified his opinion because Employee's symptoms went away, so he concluded that it was likely that the initial small protrusion was causing some of Employee's leg symptoms and, now that the disc protrusion had resolved, Employee no longer has any leg symptoms. His medical stability opinion of March 10, 2020 remained unchanged for the disc protrusion. Regarding Employee's left elbow, if Employee fell on his elbow had injured his ulnar nerve, that would generally cause immediate symptoms and pain radiation along the inside of Employee's forearm and along the ulnar side of Employee's hand. Employee had several follow-ups before the three-month mark, and Dr. Kirkham would have expected elbow symptoms to have been

mentioned, although he acknowledged it was "certainly possible" that Employee injured his elbow and did not mention it because of his severe left leg pain. Dr. Kirkham realized Employee had a fall, and its plausible that the fall caused ulnar neuropathy, but with a delay in reporting of three months, he thinks Employee's very mild ulnar neuropathy is idiopathic and unrelated to the injury on a more probable than not basis. He would impose no work restrictions on Employee for either his back or his ulnar nerve. Dr. Kirkham thinks tolerance is the "crux of the issue" for Employee. Employee has subjective back pain that is out of proportion to objective findings. Similarly, Employee's left elbow symptoms and his level of disability is out of proportion to what he would expect. Employee's disability is due to reduced tolerance and not physiologic reasons. In Dr. Kirkham's experience, non-medical factors often have much more bearing on whether a patient gets better than the actual injury from the work incident. (Kirkham dep., November 13, 2022).

83) On November 28, 2022, an electrodiagnostic study showed mild asymptomatic left median neuropathy. (Electrodiagnostic study report, November 28, 2022).

84) At a December 13, 2022 prehearing conference, Employee contended he would not be able to get a left elbow surgery consultation until January 25, 2023. (Prehearing Conference Summary, December 13, 2022).

85) On January 23, 2023, Employee followed up with Dr. Tamai, who diagnosed traumatically induced left cubital tunnel syndrome. He also wrote, "Despite the clinical diagnosis and the objective findings on the MRI examination, electrodiagnostic testing did not detect ulnar neuropathy," so he refereed Employee for a second opinion consultation. (Tamai chart notes, January 23, 2023).

86) At a January 26, 2023 prehearing conference, Employee was still awaiting a surgical consultation for his left elbow and the parties stipulated to a hearing continuance. (Prehearing Conference Summary, January 26, 2023).

87) On January 27, 2023, Doug Vermillion, M.D., evaluated Employee for left elbow pain and decided to order a left elbow MRI. (Vermillion chart notes, January 27, 2023).

88) On February 14, 2023, a left elbow MRI showed a "very mildly enlarged ulnar nerve" concerning for "mild neuritis." (MRI report, February 14, 2023).

89) At a February 22, 2023 prehearing conference, Employee was still awaiting a left elbow surgery consultation. He further specified his hearing issues would include "Authorization of

ongoing medical treatment as recommended as of the date of the Board hearing." (Prehearing Conference Summary, February 22, 2023; Bredesen email, February 22, 2023).

90) On February 23, 2023, Employee claimed 162.3 hours of attorney time, billed at $450 per hour, for a total of $72,885 in attorney fees, as well as $12,423.53 in litigation costs. (Employee's Fee Affidavit, February 23, 2023). Employee's attorney has over 20 years' legal experience, overwhelmingly involving workers' compensation cases, and he has previously been awarded fees based on a $450 hourly rate. (*Id*.) (citing *Ward v. First Group America*, AWCB Case No. 20-0077 (September 11, 2020)). He also repeatedly emphasized the effects COVID-19 pandemic related delays had upon this case. (Employee's Hearing Brief, February 24, 2023; Record).

91) On February 24, 2023, Doug Vermillion, M.D., reviewed Employee's February 14, 2023 MRI and concluded Employee "may benefit from a left ulnar nerve transposition." He referred Employee back to Dr. Tamai for surgery and follow-up care. Dr. Vermillion also restricted Employee from work until March 24, 2023. (Vermillion chart notes, February 24, 2023; Status Report, February 24, 2023).

92) On March 2, 2023, Dr. Kirkham testified, on a more probable than not basis, Employee strained his low back. Employee did have a small disc protrusion that he was not sure whether it was related to the injury, but since Employee's leg pain resolved, he thinks the low back protrusion was related to the injury and has resolved. Employee also had a left 11th rib fracture from the fall, which has healed, a left thigh contusion, which has healed, and there is some question about whether Employee injured his elbow. Dr. Kirkham's causation opinion on Employee's ulnar neuropathy remained unchanged from his prior reports. He opined there is no objective evidence that Employee should be restricted from work activities due to a left elbow injury, but rather Employee is limited by his subjective tolerance. Dr. Kirkham's opinions on Employee's low back injury were also consistent with his prior reports and he testified that Employee would not injure his back by engaging in physical activity, so Employee is not restricted from employment because of this injury either. His medical stability opinion for Employee's low back remained unchanged from his prior reports. Regardless of causation, if Employee's ulnar neuropathy is not getting better with conversative treatment, it would be reasonable to proceed with surgery, so Employee is not medically stable "in that sense," but Employee has a very mild ulnar nerve irritation that is not incompatible with full-duty work. An

ulnar nerve irritation can resolve over time, but Employee is very anxious and hyper-focused on his ulnar nerve symptoms, so psychosocial factors make it unlikely that Employee's symptoms will go away with the passage of time. Employee's low back injury is no longer a substantial factor in Employee's disability but rather is a very minor or even inconsequential factor. Psychosocial factors are the overwhelming cause of Employee's pain and disability. Employee's past use of opioids suggests he has a history of chronic pain. He explained, given this, and all the other psychosocial factors that are present, and causation requires there be no confounding factors between the injury and the pain, but in Employee's case, there are so many other confounding factors, such as his history of chronic pain and the psychosocial factors, that the link between Employee's injury and his back pain is very weak. After seeing thousands and thousands of patients, Dr. Kirkham has found that the best predictor of whether somebody gets back to work is whether they want to go back to work. (Kirkham).

93) On March 2, 2023, Employee testified regarding his work history, which has included concrete, asphalt, and construction work. He also performs "undocumented" work during the winter months. Employee has known George Stone, the owner of Tri Star, for 10 or 11 years. He did a lot of work for Stone during the winter months, such as remodeling Stone's duplexes. Employee described his work activities on the day he was injured, as well as his fall. Another worker took him to the hospital. Stone texted Employee after the injury and stated he wanted to pay Employee for his injuries and wanted to work things out between the two of them. Stone encouraged Employee to not report the injury because he did not want his insurance rates to go up and he did not want to pay for a lawyer. Employee could not work for three or four weeks afterwards; he could not even get out of bed. He first noticed elbow pain one or two weeks afterwards. His ribs bothered him the most and he just thought he had a bad bruise on his elbow. His elbow felt like he hit his funny bone. Employee's plan was always to go back to work, but his back started hurting again after the injection and by then his elbow was hurting too. The pain would not go away. Employee signed up for unemployment when Employer stopped paying him. He collected unemployment "for a little while," and although he does not have money to pay back unemployment benefits now, he would pay back the benefits he collected if he was awarded TTD. Employee denied he ever went snow machining but acknowledged buying pain pills off-the-street. Regarding his deposition testimony about a job with his stepfather in Anchorage, he told his wife that moving to Anchorage was "not a possibility" for him. He never

discussed what the job specifically was with his stepfather, and he does not know whether the job would have been within his physical capacities to perform. Employee did "under-the-table," cash work in 2018, including restaurant cleaning, foundation repair and hanging sheet rock. He first noticed finger numbness about a month after the fall. He denied previously taking pain pills for pain, but rather took them "for fun." No physician referred Employee to see Dr. Andreassen. Employee tried to be seen at TVC and was told it is not a walk-in clinic, and Dr. Schneider told him he needed to get a primary care physician, but TVC was not accepting new patients, so he saw Dr. Andreassen. Dr. Andreassen said he could be Employee's primary care physician until Employee could find one. Employe returned to TVC after seeing Dr. Andreassen because it was a previously scheduled follow-up with a specialist. He stopped going to Algone because he did not want to be on pain pills anymore. Employee does not remember getting any medical bills. Employee could not recall specific times during which he received unemployment benefits. He is interested in undergoing surgery on his left elbow. Employee worked for Rady Concrete for three summers and one winter, sometimes totaling 70 hours per week. Stone gave Employee $500 one time and $200 another time, but he never paid Employee's bills so that is why Employee filed a workers' compensation claim. (Employee).

94) Employee is credible because of his sincere and forthright presentation and because his deposition and hearing testimony is consistent with the other portions of the record. (Experience, judgment, observations, unique or peculiar facts of the case, and inferences drawn therefrom).

95) On March 2, 2023, Michelle Cortez testified she has known Employee since she was 14 years old. They are good friends, and she sees Employee two or three times a week. He has always had an anxious, jumpy demeanor. Employee travels with her family to her daughter's sports events and during a long trip to Wasilla a couple of weeks ago, they had to stop three or four times so Employee could stretch. Employee also tries to help her and her mother out with chores, like shoveling snow, but since the work injury Employee cannot complete the snow shoveling. Employee does not ride snow machines. Ms. Cortez describes Employee as a "go-getter," and she is not aware of Employee having pain complaints prior to the injury or any prior injuries. (Cortez).

96) On March 2, 2023, Employee made numerous arguments in favor of modifying the RBA's determination he was not eligible for reemployment benefits. He urged the panel to rely on Dr. McCormack's and Dr. Schneider's opinions that he cannot return to previously held occupations.

Employee also contends, since Dr. Kirkham does not account for Employee's symptoms when assessing work restrictions, his opinions are not substantial evidence under *DeYonge*. (Record).

97) On March 2, 2023, Employee clarified he is not seeking narcotic pain management benefits because Dr. McCormick did not think such treatment was reasonable or necessary. However, he is seeking "non-narcotic pain management" treatment. (Employee's Hearing Brief, February 24, 2023; record).

98) At hearing on March 2, 2023, Employer requested a decision on Employee's September 6, 2022 request that it be referred to the Division of Insurance because of Dr. Silver's late-paid SIME records review invoice. It contended, following Dr. Silver's repeated COVID-19 cancellations, the parties agreed to seek an SIME with another physician. Employer contended the Division sent Dr. Silver's invoice to its attorney's personal email address. It acknowledged the Division sent Dr. Silver's bill to its attorney more than once but contended the bill was never properly served on its Insurer through the "service portal."

99) Employer contended no one monitors its attorney's personal email except its attorney, and further contended the Division has modified its procedure because of this incident and now serves parties at their formal email service addresses, where there are people who "take care of those things." It contended that due to the significant email volume received by its attorney, there was a significant chance the Division's email would "get buried," which is what happened here. Employer contended a late payment penalty was paid to Dr. Silver and contends no referral to the Division of Insurance should be made because the invoice was not properly served. It contended the error was, in part, the Division's error, and absent formal service of the invoice, a referral should not be made. (Record).

100) On March 2, 2023, Employee he clarified he was seeking a 20 percent penalty under AS 23.30.070 instead of a late payment penalty for Dr. Silver's late-paid invoice and thought the parties and the panel "already have enough on our plate" to pursue a referral to the Division of Insurance. (Record).

101) Employer's most recent annual report for 2022 shows it has paid 3,615.24 in hospital costs, and $34,880.72 in total other medical costs. (Employer's 2022 Annual Report, Other Benefits Segments, February 14, 2023).

102) On March 7, 2023, Employee supplemented his claimed attorney fees and costs, asserting an additional $13,680 in fees and an additional $600.35 is costs, for a revised totals of $86,565 and $13,023.88 respectively. (Employee's Fee Affidavit, March 7, 2023).

103) On March 14, 2023, Employer objected to numerous line items in Employee's attorney fee statement, including a conversation held on January 9, 2020 for .1 hour with another insurer related to misjoinder of that insurer on the basis that any misjoinder of the insurer was Employee's error; an email exchange with Employee on April 27, 2020 "re roof shingles" for .1 hour on the basis it appeared to have been a private discussion unrelated to Employee's injury or claim; costs in the amount of $2,900 paid to Optum on May 11, 2021, to prepare a Medicare Set-Aside (MSA), as well as .3 hour spent on May 4, 2021, to "Prepare Optum referral," and .3 hour spent on June 16, 2021, communicating with Optum and Employee about the MSA evaluation, on numerous bases, including Employee is not Medicare eligible, the parties never exchanged settlement offers that waived future medical benefits, and an MSA did not provide relevant, useful information to the panel that would have assisted it in deciding the present disputes. It also objected to costs for flights between Fairbanks and Anchorage on January 23, 2023 and January 26, 2023, on the basis there were no time entries on those dates related to legal services provided on a trip to Fairbanks. (Employer's Response, March 14, 2023).

104) On March 21, 2023, Employee replied to Employer's attorney fee and costs objections and contended misjoinder of the other insurer occurred because Employer had "hid the injury" and failed to notify its insurer from the outset; the time entry for roofing shingles concerned their weight, which was relevant to a job description and was the subject of an letter to the rehabilitation specialist on April 23, 2020; and the airfare was to attend the instant hearing and Employee itemized those costs on the date the flights were purchased rather than the dates they were flown. He also contended the Optum analysis did not just concern Medicare issues, but also included a future medical cost projection, which was important to him in evaluating whether to make a settlement offer that included the waiver of future medical benefits. Employee further contended that medical cost projections are customarily obtained to inform settlement discussions, and the Optum cost should be allowed because all injured workers have a duty to protect Medicare's interest since Medicare may refuse to pay for expenses related to a workers' compensation injury until settlement proceeds are exhausted. (Employee's Reply, March 21, 2023).

PRINCIPLES OF LAW

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

> **AS 23.30.001. Intent of the legislature and construction of chapter.** It is the intent of the legislature that
>
> (1) this chapter be interpreted so as to ensure the quick, efficient, fair, and predictable delivery of indemnity and medical benefits to injured workers at a reasonable cost to the employers who are subject to the provisions of this chapter;
> . . . .

> **AS 23.30.010. Coverage**. (a) Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability, death or the need for medical treatment of an Employee if the disability . . . or the Employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability . . . or the need for medical treatment arose out of and in the course of the employment, the Employee must establish a causal link between the employment and the disability . . . or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the . . . disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the . . . disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability . . . or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability . . . or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability . . . or need for medical treatment. . . .

In *DeYonge v. NANA/Marriott*, 1 P.3d 90 (Alaska 2000), the Alaska Supreme Court reiterated that preexisting conditions do not disqualify a claim under the work-connection requirement if the employment injury aggravated, accelerated or combined with the preexisting infirmity to produce the disability for which compensation is sought. The Court stated so long as the work injury worsened the injured person's symptoms, the increased symptoms constitute an aggravation, "even when the job does not actually worsen the underlying condition." *Id*. at 96.

The Alaska Supreme Court has observed in *dicta*: "Workers' compensation statutes base damages entirely on wages, essentially eliminating all noneconomic damages." *C.J. v. State Dept. of Corrections*, 151 P3d 373; 381 (Alaska 2006).

> **AS 23.30.030. Required policy provisions.** . . . .
>
> (1) The insurer assumes in full all the obligations to pay . . . transportation charges to the nearest point where adequate medical facilities are available . . . imposed upon the insured under the provisions of this chapter. . . .
> . . . .
>
> (3) As between the insurer and the employee or the employee's beneficiaries, notice to or knowledge of the occurrence of the injury on the part of the insured employer is notice or knowledge on the part of the insurer. . . .

Alcan Electric v. Bringmann, 829 P.2d 1187 (Alaska 1992), dealt with an injured worker's request for transportation out of Alaska for several medical procedures offered individually in Anchorage by at least one physician. The parties agreed "an employee is entitled to out of state medical treatment when equally beneficial treatment is not available in the employee's home state." *Id.* at 1189. *See* A. Larson, *The Law of Workmen's Compensation* §61.13(b)(2) (1989). *Bringmann* cited *Braewood Convalescent Hospital v. Worker's Compensation Appeals Board*, 666 P.2d 14, 20 (Cal. 1983), which held "the employer must present evidence demonstrating the availability of a similar, or equally effective program in a more limited geographic area closer to [the injured worker's] domicile" to avoid paying additional transportation expenses out of state. Noting a 1988 amendment to the Alaska Workers' Compensation Act deleted the requirement an injured worker designate a licensed physician "in the state" meant the legislature intended to drop the "parochial view" that adequate medical treatment is always available in Alaska. *Bringmann* held: "If a doctor does not provide an option to the patient, regardless of the doctor's skill level, the option is unavailable to that patient." Since the employer failed to show any local surgeon offered all six surgical procedures to the employee, as did the outside surgeon, it "failed to demonstrate that 'adequate medical facilities' were available within the state." *Id.* at 1189.

Bermel v. Banner Health Systems, AWCB Dec. No. 08-0239 (December 5, 2008) awarded

medical transportation expenses to an injured worker who flew from Fairbanks to Anchorage for back surgery. The Anchorage surgeon was selected to perform an interbody fusion surgery, and this procedure was not available in Fairbanks. Although the surgeon decided to abort the interbody fusion based on the employee's condition during surgery, *Bermel* held that, based on the planned surgery, adequate or similar and equally effective medical facilities were not available in Fairbanks.

> **AS 23.30.041. Rehabilitation and reemployment of injured workers.**
> . . . .
>
> (e) An employee shall be eligible for benefits under this section upon the employee's written request and by having a physician predict that the employee will have permanent physical capacities that are less than the physical demands of the employee's job . . . for
>
> (1) the employee's job at the time of injury; or
>
> (2) other jobs that exist in the labor market that the employee has held or received training for within 10 years before the injury . . . .
> . . . .
>
> (k) Benefits related to the reemployment plan may not extend past two years from date of plan approval or acceptance, whichever date occurs first, at which time the benefits expire. *If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate.* If the employee's permanent impairment benefits are exhausted before the completion or termination of the reemployment process, the employer shall provide compensation equal to 70 percent of the employee's spendable weekly wages . . . .

(Employee's Emphasis). In *Carter v. B&B Construction*, 199 P.3d 1150; 1159 (Alaska 2008), the Court agreed with a board decision that concluded an employee may be eligible for .041(k) benefits prior to approval or acceptance of a reemployment plan, so long as the employee had begun the "reemployment process." It decided the reemployment process begins when the employee begins to actively pursue reemployment benefits. *Id*. at 1160. In Carter's case, the Court explained:

> Because Carter began to actively pursue reemployment benefits on April 27, 1993 when he requested an eligibility evaluation, and because he continued to actively pursue those benefits by petitioning the board for review of the division's May 4,

> 1993 "decision," by petitioning the board for a rehearing, and by appealing to the superior court, we conclude that the board did not err in awarding him reemployment benefits, beginning when his PPI payment was exhausted on July 14, 1994, for the statutory maximum period that a reemployment plan can last—two years. . . .

Id.

The Commission has concluded that the two-year limit on payment of .041(k) benefits applies only to the period "from the date of plan approval or acceptance, whichever date occurs first." It went on to conclude that an employee is not entitled to an indefinite period of stipend prior to the date of plan approval or acceptance. The Commission concluded that AS 23.30.041 establishes a reasonable time for the reemployment process to be completed, which is 242 days. Therefore, the payment of stipend in a gap between the cessation of temporary compensation and exhaustion of permanent partial disability compensation and the approval or acceptance of a plan should not exceed 242 days, under conditions in that decision. (*Griffiths v. Andy's Body & Frame*, AWCAC Dec. 119 (October 27, 2009).

> **AS 23.30.070. Report of injury to the division.** (a) Within 10 days from the date the employer has knowledge of an injury . . . alleged by the employee . . . to have arisen out of and in the course of the employment, the employer shall file with the division a report . . . .
> . . . .
>
> (f) An employer . . . who fails or refuses to file the report required by (a) of this section within the time required shall, if so required by the board, pay the employee . . . other person entitled to compensation . . . an additional award equal to 20 percent of the amounts that were unpaid when due. The award shall be against either the employer or the insurance carrier, or both.

> **AS 23.30.095. Medical treatments, services, and examinations**. (a) The employer shall furnish medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for the period which the nature of the injury or the process of recovery requires . . . . When medical care is required, the injured employee may designate a licensed physician to provide all medical and related benefits. The employee may not make more than one change in the employee's choice of attending physician without the written consent of the employer. Referral to a specialist by the employee's attending physician is not considered a change in physicians. Upon procuring the services of a physician, the injured employee shall give proper notification of the selection to the

> employer within a reasonable time after first being treated. Notice of a change in the attending physician shall be given before the change.
> . . . .
>
> (c) A claim for medical or surgical treatment, or treatment requiring continuing and multiple treatments of a similar nature, is not valid and enforceable against the employer unless, within 14 days following treatment, the physician or health care provider giving the treatment or the employee receiving it furnishes to the employer and the board notice of the injury and treatment, preferably on a form prescribed by the board. . . . When a claim is made for a course of treatment requiring continuing and multiple treatments of a similar nature, in addition to the notice, the physician or health care provider shall furnish a written treatment plan if the course of treatment will require more frequent outpatient visits than the standard treatment frequency for the nature and degree of the injury and the type of treatments. The treatment plan shall be furnished to the employee and the employer within 14 days after treatment begins. The treatment plan must include objectives, modalities, frequency of treatments, and reasons for the frequency of treatments. If the treatment plan is not furnished as required under this subsection, neither the employer nor the employee may be required to pay for treatments that exceed the frequency standard. . . .
>
> (e) . . . .The employer may not make more than one change in the employer's choice of a physician or surgeon without the written consent of the employee. Referral to a specialist by the employer's physician is not considered a change in physicians . . . .
>
> (o) . . . [A]n employer is not liable for palliative care after the date of medical stability unless the palliative care is reasonable and necessary (1) to enable the employee to continue in the employee's employment at the time of treatment, (2) to enable the employee to continue to participate in an approved reemployment plan, or (3) to relieve chronic debilitating pain. A claim for palliative care is not valid and enforceable unless it is accompanied by a certification of the attending physician that the palliative care meets the requirements of this subsection.

In *Bockness v. Brown Jug, Inc.*, 980 P.2d 462 (Alaska 1999), the Alaska Supreme Court rejected an injured employee's theory that employers are obligated to pay for any and all medical treatment chosen by the employee, no matter how experimental, medically questionable, or expensive it might be. *Id*. at 466-67. Instead, within the first two years of the injury, it held the statute's provision requiring employers to provide only that medical care "which the nature of the injury and the process of recovery requires," indicates the board's proper function includes determining whether the care paid for by employers is reasonable and necessary. *Id*. at 466. The statute does not require continuing rehabilitative or palliative care to be provided in every

instance. Rather, it grants the board discretion to award "indicated" care "as the process of recovery may require." *Municipality of Anchorage v. Carter*, 818 P.2d 661, 664 (Alaska 1991).

On the other hand, when a claim is reviewed for continued treatment beyond two years from the injury date, a panel had discretion to authorize "indicated" medical treatment "as the process of recovery may require." Given this discretion, a panel is not limited to reviewing the reasonableness and necessity of the particular treatment sought but has some latitude to choose among reasonable alternatives. *Phillip Weidner & Associates, Inc. v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999). The question of reasonableness is "a complex fact judgment involving a multitude of variables." However, where the claimant presents credible, competent evidence from his or her treating physician that the treatment undergone or sought is reasonably effective and necessary for the process of recovery, and the evidence is corroborated by other medical experts, and the treatment falls within the realm of medically accepted options, it is generally considered reasonable. *Id*. at 732.

> If the employee makes this showing, the employer is faced with a heavy burden - the employer must demonstrate to the Board that the treatment is neither reasonable and necessary, nor within the realm of acceptable medical options under the particular facts. It is not the Board's function to choose between reasonable, yet competing, medically acceptable treatments. Rather, the Board must determine whether the actual treatment sought by the injured employee is reasonable.

Id. A claim for medical treatment is to be reviewed according to the date the treatment was sought and the claim was filed. *Id*. at 731-32.

Injured workers must weigh many variables when deciding whether to pursue a certain course of medical or related treatment. An important treatment consideration in many cases is whether a physician's recommended treatment is compensable under the Act. *Summers v. Korobkin*, 814 P.2d 1369, 1372 (Alaska 1991). Thus, an injured worker is entitled to a hearing and a prospective determination on whether medical treatment for his injury is compensable. *Id.* at 1373-74.

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette v. Arctic Lights Electric, Inc.,* AWCB Dec. No. 05-0135 (May 19, 2005). One of the purposes of the "one change of physician" rule is to curb potential abuses, especially doctor shopping. *Bloom v. Tekton, Inc*., 5 P.3d 235, 237 (Alaska 2000). However, the statute has been consistently interpreted to allow an employee an opportunity to "substitute" a new physician in cases where the current treating physician is either unwilling or unable to continue providing care. *Id*. at 238. These substitutions do not count as changes in physicians. *Id*. Allowing an employee to substitute an attending physician under these circumstances is consistent with the well-settled rule under the statute an injured worker is presumed entitled to continuing medical treatment. *Id*. The substitution policy ensures that the employee's right to continuing care by a physician of his choice will not be impeded by circumstances beyond the employee's control. *Id*.

In *Guys with Tools v. Thurston*, AWCAC Dec. No. 062 (November 8, 2007), the Commission discussed the role and purpose of a designated attending physician. The attending physician is explicitly charged with responsibility for all "medical and related care," which includes making referrals to a specialist. *Id*. at 10. Requiring the attending physician to make referrals furthers the policy of preventing costly, abusive over-consumption of medical resources through duplication of services when an employee's care is directed by an ever-expanding number of specialists. *Id*. Imposing responsibility to make referrals on the attending physician ensures the attending physician is fully informed of all the medical and related care the employee receives. *Id*. The statute represents a compromise between preventing costly overtreatment and protecting an employee's free choice of physician. *Id*. at 11.

> **AS 23.30.097. Fees for medical treatment and services.**
> . . . .
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> (g) . . . . Unless the employer controverts a charge, an employer shall reimburse any transportation expenses for medical treatment under this chapter within 30 days after the employer receives the health care provider's completed report and an itemization of the dates, destination, and transportation expenses for each date of travel for medical treatment. . . .

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

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

The presumption's application involves a three-step analysis. *Louisiana Pacific Corp. v. Koons*, 816 P.2d 1379, 1381 (Alaska 1991). First, an employee must establish a "preliminary link" between the "claim" and her employment. In less complex cases, lay evidence may be sufficiently probative to make the link. *VECO, Inc. v. Wolfer*, 693 P.2d 865, 871 (Alaska 1985). In claims based on highly technical medical considerations, medical evidence is often necessary to make the connection. *Burgess Construction Co. v. Smallwood*, 623 P.2d 312, 316 (Alaska 1981). Whether or not medical evidence is required depends on probative value of available lay evidence and complexity of the medical facts. *Id*. An employee need only adduce "some," minimal relevant evidence, *Cheeks v. Wismer & Becker/G.S. Atkinson, J.V*., 742 P.2d 239, 244 (Alaska 1987), establishing a "preliminary link" between the "claim" and the employment, *Smallwood* at 316. Witness credibility is not examined at this first step. *Excursion Inlet Packing Co. v. Ugale*, 92 P.3d 413, 417 (Alaska 2004).

The mere filing of a claim does not give rise to the presumption of coverage. *Smallwood* at 316. The purpose of the preliminary link requirement is to rule out cases in which the claimant cannot show that the injury occurred in the course of employment, or that an injury arose out of it. *Carlson v. Doyon Universal-Ogden Services*, 995 P.2d 224; 228 (Alaska 2000). One case involved a dispute whether an injury had occurred at all where the employee had not reported an injury. *Resler v. Universal Services, Inc.*, 778 P.2d 1146 (Alaska 1989). Another case involved

whether the employee's disability arose out of her employment, rather than the occurrence of an injury, which was not disputed. *Carlson*. The Court held evidence of her injury, and testimony that she was unemployable, sufficed to demonstrate the preliminary link. *Id*. at 228.

Second, once an employee attaches the presumption, the employer must rebut it with "substantial" evidence that either, (1) provides an alternative explanation excluding work-related factors as a substantial cause of the disability ("affirmative-evidence"), or (2) directly eliminates any reasonable possibility that employment was a factor in causing the disability ("negative-evidence"). *Huit v. Ashwater Burns, Inc*., 372 P.3d 904; 919 (Alaska 2016). "Substantial evidence" is the amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion in light of the record as a whole. *Miller v. ITT Arctic Services*, 577 P.2d 1044, 1046 (Alaska 1978). An employer has always been able to rebut the presumption with an expert opinion that the claimant's work was probably not a substantial cause of the disability. *Childs v. Copper Valley Elec. Ass'n.*, 860 P.2d 1184;1189 (Alaska 1993). In such a case, the expert is not required to offer an alternative explanation. *Id*. For example, in *Norcon v. Alaska Workers' Compensation Bd.*, 880 P.2d 1051; 1055 (Alaska 1994), the Court held the employer successfully rebutted the presumption in a case involving the fatal cardiac arrest of an employee where two doctors testified that they did not believe the employee's work was a substantial factor in bringing about his death. An employer also successfully rebutted the presumption when its medical evaluator testified the employee's work was not a substantial factor in causing her fibromyalgia, even though he also testified that the causes of fibromyalgia are unknown. *Safeway, Inc. v. Mackey*, 965 P.2d 22 (Alaska 1998).

However, the mere possibility of another injury is not "substantial" evidence sufficient to rebut the presumption. *Huit* at 920, 921. Medical testimony cannot constitute substantial evidence if it simply points to other possible causes without ruling out work-related causes. *Childs* at 1189. The employer's evidence is viewed in isolation, without regard to an employee's evidence. *Miller* at 1055. Therefore, credibility questions and weight accorded the employer's evidence are deferred until after it is decided if the employer produced a sufficient quantum of evidence to rebut the presumption. *Norcon, Inc. v. Alaska Workers' Compensation Board*, 880 P.2d 1051, 1054 (Alaska 1994); *citing Gibson.*

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

> **AS 23.30.122. Credibility of witnesses**. The board has the sole power to determine the credibility of a witness. A finding by the board concerning the weight to be accorded a witness's testimony, including medical testimony and reports, is conclusive even if the evidence is conflicting or susceptible to contrary conclusions. The findings of the board are subject to the same standard of review as a jury's finding in a civil action.

The board's credibility findings and weight accorded evidence are "binding for any review of the Board's factual finding." *Smith v. CSK Auto, Inc.*, 204 P.3d 1001; 1008 (Alaska 2009). If the board is faced with two or more conflicting medical opinions, each of which constitutes substantial evidence, it may rely on one opinion and not the other. *DeRosario v. Chenega Lodging*, 297 P.3d 139, 147 (Alaska 2013). The board alone is charged with determining the weight it will give to medical reports. *Smith v. University of Alaska, Fairbanks*, 172 P.3d 782, 791 (Alaska 2007).

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

In the case of a factual mistake or change in conditions, a party "may ask the board to exercise its discretion to modify the award at any time until one year" after the last compensation payment is

made, or the board rejected a claim. *George Easley Co. v. Lindekugel*, 117 P.3d 734, 743 (Alaska 2005). The modification statute has been applied to changes in conditions affecting reemployment benefits and vocational status. *See, e.g.*, *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619 (Alaska 2007); *Imhof v. Eagle River Refuse*, AWCB Dec. 94-0330 (December 29, 1994); *McAlpine v. Fairbanks Memorial Hospital*, AWCB Dec. 12-0200 (November 16, 2012). The board may decide, based on evidence in the record upon conclusion of a hearing on modification, whether an employee is entitled to reemployment benefits. *See, e.g.*, *Griffiths*, 165 P.3d at 624.

> **AS 23.30.135. Procedure before the board.** (a) In making an investigation or inquiry or conducting a hearing the board is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter. The board may make its investigation or inquiry or conduct its hearing in the manner by which it may best ascertain the rights of the parties. . . .
>
> **AS 23.30.145. Attorney fees**. (a) Fees for legal services rendered in respect to a claim are not valid unless approved by the board, and the fees may not be less than 25 percent on the first $1,000 of compensation or part of the first $1,000 of compensation, and 10 percent of all sums in excess of $1,000 of compensation. When the board advises that a claim has been controverted, in whole or in part, the board may direct that the fees for legal services be paid by the employer or carrier in addition to compensation awarded; the fees may be allowed only on the amount of compensation controverted and awarded. . . .
>
> (b) If an employer fails to file timely notice of controversy or fails to pay compensation or medical and related benefits within 15 days after it becomes due or otherwise resists the payment of compensation or medical and related benefits and if the claimant has employed an attorney in the successful prosecution of the claim, the board shall make an award to reimburse the claimant for the costs in the proceedings, including a reasonable attorney fee. The award is in addition to the compensation or medical and related benefits ordered.

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

attorney is successful in the prosecution of the employee's claims. *Id*. In this latter scenario, reasonable fees may be awarded. *Id.* at 152-53.

> Although the supreme court has held that fees under subsections (a) and (b) are distinct, the court has noted that the subsections are not mutually exclusive (citation omitted). Subsection (a) fees may be awarded only when claims are controverted in actuality or fact (citation omitted). Subsection (b) may apply to fee awards in controverted claims (citation omitted), in cases which the employer does not controvert but otherwise resists (citation omitted), and in other circumstances (citation omitted).

Uresco Construction Materials, Inc. v. Porteleki, AWCAC Dec. No. 09-0179 (May 11, 2011).

In *Wise Mechanical Contractors v. Bignell*, 718 P.2d 971, 974-75 (Alaska 1986), the Court held attorney fees awarded should be reasonable and fully compensatory. Recognizing attorneys only receive fee awards when they prevail on a claim's merits, the contingent nature of workers' compensation cases should be considered to ensure competent counsel is available to represent injured workers. *Id*. The nature, length, and complexity of services performed, the employer's resistance, and the benefits resulting from the services obtained, are considerations when determining reasonable attorney fees for a claim's successful prosecution. *Id*. at 973, 975. Since a claimant is entitled to full reasonable attorney fees for services on which the claimant prevails, it is reasonable to award one-half the total attorney fees and costs where the claims on which the claimant did not prevail were worth as much money as those on which he did prevail. *Bouse v. Fireman's Fund Ins., Co.*, 932 P.2d 222; 242 (Alaska 1997).

Filing a controversion exposes an insurer to an attorney's fee award. *Bouse v. Fireman's Fund Ins. Co.*, 932 P.2d 222, 242 (Alaska 1997). An injured worker is entitled to reasonable attorney fees on issues prevailed upon. *Id*. at 241. Where an insurer resists payment, thus creating the need for legal assistance, the insurer is required to pay the attorney's fees relating to the unsuccessfully controverted portion of the claim. *Id*. Although attorney's fees should be fully compensatory so injured workers have competent counsel available to them, this does not mean an attorney automatically gets full, actual fees. *Williams v. Abood*, 53 P.3d 134, 147 (Alaska 2002). It is reasonable to award an employee half his attorney's fees when he does not prevail on all the issues raised by his claim. *Id*. at 147-148; *Bouse* at 242.

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

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

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

> **AS 23.30.155. Payment of compensation.** (a) Compensation under this chapter shall be paid periodically, promptly, and directly to the person entitled to it, without an award, except where liability to pay compensation is controverted by the employer. . . .
>
> (b) The first installment of compensation becomes due on the 14th day after the employer has knowledge of the injury or death. On this date all compensation

> then due shall be paid. Subsequent compensation shall be paid in installments, every 14 days . . . .
>
> (e) If any installment of compensation payable without an award is not paid within seven days after it becomes due . . . there shall be added to the unpaid installment an amount equal to 25 percent of the installment.
> . . . .
>
> (h) The board may upon its own initiative at any time in a case . . . cause the medical examinations to be made, or hold the hearings, and take the further action which it considers will properly protect the rights of all parties.
> . . . .
>
> (o) The director shall promptly notify the division of insurance if the board determines that the employer's insurer has frivolously or unfairly controverted compensation due under this chapter. After receiving notice from the director, the division of insurance shall determine if the insurer has committed an unfair claim settlement practice under AS 21.36.125.
>
> (p) An employer shall pay interest on compensation that is not paid when due. . . .

The Alaska Supreme Court has recognized that if payments are being made pursuant to a board order, that order makes it more difficult for an employer to modify or terminate benefit payments later because the employer must petition the board for modification of the award. *Underwater Const., Inc. v. Shirley*, 884 P.2d 156; 161 (Alaska 1994).

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

> **AS 23.30.185. Compensation for temporary total disability.** In case of disability total in character but temporary in quality, 80 percent of the injured employee's spendable weekly wages shall be paid to the employee during the continuance of the disability. Temporary total disability benefits may not be paid for any period of disability occurring after the date of medical stability.
>
> **AS 23.30.187. Effect of unemployment benefits.** Compensation is not payable to an employee under AS 23.30.180 or 23.30.185 for a week in which the employee receives unemployment benefits.

In *Alyeska Pipeline Service Co. v. DeShong*, 77 P3d 1227 (Alaska 2003), the Court had noted the statute "clearly precludes the contemporaneous receipt of temporary or permanent total

disability benefits and unemployment benefits," but "says nothing about whether an employee who has received unemployment benefits for a week during which she was eligible for, but did not receive, workers' compensation benefits, may repay the former in order to qualify for the latter." *Id*. at 1234. After examining the legislative history, the Court found that the legislature's concerns included double recoveries, *id*. at 1235, but nowhere in the legislative record was there any indication that the legislature intended receipt of unemployment benefits to permanently bar an injured employee from receiving workers' compensation benefits when appropriate. *Id*. at 1237. In affirming the board's decision, the Court held "requiring DeShong to repay her unemployment benefits before she is entitled to receive TTD benefits was an appropriate response to her situation." *Id*.

> **AS 23.30.190. Compensation for permanent partial impairment; rating guides.** (a) In case of impairment partial in character but permanent in quality, and not resulting in permanent total disability, the compensation is 177,000 multiplied by the employee's percentage of permanent impairment of the whole person. . . .
>
> **AS 23.30.395. Definitions.**
> . . . .
>
> (12) "compensation" means the money allowance payable to an employee or the dependents of the employee as provided for in this chapter, and includes the funeral benefits provided for in this chapter;
> . . . .
>
> (28) "medical stability" means the date after which further objectively measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment . . . .
>
> **8 AAC 45.050. Pleadings.**
> . . . .
>
> (e) A pleading may be amended at any time before award upon such terms as the board or its designee directs. If the amendment arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading, the amendment relates back to the date of the original pleading. . . .
>
> **8 AAC 45.052. Medical summary.**
>
> (a) A medical summary . . . listing each medical report in the claimant's or

> petitioner's possession which is or may be relevant to the claim of petition, must be filed with a claim or petition. The claimant or petitioner shall serve a copy of the summary form, along with copies of the medical reports, upon all parties to the case and shall file the original summary form with the board.
>
> (b) The party receiving a medical summary and claim or petition shall file with the board an amended summary . . . listing all reports in the party's possession which are or may be relevant to the claim and which are not listed on the claimant's or petitioner's medical summary form. . . .
>
> (c) Except as provided in (f) of this section, a party filing an affidavit of readiness for hearing must attach an updated medical summary . . . if any new medical reports have been obtained since the last medical summary was filed.
>
> > (1) If the party filing an affidavit of readiness for hearing wants the opportunity to cross-examine the author of a medical report listed on the medical summaries that have been filed, the party must file with the board, and serve upon all parties, a request for cross-examination . . . .

The workers' compensation system in Alaska favors the production of medical evidence in the form of written reports, and this preference serves a legitimate purpose. *Employers Commercial Union Insurance Group v. Schoen*, 519 P.2d 819; 822 (Alaska 1974). However, "the statutory right to cross-examination is absolute and applicable to the Board." *Id*. at 824. The medical summary and request for cross-examination process set out in 8 AAC 45.052 was developed in response to *Commercial Union Insurance Companies v. Smallwood*, 550 P.2d 1261 (Alaska 1976) (holding the employer did not waive its right to cross-examine the employee's treating physicians). This decision is so firmly entrenched in the Alaska's workers' compensation system that the objection to the admission of medical reports based on the unavailability of the author for cross-examination is commonly referred to as a "*Smallwood* objection." 8 AAC 45.900(11).

Medical records, including doctors' chart notes, opinions, and diagnoses, fall squarely within the business records exception to the hearsay rule. *Dobos v. Ingersoll*, 9 P.3d 1020, 1027 (Alaska 2000); *Loncar v. Gray*, 28 P.3d 928, 934-35 (Alaska 2001). However, letter's written by a physician to a party or a party's representative to express an expert medical opinion on an issue before the tribunal are not admissible as a business record unless the requisite foundation is established showing it is the physician's regular practice to prepare and send such

letters. *Liimatta v. West*, 45 P.3d 310; 318 (Alaska 2002); *Geister v. Kid's Corps, Inc.,* AWCAC Dec. No. 045 (June 6, 2007).

In *Frazier v. H.C. Price/CIRI Const. J.V.*, 794 P.2d 103 (Alaska 1990), the Alaska Supreme Court revisited the issue of medical evidence as hearsay after the board had promulgated its evidence regulation, 8 AAC 45.120, which addressed evidence filing and service deadlines, and the right to request cross-examination. *Frazier* reviewed decisions from other jurisdictions, which routinely held medical documents were admissible against the party "that authorized the report" because the party had in effect "vouched for the competence and credibility of the report's author." Thus, the need to impeach the author's credibility and competence through cross-examination was "less urgent." *Id*. at 105. In applying Alaska Evidence Rule 801(d)(2)(C), *Frazier* found such medical reports were not "hearsay," reversed the board's decision and remanded for an order requiring the employer to reimburse the employee for the costs of making the clinic physicians available for cross-examination, because the employer had "vouched for the credibility and competence of the physicians." *Id*. at 105-06.

> **8 AAC 45.065. Prehearings.** (a) After a claim or petition has been filed, a party may file a written request for a prehearing, and the board or designee will schedule a prehearing. . . . At the prehearing, the board or designee will exercise discretion in making determinations on
>
> (1) identifying and simplifying the issues;
>
> (2) amending the papers filed or the filing of additional papers;
> . . . . .
>
> **8 AAC 45.082. Medical treatment**. . . .
> . . . .
>
> (b) Physicians may be changed as follows:
> . . . .
>
> (2) Except as otherwise provided in this subsection, an employee injured on or after July 1, 1988, designates an attending physician by getting treatment, advice, an opinion, or any type of service from a physician for the injury. If an employee gets service from a physician at a clinic, all the physicians in the same clinic who provide service to the employee are considered the employee's attending physician.

> . . . .
>
> (4) Regardless of an employee's date of injury, the following is not a change of an attending physician:
>
> . . . .
>
> (B) the attending physician dies, moves the physician's practice 50 miles or more from the employee, or refuses to provide services to the employee; the first physician providing services to the employer thereafter is a substitution of physicians and not a change of attending physicians;
>
> . . . .
>
> (c) If, after a hearing, the board finds a party made an unlawful change of physician in violation of AS 23.30.095(a) or (e) or this section, the board will not consider the reports, opinions, or testimony of the physician in any form, in any proceeding, or for any purpose. If, after a hearing, the board finds an employee made an unlawful change of physician, the board may refuse to order payment by the employer.

8 AAC 45.120. Evidence.

. . . .

> (e) . . . . Any relevant evidence is admissible if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . . 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 Alaska Supreme Court has held that a medical expert's opinion must be within a "reasonable degree of medical certainty," or the equivalent "reasonable medical probability" to be admissible. *Maddocks v. Bennett*, 456 P.2d 453, 457-58 (Alaska 1969).

8 AAC 45.180. Costs and attorney's fees.

. . . .

> (f) The board will award an applicant the necessary and reasonable costs relating to the preparation and presentation of the issues upon which the applicant prevailed at the hearing on the claim. . . .

ANALYSIS

1) **Should the document to which Employee objects be excluded from consideration by the panel?**

The document to which Employee objects is Dr. Witham's May 15, 2020 responses to Employer's prepared questions concerning certain of his chart notes. Since these questions sought out Dr. Witham's opinions on Employee's physical capacities and disability, the document is similar in nature to those in *Liimatta* and *Geister*, which do not fall under the business records exception to the hearsay rule and either require an opportunity for cross-examination be provided, or a requisite foundation be laid that it was Dr. Witham's normal practice to respond to such inquiries. However, Dr. Witham is one of Employee's treating physicians, and as such, Employee has vouched for his credibility and competence, so Employer was not required to present him for cross-examination, notwithstanding Employee's request for it to do so. *Frazier*. Dr. Witham's May 15, 2020 responses may be considered.

2) Are Employee's rib, low back, and left elbow injuries compensable?

Employee seeks a generic decision on the "[c]ompensability of the rib, low back, and left arm/elbow injuries." His request is not understood. While compensation may be payable for disability, death, or the need for medical treatment, AS 23.30.010(a), it is unknown on what basis an injury alone would be compensable. The Act bases damages on wages and non-economic damages, such as pain and suffering, are not compensable. *C.J.* In other words, Employee is not entitled to compensation for merely being injured, so his request for a finding that his rib, low back, and left elbow injuries are compensable will be denied.

3) Is Employee entitled to medical and related transportation benefits for his low back?

Compensation or benefits are payable under the Act if, in relation to other causes, employment is the substantial cause of the disability or the need for medical treatment. *Runstrom*. This is a factual question to which the compensability presumption applies. *Meek*. The mechanism of Employee's injuries to Employee's low back is obvious, and he attached the presumption with his own testimony concerning his fall, as well as with the ED records immediately following it. *Wolfer*. Employer correctly contends that it has only controverted Employee's ulnar neuropathy, and as stated in its June 9, 2020 controversion, it continued to pay medical bills for back injury treatment. Employee's past need for low back medical treatment has never been disputed. Since

the presumption is not rebutted, *contra Miller*, Employee is entitled to payment of past medical bills for low back treatment. AS 23.30.120(a).

Although Employee is entitled to payment of past medical bills for his back, the significance of this benefit is doubtful. Employer's 2022 annual report shows it paid $3,615.24 in hospital costs, and $34,880.72 in total other medical costs and, based on Employee's deposition and hearing testimony, Medicaid likely paid some of his prescription costs. Employee has not identified any unpaid bills and, even if he had, he would still be required to produce sufficient documentation for Employer to pay them in accordance with the Act. AS 23.30.095(c), (o); AS 23.30.097(g).

Employee also seeks a *Summers* authorization for "non-narcotic pain management," though he does not identify the treatment he seeks with any specificity. Although they used different terminology and disagreed on the cause of the need for treatment, both Drs. Kirkham and McCormick recommended additional treatment to address Employee's low back pain complaints. Dr. Kirkham, the EME physician, thought Employee would benefit from a multidisciplinary pain management program even though he did not think the work injury was the substantial cause of the need for that treatment. Instead, Dr. Kirkham attributed Employee's need for treatment to preexisting chronic pain syndrome and psychosocial factors. Meanwhile, Dr. McCormick, the SIME physician, recommended a functional restoration program, like those in the Bay Area of California, where different modalities are tried, such as stretching, acupuncture, chiropractic, and cognitive behavioral therapy. He thought Employee's low back injury did cause the need for that treatment. Thus, applying the presumption analysis, Employee attaches it with Dr. McCormick's opinion, *Wolfer*, and Employer rebuts it with Dr. Kirkham's, *Huit*, so Employee is now required to prove he is entitled to non-narcotic pain management treatment by a preponderance of the evidence. *Koons*.

Employee has a history performing heavy labor, including foundation repair, hanging sheetrock and concrete work. He credibly testified about working for Rady Concrete for three summers and one winter, where he would sometimes work up to 70 hours per week. This work history makes it more likely Employee's low back injury from his fall is the substantial cause of his need for pain management treatment than chronic pain syndrome and psychosocial factors, especially

since the latter preexisted the work injury and yet Employee still performed heavy labor. *Saxton*. Dr. McCormick's opinion is afforded the most weight because, unlike Dr. Kirkham, he is the panel's doctor, and his opinions were independent. AS 23.30.122; AS 23.30.095(k). Moreover, Dr. McCormick's opinions most closely comport with other evidence in the record, as pointed out in the analysis of other issues below. Therefore, Employee will be awarded eight weeks of multidisciplinary pain management treatment of the type described by Dr. McCormick. *Carter*.

Perhaps relatedly, an employer is only required to pay for medical treatment and transportation costs "to the nearest point where adequate medical facilities are available." AS 23.30.030(1). It is unknown whether multidisciplinary pain management programs of the types described by Drs. McCormick and Kirkham are available in Alaska. *Bringmann*; *Bermel*. To resolve any disputes over whether equally beneficial treatment is available in Alaska, jurisdiction will be retained over this issue. AS 23.30.135(a); AS 23.30.155(h).

4) Is Employee entitled to additional TTD for his low back injury?

TTD benefits may not be paid for any period after the date of medical stability. AS 23.30.185. This is a factual dispute to which the compensability presumption applies. *Meek*. Employer initially controverted disability benefits after March 10, 2020 based on Dr. Witham's work release of that date. Employee attached the presumption he is entitled to additional TTD benefits with Dr. McCormick's opinion that he was medically stable one year after the November 19, 2019 injury. *Wolfer*. Employer rebutted it with Dr. Kirkham's opinion that Employee was medically stable when Dr. Witham released him to work on March 10, 2020. *Miller*. Employee is now required to prove he is entitled to additional disability benefits by a preponderance of the evidence. *Koons*.

As an incidental issue, Employee contends Dr. Kirkland's opinions on work restrictions are not substantial evidence sufficient to rebut the presumption of his entitlement to additional disability benefits under *DeYonge* since they do not consider his *subjective* pain complaints. Medical stability means the date after which further *objectively* measurable improvement from the effects of the compensable injury is not reasonably expected to result from additional medical care or treatment. AS 23.30.395(28). Since Employee conflates Dr. Kirkham's opinion on work

restrictions with his medical stability opinion, and since he fails to distinguish between his subjective symptoms and objective medical improvement mentioned in the statute, his argument is unpersuasive.

For the same reasons articulated above, Dr. McCormick's opinions are afforded the most weight. AS 23.30.122. Dr. Witham's April 23, 2020, chart notes show his symptoms later returned and another injection and additional physical therapy were prescribed, which demonstrate Employee was not medically stable on March 10, 2020, as Dr. Witham may have initially thought, and as Dr. Kirkham later opined. Therefore, Employee will be awarded additional TTD benefits from March 11, 2020 until November 19, 2020, in accordance with Dr. McCormick's opinion. AS 23.30.185.

5) Is Employee entitled to a PPI benefit for his low back?

This is a factual dispute to which the compensability presumption applies. *Meek*. Employee attached the presumption he is entitled to low back PPI benefits with Dr. McCormick's opinion he incurred as seven precent whole person PPI from the work injury. *Cheeks*. Employer rebutted it with Dr. Kirkham's opinions that Employee had incurred no low back PPI from the work injury. *Miller*. Employee is now required to prove he is entitled to low back PPI benefits by a preponderance of the evidence. *Koons*. For reasons already articulated, Dr. McCormick's opinions are given the most weight, so Employee will be awarded a seven percent low back PPI benefit. AS 23.30.122; AS 23.30.190.

6) Is Employee entitled to medical and related transportation benefits for his left elbow?

This is a factual dispute to which the compensability presumption applies. *Meek*. Employee attached the presumption that the work injury is the substantial cause of his need for left elbow medical treatment with Dr. McCormick's deposition testimony, where he changed his causation opinion on Employee's ulnar neuropathy upon being shown a physical therapy chart note documenting left elbow pain earlier than he had previously thought. *Cheeks*. Employer rebutted it with Dr. Kirkham's opinions, which provide both alternative causes for Employee's left ulnar neuropathy and eliminate work as a cause. *Huit*. Employee is now required to prove his work

injury was the substantial cause of his need for left elbow medical treatment be a preponderance of the evidence. *Koons*.

As an incidental issue, Employee contends Dr. Kirkham's opinions on his left ulnar neuropathy are not substantial evidence sufficient to rebut the presumption of his entitlement to left elbow benefits. He contends Dr. Kirkham's alternative theory, which he characterizes as "a blob of infinite idiopathic factors plus age," is inconsistent with the Act and fails to rebut the presumption because Dr. Kirkham does not identify a single substantial cause. While it is true, under *Childs*, medical testimony cannot constitute substantial evidence if it simply points to other possible causes without ruling out work-related causes, Dr. Kirkham does rule out a work-related cause based on the three-month delay in reporting left elbow pain and the six-month delay in reporting ulnar neuropathy symptoms. Moreover, as Employer pointed out at hearing, an employer has always been able to rebut the presumption with an expert opinion that the claimant's work was probably not the substantial cause. *Id.*; *Norcon*; *Mackey*. In such cases, the expert is not required to offer an alternative explanation. *Childs*. Consequently, Dr. Kirkham's opinion, ruling out work as the substantial cause due to the delay in left ulnar neuropathy symptom reporting, is sufficient to rebut the presumption.

In analyzing this issue, the panel relies on its own logic and common sense. *Rogers & Babler*. Employee was 20 feet off the ground on a ladder when he fell and landed on his left side. Consideration of the mechanism of injury alone leads to the conclusion that the fall and an associated left elbow injury were probably the substantial cause of Employee's ulnar neuropathy. *Saxton*. Moreover, Employee's rib and left leg pain were documented in the initial ED records and Employee credibly testified at hearing that his pain was such that he could not work for three or four weeks afterward, and was so severe, he could not even get out of bed. Even four days after the injury, Employee was complaining of left low back pain, left upper thigh numbness, headache, dizziness, nausea and vomiting when he followed up at TVC. Given the apparent severity of Employee's pain, it is understandable that he might not have noticed or reported his elbow symptoms until later, which Dr. Kirkham also acknowledged was possible. *Id*. Because Employee's fall, rather than idiopathic factors and age, is a more plausible explanation of Employee's need for left elbow medical treatment, Dr. McCormick's opinions are again afforded

the most weight. *Saxton*; AS 23.30.122. Employee is entitled to medical and related transportation costs for his left elbow. AS 23.30.010(a); AS 23.30.095(a).

Employee also seeks a *Summers* authorization for possible ulnar nerve decompression surgery. Although he never formally sought this treatment by filing a claim, the request emerged as an issue at the December 13, 2022 and January 26, 2023 prehearing conferences, and the February 22, 2023 prehearing conference summary, where he sought authorization of recommended medical treatment in anticipation of Dr. Vermillion's eventual surgical referral to Dr. Tamai. The request may be fairly interpreted as an amendment to his original January 2, 2020 claim. 8 AAC 45.050(e); 8 AAC 45.065(a), (b). Since Employee sought this treatment well past the two-year period specified at AS 23.30.095(a), this panel has some latitude to choose among reasonable treatment alternatives. *Hibdon*.

Employee attached the presumption that the surgery is a reasonable alternative with Dr. Vermillion's February 24, 2023 referral back to Dr. Tamai for surgery and follow-up care. *Cheeks*. Although Dr. Kirkham was skeptical of the surgical result in Employee's case, he opined Employee might have a better than 50 percent chance of improvement. Dr. McCormick was also skeptical of Employee's surgical result, but he did not rule out surgery either. He then went on to say, if a doctor wanted to perform the surgery, he would see no reason why the surgery would not be work related. Since Employer is unable to meet its "heavy burden" by showing that the treatment sought is neither reasonable and necessary, nor within the realm of acceptable medical options, *Hibdon*, it is unable to rebut the presumption, *contra Miller*, and Employee will be awarded the authorization he seeks. *Summers*.

7) Should the RBA-designee's determination that Employee is not eligible for reemployment benefits be modified?

A party may seek modification of compensation arising from a change in conditions or a mistaken factual determination. AS 23.30.130(a). Employee was initially found not eligible for reemployment benefits by the RBA-designee, who chose to rely on Dr. Kirkham's July 8, 2020 opinion that Employee could return to his previously held occupations, instead of Dr. Schneider's April 27, 2020 predictions that Employee would not be able to return to them.

At his deposition, the eventual SIME physician, Dr. McCormick, did not think Employee could perform the jobs of Cement Mason, Industrial Cleaner, Construction Worker, Cook, Roofer, Handyman and Kitchen Helper, but Employee "probably" could perform the job of Short Order Cook, one of Employee's combination duties at the Friar Tuck's Hoagies, which also included work as an Industrial Cleaner. Since Employee's ulnar neuropathy was not apparent at the time Dr. Schneider rendered his predictions on Employee's permanent physical capacities, and since his ulnar neuropathy was only starting to become apparent about the time Dr. Kirkham offered his opinions, the emergence of Employee's ulnar neuropathy was a change in Employee's condition that may warrant modification of his eligibility for reemployment benefits. Also, since there is now another physician in addition the Dr. Schneider who thinks Employee does not have the permanent physical capacities to return to his previously held occupations, it is likely that the RBA was mistaken in her original factual determination that Employee would return to his previously held occupations. *Griffiths*. Employee's eligibility determination will be referred to the RBA for consideration of Dr. McCormick's opinions. AS 23.30.041(e).

Employer cites the one-year limitation of the modification statute and correctly contends Employee's petition would be time-barred. *Lindekugel*. However, as Employee points out, with the benefits awarded by this decision, the modification clock will begin to run anew, and requiring Employee to re-submit another modification petition would be an inefficient elevation of form over substance. AS 23.30.001(1); AS 23.30.135(a); AS 23.30.155(h).

8) Is Employee entitled to reemployment stipend for any week he is not eligible for disability benefits or periodic PPI payments?

As Employee contends, he may be eligible for reemployment stipend prior to approval or acceptance of a reemployment plan so long as he had begun the reemployment process. *Carter*. However, he is not entitled to an indefinite period of reemployment stipend. *Griffiths*. It is agreed, Employee began the reemployment process when he actively began pursuing reemployment benefits through the SIME process. *Carter*. Therefore, considering the additional TTD and PPI awards above, Employee will also be awarded 242 days of reemployment stipend upon the exhaustion of his past TTD and periodic PPI payments. *Griffiths*.

9) Is Employee entitled to interest?

A workers' compensation award accrues legal interest from the date it should have been paid. *Rawls*. Therefore, Employee will be awarded interest on unpaid TTD, PPI, and reemployment stipend awarded below, and his medical providers will be awarded interest on any unpaid benefits for lower back and left elbow treatment. AS 23.30.155(p).

10) Is Employee entitled to late payment penalties?

Employee seeks late payment penalties on numerous bases. He contends he is owed a penalty because Employer required him to produce evidence of his disability contrary to the compensability presumption. However, the mere filing of a claim does not give rise to the presumption of coverage. *Smallwood*. The purpose of the preliminary link requirement is to rule out cases in which the claimant can show neither that the injury occurred in the course of employment, nor that injury arose out of it. *Carlson*. In this case, Employee's fall from the ladder has never been disputed. *Compare with Resler* (dispute involving the occurrence of an injury). Rather, the issue presented is not the occurrence of an work injury, but its connection to Employee's disability. Employee attaches the presumption in such a case when he shows a preliminary link between his employment and his disability. *Carlson*.

Employee cites AS 23.30.030(3), which provides that an employer's knowledge is imputed to its insurer. However, he does not point to any minimal, relevant evidence that Stone possessed linking his employment to his disability. Based on Employee's credible testimony, Stone was aware that he had fallen, was injured, and taken to the hospital. Beyond that, however, the extent of Stone's knowledge is murky. The closest relevant evidence that could be found was Employee's deposition testimony, where he explained:

> I was, like - - I broke my ribs, so I was, like, in bed and stuff, but he kept sending me texts saying he was going to give me money to take care if it. . . . He said he was going to give me money to take of all my bills and stuff. But he sent me texts like that afterwards.

Yet this testimony is ambiguous as to Stone's knowledge of Employee's subsequent disability. It is not clear whether the "it," "bills," and "stuff," meant Employee's medical bills, which Stone's insurer began paying, or his household bills as compensation for his disability. Neither does Employee point to any minimal, relevant evidence that Stone's insurer possessed linking his injury to his disability prior to him filing his February 13, 2020 medical summary.

Moreover, it is self-evident that the existence of medically prescribed work restrictions giving rise to a disability requires medical evidence. *Wolfer*. On February 13, 2020, Employee filed a medical summary containing records from the Fairbanks Memorial Hospital and TVC evidencing Employee's disability from the work injury. The first installment of TTD was therefore due 14 days later, or by February 27, 2020. AS 23.30.155(b). Employer issued its TTD check on March 6, 2020, which was within the requisite 7-day statutory payment period in AS 23.30.155(e), so his request for penalty will be denied on this basis, as well.

Employee also seeks a penalty on Employer's "legally baseless" controversion while he was in the reemployment eligibility evaluation process. He cites the following portion of AS 23.30.041(k) and contends it stands for the proposition that TTD benefits can only be controverted on medical stability grounds when an employee is in the reemployment process: "If an employee reaches medical stability before completion of the plan, temporary total disability benefits shall cease, and permanent impairment benefits shall then be paid at the employee's temporary total disability rate." Employee cites no decisional authority in support of his interpretation, and the meaning of the quoted language is hardly what Employee contends. It merely sets forth the order in which benefits will be paid during the reemployment process. Employee's request for penalty on this basis will also be denied.

11) Should Employer be referred to the Division of Insurance for unfairly or frivolously controverting Dr. Silver's SIME records review fee?

Employee originally sought to "join" Dr. Silver's claim seeking his SIME records review fee, and requested a late payment penalty, a finding of unfair or frivolous controversion, and referral to the Division of Insurance. However, at hearing he clarified he was seeking a 20 percent penalty under AS 23.30.070 instead of a late payment penalty and thought the parties and the

panel "already have enough on our plate" to pursue a referral to the Division of Insurance. Employee's request for penalty based on Employer's failure to timely report an injury is addressed below. Since Employee is no longer seeking a finding of unfair or frivolous controversion, or a referral to the Division of Insurance, and since this panel sees no independent reason to make such a referral under the circumstances presented, Employer will not be referred. AS 23.30.135(a); AS 23.30.155(h).

12) Should a penalty be assessed for Employer's failure to timely report the injury?

As a threshold issue, Employee explicitly seeks a penalty on Dr. Silver's late paid SIME records review invoice for Employer's failure to timely report his injury. However, the statute on which he relies provides that this panel may order an employer to "pay the employee or the legal representative of the employee or other person entitled to compensation . . . an additional award equal to 20 percent of the amounts that were unpaid when due." AS 23.30.070(f) (emphasis added). "Compensation" is a term of art in the Workers' Compensation Act, and it means "the money allowance payable to an employee or the dependents of the employee." AS 23.30.395(12).

Since Dr. Silver's SIME records review fee was not a money allowance payable to Employee, his legal representative, or his dependents, it was not compensation on which a late reporting penalty can be based.

Furthermore, Employer contends the bases of any late reporting penalties would be of limited duration and could not be based on events following its reporting. Common sense supports Employer's interpretation of the statute, the clear purpose of which is to ensure benefits due an injured worker are not delayed because an employer does not report an injury. *Rogers & Babler*. Given the circumstances leading to Dr. Silver's SIME records review fee being paid late arose long after Employer reported the injury; and given there is no nexus between Stone not reporting the work injury, and Dr. Silver not being timely paid, imposing a failure to report penalty would be improper since it would serve no purpose. Finally, imposition of a late reporting penalty is discretionary under the statute, and for the reasons just stated, a late reporting penalty should not be imposed. AS 23.30.001(1); AS 23.30.135(a); AS 23.30.155(h).

Nevertheless, Employee's credible hearing testimony, which supplements and explains Employer's late injury report, makes clear that Stone intentionally tried to conceal the work injury by texting Employee not to report it so Stone would not have to hire a lawyer or pay higher insurance premiums. 8 AAC 45.120(e). This panel could not think of a more appropriate case in which to order a late reporting penalty. *Rogers & Babler*. However, the injury reporting penalty statute is expressly limited to "amounts that were unpaid when due." AS 23.30.070(f). Under the late payment penalty analysis above, the only benefit that was unpaid when due, and hence, subject to the failure to report penalty, was Employer's initial March 6, 2020 TTD payment. Therefore, a penalty will be ordered on that amount, and it will be ordered that Insurer and Employer be jointly and severally liable for its payment. By ordering such a penalty payment, it is hoped Insurer will be encouraged to do a better job of educating its insureds of their injury reporting obligations under the Act, and by making Employer and Insurer jointly and severally liable for the penalty's payment will afford Insurer the ability to pursue contribution from Employer -- the true bad actor.

13) Did Employee fail to mitigate his disability?

Employer contends Employee failed to mitigate his disability by not taking the property manager job with his stepfather in Anchorage. However, Employee credibly testified at hearing that he never discussed what the job specifically was with his stepfather, and he does not know whether the job would have been within his physical capacities to perform. AS 23.30.122. His testimony does not "induce a belief" that his stepfather made a bona fide job offer, or that Employee could perform the essential job duties had he done so. *Contra Saxton*. Therefore, Employee's disability award will not be reduced for a failure to mitigate.

14) Should Employer be relieved of its obligation to provide Employee continuing medical care because he unlawfully changed physicians?

Under the Act, both an employee and an employer can make but one change to their respective physician without the written consent of the other party, while referrals to a specialist by either party's physician are not limited. *Colette*. However, an employee may also "substitute" a new physician in cases where the current treating physician is either unwilling or unable to continue providing care. *Bloom*. Here, Employer contends Employee exercised his one allowed change

when he began treating with Dr. Andreassen in June 2020, so it should not be liable for treatment at any provider following Dr. Andreassen, including Employee's later return to TVC, as well as charges associated with Employee's surgeon.

The evidence is conflicting on whether Employee's treatment with Dr. Andreassen could be considered a substitution of physician. Employee testified he tried to be seen at TVC but was told it was not a walk-in clinic and Dr. Schneider told him he needed to find a primary care physician. According to Employee, he then saw Dr. Andreassen, who agreed to provide primary care until he could establish care with another provider. However, before Employee presented to Dr. Andreassen, Dr. Schnieder's February 5, 2020, and April 27, 2020, chart notes indicate he was assisting Employee in establishing care with another provider at TVC. Since Dr. Schneider's chart notes are thought to be a more accurate historical accounting than Employee's memory, Employee seeking treatment from Dr. Andreassen was likely a change rather than a substitution. *Rogers & Babler*.

The remedies for an unauthorized change of physician are set forth in regulation and provide that the reports, opinions, and testimony of an unauthorized physician will not be considered. 8 AAC 45.082(c). A hearing panel may also refuse to order payment by the employer. *Id*. Regarding the former remedy, the issues decided above were resolved by evaluating the EME and SIME opinions, not those of Employee's doctors, who have not meaningfully opined on the issues presented for decision. Regarding the latter remedy, the statute's purposes are to curb doctor shopping, *Bloom*, and to prevent the costly, abusive over-consumption of medical resources. *Thurston*. Neither of the statute's purposes would be served at this point by relieving Employer of its obligation to pay for Employee's care at TVC or with Dr. Witham.

Official notice is also taken that TVC is by far the largest clinic in Fairbanks's limited medical market, and there is not a wealth of orthopedic surgeons in Fairbanks either. *Rogers & Babler*. Not only would denying Employee care at TVC, and with Dr. Witham, deprive him of his right to continuing care by a physician of his choice, but it also could be tantamount to denying him meaningful medical care altogether. Therefore, even though Employee's change to Dr. Andreassen did not fall under the substitution exception to the one change of physician rule, the

remedy of relieving Employer of its liability to pay for Employee's continuing medical care, including medical care at TVC, and with Dr. Witham, will not be adopted. AS 23.30.155(h); 8 AAC 45.082(c).

15) Should Employee's TTD award be reduced for weeks in which he received unemployment benefits?

Compensation is not payable for a week in which an employee receives unemployment benefits. AS 23.30.187. Employer seeks an offset of any compensation ordered based on his receipt of unemployment benefits and contends Employee received unemployment benefits commencing with the benefits week of June 6, 2020 through the end of the year. However, Employer faces an evidentiary hurdle with its asserted defense.

The documents Employer utilizes to support its contentions were carefully examined. Although it is certainly possible Employee received unemployment benefits from the week ending on June 6, 2020 through the end of the year, as Employer contends, available records merely evidences him receiving unemployment benefits for three discrete weeks, those ending on June 6, 2020, June 13, 2020 and December 26, 2020. Nevertheless, since this decision will award additional TTD benefits from March 10, 2020 until November 19, 2020, Employee will be ordered to repay unemployment benefits he received for the weeks ending on June 6, 2020 and June 13, 2020 to the Department of Labor and Workforce Development, Unemployment Program. *DeShong*.

16) Is Employee entitled to attorney fees and costs?

Employee seeks awards of a reasonable attorney fee and costs, as well as a statutory minimum fee on the value of future benefits. Since Employer resisted providing benefits by defending against Employee's claims, necessitating this hearing, an award of a reasonable attorney fee is appropriate. *Moore*. Reasonable attorney fees and statutory minimum fees are not mutually exclusive, *Porteleki*, but the latter may be awarded only when claims are controverted. *Moore*.

Employer's specific line-item objections are addressed as initial matters. Employer objected to .1 hour for misjoinder of another insurer, contending the misjoinder was Employee's error. Employee replied, contending the misjoinder of the other insurer occurred because Employer

"hid" the injury and did not notify its insurer from the outset. Employee's credible testimony concerning his conversations with Stone and Stone's text messages supplements and explains Employer's delay in injury reporting and supports Employee's position in response to Employer's objection. 8 AAC 45.120(e). Employee's attorney fee award will not be reduced .1 hour for the misjoinder of another insurer. Similarly, Employee's attorney's April 23, 2020 letter to the rehabilitation specialist shows the .1 billing for an email exchange concerning roofing shingles was not unrelated to Employee's case, as Employer contends, so Employee's attorney fee award will also not be reduced on that basis as well. Likewise, Employee's explanation for the dates of the invoiced airline flights between Anchorage and Fairbanks is sensible, and since there are no other invoiced costs for flights between Anchorage and Fairbanks, Employee's costs award will not be reduced based on Employer's objection to them.

Employer further objected to $2,900 in costs paid to an MSA vendor, as well. Its objection here has merit. The plain language of the regulation states, "The board will award an applicant the necessary and reasonable costs *relating to the preparation and presentation of the issues* upon which the applicant prevailed *at the hearing* on the claim"; and while Employee may have found the MSA evaluation helpful in his settlement considerations, it was not related to any issue on which he prevailed at hearing, so this cost cannot be awarded. 8 AAC 45.180(f). Employer further objected to .6 hour attorney time related to the MSA evaluation; however, since this panel thinks it is sound policy to encourage parties to explore settlement opportunities, Employee's attorney time will not be reduced the 0.6 hours Employer seeks. AS 23.30.135(a).

Pursuant to *Rusch*, the factors set forth under Rule 1.5(a) of the Alaska Rules of Professional Conduct are consulted to arrive at a reasonable, fully compensatory attorney fee award. *Bignell*. Because the parties did not present evidence or argument concerning one of those factors, and because the relevance of that factor is not self-evident, it will not be used to either support or lessen Employee's claimed fees. This factor is any unique time limitations imposed by Employee as a client, Rule 1.5(a)(5). However, other factors under Rule 1.5(a) are relevant and discussed below.

Employee has billed his attorney time at $450 per hour. His attorney has previously been awarded fees based on that hourly rate and Employer does not object to that rate. Employee's attorney is well-known among both the workers' compensation bar and workers' compensation hearing officers. He has successfully represented both employers and injured workers for two decades. Rule 1.5(a)(7). Employee's hourly billing rate is comparable to billing rates customarily awarded to similarly experienced attorneys in workers' compensation cases. Rule 1.5(a)(3). Virtually all fees in workers' compensation cases are contingent, and here, Employee's success on the merits of his claim for ulnar neuropathy benefits was far from certain. Employee's hourly billing rates, though lofty, are not inappropriate given the contingent nature of representation. Rule 1.5(a)(8).

The merits of workers' compensation claims are often litigated. Controlling law and relevant decisional authorities for the issues presented here are well known among workers' compensation practitioners and can be readily ascertained by other attorneys. However, this case involved injuries to multiple body parts and necessitated numerous depositions. Although the medical record is a relatively modest length, it is complex and dense with relevant content, as is shown in this decision's factual findings. The complexity of litigation, including the time and skills required for prosecution of Employee's claim, was well above average and is reflected in part by the number of issues presented here for decision. Rule 1.5(a)(1). Employee's attorney also repeatedly emphasized the effects COVID-19 pandemic related delays had upon this case, and these delays are self-evident, so the nature and length of the professional relationship with Employee further supports his claimed fees. Rule 1.5(a)(6). Although claimants' attorneys are rarely, if ever, precluded from other employment due to conflicts of interest, Employee's attorney was likely precluded from other employment due to the length of the proceedings and the complexity of the issues presented here. Rule 1.5(a)(2).

Employee was successful in securing medical benefits for low back treatment, including an additional eight-week multidisciplinary pain management program, and medical benefits for treatment of his ulnar neuropathy. He secured additional TTD and PPI benefits for his low back injury, as well as interest and a late reporting penalty. Employee secured a remand of the RBA-designee's determination he was not eligible for reemployment benefits, which will likely result

in his receipt of those benefits, including significant stipend amounts, and he fared well on the issue of repaying unemployment benefits compared to the amounts Employer sought to be repaid. This decision also secures his right to continue to treat with the physicians of his choice.

Although largely successful on many significant issues, Employee was not universally so. He was unsuccessful in his unusual request for a generic order on the compensability of his rib, low back and left elbow injuries, a non-existent benefit. Although the Supreme Court recognized the inherent value of an award because it makes it more difficult for an employer to *later* change an employee's status, *Shirley*, as previously discussed in the analysis of *past* medical bills for low back treatment, Employee's success on this issue is illusory since it is unlikely to provide him with any benefits he had not already received. He was further unsuccessful in his pursuit of late-payment penalties, and he initially pursued findings of unfair or frivolous controversions against Employer and a referral to the Division of Insurance, which he chose not to pursue at hearing. Employee's lack of success on these issues must also be accounted for. *Abood*; Rule 1.5(a)(5). Considering the amounts involved and the results obtained, along with the previously discussed factors under Rule 1.5, Employee should be awarded 90 percent of his claimed fees, or $77,908.50, as wells as his costs, less the $2,900 MSA vendor fee, or $10,123.88. *Bouse*. Awarding Employee a major share of his claimed fees is also consistent with the policy of ensuring that competent counsel is available to represent injured workers. *Bignell*.

Employee further seeks an award of statutory minimum fees on future benefits, but these fees may only be awarded when claims are controverted. *Moore*. Employer's May 19, 2020 and June 9, 2020 controversions included reemployment benefits, and its September 29, 2022, and October 11, 2022, controversions included all benefits related to Employee's ulnar neuropathy. Employee may now be, or may soon become, entitled to additional benefits not awarded by this decision. Possible examples might include, left elbow PPI, additional TTD following left elbow surgery, and vocational rehabilitation. Should Employee receive these benefits in the future, it will have been due to his attorney's work to date, so he should be awarded statutory minimum fees on future benefits not expressly awarded by this decision. *Porteleki*.

CONCLUSIONS OF LAW

1) Dr. Witham's May 15, 2020 responses should not be excluded from consideration by the panel.

2) Employee's rib, low back, and left elbow injuries are not compensable.

3) Employee is entitled to medical and related transportation benefits for his low back injury, including an eight-week multidisciplinary pain management program.

4) Employee is entitled to additional TTD benefits for his low back injury.

5) Employee is entitled to a PPI benefit for his low back injury.

6) Employee is entitled to medical and related transportation costs for his left elbow.

7) The RBA-designee's determination that Employee is not eligible for reemployment benefits should be modified and it will be referred to the RBA for consideration of Dr. McCormick's opinions.

8) Employee is entitled to reemployment stipend for any week he is not eligible for disability benefits or periodic PPI payments.

9) Employee is entitled to interest.

10) Employee is not entitled to late payment penalties.

11) Employer should not be referred to the Division of Insurance for unfairly or frivolously controverting Dr. Silver's SIME records review fee.

12) A penalty should be assessed for Employer's failure to timely report the injury.

13) Employee did not fail to mitigate his disability.

14) Employer should not be relieved of its obligation to provide Employee continuing medical care because he unlawfully changed physicians.

15) Employee's TTD award should not be reduced for weeks in which he received unemployment benefits, but rather he should be ordered to repay those benefits.

16) Employee is entitled to attorney fees and costs.

ORDERS

1) Employee's claims are granted in part and denied in part.

2) Employee's January 2, 2020 claim seeking an order on the compensability of his rib, low back and left elbow injuries is denied.

3) Employee's January 2, 2020 claim seeking past medical costs for treatment of his rib and lower back injuries is granted. Employer shall pay any unpaid medical bills for rib and low back treatment, plus interest, should sufficient documentation be received for their payment under the Act. Additionally, Employer shall provide Employee eight weeks of multidisciplinary pain management treatment of the type described by Dr. McCormick, in accordance with this decision.

4) Employee's January 2, 2020 claim seeking TTD benefits is granted. Employer shall pay Employee TTD benefits from March 10, 2020 until November 19, 2020, plus interest.

5) Employee's September 21, 2022 claim seeking PPI is granted. Employer shall pay Employee a seven percent whole person PPI benefit for his lower back, plus interest.

6) Employee's January 2, 2020 claim seeking medical costs for his left elbow injury is granted. Employer shall pay past medical costs for Employee's left elbow treatment, plus interest, upon receipt of sufficient documentation for payment under the Act. Additionally, Employer shall provide Employee with left ulnar nerve release surgery, should he elect to proceed with it.

7) Employee's September 1, 2022 petition seeking modification is granted. The RBA-designee's August 5, 2020 determination that Employee was not eligible for reemployment benefits is referred to the RBA for consideration of Dr. McCormick's opinions. Should the RBA-designee determine that Employee is eligible for reemployment benefits, Employer shall pay Employee 242 days of reemployment stipend, plus interest, in accordance with this decision.

8) Employee's January 2, 2020 claim seeking late payment penalties is denied.

9) Employee's September 6, 2022 petition seeking a referral to the Division of Insurance is denied.

10) Employer's insurer and George Stone shall jointly and severally pay Employee a 20 percent late reporting penalty on Employer's March 6, 2020 TTD benefit check, in accordance with this decision.

11) Upon receipt of the TTD benefits proceeds ordered above, Employee shall repay the State of Alaska, Department of Labor and Workforce Development, Unemployment Insurance program, benefits he received for weeks ending on June 6, 2020 and June 13, 2020. He shall then file evidence of compliance with the Workers' Compensation Division and serve Employer in accordance with Workers' Compensation regulations.

12) Employer shall pay Employee medical related transportation costs in accordance with this decision.

13) Employer shall pay Employee $77,908.50 in attorney fees, and $10,123.88 in costs, plus statutory minimum fees on future reemployment benefits, and benefits arising from Employee's ulnar neuropathy, not expressly awarded by this decision.

Dated in Fairbanks, Alaska on November 6, 2023.

ALASKA WORKERS' COMPENSATION BOARD

/s/
Sarah Lefebvre, Member

/s/
Lake Williams, Member

ROBERT VOLLMER, DESIGNATED CHAIR, DISSENTING IN PART

The dissent agrees with the majority's decisions holding that Dr. Witham's May 15, 2020 responses may be considered; Employee's rib, low back and left elbow injuries are not compensable; Employee is entitled interest; Employee is not entitled to late payment penalties; Employer should not be referred to the Division of Insurance for unfairly or frivolously controverting Dr. Silver's SIME records review fee; a penalty should be assessed for Employer's failure to timely report the injury; Employee did not fail to mitigate his disability; and Employer should not be relieved of its obligation to pay for Employee's continuing medical care because he unlawfully changed physicians. It also concurs separately with Employee's entitlement to a low back PPI benefit.

However, the dissent respectfully disagrees with the majority's analysis, conclusions of law and the results reached with respect to its authorization for non-narcotic pain management treatment, Employee's entitlement to additional TTD benefits for his low back injury; the work injury being the substantial cause of Employee's need for left elbow medical treatment and authorization for ulnar nerve release surgery; the RBA-designee's determination that Employee is not eligible for reemployment benefits should be modified; Employee's entitlement to reemployment stipend for any week he is not eligible for disability benefits or periodic PPI payments; ordering Employee

to repay unemployment benefits he received; and Employee's entitlement to attorney fees and costs. The Designated Chair analyzes these issues as follows:

ISSUES

3) **Is Employee entitled to medical and related transportation benefits for his low back?**

4) **Is Employee entitled to additional TTD for his low back injury?**

5) **Is Employee entitled to a PPI benefit for his low back?**

6) **Is Employee entitled to medical and related transportation benefits for his left elbow?**

7) **Should the RBA's determination that Employee is not eligible for reemployment benefits be modified?**

8) **Is Employee entitled to reemployment stipend for any week he is not eligible for disability benefits or periodic PPI payments?**

9) **Is Employee entitled to interest?**

15) **Should Employee's TTD award be reduced for weeks in which he received unemployment benefits?**

16) **Is Employee entitled to attorney fees and costs?**

FINDINGS OF FACT

The dissent adopts the following additional factual findings and conclusions:

105) At his August 1, 2022 deposition, Dr. McCormick explained the possible progression of Employee's ulnar neuropathy:

> So you *can* have swelling. Like bruising, you *can* have soft-tissue swelling and it *can* trigger a neuropathy. So yes, I mean it's - - *I didn't see those notes*, but, yes, it *can* happen like that, that you have pain and swelling and then the nerve damage ensues over the next two or three months. . . . So the nerve is pinched. There *might* be a little numbness at the time and then the atrophy and the loss of function occurs as a delayed consequence.

(Emphasis added). In response to queries about Employee's February 19, 2020 statement that his back was hurting and "everything else has pretty much healed," Dr. McCormick addressed ulnar neuropathy symptoms:

> Q. Does ulnar neuropathy ebb and flow in terms of symptoms that it produces?
>
> A. Well, he would have *intense elbow pain* and he might notice some loss of function over ensuing month, but it's not so disabling that his left hand is completely paralyzed. It's just a little weaker and it's his non-dominant hand. He might have problems, you know, opening a pickle jar or, you know, would power grasp that wasn't working so it really wasn't affecting him that much.

(Emphasis added). He was also asked about Employee's delay in left elbow symptom reporting:

> Q. Okay. I'm just wondering if - - if we just take it face value the comments in the medical reports that [Employee's attorney] has pointed out, would it be unusual to have a two- to three-month delay in reporting the onset of symptoms from a - - such as ulnar neuropathy?
>
> A. A little bit, but I've seen enough that I think it should be accepted.

Dr. McCormick further testified about the psychosocial factors that could explain his conclusion that Employee's pain and disability far exceeded the objective findings on the MRI:

> A. You know, pain doesn't occur in isolation. It occurs in individuals and it's affected by what they are going through. In this case he's telling me his daughter - his daughter had cancer. His wife was away for nine months. He got back on narcotics. I just - you know, there were factors, you know. And the prior history of narcotic use all intermixing to result in a bad outcome that maybe looked worse than the MRI findings.

(McCormick dep., March 28, 2022).

106) On March 2, 2023, Dr. Kirkham further testified, there was no mention of elbow pain for quite some time after the injury, including in the emergency room, so Employee may have fallen on his elbow, but there did not appear to be a significant injury to the elbow. He diagnosed a left elbow contusion in his initial report because Employee stated he fell on his elbow, but there is no is no objective evidence of contusion in the medical record. The record shows Employee did not complain of elbow pain until three months after the injury and he did not complain about paresthesia until several months after that. Employee's subsequent workup then showed he had

an ulnar neuropathy. If someone were to fall on their elbow and hit their ulnar nerve, it would be like someone hitting their funny bone against a hard object and getting an immediate shock of pain down his arm. If Employee hit his ulnar nerve in the fall, he would most likely get immediate, severe pain that would persist for weeks. Medical research shows traumatic ulnar nerve injuries resolve over time, not worsen over time, as happened in Employee's case. Traumatic neuropathy is not common, but when it is seen, it is most related to fractures of the femur. Traumatic neuropathy symptoms are "absolutely immediate," and there are also neurological deficits that prompt a referral for electrodiagnostic evaluation. Non-traumatic ulnar neuropathy is very common, and Dr. Kirkham sees several cases per month. In his practice, the percentages of non-traumatic ulnar neuropathy versus traumatic ulnar neuropathy are 98 percent versus two percent. In another physician's practice, it might be 95 percent to five percent. Ulnar neuropathy is found in about five percent of the population, and it usually comes on gradually and without any specific event, and physicians really do not know what causes it. Upon being asked about the possibility of "masking," where one is distracted by other more serious pain elsewhere in the body, Dr. Kirkham explained a traumatic ulnar nerve injury would cause severe ulnar nerve pain like the pain Employee was experiencing in his leg. If Employee did not report ulnar nerve symptoms because they were very mild, that would support the conclusion and any injury to his ulnar nerve was also very mild. Employee's first EMG study was barely outside the normal range and his second EMG study was completely normal, so there is no clear evidence of nerve injury, but Dr. Kirkham thinks Employee's symptoms are consistent with nerve irritation. He does see surgery performed in Employee's circumstances and Employee might have a better than 50 percent chance of an improvement in his symptoms, but there are other concerns, such as lack of objective evidence of a nerve injury, the lack of objective findings on exam, and psychosocial factors such as anxiety regarding pain and disability behavior that indicate Employee may not have a good surgical result. Dr. Kirkham identified and discussed the various psychosocial factors set forth in his October 25, 2022 addendum report that are affecting Employee's perceptions of pain and disability. Citing medical literature, he explained these factors are probably present by the teenage years, when personality is established, and people who are well-adjusted and motivated and not anxious tend to recover from injuries, and individuals who have these preexisting psychosocial factors have injuries and persistent pain that is unrelated to the actual injury. Dr. Kirkham further explained

he looks at objective findings when he opines on an employee's physical capacities. Employee's disc herniation has resolved, and he no longer has leg pain, so there is no reason to restrict Employee's activity. With respect to Employee's left elbow, findings on physical examination show Employee does not have any atrophy of the muscles, he does not have any weakness in those muscles, and the objective electrodiagnostic results show there is no nerve injury, so there is no objective reason to limit Employee's activities. Employee is limited by his subjective tolerance. Employee would also not injure his lower back if he engaged in physical activity. When his patients are reluctant to go back to work because they have pain, Dr. Kirkham explains that hurt does not equal harm. It is possible to have pain but that doesn't mean you are damaging your body. He distinguished chronic pain from acute pain and used the example of stepping on a tack to represent acute pain. Chronic pain can occur in cases without any residual tissue damage. In those cases, Dr. Kirkham thinks one needs to become more active, not less active, because if one become less active, one will become weaker and less functional, and that is going to lead to more pain, and it is just a downward spiral that he does not want his patients to get into. He agrees Employee has pain, because pain is subjective; but there is no medical evidence to limit his activity. Dr. Kirkham thinks resuming physical activity is one of the most important things a patient can do. When he sees patients have a miraculous recovery from chronic pain, it is always because they simply resumed their physical activities and the pain improved. There are 100 million people in the United States that have chronic pain, so it is obviously a difficult problem. But one can have pain and be functional and still work and that is the most healthy and productive way to look at this. Psychosocial factors explain why someone gets in a fender-bender where there is no damage to their body, but they have chronic pain the rest of their life, and someone else is in an accident where their car is destroyed, and they are paraplegic, and they go to work in six months. Physical restrictions are something a patient should not do because it will harm them. Seizures are an example. Someone with seizures should not drive a car because they can have a seizure and harm themselves or harm others, and somebody who has very bad balance, he would not recommend they go up on a roof because they could fall off the roof. (Kirkham).

107) During cross-examination, Dr. Kirkham explained why he rated Employee as having no PPI for his low back injury. When rating Employee, he did not include non-verifiable radicular complaints because he tries to perform his ratings in accordance with the "spirit of the Guides."

His explanation included using a firefighter patient of his, who had a back injury like Employee's, as an example. Dr. Kirkham contrasted that patient's desire to return to work with Employee's, which explains why he included the non-verifiable radicular complaints in the firefighter's rating but not Employee's. He also explained why Employee's lower back was medically stable at the time of his March 10, 2020 visit with Dr. Witham, notwithstanding Dr. Witham subsequently noting that Employee's pain had returned, and Dr. Witham subsequently ordering another injection and additional physical therapy. Dr. Kirkham explained, Employee has chronic pain, most likely predating the accident. Dr. Kirkham does not think Employee's pain is ever going to go away, and he does not think Employee had an absence of pain before the injury either. Employee was medically stable at that visit because he had returned to baseline at that visit. Given that Employee has not returned to work in three years, Dr. Kirkham thinks that would indicate a relatively low motivation to return to work.

ANALYSIS

3) Is Employee entitled to medical and related transportation benefits for his low back?

The dissent agrees with the majority's presumption analysis and its conclusion that Employee is entitled to payment of past medical bills for low back treatment. However, the dissent disagrees with the majority analysis and its award of multidisciplinary pain management treatment. It would instead analyze the issue as follows. Employee attached the presumption he is entitled to multidisciplinary pain management with Dr. McCormick's recommendation for a functional restoration program, which he relates to the work injury. *Wolfer*. Employer rebutted it with Dr. Kirkham's opinion that Employee's need for a multidisciplinary pain management program are his preexisting psychosocial factors and chronic pain syndrome, and not the work injury. *Huit*. Employee must now prove he is entitled to non-narcotic pain management treatment by a preponderance of the evidence. *Koons*.

In evaluating the medical opinions of Drs. McCormick and Kirkham, the dissent would begin by focusing on areas where both physicians agree. An appropriate starting point is Dr. Kirkham's October 25, 2022 addendum report. Drs. McCormick and Kirkham agree Employee's perceptions of his pain and disability far exceed the objective findings on the MRI study, they

agree Employee had disc protrusions that were not severe and commonly seen in middle-aged adults capable of doing labor, and they agree psychosocial factors are impeding Employee's recovery. As pointed out in the majority's analysis, Drs. McCormick and Kirkham also agree on Employee's need for a multidisciplinary pain management program, though they disagree on the substantial cause of the need for that treatment.

At his deposition, Dr. McCormick testified about the psychosocial factors that could explain his conclusion that Employee's pain and disability far exceeded the objective findings on the MRI:

> You know, pain doesn't occur in isolation. It occurs in individuals and it's affected by what they are going through. In this case he's telling me his daughter - his daughter had cancer. His wife was away for nine months. He got back on narcotics. I just - you know, there were factors, you know. And the prior history of narcotic use all intermixing to result in a bad outcome that maybe looked worse than the MRI findings.

Dr. Kirkham offered a very similar assessment after his October 25, 2022 evaluation, where he saw evidence of disability behavior with Employee not attempting to return to work or enjoyable activities. Like Dr. McCormick, he also thought Employee was dealing with many stressful events in his life and further diagnosed documented aberrant behavior surrounding opioid use and a history of opioid dependance in remission, as well as a possible history of chronic pain. Notably, nearly three years after the work injury, Employee reported no improvement in is his back pain at this evaluation.

Dr. Kirkham's hearing testimony was also akin to Dr. McCormick's deposition analysis of Employee's pain. Dr. Kirkham thought psychosocial factors were the overwhelming cause of Employee's pain, but Employee's use of opioids, and a history of chronic pain, were also contributing factors. He then explained, causation requires there be no confounding factors between the injury and the pain, but in Employee's case, there are so many other confounding factors, the link between Employee's injury and his back pain is very weak.

Both physicians also offer identical prognoses for Employee's back pain, regardless of whether additional treatment, such as a multidisciplinary pain management program, is undertaken. At his deposition, Dr. McCormick explained, he thinks Employee will "probably always have back

pain," even if he undergoes a functional restoration program. Dr. Kirkham similarly opined, Employee has chronic pain, most likely predating the accident, and he does not think Employee's pain is ever going to go away. Sadly, based on his experience with other workers' compensation cases involving chronic pain caused by psychosocial factors, the dissent thinks both doctors' prognoses will prove correct in this case. *Rogers & Babler*.

Ultimately, Drs. McCormick's and Kirkham's opinions differ on the substantial cause of Employee's need for multidisciplinary pain management program. Dr. McCormick explained the basis of his opinion at his deposition: "Well, low back injury was the cause. I mean, it's why he ended up on narcotics." Relatedly, his sole treatment recommendation in his March 28, 2022 report was, "Stop the narcotics." Meanwhile, Dr. Kirkham explained the basis of his opinion in his October 25, 2022 report:

> According to the medical literature, persistent pain after [a] traumatic event such as a fall has very little to do with any residual tissue damage and instead is primarily due to psychosocial factors, including the individual's emotional reaction to the event, expectation of harm, anxiety, perseveration on their symptoms, fear avoidance, catastrophizing, and passive coping style. (Citation omitted).

At hearing, he further explained, chronic pain can occur in cases without any residual tissue damage.

Both physicians agree psychosocial factors and Employee's narcotics use were contributing to his back pain. Dr. Kirkham also thinks there is a chronic pain component as well. However, in his final analysis, Dr. McCormick ascribes Employee's need for a multidisciplinary pain management program solely to his narcotics use. Dr. Kirkham takes a far broader view that accounts for several contributing causes of Employee's back pain. His causation opinion is considerably more comprehensive, insightful, and scholarly than Dr. McCormick's simplistic "Stop the narcotics" treatment recommendation. The dissent would give Dr. Kirkham's opinions significantly more weight than Dr. McCormick's, AS 23.30.122, and would conclude Employee is not entitled to a multidisciplinary pain management program. *Saxton*.

4) Is Employee entitled to additional TTD for his low back injury?

The dissent agrees with the majority's presumption analysis. Employee attached the presumption he is entitled to additional disability benefits with Dr. McCormick's opinion that Employee was medically stable one year after the November 19, 2019 injury. *Wolfer*. Employer rebutted it with Dr. Kirkham's opinion that Employee was medically stable when Dr. Witham released him to work on March 10, 2020. *Miller*. Employee is now required to prove he is entitled to additional disability benefits by a preponderance of the evidence. *Koons*.

The majority points out that Dr. Witham subsequently ordered a repeat injection, which it sees as evidence that Employee was not medically stable when he was released to work. But, as was discussed above, both Drs. McCormick and Kirkham think Employee will always have low back pain, so the dissent does not place much weight on the fact that Dr. Witham decided to recommend another epidural steroid injection based on Employee's subjective pain reporting. AS 23.30.122. Instead, the dissent thinks the above analysis of Drs. McCormick's and Kirkham's opinions on the substantial cause of Employee's need for additional medical treatment is equally applicable to the disability issue here.

In explaining Employee's continuing disability after reaching medical stability, Dr. McCormick continued with his narrow focus on Employee's narcotics use. This was why Employee was "non-workable," according to Dr. McCormick. However, Dr. McCormick's causation opinion runs into problems with the timeline in the record. Employee credibly testified at hearing that he stopped treating at Algone Pain Clinic because he did not want to take pain pills any longer. Although the medical records are incomplete, Employee likely stopped treating with narcotics sometime during the last three months of 2021. Given this, Dr. McCormick's opinion fails to account for why Employee has still not returned to work over a year later.

Meanwhile, Dr. Kirkham offered a completely obvious explanation at hearing. He thinks Employee not returning to work three years after the injury indicates a relatively low motivation to return to work. *Rogers & Babler*. Dr. Kirkham opines Employee's low motivation is explained by psychosocial factors. Citing medical literature, he explained these factors are probably present by the teenage years, when personality is established, and people who are well-adjusted and motivated and not anxious tend to recover from injuries, and individuals who have

these preexisting psychosocial factors have injuries and persistent pain that is unrelated to the actual injury. Like the analysis of Drs. McCormick's and Kirkham's causation opinions above on Employee's need for medical treatment, Dr. Kirkham's causation opinions on Employee's disability are more comprehensive, insightful, and scholarly than Dr. McCormick's and the dissent would accord them the most weight. AS 23.30.122.

Additionally, TTD benefits may not be paid past the date of medical stability. AS 23.30.185. Dr. McCormick thinks Employee was medically stable one year after the work injury because that is how long it takes for a disc protrusion to resolve when not surgically treated. Dr. Kirkham thinks Employee was medically stable when Dr. Witham released him back to work because Employee had returned to his baseline. Dr. Kirkham's medical stability opinion is based on an actual event in the record. Dr. McCormick's is based on a nebulous, generic timeframe. Dr. Kirkham's opinions would be accorded the most weight for this reason too. AS 23.30.122. The dissent finds Dr. Kirkham's explanation of his opinions markedly more persuasive than Dr. McCormick's and would conclude that Employee is not entitled to any additional TTD benefits. *Saxton*.

5) Is Employee entitled to a PPI benefit for his low back?

The dissent concurs separately with the majority on Employee's entitlement to PPI. This was the only issue on which Dr. Kirkham's medical testimony faltered at hearing. AS 23.30.122. His testimony about performing his ratings in accordance with the "spirit of the Guides" connoted a certain lack of objectivity, otherwise a hallmark of his medical testimony, and although Employee's lack of motivation to return to work may be relevant to the issues presented, his use of a firefighter patient as an example to explain why he included non-verifiable radicular complaints in that patient's PPI rating, and not Employee's, also suggests an unfairness to his process. Therefore, the dissent too would rely on Dr. McCormick's opinion on this issue and award Employee a seven percent PPI benefit for his low back. *Smith*.

6) Is Employee entitled to medical and related transportation costs for his left elbow?

The dissent agrees with the majority's presumption analysis. Employee attached the presumption that the work injury is the substantial cause of his need for left elbow medical

treatment with Dr. McCormick's deposition testimony, where he changed his causation opinion on Employee's ulnar neuropathy upon being shown a physical therapy chart note documenting left elbow pain earlier than he had previously thought. *Cheeks*. Employer rebutted it with Dr. Kirkham's opinions, which provide both alternative causes for Employee's left ulnar neuropathy and eliminate work as a cause. *Huit*. Employee is required to prove his work injury was the substantial cause of his need for left elbow medical treatment be a preponderance of the evidence. *Koons*.

Dr. McCormick's deposition testimony is illustrative. When he was shown the February 7, 2020 physical therapy notes, which documented Employee complaining of a "really painful" elbow, he stated, "I would accept the left-elbow injury as part of it" because the notes put Employee's elbow complaints closer in time to the injury. Dr. McCormick placing so much weight on this one note is concerning. Employee's elbow might have been very painful because of his activities in physical therapy that day, or from taking out the garbage at home that morning. The spontaneity of Dr. McCormick's answer indicates he failed to consider other obvious possibilities. *Rogers & Babler*; AS 23.30.122.

Later, during cross-examination, Dr. McCormick was asked whether a two- or three-month delay in ulnar neuropathy symptom onset would be unusual. He replied, "A little bit, but I've seen enough that I think it should be accepted." Here, too, Dr. McCormick's cavalier answer is concerning. Not only was his answer dismissive of the attorney's question, but also dismissive of a critical fact in this case - the significance of the delay in symptom onset. His testimony is also seemingly at-odds with his other testimony that ulnar neuropathy would have caused Employee "intense elbow pain," and while the physical therapy notes document a "really painful" elbow on February 7, 2020, that documentation was still made nearly three months after the work injury. *Rogers & Babler*; AS 23.30.122.

Dr. McCormick's theory of causation is concerning as well. Regarding the possible progression of Employee's ulnar neuropathy, he explained:

> So you *can* have swelling. Like bruising, you *can* have soft-tissue swelling and it *can* trigger a neuropathy. So yes, I mean it's - - *I didn't see those notes,* but, yes, it

> *can* happen like that, that you have pain and swelling and then the nerve damage ensues over the next two or three months. . . . So the nerve is pinched. There *might* be a little numbness at the time and then the atrophy and the loss of function occurs as a delayed consequence.

(Emphasis added). Dr. McCormick's causation theory is purely speculative and since it does not meet the requisite standard of a "reasonable medical probability," it is inadmissible and cannot be used to find that the work injury was the substantial cause of Employee's need for left elbow medical treatment. *Maddocks*. The dissent would conclude that Employee failed to prove his claim by a preponderance of the evidence, *contra Koons*, and would deny Employee's claim for left elbow medical care on this basis alone. AS 23.30.010(a).

At his deposition, Dr. Kirkham explained if Employee's fall had injured his ulnar nerve, that would cause immediate symptoms and an immediate radiation of pain along the inside of Employee's forearm and the ulnar side of Employee's hand. Like Dr. McCormick, he repeatedly described traumatic ulnar neuropathy symptoms as "severe pain." Employee had several follow-ups before the three-month mark, and Dr. Kirkham would have expected elbow symptoms to have been mentioned, although he acknowledged it was "certainly possible" that Employee injured his elbow and did not mention it because of his severe left leg pain. Dr. Kirkham realizes Employee had a fall, and its plausible that the fall caused ulnar neuropathy, but with a delay in reporting of three months, he thinks Employee's very mild ulnar neuropathy is idiopathic and unrelated to the injury on a more probable than not basis.

Dr. Kirkham also explained the differences between traumatic and non-traumatic neuropathy. Non-traumatic neuropathy is very common, while traumatic neuropathy is not common and usually occurs in patients with femoral fractures. He further explained medical research shows traumatic ulnar nerve injuries resolve over time, not worsen as happened in Employee's case.

Employer correctly framed the issue. It acknowledged Employee fell from a considerable height and contended many different injuries could *possibly* have been caused by such a fall; however, the issue here is what injuries were *probably* caused by the fall. *Koons*. Both Drs. McCormick and Kirkham agree, had Employee's ulnar nerve been injured by the fall, he would have immediately experienced "intense," "severe" pain. The nearly three-month delay in reporting

elbow pain, and the six-to-seven-month delay in reporting numbness and tingling into his forearm and fifth finger, simply cannot be ignored. They are compelling evidence that idiopathic factors and age are the substantial cause of Employee's need for left elbow medical treatment and not the work injury. *Saxton*.

In summary, Dr. Kirkham considered and eliminated the possibility of traumatic ulnar neuropathy, considered and eliminated the possibility that Employee's severe leg pain "masked" his severe elbow pain symptoms, and he stated his opinion in the proper "more probable than not standard. *Maddocks*. He also relied heavily on objective medical evidence, especially Employee's EMG results, whereas Dr. McCormick barely commented on them at all. AS 23.30.122. Dr. Kirkham's rational approach to his evaluations, his cogent explanations of his opinions, and his reliance on objective medical evidence, as well has his citations to medical literature, all stand in stark contrast to Dr. McCormick's hasty, superficial opinions. Consequently, the dissent would afford Dr. Kirkham's causation opinion on Employee's ulnar neuropathy the most weight and find that the work injury was not the substantial cause of his need for left elbow medical treatment. *Saxton*.

7) Should the RBA's determination that Employee is not eligible for reemployment benefits be modified?

During his SIME evaluation, Dr. McCormick observed Employee could walk on his toes, heels, tandem walk, and reverse tandem. He could hop on his right and left legs, squat all the way down and stand up, get on and off the exam table, flip supine to prone on the exam table with fluid movements. He later commented, "Employee moves well on examination and his pain and disability far exceed the objective findings of injury on [the] MRI," and remarked, "There are disc protrusions[,] but they are not severe and commonly seen in middle aged adults capable of doing labor." At that time, Dr. McCormick opined Employee could have resumed moderate labor by January 2021.

However, a short time later, Dr. McCormick's opinions on Employee's permanent physical capacities significantly shifted. At his deposition, he thought Employee's ability to perform medium duty work was now "questionable" due to strength level classifications and lifting

requirements for jobs Employee previously held, and he opined Employee was only capable of performing light sedentary work. Dr. McCormick never fully explained why he thought Employee's ability to perform medium duty work was now questionable, especially considering his observations and comments when he physically examined Employee at the SIME. Additionally, and once again, his use of the word "questionable" in expressing his opinions raises the same concerns expressed above with respect to the legal sufficiency of his opinions, which are required to be within a "reasonable medical probability." *Maddocks*.

On the other hand, Dr. Kirkham explained at hearing that chronic pain can occur in cases without any residual tissue damage. In those cases, Dr. Kirkham thinks one needs to become more active, not less active, because if one becomes less active, one will become weaker and less functional, and that is going to lead to more pain; it is just a downward spiral that he does not want his patients to get into. He thinks resuming physical activity is one of the most important things a patient can do. When Dr. Kirkham sees patients have a miraculous recovery from chronic pain, it is always because they simply resumed their physical activities and the pain improved. He testified there are 100 million people in the United States that have chronic pain, so it is obviously a difficult problem. Dr. Kirkham explained, one can have pain, and be functional, and still work, and he thinks this is the most healthy and productive way to look at the subject of chronic pain. According to Dr. Kirkham, psychosocial factors explain why someone gets in a fender-bender where there is no damage to their body, but they have chronic pain the rest of their life, and someone else is in an accident where their car is destroyed, and they are paraplegic, and they go to work in six months. Dr. Kirkham's opinions on the importance of a person with chronic pain resuming physical activity are commonsensical, practical and comport with the dissent's own observations and life experiences. *Rogers & Babler*.

Moreover, Dr. Kirkham explained his rationale about work restrictions. Physical restrictions are activities a patient should not do because it will harm them. He then illustrated his opinion with two compelling examples: a person who suffers from seizures should not drive because they could harm themselves or others if they had a seizure while driving; and a person with bad balance should not be on a roof because they might lose their balance and fall off the roof. Meanwhile, Dr. McCormick never explained why Employee's strength level or lifting ability had

been compromised by his back injury and he, like Dr. Kirkham, thought Employee's ulnar neuropathy was "more of a nuisance than completely disabling," then went on to further observe that it was in Employee's non-dominant hand. Dr. Kirkham's commonsense approach to work restrictions is far more compelling than Dr. McCormick's, AS 23.30.122, and the dissent would conclude that the RBA's determination should not be modified.

8) Is Employee entitled to reemployment stipend for any week he is not eligible for disability benefits or periodic PPI payments?

Since the dissent would not modify the RBA's determination that Employee was not eligible for reemployment benefits, Employee would not become entitled to reemployment stipend.

16) Should Employee's TTD benefits award be reduced for weeks in which he received unemployment benefits?

Since the dissent would not award any additional TTD benefits, Employee would not be ordered to repay unemployment benefits because the unemployment benefits he received were not received during any weeks in which he was previously paid TTD benefits.

17) Is Employee entitled to attorney fees and costs?

The dissent agrees Employee is entitled to attorney fees and costs, but under its analysis, he would prevail on far fewer issues, so his attorney fee and cost award would be far lower than that awarded by the majority.

/s/
Robert Vollmer, Designated Chair

If compensation is payable under terms of this decision, it is due on the date of issue. A penalty of 25 percent will accrue if not paid within 14 days of the due date, unless an interlocutory order staying payment is obtained in the Alaska Workers' Compensation Appeals Commission.

If compensation awarded is not paid within 30 days of this decision, the person to whom the awarded compensation is payable may, within one year after the default of payment, request from the board a supplementary order declaring the amount of the default.

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 Richard Randolf Sierer, employee / claimant v. Tri Star, Inc., employer; Umialik Insurance Co., insurer / defendants; Case No. 202000418; dated and filed in the Alaska Workers' Compensation Board's office in Fairbanks, Alaska, and served on the parties by certified US Mail on November 6, 2023.

/s/
Whitney Murphy, Office Assistant