ALASKA WORKERS' COMPENSATION BOARD MEETING

May 16-17, 2024

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TAB 1

ALASKA WORKERS' COMPENSATION BOARD MEETING AGENDA

May 16 - 17, 2024

ALASKA DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WORKERS' COMPENSATION

Zoom Video Conference: https://us02web.zoom.us/j/84445678961

To participate telephonically: 888-788-0099, Webinar ID: 844 4567 8961

Thursday, May 16, 2024

9:00am Call to order
Roll call establishment of quorum
Introduction of Senior Staff

9:10am Approval of Agenda

9:15am Reading and approval of minutes from Jan 11, 2024, Board meeting

9:30am Director's Report
- Division Update
- Approval of Board Designees
- AMA Guide update
- Proposed 2025 Hearing Calendar

10:00am Break

10:15am Public Comment Period
- Public comments

11:15am Budget & Staffing Update – Alexis Hildebrand, Admin Officer

11:30am Old Business
- Hearing procedures for SIME scheduling, 8 AAC 45.070
- Hearing officer as a commissioner's designee, 8 AAC 45.071

12:00pm Lunch Break

1:30pm Annual Report from RBA
- Reemployment Benefits Update – Stacy Niwa, Reemployment Benefits Administrator

3:00pm Break

3:15pm Annual Report Continued

5:00pm Adjournment

Friday, May 17, 2024

9:00am Call to order
Roll call establishment of quorum

9:15am New Business
- Language on service by electronic means
- Language on compensation reports

10:00am Break

10:15am Board Training
- Case summaries

12:00pm Adjournment

TAB 2

Workers' Compensation Board
Meeting Minutes
January 11, 2024

Thursday, January 11, 2024

I. Call to Order

Workers' Compensation Director Charles Collins called the Board to order at 9:02 am on Thursday, January 11, 2024. The meeting was held in Anchorage, Alaska, and by video conference.

II. Roll call

Director Collins conducted a roll call. The following Board members were present:

Brad Austin	Randy Beltz	Pamela Cline	John Corbett
Jonathon Dartt	Micheal Dennis	Sara Faulkner	Bronson Frye
Steven Heidemann	Anthony Ladd	Sarah Lefebvre	Mark Sayampanathan
Marc Stemp	Robert Weel	Debbie White	Lake Williams

Member Jonathon Dartt was absent, and members Sarah Lefebvre and Bronson Frye arrived after the roll call. A quorum was established.

III. Agenda Approval

A motion to approve the agenda was made by member Sayampanathan and seconded by member Cline. A unanimous vote approved the agenda.

IV. Approval of Meeting Minutes

A motion to adopt the minutes from the October 12-13, 2023 Board Meeting was made by member Beltz and seconded by member White. The minutes were adopted without objection.

V. Director's Report

Director Collins reviewed the list of Board Designees. A motion to accept the board designees was made by member Beltz and seconded by member Weel. The motion passed unanimously.

Director Collins discussed the division's accomplishments and goals and the upcoming legislative season. Director Collins notified the Board of a scheduled public meeting regarding adopting a new edition of the AMA Guide.

Administrative Officer Alexis Hildebrand provided an overview of Division staffing.

Break 10:02am-10:15am

VI. Public Comment Period 10:15 am- 11:15 am

Jeffrey Holloway – representing Babcock Holloway Caldwell & Stires, PC

- Suggested the board adopt electronic service of documents where service by US mail is not mandated by statute or regulation.
- Voiced concerns about rising SIME costs, which are becoming cost-prohibitive, especially when multiple physicians are required.
- Asked the Board to consider a cap or Fee Schedule similar to California, and adopt a regulation to control the costs of SIME travel.

VII. Old Business

The Board discussed member attendance at hearings.

Break 11:27am-11:35am

Ken Eichler, Dr. Doug Martin, and Victoria Riordan of the American Medical Association (AMA) explained the changes in the new AMA Guide.

Break 12:10pm-12:16pm

VIII. New Business

Approve 8 AAC 45.070 relating to hearings. Acting Chief of Adjudications Janel Wright provided an overview of this proposed amendment. Member Lefebvre requested that the Division prepare a timeline chart to demonstrate how cases will proceed if this change is implemented. Member Stemp moved to approve the amendment of 8 AAC 45.070. Member White seconded the motion. Member Cline offered an amendment to the motion to change the date of issuance from 40 to 60 days. Members Stemp and White agreed with the amendment. The motion passed unanimously.

Approve 8 AAC 45.071, relating to commissioner's designees. Member Faulkner moved to approve 8 AAC 45.071 by adding (I) but not adding (J) or (E) as proposed in the packet. Member Austin seconded the motion. The motion passed unanimously.

Member Austin motioned to adjourn, seconded by member Sayampanathan.

Meeting Adjourned 1:35 pm

TAB 3

ALASKA WORKERS' COMPENSATION BOARD

Chair, Commissioner Catherine Muñoz
Alaska Department of Labor and Workforce Development

Name	Seat	District	Affiliation
Charles Collins	Commissioner's Designee		
Brad Austin	Labor	1st Judicial District	Plumbers and Pipe Fitters Local 262
Debbie White	Industry	1st Judicial District	
Randy Beltz	Industry	3rd Judicial District	
Pamela Cline	Labor	3rd Judicial District	Intl. Brotherhood of Electrical Workers LU 1547
Mike Dennis	Industry	3rd Judicial District	
Sara Faulkner	Industry	3rd Judicial District	
Bronson Frye	Labor	3rd Judicial District	Painters and Allied Trades Local 1959
Steven Heidemann	Labor	3rd Judicial District	
Anthony Ladd	Labor	3rd Judicial District	
Marc Stemp	Industry	3rd Judicial District	
Vacant	Industry	3rd Judicial District	
Vacant	Labor	3rd Judicial District	
John Corbett	Labor	2nd/4th Judicial District	Laborers Local 942
Jonathon Dartt	Industry	2nd/4th Judicial District	
Sarah Lefebvre	Industry	2nd/4th Judicial District	Colaska
Lake Williams	Labor	2nd/4th Judicial District	Operating Engineers Local 302
Vacant	Industry	At Large	
Brian Zematis	Labor	At Large	

TAB 4

THE STATE of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Labor and Workforce Development

DIVISION OF WORKERS' COMPENSATION

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Fax: 907.465.2797

BOARD DESIGNEES – May 2024

The following staff members are appointed as Board designees to act on the Board's behalf in accordance with the Alaska Workers' Compensation Act and Regulations. (For example, the Board designee may conduct prehearing conferences, take action in connection with Board-ordered second independent medical examinations, and decide whether to continue or cancel scheduled Board hearings.)

NAME	LOCATION	POSITION TITLE
Charles Collins	Juneau	Director
Janel Wright	Juneau	Acting Chief of Adjudications
Kyle Reding	Anchorage	WC Hearing Officer II
William Soule	Anchorage	WC Hearing Officer II
Janel Wright	Anchorage	WC Hearing Officer II
Vacant	Anchorage	WC Hearing Officer I/II
Kathryn Setzer	Juneau	WC Hearing Officer II
Robert Vollmer	Fairbanks	WC Hearing Officer II
Vacant	Fairbanks	WC Hearing Officer I/II
Elizabeth Pleitez	Anchorage	WC Officer II
Harvey Pullen	Anchorage	WC Officer II
Amanda Johnson	Anchorage	WC Officer II
Carrie Craig	Anchorage	WC Officer I
Vacant	Anchorage	WC Officer I
Dani Byers	Juneau	WC Officer II
Amy Bender	Fairbanks	WC Officer II

TAB 5

ALASKA DEPARTMENT OF LABOR
& WORKFORCE DEVELOPMENT

Workers' Compensation in Alaska

A reference for Alaska Workers' Compensation Board Members

https://labor.alaska.gov/wc/home.htm

Mission

Sec. 23.30.001. Legislative intent.
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;

(2) workers' compensation cases shall be decided on their merits except where otherwise provided by statute;

(3) this chapter may not be construed by the courts in favor of a party;

(4) hearings in workers' compensation cases shall be impartial and fair to all parties and that all parties shall be afforded due process and an opportunity to be heard and for their arguments and evidence to be fairly considered.

(Emphasis underline added.)

Authority

Sec. 23.30.005. Alaska Workers' Compensation Board.
(a) The Alaska Workers' Compensation Board consists of a southern panel of three members sitting for the first judicial district, two northern panels of three members sitting for the second and fourth judicial districts, five southcentral panels of three members each sitting for the third judicial district, and one panel of three members that may sit in any judicial district. Each panel must include the commissioner of labor and workforce development, or a hearing officer designated to represent the commissioner, a representative of industry, and a representative of labor. The latter two members of each panel shall be appointed by the governor and are subject to confirmation by a majority of the members of the legislature in joint session. The board shall by regulation provide procedures to avoid conflicts and the appearance of impropriety in hearings.

(b) The commissioner shall act as chair and executive officer of the board and chair of each panel. The commissioner may designate a representative to act for the commissioner as chair and executive officer of the board. The commissioner may designate hearing officers to serve as chairs of panels for hearing claims.

(c) The governor shall appoint the members of the panels. Each member, except the commissioner of labor and workforce development, serves a term of three years. The term of a management member and the term of a labor member of each panel may not expire in the same year. The management and labor members are entitled to compensation in the amount of $50 a day for each day or portion of a day spent in actual meeting or on authorized official business incidental to their duties and to all other transportation and per diem as provided by law.
(d) [Repealed, § 9 ch 77 SLA 1979.]

(e) A member of one panel may serve on another panel when the commissioner considers it necessary for the prompt administration of this chapter. Transfers shall be allowed only if a labor or management representative replaces a counterpart on the other panel.

(f) Two members of a panel constitute a quorum for hearing claims and the action taken by a quorum of a panel is considered the action of the full board.

(g) A claim may be heard by only one panel.

(h) The department shall adopt rules for all panels, and procedures for the periodic selection, retention, and removal of both rehabilitation specialists and physicians under AS 23.30.041 and 23.30.095, and shall adopt regulations to carry out the provisions of this chapter. The department may by regulation provide for procedural, discovery, or stipulated matters to be heard and decided by the commissioner or a hearing officer designated to represent the commissioner rather than a panel. If a procedural, discovery, or stipulated matter is heard and decided by the commissioner or a hearing officer designated to represent the commissioner, the action taken is considered the action of the full board on that aspect of the claim. Process and procedure under this chapter shall be as summary and simple as possible. The department, the board or a member of it may for the purposes of this chapter subpoena witnesses, administer or cause to be administered oaths, and may examine or cause to have examined the parts of the books and records of the parties to a proceeding that relate to questions in dispute. The superior court, on application of the department, the board or any members of it, shall enforce the attendance and testimony of witnesses and the production and examination of books, papers, and records.

(i) The department may adopt regulations concerning the medical care provided for in this chapter. In addition to the reports required of physicians under AS 23.30.095(a) — (d), the board may direct a physician or hospital rendering medical treatment or service under this chapter to furnish to the board periodic reports of treatment or services on forms procured from the board.

(j) The board may also arrange to have hearings held by the commission, officer, or tribunal having authority to hear cases arising under the workers' compensation law of any other state, of the District of Columbia, or of any territory of the United States. The testimony and proceedings at the hearing shall be reported to the board and are a part of the record in the case. Evidence taken at the hearing is subject to rebuttal upon final hearing before the board.

(k) The board shall notify the contracting agency of the state or of a political subdivision of the state when it revokes the self-insurance certificate of an employer holding a contract with the state or a political subdivision of the state.

(l) Regulations adopted by the department under (h) and (i) of this section become effective only after approval by a majority of the full board.

(m) The board may by regulation delegate authority to the director to assist the board in administering and enforcing this chapter.

Workers' Compensation Division updates

The Division continues to operate with a vacancy rate higher than normal, currently the Division is recruiting for eight positions ranging from Hearing Officers to Admin Assistants. This issue is unfortunately shared across the State by other Departments and indeed also by private employers.

The major update in process is an internal audit by the Legislative Budget and Audit Committee. These audits are thorough and are an opportunity for the Division and the AWCB to exhibit the work product produced, especially under impaired conditions. The last audit of the Division was performed in 1999 and listed several deficiencies to be addressed. Those items are listed on the current audit request, although so dated the items will be of little guidance to the auditor.

Regulation Work

Alaska code 8 AAC 45.070 and 8 AAC 45.071 both were amended and approved by the AWCB in January. The amendments have been sent to the Department of Law for conformity checks and out for public comment. This allows the AWCB to work on and possibly adopt the amendments in this meeting, the file then would once again be sent to the Department of Law to have the language approved and to the Lieutenant Governor's office for enrollment into the state code.

SIME regulation **8 AAC 45.092** should be clarified to explain the role of the committee and the power to remove medical professionals from the SIME list.

Furthermore, 8 AAC 45.900(j), the definition of "previously rehabilitated" is improper and outside of statute. This paragraph should be deleted in its entirety. (Legal opinion from 2005)

A clarification of 8 AAC 45.210(b), needs to be accomplished. The words [the green copy of] should be removed from the sentence before **form 07-6101**.

Current Legislation

What passed and what got left behind.

House Bill 63 and Senate Bill 60, dealing with the repeal of the Workers' Compensation Appeals Commission, has had several hearings in varied committees in both bodies of the Legislature. On the House side the bill is in the Finance committee but has not had a hearing there. The Senate Finance has held a hearing on the Senate bill but still resides there.

House Bill 218 addressing firefighter disabilities, has been through committee work and currently is awaiting calendaring on the House side. There is no concurrent Senate work, and this may keep the bill from becoming law.

House Bill 239, a presumption of compensability of PTSD, had no committee hearings.

House Bill 376, dealing with transportation and delivery networks, is sitting in the House Labor & Commerce committee. This bill effects Uber Eats, Door Dash and other delivery driver employers. The issue contained here is what constitutes an independent contractor.

Senate Bill 147, reemployment benefits, this bill is an answer to a Board resolution and addresses several of the issues we have identified in reemployment benefits. SB 147 has passed the Senate unanimously and moved to the House where it currently is in House Labor & Commerce committee.

Senate Bill 183, protection of the Benefits Guaranty Fund. This bill has passed the Senate and is now in the House Finance committee for consideration.

Senate Bill 206, Stay-at-Work/Return-to-Work. This bill has also passed the Senate and has been transferred to the House for consideration.

AWCB Member Updates

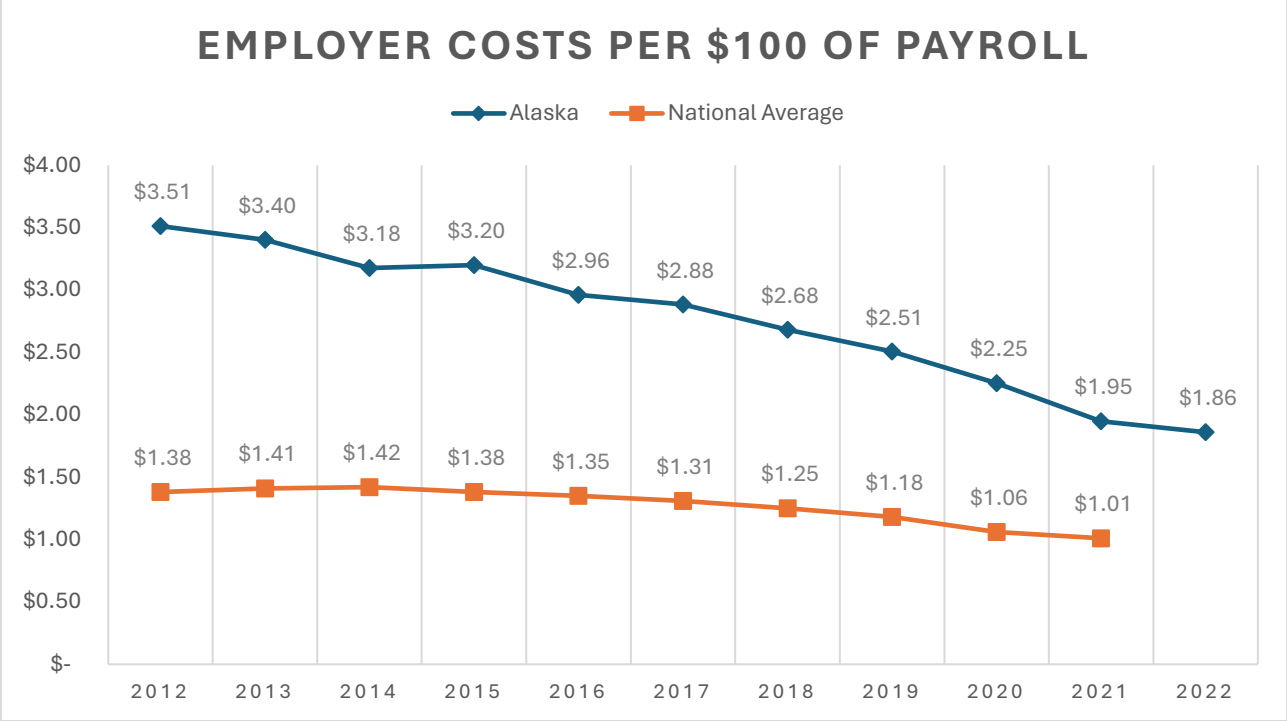
Name	Designation	District	Term Date
Brad Austin	Labor	1st District	2026
Debbie White	Industry	1st District	2027
John Corbett	Labor	2nd / 4th District	2026
Jonathan Dartt	Industry	2nd / 4th District	2025
Sarah Lefebvre	Industry	2nd / 4th District	2025
Lake Williams	Labor	2nd / 4th District	2026
Randy Beltz	Industry	3rd District	2025
Pam Cline	Labor	3rd District	2027
Mike Dennis	Industry	3rd District	2025
Sara Faulkner	Industry	3rd District	2025
Bronson Frye	Labor	3rd District	2027
Steven Heidemann	Labor	3rd District	2027
Anthony Ladd	Labor	3rd District	2026
~~Mark Sayampanathan~~	Industry	3rd District	
Marc Stemp	Industry	3rd District	2025
	Labor	3rd District	
	Industry	At Large	
Brian Zematis	Labor	At Large	2027

The following members were reconfirmed by the Legislature for a three-year term, Debbie White, Pam Cline, Bronson Frye, and Steven Heidemann. A new member was appointed and confirmed, Brian Zematis fills the at-large labor seat. Brian is new to the Board, but not to workers' compensation. Brian was a Workers' Compensation Officer in the past. Robert, (Bob), Weel was not reappointed to the Board, Bob's tenure was celebrated by the Division with a lunch and greet session and his contributions to the Board and time that he spent with our team was recognized.

Alaska Workers' Compensation Victories

The annual publication Workers' Compensation: Benefits, Costs, and Coverage, from National Academy of Social Insurance, NASI, published in February of 2024 noted several positive items occurring in the workers' compensation system. This report is authored by policy consultants at the NASI with assistance from a large study panel consisting of leaders from state workers' compensation or insurance departments, universities, the US department of Labor, insurance companies and insurance associations, and the Center for Medicare and Medicaid Services, CMS. Alaska was prominently featured in this edition.

The study panel consisting of twenty-two members recognized the work that Alaska and other jurisdictions have performed in improving the workers' compensation system. Under State Trends, the publication points out that "Employers' costs per $100 of covered wages decreased in almost every state between 2017 and 2021." This is based on the latest data available for research and shows good progress in holding down costs with the use of technology and the implementation of safer workplaces. The study continues by stating "the largest percentage decrease from 2017 – 2021 occurred in Alaska, where costs per $100 decreased by 35.9 percent."



The Alaska Workers Compensation Board was also mentioned in the latest Workers Compensation Research Institute's annual report for 2024. As a participant in workers' compensation research Alaska has stayed current with the latest medical and indemnity benefit updates and implemented those as appropriate for Alaska.

The Division has a new addition arriving late this summer! After a lengthy search process, a Hearing Officer will be joining us in August in our Fairbank office. John Burns, a former Attorney General, has agreed to join the team in our Fairbanks location. Mr. Burns has a storied career in Alaska and brings a lot of experience

to the position. As our Hearing Officers cover claim disputes and mediation in all the state districts, being attached to the Fairbanks office does not limit Mr. Burns from participating in other location hearings. As the Board knows, our Hearing Officers may work with any panel on a claim, so expect to see John Burns on a panel you participate in soon.

The most up to date AMA guide was adopted:

State of Alaska Mike Dunleavy Governor	Alaska Workers' Compensation Division PO Box 115512 Juneau, Alaska 99811-5512		
Department of Labor and Workforce Development	**BULLETIN**	Number 24-02	Date February 1, 2024
Catherine Muñoz Commissioner	SUBJECT	Adoption of American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition 2023.	
	REFERENCE	AS 23.30.190	

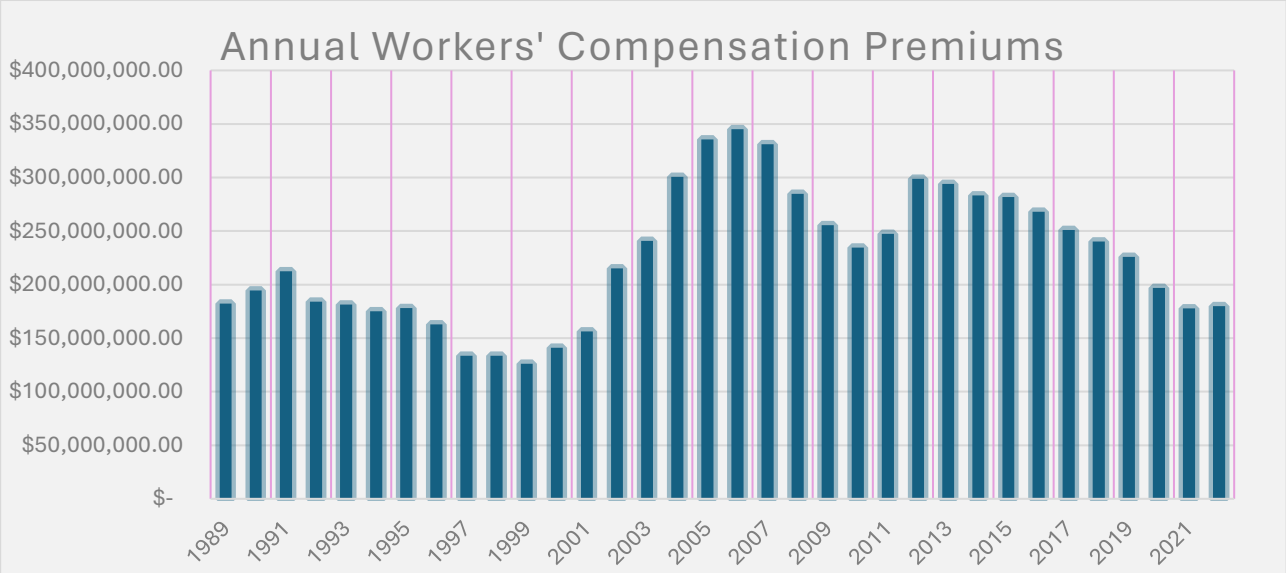
Effective Jan. 1, 2023, the American Medical Association (AMA) will consider the updated AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, 2023, to be the most recent edition of AMA Guides Sixth and the most current version of the AMA Guides.

As required by AS 23.30.190(d), the Alaska Workers' Compensation Board held an open meeting to accept the new AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition 2023. Effective March 04, 2024, all permanent partial impairment determinations and ratings under AS 23.30.190(b) must be carried out using the American Medical Association's Guides to the Evaluation of Permanent Impairment, Sixth Edition.

The American Medical Association is continuing the update process and is currently in the public notice and proposal submission stage. There is a meeting scheduled for August that will possibly result in some clarification of the updates. This 2024 edition deals with musculoskeletal system changes and updates to CPT evaluation code adjustment.

Work is Recovery

Alaska Premium Statistics



ANALYSIS OF ALASKA MEDICAL FEE SCHEDULE CHANGES
EFFECTIVE JANUARY 1, 2024

NCCI estimates that the changes to the medical fee schedule in Alaska, effective January 1, 2024, will result in an impact of +0.1% on overall workers compensation system costs.

SUMMARY OF CHANGES

The Alaska medical fee schedule (MFS), effective January 1, 2024, is based on 2024 Medicare values with state-specific conversion factors (CFs) established by the Department of Labor and Workforce Development (DLWD).

The changes to the Alaska MFS, effective January 1, 2024, include the following:

Provider Schedule

- Update the maximum allowable reimbursements (MARs) to be based on 2024 Medicare Resource-Based Relative Value Units (RBRVUs) established for each CPT[1] code and published by the Centers for Medicare and Medicaid Services (CMS). The prior MARs were based on the 2023 Medicare RBRVUs.

- All physician services' CFs remain unchanged.

Hospital Outpatient and Ambulatory Surgical Center (ASC)

- Update the MARs to be based on 2024 Medicare Outpatient Prospective Payment System (OPPS) relative weights. The prior MARs were based on 2023 OPPS relative weights.

- The CFs for Hospital Outpatient and ASC services remain unchanged.

Hospital Inpatient

- Update the MARs to be based on 2024 Medicare Severity Diagnosis Related Group (MS-DRG) weights. The prior MARs were based on 2023 MS-DRG weights. The DLWD establishes multipliers for each hospital to be applied to the Medicare MAR. There is no change to the multipliers.

[1] Current Procedural Terminology maintained by the American Medical Association.

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ACTUARIAL ANALYSIS

NCCI's methodology to evaluate the impact of medical fee schedule changes includes three major steps:

1. Calculate the percentage change in maximum reimbursements
    - Compare the prior and revised maximum reimbursements by procedure code to determine the percentage change by procedure code. For hospital inpatient services, the prior and revised maximum reimbursements are compared by episode.
    - Calculate the weighted-average percentage change in maximum reimbursements for the fee schedule using observed payments by procedure code as weights. For hospital inpatient services, the observed payments by episode are used as weights. For hospital outpatient and ASC services, observed payments are aggregated according to packaging rules, where applicable.

2. Determine the share of costs that are subject to the fee schedule
    - The share is based on a combination of fields, such as procedure code, provider type, and place of service, as reported on the NCCI Medical Data Call, to categorize payments that are subject to the fee schedule.
    - Any potential impact from the share of costs not subject to the fee schedule will be realized in future claim experience and reflected in subsequent NCCI loss cost filings, as appropriate.

3. Estimate the price level change as a result of the revised fee schedule
    - NCCI research by David Colón and Paul Hendrick, "The Impact of Fee Schedule Updates on Physician Payments" (2018), suggests that approximately 80% of the change in maximum reimbursements for physician fee schedules is realized on payments impacted by the change.
    - For facility fee schedule changes, a price realization factor of 80% is assumed.

In this analysis, NCCI relies primarily on two data sources:

- Detailed medical data underlying the calculations in this analysis are based on NCCI's Medical Data Call for Alaska for Service Year 2022. Due to low data volume, the hospital inpatient impact analysis is based on NCCI's Medical Data Call for Alaska for Service Years 2021 and 2022. Reported medical experience for COVID-19 claims as reported in NCCI Call 31 for Large Loss and Catastrophe have been excluded from the data on which this analysis is based.
- The share of benefit costs attributed to medical benefits is based on NCCI's Financial Call data for Alaska from Policy Years 2017, 2018, 2019, 2020, and 2021 projected to the effective date of the benefit changes.

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Summary of Impacts

The impacts from the fee schedule changes in Alaska, effective January 1, 2024, are summarized below.

Type of Service	(A) Impact on Type of Service	(B) Share of Medical Costs	(C) = (A) x (B) Impact on Medical Costs
Physician	-0.3%	43.0%	-0.1%
Hospital Inpatient	+0.9%	12.9%	+0.1%
Hospital Outpatient	+1.5%	14.4%	+0.2%
ASC	+0.3%	11.8%	Negligible Increase[2]
Combined Impact on Medical Costs (D) = Total of (C)			**+0.2%**
Medical Costs as a Share of Overall Costs (E)			65%
Combined Impact on Overall Costs (F) = (D) x (E)			**+0.1%**

Refer to the appendix for the weighted-average changes in MARs by physician practice category, the share of costs subject to the fee schedule by type of service, and the weighted-average change in MAR by type of service.

Non-Quantified Changes

- Maximum reimbursement for dental services, durable medical equipment, prosthetics, orthotics, supplies, and ambulance services are also governed by the fee schedule in Alaska. The share of these payments with a MAR makes up a small portion of medical costs. Therefore, the impact on overall costs due to updating the fee schedule for these services is not anticipated to be material. As such, any potential impact from this change will be realized in future claim experience and reflected in subsequent NCCI loss cost filings in Alaska, as appropriate.

[2] Negligible is defined in this document to be an impact smaller in magnitude than +/-0.1%

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APPENDIX

Weighted-Average Percentage Change in MARs Prior to Price Realization by Physician Practice Category

Physician Practice Category	Share of Physician Costs	Percentage Change in MARs
Anesthesia	3.7%	0.0%
Surgery	23.5%	-0.3%
Radiology	9.5%	-1.5%
Pathology & Laboratory	0.6%	0.0%
Evaluation & Management	22.1%	+0.4%
Medicine	35.8%	-0.7%
Other HCPCS*	0.0%	0.0%
Subject to the Fee Schedule	**95.2%**	**-0.4%**
Payments with no specific MAR	4.8%	–
Total	**100%**	**-0.4%**

*Healthcare Common Procedure Coding System

Share of Costs Subject to the Fee Schedule (FS) and Weighted-Average Percentage Change in MARs by Type of Service

Type of Service	(A) Change in MARs for Costs Subject to the FS	(B) Share of Costs Subject to the FS	(C) = (A) x (B) Change in MARs by Type of Service	(D) = (C) x 80% Impact after Price Realization
Physician	-0.4%	95.2%	-0.4%	-0.3%
Hospital Inpatient	+1.5%	76.2%	+1.1%	+0.9%
Hospital Outpatient	+2.1%	88.9%	+1.9%	+1.5%
ASC	+0.4%	91.7%	+0.4%	+0.3%

THIS DOCUMENT AND ANY ANALYSIS, ASSUMPTIONS, AND PROJECTIONS CONTAINED HEREIN PROVIDE AN ESTIMATE OF THE POTENTIAL PROSPECTIVE SYSTEM COST IMPACT(S) OF PROPOSED/ENACTED SYSTEM CHANGE(S) AND IS PROVIDED SOLELY AS A REFERENCE TOOL TO BE USED FOR INFORMATIONAL PURPOSES ONLY. THIS DOCUMENT SHALL NOT BE CONSTRUED OR INTERPRETED AS PERTAINING TO THE NECESSITY FOR OR A REQUEST FOR A LOSS COST/RATE INCREASE OR DECREASE, THE DETERMINATION OF LOSS COSTS/RATES, OR LOSS COSTS/RATES TO BE REQUESTED. THE ANALYSIS CONTAINED HEREIN EVALUATES THE DESCRIBED CHANGES IN ISOLATION UNLESS OTHERWISE INDICATED; ANY OTHER CHANGES NOT INCLUDED IN THIS ANALYSIS THAT ARE ULTIMATELY ENACTED MAY RESULT IN A DIFFERENT ESTIMATED IMPACT. I, AMELIA CARROLL, ACAS, MAAA, AM AN ACTUARIAL CONSULTANT FOR THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, INC. AND THE ACTUARY RESPONSIBLE FOR THE PREPARATION OF THIS DOCUMENT. THIS DOCUMENT IS PROVIDED "AS IS" ON THE DATE SET FORTH HEREIN AND INCLUDES INFORMATION AND EVENTS AVAILABLE AT THE TIME OF PUBLICATION ONLY.

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ANALYSIS OF ALASKA PROPOSAL RELATED TO AS 23.30.041

As Received on July 18, 2022

NCCI received a request from the Workers' Compensation Division of the Alaska Department of Labor and Workforce Development (DLWD) to evaluate the potential cost impact of possible changes to Alaska Statute (AS) 23.30.041*, Rehabilitation and reemployment of injured workers*. NCCI estimates that, if ultimately enacted, these changes may result in an impact on workers compensation (WC) system costs in Alaska of between -0.1% (-$0.2M[1]) and -0.4% (-$0.7M).

No effective date was provided with this proposal. In the below analysis, NCCI has assumed an effective date of July 1, 2023. Note that **NCCI's analysis is prospective only (i.e., for accidents occurring on or after the effective date of the proposal if ultimately enacted). To the extent the changes in this proposal are enacted and extend to accidents occurring prior to its effective date, retroactive cost impacts may arise.**

The analysis below is based on a conceptual proposal from the Alaska DLWD. If a legislative bill were introduced, NCCI would perform an analysis based on the actual bill language and the impacts stated in this analysis may change accordingly.

Summary of Proposal Related to AS 23.30.041

AS 23.30.041 sets out a statutory process and rules for providing rehabilitation and reemployment services to injured workers that meet prescribed eligibility requirements. If the employee is totally unable to return to their employment for 60 consecutive days as a result of a compensable injury, the employee or employer may request an eligibility evaluation for reemployment benefits. If the employee is totally unable to return to work for 90 consecutive days as a result of the injury, the administrator "shall" order an eligibility evaluation (unless a stipulation of eligibility was submitted). The proposal modifies the 90-day requirement by changing the wording from "shall" to "may," providing the administrator discretion in whether to pursue an eligibility evaluation for the worker.

Within 30 days after the employee receives the administrator's notification of eligibility for reemployment benefits, they must indicate whether they are electing to either use employer-provided reemployment services or accept a job dislocation benefit. Job dislocation benefits are applicable to eligible injured workers with a permanent partial impairment (PPI) rating[2], and are provided in lieu of employer-provided reemployment services. The job dislocation benefits are currently determined based on the injured worker's PPI rating as follows:

- $5,000 if 0 < PPI rating < 15%
- $8,000 if 15% ≤ PPI rating < 30%

[1] The estimated dollar impact is displayed for illustrative purposes only and calculated as the percentage impacts multiplied by 2021 written premium of $179M from NAIC Annual Statement data for Alaska. This figure does not include self-insurance, the policyholder retained portion of deductible policies, or adjustments for subsequent changes in premium levels. The use of premium as the basis for the dollar impact assumes that expenses and other premium adjustments will be affected proportionally to the change in benefit costs. The dollar impact on overall system costs inclusive of self-insurance is estimated to be between -$0.2M and -$0.9M, where data on self-insurance is approximated using the National Academy of Social Insurance's October 2021 publication "Workers' Compensation: Benefits, Costs, and Coverages, 2019."

[2] Other eligibility requirements include a permanent diminished physical capacity for performing their pre-injury or other suitable employment and no offer of employment by the employer for an amount equal to at least 75% of the worker's pre-injury wage.

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- $13,500 if 30% ≤ PPI rating

These awards are referred to below as "formula-based" job dislocation benefits. The proposal would increase these benefits by 30%, illustrated as follows:

- $6,500 if 0 < PPI rating < 15%
- $10,400 if 15% ≤ PPI rating < 30%
- $17,550 if 30% ≤ PPI rating

If instead the worker elects to use employer-provided reemployment services, a rehabilitation specialist will formulate and obtain approval of a reemployment plan. The plan must require continuous participation by the employee, and terminates within two years from the earlier of the plan approval date or the acceptance date. The cost of plan, borne solely by the employer, may not currently exceed $13,300. The proposal recommends to increase this cap to $19,300, an increase of +45.1%.

The proposal also includes recommended changes to various administrative provisions in the statute, with one of the more notable requiring the reemployment benefits administrator to develop and implement methods to return injured employees to work quickly and appropriately and provide employers with information and consultation services.

Actuarial Analysis of Proposal Related to AS 23.30.041

As noted in the summary section, the proposal would:

- Provide discretion to the administrator in ordering an eligibility evaluation
- Increase job dislocation benefits by 30%
- Raise the current reemployment benefit cap of $13,300 to $19,300.

NCCI analyzed these changes together since there are interaction effects between the proposed provisions.

In Alaska, reemployment costs provided per AS 23.30.041 can be divided into five categories:

- Employee Eligibility Evaluation Costs
- Rehabiliatation Benefit Costs per AS 23.30.041(g)
- Rehabiliatation Benefit Costs per AS 23.30.041(k)
- Reemployment Plan Costs
- Rehabilitation Specialist and Plan Monitoring Fees

The proposed changes have the potential to impact costs for all of the above.

<u>Employee Eligibility Evaluation Costs</u>

The proposal would provide the administrator with discretion in ordering an eligibility evaluation by replacing the word "shall" with "may." Stakeholder feedback indicates that the vast majority of evaluations ordered are a result of the 90-day requirement. Further, only approximately 20% to 25% of ordered

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evaluations are deemed eligible for AS 23.30.041 benefits[3]. Providing the administrator with the ability to wait longer or elect not to order an eligibility evaluation—based on a review of case-specific information—could reduce the costs of evaluations to the system. Using data from recent Alaska DLWD annual reports, NCCI estimates that eligibility evaluation costs make up approximately 25% of total reemployment benefits[4]. **Assuming that 60% to 80% of cases that would typically be deemed ineligible for reemployment benefits may no longer be submitted for evaluation under the proposal, total reemployment benefit costs could decrease between 11.6% and 15.4%.**

Formula-Based Job Dislocation Benefit Costs

Rehabiliatation benefit costs per AS 23.30.041(g)—commonly referred to as job dislocation benefits—are reported as comprising roughly 30% of total reemployment benefits using Alaska DLWD annual report data. Note that the job dislocation benefit share has fluctuated significantly in recent years, decreasing from 27% in Calendar Year 2018 to 21% in 2019, and then almost doubling to 39% in Calendar Year 2020. The proposal recommends increasing these benefits, which are based on the injured worker's PPI rating, by +30%.

As noted in the Summary section above, job dislocation benefits are determined based on the worker's PPI rating. Since the vast majority of workers are anticipated to have PPI ratings less than 15%, the typical job dislocation is expected to be $5,000 currently. However, analysis of the DLWD annual report data suggests that other amounts are being included in this cost category. It is possible that negotiated lump sum amounts for workers electing reemployment plans may be included in this category[5]. In fact, NCCI estimates that only 10% of the reported AS 23.30.041(g) costs, on average, may be attributable to formula-based job dislocation benefits[6]. Hence, NCCI estimates that only 3% (= 30% x 10%) of total reemployment benefit costs are attributable to formula-based job dislocation benefits. The remaining costs (27%) reported as AS 23.30.041(g) are considered below with AS 23.30.041(k) costs, both of which may be impacted by changes in retraining plan options available to workers under the proposal. **NCCI estimates that a +30% increase in formula-based job dislocation benefits would result in a +0.9% (=+30% x 3%) impact on total reemployment benefits costs in the state[7].**

[3] Based on Alaska DLWD annual report data for Calendar Years 2017 to 2020.
[4] Based on Calendar Years 2018 through 2020.

[5] A worker may elect to pursue a reemployment plan instead of taking a job dislocation benefit, but then ultimately seek a lump sum payment in place of performing the plan. It is possible that such amounts are reported under AS 23.30.041(g) given they are similar in nature to a job dislocation benefit. Note that these lump sum amounts are expected to be significantly greater than formula-based job dislocation benefits.

[6] The 10% share is estimated using the number of workers electing formula-based job dislocation benefits multiplied by $5,000 divided by total AS 23.30.041(g) costs.

[7] With job dislocation benefits increasing by approximately 30%, it is possible that a greater share of workers may elect these benefits since they are a direct lump-sum payment to the injured worker, whereas an increase in the cap on plan development costs is an expense borne by the employer/insurer. However, as noted in this section, these benefits are typically only $5,000 based on a PPI rating of less than 15%. As a result, both the percentage of workers anticipated to modify their behavior for an increase of approximately $1,500 (=+30% x $5,000), and any resultant impact on total reemployment benefit costs, is expected to be limited and therefore not explicitly incorporated in this analysis.

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Plan Development Costs & Rehabilitation Specialist and Plan Monitoring Fees

The recommended increase in the current reemployment plan benefit cap (+45.1%) would not be expected to affect all cases deemed eligible for reemployment benefits. For many workers, similar plans featuring such options as vocational training or online courses may still be deemed appropriate. As such, the plan cost for these workers would not be expected to notably change. However, for some workers, the increase in the cap may provide greater retraining options. This may increase plan development costs, lengthen the duration of plans, and possibly affect lump sum settlement amounts.

Using data from recent Alaska DLWD annual reports, NCCI estimates that rehabilitation plan development costs make up approximately 10% of total reemployment benefits[8]. For this analysis, NCCI assumed that one-third to one-half of workers could see a modification in their plan resulting in an increase that is proportional to the proposed cap change (+45.1%). **This translates to an impact on reemployment plan costs of +15% (=+45.1% x 33.3%) to +22.6% (=+45.1% x 50%). Hence, if these changes were to be ultimately enacted, total reemployment benefit costs could potentially increase by +1.5% (=+15% x 10%) to +2.3% (=+22.6 x 10%).**

Note that a commensurate increase in certain other reemployment benefits would also be expected. Specifically, costs that are tied to the duration of the plan—such as rehabilitation specialists and plan monitoring fees—would be expected to increase along with the cost of the rehabilitation plan. For this analysis, NCCI assumed that the increase in these other reemployment benefits would be approximately 25% to 50% of the estimated change in reemployment plan costs. That is, rehabilitation specialists and plan monitoring fees may increase between +3.8% (=+15% x 25%) and +11.3% (=+22.6% x 50%). **As rehabilitation specialist and plan monitoring fees represent approximately 5% of total reemployment benefits, if enacted, these changes may result in an impact of between +0.2% (=+3.8% x 5%) and +0.6% (=+11.3% x 5%) on total reemployment benefit costs in the state.**

All Other Reemployment Benefit Costs

For plans that are lengthened, benefits provided under AS 23.30.041(k) would be expected to increase. Rehabiliatation benefits costs under AS 23.30.041(k) are estimated to comprise roughly 30% of total reemployment benefits in the state based on Alaska DLWD annual report data. Stakeholder feedback indicates that retraining plans frequently begin after maximum medical improvement has been achieved. Once PPI benefits have been exhausted, workers are eligible for additional compensation while participating in a retraining plan per AS 23.30.041(k). Hence, if the duration of retraining plans increase, the amount of these additional compensation benefits would be expected to increase as well. An increase in the duration or options offered to the worker may also result in higher lump sum settlement amounts currently reported as AS 23.30.041(g) costs.

In this analysis, NCCI assumed that AS 23.30.041(g)[9] & (k) costs—which represent approximately 57% of total reemployment benefits—may increase between +5% and +10% if this proposal is ultimately enacted. This translates into a potential impact of +2.8% (=+5% x 57%) to +5.7% (=+10% x 57%) on total

[8] Uses an unweighted average of the shares for Calendar Years 2017 through 2020.
[9] Excluding formula-based job dislocation benefits.

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reemployment benefit costs in the state. Note that given limited detailed data is available for this segment of costs, this estimate is more directional in nature. A precise estimate cannot be objectively measured and could be greater than the range displayed.

All Provisions Combined

As summarized in the table below, NCCI estimates that the combined impact of the changes proposed by the DLWD would be -2.1% to -10.0% on total reemployment benefit costs[10].

Provision	Impact on Reemployment Benefit Costs Lower Estimate	 Upper Estimate
Employee Eligibility Evaluation Costs	-11.6%	-15.4%
Formula-Based Job Dislocation Benefits	+0.9%	+0.9%
Plan Development Costs	+2.3%	+1.5%
Rehabilitation Specialist and Plan Monitoring Fees	+0.6%	+0.2%
All Other Reemployment Benefit Costs	+5.7%	+2.8%
Combined	-2.1%	-10.0%

As reemployment costs are estimated to represent approximately 11% of indemnity benefit costs based on data from Alaska DLWD annual reports[11], this proposal may impact indemnity benefits costs between -0.2% (=-2.1% x 11%) and -1.1% (=-10.0% x 11%). Indemnity costs in Alaska are projected to comprise 34% of total benefits costs[12]. **Therefore, if ultimately enacted, the recommendations included in this conceptual proposal may impact overall WC system costs in Alaska between -0.1% (=-0.2% x 34%) and -0.4% (=-1.1% x 34%).**

		Lower Estimate	Higher Estimate
1.)	Est. Impact on Reemployment Benefit Costs	-2.1%	-10.0%
2.)	Reemployment Benefits as a % of Indemnity Benefits Costs	11%	11%
3.)	Est. Impact on Indemnity Benefit Costs = (1) x (2)	-0.2%	-1.1%
4.)	Indemnity Benefits as a % of Total Benefit Costs	34%	34%
5.)	Est. Impact on Overall WC System Costs = (3) x (4)	-0.1%	-0.4%

[10] Due to interaction effects, the combined impacts may not equal the sum of the individual components.
[11] Based on data from Calendar Years 2018 to 2020, and adjusted to reflect anticipated increases in indemnity benefit costs resulting from the enactment of Senate Bill 131, effective January 1, 2023.
[12] Based on NCCI Financial Call data for Alaska for Policy Years 2017 through 2020, trended to July 1, 2023 (assumed effective date).

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Other Considerations

Raising the cap on development plan costs and having the reemployment benefits administrator provide greater guidance to employers/insurers on methods to potentially shorten the time to return to work could have notable impacts on injured workers completing a rehabilitation plan in the future.. Any potential impact from the enactment and implementation of such guidance and services that results in improved return-to-work outcomes would be realized in future claim experience and reflected in subsequent NCCI loss cost filings in Alaska, as appropriate.

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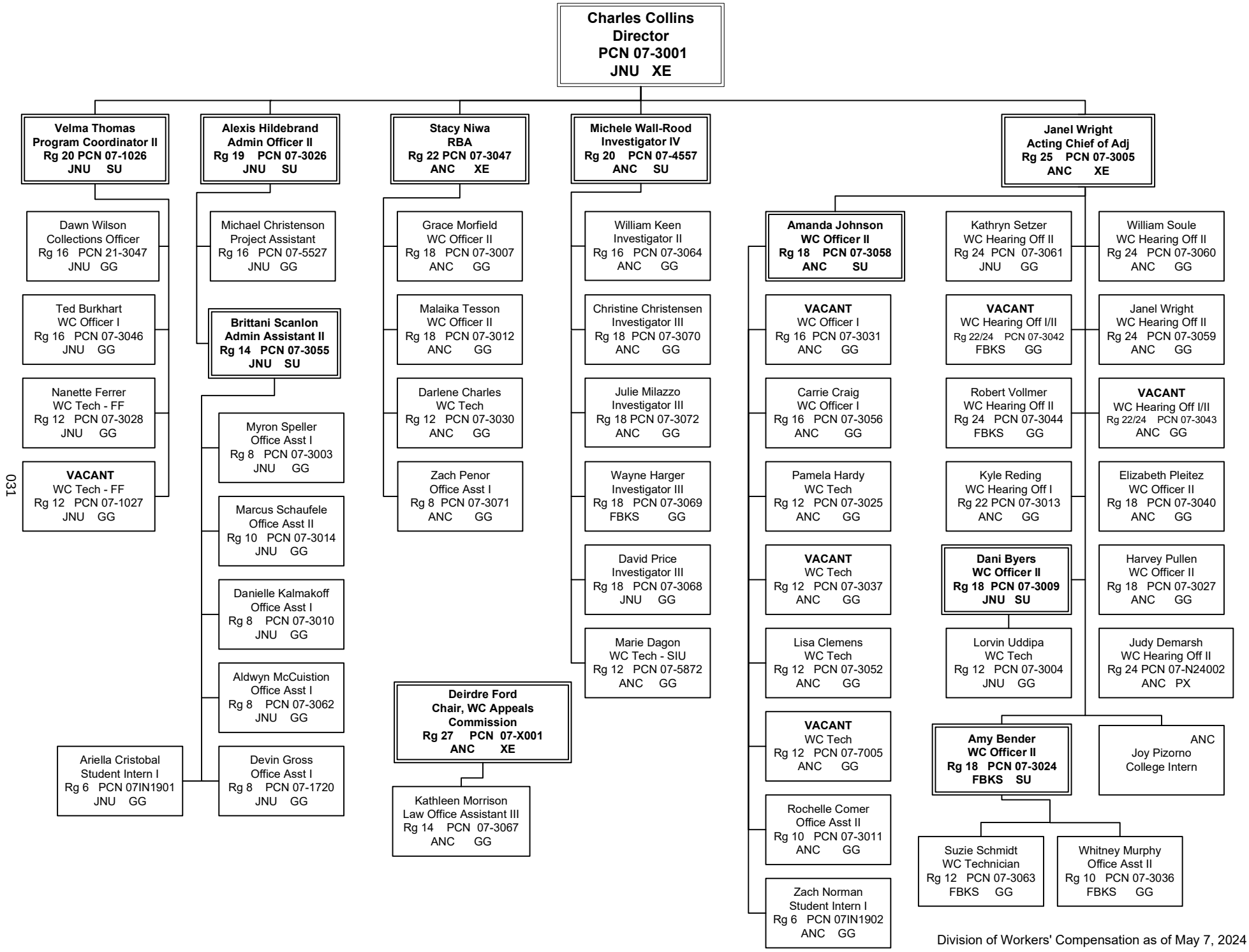
Charles Collins
Director
PCN 07-3001
JNU XE
Velma Thomas
Program Coordinator II
Rg 20 PCN 07-1026
JNU SU
Dawn Wilson
Collections Officer
Rg 16 PCN 21-3047
JNU GG
Ted Burkhart
WC Officer I
Rg 16 PCN 07-3046
JNU GG
Nanette Ferrer
WC Tech - FF
Rg 12 PCN 07-3028
JNU GG
VACANT
WC Tech - FF
Rg 12 PCN 07-1027
JNU GG
Alexis Hildebrand
Admin Officer II
Rg 19 PCN 07-3026
JNU SU
Michael Christenson
Project Assistant
Rg 16 PCN 07-5527
JNU GG
Brittani Scanlon
Admin Assistant II
Rg 14 PCN 07-3055
JNU SU
Myron Speller
Office Asst I
Rg 8 PCN 07-3003
JNU GG
Marcus Schaufele
Office Asst II
Rg 10 PCN 07-3014
JNU GG
Danielle Kalmakoff
Office Asst I
Rg 8 PCN 07-3010
JNU GG
Aldwyn McCuistion
Office Asst I
Rg 8 PCN 07-3062
JNU GG
Ariella Cristobal
Student Intern I
Rg 6 PCN 07IN1901
JNU GG
Devin Gross
Office Asst I
Rg 8 PCN 07-1720
JNU GG
Stacy Niwa
RBA
Rg 22 PCN 07-3047
ANC XE
Grace Morfield
WC Officer II
Rg 18 PCN 07-3007
ANC GG
Malaika Tesson
WC Officer II
Rg 18 PCN 07-3012
ANC GG
Darlene Charles
WC Tech
Rg 12 PCN 07-3030
ANC GG
Zach Penor
Office Asst I
Rg 8 PCN 07-3071
ANC GG
Deirdre Ford
Chair, WC Appeals Commission
Rg 27 PCN 07-X001
ANC XE
Kathleen Morrison
Law Office Assistant III
Rg 14 PCN 07-3067
ANC GG
Michele Wall-Rood
Investigator IV
Rg 20 PCN 07-4557
ANC SU
William Keen
Investigator II
Rg 16 PCN 07-3064
ANC GG
Christine Christensen
Investigator III
Rg 18 PCN 07-3070
ANC GG
Julie Milazzo
Investigator III
Rg 18 PCN 07-3072
ANC GG
Wayne Harger
Investigator III
Rg 18 PCN 07-3069
FBKS GG
David Price
Investigator III
Rg 18 PCN 07-3068
JNU GG
Marie Dagon
WC Tech - SIU
Rg 12 PCN 07-5872
ANC GG
Janel Wright
Acting Chief of Adj
Rg 25 PCN 07-3005
ANC XE
Amanda Johnson
WC Officer II
Rg 18 PCN 07-3058
ANC SU
VACANT
WC Officer I
Rg 16 PCN 07-3031
ANC GG
Carrie Craig
WC Officer I
Rg 16 PCN 07-3056
ANC GG
Pamela Hardy
WC Tech
Rg 12 PCN 07-3025
ANC GG
VACANT
WC Tech
Rg 12 PCN 07-3037
ANC GG
Lisa Clemens
WC Tech
Rg 12 PCN 07-3052
ANC GG
VACANT
WC Tech
Rg 12 PCN 07-7005
ANC GG
Rochelle Comer
Office Asst II
Rg 10 PCN 07-3011
ANC GG
Zach Norman
Student Intern I
Rg 6 PCN 07IN1902
ANC GG
Kathryn Setzer
WC Hearing Off II
Rg 24 PCN 07-3061
JNU GG
VACANT
WC Hearing Off I/II
Rg 22/24 PCN 07-3042
FBKS GG
Robert Vollmer
WC Hearing Off II
Rg 24 PCN 07-3044
FBKS GG
Kyle Reding
WC Hearing Off I
Rg 22 PCN 07-3013
ANC GG
Dani Byers
WC Officer II
Rg 18 PCN 07-3009
JNU SU
Lorvin Uddipa
WC Tech
Rg 12 PCN 07-3004
JNU GG
Amy Bender
WC Officer II
Rg 18 PCN 07-3024
FBKS SU
Suzie Schmidt
WC Technician
Rg 12 PCN 07-3063
FBKS GG
Whitney Murphy
Office Asst II
Rg 10 PCN 07-3036
FBKS GG
William Soule
WC Hearing Off II
Rg 24 PCN 07-3060
ANC GG
Janel Wright
WC Hearing Off II
Rg 24 PCN 07-3059
ANC GG
VACANT
WC Hearing Off I/II
Rg 22/24 PCN 07-3043
ANC GG
Elizabeth Pleitez
WC Officer II
Rg 18 PCN 07-3040
ANC GG
Harvey Pullen
WC Officer II
Rg 18 PCN 07-3027
ANC GG
Judy Demarsh
WC Hearing Off II
Rg 24 PCN 07-N24002
ANC PX
ANC
Joy Pizorno
College Intern
031
Division of Workers' Compensation as of May 7, 2024

TAB 6

When EE conceded in his brief ER rebutted the presumption, he waived the appeal argument it did not.
When faced with conflicting medical opinions, each of which constitute substantial evidence, the board's decision regarding which opinion will be given more weight will be affirmed.
Parties' witness list must comply with 8 AAC 45.112's requirements, including witnesses' address and telephone number, a description of the subject matter, and the substance of the witnesses' expected testimony.

THE SUPREME COURT OF THE STATE OF ALASKA

JAY JESPERSEN, Appellant, v. TRI-CITY AIR and ALASKA INSURANCE GUARANTY ASSOCIATION, Appellees.	)	Supreme Court No. S-18526 Alaska Workers' Compensation Appeals Commission No. 21-006 O P I N I O N No. 7698 – May 3, 2024

Appeal from the Alaska Workers' Compensation Appeals Commission.

Appearances: Richard L. Harren and H. Lee, Law Offices of Richard L. Harren, P.C., Wasilla, for Appellant. Vicki A. Paddock, Meshke Paddock & Budzinski, Anchorage, for Appellees.

Before: Maassen, Chief Justice, and Carney, Borghesan, Henderson, and Pate, Justices.

PATE, Justice.

I. INTRODUCTION

A pilot injured in an airplane crash in 1985 asked the Alaska Workers' Compensation Board to award him medical benefits for a 2016 spinal surgery and subsequent treatment as well as for diabetes treatment ancillary to his spinal treatment.

At the final hearing the Board excluded the testimony of the pilot's biomechanics expert because his witness list did not conform to Board regulations. Based on the evidence presented, the Board concluded the 1985 injury was not a substantial factor in the pilot's spinal problems and denied his claim.

The Alaska Workers' Compensation Appeals Commission affirmed the Board's decision, concluding that substantial evidence in the record supported the Board's decision and that the Board had not abused its discretion in its procedural rulings. The pilot appeals, arguing that the Commission's conclusions about substantial evidence and abuse of discretion were erroneous. We affirm the Commission's decision.

II. FACTS AND PROCEEDINGS

A. Facts

Jay Jespersen was employed by Tri-City Air when the small plane he was piloting crashed near Quinhagak in November 1985. Jespersen sustained a number of injuries in the crash, including several rib fractures and a vertebral compression fracture at L5.[1] Jespersen underwent treatment in Bethel at the U.S. Public Health Service hospital for a short time, recovered on his own at a friend's house in Bethel, and then returned to his home in Minnesota. In Minnesota he first received treatment from a medical doctor but later changed to chiropractic care because he did not feel he was improving under the doctor's care. Jespersen saw Dr. C. M. Carney, D.C., as well as his son, Dr. Michael Carney, D.C. In June 1987 Dr. Michael Carney diagnosed Jespersen with "early degenerative disc disease of L-5, S-1." Jespersen recovered sufficiently to work as a pilot in Minnesota beginning in June 1987.

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[1] Intervertebral discs are identified by the numbers of the vertebrae above and below the disc. L5 is the last of the lumbar vertebrae; as discussed immediately below, S1 is the first sacral vertebra.

Jespersen subsequently returned to Alaska, working for Sourdough Outfitters; he and his wife bought Brooks Range Aviation in 1994. They owned and operated the business for many years, with Jespersen working as a pilot as well as a mechanic. Jespersen and his wife spent about seven months per year in Alaska, two to three months in Arizona, and the balance of time in transit or in Minnesota.

The administrative record contains no medical records from June 1987 to August 2007, even though medical records generated later indicate that Jespersen received substantial medical care during this 20-year period. In August 2007 Jespersen went to an emergency room in Fairbanks because of a cough and weight loss. He reported that he had been taking a steroid for osteoarthritis and fibromyalgia.[2] No medical records show when Jespersen was diagnosed with osteoarthritis and fibromyalgia, which body parts were affected by the osteoarthritis, or what prompted the fibromyalgia diagnosis. During this hospital visit Jespersen was diagnosed with diabetes.[3]

In early September 2014 Jespersen returned to the emergency room in Fairbanks after he had an episode in which he lost feeling in both legs for about 30 minutes. According to hospital records, he reported that during the previous week he had felt "weakness" in both lower legs, but that day he "progressively suddenly felt both of his legs giving out" as he was walking in his yard. He fell to the ground but gradually regained sensation in both legs and was taken to the emergency room. Jespersen underwent multiple tests, but the emergency room doctors were unable to identify a cause of his loss of feeling. Jespersen was discharged because he reported

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[2] Fibromyalgia is "[a] common syndrome of chronic widespread soft-tissue pain accompanied by weakness, fatigue, and sleep disturbances; the cause is unknown." *Fibromyalgia*, STEDMAN'S MEDICAL DICTIONARY (Westlaw database updated Nov. 2014).

[3] Jespersen was also diagnosed with other conditions that are not relevant to this appeal.

being back to his baseline; he was told to follow up for further testing. Imaging studies of the lumbar spine at the time showed "[n]o evidence of lower thoracic or lumbar cord compressing lesion" but did show a disc protrusion at L5-S1 "causing mild to moderate bilateral foraminal narrowing." A study of his thoracic spine showed "small disc protrusions."

Jespersen sought medical care in Arizona for neck and back pain in February 2016. He told the provider his neck and back pain began with the airplane crash. Imaging studies showed a "broad-based disc bulge and superimposed central disc protrusion" at L5-S1, as well as foraminal stenosis.[4] The Arizona medical records report a diagnosis of degenerative disc disease; the doctor opined that Jespersen's pain in "the neck and back [was] due to a comb[ination] of cervical spondylosis, thoracic and cervical degeneration"[5] and that Jespersen had "lumbar degeneration that [was] causing [left extremity] paresthesia." He was treated with epidural steroid injections in his cervical spine and at L5-S1. He also had medial branch blocks and radiofrequency ablation at several levels of the lumbar spine, including L5, for "lumbar spondylosis."

In June 2016 Jespersen sought care in Alaska for an "[e]xacerbation of low back pain"; he was "unable to put any weight on his left lower extremity due to weakness." A chart note from this time indicates Jespersen "had back issues for over 32 years after he was involved in an airplane crash." Imaging showed a "[m]oderate disc bulge" at L5-S1, "eccentric to the left." The radiology report stated, "Multiple

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[4] Foraminal stenosis involves a narrowing of an opening in a bone or other structure. *See Foramen*, STEDMAN'S MEDICAL DICTIONARY (Westlaw database updated Nov. 2014); *Stenosis*, *id*.

[5] Spondylosis is stiffening of the vertebra. *Spondylosis*, STEDMAN'S MEDICAL DICTIONARY (Westlaw database updated Nov. 2014) ("Ankylosis of the vertebra . . . ."); *Ankylosis*, *id*. ("Stiffening or fixation of a joint as the result of a disease process . . . .").

levels of lumbar spine degenerative change are seen, which are worst at the L5-S1 level."

Jespersen received care from Dr. Paul Jensen, who recommended "an L5-S1 complete laminectomy with central decompression and diskectomy."[6] The surgery was performed in July 2016, and a few days later Jespersen reported a return of feeling in part of his foot.

Jespersen recovered well from the surgery, but the following year he had a recurrent disc problem at L5-S1. Dr. Jensen recommended a microdiskectomy in May 2017, but Jespersen wanted to try steroid injections first so as not to take time off during the summer. In July Jespersen again consulted with Dr. Jensen's office, reporting that the pain was worse and limited his activities; he was given medication. Jespersen later obtained an opinion from Dr. Jensen for use in this litigation that identified the 1985 airplane crash as a substantial factor in causing the need for the 2016 surgery and for post-surgery care.

The medical records dated after 2017 in the administrative record are relatively scant, but those records demonstrate that Jespersen had continuing problems with his diabetes as well as neck and back pain. A 2019 MRI taken in Fairbanks indicated a right disc protrusion that "abut[ted] both S1 nerve roots." Jespersen saw a chiropractor in Arizona, and it appears the chiropractor referred him to a surgeon for his neck complaints, as well as some vision problems.

In late 2020 and early 2021, Jespersen was in Minnesota for an extended period, apparently because of the COVID-19 pandemic. While there he sought care at the Mayo Clinic for multiple concerns, including low back pain and radicular symptoms as well as diabetes. At a January 2021 neurosurgery consult a physician suggested the

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[6] A laminectomy is a surgical procedure that removes the lamina (the back part of the vertebra). *Laminectomy*, STEDMAN'S MEDICAL DICTIONARY (Westlaw database updated Nov. 2014).

possibility of another decompression at L5-S1 or possibly a fusion surgery. A surgeon told Jespersen his diabetes was problematic and he needed to control his blood sugar levels; the doctors suggested Jespersen should return in three months, but Jespersen stated he would likely be in Alaska at that time.

B. Proceedings

Tri-City Air[7] paid compensation following Jespersen's injury in 1985 until June 1987, when Jespersen returned to work. Jespersen filed a claim for additional compensation in October 1987. This claim resulted in a compromise and release agreement that explicitly left open future medical care; the Board approved the settlement in 1988. The claim was dormant until December 2016, when Dr. Jensen's office filed a workers' compensation claim for medical costs because Jespersen's "commercial insurance" had denied a claim for the surgery "due to an open work comp case." Tri-City Air answered and denied the claim. It also filed a controversion notice, citing the lack of medical evidence tying Jespersen's 2016 surgery to the 1985 crash.

Tri-City Air arranged for Jespersen to be seen by Dr. R. David Bauer for an employer's medical evaluation (EME) in March 2017. Dr. Bauer listed three diagnoses related to the 1985 airplane crash and four diagnoses not substantially caused by or aggravated by the crash. Dr. Bauer thought the need for surgery in 2016 was the result of degenerative disc disease; he specifically opined that the L5 fracture was not a substantial factor in causing the disc herniation that prompted the surgery. Dr. Bauer's report noted that Jespersen's fracture was of the "superior endplate" of L5 and "did not result in any damage to the L5-S1 disc." Dr. Bauer cited several studies, including studies about the interaction between spinal fractures and disc degeneration, to support his opinion that the L5 fracture Jespersen suffered was not a substantial factor in the

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[7] In this opinion, we refer to the employer and Alaska Insurance Guarantee Association collectively as "Tri-City Air."

L5-S1 disc's later degeneration. After receiving Dr. Bauer's report, Tri-City Air filed another controversion notice.

Jespersen filed a workers' compensation claim of his own in January 2018, seeking disability benefits in addition to medical and transportation costs. The claim alleged that the "progressive effects of [the] original injury combined with the aging process have limited motion and increased pain to the point employee can no longer work, unless some pain relief is found." Tri-City Air answered and denied all claims. It also filed another controversion notice.

In January 2019 Jespersen filed with the Board a copy of responses Dr. Jensen gave to a 2017 letter Jespersen's attorney had written about causation. (It appears that Dr. Jensen did not send the responses back until 2019.) Dr. Jensen answered "yes" — with no explanation — to questions about whether the 1985 airplane crash was a substantial factor in the need for the 2016 surgery, follow-up care following this surgery, and "additional medical care which will continue into the foreseeable future." Shortly thereafter Jespersen sought a Board hearing on his 2018 claim by filing an affidavit of readiness for hearing;[8] Tri-City Air filed an affidavit in opposition. Jespersen filed a request to cross-examine Dr. Bauer, and Tri-City Air filed a request to cross-examine Dr. Jensen.[9] The Board set a hearing date for Jespersen's claim for May 2019.

Tri-City Air petitioned the Board for a second independent medical evaluation (SIME) with an orthopedic surgeon, citing a causation dispute between Dr.

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[8] *See* AS 23.30.110(c) (requiring party to file "an affidavit stating that the party has completed necessary discovery, obtained necessary evidence, and is prepared for the hearing" when requesting Board hearing).

[9] *See* 8 Alaska Administrative Code (AAC) 45.052(c) (setting out process to request cross-examination of medical report's author).

Jensen and Dr. Bauer.[10] Jespersen opposed the SIME, and the Board set a hearing on the issue for April 2019.

At the April hearing Tri-City Air asked the Board to consider an endocrinology SIME because Jespersen had testified at deposition about the effect his pain had on his blood sugar; Tri-City Air was concerned about the lack of medical evidence related to diabetes. The Board acknowledged Tri-City Air's concern. Jespersen then disavowed an intention of making a claim related to his diabetes. Jespersen's main concern about the SIME was time: Jespersen wanted a hearing quickly because of the unpaid surgery bills' financial impact on him. The Board ordered a panel SIME "including an orthopedic surgeon and an endocrinologist," with a plan to schedule the SIME to minimize the disruption in Jespersen's work.

Scheduling the SIME became problematic; eventually the parties agreed that the endocrinology appointment would not include a physical examination and that the endocrinologist could rely on the orthopedic specialist's physical examination. The Board later held a second hearing about the SIME process during which Tri-City Air objected to Jespersen's witness list because it did not conform to the Board's regulation about witness lists. That regulation requires, in relevant part, "a brief description of the subject matter and substance of the witness's expected testimony."[11]

The orthopedic SIME took place in March 2020. The SIME doctor, Dr. Sidney H. Levine, concluded Jespersen's need for "[t]reatment and evaluation in 2014"

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[10] The request cites AS 23.30.095(k), which authorizes the Board to require a SIME when there is a difference of opinion between the parties' doctors on certain issues, including causation. The Board's letters to the SIME doctors suggested it ordered the SIME pursuant to AS 23.30.095(k). This provision was added to the Alaska Worker's Compensation Act in 1988. Ch. 79, § 18, SLA 1988. We express no opinion about the applicability of this subsection to cases involving an injury that happened before July 1, 1988, because no one raised this issue. Ch. 79, §§ 18, 48, SLA 1988.

[11] 8 AAC 45.112.

was "unrelated to the initial injury" in 1985. Dr. Levine identified Jespersen's work activities over the years as well as his activities of daily living as alternative causes of the need for treatment of his lumbar spine. He indicated that the cause of Jespersen's diabetes was "undetermined, but most certainly is not related" to the airplane crash. Dr. Levine did not think any additional treatment was needed for the injuries Jespersen sustained in 1985.

Responding to one of Jespersen's questions, Dr. Levine stated that some symptoms Jespersen felt over the years "would be due to the plane accident," but said that "the substantial cause would not relate back to that injury."[12] Dr. Levine agreed with Dr. Bauer's opinion that Jespersen's 1985 compression fracture would not have affected the L5-S1 disc and stated that if the fracture had affected a disc at all, it would have affected the L4-L5 disc. Dr. Levine thought Jespersen had "evidence of peripheral neuropathy, which may be associated with diabetes," but he did not think the neuropathy was caused by the 1985 injury. Dr. Levine's deposition testimony was largely consistent with his report, and he clarified that he did not regard the airplane crash as a substantial factor in Jespersen's disc condition.

The endocrinology SIME took place in September 2020. Dr. Mark Silver, the SIME endocrinologist, said there was "no link of [Jespersen's] diabetes relating to his [1985] injury." He thought that Jespersen's "treatment with [a steroid] for several years prior to his diagnosis of type 2 diabetes mellitus would have been a substantial factor in his development" of that disease. Dr. Silver did not think the diabetes was

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[12] Dr. Levine's reference to the "substantial cause" legal standard was anachronistic. The legal standard for compensability was changed in 2005 to "the substantial cause," but that standard applies to injuries that happened on or after the amendment's effective date of November 7, 2005. *See Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 906-08 (Alaska 2016) (summarizing changes to compensability analysis in 2005). Because Jespersen's injury happened in 1985, the legal standard for causation in this case is "a substantial factor," as the Board and Commission correctly recognized.

disabling. He acknowledged that "chronic pain might aggravate blood sugar control and diabetes," but he said that "the primary cause of [Jespersen's] elevated blood sugars and poor diabetic control relate[d] to improper medical treatment of his diabetes and inadequate use of diabetic medications." He did not think chronic pain itself was a substantial factor in the development of Jespersen's diabetes.

In November 2020 the parties agreed to address Jespersen's claim at a February 2021 Board hearing; they agreed to file witness lists, briefs, and evidence "in accordance with" the Board's regulations, including 8 AAC 45.112.

Dr. Bauer testified for the hearing at a deposition in February 2021. His testimony was consistent with his report and provided a more detailed explanation about why he ruled out the L5 fracture as a possible cause of the L5-S1 disc herniation that prompted the 2016 surgery. Dr. Bauer explained that the 1985 vertebral fracture was located on the upper part of the L5 vertebra, near the L4-L5 disc, while the herniated L5-S1 disc was located below the L5 vertebra. Dr. Bauer's deposition testimony included a diagram illustrating the fracture's location to support his opinion about the cause of the disc herniation.

Both parties filed their witness lists and pre-hearing memoranda 12 days before the hearing. For the second time in the proceedings Jespersen's witness list was deficient; this time it lacked both phone numbers and summaries of testimony for any of the witnesses.[13]

At the hearing's outset Tri-City Air objected to Jespersen's witness list and asked the Board to prohibit Jespersen from presenting any additional witness testimony because of his noncompliance with the Board's regulation. Tri-City Air was particularly concerned because Jespersen listed an unfamiliar witness, Dr. Mariusz

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[13] *See* 8 AAC 45.112 (requiring witness lists to include each witness's telephone number and "a brief description of the subject matter and substance" of each witness's "expected testimony").

Ziejewski, but included no information about the substance of his planned testimony. Tri-City Air told the Board that, based on internet research, it anticipated that Dr. Ziejewski's testimony would be "complex." Jespersen's attorney revealed that Dr. Ziejewski was a biomechanical engineer. Jespersen planned to call Dr. Ziejewski as an expert in biomechanics to counter Dr. Bauer's opinions.

After hearing argument from both parties, the Board excluded Dr. Ziejewski's testimony for several reasons: Jespersen's witness list did not conform to the Board's regulation, which, under the circumstances, required it to exclude the testimony; Tri-City Air had no notice about the substance of the testimony, such as a written report; and in the Board's view, Dr. Ziejewski was "the kind of witness . . . that th[e] regulation is made for."

The Board overruled Tri-City Air's objection in part, allowing the testimony of some witnesses, including Dr. Michael Carney, D.C., who Jespersen said would testify "in rebuttal to the deposition of Dr. Bauer." The Board reasoned that Dr. Carney had filed medical records in the case so Tri-City Air had some knowledge base on which to cross-examine him.

Dr. Carney testified that after graduation from chiropractic college he had "completed a three-year course in chiropractic orthopedics" and had later been "certified in applied spinal biomechanical engineering." Dr. Carney explained why he had made a diagnosis of early degenerative disc disease at L5-S1 in 1987; he said some of the degeneration then was related to trauma. He thought the L5 fracture from the 1985 crash would continue to stress Jespersen's back even after the bone healed because it would cause vertebral misalignment. Dr. Carney opined that the need for the 2016 surgery was "a direct result of injuries sustained in the airplane crash of 1985." He gave some details about this opinion, including information that the crash happened during a right turn, which would have affected Jespersen's position on impact. He did not think the changes in Jespersen's spine could be explained solely by normal aging.

Jespersen testified that he had been in chronic pain since the injury and that he had taken the steroids for back pain and had found them helpful. He acknowledged that he had continued to work as a bush pilot and mechanic, which involved significant lifting, from shortly after the injury until 2016; he said he treated the pain with over-the-counter medicine during that time. He clarified he was seeking an order that all care for his spine after 2016, including future care, was compensable and that his claim covered his cervical and thoracic spine as well as his lumbar spine. He said he was not asking for benefits related to diabetes, but his attorney "intercede[d]" to say the claim included any diabetes care necessary for Jespersen to get treatment for his spine.

During the hearing Jespersen's attorney received a phone call, which he told the Board was from Dr. Jensen's former office manager. The attorney told the Board he had "reached out to" Dr. Jensen, who was retired, "over the past week or so" in an attempt to get his testimony, but the former office manager had just called to say that Dr. Jensen "wouldn't be able to do anything to help [Jespersen]." The parties agreed to file written closing arguments about ten days after the hearing.

During the time the record remained open for written closing arguments, Jespersen petitioned the Board in writing to reconsider its decision to exclude Dr. Ziejewski's testimony; he notified the Board that he had taken the deposition of Dr. Ziejewski following the hearing and asked the Board to supplement the record with it.

The Board issued a lengthy decision that denied Jespersen's claim for medical benefits. The Board did not analyze all three steps in the presumption analysis used in pre-2005 workers' compensation cases[14] after finding that Jespersen "agreed"

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[14] Before 2005, in order to attach the presumption that a claim was compensable, the employee needed to produce some evidence to show a link between his injury and his requested benefit. *See Huit*, 372 P.3d at 906-07 (summarizing three-step presumption analysis used in workers' compensation cases before 2005 statutory

in his briefing that "Dr. Bauer's EME report rebutted the statutory presumption of compensability." The Board reasoned that in light of this concession, it only needed to perform the third-step analysis, weigh the evidence, and determine compensability. The Board recognized that the "substantial factor" legal standard applied to this claim, meaning that to prevail, Jespersen had to prove by a preponderance of the evidence that "his 1985 injury remain[ed] a substantial factor in his need for medical treatment for his spine and for precursor diabetes treatment beginning in 2016."

After providing a detailed factual summary, the Board assigned weight to the evidence. The Board discounted Jespersen's testimony about his chronic pain because of the lack of medical records supporting his assertion that he suffered chronic and unrelenting pain from the time he returned to work in 1987 until he finally sought care for his back pain in 2016. The Board noted the absence of any medical records from June 1987 to August 2007 in the administrative record and pointed out discrepancies between Jespersen's testimony and the available medical records. The Board concluded that the absence of orthopedic complaints in the medical records and the inconsistency between the records and Jespersen's testimony at the hearing undercut his credibility. The Board considered Jespersen's testimony about his activities as a bush pilot and decided that those work activities would be expected to cause aches and pains in any person who engaged in them. With respect to Jespersen's reports of pain, the Board gave greater weight to his medical records and contemporaneous reports than to his testimony.

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amendments). If the employee did so, the employer had to rebut the presumption with substantial evidence that either eliminated the injury as a cause or provided an alternative causation explanation that excluded the work injury as a cause. *Id.* If the employer rebutted the presumption, the Board moved to the third stage, where the employee had the burden of proving by a preponderance of the evidence that the work injury was a substantial factor in his need for medical care. *Id.* at 907. The Board weighed the evidence only at the third stage. *Id.*

The Board reviewed Dr. Carney's testimony and identified concerns it had with his opinion, including his reliance on Jespersen's later reports of chronic pain during the period between 1987 and 2019 in which Dr. Carney had not seen Jespersen as a patient. The Board determined that Dr. Carney's opinions were inconsistent with other medical records and stated the imaging records more closely corresponded to Dr. Levine's opinion about them than to Dr. Carney's. It gave Dr. Carney's opinions less weight than Dr. Levine's with regard to Jespersen's degenerative disc disease.

The Board gave Dr. Bauer's opinions "considerable weight." The Board was persuaded by Dr. Bauer's deposition testimony and reproduced in its decision the diagram showing the location of the L5 fracture in relation to the L5-S1 disc that Dr. Bauer had used to illustrate his testimony. The Board thought Dr. Bauer's opinion was consistent with the opinions of the multiple doctors who had over the years diagnosed Jespersen with degenerative disc disease.

The Board gave Dr. Levine's opinions, which were consistent with Dr. Bauer's, "considerable credibility and weight" for some of the same reasons it credited Dr. Bauer's opinions. In the Board's view, even though Dr. Levine's "initial responses" about causation were "confused" because Tri-City Air used the incorrect legal standard in its questions to him, his deposition testimony clarified that his opinions were based on the correct legal standard.

Based on the weight the Board gave to Dr. Bauer's and Dr. Levine's opinions, it decided Jespersen had not met his burden of proof, concluding that the 1985 injury "was neither a factual cause nor a legal cause" of the medical care he received for his spine beginning in 2016. It denied Jespersen's claim for diabetes-related treatment because he had "not prevailed on his primary claim."

The Board's written decision also concluded that its oral rulings refusing to allow Dr. Ziejewski to testify and refusing to continue the case to cure the lack of notice to Tri-City Air about Dr. Ziejewski were correct. The Board pointed out that Tri-City Air had objected to an earlier witness list Jespersen filed because of his

noncompliance with the same regulation, which meant Jespersen's attorney had notice that Tri-City Air might object to another nonconforming witness list. The Board also concluded Jespersen's attorney had enough information that he could have complied with the regulation; the attorney told the Board that he knew before the witness lists were due that Dr. Ziejewski would be testifying.

Jespersen appealed to the Commission. He questioned Dr. Bauer's conclusions by arguing they were not logical and were inconsistent with the articles Dr. Bauer cited; he contended that Dr. Carney's causation explanations were the better ones. Jespersen asked the Commission to reverse the Board's exclusion of Dr. Ziejewski's testimony, alleging that Tri-City Air "hoodwinked the [B]oard in a surprise move at hearing . . . based upon the alleged failure to disclose the nature and manner of [Dr. Ziejewski's] testimony." He argued Tri-City Air in fact had notice about Dr. Ziejewski's testimony because in his pre-hearing brief, filed at the same time as the witness list, he had disclosed that he would "present evidence from a biomechanical engineer which will debunk the overreaching testimony of the independent orthopedic examiners." He then argued that the exclusion of Dr. Ziejewski as a witness "took away the ability of [the employee] to show that Dr. Bauer never did rebut the presumption of compensability," adding that if Dr. Bauer's testimony "did indeed rebut the presumption, then Dr. Ziejewski would have fairly, competently and appropriately assisted and/or enabled Mr. Jespersen in meeting his burden of persuasion."

The Commission did not revisit the presumption analysis, observing that because Jespersen had conceded that Dr. Bauer's testimony rebutted the presumption, the Board did not need to explain all steps in the analysis. After summarizing the evidence and explaining that the Commission is bound by the Board's credibility findings and the weight the Board gives to the evidence, the Commission decided that substantial evidence supported the Board's decision about the compensability of medical care for Jespersen's spine.

The Commission concluded that the Board did not abuse its discretion when the Board applied its own regulation to exclude Dr. Ziejewski's testimony because (1) there was no question of the regulation's validity; (2) Jespersen's witness list did not comply with regulatory requirements; (3) Tri-City had previously objected on the same grounds to another of Jespersen's witness lists, so Jespersen had some notice in addition to the regulation itself about the need to comply with the regulation; and (4) Jespersen did not argue that the regulation was "onerous or burdensome." The Commission characterized Jespersen's decision not to arrange Dr. Ziejewski's testimony earlier as a "litigation strategy" that "did not work."

Jespersen argued to the Commission that the Board erred by not allowing him "time to find and to subpoena" Dr. Jensen, adding that his "testimony and the Board's access to that testimony would also have satisfied the obligations of the Board" to investigate the claim. The Commission analyzed this argument as an appeal of the Board's denial of a request for a continuance. The Commission affirmed the Board's denial of a continuance because "[a] party's negligence does not constitute good cause for requesting a continuance."

Jespersen appeals.

III. STANDARD OF REVIEW

"In an appeal from the Commission, we review the Commission's decision and not the Board's."[15] We independently review the Commission's conclusions about whether substantial evidence supported the Board's decision by independently reviewing the record and the Board's factual findings.[16] We review the Commission's conclusions about the Board's exercise of discretion by "independently assess[ing]" the Board's discretionary rulings and applying "the appropriate standard

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[15] *Mitchell v. United Parcel Serv.*, 498 P.3d 1029, 1039 (Alaska 2021) (citing *Alaska Airlines, Inc. v. Darrow*, 403 P.3d 1116, 1121 (Alaska 2017)).

[16] *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007 (Alaska 2009).

of review."[17] The Board's application of its regulations to the facts of a case is reviewed for abuse of discretion.[18] "We will find an abuse of discretion when the decision on review is 'arbitrary, capricious, or manifestly unreasonable.' "[19] "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[20]

IV. DISCUSSION

A. Jespersen Waived The Argument That Tri-City Air Did Not Rebut The Presumption Of Compensability.

Jespersen argues on appeal that Tri-City Air did not rebut the presumption of compensability regarding medical treatment for his ongoing back pain. Tri-City Air responds that Jespersen waived this argument by failing to raise it before the Board or the Commission.

We agree with Tri-City Air. In fact, Jespersen affirmatively waived this argument when he stated in his written closing argument that "Dr. Bauer's report provided the carrier with substantial evidence to overcome the presumption of compensability."[21] We therefore do not reach the issue of whether Tri-City Air rebutted the presumption of compensability.

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[17] *Id.*

[18] *Griffiths v. Andy's Body & Frame, Inc.*, 165 P.3d 619, 623 (Alaska 2007) (quoting *Hodges v. Alaska Constructors, Inc.*, 957 P.2d 957, 960 (Alaska 1998)).

[19] *Mitchell*, 498 P.3d at 1039 (quoting *Alaska State Comm'n for Hum. Rts. v. United Physical Therapy*, 484 P.3d 599, 605 (Alaska 2021)).

[20] *Id.* (quoting *Vue v. Walmart Assocs., Inc.*, 475 P.3d 270, 279 (Alaska 2020)).

[21] Even if Jespersen had not waived this argument, it would fail. As we explain below, Dr. Bauer's and Dr. Levine's opinions were substantial evidence supporting the Board's ultimate conclusion that Jespersen's need for surgery was not work-related. These opinions, when considered in isolation, necessarily rebutted the presumption that the plane crash was a substantial factor in Jespersen's need for

B. The Commission Correctly Concluded That Substantial Evidence In The Record Supported The Board's Decision.

Jespersen argues that the Commission erred by affirming the Board's decision because substantial evidence did not support it. As Tri-City Air points out, much of his argument is based on evidence to which the Board gave little or no weight. Tri-City Air contends the Commission correctly concluded that substantial evidence supported the Board's decision because the Board gave more weight to Dr. Bauer's and Dr. Levine's opinions, which it found more consistent with the imaging studies in the record, than to Dr. Carney's.

The Commission is bound by the Board's decisions about the weight of the evidence[22] and must apply the substantial evidence standard of review to the Board's findings of fact.[23] We review the Commission's conclusion that substantial evidence supports the decision by independently reviewing the record and the Board's findings to determine whether those findings are indeed supported by substantial evidence.[24] When using the substantial evidence standard of review, "[w]e neither reweigh the evidence nor choose between competing factual inferences"; "our

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treatment. *See Cowen v. Wal-Mart*, 93 P.3d 420, 426 (Alaska 2004) (explaining same evidence may both rebut presumption of compensability and show by preponderance of evidence that injury was not work-related); *Huit v. Ashwater Burns, Inc.*, 372 P.3d 904, 906-07 (Alaska 2016) (explaining pre-2005 analysis for whether employer rebutted presumption of compensability, requiring employer to produce "substantial evidence" that, viewed in isolation and without assigning it weight, "either (1) provided an alternative explanation excluding work-related factors as a substantial cause of the disability, or (2) 'directly eliminated any reasonable possibility that employment was a factor in causing the disability' " (quoting *Tolbert v. Alascom, Inc.*, 973 P.2d 603, 611 (Alaska 1999), *superseded by statute*, ch. 10, § 9, FSSLA 2005)).

[22] *Patterson v. Matanuska-Susitna Borough Sch. Dist.*, 523 P.3d 945, 955 (Alaska 2022).

[23] AS 23.30.128(b).

[24] *Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1007 (Alaska 2009).

determination is limited only to whether such evidence exists."[25] "We have held that 'if the Board is faced with two or more conflicting medical opinions — each of which constitutes substantial evidence — and elects to rely upon one opinion rather than the other, we will affirm the Board's decision.' "[26] A choice between conflicting medical opinions is precisely what the Board faced here. The Board had the conflicting expert opinions of Dr. Carney on one side and Dr. Bauer and Dr. Levine on the other; it chose to rely on Dr. Bauer's and Dr. Levine's medical opinions.

Dr. Bauer provided an opinion that excluded work-related factors as a substantial cause of Jespersen's ongoing back pain. Dr. Bauer identified degenerative disc disease, "a progressive disease of life," as an alternative cause of Jespersen's pain, and Dr. Bauer specifically stated that the degenerative disc disease was "neither caused by nor aggravated by" the 1985 airplane crash. The Board decided Dr. Bauer's opinion was entitled to more weight than Jespersen's evidence. Moreover, the Board credited Dr. Levine's testimony, which was consistent with Dr. Bauer's and further contributed to the substantial evidence supporting the Board's decision. The Commission thus correctly concluded that substantial evidence supported the Board's decision.

C. Jespersen's Claim For Diabetes Care Was Properly Denied.

Jespersen appears to make two arguments in his opening brief about medical care for his diabetes. He argues that the administrative decision denying compensability for his diabetes care "is wrong as a matter of law, and is clearly erroneous as a factual finding." While Jespersen's argument is not entirely clear, he seems to be asserting that his diabetes care was compensable independent of his primary claim for spinal surgery and treatment because his steroid prescription was for back pain and that medication was a cause of his diabetes. He also contends that his diabetes

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[25] *Doyon Universal Servs. v. Allen*, 999 P.2d 764, 767 (Alaska 2000).

[26] *Id.* at 767-68 (quoting *Yahara v. Constr. & Rigging, Inc.*, 851 P.2d 69, 72 (Alaska 1993)).

care was compensable "for a second reason": he "cannot get treatment for his spine until he brings his diabetes under control." Tri-City Air responds that Jespersen "waived his argument that Tri-City did not rebut the presumption of compensability for his diabetes" and thus the only issue that needs to be resolved is whether he proved the claim by a preponderance of the evidence.

The Board found that Jespersen was "not seeking any medical benefits related to diabetes directly" but "said he needs diabetes treatment before his spine can be addressed and such treatment is included in his claim against" Tri-City Air. This finding is supported by multiple representations made on Jespersen's behalf. For example, at the final hearing, on February 18, 2021, the Board chair asked Jespersen himself, "And just to be clear, you're not asking for any benefits, medical benefits, related to diabetes, is that correct?" Jespersen said, "That's correct, yes," but his attorney "intercede[d]" and said, "Mr. Jespersen isn't taking the position that his diabetes came from the plane crash even though there's evidence to suggest that. But right now his diabetes needs to be treated in order to treat his back." This position appears to have been the same one articulated at the SIME hearing in 2019.

The claim for diabetes care that Jespersen presented to the Board was dependent on the compensability of his spinal surgery and treatment. We have affirmed the Board's rejection of Jespersen's medical claim for his spinal care, thus his claim for diabetes care as a necessary condition for compensable medical care for his back was also properly rejected. To the extent Jespersen is now arguing that his diabetes care is compensable independent of his claim for spinal surgery and treatment, he has waived review of that issue because he did not present such a claim to the Board.[27]

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[27] *See Wagner v. Stuckagain Heights*, 926 P.2d 456, 459 (Alaska 1996) (holding that employee waived argument that she was entitled to permanent partial disability benefits because she failed to raise issue before Board or in her initial administrative appeal).

The Commission did not err in affirming the Board's denial of Jespersen's claim for diabetes care.

D. The Commission Correctly Concluded That The Board Did Not Abuse Its Discretion By Excluding Dr. Ziejewski's Testimony.

Jespersen argues that the Board's decision to exclude Dr. Ziejewski's testimony was an unnecessarily harsh sanction in light of Jespersen's view of the importance of Dr. Ziejewski's testimony and the alternative steps the Board could have taken to allow the testimony while also permitting Tri-City Air the opportunity to meaningfully cross-examine Dr. Ziejewski. Jespersen suggests that the exclusion of Dr. Ziejewski's testimony deprived him of due process. Tri-City Air argues that the Board's regulation required the Board to exclude the testimony, so the Board did not err by following its regulation.

The Board's regulation on the filing of witness lists requires disclosure of certain information, including "the witness's address and phone number, and a brief description of the subject matter and substance of the witness's expected testimony."[28] The regulation also provides in pertinent part, "If a party directed at a prehearing to file a witness list . . . files a witness list that is not in accordance with this section, the [B]oard will exclude the party's witnesses from testifying at the hearing . . . ."[29] The only exceptions allow the admission of the testimony of a party or "deposition testimony completed, though not necessarily transcribed, before the time for filing a witness list."[30]

Jespersen was directed at a prehearing to file a witness list in accordance with Board regulations. He filed his witness list for the final hearing in February 2021, indicating that witnesses would testify "by Zoom or by telephone if located outside

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[28] 8 AAC 45.112.

[29] *Id.*

[30] *Id.*

Anchorage, AK." But Jespersen's witness list did not include phone numbers for any of the witnesses, nor did it include "a brief description of the subject matter and substance of the witness's expected testimony," as the regulation requires.[31]

The regulation sets out the penalty for failing to comply with its requirements: with two exceptions, the Board "*will exclude* the party's witnesses from testifying at the hearing."[32] However, despite the deficiencies in Jespersen's witness list, the Board allowed some of Jespersen's other witnesses to testify, including Dr. Carney. The Board thus did not completely prevent Jespersen from offering expert testimony to support his claim.

The Board did not abuse its discretion by excluding Dr. Ziejewski's testimony. First, as the Board noted, Dr. Ziejewski had confirmed that he would be able to testify as an expert in Jespersen's case the day *before* the witness lists were due, so Jespersen had adequate time to comply with the regulation by summarizing the purpose of Dr. Ziejewski's testimony. Additionally, Tri-City Air made the same objection about another of Jespersen's witness lists at an earlier hearing, which should have alerted him to both the regulation's requirements (which he should have known anyway) and the likelihood that Tri-City Air would make objections about nonconforming filings. Moreover, as the Board pointed out, Jespersen knew that biomechanics was an issue before the Board at the hearing because Dr. Bauer's 2017 report relied on biomechanical studies. Copies of the articles Dr. Bauer mentioned were filed with the Board in 2019, and Jespersen's attorney told the Board he was aware in 2017 that Dr. Bauer relied on principles of biomechanics in his opinion.

Finally, Jespersen's attorney indicated when he filed the affidavit of readiness for hearing in January 2019 that he had "obtained necessary evidence" and

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[31] *Id.*

[32] *Id.* (emphasis added).

was *then* "fully prepared for a hearing."[33] At the 2021 hearing a Board panel member asked Jespersen's attorney when he "first became aware that Dr. Bauer intended to rely on principles of biomechanics to explain Mr. Jespersen's condition"; in response the attorney acknowledged that Dr. Bauer's 2017 report discussed biomechanics, so he was first aware of the issue in 2017. In light of this answer the Board was not required to credit the attorney's suggestion that he was unaware of the potential need for an expert in biomechanics until he took Dr. Bauer's deposition in 2021.

Nothing in the record persuades us that the Board abused its discretion by excluding Dr. Ziejewski's testimony. To hold otherwise would be unfair to Tri-City Air. Jespersen's failure to comply with the Board's regulation left Tri-City Air without notice of Dr. Ziejewski's expert testimony, without which it would not have been able to adequately prepare for cross-examination at the hearing.

Nor did the Board deprive Jespersen of due process by excluding the testimony. Jespersen had ample notice of the substantive and procedural issues at the hearing, and he had an opportunity to be heard on them.[34] Jespersen had an obligation to marshal evidence in support of his claim and to do so in a timely manner. Jespersen's attorney recognized as much when he declared by affidavit that he had completed the necessary discovery, had obtained the necessary evidence, and was prepared for the hearing.[35] Under the circumstance of this case, Jespersen's inability to call the expert witness of his choice appears to have been the result of a failure on the part of his

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[33] *See* AS 23.30.110(c) (setting out requirements for affidavit requesting Board hearing).

[34] *See Matanuska Maid, Inc. v. State*, 620 P.2d 182, 192-93 (Alaska 1980) ("The crux of due process is opportunity to be heard and the right to adequately represent one's interests. Adequate notice is the common vehicle by which these rights are guaranteed." (citations omitted)).

[35] *See* AS 23.30.110(c).

attorney. The Board did not deprive Jespersen of due process by enforcing its regulation.

E. The Board Did Not Err By Failing To Secure Dr. Jensen's Testimony On Its Own.

Jespersen contends that the Board erred in failing "to secure" Dr. Jensen's testimony before it closed the record.[36] Jespersen does not explain this argument, although he suggested to the Commission that the Board should have secured Dr. Jensen's testimony under AS 23.30.135, which gives the Board discretion to investigate claims in the manner it chooses. Because Jespersen has not provided us any legal reasoning to support the argument that AS 23.30.135 or another source of law required the Board to secure the testimony of a particular witness, that argument is waived.[37]

Even if the argument were not waived, it would have no merit because the Board did not have an obligation to secure Dr. Jensen's testimony. Dr. Jensen provided yes/no answers to causation questions from Jespersen's attorney. After Tri-City Air filed a request to cross-examine Dr. Jensen, Jespersen had an obligation to produce him as a witness at either the hearing or at a deposition or risk having the Board exclude his causation opinion.[38] It is evident Jespersen's attorney knew how to subpoena a witness

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[36] The Commission interpreted a similar argument Jespersen made to it as an argument that the Board erred in denying a continuance request made at the final hearing. Jespersen did not present an argument to us about the denial of a continuance, so we do not address it.

[37] *See Patterson v. Matanuska-Susitna Borough Sch. Dist.*, 523 P.3d 945, 958-59 (Alaska 2022) (holding that we would not consider inadequately briefed claims); *Butts v. State, Dep't of Lab. & Workforce Dev.*, 467 P.3d 231, 245 (Alaska 2020) (holding argument is inadequately briefed, despite citation to legal authority, if it is presented without argument or explanation applying authority to facts of case on appeal and "we cannot discern the legal theory [the party] advances").

[38] We have held that the statutory right to cross-examination is absolute and applies to Board proceedings. *See Com. Union Cos. v. Smallwood*, 550 P.2d 1261, 1264-65 (Alaska 1976). The Board's regulation at 8 AAC 45.052(c) addresses requests

for a Board hearing because he subpoenaed Dr. Bauer in 2019. The record reflects that Dr. Jensen declined to assist Jespersen in his claim. Jespersen provides no explanation for his failure to secure Dr. Jensen's testimony in the nearly two years that elapsed between Tri-City Air's request for cross-examination and the hearing. His failure to secure Dr. Jensen's testimony did not create an obligation for the Board to do so.

V. CONCLUSION

We AFFIRM the Commission's decision.

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for cross-examination of authors of medical reports. The Board has interpreted the law as requiring exclusion of a medical report if its author is not made available for cross-examination. *See Weaver v. ASRC Fed. Holding Co.*, AWCB Dec. No. 17-0124, 2017 WL 5052953, at *28-30 (Oct. 27, 2017) (explaining *Smallwood* objections and exclusion), *aff'd*, 464 P.3d 1242 (Alaska 2020).

BOARD DECISIONS

Brown v. Union Electric, AWCB Dec. No. 24-0004 (February 1, 2024).

Board Panel: William Soule, Mark Sayampanathan

Representatives: Robert Bredesen for Employee
Martha Tansik for Employer

Main Issue:

Should the parties' stipulation to hold a decision in abeyance be approved?

Result:

Yes.

Discussion:

This is a termination of medical care case, based in large measure on alleged narcotic addiction caused by treatment for Employee's work injury. The record closed on January 3, 2024. Subsequent to record closure, the parties on January 31, 2024, agreed to hold a decision addressing the issues at hearing in abeyance until they attempted mediation. Stipulations must generally be made before a hearing record closes. 8 AAC 45.050(f)(2). Although the stipulation at issue here occurred after record closure, the stipulation regulation, when read with 8 AAC 45.195, may be modified and is broad enough to encompass post-record-closure stipulations, not made at a prehearing conference, that could result in swifter case resolution for all parties.

Should the parties' stipulation to hold a decision in abeyance be approved? Without going into detail, suffice it to say that the panel deliberated and found this case factually and legally difficult, and the likely Board decision would enter into rather uncharted factual and legal areas. In other words, neither side will like the outcome, additional litigation is a given, and a faster resolution is likely to come from mediation.

The parties' stipulation may make this case's resolution more "quick, efficient, fair, and predictable," and may result in benefits to Employee at a more "reasonable cost" to Employer, than will further litigation. Because the parties' stipulation to hold a decision in abeyance pending mediation may resolve the matter more quickly, efficiently and at less cost for all parties, it was approved, and the stipulation will bind them. 8 AAC 45.050(f)(2), (3). A decision arising from the December 14, 2023 hearing will be held in abeyance until a party requests its issuance, which will occur only if mediation fails.

Wood v. SOA, AWCB Decision No. 24-0006 (February 9, 2024).

Board Panel: Kyle Reding, Sara Faulkner, Randy Beltz

Representatives: John Franich, for Angelee Wood
Justin Tapp, State of Alaska

Issue: Has Employee's reemployment process ended?

Result: No.

Discussion:
Employee was injured in 2015 while working as a corrections officer for Employer. She sustained an injury to her head when struck by an inmate. Employee entered the reemployment process 90 days after being out of work. Employee's reemployment plan development was delayed in 2016 when the reemployment specialist was asked to place plan development on hold while Employee was treating out of state for TBI related issues. Employee was released from treatment and her physician said it was appropriate for her to resume reemployment planning. Upon return to Alaska, Employee's providers did not believe Employee could reasonably participate in plan development and plan development did not move forward. It was placed on hold at six-month intervals and the specialist issued her last status report on June 4, 2018. Nothing further occurred to develop a plan and there was no further communication between the specialist, the RBA, or the parties.

Employee argued that a plan could not be developed, and she should be found permanently and totally disabled. The specialist testified that in 2018, she did not believe a plan could be developed and she had received no guidance to reinitiate the process despite the 6-year lapse. The specialist said her file was current up until 2018. There were multiple SIME physician opinions after 2018 that found Employee could be retrained and would benefit from meaningful work. The panel found the reemployment process had not ended and the specialist was ordered to review the SIME opinions and create a reemployment plan for Employee.

Employee petitioned the Commission for review of the Board's decision. In an unpublished order, the Commission found the case's fact did not support granting a petition for review. It said, any delay necessitated by the Board's finding that the reemployment process had not ended is justified because the evidence necessary to find Ms. Wood permanently and totally disabled "is encompassed in reconvening the reemployment process after the long suspension." The Commission noted the specialist testified she had no new information regarding Employee since 2018 and had been waiting for someone to advise her to recommence the plan development process. She had not read the SIME reports. The Commission pointed out the Board's order that Ms. Cortis rely on the SIME physicians to develop, if possible, a reemployment plan. It said, "This is the same information the Board would require for a finding of PTO."

The Commission said, "The lapse of time, while lamentable, does not in and of itself mandate that the process has ended. Rather, as the Board found, the process should be resumed, and utilizing information from the SIME physicians, [specialist] or her replacement, needs to either come up with a plan or make a finding that no plan can be developed because there are no jobs in the labor market which Ms. Wood is capable of doing, whether remunerative or not."

Unsel v. Klebs Mechanical, Inc., AWCB Dec. No. 24-0007 (February 14, 2024).

Board Panel: William Soule, Mark Sayampanathan

Representatives: Jason Weiner for Employee
Martha Tansik for Employer

Main Issues:

(1) Can a party offer evidence from a medical expert outside the Act's parameters?
(2) Is a spinal cord stimulator (SCS) reasonable treatment in this case?
(3) Should Employee be required to attend, and Employer be required to pay for, an inpatient multidisciplinary pain clinic?
(4) Should Employee's benefits be suspended?

Result:

(1) No.
(2) Yes.
(3) Yes.
(4) No.

Discussion:

This is another termination of medical care case, based in large measure on alleged narcotic addiction caused by treatment for Employee's work injury. Employee began using prescribed narcotics around 2011 for his work injuries. He eventually had lumbar surgery in 2013. Employee continued on his narcotic medication, which he said was working well. However, his pain gradually increased as time went by. The EME physicians largely agreed that Employee's symptoms were work-related, or related to his treatment for his injury. Employee eventually had a lumbar fusion. Unfortunately, he developed arachnoiditis.

Eventually, Employee became "opioid dependent," and attended a pain clinic in Seattle. He was given Suboxone and had a bad reaction. By 2015, narcotics were no longer controlling his pain. Employee relocated outside and his new physician doubled his OxyContin dosage. When his pain levels increased, Employee decided to try a spinal cord stimulator (SCS). Although his first attempt was successful, Employee became disillusioned with SCSs because one unit had a malfunction; thereafter, he waffled back and forth on having a permanent SCS installed.

By 2020, Employee's daily morphine milligram equivalent (MME) was 180, which was approximately double the recommended maximum daily dose. He became desperate for pain relief. Employee's physicians eventually diagnosed him with opioid hyperalgesia.

In 2023, Employer petitioned for an order terminating Employee's ongoing narcotics and compelling him to go to a functional rehabilitation clinic. The parties at a prehearing conference agreed to file witness lists for a hearing in accordance with the Board's regulation, 8 AAC 45.112.

Although Employee timely filed his witness list, it lacked the required information from the Board's regulations. That information includes: How the witness will testify; the witnesses' name, address and phone number; and a brief description of the subject matter and substance of the witnesses' testimony. Employee's witness list also listed a medical expert who had not seen Employee as an attending physician. Employer petitioned to strike that physician as a witness because he had never seen Employee as a patient, Employee cannot hire a medical expert witness outside the Act, and the witness list failed to disclose the required information about him.

(1)Can a party offer evidence from a medical expert outside the Act's parameters? No! At hearing, the Board disallowed the expert medical witness' testimony citing Employer's objections, including "doctor-shopping." Since he did not pay the expert physician to testify at hearing, and the physician was going to do so without charge, Employee contended that he had not "hired" a medical expert. That argument failed. Our law in 8 AAC 45.082(c) is clear:

> (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. . . .

A party cannot use in a case a medical expert witness obtained outside the limits set forth in AS 23.30.095(a) for the employee, and 095(e) for the employer.

(2)Is a spinal cord stimulator reasonable treatment in this case? Yes! Employee testified he wants to get off narcotics. He does not want another SCS because he had issues with at least one of them in the past. Employer changed its position at hearing on this issue and stated it wanted the Board to determine if an SCS was or was not reasonable treatment, so the parties could possibly settle the case and consider Medicare's interests.

The Board determined an SCS is reasonable medical treatment, based on five physicians who suggested it was. However, it was up to Employee if he wanted to have third SCS trial or a permanent SCS implant. The Board held that if Employee changed his mind, Employer would have to pay for the SCS.

(3)Should Employee be required to attend, and Employer be required to pay for, an inpatient multidisciplinary pain clinic? Yes! No physician said it was a bad idea, and several said it was a great idea. Employee is willing to go to a pain clinic if it meets certain parameters, including having an expert on arachnoiditis; he said he found two such clinics. Employer said it would pay for it. So, the Board determined that an inpatient multidisciplinary pain program was reasonable treatment to address Employee's issues. The Board ordered him to attend one and for Employer to pay for it.

(4)Should Employee's benefits be suspended? No! Given this result, the Board declined to suspend or terminate Employee's current medical benefits. In the event he failed or refused to attend the pain program as directed in the Board's decision, and after an evidentiary hearing, the Board would consider suspending or terminating his ongoing medical care.

Mitchell v. United Parcel Service, AWCB Dec. No. 24-0009 (February 21, 2024) (*Mitchell XX*)

Board Panel: Kathryn Setzer, Robert Weel, Steven Heidemann

Representatives: Richard Harren, Steven C. Mitchell, Claimant/Employee
Nora Barlow, United Parcel Service, Employer

Issues: (1) Is Employee entitled to additional PTD benefits?
(2) Is Employee entitled to a compensation rate adjustment?
(3) Is Employee entitled to additional interest?
(4) Is Employee entitled to attorney fees and costs?

Result: (1) Yes.
(2) No.
(3) Yes.
(4) Yes for attorney fees and costs for time spent on *Mitchell XVI*; no for attorney fees and costs for time spent on *Mitchell XVII*.

Discussion:

(1) *Mitchell v. United Parcel Service*, AWCB Dec. No. 18-0042 (May 1, 2018) (*Mitchell XVI*) found Employee was temporarily and totally disabled from May 1, 2006 through March 26, 2007, and from March 3, 2010 through May 24, 2010; permanently and totally disabled beginning January 28, 2017; Employer was entitled to a Social Security offset under AS 23.30.225(b); Employer properly calculated the Social Security disability offset at $379.94 based on the information provided by the parties; Employee's weekly TTD and PTD benefit rate was $570.84 before offset and $190.90 after offset; and his PTD benefits were subject to revision upon his receipt of Social Security retirement benefits. *Mitchell XVI* ordered Employer to pay Employee past TTD benefits from May 1, 2016 through March 26, 2007 and from March 3, 2010 through May 24, 2010; PTD benefits from January 28, 2017 through May 1, 2018; and ongoing PTD benefits beginning May 2, 2018. It awarded Employee interest and 20 percent of his total attorney fees and costs as he prevailed on 20 percent of his claims.

Mitchell v. UPS, 498 P.3d 1029 (Alaska 2021) (*Mitchell XVIII*), the Alaska Supreme Court (Court) found Employer failed to rebut the presumption of compensability for PTD because it failed show the availability of jobs which would accommodate Employee's limitations in 2004. It reversed the Commission's conclusion that Employer rebutted the presumption Employee was permanent and totally disabled as of April 1, 2004, and remanded the case to the Commission with instructions to remand the case to the Board for an award of PTD benefits.

Pursuant to *Michell XVIII*, the Board found Employer owed Employee PTD benefits from April 1, 2004 and continuing, offset against payment of TTD and PTD benefits already paid by Employer per *Mitchell XVI*. It found Employer underpaid PTD benefits and ordered Employer to pay an additional $6,116.39.

(2) Employee contended he was entitled to compensation rate adjustment based upon a recalculation of the PTD benefit rate and social security offset rate decided in *Mitchell XVI*. Employer contended Employee's compensation rate adjustment claim was barred by res judicata. The Board found Employee was provided adequate notice of the social security offset was at issue in *Mitchell XVI* and a full and fair opportunity to litigate the PTD rate and social security offset in *Mitchell XVI*, which was a final judgment on the merits by a properly authorized administrative panel. The evidence Employee provided the Board to justify the recalculation was in existence at the time *Mitchell XVI* was decided, including the upward trend in wages for employees holding the job Employee held at the time of injury and the contributions Employer made to Employee's union trusts, except for one union contract. It found Employee could have made the same arguments and presented the same evidence at *Mitchell XVI* but he failed to do so. When Employee raised the social security offset and PTD rate calculations in his petition to reconsider *Mitchell XVI*, he did not pursue the issue before the Commission or the Court because he thought he would lack credibility if he presented too many issues on appeal. The Board found a tactical decision, error or neglect as not good cause to justify his failure to appeal *Mitchell XVI*'s social security offset and PTD benefit rate calculations. It held Employee's compensation rate adjustment was barred by res judicata.

Employee contended it was unconstitutional to use his wages from 1995 to set the compensation rate because it did not accurately reflect his actual economic losses. The Board found it did not have the jurisdiction to decide issues of constitutional law.

(3) Employer paid Employee interest based upon its calculation of PTD benefits, which the Board found deficient. The Board held Employer must pay interest on the PTD benefits awarded, and since Employer owed additional PTD benefits, it owed additional interest. It ordered Employer to calculate and pay interest in accordance with the decision and the Act.

(4) Employer did not oppose the attorney fees and costs Employee sought for time spent pursuing *Mitchell XVIII*; it opposed the attorney fees and costs Employee sought before the Commission in *Mitchell v. UPS*, AWCAC Dec. No. 272 (December 6, 2019) (*Mitchell XVII*), which had affirmed *Mitchell XVI*. The Board ordered Employer to pay Employee attorney fees and costs for time spent pursuing *Mitchell XVIII*. It held the Board did not have the authority to award attorney fees and costs for time spent before the Commission under AS 23.30.008(d) and AS 23.30.145(c). The Board denied Employee request for attorney fees and costs for time spent before the Commission. It denied attorney fees and costs for time spent on Employee's compensation rate adjustment claim because it was denied but awarded statutory fees for the $6,116.39 owed in past PTD benefits and associated interest.

Mitchell v. United Parcel Service, AWCB Dec. No. 24-0017 (March 21, 2024).

Board Panel: Kathryn Setzer, Robert Weel (term expired), Steven Heidemann

Representatives: Richard Harren, Steven C. Mitchell, Claimant/Employee
Nora Barlow, United Parcel Service, Employer

Issue: Should Mitchell XX be reconsidered or modified?

Result: Mitchell XX should be modified but not reconsidered.

Discussion:

Employee included numerous requests for modification and reconsideration of *Mitchell XX*. Employee submitted the Table of Contents of his brief before the Commission in *Mitchell XVII*, showing the arguments he made to the Commission; he did not include a contention that *Mitchell XVI* erred in its calculation of compensation rate and the Social Security offset in his brief. *Mitchell XX* was modified to state Employee included a contention in his Notice of Appeal to the Commission that *Mitchell XVI* erred in "its calculations of compensation rate, PPI offset/credit and Social Security setoff" and that *Mitchell XVII* did not address Employee's contention *Mitchell XVI* erred in its calculation of compensation rate and Social Security offset. Employee contended *Mitchell XX* erred when it held his compensation rate adjustment claim was barred by res judicata because his reduction of points on appeal was reasonable and should not bar him from consideration of the issues on their merits. Arguments are waived on appeal if they are inadequately briefed, and an issue may be abandoned on appeal by failing to include it in the points on appeal or by inadequate briefing. The Board found Employee abandoned the issue that *Mitchell XVI* erred in its compensation rate and social security offset calculations by not pursuing them with the Commission and the Court as he failed to brief them before the Commission and Court. Again, the Board held a tactical decision, error or neglect is not good cause to justify Employee's failure to pursue recalculation of *Mitchell XVI*'s social security offset calculation and PTD benefit rate on appeal. It held *Mitchell XX* did not err when it concluded Employee's compensation rate adjustment was barred by res judicata.

Raymond Pitka v. City of Fairbanks, AWCB Decision No. 24-0010 (February 26, 2024)

Board Panel: Robert Vollmer and John Dartt

Representatives: Self-represented Employee
Colby Smith, Employer

Issues: 1) Should Employer be ordered to re-issue a check for settlement proceeds under the parties' 2007 C&R?

2) Was Employee's PPI claim foreclosed by the parties' 2007 C&R?

Results: 1) No.

2) Yes.

Discussion:
Employee suffered prior back injuries that resulted in him being provided a 20 percent PPI rating. A couple years later, he was injured again when a loader ran into his garbage truck at the Borough's landfill. Employee filed a third-party lawsuit against the Borough.

In the comp. case, an EME determined Employee had a 20 percent whole person PPI based on findings that predated the garbage truck accident. Employee's doctor provided him with a 10 percent PPI rating after the garbage truck accident and a physician that examined Employee for his third-party lawsuit provided him with an eight percent PPI rating in addition to the 20 percent preexisting PPI. Employer mistakenly paid Employee a 13 percent PPI benefit, then the parties settled the comp. case in 2007 with a C&R that allocated additional proceeds towards a PPI benefit. Ultimately, Employer paid Employee about a 16 percent PPI benefit.

In 2023, Employee filed a claim seeking reissuance of a check for settlement proceeds under the parties' 2007 C&R, claiming he had never received one, notwithstanding documentary evidence, such as a return receipt "green card" and Employer's cancelled check, both bearing Employee's signature, which shows that he had. Quizzically, Employee also provided a copy of his bank statement from 2007 that showed the deposit and subsequent distribution of settlement proceeds.

Employee contended his workers' compensation attorney "forged" his signature on the green card and the settlement check and kept the settlement proceeds. He also contended his former workers' compensation attorney had forged the bank statement showing his receipt of settlement proceeds. Employee filed a second claim seeking additional PPI, contending he should have been paid "somewhere in between" the 20 percent rating and a 28 percent rating.

The panel found Employee's contentions that his former workers' compensation attorney had undertaken an elaborate series of forgeries not credible. It then applied straight-forward contract law to conclude, since Employer had fully performed under the parties' contract, its obligation was discharged, and it would not be ordered to issue another settlement check. In its decision, the panel then explained to Employee that the PPI statute requires his rating from the garbage truck accident be reduced by the amount of preexisting impairment, and concluded his misunderstanding of the PPI ratings was a mistake of fact, which cannot serve as a basis for setting aside the C&R.

Shepherd v. Alaska Wild Seafoods Partners, AWCB Decision No. 23-0072 (February 27, 2024).

Shepherd v. Alaska Wild Seafoods Partners, AWCB Decision No. 24-0012 (February 28, 2024).

Board Panel: Kyle Reding, Bob Weel

Representatives: Randall Shepherd, pro se
Adam Sadowski, Alaska Wild Seafood Partners

Issue: Should Employee's claim be dismissed?

Result: Yes

Discussion:
Employee reported a suspicious burn to his forearm while working at a cannery for Employer. He requested medical benefits and damages for pain and suffering in excess of $200,000.00. Employee left the State shortly after the injury and Employer had attempted to depose Employee twice unsuccessfully. Employer requested a hearing to dismiss Employee's claim after he failed to appear for two depositions. Employer contended a prehearing conference summary ordered Employee to attend the second deposition and, therefore, his claim should be dismissed for failing to comply with a board order.

At hearing Employee stated he would not attend a deposition as he was in fear for his life; he believed Employer would kill him. Decision No. 23-0072 explained to Employee that if he failed to attend a board ordered deposition his case would be dismissed. Employee was ordered to attend a subsequent deposition and Employer was ordered to notify the Board if Employee failed to attend. Once notified the Board would issue a subsequent decision on the written record dismissing Employee's claim.

On February 12, 2024, Employer filed notice Employee failed to appear at his deposition and requested his claim be dismissed. Employee had been advised of the potential consequence for continued refusal to comply with board ordered discovery. Employer's request for claim dismissal was heard on the written record and Employee's case was dismissed in Decision No. 24-0012.

Smith v. Walmart Associates, Inc., AWCB Dec. No. 24-0016 (March 18, 2024)

Board Panel: Kathryn Setzer, Mark Sayampanathan

Representatives: Adam Franklin, Michelle Smith
Vicki Paddock, Walmart Associates, Inc.

Issues: (1) Is Employee entitled to attorney fees and costs?
(2) Is Employee entitled to penalty and interest?

Result: (1) Yes.
(2) Yes to interest on amounts paid to medical providers; no to penalty and interest on attorney fees and costs.

Discussion:
The parties disputed what a reasonable hourly fee rate was for an attorney with Franklin's experience, Franklin's fee affidavit sought $500 per hour, Employer contended $415 per hour was reasonable based application of the US Department of Labor Consumer Price Index (CPI) upon hourly fees awarded in the past to other attorneys in decisions and orders and Franklin's experience. It requested the panel take judicial notice of the CPI and Employee objected. Employer failed to file the CPI information 20 or more days before the hearing. Because the CPI is not a generally accepted technical or scientific matter within the panel's special field as required under AS 44.62.480, it held administrative notice would not be taken of the CPI as applied to fees awarded in past decisions and orders. However, fees awarded in past decisions and orders would be considered. The presumption of compensability was not applied and the eight factors in Alaska Rule of Professional Conduct 1.5(a) were considered in determining a reasonable fee. The Board awarded an hourly attorney fee rate of $490. While Franklin did not have as much legal experience as other attorneys that were awarded similar hourly rates, his other legal experience and regular fixed basis fee in other areas of law were significant factors, as was the desire to have competent claimant counsel and the contingent nature of the work and Franklin's minor mistakes.

Employee contended interest was owed to Employee's medical providers because it withdrew its controversions and paid medical benefits. Employer contended Employee failed to produce any evidence further interest was owed and the medical providers did not file a claim for interest. Employer provided a history of medical payments, but it was unclear whether the amount paid included interest. The Board held medical providers are entitled to the benefits provided under the Act, including interest, when Employer withdrew its controversions, regardless of whether the medical providers filed a claim. It ordered Employer to pay interest to the medical providers pursuant to the Act.

Employee contended penalty and interest was owed on the amount of attorney fees and costs. Employer contended Employee was entitled to fees and costs, but it would not pay without an order. The Act provides attorney fees and costs are due within 14 days of an award in a decision and order, approval of a settlement agreement requiring approval, approval of an attorney fee and costs stipulation or the filing of a settlement agreement that does not require approval. AS 23.30.155(e), (f); AS 23.30.260. Because there was no settlement agreement or stipulation on attorney fees and costs, they were not due until an award was made in the decision and order. Employee's request for interest and penalties on attorney fees and costs was denied.

Nelson v. SOA, AWCB Dec. No. 24-0024 (April 25, 2024).

Board Panel: Kyle Reding, Sara Faulkner, Pam Cline

Representatives: Keenan Powell, for Peter Nelson
Daniel Moxley, State of Alaska

Issue: Did the C&R waive Employee's right to surgery for his C6-7 injury?

Result: Yes.

Discussion:
The parties submitted a C&R that was approved by the Board in 2022. The Employee injured his back while working for Employer. Over time, Employee developed issues at his C6-7 that were found to be work related. He developed degenerative disc disease at C3-4 which was found not to be work related. Employee's surgeon recommended surgery on both C6-7 and C3-4 at the same time as opposed to two separate surgeries. Employer maintained that it was not responsible for the C3-4 surgery. The parties crafted an agreement in which Employee would remove himself from the Workers' Compensation system to have the surgery at both levels at the same time covered by his private health insurance. In exchange, the Employer would provide all reasonable and necessary medical care after surgery, any on-going TTD after surgery, and possible reemployment benefits if Employee could not return to work.

After the agreement's approval, Employee discovered his private health insurance would not cover the surgery. He requested the Board find that his C6-7 injury compensable and requested Employer be ordered to pay. Under contract law, the Board looked at the agreement's four corners to determine whether Employee waived his right to have Employer pay for C6-7 surgery. Under the law pertaining to agreements in Workers' Compensation, an agreement may not be set aside for a unilateral mistake of fact. In this instance, the Employee believed his private insurance would cover the surgery, he did not verify this prior to signing the agreement. Employee made a mistake a fact in his belief the surgery would be covered. Other instances in which an agreement may be set aside include, misrepresentation by a party, duress, or lack of mental ability to understand the agreement. None of these issues were present. Employee's request to find his C6-7 surgery compensable was denied as he had waived that claim when he signed the C&R.

ALASKA SUPREME COURT DECISION

Jespersen v. Tri-City Air, Supreme Court Slip Op. No. 7698 (May 3, 2024).

Board Panel: William Soule, Sara Faulkner and Anthony Ladd

Representatives: Richard Harren for Employee
Vicki Paddock for Employer

Main Issues:

(1) Was an oral order striking one of Employee's four witnesses listed on a non-conforming conforming witness list correct?
(2) Did a 1985 work injury remain a substantial factor in Employee's need for medical care for his spine and diabetes since 2016?
(3) Did Employee waive numerous arguments by not raising them at hearing?
(4) Did the Board have a duty to "obtain" a treating physician's testimony when that physician declined to assist Employee at hearing by refusing to participate.

Result:

(1) Yes.
(2) No.
(3) Yes.
(4) No.

Discussion:

Employee crashed a plane in 1985, injuring his lower back, bringing his case under the old "a substantial factor" causation standard. He contended that additional lumbar spine treatment he began receiving in 2016, was still compensable. Prior to hearing, Employee filed a witness list providing only the proposed witness' names. Witnesses included: Employee, his wife, his long-time chiropractor and a previously undisclosed biomechanical engineering expert. At hearing, Employer objected to Employee calling the witnesses because the witness list was nonconforming and listed the previously undisclosed expert.

(1)Was an oral order striking one of Employee's four witnesses listed on a non-conforming conforming witness list correct? Yes! The witness list rules are clear and simple. Witness lists must be filed timely and include the witnesses' names, addresses, phone numbers, by what means they will testify, and a brief description of the subject matter and substance of the witness' testimony. If a party objects to a non-conforming witness list at hearing, the Board will apply the regulation and in most cases the witnesses will be excluded. However, a party can always testify at hearing. Further, in this case Employee's wife had already been deposed and Employer had medical records from the chiropractor. The panel allowed Employee, his wife and the chiropractor to testify (3 out of 4 witnesses on a non-conforming witness list). But the Board did not allow the biomechanical engineer expert witness to testify because Employee's witness list provided no information about him other than his name. The Court said the Board was correct and affirmed.

(2)Did a 1985 work injury remain a substantial factor in Employee's need for medical care for his spine and diabetes since 2016? No! Employee's deposition testimony and his hearing testimony on the continuity of his symptoms from 1985 to 2016 was inconsistent. Further, there was a 20-year gap in Employee's medical records between June 1987 and August 2007. The Board found it likely that Employee, who had health insurance during this gap, would have received medical treatment for continuous, unrelenting low-back pain, and would have provided those medical records to support his testimony. Beginning in 2007, numerous physicians saw Employee for various ailments and always took a history. He never mentioned his 1985 plane crash until 2016. He then had a seven-year gap in his medical records from August 2007 until September 2014, again raising the question about why he did not seek medical care during those years if he had continuous and unrelenting low-back pain that was getting progressively worse as he testified at hearing. Even in 2016, when he saw a physician for significant back and hip discomfort Employee did not mention the 1985 plane crash. In 2016, Employee saw a physician for neck pain, which he said he had 32 years, but still did not mention the 1985 accident by name. Finally, in February 2016, Employee mentioned the 1985 work injury for the first time since 2007, but still described the precipitating injury or event for his visit as "the patient fell." He also failed to tell the SIME physician he had chronic, continuous lumbar pain since 1985. Employer's evidence showed signs and symptoms consistent with degenerative changes due to post-injury work and aging. Both the EME and SIME ruled out the 1985 work injury as a substantial factor in Employee's need for treatment beginning in 2016, and their opinions were given greater weight. The Board found Employee's testimony in light of his medical records not credible. The Court found the Board's decision supported by substantial evidence, and affirmed.

(3)Did Employee waive numerous arguments by not raising them at hearing? Yes! First, in his Board hearing brief, Employee agreed that Employer's EME physician's opinion had rebutted the presumption. So, the Board moved directly to the third step of the presumption analysis. On appeal, Employee contended that Employer had not rebutted the presumption and the Board failed to do the presumption analysis. The Court found that Employee had waived that argument and the Board had properly relied on the admission stated in his hearing brief. Second, before and at the hearing, Employee contended that he had diabetes, which needed to be treated before he could have additional back surgery. Therefore, he had an ancillary claim for diabetes treatment. On appeal, he contended that he had argued all along for medical benefits for diabetes as an independent claim, which he contended developed from taking long-term steroids for his work-related back injury. The Court found that since it affirmed the Board's decision finding the need for treatment no longer work-related, the ancillary diabetes claim was moot. Moreover, the Court found Employee waived his independent claim for diabetes, because he did not present that claim to the Board. Third, on appeal Employee for the first time contended that when he learned during the hearing that his surgeon was not willing to participate as a witness at hearing, the Board had a duty to somehow obtain that physician's testimony. The Court found Employee had waived that argument as well by not raising it before the Board.

(4) Did the Board have a duty to "obtain" a treating physician's testimony when that physician declined to assist Employee at hearing by refusing to participate? No! The Court found that Employee provided no explanation for his failure to secure the surgeon's testimony in the nearly two-year period since Employer requested cross examination of that physician. The attorney's failure to secure the witness' testimony did not create an obligation for the Board to do so.

TAB 7

2024 Annual Report

Alaska Department of Labor and Workforce Development
Workers' Compensation Division

Catherine Muñoz Commissioner

STATE OF ALASKA
DIVISION OF WORKERS' COMPENSATION

REEMPLOYMENT BENEFITS ANNUAL REPORT
Calendar Year 2023

075

Stacy Niwa
Reemployment Benefits Administrator

Reemployment Benefits Section

- Provides information about reemployment benefits
- Notifies employees of their reemployment benefits rights
- Processes requests for, and stipulations to, eligibility evaluations
- Makes eligibility determinations after review of rehabilitation specialist recommendations
- Processes and serves employee elections of reemployment benefits or job dislocation benefits
- Processes assignment of eligible employees to rehabilitation specialists for plan development
- Reviews reemployment benefits plans upon request

2023 By the Numbers

- 601 injured workers were referred for evaluations for eligibility for reemployment benefits.
- 1300 eligibility evaluation reports were reviewed.
- 153 suspension letters were issued.
- 566 eligibility determinations were made.
- 73 injured workers were found eligible for reemployment benefits.
- 25 injured workers elected to receive a job dislocation benefit.

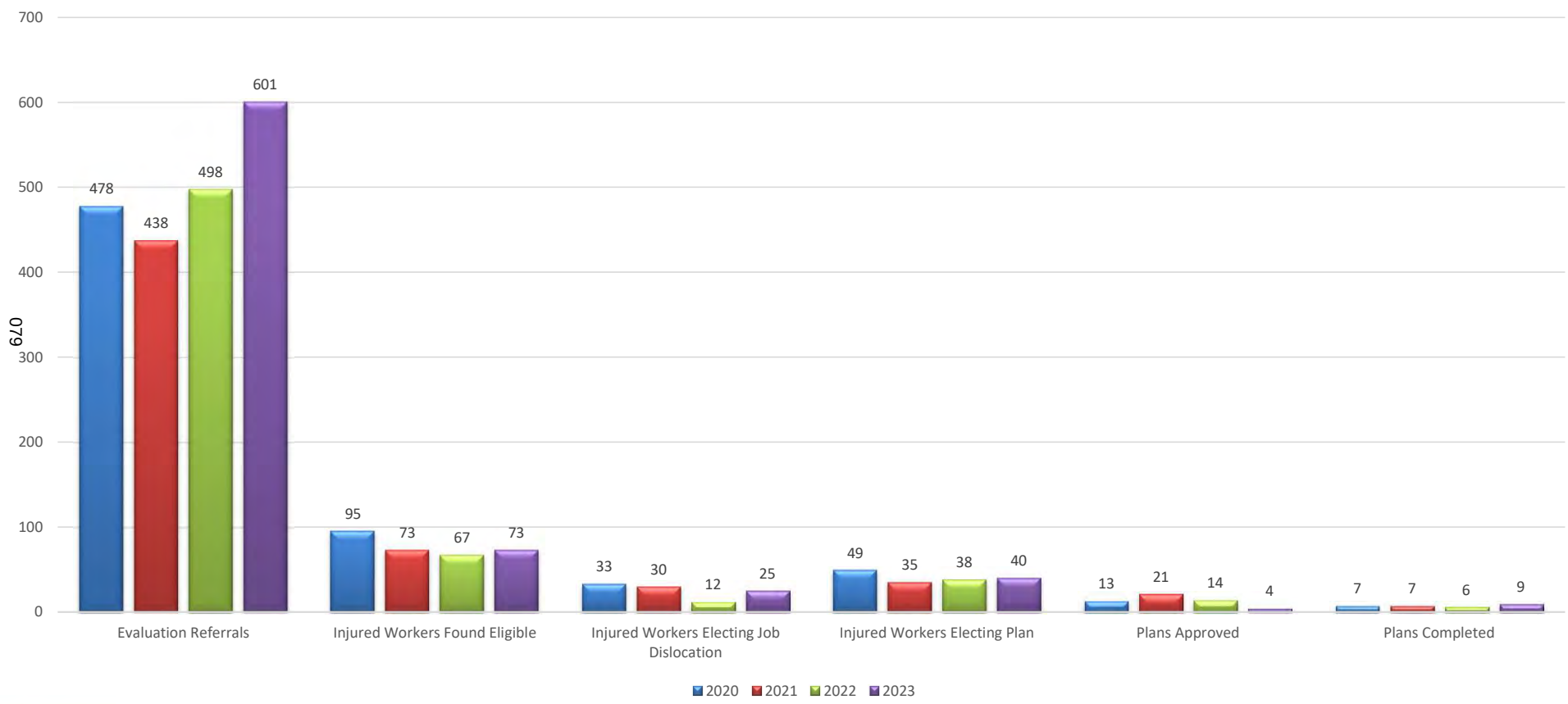
077

2023 By the Numbers, Cont.

- 40 elected to pursue reemployment benefits.
- 30 reemployment plans were submitted.
- 4 plans were signed by all parties and moved forward as agreed upon plans.
- 5 plan reviews were completed.
- 7 informal rehabilitation conferences were held to assist the parties in moving forward with reemployment benefits.
- 9 injured workers completed reemployment plans.
  - start dates of completed plans range from 1/11/2021 – 8/1/2022

078

2023 By the Numbers, Cont.



Reemployment Benefit Plans

- 104 injured workers were in the plan process at some point during 2023.
- 36 injured workers were referred for plan development in 2023.
- 22 injured workers exited the process through a Compromise and Release after plan referral and before plan completion.
- 14 injured workers were in an approved plan at year end.
- 24 injured workers were in plan development and 20 plans were pending approval at year end.
- 9 injured workers successfully completed plans with an average plan length of 17 months from plan approval to plan completion.

080

Reemployment Benefit Plans, Cont.

- 45 plans were stalled or exited for various reasons.
  - 3 injured workers' plan process was medically suspended.
  - 32 injured workers exited through a Compromise and Release agreement.
  - 7 plans were controverted or a petition to terminate reemployment benefits was filed.
  - 3 plan processes were halted because the injured worker was non-participatory.

081

Outcomes for Workers Completing Plans

- The Reemployment Benefits Section attempted to contact 22 injured workers that had completed plans between 2021 and 2023.
- 4 injured workers responded.
- 2 injured workers had returned to the workforce.
- 2 injured workers reported they had not returned to work.
  - 1 reported they were medically disabled
  - 1 reported they are continuing their education

082

Reemployment Benefit Costs

	2021	2022	2023
Evaluation Costs	$1,573,099	$1,394,704	$1,598,939
Reemployment Specialist Plan Fees	$555,366	$581,264	$582,640
Plan Costs	$263,607	$359,799	$430,218
Wage Benefits (AS 23.30.041(k))	$2,053,267	$2,479,056	$2,821,100
Job Dislocation Benefits (AS 23.30.041(g))	$917,890	$1,674,193	$1,269,230
TOTALS	$5,359,016	$6,489,016	$6,702,127
% Change	-38.85%	19.07%	3.28%

Reemployment Benefits in Settlements

Impact of settlements on reemployment benefits in 2023

- 47 injured workers exited the reemployment benefits process through Compromise and Release agreements during the reemployment benefits process.
- 50 injured workers had funds designated for reemployment benefits included in settlements approved in 2023, increasing reemployment benefit costs.
  - 29 of these injured workers had never been determined eligible for reemployment benefits, many had never entered the reemployment process or had been found not eligible for reemployment benefits.
- 43 injured workers exited the reemployment process through a settlement after a determination of eligibility, significantly reducing the number of injured workers available for plan completion.

084

Rehabilitation Specialists

- 15 Alaska Rehabilitation Specialists accepted 470 referrals for eligibility evaluations; 125 evaluations were referred to 38 specialists out of state.
- For Alaska Based Specialists:
  - 377 or 80% of the first reports were submitted within 60 days of the referral.
  - 194 or 41% of the evaluations were completed on the first report submission.
  - 306 or 65% of the evaluations were completed prior to a suspension letter from a Reemployment Benefits Administrator Designee.
  - 321 reports did not meet statutory/regulatory requirements.
- Continued improvements in our process are being made to ensure work is in compliance with statutory and regulatory requirements through suspension letters, discussions, plans of correction and disqualification from providing services under AS 23.30.041.

080

Alaska Rehabilitation Specialist Performance
2023 Reemployment Benefit Eligibility Evaluations

Rehabilitation Specialist	# of Referrals recv'd	Average # days to 1st report	% complete on 1st report or w/o suspension letter	% of late 1st reports	# 90 day gaps in reporting	# reports not meeting stat/reg	Median # days to determ
L. Cortis	22	50	45%	23%	0	5	70
J. Cranston	23	29	43%	4%	0	39	82
K. Davis	21	41	57%	19%	0	17	64
J. Doerner	35	31	71%	2%	0	2	41
R. Hoover	38	29	71%	5%	7	2	29
T. Hutto	35	34	62%	29%	1	16	34
N. Kates (Richardson)	38	40	84%	13%	0	20	40
S. Krier	36	27	78%	2%	0	24	39

Alaska Rehabilitation Specialist Performance
2023 Reemployment Benefit Eligibility Evaluations

Rehabilitation Specialist	# of Referrals recv'd	Average # days to 1st report	% complete on 1st report or w/o suspension letter	% of late 1st reports	# 90 day gaps in reporting	# reports not meeting stat/reg	Median # days to determ
D. LaBrosse	36	37	46%	19%	0	56	71
C. Robbins	38	39	97%	30%	3	12	35
B. Roberts	27	55	45%	44%	0	64	73
F. Sakata	36	53	56%	36%	4	35	55
J. Shipman	21	24	81%	0%	0	0	29
N. Silta	20	27	65%	0%	0	7	34
P. Vargas	41	55	80%	51%	8	22	43

087

088

QUESTIONS?

TAB 8

The introductory language of 8 AAC 45.070(b)is amended to read:

(b) Except as provided in (1)(A) **and (F)** of this subsection and 8 AAC 45.074(c), a hearing will not be scheduled unless a claim or petition has been filed, and an affidavit of readiness for hearing has been filed and that affidavit is not returned by the board or designee nor is the affidavit the basis for scheduling a hearing that is cancelled or continued under 8 AAC 45.074(b). The board has available an Affidavit of Readiness for Hearing form that a party may complete and file. The board or its designee will return an affidavit of readiness for hearing, and a hearing will not be set if the affidavit lacks proof of service upon all other parties, or if the affiant fails to state that the party has completed all necessary discovery, has all the necessary evidence, and is fully prepared for the hearing.

…

8 AAC 45.070(b)(1) is amended by adding a new subparagraph to read:

(F) To resolve a medical dispute under AS 23.30.095(k) or to request the board order a physical examination under AS 23.30.110(g), a party shall file with the division and serve on opposing parties a petition asking the board to order a second independent medical evaluation, a completed second independent medical evaluation form signed by the party that filed the petition, and medical records reflecting the medical disputes; if the parties do not stipulate to the second independent medical evaluation within 20 days of service of the documents, the board or its designee will schedule a hearing, the board will hold a hearing on the written record with briefs, and the board will issue its decision and order within 60 days of the date the documents were filed with the division and served on the opposing party; an affidavit of readiness for hearing form is not required.

(In effect before 7/28/59; am 5/28/83, Register 86; am 12/14/86, Register 100; am 7/1/88, Register 107; am 3/16/90, Register 113; am 7/20/97, Register 143; am 7/2/98, Register 146; am 3/31/2002, Register 161; am 5/12/2019, Register 230; am ___ / ___/ ___, Register ___)

Authority: AS 23.30.005 AS 23.30.110 AS 23.30.135

8 AAC 45.071(b)(1) is amended by adding a new subparagraph to read:

(I) an uninsured employer's discharge order;

(Eff. 3/28/2012, Register 201; am ____/____/_____, Register _____)

Authority: AS 23.30.005

(((Publisher: please move the "or" connector from the end of 8 AAC 45.071(b)(1)(G) to end of 8 AAC 45.071(b)(1)(H).)))

TAB 9

From: anne moen
To: Collins, Charles M (DOL)
Subject: Worker's Compensation/Social Security
Date: Thursday, May 9, 2024 1:15:17 PM

Dear Mr. Collins,
I am disappointed that I am unable to give testimony at the Worker's Compensation Board this month, but would be grateful if you could present this letter to the board on my behalf and the behalf of others who find themselves in a similar situation.

Thank you so much.

Respectfully,

Anne C. Moen

Dear Mr. Collins,

My name is Anne Moen. I am the widow of Alaska State Trooper, Fish and Wildlife Protection Officer James A. Moen. Jim died in 2001 in the Line of Duty. I am hopeful that you can help me on a matter that I consider to be unwarranted, unjust, and certainly not the way the State of Alaska should honor a fallen officer nor his family.

After receiving Worker's Compensation for my husband's death for years, I was notified that I would lose 50% of the amount of any Social Security benefit from my husband's Worker's Compensation benefit. I was stunned that this decrease/offset was regardless of whether I took my husband's Social Security benefit, which would come from his service in the United States Army and the Alaska Army National Guard, or MY Social Security benefit for work that I had done.

I would like someone to help me understand why this decrease/offset should apply to MY Social Security benefit. After somewhat pulling myself together after my husband's death, which was extremely difficult for me, I went to work to help me survive financially, emotionally and mentally. Now I find that the State of Alaska is going to penalize me for what I needed to do to attempt to put my life, and that of our four children, back together after such a traumatic incident.

My family has given up enough already. I lost a loving, devoted husband. I miss him every single day. My children lost an exceptional father, who loved and cared for his children in a way that

no other person ever could. My children were devastated at the loss of their Dad. He can never be replaced.

Why should my having to work so hard, after such a truly horrible, life-changing experience, cause anyone, to include the Alaska Legislative body, to think I, or another widow or widower in my position, should be penalized by reducing Worker's Compensation based on the amount of MY Social Security benefit? My husband and I both worked hard to protect this country and the State of Alaska. Please don't minimize the sacrifice that he, and his family, have already made. No one should expect us to make any more sacrifices.

Please support my efforts to correct this egregious situation. Reducing/offsetting my husband's Worker's Compensation benefit based on MY Social Security benefit is just wrong. Believe me, we have sacrificed more than enough already. Your help will be much appreciated. Thank you.

Sincerely,

Anne C. Moen